

# **Maintenance Matters**

**An Assessment of the  
Operation of Namibia's  
Maintenance Act 9 of 2003**



**Gender Research and Advocacy Project  
LEGAL ASSISTANCE CENTRE**

**2013**



## **Maintenance Matters: An Assessment of the Operation of Namibia's Maintenance Act 9 of 2003**

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# Contents

<b>Acknowledgements</b>	<b>v</b>
<b>Overview</b>	<b>vi</b>
<b>Summary of Findings and Recommendations</b>	<b>vii</b>
<b>Chapter 1: INTRODUCTION TO MAINTENANCE</b>	<b>1</b>
<b>Chapter 2: THE IMPORTANCE OF MAINTENANCE</b>	<b>3</b>
2.1 Maintenance as a human right	3
2.2 The social context of maintenance	7
2.3 The economic context of maintenance	8
2.4 The benefits of financial support	12
2.5 The wider implications of maintenance	13
<b>Chapter 3: THE DEVELOPMENT OF A NEW LAW ON MAINTENANCE</b>	<b>15</b>
3.1 Timeline for developing the bill	16
3.2 Parliamentary debates	18
3.2.1 National Assembly	18
3.2.2 National Council	24
<b>Chapter 4: OVERVIEW AND CRITIQUE OF THE MAINTENANCE ACT 9 OF 2003</b>	<b>27</b>
4.1 General principles	28
4.1.1 Purpose of the Maintenance Act	28
4.1.2 What is maintenance?	28
4.1.3 Legal liability to pay maintenance	29
4.2 Administration of the Act	42
4.3 Procedure for claiming maintenance	45
4.3.1 Maintenance complaints	45
4.3.2 Investigation by maintenance officer	45
4.3.3 Consent orders – a speedy resolution to maintenance complaints	48
4.3.4 Procedure at maintenance enquiries	49
4.3.5 Disputes about parentage	53
4.3.6 Outcome of maintenance enquiries	57
4.3.7 Contents of a maintenance order	59
4.3.8 Photographs or ID documents	60
4.3.9 Duration of a maintenance order	60
4.4 Appeals	62
4.5 Civil enforcement of maintenance orders	63
4.6 Criminal enforcement	71
4.6.1 Failure to pay as a criminal offence under the Maintenance Act	71
4.6.2 Contempt of court	83
4.6.3 Failure to maintain as a criminal offence under child protection laws	83
4.7 Changes to a maintenance order (substitution, suspension or discharge)	84
4.8 Administrative variations to a maintenance order	86

<b>4.9 The Maintenance Act and High Court orders in divorce cases</b>	<b>87</b>
4.9.1 Jurisdiction of maintenance court over High Court orders for maintenance	87
4.9.2 Effect of substitution of a High Court order by a maintenance court	88
4.9.3 Enforcement of a High Court order by a maintenance court	89
<b>4.10 The Maintenance Act and maintenance as a component of protection orders</b>	<b>91</b>
<b>4.11 Other offences and penalties</b>	<b>92</b>
<b>4.12 Reciprocal enforcement of maintenance orders</b>	<b>95</b>
4.12.1 Enforcement via Reciprocal Enforcement of Maintenance Orders Act	95
4.12.2 Hague Convention on the International Recovery of Child Support	97
4.12.3 Other international conventions on maintenance	98
<b>4.13 Child maintenance in relation to the laws on custody and access</b>	<b>99</b>

## **Chapter 5: REPORTS ON THE IMPLEMENTATION OF MAINTENANCE ACT 9 OF 2003** ..... **103**

## **Chapter 6: STUDY DESIGN AND METHODOLOGY** ..... **111**

<b>6.1 Purpose and scope of the study</b>	<b>111</b>
<b>6.2 Sample of maintenance complaints</b>	<b>111</b>
<b>6.3 Representivity of sample</b>	<b>114</b>
<b>6.4 Key informant interviews and focus group discussions</b>	<b>115</b>
6.4.1 Interviews with key informants	116
6.4.2 Format of the focus groups	116
<b>6.5 Terminology and statistics</b>	<b>117</b>
<b>6.6 Confidentiality</b>	<b>117</b>

## **Chapter 7: OVERVIEW OF MAINTENANCE COMPLAINTS IN NAMIBIA** ..... **119**

<b>7.1 Total maintenance complaints in Namibia</b>	<b>119</b>
<b>7.2 The concept of maintenance payment</b>	<b>121</b>
<b>7.3 Incomplete information</b>	<b>125</b>
<b>7.4 Birth certificates</b>	<b>126</b>
<b>7.5 Problems with investigations</b>	<b>127</b>
<b>7.6 Filing</b>	<b>131</b>
<b>7.7 Training for court staff</b>	<b>131</b>

## **Chapter 8: MAINTENANCE COMPLAINTS** ..... **133**

<b>8.1 Overview of the sample</b>	<b>133</b>
<b>8.2 Completion of forms when making a maintenance complaint</b>	<b>135</b>
<b>8.3 Profile of beneficiaries</b>	<b>136</b>
<b>8.4 Months when maintenance complaints are made</b>	<b>145</b>
<b>8.5 Profile of complainants</b>	<b>146</b>
<b>8.6 Income, assets and expenditure of complainant</b>	<b>157</b>
<b>8.7 Amount of maintenance requested</b>	<b>162</b>
<b>8.8 Requests for special forms of maintenance</b>	<b>168</b>
8.8.1 Requests for contributions in kind	168
8.8.2 Requests for specified payments to third parties	169
8.8.3 Pregnancy and birth-related expenses	170
<b>8.9 Timeline for when the first maintenance payment should be made</b>	<b>173</b>
<b>8.10 Details of how the maintenance payments should be made and frequency of maintenance payments</b>	<b>173</b>
<b>8.11 Payment to be made to and in favour of</b>	<b>173</b>
<b>8.12 Profile of defendants</b>	<b>177</b>
<b>8.13 Income, assets and expenditure of defendant</b>	<b>183</b>
<b>8.14 Support previously provided by defendant</b>	<b>184</b>



<b>Chapter 9: SUMMONSES AND DIRECTIVES TO GIVE EVIDENCE .....</b>	<b>187</b>
9.1 Directives to appear before the maintenance officer .....	188
9.2 Summons issued to a witness .....	190
9.3 Summons issued to the defendant or complainant .....	192
<b>Chapter 10: MAINTENANCE ENQUIRIES .....</b>	<b>205</b>
10.1 Submission of written evidence .....	205
10.2 Paternity disputes .....	206
10.3 Legal representation .....	207
10.4 Cases involving social workers .....	208
10.5 Postponements .....	209
10.6 Cases involving domestic violence .....	211
<b>Chapter 11: WITHDRAWALS OF MAINTENANCE COMPLAINTS .....</b>	<b>217</b>
<b>Chapter 12: MAINTENANCE ORDERS .....</b>	<b>221</b>
12.1 Total number of orders .....	221
12.2 Reason the order was made .....	224
12.3 Profile of complainants and defendants in cases where maintenance orders were issued .....	226
12.4 Profile of the beneficiaries .....	229
12.5 Average amount of maintenance ordered .....	230
12.6 Maintenance orders containing special forms of maintenance .....	235
12.6.1 Orders for contributions in kind .....	235
12.6.2 Orders for specified payments to third parties .....	236
12.6.3 Orders for the payment of pregnancy- and birth-related expenses .....	236
12.7 Frequency of payments (weekly/monthly) .....	237
12.8 Where and to whom the payments are made .....	237
12.9 How long it takes to obtain a maintenance order .....	238
12.10 Application for substituting or setting aside a default maintenance order .....	240
12.11 Identifying information on file with maintenance orders .....	241
12.12 Transfers of maintenance files between courts .....	242
<b>Chapter 13: CHANGES TO MAINTENANCE ORDERS .....</b>	<b>245</b>
13.1 Who requests the change? .....	247
13.2 What changes are requested? .....	248
13.3 Reasons changes are requested .....	250
13.4 Average time period between initial maintenance complaint and application for change .....	253
13.5 Dates when applications for change are made .....	254
13.6 Average age of beneficiary when change is requested .....	255
13.7 Details of assets, income and expenditure .....	257
13.8 Beneficiaries in requests for substitution of an existing order .....	257
13.9 Amount of maintenance requested in applications for change .....	258
13.10 Other special forms of maintenance requested in applications for change .....	259
13.11 Changes in the frequency of payments in applications for change .....	260
13.12 Changes to how the payment is made .....	260
13.13 Summons to attend court for applications to change an order .....	260
13.14 Outcome of applications for change .....	261
13.15 Requests to vary a maintenance order .....	262
13.16 Divorce orders .....	263

<b>Chapter 14: APPEALS AND MISUSE OF MAINTENANCE PAYMENTS</b>	<b>265</b>
14.1 Appeals	265
14.2 Misuse of maintenance payments	265
<b>Chapter 15: ARREARS AND ENFORCEMENT</b>	<b>269</b>
15.1 Incidence and characteristics of maintenance cases in arrears	270
15.2 Overview of outcome of cases involving arrears in maintenance payments	278
15.3 Timeline for outcome of cases in arrears	279
15.4 Overview of civil enforcement mechanisms	281
15.5 Orders for the attachment of wages	283
15.6 Warrants of execution	284
15.7 Warrants of arrest	285
15.8 Amount of maintenance owed in cases involving criminal proceedings	289
15.9 Criminal trials	290
15.10 Outcome of criminal trials	293
<b>Chapter 16: INTERNATIONAL PERSPECTIVES</b>	<b>297</b>
16.1 Principles regarding the duty to maintain	297
16.1.1 Maintenance for expenses incurred during pregnancy	297
16.1.2 Duration of child maintenance obligations	298
16.1.3 Cohabitation relationships and same-sex partnerships	299
16.1.5 Maintenance duties of other family members	299
16.1.6 Maintenance according to different customs	300
16.2 Processes for claiming maintenance	302
16.2.1 Judicial processes	302
16.2.2 Administrative processes	306
16.2.3 Hybrid processes	309
16.2.4 Advance maintenance schemes	310
16.3 Mechanisms for enforcing maintenance payments	312
16.4 Lessons for Namibia from international practice	315
16.5 Lessons from South Africa	317
<b>Chapter 17: RECOMMENDATIONS</b>	<b>323</b>
<b>Appendix</b>	<b>335</b>
Appendix A: OUTLINE OF MAINTENANCE FOCUS GROUP DISCUSSIONS	336
Appendix B: QUESTIONNAIRE FOR CLERKS OF COURT	341
Appendix C: QUESTIONNAIRE FOR MAINTENANCE OFFICERS	344
Appendix D: QUESTIONNAIRE FOR MAGISTRATES	348
Appendix E: MAINTENANCE ACT 9 OF 2003	351
Appendix F: MAINTENANCE ACT 9 OF 2003 REGULATIONS	382

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# Overview

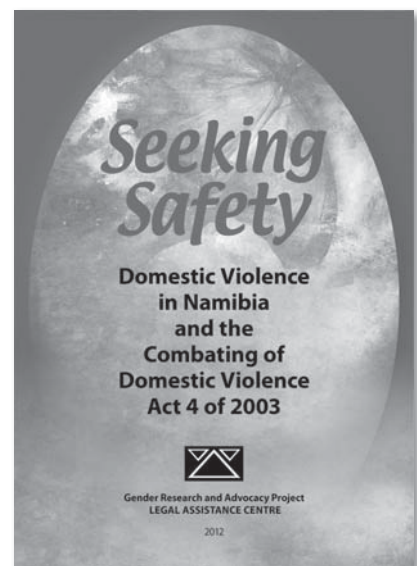
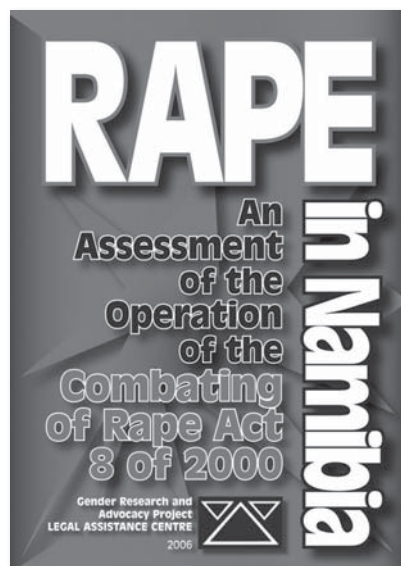
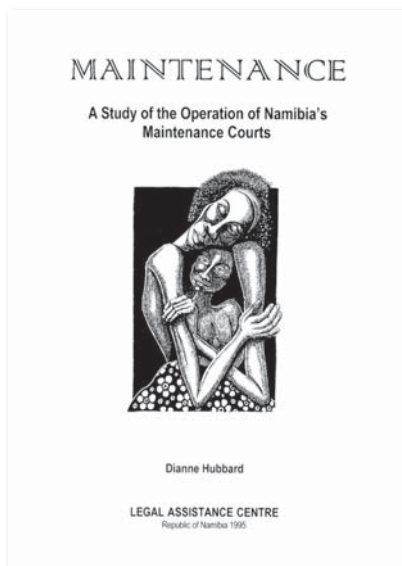
The primary purpose of this study is to assess the application of the Maintenance Act with a view to assessing whether the law is serving its intended purpose effectively. The study begins with a review of the importance of maintenance and a summary of how the Maintenance Act was developed. This is followed by a discussion of the Maintenance Act and a review of reports that have commented on the implementation of the Maintenance Act.

The study then presents the findings of the field research which included data from:

- 1 687 court files opened in the period 2005-2008 from 19 of the 31 magistrates' courts in place at the time of the study, located in 12 of Namibia's 13 regions;<sup>1</sup>
- 34 interviews with magistrates, maintenance officers and clerks from 11 regions;<sup>2</sup>
- 6 focus group discussions with a total of 62 people;<sup>3</sup>
- an examination of reported and unreported cases that cite the Maintenance Act; and
- relevant statistics, judicial developments and examples from other countries.

The study concludes with recommendations for fine-tuning the law and regulations, and for improving the implementation of the law.

The study is the third in a series conducted by the Legal Assistance Centre on the operation of key gender laws in Namibia.<sup>4</sup> The study is also a follow-up to a study published by the LAC in 1995 on the operation of the previous Maintenance Act (the Maintenance Act 23 of 1963).<sup>5</sup> Therefore this study differs from the previous two in the series as it is the only one in the set which is able to compare the operation of a pre-independence law with a post-independence law.



<sup>1</sup> In mid-2013 the government split Kavango Region into two regions, naming them Kavango East and Kavango West. As the analysis for this report was completed before this change and all contextual data (eg number of people per region) is still based on 13 regions rather than 14, we have not amended our reference to 13 regions. This is also why the report refers to Caprivi Region and Karas Region rather than the new names of Zambezi and ||Karas which were given in 2013.

<sup>2</sup> No interviews were conducted in Oshikoto and Caprivi Regions.

<sup>3</sup> In some cases we have corrected quotes from discussion participants (and text messages from LAC clients) for spelling, grammar and clarity without changing the meaning of the communication.

<sup>4</sup> Legal Assistance Centre (LAC), *Rape in Namibia: An Assessment of the Operation of the Combating of Rape Act 8 of 2000*, Windhoek: LAC, 2006. This extensive study was published in two parts – a full report and a summary of key findings.

<sup>5</sup> D Hubbard, *Maintenance: A Study of the Operation of Namibia's Maintenance Courts*. Windhoek: Legal Assistance Centre, 1995.



# Summary of Findings and Recommendations

## Key findings

**On average, someone makes a maintenance complaint in Namibia every thirty minutes during working hours, since 4000-5000 complaints are filed at the maintenance courts each year. However, only approximately two-thirds of complaints ever result in an order being made.** This is despite the fact that all children need maintenance and most claims for maintenance present a clear need for financial support. **Maintenance matters because children have a constitutional right to be cared for by their parents, and parents have a duty to act in the best interests of their children.**

**Overall, the findings show that if the maintenance complaint is a simple one and the absent parent is willing to pay maintenance, the process of making an order will be as quick and easy as the law intends it to be. However, if there are challenges along the way, the outcome is very different – the process will probably take much longer with numerous causes for delay, and an order may not even be made.** Problematic areas may be where the complainant does not have details of the absent parent's whereabouts or financial position, where there are repeated postponements resulting from evasions on the part of the absent parent, or some other reason that complicates the process.

**When an order is made, it is typically for low monthly payments, averaging N\$250/month for a single pre-school age child.** In many cases, the amount of maintenance ordered is not a realistic reflection of need but rather a generic amount that changes little according to rural or urban residence or other factors. This appears to be in part due to the lack of thorough investigation of the financial situation of defendants, a problem that is mostly due to the lack of maintenance investigators appointed to the courts.

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

**Another major concern identified in this report is that many of the innovative options included in the 2003 Act are not being utilised.** For example, the options of making payments directly to the complainant, or into the complainant's bank or post office savings account rather than to the court, are seldom utilised. Concerns about proof of payment and perceptions about what will be most likely to influence the defendant to comply seem to have influenced the low uptake of alternative methods of payment, despite the fact that no form of payment is more "official" than another. Also, few courts use the innovation of default orders in cases where a defendant who was properly summoned fails to appear in court. Another problem is that few complainants or defendants are utilising the option for substitution, suspension or discharge of a maintenance order to deal with changed circumstances.



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

**Amendments to the law are also needed to incorporate the best interests of the child and the concept of child participation, where appropriate,** to ensure that maintenance for child beneficiaries is more child-centred.

**The law should also ensure that women can apply for pregnancy-related expenses during pregnancy as opposed to after the child's birth,** to ensure that pregnant women are not forced to skimp on expenses such as antenatal care and proper nutrition during pregnancy, which can help to ensure the birth of a healthy child.

One little-known fact is that it is already possible under Namibia's common law for **one parent to claim reimbursement from the other parent where past contributions to child maintenance have not been fairly allocated in proportion to each parent's financial position.** It is not clear if such retrospective claims can be brought under the Maintenance Act, suggesting the need for an amendment to clearly authorise the maintenance court to order reimbursement for excess contributions towards the child's maintenance since the date of the child's birth, as has been done in South Africa. This would make the procedure for recovering such maintenance more accessible, and encourage parents to take their maintenance responsibilities more seriously from the moment a child is born.

As in all areas of law, there are multiple stakeholders involved and **we recommend that partnerships are developed to better support the maintenance courts** – for example, through increased involvement of social workers from the Ministry of Gender Equality and Social Welfare and through support from civil society. **We recommend that civil society liaise with the maintenance courts on the possible provision of how volunteer assistance to complainants and defendants,** using the models from the region discussed in this report as examples of how such services can successfully benefit the public and the courts. Community volunteers trained and supported by NGOs could assist complainants in making maintenance complaints, or help defendants present relevant information to the court. This could reduce the burden on court staff and help to make the process more child-centred, particularly in cases where the parents are in conflict with each other. Volunteers could also draw the attention of maintenance court personnel to relevant provisions in the Act where necessary, thus helping hold maintenance court officials accountable to implement the law correctly. Such volunteers might be well-placed to become maintenance investigators or maintenance officers in due course, thus providing paid employment for community members.

Namibia could also look to other countries for examples of how maintenance payments are enforced. One idea that might be particularly effective would be to **respond to arrears by revoking driving licences, or liquor and other business licences, or by cancelling eligibility for tender awards** – in cases where such measures would not undermine the defendant's income-earning capacity.

**So, are maintenance orders working? The answer is a qualified yes – they are working but there is considerable scope for more thorough utilisation of the various options and mechanisms provided by the law.** The portions of the new law which are being used in practice are primarily those which are familiar to the public and to court officials from the previous law. We hope that this report will help to ensure that the Maintenance Act 9 of 2003 is better implemented and that the innovative provisions contained in the law are put into practice.

## Summary of the key findings

### What does the study show?

Approximately **two-thirds of maintenance complaints result in an order**, typically for about **N\$250/month** for a single pre-school age child.

**If the maintenance complaint is a simple one and the absent parent is willing to pay maintenance, the process of making an order will be as quick and easy as the law intends it to be.** However, if there are challenges along the way, the outcome is very different.

### What do the findings tell us?

**The findings suggest that many of the innovative provisions included in the 2003 Act are not being utilised.** This appears to be due to a **lack of understanding of and confidence in the law by maintenance court officials and the public.** This problem is further compounded by a **lack of resources for the implementation of the law** – particularly the fact that **not a single maintenance investigator has been appointed in the ten years since the Act came into force.**

### What is the way forward?

**The Maintenance Act 9 of 2003 has introduced positive changes in the application of maintenance and many people are benefiting from the new law.** However the study has shown that the Act is not being effectively implemented. This means that we have the situation often encountered in respect of gender-related laws, where the law is providing the legal framework intended to support a strong system but the practical application is lacking.

**This report provides a number of recommendations for improving the implementation of the Act.** These recommendations fall under seven main areas for action, namely (1) improving implementation of the law; (2) promotion of partnerships; (3) providing information for the public and awareness-raising; (4) providing trained volunteers to assist with maintenance cases; (5) amendments to the Maintenance Act and regulations; (6) international enforcement; and (7) further research.



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

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

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

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

Few maintenance complaints are withdrawn.

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

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

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

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

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

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

Appeals of maintenance orders are rare.

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

Neither the complainant nor the defendant is likely to ask for the order to be substituted or discharged. If a change is requested, it will usually be made by the complainant over one year after the initial order. If a request for an increase in maintenance payments is made, it will usually be granted and will usually be for double the amount of maintenance awarded in the initial order - which is typically similar to the original amount of maintenance requested. Two-thirds of the requests for a decrease were granted but this figure is based on just 12 cases.

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

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

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

## Maintenance matters

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

The social context of maintenance is particularly relevant in Namibia. Approximately two-thirds of children live apart from one or both parents while the absent parent or parents are still living, and these children may be in particular need of support.

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

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

## Study design and methodology

The purpose of this study was to collect comprehensive information on the implementation of the Maintenance Act of 2003 through a quantitative assessment of data extracted from court files and a qualitative assessment of data collected in focus group discussions and key informant interviews.

Data was collected from maintenance files opened during the years 2005 to 2008. During this four-year period, nearly 19 000 maintenance complaints were opened nationwide. This study is based on data from 1 687 files from 18 of the 31 magistrates' courts that were in place at the time, representing 9% of the files opened during the years covered by the study. Data was collected from over half (58%) of all magistrates' courts in the country, from 12 of Namibia's 13 (now 14) regions.

The study also includes data from 34 key informant interviews with magistrates, maintenance officers and clerks from 11 regions, and six focus group discussions with a total of 62 people from two regions.

## Maintenance complaints

Maintenance complaints are usually made by a mother against a father. Under one percent of complaints are made by fathers and just over one percent of complaints are made by children seeking maintenance for themselves.

The complainant typically lives in an urban area, and in 40% of cases she and the defendant live in the same town or village. Complainants most often make maintenance complaints early in the year, probably because of the burden of expenses relating to schooling or child care.

The majority of maintenance complaints are made for a single pre-school age child, with no sign of any differences based on the sex of the beneficiary.

On average complainants request N\$500 for the maintenance of their child – approximately half the estimated cost of caring for the child.

The average amount of maintenance requested does not differ by rural/urban residence or by requests made by persons of different language groups. Neither does the amount of maintenance requested increase over the years examined in our sample, despite annual inflation.

The more beneficiaries there are, the lower the amount of maintenance requested per beneficiary – perhaps because of economies of scale (since expenses like rent and electricity do not necessarily increase proportionally for larger numbers of beneficiaries).

Very few complainants request special forms of maintenance either in the form of contributions in kind or payments to be made directly to third parties (such as payments for hostel fees or medical expenses). Almost no complainants seek contributions for pregnancy- and birth-related expenses.

The typical defendant does not have a history of providing maintenance voluntarily. In approximately 15% of cases the defendant will have provided some maintenance, but the contribution will have ceased more than two years prior to the complaint.

A typical maintenance complaint makes no mention of domestic violence even though nearly 40% of applicants for a protection order ask for temporary maintenance to be incorporated into that order.

Fewer than ten percent of maintenance complaints are withdrawn.

## **Summons to the court**

Nearly 70% of all the files contained a summons issued to the defendant or complainant, most of which were issued to the defendant. Few files summoned or directed witnesses to attend court. This may be because the court is able to resolve the complaint between the complainant and defendant without involving other witnesses or because witnesses attend voluntarily.

Nearly one in five summonses, almost all of which were directed to defendant, were not served.

## **The maintenance enquiry**

Because most maintenance cases are resolved by consent between the parties, full maintenance enquiries are not very common.

Most maintenance enquiries are completed without postponements. In the one in five cases where postponements do occur, half will be postponed just once, although some may be postponed more than ten times. The postponements will most often be caused by the defendant.

Although the court may make a default order if the defendant has been correctly summoned to court but has failed to attend, such orders are rarely made.

Both parties usually represent themselves without the help of legal practitioners.

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

## **The maintenance order**

A typical maintenance complaint will result in a consent order, which is agreed between the parties without a court enquiry. The remainder are similarly small proportions of default orders and orders following a hearing.

However, approximately one-third of maintenance complaints will not result in an order. In many cases this will be because the application process has fallen by the wayside rather than because the magistrate refused to make an order. We did not find a single file where an application was refused, although the outcome of the application could not always be determined.



A typical maintenance order will be for N\$250 per month, typically for a single pre-school age child. This is usually about half the amount the complainant requested and one quarter of the estimated costs of caring for the child.

A maintenance order is unlikely to contain any of the special forms of maintenance which are possible under the law – in-kind payments, payments directly to third parties for specified purposes (such as hostel fees or medical aid contributions) or payments for pregnancy- and birth-related expenses.

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

The typical maintenance complainant will receive her first payment some 2-3 months after making the application.

Particulars which could be used to identify the defendant later – such as a copy of his ID card or a photograph – are unlikely to be attached to the order even though the Act allows for this. This omission deprives court officials of a tool which could be useful in enforcement actions.

Appeals are rare, and only one in 10 recipients of a default order will apply for it to be varied or set aside (keeping in mind that the total number of default orders is very small).

There is no indication that complainants have a tendency to misuse the maintenance money, with only two *allegations* of this nature found in the entire sample studied.

## Changes to a maintenance order

Neither the complainant or the defendant is likely to ask for the order to be substituted, suspended or discharged. However, if such a change is requested, it will usually be made by the complainant more than one year after the initial order. The request will usually be to increase the amount of maintenance, often because of the pressure of school-related costs.

If a request for an increase is made, it will usually be granted and the amended order will usually be for double the amount of maintenance awarded in the initial order – however the amount requested is unlikely to differ substantially in size from the average amount of maintenance requested in respect of initial orders. This suggests that complainants are basing their requests on the actual costs of child-rearing.

Where a decrease in maintenance is requested, the defendant typically seeks to to reduce the payments to approximately 60% of the amount of maintenance originally ordered.

## Enforcement of maintenance orders

The typical defendant will not be reported to the court for defaulting on maintenance payments, whatever the reality may be.

If a defendant is reported for a breach, he will usually be in arrears for 6-9 months before the complainant informs the court – this is despite the fact that the court can take action ten days after a single payment has been missed.

Once the defendant breaches an order, the typical complainant will not receive a positive resolution to the problem.

The use of civil enforcement mechanisms – such as orders for the attachment of property or wages– is rare, even though one of the innovations of the new Act was to make provision for this kind of enforcement.

Criminal proceedings are rarely utilised to deal with breaches.

In the one in ten cases where a warrant of arrest is issued, it will often be for failure to respond to a summons, although the reason for the summons may be failure to pay maintenance. Even where a warrant of arrest is issued, the recipient will rarely be arrested – although this could be because the person in question attended court in the meantime.

In the rare cases where a criminal trial is held (only 5% of all cases in the sample), the defendant will not usually receive any punishment. It is more likely that the defendant will pay the arrears or that a new maintenance order will be made incorporating payment of the arrears after conversion of the criminal case into a fresh enquiry.

## International perspectives

The approaches to determining and claiming child support payments fall into three broad categories: judicial processes, systems managed by administrative agencies, and hybrid systems. Most countries encourage parents to reach private agreements on maintenance obligations before involving other actors.

Some countries that use a judicial process follow very strict guidelines and regulations, like Germany, which uses a table to help calculate maintenance payments based on the defendant's income. Other countries, like France, have no formal guidelines and leave decisions on maintenance largely to the discretion of the presiding officer in the case.

Administrative agencies typically use formal rules to determine payment amounts. Many have online tools which parents can use to calculate maintenance payments and apply for assistance in claiming them.

Some countries provide for advance maintenance payments, where the government pays maintenance for the child and then recovers the amount owed from the absent parent.

Mechanisms for enforcing maintenance payments vary significantly between countries. Some countries have a national office to oversee the enforcement of payments, such as in Australia, while others place responsibility for enforcing payments on the bodies that grant the maintenance orders, as in Namibia.

In the event of continued non-payment of maintenance, some authorities will also suspend the parent's passport to prevent them from leaving the country, or suspend other licenses such as driving or business licenses.

## Recommendations

Recommendations to improve the implementation of the Maintenance Act are made throughout this report. The recommendations have been grouped under the following categories:

- Improving implementation of the law
- Promotion of partnerships
- Public information and awareness-raising
- Providing trained volunteers to assist with maintenance cases
- Amendments to the Maintenance Act and regulations
- International enforcement
- Further research

Six key areas for action are summarised on the next page.

## Summary of the six key areas for action

- 1. Maintenance investigators:** We recommend that the Ministry of Justice review its budget allocations to assess whether the operation of the maintenance courts is receiving sufficient funding. One of the most helpful steps to improve the operation of the maintenance courts in Namibia will be the progressive appointment of maintenance investigators, as the law requires.
- 2. Full utilisation of existing powers of investigation:** As recommended in the 1995 maintenance study, maintenance officers need to be encouraged to use their powers of investigation more assertively to help locate defendants or to obtain accurate information about the defendants' income and means, utilising their ability to summon witnesses to court for this purpose if necessary. However, this recommendation is likely to be effective only if maintenance investigators are appointed to support maintenance officers.
- 3. Providing trained volunteers to assist with maintenance cases:** NGOs can provide volunteers to assist complainants to make maintenance complaints, or to give information to defendants who lack means on how to present information to the court or request a substitution or discharge where appropriate. Such volunteers will reduce the burden on court staff and help to make the process more child-centred, particularly in cases where the parents are in conflict with each other. If, as in South Africa, there can be a progression from volunteer to employed court staff member, the role of volunteers would not only have altruistic benefits for the community, but would also provide economic benefits for the volunteers in the long term.
- 4. Preventing large amounts of arrears:** Maintenance officers should inform complainants at the time the order is granted that arrears can be reported as soon as a single payment has been outstanding for 10 days, to prevent arrear amounts from piling up. Defendants should also be fully informed about the implications of not paying maintenance, including the various civil and criminal enforcement possibilities which may be utilised in the event of non-payment.
- 5. Information about the Maintenance Act:** The study suggests that there are areas of the Act that are not well-understood or well-utilised by either maintenance court officials or the public. For example it would be helpful to ensure that all maintenance court officials are aware of the fact that the minor children can claim maintenance on their own, and the process and mechanisms for the enforcement of maintenance orders. There is also a need for more information on maintenance aimed at the general public. Such information could be disseminated by the Ministry of Justice, or by NGOs working in partnership with the Ministry, by means of radio and television, news articles or advertisements, and pamphlets or posters placed at popular public places and at maintenance courts.
- 6. Amendments to the Maintenance Act and regulations:** We recommend that the Law Reform and Development Commission and the Ministry of Justice consider amendments to the Maintenance Act to clarify and fine-tune some issues, including revision of some of the key forms. These recommendations do not introduce new principles or innovations, since the Act already provides the key tools required for a successful maintenance system.

# BASIC FACTS ON THE MAINTENANCE ACT



## FACT SHEET

Gender Research & Advocacy Project  
LEGAL ASSISTANCE CENTRE  
Windhoek, Namibia, 2008

### What is maintenance?

- Maintenance is money or goods that a person has a legal duty to provide for the basic living expenses of his or her dependants.
- Maintenance is used for basic living expenses such as housing, water, electricity, food, clothes, transport, medical expenses and school fees. Maintenance may also be provided for pregnancy and birth-related expenses.
- All children have a right to maintenance.
- All children are treated equally before the law.
- Both parents are responsible for their children, even if a child is being cared for by someone else.
- The amount of money each parent must pay will depend on how much money they have and how much money they earn.
- The payment of maintenance must come before anything else except for payments parents make to support themselves.



### What to do if maintenance is not paid

If you do not receive a maintenance payment 10 days after it should have been paid, you should contact the Clerk of the Court. The court can take the money directly from the defendant's wages, or sell some of his or her property.

### Who can claim maintenance?

A parent, the person who looks after the child (such as the grandmother) or any other person who is worried about the child (such as a teacher) can apply for maintenance. A child can also claim maintenance from a parent without assistance from an adult.



### How long must a parent pay maintenance for a child?

A maintenance order generally ends when a child is able to look after him- or herself. This is usually when the child reaches 18. But if a child marries or starts work before the age of 18, a maintenance order will stop. If a child goes to university, maintenance may need to be paid for longer.

### How to claim maintenance

#### Go to the Magistrate's Court

- The Clerk of the Court will help you to fill in the forms. The entire process should be private and you do not need a lawyer.

#### Meeting with the Maintenance Officer

- Both parents will be asked to attend an informal meeting. Most cases are settled at this meeting. The maintenance officer will try to help the parents come to an agreement. If the parents cannot agree, a Magistrate will have to decide the case.

#### Enquiry by the Magistrate

- If the Magistrate has to decide the case, both parents must come back on another day to explain their position to the Magistrate.

- It is a crime to lie to the Magistrate or Maintenance Officer or to delay the process.
- It is a crime to threaten or intimidate the complainant.
- It is a crime to ignore a maintenance order or to misuse maintenance money.
- It is a crime for the Magistrate or Maintenance Officer to tell anyone about the details of the case.

### See the Legal Assistance Centre's Guide to the Maintenance Act 9 of 2003 for more details.

Pdf (Acrobat) versions of LAC publications are posted on the LAC website: [www.lac.org.na](http://www.lac.org.na)



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A fact sheet produced by the Legal Assistance Centre in 2008. This fact sheet, and the accompanying *Pocket Guide: Maintenance Act 9 of 2003* as well as the full 92-page *Guide to the Maintenance Act 9 of 2003* (pictured above), are available as PDFs on the LAC website: [www.lac.org.na](http://www.lac.org.na).





# Chapter 1

## INTRODUCTION TO MAINTENANCE

**M**aintenance is money or goods that a person has a legal duty to provide for the support of his or her dependants. Maintenance is used for basic living expenses such as housing, food, clothing, medicine and school-related expenses. The concept of maintenance is most commonly associated with the provision of maintenance for a minor child. However, a duty of maintenance may also be applicable between spouses, between an adult child and an elderly parent, and between a parent and an indigent or disabled adult child.



**The provision of maintenance helps to ensure that the needs of a child are met.** The provision of maintenance can be particularly important for a parent, often a woman, who is struggling to provide for the needs of her children by herself. The provision of maintenance is designed to ensure that the child has access to resources for day-to-day costs of living such as rent, electricity, water and food, as well as medical care and treatment and education-related costs such as the purchase of new school uniforms and school stationery.

Failure to pay maintenance is an offence that may be punished by a prison sentence or fine. It is also a form of child abuse if the parent can provide for the needs of the child, but is failing to do so.<sup>1</sup>

The provision of maintenance can also be important for a parent, again often a woman, who is in a violent relationship but is too afraid to leave because she does not have enough money to care for her children. Fear that she will be unable to support her children on her own should never prevent a woman from walking away from an abuser.

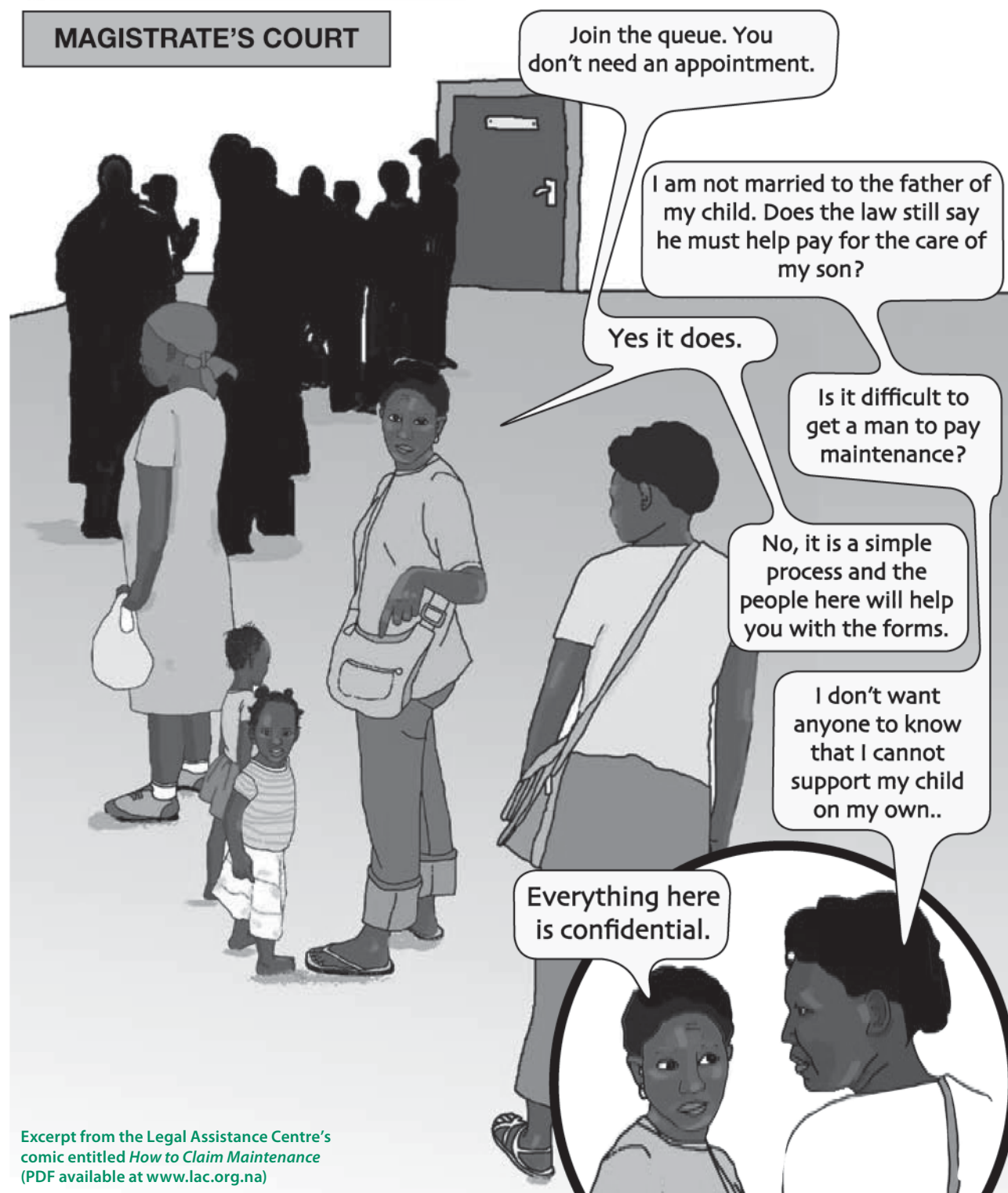
Even in cases where a parent can cover the basic costs of caring for a child, the provision of maintenance can help to cover these costs and perhaps allow the parent to set aside money to pay for the child's future needs, such as the cost of tertiary education or unexpected health care costs that may arise. The key principle is that the costs of child-rearing should be shared by both parents, in accordance with their respective assets.

<sup>1</sup> Children's Act 33 of 1960, section 18. This offence is expected to be repeated in the forthcoming Child Care and Protection Act which will replace the outdated Children's Act.



Despite the fact that the provision of maintenance should be a norm within the fabric of society, problems with accessing maintenance have been ongoing for many years in Namibia, and the need to improve access to maintenance has been regularly and frequently highlighted since Independence.

For many years the law on maintenance was governed by the Maintenance Act 23 of 1963. In 2003 the Government passed a new law on maintenance, and the Maintenance Act of 9 of 2003 introduced many positive changes. Despite these improvements, problems with accessing maintenance continue, leaving multitudes of children vulnerable and undermining their wellbeing and development. This study is intended to provide a detailed examination of the implementation of the new law, with a view to identifying shortcomings and improving its effectiveness.



Excerpt from the Legal Assistance Centre's comic entitled *How to Claim Maintenance* (PDF available at [www.lac.org.na](http://www.lac.org.na))



# Chapter 2

## THE IMPORTANCE OF MAINTENANCE

### 2.1 Maintenance as a human right

A child's right to maintenance is made clear in national and international law. The Namibian Constitution and international agreements show that there has been a shift away from the traditional understanding that caring for children is a women's rights issue towards placing the right to maintenance as central to the children's rights agenda – something that has also been noted in court decisions on maintenance in South Africa.<sup>1</sup>

**The parental duty to maintain children is recognised in the Namibian Constitution.** Article 15(1) states that children have a right to be cared for by their parents. The right to be cared for includes the provision of maintenance.

"Children shall have the right from birth to a name, the right to acquire a nationality and, subject to legislation enacted in the best interests of children, as far as possible the right to know **and be cared for by their parents.**"

Constitution of Namibia, Article 15(1)

The right of a child to be cared for is also recognised in the United Nations Convention of the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination Against Women, the African Charter on Human and People's Rights, and the African Charter on the Rights and Welfare of the Child, as illustrated by the provisions quoted below.

1. States Parties shall use their best efforts to ensure recognition of the principle that **both parents have common responsibilities for the upbringing and development of the child.** Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.

United Nations Convention on the Rights of the Child, Article 18

1. States Parties recognize **the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.**
2. **The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.**
3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.

<sup>1</sup> P Moodley, "Maintenance as a child's rights issue – an analysis of recent decisions that give substance to the 'best interests of the child standard'", in J Sloth-Nielsen and Z du Toit (eds), *Trials and Tribulations, Trends and Triumphs: Developments in International, African and South African Child and Family Law*, Cape Town: Juta Law, 2008 at 188-189.

3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.
4. **States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad.** In particular, where the person having financial responsibility for the child lives in a State different from that of the child, States Parties shall promote the accession to international agreements or the conclusion of such agreements, as well as the making of other appropriate arrangements.

United Nations Convention on the Rights of the Child, Article 27

States Parties shall take all appropriate measures ...

- (b) To ensure that family education includes a proper understanding of maternity as a social function and the **recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.**

Convention on the Elimination of All Forms of Discrimination Against Women, Article 5(b)

States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women ...

- (d) **The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount ...**

Convention on the Elimination of All Forms of Discrimination Against Women, Article 16(d)

1. Every individual shall have **duties towards his family** and society ...

African Charter of Human and Peoples Rights, Article 27

The individual shall also have the duty:

1. **to preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need ...**

African Charter of Human and Peoples Rights, Article 29(1)

### Parental Responsibilities

1. Parents or other persons responsible for the child shall have the **primary responsibility of the upbringing and development the child** and shall have the duty:
  - (a) to ensure that the best interests of the child are their basic concern at all times –
  - (b) **to secure, within their abilities and financial capacities, conditions of living necessary to the child's development ...**

African Charter on the Rights and Welfare of the Child, Article 20(1)

### Responsibility of the Child

Every child shall have responsibilities towards his family and society ... The child, **subject to his age and ability ... shall have the duty:**

- (a) to work for the cohesion of the family, **to respect his parents, superiors and elders at all times and to assist them in case of need ...**

African Charter on the Rights and Welfare of the Child, Article 30

Maintenance for children must also conform to the international principle that makes all actions concerning children subject to the principle that the **best interests of the child** is the paramount concern.

The Convention on the Rights of the Child was not the first international agreement to articulate the principle of the child's best interests,<sup>2</sup> but it is one of the most significant in that it makes this principle a centrepiece of child protection:

*In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*<sup>3</sup>

The Committee on the Rights of the Child further expands on the best interests concept in General Comment 5, stating:

*The principle requires active measures throughout Government, parliament and the judiciary. Every legislative, administrative and judicial body or institution is required to apply the best interests principle by systematically considering how children's rights and interests are or will be affected by their decisions and actions – by, for example, a proposed or existing law or policy or administrative action or court decision, including those which are not directly concerned with children, but indirectly affect children.*<sup>4</sup>

The African Charter on the Rights and Welfare of the Child also refers to the principle of the best interests of the child:

*In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.*<sup>5</sup>

The Convention on the Rights of the Child uses the words “*shall be a primary consideration*” when referring to the best interests principle, meaning that the principle is not an overriding factor but one that should be considered in respect to additional factors and principles. In contrast, the African Charter using stronger wording, saying that the principle “*shall be the primary consideration*”.<sup>6</sup> Namibia has signed both conventions and has used the wording “*the best interests of the child concerned is the paramount consideration*” in the draft Child Care and Protection Bill, indicating Namibia's commitment to recognise the importance of the best interests of the child as the overriding concern in all decisions related to a child.<sup>7</sup>

Although the Maintenance Act of 2003 recognises the right of a child to be cared for, the Act does not explicitly ensure that the best interests of the child are considered. However, case law from the South African Constitutional Court, which is a persuasive authority in Namibia, shows that the best interests of the child are of importance in maintenance matters.<sup>8</sup> To be in line with the international

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<sup>2</sup> For example, see the 1959 Declaration of the Rights of the Child and Article 5(b) of the 1979 Convention on the Elimination of All Forms of Discrimination Against Women.

<sup>3</sup> P Mahery, “The United Nations Convention on the Rights of the Child: Maintaining its Value in International and South African Child Law”, in T Boezaaet (ed), *Child Law in South Africa*, Cape Town: Juta & Co Ltd, 2009.

<sup>4</sup> Committee on the Rights of the Child, *General Comment Number 5: General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)*, 34th Session, 19 September to 3 October 2003, available at <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G03/455/14/PDF/G0345514.pdf?OpenElement>>, last accessed 28 April 2011.

<sup>5</sup> African Charter on the Rights and Welfare of the Child, Article 4(1).

<sup>6</sup> Emphasis added to both quotations.

<sup>7</sup> Child Care and Protection Bill, draft dated 12 January 2012, section 4.

<sup>8</sup> See P Moodley, “Maintenance as a child's rights issue – an analysis of recent decisions that give substance to the ‘best interests of the child standard’”, in J Sloth-Nielsen and Z du Toit (eds), *Trials and Tribulations, Trends and Triumphs: Developments in International, African and South African Child and Family Law*, Cape Town: Juta Law, 2010 at 188-193. It should be noted that the standard is embodied in the South African Constitution, Article 28(2) of which states: “A child's best interests are of paramount importance in every matter concerning the child.” In Namibia the international standards are part of Namibian law by virtue of Article 144 of the Constitution, which states: “Unless otherwise provided



standards which bind Namibia, **we recommend amending the Maintenance Act to recognise the best interests of the child as the paramount consideration when determining a maintenance order.**

The concept of **child participation** is also relevant to maintenance complaints. Article 12 of the Convention on the Rights of the Child states that a child who is “*capable of forming his or her own views*” should have the right to express those views freely in all matters affecting the child, with “*the views of the child being given due weight in accordance with the age and maturity of the child*”. In particular, a child should “*be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law*”. Namibia is a signatory of the Convention on the Rights of the Child and so should be taking steps to involve child participation.

The forthcoming Child Care and Protection Bill (as the draft bill stood in January 2012) incorporates the principles outlined in the Convention on the Rights of the Child by stating that “[e]very child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child in terms of this Act has the right to participate in an appropriate way and views expressed by the child, verbally or non-verbally, must be given due consideration”. In contrast, the Maintenance Act does not specifically recognise the role of a child who is not the complainant to participate in a maintenance hearing, but neither does it prohibit this.

In a Swedish report assessing the role of children in welfare benefit appeals, the authors considered cases where the needs of a child were denied and argued that this was because the child was not involved in the hearing. The authors asserted that failure to listen to the voice of the child is a problem as “*children’s well-being can be heavily influenced by exclusion from social relations and peer-related activities due to financial restraints in the household ... . Not being able, for instance, to participate in organized activities may, then, be damaging for children in low-income families. Thus, the possibility to participate in activities like a football trip may seem trite from an adult perspective but to a child be of great significance – and have multiple dimensions – which ought to be taken into consideration*”.<sup>9</sup> A similar argument could be made for some maintenance complaint enquiries.

One argument against the involvement of children is the fact that the process is time-consuming and the child would possibly have to miss school to attend court. However, the courts could overcome this issue by holding hearings involving child participants only in the afternoons, or by meeting with children outside of the court. However, this might only be possible if the courts increased their human resources capacity.

Overall, although it will not be necessary for the court to always require children to participate, as at times this may not be in the best interests of the child, child participation could be beneficial in some cases. **We recommend that the Maintenance Act is revised to include a provision recognising the role of child participation where appropriate in maintenance hearings.**

**The provision of maintenance has also been linked to the right to property and the right to gender equality.** At the 2006 National Conference on Women’s Land and Property Rights and Livelihood, with a Special Focus on HIV/AIDS, Debie LeBeau presented a paper arguing that women’s access to child maintenance is a right to property. She asserted that women’s right to property, particularly in urban areas, includes a right to child maintenance and that this right forms an important component of gender equality.<sup>10</sup> LeBeau explained the consequences of women being denied access to child maintenance:

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*by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.”*

<sup>9</sup> S Fernqvist, “Redefining participation? On the positioning of children in Swedish welfare benefits appeals”, in *Childhood*, 2011, 18(2) at 227-241. Note that the study assessed benefit appeals for maintenance from the State rather than applications for maintenance from the other parent of the child. However, the principles discussed are relevant to this study.

<sup>10</sup> D LeBeau, “Women’s access to child maintenance as a right to property”, in Ministry of Gender Equality and Child Welfare (MGE CW), *Report on the National Conference on Women’s Land and Property Rights and Livelihood, with a Special Focus on HIV/AIDS*, Windhoek: MGE CW, 2006, Annexure 3 at 14.



*Women's right to property – in the form of child maintenance – enable women to support themselves and their children. A denial of this right can expose women to exploitation, food insecurity, homelessness and HIV infection.*<sup>11</sup>

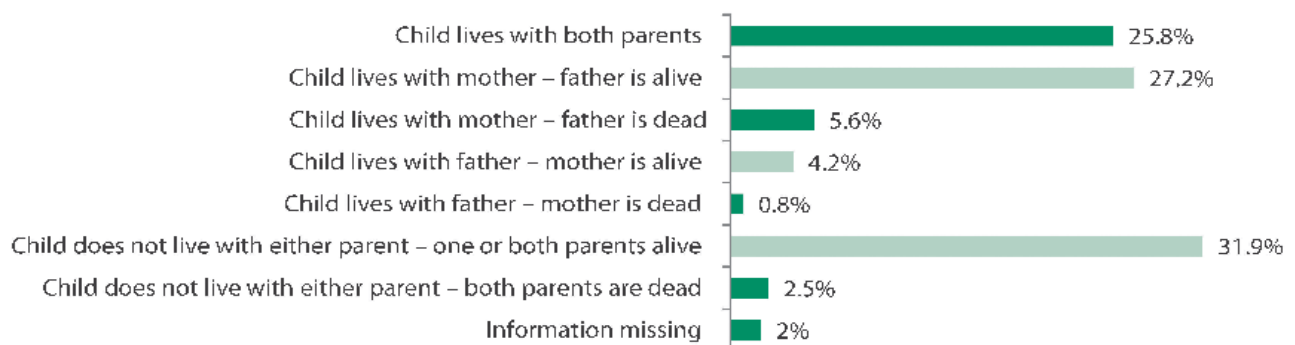
Thus, as stated in the Legal Assistance Centre's study on the previous Maintenance Act in 1995, *"the effectiveness of the maintenance court procedure is an important factor in determining the household resources of households headed by single mothers. More broadly, providing effective assistance to mothers raising children on their own is a step towards the social and economic empowerment of women"*.<sup>12</sup>

## 2.2 The social context of maintenance

**Maintenance is most often needed when the parents of a child live separately and one parent fails to provide for the needs of the child.** However, the law can also be used by a person who has charge of the day-to-day care of a child (the primary caretaker) to seek contributions for the child's maintenance from one or both parents.

Family structures in Namibia show that it is common for children to live apart from one or both parents. The 2006 Demographic and Health Survey reports that only approximately one-quarter of children live with both parents. In contrast, approximately **two-thirds of children live either with one parent and the other parent is still living, or with another caregiver and one or both parents are still living**.<sup>13</sup> In these situations the payment of maintenance may be most relevant.<sup>14</sup> This means that **accessing maintenance is an issue that may be particularly relevant for approximately 60% of children in Namibia**.

**Chart 1: Children's living arrangements**



*Approximately two-thirds of children live either with one parent and the other parent is still living, or with another caregiver and one or both parents are still living. In these situations the payment of maintenance may be most relevant. This means that accessing maintenance is an issue that may be particularly relevant for approximately 60% of children in Namibia.*

Ministry of Health and Social Services (MoHSS), *Namibia Demographic and Health Survey 2006-07*, MoHSS, 2008

<sup>11</sup> Id, Annexure 3 at 15.

<sup>12</sup> D Hubbard, *Maintenance: A Study of the Operation of Namibia's Maintenance Courts*, Windhoek: Legal Assistance Centre, 1995 at 1.

<sup>13</sup> Ministry of Health and Social Services (MoHSS), *Namibia Demographic and Health Survey 2006-07*, Windhoek: MoHSS, 2008 at 255. See Chart 1 on this page.

<sup>14</sup> This does not mean that maintenance is not relevant in other living arrangements: the payment of maintenance may still be applicable in cases where one or both parents are dead as the duty of maintenance may pass to the extended family. Most of the law on the maintenance duties of different family members is contained in cases decided by the courts instead of in the Maintenance Act, because every family situation is different. The law on the duty of support between extended family members is summarised in *S v Koyoko* 1991 NR 369 (HC).

## 2.3 The economic context of maintenance

### The status of the labour market

In the majority of cases where the child is living with one parent, the parent is the mother of the child.<sup>15</sup> Therefore the economic status of women is particularly relevant.

**Women are more likely than men to be unemployed**, as only 68.2% of the working-age population are employed, compared to 77.1% of men.<sup>16</sup>

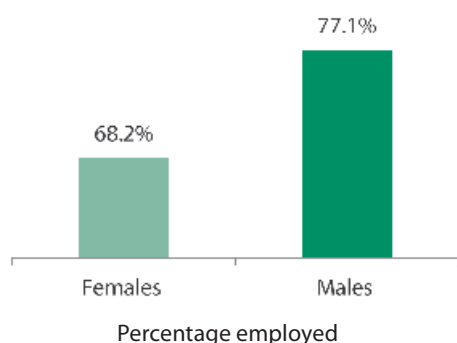
One reason for the lower proportion of women in the workforce may be that as women usually take primary responsibility for caring for children, they may be unable to take advantage of competitive employment opportunities – especially in a labour market where unemployment is high. Another reason may be that many areas of employment, such as engineering, manufacturing, science and technology, continue to be male-dominated.

The fact that women are disproportionately represented in the workforce illustrates why a mother who claims maintenance may do so not just because it is her child's right, but also because she is unable to meet the cost of child care alone. Many women would probably prefer to cover the costs themselves to avoid the conflict and irregularity of payment that is often attached to the maintenance agreements – even those which are arranged through the court.

*"I wish I could earn enough money not to have to claim maintenance from the father of my children."*

community member

**Chart 2: Comparison of employment in Namibia by sex**



To gain a better understanding of the underlying financial realities, we can also consider the average wage of people working in certain sectors. Unfortunately this information is outdated for many sectors.

In 2004 one report estimated that most workers in the informal sectors earn less than N\$1 000 per month, with almost a third earning between N\$300 and N\$400 per month.<sup>17</sup> Reports published in 2005 and 2006 also showed that most labour-hire workers earned between N\$520 and N\$1 037 per month, and domestic and farm workers earned between N\$200 and N\$500 per month.<sup>18</sup>

For people in the most lowly paid sectors there appears to be little change in the rate of pay, as in 2008 14% of domestic workers continued to report earning under N\$200 per month.<sup>19</sup> Data from 2008 also shows that petrol attendants are another low-paid employment group, earning between N\$500

<sup>15</sup> A total of 27.2% of children live with the mother and the father is living, and 5.6% live with the mother and the father is dead. A total of 4.2% of children live with the father and the mother is living, and 0.8% live with the father and the mother is dead. (Ministry of Health and Social Services (MoHSS), *Namibia Demographic and Health Survey 2006-07*, Windhoek, MoHSS, 2008 at 255)

<sup>16</sup> Ministry of Labour and Social Welfare (MoLSW), *The Namibia Labour Force Survey 2012 Report*, Windhoek: MoLSW, 2013 at 8.

<sup>17</sup> Labour Resource and Research Institute (LaRRI), *The informal sector in Namibia*, Windhoek: National Union of Namibian Workers, 2004 at 4; and N Mwilima, *A study of gender and labour market liberalisation in Africa*, Windhoek: LaRRI, 2004 at 21.

<sup>18</sup> H Jauch and N Mwilima, *Labour Hire in Namibia: Current Practices and Effects*, Windhoek: Labour Resource and Research Institute (LaRRI) for Ministry of Labour and Social Welfare, 2006 at 42; LaRRI, *Wage bargaining report 2005*, Windhoek: LaRRI, 2006 at 8.

<sup>19</sup> H Shindondola-Mote, *The plights of Namibia's domestic workers*, Windhoek: Labour Resource and Research Institute, 2008 at 41.

and N\$1 500 per month, with women in this sector tending to be concentrated in the lower income categories.<sup>20</sup> The 2012 Labour Force Survey shows that 28.3% of women earn less than N\$1 000 compared to 22.2% of men. **The reality is that many people do not earn a living wage – defined as the minimum amount of money required to meet their basic needs.**

Another way to assess the situation is to look at annual income and expenditure. **Only about half of all households in Namibia (49.2%) name salaries/wages as their main source of income;** this is followed by subsistence farming (23.1%), pensions (11.1%) and business income (8.8%).<sup>21</sup> **The finding that so many households do not receive a regular monthly income may explain why so many women are in need of maintenance, but it may also explain why it may be a struggle for so many women to access this support.**

**Analysis of household income and expenditure also shows that the difference between income and expenditure is larger in male-headed households than in female-headed households.**<sup>22</sup> This is reflected in practical differences such as a difference in housing quality: male-headed households tend to have better-quality housing than female-headed households.<sup>23</sup>

**Table 1: Main sources of income**

Income source	Percentage
Salaries/wages	49.2
Subsistence farming	23.1
Pensions	11.1
Business income	8.8
Remittances/grants	4.6
Drought/in-kind receipts	1.7
Commercial farming	0.6
Other	1.0
<b>Total</b>	<b>100.0</b>

**Source:** Namibia Statistics Agency (NSA), *Namibia Household Income and Expenditure Survey (NHIES) 2009/2010*, Windhoek: NSA, 2012 at 56.

**Table 2: Household income and expenditure**

Household	Average income	Average consumption	Difference
Male-headed households	84 141	79 586	4 555
Female-headed households	48 663	46 474	2 189
<b>All households</b>	<b>68 878</b>	<b>65 348</b>	<b>3 530</b>

**Source:** Namibia Statistics Agency (NSA), *Namibia Household Income and Expenditure Survey (NHIES) 2009/2010*, Windhoek: NSA, 2012 at 134 and 145.

**Table 3: Household types**

Household	Modern houses					Traditional houses	Improvised houses	Other
	Detached houses	Semi-detached houses	Flats	Mobile homes	Single quarters			
Female-headed	29.3	4.9	3.8	0.3	1.0	37.8	20.6	2.1
Male-headed	34.9	5.2	3.7	0.5	1.5	26.3	26.3	1.6
<b>All households</b>	<b>32.6</b>	<b>5.1</b>	<b>3.7</b>	<b>0.4</b>	<b>1.3</b>	<b>31.3</b>	<b>23.7</b>	<b>1.8</b>

**Source:** Namibia Statistics Agency (NSA), *Namibia Household Income and Expenditure Survey (NHIES) 2009/2010*, Windhoek: NSA, 2012 at 65.

Although there are clear disparities between the economic status of men and women, the data also shows that for all households, income and expenditure is fairly close. **This suggests that many people live on a survival basis and have limited opportunity to set aside money for future needs.** This is a concern as it means that families will struggle to meet unexpected expenses such as unplanned health care costs. It also presents a challenge for the increasing cost of caring for children as they grow.

The finding that many households are vulnerable to financial challenges is reiterated in a study that assessed the impact of the increase in food prices in Namibia. The researcher found that the increase

<sup>20</sup> H Jauch, N Mwilima and H Shindondola-Mote, *Service station workers in Namibia*, Windhoek: Labour Resource and Research Institute, 2008 at 22.

<sup>21</sup> Namibia Statistics Agency (NSA), *Namibia Household Income and Expenditure Survey (NHIES) 2009/2010*, Windhoek: NSA, 2012 at 56.

<sup>22</sup> Id at 134 and 145.

<sup>23</sup> Id at 65.

in food prices disproportionately affects low-income households because these households spend a proportionately higher amount of their income on food.<sup>24</sup>

## Other economic indicators

Other indicators of economic wellbeing are access to services such as water and sanitation. While half (51.3%) of Namibia's households have water on their premises, **people living in approximately one-third of households (28.9%) have to travel for up to 30 minutes to collect water**, and people living in approximately one-fifth (18.5%) of the households have to travel for more than 30 minutes. It is usually an adult female who collects water.<sup>25</sup> Having to allocate time each day to access water may affect the type of employment that a mother caring for her children can take up. This may mean that a woman earns less than she is able to, and may be yet another reason for her being in need of maintenance support for her children. Alternatively children may be asked to collect water when they should be attending school or doing homework. In such situations, maintenance may be most needed to enable the family to live in an area that has running water and sanitation facilities to ensure that some of the most basic needs of the children are met.

Another indicator is access to improved sanitation facilities, which refers to a toilet used only by the members of the household which separates waste from human contact. **Only 32.9% of Namibia's households have improved sanitation facilities.**<sup>26</sup> Access to clean water and adequate sanitation facilities has obvious implications for children's health.

Of further concern is the fact that **only 50% of children aged between 5 and 17 have basic material goods in the form of a pair of shoes, two sets of clothing and a blanket.**<sup>27</sup> This data is not disaggregated by family structure, so we cannot determine whether these children are under the care of one, both or neither parent. However, it illustrates the fact that there are many children whose basic needs are not being met and whose needs might be met through an absent parent's payment of maintenance.

Access to resources such as a television, radio and cellphone is another indicator of wellbeing. Data for Namibia shows that female-headed households are less likely than male-headed households to own or have access to a radio and television.<sup>28</sup> Interestingly, there is little difference between male- and female-headed households regarding owning or having access to a cellphone, suggesting that this means of communication in particular may be important for providing information to women, and in turn their children.

**Only 32.9% of Namibia's households have improved sanitation facilities.**

Ministry of Health and Social Services (MoHSS), *Namibia Demographic and Health Survey 2006-07*, MoHSS, 2008

**Only 50% of children aged between 5 and 17 have a pair of shoes, two sets of clothing and a blanket.**

Ministry of Health and Social Services (MoHSS), *Namibia Demographic and Health Survey 2006-07*, MoHSS, 2008

<sup>24</sup> S Levine, "The 2007/2008 food price acceleration in Namibia: An overview of impacts and policy responses", in *Food Security*, 2012, 4 at 59-71. The increases also affect urban households to a greater extent than rural households as the latter may be more likely to live on own-grown foods.

<sup>25</sup> Ministry of Health and Social Services (MoHSS), *Namibia Demographic and Health Survey 2006-07*, Windhoek: MoHSS, 2008 at 17.

<sup>26</sup> Id at 18.

<sup>27</sup> Id at 260 and 261.

<sup>28</sup> Namibia Statistics Agency (NSA), *Namibia Household Income and Expenditure Survey (NHIES) 2009/2010*, Windhoek: NSA, 2012 at 100.

**Table 4: Households that own or have access to a radio, television and cellphone**

Household	Own a radio	Access to a radio	Own a television	Access to a television	Own a cellphone	Access to a cellphone
Male-headed households	74.2	10.2	41.4	9.8	78.8	8.2
Female-headed households	68.5	13.4	34.0	10.4	78.9	10.9
<b>Both sexes</b>	<b>71.1</b>	<b>11.6</b>	<b>38.0</b>	<b>10.1</b>	<b>78.8</b>	<b>9.4</b>

Source: Namibia Statistics Agency (NSA), *Namibia Household Income and Expenditure Survey (NHIES) 2009/2010*, Windhoek: NSA, 2012 at 100.

### Linkages between living standards and child development

In a study to assess the impact of living standards on child development, researchers examined the relationship of a country's **Human Development Index** (which measures a country's social and economic status, indicated by life expectancy, education and gross domestic product) with four aspects of the home environment that have been associated with child wellbeing: **household quality** (such as access to toilet facilities); **material resources** (such as radios, TV, electricity and telephones); **formal learning resources** (such as books and store-bought toys); and **informal resources** (such as makeshift toys). The total sample consisted of 127 347 households with children under age 5 in 28 developing countries. Unfortunately Namibia was not one of the countries studied. As would be expected, the study identified a positive relationship between a high score on the Human Development Index and child wellbeing. The findings emphasise the importance of social supports, including maintenance payments, to ensure that families are able to maintain a basic standard of living.

RH Bradley and DL Putnick, "Housing quality and access to material and learning resources within the home environment in developing countries", in *Child Development*, Vol 83, No 1, 2012 at 76-91

## Poverty

Poverty affects a child's development in many ways – affecting access to sufficient nutritional food, health care and education and exposing the child to additional emotional and psychological stressors such as the strains experienced by a family living in poverty. Furthermore, children living in poverty are more likely to continue to do so for the rest of their lives and are more likely to pass on the impact of their situation to their own children.<sup>29</sup>

As of 2009/10, the poverty line in Namibia is calculated by the government as being N\$377.96 per adult. This means that anyone whose monthly consumption is less than this is living in poverty. **Analysis shows that approximately 30% of the population are poor (28.7%), and 15.3% are severely poor. Female-headed households in particular are vulnerable to poverty.** The poverty gap is the percentage change or amount of money it would take to get out of poverty. **The poverty gap is currently 8.8% – or an additional consumption of just N\$33.26 per month.**<sup>30</sup> This means that many people living in poverty could easily move out of this trap if they received a small amount of additional financial support – which for some could be most appropriately provided in the form of maintenance.

**Table 5: Poverty measures**

Measure	Percentage female-headed households	Percentage male-headed households	Percentage total households
Households living in poverty	40.4	36.4	<b>28.7</b>

Source: Namibia Statistics Agency (NSA), *Poverty dynamics in Namibia*, Windhoek: NSA, 2012 at 12.

<sup>29</sup> S Walker, T Wachs, J Meeks Gardner, B Lozoff, G Wasserman, E Pollitt and the International Child Development Steering Group, "Child development: risk factors for adverse outcomes in developing countries", in *The Lancet*, 2007, 369 at 145-57; S Grantham-McGregor, Y Cheung, S Cueto, P Glewwe, L Richter, B Strupp and the International Child Development Steering Group, "Developmental potential in the first 5 years for children in developing countries", in *The Lancet*, 2007, 369 at 60-70.

<sup>30</sup> Namibia Statistics Agency (NSA), *Poverty dynamics in Namibia*, Windhoek: NSA, 2012 at 10-11.



## Child poverty

In 2012 the Namibia Statistics Agency published a child-focused analysis of the 2009/10 Namibia Household Income and Expenditure Survey.<sup>31</sup> The report found the following:

- One in three children in Namibia grow up in households that are poor.
- Children are more likely to live in poverty than adults.
  - While 15.3% of the population are in severe poverty, 18.3% of children are in severe poverty.
  - While 28.7% of the entire population find themselves below the upper poverty line, this is true for 34% of children. (The upper poverty line is the cut-off point between poor and non-poor. The lower poverty line is the cut-off point between poor and severely poor.)

The report noted that although there has been a sharp decline in poverty levels since the 2003/04 Household Income and Expenditure Survey, child poverty in particular remains alarmingly high. **The Namibia Statistics Agency noted that “child poverty in Namibia needs to be addressed immediately if the country is to achieve its Vision 2030”. This call to action includes a need to ensure that the maintenance system is operating effectively.**

According to a brief report released by the United Nations Office of the Resident Coordinator in Namibia in collaboration with humanitarian partners in May 2013, the 2012-2013 drought has led to over 100 000 children under the age of 5 being at risk of malnutrition due to reduced availability, access and utilisation of food, compounded by limited access to safe water and improved sanitation. A further 20 000 pregnant women living in rural households classified as food insecure are also at risk of malnutrition, compromising the health of their unborn children.

*Namibia: Drought, Office of the Resident Coordinator Situation Report No. 01 (as of 24 May 2013)*

## 2.4 The benefits of financial support

The only information that indicates the impact of financial support for children comes from the assessment of the Basic Income Grant (BIG). A BIG pilot project was run in a single small community, Otjivero-Omitara, for a period of 24 months up to December 2009. All residents below the age of 60 living in the trial project area received a grant of N\$100 per person per month, without any conditions being attached. The project was designed and implemented by the Namibian Basic Income Grant Coalition<sup>32</sup> and is the first universal cash-transfer pilot project in the world. Funds to start the pilot project were raised through voluntary contributions.

The grant resulted in a significant drop in household poverty. Looking at the indicators which showed specific results that benefited children:

- The BIG resulted in a huge reduction in child malnutrition. Using a World Health Organisation measurement technique, the data shows that children’s weight-for-age improved rapidly and significantly, from 42% of underweight children in November 2007 to 17% in June 2008 and 10% in November 2008.
- Before the introduction of the BIG, almost half of the school-going children did not attend school regularly. Pass rates stood at about 40% and dropout rates were high. Many parents were unable to pay school fees. After the introduction of the BIG, more than double the number of parents paid school fees (90%) and most of the children acquired school uniforms. Non-attendance due to financial reasons dropped by 42% and this rate would have been even higher without the effects of

<sup>31</sup> Namibia Statistics Agency (NSA), *Child poverty in Namibia: A child-centred analysis of the NHIES 2009/10*, Windhoek: NSA, 2012.

<sup>32</sup> The BIG Coalition consists of four major civil society umbrella bodies in Namibia, namely the Council of Churches (CCN), the National Union of Namibian Workers (NUNW), the Namibian Non-Governmental Organisations Forum (NANGOF) and the Namibian Network of AIDS Service Organisations (NANASO).

migration towards Otjivero-Omitara. Dropout rates at the local school fell from almost 40% in November 2007 to 5% in June 2008 and almost 0% in November 2008.<sup>33</sup>

The results illustrate the significant benefits to children that financial support can provide.

## 2.5 The wider implications of maintenance

Access to maintenance is a human right and is particularly important in the social and economic context of Namibia. Access to maintenance or a lack thereof also has other wider implications. The implications of failing to provide maintenance for a child can be most clearly seen with respect to social problems such as babydumping and child labour, both of which are problematic issues in Namibia.

### Babydumping

Although babydumping is acknowledged to be a problem in Namibia, data on the incidence of babydumping and infanticide is not readily available as neither actions are categorised as separate crimes but instead are usually recorded as charges of concealment of birth, abandonment, culpable homicide or murder. Statistics provided by the police show that **approximately 19 cases of concealment of birth are reported each year**. This is based on data from the last five years.<sup>34</sup>

During 2010 and 2011 the LAC distributed 19 different comics on a variety of family law issues. In response to a comic on *What to do if you are pregnant and do not want the baby*, the most common request for further information was about maintenance. Furthermore, the most comments and enquiries overall were in response to the comic on *What to do if someone stops paying maintenance*. This suggests that improved systems for maintenance, and better public information on this topic, could be an important strategy for combating babydumping.

### Child labour

Reports suggest that child labour does occur in Namibia. Data from the 2007 child labour survey suggests that **nearly 40% of children aged 6-17 engaged in some form of child labour**.<sup>35</sup> The linkage between better parental support and the incidence of child labour was highlighted in a report on the need to eliminate the worst forms of child labour. The authors noted that the Maintenance Act is an important tool in combating child labour, “as children who get appropriate financial support may be less likely to have to revert to working to support themselves”.<sup>36</sup>



Examples of the posters produced for a campaign against babydumping initiated by the Legal Assistance Centre in 2013.

**Table 6: Incidence of reported cases of concealment of birth**

Year	Reported cases of concealment of birth
2007	23
2008	12
2009	22
2010	18
2011	21

Source: Based on statistics provided by the Namibian Police, 2012.



<sup>33</sup> C Haarmann et al, *Making the difference! The BIG in Namibia: Basic income grant assessment report*, April 2009, Windhoek: Basic Income Grant Coalition, 2009 at 13-17.

<sup>34</sup> Based on statistics provided by the Namibian Police, 2012.

<sup>35</sup> Ministry of Labour and Social Welfare (MoLSW), *Namibia Child Activities Survey (NCAS) 2005: Report on analysis*, Windhoek: MoLSW, 2008.

<sup>36</sup> D Lebeau and S Ipinge, “Towards the Development of Time-Bound Programmes for the Elimination of the Worst Forms of Child Labour in Namibia” (discussion paper), 2003 at 19.

## Summary of information about the importance of maintenance

### Maintenance as a human right

The provision of maintenance is a human rights issue. It is important for the **rights of a child** because children have the **right to be cared for by their parents** and the **best interests** of all children should be met. Children also have the right to participate in maintenance proceedings, if appropriate and in their best interests. Maintenance is also associated with the **right to gender equality**.

### The social context of maintenance

Accessing maintenance may be **particularly relevant for the approximately two-thirds of children in Namibia who live apart from one or both parents while the absent parent or parents are still living**.

### The economic context of maintenance

Women are more likely than men to be unemployed.

**Approximately 50% of the population do not receive a regular salaried monthly income.** This may explain why so many women are in need of maintenance, but it may also explain why many fathers struggle to pay maintenance.

The difference between income and expenditure is larger in male-headed households than in female-headed households. However, income and expenditure are close together for all households, which suggests that **many people live on a survival basis** and have limited opportunity to set aside money for future needs.

### Other economic indicators

People living in approximately one-third of Namibia's households have to travel for up to 30 minutes to collect **water**, and only one-third of Namibia's households have improved **sanitation facilities**. Access to clean water and adequate sanitation facilities have obvious implications for children's health and should be considered part of a child's basic needs.

Only 50% of children between 5 and 17 years of age have **a pair of shoes, two sets of clothing and a blanket**; many of these children might have their needs met through an absent parent's payment of maintenance.

### Poverty

Female-headed households are particularly vulnerable to poverty. **Children are more likely than adults to live in poverty**. The payment of maintenance may be critical in helping a family out of poverty.

### The benefits of financial support

A pilot for the Basic Income Grant (BIG) showed a **huge reduction in child malnutrition** and an **increase in school attendance rates**. The results illustrate the significant benefits to children that financial support can provide.

### The wider implications of maintenance

**Babydumping** is a regular occurrence in Namibia, with approximately 19 cases of concealment of birth reported each year. The most common question posed by readers of the LAC comic on *What to do if you are pregnant and do not want the baby* is about maintenance.

Nearly 40% of children aged 6-17 engage in some form of **child labour**. Lack of sufficient financial support may push children into child labour.



# Chapter 3

## THE DEVELOPMENT OF A NEW LAW ON MAINTENANCE

For many years practical mechanisms for enforcing the legal liability to pay maintenance were governed by the Maintenance Act of 23 of 1963, which was inherited from South Africa. However inadequacies of the Act were identified as a priority concern shortly after Independence. Many women complained about the difficulty of securing maintenance for their children and about the inefficient operation of the maintenance courts.

In 1993, the Legal Assistance Centre began extensive research into the operation of the maintenance courts in consultation with the Law Reform and Development Commission. The LAC conducted this study because maintenance *“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,<sup>[1]</sup> 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,<sup>[2]</sup> by the Women and Law Committee of the Law Reform and Development Commission, and by numerous women’s groups throughout the country”*.<sup>3</sup> The research findings, which included draft legislation, were published in September 1995. This study will be hereinafter referred to as *“the 1995 maintenance study”*.

### Participatory research on maintenance

As part of the work conducted for the 1995 maintenance study, the Legal Assistance Centre attempted to stimulate public awareness and discussion of the maintenance courts and their function. The LAC produced educational materials about the law in force at the time, and preceded group discussions convened for research purposes with explanations of the law. In fact, the group discussions and public meetings were primarily educational in nature, with information-gathering playing a secondary role. Facts about maintenance were also highlighted by LAC staff members in a number of radio and television programmes during this period, as another method of stimulating public discussion.

During the course of the research, the LAC organised a meeting at which some of the women who had approached the LAC with maintenance problems could voice their complaints directly to representatives of the Ministry of Justice and the Namibian Police, as a mechanism for empowering clients to hold government accountable. The LAC was also operating on the theory that government officials might be more sympathetic to the issues raised if they were forced to confront the users of the system directly instead of through intermediaries.

<sup>1</sup> Sadly, due to a lack of funds, the LAC now has offices only in Windhoek and Ongwediva.

<sup>2</sup> Now the Ministry of Gender Equality and Child Welfare.

<sup>3</sup> D Hubbard, *Maintenance: A Study of the Operation of Namibia’s Maintenance Courts*, Windhoek, Namibia: Legal Assistance Centre, 1995 at 1.



This meeting was considered to be a success by all parties. Some of the misunderstandings which had developed were due to miscommunication. For example, some women had complained to the LAC that the police were telling them they must trace the defendant in the maintenance case themselves. They interpreted this as an unwillingness to help on the part of the police. However, after discussing the issue further, it became clear that what the police were really asking for was more information to help them try to locate the men in question.

As a result of the discussion, some staff members at the Windhoek maintenance court were replaced and certain administrative procedures were improved. Liaison between the LAC and the police on maintenance issues improved somewhat after the meeting, and our clients reported that maintenance officers in Windhoek were making more effort to explain court procedures.

Results aside, the clients who attended this meeting gained valuable practice in asserting their rights, and the government officials involved learned more about how women perceive the maintenance process. The exercise proved that significant improvements in legal processes can be achieved in advance of formal law reform, through negotiation and follow-up. It also gave the researchers insight into what data should be extracted from the court files.

based on D Hubbard, "Engaging in Engaging Research", conference paper, March 1996

*The LAC has conducted similar activist research as part of the work conducted for the current study. For example, within the research period the LAC developed an animation, a film, radio adverts and one-page comics on various aspects of the maintenance law with the intention of raising public awareness of the law, stimulating public discussion and empowering community members to access maintenance orders on their own. As part of the research methodology, the LAC again preceded group discussions convened for research purposes with explanations of the law. The LAC also gave educational presentations about the law on maintenance at workshops and conferences on numerous occasions during the study period.*

## 3.1 Timeline for developing the bill

Following the publication of the 1995 maintenance study, the Legal Assistance Centre met to discuss recommendations from the report with members of a subcommittee appointed by the Law Reform and Development Commission specifically for this purpose.

The subcommittee submitted a report on maintenance to the full Law Reform and Development Commission in August 1996, and in September 1997, the Law Reform and Development Commission published a report which incorporated these recommendations.<sup>4</sup> The report, which made over twenty recommendations for the improvement of the law on maintenance, was approved by the Minister of Justice.

Further consultation took place between 1997 and 2000. A Maintenance Bill was drafted in 2000 and approved by Cabinet in August 2001. The Maintenance Bill was introduced into Parliament in 2002.<sup>5</sup> It was referred to the National Assembly's Committee on Human Resources, Equality and Gender Development, which held public hearings on the topic in 12 locations.<sup>6</sup> The bill was passed in 2003, incorporating some amendments proposed by the Parliamentary Committee.<sup>7</sup> The Maintenance Act 9 of 2003 came into force on 17 November 2003.<sup>8</sup>

<sup>4</sup> Law Reform and Development Commission (LRDC), *Report on maintenance*, (LRDC 5), Windhoek: LRDC, 1997.

<sup>5</sup> The second reading speech by the Deputy Minister of Justice (Hon Kanawa) cites the Legal Assistance Centre research as being the starting point for the bill: "*The preparation of the Bill came at the end of a long, but useful, process, involving a number of stakeholders. Preliminary research was undertaken by the Legal Assistance Centre before the Law Reform and Development Commission was tasked by the Ministry to undertake the necessary research.*" National Assembly, 26 February 2002, at page 22.

All references to National Assembly debates in this chapter were sourced in *Debates of the National Assembly: Fifth Session – Third Parliament 19 February – 4 April 2002, Volume 55* and *Debates of the National Assembly: Fifth Session – Third Parliament 8-22 April 2002, Volume 56* (available at the Parliament of Namibia).

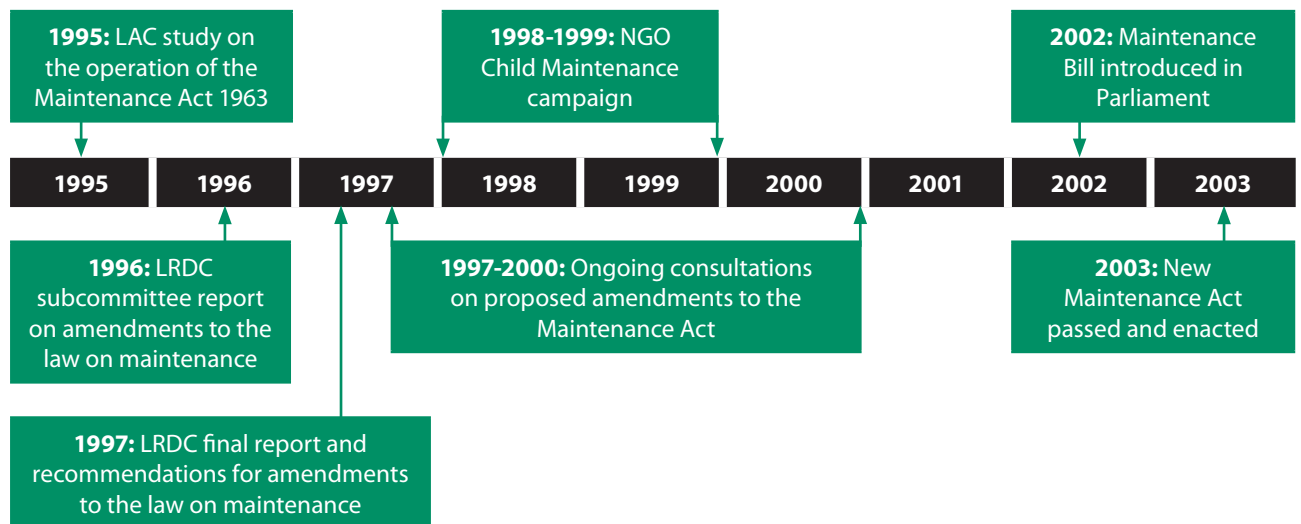
<sup>6</sup> Hearings were held in Katimo Mulilo, Rundu, Tsumeb, Oshakati, Outapi, Keetmanshoop, Mariental, Rehoboth, Gobabis, Otjiwarongo, Swakopmund and Windhoek.

<sup>7</sup> These are discussed below at page 24.

<sup>8</sup> See Government Notice 232 of 17 November 2003, Government Gazette 3093.



**Chart 3: The new Maintenance Act: eight years in process**



### Legal Assistance Centre Child Maintenance Campaign 1998-99

During 1998 and 1999, the Legal Assistance Centre spearheaded a Child Maintenance Campaign which involved the broader NGO community. Its objectives were to speed up the passage of the new Maintenance Act and to raise public awareness of the importance of financial and emotional support from parents, especially fathers.

The campaign included:

- a range of lobbying activities;
- regular radio programmes on maintenance on most of the language services of NBC national radio;
- television appearances;
- community meetings and workshops in 14 locations covering almost every region;
- a series of 4 posters in 8 languages prepared for distribution through local organisations;
- the utilisation of poetry and oral performance groups; and
- six dramatic television “shorts” aimed at fathers and shown repeatedly on NBC, as well as a variety of other television appearances to discuss the issue of maintenance.

The campaign resulted in an increase in the number of maintenance complaints being brought to the Legal Assistance Centre, increased discussions of maintenance on radio call-in shows and increased networking around the topic with community-based organisations. However, the fact that maintenance consistently continued to be a serious problem during this period indicates that interventions such as this type of campaign are insufficient on their own to produce lasting attitudinal change on the part of absent fathers in particular.

The LAC continues to engage in efforts to raise awareness about the importance of child maintenance; the LAC recently produced a film and an animation on maintenance and continues to produce accessible educational materials, including posters, pamphlets and comics, in a range of Namibian languages.

*“... all people should be encouraged to be responsible. Women should be advised not to have more children with men who already neglect their maintenance obligations towards other children. Men who do not earn a lot of money should be advised not to have more children. Parents’ earning capacities need to be taken into consideration when family planning is done.”*

Madelene de Jong, “Ten-year Anniversary of the Maintenance Act 99 of 1998 – A time to reflect on improvements, shortcomings and the way forward”, 126 (3) *South African Law Journal* 590 (2009) at 614 (footnotes omitted)

## 3.2 Parliamentary debates

### 3.2.1 National Assembly

#### Fears of abuse of the system by women

During the Parliamentary debates, there were repeated allegations that women misuse the maintenance system – by having children just to get maintenance payments, by spending maintenance money on themselves or by demanding payment from men who are not in fact the fathers of the children.

Ironically, several strong statements on this point came from a female MP (who was subsequently appointed as Deputy Minister of Women Affairs):

*[S]ome mothers claim maintenance money from their ex-partners and squander this money on other things, rather than using it for the benefit of the child it was claimed for. Moreover, these very mothers who claim money, dump the children with their mothers while claiming money from the fathers, which the children do not benefit from at all. It is equally true that those mothers refuse to give such children to their fathers who are financially strong and willing to take responsibility for the well-being of their children. This refusal comes as a means to suck money from the partner which, without any doubt, makes one thing that mothers want to make business with the children ... I would like to propose that measures be taken to curb the milking of men while the money ends up being used for something totally different from benefiting that particular child.<sup>9</sup>*

Another female MP also gave strong emphasis to this point:

*I welcome the fact that the bill lays responsibility for child maintenance on the shoulders of both parents. Men are not always to blame. Some women try to have as many children from different fathers as possible so that they can claim maintenance from all of them ... So, working mothers and those who can afford it should be made to take equal responsibility for their children. We are talking about gender equality here and not a one-way street where only one party should bear responsibility for child maintenance.<sup>10</sup>*

However, most of the other speakers on this point were male:

*It is quite clear that women keep the children hostage in order to receive money from men.<sup>11</sup>*

*I am afraid that cases of mistaken paternity will become numerous, especially if the enforcement of this law proves to be effective. Would-be mothers would seal and secure their children's future by deciding, only on the basis of income, not genetics, who the fathers of the children will be.<sup>12</sup>*

*This piece of legislation is very important because this is the first time that a law on maintenance is impartial when it comes to parents. In the past, only fathers were regarded*

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<sup>9</sup> Hon Muharukua, National Assembly, 6 March 2002. Her strong statement inspired one male MP to say: "I am at a loss as to the contribution of the Hon. Member, whether her speech was written by a male member ...?" (Hon. T. Gurirab). Hon Muharukua also singled out stepmothers who do not give proper care to the children of their husbands by other women, but did not mention any problems with step-fathers and the children their wives have by other men.

<sup>10</sup> Deputy Minister of Labour (Hon Nghindinwa), National Assembly, 26 March 2002. Another female speaker acknowledged the problem of abuse of maintenance money, but stated that "these cases are more the exception than the rule". Hon Schimming-Chase, National Assembly, 27 March 2002.

<sup>11</sup> Hon Riruako, National Assembly, 12 March 2002.

<sup>12</sup> Hon Chata, National Assembly, 12 March 2002.

*as culprits, even in cases where mothers and/or grandmothers of the beneficiaries were misappropriating the money that was given them for the purpose of maintaining the child ... Nowadays we have young mothers, especially the unmarried ones, dumping their children to be taken care of by their grandmothers in their respective villages of origin. When given money by the fathers of the children, the young mothers would normally spend this money for their own personal needs and would not give anything to the grandmother ...*<sup>13</sup>

*Some mothers forbid their children ... to have any relationships with their so-called fathers who never accepted them. You blame the people who have been taking care of their children, but some mothers put their foot down and forbid them.*<sup>14</sup>

*We are tired of women who misbehave. They need clothes, they need to support those children who do not belong to that man. We are tired of this. Some even make money from men by falling pregnant deliberately so that they can claim maintenance from the fathers ... Unfortunately, they don't use this maintenance money to support their children, they dump them with the grandmothers while they spend the money on themselves, buying make-up in order to look for other men.*<sup>15</sup>

Such objections were anticipated, and the initial bill already contained provisions which criminalised both abuse of maintenance money and providing false information in connection with a maintenance claim.

Also to this point, two female MPs noted:

*There has been a lot of publicity about the new provision which can be used to punish abuse of maintenance money. It needs to be said that the research, which was conducted, found that this is not a widespread problem. The typical maintenance payments are too low to be abused. They are N\$20, N\$50.*<sup>16</sup>

*It is not about men taking care of every child of a woman they are in [a] relationship with, and for people to take advantage of this Bill and throw insults at women is unacceptable. I think that is really just not acceptable, especially for him to go as far as saying women are now having children to make business out of maintenance. Which maintenance? The N\$70 that I am given per month? That is not acceptable.*<sup>17</sup>

The bill was referred to the Parliamentary Standing Committee on Human Resources, Equality and Gender Development, which held public hearings throughout the country in June 2002. The Committee report proposed several amendments to the bill – most of which were technical in nature.<sup>18</sup> However, one of these amendments proposed quarterly monitoring by social workers to prevent abuse

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<sup>13</sup> Deputy Minister of Prisons and Correctional Services (Hon Nambinga), 26 March 2002.

<sup>14</sup> Hon Rirauko, National Assembly, 26 March 2002.

<sup>15</sup> Hon Moongo, National Assembly, 12 March 2002. (See also Conrad Angula, “Sex talk fires up NA”, *The Namibian*, 13 March 2002.) In response to Hon Moongo’s statement, Hon Namises (female) noted: “On a point of order. I think Hon Moongo should go into more analysis on who is raping the children, who is proposing and having relationships with women, because culturally we don’t go around and we are not allowed by culture to propose to men. Then also, they are impregnated by men. So, if you want to discuss this matter, go and do a deeper analysis before you come and accuse us. The males are the prostitutes in this country, they are the ones who go out.”

<sup>16</sup> Hon Namises, National Assembly, 12 March 2002.

<sup>17</sup> Hon Kuugongelwa, National Assembly, 12 March 2002, in response to Hon Moongo who had repeatedly made sexist jokes along with his allegations that women abuse their maintenance money.

<sup>18</sup> One radical suggestion was the compulsory sterilisation of any parent with more than four children who is unable to provide maintenance for these children. This recommendation appeared to be a gender-neutral one. This proposal was rejected by the Ministry of Justice on the grounds that such a step would be unconstitutional. “Report of the Parliamentary Standing Committee on Human Resources, Equality and Gender Development on the Maintenance Bill [B.1-2002]”, November 2002 at 9; Ministry of Justice, “Report of the Parliamentary Standing Committee on Human Resources, Equality and Gender Development, Maintenance Bill, 2002, Comments and action taken on the proposed amendments”.

of maintenance payments.<sup>19</sup> This idea was considered impractical, but an amendment was made to authorise maintenance officers to investigate complaints of misuse of maintenance payments, and to make it clear that such complaints could be made by any person, including a social worker.<sup>20</sup>

## Other gender issues

As in the case of other bills, many Parliamentarians – particularly but not exclusively men – were concerned about what they perceived as ‘gender neutrality’.<sup>21</sup> The maintenance system, under both the old law and the new one, is gender-neutral on its face, but in practice is used almost exclusively by mothers seeking maintenance from absent fathers. Male MPs tried to even the score by citing failings by mothers, to counterbalance the obvious emphasis on fathers’ failure to take financial responsibility for their children:

*I must say that the Bill leaves no room for fathers to run away from their parental responsibilities, and so are the ropes equally tightened around the necks of those who divorce to double their incomes as well as those who bring forth unwanted children for the sole purpose of improving their cash flows.<sup>22</sup>*

*[I]t is commonly known that those should pay maintenance for the children are the men, but in most cases it excludes the woman who is working while the child is with the father. I think that we should also look into this situation, that mothers who are working should take responsibility for the children when they are under the custody of their fathers.<sup>23</sup>*

*[A]lthough fathers were regarded as the only culprits of child maintenance, I would like to recognise some loving and caring fathers who take care of sometimes more than ten children as single parents and these children are very well looked after without any assistance whatsoever from the different mothers of the children, while some mothers are even well-off.<sup>24</sup>*

In supporting the bill, the Minister of Women Affairs emphasised its even-handedness:

*[B]oth parents have an equal responsibility towards their children ... It, therefore, goes without saying that there are parents who deliberately neglect their children and honestly, as members of this House we should not defend those irresponsible citizens of Namibia, being men or women. I agree, it is true, there are some women who receive maintenance benefits and do not use it in the best interest of the children. At the same time, it is also true that there are men who do not maintain their children. It is a fact, and that is why this law is clearly focusing on both parents, that we must take care of our children and not to think that somebody else will do it for us. The maintenance law will empower both men and women who are suffering at the hands of other partners. A man who is not getting maintenance from his partner will benefit, and a woman who is not getting maintenance from her partner, will also benefit. Therefore, this law should not really be seen as a law for women, it is a national law because everybody is going to benefit.<sup>25</sup>*

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<sup>19</sup> “Report of the Parliamentary Standing Committee on Human Resources, Equality and Gender Development on the Maintenance Bill [B.1-2002]”, November 2002 at 7. The proposed amendment read as follows: “*The maintenance officer must instruct a social worker on a quarterly basis to investigate the circumstance of a child receiving maintenance in terms of a maintenance order and such investigation must particularly determine if the money paid in respect of the maintenance of that child is used for the child’s benefit or in accordance with the conditions set out in the maintenance order.*”

<sup>20</sup> Ministry of Justice, “Report of the Parliamentary Standing Committee on Human Resources, Equality and Gender Development, Maintenance Bill, 2002, Comments and action taken on the proposed amendments”; section 9(4)(b)(ii) and (5). See also National Assembly, 23 April 2003.

<sup>21</sup> D Hubbard, “Gender and sexuality: The law reform landscape” in D Hubbard and S LaFont, eds, *Unravelling Taboos*, Windhoek: Legal Assistance Centre, 2006 at 111.

<sup>22</sup> Hon Biwa, National Assembly, 6 March 2002.

<sup>23</sup> Minister of Lands, Resettlement and Rehabilitation (Hon Pohamba), National Assembly, 6 March 2002.

<sup>24</sup> Hon Katjita, National Assembly, 4 April 2002.

<sup>25</sup> Hon Nandi-Ndaitwah, National Assembly, 6 March 2002.

At the end of this speech, she added that “*by and large, it is women who suffer, because men tend to run away from their responsibility*”. However, she also noted that it is only women who turn to the maintenance courts because of the “*gender imbalance in our thinking*”, but that men could use the courts to get maintenance from their children’s mothers if they wished.<sup>26</sup>

A female opposition MP tied concerns about maintenance to the economically-weaker position of women in society, saying that it would help to ensure that women and children were getting access to family resources, and that it would “*strengthen the power of women within the family and society, in order for them not only to rely on the ‘goodwill’ of men*”.<sup>27</sup> These statements inspired the Minister of Justice to emphasise once again the fact that the bill was “*gender-neutral*”: “*It doesn’t declare war against men, it is neutral gender and was, after all, drafted by men.*”<sup>28</sup> The response from the female MP who had been speaking was that “*The Bill is gender neutral, but we have to address the reality.*”<sup>29</sup> She noted:

*... [T]alking of strategic long-term policies, it is important that government is again reminded of Article 14(3) and Article 23 of our Constitution. Members can read it. Half of the population lives under the breadline. Households headed by women are twice poorer than household headed by men. The results are abusive relationships which women cannot escape due to poverty. They remain not because they want to, but because of poverty ... One big problem has been men – and they are usually the problem – who ignore the summons to come to court. This is sometimes used as a delaying tactic, and sometimes as an attempt to duck responsibility altogether.*<sup>30</sup>

Many other Parliamentarians praised the bill’s neutrality, with several mistakenly under the impression that the bill introduced for the first time the principle that both mothers and fathers are responsible for the maintenance of their child in accordance with their respective means.<sup>31</sup> (In fact the new law simply articulated this long-standing legal principle for the sake of clarity). In wrapping up the Second Reading debate in the National Assembly, the Deputy Minister of Justice assured the House that “*nowhere in the Bill can any persons find gender bias in favour of one sex at the expense of the other ... A man can claim maintenance from the mother of the child if that mother has the means once the Bill becomes law.*”<sup>32</sup>

A few male MPs also acknowledged that while the bill was gender-neutral, it clearly addressed the group that disproportionately bears the responsibility of childrearing:

*I can safely say that this kind of child neglect cuts across the marital status barrier. Most men are guilty of this crime, which the traditional gender-biased division of labour in society helps to promote, as child-care is seen as the woman’s job.*<sup>33</sup>

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<sup>26</sup> Id.

<sup>27</sup> Hon Namises, National Assembly, 12 March 2002. The underlying economics were also discussed from another angle, as several speakers related maintenance to the phenomenon of “sugar daddies”, where young girls date older men with an eye on the financial resources which such men can offer.

<sup>28</sup> Hon Tjiriange, National Assembly, 12 March 2002. In a response to this comment, Hon Namises (female) replied: “*With the research that women have done. It is because of our experience that you have drafted the Bill. The information and knowledge which you have received have been created by women. The Bill is gender neutral, why should they compete here and say it was drafted by men? It was drafted by all of us.*”

<sup>29</sup> Hon Namises, National Assembly, 12 March 2002.

<sup>30</sup> Ibid.

<sup>31</sup> See for example, Hon !Nareseb, Hon Junius, National Assembly, 6 March 2002; Hon Nghindinwa, National Assembly, 26 March 2002; Hon Katjita, National Assembly, 4 April 2002. Hon Siska pointed to “*lack of responsibility*” by both parents: “*I support the punishment of the mother who misuses the maintenance funds, because if the father is begin punished, and the father pays, the money is supposed to be used solely for the purpose that it has been paid for.*” National Assembly, 4 April 2002.

<sup>32</sup> Hon Kawana, 8 April 2002.

<sup>33</sup> Hon Amukugo, National Assembly, 13 March 2002.



*I hereby call to order the thousands of men ... who run around and make lots of children without any thought about who will care for those children.*<sup>34</sup>

At one point, the debate inspired a series of sexist jokes and hand signals made by one male MP regarding the sexual prowess of men.<sup>35</sup> He was rebuked by several female MPs, with one stating:

*I don't know whether Hon. Moongo is serious in his behaviour and I would like him to withdraw the signs, which is an insult to all of us. We are laughing about it, but it is a matter of how respectful we are towards women.*<sup>36</sup>

There was also some discussion of who should bear the burden of proof of paternity in a maintenance claim, with several female MPs stating that this responsibility should lie with the father. For example:

*Also that it should be up to the father to prove that he is not the father ... not for the mother to prove that he is the father. It should, therefore, become the responsibility of the party denying paternity to provide scientific proof why he should not be considered the father of the child and hence, not liable to pay maintenance as the law requires.*<sup>37</sup>

*What I know is that when I fall pregnant, I know who impregnated me and it is not something that would be disputed and it isn't something that can be debated. I know exactly you are responsible and it is true.*<sup>38</sup>

Additionally, one female MP cited cultural concepts of gender-appropriate behaviour which could affect implementation of the new law in rural areas:

*In the villages in the regions I know well, such as in the Kavango and the four northern regions, including the Caprivi, unmarried mothers do not claim child maintenance from the men who give them children. This is regarded as shame or a form of begging. So, unmarried mothers raise their children on their own, no matter how poor they may be.*<sup>39</sup>

## Reciprocity between parents and children

The search for a sense of even-handedness eventually moved to reciprocity between parents and children, instead of between men and women. Several Parliamentarians worried about the maintenance of elderly parents by their children, arguing that the bill was too focused on the reverse situation.<sup>40</sup> For example:

*We as parents must be mindful of the fact that children may be vulnerable today and, therefore, be dependent on us for material and emotional care, but there will definitely come that inevitable day when the roles will be reversed.*<sup>41</sup>

*[C]hildren should also be responsible for the maintenance of their parents, if the parents are not in a position to maintain themselves, and the children are able to do so.*<sup>42</sup>

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<sup>34</sup> Hon Moongo, 12 March 2002. Hon Moongo also said, even-handedly, at a different point in the discussion on the same date: "I hope that this Maintenance Bill will help to make men realise that they have a duty towards every child they father, and to make women realise that having children is not an easy way to get an income."

<sup>35</sup> Hon Moongo, 12 March 2002.

<sup>36</sup> Hon Namises, National Assembly 12 March, 2002. He was also rebuked by several other female MPs, including Hon. Amukugom, Hon Kuugongelwa, and Hon Sioka. He was not rebuked by any male MPs.

<sup>37</sup> Attorney-General (Hon Ithana), National Assembly, 13 March 2002.

<sup>38</sup> Hon Siska, National Assembly, 13 March 2002.

<sup>39</sup> Deputy Minister of Labour (Hon Nghindinwa), National Assembly, 13 March 2002.

<sup>40</sup> Hon B Amathila, Hon !Naruseb, National Assembly, 13 March 2002.

<sup>41</sup> Deputy Minister of Fisheries and Marine Resources (Hon !Naruseb), National Assembly, 13 March 2002.

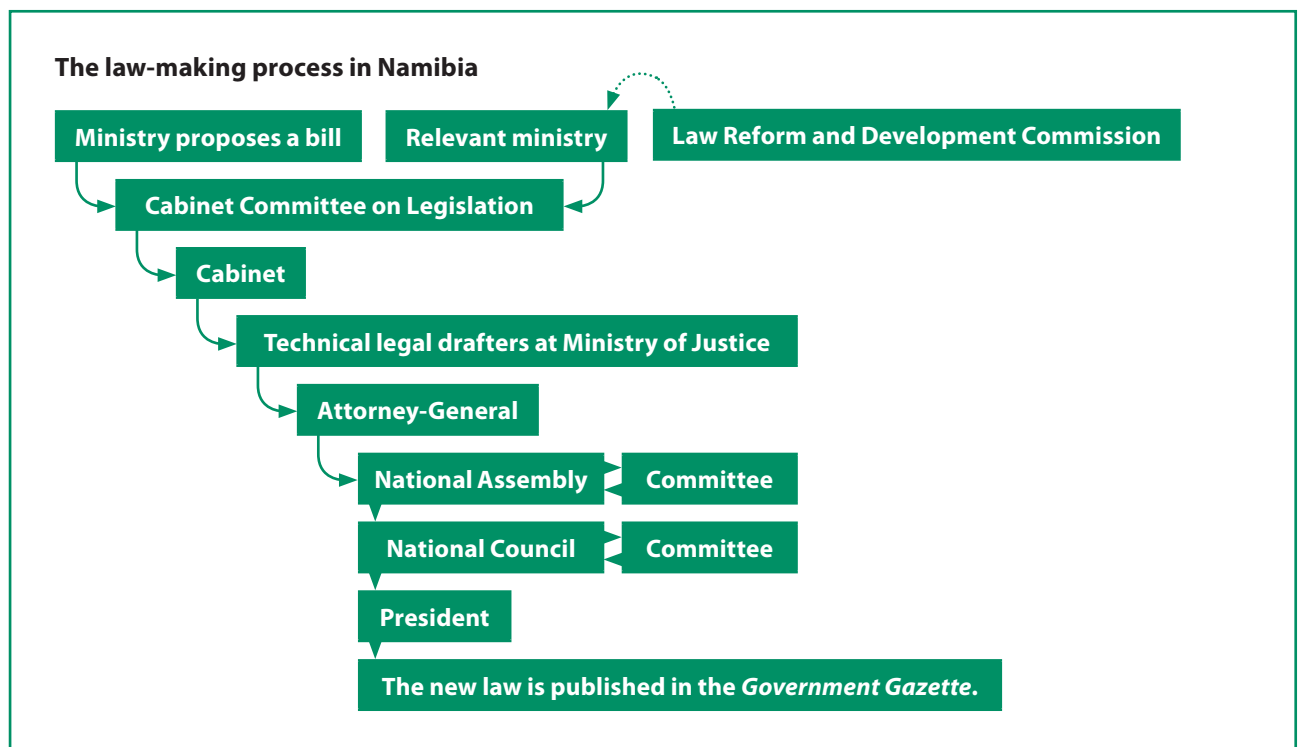
<sup>42</sup> Hon Junius, National Assembly, 13 March 2002.

... [A]n offspring has a duty to support his/her parents ... Since the bill encompasses maintenance of children by their parents and the maintenance of those for whom there is a legal duty, it is imperative that the bill address the two aspects with equal force.<sup>43</sup>

By the end of the Second Reading debate in the National Assembly, the Deputy Minister of Justice was assuring the House that the bill was not only intended “to face head on the irresponsible attitude of some of the parents, especially fathers” but also “equally intended to force irresponsible children who neglect to maintain their parents, our senior citizens”.<sup>44</sup>

The Parliamentary Standing Committee which dealt with the bill recommended an amendment to clarify children’s duties to maintain their parents,<sup>45</sup> and the National Assembly approved an amendment confirming reciprocal duties of support to parents and children under both common law and customary law.<sup>46</sup>

Although it was generally conceded that taking care of children is in line with “African custom”, one female MP felt that the bill focused too much on “European values” and not enough on “African customary practices”.<sup>47</sup> One male MP praised the bill for making reference to customary law, but complained that it did not clearly address liabilities under customary law to maintain extended family members.<sup>48</sup>



<sup>43</sup> Attorney-General (Hon Ithana), National Assembly, 26 March 2002.

<sup>44</sup> Hon Kawana, National Assembly, 8 April 2002.

<sup>45</sup> “Report of the Parliamentary Standing Committee on Human Resources, Equality and Gender Development on the Maintenance Bill [B.1-2002]”, November 2002 at 3-4: “Parents are under duty to maintain their children. However, the Committee often finds that parents especially as they grow older are neglected by their children. The current social pension is not adequate to provide for the needs of such parents. This duty should apply also under customary law.”

<sup>46</sup> The common law of Namibia already placed a legal liability on children to maintain their parents in appropriate circumstances, so the effect of the amendment was to ensure that this principle also applied to persons subject to customary law. The amendment to section 3(2)(c) stated that “For the purpose of determining whether or not a person who is subject to customary law is legally liable to maintain another person ... the legal principle, which imposes a legal duty on children to maintain their parents must be applied to children and parents who are subject to customary law.” This principle probably existed under the customary law of some communities prior to the Act’s articulation of it.

<sup>47</sup> Hon Lucas, National Assembly, 6 March 2002. See also Hon Kaura on the same date.

<sup>48</sup> Minister of Higher Education, Training and Employment Creation (Hon N Angula), National Assembly, 13 March 2002.

### Key amendments to the Maintenance Bill

The following amendments were proposed by the Parliamentary Standing Committee on Human Resources, Equality and Gender Development and adopted by the National Assembly.

- 1) The definition of “complainant” and “primary caretaker” were broadened to allow a wider range of persons to seek maintenance on behalf of a child – making it more clear that maintenance is about children’s well-being and not about a tug-of-war between parents and children, and making it possible for institutions which care for children to seek maintenance from the child’s parents.
- 2) An amendment was added to clarify children’s reciprocal duty to maintain their parents under both common law and customary law, along with guidelines for the application of this principle.
- 3) The practice of having maintenance summonses served by the maintenance investigator or messenger of the court instead of by police, which had proved in practice to be more efficient, was institutionalised.
- 4) Factors to guide the provision of maintenance for persons with disabilities were added.
- 5) The amendments added a new option of suspending a maintenance order for a temporary period (in addition to the options of enforcing, substituting, or discharging it), on the theory that this might be particularly appropriate where the person who is supposed to pay maintenance is temporarily unable to work because of an injury or illness, or is between jobs.
- 6) The initial bill included a provision allowing claims for contributions to pregnancy and birth expenses to be made within 12 months of the child’s birth. This was amended to make it possible for the court to allow a claim after that time period if the mother can show a good reason for the delay.
- 7) An amendment explicitly authorised the extension of maintenance orders past the time when a beneficiary turns 18 if that beneficiary is continuing his or her education – a question which had given rise to some confusion in the past.
- 8) The original bill allowed an employer to deduct administration costs for attaching wages from the amount which was supposed to be paid over to the beneficiary. The Legal Assistance Centre and others objected to this, and an amendment provided administration costs (in an amount prescribed by the court) would be a further deduction from the wages of the person responsible for paying the maintenance.

## 3.2.2 National Council

The subsequent discussion in the National Council was very short, but followed similar lines as the National Assembly debate – praise for the bill’s even-handedness on the responsibilities of mothers and fathers, praise for attention to children’s reciprocal duties to support their parents, and greater criticism of various behaviours by mothers than of fathers who fail to pay maintenance – with the sharpest censure of women coming from female MPs.<sup>49</sup>

One female MP complained about women who dump children with grandparents and about the misuse of maintenance money “*by the parent in most cases ladies*”, but also criticised young men who “*pretend as though they don’t have any dependents*” despite “*how many African men like to have lots of children*”.<sup>50</sup>

<sup>49</sup> National Council, 2 June 2003, 3 June 2003, 9 June 2003. The debate was sprinkled with a few Biblical references to the preciousness of children (Hon Tuhadeleni, 2 June 2003; Hon Shangeta, 9 June 2003).

All references to National Council debates were sourced in *Hansard: Official Report of the Debates of the Second National Council, 02 June – 03 July 2003, Third Session, Volume 11*, [no publication date] (available at the Parliament of Namibia).

<sup>50</sup> Hon Andowa, National Council, 3 June 2003.

Another female MP criticised a range of female behaviour: stepmothers who refuse to accept a man's children from other women, women who deny fathers access to their children as punishment for their failure to pay maintenance, babydumping, women who fail to take responsibility for contraception, women who indulge in such irresponsible sexual behaviour that they cannot identify the fathers of their children, and women who “*use the money to entertain our newly found boyfriends or husbands instead of using it for that child*”.<sup>51</sup>

One male MP also pointed a finger at women: “*When we talk about people failing in their duties to support children we do not just mean men. Today we have women who are endlessly giving birth and dump[ing] the children [on] their elderly parents, yet they do not contribute a cent. The bill should seek what to do with those irresponsible ones*”.<sup>52</sup>

However, another male MP emphasised the bill's recognition of “*shared responsibilities*” of parents, and gave fairly even-handed criticism of fathers who “*relinquish their responsibility*” and mothers who abuse maintenance money.<sup>53</sup>

The National Council passed the bill without amendments on 11 June 2003.

### Vision 2030

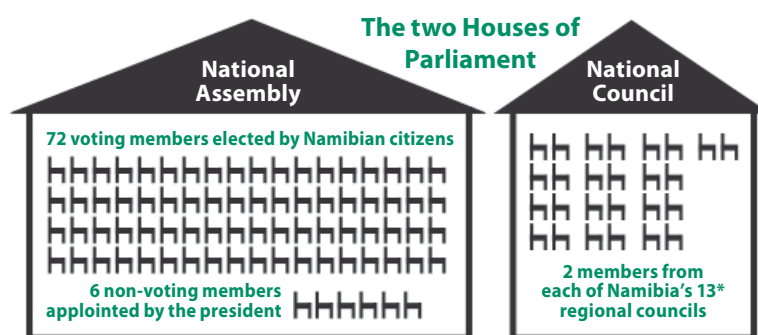
Vision 2030 was published in 2004 after the Maintenance Act was passed but was written whilst the Act was still a bill; thus, it referred to the need for a new law on maintenance:

*Non-maintenance from fathers is a serious problem, contributing to poverty in female-headed households and the poor quality of life of many children. Existing methods of obtaining maintenance through the courts are not very effective, and need some changes. Maintenance and inheritance laws will be updated and promulgated to provide the maximum benefits to women and children. These laws will be enforced more diligently than at present.*<sup>a</sup>

Part of the vision for 2030 in connection with the family was that the maintenance law would “*provide the maximum benefits to women and children within and outside marriage*” and be “*diligently enforced*”.<sup>b</sup>

<sup>a</sup> Namibia Vision 2030: Policy Framework for Long-Term National Development (Main Document), Windhoek: Office of the President, 2004 at 133.

<sup>b</sup> Id at 38.



\* Number of members subject to change after addition of a 14th region in August 2013

*“The national government is elected on the principle of proportional representation. The idea is to give chance and possibilities to even the smallest parties. The aim is to give all sectors of our population a voice at the national level.”*

President Sam Nujoma, Speech on the Conferment of an Honorary Doctorate of Law Degree, Wilberforce, Ohio, USA, 19 June 1993

<sup>51</sup> Vice Chairperson (Hon Mensah), 3 June 2003.

<sup>52</sup> Hon Shangheta, 9 June 2003.

<sup>53</sup> Hon Hakaye, National Council, 9 June 2003.

## A THUMBNAIL SKETCH OF LAW REFORM ON MAINTENANCE

The South African Maintenance Act [23 of 1963] (the Act) was made applicable to Namibia in 1970. The administration of the Act was transferred to 'South West Africa' (Namibia) in 1977, 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. The maintenance procedure is thus similar to the South African procedure before the amendments to the South African Maintenance Act.

It became apparent through community dissatisfaction expressed *inter alia* to the Namibian Law Commission [Law Reform and Development Commission] through its Women and Law Committee, Women's Groups, the Department of Women's Affairs and the offices of the Legal Assistance Centre that the maintenance rules and procedures were largely inadequate and ineffective. Consequently, the Commission initiated an investigation with the aim of addressing the shortcomings through law reform. During 1993, the Women and Law Committee of the Commission identified the procedure in obtaining and executing maintenance orders as a priority for law reform. At about the same time, the Ministry of Justice forwarded some proposals on this issue to the Commission for its comments. The Legal Assistance Centre in Windhoek was willing to conduct research in this field and to recommend the necessary reforms. Discussions were held by the Legal Assistance Centre, the Women and Law Committee, maintenance officers and magistrates, persons in the Ministry of Justice who are involved in the administration of the maintenance courts, the Office of the Prosecutor General and lower courts in the Ministry of Justice. The Legal Assistance Centre embarked on field research encompassing various regions of the country. The research involved an examination of maintenance court files; interviews with individuals and maintenance court personnel; group discussions, public meetings and consultations with community members.

During 1995, the Legal Assistance Centre published a report entitled 'Maintenance, a Study of the Operation of Namibia's Maintenance Courts'. The report covered the legal background, field research, recommendations and a draft bill. The Minister of Justice handed this report to the Commission and its Women and Law Committee for review during late 1995. In many cases, the amendments introduced to the South African maintenance law were followed, where they were considered useful. In the light of the reciprocal enforcement of maintenance orders between Namibia and South African, uniformity was encouraged. Additional amendments provided for unique Namibian situations. The various consultations and the research results indicated that the reforms were required, not so much in the substantive legal rules, but more in the procedural rules and the manner in which these substantive rules are enforced. For this reason, not much comparative legal research was done. Practical solutions had to be found for the local problems experienced by maintenance officers, magistrates, complainants and respondents.

It became apparent that a lack of practical experience and direction contributed to the general inefficacy of the maintenance system. A comprehensive set of regulations providing guidelines for each step in the maintenance process was considered essential and required from the Ministry of Justice without delay. However, it was acknowledged that many of the problems could not be addressed through amendments to the Act nor by the drafting of rules. Many problems are caused by both the social perceptions of the role and the purpose of maintenance courts and the lack of dedication of maintenance officers and officers serving and executing maintenance processes.

Brigitte Clark, "An Analysis of the Effects of Marriage, Divorce and Death on the Child Maintenance Obligation in South African Law with some Comparative Perspectives", doctoral thesis, Rhodes University 1999 at 211-213 (references omitted)





# Chapter 4

## OVERVIEW AND CRITIQUE OF THE MAINTENANCE ACT 9 OF 2003

### Overview of key changes in the 2003 Maintenance Act

The basic principles of the 2003 Maintenance Act are the same as those which previously applied. However, the new law **articulated and clarified some of the relevant common law principles**, and included mechanisms aimed at more efficient and effective application. It also **incorporated more detailed guidelines for maintenance officers and magistrates** with the intention of harmonising the work of different maintenance courts. Its other key innovations were:

- the **introduction of maintenance investigators**, intended to make it harder for people to hide themselves or their assets;
- the possibility of imposing **default orders** where defendants ignore the summons to come to court to discuss maintenance;
- a **wider range of enforcement mechanisms** for cases where a person ignores a maintenance order, with greater emphasis on civil enforcement remedies (such as attaching the property, wages or debts of the person who is in arrears) as an alternative to criminal charges;
- the **option of requiring payment in kind** when someone does not have a cash income to use for maintenance;
- the **option of allowing maintenance to be paid directly to the recipient**, for example into the recipient's bank account, instead of requiring all recipients to come to the court to collect the maintenance payments in person (which entails transport costs and sometimes lost working time);
- a new provision allowing **claims for contributions to pregnancy and birth-related expenses**;
- new provisions making it **possible to punish abuse of maintenance money** by using it for some purpose other than the beneficiary for whom it was intended; and
- a new provision **restricting the publication of any information about maintenance proceedings which might reveal the identity of any child who is involved**, to protect the child's privacy.

## Terminology

The term **beneficiary** refers to the person who benefits from a maintenance order. This will usually be a child, but it could also be a disabled or indigent adult, a parent or a husband or wife. The beneficiary is sometimes called a ‘dependant’.<sup>a</sup>

The term **complainant** refers to the person who applies for a maintenance order. The person could be applying on behalf of a beneficiary (such as a child), or for themselves. The complainant will usually be a parent, often the mother, applying for maintenance for her child. Any relative or person who is caring for a child can request maintenance from one or both of the child’s parents. The complainant could also be anyone who has an interest in the wellbeing of the beneficiary, such as a social worker, health care provider, teacher, traditional leader or employer.<sup>b</sup> A child can also make an application for himself or herself.<sup>c</sup>

The term **defendant** refers to the person being requested to pay maintenance.<sup>d</sup>

<sup>a</sup> Maintenance Act 9 of 2003, section 1.

<sup>b</sup> Id, section 1.

<sup>c</sup> In most situations, a child cannot bring a case before the court without the assistance of an adult. However this rule is not applied to maintenance hearings due to the unique role played by the maintenance officer in terms of the Maintenance Act; in essence, the maintenance officer performs the functions that would usually be carried out by a legal representative. See pages 51-52.

<sup>d</sup> Maintenance Act 9 of 2003, section 1.

## 4.1 General principles

### 4.1.1 Purpose of the Maintenance Act

The Maintenance Act provides mechanisms and guidelines for enforcing maintenance responsibilities. It does not create any new legal liabilities for maintenance between family members, although it harmonises customary law with the common law principles on maintenance.<sup>1</sup>

*“The purpose of maintenance orders is to help children with day-to-day necessities.”*

*S v Gaweseb 2007 (2) NR 600 (HC) (Damaseb, JP) at para 14*

### 4.1.2 What is maintenance?

#### Child maintenance

The Act describes child maintenance in these terms:

*The parental duty to maintain a child includes the rendering of support which the child reasonably requires for his or her proper living and upbringing and this includes provision of food, accommodation, clothing, medical care and education.<sup>2</sup>*

<sup>1</sup> Id, section 2.

<sup>2</sup> Id, section 3(3).

## Spousal maintenance

The Act does not provide a corresponding definition of spousal maintenance even though it covers the payment of such maintenance.<sup>3</sup> However, according to a recent High Court divorce case:

*The common law duty to support a spouse includes the provision of accommodation, food, clothing, medical and dental attention and other necessities of life on a scale commensurate with the social position, lifestyle and resources of the spouses. It is trite that the scope of this duty is determined by the spouses' standard of living and their standing in the community. The duty to support is not limited to household necessities. How the support is to be provided will depend on the discretion of the spouses ... [T]he obligation to maintain need not necessarily be executed by way of payment of money. A parent is also entitled to tender support in kind, e.g. by providing accommodation or by undertaking to be responsible for certain specified obligations. There is also authority that an order for maintenance may include sufficient money to maintain a motor vehicle.<sup>4</sup>*

### 4.1.3 Legal liability to pay maintenance

The Act states that the duty to provide maintenance is applicable to any relationship where one person has a legal duty to maintain another person.<sup>5</sup> However the statute comes into play only if the person who has a duty to provide maintenance is failing or neglecting to provide reasonable maintenance for the beneficiary despite being able to do so.<sup>6</sup>

#### Duty of parents to maintain children

Both parents of a child are primarily and jointly responsible for maintaining the child regardless of whether the child is born “inside or outside the marriage of the parents”, and regardless of whether the child is from a “first, current or subsequent marriage”.<sup>7</sup> Furthermore, the Act makes it clear that all children are equal, in the sense that maintenance must be measured in connection with the child’s needs regardless of any other factors such as the order of birth. The Act clearly states that “where a parent has more than one child, all the children are entitled to a fair share of that parent’s resources”,<sup>8</sup> and that the duty to maintain a particular child does not rank higher than the duty to maintain any other child of the parent (or any other person the defendant has a legal duty to maintain).<sup>9</sup> These principles override any customary laws that may not recognise the duty of both parents to maintain a child.<sup>10</sup>

Despite the common misconception that the Act is biased towards women, the Act is gender neutral. The fact that women utilise the law more than men is not related to anything in the law itself, but stems from gender roles in Namibian society, where women still play the primary role in child care and at the same time suffer greater economic disadvantages than men.<sup>11</sup>

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<sup>3</sup> For example, the Act states that husbands and wives are primarily responsible for each other’s maintenance regardless of any customary law to the contrary. Id, section 3(2)(a). See also section 26(4) on the period which may be covered by an order for spousal maintenance.

<sup>4</sup> *Walenga v Walenga* [2011] NAHC 366 at para 54 (Van Niekerk J) (citations omitted).

<sup>5</sup> Maintenance Act 9 of 2003, section 2(a).

<sup>6</sup> Id, section 5.

<sup>7</sup> Id, section 3(1)(a) and (b).

<sup>8</sup> Id, section 4(1)(d).

<sup>9</sup> Id, section 4(1)(c).

<sup>10</sup> Id, section 3(1)(c) and (2)(b).

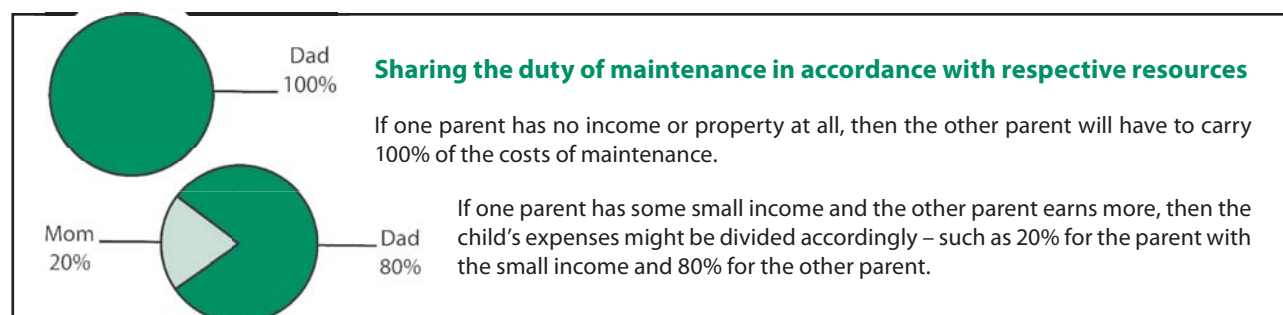
<sup>11</sup> The relative economic position of men and women in Namibia is discussed in chapter 2.

*"Why should men be subjected to pay maintenance? Are all people equal before the law in Namibia? ... The Maintenance Act should be revised."*

*"I'm a single father ... The mother of the kid works. Does she also have to pay maintenance?"*

Text message queries sent to the Legal Assistance Centre in 2010, showing that some people are not aware that the Act is gender neutral.

However, joint parental responsibility for child maintenance does not necessarily mean that both parents' contributions to the cost of raising a child will be equal.<sup>12</sup> The parent's respective resources must be applied according to the needs of the child.<sup>13</sup> The duty must be shared on the basis of how much money each parent earns and what assets they possess. Therefore the cost of raising a child will not necessarily be divided equally between the mother and the father.



### How the court decides what is fair: An example

The Namibian case of *Van Zyl v Fourie* (decided under the previous Maintenance Act of 23 of 1963) explains how the court considers the parent's respective financial needs and resources. This case involved maintenance for a 5-year-old child.

According to this case, **a good starting point is to see what monthly amount is needed to maintain the child.** The mother provided information on the cost of rent, water and electricity, child care, pre-primary school fees, clothing, groceries and the cost of putting the child on her medical aid scheme. She did not provide documentation for all of these expenses, but this was not necessary. For example, the magistrate found that a monthly expenditure of N\$1 400 on groceries in Mariental was reasonable, on the basis of his own experience that prices are high there due to the lack of competition. The mother said that she might be able to reduce the grocery bill if the family cut back to bare basics. But the court said that there is no reason for the mother and child to cut back on their standard of living unless it is unreasonable or beyond the means of the parties.

**The next step is to look at the financial resources and circumstances of each parent.** The father was a single man, and his monthly salary was more than three times what the mother was earning. The Court found that he could afford to pay maintenance of about N\$1 000/month. The father claimed that he was in debt and was not able to make ends meet. But the Court found that he could afford the maintenance payments if he made some adjustments to his lifestyle, such as finding cheaper accommodation. He was paying over N\$4 000/month on a bond for his house, so the Court suggested that he could sell the house and rent a flat for about N\$2 000/month. According to the Court, *"he should do so if the needs of his child require it"*.

To test the fairness of the respective contributions from each parent, the Court calculated what percentage of their respective incomes the mother and father would be paying towards their child's basic needs. The mother would be paying 12% of her monthly income and the father would be paying 11% of his monthly income. This would clearly be fair.

*Van Zyl v Fourie* 1997 NR 85 (HC)

<sup>12</sup> Maintenance Act 9 of 2003, section 3(2)(b) and 4(1)(b).

<sup>13</sup> Id, section 3(3) and section 4(1)(d).

## Retrospective maintenance

Under the Maintenance Act 23 of 1963, a complainant could not apply for the retrospective costs of caring for a child – but a parent who has contributed more than his or her fair share towards past maintenance has a right under the common law to recover the excess amount from the other parent.

The theory on this issue was set forth in detail in the 1990 South African case of *S v Frieslaar*.<sup>14</sup> A child has a claim for maintenance against each of his or her parents based on their legal liability to maintain their child. This claim is not based on a court order setting a particular amount of contribution. The purpose of such a court order is not to establish the duty to maintain, but to apportion the maintenance obligation between the parents based on the needs of the child and the ability of each parent to contribute.<sup>15</sup> Since maintenance is a joint liability between the parents, the general principles on joint liability are applicable; this means that a parent who has contributed more than his or her fair share towards a child's maintenance is entitled to recover the excess from the other parent.<sup>16</sup>

The *Frieslaar* case noted that the definition of “maintenance order” in the 1968 Act<sup>17</sup> included two features important to the question of whether or not such an order could include an amount for recovery of past maintenance: the requirement (a) that such an order must provide for periodical payments and (b) that these payments must be towards the maintenance of another person. The Court then concluded: “Where the purpose of an order for periodical payments is not to maintain another person, but to reimburse another person for having maintained a third person, the order does not, in my view, qualify as a maintenance order. Such an order is not directed towards the payment of maintenance for any person but towards the reimbursement of such person.”<sup>18</sup>

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<sup>14</sup> *S v Frieslaar* 1990 (4) SA 437 (C). The Maintenance Act 23 of 1963 was applicable at that time to both Namibia and South Africa.

<sup>15</sup> At 438F-G, citing *Herfst v Herfst* 1964 (4) SA 127 (W) at 130C – D.

<sup>16</sup> On this point, the *Frieslaar* case cites *Herfst v Herfst* 1964 (4) SA 127 (W) at 130F, *Farrel v Hankey* 1921 TPD 590 at 596, *Woodhead v Woodhead* 1955 (3) SA 138 (SR), *Williams v Shub* 1976 (4) SA 567 (C) and *Harwood v Harwood* 1976 (4) SA 586 (C). *Farrel v Hankey* 1921 TPD 590 at 596 states:

*The Roman-Dutch authorities are quite clear that the burden of supporting the children, whether before or after a divorce, is a burden common to the two spouses, the only qualification being that it is distributable between them according to their means. An order of Court determines that distribution, but, where there is no order, it seems to me that the usual principles of joint obligations apply. If one of the spouses contributes more than his or her share – at any rate where they are divorced, that spouse is entitled to recover the proportion due by the other spouse according to their means. To hold that there can be no recovery unless a prior order of Court has been obtained would mean that the spouse really prepared to perform the natural obligation of supporting the children is to be penalised.*

On this common law right of recovery, see also *JG v CG* 2012 (3) SA 103 (GSJ), *Africa v Africa* 1985 (1) SA 792 (SWA) and *Van der Harst v Viljoen* 1977 (1) SA 795 (C).

In *Van der Harst v Viljoen* 1977 (1) SA 795 (C), which was brought under the common law rather than under the Maintenance Act 23 of 1968, a mother recovered lying-in expenses, a contribution to “past maintenance” up to the date of summons, a sum in respect of “maintenance from the date of summons to the date of judgment”, interest on all these amounts from the date of judgment to the date of payment and an order for future monthly maintenance contributions commencing from the date of judgment.

A similar approach was taken in *Williams v Shub* 1976 (4) SA 567 (C), in respect of a common-law claim for recovery of payments towards a child's maintenance in excess of that parent's proper proportionate share; the Court said at 570: “Although the claim might not strictly be called one for maintenance it is so closely connected with it as to be substantially the same thing.” However, the *Frieslaar* case followed *Herfst v Herfst* 1964 (4) SA 127 (W) in holding that a claim for recovery of excessive past contributions to maintenance “is not strictly for arrear maintenance, but for the indemnification by one joint debtor for the expenditure or indebtedness actually incurred at the time the need therefor arose by the other joint debtor” (*Frieslaar* at 438H, quoting *Herfst* at 130F). See also *Boberg* at 243.

<sup>17</sup> Section 1 of the Maintenance Act 23 of 1963 defined “maintenance order” as “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 s 11, includes any sentence suspended on condition that the convicted person make periodical payments of sums of money towards the maintenance of any other person”.

<sup>18</sup> *S v Frieslaar* 1990 (4) SA 437 (C) at 439F-H. The Court further noted that section 5(4) of the Maintenance Act 23 of 1963 allows a court to make a maintenance order where no such order is in force “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”. The Court found that the phrase “proved to be legally liable to maintain any other person” would seem to refer only to current and future maintenance, and was “inapt” for the recovery of arrear maintenance which preceded the court order. At 439I-440A.



The Court, however, also acknowledged that past and present situations cannot always be neatly separated:

*Of course, arrear maintenance could very easily impact on current maintenance. The present financial needs of a claimant are often shaped by his financial history. The more a claimant's resources have been depleted by a defendant's neglect in the past to contribute to maintenance, the greater her need for future maintenance might be. This means that although a maintenance order cannot be made in respect of the past it can take the past into account.<sup>19</sup>*

In contrast, a maintenance order made in terms of the Maintenance Act 23 of 1963 in substitution of an existing maintenance order could have retrospective effect.<sup>20</sup>

This situation was subsequently changed in South Africa, where the Maintenance Act 99 of 1998 explicitly allows a complainant to apply for “*expenditure incurred by the mother in connection with the maintenance of the child from the date of the child's birth to the date of the enquiry*”.<sup>21</sup> It is not clear why this possibility is limited to mothers; the provision in question couples this retrospective maintenance with birth expenses, but it is not hard to imagine a situation where a father takes over the care of a child from birth.

In Namibia, the current law is somewhat ambiguous. Section 17(2)(a) states that a maintenance order “*must direct the defendant to contribute to the maintenance of the beneficiary from the date specified in the order*”.<sup>22</sup> There is nothing in the Act which limits “*the date specified in the order*” to a future time period only,<sup>23</sup> and the definition of “*maintenance order*” no longer makes reference to periodical payment towards the maintenance of another person.<sup>24</sup> No Namibian case law could be located on the question of including retrospective maintenance contributions in a maintenance order. Therefore, it is still an open question as to whether the 2003 Act allows initial maintenance orders to have a retrospective effect.

However, even if the 2003 Act is interpreted not to allow a maintenance order with retrospective effect, the persuasive South African precedents discussed above indicate that the parent who contributed more than his or her fair share in the past would have a right to bring a civil action against the other parent to recover the excess amount already paid for maintenance. In practice, however, such a legal proceeding would be impractical for most persons in Namibia. It would make more sense to allow the reimbursement for past maintenance to be dealt with by the maintenance court at the time of making a maintenance order.

**We recommend an amendment to the Maintenance Act to clearly provide that a maintenance order may include an amount to reimburse the complainant for excess contributions towards the child's maintenance since the date of the child's birth, as has been done in South Africa.** This would not be creating any new legal right, since recovery of such maintenance is already possible under the common law. But it would make the procedure for recovering such maintenance more realistically accessible, and it might encourage parents to take maintenance responsibilities more seriously.

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<sup>19</sup> *S v Frieslaar* 1990 (4) SA 437 (C) at 438-440 (some citations omitted).

<sup>20</sup> *Strime v Strime* 1983 (4) SA 850 (C). In the *Frieslaar* case, the court noted this and then stated that “*it does not follow*” that a maintenance order made for the first time can similarly have retrospective effect. At 440C-F.

<sup>21</sup> Maintenance Act 99 of 1998 (South Africa), section 16(1)(a) (ii).

<sup>22</sup> Maintenance Act 9 of 2003, section 17(2)(a), emphasis added.

<sup>23</sup> Section 5(a) of the current law states, in wording similar but not identical to that of the 1963 Act, –

*A maintenance court must not make a maintenance order unless it is satisfied that the person against whom the order is sought –*

*(a) is legally liable to maintain the beneficiary ...*

However, this language does not appear to point in one way or the other on the question of recovery of retrospective maintenance contributions.

<sup>24</sup> Maintenance Act 9 of 2003, section 1 (definition of “*maintenance order*”).

## Pregnancy and birth-related expenses

A maintenance order can also include an order for contributions to pregnancy and birth-related expenses, such as medical and hospital expenses incurred by the mother. Unless there is a reasonable explanation for a delayed claim, requests for pregnancy and birth-related expenses must be made within 12 months from the date of birth of the child.<sup>25</sup>

**Can a woman apply for pregnancy-related expense prior to the birth of the child?** The Act is not clear on this point. The relevant provision, section 17(3), reads:

*If the beneficiary of a maintenance order is a child, the maintenance court may order that maintenance contributions be made to the mother of the child for expenses incurred by the mother in connection with the pregnancy and birth of the child, including but not limited to medical and hospital expenses, but a claim under this subsection must be made within 12 months from the date of birth of the child or within such other reasonable period as the court may allow on sufficient grounds shown by the mother [emphasis added].*

The phrases emphasised in the passage above could arguably be used to argue either approach – and in practice, it appears that some courts allow claims during pregnancy whilst other courts do not.

The provision is conditioned on the fact that the beneficiary is *a child*. The ultimate beneficiary of contributions towards pregnancy and birth-related expenses is the child who is to be born, but in the eyes of the law, a foetus is not the same as a “child” since Namibian law considers personhood for legal purposes to begin only at birth.

Foetuses are protected by a legal concept called the *nasciturus* fiction, whereby the rights and interests of a foetus are “kept in abeyance” until after live birth, at which point the child is then able to exercise them; in other words, the foetus does not have legal rights, but after birth certain rights accrue to the child as if they dated from the time of his or her conception rather than the time of his or her birth. For example, if a pregnant woman is injured and these injuries result in injuries to the child subsequently born, the child is entitled to compensation for the injuries originally obtained as a foetus. The *nasciturus* fiction can also operate in the area of succession. Normally an heir can only inherit if he or she is alive at the death of the testator – but where an unborn foetus would be an heir after birth, the division of the estate is postponed to determine if there is a live birth; if so, the child will share in the estate as if he or she had been alive when the testator died.<sup>26</sup> This fiction could also be understood to apply in respect of pregnancy expenses which can affect the health and wellbeing of the child to be born – such as expenses associated with ante-natal clinic visits, nutritious food and vitamin supplements. However, applying the *nasciturus* fiction, the rights could not be claimed until there was a live birth resulting in a “child”.

Whether or not this would bar a claim of pregnancy-related expenses before the birth would depend on whether the right to claim contributions was viewed as a right which must be asserted by or on behalf of *the child*, or a right which accrues to *the mother* as a co-parent.

The provision suggests that the claim is for reimbursement to the mother, as a right accruing to the mother, when it refers to the provisions also refers to contributions being made “*to the mother*” for expenses “*incurred by the mother*” – suggesting that she could claim reimbursement at any time after the expenses have been incurred, regardless of whether or not the child has already been born.

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<sup>25</sup> Id, section 17(3).

<sup>26</sup> See RA Jordaan & CJ Davel, *Law of Persons* (2005), at 3-5, 11-15; DSP Cronjé, *The South African Law of Persons and Family Law* (1986) at 11; *Pinchin v Santam Insurance Co Ltd* 1963 (2) SA 254 (W) at 259-60.

If a mother can only claim reimbursement for such expenses after the fact, then she may not be able to afford them at all. In such cases, pregnancy-related expenses which might have benefitted the child will not be incurred, and the child to be born will not experience the benefits which he or she could have enjoyed. Even more concerning is the fact that the mother's inability to afford critical expenses during pregnancy could lead to developmental problems and result in a baby that is born prematurely or with a detrimental condition that could have been avoided. In these cases the maintenance required to care for the child will probably be far higher than if maintenance had been paid during pregnancy.<sup>27</sup>

One problem with allowing a claim for pregnancy-related expenses to be made before the child's birth concerns cases where the paternity of the unborn child is contested. Whilst it is theoretically possible to obtain samples of DNA from a foetus, this entails risks to the foetus and would not normally be done.<sup>28</sup> However, the standard presumptions regarding paternity could be applied and the defendant given a chance to disprove them (even after the child's birth if necessary).<sup>29</sup>

It would be in the child's best interest to allow claims for pregnancy-related contributions to be made before birth, even if mothers in cases where paternity is mistaken or falsified subsequently have to refund these payments to the defendant (perhaps after claiming them from the actual father). The possibility of having to make a future refund if paternity was subsequently disproved would probably deter false representations of paternity by pregnant women.

**We recommend that the Maintenance Act be amended to make it clear that contributions to pregnancy-related expenses may be claimed before the child is born, and to provide for a procedure for refunds should paternity be disproved at a later stage.** The failure to repay such contributions if paternity is later disproved could have the same penalties as the failure to pay maintenance. A complainant who was required to repay such contributions should also have a clear right to make a claim for corresponding contributions to pregnancy-related expenses from the person who has been identified as the actual biological parent.

## Major children

At common law, the legal duty to maintain a child extends beyond the age of majority, as the need for support rather than the child's status as a minor is the determining factor.<sup>30</sup> The duty of support could extend indefinitely in the case of a child who is chronically ill or disabled, but it can also apply in a case where there is simply a need for support. If the child is a major, the onus of providing that parental support is required lies with the child, and a major child is not entitled to support on such a generous a scale as a minor child.<sup>31</sup>

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<sup>27</sup> In contrast, South Africa's Maintenance Act 99 of 1998 does not clearly cover pregnancy-related expenses, but only "*expenses incurred by the mother in connection with the birth of the child*". Maintenance Act 99 of 1998 (South Africa), section 16(1)(a) (ii). The regulations shed no further light on this phrase, and we have not been able to locate any case law interpreting it.

<sup>28</sup> A paternity test can be done during pregnancy but the process is invasive and so has some risk. Prenatal paternity tests do not appear to be available in Namibia. Furthermore some doctors may not be willing to conduct a prenatal paternity test, on the grounds that a mother who finds that the father is not who she thought may wish to have an abortion – which is available only under limited circumstances in Namibia. Even in countries where abortion is more widely available, some doctors may be unwilling to conduct a prenatal paternity test for this reason. For more information see "What is a prenatal paternity test?" <[www.nhs.uk/chq/Pages/what-is-a-prenatal-paternity-test.aspx?CategoryID=61&SubCategoryID=615](http://www.nhs.uk/chq/Pages/what-is-a-prenatal-paternity-test.aspx?CategoryID=61&SubCategoryID=615)>, accessed 22 September 2013.

<sup>29</sup> As discussed on page 55, the provisions in the Children's Status Act on the presumption of paternity under certain conditions are relevant to maintenance complaints.

<sup>30</sup> See *Ex parte Jacobs* 1982 (3) SA 276 (O); *Burse v Bursey* 1999 (3) SA 33 (SCA).

<sup>31</sup> See *Gliksman v Talekinsky* 1955 (4) SA 468 (W); *Kemp v Kemp* 1958 (3) SA 736 (D); *Hoffmann v Herdan NO* 1982 (2) SA 274 (T); *Ex parte Jacobs* 1982 (2) SA 276 (O); *Sikatele v Sikatele* [1996] 1 All SA 445 (Tk); *B v B* 1997 (4) SA 1018 (SE); *Burse v Bursey* 1999 (3) SA 33 (SCA).

The Maintenance Act contains no bar to maintenance orders in respect of major “children” since the basic requirements for a maintenance complaint are that there is a legal liability to maintain and that maintenance is not being provided in practice.<sup>32</sup>

### Maintenance of major children

*“Although the duty of support persists into the child’s majority, the nature thereof changes. It is then confined to necessities; in other words, the child must be in indigent circumstances in the sense that he or she is in need of a contribution towards his or her maintenance.”*

B v B 1997 (4) SA 1018 (SE)

### Duty of children to maintain parents

Children have a duty under certain circumstances to maintain their parents. This will usually apply only after the children have become adults themselves, but minor children can in theory be expected to contribute towards the maintenance of their parents in appropriate circumstances.<sup>33</sup>

The duty of a child to maintain a parent applies only where all of the following circumstances apply:

- (1) the parent is unable to maintain himself or herself due to circumstances beyond that parent’s control;
- (2) the child is able to maintain him or herself and be able to support the parent; and
- (3) there is no other person who is legally liable to maintain the parent, such as a spouse.<sup>34</sup>

As in the case of the duty of parents to maintain their children, this principle overrides any customary laws to the contrary.<sup>35</sup>

Some South African cases have held that the duty of a child to maintain a parent arises only where the parent would be otherwise indigent, in “*extreme need or want for the basic necessities of life*”.<sup>36</sup> However, other cases have taken the view that what constitutes “necessities” depends on the parent’s station in life.<sup>37</sup> The Maintenance Act 9 of 2003 seems to accord with the latter approach, seeing that it specifies that the “*lifestyle*” of each of the relevant persons must be taken into account as a factor in any maintenance order.<sup>38</sup>

<sup>32</sup> Maintenance Act 9 of 2003, section 9(2). The term “child” is not defined, leaving open the possibility of interpreting it in context. The references to “child” in section 26 on the duration of maintenance orders make sense only if they refer to minors (“when ... the child attains the age of 18 years”, “until the child attains the age of 21 years”, etc.) Thus, they would not appear to apply to a major “child” who is unable support himself or herself. In contrast, the references to “child” in section 4(2), which concerns a “child’s” duty to maintain parents, would make sense only if they encompassed adult offspring.

<sup>33</sup> *Oosthuizen v Stanley* 1938 AD 322: “The fact that a child is a minor does not absolve him from his duty, if he is able to provide or contribute to the required support.” See also the discussion of this issue by Milne AJA in *Anthony and Another v Cape Town Municipality* 1967 (4) SA 445 (A).

<sup>34</sup> Maintenance Act 9 of 2003, section 4(2). The primacy of looking to spousal support also applies at common law. See *Manuel v African Guarantee and Indemnity Co Ltd and Another* 1967 (2) SA 417 (R).

<sup>35</sup> Maintenance Act 9 of 2003, section 3(2)(c).

<sup>36</sup> *Smith v Mutual & Federal Insurance Co Ltd* 1998 (4) SA 626 (C) at 632D-E. See also *Petersen v South British Insurance Co Ltd* 1967 (2) SA 235 (C), *Anthony and Another v Cape Town City Council* 1967 (4) SA 445 (A) and *Van Vuuren v Sam* 1972 (2) SA 633 (A).

<sup>37</sup> *Jacobs v Road Accident Fund* 2010 (3) SA 263 (SE) at para 20, citing *Wigham v British Traders Insurance Co Ltd* 1963 (3) SA 151 (W) at 153H – 154A: “[T]he authorities furthermore make it clear that in order to succeed a plaintiff is not required to show that she would be reduced to abject poverty or starvation and be a fit candidate for admission to a poor house unless she received a contribution. The Court must have regard to her status in life, to what she has been used to in the past and the comforts, conveniences and advantages to which she has been accustomed ...” and *Oosthuizen v Stanley* 1938 AD 322 at 327-328: “Support (alimenta) includes not only food and clothing in accordance with the quality and condition of the persons to be supported, but also lodging and care in sickness ... Whether a parent is in such a state of comparative indigency or destitution that a Court of law can compel a child to supplement the parent’s income is a question of fact depending on the circumstances of each case ... [T]he parent must show that, considering his or her station in life, he or she is in want of what should, considering his or her station in life, be regarded as coming under the head of necessities.”

<sup>38</sup> Maintenance Act 9 of 2003, section 16(2)(a).



In the past, under the common law, children born outside marriage did not have a duty to maintain their fathers even though their fathers had a duty to maintain them.<sup>39</sup> This was changed by the Children's Status Act 6 of 2006, which states that despite anything to the contrary contained in any law, no distinction may be made between persons born inside and outside "*in respect of the legal duty to maintain a child or any other person*".<sup>40</sup> This means that the duty of support between children born outside of marriage and their parents is now completely reciprocal, in the same manner as for children born inside marriage.

### **A child's duty to maintain a parent applies only in blood relationships, not in informal "foster parent" relationships**

In the *Koyoka* case, a man took in a young boy who was not related to him. The boy's parents were poor, so the man gave him a home, paid his school fees and treated him like his own son. The boy eventually graduated from college and got a job as a teacher. The man who had helped him ran into hard times as he aged and his business failed, leaving him in dire need of help. However, the Court ruled that the teacher who had once received assistance from him had no legal duty of support towards him. The two had no blood relationship, and there was no formal adoption. There might be a moral duty of support, but the elderly man was not entitled to utilise the Maintenance Act.

*S v Koyoka* 1991 NR 369 (HC)

## **Duty of a husband and wife to maintain each other**

The Maintenance Act makes it clear that husbands and wives are "*primarily responsible for each other's maintenance*", *regardless of any customary law to the contrary*".<sup>41</sup> However, it leaves open the question of the duty of support in religious marriages which may not fit under the umbrella of either civil or customary marriage – such as Muslim or Hindu marriages.

## **The duty of maintenance in religious "marriages"**

In recent years, the South African courts have recognised the legality of Muslim marriages for several specific purposes – including the duty of maintenance between spouses. Before South Africa's new constitutional order was in place, such marriages were not afforded recognition, primarily on the basis that this would be against public policy because of their polygamous or potentially polygamous nature.<sup>42</sup> After South Africa became a constitutional democracy, the courts gradually recognised unregistered Muslim marriages as marriages for a range of purposes, including the duty of spousal maintenance; initially only *de facto* monogamous Muslim marriages were given such recognition, but then *de facto* polygamous Muslim marriages also began to receive such recognition.

The first case to address maintenance in a Muslim marriage in light of constitutional principles was *Ryland v Edros*, where a woman who had been married and divorced in terms of Muslim rites succeeded in asserting a right to maintenance on the basis of the contractual agreement which formed

<sup>39</sup> Spiro, *Law of Parent and Child, Fourth Edition*, Kenwyn, South Africa: Juta & Co, 1985 at 404.

<sup>40</sup> Children's Status Act 6 of 2003, section 17(1). In South Africa, the common-law distinction in respect of children born outside marriage was found to constitute an unjustifiable form of unfair discrimination on the ground of birth and an unjustifiable infringement of the dignity of such children, as well as being clearly contrary to the best interests of extra-marital children. *Petersen v Maintenance Officer, Simon's Town Maintenance Court, and Others* 2004 (2) SA 56 (C).

<sup>41</sup> Maintenance Act 9 of 2003, section 3(2)(a).

<sup>42</sup> See *Esop v Union Government (Minister of the Interior)* 1913 CPD 133 and *Ismail v Ismail* 1983 (1) SA 1006 (A). Dicta in case of *Fraser v The Children's Court, Pretoria North* 1997 (2) SA 261 (CC) summarised the prevailing legal view in the pre-constitutional era: "*Unions which have been solemnised in terms of the tenets of the Islamic faith for example are not recognised in our law because such a system permits polygamy in marriage. It matters not that the actual union is in fact monogamous. As long as the religion permits polygamy, the union is "potentially polygamous" and for that reason, said to be against public policy ...*" (at paragraph 21, footnotes omitted).



the basis of the marriage, with the Court stressing that its ruling need not necessarily be followed in the case of an Islamic marriage which was in fact polygamous (as opposed to being merely *potentially* polygamous).<sup>43</sup>

In *Amod v Multilateral Motor Vehicle Accidents Fund*, the South African Supreme Court of Appeal took a more generalised approach to Muslim marriage, considering whether the common law should be developed to recognise a general duty of support arising from such marriages for the purposes of supporting a claim for loss of support. The Court applied a two-pronged test, asking firstly, whether a Muslim marriage created a legal duty of support, and secondly, whether the right to support deserved legal recognition and protection for the purposes of an action against a third party.<sup>44</sup> The Court here again emphasised the *de facto* monogamous nature of the particular marriage in question:

*The insistence that the duty of support which such a serious de facto monogamous marriage imposes on the husband is not worthy of protection can only be justified on the basis that the only duty of support which the law will protect in such circumstances is a duty flowing from a marriage solemnized and recognised by one faith or philosophy to the exclusion of others. This is an untenable basis for the determination of the boni mores of society. It is inconsistent with the new ethos of tolerance, pluralism and religious freedom ...*<sup>45</sup>

The Court specifically refrained from comment on whether a spouse in a *de facto* polygamous Muslim marriage could make a similar claim for loss of support.<sup>46</sup>

However, in *Khan v Khan*, a duty of support was found to exist in a *de facto* polygamous Muslim marriage. In this case, a male appellant claimed that the polygamous nature of his marriage meant that he was not liable during the course of the marriage to provide spousal maintenance.<sup>47</sup> In dismissing this claim, the High Court stated that it would be “*blatant discrimination to grant, in the one instance, a Muslim wife in a monogamous Muslim marriage, a right to maintenance, but to deny a Muslim wife married in terms of the same Islamic rites and who has the same rights and beliefs as the one in the monogamous marriage, a right to maintenance*” – noting that public policy considerations involved in the task of interpreting legislation such as South Africa’s Maintenance Act 99 of 1998 “*have changed with the advent of the Constitution*”.<sup>48</sup> Significantly, the court noted in this case that the “*common-law duty of support is a flexible concept that has been developed and extended over time by our Courts to cover a wide range of relationships*”.<sup>49</sup>

The same result occurred in the unreported 2006 case of *Cassim v Cassim*, where a defendant married in accordance with Islamic law was held to be under a duty to maintain his spouse by “*providing for her reasonable needs in terms of the Maintenance Act*”.<sup>50</sup> Various recent South African cases have also found a spouse in a Muslim marriage eligible for interim maintenance pending a divorce in terms of Rule 43 of the Uniform Rules of Court.<sup>51</sup>

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<sup>43</sup> *Ryland v Edros* 1997 (2) SA 690 (C).

<sup>44</sup> *Amod v Multilateral Motor Vehicle Accidents Fund* 1999 (4) SA 1319 (SCA).

<sup>45</sup> At paragraph 20 (citations omitted).

<sup>46</sup> At paragraph 24: “*I have deliberately emphasised in this judgment the de facto monogamous character of the Muslim marriage between the appellant and the deceased in the present matter. I do not thereby wish to be understood as saying that if the deceased had been party to a plurality of continuing unions, his dependants would necessarily fail in a dependant’s action based on any duty which the deceased might have towards such dependants. I prefer to leave that issue entirely open.*”

<sup>47</sup> *Khan v Khan* 2005 (2) SA 272 (F).

<sup>48</sup> At paragraph 11.11.

<sup>49</sup> At para 10.1.

<sup>50</sup> *Casim v Casim* Part A, TPD, unreported 2006-12-15; case number 3954/06, as discussed and referenced in in para 7 of *AM v RM* [2009] ZAECPHC 31 (29 May 2009).

<sup>51</sup> For instance, in *H v D* 2010 (4) BCLR 362 (WCC) ; [2010] 2 All SA 55 (WCC), a defendant responded to a claimant’s application for maintenance by asserting that Islamic marriages are excluded from Rule 43 because it uses the words “*matrimonial action*” and “*spouse*”. The High Court disagreed, holding that the term “*spouse*” in this context includes

Furthermore, in *Daniels v Campbell and Others*, the South African Constitutional Court held that the term “spouse” in the Intestate Succession Act 81 of 1987 must be read to include the surviving partner to a monogamous Muslim marriage and that the term “survivor” in the Maintenance of Surviving Spouses Act 27 of 1990 must also be read in this way.<sup>52</sup> The holding in the *Daniels* case was limited to Muslim marriages which are *de facto* monogamous.<sup>53</sup> However, polygamous Muslim marriages were addressed by the Constitutional Court in *Hassam v Jacobs*, which held that the Marriage Act 25 of 1961 and the Intestate Succession Act 81 of 1987 violate the constitutional prohibitions on discrimination if they are interpreted to provide for only one Muslim spouse to be an heir to the estate of a deceased husband.<sup>54</sup>

Judicial consideration of Hindu marriages in South Africa has followed a similar line to that of Muslim marriage,<sup>55</sup> although the specific issue of the duty of maintenance in such marriages has not yet been canvassed.

Although we could locate no Namibian cases on the duty of support between husband and wife in such religious “marriages”, it is likely that the law would develop similarly in Namibia as in South Africa given the two countries’ similar constitutional regimes as well as the similarity of the respective Maintenance Acts. However, the very fact that this question would arise only amongst tiny religious minorities in Namibia means that jurisprudential development could be extremely slow to materialise. **Therefore we recommend that the Maintenance Act be amended to place marriages concluded in accordance with generally-recognised religions on the same footing as civil and customary marriages for purposes of the mutual duty of support of spouses.** In this regard, it should be noted that there are already several Namibian statutes which define spouse or marriage or related terms to include a partner in an unregistered “marriage” which is recognised under a particular religion.<sup>56</sup>

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a spouse “to a marriage concluded in accordance with the tenets of Islamic personal law”. At para 28. The Court’s interpretation of Rule 43 also affords a Muslim spouse the right to apply for a maintenance order “even if the validity or lawfulness of such marriage is placed in dispute”. At para 14.

In *AM v RM* [2009] ZACPEHC 31 (29 May 2009) an Islamic marriage was recognised to allow a wife to seek maintenance from her husband under Rule 43 where the defendant purported to have ended the marriage by way of *talaq* (the procedure for divorce under Islamic law). The High Court held that where a separate court case to determine the current status of the marriage is pending, the defendant must pay maintenance until such time as the marriage is declared by that Court to have expired. For that purpose, “it does not matter whether or not the parties were divorced in accordance with Muslim rites or not.” At para 10. Therefore the wife was allowed to obtain the relief she sought under Rule 43 as a spouse in an Islamic marriage. In reaching this decision, the Court referred to the unreported case of *Jamalodeen v Moola* (referenced at para 18 at NPJ, unreported case number 1835/06) in which an interim maintenance order in terms of Rule 43 was granted to a claimant who had been married under Islamic law and divorced in accordance with Islamic rites, pending a decision by the trial court as to her entitlement to maintenance.

<sup>52</sup> *Daniels v Campbell NO and Others* 2004 (5) SA 331 (CC).

<sup>53</sup> At para 376.

<sup>54</sup> *Hassam v Jacobs NO and Others* 2009 (5) SA 572 (CC). In discussing the failure of the Intestate Succession Act to afford benefits to widows of polygamous Muslim marriages, the Court noted: “By discriminating against women in polygamous Muslim marriages on the grounds of religion, gender and marital status, the Act clearly reinforces a pattern of stereotyping and patriarchal practices that relegates women in these marriages to being unworthy of protection ... by so discriminating against those women, the provisions in the Act conflict with the principle of gender equality which the Constitution strives to achieve. That cannot, and ought not, be countenanced in a society based on democratic values, social justice and fundamental human rights.” At para 37.

<sup>55</sup> A claim for a broad recognition of Hindu marriages failed in the 2007 case of *Singh v Ramparsad* 2007 (3) SA 445 (D), where the wife sought an order recognising the marriage under the Marriage Act 25 of 1961 and the Divorce Act 70 of 1979. The court noted that the couple had the option to register their marriage under the South African Marriage Act, either after the celebration of the Hindu rites and rituals or by having a civil marriage performed by a marriage officer in tandem with the Hindu rites. Furthermore, the Court was not prepared to become involved in religious matters by pronouncing a divorce from a marriage where the parties took religious vows which did not countenance divorce. Because the Marriage Act “provides a compromise which permits parties to marry according to the tenets of their religion and obtain secular recognition through the process of registration”, the Court found that there was no violation of the plaintiff’s dignity or equality rights. However, despite this refusal to give general recognition to an unregistered Hindu marriage, in *Govender v Ragavayah NO and Others* 2009 (3) SA 178 (D), the same court ruled that an unregistered Hindu marriage falls within the meaning of “spouse” in the Intestate Succession Act 81 of 1987, even though such marriages are not generally valid in law.

<sup>56</sup> The Pension Funds Act 24 of 1956 in section 1 defines “dependant” in relation to a member of the fund to include certain persons not legally liable to maintenance from the fund member, including “the spouse of the member, including a party to a customary union according to Black law and custom or to a union recognized as a marriage under the tenets of any

## Cohabitation and maintenance

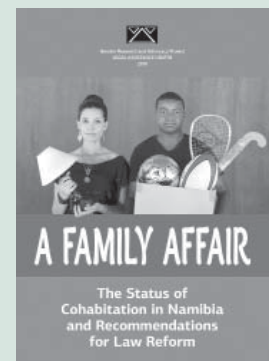
Cohabitation refers to people who are living together as husband and wife without being formally married. This is a type of intimate relationship which is relevant to significant numbers of Namibians. While it is difficult to gauge the precise prevalence of cohabitation relationships in Namibia, the practice is certainly common. National surveys indicate that at least one-fifth of Namibians in the prime of their adulthood are living together without being formally married, and this is likely to be an underestimate. The lowest figure of all the national surveys considered comes from the 2001 census, which found that 7% of the population age 15 and over was living together informally; in the 2011 census, this figure was 8%. Other surveys have produced much higher figures. Even if the relatively low estimates from the censuses are correct, this means that over 107 000 adults in Namibia were cohabiting at the time of the most recent census.

The current Namibian law on cohabitation is based primarily on common law principles. In terms of the common law, there is no legal duty of support between cohabitants either during the relationship or when it ends.<sup>a</sup>

In 2010 the Legal Assistance Centre released a study on the status of cohabitation in Namibia. The purpose of the report was to gauge public opinion on the need for law reform and to make recommendations for legislative change.

One of the report's recommendations is that certain automatic protections should apply to couples who have lived together for at least 2 years (or couples who have lived together for a shorter time period but fulfil specified criteria) – with one of these protections being a mutual duty of support during the relationship and a limited right to maintenance after the relationship ends, where this is necessary to compensate for some economic disadvantage suffered by one partner as a result of the relationship.

However, **as the law now stands, cohabiting partners have no legal liability to maintain each other and thus cannot make use of the Maintenance Act (unless they conclude a contract between themselves in respect of maintenance).**



<sup>a</sup> See, for example, *Volks NO v Robinson and Others* 2005 (5) BCLR 446 (CC), dictum in paras 54-55, applied in *McDonald v Young* 2012 (3) SA 1 (SCA).

For more information see *A Family Affair – The Status of Cohabitation in Namibia and Recommendations for Law Reform*, Windhoek: Legal Assistance Centre, 2010.

## Duty of maintenance between other family members

There is also a mutual duty of support between certain blood relatives, starting with the family members who are closest to each other.

The mutual duty of support that exists between parents and children can extend to other living ancestors and descendants. But this applies only if the parents or children cannot fulfil their duty of maintenance for some reason. For example, if a child's parents are deceased or unable to maintain the child, the duty of support next passes to the grandparents (both paternal and maternal grandparents),

*Asiatic religion*". The Combating of Domestic Violence Act 4 of 2003 states in section 3(1): "For the purposes of this Act a person is in a "domestic relationship" with another person if ... (a) they are or were married to each other, including a marriage according to they are or were married to each other, including a marriage according to they are or were married to each other, including a marriage according to any law, custom or religion ...". The Children's Status Act 6 of 2006 in section 1 defines "marriage" very broadly to include "a marriage in terms of any law of Namibia and includes a marriage recognised as such in terms of any tradition, custom or religion of Namibia and any marriage in terms of the law of any country, other than Namibia, which marriage is recognised as a marriage by the laws of Namibia". The Labour Act 11 of 2007 in section 1 defines "spouse" as meaning "a partner in a civil marriage or a customary law union or other union recognised as a marriage in terms of any religion or custom".

then to the great-grandparents and so on. In the same way, the child's duty to support his or her parents would pass next to grandchildren, then great-grandchildren and so on.<sup>57</sup>

In the past, the common-law rules made a distinction between children born inside and outside marriage on this point: only the maternal grandparents had a duty to maintain a child born outside of marriage; the father's duty to maintain a child born outside marriage did not pass to the paternal grandparents. Furthermore, the reciprocal duty of support on the part of children born outside of marriage applied only to their blood relations on the mother's side.<sup>58</sup> This situation was changed by the Children's Status Act 6 of 2006, which has as one of its objectives "*to ensure that no child suffers any discrimination or disadvantage because of the marital status of his or her parents*".<sup>59</sup> More specifically, this Act states that despite anything to the contrary contained in any law, no distinction may be made between persons born inside and outside "*in respect of the legal duty to maintain a child or any other person*".<sup>60</sup> This means that the duty of support in respect of children born outside marriage applies reciprocally to family members on both the mother's side and the father's side of the family, in the same way as for children born inside marriage.

The duty of support can also extend to other blood relatives. For example, if the parents cannot provide maintenance, brothers and sisters (and half-brothers and half-sisters) also have a duty to maintain each other – but their duty is not as strong as that of parents and grandparents. For example, in a case where a parent might be expected to provide for university education for a child, this level of maintenance might not be expected from a brother or sister. The duty to provide maintenance spreads outward in the family. Nearer blood relatives are expected to help if they can, before the duty passes on to more distant blood relatives.<sup>61</sup> For example, a brother would be expected to help before the duty of support would pass to a half-brother. However, the common law duty of support amongst collateral relatives does not extend to uncles/aunts and nieces/nephews.<sup>62</sup>

**In terms of the common law, the duty of support between parents and children does not extend to family members who are related only by marriage.**<sup>63</sup> This means that there is no duty of maintenance on step-parents, although where a couple are married in community of property, their joint estate is liable for the maintenance of a biological child of either of them.<sup>64</sup>

The customary law in different communities may apply different rules about the duty of support between extended family members which could be the basis for a legal liability to maintain. However the Maintenance Act overrules any customary law which is inconsistent with its basic principles regarding the duty of support.<sup>65</sup>

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<sup>57</sup> *Boberg's Law of Persons and the Family, Second Edition*, Kenwyn, South Africa: Juta & Co, 1999 at 252-253.

<sup>58</sup> *Motan and Another v Joosub* 1930 AD 61.

<sup>59</sup> Children's Status Act 6 of 2003, section 2.

<sup>60</sup> *Id*, section 17(1). In South Africa, the common-law distinction in respect of children born outside marriage was found to constitute an unjustifiable form of unfair discrimination on the ground of birth and an unjustifiable infringement of the dignity of such children, as well as being clearly contrary to the best interests of extra-marital children. *Petersen v Maintenance Officer, Simon's Town Maintenance Court, and Others* 2004 (2) SA 56 (C).

<sup>61</sup> *Boberg's Law of Persons and the Family, Second Edition*, Kenwyn, South Africa: Juta & Co, 1999 at 253.

<sup>62</sup> Schäfer, *Family Law Service, Issue 34*, Cape Town: Butterworth Publishers (Pty) Ltd, 2000, "Division C- Maintenance", section C17, citing *Vaughan v SA National Trust and Assurance Co* 1954 (3) SA 667 (C) at 671.

<sup>63</sup> *Boberg's Law of Persons and the Family, Second Edition*, Kenwyn, South Africa: Juta & Co, 1999 at 253-254.

<sup>64</sup> Schäfer, *Family Law Service, Issue 34*, Cape Town: Butterworth Publishers (Pty) Ltd, 2000, "Division C- Maintenance", section C16. See *Stepfamilies in Namibia: A Study of the Situation of Stepparents and Stepchildren and Recommendations for Law Reform*, Windhoek: Legal Assistance Centre (LAC), 2011, for a discussion of whether stepparents should be liable to pay maintenance. The recent case of *MB v NB* 2010 (3) SA 220 (GSJ) placed a liability on a stepparent to provide a limited degree of maintenance (in the form of contributions to school fees) based on the stepfather's treatment of the stepson as his own, including participation in the step-son's assumption of his surname, and his promise to share in the costs of this schooling. However, the Court did not equate recognise the relationship as being a "*de facto adoption*" (see para 22-27), nor did it find a "*general duty to support*" (at para 28). See also *Flynn v Farr NO and Others* 2009 (1) SA 584 (C), which refused to find a *de facto* adoption for purposes of inheritance by a stepson.

<sup>65</sup> Maintenance Act 9 of 2003, sections 3(1)(c), 3(2), 3(4)



*"As far as other relatives are concerned ... an indigent person, if there are no ascendants or descendants who can provide support, can also claim support from his brothers and sisters, including half-brothers and half-sisters. There is, however, no duty of support between more remote blood relations in the collateral line or between relations by affinity such as stepfather and stepchild or father-in-law and son-in-law."*

*S v Koyoka* 1991 NR 369 (HC)

## Maintenance of persons with infirmities or disabilities

A legal duty to maintain persons with infirmities or disabilities applies at any age, because such persons may not ever be able to become self-supporting.<sup>66</sup>

When determining whether a maintenance order for a person with disabilities should be made, the Maintenance Act 9 of 2003 requires that the court take into account the following factors:

- the extent of the disability;
- the life expectancy of the beneficiary;
- the period for which the beneficiary is likely to require maintenance; and
- the costs of medical and other care resulting from the disability.<sup>67</sup>

When the 2003 Act was being developed, the LAC recommended that the wording in point (d) should be clarified to read *"the costs of medical care and equipment, medication or services incurred by the beneficiary as a result of the disability"*. **We recommend that the law be revised to indicate that "other care" can include medical care and equipment, medication or services incurred in addition to other items.**

## Factors to be considered when making maintenance orders

The Maintenance Act 9 of 2003 states that the maintenance court will consider the following criteria when considering any application for a maintenance order:<sup>68</sup>

- the current and future lifestyle, income and earning capacity of the relevant persons;<sup>69</sup>
- the current and future property and resources of the relevant persons;
- the current and future responsibilities and financial needs of the relevant persons; and
- whether the defendant has delayed the process.

If the beneficiary is a child, the court will also take into account the following factors:<sup>70</sup>

- the financial, educational and developmental needs of the child, including but not limited to housing, water, electricity, food, clothing, transport, toiletries, child care services, education (including pre-school education) and medical services;
- the age of the child;
- the manner in which the child is, or the parents should reasonably expect, the child to be educated or trained;
- any special needs of the child, including but not limited to needs arising from a disability or other special condition;

<sup>66</sup> *Boberg's Law of Persons and the Family, Second Edition*, Kenwyn, South Africa: Juta & Co, 1999 at 253-257, citing *Kemp v Kemp* 1958 (2) SA 736 (D) at 737. See also *In re Knoop* (1983) 10 SC 198 at 199, and *Hoffmann v Herdan NO and Another* 1982 (2) SA 274 (T), where a major child unable to support herself due to ill health was allowed to make a claim for maintenance from her deceased father's estate.

<sup>67</sup> Maintenance Act 9 of 2003, section 16(4).

<sup>68</sup> *Id*, section 16(2).

<sup>69</sup> A relevant person includes the defendant, beneficiary and any person other than the defendant who is liable to maintain the beneficiary. *Id*, section 16(1).

<sup>70</sup> *Id*, section 16(3).



- direct and indirect costs incurred by the complainant in providing care for the beneficiary, including the income and earning capacity foregone by the complainant in providing that care; and
- the value of labour expended by the complainant in the daily care of the child.

The Act states that the duty to maintain a child takes priority over all financial commitments, except for financial commitments which are necessary to the parent's ability to support himself or herself or other dependants.<sup>71</sup> The Act does not make a similar statement for the duty of maintenance between husband and wife, or between child and parent.

## 4.2 Administration of the Act

All magistrates' courts (excluding regional magistrates' courts) operate as maintenance courts.<sup>72</sup>

The administrative functions of a maintenance court are supposed to be carried out by maintenance officers and maintenance investigators. The Act states that the Minister of Justice (or any staff member delegated by the Minister) may appoint persons to these positions, and the Minister is required to take all reasonable steps within the available resources of the Ministry of Justice to appoint at least one maintenance investigator for each maintenance court.<sup>73</sup> The Prosecutor-General may also appoint a maintenance officer to conduct prosecutions on behalf of the state in criminal proceedings that arise from the Maintenance Act. Any prosecutor authorised to conduct prosecutions in a magistrate's court is automatically a maintenance officer for the relevant maintenance court.<sup>74</sup>

The function of a **maintenance officer** is to investigate maintenance complaints and institute enquiries, or if there is an order in place, investigate the existence of new circumstances since the date of the order, including any reports of the misuse of maintenance funds.<sup>75</sup> A maintenance investigation may include gathering information about the identity, whereabouts and financial position of the defendant, as well as any other relevant information pertaining to the defendant. The maintenance officer may also request any person, including the defendant or complainant, to give information or produce any document or other relevant item. The maintenance officer may also request a maintenance officer from another court to obtain information relevant to the complaint or require a maintenance investigator to assist with the case.<sup>76</sup>

The function of a **maintenance investigator** is to locate the whereabouts of a person required to attend a maintenance enquiry or criminal trial held in terms of the Act; to serve court orders (a function that may also be carried out by the messenger of the court if there is no maintenance investigator<sup>77</sup>); to trace and evaluate assets of people involved in maintenance applications; and to perform other duties as specified by the court.<sup>78</sup> The Act further stipulates that, acting under the direction and control of the maintenance officer, a maintenance investigator must serve or execute the process of any maintenance court, serve summonses in respect of criminal proceedings pertaining to the Act and take sworn statements relevant to a case.<sup>79</sup>

Both maintenance officers and maintenance investigators have very wide powers of investigation. For example, both can contact employers to get information about wages. Both can contact banks to

<sup>71</sup> Id, section 4(1)(e).

<sup>72</sup> Id, section 6.

<sup>73</sup> Id, sections 7(1), 8(1) and 8(4).

<sup>74</sup> Id, section 7(2-3).

<sup>75</sup> Id, section 9(4). The misuse of maintenance funds is the failure, without reasonable or lawful excuse to use any maintenance payment for the benefit of the beneficiary. Section 9 (5).

<sup>76</sup> Id, section 10(1).

<sup>77</sup> Id, section 8(5).

<sup>78</sup> Id, section 8(2).

<sup>79</sup> Id, section 10(2).

get information about assets. The idea behind having a dedicated maintenance investigator is that this person will have more time for collecting information, without having to attend to other responsibilities at the same time.

### Successes of maintenance investigators in South Africa

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

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*All the maintenance officers who participated in this survey seek the assistance of a maintenance investigator on a daily basis ... Furthermore, all maintenance officers agree that the maintenance investigators contribute to their success. Maintenance investigators were particularly helpful in tracing defendants and serving subpoenas. Maintenance investigators were also helpful in gathering information concerning the financial position of maintenance defaulters and attaching emoluments and pension funds. It is therefore not surprising that 74.3 per cent of the participating maintenance officers concluded that the appointment of more maintenance investigators to their courts would make the recovery of maintenance and the enforcement of maintenance orders more effective."*

Madelene de Jong, "Ten-year Anniversary of the Maintenance Act 99 of 1998 – A time to reflect on improvements, shortcomings and the way forward", 126 (3) *South African Law Journal* 590 (2009) at 601 and 605-606, reporting on a survey of maintenance officials in courts across the country to assess the practical effect of the South African Act

The function of the **clerk of the court** is to register all maintenance orders.<sup>80</sup> While this sounds like a straightforward administrative task, as our field research shows, clerks sometimes play an unauthorised screening function by refusing to register complaints in some cases – particularly where the absence of dedicated maintenance personnel mean that investigation of the case is unlikely to be practically possible.<sup>81</sup>

The broad functions assigned to these court officials illustrate the high degree of official participation expected when investigating maintenance complaints. This is appropriate since maintenance claims normally involve children in need, and because complainants seeking maintenance are usually unable to afford legal representation.

However, practice has not kept pace with promise. Almost ten years after the enactment of the Maintenance Act, there is not a single maintenance investigator in Namibia.<sup>82</sup> Due to the large volume of maintenance applications in Windhoek, this magistrate's court has a magistrate designated to hear only maintenance cases and maintenance officers with no duties other than dealing with maintenance cases; but in other parts of the country, prosecutors double as maintenance officers and the same magistrates who handle other cases preside over maintenance enquiries.

The absence of dedicated personnel means that maintenance cases often do not receive the attention which they warrant.<sup>83</sup> The lack of maintenance investigators was questioned in Parliament in 2008; in response, the Deputy Minister of Justice claimed that "*practice has thus far not required or necessitated the appointment of fulltime maintenance investigators provided for in subsection 4*

<sup>80</sup> Id, section 27.

<sup>81</sup> See chapter 7, section 7.5.

<sup>82</sup> Personal communication, Ministry of Justice, August 2013.

<sup>83</sup> See chapter 7, section 7.5.

of the Act”.<sup>84</sup> We recommend that the Ministry of Justice re-assess this conclusion in light of the information provided in this study, and consider the appointment of maintenance investigators, particularly in the busiest courts.

## CASE STUDY

### The importance of proper investigation

*The case discussed below illustrates how shortfalls in the current administration of the [South African] Maintenance Act could have been circumvented if more women were given the opportunity to relate their experiences with maintenance claims. A holistic analysis of a basic issue such as maintenance reinforces the emptiness of ‘equality’ for women when it is hampered by the lack of appropriate budget allocations and does not take into account women’s experiences ...*

*The case of Mgumane v Setemane 1998 (2) SA 247 (Tk D), illustrates the effects of the breakdown between law reform, implementation and administration of the law that could be avoided if consultation was actively promoted. Here maintenance was claimed for five children by an unrepresented mother, married under customary law. In an appeal from an order of magistrate it was found that the magistrate and the maintenance officer should have conducted a thorough enquiry to establish the financial circumstances of both parties and the validity of the mother’s maintenance claim and her personal expenses. In particular, evidence should have been heard for her reason for claiming the same amount of maintenance in regard to the two children who were not at the time living with her, as for the other children. The father, who was a businessman, alleged that he did not earn sufficient income to meet the maintenance claim. His evidence should not have been accepted. Instead the magistrate and maintenance officer should have inquired into and if necessary, subpoenaed witnesses to establish the true income from his various business ventures. The responsibility of placing evidence before the court was not only that of the parties concerned but was shared by the maintenance officer and the presiding judicial officer. The court further held that where the facts demonstrate this to be possible, a parent should be required to expand his or her economic activities in order to meet the needs of dependent children and that parent’s inability to pay maintenance should be real and not apparent.*

*In this case a decision on inability to pay could not be taken as there had been a failure to adequately enquire into the income of the father or to summon witnesses to give evidence on income as was possible in terms of the Act. The court therefore referred the matter back to the magistrates court for a fresh hearing, and ordered the father to pay R500 per month towards the maintenance of the five children pending the finalisation of the fresh enquiry. Despite clear provisions in the law, the officers entrusted with administering the law failed to do so in this case (and in many others) simply because time, lack of staff or adequate incentives, do not motivate them to conduct thorough investigations for each maintenance enquiry.*

*Recognising these factors, women’s groups emphasised the importance of the appointment of maintenance investigators and it was included in the Maintenance Act [99] of 1998. This case highlights some of the inadequate maintenance enforcement mechanisms that the new Maintenance Act intends to remedy. A maintenance investigator would have gathered the facts and necessary financial evidence to provide the court with the necessary information in this case, thereby ensuring the expeditious finalisation of the maintenance claim.*

*However, despite cases such as these clogging up the justice system and resulting in untold prejudice to users of the relevant laws, our government has still not taken steps to ensure the implementation of section 15 of the Maintenance Act [99] of 1998 that provides for the appointment of maintenance investigators. Apparently due to budgetary constraints, this portion of the Act has yet to be implemented. Once again we see how ‘equal laws’ do not necessarily improve the lives of disadvantaged women, unless accompanied by a commitment of resources such as a budget, that will ensure effective use of the law by women ...*

Sharita Samuel, “Achieving Equality – how far have women come?” *Agenda*, Issue 47, 2001 at 26-27

<sup>84</sup> Question 3 put by Hon Dienda, National Assembly, 5 June 2008 and reply of Hon Deputy Minister of Justice (Mr U Nujoma), National Assembly, 12 June 2008.

## 4.3 Procedure for claiming maintenance

### 4.3.1 Maintenance complaints

A person seeking maintenance makes a complaint to the maintenance officer. The party is then referred to as the complainant. The definition of complainant in the Maintenance Act includes the beneficiary.<sup>85</sup> This means that persons, including children, can apply for maintenance for themselves. An initial maintenance complaint may be made at the court in the area where the complainant or beneficiary resides.<sup>86</sup> The person making an initial complaint must confirm under oath or affirmation that the person against whom the complaint is made is legally liable to maintain the beneficiary but is failing to do so.<sup>87</sup>

Where a maintenance order is already in place, a maintenance complaint concerning it can be made by a complainant, beneficiary, defendant or any other person affected by the order.<sup>88</sup> Such a complaint must be made at the court where the existing order is registered.<sup>89</sup> Where a maintenance order is already in force, the complaint must allege that there is sufficient cause for the substitution, suspension, or discharge of the existing order.<sup>90</sup>

### 4.3.2 Investigation by maintenance officer

Once a maintenance complaint has been made, the maintenance officer is empowered to direct the complainant and defendant to appear before him or her for investigation. The maintenance officer may also direct any other person with relevant information to appear before him or her – such as someone who has information relating to the defendant’s financial position or earnings. Directives to appear for purposes of the investigation by the maintenance officer are covered by section 10(1) (a) of the Act, which states:

*When investigating any complaint relating to maintenance, a maintenance officer may cause any person, including the defendant or complainant, to be directed to appear before that maintenance officer and to give information or produce any book, document, statement or other relevant information.*<sup>91</sup>

Although the Act states that the maintenance officer may “cause” a person to be directed to appear, the regulations indicate that the maintenance officer is empowered to issue this directive personally.<sup>92</sup> Further confusion appears from the form which is to be used for such a directive; it is labelled “DIRECTIVE IN TERMS OF 10(1)(a) OF THE MAINTENANCE ACT”, but the text addressed to the recipient states: “You are hereby **summoned** to appear in person before the maintenance officer ...”.<sup>93</sup> It is

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<sup>85</sup> Maintenance Act 9 of 2003, section 1.

<sup>86</sup> Id, section 9(1).

<sup>87</sup> Id, section 9(2)(a). An original application for maintenance must be made on Form A. Regulations for the Maintenance Act contained in Government Notice 233 of 2003 of 17 November 2003, *Government Gazette* 3093 (hereinafter “Maintenance Regulations”), regulation 2.

<sup>88</sup> Maintenance Act 9 of 2003, section 9(3).

<sup>89</sup> Id, section 9(1).

<sup>90</sup> Id, section 9(2)(b). An application relating to an existing maintenance order must be made on Form B. Maintenance Regulations, regulation 2.

<sup>91</sup> Maintenance Act 9 of 2003, section 10(1)(a). The Maintenance Regulations provide that Form C1A should be used for this purpose (regulation 3(1)). The regulations also make it an offence for any person to fail to comply with a direction issued by the maintenance officer, punishable by a fine not exceeding N\$2000 or to imprisonment for a period not exceeding six months (regulation 3(3)).

<sup>92</sup> Regulation 3(1) states: “The directive which a maintenance officer may issue under section 10(1) of the Act must be in a form corresponding substantially to Form C1A of the Annexure.”

<sup>93</sup> Form C1A appended to the Maintenance Regulations, emphasis added.

not clear how this directive is supposed to be communicated to the person who is directed to appear, ie by service of process or some other procedure.<sup>94</sup>

There is an overlap between this provision and section 11(1), which states:

*A magistrate may, before or during a maintenance enquiry and at the request of a maintenance officer, require the summoning and appearance before him or her or before another magistrate, for examination by the maintenance officer, of any person who is likely to give relevant information concerning –*

- (a) the identification or the place of residence or employment of any person who is legally liable to maintain any other person or who is allegedly so liable; or*
- (b) the financial position of the person referred to in paragraph (a).<sup>95</sup>*

The form designed for use in connection with this provision includes a space to write the “date of enquiry”, but it also allows for the option of summoning the recipient “to appear in person before the above-mentioned court or maintenance officer of the abovementioned court” on the stated date, and “to be examined by the maintenance officer in terms of section 11 of the Act or to give evidence at an enquiry, in terms of section 12 of the Act”.<sup>96</sup> Thus, a summons under section 11 can apparently be used for the purposes of summoning someone to appear before the maintenance officer or to appear before the magistrate at an enquiry.<sup>97</sup>

The summons is clearly designed to be served in accordance with the provisions on service of process,<sup>98</sup> and it contains a return of service.<sup>99</sup> The summons, unlike the directive which can be issued by the maintenance officer, contains a space for the defendant to provide information about his or her financial position and assets.<sup>100</sup>

If the information required of the defendant or any other person who is summoned is provided to the satisfaction of the maintenance officer before the day on which the person in question is required to appear, that person can be excused from appearing at court.<sup>101</sup> The examination of any of these persons may be conducted in private at a place designated by the magistrate.<sup>102</sup>

Despite the areas of confusion in the Act, there are some clear differences between a summons and a directive. A directive can be issued by a maintenance officer, while a summons can be issued only by a magistrate. Failure to obey either a directive or a summons is a criminal offence, but the punishment differs; the punishment for ignoring a directive is a fine of up to N\$2 000 or imprisonment for up to six months, while the punishment for ignoring a summons is a fine of up to N\$4 000 or imprisonment for up to 12 months.<sup>103</sup> The complainant and the defendant are somewhat peculiarly exempted from the criminal offence of failing to comply with a summons to attend a maintenance

<sup>94</sup> Regulation 28 covers service of process generally, but neither section 10 nor regulation 2 refers to “service” of a directive from the maintenance officer.

<sup>95</sup> Maintenance Act 9 of 2003, section 11(1), emphasis added. The regulations states that the Form CI should be used to summon the defendant and complainant and Form C11 to summon witnesses. The defendant should complete part B of Form C1 (assets of the opposing party). Part C of Form C1 is a return of service.

<sup>96</sup> Form C1 (for defendant and complainant). Form C11 (for witnesses) contains the same options.

<sup>97</sup> Maintenance Act 9 of 2003, sections 10(1)(a) (“When investigating any complaint relating to maintenance, a maintenance officer may cause any person, including the defendant or complainant, to be directed to appear before that maintenance officer and to give information or produce any book, document, statement or other relevant information.”) and 11(1) (“A magistrate may, before or during a maintenance enquiry and at the request of a maintenance officer, require the summoning and appearance before him or her or before another magistrate, for examination by the maintenance officer, of any person who is likely to give relevant information ...”).

<sup>98</sup> Maintenance Regulations, regulation 28.

<sup>99</sup> Form C1, Part C-Return of service. Form C11 (for witnesses other than the complainant or defendant) also contains Part B-Return of service.

<sup>100</sup> Form C1, Part B-Particulars regarding assets, income and expenditure of opposing party.

<sup>101</sup> Maintenance Act 9 of 2003, section 11(3).

<sup>102</sup> Id, section 11(4).

<sup>103</sup> Maintenance Regulations, regulation 3(3); Maintenance Act, section 36(1).



enquiry, but not from the criminal offence of failing to comply with a directive to appear before a maintenance officer.<sup>104</sup>

The relevant provisions of the Criminal Procedure Act 51 of 1977 apply to anyone who is *summoned* under section 11 for the purposes of investigation by a maintenance officer<sup>105</sup> – but apparently not to someone who is *directed* to appear before a maintenance officer.<sup>106</sup> One such provision which may be of particular relevance in some cases is section 181 of the Criminal Procedure Act 51 of 1977 which covers pre-payment of witness expenses where a witness is served with a summons outside the magisterial district from which the summons was issued; if the witness is required to travel to the magistrate’s court which issued the summons, the witness can demand payments at the time of service of “*the necessary expenses to travel to and from such court and of sojourn at the court in question*”.<sup>107</sup> Even if pre-payment of such expenses is not applicable, a person summoned to appear before the maintenance officer is entitled to the prescribed witness allowances which apply in criminal cases.<sup>108</sup> The persons eligible for these payments would include the complainant and the defendant. The Maintenance Act states that a defendant who is summoned to attend *an enquiry* is not eligible for pre-paid expenses or witness allowances unless the court specifically orders this,<sup>109</sup> but this exception does *not* appear to apply where a defendant is summoned to appear before a maintenance officer *as part of an investigation which takes place before an enquiry*.<sup>110</sup>

Where the defendant is summoned to appear before the maintenance officer or the court in terms of section 11, the summons is supposed to be accompanied by a form on which the defendant can give written consent to the proposed maintenance order if he or she chooses not to oppose it.<sup>111</sup> There is no provision for including this form with a directive issued by the maintenance officer in terms of section 10(1).

Summary of differences between directives and summonses	
Directive (section 10)	Summons (section 11)
issued by maintenance officer	issued by magistrate
method of communication not clear	formal service of process
can direct appearance before maintenance officer	can direct appearance for examination by maintenance officer or to give evidence in court
penalty for non-compliance	stiffer penalty for non-compliance
no exemption for complainant and defendant from criminal offence of failing to comply with directive to appear before a maintenance officer	complainant and defendant exempted from the criminal offence of failing to comply with a summons to attend a maintenance enquiry
no provision for providing information by some other means	appearance can be excused if information provided in advance
no reference to Criminal Procedure Act 51 of 1977; travel expenses may not be claimed	selected provisions of Criminal Procedure Act 51 of 1977 apply, including provision on travel expenses
no mechanism for consenting to requested maintenance	mechanism for consenting to requested maintenance

<sup>104</sup> Id, section 36(2).

<sup>105</sup> Id, section 11(2).

<sup>106</sup> Section 11(2) applies only where someone has been examined pursuant to section 11 – which deals with summonses. A directive to appear for questioning is covered by section 10.

<sup>107</sup> Criminal Procedure Act 51 of 1977, section 181.

<sup>108</sup> Id, section 191.

<sup>109</sup> Maintenance Act 9 of 2003, section 12(5)-(7).

<sup>110</sup> Id, section 11(2).

<sup>111</sup> Maintenance Regulations, regulation 4(5).

No provisions specific to evidence at investigations were contained in the 1963 Maintenance Act; these provisions were apparently included in the 2003 Maintenance Act as a means to help the court trace respondents whose whereabouts are unknown and to ascertain better information about defendants' finances.

The use of directives and summonses in practice is discussed in chapter 9. In brief, summonses are utilised much more frequently than directives – although we were not able to determine which avenue is more-often utilised for pre-enquiry investigations.

**We recommend that the Act and the regulations be clarified on the procedure for directing persons to attend court for the purpose of an investigation by the maintenance officer in advance of the enquiry.** In particular, the forms and procedures for the use of directives (in contrast to summonses) need to be clarified. **The distinctions between directives and summonses also need to be re-examined, to provide more clarity on the intended functions of these two methods of obtaining information during investigations which take place prior to an enquiry.**

**Furthermore, the rules on the payment of witness expenses in connection with summonses should be re-examined** – particularly the fact that the Act provides for automatic pre-paid travel expenditures for defendants who are summoned from outside the relevant magisterial district for pre-enquiry investigation as well as automatic witness allowances for all defendants summoned for pre-enquiry investigation – while providing for allowances for defendants only by order of court in respect of the enquiry itself.

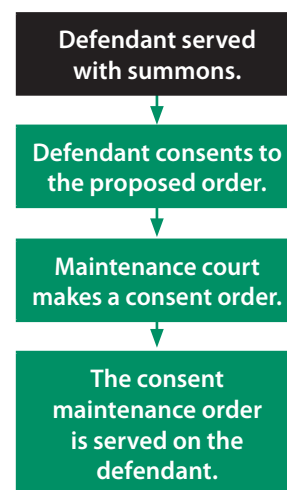
### 4.3.3 Consent orders – a speedy resolution to maintenance complaints

The normal practice in maintenance courts in Namibia is to bring the parties together to see whether it is possible to negotiate an agreement without a formal hearing before a magistrate. If the parties reach an agreement, the terms are made into a consent maintenance order which, when signed by the magistrate, has the same force as any other type of maintenance order.

The defendant does not even have to attend court if he or she accepts the proposed content of a maintenance order. The defendant is informed of a maintenance complaint by means of a summons which includes details of the proposed maintenance order,<sup>112</sup> and the defendant may return a section of this form to indicate in writing that he or she is in agreement with the proposed order.<sup>113</sup> In this case, on the date the defendant has been summoned to court, the maintenance court may make a consent order without considering any further evidence.<sup>114</sup> A copy of the consent order must be then served on the defendant, with proof of service constituting sufficient evidence that the defendant is aware of the terms of the order.<sup>115</sup>

In practice, however, it appears that most defendants attend court and discuss the content of the consent order before accepting its terms.<sup>116</sup>

**Chart 4:**  
**The process of making a consent maintenance order**



<sup>112</sup> This will be on Form G, which must accompany a summons to the defendant. Id, regulation 4(5).

<sup>113</sup> When the defendant chooses to consent, he or she should provide written consent to the maintenance officer using Part A of Form G. The defendant must do this on or before the date of the enquiry. Id, regulation 10.

<sup>114</sup> A consent maintenance order should be completed on Part B of Form G. Id, regulation 10.

<sup>115</sup> Maintenance Act 9 of 2003, section 18. The return of service showing that the copy of the consent order was served on the defendant should be Part C of Form G. Maintenance Regulations, regulation 10.

<sup>116</sup> Based on information from an informant previously employed as a maintenance clerk. This was also found to be the case in respect of unopposed protection orders. Legal Assistance Centre (LAC), *Seeking Safety: Domestic Violence in Namibia and the Combating of the Domestic Violence Act 4 of 2003*, Windhoek: LAC, 2012 at 473.

## 4.3.4 Procedure at maintenance enquiries

*“... the enquiry should be a full and proper one to enable the magistrate to arrive at an informed decision as to the needs of the children and the proportionate ability of the parents to contribute towards such needs.”*

*Mgumane v Setemane 1998 (2) SA 247 (Tk D)*

If a complainant and a defendant cannot agree on a consent order, the case will be considered by a magistrate at a hearing called a maintenance enquiry. A maintenance enquiry must be held in the presence of the defendant, or if held in the absence of the defendant, with proof that he or she was summoned to attend.<sup>117</sup>

### Privacy

There are two somewhat conflicting provisions in the Maintenance Act on the privacy of maintenance enquiries.

Section 13(9) of the Act states:

*(9) A person whose presence is not necessary must not be present at a maintenance enquiry, except where that person has been given permission to be present by the maintenance court.*<sup>118</sup>

This implies that the default position is for the enquiry to be held in closed court, unless the presiding officer has given permission for someone whose presence is not necessary to be present.

In contrast, section 13(10) states:

*(10) Where a maintenance court considers that it would be in the interests of justice or the interests of any persons who have an interest in the enquiry, it may direct that a maintenance enquiry be held in private at the maintenance court or at a place designated by the maintenance court.*<sup>119</sup>

This provision implies that the default position is for the enquiry to be held in open court, unless the presiding officer directs that it be held “*in private*” at the court or in some other more informal location.

In practice, it appears to be standard procedure for maintenance enquiries to be held in close court.<sup>120</sup> Nonetheless, **we recommend that the provisions on privacy be clarified to avoid potential confusion.**

### Summons

Witnesses, including the complainant and the defendant, are summoned for a maintenance enquiry in the same manner as for a criminal trial in a magistrate’s court.<sup>121</sup> The maintenance court may summon a witness at any time during the enquiry or examine any person who is present at the enquiry even if he or she has not been summoned as a witness. The court may also recall and re-examine any person already examined.<sup>122</sup> This flexibility gives the court considerable discretion, which is consistent with the relative informality of a maintenance enquiry.

<sup>117</sup> Maintenance Act 9 of 2003, section 13(2).

<sup>118</sup> Emphasis added.

<sup>119</sup> Emphasis added.

<sup>120</sup> Personal communication, Ministry of Justice, August 2013.

<sup>121</sup> Maintenance Act 9 of 2003, section 12(3). The Minister of Justice may also prescribe the manner in which the process of the maintenance court is prepared and served and prescribe the form of the summons used under this Act. Id, section 12(4). This has been done in the Maintenance Regulations, regulations 4 and 28.

<sup>122</sup> Id, section 12(6).

Section 181 of the Criminal Procedure Act 51 of 1977, which covers pre-payment of witness expenses where a witness is served with a summons outside the magisterial district from which the summons was issued, applies to summonses issued for maintenance enquiries; as noted above, this means that if a witness is required to travel to the magistrate's court which issued the summons, the witness can demand payments at the time of service of "*the necessary expenses to travel to and from such court and of sojourn at the court in question*".<sup>123</sup> In addition, any person summoned to appear before the maintenance officer is entitled to the prescribed witness allowances which apply in criminal cases.<sup>124</sup> The persons eligible for these payments would include the complainant and the defendant. However, the defendant is not eligible for pre-paid expenses or witness allowances unless the court specifically orders this.<sup>125</sup>

## Written evidence

The Maintenance Act also includes procedures for the use of written evidence to be submitted without accompanying oral evidence.<sup>126</sup> For example, this might be used to admit a written report on blood tests to prove paternity without accompanying oral evidence by the lab technician, or a written confirmation of wages or assets without accompanying oral evidence from the employer or bank.

If written evidence is submitted, the party submitting the evidence must serve it on the other party at least 14 days before the document is to be produced.<sup>127</sup> The other party has the opportunity to object to the submission of this evidence, provided that this objection is made at least seven days before the commencement of the enquiry.<sup>128</sup> If an objection is made, the written evidence may not be produced, although the person who made the statement may give oral evidence.<sup>129</sup> Even if the procedure for advance arrangements for the submission of written evidence has not been utilised, the party against whom the evidence is to be used may still give permission for its admission at the enquiry.<sup>130</sup>

As discussed in chapter 10, this procedure is seldom if ever used, so **we recommend that the procedure for submitting advance notice of written evidence to a party be abandoned in favour of a more practical alternative. Where a party would like to submit written evidence at a maintenance enquiry, the presiding officer should enquire as to whether the opposing party has any objections – and specifically whether that party would like a postponement in order to have the court summons the person making the written statement to give their information in person and be cross-examined.**

## Privilege

The general rules relating to privilege in civil proceedings apply to maintenance enquiries – including rules which protect spouses from being compelled to testify against each other.<sup>131</sup>

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<sup>123</sup> Maintenance Act 9 of 2003, sections 11(2) and 12 (5); Criminal Procedure Act 51 of 1977, section 181.

<sup>124</sup> Maintenance Act 9 of 2003, sections 12(6); Criminal Procedure Act 51 of 1977, section 191.

<sup>125</sup> Maintenance Act 9 of 2003, section 12(7).

<sup>126</sup> Maintenance Regulations, regulations 6 and 26(5); Maintenance Act 9 of 2003, section 14-15 (3).

<sup>127</sup> Maintenance Act 9 of 2003, section 14(2) and Maintenance Regulations, regulation 26(5). This should be done using Form D.

<sup>128</sup> Maintenance Act 9 of 2003, section 14(3).

<sup>129</sup> Id, section 14(4)(a).

<sup>130</sup> Id, section 14(5).

<sup>131</sup> Id, section 13(4). See also Namibian Constitution, Art 12(f): "*No persons shall be compelled to give testimony against themselves or their spouses, who shall include partners in a marriage by customary law ...*" and Civil Proceedings Evidence Act 25 of 1965, section 10: "*No husband shall be compelled to disclose any communication made to him by his wife during the marriage and no wife shall be compelled to disclose any communication made to her by her husband during the marriage.*"

## Inquisitorial approach

The Act stipulates that maintenance enquiries must be conducted in a manner that will ensure that substantial justice is achieved between the parties as well as with respect to the beneficiary of the maintenance claim.<sup>132</sup> This statement reinforces the idea that the presiding magistrate and the maintenance officer are both expected to play an active role in eliciting the relevant facts of the case, as under the previous statute.<sup>133</sup> Case law has also held that the maintenance court, with the assistance of the maintenance officer, has a responsibility to determine the amount of maintenance to which a child beneficiary is entitled, even if this entails action on the court's own initiative.<sup>134</sup>

### Procedure for maintenance enquiries

These excerpts describe the procedure under the Maintenance Act 23 of 1963, but the basic procedure for enquiries remains the same under the Maintenance Act 9 of 2003.

*"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, even 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 ... [T]he presiding officer will decide whether to make an order to pay maintenance or vary an existing order to pay maintenance. In doing so he will no doubt consider all the relevant factors ... in general he will look after the interests of children and see that justice is done between the parties in accordance with their means and ability to pay."*

*Buch v Buch* 1967 (3) SA 83 (T)

*"The proceedings ... 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. Often the interested parties ... are without legal representation. In the circumstances it is clearly the duty of the maintenance officer to ensure that a thorough investigation is carried out."*

*Perumal v Naidoo* 1975 (3) SA 901 (N)

*"... there is an obligation on the magistrate to conduct a thorough enquiry and not to play the role of an umpire."*

*Mgumane v Setemane* 1998 (2) SA 247 (Tk D)

*"A complaint on oath must be made to a maintenance officer alleging that a person legally liable to pay maintenance has failed to do so and the maintenance officer, after investigating the complaint, may institute an enquiry in a maintenance court having jurisdiction to deal with the matter. The person alleged to have a duty to maintain is summoned to appear before that court together with any other person who can give relevant evidence bearing on the matter. The maintenance court then holds an enquiry, witnesses give evidence under oath and a proper record is kept. The proceedings are inquisitorial in nature and it is the duty of the maintenance officer and the judicial officer who presides at the hearing to ensure that a proper enquiry is held. The presiding officer, in general, will endeavour to look after the interests of the children concerned and see that justice is done between the parties in accordance with their means and ability to pay. As may be seen from this summary, the procedure is relatively uncomplicated and based on common-sense."*

*Tsauseb v Geingos* 1995 NR 107 (HC)

<sup>132</sup> Maintenance Act 9 of 2003, section 13(3).

<sup>133</sup> In addition to the authorities quoted in the box on this page, see *Beukes v Beukes* 1995 (4) SA 429 (O). The case is reported in Afrikaans, but the headnote states the following: "Where an increase in maintenance is sought in an enquiry in terms of ... the Maintenance Act 23 of 1963, the presiding officer him/herself should play an active role. The responsibility of adducing evidence does not rest only on the parties but also on the maintenance officer and the presiding officer. That applies even where the parties have legal representation. Where important evidence is lacking (such as, in casu, evidence of the income and financial position of the party having the duty to pay maintenance), the presiding officer must ensure that that evidence is adduced."

<sup>134</sup> *Van Zyl v Steyn* 1976 (2) SA 108 (O).



## Role of maintenance officer in an enquiry

The maintenance officer is not expected to be impartial like the magistrate, but has a duty to assist the complainant to present his or her case. These excerpts describe the situation under the Maintenance Act 23 of 1963, but would be equally applicable to the similar situation under the Maintenance Act 9 of 2003.

*“When the parties are unrepresented ... the maintenance officer ... must really enquire into all relevant aspects of the case. Ordinarily laymen do not know how to conduct an enquiry of this nature. It therefore unfortunately becomes, where there is no legal representation, the duty of the maintenance officer to do the things normally done by legal representatives.”*

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

*“... 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 ...”*

*Nodala v The Magistrate, Umtata* 1992 (2) SA 696 (Tk)

## Unique nature of maintenance proceedings

A maintenance enquiry is not strictly a civil proceeding or a criminal proceeding; it has been described as a unique hybrid of these two categories of cases.<sup>135</sup> The Maintenance Act 9 of 2003 references both criminal and civil law in its enquiry procedures,<sup>136</sup> and maintenance orders are enforceable by both civil and criminal action.<sup>137</sup> However, it has been noted that a maintenance enquiry is more akin to civil proceedings than to criminal ones.<sup>138</sup>

*“An enquiry in terms ... of the Maintenance Act is neither a criminal trial nor a civil trial; the procedure is a hybrid of these two types of trials. 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 ... The enquiry in a maintenance court has been referred to as ‘a sui generis procedure’ and ‘not, strictly speaking, criminal proceedings’. It can therefore safely be said that the Maintenance Act creates a tribunal for the inexpensive adjudication of maintenance disputes by means of a sui generis procedure, which is more akin to procedure in the civil courts than in the criminal courts.”*

*Nodala v The Magistrate, Umtata* 1992 (2) SA 696 (Tk) at 699F-I, referring to the Maintenance Act 23 of 1963

## Legal representation

All parties to the proceedings have the right to legal representation. This provision is made clearer in the 2003 Act (“Any party to proceedings under this Act has the right to be represented by a legal practitioner”<sup>139</sup>) than in the 1963 Act (which stated that “any person against whom an order may be made under this section may be represented by counsel or an attorney” but was silent on the complainant’s right to legal representation<sup>140</sup>).

<sup>135</sup> *Nodala v The Magistrate, Umtata* 1992 (2) SA 696 (Tk).

<sup>136</sup> See, for example, sections 12(3) and 13(4).

<sup>137</sup> See sections 25 and 28, in comparison to section 39.

<sup>138</sup> See, eg, *Nodala v The Magistrate, Umtata* 1992 (2) SA 696 (Tk) and *Maguma v Ntengento* 1979 (4) SA 155 (C).

<sup>139</sup> Maintenance Act 9 of 2003, section 13(8).

<sup>140</sup> *Id.*, section 5(2).

However, although “*all parties*” have the right to legal representation, the law does not provide sufficient clarity of the right of a child to legal representation where the child is not a party to the case. Because maintenance disputes often pit parents against each other, it is possible that both sides may lose sight of the child’s best interest. **We recommend that the law should assign the maintenance officer a particular duty to place information about the child’s interests before the court, and to give the court discretion to order the parents to fund independent legal representation for the child (with the costs divided appropriately between them), or to order state-funded representation in cases where the child’s interests are not being well-represented in the case and no private legal representation for the child is feasible.**

An adult party to a maintenance enquiry who cannot 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. We were not able to find out how many people received legal aid in respect of maintenance cases since the 2003 Act came into force,<sup>141</sup> but the 1995 maintenance study reported that only three people received legal aid for maintenance enquiries between 1 April 1994 and 31 March 1995.<sup>142</sup>

## Evidence from previous proceedings

The maintenance court may take into consideration evidence produced in any previous proceedings concerning an existing maintenance order and accept the findings of fact from any such previous proceedings in the absence of evidence to the contrary.<sup>143</sup>

## Costs

Depending on the conduct and means of the defendant and complainant, the court can order the payment of costs for service of process or wasted time due to either party’s failure to attend an enquiry without a good reason.<sup>144</sup>

### 4.3.5 Disputes about parentage

The Maintenance Act allows for paternity tests, provided that the mother and the person alleged to be the father are prepared to voluntarily submit themselves – and the child – to the taking of samples for scientific tests (usually a DNA test). If the mother and the father, or both, are unable to pay the costs of such tests, the maintenance officer may ask the court to hold an enquiry into how to cover the costs of the test. This mini-enquiry can take place at any time during the underlying maintenance enquiry, before the court makes an order in respect of the application. During these proceedings, the maintenance court may enquire into the respective means of the parents, and any other circumstances which it believes may have a bearing on the allocation of the costs of the tests. At the end of the mini-enquiry, the court may make a provisional order directing the mother, father or both to pay all or part of the costs, or a provisional order directing the State to pay all or part of the costs. Then, “*when the maintenance court subsequently makes any maintenance order*”, it may confirm or set aside any provisional order made in respect of costs, or substitute a new order in respect of the costs of scientific testing.<sup>145</sup>

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<sup>141</sup> According to the Director of the Legal Aid Board, this information is not available.

<sup>142</sup> D Hubbard, *Maintenance: A study of the operation of Namibia’s Maintenance Courts*. Windhoek: Legal Assistance Centre, 1995 at 88.

<sup>143</sup> Maintenance Act 9 of 2003, section 15.

<sup>144</sup> Id, section 20.

<sup>145</sup> Id, section 21.

## Maintenance Act 9 of 2003

### Orders for scientific tests

21. (1) If a maintenance officer reasonably believes that –

- (a) the paternity of any child is in dispute;
- (b) the mother of that child as well as the person who is alleged to be the father are prepared to submit themselves as well as that child to the taking of blood or tissue samples in order to carry out scientific tests regarding the paternity of that child; and
- (c) the mother or the alleged father or both the mother and the alleged father are unable to pay the costs involved in the carrying out of the scientific tests,

the maintenance officer may at any time during a maintenance enquiry, but before the maintenance court makes any order, request the court to hold an enquiry referred to in subsection (2).

(2) On receipt of a request made under subsection (1), the maintenance court may enquire into the –

- (a) means of the mother as well as that of the alleged father; and
- (b) other circumstances which the maintenance court reasonably believes should be taken into consideration.

(3) At the conclusion of the enquiry referred to in subsection (2), the maintenance court may –

- (a) make a provisional order that both the mother and alleged father or that either of them pay or pays part or all of the costs to be incurred in the scientific tests;
- (b) make a provisional order directing the State to pay the whole or any part of the costs of the scientific tests; or
- (c) make no order.

(4) When the maintenance court subsequently makes any maintenance order, it may –

- (a) make an order confirming the provisional order referred to in subsection (3)(a) or (b); or
- (b) set aside any provisional order or substitute therefore any order which the court considers just relating to the payment of the costs incurred in the carrying out of the scientific tests in question.

### There are several technical problems with these provisions:

- a) **The statute covers only paternity tests.** Although maternity is less often in doubt, there could be instances where this is the case – such as where a child has been abandoned.
- b) **The statute assumes that the maintenance proceedings will involve the two parents, in respect of both testing and the allocation of costs.** But there could be cases where question of parentage arise when a primary caretaker other than a parent is seeking maintenance contributions from one or both parents.
- c) **The statute requires that mother, father and child all be prepared to submit themselves to the taking of samples for the purposes of testing. However, for a DNA test, samples are needed only from the child and from the parent whose parentage is in dispute.** Samples from the other parent would not be required, unless the connection of both parents to the child was in doubt.
- d) **The statute provides no remedy for the situation where a parent refuses to provide a sample of his or her own DNA or the DNA of the child in question.** It would be possible for the party seeking to prove parentage to make an application to the High Court to order that samples be provided for testing on the grounds that this was in the child's best interests,<sup>146</sup> but this would be expensive and cumbersome.

<sup>146</sup> The High Court would have authority to make such an order in respect of a child as part of its inherent jurisdiction as the upper guardian of all children.

- e) **The statute allows a provisional order on costs to be finalised, set aside or adjusted only “when the maintenance court subsequently makes any maintenance order”. It should be possible for the court to do this at the point when it makes a decision on the application for maintenance – even if that decision does not result in a maintenance order.** For example, suppose that a mother applies for maintenance from a man who is proven by the paternity test not to be the child’s father. No maintenance order would result in such a case, but the court might still want to finalise an appropriate order on the costs of the scientific tests.
- f) **The Maintenance Act was not amended to refer to the provisions on proof of parentage in the Children’s Status Act when the Children’s Status Act was enacted, leaving the relationship between the two laws unclear.**

The Children’s Status Act, which was passed three years after the Maintenance Act, contains a general section on proof of parentage.<sup>147</sup> These provisions, which appear in the box below together with the one regulation on this topic, have several advantages over the approach taken by the Maintenance Act:

- a) They are gender neutral.
- b) They allow a broad range of persons to initiate a proceeding to prove parentage: the mother, the father, the person whose parentage is in doubt, the primary caretaker of that person or someone authorised by the Ministry responsible for child welfare to act on behalf of that person (such as a social worker).
- c) They codify and expand the pre-existing common law presumptions on paternity to serve as a starting point.
- d) They discourage refusals to submit to testing by providing that such refusals will be presumed, unless the contrary is proved, to be aimed at concealing the truth concerning parentage. This presumption would in many cases obviate the need to order that samples be taken.

There are, however, several weak points to this alternative regime:

- a) There is an apparent contradiction between the Act and the regulations: The Act states that the High Court (as the upper guardian of all children) may order a child to be submitted to testing, while Regulation 12 empowers the children’s court to order that the putative mother, father or child submit to testing.
- b) Regulation 12 takes a more rigid approach to the allocation of costs than the Maintenance Act, providing that the costs of the testing must be borne by the person who is disputing parentage unless it is proved that this party is unable to pay, in which case the court may order that the costs be shared between that party and the State or borne fully by the State. This would mean, for instance, that even where a party maliciously or recklessly names someone as a parent of a child without any reasonable foundation for this assertion, the person who did this could not be ordered to share any of the costs of the tests even if he or she could afford to do so.
- c) Another problem is that it is not clear if the provisions on proof of parentage in the Children’s Status Act are intended to be ancillary to the other proceedings in that Act, or if they can be utilised in any matter where parentage is in dispute – including a maintenance case. The provisions refer to “*proceedings to establish parentage*”<sup>148</sup> and to “*any legal proceeding at which the parentage of any person has been placed in issue*”<sup>149</sup>, suggesting general applicability – but even though the

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<sup>147</sup> Children’s Status Act 6 of 2006. It is expected that the Children’s Status Act will be repealed and replaced by a chapter in the forthcoming Child Care and Protection Act. The current provisions of the Children’s Status Act on parentage are expected to be substantially the same in the new law, with minor technical amendments.

<sup>148</sup> Id, section 8(2), with similar language in section 8(3).

<sup>149</sup> Id, section 10(1).

magistrate's court and the children's court would in most cases be the self-same court,<sup>150</sup> it appears that a separate application would be required to utilise the proof of parentage proceedings under the Children's Status Act if parentage were questioned in a maintenance proceeding.

## **Children's Status Act 6 of 2006**

### **Proof of Parentage**

#### **Procedure**

**8.** (1) For the purpose of this section-

- (a) "putative father" means a man who claims or is alleged to be the father of a person for whom paternity has not yet been established or acknowledged without dispute; and
- (b) "putative mother" means a woman who claims or is alleged to be the mother of a person for whom maternity has not yet been established or acknowledged without dispute.

(2) Proceedings to establish parentage may be brought by-

- (a) the mother or putative mother of the person whose parentage is in question;
- (b) the father or putative father of the person whose parentage is in question;
- (c) the person whose parentage is in question;
- (d) someone, other than the mother or father of the person whose parentage is in question, who is acting as the primary caretaker of such person; or
- (e) a person authorised in writing by the Minister to act on behalf of the person whose parentage is in question.

(3) The mother or putative mother and the father or putative father of a person whose parentage is in question are competent and compellable witnesses in any proceedings in which the issue of parentage is raised, but nothing in this section is to be construed as compelling a person to testify against his or her spouse.

(4) Proof on a balance of probabilities is required in order to establish parentage in proceedings brought under subsection (2).

#### **Presumption of paternity**

**9.** (1) Despite anything to the contrary contained in any law, a rebuttable presumption that a man is the father of a person whose parentage is in question exists if-

- (a) he was at the approximate time of the conception, or at the time of the birth, of the person in question, or at any time between those two points in time, married to the mother of such person;
- (b) he cohabited with the mother of the person in question at the approximate time of conception of such person;
- (c) he is registered as the father of the person in question in accordance with the provisions of the Births, Marriages and Deaths Registration Act, 1963 (Act 81 of 1963);
- (d) both he and the mother acknowledge that he is the father of the person in question; or
- (e) he admits or it is otherwise proved that he had sexual intercourse with the mother of the person in question at any time when such person could have been conceived.

(2) Corroboration of evidence led to establish a presumption of paternity is not required and no special cautionary rules of evidence are applicable to such evidence.

<sup>150</sup> Section 4 of the Children's Act 33 of 1960 establishes children's courts:

**4. Children's courts**

(1) *The Minister of Justice ... may establish a children's court for any district or for any area comprising two or more districts or portions of districts.*

(2) *Every magistrate's court shall be a children's court for any part of the area of its jurisdiction for which no children's court has been established under subsection (1)*

They are expected to be similarly described under the forthcoming Child Care and Protection Act which will replace the 1963 Children's Act.



### Presumption on refusal to submit to scientific tests

**10.** (1) At any legal proceeding at which the parentage of any person 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 procedure which is required to carry out scientific tests relating to the parentage of the person in question, must be presumed, until the contrary is proved, to be aimed at concealing the truth concerning the parentage of that person.

(2) Regardless of anything contained in subsection (1), the High Court as the upper guardian of all children has 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 that Court in the best interests of the child.

### Regulation 12

#### Proof of parentage

**12.** (1) In order to establish parentage in proceedings brought under section 8(2) of the Act, the children's court may order that the putative mother or putative father as well as the child in question undergo a DNA testing.

(2) Any costs incurred in carrying out a DNA testing must be borne by the party who is disputing paternity or maternity but in cases where it is proved that the party is unable to pay, the court may order that the costs be shared between that party and the State or that all the costs be borne fully by the State.

We recommend that the Maintenance Act be amended to incorporate the proof of parentage proceedings contained in the Children's Status Act (with the appropriate clarifications discussed above), while retaining the flexible approach to orders for costs of scientific testing contained in the current Maintenance Act.<sup>151</sup>

## 4.3.6 Outcome of maintenance enquiries

At the conclusion of a maintenance enquiry, the court may:

- if there is no maintenance order in force, order the defendant to pay maintenance for the beneficiary;
- if there is a maintenance order in force, substitute, discharge or suspend the order; or
- decide to make no order.<sup>152</sup>

There are three ways in which a maintenance order may result from a maintenance complaint:

- 1) a consent maintenance order;
- 2) a default maintenance order; or
- 3) a maintenance order following a hearing attended by both parties.

All have the same force and effect, and are subject to the same options for enforcement.

"maintenance order" means a **maintenance order** made under section 17, a **consent order** made under section 18 and a **default maintenance order** made under section 19, or a maintenance order made by a maintenance court under any other law and includes any sentence suspended on condition that the convicted person makes payments of sums of money towards the maintenance of any other person;

Maintenance Act 9 of 2003, section 1 (emphasis added)

<sup>151</sup> The main shortcomings of the proceedings for proof of parentage in the Children's Status Act pertain to the regulations. Therefore, we recommend that appropriate revisions be made to the new regulations which are likely to be enacted when these provisions are repealed and re-enacted as part of the Child Care and Protection Bill.

<sup>152</sup> Maintenance Act 9 of 2003, section 17(1).

## Consent maintenance orders

As discussed under section 4.3.3, the defendant may agree to the terms of the order proposed by the maintenance officer before any enquiry is held. In such a case, a consent maintenance order is made by the court and served on the defendant.<sup>153</sup>

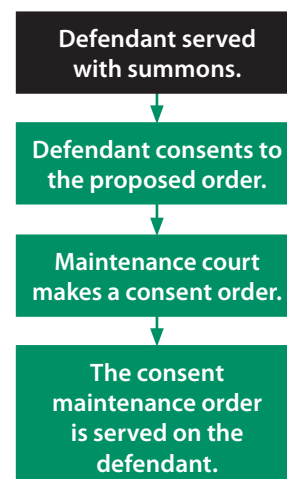
## Default maintenance orders

A default maintenance order is made when the defendant has been properly summoned to attend the maintenance enquiry but fails to appear. In this situation the maintenance officer **must** request the maintenance court for a default maintenance order. The maintenance officer must then call on the complainant or any other person whose evidence might be relevant, to either orally or in writing, adduce evidence which would assist the court in making an order. The maintenance court **may** then make a default maintenance order, an order for costs or any other order the court considers to be appropriate in the circumstances. The default order must be served on the defendant.<sup>154</sup>

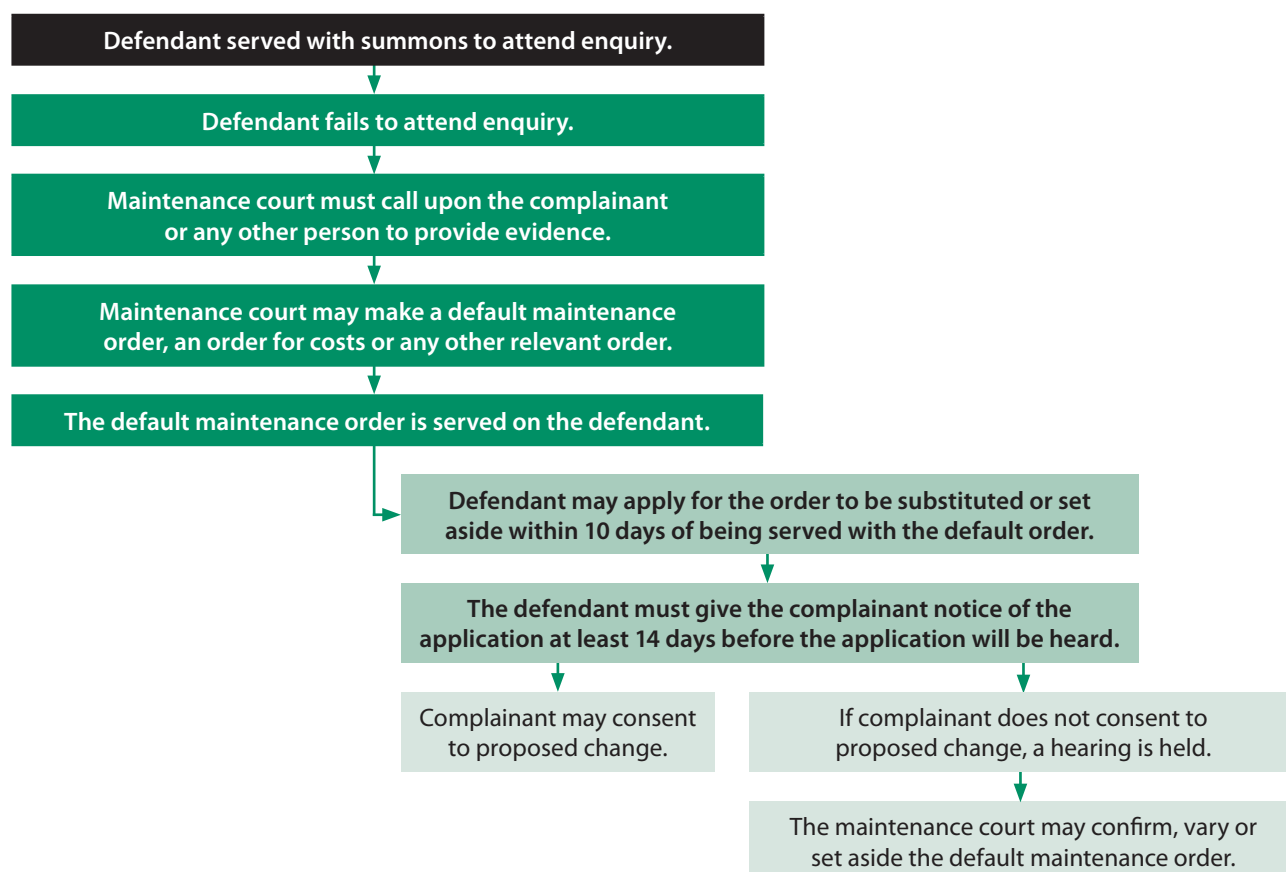
There is a special procedure whereby the defendant can apply for a default order to be substituted or set aside. The defendant is supposed to apply for substitution or to have the order set aside within ten days of being served with the order, but the court may consider an application received after

**Chart 5:**

**The process of making a consent maintenance order**



**Chart 6: The process of making a default maintenance order**



<sup>153</sup> Id, section 18. Form G is used for a consent maintenance order. Maintenance Regulations, regulation 10.

<sup>154</sup> Maintenance Act 9 of 2003, section 19(1)-(3). Form H is used for a consent maintenance order. Maintenance Regulations, regulation 11(1)-(3).

the expiry of the 10-day deadline if there is good reason to do so. Oddly, the application from the defendant is expected to specify the date on which the application is to be heard and determined. The defendant is also responsible for giving notice of this application to the complainant at least 14 days before the day on which it will be heard.<sup>155</sup>

The complainant may consent in writing to the defendant's proposal to vary or set aside the order before or at the hearing, and submit this consent to the maintenance officer.<sup>156</sup> If the complainant does not consent to the defendant's application to vary or set aside the default order, a hearing is held and the court may call upon both the defendant and complainant to provide evidence. The court may then confirm the default order, vary it or set it aside and convert the proceedings into a full maintenance enquiry which considers the matter afresh.<sup>157</sup>

We believe that placing responsibility on the defendant for giving notice to the complainant about a challenge to the default order is unwise, given that most parties do not have legal representation and given that maintenance disputes can be flashpoints that lead to incidents of domestic violence. **We recommend that this procedure be adapted so as not to encourage personal contact between the complainant and the defendant in this context.**

**Chart 7:**  
**The process of making maintenance order following a hearing**



## Maintenance order following a hearing

If there is no consent order, and both parties are present at the enquiry, then the magistrate will hear the case and can make a maintenance order at the conclusion of the hearing.<sup>158</sup>

### 4.3.7 Contents of a maintenance order

A maintenance order must contain the following information:<sup>159</sup>

- the **date** on which maintenance payments must begin;
- the **intervals** at which maintenance payments must be made (eg weekly or monthly);
- **to whom and where** the maintenance payment must be made (eg to a person, organisation or financial institution); and
- the **manner** in which the maintenance payments must be made (eg cash or direct deposit).

It is possible for the order to specify that a portion of the maintenance to be paid to a specific person or institution for a specific purpose – such as payments for hostel fees or medical expenses – with the remainder going to the complainant or beneficiary.<sup>160</sup>

One South African case has suggested that it is competent for a maintenance court to include a provision in a maintenance order providing for an automatic annual increase tied to a specified

<sup>155</sup> Maintenance Act 9 of 2003, section 19(4-7). The defendant applies to vary or set aside a default maintenance using Part A of Form I. The defendant is required to serve notice of this application on the complainant using Part B of Form I. This notice can be served on the complainant in any manner that is convenient to the defendant, but the defendant must keep proof of service. Maintenance Regulations, regulation 11 (4)-(6).

<sup>156</sup> Maintenance Act 9 of 2003, section 19(10). There is no specific form for this consent.

<sup>157</sup> Id, section 19(8-9).

<sup>158</sup> Id, section 17. Form E is used for this purpose. Maintenance Regulations, regulation 8.

<sup>159</sup> Maintenance Act 9 of 2003, section 17(2).

<sup>160</sup> Id, section 17(2)(e). See also *Schmidt v Schmidt* 1996 (2) SA 211 (W).

measure (in that case, the percentage increase in the rate of inflation during the preceding 12-month period) even without an explicit provision in the Act contemplating such increases.<sup>161</sup>

Whilst the payment of money is the most common form of paying maintenance, the Act also allows for payments in kind in the form of specified goods or livestock.<sup>162</sup>

*"I think the new Maintenance Act is brilliant in that it creates many remedies for the complainant. Even if the defendant says he is unemployed, I can go into the enquiry and ask him questions such as: "Do you have any property?" "Are you married in community of property to a spouse that has a source of income?"*

Magistrate, Rundu

### 4.3.8 Photographs or ID documents

A maintenance officer may request the court to order that photographs of the defendant or a copy of the defendant's identification document be attached to the maintenance order.<sup>163</sup> The maintenance officer must endorse or copy the personal particulars of the defendant onto the back of the photographs. One copy of the photograph should be kept in the maintenance file, and the other attached to the relevant register of payments. A copy of the photograph may be provided to anyone executing a court order or serving a document to the defendant.<sup>164</sup> This provision was included to provide tools for tracking defendants who might try to evade a maintenance order.

As a point of comparison, a 2008 survey of maintenance court personnel in South Africa found that 97% of maintenance investigators interviewed in South Africa said that no photographs of defendants are ever included in maintenance files at their courts. The assessment recommended: *"Maintenance courts should immediately start using this extremely helpful enforcement mechanism expressly provided for in the Maintenance Act ... Surely each maintenance court can afford a digital camera for use by its maintenance investigator."*

Madeline de Jong, "Ten-year Anniversary of the Maintenance Act 99 of 1998 – A time to reflect on improvements, shortcomings and the way forward", 126 (3) *South African Law Journal* 590 (2009) at 607 and 611, reporting on a survey of maintenance officials in courts across the country to assess the practical effect of the South African Act

### 4.3.9 Duration of a maintenance order

#### Duration of a maintenance order for a child

At common law, the legal duty to maintain a child extends beyond the age of majority, as the need for support rather than the child's status as a minor is the determining factor.<sup>165</sup> As discussed on page 34,

<sup>161</sup> *Martin v Martin* 1997 (1) SA 491 (N). The Court did not actually decide this point: "Counsel for the appellant also contended that the order of the maintenance court could not validly include the provision for the amount of R250 a month to be increased annually with effect from 1 October 1989 by an amount equal to the percentage increase in the rate of inflation during the preceding 12-month period. This is because s 5(4) of the Act only empowered the maintenance court to make a maintenance order for the payment of sums of money specified in the order. He submitted that an order for the payment of an increase the amount of which was uncertain, and which could only be established by evidence of the rate of inflation each year, was not an order for the payment of sums of money specified in the order. The only authority cited for this submission was the judgment of a magistrate quoted in *Davis v Davis* 1993 (1) SA 621 (C) at 625E-F. I prefer the reasoning of *Wunsh J in Schmidt v Schmidt* [1996 (2) SA 211 (W)] to the effect that such an order would specify the amount in question on the basis of the maxim *id certum est quod certum reddi potest*. However, it is unnecessary to express a final opinion on the point. I assume for the purposes of this judgment that it was competent for the maintenance court to incorporate in its order the whole of clause 4 of the agreement, including the provision for escalation of the monthly payment on account of inflation and the payment of medical and allied expenses." At 495C-G.

<sup>162</sup> *Id*, section 17(4).

<sup>163</sup> *Id*, section 48.

<sup>164</sup> Maintenance Regulations, regulation 27.

<sup>165</sup> See *Ex parte Jacobs* 1982 (3) SA 276 (O); *Burse v Bursey* 1999 (3) SA 33 (SCA).

the duty of support could extend indefinitely in the case of a child who is chronically ill or disabled, but it can also apply in a case where there is simply a need for support.

The Maintenance Act provides that a maintenance order for the support of a child will normally remain in force until (1) the child dies or is adopted; (2) the parents divorce or annul the marriage (at which point a new order would likely be made between the parties); (3) the child marries; or (4) the child reaches the age of 18. However if the child is attending an educational institution for the purpose of acquiring a course which would enable him or her to support himself or herself, the maintenance order may be extended until the child reaches the age of 21. These are the usual circumstances, but the law also gives the court discretion to provide a different termination point; the guidelines on termination of an order for maintenance of a child apply “*unless the order otherwise provides*”.<sup>166</sup>

Even if the child is not attending an educational institution when he or she reaches the age of 18, the child or any person acting on behalf of the child, may apply to the court for an extension of the maintenance order beyond age 18. The defendant must then respond to the court as to why the order should not be extended. The court will consider the application and grant the application conditionally, unconditionally, or refuse the application.<sup>167</sup> **An application for an extension of the original order would presumably not be necessary if the original order explicitly applied beyond age 18, but we recommend that the wording of the provisions on termination should be clarified on this point.**<sup>168</sup>

Section 26(2) of the Maintenance Act 9 of 2003, in what the court describes as a “*progressively humanitarian approach*”, “*embeds into statute law the obligation at common law for a parent, on application to court and subject to proof of need, to maintain a child well beyond the age of majority*”.

*Main NO v Van Tonder NO and Another* 2006 (1) NR 389 (HC) at para 25

It is important for magistrates to specify an appropriate duration for the order when drafting maintenance orders for children with chronic illnesses or disabilities who may never be able to become self-supporting, to prevent unintended termination at age 18 and unnecessary effort on the part of the child’s caretaker and the courts in considering extensions. **We recommend that the Ministry of Justice send a circular to the magistrates’ courts, highlighting the need to specify an appropriate duration of a maintenance order for a child with ill health or a disability.**<sup>169</sup>

## Duration of a maintenance order for a spouse

A maintenance order for the support of a spouse will remain in force until (1) the spouse dies or remarries; or (2) the couple divorce or annul the marriage.<sup>170</sup> There is no discretion for a maintenance court to extend maintenance for a spouse beyond these points, as the cited events terminate the legal duty of support between spouses.

In the case of a divorce, the liability to maintain can be extended beyond the divorce only by a court order for maintenance issued at the time of the divorce. This is why divorce orders will occasionally incorporate an order for spousal maintenance for a nominal amount, so as to keep the door open

<sup>166</sup> Id, section 26(1).

<sup>167</sup> Id, section 26(2)-(3).

<sup>168</sup> Section 26(1) states, in relevant part: “*A maintenance order made in favour of a child must, unless the order otherwise provides, with respect to that child, cease if and when ... subject to subsection (2), the child attains the age of 18 years, but if the child is attending an educational institution for the purpose of acquiring a course which would enable him or her to maintain himself or herself, the maintenance order does not terminate until the child attains the age of 21 years.*” Section 26(2) reads: “*Where a child in whose favour a maintenance order was made attains the age of 18 years, the child or any person acting on the child’s behalf, may, in the prescribed manner, apply to the maintenance court for an extension of the maintenance order beyond the age of 18 years.*” (Emphasis added.)

<sup>169</sup> As discussed on page 143, we found a record of only one case involving a child with disabilities. In this instance an order was not made as the child went to live with the defendant and the court stated that a maintenance order was not required.

<sup>170</sup> Maintenance Act 9 of 2003, section 26(4).



for future maintenance by way of substitution if circumstances change; if no order is made for spousal maintenance at the time of the divorce, the option of claiming such maintenance in future is foreclosed.<sup>171</sup>

*"In several decisions courts have in the past granted a "nominal" or "token" amount in respect of maintenance [in a divorce order] in order to preserve the right of the person entitled to maintenance. Where the right of maintenance is reserved, the person entitled thereto can then in future apply for an increase of such maintenance if he/she can prove what he/she needs, as well as that the other party is able to pay it. Such an application can of course then be brought in the Maintenance Court and does not have to be instituted in this Court. To bring this matter closer to home; if the Plaintiff's right to maintenance is reserved by awarding a nominal amount to her, she can always in future approach the Maintenance Court depending thereon that the Defendant's circumstances in respect of employment has improved and she can prove that she needs that maintenance."*

*Schneider v Schneider* [2010] NAHC 191 (17 November 2010) at para 11 (citations omitted)

## Duration of a maintenance order for a parent

A maintenance order for the support of a parent will remain in force as long as the parent is (1) unable to maintain himself or herself; (2) no other person has become liable to maintain the parent (such as a new spouse); and (3) the child is able to support the parent.<sup>172</sup>

The statute specifically states that a maintenance order for a child or a spouse terminates when the beneficiary dies, but does not state this explicitly in respect of maintenance for a parent. **We recommend the law is revised to state that a maintenance order for the support of a parent also comes to an end if the parent dies.**

## 4.4 Appeals

The Act allows a person who is aggrieved by an order made by a maintenance court (including a refusal to make an order) to appeal to the High Court.

The orders which can be appealed include orders for confirmation, discharge, setting aside, substitution or variation of a maintenance order. However, it is not possible to appeal a consent order (which is by definition made with the agreement of the parties), a default order (where the Act includes a procedure for challenge by the defendant) or a provisional order for payment of the costs of paternity testing (which will be reconsidered and incorporated into the final maintenance order upon the conclusion of the enquiry). However, it is possible to appeal a court's *refusal* to make a provisional costs order or a default maintenance order.<sup>173</sup>

An appeal must be made within 21 days of the decision in question, and a cross-appeal must be made within 7 days of an appeal.<sup>174</sup>

A maintenance order is not suspended pending an appeal, unless the appeal is based on the argument that the appellant is not legally liable to pay maintenance.<sup>175</sup> This rule was a new addition to the 2003 Act to protect the interests of the beneficiaries.

<sup>171</sup> See *Schneider v Schneider* [2010] NAHC 191 (17 November 2010), where spousal maintenance was awarded in the amount of N\$1 per month; see also *Buttner v Buttner* 2006 (3) SA 23 (SCA).

<sup>172</sup> Maintenance Act 9 of 2003, section 26(5).

<sup>173</sup> Id, section 47. An order made by the High Court in respect of an appeal is subject to section 19 of the High Court Act 16 of 1977, which empowers the High Court to receive further evidence on the hearing of an appeal, to remit the case to the court of first instance for further hearing, or to confirm, amend or set aside the judgment or order which is the subject of the appeal and to give any judgment or make any order which the circumstances may require.

<sup>174</sup> Maintenance Regulations, regulation 17.

<sup>175</sup> Maintenance Act 9 of 2003, section 47(5).

If the appeal involves maintenance for a child, a complainant who cannot afford legal representation can be represented by a prosecutor.<sup>176</sup> If the beneficiary is not a child, the complainant could apply for legal aid. A defendant who cannot afford legal representation could apply for legal aid. However, the availability of legal aid in maintenance cases is subject to government policy and budgetary constraints.

The High Court may make any appropriate order at the conclusion of the appeal.<sup>177</sup> Furthermore, even though there is no explicit provision in the Maintenance Act for a costs order, the High Court can award costs against the unsuccessful party in the appeal.<sup>178</sup>

## 4.5 Civil enforcement of maintenance orders

Under the previous Maintenance Act, the only avenue for enforcement was to lay a criminal charge. Case law held that a maintenance order could be enforced in the same manner as any other civil judgement,<sup>179</sup> but civil enforcement was rare with some courts being unsure that it was proper.

The current law emphasises civil enforcement remedies – such as attaching the property, income or debts of the person who is in arrears. The theory behind the changed emphasis is that criminal charges should be used only as a last resort. This makes sense for everyone – the enforcement procedure is simpler for complainants, and defendants can be forced to pay without getting a criminal record. Furthermore, criminal punishment in the form of a fine or imprisonment is likely to reduce the defendant's ability to pay the maintenance owing, which would disadvantage the intended beneficiary. It was also assumed that if criminal cases are used only as a last resort against people who wilfully refuse to pay, the failure to pay maintenance in such circumstances is likely to be treated more seriously.

The 2003 Maintenance Act allows the complainant to apply to the maintenance court for enforcement if maintenance is not paid, 10 days after the date the missed payment was due. This short time period

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<sup>176</sup> Id, section 47(2)-(3).

<sup>177</sup> Id, section 47(4). For examples of appeals (under the previous Maintenance Act) see *Vedovato v Vedovato* 1980 (1) SA 772 (T) and *Van Zyl v Fourie* 1997 NR 85 (HC). See also *Muruko v Mize* [2013] NAHCMD 228 (31 July 2013), where it was held that a party who is not satisfied with the order made by a magistrate in a maintenance enquiry may seek relief either by way of civil appeal or by way of review in terms of the provisions of section 20 of the High Court Act 16 of 1990.

<sup>178</sup> See for example, *Buch v Buch* 1967 (3) SA 83 (T); *Vedovato v Vedovato* 1980 (1) SA 772 (T); *Mgumane v Setemane* 1998 (2) SA 247 (Tk D).

<sup>179</sup> In South Africa, the Maintenance Act 23 of 1963 was amended by Act 2 of 1991, to provide in section 14C that “... any order or direction made by a maintenance court under this Act shall have the effect of an order or direction of that court made in a civil action”. However, the import of this provision continued to raise some questions.

See, for example, *Butchart v Butchart* 1996 (2) SA 581 (W), confirmed on appeal at 1997 (4) SA 108 (W). According to this case, court orders were traditionally classed as either an obligation to pay (*ad pecuniam solvendam*) or an obligation to do something (*ad factum praestandum*). Traditionally, the remedy for non-payment of the first type of order was a writ, while the remedy for non-performance of the second type of order was proceedings for contempt of court. However, according to the appeal court, the remedies available under the Maintenance Act 23 of 1963 blur this distinction, with a long line of cases holding that that a maintenance order has characteristics of both the obligation to make payments and the obligation to do something. Although there is a degree of uncertainty due to the possibility of escalation or variation, the amount of arrear maintenance owing under such an order can easily be quantified. Even where there is an unspecified amount, such as payment of medical expenses, this can be the subject of a writ if the amount is easily ascertainable and verified by an affidavit from the judgment creditor.

As the lower court explained: “According to some of the earlier cases, starting with *Slade v Slade* (1884-1885) 4 EDC 243, a maintenance order in the broad sense was regarded as an order *ad factum praestandum*, from which it followed that amounts payable thereunder could not be recovered by a writ. The original reason for so regarding maintenance orders was not to deprive a judgment creditor of the use of a writ as a weapon of recovery but to afford him or her the additional remedy of contempt of court proceedings. It is now generally accepted that a writ may be issued for unpaid maintenance. See *Williams v Carrick* 1938 TPD 147; *Manley v Manley* 1941 CPD 95; *Bam v Bhadha* (II) 1947 (1) SA 399 (N); *Du Preez v Du Preez* 1977 (2) SA 400 (C).” At 583B-E.

However, not all authorities were in agreement about this. See *Martin v Martin* 1997 (1) SA 491 (N), dicta at 496A.

was consciously added to prevent the hardships which occurred under the previous policy of requiring complainants to wait for three months before enforcement proceedings could be commenced.<sup>180</sup>

Civil enforcement can take the form of –

- (a) execution against property;
- (b) the attachment of emoluments;<sup>181</sup> or
- (c) the attachment of any debt owed to the defendant.

Any pension, annuity, gratuity, compassionate allowance or other similar benefit may also be attached or subjected to execution to fulfil a maintenance order.<sup>182</sup>

The complainant may choose the enforcement mechanism most likely to achieve results.<sup>183</sup> However, the court is not bound to employ the method of enforcement sought by the complainant, but may utilise any of the three methods of civil enforcement provided for in the Act.<sup>184</sup>

*“... if the respondent had a choice of remedies she was perfectly entitled to choose the one which she considered the more efficacious, regardless of any supposed advantages which the other may have had for the [defendant] ...”*

*Martin v Martin* 1997 (1) SA 491 (NPD)

(addressing enforcement of maintenance in South Africa under similar statutory provisions)

The procedures to enforce an order may not be implemented if there is an appeal in process – although this appears to apply only to an appeal against a finding that the defendant is legally liable to maintain the beneficiary in question.<sup>185</sup> The explicit statement that a maintenance order is not suspended pending any other form of appeal would be meaningless if enforcement were not possible pending the appeal. The South African Maintenance Act, which contains a similar principle, makes it clear that enforcement is prohibited while an appeal is pending *only* where an appeal has the effect of suspending the underlying maintenance order.<sup>186</sup> **We recommend that this issue be similarly**

<sup>180</sup> The 1963 law did not specify any time period, but some courts imposed a waiting period of three months before they would act on complaints about non-payment of maintenance. See D Hubbard, “Engaging in Engaging Research”, conference paper, March 1996.

Case law in Zimbabwe states that the fact that late payments had been accepted by the maintenance complainant in the past does not affect the respondent’s obligation to make the maintenance payments on the stipulated day. *R v Moss* 1959 (2) SA 738 (SR).

<sup>181</sup> In terms of section 1 of the Maintenance Act 9 of 2003, “emoluments” includes “any salary, wages, allowances, or any other form of remuneration or any other income which is paid periodically to any person, whether expressed in money or not”.

<sup>182</sup> Maintenance Act 9 of 2003, section 28(4).

<sup>183</sup> An application for civil enforcement of a maintenance order should be made using Form K. The application must include a copy of the maintenance order, a statement under oath or affirmation confirming the amount of money that has not been paid and a statement indicating the preferred form of enforcement. Maintenance Regulations, regulation 18. A South African court held (in a slightly different context) that the person to whom the maintenance is owing, if there is a choice of remedies, is “perfectly entitled to choose the one which she considered the more efficacious”, regardless of any supposed advantages which another remedy may have had for the person who owes the maintenance. *Martin v Martin* 1997 (1) SA 491 (N) at 497.

<sup>184</sup> Maintenance Act 9 of 2003, section 28.

<sup>185</sup> Id, section 28(4). Section 28(4) states: “A maintenance court must not, *in the circumstances contemplated in section 47(5), authorize the issue of a warrant of execution or make any order for the attachment of emoluments or any debt in order to satisfy a maintenance order until the appeal has been finalised.*” (emphasis added). Section 47(5) states: “*Notwithstanding anything to the contrary contained in any law, an appeal under this section does not suspend the payment of maintenance in accordance with the order in question, unless the appeal is noted against a finding that the appellant is legally liable to maintain the complainant.*”

<sup>186</sup> Section 23(3) of the South African Maintenance Act 99 of 1998 has a similar rule on suspensions while appeals are pending as in the Namibian statute: “*Notwithstanding anything to the contrary contained in any law, an appeal under this section shall not suspend the payment of maintenance in accordance with the maintenance order in question, 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.*” Section 26(3) states: “*A maintenance court shall not authorise the issue of a warrant of execution or make any order for the attachment of emoluments or any debt in order to satisfy a maintenance order- (a) if the payment of maintenance in accordance with that maintenance order has been suspended by an appeal against the order under section 25; or (b) if that maintenance court has made an order referred to in section 16(2) [which refers to the attachment of pensions and similar payments].*” (emphasis added). This, it is clear that civil enforcement is possible where the filing of an appeal has not had the result of suspending the underlying maintenance order.

addressed in the Namibian Maintenance Act, to clarify that civil enforcement of a maintenance order is possible while an appeal is pending, unless the maintenance order is suspended while the appeal is underway because the appeal is challenging the finding that the defendant is legally liable to maintain the beneficiary.

## Warrants of execution

The court may issue a warrant of execution against moveable property, and if this is insufficient to meet the amount owed, against immovable property. A warrant of execution against the immovable property of a person married in community of property is only applicable to the share of the property to which the defendant is entitled.<sup>187</sup>

Normally, such warrants would be prepared with the assistance of a legal practitioner. However, in the case of maintenance, the maintenance investigator (or maintenance officer when there is no investigator) must assist the complainant in preparing the warrant and in taking the prescribed steps to execute the warrant.<sup>188</sup> The clerk of the maintenance court and the messenger of the court also play specified roles in the execution of the warrant.<sup>189</sup> The messenger of the court must pay the proceeds of the execution directly to the complainant.<sup>190</sup>

The defendant may apply to have a warrant of execution set aside, if he or she acts within ten days of becoming aware of the warrant. The defendant may also apply at any time for the warrant to be substituted or suspended.<sup>191</sup>

Where the defendant has applied to have the warrant of execution *set aside*, he or she must serve notice of this on the complainant at least 14 days before the date on which the application is to be heard.<sup>192</sup> However, there is no form provided for this and no specific directions for the manner of service.<sup>193</sup>

In contrast, where the defendant has applied to have the warrant of execution *substituted or suspended*, he or she must serve notice of this on the complainant at least 14 days before the application for substitution or suspension is to be heard, in “*any manner convenient*” to the defendant – and there is a specific form for this purpose.<sup>194</sup>

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<sup>187</sup> Maintenance Act 9 of 2003, section 29(1 and 2).

<sup>188</sup> *Id*, section 29 and Maintenance Regulations, regulation 19.

<sup>189</sup> The warrant is completed on Form L. The complainant must complete Part A of Form L, giving information about the amount of maintenance owing plus interest and the address of the defendant, in triplicate (a version for the defendant, the complainant and the court). The clerk of the maintenance court must complete Part B of Form L, directing the messenger of the court to execute the warrant. The messenger of the court executing the warrant must complete Part C (return of service), and where relevant Part D (certifying that execution of the warrant was averted by payment of the amount owing), and return this to the court. Maintenance Regulations, regulations 19-20.

<sup>190</sup> *Id*, regulation 19(7).

<sup>191</sup> Maintenance Act 9 of 2003, section 29(5) and (8). To apply to have the warrant of execution set aside, the defendant must complete Part A of Form M (motivating the application with reasons). To apply to have the warrant of execution substituted or suspended, the defendant must complete Part B of Form M (motivating the application with reasons). Maintenance Regulations, regulation 21(1)-(2).

In a 2009 Namibian case, a divorced man who had been convicted of failure to pay maintenance brought an urgent application challenging a warrant of execution brought in respect of the arrear maintenance. Despite an agreement which was in the process of negotiation between the parties on the gradual payment of the arrears over time, the wife obtained a warrant of execution. The issue which fell to be determined by the High Court was whether the ex-husband could challenge the warrant through an urgent application. The Court found no basis for urgency given that no date for the sale in execution had yet been set, and given that the procedures provided by the Act for applying to have the warrant of execution set aside, substituted or suspended were available to the defendant. *Mondo v Messenger of Court: Grootfontein and Others* [2009] NAHC 96 (13 March 2009).

<sup>192</sup> Maintenance Act 9 of 2003, section 29(6)(b).

<sup>193</sup> Regulation 28 is a general provision on service of process, but it applies only to documents which are to be served by the maintenance investigator or messenger of court.

<sup>194</sup> Maintenance Act 9 of 2003, section 29(9)(b). When the defendant is applying to have the warrant of execution substituted or suspended, the defendant must complete Part C of Form M (notice to the complainant), and keep a record of how this notice was submitted to the complainant (with no form for this record being provided). Maintenance Regulations, regulation 21(3)-(4).



It is likely that the distinction between the approaches to notice in respect of the two procedures is an oversight, since there would not seem to be any logical reasons for treating notice differently in these different forms of objection to a warrant of execution.

Furthermore, in the context of maintenance, placing responsibility on the defendant (who will usually be unrepresented) to serve notice on the complainant (who will usually be unrepresented) seems a bad idea because of the context of possible domestic violence or acrimony.<sup>195</sup> **We recommend that the regulations which prescribe procedures for notice to the complainant in the case of a challenge to a warrant of execution be re-examined.**

The court must then consider the defendant's application. It may require the defendant or the complainant to give evidence.<sup>196</sup> When considering the defendant's application, the court must consider (1) the existing and prospective means of the defendant; (2) the financial needs and obligations of other persons maintained by the defendant; (3) the conduct of the defendant relevant to his or her failure to satisfy the maintenance or other order in question; and (4) any other circumstances which should, in the opinion of the court, be taken into consideration.<sup>197</sup> The court may set aside the warrant of execution if the defendant has complied with the maintenance order,<sup>198</sup> or it may after a summary enquiry suspend the warrant of execution and substitute it with an order for the attachment of emoluments or the attachment of a debt.<sup>199</sup>

## Attachment of emoluments

The court may make an attachment of emoluments (in most case, wages) either upon application of the complainant due to unpaid maintenance, or as an alternative when a warrant of execution is suspended. The attachment of emoluments may include the amount of maintenance owed, interest on the unpaid maintenance and any costs associated with the enforcement of the order.<sup>200</sup> The attachment of emoluments for a maintenance order takes priority over the attachment of emoluments for any other court order.<sup>201</sup> The employer is entitled to deduct administrative costs from the employee as well as the amount of maintenance which is owing, to the extent authorised in the court order.<sup>202</sup>

The maintenance officer must give notice of an order for the attachment of emoluments to the employer within seven days of the date on which it was issued.<sup>203</sup>

If the defendant ceases to work for an employer on whom such a notice has been served, the employer must give notice to the court within seven days after the defendant leaves.<sup>204</sup> The employer should keep a record of having provided this notice to the court.<sup>205</sup> The defendant also has a duty to give notice to the court if he or she changes employment.<sup>206</sup>

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<sup>195</sup> Somewhat analogously, in rape cases, the Legal Assistance Centre suggested amending section 64 of the Criminal Procedure Act 25 of 2004 to remove subsection (3), which gives the *accused* responsibility for asking the station commander to inform the complainant of the time and place of the bail application in certain circumstances. It is probably not to the accused's advantage to ensure that the complainant is timeously aware of the bail application, so this requirement works against logic and interest. *Rape in Namibia: An Assessment of the Operation of the Combating of Rape Act 8 of 2000*, Windhoek: Legal Assistance Centre, 2006 at 354.

<sup>196</sup> Maintenance Act 9 of 2003, section 29(12).

<sup>197</sup> Id, section 29(11).

<sup>198</sup> Id, section 29(7).

<sup>199</sup> Id, section 29(10).

<sup>200</sup> Id, section 30(1). As noted on page 24, the original Maintenance Bill allowed an employer to deduct administration costs for attaching wages from the amount which was supposed to be paid over to the beneficiary. The Legal Assistance Centre and others objected to this, and an amendment provided administration costs (in an amount to be prescribed by regulation) to be a further deduction from the wages of the person responsible for paying the maintenance.

<sup>201</sup> Id, section 31(3).

<sup>202</sup> Id, section 31(4).

<sup>203</sup> Id, section 31(1). This notice must be made on Part A of Form O, with the return of service from the employer completed using Part B of Form O. Maintenance Regulations, regulation 22(4)-(6).

<sup>204</sup> Maintenance Act 9 of 2003, section 31(2). This notice from the employer must be completed on Part C of Form O. Maintenance Regulations, regulation 22.

<sup>205</sup> Maintenance Regulations, regulation 22.

<sup>206</sup> Maintenance Act 9 of 2003, sections 17(5) and 45.



The defendant or the employer may apply to have an order for attachment of emoluments suspended, amended or rescinded.<sup>207</sup> The applicant must give notice of the application to the clerk of the maintenance court, and to the complainant at least 14 days before the application is to be heard.<sup>208</sup> As in the case of applications to suspend or substitute warrants of execution, the applicant must serve notice to the complainant in “*any manner convenient*” and keep proof of service<sup>209</sup> – which could, for the same reasons cited in respect of warrants of execution, be problematic. **We recommend that the regulations which prescribe procedures for notice to the complainant in the case of a challenge to an attachment of wages be re-examined.**

The court may require the defendant, the employer or the complainant to give oral or written evidence during the hearing in support or rebuttal of the application for an order for the attachment of emoluments.<sup>210</sup> The Namibian High Court has held that where a defendant does not attend the proceedings at which the attachment of emoluments is considered (in this case after the conviction of the defendant for failure to comply with the maintenance order), the resulting order should be treated in the same manner as a default maintenance order (in terms of section 19 and 28 of the Act).<sup>211</sup>

There are several South African cases which have held that the magistrate should give the employer an opportunity to comment on the feasibility of an emoluments order before any such order is imposed. According to one of these cases, “*As the employer, in truth, is made a party to the matter, he is entitled to be heard.*”<sup>212</sup> Another argument for giving the employer a right to be heard is the fact that criminal penalties apply to an employer who fails to comply with an emoluments order.<sup>213</sup> However, another South African case suggests that this may not be necessary if there is no doubt about the amount paid to the defendant by the employer, or about the amount of any other possible deductions from the defendant’s wages.<sup>214</sup>

The court may, on good cause shown, suspend, amend or rescind an order for the attachment of emoluments.<sup>215</sup> The employer may also bring such an application in respect of an emoluments order<sup>216</sup> – which could be viewed as an alternative to giving the employer a chance to be heard before the emoluments order is made.

## Attachment of debts

The court may make an attachment of debts owed to the defendant either upon application of the complainant, as a method for securing maintenance or as an alternative when a warrant of execution is suspended. The order may include the amount of maintenance owed, interest on the unpaid maintenance and any costs associated with the enforcement of the order.<sup>217</sup>

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<sup>207</sup> Maintenance Act 9 of 2003, section 30(2). A defendant who applies for the suspension, amendment or rescission of an order for attachment of emoluments must complete Part A of Form N. Maintenance Regulations, regulation 21(1).

<sup>208</sup> Maintenance Act 9 of 2003, section 30(3).

<sup>209</sup> Id, section 30(3). Notice must be given using Part B of Form N. Maintenance Regulations, regulation 21(2).

<sup>210</sup> Maintenance Act 9 of 2003, section 30(4).

<sup>211</sup> *Hengari v Hengari* [2011] NAHC 19 (4 February 2011).

<sup>212</sup> *S v Raseemela* 2000 (2) SACR 98 (T) at 99g-h (considering a similar procedure under the South African Maintenance Act 99 of 1998). See also *S v Nkgoele* 2000 (2) SACR 420 (T).

<sup>213</sup> *S v Raseemela* 2000 (2) SACR 98 (T) at 99e-f, h.

<sup>214</sup> *S v Botha* 2001 (2) SACR 281 (E) at 286c-e (*dicta*). This case, decided under the South African Maintenance Act 99 of 1998, dealt with the attachment of pension payments owing to a defendant.

<sup>215</sup> Maintenance Act 9 of 2003, section 30(2).

<sup>216</sup> Ibid.

<sup>217</sup> Id, section 32(1). If the court makes an order for an attachment of debts, Part A of Form F must be completed and served on the person who is indebted to the defendant. Part B of Form F constitutes the return of service. An indebted person who has repaid the debt in full should communicate this by submitting Part C of Form F to the court. Maintenance Regulations, regulation 9.

This order is directed to the person who has incurred the obligation, and it will require payments in respect of the debt to be made as specified in the court order.<sup>218</sup>

The defendant or the creditor may apply for the attachment of debts to be suspended, amended or rescinded with 14 days' notice to the complainant – as in the case of the other civil enforcement orders discussed.<sup>219</sup> **We recommend that the regulations which prescribe procedures for notice to the complainant in the case of a challenge to an attachment of debts be re-examined.**

The court may require the defendant or the complainant to give oral or written evidence during the hearing in support or rebuttal of the application.<sup>220</sup>

The court may, on good cause shown, suspend, amend or rescind the order for attachment of debts.<sup>221</sup>

## Attachment of pensions and similar benefits

It should be noted that the statute explicitly authorises the attachment of “*any pension, annuity, gratuity or compassionate allowance or other similar benefit*” in order “*to satisfy a maintenance order*”, as well as providing that such funds may be subjected to execution under a warrant of execution or any other order issued under the Act's provisions on civil enforcement.<sup>222</sup>

South African cases have held that the corresponding provision in the South African Maintenance Act (which uses virtually identical language to the Namibian one<sup>223</sup>) allows such funds to be attached for the payment of arrear maintenance, but not in respect of amounts of maintenance which will become applicable in the future.<sup>224</sup> (However, as discussed in the following section, it has been held in South African that attachment of such funds to secure future maintenance is possible in the High Court – and even in the maintenance court – as a civil remedy falling outside the parameters of the Act.)

However, it has also been held that the South African Maintenance Act authorises a continuing order for regular periodical payments from a defendant's pension fund – and the Namibian Act again contains similar wording.<sup>225</sup>

The attachment of pensions and similar payments is authorised “*notwithstanding anything to the contrary contained in any law*”.<sup>226</sup> This statement is clear. However, the Pensions Funds Act 24 of 1956 protects pensions and annuities from attachment or from being subjected to execution save to the extent permitted by (amongst other laws) the Maintenance Act 23 of 1963.<sup>227</sup> This provision, which was added in 1980, would present no bar to the attachment of pensions under the Maintenance Act 9 of 2003, as it would have to be read in light of the sweeping authorising provision in the 2003 Maintenance Act, but nonetheless **it would be best to harmonise the Pensions Funds Act 24 of 1956 and the Maintenance Act 9 of 2003 on attachment of or execution against pension payments.**

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<sup>218</sup> Maintenance Act 9 of 2003, section 32(1).

<sup>219</sup> Id, section 32(2). To make such an application, the defendant must complete Part A of Form P (motivating the application with reasons). Id, section 32(8); Maintenance Regulations, regulation 23. The defendant must serve this notice on the complainant and keep a record of having done so. Maintenance Regulations, regulation 23(3).

<sup>220</sup> Maintenance Act 9 of 2003, section 30(4).

<sup>221</sup> Id, section 32(2).

<sup>222</sup> Id, section 28(5).

<sup>223</sup> South African Maintenance Act 99 of 1998, section 26(4), as compared to Maintenance Act 9 of 2003, section 29(4).

<sup>224</sup> *Mngadi v Beacon Sweets & Chocolates Provident Fund and Others* 2004 (5) SA 388 (D).

<sup>225</sup> *S v Botha* 2001 (2) SACR 281 (E). The court found that such an order was authorised by the provision which refers (as does the corresponding provision in Namibia) to “*any person who, in terms of a contract is obliged to make periodical payments to the defendant*”. Compare South African Maintenance Act 99 of 1998, section 16(2) to Maintenance Act 9 of 2003, section 30(1). In Namibia, such an order would be a form of attachment of emoluments.

<sup>226</sup> Maintenance Act 9 of 2003, section 30(5).

<sup>227</sup> Pension Funds Act 24 of 1956, section 37A(1).

## Other civil remedies

A line of South African cases has held that although magistrates' courts are limited by the enforcement mechanisms provided by the statute, the High Court is not limited from utilising civil remedies other than those set forth in the statute in order to secure future maintenance. One South African case has gone even further, finding that the maintenance court itself is not bound by the remedies enumerated in the statute.

More specifically, a 2004 South African case allowed the attachment of withdrawal benefits from a pension fund in order to secure future maintenance from a defendant who had resigned from his job to avoid paying maintenance.<sup>228</sup> The Court stated:

*The Maintenance Act created some new rights it is true. The right to prosecute a person, who fails to pay maintenance, in breach of an order, is one such new right. But the obligation to pay maintenance to children in need thereof dates from time immemorial and the Maintenance Act creates a cheap and hopefully effective means of obtaining relief from those unable to afford the costs of a High Court application or action. In addition the maintenance court can easily deal with arrear maintenance as no complicated legal issues arise.*

*I do not believe that in enacting the Maintenance Act the Legislature was restricting the applicant to the remedies contained therein. The Maintenance Act is still a partial codification of the father's and mother's obligations to maintain their children. The residual rights of the parties remain within the jurisdiction of the High Court.*<sup>229</sup>

Similarly, a 2006 South African case held that future maintenance could be secured from an unemployed defendant by attaching a lump sum due to him in respect of the sale of immovable property.<sup>230</sup> As in the previous case, the Court found that the remedies in the Maintenance Act do not restrict the High Court from using its inherent power to secure future maintenance:

*... although the Maintenance Act 99 of 1998 has taken significant strides in devising new mechanisms to address the problem of recovery of maintenance from recalcitrant parents, the limitations of its mechanisms do not permit of its use to secure future maintenance from the fund of the nature in issue in casu. There is no provision or precedent for the proposition that a lump sum be attached in order to secure future monthly maintenance payments ...*

*... In this regard, this Court has a duty which enjoins it to summon its inherent powers "(s)o that, apart from powers specifically conferred by statutory enactments and subject to any deprivations of power by the same source, (it) can entertain any claim or give any order which at common law it would be entitled so to entertain or give' ... and, in doing so, to hold the scales of justice, where no specific law provides for the given situation.*

*... I consider this to be a proper case in which the arm of the Maintenance Act must be extended where it, by way of its recovery mechanisms, falls short in its endeavours to reach the desired results.*<sup>231</sup>

<sup>228</sup> *Mngadi v Beacon Sweets & Chocolates Provident Fund and Others* 2004 (5) SA 388 (D).

<sup>229</sup> At 396G-J. The Court took note of the provision in the South African Pension Funds Act 24 of 1956 which states that a pension benefit in terms of a registered fund may not be reduced, transferred or otherwise ceded, pledged or hypothecated, or attached or subjected to any form of execution under a judgment or order of court of law "[s]ave to the extent permitted by this Act, the Income Tax Act 58 of 1962 and the Maintenance Act, 1998" (section 37A(1)). Namibia's version of the Pensions Funds Act 24 of 1956 contains this same provision. However, the Court did not find this to be a bar to using the pensions fund to secure the payment of future maintenance, even though such a civil remedy was not explicitly provided for in the Maintenance Act. Firstly, the Court found that this was covered by the proviso to section 37A(1), which states that the fund may pay benefits "to any one or more of the dependants of the member or beneficiary or to a guardian or trustee for the benefit of such dependant or dependants during such period as it may determine", and secondly that the Maintenance Act itself provides that it may not be interpreted as allowing any person liable to maintain another from being excused from doing so, thus preserving by its own terms the joint common-law duty of support.

See section 2(2) of the South African Maintenance Act 99 of 1998: "This Act shall not be interpreted so as to derogate from the law relating to the liability of persons to maintain other persons." Compare section 2(b) of the Namibian Maintenance Act 9 of 2003: "This Act ... must not be interpreted so as to derogate from the law relating to the duty of persons to maintain other persons."

<sup>230</sup> *Burger v Burger and Another* 2006 (4) SA 414 (D).

<sup>231</sup> At paras 15, 18, 23.

In a subsequent South African case, it was held that the High Court can bind pension funds to secure future maintenance even where the defendant is not already in arrears.<sup>232</sup>

A later South African case went even further, finding that a maintenance court has power to secure future maintenance in this way.<sup>233</sup> Here, the complainant sought an order prohibiting the defendant from making any withdrawals from his annuity until such time as the child who was the beneficiary of the maintenance order in question becomes self-supporting, except with the leave of the maintenance complainant or the maintenance court. The purpose of this order was to prevent the maintenance defendant, who had a history of repeatedly being in default on maintenance payments, from depleting or dissipate the funds of the annuity, from which periodical payments were to be made for the maintenance of the beneficiary. The Court found that the maintenance court had the authority to make such an order, even though the Maintenance Act did not explicitly provide for such a remedy, saying that the Act “clearly does not provide for all the remedies maintenance courts may be called upon to grant, in which event innovative remedies should be considered”.<sup>234</sup> The Court’s reasoning was that a magistrate’s court functioning as a maintenance court is “*sui generis*”, with “wide-ranging powers in enforcing the duty of parents to support their children”.<sup>235</sup> Furthermore, a maintenance court must have the authority to fulfil the constitutional duty to protect the best interests of the child.<sup>236</sup> The Court held that this duty “overrides any real or ostensible limitation relating to the jurisdiction of magistrates’ courts”.<sup>237</sup>

*It would be absurd, and a costly time-wasting exercise, if an applicant for relief in a maintenance court should be compelled to approach the High Court for such relief because of jurisdictional limitations adhering to the magistrate’s court. This could never have been the intention of the Legislature in enacting the Maintenance Act ...*<sup>238</sup>

Thus, South African precedent asserts that the High Court and the maintenance courts have broad powers to take action to secure future maintenance payments for child beneficiaries.

*“It would be fair to expect that any parent who pleads poverty by reason of unemployment, or from any other cause, would, upon coming into fortune, selflessly seize the windfall and preserve and commit it towards the provision of the necessities of life for his or her children, and that this would be without need to be coerced ...”*

*Burger v Burger and Another* 2006 (4) SA 414 (D).

## Offsets

There is much precedent to the effect that a person who is subject to a maintenance order is not allowed to unilaterally decide to make offsets against the maintenance owing in respect of periods when a child beneficiary resides with him or her, or in respect of amounts voluntarily paid for other purposes or items supplied to the beneficiary.<sup>239</sup>

<sup>232</sup> *Magewu v Zozo and Others* 2004 (4) SA 578 (C).

<sup>233</sup> *Soller v Maintenance Magistrate, Wynberg, and Others* 2006 (2) SA 66 (C).

<sup>234</sup> At para 29.

<sup>235</sup> At para 20.

<sup>236</sup> The Namibian Constitution does not make reference to the best interests of the child, but this principle from the Convention on the Rights of the Child is part of Namibian law by virtue of Art 144 of the Namibian Constitution, which states: “Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.”

<sup>237</sup> At para 29-30.

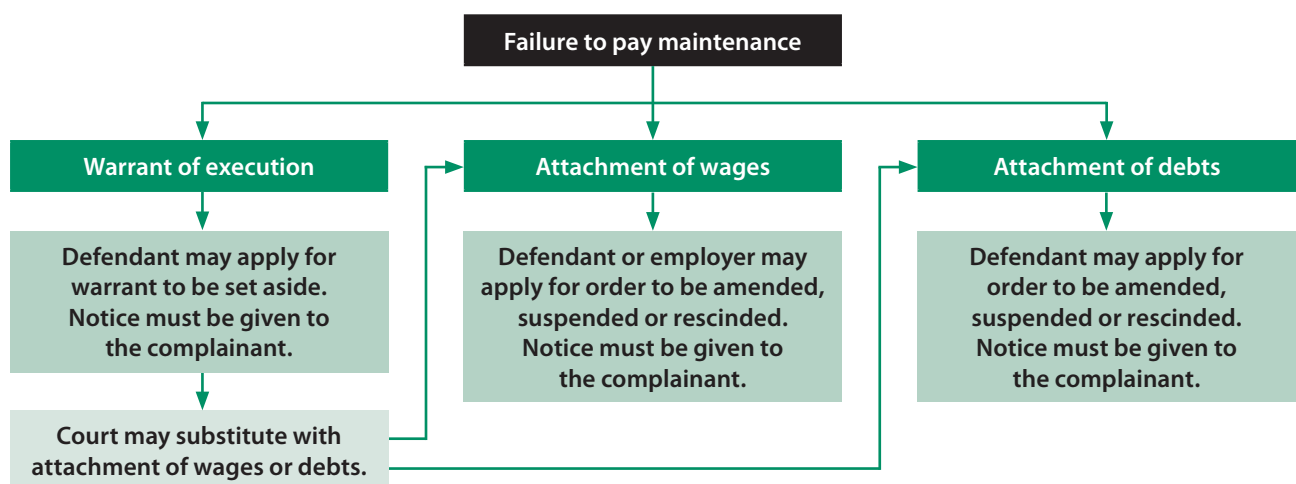
<sup>238</sup> At para 30.

<sup>239</sup> See *Jantjies v Jantjies and Others* [2000] NAHC 16 (22 May 2000), citing *Kanis v Kanis* 1974 (2) SA 606 (RA) (“It is [of] the utmost importance that orders made by the High Court for the maintenance of a wife or children should be strictly observed until varied or discharged by order of a competent Court.” At page 609G)); *S v Olivier* 1976 (3) SA 186; *R v Glasser* 1944 EDL 227.

One concern about potentially providing for offsets in cases where a child visits a non-custodial parent for a substantial period is that certain expenses which accrue to the custodial parent remain constant nonetheless. For example, the rent on a house suitable to accommodate the child does not change during temporary absences. School-related expenses are not affected by where the child stays during school holidays. Thus, it would be reasonable to expect that only regular consumables (such as water or groceries) would be affected by temporary absences of a child beneficiary.

Keeping this caveat in mind, it might be useful to provide for a simple procedure whereby the complainant and the defendant may agree on a temporary reduction of maintenance during periods where the beneficiary visits the defendant for a period longer than one month, which could be placed on file with the court. However, this should not be allowed in cases where the maintenance payments are being satisfied by an attachment order (such as attachment of emoluments) because of the administrative burden which would accrue to third parties by such a temporary reduction. If the parties could not reach agreement on this issue, the defendant could approach the court under the normal procedures with a request to suspend (or partially suspend) the order for the temporary period in question.

**Chart 8: Civil enforcement mechanisms for the failure to comply with a maintenance order**



## 4.6 Criminal enforcement

### 4.6.1 Failure to pay as a criminal offence under the Maintenance Act

Failing to obey a maintenance order is a criminal offence.<sup>240</sup> Although the 2003 Maintenance Act focuses on other approaches to enforce the payment of maintenance, if criminal enforcement seems to be the best option, the defendant will be charged and summoned to appear in court. The case then becomes a criminal case that will be dealt with in the criminal court by a prosecutor.

#### *Mens rea* (guilty mind)

South African precedent is not in full agreement as to whether *mens rea* is an element of the offence of failure to pay maintenance, or whether the offence is a “strict liability” one where the accused’s

<sup>240</sup> Maintenance Act 9 of 2003, section 39(1). In terms of section 106 of the Magistrates Courts Act 32 of 1944, it is an offence to willfully disobey or neglect to comply with an order or judgment of a magistrate’s court. This is a form of contempt of court, punishable by a fine of up to N\$1 000 or imprisonment for up to three months. However, the terms “order” or “judgment” do not include a judgment to pay a sum of money. Given that the Maintenance Act 9 of 2003 provides that failure to comply with a maintenance order is a criminal offence, it is not necessary to determine whether or not a maintenance order is excluded from the coverage of the provisions on contempt of court in respect of disobedience of a magistrate’s court order.



erroneous belief that he had a right to withhold maintenance payments would be irrelevant. In one South African case, the appellate court found that a father could be convicted of failure to pay maintenance even though he believed in good faith (but erroneously) that he was entitled to withhold payments in respect of the period when the child visited him.<sup>241</sup> However, a subsequent South African case (citing other South African precedents) held that the prosecution should be required to prove that an accused failed to make the required maintenance payments with a guilty mind, asserting that this is part of the constitutional right to be presumed innocent until presumed guilty as well as the right not to be deprived of liberty arbitrarily and without just cause.<sup>242</sup> This case also held that the requirement of a guilty mind could be satisfied by “*wilful intention, constructive intention or negligence*”.<sup>243</sup>

## Defences

Lack of means to pay maintenance is a defence to a charge of failure to comply with a maintenance order, unless it is proven that such lack of means was due to the defendant’s unwillingness to work or misconduct.<sup>244</sup> This is the sole defence articulated in the statute.

*“I’m a father of one child and I’m jobless do I still have to pay for maintenance?”*

Text message query sent to the Legal Assistance Centre

### What defences can be raised?

The bulk of South African case law (on South Africa’s similar statutory offence) has taken the view that the statutory defence of lack of means is the only one that can be raised in response to a criminal charge for non-compliance with a maintenance order – unless the proceedings are converted into an enquiry.<sup>245</sup> More specifically, it has been held that a defendant is not allowed to assert as a defence for non-payment that maintenance was not owing during temporary periods when the child was visiting the non-custodian parent; if there is a change in circumstances, then the defendant can proceed by way of a request for substitution of the order, but he has no right to decide on his own not to comply with the court order.<sup>246</sup> It has also been held that a criminal trial should not be the forum for re-evaluating the duty of maintenance or the correctness of the maintenance order. This should be done by way of an appeal rather than being raised as a defence to a criminal prosecution. If the accused contends that he is no longer liable to pay maintenance because of new circumstances which arose after the order was made, then the criminal proceedings should be converted into an enquiry.<sup>247</sup>

On the other hand, there is also some South African authority stating that an accused would be permitted to raise the defence that he is not liable in law to pay maintenance because he is not the beneficiary’s father, even though a maintenance order was already in place, provided that this

<sup>241</sup> *S v Olivier* 1976 (3) SA 186 (O).

<sup>242</sup> *S v Magagula* 2001 (2) SACR 123 (TPD) at 145g-147c. This case also asserted that the language used in respect of the offence in section 31(1) of the South African Maintenance Act (which is similar to the language used in sections 39(1) and (2) of the Namibian Maintenance Act 9 of 2003) implies a guilty state of mind through words such as “*fails*”, “*unwillingness to work*” and “*misconduct*”. See also *S v Mngxaso*; *S v Polo* 1991 (2) SACR 647 (Ck), which came to the same conclusion regarding the Maintenance Act 23 of 1963.

<sup>243</sup> *S v Magagula* 2001 (2) SACR 123 (TPD) at 147d-155d. These three states of mind are referred to in Latin as *dolus directus*, *dolus eventualis* or *culpa*.

<sup>244</sup> *Id*, section 39(2).

<sup>245</sup> *S v Oliver* 1973 (3) SA 186 (O) at 189-191 (referring to the similar provision in the 1963 Act); *S v Magugula* 2001 (2) SACR 123 (TPD) at 160d-161d and *S v Driescher* 2010 (1) SACR 443 (WCC) (both referring to the similar provision in the South African Maintenance Act 99 of 1998).

<sup>246</sup> *S v Oliver* 1973 (3) SA 186 (O) at 191H: “*When the order is ... silent about the position where the child has visited the non-custodian parent on whom the obligation to pay maintenance rests, the parent so visited is not entitled ex mero motu to pay less or to reduce the fixed amount of maintenance by a pro rata amount in respect of the period the child has visited him.*”

<sup>247</sup> *S v Pieterse* 1993 (3) SA 275 (C); *S v Sohlezi* 2000 (2) SACR 231 (NC); *S v Magugula* 2001 (2) SACR 123 (TPD).

issue had not already been determined by the maintenance court – although the court also held that the proper course of action in such circumstances would be to convert the criminal case into an enquiry.<sup>248</sup> This approach has been criticised.<sup>249</sup>

### ***Who bears the burden of proof in respect of the defence of lack of means?***

A further question is whether lack of means is a defence which must be raised and proved by the accused, or whether the prosecution must prove as an element of the crime that the failure to pay was not due to an unexcused lack of means.

One South African report suggests that placing the onus on the accused to show that failure to pay was due to a lack of means would constitute a “reverse onus” which would be unconstitutional.<sup>250</sup> One South African case has taken the view that the accused may raise lack of means as a defence without bearing any burden of proof, which then places the burden on the prosecution to disprove the defence.<sup>251</sup> According to this case, the prosecution would have three avenues for doing this: a) to show that the accused did in fact have means to make the payments; b) to show that the lack of means was due to the accused’s unwillingness to work or c) to show that the lack of means was due to the accused’s misconduct. This case asserts that proof that the lack of means is due to *unwillingness to work* is sufficient to overcome the defence, meaning that nothing further needs to be shown about the accused’s state of mind in respect of the lack of means (only that the accused was aware that failure to comply with the maintenance order would be unlawful). However, this case asserts further that proof of *misconduct* overcomes the defence of lack of means *only if coupled with a guilty mind relating to the obligation to comply with the maintenance order* – such as committing a criminal offence resulting in imprisonment with the awareness that this might prevent compliance with the maintenance order (or at least that the accused should have found this reasonably foreseeable), or by negligently spending so much money on luxuries as to be left with insufficient means to comply with the order.<sup>252</sup>

In contrast, another South African case has held that an accused who raises the defence of lack of means must first prove this alleged lack of means. The prosecution may then overcome the defence by showing that the lack of means was attributable to unwillingness to work or misconduct.<sup>253</sup> Similarly, another South African case noted (without having to decide the point) that while the State clearly bears the onus of proving that lack of means is due to unwillingness to work or misconduct, it would make sense for the onus of the initial proof of lack of means to lie with the accused, since the facts relevant to this issue would normally be in the exclusive domain of the accused.<sup>254</sup>

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<sup>248</sup> *S v Gunya* 1990 (4) SA 282 (CK) (dealing with Act 23 of 1963). See also *R v van der Merwe* 1952 (1) SA 647 (O) (dealing with a similar offence under another law).

<sup>249</sup> The *Gunya* holding was criticised in *S v Pieterse* 1993 (3) SA 275 (C) and *S v Magagula* 2001 (2) SACR 123 (TPD) at footnote 55. *R v van der Merwe* 1952 (1) SA 647 (O) was distinguished in *S v Olivier* 1976 (3) SA 186 (O) on the basis that the possibility of converting a criminal trial into a maintenance enquiry meant that there was no longer any need to explore issues such as legal liability to maintain in the context of a criminal defence. See the detailed discussion of the various precedents in *S v Magagula* 2001 (2) SACR 123 (TPD), which took the same approach as *S v Oliver* 1973 (3) SA 186 (O).

<sup>250</sup> Madelene de Jong, “Ten-year Anniversary of the Maintenance Act 99 of 1998 – A time to reflect on improvements, shortcomings and the way forward”, 126 (3) *South African Law Journal* 590 (2009) at 595-596.

<sup>251</sup> *S v Magagula* 2001 (2) SACR 123 (TPD) at 156d-157b

<sup>252</sup> *Id* at 156d-157b and footnotes 53-54. According to this case and a few other cases cited therein, punishing the accused for failure to pay maintenance which results from conviction for another crime would constitute double punishment for a single crime if the accused lacked *mens rea* in respect of the failure to pay maintenance.

<sup>253</sup> *S v Nduku* 2000 (2) SACR 382 (Tk) at 384b-385d, criticised in *S v Magagula* 2001 (2) SACR 123 (TPD) at footnotes 56 and 58. *S v Nduku* states (at para 6, emphasis added): “... on a charge of failure to make payments under a maintenance order the accused who proves lack of means as a defence is entitled to an acquittal unless it is established beyond reasonable doubt, by the prosecution, that the lack of means was due to the accused’s unwillingness to work or misconduct. The section [section 11(3) of the South African Maintenance Act 99 of 1998] does not require the accused to show that the lack of means was not caused by his/her unwillingness to work or misconduct before he/she can successfully raise the defence, instead it places the onus upon the prosecution to prove that the lack of means was self-created by the accused him or herself in refusing to work or committing misconduct which led to his/her dismissal.”

<sup>254</sup> *S v Cloete* 2001 (2) SACR 347 (C).

It should be noted that the wording of the 1963 Maintenance Act provided more clarity on this issue, stating:

*Proof that any failure which is the subject of a charge under sub-section 1 [the offence of failing to make a particular payment in terms of a maintenance order] 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.*<sup>255</sup>

As a result, several South African cases held that the court had a duty to assist an unrepresented accused with this burden of proof.<sup>256</sup>

The contrasting language in the Namibian Maintenance Act 9 of 2003 (like that of the South African Maintenance Act 99 of 1998) appears to place a burden on the accused only to *raise* the defence:

*If the defence is raised in any prosecution for an offence under this section [the offence of failing to make a particular payment in accordance with a maintenance order] that any failure to pay maintenance in accordance with a maintenance order was due to lack of means on the part of the person charged, he or she is not, merely on the grounds of such defence entitled to an acquittal if it is proved that the failure was due to his or her unwillingness to work or to his or her misconduct.*<sup>257</sup>

**We would suggest an amendment to the Act to clarify who bears the onus of proving lack of means, and we would suggest that the defendant who raises the defence of lack of means should initially bear the burden of proof, with the prosecution then having the possibility of overcoming this defence by proving that the lack of means was due to unwillingness to work or misconduct.**

Regardless of where the burden of proof lies, the maintenance court still has a duty to assist an unrepresented accused to understand the elements of the offence, the defences available and the possibility of converting the criminal trial into an enquiry.<sup>258</sup>

### **Lack of means: Dealing with irregular income**

In a 1999 South African case, a man who was accused of failure to pay maintenance raised the defence of lack of means. The magistrate found that his income consisted of irregular (although occasionally substantial) payments for professional services, and averaged this irregular income to determine a monthly income during the relevant period. The magistrate then proceeded to convict him on the basis that he had the requisite means to pay the maintenance in question, based on this average monthly income. On appeal, it was held that this approach was improper provided that the accused attempted to discharge his maintenance obligations (including payment of arrears) in accordance with the irregular nature of his income.

*S v Murray* 1999 (1) SACR 554 (W)

<sup>255</sup> Maintenance Act 23 of 1963, section 11(3), emphasis added; see also *R v Van der Merwe* 1952 (10 SA 647 (O) at 650E-D, *S v Malgas* 1987 (1) SA 194 (NC) at 195E-G; *S v Moeti* 1989 (4) SA 1053 (O) at 1054I-J; *S v Nylstroom and Andere* 1993 (1) SACR 543 (C) at 544d-i; *S v Leonards* 1997 (1) SACR (C) at 308h; *S v Goetsch* 1999 (1) SACR 558 (C) at 561k.

<sup>256</sup> See summary in *S v Magagula* 2001 (2) SACR 123 (TPD) at 161d-162b.

<sup>257</sup> Maintenance Act 9 of 2003, section 39(2), emphasis added.

<sup>258</sup> *S v Magagula* 2001 (2) SACR 123 (TPD) at 162d-164a (referring to the similar provision in the South African Maintenance Act 99 of 1998).

## What counts as misconduct in respect of lack of means to pay maintenance? Some examples

A 1957 South African case held that the misconduct “*must relate to wrongful or improper conduct inspired by a motive to defeat or disobey an order made by a Court*”, finding that failure to make maintenance payments whilst serving a sentence for fraud did not qualify as this kind of misconduct.<sup>a</sup>

A 1959 Zimbabwean case did not find misconduct where a man subject to a maintenance order left one job in hopes of securing another one, at which he expected to earn a lower salary:

*The appellant said he left [his existing job at] Lever Brothers because he was unhappy there; he did not state the reason for his unhappiness, whether it was because he felt there was no prospect of promotion or because he considered the work too onerous or some such circumstance. His reason for wanting to join the Staff Corps [the new job he sought] may have been a desire to advance his position or to find a more congenial occupation or to be assured of secure employment. The fact that he was to receive a smaller salary does not necessarily indicate that he would be worse off; the position he hoped to get might well have carried with it certain advantages which he did not enjoy with his former employers. These are matters which might influence a man, fully aware of his obligations to his family, to terminate his employment; if he does so, the propriety of his action can hardly be called in question; provided he acts in good faith, the fact that a maintenance order is operative against him cannot, in my view, affect the position. In any event, it would be at least arguable that the real cause of his lack of means (and, in my opinion, the immediate and not the remote cause should be regarded) was the fact that he was unable to secure employment in the Staff Corps; what occasioned that circumstance is unknown – whether it was due to the absence of a vacancy or, possibly, because of some disability, the appellant was not considered a suitable person. I agree that the appellant acted unwisely but that, by itself, did not constitute misconduct within the meaning of the Act.<sup>b</sup>*

Similarly, a 1971 Zimbabwean case held that it was not misconduct for the accused to have made a decision to work on his own farm and then try to sell that farm, rather than taking up employment, as he was not unwilling to work nor trying to avoid complying with the court order.<sup>c</sup>

In 1979, a South African case found no misconduct where the lack of means resulted from a drug offence, since there had been no guilty mind with respect to the failure to make maintenance payments.<sup>d</sup> Subsequent cases found that losing a job because of fighting or alcohol abuse also did not constitute misconduct in respect of failure to pay maintenance, for the same reason.<sup>e</sup>

In a 1999 South African case, the accused received a substantial lump-sum pension payment upon his resignation from employment, applied part of that payment towards discharging his future maintenance obligations and then invested and lost the balance in a *bona fide* business venture. The Court found that his failure to apply an even larger part of the pension payment towards discharging his future maintenance obligations did not constitute misconduct.<sup>f</sup>

<sup>a</sup> *R v Kinnear* 1957(2) SA 105 (T) (dealing with an analogous law). See also *S v Sigalo* 1973 (4) SA 469 (NC) and *S v Leonards* 1997 (1) SACR 307 (C) (both dealing with the South African Maintenance Act 23 of 1963).

<sup>b</sup> *R v Moss* 1959 (2) SA 738 (SR) (dealing with an analogous law).

<sup>c</sup> *S v Jarvis* 1971 (1) SA 243 (RA) (dealing with an analogous law).

<sup>d</sup> *S v Jngundela* 1979 (2) SA 565 (C).

<sup>e</sup> *S v Nylstroom en Andere* 1993 (1) SACR 543 (C) (which involved a review of several cases together; the reference is to the *Ellie* case); *S v Blaauw* 1997 (2) SACR 623 (C).

<sup>f</sup> *S v Goetsch* 1999 (1) SACR 558 (C).

## Multiple counts of failure to pay maintenance?

One point to note on criminal enforcement is that the criminal offence in the Act is “*failing to make a particular payment in accordance with a maintenance order*”. This suggests that it would be possible for a defendant who had missed multiple monthly payments to be charged with multiple counts of the offence in question – although we have not encountered any criminal case where this has been done in practice. Separate charges in respect of each payment would be similar to continuing offences, where a penalty is imposed in respect of each day that the offence persists after conviction. The possibility of using multiple charges could be kept in mind as a possibility for particularly recalcitrant defendants.

## Punishment on conviction

Failure to comply with a maintenance order is punishable by a fine of up to N\$4 000, imprisonment for up to 12 years or periodical imprisonment.<sup>259</sup>

*“It must be clear therefore that failure to pay maintenance for a child is not a peccadillo to be visited with a slap on the wrist – even for first offenders.”*

*Izack v The State* (CA 15/2013)[2013] NAHCMD 207 (23 July 2013)

In a 2006 Namibian case where the defendant was in arrears in respect of 138 instalments, the magistrate’s court imposed a sentence of the maximum fine of N\$4 000 or fourteen months imprisonment. The magistrate also ordered the convicted defendant to pay a lump sum of N\$10 000 towards the arrears by a given date, as well as N\$1 000 per month until the arrears were paid off. The defendant appealed against the fine imposed on the grounds that there was no evidence before Court that the appellant possessed readily realisable assets he could sell to pay the fine or any other means of payment – meaning that paying the fine was not in fact a realistic option for him. The state conceded this point, and the court referred the case back to the magistrate’s court for further factual enquiry to ensure that the sentence imposed does not induce the errant parent to default again.<sup>260</sup>

In another Namibian case, the magistrate’s court imposed a fine and then ordered that this fine be applied towards the arrear maintenance. On appeal, it was held that this procedure was not competent as conviction and sentence have “no connection with the question of how the arrears maintenance will be settled”.<sup>261</sup>

Another attempt at innovation in South African also fell afoul of technicalities, but was saved by a reformulation on appeal. A magistrate sentenced a recalcitrant offender to 1 440 hours of weekend imprisonment, to be reduced by the Department of Correctional Services by 15 hours for every R500 of arrear maintenance which the appellant paid off. The High Court found that the proposed mechanism for reduction, “*innovative and imaginative as it may be*”, could not legally be carried out by the relevant department. However, it substituted the magistrate’s sentence with a reformulated one with similar effect, imposing 1 440 hours of periodical imprisonment, 1 160 hours of which were suspended for five years on condition that the accused was not convicted of failure to comply with any maintenance order against him during that time and also on condition that he paid arrear maintenance in specified monthly instalments during that period.<sup>262</sup>

<sup>259</sup> Maintenance Act 9 of 2003, section 39(1).

<sup>260</sup> *S v Gaweseb* [2006] NAHC 27 (26 July 2006). The state also conceded that the order for payment of the arrears was invalid because it was not based on application by a public prosecutor as section 33(1) of the Act requires.

<sup>261</sup> *S v Libanda* [2012] NAHC 60 (12 March 2012).

<sup>262</sup> *S v Visser* 2004 (1) SACR 393 (SCA) (decided under the South African Maintenance Act 99 of 1998; quote from para 10).



*"The court will frequently be confronted with the problem of finding an appropriate sentence that punishes the accused without at the same time killing the goose that lays the golden eggs for the dependants."*

*S v Magagula* 2001 (2) SACR 123 (TPD)

Periodical imprisonment or a sentence of community service<sup>263</sup> may often be more appropriate than the usual form of imprisonment, which would prevent the defendant from working to get the money to pay maintenance.<sup>264</sup> For example, the defendant could be given a sentence of imprisonment on weekends only. In one Namibian case, the High Court approved of the use of periodical imprisonment on weekends, but required that the sentence be re-considered after the magistrate's court ascertained whether the defendant's job required him to work on any part of the weekend.<sup>265</sup>

## CASE STUDY

### Periodical imprisonment as a punishment for failure to pay maintenance and failure to pay maintenance as a form of domestic violence

*This an appeal from the maintenance court for the Windhoek district. The appellant (whom I shall hereafter refer to as the 'accused') was properly convicted on his own plea of guilty for failing to pay maintenance in respect of his minor child. After his conviction, the magistrate imposed a sentence of 1 000 hours of periodical imprisonment on Fridays at 18H00 until Sunday at 16H00; and, in addition, ordered the accused to pay the arrear maintenance of N\$12 900 in the amount of N\$300 per month with interest at the rate of 20% per annum. The effect of the sentence is that he reports for incarceration on a Friday at 18h00 and is then released at 16H00 on Sunday.*

*At the plea proceeding, the magistrate first explained to the accused that the law allows him the defence of 'no means', being the inability to pay and then asked him why he did not pay maintenance. The accused's answer was startling: He initially stated that it was through human error that he did not pay, but upon further questioning said that that he really did not have any reason for not paying.*

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*In his reasons for sentencing, the magistrate stated that failure by fathers to pay maintenance is very prevalent and has become a serious problem in our society. He added that those most detrimentally affected by this failure are the children for whose benefit maintenance orders are granted.*

*The accused comes to this court on appeal, claiming that the sentence imposed on him was shockingly severe. He says that the magistrate ought to have imposed a fine in preference to periodical imprisonment, considering that he is a first offender who pleaded guilty.*

\*\*\*

*The court a quo correctly took into account the neglect of children by fathers and the effect that has on children.*

*The accused is not a man who had difficulty raising money to pay for the maintenance. He just chose not to do so, while knowing there was a court order obliging him to pay. He was completely unperturbed by the consequence this had on his child ...*

<sup>263</sup> See Criminal Procedure Act 51 of 1977, section 285.

<sup>264</sup> See, for example, *S v Koopman*, 1998 (1) SACR 621 (C) where the Court held (under the Maintenance Act 23 of 1963) that it was a senseless punishment to impose a fine on an impoverished person for failure to pay maintenance, since such persons should be permitted to apply every cent available to their own and their children's maintenance, and *S v Mentoore* 1998 (2) SACR 659 (C), where the Court found (under the Maintenance Act 23 of 1963) that it would run counter to the best interests of the children in question to imprison an accused who has a prospect of permanent employment which he would probably lose if sentenced to imprisonment.

<sup>265</sup> *Izack v The State* [2013] NAHCMD 207 (23 July 2013).

Considering that the court order requiring accused to pay maintenance took effect on 1 September 2003, he only made payments for three months and ceased payment. He had therefore not paid maintenance for the child for a staggering period of eight years. What is more, the amount he was ordered to pay was very small in my view and probably counts for nothing in today's money value. A maintenance order is for the benefit of a child and not the custodian parent.

It is important that fathers realise that the tide has turned against those who neglect their children; and that this court will not readily interfere with trial courts' sentences against those who are found guilty of the malpractice. The Combating of Domestic Violence Act [4 of 2003] defines domestic abuse [in section 2(1)(c)] to, amongst others, include:

*'the unreasonable deprivation of any economic or financial resources to which the complainant or a family member or dependant of the complainant is entitled under any law, requires out of necessity or has a reasonable expectation of use ...'*

A child is in a domestic relationship with its biological father in terms of s 3[(1)(d)] of the Combating of Domestic Violence Act.

It must be clear therefore that failure to pay maintenance for a child is not a peccadillo to be visited with a slap on the wrist – even for first offenders. Economic abuse is a species of domestic violence as the Combating of Domestic Violence Act stipulates ...

The intent clearly behind the sentence imposed by the magistrate was two fold:

- (i) to on the one hand ensure that he remains employed to earn an income from which to pay maintenance, and
- (ii) to send a clear message, by imposing periodical imprisonment, that failure to pay maintenance will not be countenanced by the courts.

... [G]iven that the accused was unrepresented at his trial, the magistrate ought to have elicited more information to establish if imposing periodical imprisonment would not in the circumstances have the contrary effect. Although the court can take judicial notice that an employee such as the accused does not work on Sundays, it cannot take judicial notice that he does not work on Saturdays until at least the lunch hour. Had the magistrate elicited more information in that regard, it is possible that the accused works, on the very least, on Saturdays until the lunch hour. In that case, the court might either not have imposed periodical imprisonment, or might have fashioned its order to meet the circumstances of the case. That failure constitutes a material misdirection.

We feel this is an appropriate case to remit the matter to the court a quo to consider the sentence afresh in the light of this judgment. We wish to make clear that our reversal of the sentence imposed is in no way a disapproval of the imposition of periodical imprisonment but is only intended to ensure that one of the key objects intended by the sentence is not defeated ...

*Izack v The State* [2013] NAHCMD 207 (23 July 2013)  
(footnotes omitted)

***"To impose sentence in matters of this nature is an extremely difficult task. All people do not have the ability to handle their financial affairs properly. Some people out of principle do not want to pay maintenance for dependants. Others relegate that obligation to last in the line. In the majority of cases the maintenance is to be paid out of the income which is to be earned in the market. In the majority of those cases the liberty of that person is paramount. In most of the cases also the effect of direct imprisonment diminishes the earning capacity of such a person, if not destroys it. It follows that in cases where a parent pays maintenance but defaults from time to time it is in the interest of the child to threaten him with imprisonment but to try and retain his income earning capacity."***

*S v Morekhure* 2000 (2) SACR 730 (T)

## Dad lands weekend lock-ups over child support

A Windhoek resident who failed to obey a High Court order to pay N\$500 in maintenance a month for his two children will now have to spend part of every weekend until the end of November behind bars.

The tough line against the non-payment of court-ordered child support was taken by Magistrate Leah Shaanika in the Windhoek Magistrate's Court in Katutura on Tuesday.

Appearing before her was Dirk van Wyk, who had been charged with failing to pay maintenance for the two children born out of his marriage that ended in a divorce in the High Court four and a half years ago.

When the marriage was dissolved in April 1998, the High Court ordered Van Wyk to pay his ex-wife N\$250 in maintenance for each of his two children every month.

However, according to a sworn declaration from a Justice Ministry official attached to the maintenance division of the Windhoek Magistrate's Court, Van Wyk was N\$25 000 in arrears with the child support

payments by August this year. He had paid nothing since the divorce was finalised.

During his trial this week it was indicated to the Magistrate that the two children had stayed with him for part of the time since his marriage had ended. During the rest of the time, though, he still failed to pay child support.

Magistrate Shaanika ordered Van Wyk to continue paying maintenance of N\$500 a month, and to pay an additional N\$300 a month until the remaining N\$10 000 in arrears had been paid off.

She added a further string of punishment to his sentence, ordering that he has to serve 150 hours of periodical imprisonment. He has to report to be locked up behind bars at 17h00 every Friday, until he is set free again at 24h00 every Saturday, from today until the full jail term had been served by the end of November, she directed.

*The Namibian, 25 October 2002*

Of course, there may also be instances where other forms of imprisonment are appropriate. For example, a South African appellate court upheld a sentence imposing the maximum period of imprisonment on an accused who had been convicted for the offence of failure to pay maintenance four times in four years.<sup>266</sup> In contrast, it has been held in several South African cases that imprisonment will usually not appropriate for a first offender.<sup>267</sup>

Any sentence imposed may be suspended. A suspended sentence is a sentence the accused does not have to serve, provided that certain conditions are obeyed. For example, the court could order that the defendant does not have to serve the sentence imposed so long as he or she makes the required maintenance payments regularly in future. It is also common for courts to suspend a sentence in a criminal case on the condition that the defendant pays off the arrears owing.<sup>268</sup> Even if the sentence is never served, the conviction will remain on the defendant's record – which could affect future employment prospects or credit ratings.<sup>269</sup>

*"Some educated men do not pay maintenance because they think that the mother isn't smart enough to get help from the court."*

Women at the focus group discussion in Ongwediva

<sup>266</sup> *S v Philander* 1997 (2) SACR 529 (C). The Court overturned a portion of the sentence which exceeded the maximum penalty authorised by the Act.

<sup>267</sup> See, for example, *S v Grosch* 1993 (2) SACR 373 (C) (The accused was a first offender who had failed to pay maintenance for his children for a period of four months. The magistrate sentenced him to nine months' imprisonment, with four months conditionally suspended. On appeal, this was altered to a sentence of six months' imprisonment totally suspended for a period of three years. Another example is See also *S v Adams* 1994 (1) SACR 400 (C).

<sup>268</sup> See *S v November and Three Similar Cases* 2006 (1) SACR 213 (C) at para 12-14.

<sup>269</sup> Section 39(4) of the Maintenance Act 9 of 2003 provides explicitly for communication about a conviction to persons who maintain credit ratings: "If a person has been convicted of an offence under this section, the maintenance officer may, notwithstanding anything to the contrary contained in any law, furnish that person's personal particulars to any business which has as its object the granting of credit or is involved in the credit rating of persons."

## Suspended sentences and payment of arrears: The importance of not being too lenient

*"... [A] court sentencing for a contravention of [section 31(1) of the South African Maintenance Act, which is similar to section 39(1) of the Namibian Maintenance Act 9 of 2003] will always retain the power to order, as an appropriate condition of suspension of imprisonment, that the defaulter pays off his arrears by way of regular instalments. Needless to say, no such order or condition should be made without a proper enquiry being conducted by the court into the accused's financial circumstances. Furthermore, the instalment should be set on the basis that maintenance is a primary obligation on the part of the defaulter and not one which ranks equally with every other expense which the defaulter may have ...*

*These measures and remedies exist over and above those available to a custodian parent [in terms of the provisions on civil remedies which are also similar in the laws of both countries]. These remedies are available to an aggrieved party without the necessity of the defaulting party having to be convicted of contravening s 31(1). Given the existence of these separate civil remedies it is all the more important that conditions of suspension of terms of imprisonment, such as were imposed in the present matters, are properly fashioned taking into account the defaulter's financial means. **In this way the rights and remedies of the beneficiary of the maintenance order are not potentially undermined or superseded by the imposition of an unrealistic and lenient condition of suspension on the defaulter relating to the payment of arrear maintenance.***

*Applying these principles to the present matters I can see no reason why in each case the defaulter was not ordered to pay his arrears at a realistic rate and why interest was not levied on the capital sum. **The levying of interest would at least partly compensate for the loss in the value, through inflation, of the missed instalments and help to ensure that non-payment of maintenance arrears is not treated as a form of cheap credit by defaulters.** Furthermore, proper financial enquiries in each case might have brought to light that the accused had moneys available, or readily realisable assets, to pay off all or part of the outstanding arrears. In that event **an appropriate condition of suspension of the imprisonment would have been payment of such a sum within a specified time.**"*

*S v November and Three Similar Cases 2006 (1) SACR 213 (C) at para 12-14 (emphasis added)*

*"Effective enforcement of maintenance payments is necessary, not only to secure the rights of children but also to uphold the dignity of women and promote the constitutional ideals of achieving substantive gender equality. It is therefore important that courts regard deliberate failures to comply with maintenance orders as serious offences and punish such failures accordingly."*

*S v Visser 2004 (1) SACR 393 (SCA)*

## Recovery of arrear maintenance payments

If the defendant is convicted of a failure to comply with a maintenance order, in addition to the penalty associated with this offence, the court may upon application by the prosecutor issue an order for payment of the arrears owing.<sup>270</sup> Such an order for the recovery of arrears can be enforced through any of the civil enforcement mechanisms discussed above.<sup>271</sup> In practice, it is common for a sentence of imprisonment to be suspended on the condition that the arrears are paid off immediately or on the condition that regular instalments are paid towards the amount of arrears owing.<sup>272</sup> It has been held in South Africa that a court can, on suspending a sentence, order that this be done on condition that the

<sup>270</sup> Maintenance Act 9 of 2003, section 33(1). A prosecutor who wishes to apply for an order for recovery of arrear maintenance should complete Form Q. Maintenance Regulations, regulation 24. The clerk of the criminal court which has convicted the defendant must submit a copy of the order for recovery of arrears to the clerk of the civil court, who should register the order and provide this information to the complainant and the clerk of the maintenance court where the underlying maintenance order was made. Id, regulation 25. These will often be the same magistrate's court.

<sup>271</sup> Id, section 33(1).

<sup>272</sup> See, for example, *S v November and Three Similar Cases* 2006 (1) SACR 213 (C).

convicted persons pays the arrears due at the time of the trial, and not merely in respect of the time period covered by the charge sheet.<sup>273</sup>

When considering whether to grant an order to recover arrear maintenance, the court must consider (1) the existing and prospective means of the defendant; (2) the financial needs and obligations of, or in respect of the beneficiary; (3) the conduct of the defendant relevant to his or her failure to satisfy the maintenance or other order in question; and (4) any other circumstances which should, in the opinion of the court, be taken into consideration.<sup>274</sup>

One question which arises is the appropriateness of the requirement that an order for recovery of the arrears owing must be issued only on application by a public prosecutor.<sup>275</sup> Surely it would make sense to authorise the court to make such an order on its own motion at the time of sentencing, provided that there was sufficient evidence of the amount in arrears before the court. **We recommend that the Act be amended to delete the requirement that an order for payment of arrears may accompany a criminal conviction only on application by a public prosecutor.**

It was held in one recent Namibian case that it was acceptable for the accused and the complainant to agree that the accused will make payments aimed at reducing arrears as an interim measure when the criminal case was postponed before conviction. The High Court found that there was no prejudice to anyone if the arrears were reduced while the criminal case was pending, even though the exact amount of arrears was in dispute.<sup>276</sup>

Expanding on this logic, **we recommend that the Act be amended to allow the court to stay the criminal proceedings where the defendant and the complainant enter into a consent order for the payment of arrears which is made into an order of court in addition to the maintenance order which was breached.** This could take place as an alternative to conversion of the criminal trial into an enquiry, where there is no assertion of changed circumstances and no indication that the defendant is unable to pay – and thus no real purpose in holding an additional enquiry. If the consent order was not complied with, the criminal proceedings could recommence. This would work in a similar manner as a suspended sentence where payment of the arrears owing is a condition of the suspension – but without the need for the defendant to bear a criminal conviction.

## Conversion of criminal trial to enquiry

As noted above, it is possible for a criminal hearing to be converted into a new maintenance enquiry. This is the appropriate course of action where the defendant shows a genuine lack of means to pay the existing order.<sup>277</sup> It may also be appropriate in other circumstances, such as where the accused alleges that the beneficiary has become self-supporting<sup>278</sup> or that some doubt about paternity has come to light.<sup>279</sup>

*“... the accused proved that his failure to comply with the maintenance order was due to lack of means and that such lack of means was not due to his unwillingness to work or to his misconduct. His evidence, therefore, substantiated a good defence and he should not have been found guilty. In this case it is advisable and desirable that proceedings in the magistrate’s court be converted ... into an enquiry.”*

*S v Dikwidi* 1979 (4) SA 646 (B) (regarding similar conversion procedure under Maintenance Act 23 of 1963, citations omitted)

<sup>273</sup> *S v Sigalo* 1973 (4) SA 469 (NC).

<sup>274</sup> *Id*, section 33(3).

<sup>275</sup> See *S v Gaweseb* [2006] NAHC 27 (26 July 2006), where an order for payment of arrears was invalidated on this basis.

<sup>276</sup> *S v Kalundu* [2012] NAHC 325 (30 November 2012).

<sup>277</sup> *Id*, section 34.

<sup>278</sup> *S v Dannhauser* 1993 (2) SACR 398 (O).

<sup>279</sup> See *S v Gunya* 1990 (4) SA 282 (CK).



*“But if the evidence should leave open as a reasonable possibility that the accused complied with the maintenance order to the best of his ability, but lacked the means to comply to a greater extent than he did, or at all; and if it fails to show that his lack of means was his own fault ... ; and it fails to show that his lack of means is merely temporary and that he will shortly be in a position to resume payment in terms of the maintenance order, the trial should be converted ... into a maintenance enquiry.”*

*S v Magagula* 2001 (2) SACR 123 (T) at para 104 (regarding similar conversion procedure under the South African Maintenance Act 99 of 1998)

The provisions on conversion are virtually identical in the 2003 Act and the 1963 Act. The procedure is summarised in a 1995 Namibian High Court case:

*In terms of section 13 of the Maintenance Act 23 of 1963, it is the duty of the trial magistrate to convert criminal proceedings ... for an alleged failure to comply with a maintenance order into an enquiry ... if it appears to the magistrate that such enquiry is desirable eg, by reason of the excessively high maintenance payments imposed on an accused in terms of an existing maintenance order, having regard to the accused's income, assets and obligations towards all his dependants at the time of the hearing of the criminal case. This duty of the magistrate mero motu to devote his attention to the desirability or otherwise, of the criminal case being converted, and to act accordingly, exists independently of the right of the accused himself to apply ... for the substitution of an existing maintenance order. The trial magistrate himself is obliged to act if he finds it desirable, even though the accused takes no steps in this connection.*<sup>280</sup>

The same Namibian case explains the logic of the procedure:

*The desirability of converting a prosecution into an enquiry where it is clear that the accused is unable to comply with an existing maintenance order is self-evident as “failure by an accused to apply for a reduction could result in him being repeatedly tried on an unamended order and repeatedly acquitted of inability to pay; which serves no purpose and wastes the resources of the State”.*<sup>281</sup>

When a criminal proceeding is converted into an enquiry, the criminal trial ceases to exist. However, if the conversion takes place in the context of a court proceeding to enforce a suspended sentence, only the enforcement proceeding is affected; the underlying sentence is not cancelled.<sup>282</sup>

Conversion of the trial into an enquiry could raise confusion on the treatment of arrears. Orders for recovery of arrears are possible in terms of section 33 of the Maintenance Act only where there has been a conviction for failure to pay maintenance. This could be problematic on its own, as the conversion into an enquiry could take place where a defendant raises the defence of inability to pay – but the ensuing enquiry could determine that the defendant does in fact have sufficient means to pay the amount in question.<sup>283</sup>

However, under the Namibian law, arrears could be addressed even if the criminal trial were converted into an enquiry, in the absence of a conviction, by drawing on section 28 which authorises

<sup>280</sup> *Bingel v Salionga and Another* [1995] NAHC 23 (29 November 1995), quoting headnote in *S v Cloete* 1977 (4) SA 90 (C). See also *S v Pieterse* 1993 (3) SA 275 (C).

<sup>281</sup> *Id*, quoting *S v Munro* 1986(2)SA 19 (C) at 21H.

<sup>282</sup> *S v Vermeulen* 1981 (2) SA 486 (E).

<sup>283</sup> See *S v Lübke* 1998 (2) SACR 552 (T). It has been pointed out in South Africa that if the conversion of a criminal trial into a maintenance enquiry did not produce a favourable outcome for the accused (in other words, if the original order was confirmed), there would be no bar to a renewed prosecution for the original offence – which could then address arrear maintenance if it resulted in a conviction. See *S v Magagula* 2001 (2) SACR 123 (TPD) at 141i-142a.

civil enforcement measures for any arrears owing.<sup>284</sup> So, in the situation where a criminal trial has been converted into an enquiry, there would seem to be nothing to prevent the complainant from applying at that enquiry for civil enforcement of arrears owing – unless the maintenance court has substituted or discharged the maintenance order with retroactive effect.<sup>285</sup>

## 4.6.2 Contempt of court

*“Although money judgments cannot ordinarily be enforced by contempt proceedings, it is well established that maintenance orders are in a special category in which such relief is competent.”*<sup>286</sup> This is clear in instances where the order to pay maintenance is embodied in a High Court order (such as a divorce order). However, it has also been held in South Africa that it is competent for the *High Court* to make an order for contempt of court for failure to comply with an order made by a *magistrate’s court*.<sup>287</sup> The South African Constitutional Court held that this is permissible as “*process-in-aid*”, which is the means whereby a court enforces a judgment of another court which cannot be effectively enforced through its own process.<sup>288</sup> Process-in-aid “*will not ordinarily be granted for the enforcement of a judgment of another court if there are effective remedies in that court which can be used*”,<sup>289</sup> but in this case the Court found that no effective redress had been possible through the mechanisms available at the maintenance court because of flaws in the implementation of the Maintenance Act.<sup>290</sup>

As in the case with a criminal prosecution under the Maintenance Act, the respondent can raise the defence that breach of the court order was due to a good faith inability to pay the maintenance owing.<sup>291</sup>

## 4.6.3 Failure to maintain as a criminal offence under child protection laws

Failure to maintain a child is also a criminal offence under Namibia’s child protection laws. The Children’s Act 33 of 1960 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.*<sup>292</sup>

If someone is charged with this offence, it is assumed that he or she had the ability to provide the child in question with adequate maintenance; the accused bears the onus of proving lack of means

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<sup>284</sup> Maintenance Act 9 of 2003, section 28. Section 28(1) states: “Where a defendant against whom a maintenance order or an order under section 17(3) [pregnancy and birth-related expenses], 20 [costs] or 21(4) [costs of scientific tests] has been made fails, within 10 days from the date on which payment becomes due, to comply with the order, the complainant may apply to the maintenance court where the order is registered for enforcement of the order”. Section 28(3) states that “the maintenance court may authorise enforcement of the order in order to recover the amount due together with any prescribed interest which has accrued on the amount” (ie any arrears owing) by means of a execution against property, attachment of emoluments or attachment of a debt owed to the defendant.

<sup>285</sup> In South Africa, it has been held that it is not competent for a magistrate to make an order in respect of arrears at the conclusion of a criminal trial that has been converted into an enquiry. *S v Lübke* 1998 (2) SACR 552 (T). However, what we contemplate here is not an “order” in respect of arrears, but civil enforcement in respect of those arrears.

<sup>286</sup> *Bannatyne v Bannatyne (Commission for Gender Equality, as amicus curiae)* 2003 (2) SA 363 (CC) at para 18.

<sup>287</sup> Contempt of court in a magistrate’s court is limited to situations where a person “wilfully insults a judicial officer during his sitting or a clerk or messenger or other officer during his attendance at such sitting, or wilfully interrupts the proceedings of the court or otherwise misbehaves himself in the place where such court is held”. Magistrates Courts Act 32 of 1944, section 108(1).

<sup>288</sup> *Bannatyne v Bannatyne (Commission for Gender Equality, as amicus curiae)* 2003 (2) SA 363 (CC) at para 20.

<sup>289</sup> *Id* at para 22.

<sup>290</sup> *Id* at paras 26-32.

<sup>291</sup> See *Dezius v Dezius* 2006 (6) SA 395 (T), which involved a contempt of court proceeding for maintenance *pendente lite* in a divorce matter.

<sup>292</sup> Children’s Act 33 of 1960, section 18(2).

which is not due to the accused's own fault or negligence.<sup>293</sup> It is also a form of criminal neglect if the indigent accused has failed to take reasonable steps to get assistance with maintaining the child from State authorities or charities,<sup>294</sup> such as applying for a state maintenance grant if eligible.

The punishment for this offence is a fine of up to 200 pounds<sup>295</sup> (N\$400), or imprisonment for up to two years, or both – with the possibility of an increase sentence if the accused stood to benefit in any way in the event that the child died.<sup>296</sup>

The forthcoming Child Care and Protection Act is expected to include a similar criminal offence. The draft bill states:

*A person who is legally liable to maintain a child commits an offence if that person, while able to do so, fails to provide the child with adequate food, clothing, lodging and medical assistance and is liable on conviction to a fine not exceeding N\$50 000 or to imprisonment for a period not exceeding ten years or to both the fine and imprisonment.*<sup>297</sup>

## 4.7 Changes to a maintenance order (substitution, suspension or discharge)

When an application is made to amend an existing maintenance order, the court will consider whether there have been changes in the relevant circumstances and whether there is sufficient cause for the substitution, suspension or discharge of the order.<sup>298</sup> The applicant must show changed circumstances to ensure that the application for change is not simply an appeal of the underlying decision in disguise. The procedure for a request for the suspension, substitution or discharge of an existing maintenance order is the same as for an initial maintenance complaint.<sup>299</sup>

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

*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.*<sup>300</sup>

The same principle could reasonably be applied to maintenance cases.

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<sup>293</sup> Id, section 18(3).

<sup>294</sup> Id, section 18(4).

<sup>295</sup> Id, section 18(5); see *S v George* (CR 25/2010) [2010] NAHC 149 (12 October 2010) at para 8. The pound was the currency of the Union of South Africa from the time the country became a British Dominion in 1910 until it was replaced by the rand shortly before South Africa became a Republic in 1961. The South African pound was replaced by the rand on 14 February 1961 in terms of the Decimal Coinage Act 61 of 1959, at a rate of 2 rand = 1 pound. See also South African Reserve Bank Act 90 of 1989, section 15(2), and its predecessor, the South Africa Reserve Bank Act 29 of 1944, section 10A.

<sup>296</sup> Id, section 18(5).

<sup>297</sup> Child Care and Protection Bill, draft dated 12 January 2012, section 235(2).

<sup>298</sup> Maintenance Act 9 of 2003, section 16(5).

<sup>299</sup> Id, section 9(2)(b). A request to change an existing maintenance order is made on Form B, which is entitled “Changes to existing maintenance order”. See Maintenance Regulations, regulation 2(b).

<sup>300</sup> *Loubser v Loubser* 1985 (4) SA 687 (CPD) at 684F-G.

## CASE STUDY Substitution

A 2009 Namibian case which involved an appeal against the outcome of a request for substitution of a maintenance order illustrates the procedure and the factors to be considered.

A maintenance order for N\$450/month was in place for a single child, "S." The mother requested an increase to N\$1 000/month. The maintenance court granted an increase to N\$600/month which the mother appealed. The motivation for the request for the increase was that the child was now attending high school, which involved additional expenses in driving to and from the school, and that the cost of living had gone up. Furthermore, the mother asserted that the respondent had the financial means to contribute more to the maintenance of the child.

In the proceedings before the magistrate's court, the mother stated that she was an unmarried primary school teacher with a net salary of N\$5 620/month. She shared her accommodation with a friend who contributed to the household expenses, plus S and two other minor children. The mother reported that she paid S's school fees of N\$3 548 per year as well as varying sums of money on clothes, shoes, school and sports uniforms, toiletries, cosmetics and holidays – but was unable to report precise expenditures.

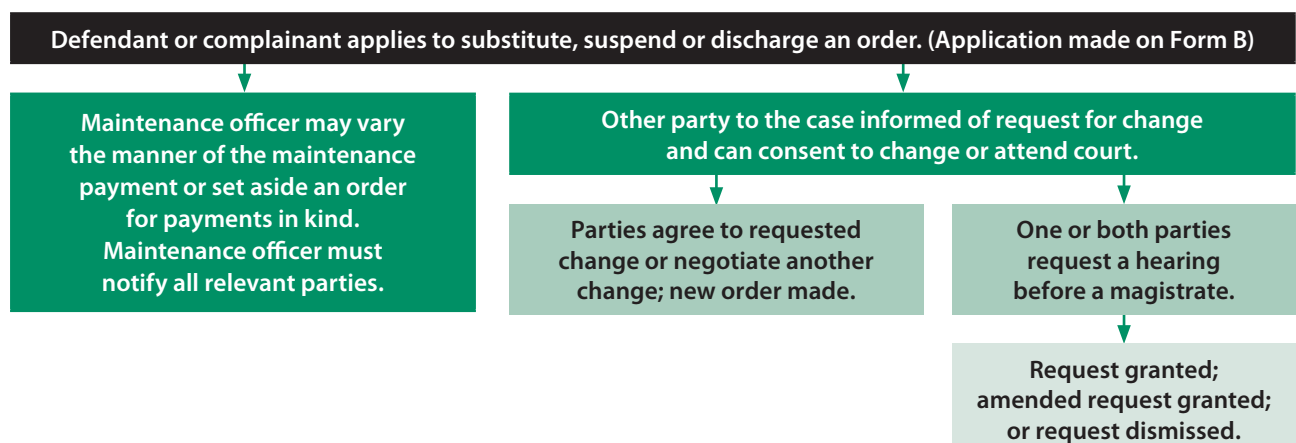
The father was a married public servant with five children, who was also supporting a sixth stepson. His pay slip showed that he received a net salary of N\$5 914/month. He argued that the amount being claimed for S's maintenance was excessive. Under the original maintenance order of N\$450/month, if the mother contributed an equal amount this would provide S with N\$10 800/ year. If both parents contributed N\$600/month, the figure would be N\$14 400/year. The father submitted that this would be a reasonable contribution to S's maintenance, particularly considering his expenses for supporting his other five children and his stepson, as well as his general household expenses. He also argued that N\$1 000/month would be unaffordable for him, even if the support of his stepson was not taken into account in the calculation.

The mother argued that his current wife was employed and able to assist with the maintenance of the children born of their marriage, but no evidence of the wife's income or the couple's marital property regime was placed before the court (which would have been relevant since a duty to support a stepchild rests on the joint estate where a stepparent is married in community of property to the child's biological parent).

The High Court held that is "*evident that, at the level of today's cost of living, it stretches the respondent's salary of about N\$5 000 per month to breaking point to support the size of his family ... The increased maintenance claimed by the [mother] is clearly beyond the means of the parties and the [father] is not in a position to meet the claim.*" Thus, the High Court found that the mother had not discharged the onus of showing sufficient cause for variation of the order.

*Mokomele v Kaihivi* [2009] NAHC 101 (12 June 2009)

**Chart 9: The process of substituting, suspending or discharging a maintenance order**



## 4.8 Administrative variations to a maintenance order

The maintenance court is authorised at the request of the maintenance officer, to make simple administrative changes such as changing the details of the bank where maintenance money is to be paid, or changing the recipient of the maintenance money in appropriate circumstances (for example, where the child is going to stay with the grandmother for a while or where the complainant would like the defendant to pay some of the costs directly to a school hostel or a day care centre).<sup>301</sup> The court can also, at the request of the maintenance officer, set aside an order for payment of all or part of the maintenance owing in kind.<sup>302</sup> These changes can be made without the necessity for an enquiry or a formal substitution proceeding.

The Act and regulations also make provision for notification and procedures to be followed if the defendant changes his/her place of residence or employment while a maintenance order is in place,<sup>303</sup> and for the procedures for transferring a maintenance file if the complainant changes his or her place of residence to a residence in a new jurisdiction.<sup>304</sup>

The wording of the rule regarding notification and file transfer is confusing. It refers to any change of residence (*“Where a complainant in whose favour a maintenance order or any other order under this Act was made or given changes his or her place of residence ...”*), but requires that such a complainant give notice of the change of address to the *“maintenance officer of the maintenance court which has jurisdiction in the area where the complainant now resides”* – suggesting that notice is required only if the complainant’s new residence is in a different magisterial district from the one where the order was initially made. However, complainants cannot be expected to know the boundaries of magisterial districts. It might be obvious in some cases that a complainant has moved from one magisterial district to another (such as a move from Windhoek to Keetmanshoop), but in other cases (such as a move from one village to another), this might not be clear. **It would be helpful to amend this provision to require the complainant to notify the court where the maintenance order was initially registered of any change of address.** This would be helpful if the complainant needs to be located in respect of a subsequent request for change, or for purposes of an investigation into alleged misuse of maintenance money. **The clerk of the original court could then have a duty to effect a transfer of the file if the change of address results in a change of jurisdiction.**

Administrative variations to maintenance orders are discussed in more detail in sections 13.15 and 13.16.

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<sup>301</sup> Maintenance Act 9 of 2003, section 22. The maintenance officer must inform the complainant and the defendant of any such change, and if relevant the employer or person paying debts directly to the court, using Form J. Maintenance Regulations, regulation 12.

<sup>302</sup> Maintenance Act 9 of 2003, section 22 read together with section 17(4).

<sup>303</sup> Id, section 17(5). A defendant who changes residence or employment must give notice to the court using Form S. Maintenance Regulations, regulation 15.

<sup>304</sup> Maintenance Act 9 of 2003, section 24(1). A complainant who changes his or her place of residence must notify the court of this change using Part A of Form R. The clerk of the court where the maintenance order was made then follows a specified procedure for transfer of the relevant files to the maintenance court which will now have jurisdiction over the matter as a result of the move. The clerk at the original court must retain copies of orders, judgements and records of payments and send the original documents by hand or registered post to the clerk of the new court. The clerk at the new court must number the case with the next consecutive number for maintenance cases for the year in which the file is received. The clerk of the new maintenance court must then give notice of the transfer, using Part B of Form R, to the defendant and any person who is required under the Act to deliver money or property (such as an employer where there is an attachment of emoluments in place). Maintenance Regulations, regulation 14.



## 4.9 The Maintenance Act and High Court orders in divorce cases

### 4.9.1 Jurisdiction of maintenance court over High Court orders for maintenance

The Maintenance Act 23 of 1963 clearly gave the maintenance court jurisdiction to substitute or enforce orders for maintenance made by the High Court in divorce cases. It defined “*maintenance order*” as “*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 ...*”<sup>305</sup>

The position remains the same under the Maintenance Act 9 of 2003, although the approach used to achieve this is somewhat circuitous. Section 1 of the 2003 Act defines a “*maintenance order*” as “*a maintenance order made under section 17, a consent order made under section 18 and a default maintenance order made under section 19, or a maintenance order made by a maintenance court under any other law ...*”.<sup>306</sup> It defines “*maintenance court*” to include “*any other court which is authorised by law to grant maintenance orders*”<sup>307</sup> – which would include the High Court acting in divorce proceedings or in any other context where maintenance was at issue.

This more cumbersome approach has caused some confusion in practice,<sup>308</sup> so we recommend that the Act be amended to include a more straightforward statement of the maintenance court’s jurisdiction to enforce, vary, suspend or set aside orders for maintenance made by any court, including the High Court.<sup>309</sup>

The Law Reform and Development Commission has put forward a proposal for a new law on divorce. The proposed Divorce Bill would explicitly authorise the maintenance court to deal with a High Court order for child maintenance or spousal maintenance:

*A maintenance order issued in terms of this clause [the clauses authorizing orders for child maintenance and spousal maintenance by a court issuing a decree of divorce] shall be a “maintenance order” for the purposes of the Maintenance Act, 1960 (Act 23 of 1960), and may be substituted, varied, discharged or enforced by a maintenance court in terms of that Act.*<sup>310</sup>

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<sup>305</sup> Maintenance Act 23 of 1963, section 1, emphasis added. See *Sher v Sher* 1978 (4) SA 728 (W) at 729; *Havenga v Havenga* 1988 (2) SA 438 (T) at 443A; *Rubenstein v Rubenstein* 1992 (2) SA 709 (T) (overruling *Jerrard v Jerrard* 1992 (1) SA 426 (T)).

<sup>306</sup> Maintenance Act 9 of 2003, section 1, emphasis added.

<sup>307</sup> Ibid.

<sup>308</sup> As evidenced by enquiries made by clients and magistrates to the Legal Assistance Centre.

<sup>309</sup> As a point of comparison, section 5(1) of the Children’s Status Act 6 of 2006 gives a children’s court power, if circumstances have changed, to “alter an order of the High Court pertaining to custody, guardianship or access made in connection with a divorce or in any other proceedings”.

Another example of a more direct statement can be found in the Child Care and Protection Bill (draft dated January 2012, section 93): “*Procedures for certain orders apply to children of divorced parents. The procedures for orders pertaining to custody in section 95, orders pertaining to guardianship in section 96(3) to (6), orders restricting or denying access to a parent not having custody of a child in section 97(5) to (8) and orders dealing with the unreasonable denial or restriction of access in section 97(11) and (13) apply with the changes required by the context to children of divorced or estranged parents.*”

<sup>310</sup> Law Reform and Development Commission, *Report on Divorce*, Project 8, Windhoek: Law Reform and Development Commission, 2004 (sections 17(2) and 18(2) of the Divorce Bill appended to that report, which are identical save for the clause referred to). Although the report was published after the enactment of the 2003 Maintenance Act, the bill was drafted at an earlier date and therefore refers to the 1963 Maintenance Act.

This provision as it currently stands would make it very clear that the maintenance court can amend or enforce a High Court order for child maintenance or spousal maintenance that is made as part of a divorce order – and it could be replicated in the Maintenance Act to leave no doubt.<sup>311</sup>

If a divorce order does not contain any reference to child maintenance, the maintenance court can process the application for maintenance in the same way as any other new application for child maintenance. However, a divorced person cannot apply for spousal maintenance after a divorce is final if the divorce order made no provision for spousal maintenance.<sup>312</sup>

The maintenance court has the authority to change or enforce a maintenance order arising from a divorce regardless of whether the maintenance was simply an order of the court, or an agreement between the parties which was made into an order of court.<sup>313</sup>

One challenge for a maintenance court dealing with a maintenance order in a divorce case is that maintenance in the context of such cases is generally considered together with the division of property and claims to the custody of minor children. For example, it was noted in one Namibian case that although division of property was the main bone of contention, the issues of property, custody and maintenance have to be “*collectively considered*”.<sup>314</sup>

## 4.9.2 Effect of substitution of a High Court order by a maintenance court

It has been held that orders for variation or enforcement of a High Court order for maintenance should, “*save in exceptional circumstances*”, be pursued in the maintenance court rather than in the High Court.<sup>315</sup> Several South African cases have explored the effect of a substitution of a High Court order for maintenance by a maintenance court.

*Purnell v Purnell* (decided in terms of the 1963 Maintenance Act) held that where a High Court order has been varied by a maintenance court, the original High Court order has ceased to exist.<sup>316</sup> However, it was held in *Cohen v Cohen* that a maintenance court order causes a pre-existing higher court order to cease to be of force and effect only insofar as the maintenance court order expressly, or by necessary implication, replaces such order.<sup>317</sup>

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<sup>311</sup> The Law Reform and Development Commission has also developed a Recognition of Customary Marriages Bill which contains a specific provision relating to maintenance. This Bill as currently drafted requires that before a customary marriage can be dissolved, the parties must show that they have made an agreement with respect to the maintenance of any children of the marriage, or that there is a court order to this effect, to ensure that the best interests of the children are met. With respect to enforcement, however, the Bill states: “A person who had been a party to a valid customary law marriage that was dissolved in accordance with the provisions of this section may approach the High Court to settle any dispute or enforce any agreement that resulted from the dissolution of the marriage concerned.” Law Reform and Development Commission, *Report on Customary Law*, Project 12, Windhoek: Law Reform and Development Commission, 2006, at section 12(4) and (5) of the proposed bill. It would be useful if this Bill is harmonised with the Divorce Bill, by giving explicit authorisation to maintenance courts to deal with maintenance agreements or maintenance orders arising out of customary divorces.

<sup>312</sup> See, for example, *Schneider v Schneider* [2010] NAHC 191 (17 November 2010), where a token amount of spousal maintenance was awarded at the time of the divorce so that the possibility of future maintenance would not be foreclosed.

<sup>313</sup> See *Rubenstein v Rubenstein* 1992 (2) SA 709 (T), which overruled *Jerrard v Jerrard* 1992 (1) SA 426 (T).

<sup>314</sup> *A v A* [2010] NAHC 176 (29 October 2010).

<sup>315</sup> *Schmidt v Schmidt* 1996 (2) SA 211 (W), which stated at 220F-H: “It would be anomalous if a party seeking to enforce an order or have it replaced, which occurs frequently in matrimonial and post-matrimonial proceedings, incorporating an undertaking to pay a quantified monthly amount and medical expenses and also an undertaking to pay other unquantified obligations, would have to have recourse to different courts or that two ‘maintenance orders’ would be extant dealing with the maintenance (using the word in a neutral sense) obligations between the same two parties. It is also not practical or in the interests of justice that two different courts enquire into and deal with separate components of a general maintenance obligation.”

<sup>316</sup> *Purnell v Purnell* 1993 (2) SA 662 (A). See also *Stinnes v Stinnes* 1996 (4) SA 1024 (T).

<sup>317</sup> *Cohen v Cohen* 2003 (3) SA 337 (SCA): “The point of departure is to identify the issue between the parties that the maintenance court has been called upon to decide and then to compare the order made with that issue. If there is any

Where the original High Court order has been completely substituted by a maintenance court – and therefore ceased to be of any force or effect – the question arises as to whether the beneficiary of the pre-existing order still has a right to enforce arrears in periodic payments that accrued under that order prior to its substitution. It has been held that this is possible:

*By stating that when a maintenance court makes an order in substitution for an existing order the latter ‘shall cease to be of force and effect’, s 22 of the Maintenance Act does not denote that the existing order shall be deemed never to have existed. On the contrary, the language bears the plain meaning that the existing order shall cease to be of force or effect from the moment it is substituted, in other words ex nunc. The substitution effected by the maintenance court order occurs when the order is made, and according to its tenor. Thus, unless, and only to the extent that the substituting order is expressed to have retrospective effect, it operates prospectively and does not derogate from the fact of the existence of the prior order, nor from any of the rights of the beneficiary of the pre-existing order which had already fully accrued.<sup>318</sup>*

### 4.9.3 Enforcement of a High Court order by a maintenance court

There appear to be no problems with enforcing a High Court order for maintenance by means of the mechanisms in the Maintenance Act. In the Namibian case of *S v Gaweseb*,<sup>319</sup> the appellant appeared in the Windhoek Magistrate’s Court charged with a contravention of section 39(1) of the Maintenance Act 9 of 2003 in respect of failure to comply with a provision on child maintenance in a divorce order dating from 4 December 1992 (before the new Act came into force). Neither party nor the court raised the issue of the magistrate’s court’s jurisdiction. Similarly, the Namibian case of *Mondo v Messenger of Court: Grootfontein and others*<sup>320</sup> concerned a writ of execution issued in terms of the Maintenance Act 9 of 2003 for failure to pay child maintenance in terms of a divorce order dating from 24 February 2004 (after the new Act came into force). Again, neither party nor the court raised the issue of the magistrate’s court’s jurisdiction to implement this enforcement proceeding.

However, one question which has arisen is whether the civil enforcement mechanisms in the maintenance court co-exist with those which normally apply to a High Court order for maintenance. In South Africa, the case of *Thomson v Thomson*<sup>321</sup> asserted that all the possible enforcement mechanisms continue to co-exist:

*The Maintenance Act of 1998 does not preclude a party from issuing a writ of execution out of the High Court for failure to pay maintenance. This procedure remains competent ... When the party resists such a writ in the High Court on the ground that it should not be enforced, for example, because of inability to pay, lack of need on the claimant’s part or on some other ground of fairness or equity, it would be appropriate for the High Court to order that the matter be referred to the maintenance court for an enquiry ...”<sup>322</sup>*

In contrast, the South African case of *PT v LT and Another*<sup>323</sup> held that the South African Maintenance Act “provides for a unified system of civil enforcement” of maintenance orders,<sup>324</sup> and that the

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ambiguity, the order should be interpreted restrictively, so as to be limited to the said issue.” At para 14. See also *Botha v Botha* 2005 (5) SA 228 (W).

<sup>318</sup> *PT v LT and Another* 2012 (2) SA 623 (WCC) at para 9.

<sup>319</sup> *S v Gaweseb* [2006] NAHC 27.

<sup>320</sup> *Mondo v Messenger of Court: Grootfontein and others* [2009] NAHC 96 (13 March 2009).

<sup>321</sup> *Thomson v Thomson* 2010 (3) SA 211 (W).

<sup>322</sup> At para 20.

<sup>323</sup> *PT v LT and Another* 2012 (2) SA 623 (WCC).

<sup>324</sup> At para 22.

enforcement mechanisms in the Maintenance Act are “intended to comprehensively regulate the civil enforcement of maintenance orders (as defined) made by any court in the Republic”.<sup>325</sup> The Court’s reasoning was as follows:

*It is unlikely to have been the legislature’s intention that there should be two different systems of civil enforcement of High Court maintenance orders in existence parallel to each other; the one with a 10-day moratorium on enforcement, the other having no such moratorium; the one providing for a statutory procedure to convert the enforcement process into an enquiry; the other attended by no statutory restraints. An ability by a maintenance creditor to choose between such alternative enforcement processes, if the choice were available, would introduce an arbitrariness in respect of the consequences for the debtor that would be difficult to reconcile with rationality and equality before the law. Moreover, having regard to the expressed intention of the Act, being the creation of a fair and equitable maintenance system under the framework of the statute, the achievement of that objective would not be assisted if s 26(1) [which is similar to section 28(1)-(3) of the Namibian Maintenance Act 9 of 2003] were read as merely permissive or enabling in nature, and as allowing for disparate but parallel means of enforcement of High Court maintenance orders – the one under the Act, and the other outside it.”<sup>326</sup>*

Another question which is unsettled is whether the Maintenance Act applies to interim orders for maintenance made by the High Court while a divorce is pending (under Rule 43 of the High Court rules). In *PT v LT and Another*, the Court provided the following description of the differing case law on this point (in dicta):<sup>327</sup>

*Rule 43 is a procedural provision. It regulates the procedure to be followed in applications of an interim nature in matrimonial matters. Relief obtained under the procedure is not final in nature and is directed at a regulation of the relevant issues, including maintenance, only pending the determination of the principal matrimonial case. Section 20(7) of the Supreme Court Act 59 of 1959 precludes any appeal from an order of the High Court given in terms of rule 43. [In Namibia, section 18(7) of the High Court Act 16 of 1990 has the same effect.] In *De Witt v De Witt* 1995 (3) SA 700 (T), it was held that a maintenance order made in terms of rule 43 was amenable to replacement, upliftment or suspension by the maintenance court in terms of the provisions of the 1963 Maintenance Act, despite the anomalous consequences of such a reading of the statute in the face of the provisions of s 20(7) of the Supreme Court Act. The basis for the court’s conclusion appears to have been that there was no warrant for reading in the word ‘final’ before the word ‘order’ in the definition of ‘maintenance order’. A two-judge bench of the Transvaal Provincial Division subsequently held that this conclusion could not be faulted: see *Thompson v Thompson* 1998 (4) SA 463 (T). It is not necessary for me to determine whether these judgments were correct. Without so deciding, it nonetheless seems to me, with respect, however, that it might be that the judgments failed to give sufficient weight to the qualification to the statutory definition requiring regard to the context. In this regard context could arguably include not only the four corners of the Act, but also its evident purpose and position in the applicable broader statutory framework. Approached in that manner it does not appear to me to be at all certain that the legislature intended to bring orders made for maintenance pendente lite in terms of rule within the embrace of ‘maintenance order’ as defined in s 1 of the Maintenance Act.”<sup>328</sup>*

**We recommend that the role of the maintenance court in enforcing High Court orders be clarified to remove all doubt. We suggest that the Maintenance Act should make it clear (a) that the enforcement measures under the Act are available in respect of maintenance in divorce orders, alongside any other existing enforcement measures that apply to High Court orders; and (b) that the civil**

<sup>325</sup> At para 24.

<sup>326</sup> At para 19 (footnotes omitted).

<sup>327</sup> *PT v LT and Another* 2012 (2) SA 623 (WCC).

<sup>328</sup> At para 14.



enforcement measures under the Maintenance Act are available in respect of interim orders for maintenance issued while a divorce is pending.

### CASE STUDY

#### Enforcement through the courts and not between the parties

The Legal Assistance Centre received the following query from a client:

*I was wondering if you could give me advice on how to handle my ex-husband's maintenance and visitation rights as I have moved to [another town]. It is almost impossible to have a normal, civil conversation with him myself and I cannot afford to take the matter to court every time we have an argument or disagreement since I am currently a housewife (in other words I do not have a fixed income) to my second husband. I was divorced about 5 years ago and was awarded custody and control" of our minor child (8 years now). It is my responsibility to "deliver" the child to him in [the other town] for the school holidays and what can I do since he does not pay the full monthly school fees?*

We informed the client that if the father is not complying with the maintenance order, she can report this to the maintenance court. She does not have to return to the High Court to seek enforcement of the maintenance provisions on the divorce order. However, she should not withhold access to the child even if the ex-husband does not pay maintenance, but rather seek a remedy through the court.

## 4.10 The Maintenance Act and maintenance as a component of protection orders

As noted in the section above, the Maintenance Act 9 of 2003 defines a “*maintenance order*” to include “*a maintenance order made by a maintenance court under any other law ...*” and defines “*maintenance court*” to include “*any other court which is authorised by law to grant maintenance orders*”.<sup>329</sup> In addition to including maintenance orders made as part of divorce orders by the High Court, this would include orders for temporary maintenance incorporated in protection orders issued by magistrate's courts in terms of the Combating of Domestic Violence Act 4 of 2003.

Protection orders are court orders which are issued in situations of domestic violence (or threats of such violence) directing the respondent to refrain from any further violent acts. Protection orders may include a range of provisions depending on the situation. A protection order may include “*a provision temporarily directing the respondent to make periodic payments in respect of the maintenance of the complainant, and of any child of the complainant, if the respondent is legally liable to support the complainant or the child, as an emergency measure where no such maintenance order is already in force*”.<sup>330</sup> Such an order may remain in force for remains in force for any period set by the court up to a maximum of six months.<sup>331</sup> The time limit stems from the fact that these temporary maintenance orders are not meant to be a substitute for the procedure outlined in the Maintenance Act, but are rather meant to be utilised as emergency measures, to prevent a complainant who has suffered violence from having to initiate multiple court procedures at once.<sup>332</sup>

<sup>329</sup> Maintenance Act 9 of 2003, section 1 (emphasis added).

<sup>330</sup> Combating of Domestic Violence Act 4 of 2003, section 14(2)(h).

<sup>331</sup> Id, section 15(e). A study of protection orders by the Legal Assistance Centre found that this six-month maximum period was ignored in a substantial number of cases (about 13% of the cases for which the intended duration of the maintenance order can be ascertained) – with some courts contemplating orders with the same sorts of durations as ordinary maintenance orders issued in terms of the Maintenance Act (such as until the child turns 18, or becomes self-supporting). Legal Assistance Centre (LAC), *Seeking Safety: Domestic Violence in Namibia and the Combating of Domestic Violence Act 4 of 2003*, Windhoek: LAC, 2012 at 437.

<sup>332</sup> See Legal Assistance Centre (LAC), *Seeking Safety: Domestic Violence in Namibia and the Combating of Domestic Violence Act 4 of 2003*, Windhoek: LAC, 2012 at 437.



In a study of a national sample of protection orders issued during 2004-2006, the Legal Assistance Centre found that orders for temporary maintenance were included in protection orders in 34% of cases – with three-fourths (76%) of these being maintenance for children, 15% for the complainant and children together, and 9% for the complainant alone.<sup>333</sup>

The criminal enforcement measures provided under the Maintenance Act would not be of much use in respect of maintenance provisions in protection orders, since the Combating of Domestic Violence Act provides that violation of a protection order is a criminal offence punishable by a fine of up to N\$8 000, imprisonment for up to two years or both – a higher maximum penalty than the Maintenance Act provides.<sup>334</sup> However, the civil enforcement mechanisms or the substitution proceedings in the Maintenance Act could be useful additions to the criminal enforcement mechanism in the Combating of Domestic Violence Act.

**We recommend that the Maintenance Act make explicit provision for the possibility that a person with a protection order providing for maintenance will approach the maintenance court for a longer term maintenance order.** It should be possible in such circumstances for the maintenance court to have reference to the maintenance provision in the protection order, and to have reference to any arrears owing under such a provision in deciding on the terms of a maintenance order which will operate in future. It should also be possible for the maintenance court to replace, substitute or set aside any provision on maintenance in a protection order to ensure a seamless transition between a protection order's provisions on maintenance and a maintenance order issued under the Maintenance Act.

## 4.11 Other offences and penalties

The crime of failure to comply with a maintenance order has already been discussed above. However, the Act also provides for a number of additional offences. The highest penalty in the Act is for intimidating a complainant not to lay a maintenance complaint or a criminal charge for failure to pay maintenance. This illustrates the fact that, in the eyes of the law, the right of a person to seek maintenance is extremely important.

### Crimes relating to maintenance investigations

The following are crimes:

- giving false information to a maintenance investigator or maintenance officer or magistrate during the maintenance investigation
- failing to obey a summons to appear before a magistrate to give information about a maintenance case without a reasonable excuse
- refusing to answer questions or to provide information without a lawful excuse while being questioned by a magistrate.

The penalty is a fine of up to N\$4 000 or imprisonment for up to 12 months.<sup>335</sup>

Failure to comply with a directive issued by a maintenance officer is punishable by a fine of up to N\$2 000 or up to six months imprisonment.<sup>336</sup>

*"We shouldn't take it personally when women claim maintenance from us."*

Participant in the male focus group discussion in Ongwediva

<sup>333</sup> Id at 434. These findings are discussed in more detail in section 10.6 below.

<sup>334</sup> Combating of Domestic Violence Act 4 of 2003, section 16(1).

<sup>335</sup> Maintenance Act 9 of 2003, section 35 and 37(2).

<sup>336</sup> Maintenance Regulations, regulation 3(3).

## Crimes relating to maintenance enquiries

The following are crimes:

- giving false information relating to the enquiry
- failing to obey a summons to attend a maintenance enquiry without a reasonable excuse (for any witness other than the complainant or the defendant)
- refusing to answer questions or to provide information at a maintenance enquiry without a lawful excuse
- insulting or obstructing the work of the magistrate, the maintenance officer, the maintenance investigator or the clerk of the court
- interrupting the proceedings or otherwise misbehaving at the enquiry.

The penalty is a fine of up to N\$4000 or imprisonment for up to 12 months.<sup>337</sup>

## Failure to comply with order for attachment of emoluments or debts

Refusing or failing to make a payment under an emoluments order or an order for the attachment of debts without a sufficient reason is punishable by a fine of up to N\$2000 or up to six months imprisonment.<sup>338</sup>

A defendant who fails to inform the court that he or she has left employment where an order for the attachment of emoluments is in force could receive a fine of up to N\$2000 or up to six months imprisonment. The same applies to an employer who fails to inform the court that a defendant subject to an emoluments order has left employment with that employer.<sup>339</sup>

## Misuse of maintenance money

It is a crime to misuse maintenance money. The penalty is a fine of up to N\$4000 or imprisonment for up to 12 months.<sup>340</sup> Any person may make a complaint about the misuse of maintenance money.<sup>341</sup>

*“Many liable parents renege on their obligations to maintain their dependants, especially where children are brought up in single-parents households. In particular, parents who do not take care of the children on a daily basis perceive the other parent, the caregiver, as squandering the maintenance money she (or he) receives and spending on herself (or himself) rather than on their children. This perception is totally wrong.”*

Madelene de Jong, “Ten-year Anniversary of the Maintenance Act 99 of 1998 – A time to reflect on improvements, shortcomings and the way forward”, 126 (3) *South African Law Journal* 590 (2009) at 613 (footnotes omitted), reporting on a survey of maintenance officials in courts across the country to assess the practical effect of the South African Act

## Intimidation

It is a crime to compel or induce a complainant not to file a complaint at the maintenance court or not to lay a criminal charge against a defendant for his or her failure to support a specific person, with any manner of threats (including the use of witchcraft) to kill, assault or injure the complainant or any other person, or to cause damage to that complainant or any other person, or to cause damage to that complainant’s property or another person’s property. The penalty is a fine of up to N\$20000 or up to 5 years imprisonment.<sup>342</sup>

<sup>337</sup> Maintenance Act 9 of 2003, sections 36-38.

<sup>338</sup> Id, section 44.

<sup>339</sup> Id, section 44.

<sup>340</sup> Id, section 40.

<sup>341</sup> Maintenance Regulations, regulation 30. Such a complaint should be made on Form T.

<sup>342</sup> Maintenance Act 9 of 2003, section 41.

## Other crimes

It is an offence for the defendant to fail to inform the court of a change of address or employment, punishable by a fine of up to N\$2000 or six months imprisonment.<sup>343</sup>

Publishing identifying information about any person under the age of 18 who is or was involved in any proceedings at a maintenance enquiry can be punished by a fine of up to N\$8000 or up to two years imprisonment. Such information could include the name and address of the minor, or details, such as the school the child is attending or any other information that is likely to reveal the identity of the child. A magistrate or the Minister of Justice may give permission for information about a child to be published if it is in the interest of the child.<sup>344</sup>

It is an offence for a court official or any other person fulfilling a function under the Maintenance Act to disclose any information acquired during his or her duties, unless it is part of his or her function or is required by the law or the court. The penalty is a fine of up to N\$4000 or imprisonment for up to 12 months.<sup>345</sup>

Summary of criminal offences under the Maintenance Act	
<b>Any person</b>	<ul style="list-style-type: none"> <li>• failing to obey a directive to appear before a maintenance officer to give information about a maintenance case (regulation 3(3))</li> <li>• giving false information during the maintenance investigation (s. 37(2))</li> <li>• failing to obey a summons or a warning to appear or remain at an investigation by a maintenance officer or a maintenance enquiry (ss. 35(1)(b)-(d); 36(1)(b)-(d)); although the offence of failing to obey a summons to attend a maintenance enquiry does <i>not</i> apply to the complainant or defendant, the offence of failing to remain in attendance or to return after a postponement does (s. 36(2))</li> <li>• refusing to answer questions or to provide information without a lawful excuse while being questioned in examination by a maintenance officer or at an enquiry (ss. 35(1)(e); 36(1)(e))</li> <li>• giving false information to a maintenance officer or at an enquiry (ss. 35(1)(a); 36(1)(a))</li> <li>• otherwise providing false information (s. 37)</li> <li>• insulting or obstructing the work of the magistrate, the maintenance officer, the maintenance investigator or the clerk of the court, or interrupting the proceedings or otherwise misbehaving at the enquiry (s. 38)</li> <li>• intimidating a complainant not to lay a maintenance complaint or a criminal charge for failure to pay maintenance (s. 41)</li> <li>• publishing the name or address of a child under 18 involved in maintenance proceedings (s. 42)</li> </ul>
<b>Defendant</b>	<ul style="list-style-type: none"> <li>• failing to make a particular payment in accordance with a maintenance order (s. 39(1))</li> <li>• failing to inform the court that he or she has left employment where an order for the attachment of emoluments is in force (s. 44)</li> <li>• failing to give notice of change of residence or employment while maintenance order is in force (s. 45)</li> </ul>
<b>Complainant</b>	<ul style="list-style-type: none"> <li>• misusing a maintenance payment by failing to use it for the benefit of the beneficiary (s. 40)</li> </ul>
<b>Employer</b>	<ul style="list-style-type: none"> <li>• refusing or failing to make a payment under an emolument order without a sufficient reason (s. 44)</li> <li>• failing to notify court if defendant leaves employment while emolument order is in force (s. 44)</li> </ul>
<b>Debtor</b>	<ul style="list-style-type: none"> <li>• refusing or failing to make a payment under an order for the attachment of debts without a sufficient reason (s. 44)</li> </ul>
<b>Court officials</b>	<ul style="list-style-type: none"> <li>• disclosing information acquired in the performance of functions under the Act for unauthorised purposes (s. 43)</li> </ul>

<sup>343</sup> Id, section 45.

<sup>344</sup> Id, section 42.

<sup>345</sup> Maintenance Act 9 of 2003, section 43.

## 4.12 Reciprocal enforcement of maintenance orders

### 4.12.1 Enforcement via Reciprocal Enforcement of Maintenance Orders Act

It is sometimes possible to claim maintenance from a person who is living in another country. In terms of the Reciprocal Enforcement of Maintenance Orders Act 3 of 1995, maintenance orders may be enforced between Namibia and countries with which Namibia has made specific agreements for this purpose.<sup>346</sup> The Reciprocal Enforcement of Maintenance Orders Act 3 of 1995 replaced the similar Reciprocal Enforcement of Maintenance Orders Act 80 of 1963.<sup>347</sup>

#### Designated countries

The 1995 Act specifically provides that any country which had been declared as a proclaimed country under the 1963 Act for the purposes of that Act is to be taken to be a designated country for the purposes of the 1995 Act.<sup>348</sup> The result of the declaration of a proclaimed country is that any maintenance order made by a court either in the proclaimed country or in Namibia will, on a basis of reciprocity, be recognised and enforceable by a competent authority of the other country against any person to whom the maintenance order relates and who happens to be in that particular country.<sup>349</sup>

South Africa is the only country that was designated under the 1963 Act by an independent Namibian government.<sup>350</sup> However, some of the designations made prior to Namibian independence by the State President of South Africa were applicable to “South West Africa” and thus survive in independent Namibia.<sup>351</sup>

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<sup>346</sup> Reciprocal Enforcement of Maintenance Orders Act 3 of 1995, section 2.

<sup>347</sup> Reciprocal Enforcement of Maintenance Orders Act 3 of 1995. Sections 1, 5, 6, 7, 8, and 9 are amended by the Maintenance Act 9 of 2003. Section 13 of the 1995 Act provides that any country designated under the 1963 Act will be deemed to be a designated country for the purposes of the 1995 Act.

Under the 1963 Act, the right and obligation to enforce a maintenance order made by a court of a proclaimed country against a person in Namibia did not stem from, and was not governed by, the existence of a reciprocal agreement between Namibia and such other country. That right and obligation arise from the exercise of the statutory power conferred by the 1963 Act – namely the declaration/designation of the relevant country as a proclaimed/designated country to which the Act is applicable. The 1995 Act takes a somewhat different approach, authorising the Minister of Justice to declare as a designated country “any country with which Namibia has in terms of the Namibian Constitution entered into an agreement providing for the reciprocal enforcement of maintenance orders”. (section 2(1)).

<sup>348</sup> Reciprocal Enforcement of Maintenance Orders Act 3 of 1995, section 13.

<sup>349</sup> Id, sections 3-7

<sup>350</sup> Government Notice 124 of 10 September 1993, Government Gazette 727.

<sup>351</sup> The 1963 Act was an Act of the South African Parliament that was made applicable to the “territory of South West Africa” by the Reciprocal Enforcement of Maintenance Orders Amendment Act 40 of 1970, with effect from 1 March 1971.

During the years 1977 to 1980, the administration of some South African statutes was transferred from South African government departments to the Administrator-General of South West Africa. Most of these transfers were effected by “Transfer Proclamations” promulgated by the Administrator-General, in respect of all South African statutes administered by a specific South African government department, with some exceptions listed in the individual Transfer Proclamations. The individual Transfer Proclamations often refer to the “General Proclamation” – the Executive Powers Transfer (General Provisions) Proclamation, 1977 (AG. 7/1977, as amended), which sets forth the mechanics of the transfer of powers.

The 1963 Act was administered by the Minister of Justice of South Africa with respect to both South Africa and the territory of “South West Africa”. The administration of South African laws applicable in the territory and administered by the Minister of Justice of South Africa was transferred to the Administrator-General of South West Africa by the Executive Powers (Justice) Proclamation No. 33 of 1979. Section 3(1)(k) of this Proclamation explicitly excluded the Reciprocal Enforcement of Maintenance Orders Act 80 of 1963 from the provisions of section 3(1) of the General Proclamation – meaning that the functions of the Minister were not transferred. Nevertheless, as of 1979, section 2 of the 1963 Act empowered the State President to issue Proclamations designating countries to which the Act was applicable. This power was not affected by the exclusion from section 3(1) of the General Proclamation, but was governed by section 3(4) of the General Proclamation which states that any proclamation issued by the State President after the commencement of any transfer proclamation

The countries in question are as follows:<sup>352</sup>

- North-West Territories, Canada<sup>353</sup>
- State of California, USA<sup>354</sup>
- Province of Alberta, Canada<sup>355</sup>
- United Kingdom.<sup>356</sup>

It appears that most people are unaware that Namibia has these reciprocal arrangements in place and as a result few requests for reciprocal enforcement are made. The only information we could source on reciprocal enforcement indicates that Namibia deals with approximately three-four reciprocal maintenance orders involving South Africa each year.<sup>357</sup> The Ministry of Justice has also reportedly dealt with other countries such as Cuba through diplomatic channels, even where no formal agreements are in place.<sup>358</sup>

## Applications for maintenance orders against persons in designated countries

If there is no maintenance order in force, the applicant can apply for maintenance from a person living in a designated country in the same way as if this defendant lived in Namibia. The maintenance court in Namibia and the maintenance court in the designated country will work as partners to deal with the case.

A defendant living outside the country should be given notice of the Namibian enquiry if possible. The defendant can consent to the maintenance that is requested, just as if he or she were living in Namibia, by signing a consent form.<sup>359</sup> If it is not possible to give notice to the person living outside the country, or if this person got notice but did not attend the enquiry, then the enquiry can go ahead in Namibia in the usual way in the defendant's absence. The information which is given to the court will be written down and signed by the witnesses who provide the information.<sup>360</sup>

The magistrate can make a provisional maintenance order at the end of the enquiry. The Namibian government will send a copy of the provisional maintenance order and the evidence that was given at the enquiry to the government of the designated country.<sup>361</sup> The person who is being asked to pay

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under a law which at the time of such commencement applied to both South Africa and the territory of South West Africa and which is published in the *Government Gazette* of the Republic “shall, notwithstanding the provisions of (1), apply in the territory if such proclamation ... or the notice by which it is so published, contains a statement that it was or is issued or made with the consent of the Administrator-General, and applies also in the territory ...”. None of the Proclamations issued by the State President under the 1963 Act after the date of transfer, or the notices publishing them, make any explicit reference to the territory or the Administrator-General, and thus were not applicable to the “territory of South West Africa”. The South African Transfer of Powers and Duties of the State President Act 97 of 1986 amended section 2 of the 1963 Act so that the power to designate countries under the Act was in future to be exercised by means of a notice issued by the Minister of Justice rather than by a Proclamation of the State President. The effect of this change would have been that any subsequent notices issued by the Minister of Justice in this regard would have been applicable to the Territory of South West Africa by virtue of the exclusion of the 1963 Act from section 3(1) of the General Proclamation. However, we have not located any such notices between 1986 and Namibian independence on 21 March 1990.

The result is that the only designations applicable to “South West Africa” were those which were made prior to the date of transfer in 1979. In addition to the countries, which are listed in the text, several secondary sources list Government Notice 68 of 1968 as designating Germany under the Act. However, it has not been possible to locate this Government Notice, and it seems impossible that it could have been a valid designation under the Act, because in 1968 such a designation could only have been made by means of a Proclamation of the State President. Therefore, we have not included Germany in the list of designated countries.

Upon Namibia's independence, the powers given to the South African Minister of Justice under the 1963 Act were vested in the Minister of Justice of Namibia by virtue of the transitional provisions contained in Article 140 of the Namibia Constitution. However, as noted in the text, the only country designated under the 1963 Act after independence is South Africa.

<sup>352</sup> This list excludes the South African “homelands” which existed as semi-autonomous political units under apartheid but are now part of a unitary South Africa, as declarations in respect of these “homelands” are of no ongoing relevance.

<sup>353</sup> Proclamation No. R. 160 of 1970 of 19 June 1970.

<sup>354</sup> Proclamation No. R. 1 of 1971 of 8 January 1971.

<sup>355</sup> Proclamation No. R. 175 of 1971 of 13 August 1971.

<sup>356</sup> Proclamation No. R. 9 of 1976.

<sup>357</sup> Personal communication, Ministry of Justice official, 2013.

<sup>358</sup> Ibid.

<sup>359</sup> Reciprocal Enforcement of Maintenance Orders Act 3 of 1995, section 5(2)(c).

<sup>360</sup> Id, section 5(1).

<sup>361</sup> Id, section 5(2)(a).



maintenance will then have a chance to tell his or her side of the story in the country where he or she lives. In other words, a court in the designated country will hold “the other half” of the enquiry. The magistrate in this court will decide whether to confirm the provisional maintenance order, to change it, or to send the case back to the maintenance court in Namibia for more information.<sup>362</sup> If the defendant received fair notice of the enquiry which was held in Namibia – whether or not he or she attended the enquiry – then the court in the designated country can limit its portion of the enquiry to a consideration of the amount of maintenance to be paid.<sup>363</sup>

Where the maintenance order in question is made by a Namibian court, that court will transmit a copy of the order to the Permanent Secretary of the Ministry of Justice, who will then transmit it to the administrative head of the Department of Justice in the designated country in question.<sup>364</sup>

A maintenance order made in this way can be enforced in the designated country in a similar way as a maintenance order made in Namibia.<sup>365</sup>

The procedure works in the opposite direction when an order is made in the designated country in question and the defendant is resident in Namibia.<sup>366</sup>

## Enforcement of a maintenance order in another country

If a Namibian maintenance order is already in force against a person who moves to another country, the complainant can go to the maintenance court to ask for help in enforcing the order if necessary. The Namibian government will work together with the government in the designated country to enforce the order, using the same mechanisms as those for the registration of a new order.<sup>367</sup>

A similar procedure is applied to cases where an order for the attachment of wages is made against a person who lives in Namibia but receives wages in a designated country. The two governments will work together to make sure that the complainant gets the money.<sup>368</sup>

## 4.12.2 Hague Convention on the International Recovery of Child Support

In future, Namibia may manage maintenance applications across countries differently. This is because the Namibian government is reportedly in the process of preparing to accede to the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance.

The object of this new international convention is “to ensure the effective international recovery of child support and other forms of family maintenance”.<sup>369</sup> It is designed to offer children and other dependants a simple, swift and cost-effective international system for the recovery of maintenance. The Convention pursues these objectives by a combination of means:

- *an efficient and responsive system of co-operation between Contracting States in the processing of international applications;*
- *a requirement that Contracting States make available applications for establishment and modification, as well as for recognition and enforcement, of maintenance decisions;*
- *provisions which ensure effective access to cross-border maintenance procedures;*

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<sup>362</sup> Id, section 5(3) and 6(1).

<sup>363</sup> Id, section 6(2).

<sup>364</sup> Id, section 3.

<sup>365</sup> Id, section 7.

<sup>366</sup> Id, section 4.

<sup>367</sup> Id, sections 3 and 4.

<sup>368</sup> Id, section 8.

<sup>369</sup> Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, Art 1.

- *a broadly based system for the recognition and enforcement of maintenance decisions made in Contracting States;*
- *expedited and simplified procedures for recognition and enforcement; and*
- *a requirement of prompt and effective enforcement.*<sup>370</sup>

The Convention addresses many practical matters that can affect the efficiency with which international claims are pursued – such as language requirements, standardised forms and the exchange of information on national laws. It also allows and encourages the use of new information technologies to reduce the costs and delays which have in the past plagued international maintenance claims.<sup>371</sup>

The final text of the Convention was approved by 70 states in 2007.<sup>372</sup> The Convention came into force on 1 January 2013 but has so far been ratified by only four individual countries – although it has also been signed by Burkina Faso, the European Union and the USA.<sup>373</sup> The Namibian government is reportedly considering ratification of this Convention as part of its process to strengthen child protection measures through the enactment of the Child Care and Protection Bill.<sup>374</sup>

*“There has perhaps never been a more exciting time to work in the international recovery of maintenance than today.”*

Danièle Ménard, National Child Support Enforcement Association's  
2nd International Child Support Conference, Vancouver, March 2008

### 4.12.3 Other international conventions on maintenance

Several international conventions have been enacted to help dependents enforce claims for maintenance abroad. The older maintenance conventions are potentially relevant, given the fact that there are as yet few signatories to the new Hague Convention on the Recovery of Child Support.

The *1956 UN Convention on the Recovery Abroad of Maintenance* has been signed by the vast majority of UN member states, including South Africa (prior to Namibian independence, as the Union of South Africa) – which means that Namibia could succeed to this Convention if it chose to do so.<sup>375</sup> The purpose of this Convention is to “*facilitate the recovery of maintenance to which a person [the claimant] who is in the territory of one of the Contracting Parties, claims to be entitled from another person [the respondent] who is subject to the jurisdiction of another Contracting Party*”.<sup>376</sup> The recovery of maintenance is facilitated through the use of “*Transmitting and Receiving Agencies*”.<sup>377</sup> This Convention was largely a response by the international community to improve the lives of dependents, mostly

<sup>370</sup> Excerpt from an outline to the Hague Child Support Convention available at <[www.hcch.net/upload/outline38e.pdf](http://www.hcch.net/upload/outline38e.pdf)>, accessed 29 August 2013.

<sup>371</sup> Ibid.

<sup>372</sup> Ibid.

<sup>373</sup> The Convention has been signed and ratified by (1) Albania (2) Bosnia and Herzegovina (3) Norway and (4) the Ukraine. Burkina Faso, the European Union and the United States of America have signed but not ratified the Convention. Status Table <[www.hcch.net/index\\_en.php?act=conventions.status&cid=131](http://www.hcch.net/index_en.php?act=conventions.status&cid=131)>, accessed 29 August 2013.

<sup>374</sup> Ministry of Gender Research Equality and Child Welfare, Legal Assistance Centre and UNICEF, *Public Participation in Law Reform: Revision of Namibia's Child Care and Protection Bill*, Windhoek, Government of the Republic of Namibia/ UNICEF, 2010 at 187, 189.

<sup>375</sup> See Treaty Section of the UN Office of Legal Affairs, Summary of Practice of the Secretary-General as Depository of Multi-lateral Treaties, New York: United Nations, 1999, available at <<http://untreaty.un.org/ola-internet/Assistance/Summary.htm>>, accessed 29 August 2013; see also Vienna Convention on Succession of States in respect of Treaties (1978), available at <<http://untreaty.un.org/cod/avl/ha/vcssrt/vcssrt.html>>, accessed 29 August 2013, but note that Namibia is not a party to this Convention.

<sup>376</sup> 1956 UN Convention on the Recovery Abroad of Maintenance, Art 1.

<sup>377</sup> Excerpt from the Convention of the Recovery Abroad of Maintenance. Available at [www.refworld.org/cgi-bin/texis/vtx/rwmain?page=type&type=MULTILATERALTREATY&publisher=UNGA&coi=&docid=3dda24184&skip=0](http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=type&type=MULTILATERALTREATY&publisher=UNGA&coi=&docid=3dda24184&skip=0), accessed 3 June 2013.

women and children, left behind without support when their partners moved to another country – a significant problem following the return of overseas soldiers at the end of the Second World War.<sup>378</sup> The 1956 convention can be applied in combination with the 1958 or 1973 conventions discussed below.<sup>379</sup>

The *1958 UN Convention Concerning the Recognition and Enforcement of Decisions Relating to Maintenance Obligations Towards Children* was concluded in April 1958 and came into force in 1962. This Convention is applicable only to the recognition and enforcement of maintenance obligations towards children. There are 20 contracting states to this convention, but neither South Africa nor Namibia is a party.<sup>380</sup>

The *1973 Convention on the Law Applicable to Maintenance Obligations and the accompanying 1973 Convention on Recognition and Enforcement of Decisions Relating to Maintenance Obligations* established common provisions for adult and child maintenance in line with the 1956 and 1958 conventions.<sup>381</sup> These Conventions expand the international application of maintenance agreements in that they apply even if the applicable law is that of a non-contracting State.<sup>382</sup> Neither South Africa nor Namibia is a party to these Conventions.

Thus, Namibia has a number of international tools which it could apply to facilitate international recognition and enforcement of maintenance orders. **We recommend that Namibia become a party to all of these conventions on maintenance, in order to secure the widest possible mechanisms for recovery of maintenance across national borders.**

## 4.13 Child maintenance in relation to the laws on custody and access

For many people the concepts of maintenance, custody and access are interlinked. The Legal Assistance Centre frequently receives queries in this regard. In some cases the parent with custody of the child wants to restrict the other parent from having access because of that parent's refusal to pay maintenance. In other cases the non-custodian parent wants to refuse to pay maintenance because the custodian parent is withholding access. Sometimes the parent who has been asked to pay maintenance will seek custody of the child to avoid maintenance payments.

Although problems associated with maintenance, custody and access are often related, a parent with custody should not refuse access if the non-custodian parent refuses to pay maintenance and a non-custodian parent should not refuse to pay maintenance if the parent with custody is refusing access. Instead problems with failure to pay maintenance should be dealt with through the maintenance court, while problems with custody or access can be dealt with through the children's court or the High Court.<sup>383</sup> The guiding principle in all these forums should be what is best for the child.

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<sup>378</sup> P Contini, "The United Nations Convention on the Recovery of Abroad Maintenance", December 1956, *St John's Law Review* Vol. XXXI No. 1, at 1, available at <<http://scholarship.law.stjohns.edu/cgi/viewcontent.cgi?article=4585&context=lawreview>>, accessed 3 June 2013.

<sup>379</sup> A Borrás, "Council Regulation 4/2008, of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matter relating to maintenance obligations –an overview", Lisbon, Portugal: EJTN -Seminar on Maintenance Obligations in Europe, 2012, at 3 (available online at <[www.ejtn.net/PageFiles/6333/Alegria\\_Borras\\_PDF.pdf](http://www.ejtn.net/PageFiles/6333/Alegria_Borras_PDF.pdf)>).

<sup>380</sup> See the following website for more information (in French): <[www.hcch.net/upload/conventions/txt09en.pdf](http://www.hcch.net/upload/conventions/txt09en.pdf)>, accessed 23 September 2013.

<sup>381</sup> Full text of the conventions available at <[www.hcch.net/index\\_en.php?act=conventions.text&cid=86](http://www.hcch.net/index_en.php?act=conventions.text&cid=86)> and <[www.hcch.net/index\\_en.php?act=conventions.text&cid=85](http://www.hcch.net/index_en.php?act=conventions.text&cid=85)>, accessed 14 August 2013.

<sup>382</sup> European Juridical Network, "Maintenance Claims- International Law", 6 August 2007, available at <[http://ec.europa.eu/civiljustice/maintenance\\_claim/maintenance\\_claim\\_int\\_en.htm](http://ec.europa.eu/civiljustice/maintenance_claim/maintenance_claim_int_en.htm)>, accessed 3 June 2013.

<sup>383</sup> Maintenance Act 9 of 2003, section 9; Children's Status Act 6 of 2006, section 14. The High Court as the upper guardian of all minors has inherent jurisdiction over these issues.

## Custody and access

Custody is the responsibility for the day-to-day care of a child. If the parents are married, they have joint custody of the child.<sup>a</sup> If the parents are not married, only one parent will be the custodian of the child, even if the parents live together. The law does not say which parent must be the custodian – it is up to the parents to decide.<sup>b</sup> If the parents cannot agree who will be the custodian of their child, they can ask the court to decide. Someone who has been authorised to act on behalf of the child can also apply to the court to make this decision. The court will consider the facts of the case and make a decision based on the best interests of the child.<sup>c</sup> If there is no agreement between the parents and no court order, then the position is governed by common law, which makes the mother the child's guardian and custodian.<sup>d</sup>

Where the parents are unmarried, the non-custodian parent has an automatic right of access to the child.<sup>e</sup> Where a dispute arises (for example if the custodial parent is unreasonably preventing the other parent from seeing the child, or the non-custodian parent is not caring for the child properly during period of access), either parent can apply to the court for an appropriate order.<sup>f</sup>

When considering which parent should have custody of a child, the court may not approve an application for the custody of a child if the application is based on a desire to avoid the payment of maintenance in respect of that child.<sup>g</sup>

<sup>a</sup> Married Persons Equality Act 1 of 1996, section 14, read together with the common law on custody of the children of a marriage.

<sup>b</sup> Children's Status Act 6 of 2006, section 11. The parents can make a verbal or written agreement.

<sup>c</sup> Id, sections 11 and 12. A decision about custody can also be changed. A request to change custody works in the same way as an initial application for custody. A parent can also apply to the court for temporary custody in an emergency. An application for temporary custody can only be made if the parents cannot come to an agreement about custody and the best interests of the child are being affected by the situation. Only the parent who is caring for the child at the time can make this application.

<sup>d</sup> The statute does not repeal the common law provision which gives the mother sole custody and guardianship of a child born outside marriage. See *Boberg's Law of Persons and the Family, Second Edition*, Kenwyn, South Africa: Juta & Co, 1999 at 391. Therefore the common law would survive to govern a situation not covered by the provisions of the Act.

<sup>e</sup> Access means having contact with the child. Access can include visiting the child, taking the child on trips, having telephone conversations or exchanging letters. The right of access is automatic if this parent has voluntarily acknowledged that he or she is the parent. If the parent without custody did not voluntarily acknowledge the child, this parent can still apply to the court for access rights. Children's Status Act 6 of 2006, section 14. The right of access is subject to the reasonable control by the person caring for the child and the parent with access may not remove the child from the usual place of residence without the custodian's consent. Children's Status Act 6 of 2006, section 14.

<sup>f</sup> Ibid.

<sup>g</sup> Id, section 3(2)(b).

Interviews with court officials showed that the courts also receive queries where the questions of access and maintenance are interlinked. The maintenance officer at the Keetmanshoop court stated that defendants commonly ask whether they can have custody of the child as an alternative to paying maintenance. He explained that many defendants do not understand why they should pay maintenance when it can be avoided by, for example, sending the child to live with a grandmother. Similar opinions were expressed by the participants at the male focus group discussion held in Keetmanshoop. The maintenance officer at one court described the solution she had found to address such cases – if the father takes custody of the children and takes them to live with the grandmother and the complainant then seeks to withdraw the case, she requests that the grandmother come to court and transfer the case into her name.<sup>384</sup>

The maintenance officer at another court discussed the fact there are some cases where she believes the child would be better off with the defendant. In these cases she advises the complainant to give custody of the child to the defendant and tells the complainant that she is not willing to proceed with the application for maintenance. She viewed this as a practical solution to a very difficult situation, made after assessing what is in the best interests of the children. However, this is a matter of concern as the Maintenance Act says that a maintenance officer must investigate an application

<sup>384</sup> The primary caretaker of a child may apply for maintenance. See the definition of "complainant" in section 1 of the Maintenance Act 9 of 2003.

for maintenance.<sup>385</sup> Furthermore a decision about custody is extremely serious and when brought to the court, the decision must be made by a magistrate in terms of the Children's Status Act after all interested parties have been given an opportunity to be heard – not by a maintenance officer on the basis of possibly incomplete information.<sup>386</sup> In fact, when the Children's Status Act is re-enacted as part of the Child Care and Protection Act, it is anticipated that a social worker assessment will be required before the court makes a decision on custody.<sup>387</sup> By ignoring these legal requirements, the maintenance officer may be preventing the complainant from having access to the proper legal channels for such a decision. A particular concern is that the complainant may feel intimidated by the maintenance officer and may not be aware of the legal right to have the case heard before a magistrate.

**We recommend the Maintenance Act is amended to allow a maintenance case to be diverted to a custody hearing should the situation require this, with the possibility of ordering temporary maintenance in the meantime whilst the question of a possible change in custody is pending.**<sup>388</sup>

As another option, the magistrate at the Mariental court recommended that rather than having the issues of maintenance and other children's issues dealt with separately, the two "courts" should be amalgamated into a family court which could handle maintenance, domestic violence, and child care/adoption/custody issues in combination. **We recommend that a helpful streamlining of procedures could be accomplished by amending the Maintenance Act and the Children's Status Act (or the forthcoming Child Care and Protection Act which is expected to incorporate the Children's Status Act) to provide for the amalgamation of proceedings on maintenance and custody – in a manner somewhat similar to the current procedure for converting a criminal trial for non-payment of maintenance into an enquiry which investigates possible changes to the maintenance order.**

### Summary of information about the Maintenance Act

- The Maintenance Act provides mechanisms and guidelines for enforcing maintenance responsibilities. It does not create any new legal liabilities for maintenance between family members, although it harmonises customary law with the common law principles on maintenance.
- The duty to provide maintenance is applicable to any relationship where one person has a legal duty to maintain another person. However the statute comes into play only if the person who has a duty to provide maintenance is failing or neglecting to provide reasonable maintenance despite being able to do so.
- Since maintenance is a joint liability between the parents, the common-law principles on joint liability allow a parent who has contributed more than his or her fair share towards a child's maintenance to recover the excess from the other parent. It is possible that this could be done by means of a maintenance order, since the Maintenance Act provides for an order directing the *defendant* "to contribute to the maintenance of the beneficiary from the date specified in the order" – although it not entirely clear that this provision authorises retrospective recovery of excess contributions.
- Maintenance is money or goods that a person has a legal duty to provide for the support of his or her dependants. A maintenance order can include an order for contributions to pregnancy and birth-related expenses. However the Act is currently unclear on whether a mother can claim pregnancy-related expenses before the child is born. As a result some courts allow such claims whilst other courts require the mother to return after the child's birth.

<sup>385</sup> In cases where a maintenance order is not already in place, a maintenance officer **must** "investigate the complaint and institute a maintenance enquiry". The law sets out a number of steps that must be followed during the enquiry. For example, under the direction and control of the maintenance officer, the maintenance investigator **must** take statements under oath or affirmation from persons who may be able to give relevant information concerning the subject of any complaint relating to maintenance. The maintenance officer **must** also gather information concerning the identification or whereabouts of any person who is legally liable to maintain the person mentioned in such complaint or who is allegedly so liable and information about the financial position of such person and any other relevant information (emphasis added). Maintenance Act 9 of 2003, section 9(4a) and 10(2d and e). A maintenance officer must also investigate complaints pertaining to existing orders (section 9 (4b))

<sup>386</sup> Children's Status Act 6 of 2006, section 12.

<sup>387</sup> Child Care and Protection Bill, draft dated 12 January 2012, section 95.

<sup>388</sup> This would be similar to a "Rule 43" application for maintenance during the period that a divorce case is pending in the High Court. See page 90.



- Although maintenance orders usually end between the ages of 18-21, the Maintenance Act contains no bar to maintenance orders in respect of major “children” since the basic requirements for a maintenance complaint are that there is a legal liability to maintain and that maintenance is not being provided in practice.
- A legal duty to maintain persons with infirmities or disabilities applies at any age, because such persons may not ever be able to become self-supporting.
- Children have a duty under certain circumstances to maintain their parents. This will usually apply only after the children have become adults themselves, but minor children can in theory be expected to contribute. There is also a mutual duty of support between certain blood relatives, starting with the family members who are closest to each other.
- The Maintenance Act makes it clear that husbands and wives have a duty of maintenance towards each other under both civil and customary law. However, cohabiting partners have no legal liability to maintain each other and thus cannot make use of the Maintenance Act (unless they conclude a contract between themselves in respect of maintenance). There is also no automatic legal liability for maintenance between spouses in religious marriages which do not satisfy the requirements for civil marriage, such as some Muslim or Hindu marriages.

### **Claiming maintenance**

- Once a maintenance complaint has been made, the maintenance officer must investigate the case.
- The normal practice is to bring the parties together to see whether it is possible to negotiate an agreement without a formal hearing before a magistrate. If the parties reach an agreement, the terms are made into a consent maintenance order.
- If a complainant and a defendant cannot agree on a consent order, the case will be considered by a magistrate at a hearing called a maintenance enquiry.
- If the court is satisfied that a defendant received notice to attend an enquiry but failed to do so, a default maintenance order can be made.

### **Appeals**

- The Act allows a person who is aggrieved by an order made by a maintenance court (including a refusal to make an order) to appeal to the High Court.

### **Enforcement**

- The current law provides for a range of enforcement remedies – such as attaching the property, income or debts of the person who is in arrears.
- Failing to obey a maintenance order is a criminal offence. The Maintenance Act also provides for a number of additional offences. The highest penalty in the Act is for intimidating a complainant not to lay a maintenance complaint for failure to pay maintenance. Failure to maintain a child is also a criminal offence under Namibia’s child protection laws.
- Case law disagrees on the question of who bears the onus of proving lack of means in a criminal trial for failure to pay maintenance; the wording in the current law, in contrast to the situation under the 1963 Act, does not make it clear if the defendant is required merely to raise such a defence, or must prove lack of means, thus shifting the burden to the prosecution to overcome the defence by proving that the lack of means was due to unwillingness to work or misconduct.

### **Changes to maintenance orders**

- A complainant or defendant can apply for an order to be substituted, suspended or discharged.
- The maintenance court may amend or enforce a maintenance order contained in a divorce order issued by the High Court, and possibly an interim order made by the High Court while a divorce is pending (case law on this issue varies). The maintenance court may also enforce, change or replace a temporary maintenance order contained in a protection order.

### **Maintenance across international borders**

- Maintenance orders may be enforced between Namibia and countries with which Namibia has made specific agreements for this purpose. If Namibia becomes a signatory to the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, the Namibian courts will be able to work with a greater number of countries to recover maintenance.



# Chapter 5

## REPORTS ON THE IMPLEMENTATION OF MAINTENANCE ACT 9 OF 2003

There is a shortage of information on the operation of the Maintenance Act. The 1995 report on maintenance noted that there is a “*dearth of information about maintenance*” – noting in particular that the 1991 Population and Housing Census did not include any questions about maintenance, something that was not remedied in the 2001 or 2011 censuses.<sup>1</sup> Other reports which make reference to the Maintenance Act 9 of 2003 do so only in passing, without providing any critical analysis or factual information about its operation.

Following the enactment of the new law, the first detailed report on problems still faced accessing maintenance was at the **2006 National Conference on Women’s Land and Property Rights and Livelihood, with a Special Focus on HIV/AIDS**. One of the presenters discussed some problems with the application of the Maintenance Act, with a focus on one detailed case study.<sup>2</sup> She asserted that some men cause unnecessary delays as a tactic to avoid paying maintenance, such as refusing to produce proof of income or denying paternity, which can mean that women struggle to maintain their children on their own for months or even years.<sup>3</sup> The consequences for women are problematic:

*The sum total effect of these tactics means that it often falls on the woman to continually go back to court to enforce the maintenance order. All of this time costing the woman money and time – wearing her down until many women give up the quest for child maintenance. Often times the women are poorly educated and do not, themselves, understand the process or what has been said in court. But they do understand one thing – that these delaying tactics mean insecurity in child maintenance leading to home and food insecurity and indeed, an insecurity of life. One never knows when the next meal will come.<sup>4</sup>*

The case study presented to illustrate some of the problems in the implementation of the Maintenance Act described the experiences of Hennely, a single mother of five children living in Katutura. She separated from her partner of 15 years due to his abusive behaviour. He refused to assist with

<sup>1</sup> D Hubbard, *Maintenance: A Study of the Operation of Namibia’s Maintenance Courts*. Windhoek: Legal Assistance Centre, 1995 at 1.

<sup>2</sup> D LeBeau, “Women’s access to child maintenance as a right to property” in Ministry of Equality and Gender Welfare, *Report on the National Conference on Women’s Land and Property Rights and Livelihood, with a Special Focus on HIV/AIDS*, Windhoek: Ministry of Equality and Gender Welfare, 2006, Annexure 3 at 18.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

maintenance, forcing her to turn to prostitution to earn money to feed her children. She became infected with HIV/AIDS as a result, and she unknowingly passed HIV on to one of her children.<sup>5</sup> Hennely's attempts to make her former partner contribute to the children's maintenance have been very difficult, as described in the case study:

*Hennely has been to maintenance court many times, but they keep postponing the case. The father of her children has used every tactic there is to get out of paying maintenance. He has filed affidavits alleging that the children are not his (the Magistrate would have none of this). He has refused to bring his pay slips to court. He has alleged to make far less money than is probable. He has claimed that he has other economic obligations. He has said that he does not have a house, car and satellite dish (I have seen these with my own eyes). He has not shown up for his court dates. He pays one payment, just before his court date and then goes to court and tells the Magistrate that he has been paying.<sup>6</sup>*

Two of Hennely's children reportedly died of malnutrition,<sup>7</sup> illustrating the potentially dire consequences of a failure to obtain maintenance.

The conference delegates adopted several recommendations pertaining to maintenance issues. The final report recommended that the courts increase their capacity to enforce maintenance orders.<sup>8</sup> More specifically, the report highlighted the need for maintenance investigators and the need to inform community members of their rights and responsibilities under the Maintenance Act.<sup>9</sup> In addition, the conference recognised entitlement to child maintenance contributions as a right to property.<sup>10</sup>

In the same year, the government put in place a **specialised prosecution unit** under the auspices of the Prosecutor-General to address sexual offences, domestic violence, maintenance and serious offences. The Ministry of Gender Equality and Child Welfare reports that this unit gives guidance to police investigating cases and assists women who are experiencing difficulty claiming maintenance from their partners. The unit collaborates with prosecutors to ensure that maintenance orders are obtained and enforced, and assists clients to invoke criminal proceedings under the Maintenance Act where appropriate.<sup>11</sup> According to the Office of the Prosecutor-General, the unit deals with maintenance cases that have been taken to the High Court on appeal, as well as cases where the defendant has gone into arrears. The unit may also deal with cases where there is alleged corruption, such as where the defendant is a high-ranking official who is refusing to comply with a maintenance order. Cases can be brought directly to the specialised prosecution unit, although it is not clear how well-known the unit is to the general public, as it does not appear that complainants are commonly informed about the unit by the maintenance courts. Aside from a brief reference to the unit in Namibia's *Beijing 10+* report, we were not able to source any documented information about the unit's operation or effectiveness – and as discussed in chapter 4, few cases about maintenance issues are taken beyond the maintenance court, meaning that there are few Namibian court judgements on maintenance which can be consulted.

Another source of information about the operation of the Maintenance Act comes from the response by the Ministry of Justice to a **question raised in Parliament** in 2008. On 5 June 2008 a female member of the opposition party posed a question to the National Assembly about the implementation of the

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<sup>5</sup> Id at 19.

<sup>6</sup> Ibid.

<sup>7</sup> Hennely was one of the persons interviewed by the Legal Assistance Centre for a study on sex workers: "Whose Body Is It?": *Commercial Sex Work and the Law in Namibia*, Windhoek: Legal Assistance Centre, 2002.

<sup>8</sup> Ministry of Equality and Gender Welfare, *Report on the National Conference on Women's Land and Property Rights and Livelihood, with a Special Focus on HIV/AIDS*, Windhoek: Ministry of Equality and Gender Welfare, 2006 at 12.

<sup>9</sup> Id at 22.

<sup>10</sup> Ibid.

<sup>11</sup> Ministry of Gender Equality and Child Welfare, *Namibia country report on the implementation of the Beijing Platform of Action for Beijing 15+*, 1995-2009, Windhoek: Ministry of Gender Equality and Child Welfare, 2010 at 35 and 64.

Maintenance Act after its first five years of operation.<sup>12</sup> Specifically, the question asked about initial and in-service training of maintenance officers; the accessibility and transparency of maintenance services, including adequate and accessible record-keeping; supervision of maintenance officers to assure proper conduct; salary of maintenance officers; and whether an adequate number of maintenance officers have been appointed throughout the country.<sup>13</sup>

In answer to this question, the Deputy Minister of Justice first responded with statistics on maintenance complaints lodged with the Windhoek Magistrate's Court since the current Maintenance Act came into operation in 2003. He noted that the following number of complaints had been lodged at this one court:<sup>14</sup>

- 2003: 2 159 complaints lodged<sup>15</sup>
- 2004: 1 292 complaints lodged
- 2005: 1 292 complaints lodged
- 2006: 1 260 complaints lodged
- 2007: 1 072 complaints lodged
- 2008 (from 2 January to 5 March): 260 complaints lodged.

The Deputy Minister then proceeded to give the following information:

*In Windhoek there is one magistrate assigned solely for the Maintenance Court, who handles enquiries and consequently criminal hearings. A fulltime prosecutor, a maintenance officer and four legal clerks support this Magistrate. In all other districts countrywide, district magistrates also handle maintenance matters and the prosecutor assigned to these courts is the maintenance officer.*

*The Maintenance Court was established with the specific purpose to ensure that the necessary support is provided when children are neglected by one or both of their biological parents.*

The Deputy Minister also described the process which usually takes place in a criminal case for non-compliance with a maintenance order:

*Where the respondent offers to pay an amount, the case is postponed for a reasonable time, as requested by the respondent, to make the required payments.*

*Where a complaint is received, the person liable for the support of a child is summoned to appear before Court for a full enquiry into such person's financial ability to provide the required support.*

*The Court attempts do everything possible to convince the respondent of his/her duty to support his/her children and in all possible ways encourage the respondent to provide such support without imprisoning the latter.*

*Only when it is clear that the respondent is able but refuses to provide such support to his/her children, the Court, in terms of the Act, is allowed to imprison such respondent for the failing to comply with a court order.<sup>16</sup>*

The Deputy Minister went on to address several specific points of the question:

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<sup>12</sup> At the request of Hon Dienda, the Legal Assistance Centre assisted with the drafting of this question.

<sup>13</sup> Question 3 put by Hon Dienda, National Assembly, 5 June 2008.

<sup>14</sup> The data is the same as that reported by the LAC on page 112, except for 2004 where we report 1 297 maintenance files were opened. The discrepancy could be a typographical error.

<sup>15</sup> The Maintenance Act 9 of 2003 came into force in November 2003. We assume the data cited is for applications for the entire year.

<sup>16</sup> Hon Deputy Minister of Justice (Mr U Nujoma), 12 June 2008.

*No initial training is provided but in-service training is provided on a daily basis to the maintenance officer and other administrative clerks in the Maintenance Division. It is expected of the maintenance officer and clerks to acquaint themselves with the Maintenance Act (Act 9 of 2003) on a regular basis.*

*The Magistrate, with the assistance of support staff, is responsible for record-keeping and a file is opened for every maintenance complaint. Complaints from the public can be reported to the magistrate.*

*The work of maintenance officers in this office is personally observed by supervisory officials for monitoring purposes.*

*Supervisory officials include the head of office in the case of Windhoek, the Magistrate, the maintenance officer, the administrative head as well as the prosecutor who is an ex-officio maintenance officer.*

*Supervising officials check case files on a regular basis.*

*Supervising officials do not necessarily interview complainants. Complainants are interviewed by maintenance officer or members of the support staff who assist with maintenance matters. Complaints about the performance of staff members or lack thereof are handled by the Magistrate.*

*Support dealing with the maintenance matters is supervised by a maintenance officer who is supervised by the Maintenance Magistrate.*

*Maintenance officers are legal clerks and legal officers appointed of different grades and levels in the respective job categories in the Public Service with different scales of salaries.*

*No investigators have been appointed since the Maintenance Act came into operation because this job was done by the police and we have budgetary constraints.*

*At the time of promulgation of this Act, the Police assisted the Courts to trace defendants. When the Police were no longer available for these purposes,<sup>17</sup> messengers of the Civil Court were and are still utilised to serve the Court process when the whereabouts of a defendant is known. This practice has thus far not required or necessitated the appointment of fulltime maintenance investigators provided for in subsection (4) of the Act.*

*Should reports be received from investigators, it would not be available to the general public because the contents of the reports are confidential.<sup>18</sup>*

In 2008, the **Situational Analysis for Women and Children** published by the National Planning Commission recognised the importance of the Maintenance Act, stating that “*the Maintenance Act 2003 assists children by improving the system whereby caregivers can obtain maintenance for children from absent parents*”.<sup>19</sup> However, there is no discussion of the Act at all in the latest situation analysis of children and adolescents published in 2010.<sup>20</sup>

The **first National Gender Policy**, published in 1997, makes no specific mention of maintenance,<sup>21</sup> but the accompanying **National Gender Plan of Action (1998-2003)** recommended law reform on

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<sup>17</sup> As noted on page 24, the law was amended to have maintenance summonses served by the maintenance investigator or messenger of the court instead of by police. (Maintenance Act 9 of 2003, section 8 (5))

<sup>18</sup> Hon Deputy Minister of Justice (Mr. U Nujoma), 12 June 2008.

<sup>19</sup> UNICEF, *Situation analysis of women and children in Namibia 2008*, Windhoek, UNICEF, 2008 at 16.

<sup>20</sup> National Planning Commission, *Children and Adolescents in Namibia 2010: A Situation Analysis*, Windhoek: National Planning Commission, 2010

<sup>21</sup> Department of Women Affairs, Office of the President, *National Gender Policy*, Windhoek: Office of the President, 1997.



maintenance, the use of media to disseminate legal information on various gender-related topics, including child maintenance, and research on the implementation of various laws relevant to women (presumably including the Maintenance Act).<sup>22</sup>

The **second National Gender Policy** recognises the importance of maintenance throughout the document. In the situation analysis, the government recognises challenges in implementation:

*Most critically, implementation of progressive gender-related laws remains ineffective, owing to shortages in funding and human resources, inadequate training and insufficient monitoring. For example, many magistrates' courts lack the proper forms under the new Maintenance Act of 2003, and are still using the old forms, denying women and children in those regions effective protection under the new maintenance laws. Furthermore, important legal battles remain, such as those confronting issues of customary laws and harmful social practices; protection of children, particularly step-children; power-sharing and decision-making; and equality in the family.*<sup>23</sup>

The policy connects maintenance with gender equality in the family in one of the thirteen objectives of the policy:

- *Promote gender equality in family relationships, and provide greater protection for women in all spheres of family life, including marriage, divorce, maintenance and inheritance.*<sup>24</sup>

Access to maintenance is also included as part of the specific policy objective for one of the twelve areas of concern, "Equality in the Family":

***Policy objective:** Ensure gender equality and respect for the important role of women in all aspects of family life, including steps to protect women's rights in respect of marriage, divorce, maintenance, inheritance and cohabitation.*

This section notes: "*The issue of maintenance should also be highlighted, since this is one of the concerns most often cited by women. The new law on the Maintenance Act No. 9 of 2003 is a strong one, but it is not well implemented in practice.*"<sup>25</sup> It calls for more effective implementation of a range of laws which are aimed at promoting equality in the family, including the Maintenance Act.<sup>26</sup> It then lists three "Strategies for maintenance":

- *Lobby for increased funding to ensure the hiring of maintenance investigators in all magistrates courts.*
- *Equip all magistrates' courts with proper maintenance forms, and provide intensified training on the Maintenance Act to magistrates, maintenance clerks and maintenance officers.*
- *Develop an education campaign to inform women, men and caregivers of their rights regarding child maintenance, and to inform men and women of their obligations under the Maintenance Act.*<sup>27</sup>

The average amount of maintenance ordered is included as an indicator for monitoring the success of the strategies in this policy section.<sup>28</sup>

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<sup>22</sup> Department of Women Affairs, Office of the President, *National Gender Plan of Action (1998-2003): Effective Partnership Towards Gender Equality*, Windhoek: Office of the President, 1998 at 35-37.

<sup>23</sup> Ministry of Gender Equality and Child Welfare, *National gender policy 2010-2020*, Windhoek: Ministry of Gender Equality and Child Welfare, 2010 at 39 (emphasis added).

<sup>24</sup> Id at 22 (para 3.3.2.13, emphasis added).

<sup>25</sup> Id at 42 (emphasis added).

<sup>26</sup> Id at 43 (para 4.12.1)

<sup>27</sup> Id at 43 (paras 4.12.3-4.12.5).

<sup>28</sup> Id at 50.

The current National Gender Policy also includes provisions on maintenance as a component of access to justice in the section on “Gender, Legal Affairs and Human Rights”:

- *Encourage increased procedural access to justice; this will entail providing facilities geographically accessible to women, and ensuring that facilities are adequately staffed and stocked with documents and forms – such as maintenance complaint forms and domestic violence protection order applications – which are mostly utilised by women.’*
- *Encourage substantive access to justice by ensuring that all laws and policies are being enforced to the fullest, and that actors within the justice system are given the resources, education, ongoing training and support to effectively uphold the laws.*
- *Work with the Ministry of Justice and civil actors to ensure that legal aid is available for women who cannot afford legal representation, including representation in matters which affect women particularly such as divorce, maintenance and domestic violence cases.<sup>29</sup>*

There is little mention of parental responsibilities to provide for maintenance in Namibia’s policies on children, indicating that maintenance is still thought of as a woman’s issue instead of an issue which is central to the best interests of children.<sup>30</sup> However, brief commentary on the operation of the Maintenance Act is included in Namibia’s **consolidated second and third periodic report** to the Committee that monitors the **Convention on the Rights of the Child**. The government’s report explains that the Maintenance Act 9 of 2003 “*was passed in order to establish a framework for holding parents accountable for the maintenance of their children*”. It states that effective implementation of several laws – including the Maintenance Act 2003 “*remains problematical*”;<sup>31</sup> however, it also asserts, without elaboration, that the problems which have been experienced with implementation of the Maintenance Act “*are now being addressed*”.<sup>32</sup> The lack of detail is concerning given the great value maintenance can have in protecting the best interests of a child.

The Legal Assistance Centre commented on this omission in its **alternative report to the Committee that monitors the Convention**, noting that:

*We do not believe that the problems with the implementation of this Act are being addressed. Clerks or court, magistrates and prosecutors need more training on the Act, with better follow-up, monitoring and supervision following training. The Act also provides for maintenance investigators, but there is no maintenance investigator in the country nine years after the Act came into force.<sup>33</sup>*

The LAC recommended “*continued and intensified attention to the implementation of this key law on maintenance*”.<sup>34</sup> However the Committee did not make any specific reference to the implementation of the Maintenance Act in its final recommendations.<sup>35</sup>

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<sup>29</sup> Id at 40 (paras 4.10.6-4.10.8).

<sup>30</sup> The government’s 2007 *Plan of Action for Orphans and Vulnerable Children* mentioned the Maintenance Act in passing as part of the backdrop to the Plan: “*The Maintenance Act 2003 assists children by improving the system whereby caregivers (including extended family members or even unrelated caregivers) can obtain maintenance for children from absent parents.*” *National Plan of Action for Orphans and Vulnerable Children in Namibia, Volume 1*, Windhoek: MGEWCW, 2007, updated 2008, at 18. *Namibia’s National Agenda for Children 2012-2016* (Windhoek: Government of the Republic of Namibia, [2012]) discusses state maintenance grants, but not parental duties to provide maintenance.

<sup>31</sup> Republic of Namibia. *First, second and third periodic reports on the implementation of the United Nations Convention on the Rights of the Child and two optional protocols*. 1997-2008. Windhoek, Namibia: Ministry of Gender Equality and Child Welfare, 2009 at 18 and 42.

<sup>32</sup> Ibid.

<sup>33</sup> Legal Assistance Centre, *Alternative report to Namibia’s first, second and third periodic reports on the implementation of the United Nations Convention on the Rights of the Child and two optional protocols (1997-2008)*, 2012 at 29.

<sup>34</sup> Ibid.

<sup>35</sup> Committee on the Convention on the Rights of the Child, *Concluding observations: Namibia*, Sixty-first session, 17 September – 5 October 2012.

## Does Namibia's Maintenance Act meet the standards outlined in the Convention on the Rights of the Child?

The following checklist is taken from the implementation handbook for the Convention on the Rights of the Child. We have completed the checklist based on our assessment of Namibia's adherence:

### Article 27: Child's Right to an Adequate Standard of Living

#### Maintenance

- ☒ Is legislation implemented to ensure that children can recover maintenance from both parents and from any others who have responsibility for their conditions of living?
- ☒ Does such legislation make the child's best interests a primary or paramount consideration?
- ☒ Is such legislation simple and cheap for the child or child's caregiver to enforce?
- ☒ Does it include measures to obtain income or assets from those who default on their maintenance responsibilities?
- ☒ Has the State acceded to all appropriate international or bilateral agreements and treaties relating to the recovery of maintenance abroad?

This simple assessment shows that in many ways Namibia is adhering to the standards outlined in the Convention on the Rights of the Child. We have recommended that the Maintenance Act be amended to specifically recognise the best interests of the child (see page 6). We understand that Namibia intends to sign the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance (see page 97). However whilst at face value Namibia may appear to be meeting international requirements, the inadequacies in the implementation of the Act continue to be problematic.



First, Second and Third  
Namibia Country Periodic Reports  
on the  
Implementation of the United Nations  
Convention on the Rights of the Child  
and  
Two Optional Protocols  
1997-2008



Republic of Namibia

#### NATIONAL GENDER POLICY

(2010 - 2020)

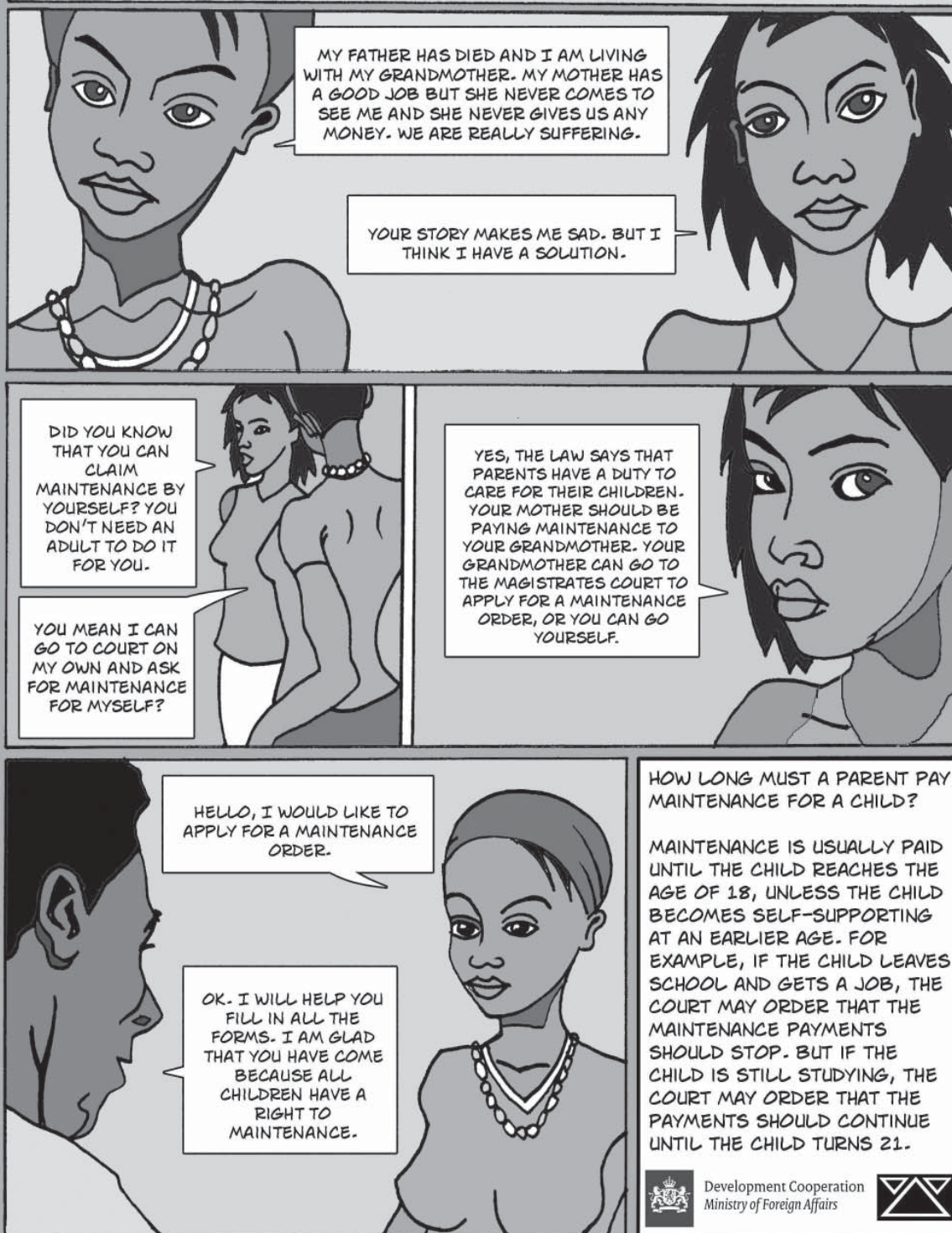
Ministry of Gender Equality and Child Welfare  
(MGE CW)

Windhoek, Namibia

March 2010



# Can a child claim maintenance?



Gender Research & Advocacy Project, Legal Assistance Centre. Windhoek Namibia 2010



Development Cooperation  
Ministry of Foreign Affairs



One of the one-page comics produced by the Legal Assistance Centre for publication in newspapers.



# Chapter 6

## STUDY DESIGN AND METHODOLOGY

### 6.1 Purpose and scope of the study

The purpose of this study was to collect comprehensive information on the implementation of the Maintenance Act of 2003 through a quantitative assessment of data extracted from court files and a qualitative assessment of data collected in focus group discussions and key informant interviews.

In 1995 the Legal Assistance Centre published a report on its study of the operation of the previous Maintenance Act (the Maintenance Act 23 of 1963).<sup>1</sup> Therefore we are able to compare findings from the current data set with data from the previous study. This information provides an important perspective on how changes to the law on maintenance have affected access to maintenance, and a general understanding of how access to maintenance has changed over time. Comparisons with the findings of the previous research, referred to as “**the 1995 maintenance study**”, are made throughout the report.

As Namibia and South Africa share a common history, many of their laws are the same or similar, and some of the problems and challenges experienced are similar. This is true of maintenance. Therefore, where relevant a study on the operation of South Africa’s Maintenance Act, published in 2004, is repeatedly cited in this report.<sup>2</sup> The study is referred to as “**the 2004 study on the South African Maintenance Act**”.

### 6.2 Sample of maintenance complaints

Quantitative data was collected from court files accessed from a national selection of Namibia’s magistrates’ courts. We applied for and received permission from the Chief of the Lower Courts to access the court files for this purpose.<sup>3</sup>

**We chose to collect data from maintenance files opened between 2005 and 2008.** The starting point of 2005 was chosen because this is two years after the Maintenance Act of 2003 came into operation. We estimated that the interval of two years should have given the courts sufficient time to effectively adopt the requirements of the new law. The end-point of 2008 was chosen because we planned to start data collection in 2009.

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<sup>1</sup> D Hubbard, *Maintenance: A Study of the Operation of Namibia’s Maintenance Courts*, Windhoek: Legal Assistance Centre, 1995.

<sup>2</sup> Community Agency for Social Equality (CASE), *Implementation of the Maintenance Act in the South African Magistrate’s Courts*, Braamfontein: CASE, 2004.

<sup>3</sup> The Chief of the Lower Courts is now known as the Chief Magistrate.



The sample was prepared by collecting information on the total number of maintenance order applications from every court in Namibia between 2005 and 2008. The data was collected by contacting all magistrates' courts by telephone to request this information. **A total of 18 683 maintenance order applications were received by magistrates' courts nationwide between 2005 and 2008.** We subsequently collected data on the total number of maintenance applications opened in 2004, 2009 and 2010.

**Table 7: Maintenance order applications at all magistrates' courts, 2005-08**  
(total universe of maintenance order applications)

2005	2006	2007	2008	Total
4 832	4 571	4 590	4 690	<b>18 683</b>

**Table 8: Maintenance order applications for all magistrates' courts, 2004-10<sup>4</sup>**

Court	Maintenance complaints made							Total
	2004	2005	2006	2007	2008	2009	2010	
Aranos	25	33	16	27	28	24	30	<b>183</b>
Bethanie	14	20	14	29	20	13	9	<b>119</b>
Eenhana	51	36	29	42	25	36	59	<b>278</b>
Grootfontein	100	96	97	123	127	114	102	<b>759</b>
Gobabis	94	123	174	169	121	156	187	<b>1 024</b>
Karasburg	154	159	170	124	94	88	135	<b>924</b>
Katima Mulilo	250	322	285	345	220	278	248	<b>1 948</b>
Karibib	21	20	24	35	24	24	29	<b>177</b>
Keetmanshoop	228	275	207	163	204	253	213	<b>1 543</b>
Khorixas	64	81	80	26	52	26	62	<b>391</b>
Lüderitz	45	56	59	79	93	104	109	<b>545</b>
Maltahöhe	10	8	11	4	10	9	16	<b>68</b>
Mariental	118	145	137	149	131	136	172	<b>988</b>
Okahandja	86	115	108	69	101	271	30	<b>780</b>
Okakarara	23	20	22	30	16	9	18	<b>138</b>
Omaruru	36	37	56	51	41	59	30	<b>310</b>
Ondangwa	186	176	203	192	108	108	120	<b>1 093</b>
Oranjemund	11	9	10	7	5	8	7	<b>57</b>
Oshakati	272	254	235	265	280	260	293	<b>1 859</b>
Otavi	55	58	40	53	42	29	30	<b>307</b>
Outapi	89	99	107	124	143	142	124	<b>828</b>
Otjiwarongo	200	184	205	216	188	179	169	<b>1 341</b>
Outjo	83	78	87	77	81	77	65	<b>548</b>
Opuwo	6	11	14	35	15	4	6	<b>91</b>
Rehoboth	225	268	227	228	149	158	145	<b>1 400</b>
Rundu	438	316	335	317	311	373	458	<b>2 548</b>
Swakopmund	254	245	242	254	286	278	272	<b>1 831</b>
Tsumeb	88	116	123	65	72	93	132	<b>689</b>
Usakos	32	35	27	24	17	19	26	<b>180</b>
Walvis Bay	128	145	167	196	339	341	317	<b>1 633</b>
Windhoek	1 297	1 292	1 060	1 072	1 347	1 236	1 275	<b>8 579</b>
<b>Total</b>	<b>4 683</b>	<b>4 832</b>	<b>4 571</b>	<b>4 590</b>	<b>4 690</b>	<b>4 905</b>	<b>4 888</b>	<b>33 159</b>
<b>Percentage per year</b>	<b>14.1</b>	<b>14.6</b>	<b>13.8</b>	<b>13.8</b>	<b>14.1</b>	<b>14.8</b>	<b>14.7</b>	<b>100.0</b>

<sup>4</sup> We collected data on the total number of maintenance files opened at the courts at the start of the study (data collected on files opened between 2005 and 2008) and the end of the study (data collected on files opened between 2004 and 2009 and 2010). On some occasions we were given overlapping data and noted that there were differences in the total number of files recorded. However, this is a standard limitation of this type of research and may be due to a wide range of reasons such as clerical errors in counting files, files being in use at the time of counting and files being moved between courts. The data in this table is based on the final information we received from each of the courts.

The total number of files opened between 2005 and 2008 was clearly too large to sample in its entirety (18683). Therefore we designed a sample to assess a representative proportion of the cases. **Data was collected from 1 687 files from 18 of the 31 magistrates' courts that were in place at the time.** This represents over half (58%) of all magistrates' courts in the country, from 12 of Namibia's 13 regions.<sup>5</sup>

The sample was designed to reflect a representative proportion of cases opened in different parts of the country and to be a reasonable sample in terms of financial and human resource capacity limitations. The selection of courts was based on (1) ensuring that we included the nine courts sampled for the 1995 maintenance study<sup>6</sup> and (2) including a sample of large and small courts in a diverse range of communities.

The number of files sampled per court was determined by a sliding scale as shown in Table 10. The purpose of this approach was to ensure that information from the larger courts would not be so dominant that the situation in smaller courts was obscured.

**Table 9: Courts sampled in this study by region**

Region	Location
Karas	Bethanie, Karasburg, Keetmanshoop
Hardap	Mariental, Rehoboth
Khomas	Katutura
Erongo	Swakopmund, Walvis Bay
Omaheke	Gobabis
Otjozondjupa	Okakarara, Otjiwarongo
Oshikoto	Tsumeb
Oshana	Ondangwa, Oshakati
Ohangwena	Eenhana
Kunene	Khorixas
Omusati	Outapi
Kavango	Rundu

**Table 10: How the number of files sampled per court was determined**

≤ 150 cases per year	151-250 cases	251-650 cases	651-1 200 cases	≥ 1 201 cases
Every 5 <sup>th</sup> case sampled	Every 7 <sup>th</sup> case sampled	Every 10 <sup>th</sup> case sampled	Every 15 <sup>th</sup> case sampled	Every 20 <sup>th</sup> case sampled

Based on the data for the total number of maintenance files per court in our sample (Table 8), we expected to sample a total of 1 726 files. The actual number of files collected was 1 687. This change is due to clerical errors in counting files, files not accessible to the researchers because they were in use at the time of sampling, and files being moved between courts.

Data collection was started in 2008 through a preliminary sample of data from the Katutura Magistrate's Court and the Karasburg Magistrate's Court. Full data collection was conducted during 2009 and 2010. It took two years to collect the data as the data was collected by visiting law students and volunteers at the Legal Assistance Centre to keep the field research budget manageable. The data was analysed in 2011-12 and published in 2013.

Data from the 1995 maintenance study was collected from 618 files from nine courts. The case files studied covered initial complaints brought to the courts between 1989 and 1993.

**Table 11: Comparison of samples in the 1995 study and the current study**

1995 study	Current study
618 case files 9 magistrates' courts 8 regions	1 687 case files 18 magistrates' courts 12 regions

## Summary of the sample

The final sample consisted of 1 687 maintenance order applications opened between 2005 and 2008 from 18 of the 31 magistrates' courts. The courts which were sampled were located in 12 of Namibia's 13 regions.

<sup>5</sup> As of 2013 there are 39 magistrates' courts in Namibia. Data was not collected from Caprivi Region.

<sup>6</sup> The following courts were sampled in the 1995 study: Gobabis, Keetmanshoop, Mariental, Otjiwarongo, Rehoboth, Rundu, Swakopmund, Tsumeb and Windhoek. These courts were chosen to reflect data collected from north, south, east, west and central Namibia with the choice of courts in each area partly influenced by the location of the advice offices of the Legal Assistance Centre at the time.

## 6.3 Representivity of sample

Information was collected from a total of 1 687 maintenance complaints from 18 of Namibia's 31 magistrates' courts, in 12 of the country's 13 regions. This sample represents 9.0% of the files opened during the years covered by the study: 2005-08 (1 687/18 683).

The percentage of maintenance complaints per region included in the sample is largely similar to the total percentage of maintenance complaints per region, as illustrated by Table 12. However, there are some variances. This is because the universe was so large that we had to limit the sample to a workable size. If we had used the same interval everywhere, courts with small numbers of maintenance files would have been under-sampled even though the population in these areas is high. We were also limited by resource constraints which meant we could not visit all areas that we would ideally like to have sampled.

**Table 12: Representivity of sample by region**

Region	Maintenance complaints in sample	Total number of maintenance complaints 2005-08	Maintenance complaints in region as a percentage of total 2005-08	Maintenance complaints in regional sample as a percentage of total sample
Caprivi	0	1 172	6.3	0
Erongo	230	2 504	13.4	13.6
Hardap	212	1 467	7.9	12.6
Karas	199	1 901	10.2	11.8
Kavango	121	1 279	6.8	7.2
Khomas	236	4 771	25.5	14.0
Kunene	34	398	2.1	2.0
Ohangwena	46	132	0.7	2.7
Omaheke	97	587	3.1	5.7
Omusati	93	473	2.5	5.5
Oshana	228	1 713	9.2	13.5
Oshikoto	66	376	2.0	3.9
Otjozondjupa	125	1 910	10.2	7.4
<b>Namibia</b>	<b>1 687</b>	<b>18 683</b>	<b>100.0</b>	<b>100.0</b>

The percentage of maintenance complaints per year included in the sample is largely similar to the total percentage of maintenance complaints per year, as Table 13 illustrates.

It is also relevant to assess the proportional representation of files from specific courts, as during the analysis we identified some practices that occurred more than would be expected at some courts. Reference to such findings are made later in the text.

**Table 13: Representivity by year**

Year	Maintenance complaints in sample	Total number of maintenance complaints	Proportion of total universe	Proportion of sample
2005	398	4 832	25.9	23.6
2006	432	4 571	24.5	25.6
2007	437	4 590	24.6	25.9
2008	420	4 690	25.1	24.9
<b>Total</b>	<b>1 687</b>	<b>18 683</b>	<b>100.0</b>	<b>100.0</b>

### Summary of the representivity of the sample

Overall, the correspondence between the distribution of our sample and the distribution of the total universe of maintenance complaints ensures that our findings present an accurate picture of the overall situation.

**Table 14: Sampling by court**

	Number of files sampled	Total number of files in universe	Proportion of total universe	Proportion of sample
Bethanie	15	83	0.9	0.6
Eenhana	17	132	1.0	1.0
Gobabis	46	587	3.9	2.7
Karasburg	34	547	3.7	2.0
Keetmanshoop	66	849	5.7	3.9
Mariental	93	562	3.8	5.5
Okakarara	101	88	0.6	6.0
Ondangwa	73	679	4.6	4.3
Oshakati	97	1 034	6.9	5.7
Otavi	109	193	1.3	6.5
Outapi	93	473	3.2	5.5
Otjiwarongo	108	793	5.3	6.4
Rehoboth	111	872	5.9	6.6
Rundu	111	1 279	8.6	6.6
Swakopmund	121	1 027	6.9	7.2
Tsumeb	136	376	2.5	8.1
Walvis	121	847	5.7	7.2
Windhoek	235	4 471	30.0	13.9
<b>Total</b>	<b>1 687</b>	<b>14 892</b>	<b>100.0</b>	<b>100.0</b>

## 6.4 Key informant interviews and focus group discussions

The data from the court files was supplemented by key informant interviews and focus group discussions conducted during the same time period. The key informants were clerks of the court, maintenance officers and magistrates. Focus group participants were community members from the towns served by some courts in the sample. Focus groups were organised according to feasibility – choice of location was based on the availability of participants and the time available to the researchers to conduct a discussion alongside collecting the data from the courts.

**Table 15: Details of key informant interviews and focus group discussions**

Category of informant	Number	Locations	Regions
<b>Key informant interviews</b>			
Magistrates	10	<b>8 locations:</b> Gobabis, Karasburg, Mariental x 3, Ondangwa, Otjiwarongo, Outapi, Rundu, Walvis Bay	<b>8 regions:</b> Omaheke, Karas, Hardap, Oshana, Otjozondjupa, Omusati, Kavango, Erongo
Maintenance officers (all were prosecutors with additional responsibilities)	10	<b>9 locations:</b> Eenhana, Gobabis, Keetmanshoop, Mariental, Ondangwa, Oshakati x 2, Rehoboth, Rundu	<b>6 regions:</b> Ohangwena, Omaheke, Karas, Hardap x 2, Oshana x 2, Kavango
Clerks of court	14	<b>12 locations:</b> Bethanie, Eenhana, Gobabis, Karasburg, Keetmanshoop, Khorixas, Mariental x 2, Okakarara x 2, Ondangwa, Oshakati, Rehoboth, Rundu	<b>8 regions:</b> Karas x 3, Ohangwena, Omaheke, Kunene, Hardap x 2, Otjozondjupa, Oshana x 2, Kavango
<b>Total</b>	<b>34</b>	<b>15 locations</b>	<b>11 regions*</b>
<b>Focus group discussions</b>			
Community members	<b>6 groups:</b> 32 women 30 men	<b>3 locations:</b> Karasburg (11 women, 13 men), Keetmanshoop (10 women, 8 men), Ondangwa (11 women, 9 men)	<b>2 regions:</b> Karas, Oshana
<b>Total</b>	<b>62</b>	<b>3 locations</b>	<b>2 regions</b>

\* Interviews were conducted in every region other than Oshikoto and Caprivi.

Interviews were also conducted in the 1995 maintenance study; interviews with maintenance court personnel were conducted in 10 regions (interviews were not conducted in Oshikoto, Ohangwena and Omusati Regions) and group discussions with community members were conducted in three regions (Karas, Omusati and Oshana).<sup>7</sup>

### Summary of information collected through key informant interviews and focus group discussions

- 34 key informant interviews with magistrates, maintenance officers and clerks from 11 regions (no interviews conducted in Oshikoto and Caprivi Regions)
- 6 focus group discussions with a total of 62 people from two regions (Karas and Oshana Regions)

## 6.4.1 Interviews with key informants

Semi-structured questionnaires were prepared for interviews with magistrates, maintenance officers and clerks of court. The key informants were asked a series of questions about their role in the operation of the Act. The interview guides are included in the Appendix. The researchers exercised flexibility to allow for personalised interviews according to the key informant's areas of knowledge and experience.

## 6.4.2 Format of the focus groups

Focus group discussions were conducted with community members with the aim of offering a safe and collaborative environment for people to provide opinions. The focus groups were assembled with the assistance of local organisations and community leaders. We invited people involved in maintenance cases but were happy to include people who knew about maintenance problems but were not themselves involved in a case. Both men and women were invited to attend the focus group discussions, in separate sessions. This was because the Legal Assistance Centre is aware that there are pressures between the sexes about claiming maintenance – some men may feel defensive about their duty to pay maintenance and some women may feel vulnerable about discussing problems with claiming maintenance in front of men. Therefore, to avoid possible situations where participants were not comfortable to speak about gender-related issues, we organised single-sex focus group discussions.

*"He has offered to pay maintenance if she sleeps with him."*

Text message to the Legal Assistance Centre, 27 February 2013

Each focus group discussion was designed to last for approximately half a day and included a variety of activities, namely brainstorming, open-ended discussions, role plays and listing of problems and solutions. The structure of the discussions was the same for the male and female groups. A detailed focus group discussion plan is included in the Appendix. In some cases, time constraints meant that only some of the activities were completed.

<sup>7</sup> Interviews with maintenance court personnel were conducted in Gobabis, Katima Mulilo, Keetmanshoop, Mariental, Oshakati, Ombalantu, Ondangwa, Otjiwarongo, Rehoboth, Rundu, Swakopmund, Tsumeb and Windhoek. Interviews with community members were conducted in Keetmanshoop, Swakopmund, Tsumeb and Windhoek. Information was also collected in group discussions and public meetings in Keetmanshoop, Onamula, Oniimwandi, Oshikuku, Mariental, Windhoek and Uukwangula. However, these meetings were primarily educational forums in which information-gathering played a secondary role. Information was also recorded from a meeting organised by the LAC in Windhoek between women who were experiencing problems with the maintenance court and officials from the Ministry of Justice and the Namibian Police. (D Hubbard, *Maintenance: A Study of the Operation of Namibia's Maintenance Courts*, Windhoek: Legal Assistance Centre, 1995 at 54-55)



## 6.5 Terminology and statistics

The term ‘**beneficiary**’ refers to the person who benefits from a maintenance order. This will usually be a child, but it could also be a destitute or disabled adult, a parent or a spouse. The beneficiary is sometimes called a ‘dependant’. The term ‘**complainant**’ refers to the person who applies for a maintenance order. The person could be applying on behalf of a beneficiary (such as a child), for themselves, or for themselves and another beneficiary together. The complainant will usually be a parent, often the mother, applying for maintenance for her child. Any relative or person who is caring for a child can request maintenance from one or both of the child’s parents. The complainant could also be anyone who has an interest in the wellbeing of the beneficiary, such as a social worker, health care provider, teacher, traditional leader or employer. The term ‘**defendant**’ refers to the person being requested to pay maintenance.

BENEFICIARY	COMPLAINANT	DEFENDANT
Person who benefits from a maintenance order	Person who applies for a maintenance order	Person requested to pay maintenance

The ‘**mean**’ is what is commonly referred to as the average. It is calculated by taking all the values, adding them up and dividing by the total number of cases. The weakness of this measure is that one very high or low number can skew the mean in one direction or another. The ‘**median**’ is the middle value. It is calculated by listing all the values in order from lowest to highest value, and picking out the value in the middle of the list. The median is a particularly useful measure when there are some very high or low values which may have distorted the average. The ‘**mode**’ is the value on the list which is repeated most frequently. This can be a particularly useful measure for showing the most typical statistic. Looking at all these measures together helps to give a clear profile of case characteristics.

MEAN	MEDIAN	MODE
The average value	The value in the middle of the list	The value which occurs most frequently

Most of the statistical information presented in this study was drawn from information recorded on the official forms contained in the court files, supplemented by information from notations on or in the files. We have also included information from interviews and discussions which provides insights into how to interpret the statistics and how to address the issues they raise.

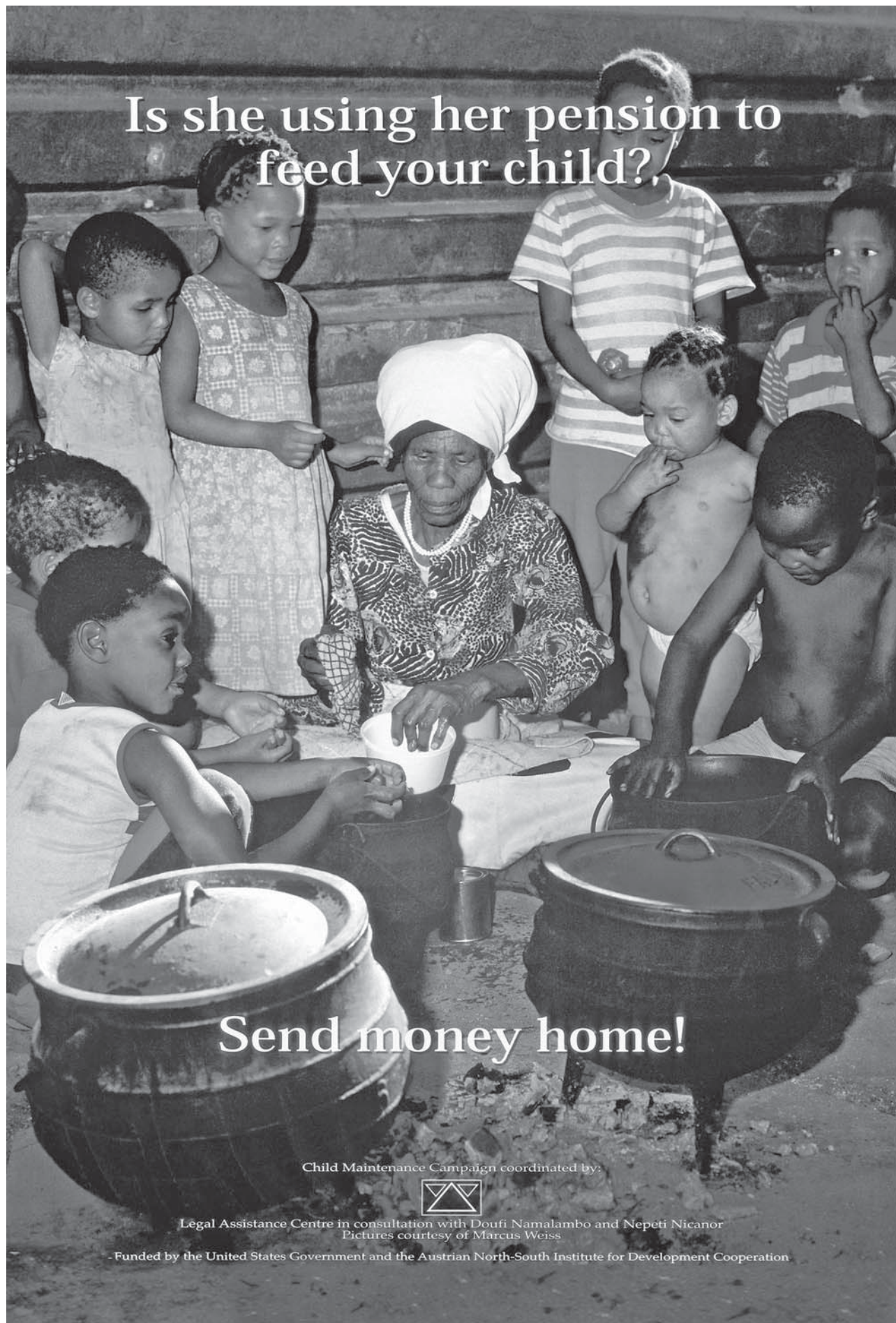
As per standard convention, statistics cited in this study have been rounded to one decimal point. Decimal places of less than 0.5 are rounded down and decimal places of 0.5 or greater are rounded up.

## 6.6 Confidentiality

All researchers who extracted information from court files were required to sign an oath of confidentiality. During data analysis, case files were identified by number. No names of any parties are included in this report except where they appear in press accounts. We have taken care throughout our research not to compromise the confidentiality of any party to a maintenance order application or any client of the Legal Assistance Centre.

*43. (1) A person must not disclose to another person any information acquired by that person in the performance of that person’s functions under this Act, unless the disclosure is made for the purpose of performing functions under this Act or is authorised by a court of law or by any law.*

Maintenance Act 9 of 2003



Is she using her pension to  
feed your child?

Send money home!

Child Maintenance Campaign coordinated by:



Legal Assistance Centre in consultation with Doufi Namalambo and Nepeti Nicanor  
Pictures courtesy of Marcus Weiss

Funded by the United States Government and the Austrian North-South Institute for Development Cooperation

One of the posters produced for the Child Maintenance Campaign coordinated by the Legal Assistance Centre in 1998-1999.





# Chapter 7

## OVERVIEW OF MAINTENANCE COMPLAINTS IN NAMIBIA

### 7.1 Total maintenance complaints in Namibia

As discussed in section 6.2, we collected data on the total number of maintenance complaints nationwide between 2004 and 2010.

#### Change in the number of complaints over time

Analysis of the number of files opened in all courts shows that there is little change in the number of files opened each year. Overall there is a difference of approximately 1% between the number of files opened each year, and the change does not indicate a gradual increase in case numbers over time. This contrasts with findings from the Legal Assistance Centre report on the operation of the Combating of Domestic Violence Act, *Seeking Safety*, which found that more and more applications for protection orders were opened each year.<sup>1</sup> The reason for this is probably that, while the Maintenance Act and the Combating of Domestic Violence Act both came into force in 2003, there was a previous law on maintenance that was being utilised by the public to claim maintenance, whereas prior to the Combating of Domestic Violence Act there was no law aimed specifically at domestic violence.<sup>2</sup> Therefore the new Maintenance Act did not have a dramatic effect on the number of people opening cases, whereas the enactment of the Combating of Domestic Violence Act did influence the number of people seeking assistance in cases of domestic violence.

#### Differences in the number of files opened by region

When analysed by region, there is a large difference between the percentage of the population living in some regions and the percentage of maintenance complaints. The number of maintenance complaints can be expressed as a percentage of the regional population. The results show a range

<sup>1</sup> The number of applications increased dramatically over the course of the study, more than trebling nationwide between 2004 and 2006, from 211 applications in 2004 to 747 in 2006. (Legal Assistance Centre (LAC), *Seeking Safety: Domestic Violence in Namibia and the Combating of the Domestic Violence Act 4 of 2003*, Windhoek: LAC, 2012 at 250)

<sup>2</sup> Prior to the Combating of Domestic Violence Act of 2003, a person experiencing domestic violence would have had the option to lay a criminal charge, obtain an interdict from the High Court, obtain a peace order, get a divorce or start a civil action. (Legal Assistance Centre (LAC), *Seeking Safety: Domestic Violence in Namibia and the Combating of the Domestic Violence Act 4 of 2003*, Windhoek: LAC, 2012 at 14)

from 4.4% in Karas (and similar percentages in neighbouring regions Hardap (3.1%) and Erongo (3.0%)) to 0.1% in Ohangwena (again with similar percentages in neighbouring regions Omusati (0.3%) and Oshikoto (0.4)).

There are a number of reasons for this pattern. Consideration must be given to the size and population density of the region. Karas, which has the highest proportion of maintenance complaints by population, has the lowest population density. In contrast, Ohangwena, which is the second most populous region, is a relatively small region with a high population density but a low percentage of maintenance complaints. Similar findings are seen for Omusati and Oshikoto. This suggests that cultural factors in northern Namibia may deter people from claiming maintenance.

The accessibility of courts appears to be another important determining factor. The 2009/2010 Namibia Household Income and Expenditure Survey assesses distance from magistrates' courts. Tables 16 and 17 reproduce this data and show the regional differences.<sup>3</sup> The table shows that people in Ohangwena, Omusati and Oshikoto Regions live further from the courts than the national average. This is likely to be a contributing factor to explain why there are fewer maintenance complaints than would be expected for these regions. In contrast, there are higher proportions of maintenance complaints in Karas, Hardap, Erongo and Khomas, where a majority (or at least almost half) of the population lives within 10km of a magistrate's court.<sup>4</sup> A link between accessibility and utilisation of the court is to be expected as people who claim maintenance do so because they need financial support – if they do not have the resources to access the courts, they may not be able to make a complaint. The problem of unequal distribution of courts as a general barrier to accessing justice has been noted previously.<sup>5</sup>

**Table 16: Maintenance complaints by region, 2004-10**

Region	Number of courts in region	Area in square kilometres*	Population density*	Population in region (all ages)*	Number of maintenance complaints 2004-10	Percentage of all maintenance complaints 2004-10	Number of maintenance complaints expressed as a percentage of the regional population
Karas	6	161 514	0.5	76 000	3 371	10.2	4.4
Hardap	3	109 781	0.7	79 000	2 456	7.5	3.1
Erongo	6	63 539	2.4	150 400	4 522	13.8	3.0
Khomas	1	36 964	9.2	340 900	8 579	26.1	2.5
Otjozondjupa	5	73 600	1.4	142 400	3 325	10.1	2.3
Caprivi	1	14 785	6.1	90 100	1 948	5.9	2.2
Oshana	2	79 800	20.3	174 900	2 952	9.0	1.7
Omaheke	1	84 981	0.8	70 800	1 024	3.1	1.4
Kavango	1	48 742	4.6	222 500	2 548	7.7	1.1
Kunene	2	115 260	0.8	88 300	639	1.9	0.7
Oshikoto	1	87 000	4.7	181 600	689	2.1	0.4
Omusati	1	26 551	9.1	242 900	828	2.5	0.3
Ohangwena	1	10 706	22.9	245 100	278	0.8	0.1
<b>Total</b>	<b>31</b>	<b>825 615</b>	<b>2.5</b>	<b>2 104 900</b>	<b>33 159</b>	<b>100.0</b>	<b>NA</b>

\* **Source:** Namibia Statistics Agency (NSA), *Namibia 2011 Population and Housing Census Basic Report*, Windhoek: NSA, undated at 42.

<sup>3</sup> Namibia Statistics Agency (NSA), *Namibia Household Income and Expenditure Survey (NHIES) 2009/2010*, Windhoek: NSA, 2012 at 95.

<sup>4</sup> Oshana, Kavango, Kunene and Otjozondjupa Regions are exceptions to this pattern; the percentage of their populations living within 10km of a magistrate's court is comparable to or higher than that of Karas, but these regions have a much smaller proportion of maintenance complaints relative to their populations than Karas. Accessibility to courts is likely to be a factor which interacts with other factors.

<sup>5</sup> J Nakuta and F Chipepera, *The Justice Sector and the Rule of Law in Namibia: Management, personnel and access*, Windhoek: Namibia Institute for Democracy and the Human Rights and Documentation Centre, undated.

**Table 17: Percentage of households by distance to magistrate's court (reproduced data)**

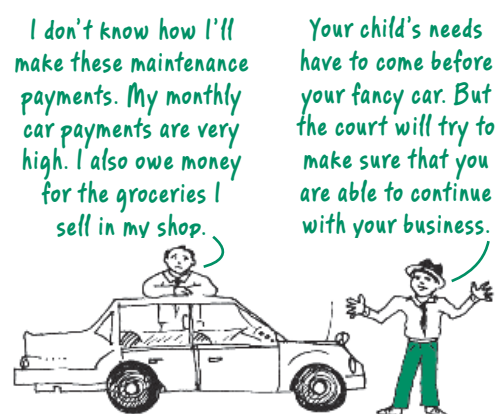
Region	Distance to magistrate's court in kilometres						Percentage of population living within 10 km of magistrate's court	Total number of households
	0-1	2-5	6-10	11-20	21-50	>50		
Caprivi	5.1	21.9	9.9	7.8	16.7	38.6	<b>36.9</b>	21 254
Erongo	16.9	65.5	6.1	0.8	3.8	7.0	<b>88.5</b>	39 221
Hardap	14.5	40.7	4.8	4.9	7.1	27.9	<b>60.0</b>	15 894
Karas	15.3	26.9	1.8	0.4	6.9	48.8	<b>44.0</b>	21 299
Kavango	7.1	22.1	12.8	11.1	23.3	23.6	<b>42.0</b>	43 889
Khomas	13.6	45.0	29.6	6.3	3.2	2.3	<b>88.2</b>	83 562
Kunene	17.7	19.6	3.9	0.3	3.9	54.5	<b>41.2</b>	17 096
Ohangwena	7.1	7.2	12.4	14.3	37.9	21.2	<b>26.7</b>	38 997
Omaheke	7.1	28.0	2.0	2.7	7.8	52.4	<b>37.1</b>	15 159
Omusati	3.7	7.8	8.9	18.9	37.3	23.3	<b>20.4</b>	45 161
Oshana	14.4	29.6	20.2	23.9	9.7	2.1	<b>64.2</b>	35 087
Oshikoto	4.2	11.0	2.2	9.1	27.3	46.1	<b>17.4</b>	32 038
Otjozondjupa	13.1	39.2	3.8	2.3	18.9	22.8	<b>56.1</b>	28 135
<b>Namibia</b>	<b>10.6</b>	<b>29.5</b>	<b>12.5</b>	<b>9.0</b>	<b>16.4</b>	<b>22.0</b>	<b>–</b>	<b>436 795</b>

Source: Namibia Statistics Agency (NSA), *Namibia Household Income and Expenditure Survey (NHIES) 2009/2010*, Windhoek: NSA, 2012 at 95.

## 7.2 The concept of maintenance payment

The Maintenance Act states that both parents of a child are primarily and jointly responsible and liable to maintain their child.<sup>6</sup> The primary purpose of the Maintenance Act is to provide assistance for situations when both parents do not voluntarily provide for their children.

The Act is clearly needed as assessment of the number of maintenance complaints opened per year (approximately 4737<sup>7</sup>) illustrates how common it is for people to approach the courts for assistance to access support for their children. Indeed, analysed another way, **the figures suggest that on average someone makes a maintenance complaint every thirty minutes in Namibia.**<sup>8</sup> In contrast, between 2006 and 2008 (the most recent years for which data was collected by the Legal Assistance Centre), there was an average of over 900 protection order applications per year nationwide. **The number of maintenance order complaints is five times higher than the number of protection order applications.**<sup>9</sup>



Public opinion about the need for and role of maintenance is mixed. The focus group discussions and individual conversations with community members held for this study provide a good illustration of how some people in Namibia perceive maintenance. We often found that while both men and women agreed that children need support, male participants often became increasingly defensive about their personal obligations to provide maintenance. A female participant summarised how some men feel: "Many men say to women, 'Go to court, I don't care,' but when you actually go to court, the man is so angry, he wants to strangle you."

<sup>6</sup> Maintenance Act 9 of 2003, section 3.

<sup>7</sup> Total number of maintenance complaints opened between 2004 and 2010 (7 years) = 33159.

<sup>8</sup> There are 52 weeks in the year and 5 working days per week = 260 days. Each working day is 8 hours = 2080 working hours in a year.  $4737/2080 = 1.7$  per hour or 1 every 30 minutes.

<sup>9</sup> Legal Assistance Centre (LAC), *Seeking Safety: Domestic Violence in Namibia and the Combating of the Domestic Violence Act 4 of 2003*, Windhoek: LAC, 2012 at 251.



**"Duty. Responsibility. This is not a car, this is a human being. You brought it into the world."**

Participant in the male focus group discussion in Keetmanshoop, criticising men who do not take responsibility

**"It's my right to get money from him because it's our child and the child has a right."**

Participant in the female focus group discussion in Keetmanshoop

***"The judiciary must endeavour to ensure for vulnerable children and disempowered women their small but life-sustaining legal entitlements. If court orders are habitually evaded and defied with relative impunity, the justice system is discredited and the Constitutional promise of human dignity and equality is seriously compromised for those most dependent on the law."***

Bannatyne v Banntyne 2003 (2) SA 363 (CC), on the South African Maintenance Act, which is very similar to the Namibian law

The male participants also often discussed the problem of misuse of maintenance money. However, as discussed under section 14.2, we identified only a very small number of situations where misuse of maintenance money was noted in the files. This suggests that the misuse of maintenance money is not as big a problem as it is perceived to be.

In contrast, the female participants were very clear about the fact that both parents have a duty to provide maintenance and that there is no stigma or shame in submitting a maintenance complaint to the court. However, some women said that if they could provide support for their children without having to ask for maintenance, they would. The reasons they gave included the numerous difficulties to get the money, the constant delayed payments and the fact that the father will often make it seem as though the mother is asking for money for herself, even when the amount of maintenance paid is not a realistic reflection of the costs incurred in the care of the child.

One maintenance officer, who is not a Namibian citizen, said that there is a *"cultural thing about maintenance"* which he had not seen in his own country. He described Namibian society as *"maternalistic"*, saying that the child is thought to belong to the mother with the father leaving all the responsibility to the mother because, to the men, *"being a father is not a real responsibility"*. Indeed, one maintenance officer who had received training on the Maintenance Act stated that *"it taught us how to be sensitive to the need for maintenance, since maintenance has not been a part of our traditional culture"*. Another maintenance officer described the process of applying for maintenance as *"the complainant says how much she wants, and he [the defendant] has to prove why he can't pay it"*. A maintenance officer from another court described a related attitude: *"defendants often believe that they grew up not eating well, so they don't believe that they need to pay for their children to eat well"*. For example, in one file the defendant tried to explain why it was difficult to pay maintenance: *"Yesterday I bought fish, but they finish food fast."* This complaint was brought by a young man for his six teenage siblings.

Even though the provisions in the Maintenance Act are intended to help alleviate conflict and put the needs of the child first, some court officials reported that maintenance investigations can still result in strife between the parents. One maintenance officer explained that *"court orders create a hostile relationship between the mother and father and between the father and the child"*. Another clerk said that *"sometimes women come in clearly looking for revenge; this is mostly when a man has had a few girlfriends and has chosen to marry one rather than the other, then the scorned women will come and ask even if she has enough money"*. Due to the gender-based conflict that can be involved, one female maintenance officer said that she asks a male maintenance officer to assist with defendants or asks the magistrate to assist as *"the defendants complain that it is all women ganging up on them and that the maintenance officers have already decided before the defendants even come in that they are in the wrong"*. She explained that asking the male magistrate to discuss the

law “calms them down”. In the focus group discussion in Karasburg, the participants also described problems of conflict between parents. The female participants described men as “negligent” at making payments or “devious” in the way that they manage to refuse to pay adequate maintenance. Conversely, the male participants felt that women receive an unfair sum for maintenance that is usually not spent on the children.

*“Education is needed so people know that maintenance is not punishment, but a responsibility.”*

Maintenance officer

## CASE STUDY

We received the following query by fax from a client. The story has been edited for grammar and to protect the confidentiality of the client.

*The mother needed N\$150 per child [for 4 children] which I couldn't afford. We agreed upon N\$100 per child. Time after time she came in for increments but couldn't succeed. Ironically the instruction which made me pay this amount cannot be found on my file. One of the kids was enrolled in another school without informing me. I even don't see their school reports. Two of the older children finished school of which one was working for more than two years. I made a sworn declaration at the Namibian Police and handed it in with certified copies of the birth certificates but it got lost at the Maintenance Office. I suppose the mother should pay back the monies I overpaid, but instead I was in arrears with N\$11 000 according to them. I brought all my receipts from the date I started paying maintenance from. They couldn't convince me on this amount in arrears after calculations for more than an hour. The amount to pay was increased to N\$500. It happens when the defendant is against three women (the mother, the maintenance officer and the prosecutor).*

*Again this same strange thing happened when I came to the court for a reduction. This time the magistrate (also a woman), instructed me to go ahead with the payment of N\$500. I was never given the time to state that I can't afford this amount. I am also the father of two [other] school-going kids. Again three women against one man.*

In this story, the client experienced a number of problems including poor communication from the mother of his children and poor file management by the clerk of the court. This appears to have led to the defendant feeling resentful against women. We recommended that he make a complaint to the court and also discuss his needs in more detail. The case is an example of the importance of open communication to help ensure that parties to the case understand why they must contribute. The court must also ensure that the defendant is really able to pay the amount in the order, and is aware of the possibility of substitution or discharge of the order should circumstances change.

While some people in Namibia resent or do not understand the principles behind maintenance, there are also many positive stories of parents supporting their children. For example, the maintenance officer at the Ondangwa court said that they sometimes have cases where fathers will come to court on their own accord and make a pre-emptive offer to pay maintenance.

*“Maintenance money is just the basics – a place to stay, education – it's not so much.”*

*“It is not about breaking up with your girlfriend; this responsibility is with the child.”*

*“It's to keep the child going. It's for food and education. It's your duty to take care of your child regardless of whether you are with the lady.”*

Participants in the male focus group discussion in Keetmanshoop

This editorial, published in *The Namibian* newspaper, illustrates the need for better community understanding about the provision of maintenance.

### Raising Children, Building A Country

#### WHAT happened to the practice and the philosophical approach that the entire village, location, or township would raise a child?

Last week Friday, the police found an ‘abandoned child’ at a shebeen in Katutura. Unable to trace the parents, the police took the three-month-old baby with them.

Only on Monday morning, after the media had reported the matter in headline news, were both mother and father reminded, seemingly, to claim back their child.

The baby boy’s mother said she gave the child to the father’s friend in order to demand maintenance for the infant.

But that incident is a microcosm of the decay in the country and further indicative of the breakdown in our communities.

It left just way too many questions unanswered even as the police reported that the boy and his parents were reunited after a weekend apart. It was by choice, the choice of his own parents. What a scandal for them but even more so for society.

At the rate we are going, Namibia’s moral fabric is tearing apart very fast and the country’s citizens do not appear concerned enough to address the issue about what values we will bequeath to the young and future generations.

People with lots of money look only after themselves and their nuclear families most of the time. Many are complacent in the belief that they pay taxes and are thus only too happy to pass the buck onto elected officials/ politicians and government employees.

The not-so-well-to-do are also just too comfortable leaving their loved ones, especially the vulnerable members, in the care of the government – the ever-increasing social welfare grants (about N\$3 billion in the current budget for orphans and vulnerable children, pensioners and the ‘war veterans’) is a testimony to that.

While it is correct to expect the government to use taxpayers’ money frugally, Namibians seem to have signed over their personal responsibilities to the State.

How often does one hear people calling the radio shows and imploring that *epangelo nali talepo nawa opo* (the government must look into it)? Societies,

which at independence received zero assistance from the government, have come to rely heavily and almost exclusively on the State.

The government has also made it too easy to dish out largesse, thus encouraging a culture of entitlement and handouts, when we all know that this is counter-productive. Many people in rural areas no longer till the land as their parents did just 20 years ago in order to subsist from their farming because they receive *oshikukuta* (drought aid). Neighbours and extended families don’t bother anymore to take in children of their struggling kith and kin or simply check in as to how the others are coping.

In fact, parenting has become a selfish individualistic exercise where adults are only concerned with the well-being of their biological children, nieces and nephews and grandchildren. Parents actually get upset when others make any move to show some disciplinary path for their children.

The result is a breakdown of the African family and the cohesion of good ethics and hard work in many communities across the Land of the Brave.

It leaves one to wonder whether the ‘grown-ups’ ever ponder about where the country is headed and what to do about the issues.

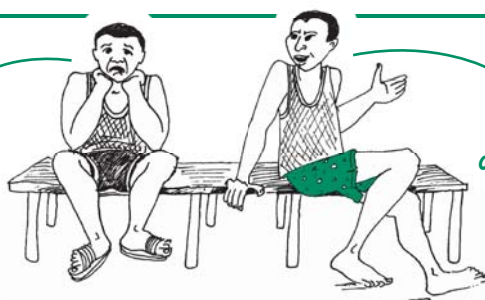
Is Namibia ever going to regain those moral values that underpinned the humaneness habitually associated with Africa, and which the Bantu or Nguni people encapsulate in *Ubuntu, uuntu womuntu*?

It is about time that individuals stop expecting too much from the government and start organising themselves into practical structures to take the country to where we all know it should be.

We can’t do that by abandoning our parental responsibilities (read that as citizens) and adopting foreign concepts of caring only about one’s personal wellbeing.

The sooner we realise that no one else can get us to our destination but ourselves the more easily we can face the obstacles.

The mother of my firstborn child wants me to pay maintenance. But the mother of my other two children already have maintenance orders against me. I can’t afford this!



You should have thought of that before you had so many children! You will have to share your resources with ALL your children. They are your responsibility!

## 7.3 Incomplete information

Many of the files sampled for this study contained very little information, much of which was incomplete. This made the analysis extremely difficult as the sample size for specific pieces of information was sometimes too small to be statistically relevant, and in many cases we were unable to determine the outcome of enquiries. As one researcher wrote in her feedback notes:

*The files were generally quite thin, frequently containing only a Form A, a Form C1, and a return of service. Often there was no indication as to what ultimately happened in the case; for example, there would be a complaint that the defendant was in arrears on the initial C1, but no documents indicating how the court had followed up.<sup>10</sup>*

The regulations of the Maintenance Act prescribe the forms on which a maintenance complaint must be made, but do not detail any explicit procedures for opening case files or keeping records.<sup>11</sup> At one court, the maintenance officer/clerk would only open a file when a maintenance order is made, although all applications are listed on the register. At another court, the clerk would only open a maintenance file when the defendant had been summoned. The maintenance officer at another court said that she will sometimes not complete a maintenance application if the defendant is unemployed and does not have any money – but explained that “*this is very rare and only in hopeless cases*”.

It is a matter of concern that the courts are not operating in line with the provisions in the Act. The Act states that a maintenance officer *must* investigate an application for maintenance.<sup>12</sup> It is important for the course of justice, transparency and accountability that the maintenance complaints are recorded and investigated even if they do not result in a maintenance order. Furthermore, unemployment is not in itself decisive as the Maintenance Act allows for payments to be made in kind, or for property to be attached or sold.<sup>13</sup> The reality of life in Namibia is that some defendants may be unable to pay maintenance, and due to the burden of work on court staff, some officials may feel that completing the extensive amount of information required on the application form is not necessary. However, it is a miscarriage of justice for a maintenance officer to fail to investigate a maintenance complaint, and this leaves courts open to accusations of partiality towards defendants or nepotism towards friends, even if this is not the case.

Furthermore, in light of the variability of practice across courts, **we recommend that the Ministry of Justice consider the development of guidelines or a revision of the regulations to clarify the procedure for opening, investigating and maintaining maintenance files. Supervisory personnel should also be tasked to spot-check files to ensure that the guidelines are adhered to.** For example, as suggested in the 1995 maintenance report, 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.<sup>14</sup>

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<sup>10</sup> Field notes of Christina Beninger, 2010. All of the researchers were asked to prepare field notes on their personal observations. Form A is the application form to make a maintenance complaint and Form C1 is a summons.

<sup>11</sup> Regulations for the Maintenance Act contained in Government Notice 233 of 2003 of 17 November 2003, *Government Gazette* 3093 (hereinafter “**Maintenance Regulations**”), regulation 1.

<sup>12</sup> In cases where a maintenance order is not already in place, a maintenance officer *must* “investigate the complaint and institute a maintenance enquiry”. The law sets out a number of steps that must be followed during the enquiry. For example, under the direction and control of the maintenance officer, the maintenance investigator *must* take statements under oath or affirmation from persons who may be able to give relevant information concerning the subject of any complaint relating to maintenance. The maintenance officer *must* also gather information concerning the identification or whereabouts of any person who is legally liable to maintain the person mentioned in such complaint, or who is allegedly so liable, and information about the financial position of such person and any other relevant information (Maintenance Act 9 of 2003, sections 9(4a) and 10(2d and e)). A maintenance officer must also investigate complaints pertaining to existing orders (section 9(4b)).

<sup>13</sup> Maintenance Act 9 of 2003, sections 17(4) and 29.

<sup>14</sup> D Hubbard, *Maintenance: A Study of the Operation of Namibia's Maintenance Courts*, Windhoek: Legal Assistance Centre, 1995 at 145.



## 7.4 Birth certificates

The regulations of the Maintenance Act state that for a new complaint, the complainant must “*lodge the complaint on a form corresponding substantially to Form A of the Annexure*”.<sup>15</sup> However, it appears that a number of courts also require the complainant to submit copies of the birth certificates of the proposed beneficiaries. At one court our researchers saw a sign stating that birth certificates *must* be provided. The court officials’ justification for this practice was that it helps them to ensure that the children really exist.

REPUBLIC OF NAMIBIA  
MINISTRY OF HOME AFFAIRS AND IMMIGRATION  
DEPARTMENT OF CIVIC AFFAIRS  
CONFIRMATION OF BIRTH

3/16/09  
C 0000000

A. PARTICULARS OF CHILD

Surname: \_\_\_\_\_ Place of birth: \_\_\_\_\_  
First names: \_\_\_\_\_ Region of birth: \_\_\_\_\_  
Date of birth: \_\_\_\_\_ Sex: \_\_\_\_\_ Country of birth: \_\_\_\_\_

B. PARTICULARS OF CHILD'S FATHER

Surname: \_\_\_\_\_  
First names: \_\_\_\_\_  
Date of birth: \_\_\_\_\_  
Place of birth: \_\_\_\_\_  
Country of birth: \_\_\_\_\_

C. PARTICULARS OF CHILD'S MOTHER

Surname: \_\_\_\_\_  
First names: \_\_\_\_\_  
Date of birth: \_\_\_\_\_  
Place of birth: \_\_\_\_\_  
Country of birth: \_\_\_\_\_

D. GENERAL INFORMATION

Are the parents indicated under items B and C married to each other? (yes/no) \_\_\_\_\_ Place: \_\_\_\_\_ Date: \_\_\_\_\_  
Status of parents during child's birth in Namibia: \_\_\_\_\_

E. INFORMANT

Capacity: \_\_\_\_\_ Signed by: \_\_\_\_\_

Official date stamp: \_\_\_\_\_ For Ministry of Home Affairs and Immigration \_\_\_\_\_ © Open 2009

However, although all children in Namibia should have a birth certificate, the reality is that many do not.<sup>16</sup> The courts should not make it a mandatory requirement for the complainant to provide a copy of the birth certificate to open a case as this may be a barrier that prevents some people from accessing maintenance. The courts should instead process maintenance complaints whilst waiting for the complainant to provide a birth certificate. One concern cited by the courts is that people may give false information about their children. However, the Act already includes a penalty of up to N\$4000 or 12 months imprisonment for providing false information for a maintenance complaint.<sup>17</sup> Furthermore, the Act states that the maintenance officer may request any person to give information or produce any book, document, statement or other relevant information for the investigation.<sup>18</sup> This provision allows the maintenance officer to request the complainant to provide copies of the birth certificate(s) or other documentation if there is cause for suspicion.

As a practical step towards addressing this problem, we recommend that the Ministry of Justice and Ministry of Home Affairs and Immigration develop a closer working relationship. For example, clerks of the court could be sent for training at the nearest Ministry of Home Affairs and Immigration office to help them to understand the procedure for obtaining birth certificates, so that, if someone applying for maintenance does not have this information, the clerk is able to give basic guidance, and can direct the complainant to the appropriate person at the Ministry office if there are particular problems with the case.

Finally, although it is a matter of concern that some courts require complainants to provide birth certificates, it should be noted that we also learnt that where this requirement is in place, the courts do often try to assist the complainant to get the certificates. For example, the maintenance officer at one court stated that she requires a birth certificate to open a maintenance case, and regularly gives complainants N\$6 of her own money to obtain a copy of their child's birth certificate from the Ministry of Home Affairs and Immigration.<sup>19</sup> Despite this altruistic gesture, the requirement to have a birth certificate should not be tied to opening a case.

<sup>15</sup> Maintenance Regulations, regulation 2.

<sup>16</sup> According to the 2006-07 Namibia Demographic and Health Survey, only 60.4% of births from 2001-06 were registered – a slight decline from 70.5% reported in the 2000 Demographic and Health Survey. However, the Government is making praiseworthy efforts to improve this situation. For example, in 2008 the total number of children registered at hospital-based facilities was 1748. This rose to 23575 in 2010. (Ministry of Health and Social Services (MoHSS), Namibia Demographic and Health Survey 2006-07, Windhoek: MoHSS, 2008 at 23-24; and Ministry of Home Affairs and Immigration (MHAI), *Ministry of Home Affairs and Immigration Operational Framework for 2012-2013*, Windhoek: MHAI, 2011 at 18)

<sup>17</sup> Maintenance Act 9 of 2003, section 37(1).

<sup>18</sup> Id, section 10(1).

<sup>19</sup> It is not clear what the N\$6 is for. Section 2 of the 2001 amendment of the regulations under the Births, Marriages and Deaths Registration Act 81 of 1963 (contained in Government Notice 2564 of 2001) states that it costs N\$30 to obtain a copy of a birth certificate. There is no charge to register the birth of a child for the first time. It is possible that the money was given for transport between the offices.



## 7.5 Problems with investigations

### Locating the defendant

The Maintenance Act states that one of the functions of a maintenance investigator is to locate the whereabouts of a person required to attend a maintenance enquiry.<sup>20</sup>

The Act states that the Minister must take all reasonable steps within the available resources of the Ministry of Justice to appoint at least one maintenance investigator for each maintenance court.<sup>21</sup> Despite this provision, ten years after the enactment of the Maintenance Act, there are no maintenance investigators in Namibia, and in most courts prosecutors function as maintenance officers as one of their many duties. This burden of work means that the maintenance officers (prosecutors) have limited time available to investigate the whereabouts of a defendant and the defendant's financial position if the complainant is not able to provide this information.

Due to the fact there are no maintenance investigators, it appears that in a number of courts, if the complainant does not have information about the whereabouts of the defendant, the complaint will not be taken forward. As one clerk of court explained:

*“We usually try to ask them to get a phone number for the father if they don't know where he is. We usually just take the phone number and name of the father, and before we open the file we try to find him. If we can't find him, then we don't open a file. If we do find him, then we ask the complainant to come back and we open the file. If we don't know where the father is, then we don't complete an application. We don't fill anything out unless we have everything together.”*

The maintenance officer from another court stated:

*“It is the complainant's responsibility to find the defendant. If she cannot find him, then she cannot make a claim, but it shouldn't be the end of the road. The complainant technically has recourse to the police, but the police in reality do not conduct such investigations.”<sup>22</sup>*

A clerk made a similar comment, stating that in order to not waste court time, she does not get complainants to fill in a maintenance complaint unless they can give a physical address for the defendant. At another court the clerk said that if the complainant does not have details about the defendant, *“normally they are sent away. This is where the maintenance investigator is supposed to come in. We don't have the power to do this – this is outside my duties.”*

At another court, the clerk will only open a maintenance complaint if the defendant has not voluntarily paid maintenance for four to five months. We were told that if the defendant has failed to support the child for less than four to five months, the complainant is sent away and told to come back only after the child has not been supported for this amount of time. The court's justification for this was that often the defendant lives some distance from the court, and rather than implement inconvenient court proceedings, the complainant and defendant should seek to resolve the matter between themselves before coming to court. The clerk stated that this helps to avoid wasting the court's time and resources. While it is possible that some people may choose to resolve maintenance disputes outside of court, the Act does not state a time period for when someone can apply for maintenance. Forcing complainants to wait for such a long time can disadvantage the child if the parent with custody has no money for food, clothing or school expenses.

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<sup>20</sup> Maintenance Act 9 of 2003, section 8(2a).

<sup>21</sup> Id, section 8(4).

<sup>22</sup> As noted in this section, the maintenance investigator has a duty to locate the whereabouts of the defendant. It is not clear what recourse with the police the maintenance officer is envisaging – perhaps a missing persons search.

The clerks from some courts noted that they are not allowed to use the telephone in attempting to find a defendant, while at other courts the cost of issuing a summons was noted as a problem.

The Legal Assistance Centre has been aware of this problem for some time as we regularly receive complaints from clients who have not been helped by the maintenance court. The lack of maintenance investigators was discussed in Parliament in 2008 (see chapter 5).<sup>23</sup> The Deputy Minister of Justice claimed that “*practice has thus far not required or necessitated the appointment of fulltime maintenance investigators provided for in subsection 4 of the Act*”. The reality appears to suggest otherwise.

*“When the parties are unrepresented ... the maintenance officer ... must really enquire into all relevant aspects of the case. Ordinary laymen do not know how to conduct an enquiry of this nature. It therefore ... becomes, where there is no legal representation, the duty of the maintenance officer to do the things normally done by legal representatives ... .”*

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

## CASE STUDY

We received the following email from a client. The story has been edited for grammar and to protect the confidentiality of the client.

*I have a problem with the father of my son. He refuses to tell me where he is employed or where he lives. He used to show up every second month after I call him to tell him that the child needs clothes or food for school, and when he shows up he gives me N\$200 or buys snacks for him.*

*The last time I saw him was a few days before the schools opened when I begged him to buy a pair of shoes for the child which he did, but after that he went silent.*

*A friend of mine spoke to a cousin of his and told her that I was going to take him to court about the child and the same night he called me from a different number and told me that his phone got lost. I explained to him why I was looking for him and that we need to talk. All he said was that he will get back to me. His phone is still off and I do not know how to get hold of him.*

*I called his brother and he could not give me any info as to where the brother is.*

*All I want is for him to assist me; the child needs clothes, he must eat, school must be paid and there must be food for him to eat at school.*

*I called the court three weeks back and I spoke to a lady, but did not get her name. She told me I should have an address of where he works or lives.*

We suggested that the client inform the court about the provision in the Maintenance Act that allows the maintenance officer to summon any person to provide relevant information on the case. The maintenance officer could summon the brother to provide this information as provided for under section 10(1) of the Act.

*“I just want to know what to do if the wife of this person don't want to give info about the father of the child or children.”*

Text message sent to the Legal Assistance Centre

<sup>23</sup> Question 3 put by Hon Dienda, National Assembly, 5 June 2008.

The fact that many courts refuse to open a case if the complainant does not provide contact details for the defendant, or otherwise put limited effort into finding the defendant, is a matter of concern. The Act states that the maintenance officer may request any person to give information or produce any book, document, statement or other relevant information for the investigation.<sup>24</sup> For example, as in the case study on the previous page, if the complainant has contact with the family of the defendant but they will not tell her where the defendant is, the court can summon a family member to court to provide this information.

The clerk at another court said that they ask the defendant's relatives for contact information, or, if the complainant knows where the defendant is but does not have contact details, the messenger will take her with him to be shown where the defendant can be contacted. If the defendant lives outside the area, the court advises the complainant to ask a friend or relative of the defendant to find him. Although these are practical solutions to the problem, it is important that the burden of finding the defendant is not placed on the complainant.

Many of the court officials recommended the involvement of the police – either as a place where complainants can make an application for maintenance (as police stations are more numerous than courthouses) or to assist with maintenance investigations. A similar proposal was made by court officials in the Legal Assistance Centre study on the operation of the Combating of Domestic Violence Act, but the police opposed this recommendation as *“it would be unrealistic to expect the police to be trained to assist with this on top of their other duties – especially since the police might only receive such applications infrequently”*.<sup>25</sup> A similar comment regarding police involvement with maintenance cases could be made, so it seems unrealistic to recommend the transfer of duties from one over-burdened government office to another.

Although a number of courts reported problems locating defendants, some courts also reported examples of how they have found solutions to this problem. For example, the clerk of the court in Eenhana explained that she sends the names of the defendants who cannot be found to the local radio station(s). The names and court dates are broadcast and this is often very effective. Another positive story came from the Rundu court, where we were told that the prosecutor and magistrates met with the head of the region's police force to request help from the police in locating and serving defendants.

## Investigating the defendant's financial situation

The Maintenance Act, through its provision for maintenance investigators, and case law<sup>26</sup> both envisage that the maintenance court will investigate the maintenance complaint. However, the reality is that many court officials have limited time to investigate the cases. As one maintenance officer stated, *“people liable to pay maintenance often slip through the cracks”*. The maintenance officer from the Ondangwa court gave a practical example to illustrate this: *“Taxi drivers are especially difficult because there is no maintenance investigator to find out exactly how much they earn. You can call up the taxi owner, who might be the defendant's brother, and the taxi owner/brother will lie about how much is earned.”* One maintenance officer said that his *“number one”* suggestion for improving the operation of the Act would be to have *“an exclusive maintenance officer, who can work on these files 2-3 days per week instead of 2-3 days per month ... I don't have the time”*. One magistrate also noted that it can be difficult to access the information required for a maintenance investigation, explaining that the maintenance officer will ask the defendant two or three times to bring in his payslip, *“but even at the enquiry he still does not bring evidence of his income”*. As discussed under Section 10.5, one reason for cases being postponed is that the court requires further

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<sup>24</sup> Maintenance Act 9 of 2003, section 10(1).

<sup>25</sup> Legal Assistance Centre (LAC), *Seeking Safety: Domestic Violence in Namibia and the Combating of the Domestic Violence Act 4 of 2003*, Windhoek: LAC, 2012 at 261.

<sup>26</sup> For example, it has been held (*S v Bedi* 1971 (4) SA 501 (N)) 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. See also *Pieterse v Pieterse* 1965 (4) SA 344 (T) and *Nodala v The Magistrate*, Umtata 1992 (2) SA 696 (TK).

information. Court officials also said that some defendants will use fake or old payslips. We were told of one example where the defendant forged his payslip, but the complainant arranged for the bank statements to be provided to the court (the couple were married) and these showed that the true income of the defendant differed from his payslip. As one maintenance officer said, *“it is very easy for the defendant to mislead the prosecutors who don’t have enough time to investigate thoroughly”*. The 2004 study on the South African Maintenance Act also noted that it is common for both parties to lie about their financial situation, with some employers also lying in order to help their employees.<sup>27</sup>

Overall it is clear that the courts experience a number of problems with the investigation of cases. **We recommend that the Ministry of Justice review its budget allocations to assess whether the operation of the maintenance courts is receiving sufficient funding, particularly to allow for the appointment of maintenance investigators in the busiest courts.**

**We also carry forward the recommendation made in the 1995 maintenance report that maintenance officers need to be encouraged to use their powers of investigation more assertively, to help locate defendants or to obtain accurate information about the defendants’ income and means.**<sup>28</sup> For example, the court can access bank statements even if the complainant and defendant are not married, as the Act allows the maintenance officer to cause any person, including the defendant and the complainant, to be directed to appear before that maintenance officer and to give information or produce any book, document, statement or other relevant information.<sup>29</sup> This would include summoning a staff member at a bank to provide bank statements belonging to the defendant or asking an employer to provide the defendant’s payslip.

### Getting information from banks

Either the complainant or the defendant might benefit from access to information about each other’s financial position.

Banks have a duty of confidentiality to their customers, but they can still be ordered by law to provide the courts with information about their clients in some circumstances. Maintenance officers have the power to trace and evaluate the assets of responsible persons, and to gather information concerning the financial position of any person who is responsible for maintaining someone else. These powers appear to overrule a bank’s duty to keep client information confidential.

Banks can be ordered to produce account books as evidence in court cases. At least 10 days written notice must be given to the person on the other side of the case. This person can ask the magistrate to order that the financial information be kept confidential. It is up to the magistrate to decide.

A bank cannot be forced to produce accounts and other financial documents without a court order. Section 31 of the Civil Proceedings and Evidence Act states:

***“No bank shall be compelled to produce its ledgers, day-books, cash-books or other account books in any civil proceedings unless the person presiding at such proceedings orders that they shall be so produced.”*** (emphasis added)

Maintenance Act 9 of 2003, sections 8 and 10  
Civil Proceedings and Evidence Act 25 of 1965, sections 27-32  
*Swart & Another v Marais & Others* 1992 NR 47 (HC)

<sup>27</sup> Community Agency for Social Equality (CASE), *Implementation of the Maintenance Act in the South African Magistrate’s Courts*, Braamfontein: CASE, 2004 at 20.

<sup>28</sup> D Hubbard, *Maintenance: A Study of the Operation of Namibia’s Maintenance Courts*, Windhoek: Legal Assistance Centre, 1995 at 149.

<sup>29</sup> Maintenance Act 9 of 2003, section 10(1)(a).

## 7.6 Filing

Our original plan was to sample data until mid 2008, but due to delays in finalising the data collection, we extended the data collection period to the end of 2008. This required us to revisit some of the first courts sampled to collect the remaining data. We were concerned to find that forms which had been identified during the first visit had gone missing at one court at least. As noted by one researcher:

*“Since the previous researchers visited the court, many files they sampled have been removed from the office. The present location of the files is unknown. The prosecutor/maintenance officer has only been at the court for one month and was unable to help. Other staff members insisted the files found in the prosecutor’s office were the only files in the court and that no files were kept in storage except archived files from before 2000.”<sup>30</sup>*

At some courts we also encountered problems with filing. For example, at one court the researchers could not find any files for 2007. When we enquired about this, the clerk suggested that when court records were moved to a new building during the previous year, these files may have been lost in transit. The researchers also struggled at many courts to find the files required for our sample because the files were not located in a single place but rather were stored haphazardly in various offices. In some cases the files did not contain all the information, and our researchers found forms



Photograph of files at one of the courts visited

which should have been in the files amongst the papers lying in loose piles stored in a disorganised manner in various offices. The loss of a single file should be a matter of concern, and the fact that a substantial number of files appeared to be missing from some courts is a serious worry.

## 7.7 Training for court staff

*“We need trainings with information on how to communicate with clients, and about new changes in the law – especially for those of us who didn’t study law. We need more books and pamphlets and trainings.”<sup>31</sup>*

The purpose of the Maintenance Act 9 of 2003 was to improve on many of the limitations identified in the Maintenance Act 23 of 1963. In many ways, this goal appears to have been achieved – as one maintenance officer commented, *“the Act is self-explanatory and user-friendly”*. Another maintenance officer described the 2003 Maintenance Act as *“a big improvement on the previous legislation. The civil law style of the procedures and processes introduced by the Act are very good.”*

However, the 2003 Act has also created some challenges, particularly regarding the forms that must be completed. As one clerk of court explained:

*“The new forms are so ... [unfinished sentence]. They didn’t even come to explain how to use the new forms. We found out from another office how to use some of them and those are the ones that we use. I think the new forms are very hard. We need someone to come and explain to us how to use them. We want more training on the forms and the Act.*

*I don’t like the new forms, for one I don’t know what form to use for arrears. We had to find out from Keetmanshoop how to garnish wages. Before they told us how, we didn’t know.*

*The old forms were really easy to complete – they were few and they were shorter. Maybe these ones are easy, but no one ever told us how to fill them out.”*

<sup>30</sup> Field notes of Laila Hassan, 2010. All of the researchers were asked to prepare field notes on their personal observations.

<sup>31</sup> Clerk of a maintenance court.



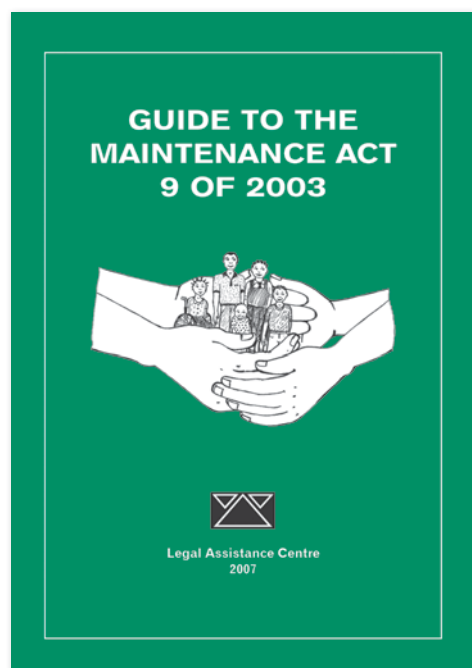
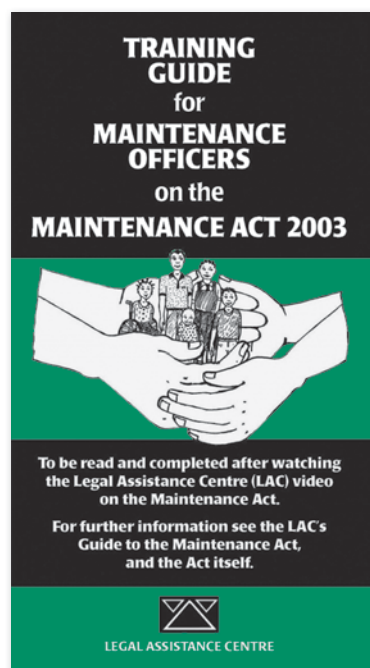
Similar comments were made by other court officials. However, some court officials were of the opposite opinion – one maintenance officer found the forms “*clear and easy to work with*”, and easier to use than the previous forms.

Some court officials noted that there is a need for social workers to assist with some of the cases. An alternative suggestion is for clerks to receive training on how to deal with the emotional aspect of some applications. As one clerk said, “*we need people with patience and understanding, because it can be very emotional for the complainants*”. Another clerk made a similar comment:

*“I definitely think there should be more training, especially for you to work with maintenance clients. You need training to understand client needs. Everyone has a different reason for applying for maintenance. Psychological training is needed. Some people think that maintenance is a solution to marital problems. Some women try to punish men. The man thinks you are taking sides when you talk to the woman and vice versa. Men take it personally. Both men and women are your clients – you need to listen to both.”*

The clerk of the Rehoboth court stated that the town council had arranged for social workers to be at the court every Tuesday for screening. This is an excellent example of how the community identified a need and made provisions to help address the problem.

Many of the court staff appear to be learning on the job. As one clerk of the court said, “*We were given a copy of the Act and told to go through it ourselves.*” While it is essential that all court officials are familiar with the wording of the Act – something that can best be achieved by reading the Act – the failure of the Ministry of Justice to provide sufficient training on the Maintenance Act places an unfair and unrealistic burden on staff. Worryingly, one clerk of the court informed us that she did not even have a copy of the Act to refer to, and another described the process of learning on the job as “*trial and error*”. The 2004 study on the South African Maintenance Act noted similar problems, stating that, “[f]ormal training for maintenance staff at all levels was reportedly very rare and most of the maintenance staff relied on their own initiative and learning from more experienced colleagues”.<sup>32</sup> The lack of training and understanding of the Maintenance Act cited by some court officials may be one reason for our finding such poor record-keeping. **We recommend that the Ministry of Justice should ensure that adequate training is provided for all maintenance court officials.**



LAC materials for training court officials and educating the public

<sup>32</sup> Community Agency for Social Equality (CASE), *Implementation of the Maintenance Act in the South African Magistrate's Courts*, Braamfontein: CASE, 2004 at 17.



# Chapter 8

## MAINTENANCE COMPLAINTS

A person seeking maintenance should make a complaint to the maintenance officer at the maintenance court. A maintenance complaint may be made either at the court in the area where the complainant or beneficiary resides or at the court where an existing complaint is lodged.<sup>1</sup>

### 8.1 Overview of the sample

A maintenance complaint should be made on a form that is the same as or substantially similar to Form A<sup>2</sup> (see Form A excerpt next page). **This study is based on data collected from 1 687 files. The files contained 1 711 maintenance complaints.** The vast majority of files contained one complaint or the details of one complaint (1 542/1 687; 91.4%). A small number of files contained two (22/1 687; 1.3%) or three complaints (1/1 687; 0.1%). Reasons for finding multiple forms in a single file varied. For example, in some cases it was because the complainant changed (such as from the mother to the grandmother). In other cases it was because a request for maintenance for another child (such as a newborn baby) was added. Applications to change the recipient should have been made on a different application form (Form B, changes to an existing maintenance order). However, we have not excluded this information as it does not compromise the overall analysis, and in general we have assessed information as it was presented in the files, even though there were sometimes errors in the use of some forms. In a handful of files (122/1 687; 7.2%) there was no complaint form on file. The existence of the file clearly means that a complaint was made, but there was no documentation for the complaint itself. Information about the application was gleaned from other forms and documents contained in the file.

**Table 18: Number of maintenance complaints per file**

Number of forms on file	Total based on cases	Percentage	Total number of forms	Percentage
None	122	7.2	122	7.1
Contained 1 Form A	1 542	91.4	1 542	90.1
Contained 2 Form As	22	1.3	44	2.6
Contained 3 Form As	1	0.1	3	0.2
<b>Total number of cases</b>	<b>1 687</b>	<b>100.0</b>	<b>1 711</b>	<b>100.0</b>

Data from the 1995 maintenance study was collected from 618 files. The study does not report a difference between the number of files and the number of complaints on file.<sup>3</sup> As a point of comparison, the 2004 study on the South African Maintenance Act analysed a total of 432 court files.<sup>4</sup>

<sup>1</sup> Maintenance Act 9 of 2003, section 9(1).

<sup>2</sup> Regulations for the Maintenance Act contained in Government Notice 233 of 2003 of 17 November 2003, *Government Gazette* 3093 (hereinafter “Maintenance Regulations”).

<sup>3</sup> D Hubbard, *Maintenance: A Study of the Operation of Namibia’s Maintenance Courts*, Windhoek: Legal Assistance Centre, 1995 at 53.

<sup>4</sup> Community Agency for Social Equality (CASE), *Implementation of the Maintenance Act in the South African Magistrate’s Courts*, Braamfontein: CASE, 2004 at 27.

# Excerpt from Form A, section 1

## Maintenance complaint

COMPLAINT IN TERMS OF SECTION 9(1) OF THE ACT (NEW COMPLAINT)

Reference No. ....

(This information should, as far as possible, be given in order to investigate the complaint)

I, ..... (full name of complainant)  
 born on ..... (date) / age .....  
 identity number .....  
 living at .....  
 telephone number .....  
 working at .....  
 telephone number .....

Hereby \*declare under oath/truly affirm as follows:

1. .... (full name of defendant)  
 born on ..... (date) / age .....  
 identity number .....  
 living at .....  
 telephone number .....  
 working at .....  
 telephone number .....

is legally liable to maintain \*me and/or the following beneficiary(ies), who is/are under my care:

..... born on.....  
 ..... born on.....  
 ..... born on.....  
 ..... born on.....  
 ..... born on.....

2. \*The defendant is legally liable to maintain me or the beneficiary(ies) because .....  
 .....

3. \*The beneficiary(ies) mentioned in paragraph 1 is/are under my care because .....  
 .....

4. The defendant has since ..... not supported \*myself/the said beneficiary(ies) and has made  
 \*no contribution towards maintenance/the following contribution towards maintenance:  
 .....

5. I request that the defendant be ordered to make the following contribution(s) towards maintenance:

(a) A\*weekly/monthly contribution of –

N\$	Name of Beneficiary
N\$ In respect of myself (complainant)	.....
N\$ In respect of	.....
N\$ In respect of	.....
[...]	[...]

(b) The first payment should be made on ..... and after that on or before the ..... day of each  
 succeeding \*week/month. All payments should be made  
 to .....  
 in favour of .....

and/or

(c) Other contributions (for example medical and dental costs, school fees, fees to tertiary institutions, school clothes,  
 expenses for sport and/or cultural activities, birth expenses and maintenance for beneficiary(ies) from birth):  
 .....  
 .....

[...]

Whilst the majority of files in the sample contained information completed on forms from the 2003 Maintenance Act (1 589/1 711; 92.9%), some of the complaints were made on forms from the 1963 Maintenance Act (81/1 711; 4.7%). Old forms were used in three courts, namely Karasburg, Okakarara and Rundu. Only a handful of applications were made on old forms at the courts in Okakarara (1/17; 5.9%) and Rundu (13/121; 10.7%), whereas the majority of the maintenance complaints sampled in the Karasburg court over all four years were made on old forms (67/73; 91.8%). It is concerning that the Maintenance Act came into operation in 2003 and yet the Karasburg court continued to use old forms in 2008. One staff member said that they had not been trained on how to use the new forms, and that the forms for the old Act were “few and they were shorter”.

## 8.2 Completion of forms when making a maintenance complaint

Form A requires the complainant to provide a fairly extensive amount of quantitative information. Many of the clerks interviewed for this study said that Form A was too long. This comment is reflected by the fact that on many forms a substantial amount of information that should have been provided was missing. As one clerk explained, the application process is more of a discussion where the complainant is “just here to sit and talk to you about the problem”.

As a result of the high incidence of incomplete complaints, we can compile only a partial picture of maintenance complaints. Therefore, whilst the sample size for the data presented in this section should be 1 687 (number of files) or 1 711 applications (number of applications), in the following tables the total sample available for specific data is often lower than this.

Court officials are often required to fulfil multiple functions and this can mean that they are overstretched. This may be one reason that the forms are often not properly completed. Some of the court officials requested more training so that they can better assist parties to complete maintenance complaints. They also requested more information materials to enable complainants to better understand the process for themselves.

*“We need more information. For example, booklets about the process that we could hand out. It would be easier because then we don’t have to explain everything in person, especially when there are lots of people waiting. Some people need a lot of explanation because they don’t know what to do.”*

One court official suggested that more support should be made available for complainants to help them complete the application form. The court official cited the example of Women and Law in Southern Africa (WLSA), a civil society organisation in Zimbabwe that helps women make claims for maintenance.<sup>5</sup> The 2004 study on the South African Maintenance Act reported a similar practice at some South African courts. For example, in Pietermaritzburg the NGO Justice and Women (JAW) at one point had offices at the court premises. JAW deals with a range of matters relating to women’s rights, including maintenance issues. The organisation tries to educate women about the maintenance system, as well as helping complainants with maintenance complaints. Many of the JAW staff members are maintenance recipients themselves, so they have first-hand knowledge of the maintenance system. JAW also works with court officials to better understand the problems they encounter in carrying out their duties. JAW staff note many problems with the process of applying for maintenance, such as literacy or language barriers (the maintenance forms are available only in

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<sup>5</sup> Women and Law in Southern Africa (WLSA) is an action-oriented research organisation founded in 1989. Its main objective is to conduct research that supports action to improve the socio-legal position of women. WLSA has offices in seven countries of Southern Africa: Malawi, Botswana, Lesotho, Mozambique, Swaziland, Zambia and Zimbabwe <[www.wlsazim.co.zw](http://www.wlsazim.co.zw)>, accessed 23 September 2013. WLSA works in conjunction with the courts by helping complainants to fill in application forms and draft papers needed for court applications. By providing free assistance, WLSA relieves the workload of the clerk of the court and also ensures that the complainant receives information which will be to the benefit of her case. WLSA also distributes pamphlets and guides on maintenance. (Personal communication with WLSA, 2012)

English) and the fact that some clerks focus on completing the required paperwork without ensuring that the complainants understand the process.<sup>6</sup>

The organisation Mosaic, which operates in Cape Town, provides another model for assistance. Although Mosaic's main focus is on domestic violence with an objective of increased availability and accessibility of high-quality services for domestic violence and abuse survivors, related issues such as maintenance inevitably become part of its work. For example, Mosaic educates women about their rights and about economic abuse, and aims to increase their awareness of what they are entitled to, and where in the court system they can go to get it. At the Paarl court, the Mosaic volunteers help women to fill out maintenance claims and protection orders at the same time. As noted in the 2004 study on the South African Maintenance Act, *"at any of the courts, especially those on low budgets, unpaid volunteers appeared to be a vital and very much appreciated part of the maintenance staff"*.<sup>7</sup>

Participants at the focus group discussion held in Karasburg recommended that volunteers assist at the maintenance court, and that they be afforded recognition of their work, including some form of financial benefit. The focus group also suggested that the church has an important role in addressing family matters, and could help to support maintenance complainants. The group noted that the community often turns to the church as a first point of contact to address family problems. Therefore, as an alternative to placing volunteers in the court, bodies such as the Council of Churches in Namibia could offer practical training on the Maintenance Act to pastors and church leaders.

The 2004 South African study noted that volunteer work could lead to formal employment, finding that some court staff had previously been volunteers for NGOs that worked at the courts. The experience they had gained had obviously made them more attractive as potential court employees.<sup>8</sup>

**We recommend that courts or NGOs consider recruiting volunteers to assist complainants to make maintenance complaints. If, as in South Africa, there can be a progression from volunteer to employed court staff member, the role of volunteers would not only have altruistic benefits for the community, but would also provide economic benefits for the volunteers in the long term. This could be particularly beneficial given Namibia's high rate of unemployment.**<sup>9</sup>

## 8.3 Profile of beneficiaries

The term '**beneficiary**' refers to the person who benefits from a maintenance order. This will usually be a child, but it could also be a disabled adult, a parent or a spouse. The beneficiary is sometimes called a 'dependant'.<sup>10</sup>

### Number of beneficiaries

**The median number of beneficiaries per order, including complainants who are also themselves beneficiaries, was one (mean 1.5; range 1-8).** Very few applications were made for more than three beneficiaries – 2.7% of the applications were made for four beneficiaries and 2.2% were made for

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<sup>6</sup> Summarised from Community Agency for Social Equality (CASE), *Implementation of the Maintenance Act in the South African Magistrate's Courts*, Braamfontein: CASE, 2004 at 23-24. Currently, JAW no longer holds an office at the Court in Pietermaritzburg, but still strives to educate women on maintenance issues and their rights. They do this by conducting workshops and providing a paralegal service which offers information to complainants. The information offered includes a summary of legal rights, understanding budgets, what complainants are entitled to under a maintenance order as well as strategising to ensure the success of a complainant's case. (Personal communication with JAW, 2012; <[www.justiceandwomen.blogspot.com/p/about-justice-and-women.html](http://www.justiceandwomen.blogspot.com/p/about-justice-and-women.html)>, accessed 23 September 2013)

<sup>7</sup> Community Agency for Social Equality (CASE), *Implementation of the Maintenance Act in the South African Magistrate's Courts*, Braamfontein: CASE, 2004 at 15, 23-24, and personal communication with Mosaic, 2012.

<sup>8</sup> Id at 15.

<sup>9</sup> See Ministry of Labour and Social Welfare (MoLSW), *The Namibia Labour Force Survey 2012 Report*, Windhoek: MoLSW, 2013 at viii.

<sup>10</sup> Maintenance Act 9 of 2003, section 1.



five to eight beneficiaries. The figures are almost the same if complainants who were themselves beneficiaries are excluded. It is difficult for us to determine the total number of beneficiaries included in the sample as the information is sometimes unclear – for example, when there was no application form or when dependants were listed but it was not clear whether or not maintenance complaints were being made for all of the children listed. Overall we are able to say that the sample includes at least 2254 beneficiaries excluding complainants and 2411 beneficiaries including complainants.

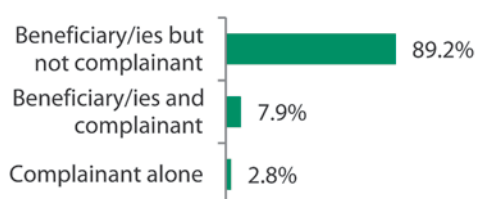
**Table 19: Number of beneficiaries in maintenance complaints**

Application or order	Total	Median	Mean	Minimum	Maximum
Number of beneficiaries including complainants as beneficiaries	2411	1	1.5	1	8

The majority of complaints were made for a beneficiary or beneficiaries excluding the complainant (1306/1463; 89.2%). However, this still means that **in approximately one in 10 cases, the complainant was also a beneficiary** (157/1463; 10.7%). In some cases the beneficiary-complainant was a minor applying for maintenance from his or her parent. In other cases the beneficiary-complainant was a spouse applying for maintenance from the other spouse, sometimes for herself alone and sometimes for the children as well. In one case a grandmother applied for maintenance for herself and her grandchild from her child, who was the parent of the grandchild. Overall there were 157 cases where the complainant applied for maintenance for himself or herself. In 41 cases the complainant applied only for maintenance for himself or herself. In 116 cases the complainant applied for maintenance for himself or herself and one or more beneficiaries. **Thus the typical maintenance complaint encountered is that of a woman seeking maintenance for either one or two beneficiaries, but not for herself, with requests for maintenance for a single beneficiary being most common.** The profile of beneficiary-complainants is further discussed in section 141.

Due to the fact that information about the beneficiary-complainants will affect the overall picture of beneficiaries (for example adult beneficiary-complainants will raise the average age of beneficiaries), in some instances we have analysed the data for beneficiaries excluding beneficiary-complainants. However, given the small number of cases where a complainant applied for maintenance for himself or herself as well, this is not always necessary. We also separately assess cases where the complainant-beneficiary is a minor.

**Chart 10: Type of beneficiary in maintenance complaints (n=1463)**

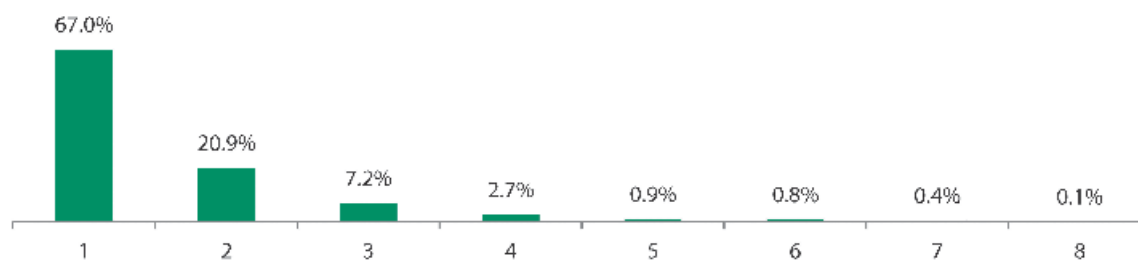


**Table 20: Type of beneficiary in maintenance complaints**

Type of beneficiary	Number	Percentage
Beneficiary/ies but not complainant	1 306	89.2
Beneficiary/ies and complainant	116	7.9
Complainant alone	41	2.8
<b>Total</b>	<b>1 463</b>	<b>100.0</b>
<i>Missing</i>	248	14.5
<b>Total number of maintenance complaints</b>	<b>1 711</b>	<b>100.0</b>



**Chart 11: Number of beneficiaries applied for per application – including complainant (n=1 565)**



**Table 21: Number of beneficiaries**

Number of beneficiaries per application (including complainant)			Number of beneficiaries per application (excluding complainant)		
Number of beneficiaries	Number of applications	Percentage of applications	Number of beneficiaries	Number of applications	Percentage of applications
1*	1 049	67.0	1*	1 055	69.2
2	327	20.9	2	319	20.9
3	112	7.2	3	90	5.9
4	43	2.7	4	33	2.2
5	14	0.9	5	11	0.7
6	12	0.8	6	10	0.7
7	6	0.4	7	4	0.3
8	2	0.1	8	2	0.1
<b>Total**</b>	<b>1 565</b>	<b>100.0</b>	<b>Total**</b>	<b>1 524</b>	<b>100.0</b>
<i>Missing</i>	<i>146</i>	<i>8.5</i>	<i>Missing</i>	<i>187</i>	<i>10.9</i>
<b>Total</b>	<b>1 711</b>	<b>100.0</b>	<b>Total</b>	<b>1 711</b>	<b>100.0</b>

\* When the number of beneficiaries including the complainant is calculated and equals 1, this could refer to a complainant who applied for maintenance for herself only, or to a complainant who applied for only one beneficiary but not for herself. There were 1 055 applications where there was only one beneficiary who was not the complainant.

\*\* Total number of beneficiaries including the complainant = 2 411; total number of beneficiaries excluding the complainant = 2 254; total number of complainants who applied for maintenance = 157.

This finding is similar to the results of the 1995 study which also found that in the majority of cases, women sought maintenance for either one child (68%) or two children (18%).<sup>11</sup> The 2004 study on the South African Maintenance Act also found that the majority of maintenance cases (70%) were filed on behalf of one child.<sup>12</sup>

The total fertility rate in Namibia is 3.6 and the average household size is 4.4 people.<sup>13</sup> The mean number of children born to women is 1.91.<sup>14</sup> Whichever indicator is used, the majority of maintenance complaints are for fewer children than the average family size. This shows that contrary to the popular belief that women have children to access maintenance payments, women do not keep having children simply to access more money. However, it should be noted that complainants could have multiple children with different fathers, and could have a number of different maintenance cases open.

Furthermore, although the majority of complainants apply for maintenance for only one beneficiary, this does not always mean that the defendant has a duty to this child only. Some files show that the defendant was a parent of many children. For example, in one of the files sampled, the defendant

<sup>11</sup> D Hubbard, *Maintenance: A Study of the Operation of Namibia's Maintenance Courts*, Windhoek: Legal Assistance Centre, 1995 at 65.

<sup>12</sup> Community Agency for Social Equality (CASE), *Implementation of the Maintenance Act in the South African Magistrate's Courts*, Braamfontein: CASE, 2004 at 30.

<sup>13</sup> Namibia Statistics Agency (NSA), *Namibia 2011 Population and Housing Census Basic Report*, Windhoek: NSA, undated at 8.

<sup>14</sup> Ministry of Health and Social Services (MoHSS), *Namibia Demographic and Health Survey 2006-07*, Windhoek: MoHSS, 2008 at page 46.

supplied birth certificates for twelve other biological children as evidence of expenses. Another file contained the following statement from the defendant: *“I am willing to pay maintenance. I propose that I pay N\$150 as I have 7 dependants and am the sole bread winner. I am a Police Officer and earn N\$1900. [I am] married and have 7 children.”* The court agreed to this request and an order was made for N\$150 for the child.

Similar examples were cited by court officials. For example, one maintenance officer stated, *“There are men in here that say they can’t pay N\$200, because they are already have say 10 other kids. One guy had 16 kids.”* The maintenance officer from another court said that some defendants will try to pretend that they have more dependants than they really do have; he cited the example of cases where defendants will bring the birth certificates of their brother’s children.

A case brought to the Legal Assistance Centre is an example of a maintenance situation involving a large family. The client, who has 10 children from different women, stated that he has to support these children from a salary of N\$3600, and that, after deductions and travel expenses (taxi fares), he is left with N\$60. He asked for advice on how to manage his obligations to provide maintenance. We suggested that he discuss his situation with the maintenance officer dealing with his case so that the court can assess what is a reasonable amount of maintenance for him to pay.

Another client sent the following query by text message to the LAC information line:

*“Hi. I have a one year old daughter and her father who has 5 other children hasn’t paid maintenance since last year. I haven’t been to the maintenance people ’cause he said that they will only look at how many kids he have then I will only get N\$50. Is that true?”*

We informed the client that the court will take into consideration the fact that the father has five children to support, but this does not necessarily mean that maintenance will be set at N\$50. The amount of maintenance to be paid is decided on a case-by-case basis.

We have received similar queries by email, such as the following:

*“I have a kid of 12 years now and his father does not want to help with anything, he keeps on making empty promises but does not keep them and every time I ask him he is saying he have many children. I don’t know whether he is contributing towards the other children’s wellbeing or not, and if he does why not mine? I really don’t know what to do now since the boy is very fond of him?”*

We explained that the client can still apply for maintenance as the father has a duty to provide support. Providing maintenance should not be seen as an area for conflict between the parents but rather as a necessity to provide for the needs of the child.



The Legal Assistance Centre has published a comic on what to do if someone stops paying maintenance. In the story, the defendant tells the four different mothers of his children that he cannot pay maintenance. However, when the fifth mother goes to the maintenance court, the defendant learns that he has a duty to provide maintenance to all his children. We chose this storyline in response to the cases we hear where some parents who have many children think that they do not have to provide for them.

*“This’s a very beautiful story, we do have many many girls who’s just suffering from their children while fathers [are] nowhere to be found. It must be advertised on all newspaper and TV, to let all poor girls to know this, then no children will suffer anymore!”*

Text message sent to the Legal Assistance Centre

*"I would like to know if someone has more than 4 children does he stop paying child support? The father of my baby sent me a text message saying that he is making a lot of children from different women so he don't need to pay support for them. He allegedly has four children now the youngest one is now one month old and my son is ten months."*

Email sent to the Legal Assistance Centre

## Age of beneficiaries

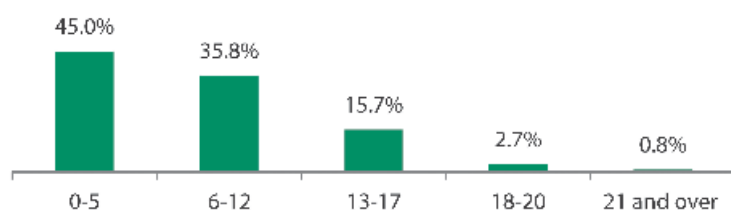
A maintenance complaint for a child can be made at any time from the start of the pregnancy or from birth. The majority of maintenance orders will remain in place until the child is 18-21 years of age.<sup>15</sup> If the child has a disability, the order may continue for life.

**The typical beneficiary is a child of pre-school or primary school age, with younger children predominating.**<sup>16</sup> Nearly half of the beneficiaries were pre-school age at the time when the maintenance complaint was made (982/2180; 45.0%). Approximately one-third of the beneficiaries were primary school age (6-12; 780/2180; 35.8%) and one-sixth were secondary school age (13-17; 342/2180; 15.7%). Of the beneficiaries aged 0-5 (n=982), the age range was fairly evenly spread.

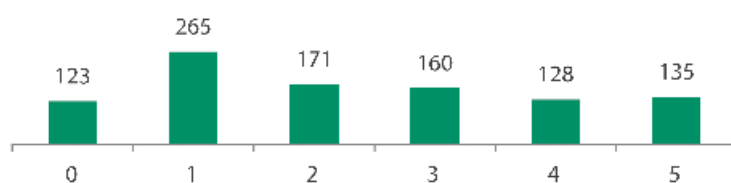
In a small proportion of cases, the beneficiaries were aged 18-20 (58 cases; 2.7%) or age 21 or older (18 cases; 0.8%). The median age of the beneficiaries was 6.0 (mean 7.1; range 0-31).

The 1995 study also found that most beneficiaries were pre-school age (about 65%).<sup>17</sup>

**Chart 12: Age of beneficiaries (excluding cases where complainant applies for himself or herself; n=2180)**



**Chart 13: Number of beneficiaries aged 0-5 (n=982)**



**Table 22: Age of beneficiaries when the maintenance complaint was made (excluding cases where the complainant applied for himself or herself)**

Age	Number	Percentage
0-5	982	45.0
6-12	780	35.8
13-17	342	15.7
18-20	58	2.7
21 and over	18	0.8
<b>Total*</b>	<b>2 180</b>	<b>100.0</b>

\* It is difficult for us to determine the total number of beneficiaries included in the sample as the information is sometimes unclear. Information on the age of beneficiaries when the maintenance complaint was made (excluding cases where the complainant applied for himself or herself) was available for 2180 beneficiaries.

<sup>15</sup> On the question of whether a maintenance complaint can be made before the child's birth, see chapter 4 at page 33. Once a maintenance order is made, it will usually remain in force until: (1) the child dies or is adopted; (2) the parents divorce or annul the marriage (at which point a new order would likely be made between the parties); (3) the child marries; or (4) the child reaches the age of 18. However, if the child is attending an educational institution for the purpose of acquiring a course which would enable him or her to maintain himself or herself, the maintenance order does not terminate until the child reaches the age of 21. Even if the child is not attending an educational institution when he or she reaches the age of 18, the child, or any person acting on behalf of the child, may apply to the court for an extension of the maintenance order. The defendant must then respond to the court as to why the order should not be extended. The court will consider the application and grant the application conditionally or unconditionally, or will refuse the application. (Maintenance Act 9 of 2003, section 26 (1-3))

<sup>16</sup> The ages of the complainant-beneficiaries have been excluded so that we may assess the average age of child beneficiaries only. Only 18 applications were made where the complainant was under the age of 18. The exclusion of this amount of data from the sample is not sufficient to affect the analysis. Analysis of the age of the complainant in cases where he or she claimed maintenance for him or herself is presented on page 141.

<sup>17</sup> D Hubbard, *Maintenance: A Study of the Operation of Namibia's Maintenance Courts*, Windhoek: Legal Assistance Centre, 1995 at 66.



## Complainant-beneficiaries

**One in 10 maintenance complaints included an application for maintenance for the complainant** (157/1 463; 10.7%; data missing in 248 cases). In some cases such applications were made by a spouse for spousal maintenance; we can confirm that the defendant was the spouse of a complainant who applied for maintenance for himself or herself in 50 applications.<sup>18</sup> In other cases it was a child applying for maintenance for himself or herself. Data on the relationship between the complainant and defendant is missing in the remainder of the cases. In many instances this is because the application described the relationship between the defendant and the other beneficiaries (eg parent-child relationship) but did not clarify the relationship between the complainant and defendant.

The age of the beneficiary-complainant can be determined in 122 of the 157 applications. **The median age of the beneficiary-complainant was 37 (mean 35.0; range 12-58).**

**In the entire sample there were 18 applications where the complainant was under the age of 18 (although not all applications specified the age of the beneficiary-complainant). Of these there were nine maintenance complaints where a complainant under the age of 18 applied for maintenance for himself or herself.** In six of the other nine cases, the child was a minor mother claiming for her own child and in three cases information is missing. The age of these complainants ranged from 12-17.

The 1995 study did not include any applications made by complainants under the age of 18, but noted that “*interviews and observations indicated that this does happen – although rarely*”.<sup>19</sup> As the data from the current study shows, it is still rare for children to claim maintenance. Child complainants are discussed further on page 150.

**Table 23: Complainants under age 18 – relationship to beneficiary**

Relationship to beneficiary	Number	Percentage
Complainant is the beneficiary	9	50.0
Complainant is the parent applying for maintenance from the other parent	6	33.3
Information missing	3	16.7
<b>Total</b>	<b>18</b>	<b>100.0</b>

## Requests for maintenance for adult beneficiaries

**The sample included requests for maintenance for 16 beneficiaries aged 21 or older in 12 different maintenance complaints.** None of the complaints explained why the complainant was asking for maintenance for adult children. In 10 of the 12 applications, the complainant requested maintenance for beneficiaries under the age of 21 as well as beneficiaries over the age of 21. This suggests that the complainants hoped to receive maintenance for their adult children as well. The oldest beneficiary who was not also a complainant was 31 years of age.

The number of beneficiaries in complaints including over-age beneficiaries ranged from one to eight (see Table 24.)

**Table 24: Number of beneficiaries in complaints including adult beneficiaries**

Number of complaints	Total number of beneficiaries (including adult beneficiaries)
1	1
5	2
1	3
1	4
2	6
1	7
1	8

This suggests that the applicants may have been under financial pressure due to the number of children they had to care for. It is possible that some requested maintenance for all their offspring, even whilst knowing that this would be unlikely. Some may have been aware that maintenance can

<sup>18</sup> A maintenance order for the support of a spouse will remain in force until: (1) the spouse dies or remarries; or (2) the spouses divorce or annul their marriage. (Maintenance Act 9 of 2003, section 26(4))

<sup>19</sup> D Hubbard, *Maintenance: A Study of the Operation of Namibia's Maintenance Courts*, Windhoek: Legal Assistance Centre, 1995.



be secured for adult offspring who are dependent upon their parents because of disability, poverty or unemployment (although, as explained in chapter 4 at page 34, the level of need required in most such cases will often mean that no maintenance order will be made).

Of the 12 complaints made, orders were made in only three cases. The outcome of the 12 cases is as follows:

- Three orders were made that appear to cover beneficiaries over the age of 21.
- Two orders were made for children under the age of 18, but seemingly not for the adult beneficiaries.
- Two cases were removed from the roll.
- One case was withdrawn.
- Four files contained only a complaint (three of these cases contained a record of a summons but no further information).

## CASE STUDY

### The ongoing need for maintenance

Many young adults continue to need financial support, particularly if they are engaged in tertiary education. The LAC commonly receives requests for assistance from university students. Here is one example:

*"Am a boy of 20 years old. I have a problem with my father, he does not support us or my brother. I am at UNAM while my brother is at the Namibian Institute of Mining and Technology. Our father never pays our school fees or buys books for us. He is always saying that our surname will change from his apparently we are no more his children. Only our mother takes care of us, but she is a cleaner while father is a teacher. Is there no legal action that we can take to support us financially?"*

We told the client that he could apply for a maintenance order, and that, although maintenance is normally provided only up to age 18, maintenance orders are also generally available up to age 21 if the beneficiary is still studying.

Regarding the surname issue, we explained that in practice it is extremely unlikely that the father would be able to change his child's surname without the mother's consent in terms of the laws on birth registration.

Here is another example, from 2012:

*"I am a girl of 21 years doing my diploma at UNAM as my first year but I have registered 2009 and I was supposed to be graduated by now just that my dad does not want to support me plus my siblings, is it possible for him to pay maintenance even though they are married with my mom? My mom tried her level best to get me back again in school since I have been two year down cos she can't afford my tuition fees plus that of my siblings back home. Sometimes I have to dodge classes since I don't have taxi money. Whenever I ask him for taxi money he answer me badly or ignore me totally. They are both soldiers."*

We told the client that although a maintenance order usually ceases when the child reaches age 18, the court could order that it remains in force until the child is 21 if the child is attending an educational institution for the purpose of acquiring a qualification which would enable the child to become self-supporting. Although the Act does not discuss maintenance after age 21, at common law the legal liability to maintain can extend past this point in unusual cases. The client, her mother or the siblings could apply for a maintenance order for any of the children who are unable to support themselves, although maintenance orders for children over age 18 who are not studying would generally be available only in cases of extreme indigency.

*"I'm a 19-year-old student. I want to know if I can report my father for not paying maintenance as I'm a single parent child and I struggle to pay tuition fees. Where can I get help? Plz help."*

Text message sent to the Legal Assistance Centre

## Sex of beneficiaries

Our assessment regarding the sex of the beneficiaries, excluding beneficiary-complainants, established that a similar proportion of applications were made for male and female beneficiaries. However, this information is available for only about half of the complaints. The Legal Assistance Centre rarely comes across situations where the girl-child is treated significantly less favourably than the boy-child, but it should be noted that some interviewees suggested that this may occur in some instances. The clerk of the Eenhana court stated that “*people are more willing to get their sons through school sometimes*”. Another clerk thought that boys were more expensive to maintain than girls and that complainants should request more money for a boy-child, but did not expand on why boys cost more than girls.

When we assessed the sex of the beneficiary-complainants separately, we found that the vast majority were female (152/156; 97.4%; data missing in one case). In the 50 applications where we can confirm that the complainant and defendant were married and the complainant was included as a beneficiary, the complainants were all female. This means that we do not have any records of a man applying for spousal maintenance. This is not surprising, given that it is rare for men to apply for child maintenance, let alone spousal maintenance. In the four cases where the beneficiary-complainants were male, they were aged 16, 17 and 21 (data missing in one case). All four of these cases involved complainants applying for maintenance from a parent.

**Chart 14: Sex of beneficiaries (excluding cases where complainant applies for maintenance for himself or herself; n=1 619)**



**Table 25: Sex of beneficiaries (excluding cases where complainant applies for maintenance for himself or herself)**

Sex	Number	Percentage
Male	858	53.0
Female	761	47.0
<b>Total</b>	<b>1 619</b>	<b>100.0</b>
Missing	770	32.2
<b>Total number of beneficiaries</b>	<b>2 389</b>	<b>100.0</b>

## Children with disabilities

We found a record of only one case involving a child with disabilities. It states, “[T]he child is paralysed but does not need special care. A charity gave him a wheelchair. He use[d] to go to a physical training centre but the child made no progress.” The case involved a custody dispute between the unmarried parents as well as a maintenance claim. The complainant appeared to want the defendant to have custody of the child, and because the defendant agreed to this, the court stated that a maintenance order was not required. There is no record of a social worker assessment, even though this might have been warranted. The forum for a custody or child protection hearing is in the children’s court, not the maintenance court; currently when a maintenance court sees that an investigation into the child’s situation is needed, it should refer the case to a social worker to deal with in terms of the Children’s Status Act 6 of 2006 or the Children’s Act 33 of 1960. The Child Care and Protection Bill which is expected to replace the Children’s Act clarifies child protection referrals by providing that cases can be referred to the children’s court from a range of sources, including the maintenance court.<sup>20</sup> In this instance the child’s wellbeing should possibly have been assessed by means of a social worker report submitted to the children’s court. See section 10.4 for a discussion of cases involving social workers.

<sup>20</sup> Child Care and Protection Bill, draft dated 12 January 2012, section 37(2):

- (2) If in the course of any proceedings before any court relating to divorce, maintenance or domestic violence or, in the case of proceedings before the children’s court relating to custody, access to a child or guardianship, such court forms the opinion that a child of any of the parties to the proceedings has been abused or neglected, the court –
  - (a) may suspend the proceedings pending an investigation contemplated in section 135 into the question whether the child is in need of protective services; and
  - (b) must request the Prosecutor-General to attend to any allegations of criminal conduct.

It is a matter of concern that we found only one case that dealt with a child with a disability. Data from the Ministry of Education shows that in 2012, 32 404 learners with disabilities were enrolled in the education system.<sup>21</sup> Therefore, the fact that we could identify only one application for a child with a disability in our sample suggests that parents of children with disabilities may be a vulnerable group regarding awareness of the provisions of the Maintenance Act. **We recommend that the government or civil society develop communication materials for parents of children with disabilities to inform them of the provisions of the Maintenance Act.**

## Beneficiary profile

### Number of beneficiaries

In the majority of maintenance complaints, the complainant sought maintenance for one beneficiary. This is followed by complaints for either two or three beneficiaries. Very few complaints were made for more than three beneficiaries.

### Age of beneficiaries (excluding cases where the complainant applied for maintenance for himself or herself)

- Nearly half of the beneficiaries were pre-school age when the first application for maintenance was made. Approximately one-third were primary school age and one-sixth were secondary school age. In a small proportion of cases the beneficiaries were 18 years old or older.
- The median age of beneficiaries was 6.0 and the mean age 7.1.

### Sex of beneficiaries (excluding cases where the complainant applied for maintenance for himself or herself)

A similar proportion of maintenance complaints were made for maintenance of male and female beneficiaries, suggesting that there is no difference in the treatment of boys and girls on this score.

### Complainants as beneficiaries

- Approximately one in 10 maintenance complaints included a claim for maintenance for the complainant.
- Nine applications were made by a complainant-beneficiary under the age of 18.
- The vast majority of beneficiary-complainants were female.
- In 50 applications the beneficiary-complainant was the defendant's spouse.

My son is hungry but his father has a new wife and child and spends all his money on them!



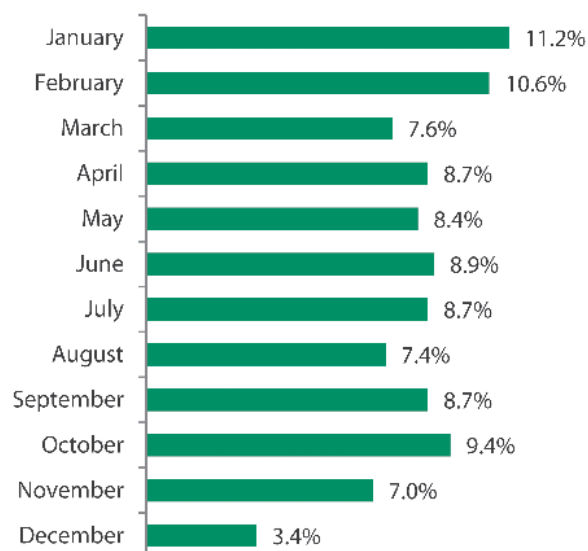
That is against the law! All children have the right to a fair share of their parents' resources.

<sup>21</sup> Education Management Information System, *Education Statistics 2012*, Windhoek, Namibia: Ministry of Education, 2013, table 61.

## 8.4 Months when maintenance complaints are made

Maintenance complaints were made most frequently in January (11.2%) and February (10.6%), and least frequently in December (3.4%). The numbers of applications made at the start versus the end of the year differ significantly.

**Chart 15: Month maintenance complaint was made (n=1 306)**



**Table 26: Month maintenance complaint was made**

Month	Number	Percentage
January	146	11.2
February	139	10.6
March	99	7.6
April	114	8.7
May	110	8.4
June	116	8.9
July	114	8.7
August	96	7.4
September	113	8.7
October	123	9.4
November	91	7.0
December	45	3.4
<b>Total</b>	<b>1 306</b>	<b>100.0</b>
Missing	405	23.7
<b>Total</b>	<b>1 711</b>	<b>100.0</b>

The pattern relates to the school calendar, suggesting that complainants probably need money to pay for school-related costs. As discussed under section 8.3, approximately half of the applications were made for children of pre-school age (0-5 years). Although school-related costs are not relevant for these children, it is still possible that parents incur costs for kindergarten or other child care arrangements. In 2010, parents contributed an average of N\$208 per child to School Development Funds (SDF).<sup>22</sup> Given that some domestic workers and farm workers may earn only N\$200 to N\$500 per month, the average cost of the SDF could be equivalent to one month's wage.<sup>23</sup> Fortunately, in 2013 payments to SDFs were abolished, although fees are still payable at private schools, and some state schools appear to have found alternative ways to oblige parents to provide additional funds to cover school costs.<sup>24</sup>

There are also a number of other costs associated with school attendance, including the costs of uniforms, transport and hostel accommodation. There are also opportunity costs associated with sending children to school, such as children being less available to assist with household chores and other activities that are important for the survival of some households, particularly in rural areas. And so, "as the private costs of schooling mount, there comes a tipping point for the parent

<sup>22</sup> Private schools are excluded from this average. The maximum annual fee for state schools is set at N\$250, unless the Minister of Education approves a higher amount. In practice the amount charged varies widely. For instance, the lowest annual charge in 2010 for all schools (primary, combined and secondary) was N\$2 per learner, and the highest N\$3 600. There was a substantial variation between the amounts charged by rural and urban schools. (J Ellis, *Free Primary Education in Namibia: Current Context*, 2011, Windhoek: Ministry of Education, 2011 at 2)

<sup>23</sup> Labour Resource and Research Institute (LaRRI), *Wage Bargaining Report 2005*, Windhoek: LaRRI, 2006 at 8.

<sup>24</sup> Take for example this sms published in *The Namibian* on 16 January 2013. "At Nau-Aib Primary School in Okahandja, we were told that teachers don't know how to give us the school fee money back, and that they will take N\$100 to buy exercise books and copy paper. Why don't the people want to give us our money back? They are telling us to donate the money to the school. Minister Iyambo, we need answers and solutions to this matter." Many other people have sent similar complaints to the newspaper (see <[www.namibian.com.na/index.php?id=28&tx\\_ttnews\[tt\\_news\]=106117&no\\_cache=1](http://www.namibian.com.na/index.php?id=28&tx_ttnews[tt_news]=106117&no_cache=1)>, last accessed 16 January 2013).

or guardian, forcing a decision that a child will not go to school”.<sup>25</sup> **Due to a combination of these factors, the fact that complainants apply for maintenance at the start of the school year but do not receive the money for some time may influence whether or not a child is sent to school.**<sup>26</sup> Although it was possible in the past to apply for an exemption from SDF payments, many people were not aware of this option. Furthermore, although schools were not legally permitted to exclude a child from school due to inability to make SDF payments, a school may have been reluctant to grant an exemption if it was aware that one parent was earning sufficient income to pay the SDF contribution. Such circumstances could have inspired some complainants to seek maintenance orders.<sup>27</sup>

The average time lapse between complaint and maintenance order is 2.5 months, as explained in section 12.9. **We recommend that magistrates’ courts allocate increased staff time to the maintenance court at the start of the year to assist with the increase in the caseload at this time; even though SDF contributions have been eliminated, other school expenses such as uniforms and transport are likely to continue to inspire higher numbers of maintenance applications early in the year. We further recommend encouraging members of public to apply for maintenance early enough to allow sufficient time for investigation and resolution before pressing costs such as child-care and education-related costs must be paid.** To allow sufficient time for investigation, complainants should make a maintenance complaint at least three months before they need to pay education-related costs (for example in September/October if the expenses are anticipated in January, or in May if the expenses are anticipated in August).

The 1995 maintenance study did not assess the months in which maintenance complaints were made.<sup>28</sup>

### Months in which maintenance complaints are made

Applications for maintenance orders are made most frequently in January and February, and least frequently in December.

## 8.5 Profile of complainants

The term ‘**complainant**’ refers to the person who applies for a maintenance order. The complainant can apply on behalf of one or more beneficiaries, or for herself or himself alone or in addition to other beneficiaries. The complainant will usually be a parent applying for maintenance for his or her child. Any relative or other person who is caring for a child can also request maintenance from one or both of the child’s parents. The complainant could also be anyone who has an interest in the wellbeing of the beneficiary, such as a social worker, health care provider, teacher, traditional leader or employer.<sup>29</sup> A child can also make an application for himself or herself.<sup>30</sup>

<sup>25</sup> J Ellis, *Free Primary Education in Namibia: Current Context*, 2011, Windhoek: Ministry of Education, 2011 at 6.

<sup>26</sup> It should be noted that parents do not have a choice about sending their children to school. The Education Act states that following receipt of notice to send a child to school, failure to send the child to school could result in a fine of up to N\$6000 or imprisonment for up to 2 years, or both. (Education Act, 53(5) and 77(2)(b))

<sup>27</sup> Primary education shall be compulsory and the State shall provide reasonable facilities to render effective this right for every resident within Namibia, by establishing and maintaining State schools at which primary education will be provided free of charge (Constitution of Namibia, Article 20(c)).

<sup>28</sup> D Hubbard, *Maintenance: A Study of the Operation of Namibia’s Maintenance Courts*, Windhoek: Legal Assistance Centre, 1995.

<sup>29</sup> Maintenance Act 9 of 2003, section 1, definition of “complainant”.

<sup>30</sup> In most situations a child cannot bring a case before the court without the assistance of an adult. However, this rule is not applied to maintenance hearings due to the unique role played by the maintenance officer in terms of the Maintenance Act, as in essence the maintenance officer performs the functions that would usually be carried out by a legal representative. The Maintenance Act also states that a beneficiary can apply for maintenance (Maintenance Act 9 of 2003, section 9(3)).



**A large majority of maintenance complaints were made by the parent of the beneficiary (1 045/1 185; 88.2%; data missing in 526 applications).** A small percentage of applications were made by a grandparent (55/1 185; 4.6%) or by another member of the extended family (25/1 185; 2.1%). Members of the extended family who made applications were aunts (19), siblings (5) and a cousin. A similarly small minority of complainants were guardians or primary caretakers (17/1 185; 1.4%). The father made the application in only 0.9% of the complaints sampled (see page 153 for a discussion on the sex of the complainant). In the majority of the remaining files (n=32), the relationship between the complainant and the beneficiary was unclear (for example, several files reflected that the beneficiary was a minor but did not specify the relationship between the complainant and the beneficiary).

Although the sample included only 25 maintenance complaints made by members of the extended family (in addition to 55 applications made by a grandparent), this is still a positive finding as it shows that some people are aware that they can apply for maintenance for relatives in their care. However, given that we identified so few complaints of this nature, **we recommend that qualitative research is conducted on how children living separately from their parents are supported.**<sup>31</sup> This information could be used to inform stakeholders as to whether or not public awareness-raising is needed to convey the fact that anyone who has an interest in the wellbeing of a beneficiary can apply for maintenance on their behalf. This might be useful in situations where the child is living with the grandmother but the mother and father are in conflict and the mother is unwilling to apply for maintenance. The grandmother could then decide that she will apply for maintenance to ensure that the children receive the support they need.<sup>32</sup> As the clerk of the Ondangwa court explained, *“People think it is only the biological mother and father that can claim maintenance for their children; 95% of people don’t know that anyone else can claim maintenance.”*

Some extended family members may not apply for maintenance from the parents because they know that if they are registered as the child’s foster parent, the child will receive a foster care grant from the Ministry of Gender Equality and Child Welfare (N\$250 per month per child<sup>33</sup>). In these cases, the primary caretaker may feel that this money is easier to access. It also may be that the child is living with an extended family member because the parent cannot afford to care for the child and so the family feels that there is no point in applying for a maintenance order. However, given that the foster care grant places a financial burden on the Government, it would be in the interest of the Ministry of Gender Equality and Child Welfare to ensure that primary caregivers are aware that they can claim maintenance from either parent of a child.<sup>34</sup> **We recommend that the Ministry of Gender Equality and Child Welfare produce a simple factsheet or pamphlet aimed at extended family members who can apply for a maintenance order instead of a foster care grant.**

Another reason for the low number of maintenance complaints from people other than the biological parents may be that in some cases court officials are resistant to applications that are not made by a biological parent. For example, one clerk of court said that he could not assist with applications made by grandparents. He said that he refers these cases for hearings on guardianship.<sup>35</sup> The maintenance officer at this court made a similar statement, which suggests that this is the practice of the court rather than a misunderstanding by a single court official. Regardless of whether or not there is a need

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<sup>31</sup> Only a quarter of all children in Namibia live with both of their parents. Just over a third do not live with either parent, and 24% do not live with either parent despite both parents being alive. (Ministry of Health and Social Services (MoHSS), *Namibia Demographic and Health Survey 2006-07*, Windhoek: MoHSS, 2008 at 256, Table 16.1)

<sup>32</sup> The Act defines a complainant as: (a) a beneficiary; (b) a parent or other legal custodian or primary caretaker of a beneficiary; or (c) any other person who has an interest in the well-being of the beneficiary, including but not limited to a relative, social worker, health care provider, teacher, traditional leader, religious leader or an employer (Maintenance Act 9 of 2003, section 9(3)).

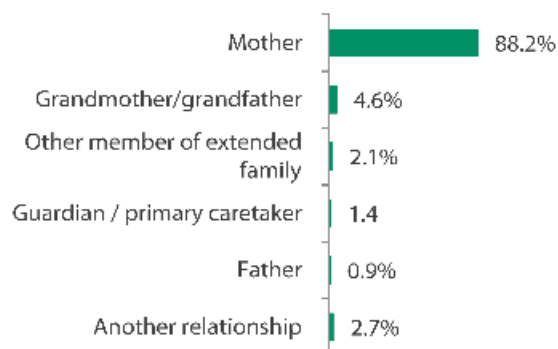
<sup>33</sup> Personal communication from the MGECEW in 2013. The procedure is set to change with the passing of the Child Care and Protection Bill. When this Bill becomes an Act, family members caring for a relative will be able to access a grant without being registered as foster parents.

<sup>34</sup> In February 2009 the Government spent N\$16 081 400 on maintenance grants, foster care grants and disability grants, with the highest proportion of this expenditure going to foster care grants. Republic of Namibia, *First, Second and Third Namibia Country Periodic Reports on the Implementation of the UN Convention on the Right of the Child (1997-2008)*, Windhoek: Ministry of Gender Equality and Child Welfare, 2009 at 47.

<sup>35</sup> This is likely to be another misunderstanding: it is likely that the clerk meant to refer to who will be the primary caretaker of the child.

for a custody/guardianship hearing, the courts should not prevent grandparents acting as primary caretakers from making applications for maintenance, as the Maintenance Act clearly allows for this.<sup>36</sup>

**Chart 16: Complainant's relationship to beneficiary (n=1 185)**



**Table 27: Complainant's relationship to beneficiary**

Relationship	Number	Percentage
Mother	1 045	88.2
Grandmother/grandfather	55	4.6
Other member of extended family	25	2.1
Guardian/primary caretaker	17	1.4
Father	11	0.9
Another relationship	32	2.7
<b>Total</b>	<b>1 185</b>	<b>100.0</b>
Missing data	526	30.7
<b>Total</b>	<b>1 711</b>	<b>100.0</b>

## Spousal maintenance

It is not surprising that there were so few applications for spousal maintenance (50/1 711; 2.9%) because, according to the 2011 census, only 28% of people are married under civil or customary law.<sup>37</sup> The female focus group in Keetmanshoop gave this explanation for the rarity of applications for spousal maintenance: *“It’s legal; we just don’t do it because we feel scandalous ... . We are proud.”* Furthermore, where there is a dispute between spouses over maintenance, it is possible that the relationship has broken down to the extent that divorce proceedings may ensue – and maintenance can then be addressed through the divorce process. Although maintenance complaints for spousal maintenance are rare, the maintenance officer at the Ondangwa court gave an example of when a spouse might want to claim maintenance:

*“Fathers don’t want to take responsibility. Some fathers think maintenance is not necessary. Especially when a wife is living with her husband, he will think that there is no need for her to claim maintenance. Many husbands work in Windhoek while their wives live in town [Ondangwa] and they think that the wives shouldn’t claim maintenance. But they forget about all of those months that the woman is alone without help. Women often bring cases against their husbands.”*

We identified one case in our sample that involved an application for spousal and child maintenance by a woman married under customary law.<sup>38</sup> The court initially ordered maintenance of N\$600 (N\$300 for the complainant and N\$150 each for two children). However, one month after the order was made, the defendant applied for a discharge of the order on the grounds that he was not obliged to maintain the complainant because they were not actually married under customary law. At the

<sup>36</sup> Maintenance Act 9 of 2003, section 1 (definition of “complainant”).

<sup>37</sup> The census does not provide information on the percentage of people who are separated as the report combines the percentages of people who are divorced and separated – 2.0% being the combined percentage (Namibia Statistics Agency (NSA), *Namibia 2011 Population and Housing Census Basic Report*, Windhoek: NSA, undated at 8).

<sup>38</sup> According to the Maintenance Act, husbands and wives are primarily responsible for each other’s maintenance regardless of any customary law to the contrary (Maintenance Act 9 of 2003, section 3(2)(a)).

Customary marriage is a marriage which takes place in terms of the customs of the community. This differs from civil marriage, which takes place in a church or in front of a magistrate. Since Independence, customary marriages and civil marriages have been treated equally for many purposes, such as citizenship rights and employees’ compensation. However, customary marriages are not fully recognised in the eyes of the law. For example, in some instances people married under customary law are unable to benefit from pension schemes, medical aid schemes or housing schemes in the same way as people married under civil law.

Law reform proposals currently under discussion would ensure that customary marriages will enjoy full legal recognition, in the same way as civil marriages and would institute a system of marriage certificates which can serve as proof of the existence of the customary marriage. However, these proposals have not been taken forward in recent years and the current two-tier system of marriage remains in place. See Legal Assistance Centre, *Recognition of Customary Marriages: A Summary of the Law Reform and Development Commission Proposal*, Windhoek: LAC, 2005.

enquiry, which was held approximately one month later, the complainant claimed that they were married under customary law by the chief of the traditional authority. To support this argument, the complainant produced a document purporting to substantiate the marriage, signed by two witnesses to the marriage ceremony. However, the defendant claimed that there was no ceremony and that the document was forged. The complainant then admitted that the defendant was not present when she obtained the purported traditional marriage declaration. The magistrate postponed making a decision for approximately two weeks, and then reduced the maintenance order to an order for the children only (N\$150 each for the two children), on the grounds that the purported traditional marriage declaration was not authentic and that a customary marriage did not take place.

The file also contained a letter from the Office of the Prosecutor-General referring to a possible appeal on the grounds that the magistrate did not sufficiently investigate the validity of the marriage by, for example, summoning the chief who was said to have solemnised the marriage, or the witnesses to the alleged marriage. However, there is no further information in the file.<sup>39</sup>

## Other relationships: maintenance for a parent from a child

The Maintenance Act states that children have a duty under certain circumstances to maintain their parents. This will usually apply only after the children have become adults themselves, and only when all of the following circumstances are present:

- (1) the parent is unable to maintain himself or herself due to circumstances beyond that parent's control;
- (2) the child is able to maintain himself or herself and able to support the parent; and
- (3) there is no other person who is legally liable to maintain the parent, such as a spouse.<sup>40</sup>

**We identified only one file in our sample containing an application by a parent seeking maintenance from a child.** In this case the grandmother was claiming maintenance for her grandchild and herself. Unfortunately we do not know the outcome of this case as the file contained only details of the complaint and a summons.

One magistrate explained that parents seldom need to exercise the option of applying for maintenance because, *"When a man is confronted by an elder he will be sort of submissive and will agree. Normally elderly people do not have such complicated demands and will accept whatever the man wants to give."* A male participant in the Ondangwa focus group discussion suggested that when there is a good relationship between parent and child, maintenance will be provided when needed: *"If the woman is the only one supporting the child, then when the child grows up and has a job, the child will only support the mother, not the father. The mother instils this in the child."*

Despite this feedback, we believe that more people would utilise the option of applying for maintenance if there were greater public awareness of this option. **To increase public awareness of the fact that a parent can apply for maintenance from a child, we recommend that the Ministry of Labour and Social Welfare (which administers old-age pensions) produce a simple factsheet or poster about the duty of children to provide maintenance to their parents in certain circumstances, and ensure that this information is widely circulated to pensioners.**

The 1963 Maintenance Act did not define the term 'complainant'. Therefore the law lacked clarity as to who could apply for maintenance. As a result, the 1995 maintenance study did not formally assess the relationship between the complainant and the beneficiary,<sup>41</sup> although it did assess the relationship between complainant and defendant, as discussed in section 8.12.

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<sup>39</sup> The Act allows the maintenance officer to cause any person to be directed to appear before that maintenance officer and to give information or produce any book, document, statement or other relevant information (Maintenance Act 9 of 2003, section 10(1)(a)).

<sup>40</sup> Maintenance Act 9 of 2003, section 4(2).

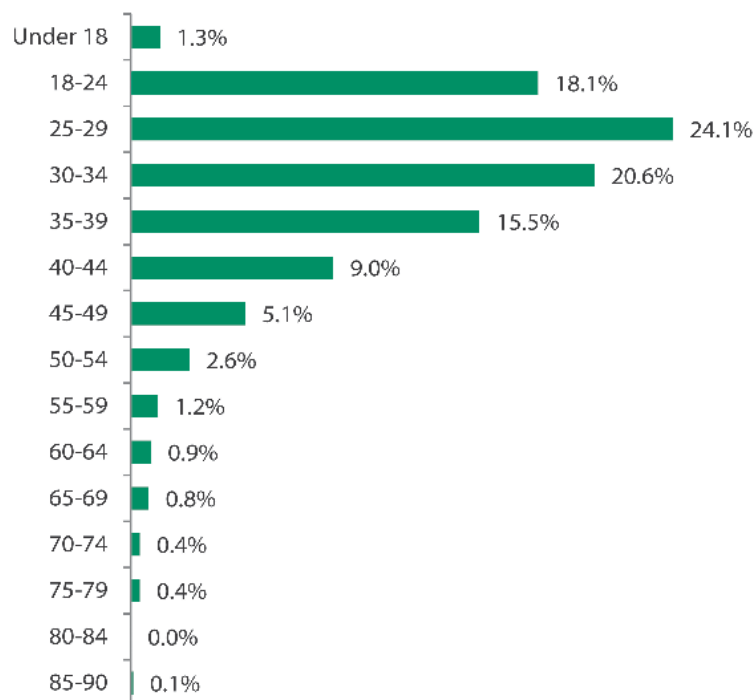
<sup>41</sup> D Hubbard, *Maintenance: A Study of the Operation of Namibia's Maintenance Courts*, Windhoek: Legal Assistance Centre, 1995.

## Age of complainants

The majority of complainants (1 082/1 382; 78.3%; data missing from 329 applications) were between 18 and 39 years of age at the time of the complaint. The median age of the complainants was 31 (mean 32.8; range 12-85).

The 1995 maintenance study did not analyse the age of the complainants.<sup>42</sup>

**Chart 17: Age of complainants (years) (n=1 382)**



**Table 28: Age of complainants (years)**

Age group	Number	Percentage
Under 18	18	1.3
18-24	250	18.1
25-29	333	24.1
30-34	285	20.6
35-39	214	15.5
40-44	125	9.0
45-49	70	5.1
50-54	36	2.6
55-59	17	1.2
60-64	12	0.9
65-69	11	0.8
70-74	5	0.4
75-79	5	0.4
80-84	0	0.0
85-90	1	0.1
<b>Total</b>	<b>1 382</b>	<b>100.0</b>
Not recorded	329	19.2
<b>Total</b>	<b>1 711</b>	<b>100.0</b>

The definition of ‘complainant’ in the current Maintenance Act includes the beneficiary.<sup>43</sup> This means that a child can apply for maintenance. However, **only a very small minority of maintenance complaints were made by child-complainants (18/1 382; 1.3%)**. All of the applications were made by children in their teens, bar one application made by a 12-year-old child. The majority of these applications (12/18) were made by older teenagers aged 16-17.

It is not surprising that very few applications were made by children, as children will usually have someone who can make the application on their behalf. However, there may be situations when a child needs to apply for himself or herself – for example, one clerk cited two cases where children had made applications for maintenance for themselves because “*the mother doesn’t want to come and complain*”. In nine cases, the child complainant was claiming maintenance for himself or herself; in six cases the child complainant was a mother claiming for her own child; and in three cases information is missing.

In over half (11) of the 18 maintenance complaints made by children, a maintenance order was made. The amount of maintenance ordered ranged from N\$200 to N\$500 plus payment of School Development Fund contributions. Six of the files did not contain any record of a maintenance order being made; some files ended with the failure of the defendant to attend a hearing. In two cases the applications were withdrawn or struck from the roll. In one of these cases the beneficiary, a baby, had died, and in the other, the court determined

**Table 29: Age of minor complainant (years)**

Age	Number
12	1
14	2
15	3
16	4
17	8
<b>Total</b>	<b>18</b>

<sup>42</sup> Ibid.

<sup>43</sup> Maintenance Act 9 of 2003, Definitions.

that the defendant's income was insufficient to justify an order.<sup>44</sup> **The complainant in the case where the beneficiary was an infant who died, a 12-year-old mother, was the youngest complainant in the sample.**

## CASE STUDY

### An application for maintenance made by an 18-year-old child

In 2009 an 18-year-old girl approached the Legal Assistance Centre to ask for help to obtain increased maintenance payments from her father. The LAC usually refers people directly to the maintenance court as the process to make a maintenance complaint should be straightforward and the clerk of the court or maintenance officer can assist. However, in this instance, given that the complainant was a minor, the LAC was happy to assist. The client was also assisted by her grandmother. The details of her case are as follows.

When the client was five years old, the court had ordered the father to pay N\$200 in maintenance every month. However, the father paid this N\$200 for only a few months before going into arrears. The State instituted criminal charges against the father for failure to pay maintenance, but the father repeatedly failed to appear in court. The court ordered an attachment of wages, which resulted in maintenance being paid for some time, but the payments stopped again when the father changed jobs.<sup>a</sup> The client reported having a troubled relationship with her father. Her mother had passed away in 2008.

The client sought to have the monthly maintenance amount increased to N\$1 500 to better suit her needs. With the LAC's help, she provided the court with a list of her expenditures along with receipts and supporting letters as proof. She also provided a list of her father's known assets and expenditures in order to show that he would be capable of paying the increased amount.

At the first hearing in February 2009, the father did not appear in court, instead sending a note explaining that he was medically unable to participate in hearings for two months. The magistrate therefore decided not to issue default judgement and instead postponed the matter for two months.

The client informed us that the court eventually ordered the father to pay N\$900 per term plus N\$3 000 for the purchase of clothes.

The LAC followed up with the client several months later, and was informed that the father had not defaulted with the maintenance payments since the judgement was made. Although parent and child did not seek counselling as recommended, it appeared that the relationship between them had improved and they were on good speaking terms. We followed up again on the case at a later date, and the client informed us that the father had stopped paying towards the N\$3 000. The client returned to the court to report this, but the magistrate cancelled this part of the order, stating that it was for "luxuries". We were also told that the father wanted to recover the money he had already paid to the child, expecting the child to pay back N\$900 per month until he has recovered what he had already paid. It is unlikely that the father could legally force his daughter to repay the money, but in any event, this case exemplifies the emotional complexities that maintenance cases can involve.

<sup>a</sup> This should not have happened: the employer has a duty to contact the court when an employee who has his wages attached for maintenance leaves the place of employment. The court could then transfer the order to the next place of employment. (Maintenance Act 9 of 2003, section 31(2))

We believe that more children would apply for maintenance if there were greater public awareness about this option. For example, when the Legal Assistance Centre published a comic on what to do if someone stops paying maintenance, we received queries from children asking if they may claim maintenance. In an effort to bring clarity to this issue, the LAC placed a one-page cartoon in *The Namibian* on this topic. The story is about a child who is living with her grandmother. Her father is dead and her mother lives separately. The mother has a good job but does not provide maintenance

<sup>44</sup> In this case a sister applied for maintenance for herself and her four siblings. The family were living with their aunt. However, the father was earning only N\$427.39 per month and the court decided that it could not make an order. Instead, the court advised the children to seek assistance from a social worker.



for her daughter. A friend tells the child that she can apply for maintenance on her own. The child goes to court and applies for a maintenance order. The LAC also included a subplot about a child applying for maintenance in its 2011 film entitled *Maintenance Matters*. In this story, Melody's mother is afraid to apply for maintenance because her ex-partner (Melody's father) has been abusive in the past and she does not want the maintenance complaint to restart the violence. Melody asks if she can apply for maintenance herself, and does so with the help of the maintenance officer. The maintenance officer also explains to Melody's mother that if she is afraid of further violence, she can apply for a protection order. The father is initially surprised and angry that he has been asked to pay maintenance, but when he learns more about his duty to support his child, he changes his mind and consents to the maintenance order. The film has been widely shown at workshops and trainings and on the Namibian Broadcasting Corporation television channel.

*"I am 17 years old girl. I am schooling and my father is working for the government and he did not give me anything from the day I born till today. I am suffering."*

Text message sent to the Legal Assistance Centre



Another reason for the low number of maintenance complaints made by children appears to be that some courts actively discourage applications from minors. For example, one clerk said, *"If there is a case with a child, then it would be a child of maybe 16. If younger than that, then it must be the guardian or the mother."* A maintenance officer from a different court said, *"The child must be over 18 or the child needs a guardian to request and receive maintenance."* The court officials at another court also discourage applications from minors, for this reason:

*"The court doesn't want the children to have direct access to money because they [court officials] worry that it might encourage the children to drop out of school. So, if a child comes in trying to fill out an application, they are told that their guardian must lay the complaint."*

This court also stated that children cannot represent themselves in court or receive maintenance payments directly – with both of these perceptions ignoring the special provisions which have been made in the Maintenance Act for child complainants.<sup>45</sup> Given the misunderstandings about who can claim maintenance, **we recommend that the Ministry of Justice issue a circular to the maintenance courts to clarify the fact that minor children can claim maintenance on their own.**

Whilst the courts may have realistic concerns about children possibly misusing maintenance money, this problem should be addressed through means other than a refusal to process a maintenance complaint made by a child – such as by involving a social worker. The forthcoming Child Care and Protection Bill will allow for child-headed households to exist independently and to manage their own budgets, with some adult supervision and support.<sup>46</sup> This is an example of how the concept of child participation is being increasingly recognised in Namibia's legislation.

Fortunately some courts do willingly allow children to claim maintenance. For example, the clerk of the Rehoboth court stated that he sometimes sees one or two claims made by children per month.

<sup>45</sup> Maintenance Act 9 of 2003, section 1 (definition of "complainant") and section 9(3) ("A complaint ... may be made by ... a beneficiary ...").

<sup>46</sup> Child Care and Protection Bill, draft dated 12 January 2012, section 205.

Rundu court officials also stated that they process claims from minors. This statement was verified by the fact that four of the 18 maintenance applications made by minors in our sample came from the Rundu court. One magistrate recommended that a separate, child-friendly application form should be provided for child applicants. **We recommend that the Ministry of Justice consider producing a simplified application form for children. An alternative solution could be to produce a simple pamphlet for children on how to apply for maintenance for themselves.** The pamphlet could include a step-by-step guide on how to complete the application form. Adults would also find such a pamphlet useful.

## Sex of complainants

**The vast majority of complainants were women (1 541/1 569; 98.2%; data missing in 142 applications), whilst only 1.8% were men (28/1 569).**

This is a slight improvement on the 1995 study finding that not a single maintenance complaint in the sample had been initiated by a man.<sup>47</sup> However, the small proportion of male complainants in our sample suggests that the notion that men should not claim maintenance continues to prevail in Namibia.

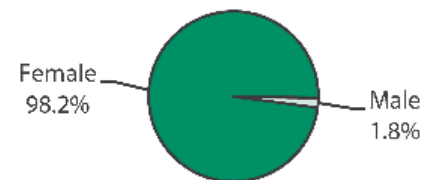
The quantitative finding that few men are making maintenance complaints is substantiated by comments made by court officials. For example, the clerk of the Ondangwa court said, “*We have never seen a man come to the court to claim maintenance against a woman. It is taboo. It is a matter of pride for men.*” However, at the nearby Oshakati court, the maintenance officer cited a case where an uncle claimed maintenance for his nephew from the child’s father (his brother) after the death of the mother. As these courts are located close together, the clerk’s perception that men will not claim maintenance is not entirely true, although the data from this study does show that applications from men are not common. It should be noted that in the case cited, the man was not claiming from a woman but from another male relative, which may have been culturally more acceptable.

The Legal Assistance Centre film about maintenance (*Maintenance Matters*) features a subplot about a father claiming maintenance from his ex-girlfriend for his two children. He is teased by her new boyfriend about wanting maintenance for the children, but with the encouragement of his neighbour and the maintenance officer, he persists with the application. The new boyfriend tries to shame the man into not applying for maintenance, but learns that it is an offence to intimidate a complainant.<sup>48</sup> After the maintenance hearing, the mother admits that the process has taught her that she should be contributing towards the care of their children. We chose to include this subplot to help change public opinion about men applying for maintenance.

## Language group

It is interesting to attempt to assess access to the courts by language group as there may be some cultural groups that are more or less likely to access the maintenance system. Reasons for such differences may stem from differences in cultural attitudes about child maintenance, differences

**Chart 18: Sex of complainants (n=1 569)**



**Table 30: Sex of complainants**

Sex	Number	Percentage
Male	28	1.8
Female	1 541	98.2
<b>Total</b>	<b>1 569</b>	<b>100.0</b>
Not recorded	142	8.3
<b>Total</b>	<b>1 711</b>	<b>100.0</b>

<sup>47</sup> D Hubbard, *Maintenance: A Study of the Operation of Namibia’s Maintenance Courts*, Windhoek: Legal Assistance Centre, 1995 at 58.

<sup>48</sup> It is an offence to threaten to kill, assault or injure a complainant or any other person by any means (including the use of witchcraft), or to cause damage to the complainant or any other person, or to the property of the complainant or another person, with the intention of compelling or inducing the complainant not to file a complaint at the maintenance court or not to lay a criminal charge against a defendant who fails to support a specific person. The penalty is a fine of up to N\$20 000 or imprisonment for up to 5 years. (Maintenance Act 9 of 2003, section 41)

in the adequacy of family and community backup systems to ensure that children are sufficiently maintained, or different levels of need or awareness across the country.

Analysis of the language group of the complainant and defendant is based on their surname as this is the only means of identifying language group based on the standard information recorded in the files. However, there are a number of limitations to assessing the data in this way. For example, if a Nama woman is married to a Herero man and applies for maintenance using her married surname, she will be recorded in this study as a Herero complainant. Furthermore, not all surnames are clearly associated with a cultural group. Therefore the assessment of language group must be treated with caution.

**Approximately one-third of complainants were Oshiwambo speakers and another third Damara/Nama speakers. Approximately one-sixth were Afrikaans speakers and one-twelfth were Otjiherero speakers.** The remaining language groups (German, Setswana, English, Rukwangali and Silozi) were identified in only a minority of files (each in less than 2% of the files). In 11.9% of the files we were unable to determine the language spoken by the complainant. The proportional differences between language groups are similar to the proportion of language speakers in the entire population, although it seems that Afrikaans speakers are slightly more likely to claim maintenance (constituting 15% of the people accessing the maintenance court compared to representing 7.2% of the population) and Rukwangali speakers are much less likely to claim maintenance (constituting only 0.4% of the people accessing the maintenance courts but constituting 15% of the population). Rukwangali speakers also have the lowest per capita income when income is assessed by language group.<sup>49</sup>

The low number of maintenance cases brought by Rukwangali speakers has three possible explanations:

- (1) Rukwangali-speaking complainants may lack the funds to access the courts (see page 120 for a discussion on accessibility of courts).
- (2) Because income is so low, Rukwangali-speaking complainants may feel that it is not worthwhile to make a maintenance complaint.
- (3) The community may utilise alternative channels; according to the magistrate at the Rundu court, *“most people in the Kavango region go to the traditional courts rather than the maintenance court. Only educated complainants approach our office. Most people in the Kavango region prefer speaking to a traditional authority, such as a headman.”*

Other court officials did not comment on differences in the incidence of maintenance complaints between different cultural groups in Namibia. In light of the low number of maintenance complaints made in Kavango Region, **we recommend that a small qualitative study is conducted in Kavango to assess child support mechanisms in these communities. We also recommend that training be given to traditional leaders in Kavango on the law on maintenance, including the role of traditional leaders in negotiating maintenance agreements outside of court and when to refer problem cases to the maintenance court.**

The results here differ to those reported in the 1995 study. The 1995 study found that 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 was 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.<sup>50</sup> Given that the sample for the 1995 study under-represented files from northern Namibia, it is not surprising that the results differ. However, similarities still exist in terms of the low prevalence of maintenance complaints made by Rukwangali/Rukavango speakers.

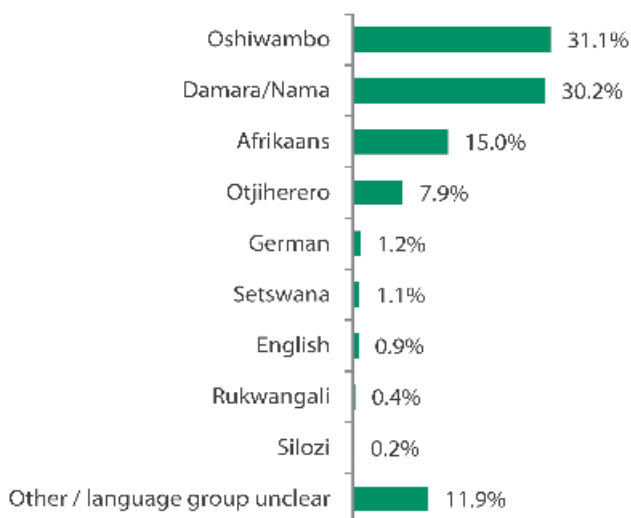
<sup>49</sup> Namibia Statistics Agency (NSA), *Namibia Household Income and Expenditure Survey 2009/2010*, Windhoek: NSA, 2012 at 126. The per capita income for German speakers is 26 times higher than the per capita income for Rukwangali speakers.

<sup>50</sup> D Hubbard, *Maintenance: A Study of the Operation of Namibia’s Maintenance Courts*, Windhoek: Legal Assistance Centre, 1995 at 60.

This confirms the need for more to be done to ensure that people from this language group are aware of how to make a maintenance complaint.

The 1995 maintenance report recommended that a relationship between traditional courts and the maintenance courts on issues of maintenance should be considered. Whilst such courts have not traditionally dealt with maintenance cases in many communities, there are some regions (such as 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. For example, **traditional courts could be empowered to deal with maintenance questions in terms of the Maintenance Act, provided that their decisions are ratified by a magistrate's court.**<sup>51</sup>

**Chart 19: Language groups of complainants (n=1 565)**



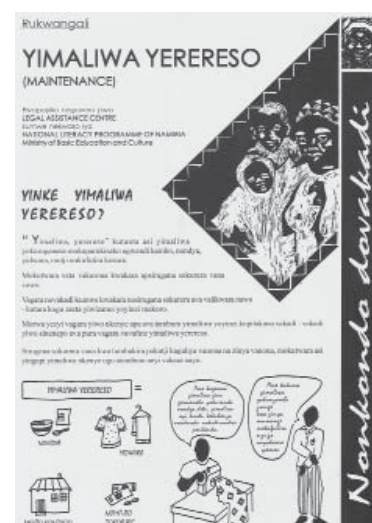
**Table 31: Language groups of complainants**

Language groups of complainant	Number	Percentage	Percentage in the population*	Is the sample higher or lower than the general population distribution?
Oshiwambo	532	31.1	48.3	Lower
Damara/Nama	517	30.2	11.8	Higher
Afrikaans	256	15.0	7.2	Higher
Otjiherero	136	7.9	8.4	Similar
German	21	1.2	0.4	Similar
Setswana	18	1.1	0.2	Similar
English	16	0.9	1.4	Similar
Rukwangali	7	0.4	15.0	Lower
Silozi	4	0.2	Counted under other	–
Other / language group unclear	204	11.9	7.1**	–
<b>Total</b>	<b>1 711</b>	<b>100.0</b>		

\* **Source:** Namibia Statistics Agency (NSA), *Namibia Household Income and Expenditure Survey (NHIES) 2009/2010*, Windhoek: NSA, 2012 at 27.

\*\* Includes Khoisan and Caprivi languages, and other European and other African languages.

Many of the recommendations in this report relate to the need for increased awareness about the law on maintenance. The differences in the language spoken by the complainants can be used to identify the languages to prioritise for educational materials. **We recommend that educational materials should be produced in Oshiwambo and Damara/Nama to support complainants who most commonly make maintenance complaints. We also recommend that materials should be produced in Rukwangali to ensure that people from this language group are aware of how to apply for maintenance.** The LAC has previously produced simplified materials on maintenance in a number of indigenous languages and these materials could be updated, reproduced and translated as necessary.



<sup>51</sup> Id at 146.



It is interesting to look at the data for the Windhoek court alone, given that due to in-migration and urbanisation, a wide range of cultural groups reside in Windhoek. This means that the pattern of language groups of complainants in Windhoek may indicate that some cultural groups are more or less likely to claim maintenance. However, the data shows that there is no difference in the distribution of the language groups accessing the maintenance court than in the national sample, although the differences between the different groups is slightly smaller.

**Table 32: Language group of complainants – Windhoek court only**

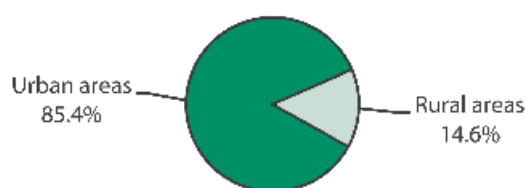
Language group of complainant	Number	Percentage of Windhoek sample (242)	Percentage of overall sample
Oshiwambo	67	27.7	31.1
Damara/Nama	63	26.0	30.2
Afrikaans	36	14.9	15.0
Otjiherero	24	9.9	7.9
German	11	4.5	1.2
Setswana	8	3.3	1.1
English	7	2.9	0.9
Rukwangali	4	1.7	0.4
Silozi	0	0	0.2
Other / language group unclear	22	9.1	11.9
<b>Total</b>	<b>242</b>	<b>100.0</b>	<b>100.0</b>

## Residence in a rural versus urban area

The vast majority of maintenance complaints (1 235/1 446; 85.4%; data missing for 265 complaints) were made by people living in urban areas. The remainder were made by people living in rural areas (211/1 446; 14.6%).<sup>52</sup>

As discussed in section 7.1, distance to the nearest magistrate's court is a relevant factor in terms of accessing maintenance payments in many regions. This factor probably helps to explain why the majority of applications for maintenance are made by people living in urban areas. The majority of people who apply for maintenance do so because they have insufficient money to meet the day-to-day costs of caring for their child. People living in rural areas may be unlikely to have the money needed to travel to the nearest court to apply for maintenance. The maintenance officer in Eenhana made such a comment, saying that the number of maintenance applications is low in his court because mothers cannot find the money to come to court to make the application.

**Chart 20: Residence area of complainants (n=1 446)**



**Table 33: Complainants' place of residence: urban or rural area**

Complainants' place of residence	Number	Percentage
Larger urban area	1 127	77.9
Smaller urban area	108	7.5
Rural area	211	14.6
<b>Total</b>	<b>1 446</b>	<b>100.0</b>
Missing	265	15.5
<b>Total</b>	<b>1 711</b>	<b>100.0</b>

A further problem, cited in a report on Namibia's justice sector, is that "[t]he distribution of courts in Namibia is not geographically balanced, leading to limited physical access to justice depending on which part of the country one resides in. Courts are mainly found in areas with high concentrations of economic activity. This anomaly is partly addressed through the system of circuiting Regional and High Courts."<sup>53</sup> Unfortunately, as regional magistrates' courts are not maintenance courts, the circuit courts do not provide a solution in this instance.<sup>54</sup>

<sup>52</sup> Categorisation into larger urban, smaller urban or rural areas is based on the designation of urban centres as per the preliminary results for the 2011 census (National Planning Commission, *Namibia 2011 Population and Housing Census Preliminary Results*, Windhoek, Namibia: National Planning Commission, 2012 at 57).

<sup>53</sup> J Nakuta and F Chipepera, *The Justice Sector and the Rule of Law in Namibia: Management, Personnel and Access*, Windhoek: Namibia Institute for Democracy and Human Rights and Documentation Centre, undated.

<sup>54</sup> Maintenance Act 9 of 2003, section 6.



The Legal Assistance Centre study on the operation of the Combating of Domestic Violence Act reported a similar rural/urban divide to that identified in this study. The report states that the vast majority of protection order applications (92%) come from people living in urban areas.<sup>55</sup> The report suggests that this is probably because of lower public awareness in rural areas and difficulty in accessing courts. Several key informants interviewed for the study also said that this may be because rural people are more likely to seek help from community elders or traditional leaders in terms of customary law.<sup>56</sup> Similar reasons are applicable for maintenance complaints.

Given the scarcity of maintenance order applications by rural dwellers, **we recommend that the Ministry of Justice and other stakeholders hold information sessions on the law in rural areas, to discuss specific obstacles to utilisation of the law with rural communities and to involve traditional leaders in popularising the law.**<sup>57</sup>

The 1995 study did not assess the residence maintenance complainants.<sup>58</sup>

## 8.6 Income, assets and expenditure of complainant

### Income and assets of complainant

Form A requires the complainant to complete information about his or her income, assets and expenditure. (See Form A excerpt on the next two pages.)

However, this information was only provided in a small minority of cases. Some files contained separate information about the income, assets and expenditure of the complainant. The finding that so few cases contained details of the complainant's income is a matter of concern as the court should be using such information to determine the amount of maintenance that should be paid. Although the information may be discussed orally, given that maintenance cases take some months to be concluded and are often amended in years to come, it is important that the files contain an appropriate record of the process followed in determining the amount of maintenance that should be paid. The 2004 study on the South African Maintenance Act similarly found that very few applications contained information about the complainant's income.<sup>59</sup> The 1995 maintenance study did not assess the income or assets of the complainant as this was not recorded in detail on the forms in use at that stage.<sup>60</sup> **We recommend that the Ministry of Justice consider the development of guidelines or a revision of the regulations to clarify the procedure for opening a maintenance complaint and comparing information on income and expenditure. Supervisory personnel should also be tasked to spot-check files to ensure that the guidelines are adhered to.**

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<sup>55</sup> The methodology used to analyse the data was different in the two studies (an expanded analysis was used in *Seeking Safety*), therefore the percentages are not directly comparable. However, both studies found that the majority of applications are made by people living in urban areas, and this trend implies that people living in rural areas have problems with accessing justice.

<sup>56</sup> Legal Assistance Centre (LAC), *Seeking Safety: Domestic Violence in Namibia and the Combating of the Domestic Violence Act 4 of 2003*, Windhoek: LAC at 269.

<sup>57</sup> The Legal Assistance Centre made a similar recommendation in respect of the Combating of Domestic Violence Act (*ibid*). Popularisation of the two laws would take place simultaneously.

<sup>58</sup> D Hubbard, *Maintenance: A Study of the Operation of Namibia's Maintenance Courts*, Windhoek: Legal Assistance Centre, 1995.

<sup>59</sup> Community Agency for Social Equality (CASE), *Implementation of the Maintenance Act in the South African Magistrate's Courts*, Braamfontein: CASE, 2004 at 28.

<sup>60</sup> D Hubbard, *Maintenance: A Study of the Operation of Namibia's Maintenance Courts*, Windhoek: Legal Assistance Centre, 1995.

Excerpt from Form A  
**Income, assets and expenditure of complainant**

[...]

6. Particulars of my assets and \*weekly/monthly income and expenditures (supported by documentary proof, where possible) are as follows:

Assets	
Fixed property .....	N\$.....
Investments .....	N\$.....
Savings .....	N\$.....
Shares .....	N\$.....
Motor vehicles .....	N\$.....
Other: .....	N\$.....
.....	N\$.....
.....	N\$.....
<b>Total value of Assets</b>	N\$.....

Income	
Gross salary .....	N\$.....
Minus deductions:	
Tax .....	N\$.....
Medical Aid .....	N\$.....
Pension .....	N\$.....
Other: .....	N\$.....
.....	N\$.....
.....	N\$.....
Total nett salary .....	N\$.....
Other income (state source) .....	N\$.....
.....	N\$.....
.....	N\$.....
<b>Total income</b> .....	N\$.....

Expenditure			
	Self	Beneficiary(ies)	Total
1. Lodging (bond repayment/levy/rent/board)	N\$.....	N\$.....	N\$.....
2. Food: Groceries .....	N\$.....	N\$.....	N\$.....
Meat .....	N\$.....	N\$.....	N\$.....
Bread and milk .....	N\$.....	N\$.....	N\$.....
Fruit and vegetables .....	N\$.....	N\$.....	N\$.....
Baby food .....	N\$.....	N\$.....	N\$.....
Lunches .....	N\$.....	N\$.....	N\$.....
3. Household expenditure:			
Water and electricity/ .....	N\$.....	N\$.....	N\$.....
Gas/paraffin .....	N\$.....	N\$.....	N\$.....
Rates and taxes .....	N\$.....	N\$.....	N\$.....
Cleaning materials .....	N\$.....	N\$.....	N\$.....
Laundry/Dry-cleaning .....	N\$.....	N\$.....	N\$.....
Toiletries .....	N\$.....	N\$.....	N\$.....
Telephone .....	N\$.....	N\$.....	N\$.....
Domestic worker .....	N\$.....	N\$.....	N\$.....
Garden services .....	N\$.....	N\$.....	N\$.....
Insurance (short term) .....	N\$.....	N\$.....	N\$.....
4. Clothing:			
Clothes and shoes .....	N\$.....	N\$.....	N\$.....
School uniforms .....	N\$.....	N\$.....	N\$.....
Sports clothes .....	N\$.....	N\$.....	N\$.....
5. Personal care (including hair care/ cosmetics, etc.): .....	N\$.....		

6. Transport:			
Bus .....	N\$.....	N\$.....	N\$.....
Car: Installments .....	N\$.....	N\$.....	N\$.....
Maintenance .....	N\$.....	N\$.....	N\$.....
Fuel .....	N\$.....	N\$.....	N\$.....
Licenses .....	N\$.....	N\$.....	N\$.....
Insurance .....	N\$.....	N\$.....	N\$.....
Taxi .....	N\$.....	N\$.....	N\$.....
Lift Club .....	N\$.....	N\$.....	N\$.....
Parking .....	N\$.....	N\$.....	N\$.....
Other .....	N\$.....	N\$.....	N\$.....
7. Educational expenditure:			
School fees .....	N\$.....	N\$.....	N\$.....
After school care .....	N\$.....	N\$.....	N\$.....
Day care .....	N\$.....	N\$.....	N\$.....
Study policy (insurance) .....	N\$.....	N\$.....	N\$.....
Books .....	N\$.....	N\$.....	N\$.....
Stationery .....	N\$.....	N\$.....	N\$.....
Outings .....	N\$.....	N\$.....	N\$.....
Sports .....	N\$.....	N\$.....	N\$.....
Extramural .....	N\$.....	N\$.....	N\$.....
Other school expenditure .....	N\$.....	N\$.....	N\$.....
8. Medical expenditure:			
Doctor/dentist/etc.....	N\$.....	N\$.....	N\$.....
Medication (prescription) .....	N\$.....	N\$.....	N\$.....
Hospital .....	N\$.....	N\$.....	N\$.....
Other medical expenditure .....	N\$.....	N\$.....	N\$.....
9. Insurance:			
Life .....	N\$.....	N\$.....	N\$.....
Annuity .....	N\$.....	N\$.....	N\$.....
House owners/holders .....	N\$.....	N\$.....	N\$.....
10. Pocket money/allowances: .....	N\$.....	N\$.....	N\$.....
11. Holidays: .....	N\$.....	N\$.....	N\$.....
12. Maintenance, replacement and repairs of items:			
House .....	N\$.....	N\$.....	N\$.....
Household appliances .....	N\$.....	N\$.....	N\$.....
Kitchenware .....	N\$.....	N\$.....	N\$.....
Linen, towels, etc. ....	N\$.....	N\$.....	N\$.....
Bicycles/bikes/scooters .....	N\$.....	N\$.....	N\$.....
Other items .....	N\$.....	N\$.....	N\$.....
13. Entertainment and recreation: .....	N\$.....	N\$.....	N\$.....
14. Personal loans: .....	N\$.....	N\$.....	N\$.....
15. Security alarm system: .....	N\$.....	N\$.....	N\$.....
16. Membership fees: .....	N\$.....	N\$.....	N\$.....
17. Religious contributions/charities: .....	N\$.....	N\$.....	N\$.....
18. Gifts: .....	N\$.....	N\$.....	N\$.....
19. TV license: .....	N\$.....	N\$.....	N\$.....
20. Reading materials: Books .....	N\$.....	N\$.....	N\$.....
Newspapers .....	N\$.....	N\$.....	N\$.....
Periodicals .....	N\$.....	N\$.....	N\$.....
21. Lease/instalment sales payments: Furniture .....	N\$.....	N\$.....	N\$.....
Appliances .....	N\$.....	N\$.....	N\$.....
Other .....	N\$.....	N\$.....	N\$.....
22. Pets: Food .....	N\$.....	N\$.....	N\$.....
Veterinary surgeon .....	N\$.....	N\$.....	N\$.....
Licence .....	N\$.....	N\$.....	N\$.....
23. Other (not specified above): .....	N\$.....	N\$.....	N\$.....
<b>Total expenditure</b> .....	N\$.....	N\$.....	N\$.....

Details of gross income were recorded in 156 files, net income in 68 files and total income in 102 files. Due to the wide range of data reported in this section, the median is the most representative average to use to analyse the data. **The median gross income was N\$1 000 per month (range N\$80-N\$24 000). The median net income was N\$1 259 per month (range N\$300-N\$19 175). The median total income was N\$813 (range N\$80-N\$19 175).** The range of income is fairly large, which suggests that people from a range of economic brackets are applying for maintenance. However, the median shows that the majority of applicants are from low-income brackets.

According to the 2009/2010 Namibia Household Income and Expenditure Survey, the average annual household income in Namibia is N\$68 878 (N\$5 740 per month).<sup>61</sup> Female-headed households report an average annual household income of N\$48 663 (N\$4 055), whilst male-headed households have an average annual income of N\$64 141 (N\$5 345 per month).<sup>62</sup> Our study reports that the median gross monthly income for complainants is N\$1 000. This is approximately one-quarter of the national average monthly income for female-headed households. This average income for complainants is based on a very small sample and so must be treated with caution, but it suggests that the maintenance court is typically utilised by people at the lower end of the income spectrum.

**Table 34: Income of complainant (N\$)**

Income	Number	Median	Mean	Minimum	Maximum
Gross	156	1 000	2 002	80	24 000
Net	68	1 259	2 112	300	19 175
Total*	102	813	1 436	80	19 175

\* Total income is where gross/net income details were not provided separately.

Only 34 cases included information on assets and 27 of these reported the value of these assets. The type of assets recorded included property, shares and investments, savings, motor vehicles, household goods and insurance policies. Although the median value of the assets is reported, it must be treated with caution due to the extremely small sample size. The median value was N\$5 000 (range N\$100-N\$105 000). The large range in the size of assets owned by complainants, like the range of income, shows that people from a range of economic brackets are applying for maintenance.

**Table 35: Assets owned by complainant**

Type of asset	Number of applications where recorded*
Fixed property	24
Shares and investments	3
Shares	2
Motor vehicles	5
Other (household goods, insurance policies, rental income)	11

\* Total is greater than 27 because complainants reported more than one type of asset.

## Expenditure of complainant

Whilst information on expenditure was completed more often than details of income or assets, it was still only completed in a minority of applications (232/1 711; 13.6%).

**The median estimated monthly expenditure was N\$1 158 in total.** When analysed separately, this figure was N\$1 170 for complainants and N\$715 for beneficiaries. The most commonly reported forms of expenditure were food, household expenses, educational expenses and medical expenses. Interestingly the cost of accommodation was reported in only one in five of the applications where details of expenditure were recorded (52/232; 22.4%). Other expenses such as gifts, entertainment, security and membership fees were listed in a minority of applications.

Some files contained supplementary information about expenditure. For example, one file contained letters from the principals of the children's schools, stating that the children were attending the school

<sup>61</sup> Namibia Statistics Agency (NSA), *Namibia Household Income and Expenditure Survey (NHIES) 2009/2010*, Windhoek: NSA, 2012 at 134.

<sup>62</sup> Ibid.

and detailing the cost of the School Development Fund (for three children attending the primary school N\$200 each per year, and N\$380 for the child attending junior secondary school). Another file from the same court contained a letter from the child's school stating that learners would be sent home if payment for the SDF remained in arrears. A file at another court stated that the children (in Grades 3 and 5) were attending the school and the parent owed N\$21 and N\$30 respectively for the children. Although payment of the SDF has been abolished at state primary schools as of 2013, parents may continue to incur education-related costs such as payments for school uniforms, stationery and the child's participation in extra-curricular activities.

**Table 36: Expenditure of complainant (N\$)**

Expenditure*	Number	Median	Mean	Minimum	Maximum
<b>Food (total)</b>	<b>232</b>	<b>400</b>	<b>569</b>	<b>40</b>	<b>4 000</b>
Food (complainant)	85	400	641	35	3 600
Food (beneficiary)	148	300	421	31	3 976
<b>Household expenses (total)</b>	<b>174</b>	<b>300</b>	<b>504</b>	<b>10</b>	<b>9 700</b>
Household expenses (complainant)	76	371	624	10	9 700
Household expenses (beneficiary)	97	200	265	0	1 800
<b>Educational expenditure (total)</b>	<b>165</b>	<b>280</b>	<b>427</b>	<b>13</b>	<b>3 125</b>
Educational expenditure (complainant)	36	325	453	0	1 980
Educational expenditure (beneficiary)	131	240	399	0	3 125
<b>Medical expenditure (total)</b>	<b>130</b>	<b>53</b>	<b>148</b>	<b>4</b>	<b>2 636</b>
Medical expenditure (complainant)	40	90	183	8	1 625
Medical expenditure (beneficiary)	90	60	135	4	1 346
<b>Accommodation (total)</b>	<b>52</b>	<b>400</b>	<b>5 486</b>	<b>80</b>	<b>231 460</b>
Accommodation (complainant)	34	470	8 153	140	231 460
Accommodation (beneficiary)	17	250	336	0	2 000
<b>Other expenses (total)</b>	<b>21</b>	<b>430</b>	<b>1 000</b>	<b>50</b>	<b>7 075</b>
Other expenses (complainant)	10	650	1 514	0	5 850
Other expenses (beneficiary)	15	281	374	50	1 175
<b>Total (total)</b>	<b>262</b>	<b>1 158</b>	<b>2 237</b>	<b>8</b>	<b>44 210</b>
<b>Total (complainant)</b>	<b>77</b>	<b>1 170</b>	<b>2 817</b>	<b>70</b>	<b>44 210</b>
<b>Total (beneficiary)</b>	<b>169</b>	<b>715</b>	<b>1 204</b>	<b>8</b>	<b>15 533</b>

\* The total expenditure is calculated by adding together the expenditure for the complainant and the beneficiary. However, in some applications, only a combined expenditure was recorded for the complainant and beneficiary/ies. This has been included in the total expenditure. Therefore sub-categories do not always add up to the total expenditure.

The relationship between income and expenditure seems to be a realistic reflection of the overall cost of living in Namibia; it also shows that income and expenditure are not far apart. The median gross income was N\$1 000 per month and the median total estimated expenditure was N\$1 158. According to the 2009/2010 Namibia Household Income and Expenditure Survey, female-headed households have an average annual household income of N\$48 663 (N\$4 055.25 per month) and an annual consumption of N\$46 474 (N\$3 872 per month). Male-headed households have an average household average annual income of N\$64 141 (N\$5 345 per month) and an annual consumption of N\$79 586 (N\$6 632 per month).<sup>63</sup> The fact that income and expenditure in all these assessments are so close together demonstrates how maintenance payments can be important for survival.

Although the majority of estimated expenditures appear realistic, some amounts do appear to be unusual. Some complainants stated that they spent a very low amount on food per month for themselves (N\$35) or for the beneficiary (N\$31), although it is possible that some of these may be cases where the complainant grows the majority of the family's food or where food is supplied by extended family members. At the other end of the scale, one complainant claimed that she spent N\$3 976 per month on food for one beneficiary.

<sup>63</sup> Id at 125 and 134.



Many of the court officials commented that completing the expenses section on the maintenance complaint form is problematic as the section is complicated, time-consuming and unnecessary. As one maintenance officer explained, *“the forms are complicated when it comes to expenditure. The women aren’t employed and their husbands have irregular jobs, so income and expenditure can be difficult to calculate.”* Another maintenance officer said that complainants can be unrealistic when making their claims, explaining that some complainants say they buy clothes for their children every month, something he did not believe to be true. However, the maintenance officer noted that as the form only allows for monthly expenses, there is nowhere else to record the irregular payments. One magistrate said that some women may exaggerate issues if the defendant has been unfaithful in their relationship. The maintenance officer from another court said that they do not ask for supporting documents because this delays the process and often the parties do not have the necessary receipts, particularly when the expenses are for payments that may only be made irregularly.

In light of the fact that few files contained detailed information about the financial position of the complainant, and the fact that the forms are complicated to complete, **we recommend that the Ministry of Justice consider revising the method for collecting information on income, assets and expenditure of parties in respect of maintenance complaints.**

The 1995 maintenance study did not assess the expenses of the complainant as again there was little information recorded in the files.<sup>64</sup>

### Summary of the profile of complainants

- Almost all maintenance complaints were made by one of the parents of the beneficiaries, usually by the mother of the child. Fewer than 1% of maintenance complaints were made by fathers.
- The majority of complainants were between the ages of 18 and 39 at the time of the complaint. Only 1.3% of maintenance complaints were made by children seeking maintenance for themselves.
- More maintenance complainants were made by children seeking maintenance for themselves than by fathers applying for maintenance, although the difference is very small (18 versus 11).
- Approximately one-third of the complainants were Oshiwambo speakers and another third were Damara/ Nama speakers. Approximately one-sixth were Afrikaans speakers and one-twelfth were Otjiherero speakers. The proportions of language groups are similar to the proportion of language speakers in the entire population, although it seems that Afrikaans speakers are slightly more likely to claim maintenance than others, while Rukwangali speakers are much less likely to claim maintenance.
- The vast majority of maintenance complaints were made by people living in urban areas.
- The median income for the complainant ranged between N\$813 and N\$1 259.
- The median total estimated expenditure was N\$1 158 (N\$1 170 for complainants and N\$715 for beneficiaries).

## 8.7 Amount of maintenance requested

Form A allows the complainant to request a specific amount of maintenance. This section was completed in the majority of complaints (1 391/1 687; 82.5%; information missing from 24 complaints). As discussed in section 8.3, the majority of maintenance applications were made for one beneficiary, therefore the median amount of maintenance requested does not have to be adjusted for the number of beneficiaries. **The median amount of maintenance requested for beneficiaries, excluding beneficiary-complainants, was N\$500 (mean N\$584; range N\$50-N\$7 000).** The amount of maintenance requested per beneficiary is discussed later in this section.

<sup>64</sup> D Hubbard, *Maintenance: A Study of the Operation of Namibia’s Maintenance Courts*, Windhoek: Legal Assistance Centre, 1995.

### Excerpt from Form A, section 1 Maintenance complaint

5. I request that the defendant be ordered to make the following contribution(s) towards maintenance:

(a) A\*weekly/monthly contribution of –

N\$	Name of Beneficiary
N\$ In respect of myself (complainant)	.....
N\$ In respect of	.....
N\$ In respect of	.....
[...]	[...]

(b) The first payment should be made on ..... and after that on or before the ..... day of each succeeding \*week/month. All payments should be made

to .....

in favour of .....

and/or

(c) Other contributions (for example medical and dental costs, school fees, fees to tertiary institutions, school clothes, expenses for sport and/or cultural activities, birth expenses and maintenance for beneficiary(ies) from birth):

.....

.....

As discussed in section 8.6, the total median expenditure was N\$1 158. This means that **the amount of maintenance requested is approximately half of the estimated expenditure of caring for the beneficiary**. However, the sample sizes for the two pieces of data is very different: 1 375 for the requested maintenance, compared to 232 for expenditure. Therefore the comparison must be treated with caution.

The complainant requested an amount of maintenance for himself or herself in 157 applications, although data was available on the amount of maintenance requested for only 109 of these applications. **The median amount of maintenance requested for the complainant alone was N\$500 (mean N\$805; range N\$100-N\$4 000)**. As discussed, the estimated expenditure on the complainant is N\$1 170. Therefore the amount of maintenance requested for the complainant is also approximately half of the estimated expenses. In this instance the sample sizes are more comparable: 109 for the requested maintenance, compared to 77 for expenditure.

The median amount of maintenance requested for child complainant-beneficiaries was N\$425 (mean N\$521; n=14). This is slightly less than the median and mean for other child beneficiaries. However, the two sample sizes vary widely: 14 for the amount requested by child-complainants, compared to 1 375 for the amount requested for all child beneficiaries. Therefore the comparison must be treated with caution.

The amount of maintenance requested can also be compared with the amount of maintenance that the defendant has previously provided. **The median amount of maintenance requested (N\$500) is not substantially higher than the median amount of maintenance previously provided (N\$300; see section 8.14)**. However, again this comparison should be treated with caution as the amount of maintenance previously provided is calculated from a small subset of the files (74 compared to 1 375).

In the 1995 maintenance study, the median total amount of maintenance applied for was N\$150 (mean N\$187; range N\$20-N\$1 100). The median amount of maintenance requested per child was N\$100 (mean N\$135; range N\$8-N\$1 000).<sup>65</sup> Changes in the value of maintenance payments, considering factors such as inflation, are discussed on page 165.

<sup>65</sup> Id at 69.

Maintenance payments should not be based on minimal subsistence levels, but on the standard of living of the members of the family in question.<sup>66</sup> However, comparison to minimal subsistence levels can give an indication of the reality of the amount of maintenance applied for or provided. The 1995 maintenance study cited a report which calculated the amount of money needed to meet most basic daily subsistence requirements in 1992 as N\$115 for an adult, N\$86 (75%) for a child aged 6-15 and N\$58 (50%) for a child aged 0-5.<sup>67</sup> The majority of beneficiaries in the 1995 study were of pre-school age and the median amount of maintenance requested per child was N\$100 – this is just slightly more than the basic subsistence level.<sup>68</sup>

According to the 2008 Review of Poverty and Inequality in Namibia, for 2003/04, people were defined as poor if they subsisted on less than N\$262 per day and severely poor if they subsisted on N\$185 per day. As of 2009/10, the poverty line (calculated using a more refined methodology) was N\$377.96.<sup>69</sup> Given that our sample assessed files from 2005-08, the poverty line will have been a mid-point between these two figures (N\$319.98). Using the same calculations as cited in the 1995 study (ie assuming that the amount of money needed for a child aged 0-5 is 50% of that needed for an adult), the minimal amount of money needed for a child in this age bracket is N\$159.99. The median amount of maintenance requested in this study is N\$500 – approximately three times the estimated poverty level for a child. This is a positive finding for the wellbeing of children. Although the methodologies used to calculate subsistence in the underlying reference documents are different, the difference between the poverty level and the amount of money requested for maintenance appears to be increasing over time. This suggests that maintenance complainants are providing children with more than the absolute bare necessities. However, as discussed in the following section, this finding must be considered in the context of the cost of living.

*"I'm a 19 year-old lady with a kid of 1 year 9 months. The father stopped sending money since he was only 3 months old. I don't know what to do."*

Text message sent to the Legal Assistance Centre

<sup>66</sup> Case law on this issue has been codified in the Maintenance Act 9 of 2003, section 16(3)(c): "Where the beneficiary is a child, the court must also have particular regard to ... the manner in which the beneficiary is being, and in which his or her parents reasonably expect him or her to be, educated or trained."

<sup>67</sup> G Van Rooy et al, *Household Subsistence Levels in Namibia: A pilot study in three selected communities*. Windhoek: Social Science Division, University of Namibia, 1994 at 38-39, 9-12, cited in D Hubbard, *Maintenance: A Study of the Operation of Namibia's Maintenance Courts*, Windhoek: Legal Assistance Centre, 1995 at 70.

<sup>68</sup> D Hubbard, *Maintenance: A Study of the Operation of Namibia's Maintenance Courts*, Windhoek: Legal Assistance Centre, 1995 at 66.

<sup>69</sup> The poverty line is set by computing the cost of a food basket which enables a household to meet a minimum nutritional requirement, and then adding an allowance for the consumption of basic non-food items. This is because, whilst having sufficient resources in the household to meet food requirements is critical, it is not enough to classify a household as poor or non-poor. This, in turn, is because households that can afford to meet the food requirements of all members but lack resources to purchase clothing and shelter, for example, should be considered deprived in a very basic sense.

The food poverty line was calculated by assessing the monetary value of a minimum nutritional intake of 2100 kilocalories in a low-income household based on available prices, taking into account regional price differences (N\$127).

Two approaches to estimating the non-food components of the poverty line were used in the analysis. In the first approach, non-food expenditure is calculated from actual expenditure on non-food items by households where *food* expenditure is approximately equal to the food poverty line. This component is then added to the food poverty line. In the second approach, non-food expenditure is calculated from actual non-food expenditure of households whose *total* expenditure is equal to the food poverty line. Similarly, this component is then added to the food poverty line. The rationale for the latter, more austere approach is that if these households are able to obtain a minimum food basket but choose to divert resources to buy non-food items, then the household must clearly view these items as essential.

The choice of this poverty line differs to those used in previous national poverty reports. Previously, the official poverty line was defined using the relative share of food expenditure to total expenditure of households. A household was considered "poor" if food expenditure made up 60% or more of total expenditure. The household was classified as "severely poor" if food expenditure made up 80% or more of total expenditure.

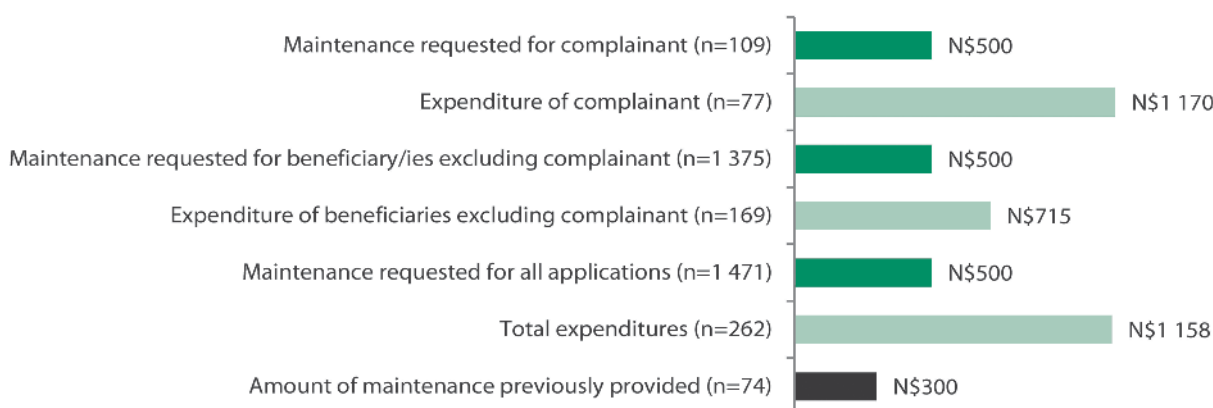
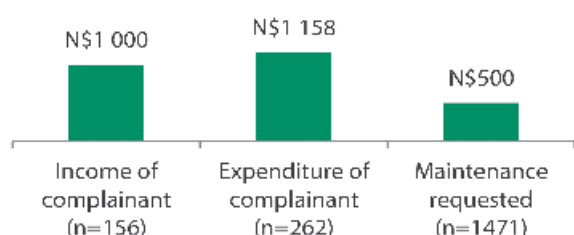
The method used to define poverty was changed for a number of reasons, including methodological problems. According to the report, the new method of determining the poverty line is used widely in the SADC region and in developing countries more generally.

(Central Bureau of Statistics, *Review of Poverty and Inequality in Namibia*, Windhoek: National Planning Commission, 2008 at 3)

**Table 37: Amount of maintenance applied for (N\$)**

Beneficiary	Number*	Median	Mean	Minimum	Maximum
Complainant only	109	500	805	100	4 000
Complainant only; complainant under age 21	14	425	521	100	1 300
Beneficiaries excluding complainant	1 375	500	584	50	7 000
All applications	1 471	500	632	50	10 000
1995 maintenance study; per beneficiary	Not reported	Not reported	135	8	1 000

\* The number of applications used to calculate the average amount of maintenance requested for the complainant alone added to the number of applications used to calculate the average amount of maintenance requested for beneficiaries alone does not equal the number of applications used to calculate the average amount of maintenance for all beneficiaries. This is because in some cases the amount of maintenance for the complainant or beneficiaries alone could not be determined.

**Chart 21: Median amount of maintenance requested versus expenditure (N\$)****Chart 22: Median income and expenditure of the complainant and amount of maintenance requested (N\$)**

*Let us sit together and discuss everyone's income and expenses. Maybe then you will be able to agree on how to share the costs of the things your children need.*



## Amount of maintenance requested over time

The median amount of maintenance requested did not change over the four years that files were sampled. This is despite the fact that inflation increased over the same time period. In contrast, between 1988 and 1993 the median amount of maintenance requested did increase slightly. Therefore, whilst the amount of maintenance requested between 2005 and 2008 is above the poverty level, it is not keeping pace with inflation, which means that the impact of the maintenance payments decreases with time.

**Table 38: Median amount of maintenance requested for all beneficiaries analysed by year 2005-08 (N\$)**

Year	Valid Number*	Median	Inflation**	Minimum	Maximum
2005	334	500	2.2	150	4 000
2006	375	500	5.1	150	7 500
2007	383	500	6.7	50	10 000
2008	379	500	10.3	100	6 500
<b>Total</b>	<b>1 471</b>	<b>500</b>	<b>–</b>	<b>50</b>	<b>10 000</b>

\* The numbers do not amount to 1 711 because some information is missing for each year.

\*\* Unpublished data, <NEPRU\_inflation\_Jan 1973\_to June 2009.xls>, accessed 11 June 2009 (website no longer active; data on file).

**Table 39: Median amount of maintenance requested for all beneficiaries analysed by year 1988-93 (N\$)**

Year	Valid Number	Median	Inflation*	Minimum	Maximum
1988	Not reported	100	12.9	30	600
1989		100	15.1	30	780
1990		150	12.0	30	1 000
1991		150	11.9	20	500
1992		165	17.7	50	1 100
1993		200	8.5	50	750
<b>Total</b>		<b>150</b>	<b>–</b>	<b>20</b>	<b>1 100</b>

\* Unpublished data, <NEPRU\_inflation\_Jan 1973\_to June 2009.xls>, accessed 11 June 2009 (website no longer active; data on file).

The change over time should also be assessed according to the dynamic economic profile of Namibia. For example, the National Statistics Agency reports that average monthly expenditure has increased over time since 1993/94 from N\$556.21 to N\$1 288.07 in 2009/10 (with expenditure adjusted for 2009/10 prices).<sup>70</sup>

## Is the amount of maintenance applied for realistic?

Maintenance is intended to be used for basic living expenses such as housing, food, clothing, medicine and school expenses. The Maintenance Act states that the persons legally liable to maintain a child must provide “reasonable” support for the child. One purpose of the maintenance enquiry is to determine what constitutes reasonable support.

At one of the focus group discussions, the participants were told a basic fictional story about a women applying for maintenance:

*Grace’s child is six years old. She has never been to the maintenance courts before even though Lucas [the child’s father] has never paid maintenance.*

The participants were asked to say whether her maintenance complaint was successful and whether she received the amount of maintenance that she requested, although no specific amount of money was specified. The female participants stated that she would receive a maintenance order but that the amount ordered would be less than requested.

The Legal Assistance Centre asked the court officials whether they think the complainants ask for too little, too much, or the right amount of maintenance. The overall response was that the complainants often ask for more money than the defendant will be able to provide but this does not necessarily mean that the request is unrealistic. As one magistrate explained, the request “*is often justified [but the] means of the father [are] not sufficient usually*”. Some of the court officials felt that the complainants sometimes apply for an inflated amount of maintenance: “*Sometimes women are unreasonable, when the man can’t afford and they refuse to negotiate. Then I have to make clear that we are not there to bash on the guy; if he can’t afford it, I will explain that to her; I will recommend an amount that I think is reasonable.*” Another court official explained, “*It depends on the type of job that the defendant does – if the complainant is trying to claim \$600 from a goat-herd, I will know if they are trying to ask for too much.*” An ex-court official felt that people sometimes see maintenance complainants as a type of bargaining exercise – the complainant will request an amount higher than she expects to get in anticipation of the amount being lowered during negotiations. However one maintenance officer was of the opposite opinion, explaining that the complainants sometimes apply for too little maintenance: “*Women more often don’t really know how much they need; N\$200 seems like a lot in a lump but isn’t really sufficient to feed a child for a month.*” This analysis of the situation appears to be relevant to many of the applications.

<sup>70</sup> Prices are calculated as average monthly expenditure per capita. This takes into account differences in household size and composition. (Namibia Statistics Agency (NSA), *Poverty Dynamics in Namibia*, Windhoek: NSA, 2012 at 8.)



One clerk explained the concept of a reasonable amount as one where the defendant will sign a consent maintenance order rather than ask for a hearing. We are concerned by this definition as the request for a reasonable amount should be based on the needs of the child and the ability of the defendant to provide this sum, rather than an estimation of an amount that will not cause conflict between the complainant and defendant, or result in a formal enquiry which will be a longer process. But one challenge in determining a reasonable amount of maintenance is balancing the needs of the child with the timeline of the process.

The 2004 study on the South African Maintenance Act also noted that some complainants request an inflated amount of maintenance whilst others request only very low amounts of money because they are unable to accurately estimate the financial needs of their children. This study also noted that some complainants are unwilling to accept that the defendant cannot provide the requested amount of maintenance, whilst in other cases the defendants offer unreasonably low amounts of maintenance.<sup>71</sup>

## Amount of maintenance requested per beneficiary

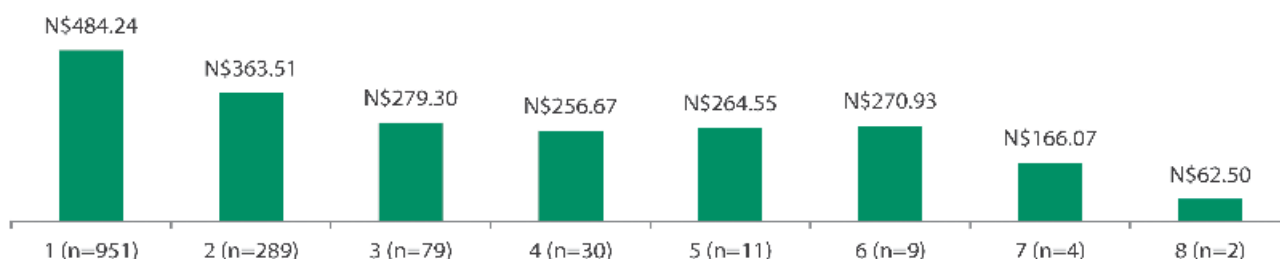
The maintenance complaints can also be analysed to assess the amount of maintenance claimed per beneficiary by dividing the total amount of maintenance by the number of beneficiaries. The results show that **the more beneficiaries there are, the lower the amount of maintenance requested per beneficiary**. This is not surprising given that there may be some economies of scale, such as where several children share one house or can hand clothes down from older to younger children.

The 1995 study did not analyse the data in this manner.

**Table 40: Contribution towards each beneficiary – total amount divided by number of beneficiaries (N\$)**

Number of beneficiaries (excluding complainant)	Number	Median	Mean	Minimum	Maximum
1	951	400	484	50	6 500
2	289	300	364	75	3 500
3	79	200	279	33	1 167
4	30	200	257	50	750
5	11	300	265	100	500
6	9	200	271	33	700
7	4	175	166	57	257
8	2	63	63	25	100

**Chart 23: Median amount of maintenance requested per beneficiary**  
(total amount of maintenance divided by number of beneficiaries)



<sup>71</sup> Community Agency for Social Equality (CASE), *Implementation of the Maintenance Act in the South African Magistrate's Courts*, Braamfontein: CASE, 2004 at 20.

## Amount of maintenance requested by rural/urban residence

The amount of maintenance requested can also be analysed by rural/urban residence.<sup>72</sup> The results show that there is very little difference, despite the fact that there are more people living in poverty in rural than in urban areas.<sup>73</sup> However, the proportion of people living in smaller urban or rural areas represents only one-fifth of the complainants (22.4%). Therefore we cannot draw any conclusions from this information.

**Table 41: Amount of maintenance requested by rural/urban residence of the complainant for all beneficiaries (N\$)**

Rural/urban residence	Number	Median	Mean	Minimum	Maximum
Larger urban areas	1 042	500	670	100	10 000
Smaller urban areas	103	400	519	150	4 000
Rural areas	198	500	542	100	3 000
<b>Total</b>	<b>1 343</b>	<b>500</b>	<b>639</b>	<b>100</b>	<b>10 000</b>

## Amount of maintenance requested by language group

The amount of maintenance requested can also be analysed by language group. However there is very little variation when analysed in this way.

This is despite the fact that the poverty profile of Namibia shows that 68% of Khoisan speakers and 53.7% of Rukwangali speakers are poor. This is compared to 6.9% of Afrikaans people who are poor. Analysed by region, 55.2% of people in Kavango Region and 50.2% of people in Caprivi Region live in poverty, compared to 7.1% of people in Erongo Region and 10.7% of people in Khomas Region.<sup>74</sup>

The amount of maintenance requested by language group can also be assessed per beneficiary. However again there is little difference (and there is only a small sample size for some of the groups).

## 8.8 Requests for special forms of maintenance

### 8.8.1 Requests for contributions in kind

The option to make an order for maintenance in kind was an innovation of the 2003 Maintenance Act. It states that “a maintenance order may direct that payment be made in kind by specified goods or livestock, for all or some portion of the settlement of amounts already owing or the future payment of instalments”.<sup>75</sup> The purpose of this provision is to provide a remedy in instances where the defendant is able to provide support for the child but cannot provide this support as a financial contribution. Payments in kind can also be used to supplement a financial order. For example, a farmer may be able to provide food rather than financial support and a salaried worker who may only be able to provide a small amount of financial support can include the child on a medical aid scheme that is part of the package of employment. The need for in-kind options is relevant, as according to the 2009/2010 Namibia Household Income and Expenditure Survey, whilst the main source of income in Namibia is salaries/wages (49.2% of the households), the second most common source of income is subsistence farming (28.1% of households). However, Form A does not

<sup>72</sup> Categorisation into larger urban, smaller urban or rural areas is based on the designation of urban centres as per the preliminary results for the 2011 census (National Planning Commission, *Namibia 2011 Population and Housing Census Preliminary Results*, Windhoek, Namibia: National Planning Commission, 2012 at 57).

<sup>73</sup> A total of 14.6% of people in urban areas live in poverty compared to 37.4% of people in rural areas (Namibia Statistics Agency (NSA), *Poverty Dynamics in Namibia*, Windhoek: NSA, 2012 at 13).

<sup>74</sup> Namibia Statistics Agency (NSA), *Poverty Dynamics in Namibia*, Windhoek: NSA, 2012 at 13 and 18.

<sup>75</sup> Maintenance Act 9 of 2003, section 17(4).

clearly provide a space for suggesting in-kind payments, so complainants may not understand that this option is available.<sup>76</sup>

A minority of requests contained an application for payments in kind (1/1 711; 0.01%) or for in-kind payments and specified financial payments (a further 53 files; 53/1 711; 3.1%). There is some ambiguity between in-kind and specified payments as the details on file are not always clear. For example, a request for clothes could mean clothes or money for clothes.

## 8.8.2 Requests for specified payments to third parties

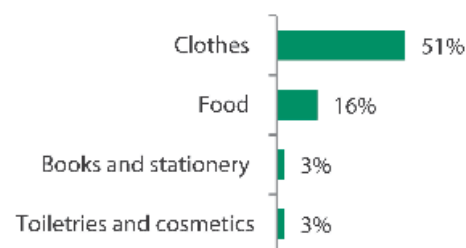
The Maintenance Act also envisages that a maintenance order “*may specify that all or part of contributions made under the order be made to a specific person or institution for a purpose specified in the order*”.<sup>77</sup> Form A focuses primarily on this possibility in the section on “*other contributions*”, giving examples of medical and dental costs, school fees, fees to tertiary institutions, school clothes, expenses for sport and/or cultural activities, birth expenses and maintenance for beneficiary/ies from birth. The option of direct payment is useful because if the money is paid as part of the maintenance order, the complainant may have competing uses for the money.

Only a minority of requests contained an application for specified financial payments (67/1 711; 3.9%).

There were 79 requests for the payment of medical expenses. It is likely that the majority of these were for the defendant to add the beneficiary to his or her medical aid scheme. A local study which sampled data from households in the greater Windhoek area in 2006 reported that in the poorest consumption quintile, only 5.27% of people were enrolled in a medical aid fund compared to 69.14% in the wealthiest quintile.<sup>78</sup> Given this contextual information, it is not surprising that there were few requests for this option.

One reason for the small number of such requests may be that complainants are confused about what they can request under this section. **We recommend that the explanation of other contributions on Form A be revised to make it clearer what can be requested here. Form A should also include a separate section for requesting contributions in kind** The small number of applications for other forms of maintenance could also be due to the fact that some court officials do not like to facilitate alternative forms of payment because of problems that complainants report in accessing them.

**Chart 24: Requests for in-kind payments\***



**Table 42: Requests for in-kind payments\***

Request	Number
Clothes	51
Food	16
Books and stationery	3
Toiletries and cosmetics	3

\* Multiple requests were made in some complaints.

**Table 43: Requests for specified financial payments\***

Request	Number
Medical costs	79
School fees	71
Dental costs	11
Birth-related expenses	9
Child care	5
Transport	5
Tertiary education costs	5
Expenses from birth	4
Sports**	3
Cultural activities	2
Other including house maintenance, unspecified extra-mural activities and a funeral policy	14

\* Multiple requests were made in some complaints.

\*\* A recent report on the cost of education estimates that costs related to school sports may be approximately N\$100-200 per year, with an additional cost of N\$700 for purchasing sports clothing and trainers (Justin Ellis, *Free Primary Education in Namibia: Current Context, 2011*, Windhoek: Ministry of Education, 2011 at 5).

<sup>76</sup> Namibia Statistics Agency (NSA), *Namibia Household Income and Expenditure Survey (NHIES) 2009/2010*, Windhoek: NSA, 2012 at 56.

<sup>77</sup> Id, section 17(2)(e).

<sup>78</sup> MRCC/AIID/PharmAccess Foundation, *Baseline Data Finds for the Okambilimbili Health Insurance Evaluation Project in Namibia*. Windhoek: University of Namibia, 2007.

### 8.8.3 Pregnancy and birth-related expenses

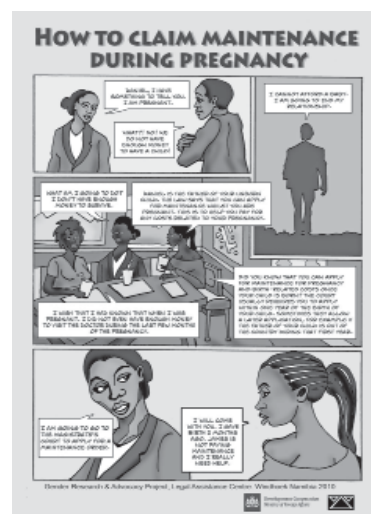
The Maintenance Act allows for maintenance orders to be made for the payment of pregnancy and birth-related expenses such as medical and hospital expenses incurred by the mother:

*If the beneficiary of a maintenance order is a child, the maintenance court may order that maintenance contributions be made to the mother of the child for expenses incurred by the mother in connection with the pregnancy and birth of the child, including but not limited to medical and hospital expenses, but a claim under this subsection must be made within 12 months from the date of birth of the child or within such other reasonable period as the court may allow on sufficient grounds shown by the mother.<sup>79</sup>*

Only a very limited number of applications contained claims for pregnancy and birth-related expenses (9/1711; 0.5%). As discussed on page 33, this may be because there appears to be some confusion about the precise meaning of the provision in the Act. Some courts appear to interpret the provision to mean that the mother may only claim these pregnancy-related expenses once the child has been born; court officials from four courts stated that they do not process complaints from pregnant women. In contrast, other courts interpret the provision to allow a pregnant woman to claim maintenance for pregnancy-related expenses; the maintenance officer at one court stated that he had processed 10-15 such cases in the last year. As discussed on page 33, it is not clear what is the correct interpretation of the Maintenance Act on this point.

Another reason why complainants seldom apply for maintenance during pregnancy may be that the defendant is unwilling to contribute towards the cost of an unborn child. For example, one clerk of court said that defendants insist on waiting until the child is born to make sure that the mothers are not faking the pregnancy. The courts should not accept this excuse as the complainant could submit a doctor's note as proof if really necessary, for example before the pregnancy is visible. The clerk also said that the fathers will refuse to help with medical expenses in case there is a miscarriage or something goes wrong. Again this is an unfair reason not to pay maintenance and counterintuitive, as assistance with maintenance could help the mother improve her quality of health or allow her time to rest rather than working, which in turn could increase the likelihood that the pregnancy will progress safely. Another reason for there being so few applications may be that complainants do not feel that they have a moral right to apply. One community member explained that she would not apply during pregnancy as the expenses are for her rather than the unborn child. **All of these responses suggest that there is a need for greater public discourse on when the duty of maintenance starts.** However, whilst there is a need to increase public awareness about this option, not all people may wish to take advantage of the option; according to a magistrate at the Rundu court, "*There are traditional beliefs here in the north that many people follow. If you do things without seeing the baby, the baby can die.*" However, it is important that people are aware that the option to apply for maintenance during pregnancy is (at least arguably) available if they so choose.

When the Legal Assistance Centre published its comic on what to do if someone stops paying maintenance, we received a number of queries about whether claims can be made during pregnancy. Some people cited problems they had experienced at the courts when they tried to make such a complaint. In an effort to bring clarity to this issue, the LAC placed a one-page comic in *The Namibian* on this topic. The comic showed friends discussing the problem, with one friend explaining that it is possible to claim maintenance during pregnancy. **We recommend that further awareness-raising is needed to encourage people to apply for maintenance during pregnancy. We also recommend that the Maintenance Act be clarified to remove the ambiguities on this issues, making it clear that claims for pregnancy-related expenses can be made before the child's birth.**



<sup>79</sup> Maintenance Act 9 of 2003, section 17(3).

and to provide for a procedure for adjustments should paternity be disproved at a later stage. Form A should also be revised accordingly.

### CASE STUDY

#### What to do if you are pregnant but do not know how to support the child

The Legal Assistance Centre received the following email from a client:

*Hi. I need your help I'm pregnant and the baby's father told me to abort it but I refused. Now he is denying it, I'm not working to support this baby and he is working, I want this baby but I don't want a baby without a father. PLEASE HELP*

We told the client that she has many options. We suggested that she consider involving her family to see if they can help to mediate with the father. We also told her about her option to apply for a maintenance order, including for pregnancy-related expenses. We also gave the client information about other options such as foster care and put her in contact with counselling support.

The 1995 study also found that only a tiny number of applications were made before the child's birth (6 cases – about 1%).<sup>80</sup> The provision on pregnancy and birth-related expenses in the 2003 Maintenance Act was intended to bring clarity in this area and to encourage more women to utilise this option. However this appears not to have worked, perhaps because of the lack of clarity which remains.

### The importance of maternal health – the bigger picture

The health of mothers is a major determinant of that of their children, and thus indirectly affects the formation of human capital. Motherless children die more frequently, are more at risk of becoming malnourished and are less likely to enrol at school. The babies of ill or undernourished pregnant women are more likely to have a low birth weight and impaired development. Low birth-weight children in turn are at greater risk of dying and of suffering from infections and growth retardation, have lower scores on cognitive tests and may be at higher risk of developing chronic diseases in adulthood.

Healthy children are at the core of the formation of human capital. Child illnesses and malnutrition reduce cognitive development and intellectual performance, school enrolment and attendance, which impairs final educational achievement. Intrauterine growth retardation and malnutrition during early childhood have long-term effects on body size and strength with implications for productivity in adulthood. In addition, with the death or illness of a woman, society loses a member whose labour and activities are essential to the life and cohesion of families and communities.

Healthy mothers have more time and are more available for the social interaction and the creation of the bonds that are the prerequisite of social capital. They also play an important social role in caring for those who are ill. The economic costs of poor maternal and child health are high; substantial savings in future expenditure are likely through family planning programmes and interventions that improve maternal and child health in the long term. Consequent gains in human and social capital translate into long-term economic benefits. There is evidence of economic returns on investment in immunization, nutrition programmes, interventions to reduce low birth weight, and integrated health and social development programmes.

Extract from World Health Organization, *World Health Report 2005*.  
*Make every mother and child count*. Geneva: World Health Organization, 2005 at 6, references omitted

<sup>80</sup> D Hubbard, *Maintenance: A Study of the Operation of Namibia's Maintenance Courts*, Windhoek: Legal Assistance Centre, 1995 at 66.



## Maternal mortality in Namibia

Data shows that the maternal mortality rate in Namibia is rising (from 0.38 in 2000 to 0.52 in 2006-07).<sup>a</sup> There are many possible explanations for this situation.

- Research shows that approximately 70% of women have at least four antenatal checkups during pregnancy; *however this means that 30% of pregnant women in Namibia are not receiving the recommended number of checkups during their pregnancy.*
- Although most women make their first antenatal visit in either their first or second trimesters (32.6% and 38.3% respectively), *this also means that approximately 30% of women do not see a health care provider until their third trimester.*
- Whilst a high percentage of pregnant women receive assisted deliveries by trained personnel (81.4%), *approximately 20% of pregnant women give birth without assistance from a trained professional.*
- Whilst free maternal health care is available, *only 11.7% of women do not pay for the delivery of their child.*<sup>b</sup>
- Although most women receive post-natal care, *approximately 20% of women do not receive any post-natal care.*<sup>c</sup>
- Many people in Namibia live in poor socio-economic conditions, meaning that unemployment and hunger can have adverse affects on the weakened mothers.<sup>d</sup>

Research has also shown that other factors contributing towards the rising rate of maternal mortality include insufficient availability of emergency care facilities and inequitable distribution of services across the country.<sup>e</sup> The high rate of HIV infection in the country is also a contributing factor, as HIV-positive mothers are more susceptible to malaria, tuberculosis and other diseases due to immunodeficiency and these diseases contribute to the increase in maternal mortality.<sup>f</sup> Women also report lack of money to pay for medical treatment, or trouble accessing health care services due to the distance and need for transport, as barriers to accessing health care services.<sup>g</sup>

Many of the factors contributing to maternal mortality are related to financial need. This illustrates the importance of ensuring that women can apply for maintenance when they are pregnant and ensuring that fathers understand that their obligations towards their children start during pregnancy.

<sup>a</sup> It must be recognised that there are large sampling errors associated with the data, but in spite of this caveat, it is clear that maternal mortality has risen (Ministry of Health and Social Services (MoHSS), *Namibia Demographic and Health Survey 2006-07*, Windhoek: MoHSS, 2008 at 113).

<sup>b</sup> For those who paid for delivery, the cost of delivery was less than N\$50 for 84.9% of the women surveyed, although 5.6% paid more than N\$300. Analysis of the data shows that the younger the mother and the lower her education level, the less money she paid for delivery.

<sup>c</sup> Ministry of Health and Social Services (MoHSS), *Namibia Demographic and Health Survey 2006-07*, Windhoek: MoHSS, 2008 at 125.

<sup>d</sup> National Planning Commission (NPC), *Second Millennium Development Goals Report, Namibia*, Windhoek: NPC, 2008 at 29.

<sup>e</sup> Ministry of Health and Social Services (MoHSS), *Report on Needs Assessment for Emergency Obstetrics Care*, Windhoek: MoHSS, 2006 at 87.

<sup>f</sup> Directorate of Special Programmes, *Progress Report on the Third Medium Term Plan on HIV/AIDS*, Windhoek: Ministry of Health and Social Services, 2009 at xi.

<sup>g</sup> *Id* at 128.

*"I would like to know [what to do] in the case of a baby that has not yet been born. I am a month before giving birth and do not have anything for the baby yet."*

Text message sent to the Legal Assistance Centre

## 8.9 Timeline for when the first maintenance payment should be made

The maintenance application allows the complainant to request when the first maintenance payment should be made. This date is needed as an order does not come into force until it is served.

Excerpt from Form A, section 1  
**Maintenance complaint**

5. I request that the defendant be ordered to make the following contribution(s) towards maintenance:

(a) A \*weekly/monthly contribution of –  
[...]

(b) The first payment should be made on ..... and after that on or before the ..... day of each succeeding \*week/month. All payments should be made  
to .....  
in favour of .....

On average, complainants requested that maintenance payments should start approximately 58 days after their application (range 0-165 days). Given that the data shows that the median time between the application and the maintenance order is 81 days (see section 12.9; approximately 2.5 months; n=772), the requested timeline appears to be fairly realistic although somewhat ambitious.

**Table 44: Time between date of application for maintenance and date requesting first maintenance payment (days)**

Number	Median	Minimum	Maximum
529	58	0	165

## 8.10 Details of how the maintenance payments should be made and frequency of maintenance payments

The complainant may also specify whether she would like to receive maintenance on a weekly or monthly basis. This was recorded on most maintenance complaints (1 095/1 711; 64.0%). **In all but one complaint, the request was for monthly payments.** In a single case, the complainant requested weekly payments but the outcome of the complaint was not recorded in the file.

## 8.11 Payment to be made to and in favour of

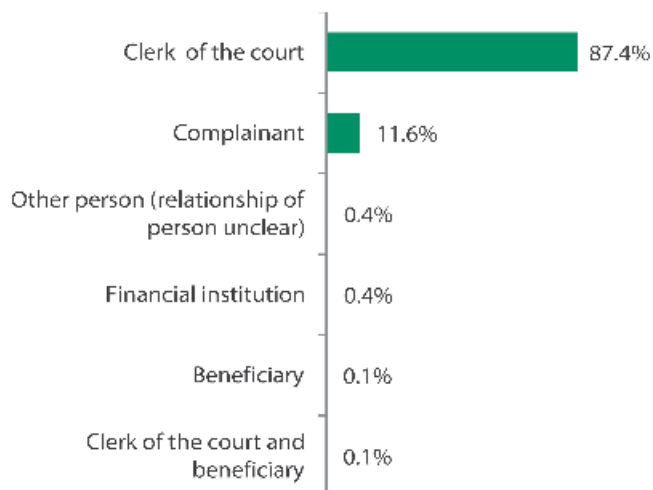
The Maintenance Act states that a maintenance order “*must specify the person to whom or organisation, financial institution or other institution to which the contributions may be made*”, and “*must, subject to rules or regulations made under this Act, specify the manner in which the contributions may be made*”.<sup>81</sup> The regulations do not contain any further details. The payment options under the Act are broader than in the 1963 Act which did not allow payments to be made directly to the beneficiary. Under the 1963 Act payments had to be made directly to the court and collected by the appropriate person.

<sup>81</sup> Maintenance Act 9 of 2003, section 17(2)(b)-(c).

The primary purpose of the cited provision in the 2003 Act was to allow for payments to be deposited directly in bank accounts, post office accounts, or via other such methods, to save complainants the trouble and expense of monthly trips to the court.

Details of whom the payment should be made to were completed in approximately half of the applications (819/1 711; 47.9%). Although the complainant has as wide range of options, **the majority of requests were for maintenance to be paid to the clerk of the court (716/819; 87.4%) followed by requests for the maintenance to be paid directly to the complainant (95/819; 11.6%).** Payments were made to an organisation, financial institution or directly to the beneficiary in a minority of cases.

**Chart 25: Who should the payment be made to?**



**Table 45: Who should the payment be made to?**

Recipient	Number	Percentage
Clerk of the court	716	87.4
Complainant	95	11.6
Other person (relationship of person unclear)	3	0.4
Financial institution	3	0.4
Beneficiary	1	0.1
Clerk of the court and beneficiary*	1	0.1
<b>Total</b>	<b>819</b>	<b>100.0</b>
Missing	892	52.1
<b>Total</b>	<b>1 711</b>	<b>100.0</b>

\* It is not clear why the complainant requested both clerk and beneficiary – it is probably an error or confusion on the part of the complainant.

Some courts appeared to be unaware of the flexibility provided by the Act. For example the clerks at the Rundu and Karasburg courts both noted that people who live far from the court face challenges in terms of both cost and time when they have to pay money to or collect money from the court. The clerk of the Rundu court also stated she cannot process all the maintenance payments for complainants in a single day. However these courts do not appear to be implementing the alternative mechanisms offered by the 2003 Act. Another clerk also said that sometimes the complainants do not come to the court for some months and need to be reminded to come in. This suggests that collecting the money from the court is a burden for some complainants. The clerk at a different court said that they do not like orders for payment via bank transfers because the defendant can simply close the bank account to avoid future payments. However this point is not relevant because defendants who pay directly to the court could also just stop making these payments.

Interviews with court officials showed that some courts have developed practical solutions to the problems of payment and collection of maintenance. For example the clerk of the court in Eenhana explained that she telephones the complainants when the defendants make monthly payments because the defendants will often make payments on different days each month and it is too expensive for the complainants to travel to the court from the villages if they are not assured that the payment has been made.

Another problem appears to be when the defendant is not living in the same region as the complainant. The clerk of the Karasburg court explained that “*many people work in Windhoek, and even though they make a salary it is also difficult to get the money here*”, whilst another court official asked “*why isn’t it possible for a defendant living in Lüderitz to make his maintenance payments to the nearest court? The delay of maintenance payments is due to having to send them across the country.*” One person explained that the defendant may send the money by bank transfer to someone he knows who lives near the court, who then pays the money to the court. This seems far more labour intensive than necessary. In such situations, the courts could recommend that the defendant makes payments to the complainant’s bank account.

One clerk stated that “*the payment system outlined in the new Maintenance Act must be improved*”, seemingly not recognising that the Act itself is not the problem. Instead it appears to be a lack of awareness of, and confidence in, the options. The Legal Assistance Centre often hears of cases where complainants ask for the money to be paid to the court because they think that this is a more formal arrangement. However there is no hierarchy of formality or enforceability in respect of payment methods – the consequences of not making a payment into the complainant’s bank account are the same as not making a payment to the court.

Some court officials said that although they are aware of the different payment options, they prefer that payments are made to the court so that the maintenance officer can monitor them. One clerk explained that when the complainant comes to collect the money and it is not there, this triggers the court’s knowledge of a non-payment. The clerk at another court made a similar statement, saying that the court prefers to receive the money directly so that they can have a record of whether maintenance is paid, which is useful if problems arise in the future.

The Maintenance Act states that if maintenance is not paid, the complainant may apply for enforcement procedures after any payment is 10 days late.<sup>78</sup> It would be less burdensome for complainants to receive maintenance directly and travel to the court only if they need to report a breach of the order, than to have to travel to the court each month to collect regular payments. Utilising direct payment methods could also free up the time of clerks for functions other than receiving and distributing maintenance payments.

Records of payments made can be provided in various ways. If the defendant makes a bank transfer, this transaction will be recorded on the bank statement of both the complainant and the defendant. If the defendant pays in cash, the court could encourage the complainant and defendant to use a simple receipt book to record the transactions. New cellphone facilities for transferring money could also be a low-cost option for making maintenance payments.<sup>82</sup>

**We recommend that complainants should be informed of the different payment options which are possible. Banks and other financial service providers could also be encouraged to leave public information materials at magistrates’ courts to help complainants and defendants know what options they could utilise for making payments. Secondly, when a maintenance order is made, the defendant should be clearly informed of the consequences of failing to pay maintenance regardless of the payment method, and the complainant should be clearly informed of how to report a breach of the order. We also recommend that the Ministry of Justice send a circular to the courts to confirm the different type of payment arrangements permitted under the Act and the various forms of records which can serve as acceptable proof of payments.**

We posted the following question on the LAC Facebook page to gauge public opinion:

*If you applied for [a] maintenance order and the court granted this order, would you prefer the other person to pay the money directly into your bank account or to the court?*

One person responded that she thought payments directly to the complainant are best:

*The courts are useless. Either the money will mysteriously get lost or they will never process the documentation and hold on to it for the interest for as long as possible. Rather have it put directly into my account and if payments are missed the courts should offer quick, easy, affordable and effective recourse.<sup>83</sup>*

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<sup>82</sup> Although banking costs vary between banks, at one bank in Namibia (First National Bank), it costs the sender N\$0.99 to transfer money to a cellphone. The recipient receives a pin number and can then withdraw the money from a First National Bank ATM at no cost. (*First National Bank pricing guide for 2013/2014*, available at <[www.fnbnamibia.com.na/about-fnb/pricing-guide.html](http://www.fnbnamibia.com.na/about-fnb/pricing-guide.html)>, last accessed 23 September 2013)

<sup>83</sup> The comment about the courts gaining interest from the money seems unrealistic. Most money will be held as cash in

However in contrast, another person responded that payments to the court are best:

*I would rather have him pay it to the court then it's guaranteed that he will definitely pay.*

Discussion with community members has also shown that people perceive payments made to the court as having more “authority” and many people prefer this option, despite the fact that collecting the payments will be more of an inconvenience to them.

Although payment to the court is the most popular option, it is not without its problems. In 2012 the Legal Assistance Centre received a complaint that the Omaruru court had stopped making maintenance payments. The client informed us that the court had been unable to make maintenance payments for three months due to a broken computer.

We followed up on the complaint with the Omaruru court. The clerk at the court stated that the court was at that time unable to make maintenance payments but that it had been only for one month, not three, that payments had not been processed. The broken piece of equipment had been sent to Windhoek for repairs. The clerk noted that the machine was “worn out” and that she had requested a replacement. The court had tried to make manual payments but apparently this was incompatible with the system. The clerk anticipated that they would be able to make payments again the following week.

The LAC followed up on the story a few weeks later. The court had received a new machine. Part of the reason for this may have been the publicity that had ensued when one frustrated community member sent a text message to *The Namibian* newspaper:

*“WE, mothers from Omaruru, have been struggling without maintenance payments for four month[s] because the computer is out of order. We are being told to wait but nothing has been done. Our children are suffering.”*

Published on *The Namibian* sms page on 10 August 2012

The application form also allows the complainant to specify whom the payment will be made in favour of. This is probably for situations where the payment is made to someone other than the beneficiary – for example where the payment is made to the mother or grandmother in favour of the beneficiary.

Details of whom the payment should be made in favour of were completed in only approximately half of the applications (803/1 711; 46.9%). The majority of payments were to be made in favour of the beneficiary (509/803; 63.4%) or complainant (276/803; 34.4%). A few cases (13) confusingly requested payment to the complainant *and* the beneficiary (probably resulting from a misunderstanding of the question). Payments were made in favour of another person in only a minority of cases. Other people receiving the payments included an aunt, the mother of the child (where the complaint was made by the grandmother) and a person whose relationship was unspecified.

*“I would like to find out, if a person is divorced and they are paying maintenance towards the kids monthly through bank deposits, what should one do to change that so that it can be paid through the maintenance court.”*

Email question sent to the Legal Assistance Centre

**Table 46: Who should the payment be made in favour of?**

Recipient	Number	Percentage
Beneficiary	509	63.4
Complainant	276	34.4
Complainant and beneficiary	13	1.6
Other person	3	0.4
Clerk of the Court*	2	0.2
<b>Total</b>	<b>803</b>	<b>100.0</b>
Missing	908	53.1
<b>Total</b>	<b>1 711</b>	<b>100.0</b>

\* It is not clear why clerk of the court is completed – it is probably an error or confusion on the part of the complainant.

the cash hall. Even if money is channelled through a bank account, the cost of running the bank account is likely to be higher than the interest received.



### Summary of the amount of maintenance requested

- The median total amount of maintenance requested for one beneficiary was N\$500. The amount of maintenance applied for is approximately half of the estimated expenditure required to maintain the beneficiary.
- Between 2005 and 2008 there was no change in the amount of maintenance requested despite increases in the cost of living.
- The more beneficiaries there are, the lower the amount of maintenance requested per beneficiary.
- No patterns were identified when the amount of maintenance requested was assessed by rural/urban residence or by language group.
- Very few complainants requested maintenance in the form of in-kind payments or payments directly to institutions (such as schools).
- Very few complainants made claims for contributions to pregnancy or birth-related expenses.
- All but one request was for the maintenance to be paid on a monthly basis.
- The vast majority of requests were for maintenance to be paid to the clerk of the court, meaning that other payment options intended to be more convenient for complainants are not being utilised.

## 8.12 Profile of defendants

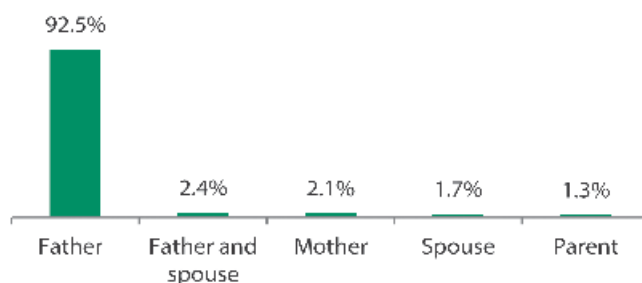
The term **defendant** refers to the person being requested to pay maintenance.<sup>84</sup>

### Relationship between defendant and beneficiary

In a large majority of complaints, the defendant was liable to maintain the beneficiary because he was the father of the child (1 199/1 264; 94.9%, data missing from 447 applications). There were a small number of files where the defendant was liable because she was the mother (26/1 264; 2.1%). The defendant was listed as the spouse, or spouse of the complainant and parent of the beneficiary, in a total of 52 applications (52/1 264; 4.1%).<sup>85</sup>

Although there were only a few cases where the defendant was the mother of the child (26), this is still a positive finding as in the 1995 study there were no maintenance complaints made by a father against a mother.<sup>86</sup>

**Chart 26: Defendant's relationship to beneficiary (n=1 264)**



**Table 47: Defendants' relationship to beneficiary**

Relationship	Number	Percentage
Father	1 169	92.5
Father and spouse	30	2.4
Mother	26	2.1
Spouse	22	1.7
Parent	17	1.3
<b>Total</b>	<b>1 264</b>	<b>100.0</b>
Missing data	447	26.1
<b>Total</b>	<b>1 711</b>	<b>100.0</b>

<sup>84</sup> Maintenance Act 9 of 2003, section 1, definition of "defendant".

<sup>85</sup> This is in line with the finding on page 141 that there were 50 complaints where a complainant requesting maintenance for himself or herself was identified as the spouse of the defendant.

<sup>86</sup> D Hubbard, *Maintenance: A Study of the Operation of Namibia's Maintenance Courts*, Windhoek: Legal Assistance Centre, 1995 at 58.

When the relationship between defendant and beneficiary is compared to that of the relationship between complainant and beneficiary, in the majority of cases both parties were the parents of the child (1 030/1 185; 86.0%). In 5.1% of cases, an extended family member (including a grandparent) applied for maintenance from the father (60/1 185) and in 1.4% of cases, a guardian or primary caretaker applied for maintenance from the father (17/1 185). Extended family members applied for maintenance from the mother of the child in 1.3% of cases (15/1 185).

**Table 48: Relationship between complainant, defendant and beneficiary**

Relationship between complainant and beneficiary							
Relationship between defendant and beneficiary	Relationship	I am the mother	I am the grandmother	I am another extended family member	I am the father	I am a guardian / primary caretaker	Total
	Information missing for the defendant	22	1	1	1	0	27
	He is the father of my child	991	47	13	0	17	1 079
	He/she is my spouse	2	0	0	0	0	9
	He is the father of my child and my spouse	30	0	0	0	0	30
	She is the mother of my child	0	8	7	9	0	26
	He/she is my/our parent	0	0	4	0	0	14
	<b>Total*</b>	<b>1 045</b>	<b>56</b>	<b>25</b>	<b>10</b>	<b>17</b>	<b>1 185</b>

## Age of defendant

The majority of defendants (630/811; 77.7%; data missing from 900 applications) were between the ages of 25 and 44. The median age of the defendants was 35 (mean 36.47; range 18-65). This is a slightly older age bracket compared to the majority of complainants, who were mainly between the ages of 18 and 39. The range in the age of the defendants (18-65) is also smaller than the range in age of the complainants (12-85). This is to be expected given the fact that the defendant must be able, but failing or neglecting, to provide reasonable maintenance for the beneficiary.<sup>87</sup> It is also logical in light of the fact that children are sometimes cared for by grandparents, who may become maintenance complainants.

There were seven cases where the defendant was under the age of 21 (a minor). These defendants were all 18-20 years old. A minor may be able to provide support if he has left school and is working. Alternatively, if the minor defendant is still attending school or is unemployed, the mutual duty of support that exists between parents and children can extend to other family members.<sup>88</sup> For example, the grandparents could be ordered to assist.

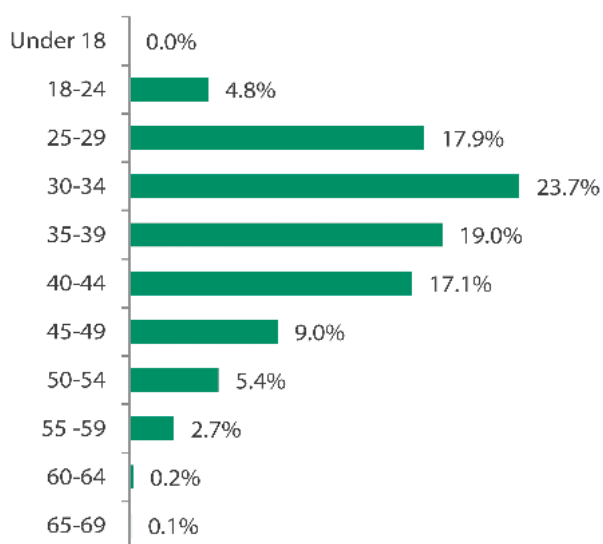
In five of the seven cases a consent order was made. In each of these cases the defendant was working. In the two remaining cases, the outcome of the cases was not recorded in the file.

The 1995 maintenance study did not analyse the age of the defendants.<sup>89</sup>

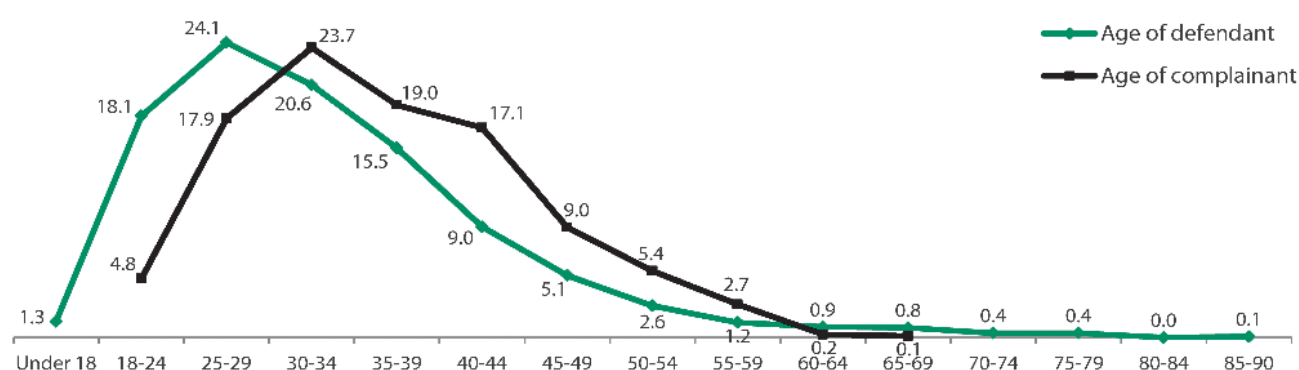
<sup>87</sup> Maintenance Act 9 of 2003, section 5.

<sup>88</sup> See page 29 for a discussion on legal liability to maintain.

<sup>89</sup> D Hubbard, *Maintenance: A Study of the Operation of Namibia's Maintenance Courts*, Windhoek: Legal Assistance Centre, 1995.

**Chart 27: Age of defendant (n=811)****Table 49: Age of defendants (years)**

Age group	Number	Percentage
Under 18	0	0.0
18-24	39	4.8
25-29	145	17.9
30-34	192	23.7
35-39	154	19.0
40-44	139	17.1
45-49	73	9.0
50-54	44	5.4
55-59	22	2.7
60-64	2	0.2
65-69	1	0.1
<b>Total</b>	<b>811</b>	<b>100.0</b>
Not recorded	900	52.6
<b>Total</b>	<b>1711</b>	<b>100.0</b>

**Chart 28: Comparison of age of defendant (n=811) and age of complainant (n=1 382)**

## Sex of defendant

The vast majority of defendants in the maintenance complaints were men (1 538/1 572; 97.8%; data missing from 139 complaints), whilst only 2.2% were women (34/1 572).<sup>90</sup> This is to be expected given the fact that the vast majority of complainants in maintenance order applications were women (1 540/1 570; 98.1%) and most maintenance complaints involved the child's parents. Although only a very small number of defendants were women, the fact that there were some is a positive sign that some people are aware that the law on maintenance can be utilised by either parent.

**Chart 29: Sex of the defendant (n=1 572)****Table 50: Sex of defendant**

Sex	Number	Percentage
Male	1 538	97.8
Female	34	2.2
<b>Total</b>	<b>1 572</b>	<b>100.0</b>
Not recorded	139	8.1%
<b>Total</b>	<b>1 711</b>	<b>100.0</b>

<sup>90</sup> On page 177, the data shows that we can confirm that the mother was the defendant in 26 cases. The relationship to the beneficiary was not specified in the remaining eight cases – the defendant could have been the mother, an extended family member or a guardian of the child.

The 1995 maintenance study did not analyse the sex of the defendant. However the report showed that all maintenance complaints were brought by women.<sup>91</sup> From this we can infer that all defendants were probably men given that most maintenance complaints involve the child's parents, who have the primary duty of support for the child. Therefore there has been a positive change in the increase in understanding in the years between the two studies. This change may also stem from an increase in the number of men who may have custody of their children.

## Language group

As stated on page 153, analysis of the language group of the complainant and defendant is based on their surname and as a result the analysis must be treated with caution.

The results for the language group of the defendant are very similar to the language group of the complainant, both when assessed by all courts and when assessed for the files opened in the Windhoek court only.

**The results show that nearly 40% of defendants were Oshiwambo speakers and approximately 25% Damara/Nama speakers. Approximately one-seventh were Afrikaans speakers and one-twelfth were Otjiherero speakers.** The remaining language groups (German, Setswana, English, Rukwangali and Silozi) were identified in only a minority of files (each in less than 2% of the files). In 12.5% of the files we were unable to determine the language spoken by the defendant. The proportional differences between language groups are similar to the proportion of language speakers in the entire population, although as seen with complainants, Afrikaans speakers seem slightly more likely to be involved in maintenance cases (constituting 13.1% of the defendants compared to representing 7.2% of the population) and Rukwangali speakers less likely (constituting only 0.8% of defendants but representing 15% of the population). Further discussion on the pattern of language groups is provided under the language groups of the complainants.

**Table 51: Language group of defendant and complainant**

Language group	Number – defendant	Percentage	Number – complainant	Percentage	Percentage in the population*	Is the sample higher or lower than the general population distribution?
Oshiwambo	597	34.9	532	31.1	48.3	Higher
Damara/Nama	458	26.8	517	30.2	11.8	Lower
Afrikaans	224	13.1	256	15.0	7.2	Higher
Otjiherero	145	8.5	136	7.9	8.4	Similar
German	21	1.2	21	1.2	0.4	Similar
Setswana	19	1.1	18	1.1	0.2	Similar
English	17	1.0	16	0.9	1.4	Similar
Rukwangali	14	0.8	7	0.4	15.0	Lower
Silozi	2	0.1	4	0.2	Combined under other	–
Other/ language group unclear / information missing	214	12.5	204	11.9	7.1**	–
<b>Total</b>	<b>1 711</b>	<b>100.0</b>	<b>1 711</b>	<b>100.0</b>		

\* **Source:** Namibia Statistics Agency (NSA), *Namibia Household Income and Expenditure Survey (NHIES) 2009/2010*, Windhoek: NSA, 2012 at 27.

\*\* Includes Khoisan and Caprivi languages, and other European and other African languages.

<sup>91</sup> D Hubbard, *Maintenance: A Study of the Operation of Namibia's Maintenance Courts*, Windhoek: Legal Assistance Centre, 1995 at 58.

**Table 52: Language group of defendant – Windhoek court only**

Language group	Number – defendant	Percentage	Number – complainant	Percentage
Oshiwambo	86	35.5	67	27.7
Damara/Nama	64	26.4	63	26.0
Afrikaans	25	10.3	36	14.9
Otjiherero	18	7.4	24	9.9
Rukwangali	9	3.7	4	1.7
German	7	2.9	11	4.5
English	7	2.9	7	2.9
Setswana	6	2.5	8	3.3
Silozi	0	0.0	0	0.0
Language group unclear / information missing	20	8.3	22	9.1
<b>Total</b>	<b>242</b>	<b>100.0</b>	<b>242</b>	<b>100.0</b>

The language spoken by the complainant can be compared with the language spoken by the defendant. **Overall the majority of complainants and defendants in each case were of the same language group (1 066/1 492; 71.4%).** This finding is not surprising given that the complainants and defendants were most often the child's parents and intimate relationships often occur between members of the same language group.<sup>92</sup> The same-language relationship was highest for complaints made by Oshiwambo-speaking complainants (454/525; 86.5%) and lowest for complaints made by English-speaking complainants (4/16; 25.0%). In approximately one-third of cases (426/1 492; 28.6%) the complainant and defendant were from a different language group. However this information must be treated with an even higher degree of caution due to the small sample sizes for some language groups (such as English). In many cases the parents may also have been bi- or multi-lingual. To avoid misleading results, cases where the language group of the complainant or defendant is missing have been removed from this analysis.

The 1995 maintenance study also noted similar language group distribution between complainants and defendants. Afrikaans-speaking respondents were involved in 31% of all cases followed closely by Damara/Nama-speaking respondents who were involved in 30% of all cases. Oshiwambo speakers were respondents in only 18% of all cases, whilst 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 few English speakers or German speakers amongst the respondents in the sample.<sup>93</sup>

**Table 53: Comparison of language group of complainant and defendant**

Language group of complainant	Defendant is same language group	Defendant is from a different language group	Total	Percentage in same language group
Oshiwambo	454	71	525	86.5
Damara/Nama	340	173	513	66.3
Otjiherero	90	45	135	66.7
Silozi	2	2	4	50.0
Afrikaans	159	95	254	62.6
Setswana	9	8	17	52.9
German	6	15	21	28.6
Rukwangali	2	5	7	28.6
English	4	12	16	25.0
<b>Total*</b>	<b>1 066</b>	<b>426</b>	<b>1 492</b>	<b>71.4</b>

\* Cases where the language group of the complainant or defendant is missing have been removed.

<sup>92</sup> A similar pattern was found in the Legal Assistance Centre's domestic violence study (Legal Assistance Centre (LAC) *Seeking Safety: Domestic Violence in Namibia and the Combating of the Domestic Violence Act 4 of 2003*, Windhoek: LAC at 285).

<sup>93</sup> D Hubbard, *Maintenance: A Study of the Operation of Namibia's Maintenance Courts*, Windhoek: Legal Assistance Centre, 1995 at 62.



The amount of maintenance requested by the complainant can be assessed by the language group of the defendants. The results show that the amounts requested do vary between language groups, but the sample size is very small for some groups – such as Setswana or Silozi-speaking defendants. This means that we cannot draw conclusions from this data.

**Table 54: Amount of maintenance requested by defendant's language group for all beneficiaries (N\$)**

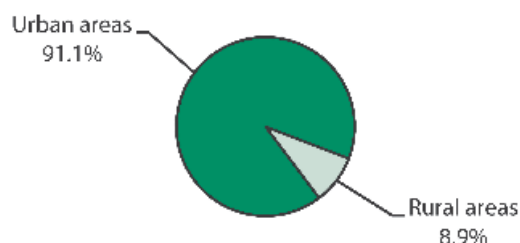
Language group	Number	Median	Mean	Minimum	Maximum
Afrikaans	206	600	874	100	10 000
Damara/Nama	422	400	554	100	5 000
English	8	325	356	100	750
German	11	400	810	200	2 655
Oshiwambo	368	250	295	50	2 000
Otjiherero	73	250	268	100	900
Rukwangali	19	250	248	100	500
Setswana	16	215	288	150	950
Silozi	3	250	200	100	250
Other / language group unclear	73	500	664	150	4 000

The amount of maintenance requested by language group can also be assessed per beneficiary. However again there is little difference and there is only a small sample size for some of the groups.

## Residence in a rural versus urban area

The majority of respondents (1 279/1 404; 91.1%) lived in urban areas. This is similar to the residence of the majority of complainants (85.4%). The rest of the respondents (8.9%) lived in rural areas, as did 14.6% of complainants.<sup>94</sup> One defendant was recorded as living in South Africa. In this case, a maintenance order was successfully obtained under the Reciprocal Enforcement of Maintenance Orders Act 3 of 1995. The law on maintenance across international borders is discussed on page 95.

**Chart 30: Residence of defendant (n=1 404)**



**Table 55: Defendants' place of residence: urban or rural area**

Defendants' place of residence	Number	Percentage
Larger urban area	1 143	81.4
Smaller urban area	136	9.7
Rural area	125	8.9
<b>Total</b>	<b>1 404</b>	<b>100.0</b>
Missing	307	17.9
<b>Total</b>	<b>1 711</b>	<b>100.0</b>

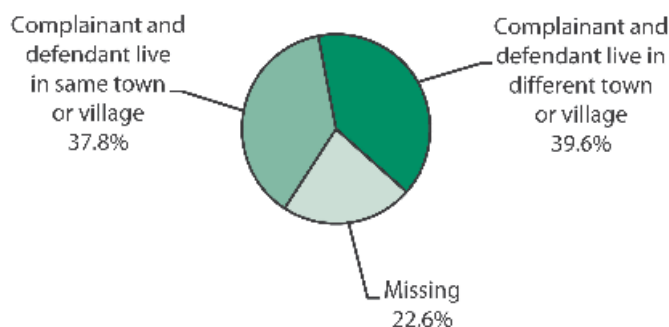
The 1995 study did not assess the residence patterns of the parties to the maintenance complaints.<sup>95</sup>

Analysis of the data shows that the defendant and complainant live in the same town or village in approximately 40% of cases (37.8%). In a similar proportion of applications (39.6%), the complainant and defendant live in a different town or village. Data is missing for the remaining cases. The high proportion of cases where the complainant and defendant live in different places may explain why it is so common for the courts to struggle to locate the defendant and to secure his attendance at court. This factor could also point to difficulties for defendants who are required to make payments into a court which may be different from the one which made the maintenance order.

<sup>94</sup> Categorisation into larger urban, smaller urban or rural areas is based on the designation of urban centres as per the preliminary results for the 2011 census (National Planning Commission, *Namibia 2011 Population and Housing Census Preliminary Results*, Windhoek, Namibia: National Planning Commission, 2012 at 57).

<sup>95</sup> D Hubbard, *Maintenance: A Study of the Operation of Namibia's Maintenance Courts*, Windhoek: Legal Assistance Centre, 1995 at 62.

**Chart 31: Complainant and defendant place of residence (n=1 711)**



**Table 56: Complainant and defendant place of residence**

Place of residence	Number	Percentage
Complainant and defendant live in same town or village	647	37.8
Complainant and defendant live in different town or village	677	39.6
Missing	387	22.6
<b>Total</b>	<b>1 711</b>	<b>100.0</b>

The amount of maintenance requested by the complainant can also be assessed according to whether the defendant was residing in a rural or urban area. The results show that there is little difference.

**Table 57: Amount of maintenance requested by rural/urban residence of defendant for all beneficiaries (N\$)**

Rural/urban residence	Number	Median	Mean	Minimum	Maximum
Larger urban areas	1 065	500	664	100	10 000
Smaller urban areas	124	400	579	100	4 000
Rural areas	118	400	497	100	6 500

## 8.13 Income, assets and expenditure of defendant

### Income and assets of defendant

As with details of the complainants' income, assets and expenditure, details of the defendants' income, assets and expenditure were recorded in only a minority of files. As for complainants, this information was collated both from the relevant section on the application form and from details contained within the file. Therefore this information is not based only on the information provided by the complainant on the initial maintenance complaint; it may also include information provided by the defendant at a later stage. Although there may be some errors in the information provided, particularly if the information was provided only by the complainant, it is the information used by the court to review the application. As noted in the section about the complainant, the fact that so few cases contained details of the defendant's financial position is a matter of concern as the court should be using such information to determine the amount of maintenance that should be imposed. **We recommend that the Ministry of Justice consider the development of guidelines or a revision of the regulations to clarify the procedure for investigating the defendant's financial position. Supervisory personnel should also be tasked to spot-check files to ensure that this practice is adhered to.**

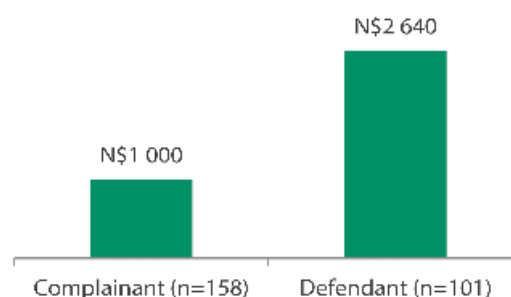
Details of gross income were recorded in 101 files, net income in 157 files and total income in 10 files. The median gross income was N\$2 640 per month (range of N\$250-N\$45 546). The median net income was N\$1 784 per month (range of N\$112-N\$28 666). The median total income was N\$3 472 (range N\$250-N\$12 428). There was one case where the complainant stated that the defendant had a monthly income of N\$350 000. The complainant stated that the defendant owned four businesses, three car and three houses. She estimated that he was earning N\$15 000-N\$20 000 per day. The file shows that the defendant was ordered to pay N\$2 655 per month. The file also contains a note to say that the defendant agreed to give the complainant one of his businesses in lieu of maintenance.

**Table 58: Income of defendant (N\$)**

Income	Number	Median	Mean	Minimum	Maximum
Gross	100	2 570	4 004	250	45 546
Net	157	1 784	2 500	112	28 666
Total*	10	2 901	3 472	250	12 428

\* Total income is where gross/net income details were not provided separately.

The gross income of the complainant and defendant can be compared as the data was collected from a similar number of files, but the numbers of files for net and total income are too varied to allow for a realistic comparison. The comparison of gross income shows that **the median income of the defendant is approximately twice the median income of the complainant**. It should be noted that although the data can be compared, the sample size is small. Further discussion on national patterns for income and expenditure is provided under the analysis of the complainants' income and expenditure.

**Chart 32: Gross income of complainant and defendant (N\$)****Table 59: Gross income of complainant and defendant (N\$)**

Gross income	Number	Median	Mean	Minimum	Maximum
Complainant	158	1 000	1 984	60	24 000
Defendant	100	2 570	4 004	250	45 546

Details of the defendant's expenditure were found in only a minority of the files (37/1 711; 2.2%). Therefore analysis of this information would provide an unrealistic picture. The lack of information of the defendant's expenditure is a matter of concern, particularly since defendants may have a legal liability to support children of different mothers.

## 8.14 Support previously provided by defendant

Form A requires the complainant to state whether the defendant has provided maintenance in the past, and if so, when the payments ceased. This information is required because the Maintenance Act states that for an order to be made, the defendant must be failing to provide maintenance and the complainant must confirm this under oath. If the defendant has provided maintenance in the past, the complainant must give this information to the court.<sup>96</sup>

### Excerpt from Form A, section 1 Maintenance complaint

4. The defendant has since ..... not supported \*myself/the said beneficiary(ies) and has made \*no contribution towards maintenance/the following contribution towards maintenance:

.....  
.....

**Defendants had previously provided maintenance in only approximately 15% of complaints (245/1 711; 14.3%).** Where this information was recorded, complainants reported one to three forms of support.

<sup>96</sup> The complainant must confirm under oath or affirmation that the person against whom the complaint is made is legally liable to maintain the beneficiary but is failing to do so, or, if the complaint pertains to an existing order, that there is sufficient cause for the suspension, substitution or discharge of the existing order (Maintenance Act 9 of 2003, section 9(2)).

The support provided was most commonly unspecified support since the child's birth (n=123), followed by money (n=74) and unspecified support on several occasions only when asked (n=30).

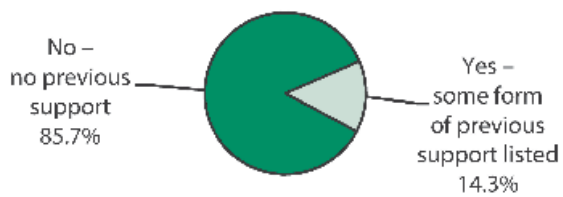
In the applications where previous financial support was quantified (n=74), the median amount provided was N\$300 (range N\$50-N\$1 600). **Thus the median amount of maintenance previously provided is 60% of the median amount of maintenance applied for (N\$500).**

Of the defendants who had previously paid maintenance (n=245), there was a large range in the time periods when the payments had last been made. Approximately one-third had paid within the last year (74/239; 31.0%), but one-fifth had last provided maintenance 5-10 years ago (53/239; 22.2%). Some 15% had not provided maintenance for over 10 years (37/239; 15.5%).

**Overall the median time in months between the application and the date maintenance was last paid was two years (28.0 months; mean 55.5 months, range 0-214 months).** In the case where maintenance was last paid 214 months ago (nearly 18 years previously), there were no details in the file other than that the defendant had not paid maintenance since the child's birth. The mother made the complaint in March and a consent order was signed in November of the same year.

The results suggest that complainants do not rush to court to access maintenance payments. This is in line with discussion throughout this report which suggests that many complainants would prefer to provide for the child themselves, if they were able to. The reality appears to be that the complainant tries to provide for the child for as long as possible and then applies for maintenance when she can no longer manage on her own. **More awareness-raising is needed to encourage people that it is acceptable to apply for maintenance – mothers who struggle in the interim may not be acting in the best interests of their children.** It is also important that people are able to associate the concept of maintenance with meeting the needs of the child and not with the idea that it is used to punish an absentee father.

**Chart 33: Has defendant previously provided maintenance? (n=1 711)**



**Table 60: Support previously provided by defendant**

Type of support	Number	Percentage
Support since child's birth	123	46.9
Money	74	28.2
Only when asked several times	30	11.5
Clothing	13	5.0
Food	8	3.1
Medical aid	6	2.3
Support for 3/6/7 months	4	1.5
School-related expenses	3	1.1
Since pregnancy	1	0.4
<b>Total</b>	<b>262*</b>	<b>100.0</b>

\*Multiple responses possible

**Table 61: Support previously provided by defendant**

Type of support	First form of support listed	Second form of support listed	Third form of support listed
Support since child's birth	122	1	
Money	71	3	
Only when asked several times	26	4	
Clothing	8	4	1
Support for 3/6/7 months	4		
Medical aid	3	2	1
Food	2	5	1
Since pregnancy	1	3	
Subtotal	237	22	3
<b>Total</b>	<b>262</b>		

**Table 62: Time between date maintenance was last paid and application**

Period when maintenance was last paid	Number	Percentage
0-12 months ago	74	31.0
1-2 years ago	39	16.3
2-3 years ago	14	5.9
3-5 years ago	22	9.2
5-10 years ago	53	22.2
+10 years ago	37	15.5
<b>Total</b>	<b>239</b>	<b>100.0</b>

**Table 63: Time between date maintenance was last paid and application (days)**

Number	Median	Mean	Minimum	Maximum
239	26	54.2	0	214

### Summary of the profile of the defendant

- In the vast majority of complaints, the defendant was the father of the child.
- The majority of defendants were between the ages of 25 and 44.
- The results show that nearly 40% of defendants were Oshiwambo speakers and approximately 25% Damara/ Nama speakers. Approximately one-seventh were Afrikaans speakers and one-twelfth were Otjiherero speakers. This essentially mirrors the language group pattern of the complainants.
- The majority of defendants live in urban areas. Approximately 40% live in the same town or village as the complainant.
- The defendant had previously provided maintenance in approximately 15% of the applications, with contributions typically having ceased two years or longer before the complainant applied for maintenance.





# Chapter 9

## SUMMONSES AND DIRECTIVES TO GIVE EVIDENCE

When a maintenance complaint is made, the maintenance officer *must* investigate the case.<sup>1</sup> During the investigation process, the maintenance officer may, among other tasks, cause any person, including the defendant or complainant, to be *directed* to appear before that maintenance officer and to give information or produce any book, document, statement or other relevant information.<sup>2</sup> Form C1A is used to direct the relevant person to attend court.

The maintenance officer may also ask the magistrate to issue a *summons* for the complainant, defendant or witness to attend the court to assist with the investigation. A witness can be summoned in this instance for the purpose of identifying the defendant or the defendant's place of residence or employment, or to give information about the defendant's financial position.<sup>3</sup> In addition to the option to summon witnesses for the investigation, the maintenance officer *must* summon any person, including the complainant and the defendant, to the court to give evidence as required.<sup>4</sup> The summoning of a witness for a maintenance enquiry must be done in the same manner as the summoning of a witness to attend a criminal trial in a magistrate's court.<sup>5</sup>

### The difference between a summons and a directive

A directive can be issued by a maintenance officer, whereas only a magistrate can issue a summons. However, both a directive and a summons must be obeyed. The punishment for ignoring a directive could be a fine of up to N\$2 000 or imprisonment for up to six months,<sup>a</sup> and the punishment for ignoring a summons is a fine of up to N\$4 000 or imprisonment for up to 12 months.<sup>b</sup>

<sup>a</sup> Regulations for the Maintenance Act contained in Government Notice 233 of 2003 of 17 November 2003, *Government Gazette* 3093 (hereinafter "**Maintenance Regulations**"), regulation 3(3).

<sup>b</sup> Maintenance Act 9 of 2003, section 36. However, some courts do not seem to be utilising this provision. For example, at one court, if the defendant does not respond to the summons, the clerk will telephone the defendant in the first month, send a warning letter in the second month, and only in the third month go to the prosecutor for a warrant of arrest.

<sup>1</sup> Maintenance Act 9 of 2003, section 9(4).

<sup>2</sup> Id, section 10(1)(a).

<sup>3</sup> Id, section 11(1). The difference between the use of a directive versus a summons for the purpose of investigation by the maintenance officer are discussed in section 4.3.2.

<sup>4</sup> Id, section 12(1).

<sup>5</sup> Id, section 12(3). The Minister of Justice may also prescribe the manner in which the process of the maintenance court is prepared and served, and the form of the summons used under this Act (section 12(4)). See Maintenance Regulations, regulations 4 and 28.

## 9.1 Directives to appear before the maintenance officer

### Excerpt from Form C1A Directive to attend a maintenance enquiry

In the maintenance inquiry between

..... (complainant)

and

..... (defendant)

Name of person: .....

ID No/Date of birth: .....

Work address: .....

Home address: .....

You are hereby summoned to appear in person before the maintenance officer at the abovementioned court at 9h00 to:

(a) give evidence and/or

(b) produce the following **\*book/s \*documents/\*material** (\* delete whichever is inapplicable)

If you fail to comply with this directive, you commit an offence and are liable on conviction to a fine of up to N\$2000, or to imprisonment up to six months, or to both fine and imprisonment.

[...]

#### Summary of differences between directives and summonses

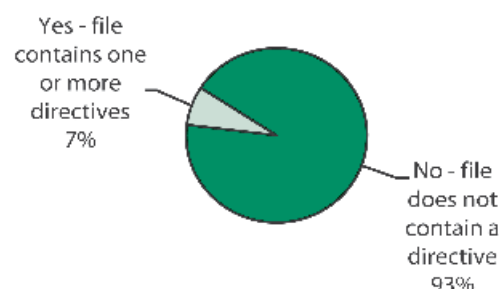
Directive (section 10)	Summons (section 11)
issued by maintenance officer	issued by magistrate
method of communication not clear	formal service of process
can direct appearance before maintenance officer	can direct appearance for examination by maintenance officer or to give evidence in court
penalty for non-compliance	stiffer penalty for non-compliance
no exemption for complainant and defendant from criminal offence of failing to comply with directive to appear before a maintenance officer	complainant and defendant exempted from the criminal offence of failing to comply with a summons to attend a maintenance enquiry
no provision for providing information by some other means	appearance can be excused if information provided in advance
no reference to Criminal Procedure Act 51 of 1977; travel expenses may not be claimed	selected provisions of Criminal Procedure Act 51 of 1977 apply, including provision on travel expenses
no mechanism for consenting to requested maintenance	mechanism for consenting to requested maintenance

*“... the difficulties with the operation of the maintenance system ... – which imposes disproportionately heavy burdens on mothers – undermines the achievement of the foundational value of gender equality ...”*

*S v Visser 2004 (1) SACR 393 (SCA) (referring to failings in the South African maintenance system similar to those in Namibia)*

A small minority of the files contained a C1A form directing someone to appear before the maintenance officer and to give information or produce relevant information (122/1 687; 7.2%). Most files contained one (93/122; 76.2%) or two (21/122; 17.2%) directives. A small number of files contained three, four or five directives, resulting in a total of 164 directives being included in the sample.

**Chart 34: Does the file contain a directive to attend court? (n=1 687)**



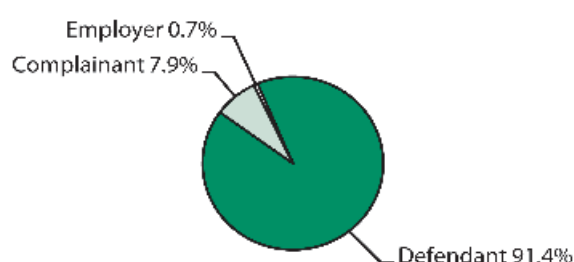
**Table 64: Number of directives on file**

Number of directives on file	Number of files containing a directive	Number of forms	Percentage
1	93	93	76.2
2	21	42	17.2
3	5	15	4.1
4	1	4	0.8
5	2	10	1.6
<b>Total</b>	<b>122</b>	<b>164</b>	<b>100.0</b>

Directives were issued at five of the 18 courts in the sample. The majority (125/164; 76.2%) were issued from the Keetmanshoop court. A small percentage were issued from the Gobabis court (36/164; 22.0%). At the Katutura, Otavi and Keetmanshoop courts we sampled one file that each contained one directive.

The majority of directives were issued to the defendant (127/139; 91.4%; information missing from 25 directives). The remainder were issued to the complainant (11/139; 7.9%), and in one case to an employer.

**Chart 35: Person summoned using a directive to attend the maintenance court (n=139)**



**Table 65: Person summoned using a directive to attend the maintenance court (Form C1A)**

Person	Frequency	Percentage
Defendant	127	91.4
Complainant	11	7.9
Employer	1	0.7
<b>Total</b>	<b>139</b>	<b>100.0</b>
Missing	25	15.2
<b>Total</b>	<b>164</b>	<b>100.0</b>

Form C1A allows the maintenance officer to request the witness to give evidence and/or produce books, documents or material. Approximately a third of the directives issued contained details of the information that the witness should bring (45/164; 27.4%). All of the directives containing this information were issued from the Keetmanshoop court – the persons collecting the data noted that the court printed the message “Please bring your latest pay slip and expenditures” on the bottom of the forms. On the form directed to the employer, the employer was requested to bring proof to the court as to why he/she was not implementing an order for the attachment of wages.

The median time between the date on which the directive was signed by the maintenance officer and the date on which the person was required to attend court was 43 days (mean 42.4 days). As this form does not require a formal return of service, we cannot analyse how long it took for the witness to receive it. The timeline is similar to that for the delivery of summonses (see page 196), and appears to be a realistic estimation of the time taken to investigate cases.

Given that few courts use this form, and that the forms are only partially completed when they are used, we recommend that the Ministry of Justice provide training for maintenance court officials on when it is appropriate to use a directive and how to complete the form. Of particular relevance is clarification of when a directive should be addressed to the defendant/complainant compared to the use of a summons.

The Maintenance Act of 1963 did not allow for issuing directives; therefore comparable information is not available in the 1995 study.<sup>6</sup>

## 9.2 Summons issued to a witness

Excerpt from Form C11

**Summons to a witness to attend a maintenance enquiry**

In the maintenance inquiry between ..... (complainant)  
and ..... (defendant)

PART A  
SUMMONS

To any person authorised to serve process:  
You are hereby directed to –

1. Summon the following person(s):

Name of witness: .....  
Identity number/date of birth: .....  
Address: .....  
\*Rail warrant attached/not issued:  
and  
Name of witness: .....  
Identity number/date of birth: .....  
Address: .....  
\*Rail warrant attached/not issued:  
and  
Name of witness: .....  
Identity number/date of birth: .....  
Address: .....  
\*Rail warrant attached/not issued:

\* (a) to appear in person before the above-mentioned court / the maintenance officer of the above-mentioned court at 09h00 on the date stated above; and  
\* (b) to remain present until excused by the court,  
\* (c) to be examined by the maintenance officer in terms of section 11 of the Act or to give evidence at an enquiry in terms of section 12 of the Act.

2. Serve on each of the above-mentioned person(s) a copy of this summons and report to this Court what you have done with regard to it; and

3. Request the above-mentioned person(s) to produce the following at the enquiry:  
(a) .....  
(b) .....  
(c) .....

Warnings to the person(s) who \*is/are hereby summoned as \*a witness(es):

1. If your above-mentioned address changes before the proceedings are finalised or before you are officially informed that you are no longer required as a witness, you must inform the maintenance officer of the above-mentioned court thereof.

2. If you fail to comply with the above-mentioned warning and this summons you may be arrested and on conviction be sentenced to a fine or a term of imprisonment.

[...]

<sup>6</sup> D Hubbard, *Maintenance: A Study of the Operation of Namibia's Maintenance Courts*, Windhoek: Legal Assistance Centre, 1995.

**A very small minority of the files contained a C11 form (17/1 687; 1.0%). This form is used to summon witnesses other than the complainant and the defendant to attend the maintenance court.** The majority of files contained one summons to a witness (17/20; 85.0%), and a small number of files contained two summonses (3/20; 15%), giving a total of 20 C11 summonses in the sample. The majority of these forms (16/20; 80.0%) were issued by the Oshakati court. The single summons identified in the sample issued by the Windhoek court in 2005 (two years after the 2003 Act came into effect) used a summons from the 1963 Act.

Eighteen of the 20 summonses were incorrectly used to summon the complainant and defendant rather than summoning other witnesses. Therefore the analysis of these C11 forms has been combined with the analysis of the summonses to the complainant/defendant.

In the remaining two summonses, both of which were issued for the same case, witnesses who were not the complainant and defendant were summoned, although it is not clear who the witnesses were. The witnesses were asked to bring “*expenses spent on the kids*” and “*proof of payment of kid’s school fees*”, suggesting that the witnesses were caregivers of the children. On the first summons, three witnesses were summoned, and a fourth witness was summoned on the second summons. All four witnesses were summoned to the same enquiry.

In addition to the completed forms, two files contained additional information about witnesses attending an enquiry. In one case the complainant and defendant could not agree on the details of the case. The complainant requested N\$500 per month for one child. The defendant claimed that he already provided N\$200-300 per month for the beneficiary and paid some medical expenses, but the complainant said that this was not true. The defendant also stated that he was supporting 12 children, seven of whom were living with him, but the complainant stated that she knew of only three children for whom the defendant was responsible. Given the discrepancies in information, the enquiry was postponed for nine days and the defendant stated that he would bring two witnesses. The file contains details of the second enquiry, but they do not reflect whether or not the witnesses attended. The outcome of the enquiry was an order for N\$150 per month. The defendant went into arrears shortly thereafter, and criminal proceedings were initiated. At one point the amount of arrears totalled N\$1 650. The defendant was eventually ordered to pay N\$250 per month. In the other case the defendant and his/her work supervisor attended the maintenance court and agreed to an order for the attachment of wages.

We believe that there are three possible reasons for witnesses rarely being summoned to maintenance investigations or enquiries: (1) the witnesses may have attended voluntarily at the request of the defendant or complainant, so a summons was not required; (2) the magistrate and maintenance officer are satisfied that the complainant/defendant has provided sufficient information; and (3) written evidence is used instead.

The use of written evidence is an innovation of the 2003 Maintenance Act. The change followed similar amendments to the South African law on maintenance. Some of the files showed that this option is used in practice. For example, one file contained a letter from the principal of the child’s school stating that the complainant (the mother) had not paid the School Development Fund contribution for three years because she did not have the resources, although the school was aware that the father did have resources to pay. Another file contained a letter from the principal of the child’s school confirming the cost of the School Development Fund contribution. Other files contained letters from the employer stating the duration and terms of employment. For example, one file contained the following letter:

*“To whom it may concern, I confirm that as operational manager [the defendant] started his employment at our company on [date] and [is] still employed as an armed response officer. His salary is N\$1 000 pm. [He is a] hardworking, self-disciplined and trustworthy person.”*

The 1995 study did not assess the summoning of witnesses to the maintenance court.<sup>7</sup>

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<sup>7</sup> Ibid.



## 9.3 Summons issued to the defendant or complainant

Excerpt from Form C1

### Summons to a complainant or defendant to attend a maintenance enquiry

#### PART A SUMMONS

To any person authorised to serve process:

You are hereby directed to –

1. summon the following persons:

Name of complainant .....  
 Identity number/Date of birth .....  
 Address .....  
 Rail warrant attached/not attached\* .....

And/or

Name of defendant .....  
 Identity number/Date of birth .....  
 Address .....  
 \*Rail warrant attached/not attached .....

- (a) \*to appear in person before the above-mentioned court or maintenance officer of the abovementioned court at 09h00 on the date stated above; and
  - (b) to remain present until excused by the court, or
  - (c) to be examined by the maintenance officer in terms of section 11 of the Act or to give evidence at an enquiry, in terms of section 12 of the Act.
2. serve on each of the above-mentioned persons a copy of the summons and report to this Court what you have done with regard to it; and
  3. request the above-mentioned persons to produce the following at the enquiry:
    - (a) Part B of this form, duly completed by ..... (other party), together with supporting documents, where possible
    - (b) .....
    - (c) .....

To the persons who are hereby summoned:

1. Warnings:
  - (a) If your above-mentioned address changes before the proceedings are finalised or before you are officially advised that you are no longer required as a witness, you must inform the maintenance officer of the above-mentioned court thereof.
  - (b) If you fail to comply with this warning in (a) and this summons you may be arrested and on conviction be sentenced to a fine or to a term of imprisonment.
2. An application has 'been made for –

\*(a) the \*making of the following maintenance order/substitution of the existing maintenance order

\*(i) A \*weekly/monthly contribution of

N\$	Name of Beneficiary
N\$      In respect of	Complainant
N\$      In respect of	.....
N\$      In respect of	.....
[...]	[...]

and/or

\*(ii) .....  
 (other contributions, for example medical and dental costs, school fees, fees for tertiary institutions, school clothes, expenses for sport and/or cultural activities, birth expenses and maintenance for beneficiary(ies) from birth); or

- (b) the discharge, variation or suspension of the existing maintenance order.

[...]

**PART B***(To be completed by defendant or on defendant's instructions)*

**Particulars regarding assets, income and expenditure of opposing party** Particulars of my assets and \*weekly/monthly income and expenditures (supported by documentary proof, where possible) are as follows:

Assets	
Fixed property .....	N\$.....
Investments .....	N\$.....
Savings .....	N\$.....
Shares .....	N\$.....
Motor vehicles .....	N\$.....
Other: .....	N\$.....
.....	N\$.....
.....	N\$.....
.....	N\$.....
<b>Total value of Assets</b>	N\$.....

Income	
Gross salary .....	N\$.....
Minus deductions:	
Tax .....	N\$.....
Medical Aid .....	N\$.....
Pension .....	N\$.....
Other: .....	N\$.....
.....	N\$.....
.....	N\$.....
.....	N\$.....
Total nett salary .....	N\$.....
Other income (state source) .....	N\$.....
.....	N\$.....
.....	N\$.....
<b>Total income</b> .....	N\$.....

Expenditure			
	Self	Beneficiary(ies)	Total
1. Lodging (bond repayment/levy/rent/board)	N\$.....	N\$.....	N\$.....
2. Food [...]	N\$.....	N\$.....	N\$.....
3. Household expenditure [...]	N\$.....	N\$.....	N\$.....
4. Clothing [...]	N\$.....	N\$.....	N\$.....
5. Personal care	N\$.....	N\$.....	N\$.....
6. Transport [...]	N\$.....	N\$.....	N\$.....
7. Educational expenditure [...]	N\$.....	N\$.....	N\$.....
8. Medical expenditure [...]	N\$.....	N\$.....	N\$.....
9. Insurance [...]	N\$.....	N\$.....	N\$.....
10. Pocket money/allowances	N\$.....	N\$.....	N\$.....
11. Holidays	N\$.....	N\$.....	N\$.....
12. Maintenance, replacement and repairs [...]	N\$.....	N\$.....	N\$.....
13. Entertainment and recreation	N\$.....	N\$.....	N\$.....
14. Personal loans	N\$.....	N\$.....	N\$.....
15. Security alarm system	N\$.....	N\$.....	N\$.....
16. Membership fees	N\$.....	N\$.....	N\$.....
17. Religious contributions/charities	N\$.....	N\$.....	N\$.....
18. Gifts	N\$.....	N\$.....	N\$.....
19. TV license	N\$.....	N\$.....	N\$.....
20. Reading materials [...]	N\$.....	N\$.....	N\$.....
21. Lease instalments sales payments [...]	N\$.....	N\$.....	N\$.....
22. Pets [...]	N\$.....	N\$.....	N\$.....
23. Other (not specified above)	N\$.....	N\$.....	N\$.....
<b>Total expenditure</b>	N\$.....	N\$.....	N\$.....

**PART C****RETURN OF SERVICE**

[...]

Nearly 70% of the files contained a summons issued to the defendant or complainant (1 113/1 687; 66.0%). The sample is based on the use of either Form C1 or C11 (where Form C11 was erroneously used for this purpose, as discussed in section 9.2). Over half of the files containing summonses to the defendant or complainant contained only one summons (664/1 113; 59.7%), and nearly a third contained two summonses (328/1 113; 29.5%). The maximum number of summonses per file was eight. This resulted in a total of 1 793 summonses being included in the sample.

Some courts appear to issue summonses in exceptional cases (eg Karasburg and Oshakati), some issue summonses for all maintenance complaints (eg Mariental and Swakopmund), and others appear to issue summonses only in some cases (eg Keetmanshoop and Tsumeb). **We recommend that when the Magistrates Commission holds conferences and when court officials from different courts meet, the maintenance court officials should discuss the use of directives and summonses as a means to identify best practice.**

**Table 66: Summons issued to the defendant or complainant**

Number of summonses on file	Number of files	Number of forms	Percentage of files
1	658	1 113	59.1
2	328	455	29.5
3	71	127	6.4
4	32	56	2.9
5	11	24	1.0
6	9	13	0.8
7	3	4	0.3
8	1	1	0.1
<b>Total</b>	<b>1 113</b>	<b>1 793</b>	<b>100.0</b>

Most summonses were issued for the defendant (1 399/1 724; 81.1%; information missing from 69 summonses), and the remaining ones were issued for the complainant (325/1 724; 18.9%). The vast majority of summonses for the complainant came from the Windhoek court (274/325; 84.3%) over all four years for which data was collected.<sup>8</sup> This suggests that it is standard practice for this court to serve summonses on the complainants. In contrast, only a handful of summonses were issued to complainants at other courts, suggesting that there were special circumstances in these cases that warranted the use of a summons.<sup>9</sup> This is logical as the complainant is the one who initiated the maintenance complaint and is likely to be willing to attend court voluntarily. One reason for the Windhoek courts issuing summonses to the complainants may be to give the complainants proof of the court date to show their employers. There may be a lesser need for this in towns with smaller communities where it would be harder to ‘fake’ an appearance at the maintenance court.

**Chart 36: Summons delivered to defendant or complainant (n=1 724)**



**Table 67: Summons delivered to defendant or complainant**

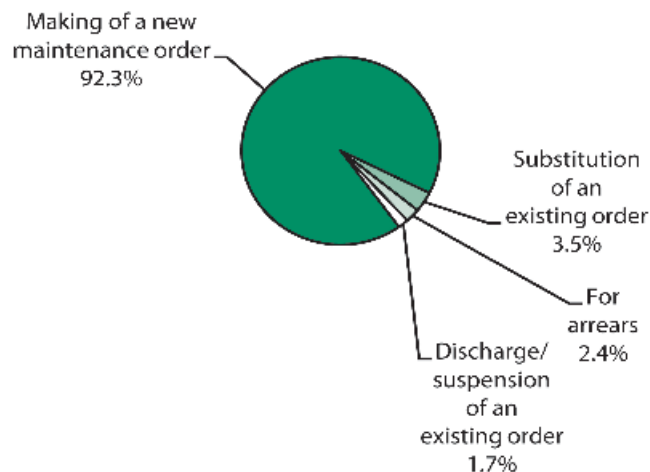
	Frequency	Percentage
Defendant	1 399	81.1
Complainant	325	18.9
<b>Total</b>	<b>1 724</b>	<b>100.0</b>
Missing	69	3.8
<b>Total</b>	<b>1 793</b>	<b>100.0</b>

The majority of summonses were issued as part of a new maintenance enquiry (1 384/1 498; 92.4%; information missing from 295 summonses). In a minority of cases, the summonses were issued as part of an enquiry to substitute (53/1 498; 3.5%) or discharge/suspend (25/1 498; 1.7%) an order. Summonses were issued for cases that had gone into arrears in a similarly small proportion of the cases (36/1 498; 2.4%).

<sup>8</sup> Our sample contains 236 files from the Windhoek court.

<sup>9</sup> Summonses to the complainants were also issued at the courts in Eenhana (5), Gobabis (6), Keetmanshoop (1), Khorixas (1), Ondangwa (2), Oshakati (18), Otjiwarongo (1), Outapi (2), Rehoboth (12), Rundu (1), Swakopmund (1) and Walvis Bay (1).

**Chart 37: Type of maintenance enquiry for which summonses were issued (n=1 498)**



**Table 68: Type of maintenance enquiry for which summonses were issued**

Type of maintenance enquiry	Frequency	Percentage
Making of a new maintenance order	1 384	92.3
Substitution of an existing order	53	3.5
For arrears	36	2.4
Discharge/suspension of an existing order	25	1.7
<b>Total</b>	<b>1 498</b>	<b>100.0</b>
Missing	295	16.4
<b>Total summonses included in the sample</b>	<b>1 793</b>	<b>100.0</b>

The 1995 maintenance study found that summonses were issued for all maintenance complaints sampled. In the majority of the cases, only one summons was issued (82%). Two summonses were issued in 15% of the cases and three or four summonses were issued in a minority of cases (3%).<sup>10</sup> Similar to the finding in the current study, the 1995 study noted that many case files involving substitution proceedings did not contain any information about summonses.<sup>11</sup> The study did not note any summonses issued for cases that had gone into arrears.

The summonses request the recipient to appear in person before the maintenance officer and to give information, or to appear at a formal hearing before the magistrate. However, it is not always clear from the summons which option has been selected. Therefore, based on the data collected for this study, we are not able to determine whether the witnesses were summoned to see the maintenance officer or the magistrate.

The form also allows the maintenance officer to request the complainant/defendant to bring specific information. On many forms, multiple requests for information were completed, some of which overlap – therefore the percentage totals more than 100%. The complainants/defendants were most commonly requested to bring information about their income in the form of a payslip or statement (or other proof) of earnings and monthly expenditure. Requests to bring identification were also fairly common. In a small number of cases the complainant/defendant was requested to bring bank statements (14 summonses) or proof from a DNA test (2 summonses). One person was requested to bring unspecified information about “arrears”; presumably the summons in this instance was issued for a failure to comply with a maintenance order.

**Table 69: Information that the defendant/complainant was requested to bring**

Type of information requested	Frequency	Percentage*
Payslip	1 344	93.7
List of monthly expenses / expenditure list	1 199	83.6
Identity card	233	16.2
Proof of income	70	4.9
Statement of earnings signed by employer	34	2.4
Bank account statement	14	1.0
Documentary proof of every alleged item of expenditure	3	0.2
Proof from a DNA test	2	0.1
Arrears	1	0.1
Personal budget	1	0.1
<b>Total</b>	<b>2 901</b>	<b>202.3</b>

\* Multiple responses possible – thus the total percentage is more than 100%.

<sup>10</sup> D Hubbard, *Maintenance: A Study of the Operation of Namibia's Maintenance Courts*, Windhoek: Legal Assistance Centre, 1995 at 73.

<sup>11</sup> Id at 102.

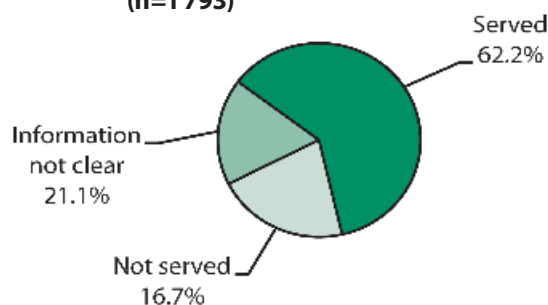
## Service of summonses

A summons to attend a maintenance enquiry is deemed served if it has been: (1) delivered or offered personally to the person in question; (2) delivered to that person's place of residence or place of business/workplace (including being given to the person in authority or in charge of the person in question at the place of business/workplace); or (3) in the case of a juristic person, delivered to the registered office or main place of business (including to a director or responsible employee of the juristic person). It is sufficient to attach the notice to the door or gate if the residence or place of business/workplace is kept closed.<sup>12</sup>

The data shows that approximately two-thirds of the summonses were served (1 115/1 793; 62.2%) and 16.7% were not (299/1 793). Information was not clear for 21.1% of the summonses (379/1 793). The 1995 maintenance study reported a similar success rate of 76%.<sup>13</sup>

However, it should be noted that nearly 20% of the summonses were served on the complainant (see page 194). When analysed separately, the success rate for service of a summons on the defendant is lower. Tables 71 and 72 assess the service of summons by recipient. For the summonses that were not served, all but two were intended for the defendant.<sup>14</sup> This finding is to be expected given that the summonses for the complainant were probably given to the complainant in person at the court.

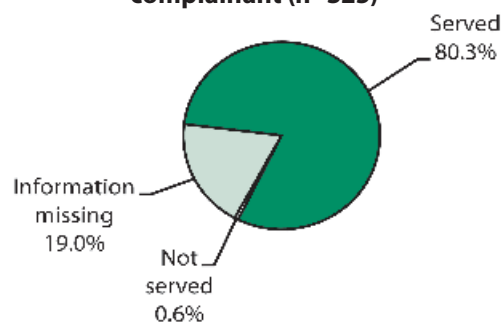
**Chart 38: Outcome of service of summonses (n=1 793)**



**Table 70: Outcome of service of summonses**

Outcome	Frequency	Percentage
Served	1 115	62.2
Not served	299	16.7
Information not clear	379	21.1
<b>Total</b>	<b>1 793</b>	<b>100.0</b>

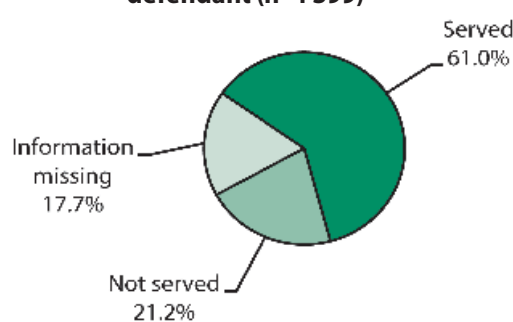
**Chart 39: Outcome of service of summonses to the complainant (n=325)**



**Table 71: Outcome of service of summonses to the complainant**

Outcome	Frequency	Percentage
Served	261	80.3
Not served	2	0.6
Information not clear	62	19.0
<b>Total</b>	<b>325</b>	<b>100.0</b>

**Chart 40: Outcome of service of summonses to the defendant (n=1 399)**



**Table 72: Outcome of service of summonses to the defendant**

Outcome	Frequency	Percentage
Served	854	61.0
Not served	297	21.2
Information not clear	248	17.7
<b>Total</b>	<b>1 399</b>	<b>100.0</b>

<sup>12</sup> Maintenance Regulations, regulation 28 read with regulation 4.

<sup>13</sup> D Hubbard, *Maintenance: A Study of the Operation of Namibia's Maintenance Courts*, Windhoek: Legal Assistance Centre, 1995 at 74.

<sup>14</sup> For the two summonses intended for the complainant but not served, in one instance the complainant had moved to another town, and in the other instance the police did not have transport to deliver the summons.



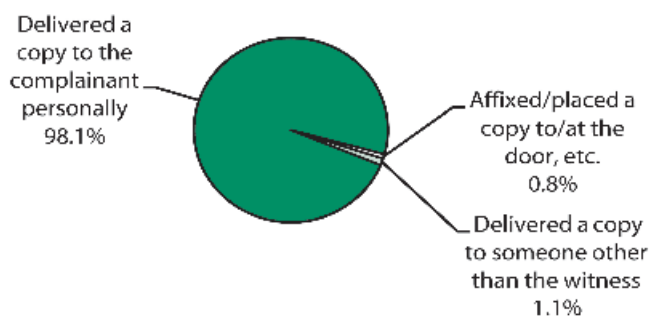
Overall, 98.1% of the summonses successfully served on the complainant (256/261) were served personally, compared to 45.1% of summonses successfully served on the defendant personally. This finding is to be expected.

**It is a matter of concern that nearly one in five summonses, almost all of which were directed to defendants (299/1 793; 16.7%), were not served.** The main reasons were that the person was not known at the address given (89/299; 29.8%), there was a problem with the address (56/299; 18.7%), or there were logistical problems with service delivery (52/299; 17.4%). The logistical problems include the police not having transport available, needing more information to be able to serve the summons, receiving the summons too late to serve it in time, or the summons being sent to the wrong jurisdiction. For 16.0% of the summonses not served, the reason was not reported, and for 14.0% the person was no longer at the address given. The logistical problems are particularly concerning because the failure to serve the summons is not due to any fault on the part of the defendant or complainant. **We recommend that the Ministry of Justice review the matter of service delivery and address any problems identified with the intention of improving both speed and success rate.**

Regarding the high proportion of summonses not served because the person was apparently no longer at the address given, 29.8% were not served because the person was not known at that address, and 18.7% were not served because there was a problem with the address. It is to be expected that some complainants will not have information about the defendant's whereabouts, particularly if the defendant has no contact with the beneficiaries, but this need not prevent the service of a summons as the Maintenance Act allows the court to summon a witness such as a relative to provide the defendant's contact details.

The 1995 maintenance study reported similar findings. The study found that in 39% of the cases where the summons was not served, this was because the respondent could not be found at the address given by the complainant or the address was insufficient. In 18% of such cases, the summons expired before it could be served. No reason was recorded in 17% of the cases.<sup>15</sup>

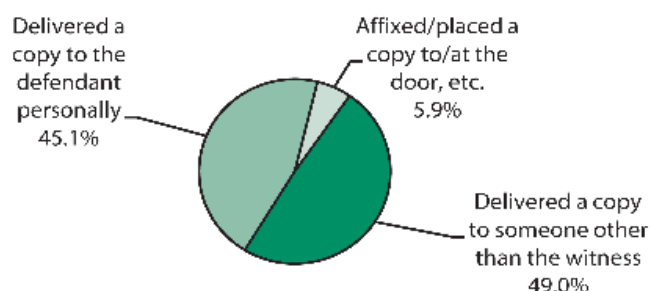
**Chart 41: Means of service of summonses to the complainant (n=260)**



**Table 73: Means of service of summonses to the complainant**

Means of service of summons	Frequency	Percentage
Delivered a copy personally*	256	98.1
Delivered a copy to someone other than the complainant	3	1.1
Affixed/placed a copy to/at the door, etc.	2	0.8
<b>Total</b>	<b>261</b>	<b>100.0</b>

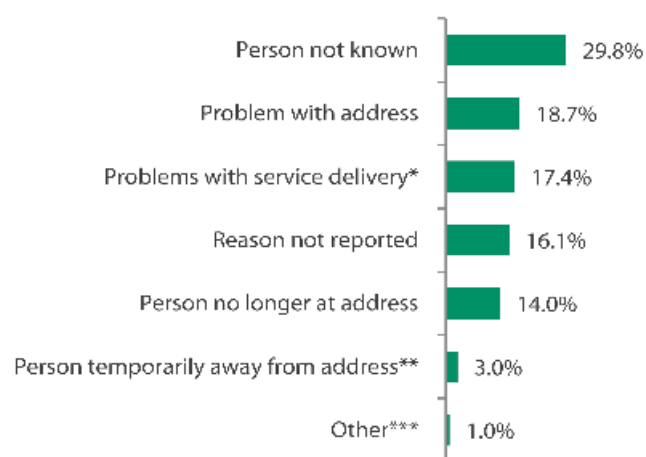
**Chart 42: Means of service of summonses to the defendant (n=854)**



**Table 74: Means of service of summonses to the defendant**

Means of service of summons	Frequency	Percentage
Delivered a copy to someone other than the defendant	419	49.1
Delivered a copy personally	385	45.1
Affixed/placed a copy to/at the door, etc.	50	5.9
<b>Total</b>	<b>854</b>	<b>100.0</b>

<sup>15</sup> D Hubbard, *Maintenance: A Study of the Operation of Namibia's Maintenance Courts*, Windhoek: Legal Assistance Centre, 1995 at 74.

**Chart 43: Reasons for failure to serve a summons**

\* no clerk available / no transport available / police require more information / summons received too late / person outside of jurisdiction / error on the summons / police have requested change of date

\*\* travelling for work / sick / hospitalised

\*\*\* employer refused the maintenance officer entry / stated person is a casual worker / service suspended by attorney

**Table 75: Reasons for failure to serve a summons**

Reasons summons was not served	Frequency	Percentage
Person not known	89	29.8
Problem with address	56	18.7
Problems with service delivery*	52	17.4
Reason not reported	48	16.1
Person no longer at address	42	14.0
Person temporarily away from address **	9	3.0
Other***	3	1.0
<b>Total</b>	<b>299</b>	<b>100.0</b>

In the service of one summons, the recipient's employer refused to allow the person serving the summons to enter the property, and in the service of another summons, the employer refused to accept the summons because the employee was a casual worker. In the first scenario, the Regulations for the Maintenance Act state that if the person on whom a document is to be served keeps the place of residence/business or place of employment closed and thereby prevents the messenger of court or maintenance investigator from serving the document, it is sufficient to attach the notice to the door or gate.<sup>16</sup> Therefore the person delivering the summons should not have returned the summons to the court, but should rather have attached it to the door/gate. In the second scenario the Labour Act 11 of 2007 (which came into force in 2009) now defines an employee as "*an individual, other than an independent contractor, who – (a) works for another person and who receives, or is entitled to receive, remuneration for that work; or (b) in any manner assists in carrying on or conducting the business of an employer*".<sup>17</sup> This means that in the eyes of the law, the concept of casual labour no longer exists as it did under the Labour Act 6 of 1992. Therefore an employer now has no basis for refusing to accept the summons on behalf of any employee. It is understandable that some employers may be resistant to the service of summons due to not understanding their potential obligations under the Maintenance Act. **We recommend that a simple pamphlet about the Maintenance Act is created for employers, to inform them of their obligations in terms of the law.**

Further information about problems with service was obtained from interviews with court officials. The magistrate at the coastal court of Walvis Bay stated that it can be difficult to summon defendants working for the military or as fishermen. In the case of fishermen, they are often stationed in Lüderitz for two years, by which time the complainant will usually have given up. It is not clear why the messenger from the Lüderitz court could not serve the summons, or why the defendant cannot be dealt with at the Lüderitz court, in the same way that a maintenance order across countries is managed. **As noted on page 288, we recommend that the courts consider how to better work with each other and then develop an operational protocol.** This is particularly relevant given the finding that 39.6% of complainants and defendants do not live in the same area and therefore possibly not in the same jurisdiction (see section 8.12).

A maintenance officer from another court described the problems they have with contacting defendants who work for NamPol or the military. For example, he said that the messenger is not allowed inside the military compound, and if the complainant does not know the force number for the defendant, the Ministry of Defence is uncooperative.

<sup>16</sup> Maintenance Regulations, regulation 28(4) read with regulation 4.

<sup>17</sup> Labour Act 11 of 2007, definitions.

The clerk at another court complained that the messengers of court often do not provide proof of service before the date of the court hearing. This means that the court does not know whether the defendant was properly served but chose to ignore the summons, or whether the summons was not delivered in time. The maintenance officer at a different court also noted this problem, stating that problems with service delivery mean that the court cannot make a default maintenance order if it is not clear whether the summons was correctly served.

The Legal Assistance Centre receives complaints about the service of summonses. One example comes from a message sent to our text message line:

*"I have a question. I put in maintenance for my kid in 2006 but up to now nothing happen. I am so tired to go to court and they tell me the father did not get the summons up to now."*

We advised the client to return to the court to find out why the court is unable to serve the summons. The client did not make further contact with us.

Analysis of the success of service delivery by region shows a success rate ranging from 27.6% (Oshikoto) to 75.1% (Khomas). The court officials gave reasons for some of the regional differences. For example, the clerk of court at Khorixas reported that the court shares a messenger with the Outjo court and this can lead to delays. Similarly, the messenger used by the Oshakati court is located in Tsumeb. The maintenance officer at the Rundu court was aware that service of documents had been a problem and stated that the court had made an agreement with the police sergeant for the police force to serve the summonses. A number of court officials from different courts also complained that the serving of documents was a problem due to cost. **On page 197, we recommend that the Ministry of Justice investigate problems associated with the service of summonses. In this assessment the Ministry should consider why some regions are better able than others to serve summonses, and promote the sharing of best practices.**

**Table 76: Service of summonses by region**

Region	Court	Served	Not served	Missing	Total	Percentage served
Khomas	Windhoek	455	59	92	<b>606</b>	75.1
Hardap	Mariental Rehoboth	180	47	31	<b>258</b>	69.8
Karas	Bethanie Karaburg Keetmanshoop	59	14	18	<b>91</b>	64.8
Omaheke	Gobabis	74	27	28	<b>129</b>	57.4
Omusati	Outapi	61	35	11	<b>107</b>	57.0
Erongo	Swakopmund Walvis Bay	143	64	47	<b>254</b>	56.3
Kunene	Khorixas	10	4	5	<b>19</b>	52.6
Otjozondjupa	Okakarara Otjiwarongo	71	28	42	<b>141</b>	50.4
Kavango	Rundu	28	8	37	<b>73</b>	38.4
Ohangwena	Eenhana	7	0	12	<b>19</b>	36.8
Oshana	Ondangwa Oshakati	19	8	40	<b>67</b>	28.4
Oshikoto	Tsumeb	8	5	16	<b>29</b>	27.6
<b>Total</b>		<b>1 115</b>	<b>299</b>	<b>379</b>	<b>1 793</b>	<b>NA</b>

The 1995 maintenance study also noted some regional differences in the success rates for serving summonses. In the nine locations where data was collected, the success rates for serving first summons ranged from 89-100% in Gobabis, Otjiwarongo and Rundu to 54-56% in Mariental and Tsumeb.

The study postulated that these differences might have been due to the attitude and efficiency of the police in the different locations, or to the ability of complainants in the different locations to accurately identify the respondent's address.<sup>18</sup>

In the files that contained more than one summons, we cannot accurately assess the proportion of cases in which a summons was not served at first, but was served on re-issue. This is because the details on file are not reliable enough for us to determine whether a second summons was issued for the same purpose or a different purpose. There are also some files containing records showing that the defendant did not receive the summons but did attend the hearing on the date specified, which suggests that somehow the summons was delivered or the defendant was otherwise successfully contacted.

Despite these limitations, we can assess the success rate for the service of summonses according to the number of forms on file. This analysis shows that the more summonses on file, the better the success rate (a 78.1% success rate for the first summons on file compared with a 100% success rate for the service of the sixth to eighth summons on file; note that the sample size is small for cases with multiple summonses on file). This suggests that in cases where there are multiple summonses on file, this is not because previous attempts to serve documents on the defendant/complainant failed and the clerk repeatedly issues summonses. As noted in the 1995 maintenance study, which observed a similar pattern for the service of multiple summonses per file, the court would be unlikely to persist in issuing summonses if there was no new information about the whereabouts of the respondent who could not be located.<sup>19</sup>

Another reason for increasing success with the service of summonses may be that once the defendant has been successfully located, the court is able to serve further summonses more easily if required. Alternatively, when the defendant attends court, the court may serve the summons for the next meeting in person.

**Table 77: Success of the service of summonses by number of summonses on file**

Number of summonses on file	Total	Served		Not served	
	Number	Number	Percentage	Number	Percentage
1	895	699	78.1	196	21.9
2	355	276	77.7	79	22.3
3	95	81	85.3	14	14.7
4	40	34	85.0	6	15.0
5	20	16	80.0	4	20.0
6	6	6	100.0	0	0.0
7	2	2	100.0	0	0.0
8	1	1	100.0	0	0.0
<b>Total</b>	<b>1 414</b>	<b>1 115</b>	<b>100.0</b>	<b>299</b>	<b>100.0</b>

The forms can also be assessed on a case-by-case basis to assess the pattern of service. For example, if there is one summons on file, it was either served or not served, or data is missing. If there are two summonses on file, both summonses could have been served, or the first was served and the second was not, or the first was served but data is missing for the second, and so forth. Although this information gives us a picture of the pattern of service in various cases, the variation between the course taken in different cases makes it difficult to extrapolate any useful information from this pattern.

<sup>18</sup> D Hubbard, *Maintenance: A Study of the Operation of Namibia's Maintenance Courts*, Windhoek: Legal Assistance Centre, 1995 at 75.

<sup>19</sup> Id at 74.

**Table 78: Case-by-case analysis of service of summonses**

Number of summonses on file	Outcome							Frequency	Sub-total
1	Served							397	658
1	Not served							113	
1	Missing							148	
2	Served	Served						154	328
2	Served	Not served						28	
2	Served	Missing						31	
2	Not served	Served						32	
2	Not served	Not served						18	
2	Not served	Missing						13	
2	Missing	Served						25	
2	Missing	Not served						4	
2	Missing	Missing						23	
3	Served	Served	Served					22	71
3	Served	Served	Not served					1	
3	Served	Served	Missing					2	
3	Served	Not served	Served					8	
3	Served	Not served	Not served					1	
3	Served	Not served	Missing					3	
3	Served	Missing	Served					6	
3	Served	Missing	Missing					5	
3	Not served	Served	Served					6	
3	Not served	Served	Missing					1	
3	Not served	Not served	Served					2	
3	Not served	Not served	Missing					3	
3	Not served	Missing	Served					1	
3	Not served	Missing	Served					1	
3	Missing	Served	Served					1	
3	Missing	Served	Not served					1	
3	Missing	Served	Missing					1	
3	Missing	Missing	Served					2	
3	Missing	Missing	Missing					4	
4	Served	Served	Served	Served				9	32
4	Served	Served	Served	Missing				2	
4	Served	Served	Not served	Served				1	
4	Served	Served	Missing	Missing				2	
4	Served	Not served	Served	Served				2	
4	Served	Not served	Served	Missing				1	
4	Served	Not served	Not served	Served				1	
4	Served	Missing	Served	Served				1	
4	Served	Missing	Not served	Missing				1	
4	Served	Missing	Missing	Missing				2	
4	Not served	Served	Missing	Served				2	
4	Not served	Missing	Served	Missing				1	
4	Missing	Not served	Served	Not served				1	
4	Missing	Not served	Missing	Served				1	
4	Missing	Missing	Served	Served				1	
4	Missing	Missing	Missing	Served				1	
4	Missing	Missing	Missing	Missing				3	
5	Served	Served	Served	Served	Served			2	11
5	Served	Served	Served	Served	Not served			1	
5	Served	Served	Served	Missing	Served			1	
5	Served	Served	Not served	Served	Served			1	
5	Served	Not served	Served	Served	Served			1	
5	Served	Not served	Not served	Served	Served			2	
5	Served	Not served	Not served	Not served	Served			1	
5	Not served	Served	Served	Served	Served			1	
5	Missing	Missing	Served	Served	Served			1	
6	Served	Served	Served	Served	Served	Served		1	9
6	Served	Served	Served	Served	Missing	Served		1	
6	Served	Served	Served	Missing	Missing	Served		1	
6	Served	Served	Not served	Missing	Not served	Missing		1	
6	Served	Served	Missing	Served	Served	Served		1	
6	Served	Not served	Not served	Not served	Missing	Served		1	
6	Served	Not served	Not served	Not served	Missing	Missing		1	
6	Not served	Missing	Missing	Not served	Not served	Missing		1	
6	Missing	Missing	Served	Not served	Served	Missing		1	
7	Served	Served	Served	Served	Served	Served	Served	1	3
7	Served	Served	Served	Missing	Served	Served	Missing	1	
7	Not served	Missing	Served	Served	Not served	Missing	Missing	1	
8	Served	Served	Not served	Served	Served	Missing	Served	1	1
<b>TOTAL</b>									<b>1 113</b>



## Cost of service

The cost of service was recorded for the majority of the summonses to the complainant/defendant (1 282/1 773; 72.3%).<sup>20</sup> The mean cost of service was N\$105.12 (range N\$0-N\$1 738). The cost of service ranged widely for the summonses served, but the majority cost between N\$1 and N\$100. The summonses issued at no cost will have been those given to the recipient whilst he/she was at court.

The maintenance officer at one court stated that the cost of service is a problem. As the cost incurred is per kilometre, the cost of serving summonses can be very high. The maintenance officer gave the example of service costing up to N\$3 000-N\$4 000, although we did not find examples of such costs in the files that we sampled. The clerk of the same court also commented that it can take up to three months for a summons to be served if the defendant lives far from the court, perhaps because other daily duties mean that the messenger struggles to find the time to make a long trip to deliver a single summons.

**Table 79: Cost of service for the delivery of summonses (N\$)**

Cost in N\$	Frequency	Percentage
0	180	14.0
1-50	462	36.0
51-100	405	31.6
101-150	87	6.8
151-200	32	2.5
201-500	61	4.8
501-1 000	33	2.6
+ 1 000	22	1.7
<b>Total</b>	<b>1 282</b>	<b>100.0</b>

## Timeline for the delivery of a summons

The timeline between the signing and delivery of a summons is available for the majority of the summonses. As the majority of summonses for the complainant were delivered in person, probably at court, we have analysed the timeline only for the delivery of summonses to the defendant. **The median time between the signing of the summons and the date of delivery of the summons for the defendant was 14 days (mean 18.0 days; range 0-113 days<sup>21</sup>)** – a fairly short timeline. In some cases it took a long time for the summons to be served, but the majority were delivered within 30 days of being signed by the magistrate. Overall this is a positive finding as it suggests that in general summonses are delivered timeously.

**Table 80: Time between signing of summons and date of delivery to defendant**

Number of days	Frequency	Percentage
0 days	20	2.7
1-15 days	397	52.9
16-30 days	209	27.8
31-45 days	91	12.1
46-60 days	21	2.8
61-75 days	9	1.2
More than 76 days	4	0.5
<b>Total</b>	<b>751</b>	<b>100.0</b>
<i>Missing</i>	103	12.1
<b>Total</b>	<b>854</b>	<b>100.0</b>

The 1995 maintenance study similarly found that the majority (roughly 95%) of the summonses issued for new maintenance complaints were issued within about one month of the complaint being made.<sup>22</sup>

The LAC study on the operation of the Combating of Domestic Violence Act looked at the timeline for the service of interim protection orders.<sup>23</sup> Although a direct comparison between the service of a protection order and the service of a summons to attend the maintenance court cannot be made (particularly because an interim protection order may help to alleviate immediate and life-threatening violence whereas a summons to attend the maintenance court is less dramatic), it is interesting to

<sup>20</sup> Form C11 and directives do not include a space to record cost of service.

<sup>21</sup> In the case where service took 113 days, the court issued two summonses. The second summons was not served because the defendant's employer refused to accept the document at the head office and refused to allow the messenger to enter the mining area where the defendant worked to serve the document. However, the defendant was somehow notified as he attended the enquiry.

<sup>22</sup> D Hubbard, *Maintenance: A Study of the Operation of Namibia's Maintenance Courts*, Windhoek: Legal Assistance Centre, 1995 at 74.

<sup>23</sup> Legal Assistance Centre, *Seeking Safety: Domestic Violence in Namibia and the Combating of the Domestic Violence Act 4 of 2003*, Windhoek: Legal Assistance Centre, 2012 at 454-460.

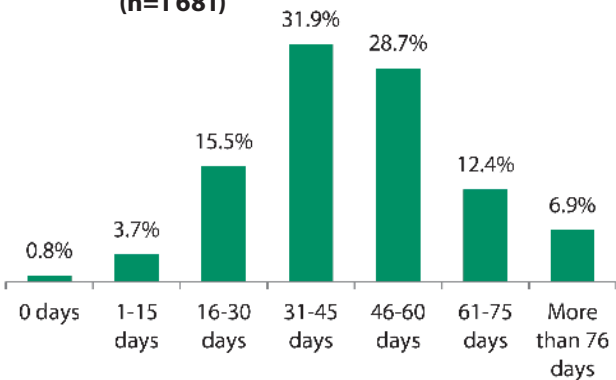
note that the median time estimated for service was 7 days.<sup>24</sup> As discussed, the median number of days taken to summons the defendant/complainant to a maintenance investigation/enquiry was 14 days. Although both of these timelines are fairly reasonable, there are sometimes delays in the service of both interim protection orders and summonses to maintenance courts, and this suggests that challenges in the service of court documents is endemic across the justice system. **As noted on page 197, we recommend that the Ministry of Justice review problems with service delivery and address any problems identified with the intention of improving standards. In this assessment the Ministry should consider why some regions are better able than others to serve summonses, and promote the sharing of best practices.**

**Time between the date on which the summons was signed by the court and the date of required attendance at court**

The timeline between the date on which the summons was signed by the court and the date of required attendance at court is available for the majority of the summonses (1 681/1 793; 93.8%). It should be noted that summonses can be issued at any time during the investigation/enquiry, and we do not have enough information to assess at what point in the process the summonses were issued.

The date to attend court was usually between 16 and 60 days after the summons was signed (1 280/1 793; 71.4%). **The median time between the date on which the summons was signed and the date to attend the court was 44.0 days (mean 45.9 days; range 0-277 days<sup>25</sup>).** Given the time required for the service of the summons (approximately 14 days), the interval between the date on which the summons was probably delivered and the date of the enquiry appears to be fair to the defendant.

**Chart 44: Time between date of signing summons and date of required attendance at court (n=1 681)**



**Table 81: Time between date of signing summons and date of required attendance at court**

Number of days	Frequency	Percentage
0 days	14	0.8
1-15 days	63	3.7
16-30 days	261	15.5
31-45 days	537	31.9
46-60 days	482	28.7
61-75 days	208	12.4
More than 76 days	116	6.9
<b>Total</b>	<b>1 681</b>	<b>100.0</b>
Missing	112	6.2
<b>Total</b>	<b>1 793</b>	<b>100.0</b>

**Information to be completed by the person receiving the summons**

The defendant is required to complete section B of the summons, providing information about his/her assets, income and expenditure. However, this information was provided comprehensively on only a small number of summonses. Overall, information about assets was provided on four of the summonses,

<sup>24</sup> Only a very small number of files contained a return of service; in the sample of 1 122 files, only 10 contained documents specifically labelled as returns of service, while 33 other files had sworn declarations or other information from police confirming that service had taken place. Therefore the date on which the notice of intention to oppose was signed by the respondent was used as a proxy for the date of service.

<sup>25</sup> In this case, the second summons was signed in August and ordered the defendant to attend court in May the following year. There is no explanation as to why there was such a long time period until the next meeting was held. The file contained a handwritten note dated at the time of the second meeting. The note stated that both parties were present and that the defendant was unemployed. The case was postponed for one month for the defendant to bring proof of employment. A note dated the following month stated that the defendant was still unemployed. The case was postponed for three months to give the defendant time to find employment. A final note, dated three months later, stated that the defendant was still unemployed and the parties agreed to withdraw the matter until the defendant found employment. There are no further details contained in the file.

about income on seven summonses and about expenditure on 12 summonses. We did not analyse any of the information about the defendant's financial position as the small sample size would make this information statistically misleading.

The 2004 study on the South African Maintenance Act also noted that few files contained information about the respondent's income, and that this *"raises concerns as to how maintenance officers or magistrates decide on the amount to be awarded, without having a notion of what the respondent earns on a monthly basis"*.<sup>26</sup>

### Summary of the use of summonses and directives

#### Use of directives

- A small minority of the files contained a directive to attend the maintenance court.
- The majority of directives were issued to the defendant.
- The median time between the date on which the form was signed by the maintenance officer and the date of investigation was 43 days.

#### Summonses issued to witnesses

- Our sample captured a total of 20 summonses issued to witnesses, 18 of which were incorrectly issued to the defendant or complainant. Courts could better utilise this option to investigate maintenance complaints.

#### Summonses issued to the complainant or defendant

- Nearly 70% of all the files contained a summons issued to the defendant or complainant.
- Most summonses were issued to the defendant.
- However, only 60% of the summonses issued to the defendant were successfully served.
- The median time between the signing of the summons and the date on which the summons was delivered to the defendant was 14 days. This is a reasonable time for service of process.
- The median time between the signing of the summons and the date on which the defendant was required to attend court was 44 days. Given that service of process typically takes 14 days, this appears to give defendants reasonable notice to prepare to present their cases.

<sup>26</sup> Community Agency for Social Equality (CASE), *Implementation of the Maintenance Act in the South African Magistrate's Courts*, Braamfontein: CASE, 2004 at 29.



# Chapter 10

## MAINTENANCE ENQUIRIES

**B**ecause such a high proportion of maintenance orders are consent orders (92.5% of all orders), there were few instances where orders were made after a maintenance enquiry (only 24 cases in our sample). Of course there may have been other cases where enquiries were held with no maintenance order being made at the conclusion of the enquiry, but it seems safe to conclude that enquiries are the exception rather than the rule. This section presents information which could be gleaned from the files in cases where enquiries were held.

### 10.1 Submission of written evidence

The Maintenance Act states that if written evidence is submitted, the party submitting the evidence must serve it on the other party using Form D at least 14 days before the document is to be produced.<sup>1</sup> The other party has the opportunity to object to the submission of this evidence, provided that this objection is made at least seven days before the commencement of the enquiry.<sup>2</sup> If an objection is made, the written evidence may not be produced, although the person who made the statement may give oral evidence.<sup>3</sup> If the procedure for the submission of written evidence is not properly followed, the party against whom written evidence is to be submitted may still give permission for the evidence to be introduced before or during the enquiry.<sup>4</sup>

We did not find any cases where Form D had been used. It is possible that the courts do not commonly use written evidence as part of the enquiry. However, as discussed below, there were cases that involved paternity tests and we did find information such as a letter from a school principal in some files. Therefore it is possible that the courts are not following the requirements of the Act when utilising written evidence, or that affected parties are giving permission for the use of such evidence in person. It is not practical to expect a layperson to understand the consequences of written evidence without some explanation from the maintenance officer or the magistrate, and most parties who appear before the maintenance court are unrepresented. **Therefore, we recommend that the procedure for submitting advance notice of written evidence to a party be abandoned in favour of a more practical alternative. Where a party would like to submit written evidence at a maintenance enquiry, the presiding officer should enquire as to whether the opposing party has any objections – and specifically whether that party would like a chance to cross-examine the person making the written statement or a postponement to prepare a response to the evidence in question. The affected party would be in a better position to know whether or not to object to written evidence after receiving some information on his or her options from the court.**

<sup>1</sup> Maintenance Act 9 of 2003, section 14(2) of the Act and Regulation 26(5).

<sup>2</sup> Id, section 14(3).

<sup>3</sup> Id, section 14(4)(a).

<sup>4</sup> Id, section 14(5).

## 10.2 Paternity disputes

As discussed in section 4.3.5, both the Maintenance Act and the Children's Status Act 6 of 2006 contain procedures for dealing with disputes about parentage. The pros and cons of the two approaches are compared in section 4.3.5, which notes that the two laws could work tougher as they stand – although it appears a separate application would be required to utilise the proof of parentage proceedings in the Children's Status Act, which seems unnecessarily cumbersome. That section **recommends that the Maintenance Act be amended to incorporate the proof of parentage proceedings contained in the Children's Status Act (with certain clarifications), while retaining the flexible approach to orders for costs of scientific testing currently contained in the Maintenance Act.**

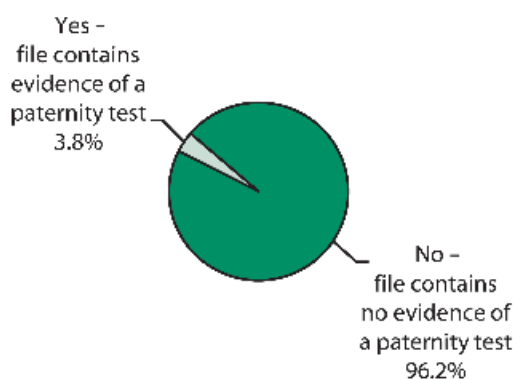
In most cases a paternity test is probably not needed. Therefore it is not surprising that **only a small percentage of the entire sample of files contained evidence of a paternity dispute (64/1 687; 3.8%).** However, the cost of a paternity test is probably a deterrent to people who may want a test to be performed. Paternity tests were recorded in files sampled from 14 of the 18 courts.<sup>5</sup> This suggests that there is no location where paternity is particularly often in dispute or where defendants are unable to access this option. In all but one case, only one putative father was tested for paternity. In the only case in which two putative fathers were tested, the test results showed that the man cited by the complainant as the child's father was indeed the father. In some of the cases in which a paternity test was conducted, the defendant requested testing of one but not all of the beneficiaries.

Another area where we see information about paternity is amongst the reasons for the postponement of cases. As shown in section 10.5, approximately 10% of the postponements recorded in the sample were due to paternity disputes (61/730; 8.4%). Analysis of the files containing a paternity test shows that only four of these cases did not involve a postponement.

Unfortunately data is missing for nearly two-thirds (64.1%) of the tests. For the 23 tests where a result is available, the defendant was the father in 56.5% of the cases. However the small sample size means that these results should not be extrapolated.

In some cases it appears that a paternity test was requested but not conducted. For example, in one case the complainant did not take the child to give a sample for testing, and did not attend the subsequent enquiry at court, so the case was struck from the roll. In another case the defendant was in police custody and the test was postponed until his release. In another case the test was postponed until the defendant had money, and it was not clear from the file whether the test was subsequently conducted. It should also be noted that in some cases the request for a paternity test was made *after* a maintenance order had already been made.

**Chart 45: Does the file contain evidence of a paternity test? (n=1 687)**



**Table 82: Outcome of paternity tests**

Outcome	Frequency	Percentage
Defendant is the biological father	13	56.5
Defendant is not the biological father	10	43.5
<b>Total</b>	<b>23</b>	<b>100.0</b>
Missing	41	64.1
<b>Total</b>	<b>64</b>	<b>100.0</b>

If the court orders a paternity test, it may order the mother, father or both to pay all or part of the costs, or it may order the State to pay all or part of the costs. The decision on the payment for the test will depend on the means of the mother, the alleged father and any other relevant circumstances.<sup>6</sup>

<sup>5</sup> Paternity tests were not recorded at Bethanie, Karasburg, Okakarara and Khorixas – only a small proportion of the total files were sampled at each of these courts, which suggests that the sampling process may have influenced the fact that we did not identify evidence of paternity tests conducted at these courts.

<sup>6</sup> Maintenance Act 9 of 2003, section 21.



Currently all paternity tests are conducted outside Namibia – the sample is taken in-country and then are sent to South Africa. This adds to the time and expense of the test. As of May 2013, depending on where the test is done, the cost was approximately N\$1 400, and the time needed to get results was approximately one month. Given that the median amount of maintenance ordered is N\$250 (see section 12.5), the cost of the test is equivalent to nearly four months of maintenance payments.

Samples can be taken at any of the Pathcare offices across Namibia. However, we struggled to get clarity from the courts, and even from some Pathcare staff, on where samples can be taken. Some people said that people have to travel to Windhoek to have the sample taken for a paternity test. The clerk of the Keetmanshoop court said that parents have to travel to Windhoek and that this is a barrier because they have to pay for travel-related costs in addition to the cost of the test. The clerk estimated that transport by bus plus meals may cost an additional N\$300 per person.

Information on who paid for the test is available for only seven of the cases. In five cases the defendant was ordered to pay all of the costs, in one case the State was ordered to pay all of the costs, and in another the defendant and the State shared the costs. In the case where the State paid all of the costs, the defendant was earning N\$950 per month and the mother was unemployed. As the cost of a paternity test was at that stage N\$900-N\$1 200 (excluding travel costs), the test would cost more than the defendant's monthly salary. Therefore it is not surprising that the court ordered the State to pay for the test. In the case where the costs were split between the defendant and the State, the defendant had first been ordered to pay all of the costs but had disputed this order.

The data suggests that although the Maintenance Act theoretically provides an accessible structure for paternity testing, the practical problems involved in terms of cost and time mean that paternity testing is not as accessible as it is intended to be. **We recommend that Namibia proceed with its plans to conduct DNA testing in-country.** This would reduce the cost and time associated with such tests.

The 1995 maintenance study did not assess the incidence of paternity disputes.<sup>7</sup>

### Summary of information about paternity disputes

- Only a small percentage of files contained evidence of a paternity dispute.
- The outcome of the tests was recorded in fewer than half of the files where tests took place. Therefore we cannot make a meaningful assessment of the test outcomes.
- Paternity tests currently cost about N\$1 400, and it can take approximately one month to get the results.

## 10.3 Legal representation

The files show that the complainant and/or the defendant was represented by a lawyer in a very small minority of cases (42/1 687; 2.5%). In approximately half of the cases in which lawyers were involved, only the defendant had a lawyer (19/42; 45.2%). In approximately one-quarter of the cases both parties had a lawyer (12/42; 28.6%), and in one-quarter only the complainant had a lawyer (11/42; 26.2%). In some of the cases, lawyers were involved because the parties were getting divorced. In two cases the defendants were abroad and asked a lawyer to be present to represent their interests. Another case involved a dispute about the validity of the marriage between the complainant and defendant (the complainant was applying for maintenance for herself and her beneficiaries – see the summary of this file on page 148). In other cases it is not clear why the parties chose to have legal representation. Fourteen maintenance enquiries were postponed to allow the defendant or complainant to get legal representation (see section 10.5).

<sup>7</sup> D Hubbard, *Maintenance: A Study of the Operation of Namibia's Maintenance Courts*, Windhoek: Legal Assistance Centre, 1995.

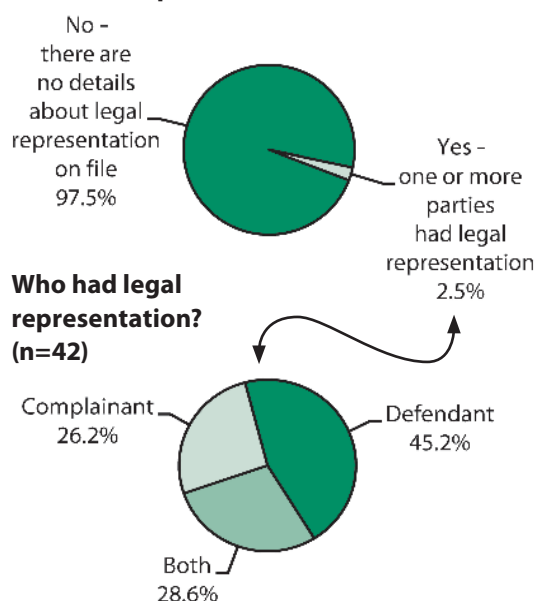
**Table 83: Does the file contain evidence that parties to the case had legal representation?**

Who had legal representation?	Frequency	Percentage
Defendant had a lawyer	19	45.2
Defendant and complainant had a lawyer	12	28.6
Complainant had a lawyer	11	26.2
<b>Total</b>	<b>42</b>	<b>100.0</b>

Because so few cases involved legal representation, we cannot assess whether representation affects the outcome of a case. While some people may think that a lawyer will help a defendant to reduce the amount of maintenance he must pay, one magistrate said that if a defendant has a lawyer, the court may make a higher maintenance order as it is clear that the defendant has money.

The 1995 maintenance study did not assess the incidence of legal representation.<sup>8</sup>

**Chart 46: Does the file contain evidence that parties to the case had legal representation? (n=1 687)**



### Summary of information about legal representation

- The complainant and/or the defendant had legal representation in a very small minority of the files sampled.
- Where legal representation was engaged, the most common scenario was that only the defendant was represented by a lawyer.

## 10.4 Cases involving social workers

**Only a handful of cases involved a social worker.** Two files contained a memo from a social worker which gave background to the case and recommended that maintenance be ordered. In another case a letter from a social worker detailed the discussion process between the complainant and the defendant regarding the payment of maintenance. Details in the file show that the parents eventually resolved their dispute and agreed to monthly maintenance and access. One file contained a letter from the maintenance officer requesting a report from a social worker because the complainant and defendant were still living in the same house. The maintenance officer wanted information about their living conditions and the welfare of the children. However, the file did not contain a report from a social worker. In another case, the child was living with a foster family. The complainant (the foster mother) applied to the court for maintenance from the biological father. The file contained a record of a child protection hearing and noted that the child was under the supervision of a social worker. It is unusual (but commendable) that the foster parent applied for maintenance.<sup>9</sup>

Although only a very small number of files contained information showing social worker involvement, we believe that more families would benefit from such an intervention. The Rehoboth court reported that a social worker regularly visits the court, and this is a positive model that could be adopted by other courts. However, the greatest challenge is the small number of social workers in Namibia.

<sup>8</sup> D Hubbard, *Maintenance: A Study of the Operation of Namibia's Maintenance Courts*, Windhoek: Legal Assistance Centre, 1995.

<sup>9</sup> An alternative option could have been for the maintenance court to refer the complainant to the Ministry of Gender Equality and Child Welfare (MGEWCW) to discuss whether the State would make a contribution order against the biological parents. See page 284 for a discussion on contribution orders.

The Government estimates that there is a ratio of one social worker to 13 519 people.<sup>10</sup> Given that the country has a population density of two people per square kilometre, this ratio clearly does not allow social workers to adequately fulfil their mandate. There is a clear need for more social workers in Namibia. We recommend that the Ministry of Gender Equality and Child Welfare employ more social workers and assistants (as provided for under the Child Care and Protection Bill), and when feasible we recommend that the Ministry of Justice and Ministry of Gender Equality and Child Welfare develop a closer working relationship so that social workers may be more involved in maintenance enquiries.

## 10.5 Postponements

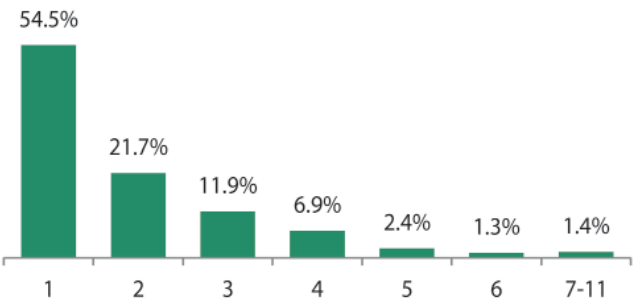
*"Maintenance is 'the stepchild of justice' because criminal cases get priority."*

Magistrate

Approximately one in five files contained at least one postponement (378/1 687; 22.4%). Approximately half of these files recorded only one postponement (206/378; 54.5%) and over 10% contained 4-11 postponements. Overall, 730 postponements were recorded in the sample from 378 files. **However, not all of these postponements took place in the context of enquiries.** Due to the lack of information in the files, we are not able to establish at what stage in the process the postponements occurred – for example in some cases the maintenance officer might have noted a postponement in the meetings that he/she held with the complainant and defendant, and in other cases the postponement may have been noted during the hearing before the magistrate.

The majority of postponements were associated with the initial maintenance application (619/730; 84.8%), and a small percentage were associated with applications for a change (substitution) to be made to an order (54/730; 7.4%) or with arrears proceedings (30/730; 4.1%). This finding is to be expected given that a very small minority of files contained a request to change an existing order (89/1 687; 5.2.0%; see chapter 13).

**Chart 47: Number of postponements contained in the files (n=378)**



**Table 84: Number of files containing postponements**

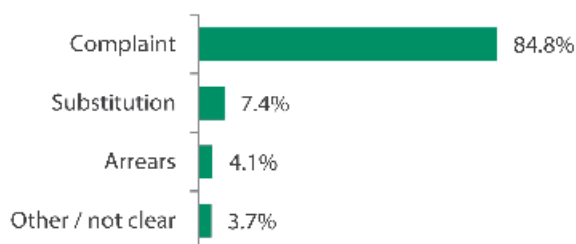
Number of postponements	Number of files	Percentage
1	206	54.5
2	82	21.7
3	45	11.9
4	26	6.9
5	9	2.4
6	5	1.3
7	1	0.3
8	1	0.3
9	1	0.3
11	2	0.5
Total	378	100.0

*"Most mothers are unemployed, but they must maintain their children."*

Participant in the female focus group discussion in Ondangwa

<sup>10</sup> Republic of Namibia, *First, Second and Third Namibia Country Periodic Reports on the Implementation of the UN Convention on the Right of the Child (1997-2008)*, Windhoek: Ministry of Gender Equality and Child Welfare, 2009 at 15.

**Chart 48: Stage of maintenance complaint when postponement recorded (n=730)**



The files contained a range of reasons for the postponements. **In total, approximately 40% of the postponements were attributable to the defendant alone (313/730; 42.9%; rows shaded green in Table 86).** Approximately a fifth of the postponements occurred because the defendant did not appear in court, due to sickness or travelling for work purposes, or for an unspecified reason (159/730; 21.8%). Fifty-two postponements were due to the court being unable to trace the defendant (7.1%), and one was due to the defendant residing in another country. Defendants also caused delays due to paternity disputes (61/730; 8.4%; further discussed in section 10.2) or because they did not bring sufficient proof of their financial status (48/730; 6.6%). A small number of cases were postponed to allow the defendant to seek employment (49/730; 6.7%) or receive payment from the workplace (4/730; 0.5%). In a small number of cases the complainant (36/730; 4.9%) or both the defendant and the complainant (42/730; 5.8%) failed to attend court. Four cases were postponed because the complainant did not bring enough proof (4/730; 0.5%).

In some cases maintenance court personnel do not appear to have been proactive enough in addressing the delays. For example, there were 17 postponements because the parties could not reach an agreement. While it is important to allow the parties to attempt to reach agreement, the best interests of the child should be the paramount consideration, and repeated delays for this purpose may not be in the interests of the child. Maintenance officers should have more confidence in referring cases for enquiry if an agreement cannot be reached.

**Table 85: Stage of maintenance complaint when postponement recorded**

Stage of maintenance complaint	Frequency	Percentage
Complaint	619	84.8
Substitution	54	7.4
Arrears	30	4.1
Other / not clear	27	3.7
<b>Total</b>	<b>730</b>	<b>100.0</b>

**Table 86: Reason for postponement**

Reason	Frequency	Percentage
Defendant did not appear in court for a variety of reasons	159	21.8
For further enquiry	73	10.0
Blood tests needed / paternity disputed	61	8.4
Defendant could not be traced	52	7.1
Defendant not working / needs time to seek employment	49	6.7
Defendant to bring proof	48	6.6
Both parties failed to attend	42	5.8
Complainant did not appear in court for a variety of reasons	36	4.9
Parties could not reach an agreement	17	2.3
Problems with court administration (summons not served or served late, or limited capacity of the court)	16	2.2
Defendant/complainant to obtain legal representation	14	1.9
Progress regarding maintenance payments determined (making of a consent, default or attachment of wages order or defendant to pay arrears)	7	1.0
Criminal proceedings involved (defendant has been arrested or the case was referred to the public prosecutor)	4	0.5
Complainant requests postponement	4	0.5
Defendant waiting for payment from his workplace	4	0.5
Complainant to bring additional proof	4	0.5
Defendant and complainant agree to postponement	3	0.4
Defendant requests postponement as in another country	1	0.1
Unknown	136	18.6
<b>Total</b>	<b>730</b>	<b>100.0</b>

## Time between postponements

**For cases that were postponed on more than one occasion (172/378; 45.5%), the median time between postponements was 42 days** (mean 63.8 days; range 1-952 days).<sup>11</sup> Although a timeline of 42 days is probably realistic, such delays are likely to present the complainant with challenges for caring for the child and are not in the best interests of the child. The Child Care and Protection Bill provides clear timelines for child protection hearings.<sup>12</sup> **We recommend that the Maintenance Act include similar timelines to which courts should adhere wherever possible (i.e. the courts should be permitted to allow longer timelines if necessary, as some cases may require this).**

The 1995 maintenance study did not record data on postponements.<sup>13</sup>

The court officials interviewed discussed the frequent delays associated with maintenance enquiries. One clerk said that cases are often postponed because the defendant will not bring his payslip when initially summoned. This comment is substantiated by the data in this section which shows that 6.6% of the postponements were due to the defendant not bringing enough proof to court. The clerk also said that postponements occur when the complainant asks for an increase in the maintenance order and the defendant asks for time to accumulate information to show why he cannot pay the increased amount.

Another clerk said that the defendant will ask for a postponement to introduce delays into the process. For example, the defendant will come to court just often enough to avoid having a warrant of arrest issued, and each time will ask for more time so that an order is not made. The court officials at another court said that enquiries can take up to a year if there are problems with the case. This suggests that although the 2003 Act introduced default orders to deal with a lack of response from the defendant, some people are still circumventing the system.

### Summary of information about postponements of maintenance complaints

- Approximately one in five files contained at least one postponement.
- Approximately half of these files contained only one postponement, and over 10% contained 4-11 postponements.
- The majority of the postponements were associated with the initial maintenance application, and a small percentage were associated with applications for changes to be made to an order or with arrears proceedings.
- Postponements attributable to the defendant alone accounted for approximately 40% of the postponements.
- For the files that contained more than one postponement, the median time between postponements was 42 days.

## 10.6 Cases involving domestic violence

The Combating of Domestic Violence Act allows complainants to request an order for temporary maintenance for the complainant, or for children or other dependants of the respondent, for a maximum period of six months, on the theory that someone who is experiencing domestic violence is unlikely to be able to cope with a variety of simultaneous court procedures, and yet should not feel compelled to stay in a violent situation because of economic necessity. A request for temporary maintenance is possible only where the respondent has a legal liability to maintain the person in question.

<sup>11</sup> In the case where there is a postponement of 952 days, it is not clear why this delay occurred. A warrant of arrest was issued for the defendant in February 2007, and there is no further information in the file until October 2009 when there are notes from an enquiry.

<sup>12</sup> For example, the proceedings of a children's court may be adjourned only on good cause shown, taking into account the best interests of the child, and for a period of no more than 30 days at a time (see Child Care and Protection Bill, draft dated 12 January 2012, section 45).

<sup>13</sup> D Hubbard, *Maintenance: A Study of the Operation of Namibia's Maintenance Courts*, Windhoek: Legal Assistance Centre, 1995.



The relevant provision in the Act reads as follows:

*(2) A protection order may, at the request of the applicant or on the court's own motion, include any of the following provisions –*

\*\*\*

*(h) a provision temporarily directing the respondent to make periodic payments in respect of the maintenance of the complainant, and of any child of the complainant, if the respondent is legally liable to support the complainant or the child, as an emergency measure where no such maintenance order is already in force ...*<sup>14</sup>

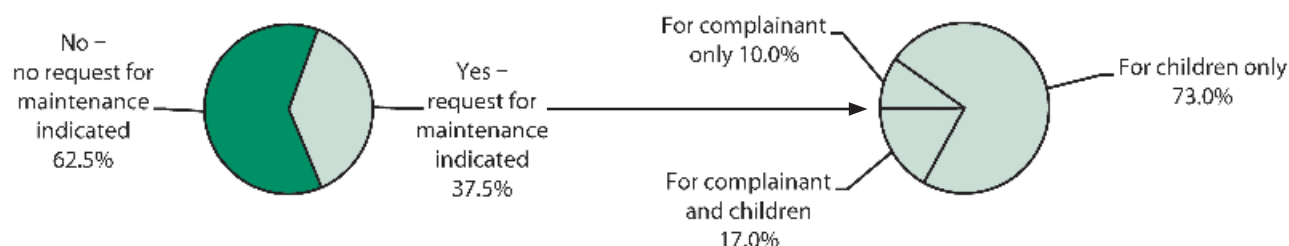
We identified four cases that made reference to domestic violence. Two files contained temporary maintenance orders made under the Combating of Domestic Violence Act. In the first case the defendant was ordered to pay N\$75 maintenance per child for four children (total N\$300). The complainant applied for this order to be made into a standard maintenance order for the same amount, and it was made into a consent order. In the second case the defendant was ordered to pay N\$1 500 per month for the complainant and N\$500 for one beneficiary. However, the file does not contain a final maintenance order. The third file contained a reference to the complainant (the grandmother) having made an appointment to apply for a protection order, but did not contain any other information about domestic violence. The fourth file contained details of a protection order in which the parties agreed not to commit acts of domestic violence against each other, but there are no further details because pages were missing from the order.

We can also find information on the relationship between maintenance complaints and protection orders in the LAC study report on the Combating of Domestic Violence Act.<sup>15</sup> The study found that maintenance was requested by the complainant in about 38% of the cases where complainants completed the relevant section on the application form (395/1052; 37.5%). Overall, temporary monthly maintenance was granted in 34% of the cases where protection orders were issued (287/844; 34.0%). Some of the orders for maintenance were included at the behest of the magistrate rather than the complainant.

**Table 87: Temporary maintenance orders within applications for protection orders**

	Frequency	Percentage
Request for maintenance indicated	395	37.5
Request not indicated	657	62.5
<b>Total</b>	<b>1 052</b>	<b>100.0</b>
Maintenance included in interim protection order	287	34.0
Maintenance not included in interim protection order	557	66.0
<b>Total</b>	<b>844</b>	<b>100.0</b>

**Chart 49: Temporary maintenance orders within applications for protection orders**



Based on information where we can compare the request for maintenance within a protection order with the outcome of the interim protection order, a temporary maintenance order was requested and granted in 32.1% of the applications, requested but not granted in 7.6% of the applications, and not requested but granted in 2.6% of the applications. Over half of the temporary protection orders did not include an order for maintenance.

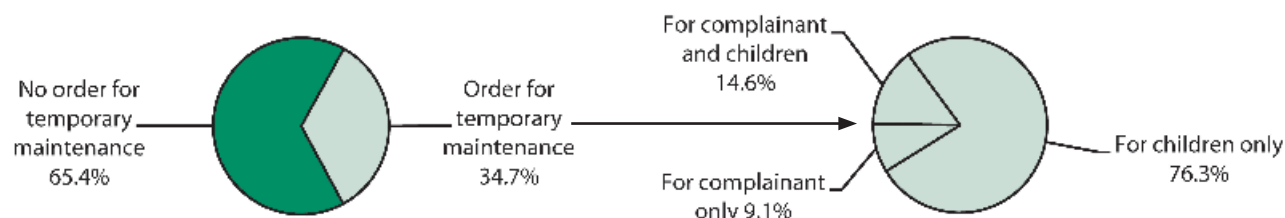
<sup>14</sup> Combating of Domestic Violence Act 4 of 2003, section 14(2)(h).

<sup>15</sup> Legal Assistance Centre (LAC), *Seeking Safety: Domestic Violence in Namibia and the Combating of the Domestic Violence Act 4 of 2003*, Windhoek: LAC, 2012 at 369-372 and 433-438.

**Table 88: Temporary maintenance in interim protection orders**

Overview of all requests and outcomes		Number	Percentage
<b>The respondent must pay temporary monthly maintenance (for the complainant or specified children)</b>	Requested and granted	250	32.1
	Requested, but not granted	59	7.6
	Not requested, but granted	20	2.6
	Neither requested nor granted	450	57.8
	<b>Total</b>	<b>779</b>	<b>100.0</b>

This table is based on all 779 cases where the complainant's requests could be compared to the interim protection order outcomes, to give a more comprehensive picture of interim protection order outcomes on this point.

**Chart 50: Temporary maintenance orders within interim protection orders**

Most of the requests were for maintenance for children in the care of the complainant (291/395; 73.7%), followed by requests for maintenance for children and for the complainant (65/395; 16.5%). Very few of the maintenance requests were only for the complainant (439/395; 9.9%). The orders granted showed a similar distribution (maintenance for children 219/287 or 76.3%; children and complainants 42/287 or 14.6%; and complainant only 26/287 or 9.1%).

**Table 89: Beneficiaries in applications for temporary maintenance in protection orders**

	Request for a protection order	Percentage	Temporary protection order contains provision for maintenance	Percentage
Children only	291	73.7	219	76.3
Complainant and children	65	16.5	42	14.6
Complainant only	39	9.9	26	9.1
<b>Total</b>	<b>395</b>	<b>100.0</b>	<b>287</b>	<b>100.0</b>

The maintenance requests for children typically involved only one or two children, with a fairly even balance of boys and girls. This finding is in line with general requests for maintenance. Most of the requests for child maintenance involved children under the age of 15, again a finding that is in line with general requests for maintenance. There were 19 cases involving children older than 18. It is possible that some of these cases involved offspring who were still studying, or offspring with disabilities for whom the parental duty of support would extend beyond age 18 or 21. It could also be that some of the complainants who filled in the application form did not know that maintenance normally ceases at age 18.

The vast majority of the children involved in these requests were children born to both the complainant and the respondent. There were a handful of applications (19) where the complainant requested maintenance for a child of the complainant who was apparently not related by blood to the respondent (such as a child of the complainant or the complainant's spouse or partner). These applications appear to be based on a misunderstanding of the provisions of the current law, as there is no legal obligation on persons to provide maintenance for stepchildren.

Of the maintenance requests that were granted, the 261 orders which included maintenance for children covered a total of 528 children, with most orders covering either one or two children. Two of the orders covered children of the complainant's current spouse or partner – persons whom the respondent is extremely unlikely to have had a legal liability to maintain. One grandchild was covered by a maintenance order, which seems reasonable as responsibility for maintenance passes

to grandparents if parents are unable to maintain their children. Astonishingly, one maintenance order covered a pet – which should more properly have been incorporated into the household expenses covered by maintenance to the complainant. Because there were a few cases where the provisions on temporary maintenance seem to have been misapplied by the courts, future training needs to emphasise the fact that this option, as under the Maintenance Act, is available only where the respondent has a legal liability to maintain the person in question.

The amounts of temporary maintenance requested ranged from N\$100 to N\$10 000 per month for complainants, and from N\$50 to N\$8 000 per month per child. They were typically N\$500 per month for the complainant and N\$300 per month per child. This amount is within the range of general applications for maintenance. The total amount of maintenance requested per case, whether for the complainant or for children or for some combination of the two, was typically N\$600 per month. As would be expected, requests for child maintenance were slightly higher for older children than for younger children. Mirroring requests almost exactly, the amounts of maintenance granted ranged from N\$100 to N\$10 000 per month for complainants, and from N\$50 to N\$8 000 per month per child, and were typically N\$600 per month for the complainant and N\$300 per month per child. The total amount that any single respondent was ordered to pay for all beneficiaries together ranged from N\$150 to N\$12 500 per month. The amounts of maintenance ordered were consistent with the pattern of requested amounts, with minors over the age of 18 receiving slightly higher amounts than younger children. The average amount of maintenance granted is higher than for maintenance orders not associated with protection order applications (see section 12.5), but the sample sizes differ and so a direct comparison cannot be made.

**Table 90: Amount of maintenance in applications for protection orders and temporary protection orders**

Request for a protection order	Number	Mean (N\$)	Median (N\$)	Minimum (N\$)	Maximum (N\$)
<b>Amount of maintenance requested</b>					
Complainant	101	1 059	500	100	10 000
All children (per case)	338	879	600	100	9 500
Per child	678	443	300	50	8 000
<b>Total amount for all beneficiaries (where information not subdivided)</b>	<b>376</b>	<b>1 075</b>	<b>600</b>	<b>150</b>	<b>12 500</b>
<b>Amount of maintenance ordered</b>					
Complainant	66	1 357	600	100	10 000
All children (per case)	254	897	600	200	8 000
Per child	511	446	300	50	8 000
<b>Total amount for all beneficiaries (where information not subdivided)</b>	<b>279</b>	<b>1 137</b>	<b>600</b>	<b>150</b>	<b>12 500</b>

The *Seeking Safety* study assessed the final protection orders according to whether the final order provided for the same or more or less protection than the interim protection order because there were so many cases where interim protection orders did not lead to final orders.<sup>16</sup> Therefore we cannot assess the number of final protection orders that resulted in a maintenance order.

The *Seeking Safety* report noted the problem that courts often set the period of maintenance payments for longer than the six-month maximum period set by the Act, with some courts contemplating orders with the same sorts of durations as ordinary maintenance orders issued in terms of the Maintenance Act (such as until the child turns 18 or becomes self-supporting). The report states that “issuing temporary maintenance orders as an adjunct to protection orders seems to be an area which has caused some confusion amongst magistrates and should be emphasised in future training”.<sup>17</sup> The report also noted that delay in arranging for a temporary maintenance order can be a problem, as

<sup>16</sup> Id at 483, 491.

<sup>17</sup> Id at 437.

it was the opinion of one social worker that maintenance orders “take so long that it’s a risk for the family to even consider them”.<sup>18</sup>

**We recommend that the Ministry of Justice send a circular to the courts explaining the differences between the procedure for granting maintenance as part of a protection order under the Combating of Domestic Violence Act and the procedure for granting maintenance under the Maintenance Act, and the fact that the enforcement mechanisms in the Maintenance Act can be applied to provisions for temporary maintenance embodied in protection orders (see section 4.10). It would also be useful if magistrates or other court officials ensure that people who obtain temporary maintenance as part of a protection order understand that it is a temporary emergency measure and not a substitute for an ordinary maintenance order issued in terms of the Maintenance Act.**

### CASE STUDY

#### Maintenance as part of a protection order

This case involved a protection order in terms of the Combating of Domestic Violence Act 4 of 2003. The parents of three children were divorced, with custody of the children having been awarded to the father. The mother brought an application for a protection order after she discovered that two of the children had been severely beaten by the father in the guise of discipline. The mother was granted an interim protection order but this interim order was discharged by the magistrate after holding an enquiry. The mother successfully appealed against the discharge of that interim protection order; the High Court overturned the magistrate’s decision and issued a final protection order awarding temporary custody of the minor children to the mother subject to reasonable access by the father, and directing the father not to commit any further acts of domestic violence against them. The final protection order also included a temporary order for maintenance to be paid by the father.

*The question of maintenance could not be agreed upon. What was however agreed upon was that the respondent [the father] would continue to pay for the school fees of two of the children, namely J and P, and that the appellant [the mother] would continue pay the school fees of D and that all three children would remain on the respondent’s medical aid with the appellant to pay any excess in respect of medical treatment. The appellant had in the interim [protection] order proceedings claimed N\$500.00 as maintenance per child. The respondent has however tendered only N\$200.00 as maintenance per child. This aspect would need to be the subject of a further enquiry and determined then. The arrangement which I make below would only be of an interim nature, pending that further enquiry. I have determined that the sum of N\$400.00 in maintenance per child should be paid in that interim period.*

*FN v SM [2012] NAHC 226 (8 August 2012)*

### Summary of cases involving domestic violence

- We identified four cases that involved domestic violence. Further information on linkages between maintenance and domestic violence can be found in the LAC report *Seeking Safety*.
- In most cases where a victim of domestic violence requested that a protection order should include temporary maintenance, this request was granted.

<sup>18</sup> Id at 496.



# Seeking Safety

Increasing awareness of the **IMPACT OF DOMESTIC VIOLENCE** in Namibia



## What is child abuse?

1. Child abuse is the mistreatment of a child. Children can be abused by people they know, such as family members, or by people in the community, or by strangers.
2. There are many different types of abuse. These include physical, sexual, economic and psychological acts of violence.
3. When a child is abused by family members, this is domestic violence. It is also domestic violence if a child is allowed to see physical, sexual or psychological abuse against a family member.

## What to do if you are a child and you are being abused

1. Speak to a trusted adult or friend. This could be a family member, teacher or pastor.
2. Ask the adult or friend to help you contact a social worker, a Woman and Child Protection Unit or the police. You can also contact a social worker or police officer directly.
3. If you cannot find anyone to help you or if you are not sure what to do, you can call LifeLine/ChildLine free on 116. They can advise you.

## What to do if you know that a child is being abused

Report the case to a social worker, a Woman and Child Protection Unit or the police.

Poster series produced by the **Legal Assistance Centre** with support from **UNICEF**



**unicef**   
unite for children

Photo by  
**Rachel Coomer**

**Disclaimer:**  
The persons depicted in this series of posters are not actual victims.

**ZERO TOLERANCE FOR DOMESTIC VIOLENCE!**

One of the posters produced for the Legal Assistance Centre's campaign against domestic violence, initiated in 2012 at the launch of the LAC report entitled *Seeking Safety: Domestic Violence in Namibia and the Combating of the Domestic Violence Act 4 of 2003*.





# Chapter 11

## WITHDRAWALS OF MAINTENANCE COMPLAINTS

A small minority of files in the sample were withdrawn (138/1687; 8.2%). The 1995 maintenance study found a similar proportion of files withdrawn (9%).<sup>1</sup>

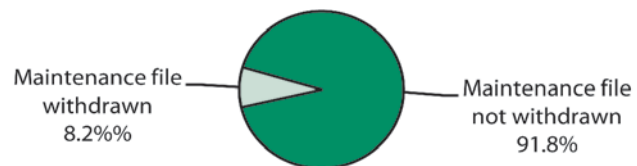
The majority of withdrawals were made during the complaint process (91/138; 65.9%). Nearly a third were made after a maintenance order had been granted (39/138; 28.3%), and the remainder were withdrawn after the payments had gone into arrears (3), during an application for change (2), or at a point in time that was not clear (3).

The majority of withdrawals were made by the complainant (99/138; 71.7%), and just under 10% were made by the court. In nearly 20% of the withdrawals (26/138; 18.8%) it was unclear who made the request to withdraw. The proportion of cases removed by the court is lower than identified in the 1995 maintenance study which found that the court withdrew one-third of the complaints.<sup>2</sup> It is not clear why the number has dropped.

Interviews with court officials provide further insight into why some complainants withdraw their complaints. A number of the clerks of court stated that some complainants withdraw their applications because of pressure from the defendant or a family member. In one case described by a clerk, the defendant harassed the complainant in an attempt to intimidate her into withdrawing the application. In this instance the court advised the complainant to apply for a protection order, which the same court then granted.<sup>3</sup>

One clerk stated that sometimes the complainant's parents force her to withdraw because claiming maintenance is "a taboo in their culture" or because the family is concerned that the defendant's

**Chart 51: Proportion of maintenance files withdrawn (n=1 687)**



**Table 91: At what stage was the maintenance file withdrawn?**

Stage	Frequency	Percentage
Maintenance complaint	91	65.9
After a maintenance order was made	39	28.3
Payments were in arrears	3	2.2
Application of change	2	1.4
Time point unclear	3	2.2
<b>Total</b>	<b>138</b>	<b>100.0</b>

<sup>1</sup> D Hubbard, *Maintenance: A Study of the Operation of Namibia's Maintenance Courts*, Windhoek: Legal Assistance Centre, 1995 at 124.

<sup>2</sup> Id at 124.

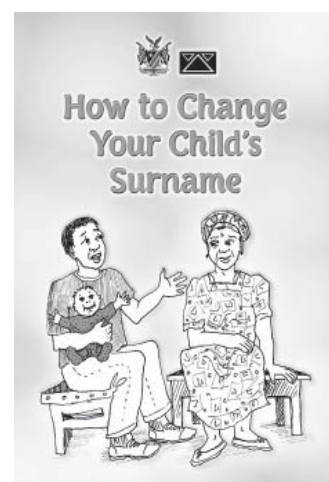
<sup>3</sup> This advice was not the only option as the Maintenance Act makes it an offence to compel or induce a complainant not to file a maintenance complaint (Maintenance Act 9 of 2003, section 41).

family will go to a witchdoctor. The clerk said that while threats of witchcraft are not common, they do occur in the Owambo community. The magistrate of the Rundu court also cited a case of intimidation through witchcraft. The court reported the person making the threats to the police – an option that is provided for in the Maintenance Act.

The magistrate of the Karasburg court reported a similar story but with a different ending. In this case the complainant repeatedly made and withdrew maintenance complaints due to the defendant's violent behaviour. Although the complainant had been granted a protection order, it did not provide sufficient protection because the complainant did not want the punishment for failing to obey a protection order to be enforced (a prison sentence or fine) as this could stop the defendant from providing the maintenance.<sup>4</sup> However, an option that was not utilised is the fact that the maintenance court is empowered to impose a term of periodic imprisonment. This could have provided a viable solution to cases such as this where intimidation is being used.<sup>5</sup>

The LAC is also sometimes informed of situations involving intimidation through witchcraft. For example, in a workshop held in the Okakarara area in 2006, one participant stated that “[T]he reports are true. They kill the children with witchcraft. Cases are happening. If you have a child, you are so afraid to go to the man, because he will kill the child. It happens a lot. The cause of death is witchcraft! The children get ill and die. Women are afraid to ask the men for money because of it.”

Another problem reported by a clerk is that some men think that being asked to pay maintenance is an insult and a punishment. This clerk explained that a defendant will sometimes threaten to “take the kid off from [his] surname.” Legally the father cannot do this as the law allows for a child's surname to be changed in a limited number of circumstances, none of which would allow the father to apply for a surname change for this reason.<sup>6</sup> However, the negative pressure from the father in this regard may be sufficient to intimidate the complainant to withdraw her complaint. In 2011 the Legal Assistance Centre produced public information pamphlets entitled *How to Register the Birth of a Child* and *How to Change Your Child's Surname*. This information may be useful for informing parties to a maintenance case as to how and when their child's surname can be changed. **We recommend that the Ministry of Justice collaborate with the Ministry of Home Affairs and Immigration to provide copies of the Legal Assistance Centre pamphlets on registering a birth and changing a surname to all maintenance courts in Namibia.**



<sup>4</sup> A person who, without lawful justification, breaches a protection order commits an offence and is liable on conviction to a fine not exceeding N\$8000 or to imprisonment for a period not exceeding two years, or to both the fine and imprisonment (Combating of Domestic Violence Act 4 of 2003, section 16(1)).

<sup>5</sup> Criminal Procedure Act 51 of 1977, section 285.

<sup>6</sup> According to the Births, Marriages and Deaths Registration Act 81 of 1963, a child's surname can be formally changed in the birth register and on the child's birth certificate if the child is a minor (under the age of 21) and is known by a surname other than the surname on the birth certificate, in any of the following circumstances:

- The child was born outside marriage and was registered with the father's surname but is known by the mother's surname.
- The child was born outside marriage and is known by the mother's surname or the surname of her husband (the child's stepfather), and not by the surname on the birth certificate.
- The child was born inside marriage and has been known by the mother's surname or the surname of her new husband (the child's stepfather) since the death of the child's father or the divorce of the child's biological parents.
- The child is known by the surname of his or her guardian (for example if both parents have died).

The Ministry of Home Affairs and Immigration will also sometimes allow changes to the birth certificate in other circumstances where a child is known by a surname other than the one on the birth certificate. It is also possible for a child born outside marriage and registered with the mother's surname to change his or her surname to the father's surname, if the father has acknowledged the child. The Ministry is currently in the process of revising the law on birth registration.

In the focus group discussions, community members confirmed that people experience intimidation. One woman stated the following:

*“Intimidation and harassment discourage mothers from claiming maintenance. I received threats from the father of my child’s best friend. Also anonymous callers called me to say: ‘You will be embarrassed if you try to claim maintenance.’ But I attended workshops so I knew to report the harassment to the police. After I reported the incident to the police, it actually stopped. But the father never showed up to court on three hearing dates. Nothing has been done about this. The father of my child is a lecturer at a university. The child is at the university, but the father won’t pay school fees.”*

Other participants said that if women claim maintenance, the fathers threaten to bewitch the child. Sometimes a child will die and this will discourage other women from applying for maintenance because they fear that their child’s father might threaten to bewitch the child or actually do something that appears to prove bewitchment. Some people also believe that marriage can only last with the parents’ blessing, and some families will not bless a marriage if the woman has claimed maintenance from the father for children that were born before the marriage takes place.

While many court officials were aware that complainants withdraw cases due to pressure or intimidation, it appears that in many cases the complainant does not tell the court that she is being intimidated. As one maintenance officer explained, *“If a woman wants to withdraw, I will ask her if she was intimidated. She’ll just say, ‘no we talked’. I know it’s more, in my gut.”* The clerk at another court made a similar statement, saying that the complainant will not tell him directly why she wants to withdraw a case, but *“Sometimes I hear from a relative that the complainant has been threatened. It is very common for the defendant to tell her that he will leave his job to avoid maintenance, or divorce her.”*

Only one clerk with whom we discussed this issue, who had served as a clerk for eight years, specifically stated that she was not aware of any cases where the complainant was pressurised to withdraw the case.<sup>7</sup> It is possible that complainants had withdrawn cases at this court due to pressure or intimidation, but the actual reasons for withdrawals at this court were not known to this clerk.

One clerk of court said that when complainants ask to withdraw a case, she discourages them from doing so, because she knows from experience that even if the defendant promises to pay maintenance informally, in many cases the payments stop after a short time. This clerk stated that she also warns the complainant that he or she could be asked to pay some of the associated costs if he or she subsequently reapplies for a maintenance order – although the clerk added that the court does not apply this provision in practice. In any case this warning is not entirely valid because the court is only allowed to order the payment of costs of service or wasted costs due in the event of failure to attend a hearing, depending on the conduct and means of the persons involved in the enquiry, and it is not acceptable to misinform the complainant in this regard.<sup>8</sup> The magistrate at another court similarly noted that complainants will return to court eventually: *“At times the defendants persuade the complainants not to show up, but in a month the complainants will be back because the defendant didn’t pay the promised maintenance.”*

Many of the court officials said that they require the complainants to make a sworn statement before they are permitted to apply for their maintenance order to be discharged. The court officials at one court stated that if the case is on the roll, the withdrawal process depends on the public prosecutor who requires both parties to give a statement to the police. If the reason for withdrawal is not valid, the prosecutor will not withdraw the case. These practices are a matter of concern as there is nothing in the Act that requires them. The Act does require a complainant to make a sworn statement when

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<sup>7</sup> Due to limitations on time, not all clerks of the court discussed this question with the researchers.

<sup>8</sup> Maintenance Act 9 of 2003, section 20.

requesting the enforcement of an order,<sup>9</sup> but it does not specify that the complainant must make a sworn statement to withdraw a complaint or initiate proceedings to discharge an order. It may be that some court officials are confusing the process for withdrawing a maintenance case with the process for withdrawing a criminal case, such as a rape case. Alternatively it may be that the court officials ask the complainants to make a sworn statement to ensure that the complainant is definitely serious about the withdrawal – the added step may make it less likely that the complainant opens and closes a case repeatedly. However, adding difficulties to the process is not a valid way to reduce the incidence of maintenance complaint withdrawals. Instead, greater public awareness of the importance of paying maintenance is needed to achieve long-term opinion change about maintenance. **We recommend that maintenance officers and clerks of court be provided with guidelines for the correct procedure to follow when a complainant seeks to withdraw a maintenance complaint.**

The maintenance officer at the Eenhana court discussed his plan to introduce a register of withdrawn files. He had also drafted a form to be filled in for each file withdrawn, which specifies all actions taken by the maintenance officer or the maintenance clerk with regard to the case. **We recommend amending the regulations of the Act to include such a withdrawal information form as it would be very useful for monitoring the management of maintenance cases.**

### **Summary of information about the withdrawal of maintenance cases**

- A small minority of files were withdrawn.
- The majority of withdrawals were made during the complaint process.
- The majority of withdrawals were made by the complainant, and just over 10% were made by the court.

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<sup>9</sup> Id, section 28.



# Chapter 12

## MAINTENANCE ORDERS

**T**he Maintenance Act states that three types of maintenance orders may be made:

1. a consent maintenance order;
2. a default maintenance order; or
3. a maintenance order following a hearing.<sup>1</sup>

A **consent maintenance order** is made when the defendant consents to the proposed maintenance order summarised in the summons that he or she received. In this case the defendant does not have to attend an enquiry. Instead, the defendant can sign Part A of the order and return it to the court. Consent may also be an outcome of the initial meeting with the maintenance officer where the complainant and defendant have a chance to discuss the situation. Also, in practice many defendants speak to the maintenance officer in person when they return the forms, allowing for a mini-interview to be held. On the date of the hearing, the maintenance court may make a consent maintenance order without hearing or taking any further evidence. A copy of the consent order must be served on the defendant.

A **default maintenance order** is made when the defendant has been properly summoned to attend the maintenance enquiry but fails to appear. Default orders were an innovation of the 2003 Maintenance Act. They were included in an attempt to prevent situations where the defendant purposefully fails to attend a maintenance enquiry with the intention of prolonging the enquiry to avoid being required to pay maintenance. The 2003 Act says that if the defendant fails to attend the enquiry, the maintenance officer must request the magistrate to make a default maintenance order. The magistrate must then call on the complainant or any other person whose evidence might be relevant, to provide evidence which would assist the court in making an order. The maintenance court may then make a default maintenance order. The default order must be served on the defendant. Proof of service is sufficient evidence that the defendant is aware of the order.

A **maintenance order following a hearing** is made when both the complainant and defendant attend a maintenance enquiry in the presence of the magistrate.

All of the orders have equal force.

## 12.1 Total number of orders

The sample contained 1687 files and 1711 different applications for maintenance. It also contained a total of 1126 consent orders, default orders and orders following a hearing in respect of 1006 files. Some files contained one to three orders. No orders were found in 681 files. There are four scenarios that

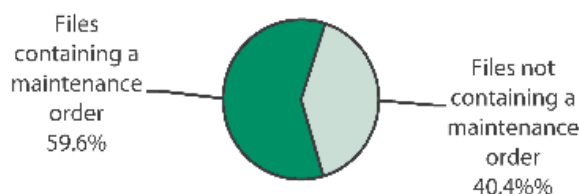
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<sup>1</sup> Maintenance Act 9 of 2003, sections 17-19.



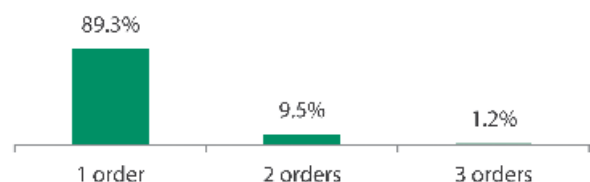
could have occurred: (1) a complaint is made and an order is made; (2) a complaint is made and more than one order is contained in the file; (3) a complaint is made but no order is made; (4) no complaint is on file but an order is made. This explains why the number of files that do not contain an order (681) does not match the fact that 1711 complaints resulted in only 1126 orders (meaning that no orders were made in respect of 585 complaints). As some files contained multiple applications and multiple orders, we have compared both the number of files with the number of files containing at least one order, and the total number of complaints with the total number of orders.

**Chart 52: Proportion of files in the sample containing a maintenance order (n=1 687)**



The majority of files which contained a maintenance order contained a single order (898/1006; 89.3%). Approximately 10% of the files contained two orders (96/1006; 9.5%) and a small number (12) contained three orders. The files that contained more than one order were where changes had been made.

**Chart 53: Number of orders in the files (n=1 006)**



**Table 92: Number of orders in the files**

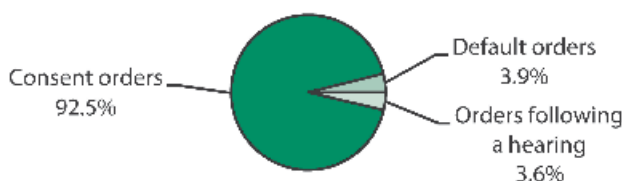
Number of orders in the file	Frequency	Percentage
1	898	89.3
2	96	9.5
3	12	1.2
<b>Total</b>	<b>1 006</b>	<b>100.0</b>

## Total number of orders by type

The vast majority of orders were consent orders (1041/1126; 92.5%) with the remainder consisting of similarly small proportions of default orders (44/1126; 3.9%) and orders following a hearing (41/1126; 3.6%).

The 1995 study also found that the vast majority of orders were consent orders (426/618; 68.9%), with only 30 maintenance orders following a hearing being made (30/618; 4.9%). The remaining cases were removed from the roll. As default orders were an innovation of the 2003 Maintenance Act, this option was not available at the time of the 1995 study.<sup>2</sup>

**Chart 54: Type of maintenance orders made (n=1 126)**



**Table 93: Type of maintenance orders made**

Type of order	Number of orders	Percentage of orders	Number of files	Percentage of files
Consent orders	1 041	92.5	964	57.1
Default orders	44	3.9	41	2.4
Orders following a hearing	41	3.6	38	2.3
<b>Total</b>	<b>1 126</b>	<b>100.0</b>	<b>1 687</b>	<b>61.8</b>

<sup>2</sup> D Hubbard, *Maintenance: A Study of the Operation of Namibia's Maintenance Courts*, Windhoek: Legal Assistance Centre, 1995 at 85.

## Total number of consent orders

The majority of maintenance orders were consent orders (1041/1126; 92.5%). Consent orders were made at all of the courts in the study. As one magistrate explained, *“most of the time, people arrive, the prosecutor calls names, they have a consultation. Most settle, this is the normal scenario.”* He estimated that only one case per month leads to a hearing before the magistrate as *“most of the time they agree”*.

**Table 94: Number of consent orders in files containing consent orders**

Number of consent orders	Frequency	Percentage
1	891	92.4
2	69	7.2
3	4	0.4
<b>Total</b>	<b>964</b>	<b>100.0</b>

Consent orders were contained in 964 files. The majority of files that contained a consent order contained a single consent order (891/964; 92.4%), however some files contained two (69/964; 7.2%) or three (4/964; 0.4%) consent orders.

## Total number of default orders

The sample contained a small proportion of default orders (44/1126; 3.9%). Default orders were contained in 42 files. The majority of files containing a default order contained one default order (39/41; 95.1%). One file contained two default orders and another contained three default orders.

**Table 95: Number of default orders in files containing default orders**

Number of default orders	Frequency	Percentage
1	39	95.1
2	1	2.4
3	1	2.4
<b>Total</b>	<b>41</b>	<b>100.0</b>

Although some courts appear not to use this option, a maintenance officer at one court estimated that three or four out of 10 maintenance complaints each week result in default orders. We did not sample any default orders from this court, suggesting that the clerk may be over-estimating the prevalence, although the magistrate at the same court also discussed the process of issuing a default order, indicating that this court does utilise the option: *“The lady applies in chambers, and gives evidence about financials. I grant what is asked if he didn’t show even though summoned. He can come and apply for a rescission.”*

The fact that so few files contained a default order suggests that **this new option is not being well-utilised by the courts**. This is despite the fact that section 15.7 shows that approximately half of the warrants of arrest recorded in the sample (134/278; 48.2%) were issued for failure to respond to summonses to attend court. It is likely that in many of these cases it could have been appropriate for the court to issue a default maintenance order. The clerk at one court explained that default orders are not common because the defendant may not be able to pay, for reasons such as having financial commitments towards many children. By ensuring that the defendant attends court, the magistrate can examine the financial status of the defendant before making an order. Whilst such an arrangement is considerate of the needs of the defendant, it is not in the best interests of the child for whom maintenance has been requested. Furthermore the Act provides a special procedure for the defendant to apply for a default order to be substituted or set aside if need be.<sup>3</sup> With such a measure in place, the courts should not be reluctant to issue a default order. Notes from the files also show that in some instances, even when a warrant of arrest might be issued for failure to respond to a summons, the police are told that it is sufficient to deliver a warning to the defendant rather than make the arrest. **We recommend that the Ministry of Justice should issue a circular with guidelines on when a default order should be made and include an explanation of the process a defendant can use to challenge such an order, to ensure the courts are aware of the practical purpose of this process.**

<sup>3</sup> The defendant may apply within 10 days of being served with the order for it to be substituted or set aside (Maintenance Act 9 of 2003, section 19(4-9)).

## Total number of maintenance orders following a hearing

The sample contained a small proportion of maintenance orders made following a hearing (41/1 126; 3.6%). Such orders were contained in 38 files. The majority of files containing a maintenance order following a hearing contained one order (35/38; 92.1%). Three of the files (3/38; 7.9%) contained two orders.

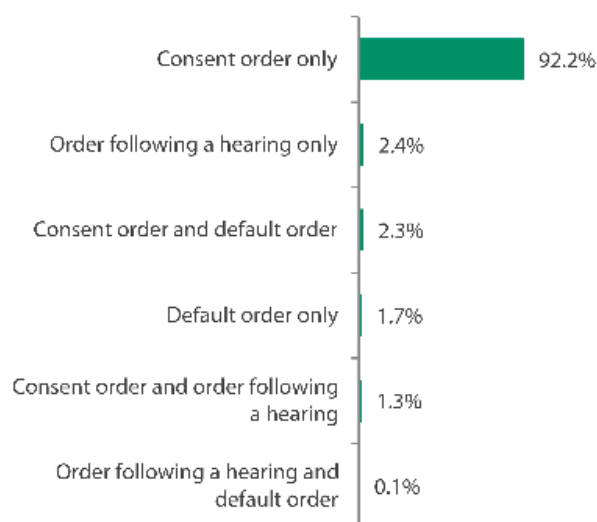
**Table 96: Number of orders following a hearing in files containing orders following a hearing**

Number of orders following a hearing	Frequency	Percentage
1	35	92.1
2	3	7.9
<b>Total</b>	<b>38</b>	<b>100.0</b>

## Number of files containing multiple types of order

Some files contained multiple types of orders, such as a combination of a consent order and an order following a hearing. For example, a small proportion of files contained either a consent order and a default order (23) or a consent order and an order following a hearing (13). One file contained an order following a hearing and a default order. These files probably represent situations where there was, for example, an initial maintenance order followed by a request for substitution.

**Chart 55: Orders contained in the file**



**Table 97: Orders contained in the file**

Orders contained in the file	Frequency	Percentage
Consent order only	928	92.2
Order following a hearing only	24	2.4
Consent order and default order	23	2.3
Default order only	17	1.7
Consent order and order following a hearing	13	1.3
Order following a hearing and default order	1	0.1
<b>Total</b>	<b>1 006</b>	<b>100.0</b>
<i>Files that did not contain an order</i>	<i>681</i>	<i>40.4</i>
<b>Total</b>	<b>1 687</b>	<b>100.0</b>

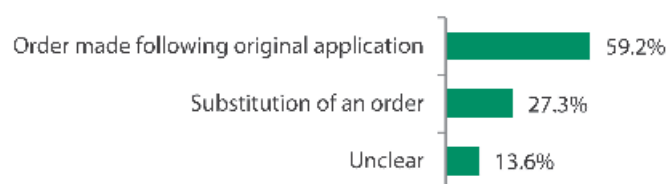
## 12.2 Reason the order was made

Information on why the maintenance order was made – for example as part of an original application or in response to a request to substitute/suspend/discharge – is recorded on the default orders and the orders following a hearing but not on the consent orders. Therefore information is available for only a small proportion of the total number of orders (85/1 126; 7.5%).

Analysis shows that the majority of default orders and orders following a hearing were made following the first application. Given the small sample size, no further patterns can be identified. No default orders were made for the discharge or suspension of an order – this is to be expected as in these cases it is likely that it is the defendant who requests this change.

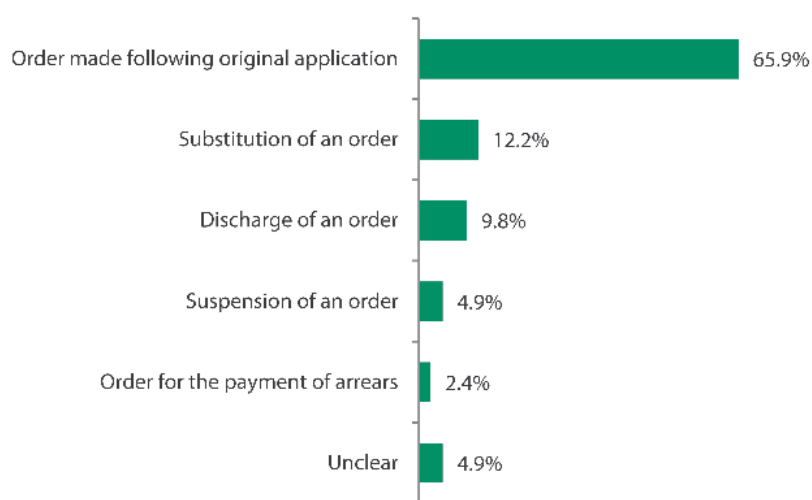
Neither were default orders made for the payment of arrears. Again this is to be expected given that if the defendant has ignored the terms of the first order, simply issuing another order is not likely to result in the payment of the arrears.

**Chart 56: Basis for default orders (n=44)**



**Table 98: Basis for default orders and orders following a hearing**

Reason order made	Frequency				
	Default order		Order following a hearing		Total number
	Number	Percentage	Number	Percentage	
Order made following original application	26	59.1	27	65.9	53
Discharge of an order	0	0.0	5	12.2	5
Substitution of an order	12	27.3	4	9.8	16
Suspension of an order	0	0.0	2	4.9	2
Order for the payment of arrears	0	0.0	1	2.4	1
Unclear	6	13.6	2	4.9	8
Total	44	100.0	41	100.0	85

**Chart 57: Basis for maintenance orders following a hearing (n=41)**

*This is an informal proceeding. I want you both to explain your situations. You can ask each other questions, and I will probably ask you both some questions too.*



## Should people make maintenance agreements outside of court?

The Maintenance Act states that both parents have a duty to maintain their child. This does not mean that parents who are not living together must always seek assistance from the maintenance court to formalise maintenance payments. It is simpler and faster for parents to come to an agreement by themselves. However, in cases where the parent who should be providing support fails to do so on a regular basis, the parent with custody of the child may wish to submit a maintenance complaint to the court.

The Child Care and Protection Bill will allow parents who have custody of a child to make parenting plans. Parenting plans are written agreements between co-holders of parental responsibilities and rights, confirmed by two witnesses, about things like:

- where and with whom the child will live
- maintenance
- contact with various persons
- schooling and religious upbringing
- medical care, medical expenses and medical aid coverage.

Parenting plans are voluntary agreements which are intended to help prevent disputes, although provision is made for getting help to mediate a plan where there is disagreement. Parenting plans can be registered with the children's court, which makes them enforceable in court.<sup>a</sup> Parents who do not want to involve the court could still use the format of a parenting plan to make a private agreement on the payment of maintenance.

<sup>a</sup> Child Care and Protection Bill, draft dated 12 January 2012, chapter 9.

## 12.3 Profile of complainants and defendants in cases where maintenance orders were issued

The profile information about the complainant and defendant is determined from the maintenance complaint form. We assessed this information for all complainants and defendants, as discussed in chapter 8. We then analysed this information if the complainant was successful in obtaining a maintenance order against the defendant and by the type of order as discussed below.

### Age of complainant

The typical successful complainant was 31 years of age (mean 33; range 15-85). There is little difference between the age profile of the average applicant and successful complainant.

There is no notable difference in age of the complainant between the type of maintenance order made, particularly as the number of default and maintenance orders made was small.

**Table 99: Age of complainant: application compared to outcome (years)**

Outcome	Number	Median	Mean	Minimum	Maximum
All complainants (application)	1 382	31	32.8	12	85
All orders	918	33	31.0	15	85
Consent order	848	31	32.9	15	85
Default order	39	30	34.9	19	70
Order following a hearing	31	31	33.2	22	47

### Age of defendant

The typical defendant in a successful maintenance order was 35 years of age (mean 37; range 18-65). There is little difference between the age profile of the average defendant and the defendant against whom an order was made.

There is no notable difference in age of the defendant between the type of maintenance order made, particularly as the number of default and maintenance orders made was small.

**Table 100: Age of defendant: application compared to outcome (years)**

Outcome	Number	Median	Mean	Minimum	Maximum
All defendants (application)	811	35	36.5	18	65
All orders	567	35	35.0	18	65
Consent order	519	35	36.1	18	65
Default order	25	31	32.8	22	54
Order following a hearing	23	34	37.9	23	59

### Language group of complainant

The typical complainant in a successful maintenance order was Damara/Nama- or Oshiwambo-speaking. The representation of language groups varies slightly between application and order. Complainants from Damara/Nama and Silozi language groups appear slightly more likely to receive a maintenance order than those from Oshiwambo, German, English and Rukwangali language groups. The reason for this pattern is unclear.



**Table 101: Language group of complainant: application compared to outcome**

Maintenance complaint	Maintenance order
Oshiwambo	Damara/Nama
Damara/Nama	Oshiwambo
Afrikaans	Afrikaans
Otjiherero	Otjiherero
German	Silozi
Setswana	Setswana
English	German
Rukwangali	English
Silozi	Rukwangali
Other / language group unclear / information missing	Other / language group unclear / information missing

**Table 102: Language group of complainant: application compared to type of outcome**

Language group	Applications		Consent order		Order following a hearing		Default order		Total	
	N	%	N	%	N	%	N	%	N	%
Damara/Nama	517	30.2	338	35.7	12	33.3	20	48.8	370	36.2
Oshiwambo	532	31.1	314	33.2	13	36.1	6	14.6	333	32.6
Afrikaans	256	15.0	152	16.1	4	11.1	10	24.4	166	16.2
Otjiherero	136	7.9	68	7.2	2	5.6	1	2.4	71	6.9
Silozi	4	0.2	5	0.5	0	0.0	0	0.0	5	0.5
Setswana	18	1.1	15	1.6	1	2.8	0	0.0	16	1.6
German	21	1.2	12	1.3	0	0.0	2	4.9	14	1.4
English	16	0.9	8	0.8	0	0.0	1	2.4	9	0.9
Rukwangali	7	0.4	2	0.2	0	0.0	0	0.0	2	0.2
Other / language group unclear / information missing	204	11.9	32	3.4	4	11.1	1	2.4	37	3.6
<b>Total</b>	<b>1 711</b>	<b>100.0</b>	<b>946</b>	<b>100.0</b>	<b>36</b>	<b>100.0</b>	<b>41</b>	<b>100.0</b>	<b>1 023</b>	<b>100.0</b>

## Language group of defendant

The typical defendant in a successful maintenance order was Oshiwambo or Damara/Nama- speaking. There was only a minor variation in the representation of the defendant's language group between complaint and order.

**Table 103: Language group of defendant: application compared to outcome**

Maintenance complaint	Maintenance order
Oshiwambo	Oshiwambo
Damara/Nama	Damara/Nama
Afrikaans	Afrikaans
Otjiherero	Otjiherero
German	Setswana
Setswana	German
English	Rukwangali
Rukwangali	English
Silozi	Silozi
Other / language group unclear / information missing	Other / language group unclear / information missing

**Table 104: Language group of defendant: application compared to type of outcome**

Language group	Applications		Consent order		Order following a hearing		Default order		Total	
	N	%	N	%	N	%	N	%	N	\$
Oshiwambo	597	34.9	347	36.3	14	38.9	16	39.0	377	36.5
Nama	458	26.8	306	32.0	14	38.9	15	36.6	335	32.5
Afrikaans	224	13.1	132	13.8	2	5.6	6	14.6	140	13.6
Otjiherero	145	8.5	72	7.5	2	5.6	0	0.0	74	7.2
German	21	1.2	10	1.0	0	0.0	1	2.4	11	1.1
Setswana	19	1.1	15	1.6	1	2.8	0	0.0	16	1.6
English	17	1.0	8	0.8	0	0.0	0	0.0	8	0.8
Rukwangali	14	0.8	8	0.8	2	5.6	0	0.0	10	1.0
Silozi	2	0.1	3	0.3	0	0.0	0	0.0	3	0.3
Other / language group unclear / information missing	214	12.5	54	5.7	1	2.8	3	7.3	58	5.6
<b>Total</b>	<b>1 711</b>	<b>100.0</b>	<b>955</b>	<b>100.0</b>	<b>36</b>	<b>100.0</b>	<b>41</b>	<b>100.0</b>	<b>1 032</b>	<b>100.0</b>

## Residence of complainant

The typical complainant in a successful maintenance order lived in a larger urban area. There is no difference in the pattern of complainants' residence between maintenance complaints and maintenance orders.

**Table 105: Residence of complainant: application compared to type of outcome<sup>4</sup>**

Residence	Applications		Consent order		Order following a hearing		Default order		Total	
	N	%	N	%	N	%	N	%	N	%
Larger urban areas	1 127	77.9	702	80.9	29	85.3	33	86.8	764	81.3
Smaller urban areas	108	7.5	51	5.9	3	8.8	5	13.2	59	6.3
Rural areas	211	14.6	115	13.2	2	5.9	0	0.0	117	12.4
<b>Total</b>	<b>1 446</b>	<b>100</b>	<b>868</b>	<b>100.0</b>	<b>34</b>	<b>100.0</b>	<b>38</b>	<b>100.0</b>	<b>940</b>	<b>100.0</b>

## Residence of defendant

The typical defendant in a successful maintenance order lived in a larger urban area. There is no difference in the pattern of defendant's residence between maintenance complaints and maintenance orders.

**Table 106: Residence of defendant: application compared to type of outcome<sup>5</sup>**

Residence	Applications		Consent order		Order following a hearing		Default order		Total	
	N	%	N	%	N	%	N	%	N	%
Larger urban areas	1 143	81.4	725	84.4	29	85.3	31	81.6	785	84.3
Smaller urban areas	136	9.7	76	8.8	4	11.8	6	15.8	86	9.2
Rural areas	125	8.9	58	6.8	1	2.9	1	2.6	60	6.4
<b>Total</b>	<b>1 404</b>	<b>100</b>	<b>859</b>	<b>100.0</b>	<b>34</b>	<b>100.0</b>	<b>38</b>	<b>100.0</b>	<b>931</b>	<b>100.0</b>

<sup>4</sup> Categorisation into larger urban, smaller urban or rural areas is based on the designation of urban centres as per the preliminary results for the 2011 census (National Planning Commission, *Namibia 2011 Population and Housing Census Preliminary Results*, Windhoek, Namibia: National Planning Commission, 2012 at 57).

<sup>5</sup> Categorisation as in footnote 4 (ibid).

## 12.4 Profile of the beneficiaries

### Number of beneficiaries

**Maintenance orders were typically made for one beneficiary.** The median number of beneficiaries in maintenance orders is similar to the median number of beneficiaries on the applications. This is true when all maintenance orders are analysed together or separately by type of order. **The fact that there is little difference between the number of beneficiaries applied for and the number of beneficiaries covered by the orders shows that complainants are not requesting maintenance inappropriately.**

The maximum number of beneficiaries applied for was 8. The maximum number of beneficiaries on an order was 7. As discussed on page 141, some applications were for beneficiaries over the age of 18 (which are not often appropriate) and not all applications were successful. The number of beneficiaries covered by consent orders ranged from 1-7. The number of beneficiaries covered by default orders ranged from 1-3. The number of beneficiaries covered by orders following a hearing ranged from 1-6. Although the range in the number of beneficiaries for consent orders is broader than for the other types of orders this is probably only because consent orders account for the majority of the orders made.

**Table 107: Number of beneficiaries: application compared to type of outcome**

Type of order	Number of beneficiaries				
	Number	Median	Mean	Minimum	Maximum
Application – including the complainant	1 565	1	1.5	1	8
Application – excluding the complainant		1	1.4	1	8
All orders – including the complainant	1 102	1	1.5	1	7
All orders – excluding the complainant		1	1.4	0	7
Consent orders – including the complainant	1 025	1	1.4	1	7
Consent orders – excluding the complainant		1	1.4	0	7
Default orders – including the complainant	42	1	1.3	1	3
Default orders – excluding the complainant		1	1.3	1	3
Order following a hearing – including the complainant	35	2	2.0*	1	6
Order following a hearing – excluding the complainant		2	1.8	0	6

\* We applied an ANOVA test and a Levine's test to see whether a mean of 2 is statistically significant. The results of these tests suggest that it is not. Instead it is likely to be a result of the small sample size.

### Age of beneficiaries

**The typical beneficiary in a successful maintenance order was aged 0-12.** There is no difference between the ages of beneficiaries mentioned in the applications and the ages of the beneficiaries who were covered by orders. The median age of beneficiaries in successful orders was 6 (mean 6.9; range 0-23). There is some difference in the median age of the beneficiaries for consent orders, default orders and orders following a hearing but the sample sizes differ substantially so we cannot draw conclusions from these differences.

The information about the age of the beneficiary is determined from the maintenance complaint; therefore the age of the beneficiary covered by the order is not necessarily the same as the age of the child at the time the order was made. This information is not recorded in the files and would be time-consuming and unnecessary to calculate. Instead the analysis assesses whether there are any age groups of beneficiaries that are more likely to be successful than others. The results show that this is not the case.

**Table 108: Median age of beneficiaries in successful maintenance orders**

Type of order	Number of beneficiaries				
	Number	Median	Mean	Minimum	Maximum
All orders	1 252	6	6.9	0	23
Consent orders	1 188	6	6.9	0	20
Default orders	47	3	5.3	0	17
Orders following a hearing	56	5	7.4	0	23

There were 12 cases where applications were made for beneficiaries over the age of 18. Details of the applications for and outcome of these cases are discussed on page 142.

The 1995 maintenance study found that the average age of the beneficiary for whom maintenance was sought was six years old.<sup>6</sup> It did not assess the average age of beneficiaries covered by maintenance orders.

**Table 109: Age of beneficiaries: application compared to type of outcome**

Age	Application		All orders		Consent orders		Orders following a hearing		Default orders	
	N	%	N	%	N	%	N	%	N	%
0 to 5	982	45.0	574	45.8	546	46.0	30	53.6	28	59.6
6 to 12	780	35.8	454	36.3	434	36.5	13	23.2	14	29.8
13 to 17	342	15.7	198	15.8	187	15.7	8	14.3	5	10.6
18 to 20	58	2.7	24	1.9	21	1.8	3	5.4	–	
21 and over	18	0.8	2	0.6	–		2	3.6	–	
<b>Total number of beneficiaries</b>	<b>2 180</b>	<b>100.0</b>	<b>1 252</b>	<b>100.0</b>	<b>1 188</b>	<b>100.0</b>	<b>56</b>	<b>100.0</b>	<b>47</b>	<b>100.0</b>
<i>Missing</i>	209	8.7	236	15.9	223	15.8	8	12.5	8	14.5
<b>Total</b>	<b>2 389</b>	<b>100.0</b>	<b>1 488</b>	<b>100.0</b>	<b>1 411</b>	<b>100.0</b>	<b>64</b>	<b>100.0</b>	<b>55</b>	<b>100.0</b>

## 12.5 Average amount of maintenance ordered

Overall, the median amount of maintenance ordered for the first maintenance order on file was N\$250 (mean N\$315.71; range N\$50–N\$5 500). This is half the median amount that was requested (N\$500).

The total number of maintenance orders in the sample is 1 126, of which 994 were the first order made. Therefore there are only 132 orders in the sample which were made subsequent to the first order. There is no difference in the median value for all orders compared to the first order made, but this may be in part due to the small sample size of subsequent orders.

The Ministry of Gender Equality and Child Welfare provides a state maintenance grant,<sup>7</sup> a special maintenance grant for children with disabilities<sup>8</sup> and a foster care grant.<sup>9</sup> Each of these grants pays N\$250 per child per month. Currently the grant amounts are set by administrative guidelines rather than regulations, although this is set to change with the passage of the Child Care and Protection Bill. Although no grant amounts have been finalised, the draft regulations for the bill propose an

<sup>6</sup> D Hubbard, *Maintenance: A Study of the Operation of Namibia's Maintenance Courts*, Windhoek: Legal Assistance Centre, 1995 at 66.

<sup>7</sup> This grant is paid to a biological parent who earns less than N\$1 000 per month and supports a child under 18 years of age, where the other parent receives either an old-age pension or a disability grant, or is unemployed, or is in prison for six months or longer, or has died (Ministry of Gender Equality and Child Welfare, *Child Welfare Grants in Namibia* (pamphlet), 2010).

<sup>8</sup> Children with a disability under age 16 are eligible for this grant (ibid).

<sup>9</sup> This grant is paid to any person who undertakes the temporary care of a child found to be in need of care and placed in this person's custody by court order in terms of the Children's Act 33 of 1960 (ibid).

increase in the grant amounts, setting the state maintenance grant<sup>10</sup> and the foster care grants<sup>11</sup> at N\$300 per child per month and the disability grant at N\$700 per child per month. The draft regulations also provide for a short-term emergency grant of N\$200 per child per month.<sup>12</sup> Therefore whilst the average amount of maintenance ordered in maintenance cases is equal to the current government grant amounts, the average amount of maintenance ordered will probably soon be less than the government grant amounts.

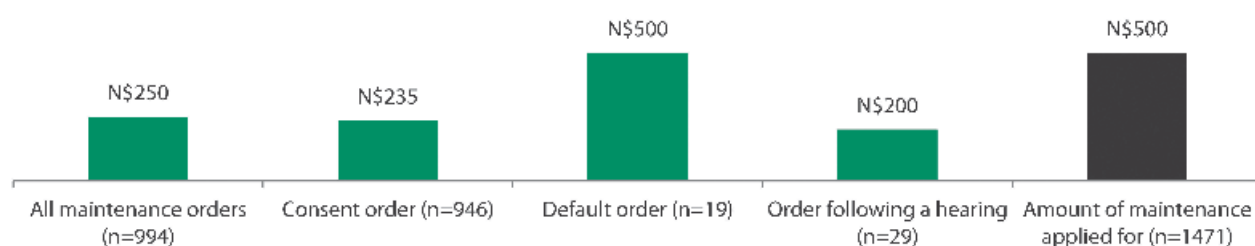
South Africa serves as another point of comparison. The 2004 study on the South African Maintenance Act found that on average, each child received an amount of R272 per month (range R20-R1 800; n=450).<sup>13</sup> This is similar to the median amount of maintenance ordered in this study sample, even though one might have expected there to be a greater difference given the better economic status of South Africa.<sup>14</sup>

**Table 110: Average amount of maintenance ordered for the first order made (N\$)**

Beneficiary	Number	Median	Mean	Minimum	Maximum
Amount of maintenance applied for	1 471	500	632	50	10 000
All maintenance orders*	994	250	315	50	5 500
Consent order	946	235	305	50	5 500
Default order	19	500	555	150	2 655
Order following a hearing	29	200	490	50	3 900

\* In some cases only this information provided, therefore the average maintenance for all beneficiaries is not a sum of the separate orders.

**Chart 58: Median amount of maintenance ordered**



*"My father stopped paying the N\$250 but he has a new car and he is adding and making his [house] bigger."*

Text message sent to the Legal Assistance Centre

<sup>10</sup> The Child Care and Protection Bill will improve access to the state maintenance grant as eligibility will be extended to two-parent families, children in child-headed households and children in informal "foster care" with extended family members, once they have registered documentation to prove they are caring for the child in question (Child Care and Protection Bill, draft dated 12 January 2012, chapters 8 and 12).

<sup>11</sup> Eligibility for this grant will be limited to children in court-ordered foster care. The Child Care and Protection Bill will define foster care as "care of a child by a person who is not the parent, guardian, family member or extended family member in terms of an order of the children's court". Family members or friends who were previously defined as foster parents will be termed kinship carers. The Act defines kinship care as "care of a child by a member of the child's family or extended family". Kinship carers may be eligible for the state maintenance grant once they have registered documentation to prove they are caring for the child in question. (Child Care and Protection Bill, draft dated 12 January 2012, section 1 (Definitions) and chapters 8 and 12)

<sup>12</sup> Draft regulations for the Child Care and Protection Bill, dated February 2012, regulation 131(1).

<sup>13</sup> Community Agency for Social Equality (CASE), *Implementation of the Maintenance Act in the South African Magistrate's Courts*, Braamfontein: CASE, 2004 at 32.

<sup>14</sup> According to the World Bank, South Africa is also an upper-middle-income country, although the per capita GNI (gross national income) is US\$7 610 compared to US\$5 670 for Namibia (<<http://data.worldbank.org/country/namibia>> and <<http://data.worldbank.org/country/south-africa>>, last accessed 23 September 2013).



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

The majority of beneficiaries were aged 0-12.

**For a child under the age of 1** who has been weaned onto solid foods but is still breastfeeding, N\$250 per month could probably cover most of the monthly cost of disposable nappies but not the cost of fruit and vegetables for purees and would probably not cover any unexpected medical expenses.<sup>a</sup>

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

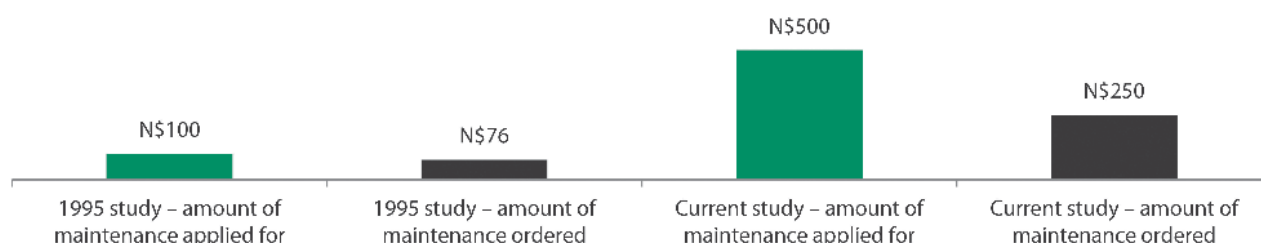
**For a child aged 12**, the maintenance will contribute to the cost of monthly groceries but will not be enough and will not leave any money for clothing, medical expenses, education-related costs or any other needs of the child.

<sup>a</sup> It is harder to estimate the cost of using cloth nappies, and it appears that most people prefer to use disposables.

The 1995 maintenance study also found that the average maintenance ordered was lower than the average amount of maintenance requested. Overall the mean amount of maintenance ordered was N\$109 per month (range N\$15-N\$1 200), with a mean monthly per-child payment of N\$76. Maintenance was ordered for the complainant in only three cases. The median total amount of maintenance applied for was N\$150 (range of N\$20-N\$1 100). The median amount of maintenance requested per child was N\$100 (range of N\$8-N\$1 000).<sup>15</sup>

Therefore, since the 1995 maintenance study, the amount of maintenance has only increased by a multiple of three even though more than 10 years have passed. In 1995 there was also a much closer correlation between the amount of maintenance applied for and the amount of maintenance requested.

**Chart 59: Amount of maintenance applied for and ordered: 1995 study and current study (N\$)**



The 1995 maintenance study also found that in the majority of cases, maintenance payments ordered as a result of a hearing were smaller than those resulting from consent agreements, although this finding must be treated with caution due to the fact there were so many more maintenance orders resulting from consent agreements than from maintenance enquiries.<sup>16</sup> In the current study there was also a difference in the median amount of maintenance ordered by type of order made, but the large difference in sample size (n=19 to n=946) means that a statistical comparison would not be valid.

Information about the amount of maintenance ordered can also be subdivided into the categories shown in Table 111. Given the small number of default orders and orders following a hearing, this information has been calculated for all orders combined.

<sup>15</sup> D Hubbard, *Maintenance: A Study of the Operation of Namibia's Maintenance Courts*, Windhoek: Legal Assistance Centre, 1995 at 69 and 92.

<sup>16</sup> 72% of the files contained a consent order versus 5% of the files which contained an order following a hearing (D Hubbard, *Maintenance: A Study of the Operation of Namibia's Maintenance Courts*, Windhoek: Legal Assistance Centre, 1995 at 84 and 94).

**Table 111: Comparison between application and first maintenance order by type of beneficiary (N\$)**

Application or order	Beneficiary	Number	Median	Mean	Minimum	Maximum
Application	Complainant only	109	500	805	100	4 000
Order	Complainant only	55	250	329	100	1 000
Application	Beneficiary/ies excluding complainant	1 375	500	584	50	7 000
Order	Beneficiary/ies excluding complainant	949	200	304	50	5 500
Application	All beneficiaries*	1 471	500	632	50	10 000
Order	All beneficiaries*	994	250	316	50	5 500

\* In some cases only this information provided, therefore the average maintenance for all beneficiaries is not a sum of maintenance for the complainants and maintenance for the beneficiaries.

**Table 112: Average amount of first maintenance ordered: consent orders (N\$)**

Beneficiary	Number	Median	Mean	Minimum	Maximum
Maintenance for complainant	52	250	325	100	1 000
Maintenance for beneficiaries (excluding complainant)	903	200	295	50	5 500
Maintenance for all beneficiaries*	946	235	306	50	5 500

\* In some cases only this information provided, therefore the average maintenance for all beneficiaries is not a sum of maintenance for the complainants and maintenance for the beneficiaries.

**Table 113: Average amount of first maintenance ordered: default orders (N\$)**

Beneficiary	Number	Median	Mean	Minimum	Maximum
Maintenance for complainant only	NA				
Maintenance for beneficiaries (excluding complainant)	19	500	556	150	2 655

**Table 114: Average amount of first maintenance ordered: orders made following a hearing (N\$)**

Beneficiary	Number	Median	Mean	Minimum	Maximum
Maintenance for complainant only	3	300	400	100	800
Maintenance for beneficiaries (excluding complainant)	27	200	442	50	3 900
Maintenance for all beneficiaries	29	200	490	50	3 900

\* In some cases only this information provided, therefore the average maintenance for all beneficiaries is not a sum of maintenance for the complainants and maintenance for the beneficiaries.

## CASE STUDY

### An example of negotiation towards an agreed amount of maintenance adapted from a transcript of a maintenance hearing before a magistrate

Both parties were present at the hearing. The complainant, who was the children's mother, requested N\$250 per child for two children aged three and six. The children's father offered to pay N\$250 for both children. The complainant did not accept this offer, explaining that the defendant earns N\$3 200 per month whilst she earns N\$700 per month. The complainant suggested N\$300 for both children. The mother presented details of some of the expenses she incurs for the children such as N\$170 for the School Development Fund and N\$70 for the 3-year-old to attend kindergarten (total N\$240). The magistrate ordered the defendant to pay N\$270 for both children (N\$135 per child).

*This example illustrates how the amount ordered is often less than the amount initially requested by the complainant but is higher than the amount proposed by the defendant.*

*"I just want to find out, if the father of my baby gets N\$20,000 per month, how much maintenance can he give me?"*

Text message sent to the Legal Assistance Centre

## Median amount of maintenance ordered per beneficiary for the first maintenance order

Table 115 shows the median amount of maintenance ordered per beneficiary for the first maintenance order. It shows that the greater the number of beneficiaries, the lower the amount of maintenance ordered per child. However the findings must be treated with caution due to the small sample size.

**Table 115: Median amount of maintenance ordered per beneficiary for the first maintenance order (N\$)**

Information source	Beneficiary									
Applied for	Complainant (n=109)	Beneficiary 1 (n=1 340)	Beneficiary 2 (n=388)	Beneficiary 3 (n=111)	Beneficiary 4 (n=44)	Beneficiary 5 (n=19)	Beneficiary 6 (n=10)	Beneficiary 7 (n=3)	Beneficiary 8 (n=1)	Only total recorded (n=1 471)
	500 (100-4 000)	400 (50-6 500)	250 (50-3 500)	200 (50-700)	200 (50-700)	200 (100-700)	237.50 (100-700)	150 (100-200)	100	500 (50-1 000)
Consent maintenance orders	Complainant (n=52)	Beneficiary 1 (n=881)	Beneficiary 2 (n=232)	Beneficiary 3 (n=56)	Beneficiary 4 (n=22)	Beneficiary 5 (n=9)	Beneficiary 6 (n=2)	Beneficiary 7 (n=1)	Beneficiary 8	Only total recorded (n=25)
	250 (100-1 000)	200 (25-2 500)	150 (25-5 000)	127.50 (33-400)	100 (50-300)	150 (50-300)	81.50 (80-83)	80.00	NA	400 (100-1 500)
Default maintenance orders	Complainant	Beneficiary 1 (n=18)	Beneficiary 2 (n=16)	Beneficiary 3 (n=3)	Beneficiary 4	Beneficiary 5	Beneficiary 6	Beneficiary 7	Beneficiary 8	Only total recorded
	N/A	300 (100-2 655)	175 (100-300)	100 (100-200)	N/A	N/A	N/A	N/A	N/A	NA
Maintenance orders following a hearing	Complainant (n=3)	Beneficiary 1 (n=23)	Beneficiary 2 (n=13)	Beneficiary 3 (n=3)	Beneficiary 4 (n=1)	Beneficiary 5	Beneficiary 6	Beneficiary 7	Beneficiary 8	Only total recorded (n=4)
	300 (100-800)	150 (50-1 300)	150 (25-1 300)	200 (25-1 300)	200	N/A	N/A	N/A	N/A	575 (120-2 000)

## Median amount of maintenance ordered per year for the first maintenance order

When analysed by year, the change in the amount of maintenance ordered is variable. Whilst there is no change between 2005 and 2006, there is a 25% increase between 2006 and 2007 and a 16.7% increase between 2007 and 2008. Data over a greater number of years is needed to see whether the increase over this three-year period is a persistent pattern. It is a positive finding that the increases by year are greater than inflation for two of the years, but difficult to assess whether this is a general trend over such a short time.

The 1995 study did not assess the amount of maintenance ordered by year, although the study did assess the amount of maintenance applied for each year as reported in section 8.7.<sup>17</sup>

**Table 116: Median amount of maintenance ordered per year for the first maintenance order for beneficiaries under the age of 18 (N\$)\***

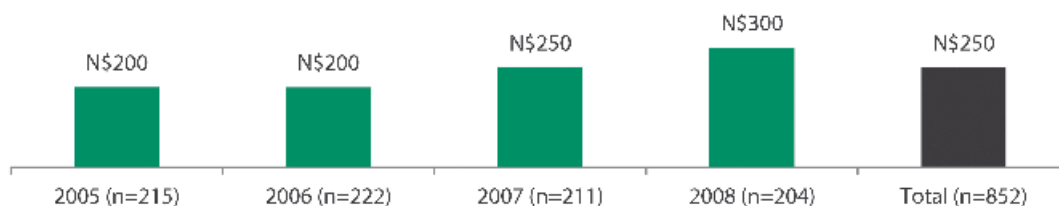
Year	Number	Median amount ordered	Percentage increase	National inflation**	Number	Median amount applied
2005	215	200	–	2.2	334	500
2006	222	200	0	5.1	375	500
2007	211	250	25	6.7	383	500
2008	204	300	16.7	10.3	379	500
<b>Total</b>	<b>852</b>	<b>250</b>	<b>–</b>	<b>–</b>	<b>1 471</b>	<b>500</b>

\* The data set by different type of orders is too small to yield any meaningful results if split by year.

\*\* Unpublished data, <NEPRU\_inflation\_Jan 1973\_to June 2009.xls>, accessed 11 June 2009 (website no longer active; data on file).

<sup>17</sup> D Hubbard, *Maintenance: A Study of the Operation of Namibia's Maintenance Courts*, Windhoek: Legal Assistance Centre, 1995.

**Chart 60: Median amount of maintenance ordered per year for the first maintenance order for beneficiaries under the age of 18**



## Median amount of maintenance ordered for the first order by rural/urban residence of the complainant

As with the analysis of the amount of maintenance requested by rural/urban residence, there is little difference by residence for the amount of maintenance ordered. This is true for the residence of both the complainant and the defendant. Furthermore, as the proportion of people living in smaller urban or rural areas represents only one-fifth of the complainants and less than one-quarter of defendants, we cannot draw any firm conclusions from this information.

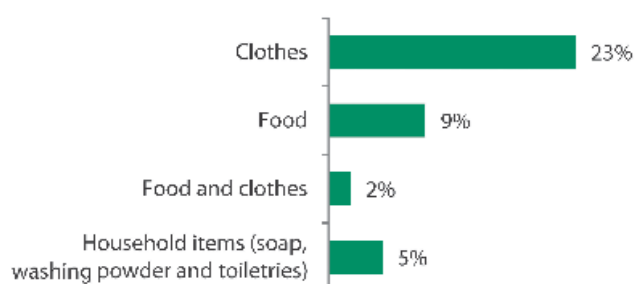
## 12.6 Maintenance orders containing special forms of maintenance

### 12.6.1 Orders for contributions in kind

The option of making a maintenance order for contributions in kind was an innovation of the 2003 Act. The purpose of this provision was to assist in instances where the defendant is able to provide support for the child but not as a financial contribution. For example a farmer may be able to provide food rather than financial support. The Act states that “a maintenance order may direct that payment be made in kind by specified goods or livestock, for all or some portion of the settlement of amounts already owing or the future payment of instalments”.<sup>18</sup>

A minority of orders contained an order for payments in kind (12/1 126; 1.0%) or for in-kind payments and specified financial payments (a further 17 files; 17/1 126; 1.5%). All were made in consent orders. Because in-kind payments are specific to the situation, the court is unlikely to make a default in-kind payment order without knowledge that the defendant will be able to fulfil the order. It is unclear why there are no in kind payments in orders following a hearing – although since the total number of orders following a hearing is small, this may just be a product of the small sample rather than a meaningful finding.

**Chart 61: Orders for in-kind payments\***



**Table 117: Orders for in-kind payments\***

Form of payment	Frequency – consent order
Clothes	23
Food	9
Food and clothes	2
Household items (soap, washing powder and toiletries)	5
<b>Total</b>	<b>39</b>

\* Multiple payments were made in some orders

<sup>18</sup> Maintenance Act 9 of 2003, section 17(4).

Insight into why there were so few instances of in-kind contributions overall was gained through interviews with the court officials. Two magistrates interviewed at one court explained that they always try to make a maintenance order for cash as “*maintenance grants should be for today*”, their meaning being that the complainant should receive the maintenance without delay. They explained that sometimes defendants offer sheep as payment instead of money; however, in reality the sheep are only very small lambs and it can take up to two years before the value of the animal can be realised. In the meanwhile, there is no financial support for the child. The maintenance officer at another court said that “*it is much harder to keep track of [these payments] and men default on those payments more, in fact always. For instance if they agree to give cattle, women don’t have anywhere to keep them or they go into her brother’s herd and the children don’t benefit.*” However, the maintenance officer at one court gave the example of where a defendant had two cars. The defendant agreed that one of the cars could be used to transport the child. This is a form of in-kind payment.

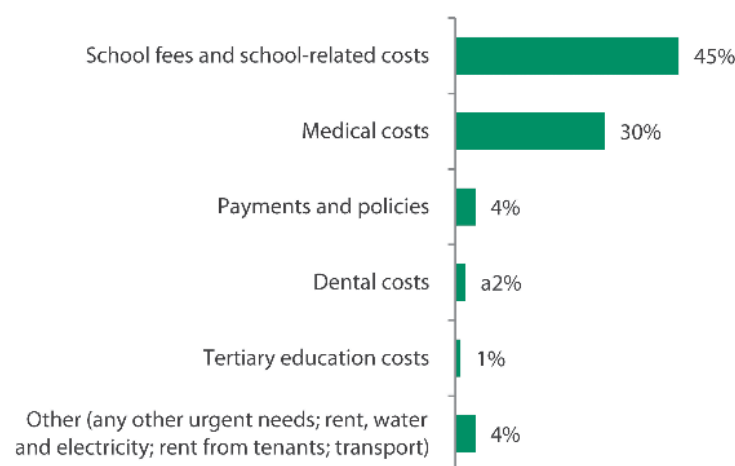
Contributions in kind were not permitted under the 1963 Act, so information on this variable is not reported in the 1995 study.

## 12.6.2 Orders for specified payments to third parties

The Maintenance Act also allows for all or part of a maintenance payment to be made to a specific person or institution for a purpose specified in the order. For example, the defendant may be asked to pay school-related costs directly to the school, or put a child on his or her medical aid scheme.<sup>19</sup>

**Only a minority of orders contained an order for specified financial payments (49/1 126; 4.4%).** Three orders following a hearing contained provisions for specified payments (sometimes for more than one type of specified payment). As expected, no specified payments were not made in default orders. Orders for the payment of School Development Fund contributions were most common, followed by payments for medical costs.

**Chart 62: Orders for specified financial payments\***



**Table 118: Orders for specified financial payments\***

Form of payment	Frequency – consent order
School fees and school-related costs	45
Medical costs	30
Payments and policies	4
Dental costs	2
Tertiary education costs	1
Other (any other urgent needs; rent, water and electricity; rent from tenants; transport)	4

\* Multiple payments were made in some orders

## 12.6.3 Orders for the payment of pregnancy- and birth-related expenses

We identified nine applications for pregnancy and birth-related expenses (see page 170). Two applications were discontinued (one was withdrawn, the complainant and defendant absent in the second). In the remaining seven cases, **no pregnancy- and birth-related expenses were ordered**. In some cases the court may have decided that the amount of maintenance ordered was sufficient to cover these costs, although this was not specified and the amount of maintenance ordered in each case was lower than the amount of maintenance requested.

<sup>19</sup> Maintenance Act 9 of 2003, section 17(2)(e).



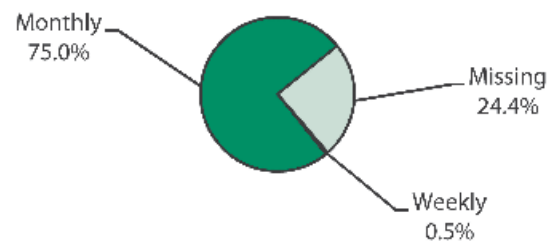
## 12.7 Frequency of payments (weekly/monthly)

The vast majority of orders were for payments to be made on a monthly basis (845/1 126; 75.0%; data missing from 275 orders). Orders for weekly payments were made in only 0.5% of the sample (6/1 126). All of the weekly orders were consent orders. This is to be expected given that the majority of orders were consent orders (92.5%). Orders for monthly maintenance payments are logical given that most people are paid on a monthly basis and items such as rent and bulk food shopping are also often paid or purchased on a monthly basis.

The frequency of the payments in the orders is similar to that applied for, as in all but one of the applications, the applicant requested monthly payments (information missing in 616 of the applications).

The 1995 study did not report the frequency of payments.<sup>20</sup>

**Chart 63: Frequency of payment for maintenance orders (n=1 126)**



**Table 119: Frequency of payments for maintenance orders**

Type of order	Weekly	Percentage of total number of orders (n=1 126)	Monthly	Percentage of total number of orders	Data missing
Consent orders	6	0.5	779	69.2	256
Default orders	0	0	33	2.9	11
Orders following a hearing	0	0	33	2.9	8
<b>Total</b>	<b>6</b>	<b>0.5</b>	<b>845</b>	<b>75.0</b>	<b>275</b>

## 12.8 Where and to whom the payments are made

The Maintenance Act states that a maintenance order “*must specify the person to whom or organisation, financial institution or other institution to which the contributions may be made*” and “*must, subject to rules or regulations made under this Act, specify the manner in which the contributions may be made*”.<sup>21</sup> The regulations do not contain any further details. The payment options under the Act are broader than in the 1963 Act which did not allow payments to be made directly to the beneficiary. Under the 1963 Act payments had to be made directly to the court and collected by the appropriate person.

**Although the 2003 Act allows payments to be made directly to the beneficiary, or paid to an organisation or institution such as a bank or a post offices savings account, the majority of payments were still made directly to the court.**

The order also provides a space for naming whom the payment is to be in favour of. In the majority of cases the order stated that the payment was either in favour of the beneficiary (544/1 054; 51.6%) or the complainant (465/1 054; 44.1%). Given that so few orders contained the complainant as one of the beneficiaries, it appears that magistrates complete this form differently according to their understanding – in many cases the payments made to the complainant to use for the beneficiary.

<sup>20</sup> D Hubbard, *Maintenance: A Study of the Operation of Namibia's Maintenance Courts*, Windhoek: Legal Assistance Centre, 1995.

<sup>21</sup> Maintenance Act 9 of 2003, section 17(2)(b)-(c).

**Table 120: Person to whom the payment must be made**

Person to whom the payment must be made	All orders		Consent orders		Default orders		Maintenance orders following a hearing	
	N	%	N	%	N	%	N	%
Clerk of the Court	898	89.3	831	89.0	37	90.2	30	96.8
Complainant	84	8.3	80	8.6	4	9.8	0	0.0
Financial institution	12	1.2	11	1.2	0	0.0	1	3.2
Other person	6	0.6	6	0.6	0	0.0	0	0.0
Beneficiary	4	0.4	4	0.4	0	0.0	0	0.0
Organisation	2	0.2	2	0.2	0	0.0	0	0.0
<b>Total</b>	<b>1 006</b>	<b>100.0</b>	<b>934</b>	<b>100.0</b>	<b>41</b>	<b>100.0</b>	<b>31</b>	<b>100.0</b>
<i>Missing</i>	<i>120</i>	<i>10.7</i>	<i>107</i>	<i>10.3</i>	<i>3</i>	<i>6.8</i>	<i>10</i>	<i>24.4</i>
<b>Total</b>	<b>1 126</b>	<b>100.0</b>	<b>1 041</b>	<b>100.0</b>	<b>44</b>	<b>100.0</b>	<b>41</b>	<b>100.0</b>

## 12.9 How long it takes to obtain a maintenance order

### Time between maintenance complaint and date the magistrate signs the order

Overall, the median time between the date the maintenance complaint was made and the date the magistrate signed the order was 56 days (mean 88.8 days; range 0-1 602 days). There is little difference between the timelines for signing consent orders, default orders and orders following a hearing. This suggests that there is no particular type of order which produces a faster resolution than the others.

**Table 121: Time between date maintenance complaint was made and date the magistrate signed the order**

Type of order	Number	Median	Mean	Minimum	Maximum
All orders	664	56	88.8	0	1 602
Consent order	628	56	88.7	0	1 602
Default order	16	53	114.3	16	994
Order following a hearing	20	47	71.5	0	266

### Time between date the magistrate signs the order and date the payments start

The median time between the date the magistrate signed the order and the date the first payment was to start was 23 days (mean 24.2 days; range 0-84 days). There is only a small difference between the timelines for the first payment for consent orders, default orders and orders following a hearing. The timeline is shortest for orders following a hearing although there is a big difference between the sample size for orders following a hearing compared with consent orders. It is possible that during the hearing, the magistrates discusses with the parties when the payments can start.

**Table 122: Time between date magistrate signs the order and date the payments start**

Type of order	Number	Median	Mean	Minimum	Maximum
All orders	652	23	24.2	0	84
Consent order	616	23	24.4	0	84
Default order	16	26	25.4	0	42
Order following a hearing	20	16	16.9	0	38

*"Where the interests of minor children are at stake and where every delay in the finalisation of an ... enquiry prejudices those interests, the maintenance officer should make every effort to ensure that the enquiry is expeditiously proceeded with."*

*Nguza v Nguza 1995 (2) SA 954 (Tk GD)*

Considering these two timelines in combination, the typical successful maintenance complainant will receive her first maintenance payment 79 days after making an application at the court – in other words, after a wait of 2-3 months.

## Timeline for service of consent orders and default orders to the defendant

When a consent order or a default order has been made, it must be served on the defendant. **The vast majority of consent orders were signed by the defendant, signed by the magistrate and re-served on the defendant on the same day (656/666; 98.5%).** For the 31 orders that were not signed by the defendant and magistrate on the same day, 19 were signed within 10 days, three with 11-20 days, three within 21-30 days and six within 31-91 days.

Unfortunately, for over half of the default orders made there is no return of service. For the orders that were served, 12 were served within 1-30 days. Five were served either within 31-51 days and three were served over 52 days later – the longest to be served taking 447 days.

In both of these scenarios, in the extreme cases where service takes an unusually long time, maintenance payments may not actually start on the date indicated in the order. However, these problematic cases involving long delays in service of the consent order or default order appear to be rare.



**Table 123:** Time between the date the defendant signs the consent order and the date the magistrate signs the consent order (days)

Interval	Frequency	Percentage
0 days	828	96.4
1-10 days	19	2.2
11-20 days	3	0.3
21-30 days	3	0.3
31-91 days	6	0.7
<b>Total</b>	<b>859</b>	<b>100.00</b>
Missing	182	17.5
<b>Total</b>	<b>1 041</b>	<b>100.0</b>

**Table 124:** Time between the date the defendant signs the consent order and the date the final consent order is served on the defendant (days)

Interval	Frequency	Percentage
0 days	656	98.5
1-10 days	7	1.1
11-20 days	2	0.3
21-30 days	1	0.2
<b>Total</b>	<b>666</b>	<b>100.00</b>
Missing	375	36.0
<b>Total</b>	<b>1 041</b>	<b>100.0</b>

**Table 125:** Time between the date the magistrate signs the default order and the date the order was served (days)

Interval	Frequency	Percentage
1-10 days	6	30.0
11-20 days	2	10.0
21-30 days	4	20.0
31-51 days	5	25.0
More than 52 days	3	15.0
<b>Total</b>	<b>20</b>	<b>100.00</b>
Missing	24	54.5
<b>Total</b>	<b>44</b>	<b>100.0</b>

## 12.10 Application for substituting or setting aside a default maintenance order

A special procedure applies if a defendant wishes to oppose a default order. The defendant may apply within 10 days of being served with the order for it to be substituted or set aside. The court may consider such an application after the expiry of 10 days if there is good reason to do so.

When the defendant opposes the default order, the defendant must give notice to the complainant at least 14 days before the day on which the application will be heard.<sup>22</sup> The complainant may, before or at the hearing, consent in writing to the application to vary or set aside the order and submit this consent to the maintenance officer.<sup>23</sup>

If a hearing is held (where the defendant opposes the default order and the complainant does not consent) the court may call upon the defendant and complainant to provide evidence in support and rebuttal of the application. The court must then consider the evidence and decide whether to confirm, vary or set aside the default order. Alternatively the court may order that a maintenance enquiry be held.<sup>24</sup>

**A total of five files contained an application to vary or set aside a default order.** Although this is a small number of applications, given that there were only 44 default orders on file, this means **one in 10 recipients of a default order opposed the order** (5/44; 11.4%). This rate is probably realistic given that the defendant has not previously given his or her information to the court and may now wish to do so.

Three of the applications were for the order to be set aside, while two were for the order to be varied.

- In the three cases where the request was for the order to be set aside, one was because the beneficiary was over the age of 18, and another because the defendant was disputing paternity. The third case contains no details. In the case of the child over the age of 18, the complainant was requesting maintenance because the child was still studying. Although the defendant initially disputed the order, he eventually agreed to pay maintenance. We do not know the outcome of the case with the disputed paternity test because there is no further information on file. The file was transferred between courts approximately one year later.
- In the two cases where a variation was requested, each request was for the amount of maintenance to be lowered. The defendants asked to pay a lower amount of maintenance on the grounds that they could not afford the amount of maintenance ordered. In both cases the defendants asked for the amount of maintenance paid to be halved; in one case the defendant requested a decrease of the total from N\$400 to N\$200, and in the other to pay N\$400 for both children instead of N\$400 per child. In each case the changes requested by the defendant were made.

Although the Act states that the defendant must inform the complainant of the application,<sup>25</sup> only two of the four files contained reference to this. In these two files, a copy of the notice that should be given to the complainant was filed. However this still does not confirm whether or not the complainant received the notice. Given the small sample size, we cannot determine the process is working in practice.

There is no comparable data from the 1995 study because default orders were an innovation of the 2003 Act.

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<sup>22</sup> Maintenance Act 9 of 2003, section 19(4-7).

<sup>23</sup> Id, section 19(10).

<sup>24</sup> Id, section 19(8-9).

<sup>25</sup> Id, section 19(4-7).

### Summary of information about maintenance orders

- Approximately two-thirds of complaints result in an order.
- The majority of files which contained a maintenance order contained a single order. Other files contained a series of orders, probably in respect of requests for changes to the original order.
- The vast majority of orders were consent orders, with the remainder consisting of similarly small proportions of default orders and orders following a hearing.
- The typical successful complainant was 31 years of age. The typical defendant covered by a successful maintenance order was 35 years of age.
- The typical complainant and defendant in a successful maintenance order were Damara/Nama- or Oshiwambo-speaking, and lived in a larger urban area.
- Maintenance orders were typically made for one beneficiary.
- The typical beneficiary covered by a successful maintenance order was aged 0-12.
- The median amount of maintenance ordered for the first maintenance order on file was N\$250 per child.
- A minority of orders contained an order for contributions in kind or payments directly to third parties for a specific purpose. No pregnancy and birth-related expenses were ordered.
- The vast majority of orders were for payments to be made on a monthly basis.
- Although the 2003 Act allows payments to be made directly to the beneficiary, or paid to an organisation or institution such as a bank or a post offices savings account, the majority of payments were still made directly to the court.
- The median time between the date the maintenance complaint was made and the date the magistrate signed the order was 56 days. The median time between the date the magistrate signed the order and the date the first payment was to start was 23 days. This suggests that the typical maintenance complainant will receive her first payment some 2-3 months after making the application.
- Only one in 10 recipients of a default order applied for it to be varied or set aside.

## 12.11 Identifying information on file with maintenance orders

### Photographs and identification documents

A maintenance officer may request the court to order that photographs or a copy of the identification document of the defendant are attached to the order.<sup>26</sup> The maintenance officer must endorse or copy the personal particulars of the defendant onto the back of the photographs. One copy of the photograph should be kept in the maintenance file, the other attached to the record of payments. A copy of the photograph may be provided to anyone executing a court order or serving a document on the defendant.<sup>27</sup>

These provisions were innovations of the new Act and were intended to make it easier to enforce maintenance orders; if court officials have a photograph of the defendant, the defendant cannot pretend to be someone else when an official tries to serve court documents. However, **only four percent of the files (67/1 687; 4.0%) contained identification documents belonging to the defendant and less than 1% (14/1 687; 0.8%) contained a photograph of the defendant.** Of these, only two had the details of the defendant endorsed or copied on the back of the photograph. It is to be expected that more files had information about the defendant's ID than a photograph as it is probably easier for the defendant to produce an identification document to be copied compared to producing a photograph.

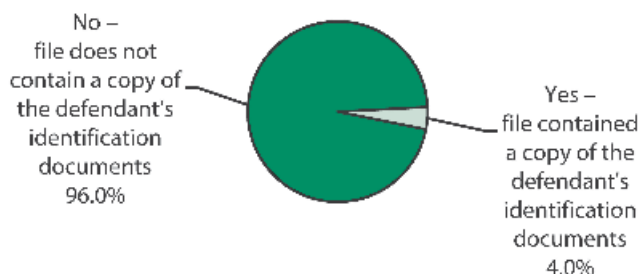
<sup>26</sup> Maintenance Act 9 of 2003, section 48.

<sup>27</sup> Maintenance Regulations, regulation 27.



Despite the small sample identified, all of the courts except for Swakopmund had at least one file containing a copy of the defendant's identification document. Photographs were contained in files from 7 of the 18 courts.<sup>28</sup> **The low number of files containing either piece of information suggests that the practice of filing photographs or copies of identification documents is not common at the courts. We recommend that the Ministry of Justice send a circular to the courts to remind court personnel that they can keep photographs and copies of identification documents of the defendant on file and to explain why this may be useful in practice.**

**Chart 64: Does file contain a copy of the defendant's identification documents?**



### Summary of identifying information on file with maintenance orders

Only four percent of the files (67/1 687; 4.0%) contained identification documents belonging to the defendant and less than 1% (14/1 687; 0.8%) contained a photograph of the defendant.

## 12.12 Transfers of maintenance files between courts

A complainant and a defendant both have a duty to notify the court of certain changes that occur while a maintenance order is in place.

If the defendant changes his/her place of residence or employment, he/she must notify the court where the maintenance order is registered within seven days.<sup>29</sup> The defendant must also notify the person, organisation or institution to whom the payment is made if this is not the maintenance court.

If the complainant changes his/her place of residence, he/she must notify the maintenance officer at the maintenance court which has jurisdiction in the area where the complainant now resides within thirty days. When the clerk of the court where the case was initially registered receives notice that the complainant has moved, the clerk must transfer the file to the new court. The clerk must retain copies of orders, judgements and records of payments and send the original documents by hand or registered post to the clerk of the new court. The clerk at the new court must number the case with the next consecutive number for maintenance cases for the year during which it was received.<sup>30</sup> The clerk at the new court must notify the defendant and any other person who is required to pay or deliver any payment or money to the complainant.

Our sample contained 51 notifications of change of address. The complainant changed address in 49 files and there was one notification of change of address by the defendant. In two cases the complainant changed address twice.

Whilst we noted 51 notifications of change of address, there were 53 files that were transferred between the courts (53/1 687; 3.1%; it is likely that two files did not contain the notification of change of address). Three files involved two transfers. A similar finding was identified in the 1995 study

<sup>28</sup> Mariental (1), Okakarara (1), Oshakati (6), Rehoboth (1), Rundu (1), Swakopmund (1) and Tsumeb (3).

<sup>29</sup> Maintenance Act 9 of 2003, section 17(5).

<sup>30</sup> Id, section 24(1) and regulation 14.

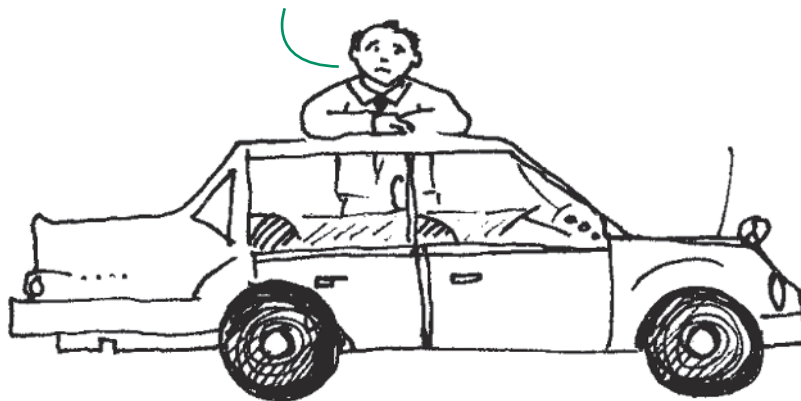
which found that transfers of maintenance orders from one magisterial district to another took place in only about 1% of cases.<sup>31</sup>

The clerks at a number of courts complained about problems associated with transferring files. The clerk at the Gobabis court complained that it can take approximately two months to receive a file. He said that this was a particular problem with the Katutura court. The clerks of the Ondangwa and Rehoboth courts also stated that transfers from the Katutura office are problematic.<sup>32</sup> One clerk noted that “*sometimes people give the complainant her own file and tell her to take it herself to the other court*”. This is contrary to the transfer process stipulated in the Act and regulations.

A further problem, noted by the clerks of the Karasburg and Keetmanshoop courts, is that when a transferred case has an order for the attachment of wages, it may take the employer some time to arrange for the payments to be transferred from one court to the other court. During the intervening period, the payments continue to be made to the original court and the money must then be transferred. The clerk at the Mariental court noted that this can be a problem, saying that it can take 3-6 months for money to be paid to the correct court, and complainants suffer due to this delay. The maintenance officer at the Oshakati court noted a similar concern, suggesting that this is a problem experienced across the country.

**We recommend that the Ministry of Justice review the steps taken when transferring files to address these problems.**

*I don't know how I'll make these maintenance payments. My monthly car payments are very expensive. I also owe money for the groceries I sell in my shop.*



*Your child's needs have to come before your fancy car. But the court will try to make sure that you are able to continue with your business.*



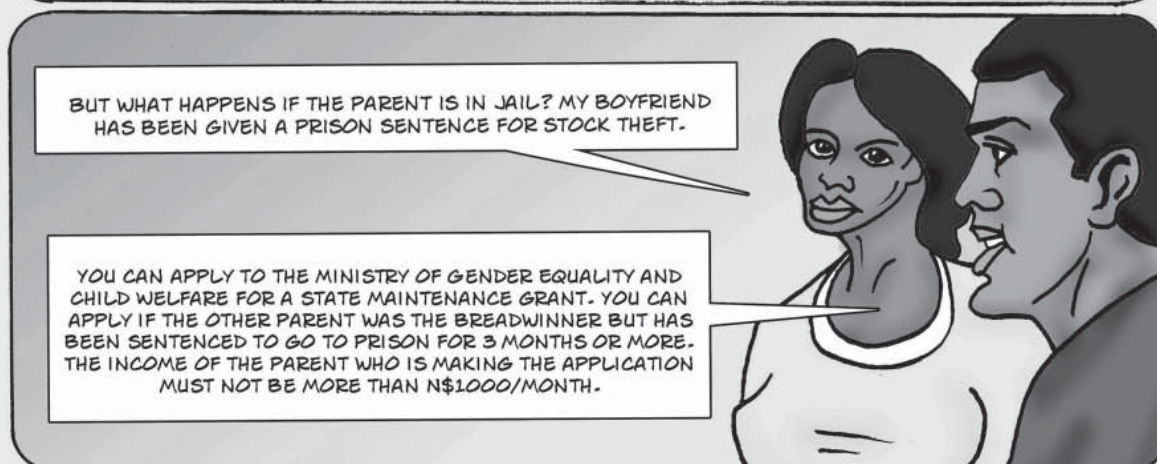
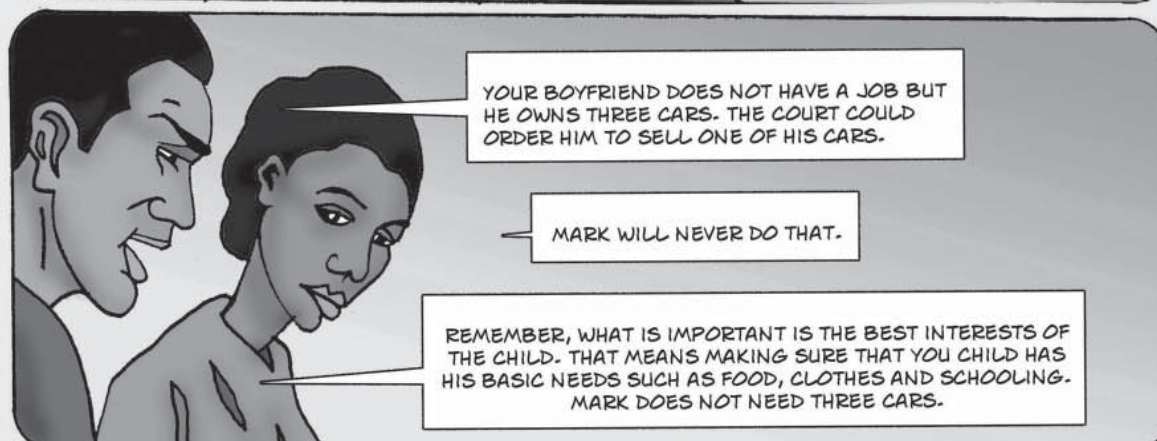
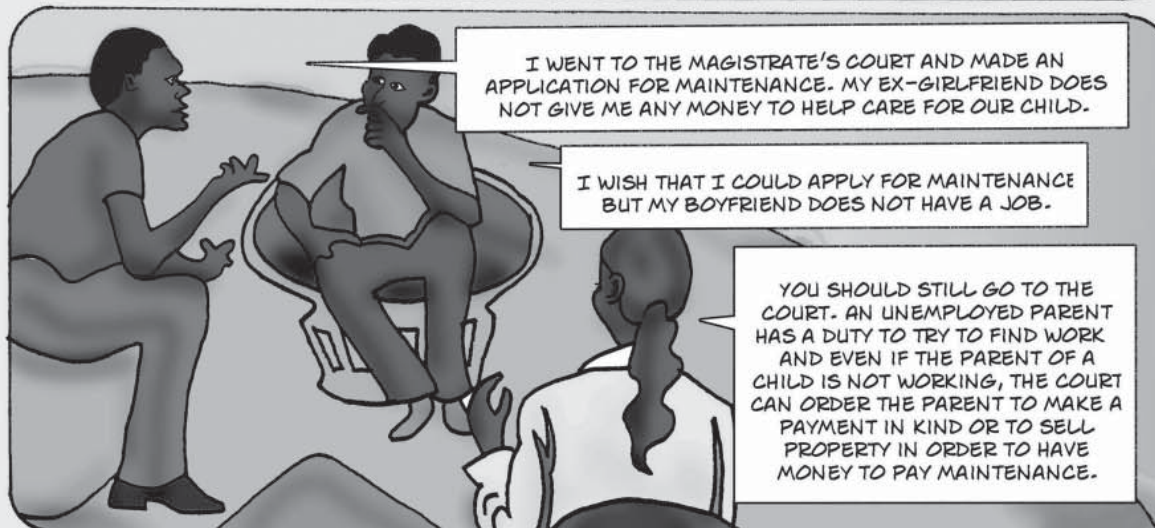
*I am happy that I am able to help you now, after all the support you gave me when I was growing up.*



<sup>31</sup> D Hubbard, *Maintenance: A Study of the Operation of Namibia's Maintenance Courts*, Windhoek: Legal Assistance Centre, 1995 at 126.

<sup>32</sup> Although significant delays are not reasonable, it should be noted that the Katutura court deals with over 1 200 maintenance complaints per year compared with approximately 150-200 complaints per year at the Gobabis, Ondangwa and Rehoboth courts.

# Can I claim maintenance if the father of my child is not working?



Gender Research & Advocacy Project,  
Legal Assistance Centre. Windhoek Namibia 2010



Development Cooperation  
Ministry of Foreign Affairs



One of the one-page comics produced by the Legal Assistance Centre for publication in newspapers.





# Chapter 13

## CHANGES TO MAINTENANCE ORDERS

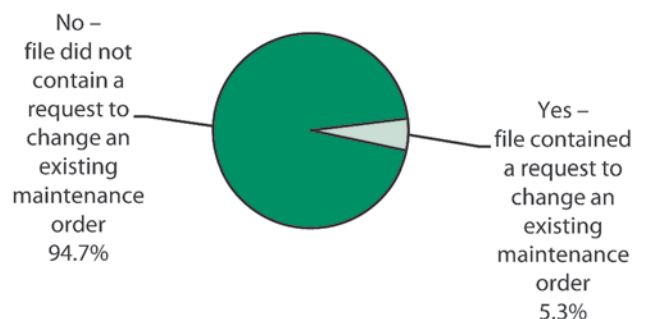
**P**arties to a maintenance complaint can ask the court to suspend, substitute or discharge an order.<sup>1</sup> A request to change an existing order should be made on a form that is the same as or substantially similar to Form B contained in the regulations (see Form B excerpt next page). When changes are made to a maintenance order, the clerk of the court must amend the register.<sup>2</sup>

A maintenance officer may also vary the manner of the maintenance payment or set aside an order for payments in kind. If a maintenance order is varied, the maintenance officer must inform the complainant and the defendant, and if relevant, the employer or person paying debts directly to the court.<sup>3</sup>

A very small minority of files contained a request to change an existing order (89/1 687; 5.3%). The majority of these files contained one request for change (76/89; 85.4%). In 13 files (13/89; 14.6%) there were two requests for change, resulting in a total of 102 applications for change being included in the sample (102/1 687; 6.0%). Given the small number of files, all the data in this section should be treated with caution.

Although only a small number of requests to change a maintenance order were recorded, as noted in chapter 8, some new maintenance complaints might have been better made as requests to change an existing order because the defendant had been paying maintenance in terms of a maintenance order in the past. It is also possible that some requests for change were made to orders in the sample but the details were not recorded. We can make this supposition because our sample shows that some files contained a second order substituting an original order even though there is no formal request for change on file. This often

**Chart 65:** Did the file contain a request to change an existing maintenance order? (n=1 687)



*"There must be a good reason for requesting the change. If there is no reason for changing the initial maintenance order, then the maintenance officer will not arrange an enquiry. The reason for the change will usually involve changed circumstances, but there could be some other 'sufficient cause'."*

*Beukes v Beukes 1995 (4) SA 429 (OPA)*

<sup>1</sup> Maintenance Act 9 of 2003, section 16(5).

<sup>2</sup> Id, section 23.

<sup>3</sup> Id, section 22 and Regulations for the Maintenance Act contained in Government Notice 233 of 2003 of 17 November 2003, *Government Gazette* 3093 (hereinafter "**Maintenance Regulations**"), regulation 12.

occurred when the amount of maintenance to be paid was increased. As information on why or how the changes were processed is missing, we have included in our analysis only the 89 requests for change that were documented in the files as formal requests for change.

### Excerpt from Form B Changes to existing maintenance order

*(This information should, as far as possible, be given in order to investigate the complaint)*

I, ..... (full name of deponent)  
 born on ..... (date) / age .....  
 identity number .....  
 living at .....  
 telephone number .....  
 working at .....  
 telephone number .....

Hereby \*declare under oath/truly affirm as follows:

1. .... (full name of defendant)  
 born on ..... (date) / age .....  
 identity number .....  
 living at .....  
 telephone number .....  
 working at .....  
 telephone number .....

was ordered by ..... (Court)  
 on the ..... day of ..... to pay –

(a) on a \*weekly/monthly basis with effect from .....

Towards the maintenance of myself and/or the following beneficiary(ies) in the sum of –		
N\$	Name of Beneficiary	Born on
N\$ .....	Complainant	.....
N\$ .....	.....	.....
N\$ .....	.....	.....
N\$ .....	.....	.....
N\$ .....	.....	.....

All payments should have been made to .....  
 in favour of .....

and

(b) .....

(other contributions, for example medical and dental costs, school fees, fees to tertiary institutions, school clothes, expenses for sport and/or cultural activities, birth expenses and maintenance for children from birth).

A copy of the order is attached.

2. Good cause/reason exists for the **substitution** of the said maintenance order as follows:

(a) A \*weekly/monthly payment with effect from ..... in the amount of

N\$	Name of Beneficiary
N\$ .....	Complainant
N\$ .....	.....
N\$ .....	.....
N\$ .....	.....
N\$ .....	.....

[...]



## 13.1 Who requests the change?

The majority of requests for change were made by the complainant (64.7%; 66/102) with the remainder being made by the defendant (26.5%; 27/102). Information on who made the request to change was not clear in nine (8.8%) cases.

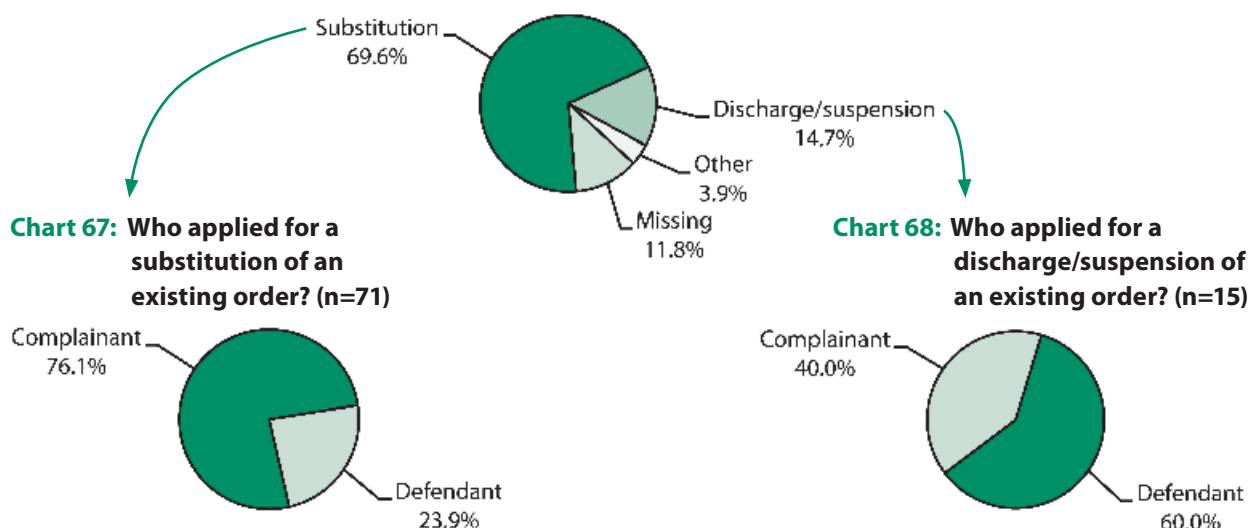
Of the 66 complainants who requested a change, we could determine the probable language group of the complainant (based on the assumption that it is the same person who made the original complaint) in 47 cases. The language groups of complainants involved in cases with a request for change were proportionally similar to the language groups of complaints from the original applications. This is the same as the 1995 study which also found that the language groups of complainants who made requests for change followed the same broad patterns as the language groups involved in all maintenance complaints. This suggests that there is no particular community which has more or less information about this procedure or is more or less likely to utilise the procedure.<sup>4</sup>

The language groups of the defendants involved in cases with a request for change was also broadly similar to the language groups of defendants from the original applications.

The majority of applications to *substitute* an order were made by the complainant (54/71; 76.1%), with the remaining 23.9% of the applications to substitute an order being made by the defendant (17/71). This result is similar to the 1995 study which showed that the vast majority of substitutions (89%) were requested by the complainant.<sup>5</sup>

The applications to *discharge/suspend* an order were nearly equally divided between those made by complainants (6/15; 40.0%) and defendants (9/15; 60.0%), with slightly more applications made by the defendant. The 1995 study did not assess applications to discharge or suspend orders. This may be because the Act did not clearly outline the process to do so and so few people applied to the court to discharge or suspend orders.

**Chart 66: Type of change requested to a maintenance order (n=102)**



The results can also be analysed in a different way. Of the requests for change made by complainants, complainants most commonly requested the order to be substituted (81.8%; 54/66). As would be expected, these were almost always requests for increases in the amount of maintenance to be paid;

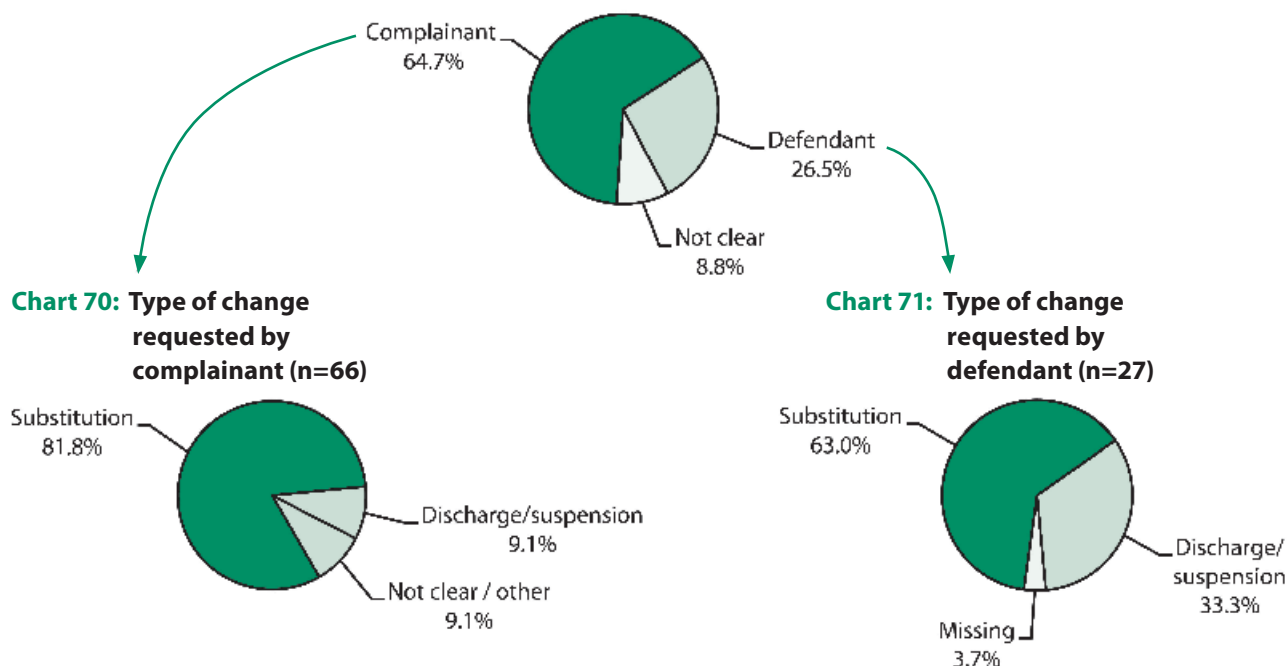
<sup>4</sup> D Hubbard, *Maintenance: A Study of the Operation of Namibia's Maintenance Courts*, Windhoek: Legal Assistance Centre, 1995 at 99.

<sup>5</sup> Ibid.

only one complainant requested a decrease.<sup>6</sup> Approximately one in 10 of the applications made by a complainant were for the order to be discharged/suspended (9.1%; 6/66). Two applications requested that the method of payment be changed (2/66; 3.0%).

Of the requests for change made by defendants, **defendants most commonly requested the order to be substituted (63.0% 17/27)** with the remainder of requests being for the order to be discharged/suspended (9/27; 33.3%); only one defendant requested an increase.<sup>7</sup> The reason for one application was unclear (1/27; 3.7%). The fact that it is more common for the defendant to request a substitution than a discharge/suspension suggests that the option to request a change is not being abused by defendants.

**Chart 69: Who requested a change to an existing order? (n=102)**



## 13.2 What changes are requested?

The majority of applications for change were for the order to be substituted (71/102; 69.6%), whilst a minority of applications for change were for the order to be discharged or suspended (15/102; 14.7%). The nature of the change requested was not clear from the information recorded in respect of 12 applications for change.

Four applications were for requests which should not have utilised the mechanism for requesting changes. In one case the complainant requested the enforcement of a maintenance order made as part of a divorce order. In this case the defendant challenged the complainant's request for enforcement because he was unemployed. However the court upheld the complainant's request. In the second case, the complainant requested a change in the method of payment from a deposit into the complainant's NamPost account to payment to the court. The complainant requested this change as the defendant had made only two deposits into the bank account. In the third case, the complainant requested a once-off payment of N\$120 000. This case is further discussed on page 258. The reason for the request in the fourth file was unclear.

<sup>6</sup> In this case a consent order was made for N\$300 for one beneficiary. Two months after the order was made, the complainant requested a decrease in the amount of maintenance from N\$300 to N\$150. There is no information as to why this decrease was requested. Two months after this request (four months after the order was granted), the complainant applied to cancel the maintenance order. There is no information as to why the complainant applied for the decrease or closure of the case. It is possible that there was a change in custody.

<sup>7</sup> In this case the defendant stated that he would no longer contest the paternity of the third child for whom he was paying maintenance. Instead he offered to contribute a further N\$250 to the amount ordered.

As discussed at the start of this chapter, some files contained two requests for changes. There were a variety of reasons for more than one request for change being made. For example, in some cases the complainant applied for two successive increases in the amount of maintenance paid, whilst in others the defendant applied for successive decreases. In other cases the first application was for an increase, the second for the discharge of the order when the beneficiary became self-supporting. Other examples include both a request for a change to the amount of money paid and a request for a change in the means of payment, or a request for change in the amount paid followed by a notification that one of the beneficiaries had died.

**Table 126: Type of change requested to a maintenance order and by whom**

Number of files	Complainant	Defendant	Missing	Total number and percentage of orders where changes were requested	
				Number	Percentage
Substitution – increase	53	1		54	52.9
Substitution – decrease	1	16		17	16.7
Discharge/suspension	6	9		15	14.7
Other	4	0		4	3.9
Missing	2	1	9	12	11.8
<b>Total</b>	<b>66 (64.7%)</b>	<b>27 (26.5%)</b>	<b>9 (8.8%)</b>	<b>102</b>	<b>100.0</b>

The data from the 1995 study showed similar results. Requests for substitutions were contained in 5.7% of cases (35/618) compared with 4.2% of cases in the current sample (71/1 687). **One of the recommendations in the 1995 report was that “both women and men need to be informed of the possibility of requesting an increase or 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).”<sup>8</sup> We make this recommendation again in this report.**

The 2004 study on the South African Maintenance Act also found that only a small proportion of the files contained an application for change (11%).<sup>9</sup> The low number of requests for change identified in the current study shows that there continues to be a need for more public education on the possibility of requesting substitutions. In recent years the Legal Assistance Centre has provided information about specific provisions within the Maintenance Act through the placement of full-page comic adverts in the newspaper about topics such as claiming for pregnancy-related expenses or the possibility of a child making an application. To date the LAC has not focused on the option of applying for a substitution, discharge or suspension of an order but would like to do so in future if resources are available. **We recommend that a simple factsheet or pamphlet that explains the process to apply for a change is developed. Court officials could give this information to both parties to a maintenance complaint during the initial application process to ensure that they are informed from the start.**

Approximately half of the applications for change in the current study were made at the Windhoek Court (54.9%) even though the files from the Windhoek court represent only 17% of the sample. It may be that the Windhoek court is ensuring that parties to a maintenance order are aware that they are able to make changes. Alternatively it may be that the Windhoek court is more accessible for people, whereas people in other areas live further from the court and the cost of travelling to the court, perhaps on numerous occasions, or the difficulty in getting leave from work, outweighs the anticipated benefit from a change that might be made (as discussed in more detail under section 7.1, the majority of people in Khomas live less than 10 km from the Windhoek Magistrate’s Court).

<sup>8</sup> D Hubbard, *Maintenance: A Study of the Operation of Namibia’s Maintenance Courts*, Windhoek: Legal Assistance Centre, 1995 at 99.

<sup>9</sup> Community Agency for Social Equality (CASE), *Implementation of the Maintenance Act in the South African Magistrate’s Courts*, Braamfontein: CASE, 2004 at 36.

**Table 127: Courts where applications for change were made**

Court	Frequency	Percentage
Gobabis	1	1.0
Keetmanshoop	5	4.9
Mariental	4	3.9
Oshakati	1	1.0
Otjiwarongo	2	2.0
Outapi	1	1.0
Rehoboth	5	4.9
Rundu	9	8.8
Swakopmund	4	3.9
Tsumeb	3	2.9
Walvis Bay	11	10.8
Windhoek	56	54.9
<b>Total</b>	<b>102</b>	<b>100.0</b>

I do not like this decision of the magistrate that I must pay N\$100 a month for my child. I am going to go back to the court and see if I can get another magistrate who will decide differently!

That won't work! You did not appeal against the order at the time. The maintenance court will not change the maintenance order now unless there is a good reason.



## 13.3 Reasons changes are requested

Approximately two-thirds of the applications for change provided a clear reason for the request (66/102; 64.7%).

The applicant listed a reason for the increase in 39 of the 54 applications for an increase (72.2%). Of the reasons for requesting an increase, nearly half (17/39; 43.6%) specified contributions to School Development Funds or school-related expenses such as transport to school. In nine applications (9/39; 23.1%) the applicant cited a general increase in expenses but did not mention school-related costs and in two applications (2/39; 5.1%) the complainant stated that the defendant had found employment. A range of other individual reasons were also listed. In some applications it appears that the defendant was not making payments and the complainant was really applying for the enforcement of the order by changing where or how the payment was made, and using the opportunity to apply for an increase at the same time.

The amount of maintenance that should be paid has been discussed in a 1998 court case in South Africa, in which the judge clarified that a parent has a duty not only to provide maintenance according to his or her income but maintenance according to his or her earning capacity – “a parent cannot be allowed not to realise the full potential of his/her earning capacity to the detriment of his/her children who are in need of maintenance”.<sup>10</sup>

Eleven of the 17 applications for a decrease listed a reason. Over half of these applications (6/11; 54.5%) stated that the maintenance order was too high in light of the defendant’s responsibilities to support other dependants. For example one defendant informed the court that he had fathered another child, another defendant stated that he had five other children and could not meet his financial obligations, whilst others cited expenses for other children (N\$300–N\$1 900) but did not cite the number of children. In three other applications for a decrease, the defendant applied because he was unemployed or did not have regular employment. The fact that these three defendants applied for a decrease rather than a discharge is a positive finding as it suggests that the defendants are aware of their commitments but know that realistically they cannot provide the amount of maintenance required by the order at the time and so ask for a decrease but not cessation of the maintenance payments.

<sup>10</sup> “An inability to pay maintenance or to pay the full amount required for maintenance must be real and not apparent. A parent cannot be allowed not to realise the full potential of his/her earning capacity to the detriment of his/her children who are in need of maintenance. In a given case the facts may amply demonstrate that a parent can earn more than he/she is actually earning and that it would be a matter of relative ease for him/her to so adjust his/her position as to be able to earn a higher income. In such a situation the courts would be failing in their duty if they were to accept ... that the parent is unable to pay maintenance or to pay maintenance to the extent of the children’s needs.” (Mgumane v Setemane 1998 (2) SA 247 (Tk D))

Reasons for applications to discharge or suspend a maintenance order were listed for all applications reviewed (n=15). In four of the applications, the defendant cited unemployment. By itself, this is not a reason to discharge an order. The 1995 Maintenance Study noted that “*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*”. However, although “*the assumption that an unemployed respondent will not have the means to pay maintenance is often true ... this assumption should not discourage complainants or the court from proceedings against respondents who are able to pay even in the absence of regular income*”.<sup>11</sup> The statement continues to hold true. Furthermore, the Maintenance Act of 2003 was intended to address problems of lack of formal employment as the option to make payments in kind was an innovation of the Act included in an effort to broaden the options a person may have for providing maintenance. However, despite this provision, it seems that some people still think that the court can order maintenance only if the defendant is employed. For example in addition to the formal applications to discharge an order as discussed in this chapter, other files contained records of informal applications to discharge orders. For example one file contained a letter from the defendant informing the court that he is no longer employed because his employer shut down and as a result he is no longer able to pay maintenance. The file does not contain any information as to whether the defendant received a retrenchment package. The defendant did not offer to make other contributions or suggest a timeline for when payments could restart. We do not know the outcome of this case as the file contained only the application for a maintenance order, a consent maintenance order and this letter. In another file, the doctor of the defendant wrote a letter confirming that the defendant had a foot injury which meant that he was disabled and unable to continue working. Again the file does not contain any information as to whether the defendant received compensation and does not contain details about the outcome of the case.

In three cases the application for discharge was made because the parties settled outside of court. Two applications for discharge were made because the beneficiaries were aged 18-21 and were either no longer attending school or were working. In another application, the defendant died and in a fourth, the paternity of the child was in dispute.

Two other applications for discharge were made by the complainant. Unfortunately we can glean little information as to the motivation of these complainants. The files show that one complainant simply stated, “*I don’t want to proceed with the case; [it] concerns family matters,*” whilst the other stated, “*I do not want to proceed with the case anymore.*” In the latter file the defendant was warned to refrain from intimidating the complainant. However it appears that this warning was ineffective given that the complainant withdrew her case. Further discussion of the withdrawal of cases is contained in chapter 11.

These examples show that the applications to discharge an order are made for a range of reasons. Whilst in some cases the application reflects a changing situation (such as the defendant being unemployed or the beneficiaries leaving school and working), there is also some indication that intimidation occurs in some cases. Further discussion on intimidation is also found in chapter 11.

We know why two cases were suspended. In one case it was because the children were staying with the grandparents. In the second case the complainant stated the reason was “*because I am under pressure because of the negative attitude of my husband*”.<sup>12</sup> Whilst there are no further details, this suggests that the complainant was experiencing some form of intimidation.

As noted, some files contained informal records of changes. For example, in some cases the complainant informally applied for a discharge to avoid conflict with the defendant or due to sympathy for the defendant:

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<sup>11</sup> D Hubbard, *Maintenance: A Study of the Operation of Namibia’s Maintenance Courts*, Windhoek: Legal Assistance Centre, 1995 at 23.

<sup>12</sup> In this case the complainant had requested maintenance for herself and four children.



*“I want to withdraw [my maintenance order] my reason is I am feel pity [for] his father he has a lot of child perhaps he cannot afford.”*

*“I want to declare I reported my boyfriend on maintenance his name is ... . I want to declare that the maintenance which I reported [I] want to cancel it because my boyfriend is supporting my kids. So I feel that I can withdraw the case ... .”<sup>13</sup>*

The files also contained examples of situations where the children were now living with the defendant:

*“I am hereby declare under oath that I am the biological mother for ... born in ... at ..., I declare that from today her biological father ... he is the one who is going to take care of the child. The maintenance which was N\$250 is cancelled due to the reason that the child is going to stay with her father. That is all I can declare.”*

*“I the above mentioned person so hereby declare that I am the complainant in a maintenance case no ... and I would like to withdraw this matter against the respondent ... . The reason why I withdraw the matter is simply that the respondent promised to look after the child. I declare that this information is true and correct.”<sup>14</sup>*

In one file the complainant withdrew the order because she had married the respondent and they were now “living under the same roof”.

**Table 128: Reasons for requesting changes in maintenance orders**

Change requested	Number of applications stating reason for request
<b>Applied for an increase</b>	<b>39</b>
Reason includes reference to School Development Fund contributions or school-related expenses	17
General increase in expenses	9
Defendant has found employment	2
Other (including defendant has not been paying maintenance so complainant applies for enforcement and an increase; defendant has told complainant to leave the common house; beneficiary added; enforcement of a maintenance order in a divorce order)	11
<b>Applied for a decrease</b>	<b>11</b>
Expenses are too high (other beneficiaries cited)	6
Unemployed	3
One of the beneficiaries died	1
Other (children now staying with defendant)	1
<b>Applied for a discharge/suspension</b>	<b>15</b>
Defendant is now unemployed	4
Settled outside of court	3
Complainant withdraws case / pressure from husband	3
Beneficiary is aged 18-21 and is working	2
Other (defendant died; paternity dispute; children staying with grandparents)	3
<b>Other (applied for a change in the means of payment without a change in the amount of maintenance paid)</b>	<b>1</b>
<b>Total</b>	<b>66</b>
Missing	36 (35.3%)
<b>Total</b>	<b>102</b>

<sup>13</sup> Sworn declarations from complainants.

<sup>14</sup> Ibid.

## CASE STUDIES

The Legal Assistance Centre received the following query by email from the wife of man who was ordered by the court to pay maintenance for children from a previous relationship. The case is an example of a defendant who is considering requesting a change to a maintenance order due to his commitments to all his children. In this instance the client wanted to know whether all children should receive the same amount of maintenance:

*Husband remarried, according to divorce order pays maintenance for child. (ok) ([children] receiving N\$450). Has 2 children aged 14 out of wedlock, long before marriage, he has paid for year[s] N\$200 per child and since 2010 is paying N\$350 per child. If one looks at these 3 children (2 of them get N\$350, 1 get N\$450) is this the way it should be?*

*One parent from the N\$350 child summoned the father to court, magistrate ordered, not even taking in consideration his other 2 children with wife, that he pays N\$500 for clothing, buy toiletries and school fees.*

*Now, those children get their maintenance and the parents just keep on demanding. My question, is there a way through all of this, so that all children get an equal amount of money, all 5 of them?*

We responded that all children have a right to maintenance and the amount provided per child depends on his or her needs and the means of both parents. Therefore it may be that a father pays a different amount of maintenance for each of his children.

We also told the client that the defendant has a reasonable concern if he feels that his commitments to his other children have not been considered. When the amount of maintenance is considered by the court, the court should take into consideration all of the defendant's children as all children have a right to maintenance, regardless of whether they are born inside or outside of marriage.

We suggested that the client ask the court to review the defendant's case if he is concerned that the amount of maintenance ordered is not realistic.

## 13.4 Average time between initial maintenance complaint and application for change

**On average, requests for change were made just over one year after the original order came into effect (mean 15.7 months; n=67; data missing for 35 applications).** Given that the cost of living increases each year, requests for near-annual changes in the amount of maintenance paid are realistic. In general, requests for change were made sooner by the defendant than the complainant but the difference was not significant.

As discussed, the majority of requests for change were for increases in the amount of maintenance paid (54/102; 52.9%). **The average timeline for increases in the amount of maintenance paid was 20.3 months (n=39) after the initial order – in other words, just short of two years.** All but one of the applications to increase the amount of maintenance paid were made by the complainant. It may be that complainants are affected by increases in the cost of living but may not have the time or means to apply on an annual basis for an increase in the amount paid.

**Applications to discharge or decrease the amount of maintenance paid were made sooner than applications to increase the amount of maintenance paid (discharge: 8.8 months; decrease: 10.9 months; n=11),** although the sample size between these groups differs. As discussed, applications for discharge were made almost equally by the defendant and the complainant. All but one of the applications to decrease the amount of maintenance paid were made by the defendant.

In the 1995 report, the Legal Assistance Centre recommended that 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. The purpose of this recommendation was to remove the need for complainants to come into court and start the whole process over again in order to obtain an increase in maintenance to compensate for the rising costs of living. This recommendation was supported by magistrates as well as people who use the maintenance courts. However the recommended provision was not included in the 2003 Act. Based on the data identified in this study which shows that few people apply for increases in the amount of maintenance paid despite large increases in inflation in some years, **we again recommend that 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.** As suggested in the 1995 maintenance report, the complainant should be able to complete a simple application form, a copy of which the complainant must arrange to have delivered to the defendant. The increase should be made automatically unless the defendant objects within a set period of time. If the defendant chooses to oppose the application within the set time period, the defendant must be required to submit sufficient evidence to justify the opposition.<sup>15</sup> Such a recommendation is not prejudicial to the defendant as the defendant could apply to the court for a decrease if the increase proved to be too burdensome.

**Table 129: Median time between the date the original maintenance order came into effect and the date the request for change was made**

Request for change	Number of orders*	Timeline in months
Average timeline for all requests	67/102	15.7
Average timeline for all requests made by complainants	47/66	18.0
Average timeline for all requests made by defendants	20/27	10.3
<b>Applications to discharge – total</b>	<b>15/15</b>	<b>8.8</b>
Applications by complainant to discharge	6/6	8.5
Applications by defendant to discharge	9/9	9.0
<b>Applications to substitute (increase) – total</b>	<b>39/54</b>	<b>20.3</b>
Applications by complainant to substitute (increase)	38/39	20.7
Applications by defendant to substitute (increase)	1/1	6.7
<b>Applications to substitute (decrease) – total</b>	<b>11/16</b>	<b>10.9</b>
Applications by complainant to substitute (decrease)	1/1	2.1
Applications by defendant to substitute (decrease)	10/16	11.7
Other requests for change (1 x enforcement of order; 1 x change of method of payment)	2/2	2.8

\* In most cases information on the timeline was not available for all files.

## 13.5 Dates when applications for change are made

**Complainants most commonly requested changes in maintenance orders in the months of February, March, April and August.**<sup>16</sup> Given that approximately half of the requests for increase were attributed to school-related costs, the timing of the requests are in line with the reasons cited.

**Defendants most commonly requested changes in February and July.** As discussed under section 13.3, the most common reason to apply for a decrease was the pressure of other expenses. Therefore, applications in February may be due to the impact of school-related costs on the defendant. Reasons

<sup>15</sup> D Hubbard, *Maintenance: A Study of the Operation of Namibia's Maintenance Courts*, Windhoek: Legal Assistance Centre, 1995 at 144.

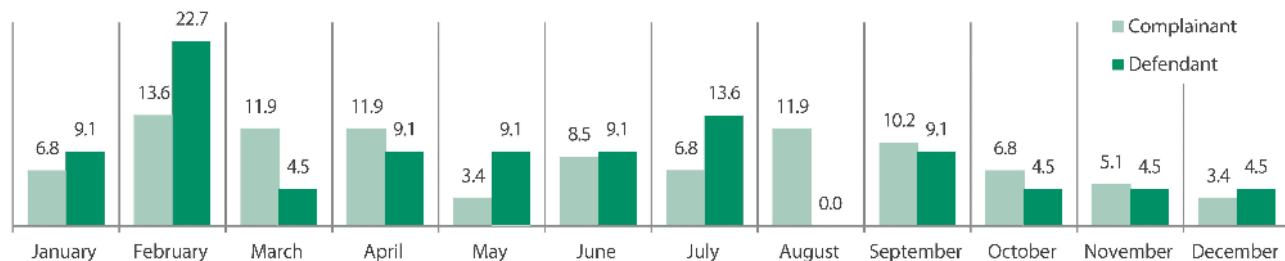
<sup>16</sup> As discussed under section 8.4, maintenance complaints were most commonly made in January and February.

for mid-year applications could be that when children move from primary to secondary school, parents are sometimes required to pay towards the School Development Fund in advance and this cost is often incurred mid-year. Another reason suggested was that the defendant was hoping to receive a salary increase but this did not materialise.<sup>17</sup> These financial pressures may mean that the defendants find themselves unable to meet the demands of the maintenance orders and so request a decrease.

**Table 130: Month in which request for change was made**

Month	Complainant		Defendant	
	Number of applications for change made during month	Percentage of all applications by complainant	Number of applications for change made during month	Percentage of all applications by defendant
January	4	6.8	2	9.1
February	8	13.6	5	22.7
March	7	11.9	1	4.5
April	7	11.9	2	9.1
May	2	3.4	2	9.1
June	5	8.5	2	9.1
July	4	6.8	3	13.6
August	7	11.9	0	0.0
September	6	10.2	2	9.1
October	4	6.8	1	4.5
November	3	5.1	1	4.5
December	2	3.4	1	4.5
<b>Total</b>	<b>59</b>	<b>100.0</b>	<b>22</b>	<b>100.0</b>
<i>Missing</i>	7	10.6	5	18.5
<b>Total</b>	<b>66</b>	<b>100.0</b>	<b>27</b>	<b>100.0</b>

**Chart 72: Month in which request for change was made**



## 13.6 Average age of beneficiary when change is requested

The median age of the beneficiary when the first request for change was made was 7 (mean 8.8; range 0-23; n=109). The median age of beneficiaries covered by successful initial orders was 6 (mean 6.9; range 0-23; n=1 252). This is in line with the finding that the average time between the original maintenance order and the request for change is 15.7 months (see section 13.4).

When the requests for change are sub-analysed, the median age of the beneficiary when an increase was requested was 8, when a decrease was requested was 5.5 and when a discharge was requested was 10.5. This pattern correlates to probable life patterns in some respects; an 8-year-old child will have recently started school and the complainant may be experiencing the impact of increased expenses.

<sup>17</sup> Reasons based on discussion with parents.

**Table 131: Average age of beneficiary when request for change is made**

Average age	Number of beneficiaries	Median age	Mean age	Minimum	Maximum
Average age of beneficiaries when request for change is made	109*	7	8.8	0	23
Average age of beneficiaries when request for an application for an increase is made	64	8	9.0	0	22
Average age of beneficiaries when request for an application for a decrease is made	14	5.5	4.8	1	9
Average age of beneficiaries when an application for a discharge is made	26	10.5	11.5	2	23
Average age for other requests for change	4	4	4.3	3	6
Information missing	1	3	3.0	3	3

\* The N number is higher than the number of requests for change because some requests involved more than one beneficiary.

## Applications for change for beneficiaries over the age of 18

There were seven applications for change for nine beneficiaries over the age of 18. The beneficiaries were all aged 15-23 at the time of the original application for maintenance and were aged 19-23 at the time the request for change was made. Five of the seven applications were made by the complainant.

**Table 132: Details of applications for change for beneficiaries over the age of 18**

Age of beneficiary at date of first application	Age of beneficiary at date of first request for change	Who is requesting change?	Change requested	Outcome	Notes
17	19	Complainant	Substitution – increase	Granted	The complaint was also for three other beneficiaries who were under the age of 18.
15	19	Complainant	Substitution – increase	Granted	The complaint was also for four other beneficiaries under the age of 18. The complainant requested a lump-sum payment of N\$50 000 from the defendant's pension as the defendant had lost his job. The defendant agreed to pay N\$10 000.
17	22	Complainant	Substitution – increase	Granted	The inference from information on file is that the request was made because the beneficiary was still studying.
17	20	Complainant	Substitution – increase	Granted	The reason for the request was that the beneficiary was still studying. In this case the increment requested by the complainant was granted but was not made as part of the maintenance payments imposed by the order. Instead the defendant was ordered to contribute specifically to the School Development Fund costs and examination fees.
	22	Defendant	Discharge	Granted	The reason for the discharge was that the beneficiary had become self-supporting.
18	19	Defendant	Discharge	Granted	The complaint was also for four other beneficiaries who were under the age of 18.
19	19	Complainant	Discharge	Granted	The inference from information on file is that the request was made because one or more beneficiaries were still studying.
19	19				
21	21				
23	23				



Three of the applications were for the maintenance order to be discharged. All three requests for discharge were granted. In one case the defendant applied for the discharge because the beneficiary was self-supporting, in another case because the defendant was over the age of 18. One of the applications for discharge was made by the complainant. The complainant was an older sibling who had applied for maintenance on behalf of his six siblings. The defendant, who was the father, had disputed the complaint throughout the process. The elder brother applied for the discharge because “we have come to an agreement that he’s [the father] going to maintain us out of court because if he resigns the bursaries shall also stop paying the studies”. This suggests that the father was threatening to resign from his job to avoid paying maintenance. The Maintenance Act makes it an offence to compel or induce a complainant not to file a complaint at the maintenance court or not to lay a criminal charge against a defendant for his or her failure to support a specific person.<sup>18</sup> There is no record in the file of whether this provision and the legal remedies were discussed with the complainant.

The other four applications were for an increase in the amount of maintenance paid for beneficiaries aged 19, 20 and 22. In all four cases the increase was granted. In two cases the beneficiary was continuing studies, but no specific reason other than increased costs were cited.

## 13.7 Details of assets, income and expenditure

Only one application for change made by a defendant contained information about expenditure. None of the applications made by a defendant contained information about income or assets. One application made a complainant contained information about his/her assets, five applications made by complainants contained information about income and nine contained information on expenditure. In three files additional information related to the request for change was included in the file. It is possible that this information was discussed in person and the details not recorded. However the lack of record-keeping is still a problem; if requests for change are made at a later date, the court has little information to reference on previous actions taken. Due to insufficient information, we have not analysed this data as the analysis would be misleading.

## 13.8 Beneficiaries in requests for substitution of an existing order

### Number of beneficiaries

In the majority of requests for a substitution, the complainant sought maintenance for only one beneficiary (51/71; 71.8%). This finding is the same as that for initial maintenance orders, as discussed in section 12.4.

In four applications for change, the complainant requested an increase in the number of beneficiaries and in one application the complainant requested a decrease in the number of beneficiaries. In one application, the complainant also made a request for him/herself.

**Table 133: Number of beneficiaries in applications for change**

Number of beneficiaries	Frequency	Percentage
1	51	73.9
2	7	10.1
3	6	8.7
4	1	1.4
5	4	5.8
<b>Total</b>	<b>69</b>	<b>100.0</b>
Missing	2	2.8
<b>Total</b>	<b>71</b>	<b>100.0</b>

<sup>18</sup> Maintenance Act 9 of 2003, section 41. The offence may be subject to a fine of up to N\$20 000 or imprisonment for up to five years.

## Change in number of beneficiaries

Of the four applications for an increase in the number of beneficiaries, two applications involved an increase from one to two beneficiaries and two applications involved an increase from two to three beneficiaries. In one of these cases the paternity of one of the children was in question. The defendant subsequently withdrew his opposition to paternity and agreed to pay more maintenance than was originally requested. In the case where the complainant also asked for maintenance, the defendant and complainant were married with one child. The defendant was paying N\$350 maintenance for their child. Following an enquiry into the application for change, the defendant agreed to increase the amount of maintenance paid from N\$350 to N\$950.

In one application, the defendant applied for a decrease in the number of beneficiaries after one of his children died.

## 13.9 Amount of maintenance requested in applications for change

### Requests for an increase in the amount of maintenance paid

In cases where the applicant requested an increase, the beneficiary/ies were **currently receiving N\$200** (n=52). This figure is the same for requests for change for beneficiaries alone and for cases where the complainant was also a beneficiary. The amount being received at the time of the request is slightly lower than the median amount of maintenance in the total sample of maintenance orders (N\$250), but in light of the difference in sample size (n=52 vs n=1 103) we cannot comment on this difference.

Excluding maintenance for the complainant, the median amount of **maintenance requested in an application for change was N\$500** (n=52), representing an increase of N\$300 in the typical case. Maintenance requested for all beneficiaries including applications for maintenance for the complainant and beneficiary together was N\$550 (n=55). **The new amount of maintenance requested in these applications for change is the same as the median amount of maintenance requested in respect of initial orders. This indicates that people who request a change are not requesting amounts that are any higher than the average amount of maintenance requested at the outset (N\$500; see section 8.7), suggesting that the amount originally requested may be a realistic reflection of the complainants' needs.**

In one case the complainant requested a once-off payment of N\$120 000. The complainant and defendant appear to have been in the process of a divorce.<sup>19</sup> The outcome of the case is not clear as the file only contained a request for change and a summons. In another case, a complainant who was receiving N\$200 per month for five children requested a once-off payment of N\$50 000 as the defendant had lost his job (this case is also referred to under section 13.2. The defendant agreed to pay a lump sum of N\$10 000.

### Requests for a decrease in the amount of maintenance paid

In cases where the applicant requested a decrease, the beneficiary/ies were **currently receiving N\$475** (n=14). Maintenance received for beneficiaries excluding complainants was N\$400 (n=13).

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<sup>19</sup> Where maintenance is needed before a divorce but the divorce is pending, there is a special procedure for this under Rule 43 of the Rules of the High Court. It may have been more appropriate for the High Court to have used this procedure rather than the parties going separately to the maintenance court.

The amount being received at the time of the request is higher than the median amount of maintenance in the total sample of maintenance orders (N\$250) but in light of the difference in sample size (n=14 vs n=1 103) we cannot comment on this difference.

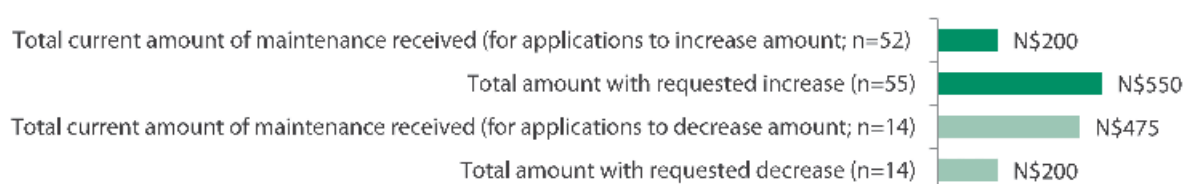
The median amount of **maintenance requested in an application for change** was N\$200 (n=15), representing a reduction of nearly 60% on the median initial order in these cases. Maintenance requested for beneficiaries excluding complainants was N\$175 (n=14), similarly representing a decrease of nearly 60% from the initial maintenance order.

These results show that requests for increases and decreases are not made in small increments. This may be because of the effort it takes to seek a change (complainants wait until they need a lot more money before making a request), because the original amount ordered was unrealistic or for some other reason.

**Table 134: Amount of maintenance currently received and new amount of maintenance requested (N\$)**

	Contribution currently received for complainant	Contribution currently received for beneficiary/ies	Total current contribution received	Amount of maintenance requested for complainant	Amount of maintenance requested for beneficiary/ies	Total amount of maintenance requested	Change in the total amount of maintenance requested	Percentage change
Requests for increases								
Number of orders	7	49	52	8	52	55	50	175%
Median request for applications to increase the amount of maintenance paid	300	200	200	650	500	550	300	
Requests for decreases								
Number of orders	2	13	14	2	14	15	14	57%
Median request for applications to decrease the amount of maintenance paid	550	400	475	250	175	200	225	

**Chart 73: Change in the total amount of maintenance requested**



Most applications for change involved one beneficiary (51/71; 71.8%). Given the small number of cases involving more than one beneficiary (20), an assessment of the change in the amount of maintenance requested per beneficiary would not be statistically meaningful and so has not been assessed.

## 13.10 Other special forms of maintenance requested in applications for change

Information about special forms of maintenance in the original order was recorded on only five of the applications for change. In all five of the orders, other forms of contribution were in addition to regular financial support. The contributions were for medical costs (two applications), school fees

(two applications), school clothes (two applications), fees for tertiary education (one application), expenses for sport (one application), payments towards a study policy (one application) and payments towards school expenses such as books, stationery and clothes for extra-mural activities (one application).

Requests for other forms of contribution were included on only one application for change, where the complainant requested contribution towards medical costs. This request had also been made and ordered in the original order.

Two files contained an application to set aside the order, including the other contributions. In one case the defendant applied for a discharge of the maintenance order as he had retired. In the second case the complainant withdrew the order because the defendant “*sent me an sms on my phone which I am not pleased with. This is all I declare.*” Therefore the reasons for stopping these forms of payments were related to the payment of maintenance in general, rather than to the specific contribution in question.

## 13.11 Changes in the frequency of payments in applications for change

**Applications for change rarely requested a change in the frequency of payments.** Where the information was available (58/73; 79.5%), all of the original orders required the defendant to make monthly maintenance payments. This was also true for the requests for a substituted order, except for two applications which requested once-off payments as discussed on page 258 (56/73; 76.7%).

## 13.12 Changes to how the payment is made

In one file the complainant requested the mode of payment be changed from a deposit in a NamPost account to payment to the court. The defendant had gone into arrears and it seems that the complainant was hoping that payment through the court would help to prevent this problem. As discussed under section 8.11, many people, both complainants and court officials, are of the opinion that payment through the court is taken more seriously by the defendant. This change could have been requested as a variance to an order, the procedure for which is discussed in section 13.15.

## 13.13 Summons to attend court for applications to change an order

Chapter 9 discusses summoning the complainant, defendant and witnesses to court. The data shows that **only a minority of the summonses were issued for requests for a substitution, discharge or suspension (78/1 498; 5.2%).**

The majority of summonses issued for an application to change a maintenance order were served (56/78; 71.8%). This success rate is similar to the success rate for all summonses, which was 62.2% (see page 196).

**Table 135: Type of maintenance enquiry summons issued for**

Type of maintenance enquiry	Frequency	Percentage
Making of a new maintenance order	1 384	92.4
Substitution of an existing order	53	3.5
For arrears	36	2.4
Discharge/suspension of an existing order	25	1.7
<b>Total</b>	<b>1 498</b>	<b>100.0</b>
<i>Missing</i>	295	16.5
<b>Total summonses included in the sample</b>	<b>1 793</b>	<b>100.0</b>

**Table 136: Outcome of summons**

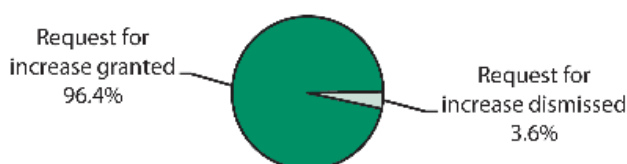
Outcome	Substitution	Discharge/suspension	Total	Percentage
Served	36	20	56	71.8
Not served	4	1	5	6.4
Information not clear	13	4	17	21.8
<b>Total</b>	<b>53</b>	<b>25</b>	<b>78</b>	<b>100.0</b>

## 13.14 Outcome of applications for change

Overall, where the information is available, only a small percentage of applications for change were dismissed (6/69; 8.7%). Most were granted (45/69; 65.2%) or had another outcome. For example, in three cases the request was settled outside of court without a formal order being made to discharge the maintenance order. In one of the cases, the defendant sold the complainant a business which would provide the complainant with an income. In two cases the defendant agreed to continue to maintain the beneficiaries without a court order. In one of these cases, the complainant stated “*if he resigns the bursaries shall also stop paying*”. Data on the outcome of the applications is missing for approximately one-third of the requests (33/102; 32.4%).

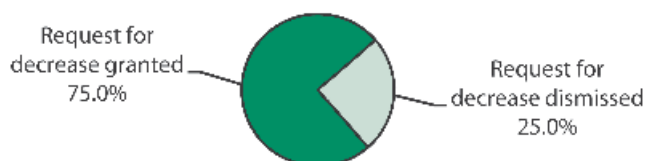
Where the information is available, all but one of the requests for an increase were granted (27/28; 96.4%). However data on case outcome was missing in respect of nearly half of the requests (26/54; 48.1%).

The majority of the substituted orders for increases were consent orders (23/28; 82.1%). Three substituted orders were made following a hearing (10.7%) and two were default orders (7.1%).

**Chart 74: Outcome of requests for increase (n=28)**

Where the information is available, two-thirds of the requests for a decrease were granted (9/12; 75.0%). However again a high proportion of data was missing (5/17; 29.4%) and the sample size is small (n=17).

Again the majority of substituted orders for decreases were consent orders (7/9; 77.8%), with one such order being made following a hearing.

**Chart 75: Outcome of request to decrease (n=12)**

Where the information is available, the majority of requests to discharge/suspend the order were granted (9/11; 81.8%). However again the sample size is small in total (n=15).

**Table 137: Outcome of applications to change**

Outcome	Number of orders	Percentage
Granted	45	65.2
Dismissed	6	8.7
Other	18	26.1
<b>Total</b>	<b>69</b>	<b>100.0</b>
Not clear	33	32.4
<b>Total</b>	<b>102</b>	<b>100.0</b>

**Table 138: Outcome of requests to increase the amount of maintenance paid**

Outcome	Number of orders	Percentage
Request for increase granted	27	96.4
Request for increase dismissed	1	3.6
<b>Total</b>	<b>28</b>	<b>100.0</b>
Outcome of request for increase not clear	26	48.1
<b>Total</b>	<b>54</b>	<b>100.0</b>

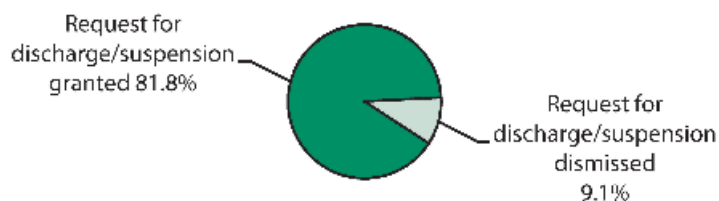
**Table 139: Outcome of requests to decrease the amount of maintenance paid**

Outcome	Number of orders	Percentage
Request for decrease granted	9	75.0
Request for decrease dismissed	3	25.0
<b>Total</b>	<b>12</b>	<b>100.0</b>
Outcome of request for decrease not clear	5	29.4
<b>Total</b>	<b>17</b>	<b>100.0</b>



One consent order and five orders following a hearing were made. The type of order for the remaining three requests is not clear.

**Chart 76: Request to discharge/suspend (n=11)**



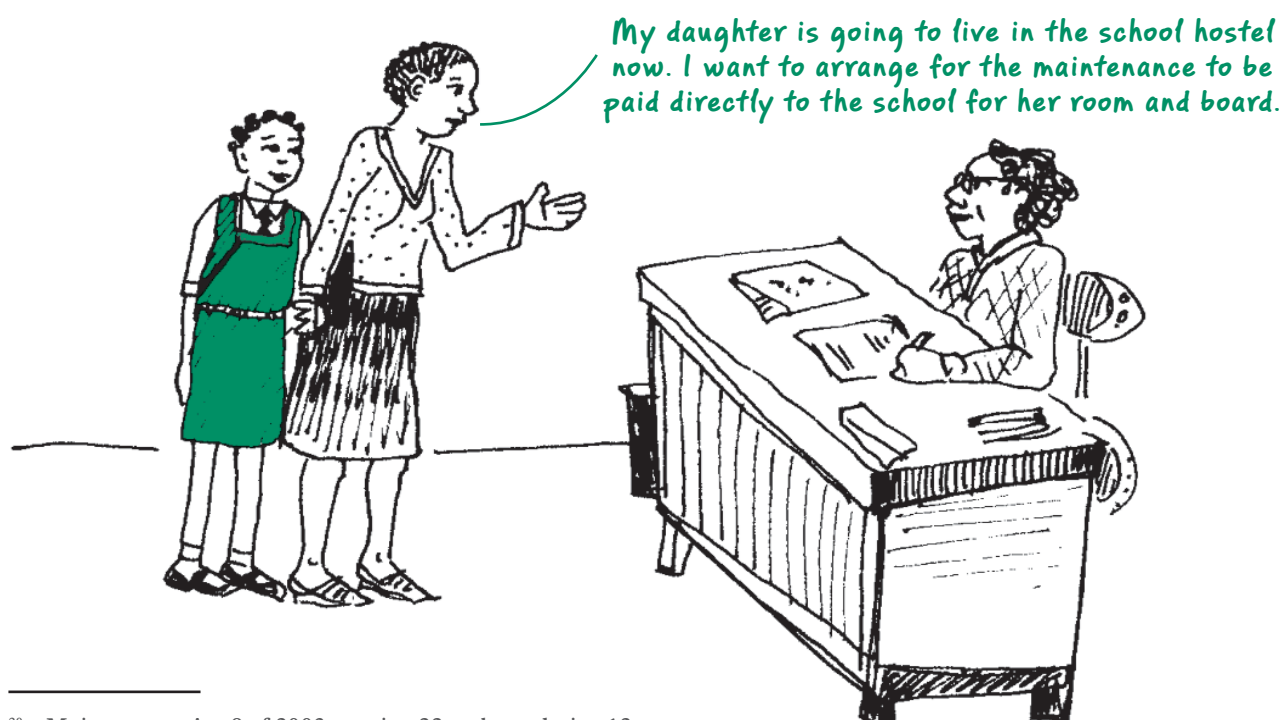
**Table 140: Outcome of requests to discharge/suspend the amount of maintenance paid**

Outcome	Number of orders	Percentage
Request for discharge/suspension granted	9	81.8
Request for discharge/suspension dismissed	2	9.1
<b>Total</b>	<b>11</b>	<b>100.0</b>
Missing	4	26.7
<b>Total</b>	<b>15</b>	<b>100.0</b>

## 13.15 Requests to vary a maintenance order

A maintenance officer may vary the manner of the maintenance payment including setting aside an order to make payments in kind. Changes could include changing who receives the payment or where the payment is made. The maintenance officer must inform the complainant and the defendant, and if relevant, the employer or debtor paying amounts directly to the court, using a form the same as or substantially similar to Form J.<sup>20</sup>

We identified 69 files in the sample that contained a variance to the maintenance order (69/1 687; 4.1%). Whilst the majority of files contained one variance, three contained two variances, resulting in a total of 72 applications for variance in the sample. However the information was filed as handwritten notes rather than through completion of Form J. **We recommend that the Ministry of Justice train maintenance officers on the use of Form J.** All of the notices were for a change in designation of who was receiving the payment. For example, in one case the payments were changed from the mother (who was studying in Windhoek at the Polytechnic) to the grandmother who was living with the child in another town. In another case the beneficiary was now living with the sister of the complainant and the request was to transfer the payment to the sister. In a third case the complainant died and the request was to transfer the payment to the relative caring for the child. In the three files with two applications for change, these were to change the recipient of the payment, and then to change it back again to the complainant.



<sup>20</sup> Maintenance Act 9 of 2003, section 22 and regulation 12.

### Summary of requests to change a maintenance order

- A very small minority of files contained a request to change an existing order.
- The majority of requests for change were made by the complainant. The majority of applications for change were for substitutions. Where defendants requested changes, they most commonly requested substitutions, not discharges.
- The applications to discharge or suspend an order were made almost equally by defendants and complainants, although the sample size is very small.
- Of the reasons in applications for an increase, nearly half specified School Development Fund contributions or other school-related costs (eg transport to school).
- Of the reasons cited in applications for a decrease, over half stated that the maintenance order was too high in light of the defendant's responsibilities to maintain other dependants.
- The sample contained only a small number of applications to discharge an order. Reasons to discharge the order included the defendant's unemployment, the beneficiary leaving school or becoming self-supporting, or an arrangement made by the parties outside court. Some requests to discharge the order were made by complainants due to possible intimidation from the defendant.
- On average, requests for change were made just over one year after the original order came into effect. Applications to discharge or decrease the amount of maintenance paid were made sooner than applications to increase the amount of maintenance paid.
- Complainants most commonly requested changes in maintenance orders in the months of February, March, April and August. Defendants most commonly requested changes in February and July.
- The median age of the beneficiary when the request for change was made was 7.
- Where an increase in maintenance was requested, the applicant requested approximately double the amount of maintenance currently being received. The amount requested is the same as the median amount requested for first applications.
- Where a decrease in maintenance was requested, the applicant requested to pay approximately 60% of the amount of maintenance currently being paid.
- The majority of applications for change were granted.

## 13.16 Divorce orders

The basis for the maintenance court's jurisdiction over divorce orders is discussed in section 4.9. The legal provisions on this are less straightforward than in the 1963 Act, and we have recommended that they be clarified.

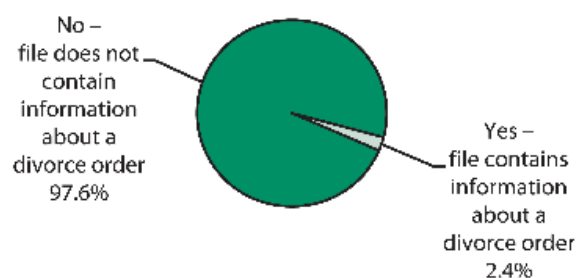
Despite the lack of clarity on jurisdiction, **a small proportion of files involved divorce cases**. A total of 40 files in the sample contained information about a divorce order (40/1 687; 2.4%). It was unclear from half of the files (19/40; 47.5%) whether the divorce order or divorce proceedings were in place before or after the first maintenance complaint was made.<sup>21</sup> Where this information was available, half of the cases involved divorce proceedings before the maintenance complaint was made (10/21; 47.6%) and half involved divorce proceedings which started after the maintenance complaint was made (11/21; 52.4%).

<sup>21</sup> Where interim maintenance is needed while the divorce case is pending, there is a special procedure for this under Rule 43 of the Rules of the High Court.

Given the lack of clarity in the law, it is not surprising that there was no consistency amongst courts regarding the procedure where the complainant applied for an increase in the amount of maintenance paid by the defendant in terms of a divorce order. For example, whilst some courts requested the complainant to complete a new maintenance complaint form, considering the request a new case, other courts used a request for change form, considering the request part of an existing case. Whilst either method is feasible, it would be useful for all courts to operate under a standard protocol for ease of implementation and monitoring. **We recommend that the Maintenance Act should be amended to include a more straightforward statement of the maintenance court's jurisdiction to enforce, vary, suspend or set aside orders for maintenance made by any court, including the High Court.**

The 1995 study included 25 maintenance complaints made following a divorce (25/618; 4.0%).<sup>22</sup> Therefore the total proportion of files containing information about a divorce is slightly higher in the 1995 study than the proportion of files identified in this study. When only the proportion of files containing a maintenance complaint after a divorce is compared, the difference is greater (10/1 687; 0.6% from the current sample versus 25/618; 4.0% for the 1995 study). However given that the sample size is small from both studies we cannot draw conclusions from these comparisons.

**Chart 77: Does the file contain information about a divorce order? (n=1 687)**



For files where the complainant came to court after the divorce, some contained information on the maintenance ordered at the time of the divorce. In these cases, the median amount of maintenance ordered by divorce order (n=27) was N\$400 (mean N\$460). This is higher than the average amount of maintenance ordered in a maintenance order, although the sample size is much smaller.

Maintenance in a divorce case is also not necessarily comparable to maintenance in a situation involving separate households. In divorce cases, a court may consider property division, spousal maintenance and child maintenance all in conjunction in an effort to achieve overall fairness. In one of the applications to the maintenance court following a divorce order, the complainant requested an increase in the amount of maintenance. The defendant was resident in South Africa and therefore it is a case of an application for a reciprocal maintenance order (see section 4.12 for further discussion of reciprocal maintenance orders). In this case the complainant asked for the maintenance payment of N\$250, which the defendant was paying irregularly, to be increased to N\$1 500 to cover pocket money, medical aid (N\$500), school-related costs (N\$380), food and clothes. The court sent a letter to the Permanent Secretary of the Ministry of Justice for further action. Four months later there is a note on the file saying that a fax from the complainant was sent to the Permanent Secretary, but there is no detail as to what the message said. There is no further information in the file. This suggests that the attempts to resolve this case of cross-border maintenance were not successful.

### Summary of maintenance orders related to divorce proceedings

Only a small proportion of files involved divorce cases. One reason for this may be the lack of clarity in the law as to whether a maintenance court can amend provisions on maintenance in a divorce order.

<sup>22</sup> D Hubbard, *Maintenance: A Study of the Operation of Namibia's Maintenance Courts*, Windhoek: Legal Assistance Centre, 1995 at 105.



# Chapter 14

## APPEALS AND MISUSE OF MAINTENANCE PAYMENTS

### 14.1 Appeals

We did not identify any appeals of a maintenance case in our sample. The magistrates at one court said that it is rare for a defendant to make an appeal as *“both complainants and defendants feel they have no grounds on which to appeal the decision. In particular, fathers seem to come to the realisation that it was their responsibility to maintain their children once they had attended a court enquiry or hearing.”* The clerk from another court made a similar statement.

A search of reported Namibian High Court cases and unreported High Court cases available online turned up only one example of an appeal filed under the 2003 Maintenance Act. This case, which is described in detail at page 85, involved an appeal against the outcome of a request for substitution. In brief, there was a maintenance order in place for N\$450/month for a child beneficiary. The child’s mother requested an increase to N\$1 000/month, but the maintenance court granted an increase to only N\$600/month. The mother appealed this decision, but the High Court, after reviewing the financial position of both parents, confirmed the decision of the maintenance court on the grounds that the mother had not discharged the onus of showing that the father could pay any higher amount.<sup>1</sup> As the Act contemplates, the mother was represented in the appeal by a state prosecutor.<sup>2</sup> The respondent in the appeal also had legal representation.

### 14.2 Misuse of maintenance payments

One innovation of the 2003 Maintenance Act was to introduce a penalty for the misuse of maintenance payments. The complainant, beneficiary, defendant or any person who is affected by a maintenance order may complain to the court about the misuse by any person of a payment made in terms of a maintenance order.<sup>3</sup> The maintenance officer is obliged to investigate the complaint, and if found

<sup>1</sup> *Mokomele v Kaihivi* [2009] NAHC 101 (12 June 2009).

<sup>2</sup> See Maintenance Act 9 of 2003, section 47(2). The prosecutor in the case was from the unit established by the Office of the Prosecutor-General to specialise in sexual offences, domestic violence and maintenance.

<sup>3</sup> Maintenance Act 9 of 2003, section 9(3) and (4)(b)(ii).

guilty, the person misusing the maintenance could receive a fine of up to N\$4 000 or imprisonment for a period which does not exceed 12 months.<sup>4</sup>

**Two files reported information about misuse of maintenance money. This represents 0.1% of the total files sampled (2/1 687; 0.1%).** Both cases were reported at the Katutura court, in 2005 and 2006 respectively. The maintenance orders were for N\$500 and N\$1 000 per month. In one case the maintenance order was for the beneficiary alone, in the second case it was for a beneficiary and the complainant. The defendants complained that the complainants were not using the funds for the basic needs of the children. Both defendants made similar complaints, the first stating that the complainant “*does not even pay school fees for the children*”, whilst in the second case the defendant stated that the complainant “*is not paying water & school fees and she’s not buying food for the house*”.

One of the files contained a letter from the school principal confirming that the complainant had not paid the School Development Fund contribution. The letter stated that “*it is affecting negatively the school work of the children*”. The allegation of the misuse of maintenance money was made in March and the complainant was given until May to show proof that she had paid the School Development Fund. The file contains a notice of postponement in May. A warrant of arrest was issued in July as both parties were absent from court. There is no further information in the file. Two years later the case was closed as the defendant made a lump sum payment to the complainant. The defendant had lost his job and the money (N\$10 000) was intended to give him time to find another job without having to worry about monthly maintenance payments.

In the second complaint, the court issued a summons to the complainant to attend a criminal hearing on the charge of misuse of maintenance payments. The case was postponed twice and then withdrawn. There is no further information in the file.

Interviews with court officials suggested that the incidence of reports of the misuse of maintenance money is slightly more frequent than our sample suggests, but that the allegations are not always documented. For example, at one court the maintenance officer may ask a social worker to investigate the situation and talk to the complainant. At another court the clerk stated that they call in both parties and attempt to resolve the problem. At another court the clerk will call the complainant to the court and remind her of her responsibilities with regard to the maintenance payments. These steps are in line with the process to investigate a complaint about the misuse of maintenance payments. However, the court officials should ensure that the information about such steps is documented in the files. The clerk at one court stated that when a complaint is made about misuse of maintenance money, the court will stop payments until the case has been investigated. This practice is incorrect as the Act does not give the court the power to stop payments in this manner. The Act simply states that the maintenance officer must investigate the complaint and provides a penalty for the offence.<sup>5</sup> The reason for allowing the payments to continue is that it could be detrimental to the best interests of the child to abruptly stop the payments, particularly if it transpires that the payments are in fact being used for the benefit of the child. **We recommend that the Ministry of Justice send a circular to the maintenance courts clarifying the procedure for addressing the misuse of maintenance money, including the importance of documenting complaints, investigations and outcomes.**

One clerk noted that concern over the misuse of maintenance money is often greater than the reality – he explained that “*men complain about the way that women spend an amount as small as N\$70 per month. They say: ‘I saw my child playing in the street without shoes, the mother is not spending the maintenance money properly.’ I say: ‘We are in Africa. Just because the child is not wearing shoes does not mean he does not own shoes’.*”

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<sup>4</sup> Id, section 40.

<sup>5</sup> Id, section 9(4)(b)(ii). Misuse of maintenance could result in a fine of up to N\$4 000 or imprisonment for a period not exceeding 12 months (section 40).



The problem of the misuse of maintenance payments was considered in some of the focus group discussions. In the discussions in Keetmanshoop, both the women's and men's focus groups shared similar perceptions that maintenance funds were sometimes misspent on clothes, alcohol, gambling and new boyfriends. They suggested that in some cases the mother may send the child to live with another relative but will continue to receive maintenance payments without passing them on. Participants in the male focus group discussion suggested that men who are concerned about how the maintenance money is being spent should spend time with their children. Then they can then see the reality of the day-to-day costs and can also use the time to bond better with their children. All of the participants expressed strong disapproval of the misuse of maintenance and there was a great sense of injustice associated with this practice.

### Summary of appeals and misuse of maintenance payments

- We did not identify any appeals of a maintenance case in our sample.
- Two files reported details of the misuse of maintenance money. This represents 0.1% of the total files sampled.

It is important to remember that money is interchangeable. For example, suppose that you see a woman pick up a maintenance payment at the court. She gets into a taxi and takes the money to her new boyfriend. Is she abusing the maintenance payment? Maybe. But it may also be that her new boyfriend loaned her money for groceries during the month which she is now re-paying.

Research conducted by the Legal Assistance Centre did not find abuse of maintenance money to be a problem. The typical maintenance payments are very low. Someone looking for easy money would most likely look elsewhere. But the provision on abuse is still a welcome one – anyone who misuses maintenance money for their own selfish purposes should be punished.

#### A NOTE TO DEFENDANTS

If you suspect that maintenance money is being abused, this is NOT a good reason for failing to pay. The right course of action is to ask the maintenance officer to investigate. But you must continue to obey the maintenance order as long as it remains in force.



*"It is true that there are some women who receive maintenance benefits and do not use it in the best interest of the children. At the same time, it is also true that there are men who do not maintain their children. It is a fact, and that is why this law is clearly focusing on both parents, that we must take care of our children and not think that somebody else will do it for us. Therefore, this law should not really be seen as a law for women; it is a national law because everybody is going to benefit."*

**Hon. Nandi-Ndaitwah,**  
Minister of Women Affairs and Child Welfare  
Parliamentary debate on the Maintenance Act

Excerpt from *Guide to the Maintenance Act 9 of 2003*, Windhoek: Legal Assistance Centre, 2007 at 66.

Will you be there from  
start to finish?



Be part of your child's success!

Child Maintenance Campaign coordinated by:



Legal Assistance Centre in consultation with Doufi Namalambo and Nepeti Nicanor  
Pictures courtesy of Marcus Weiss

Funded by the United States Government and the Austrian North-South Institute for Development Cooperation

One of the posters produced for the Child Maintenance Campaign coordinated by the Legal Assistance Centre in 1998-1999.



# Chapter 15

## ARREARS AND ENFORCEMENT

The Maintenance Act states that if maintenance is not paid, the complainant may apply 10 days after the date the payment was due for the maintenance court to enforce the order.<sup>1</sup>

The Maintenance Act states that when a request for the enforcement of a maintenance order is made, the application must include a copy of the maintenance order, a statement under oath or affirmation confirming the amount of money that has not been paid and a statement indicating the preferred method of enforcement.<sup>2</sup>

The court can impose a number of civil options to address the failure to pay maintenance: namely, a warrant of execution, an order for the attachment of wages and/or an order for the attachment of debts. Procedures seem to vary across courts. For example, the researchers collecting data from the Keetmanshoop court noted that the court appears to issue a default order for the attachment of wages when the defendant goes into arrears. In contrast, in Swakopmund the court appears to deal with cases of arrears by summoning the defendant and making a new order for payment to cover the amount in arrears alongside the regular maintenance payments. Although this is not one of the methods of enforcement envisaged by the Act, it is not problematic if it is effective at promoting the payment of arrears.

Ultimately, the court can also implement criminal proceedings, although these will usually be a secondary option as the primary purpose of enforcement is to ensure the payment of maintenance, not the punishment of the defendant. Failure to pay maintenance is a crime punishable by a fine of up to N\$4000 or imprisonment for up to 12 months.<sup>3</sup>

A criminal proceeding which results in a conviction can be combined with the recovery of arrear maintenance owing.

The diagrams on the next page summarise the different enforcement mechanisms which are available.

*"Courts need to be alive to recalcitrant maintenance defaulters who use legal processes to side-step their obligations towards their children."*

*Bannatyne v Bannatyne  
(Commission for Gender Equality, as amicus curiae) 2003 (2) SA 363 (CC) (Mokgoro J),  
on the South African Maintenance Act,  
which is very similar to the Namibian law*

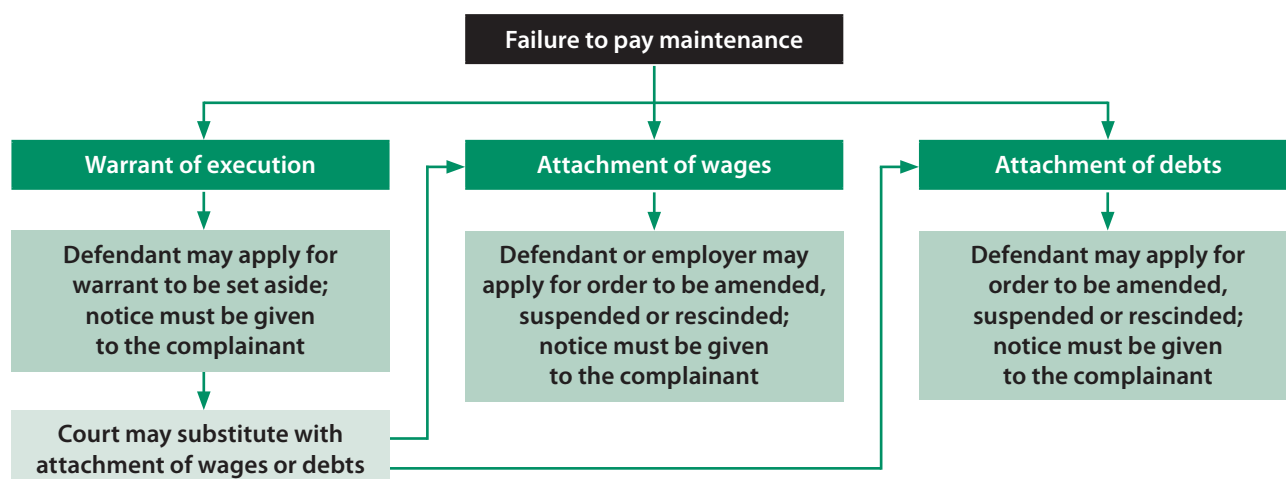
<sup>1</sup> Maintenance Act 9 of 2003, section 28.

<sup>2</sup> Id, section 28.

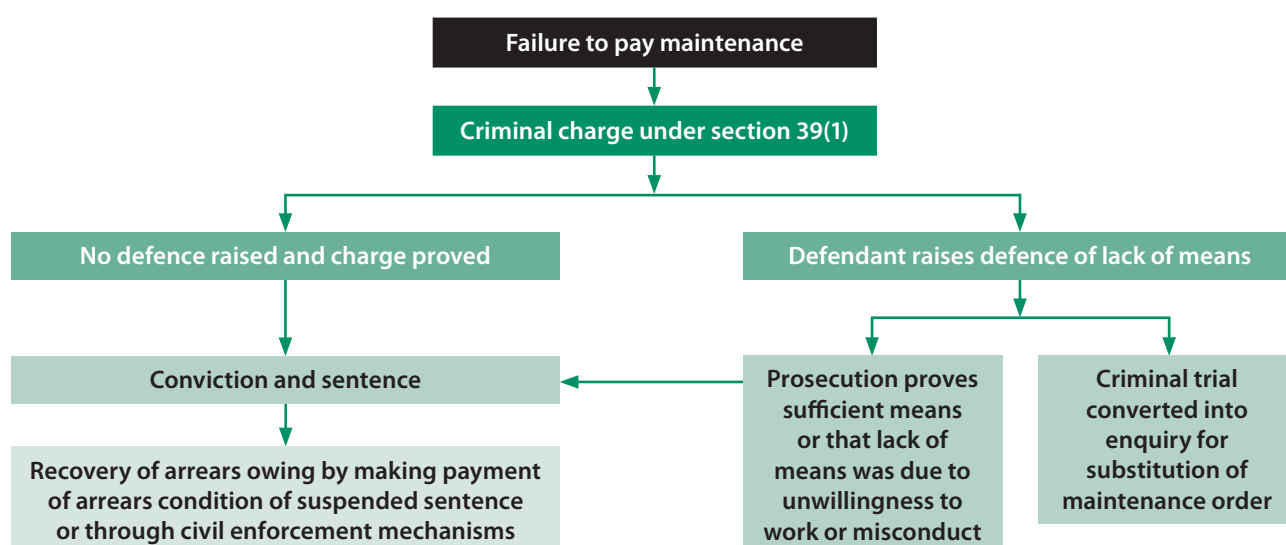
<sup>3</sup> Id, sections 39(1) and 33.



**Chart 78: Civil enforcement mechanisms**



**Chart 79: Criminal enforcement mechanisms**



## 15.1 Incidence and characteristics of maintenance cases in arrears

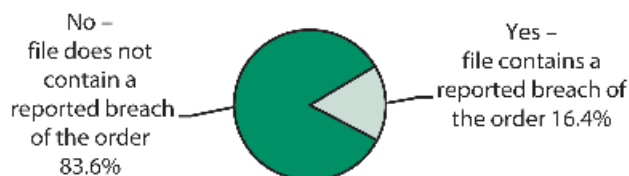
Approximately one in six files contained at least one reported breach in the payment of maintenance (276/1 687; 16.4%). A total of 346 breaches of maintenance orders were recorded in 276 files. This percentage is similar to, but lower than, the incidence of arrears in the 1995 study which reported that approximately one in four files contained at least one breach (26%).<sup>4</sup> Despite the decline, the incidence of breaches continues to be high. Given that so many cases go into arrears, **we recommend that the court be allowed to attach the wages of the defendant at the time of making an initial order rather than only when a breach has occurred.**<sup>5</sup> This mechanism could be used in cases where the complainant is able to provide sufficient motivation.

<sup>4</sup> D Hubbard, *Maintenance: A Study of the Operation of Namibia's Maintenance Courts*, Windhoek: Legal Assistance Centre, 1995 at 107.

<sup>5</sup> This was proposed during discussion of the draft Maintenance Bill, but not incorporated into the final bill. The defendant can agree to an attachment of wages at any time. This may be easier for the defendant, or may remove temptation to spend the money owing on something else.

The number of reported breaches per file ranged from one to four (median one; mean 1.5). The number of files containing either three or four breaches totalled 13. The number of breaches per file is much lower than identified in the 1995 study which reported a range of 1 to 28 breaches with a median of five (mean seven). However it is possible that some people stop reporting breaches after they have occurred once or twice out of a sense of futility, meaning that some incidences of repeated breaches in may go unreported.

**Chart 80: Does file contain a reported breach of the maintenance order? (n=1 687)**



**Table 141: Number of declarations of arrears per file**

Number of reports of a breach on file	Number of files	Percentage
1	223	80.8
2	40	14.5
3	9	3.3
4	4	1.5
<b>Total</b>	<b>276</b>	<b>100.0</b>

**Table 142: Comparison of the incidence of breaches between the current study and the 1995 study**

Incidence of breaches	Number	Median	Mean	Minimum	Maximum
Incidence of breaches in current study	346	1	1.5	1	4
Incidence of breaches in 1995 study	Not reported	5	7.0	1	28

The fact that both the percentage of files containing breaches and the number of breaches per file is lower than identified in the 1995 study suggests that the public has become more aware of the consequences of failing to pay maintenance in the intervening years. A contributing factor may be the stronger enforcement mechanisms provided for in the 2003 Maintenance Act, such as attachment of wages without first requiring a criminal conviction and the power to order the payment of arrears with interest. The risk of being subjected to such enforcement mechanisms may provide sufficient deterrent to many defendants to prevent them from going into arrears. As one magistrate said, in the majority of cases, *“once you inform the defendant of the consequence of failing to pay (ie prison, attachment of wages), the defendant normally pays within two days”*. Similar opinions emerged at the male focus group in Keetmanshoop, where participants felt that people do not want to fall into arrears because they are aware of the negative consequences. As one participant said, *“Most of the guys don’t want to go to jail so they will pay. You have to maintain yourself too. Maintain your child, stay out of trouble.”*

However the clerk of the Keetmanshoop court was of a different opinion, saying that *“there are more cases for outstanding arrears than for new cases themselves”*. The clerk explained that many defendants deliberately go into arrears in order to delay paying the complainant. The female participants at the Keetmanshoop focus group discussion suggested that this may be because the man wants to *“get back at the mother”*, for example because she *“dumped him”* and *“he still wants to be with her but she doesn’t want to be with him”*. They also suggested that the father may have another family, lacks sufficient resources to support all his children, and does not want his wife to know about his other child. The clerk of another court made a similar statement, saying that some defendants will not pay until they are *“followed, until they are summoned”*, as the defendants *“neglect, they just ignore”* their obligations. The participants at the female focus group discussion in Ondangwa stated that *“sometimes fathers pretend that they have forgotten to pay their maintenance, but really they haven’t”*. Another clerk of court said that the most common request from complainants is for assistance in getting maintenance payments that have gone into arrears. The clerk said that the complainants also want to know how long it will take to receive the outstanding money. Participants at the female focus group discussion in Keetmanshoop concluded, *“Most of us have problems with that [arrears]. There are fathers that really do their best and there are mothers who aren’t even trying but mostly in Namibia it is the fathers [not trying]. There are situations where fathers get a lot of money and you take them to the law but nothing is done.”*

In contrast, participants at the male focus group discussion in Ondangwa stated that *“most men default because the mother is misusing the money”*. As discussed on page 265, data from this study



suggests that women do not misuse maintenance payments. The Act also contains a mechanism to address the misuse of maintenance money which the defendant could utilise if he were genuinely concerned that the money was being misspent.

In general, the proportion of files from each court containing a breach is similar to the proportion of files from each court in the total sample. However at some courts there was a different proportion of breaches than would be expected – for example the Rehoboth court which represents 6.6% of the sample, had 15.6% of the breaches. In contrast, the Mariental court, which represents 6.0% of the sample, had only 2.6% of the breaches and the Karasburg court, which represents 4.3% of the sample, had only 0.3% of the breaches. It would be interesting to conduct a small qualitative survey in areas where breaches are particularly high and low to assess whether there are any specific reasons for reported breaches occurring so frequently or infrequently.

The 1995 study also found regional differences, identifying a higher incidence of arrears in Windhoek (representing 45% of the sample compared to 52% of cases involving arrears) and Gobabis (representing 4% of the sample compared to 9% of cases involving arrears) and a lower incidence of arrears in Keetmanshoop (8% of the sample compared to only 1% of arrears), Rehoboth (6% of the sample compared to only 1% of arrears) and Swakopmund (10% of the sample compared to 6% of arrears).<sup>6</sup>

**Table 143: Incidence of breaches by court**

Court	Total number of files sampled	Percentage	Records of breaches	Percentage
Bethanie	15	0.9	5	1.4
Eenhana	46	2.7	6	1.7
Gobabis	97	5.7	15	4.3
Karasburg	73	4.3	1	0.3
Keetmanshoop	111	6.6	28	8.1
Khorixas	34	2.0	2	0.6
Mariental	101	6.0	9	2.6
Okakarara	17	1.0	4	1.2
Ondangwa	93	5.5	4	1.2
Oshakati	136	8.1	46	13.3
Otjiwarongo	108	6.4	23	6.6
Outapi	93	5.5	13	3.8
Rehoboth	111	6.6	54	15.6
Rundu	121	7.2	0	0.0
Swakopmund	121	7.2	24	6.9
Tsumeb	66	3.9	4	1.2
Walvis Bay	109	6.5	33	9.5
Windhoek	235	13.9	75	21.7
<b>Total</b>	<b>1687</b>	<b>100.0</b>	<b>346</b>	<b>100.0</b>

*"Where can I go if I already have a maintenance file open in Rehoboth, but I am living in Windhoek, and the father doesn't pay?"*

Text message sent to the Legal Assistance Centre

<sup>6</sup> D Hubbard, *Maintenance: A Study of the Operation of Namibia's Maintenance Courts*, Windhoek: Legal Assistance Centre, 1995 at 108.

## CASE STUDIES

### Breaches of maintenance orders

The Legal Assistance Centre (LAC) regularly receives complaints from the public regarding problems with maintenance arrears.

*I start[ed] a maintenance [complaint] in 2003 in July but a man paid only one month since now he did not paid, what can I do? I'm having three kids with [him] now is only me who struggle with my kids, the first born now is having 15 years, the other one is having 13 and my last born having 11, what can I do for him?*

*The father of my daughter paid maintenance [for] only six months and stop[ped] in 1996 now she is 14 years and never receive a cent from him, he is having a nice house and still working he never even call her and she never meet her since she was born. WHAT MUST I DO PLZ HELP ME.*

Text messages sent to the Legal Assistance Centre

In one case, the LAC assisted a client to access maintenance payments through a disability fund. The defendant had been paying maintenance through attachment of wages but left his employment due to being declared disabled. The employer should have contacted the court, in light of its duty to inform the court within seven days if the defendant leaves its employment (Maintenance Act 9 of 2003, section 31(2)). However the employer did not fulfil this obligation and the complainant did not receive any further maintenance payments. The LAC liaised with the company in question, which referred the LAC to the company's insurance provider for assistance with transfer of the maintenance order to the disability income the defendant was receiving.

In another case the client asked the LAC to intervene because the court was failing to act on her report that the maintenance payments had gone into arrears. The LAC wrote a letter to the court on behalf of the client, reminding the court what the law says in regard to failure to pay maintenance and summarising the mechanisms that can be used to enforce payment. The client did not make further contact with the LAC, indicating that she had received sufficient assistance to proceed without further support from us.

#### **To the Maintenance Officer**

#### **RE: Management of maintenance claim for complainant**

We are writing to the XXX Magistrate's Court following a request for assistance by XXX. Ms XXX has informed us that she has experienced difficulties with a maintenance case that she has opened at the XXX Court. We would like to enquire whether all required steps have been taken in the above-mentioned case.

Based on the information we have received, we would like to make the following comments:

1. The defendant appears to have defaulted on maintenance payments. This is a violation of the Maintenance Act and can be punished by a fine of up to N\$4 000 or imprisonment for up to 12 years.
2. If the defendant is failing to pay maintenance, the money can be obtained through the following means:
  - a. attachment of wages;
  - b. selling of property;
  - c. the payment of any debts owed to the defendant to the complainant;
  - d. the payment of any pensions or annuities for the defendant to be paid directly to the complainant.
3. If the defendant is not working, the payment of any pensions, annuities or other income to the defendant can still be paid directly to the complainant if appropriate. Alternatively, property could be sold. Furthermore, the reason for the defendant being unemployed should be queried. It is a violation of the Maintenance Act to stop working to avoid payment of maintenance.

The aim of the Maintenance Act is to ensure that the best interests of the child are met. The payment of maintenance should come above all other expenses except for financial commitments that are necessary to the parent's ability to support him or herself or other dependant.

The vast majority of breaches occurred following a consent order (315/346; 91.0%). However, as the vast majority of maintenance orders were consent orders (92.5%), this finding is to be expected. Court officials did not identify particular characteristics of cases where breaches occurred, although the magistrate at one court said that arrears often involve soldiers and police officers. However there is no quantitative data to back up this anecdotal statement.

**Table 144: Type of order first made in cases where breaches were reported**

Type of order	Frequency	Percentage	Percentage of all orders
Consent order	315	91.0	92.5
Divorce order	10	2.9	–
Order following a hearing	5	1.4	3.6
Default order	4	1.2	3.9
Not clear	12	3.5	–
<b>Total</b>	<b>346</b>	<b>100.0</b>	<b>100.0</b>

## Amount of maintenance outstanding and duration of arrears

The detail in the case files is insufficient to allow an accurate assessment of when defendants go into arrears and how long complainants wait before informing the court. However, using the available information, we can calculate approximations of these timeframes.

The median amount of maintenance outstanding when a breach was reported was N\$1 500 (range N\$50–N\$65 992). **The typical amount of maintenance outstanding is six times greater than the median maintenance payment (N\$250; see section 12.5<sup>7</sup>).** This is the equivalent of 6 months of the median maintenance payment although we cannot be sure of this timeline as we know only when the complainant reported the breach, not when the defendant went into arrears. The 1995 maintenance study found that the median amount of maintenance outstanding (N\$450) was four times higher than the median amount of maintenance per child per month (N\$100).<sup>8</sup>

An alternative way of looking at arrears is to assess the time lapse between the date of the order and the date when the breach was reported. Again this does not show exactly when between the two dates the defendant went into arrears, but it does help to give some indication of the timeline. **The median time between the date the maintenance order came into effect and the date the breach was reported was 9 months**, meaning that a defendant who goes into arrears is likely to do so fairly soon after the order has been made. This suggests that either some defendants do not take the implications of a maintenance order seriously, or that the terms of the maintenance order are not viable for the defendant.

These findings suggest that the defendant is in arrears for approximately 6–9 months before the complainant reports it to the court. To encourage regular payments and prompt reporting of breaches sooner, **we recommend the development of a simple pamphlet on a parent’s responsibility to pay maintenance and the consequences of failing to pay maintenance, to ensure that defendants clearly understand their duties in this regard and that complainants know what recourse they have in the event of a breach. The pamphlet should also include information on how to apply for a change to a maintenance order.**

Whilst the majority of cases that went into arrears were reported within 6 months of the order (110/276; 39.9%), this is followed by a similar proportion of cases that were reported 7–12 months later (64/276; 23.2%) or 1–2 years later (69/276; 25.0%). In four cases breaches were reported more than 4 years after the order was made.

<sup>7</sup> N\$250 is also the median amount of maintenance ordered only for the cases that were in arrears.

<sup>8</sup> D Hubbard, *Maintenance: A Study of the Operation of Namibia’s Maintenance Courts*, Windhoek: Legal Assistance Centre, 1995 at 69 and 109.

The 1995 study found that the average arrears case involved a complaint about arrears made 13 months after the date on which maintenance payments began.<sup>9</sup> Similar to this study, the 1995 study found that 35% of all arrears cases involved defendants who fell into arrears within six months of the date on which maintenance payments were to begin, 26% fell into arrears 7-12 months later and 21% fell into arrears 1-2 years later.<sup>10</sup>

One possible explanation for the longer timeline for reporting breaches in the 1995 study is because the previous Act did not specify a timeline for when a breach could be reported and some courts followed a policy of not instituting criminal proceedings until the respondent was at least three months in arrears. The justification for this timeline was the need to establish that the defendant was clearly not going to pay maintenance rather than simply being late. Given that maintenance is provided for basic needs, allowing the defendant to be in arrears for such a long period of time could put the complainant under considerable pressure.

The 2003 Maintenance Act improved on the 1963 Act by providing a specific timeframe for making complaints, specifying that complainants may report a breach 10 days after a missed payment was due.<sup>11</sup> However despite this provision, it appears that many complainants wait much longer than 10 days before making a complaint. When the beneficiary is a child, failure to provide maintenance for such a long time is not in the best interests of the child. It also makes it very difficult for the defendant to repay the amount of money owed, as the mounting arrears will be much higher than the regular monthly payments. Therefore, **by leaving the breach unaddressed for so long, the complainant may be making it increasingly unlikely that the arrears will be paid, or making it take much longer for the full amount of arrears to be paid off.** It also sends the message that defendants do not have to comply with a court order.

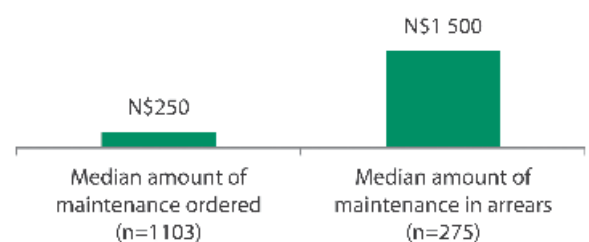
**Table 145: Amount of maintenance outstanding and time maintenance is outstanding**

Time/amount	Number of cases in arrears	Median	Mean	Minimum	Maximum
Amount in arrears (N\$)	275	1 500	3 133.25	50	65 992
Duration in arrears (months)	276	9	12.2	<1	76

**Table 146: Time between date order was made and date breach was reported**

Time maintenance is in arrears	Frequency	Percentage
0-6 months	110	39.9
7-12 months	64	23.2
1-2 years	69	25.0
2-3 years	22	8.0
3-4 years	7	2.5
More than 4 years	4	1.4
<b>Total</b>	<b>276</b>	<b>100.0</b>

**Chart 81: Comparison of median amount of maintenance ordered per month and median amount of maintenance outstanding**



Some of the court personnel explained why breaches in maintenance orders are not dealt with 10 days after they occur. One clerk in Ondangwa explained, *“If the defendant does not pay maintenance after 10 days, the court must follow up. But the post office alone takes one week. Let’s say the defendant is in southern Namibia and pays via the post office. The payment may take one or two weeks to register. Ten days is inconvenient for the men. Men cannot travel to Ondangwa to pay maintenance; they must use the slow postal service.”*

<sup>9</sup> Id at 108.

<sup>10</sup> Id at 109.

<sup>11</sup> Maintenance Act 9 of 2003, section 28.

The clerk at another court stated that they do not process complainants about a failure to pay after the 10-day time period stipulated in the Act because this would result in too much paperwork if applied in every case where the situation occurred. The clerks from three other courts stated that they require the complainant to wait for three months of non-payment before they will process a claim for arrears. In other words, the system used under the old law is still being applied in practice.

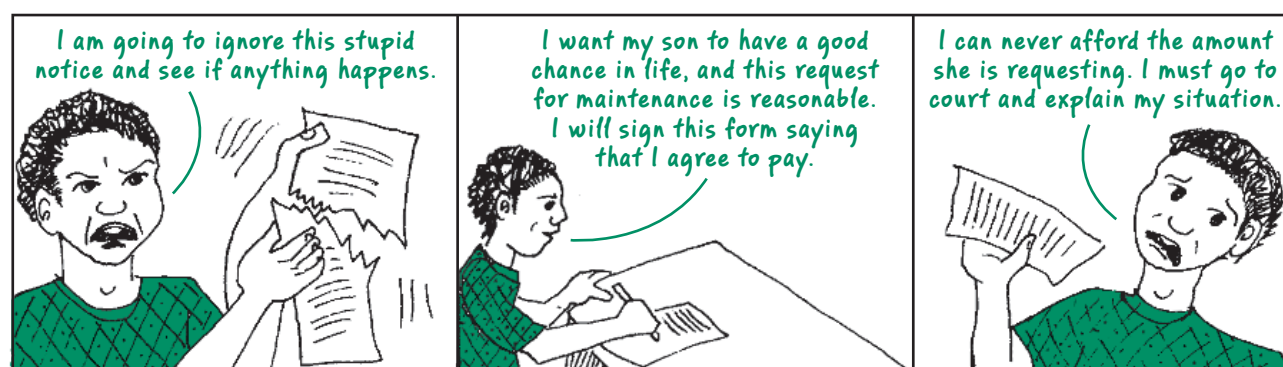
It appears that some of the courts use mechanisms outside those outlined in the Act for dealing with cases that go into arrears. For example the clerk at one court explained that the court will write a letter to the defendant after one month if payments have not been received and send a second warning letter if payment is not made for a second month. Only then will the clerk arrange for a summons to be sent. Another clerk stated that, *“There needs to be more attention on other measures to recover outstanding monies. We need something quicker and more detailed,”* despite the fact that there are quick and detailed mechanisms already in place. As noted under section 9.3, a small proportion of the summonses in the sample were issued for cases that had gone into arrears (36/1 493; 2.4%).

Feedback from community members from the focus group discussions also shows that people often wait for some time before reporting breaches. One of the activities at the focus group discussions was for the participants to postulate the end of an incomplete story. One of the scenarios put to the group was that a father is trying to delay the process by not attending court. The female participants at the Keetmanshoop focus group discussion agreed that the defendant will *“get three chances, up to 3 months or so”*. All of the women agreed that a grace period of three months is the norm in Keetmanshoop, although they noted that after three months the defendant should be locked up, saying that the *“court is more serious about arresting people than before”*.

The Legal Assistance Centre has produced materials to encourage the public to report breaches in maintenance orders as early as possible. For example, the LAC produced a comic entitled *What to do if someone stops paying maintenance* and a radio advert which was broadcast on a commercial radio station in 2011 and distributed to other radio stations in 2012. **We recommend that the public is made more aware of their right to report a failure to pay maintenance 10 days after a payment is missed. Maintenance officers should also inform complainants at the time the order is granted of the correct timeline for reporting arrears. Defendants should also be fully informed about the process and the implications of not paying maintenance. Maintenance officials should also receive training on the process and the mechanisms for the enforcement of maintenance orders, and encouraged to review cases where breaches occur to ensure that the best possible payment arrangement is in place (see section 8.11 for further discussion on payment options).**



More public awareness materials about breaches of maintenance payments are also needed. Currently the information materials produced by the LAC focuses on the role of the complainant to report breaches in maintenance payments. However there is also a need for opinion change to be generated amongst people paying maintenance about why going into arrears is a problem for the child they are supporting. **We recommend that public information materials are developed to better explain the importance of paying maintenance and how the failure to pay maintenance can affect a child.**





## CASE STUDY

### The failure to pay maintenance

The Legal Assistance Centre was approached by one client who asked for information about her options. She had an informal maintenance agreement with the father of her children. The father informed her that he had left his current job and was going to move to another town and be employed the following month. Whilst the father had fairly good record of paying maintenance, he now informed the mother that he was unable to pay maintenance in the current month and that “*she must give him time*”. The mother was very concerned as she did not have money available to cover the missed maintenance payment. We advised the client to discuss the situation with the father. For example, could he borrow money from a relative to pay maintenance? Could they agree on a lower amount of maintenance that he could provide during the month in question to help cover critical costs? If the client felt that informal discussions were now a problem, she could also apply to the court for a maintenance order.

This case study illustrates the impact of the failure to pay maintenance. The father was right in discussing his changing situation with the mother, but it is unfair of him to simply expect the mother to cope without his monthly contribution as the costs the mother is incurring for the care of her children will not go away – she will not be able to put on hold the buying of food or the payment of childcare costs. Therefore whilst open communication is very important, it is also important to ensure that parents who pay and receive maintenance understand that such payments are often crucial for the child’s wellbeing and so should be an important priority.

Illustrating this message, one of the male focus groups in Ondangwa created the following role play:

**Lucus:** Oh my friend, how are you?

**John:** Fine.

**Lucus:** I’m so concerned. I received a letter that makes me wonder. I don’t know where it’s from. It says I have to pay maintenance fees for kids that I’m raising. My cattle are dead. I only have 3 goats and now my house is empty. What can I do? My girlfriend has now put a maintenance fee for me and I don’t know how to pay.

**John:** Ask your relatives to help. You must support your children.

*Advert encouraging complainants to report failure to pay maintenance, aired by the Legal Assistance Centre on commercial radio in 2011.*

**Lady 1:** I applied for maintenance order in January and the court ordered Luke’s father to pay maintenance every month but he only made one payment.

**Lady 2:** That’s a crime.

**Lady 1:** It’s been so long, can I still report it?

**Lady 2:** Yes you can, you can report it 10 days after the maintenance was due or anytime after that. You don’t need a lawyer. The court can order money to be deducted from his salary and be paid directly to you.

**Man:** Failure to pay maintenance without good reason is a crime. Parents, take responsibility for you children. Go to your nearest magistrate’s court to report a failure to pay maintenance.

This advert was produced by the Legal Assistance Centre. Fighting for human rights in Namibia since 1988.

**“Guys should get arrested if they dont pay maintenance!!!!”**

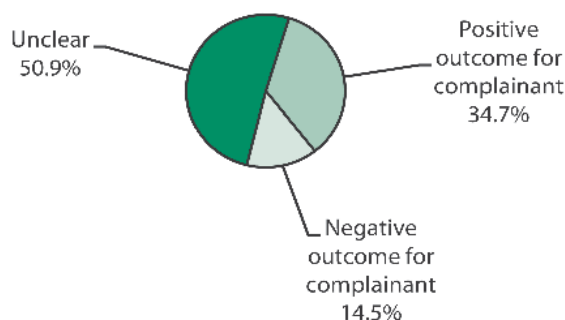
Comment posted on the LAC Facebook page in response to a question on what to do if someone stops paying maintenance

## 15.2 Overview of outcome of cases involving arrears in maintenance payments

The files show that there were a wide range of outcomes following a breach in the payment of maintenance. Unfortunately in approximately half of the cases, the outcome of the situation was not clear (176/346; 50.9%). In approximately **one-third of the cases there was a positive outcome for the complainant (120/346; 34.7%)**. This included the defendant paying or agreeing to pay all or most of the arrears,<sup>12</sup> the court making a new maintenance order to include the amount in arrears, the court ordering the attachment of wages or a warrant of execution, or the beneficiary going to live with the defendant (this is classed as a positive result as the court should allow this only if it is in the best interests of the beneficiary). The new mechanisms introduced by the 2003 Act, namely the attachment of wages or execution orders, were used in only a minority of instances (see sections 15.5 and 15.6 for further discussion of files that used these mechanisms).

**In approximately one-sixth of the cases there was a negative outcome for the complainant (50/346; 14.5%).** This included the amount in arrears being reduced or suspended, or the case being adjourned, postponed, withdrawn, or struck from the roll. Hearings were adjourned or postponed in 13 cases. Reasons for postponements included the court requesting proof of payment (5), absence of both parties (4), an appeal (1) and reasons not documented (3). In one case the payment of arrears was suspended until the defendant was better able to pay. Although this is a negative outcome for the beneficiary, it may still be the most realistic outcome in the circumstances as a defendant cannot be forced to pay maintenance if he does not have the means to do so.<sup>13</sup> However, overall this finding is discouraging as the new law on maintenance was intended to provide more effective enforcement mechanisms. The problem seems to

**Chart 82: Outcome of reported breach in a maintenance order (n=346)**



**Table 147: Outcome of reported breaches of maintenance payments**

Outcome	Frequency	Percentage
<b>Positive solution for complainant</b>	<b>120</b>	<b>34.7</b>
Arrears paid / partly paid	47	13.6
New maintenance order made including the amount in arrears	37	10.7
Order made for attachment of wages	27	7.8
Arrears to be paid (no court order)	4	1.2
Order for warrant of execution	2	0.6
Arrears reduced (beneficiary to live with defendant)	1	0.3
Case withdrawn (beneficiary to live with defendant)	2	0.6
<b>Negative solution for complainant</b>	<b>50</b>	<b>14.5</b>
Matter struck from roll	33	9.5
Case adjourned/postponed	13	3.8
Case withdrawn (defendant unemployed; reason unknown)	2	0.6
Arrears suspended until the defendant is better able to pay	1	0.3
Defendant ordered to pay arrears and fined but case overturned on appeal	1	0.3
<b>Outcome of reported breach not clear</b>	<b>176</b>	<b>50.9</b>
<b>Total</b>	<b>346</b>	<b>100.0</b>

<sup>12</sup> In the four cases where the defendant agreed to pay the arrears without a court order, in two cases the defendant made a sworn declaration that he would pay the arrears and in one case the defendant arranged to pay off the arrears in two instalments over a period of two years.

<sup>13</sup> Maintenance Act 9 of 2003, section 5.

be that the options in the law are not being optimally implemented rather than the law failing to provide sufficient remedies.

We identified only two arrears cases that were withdrawn. One maintenance officer said that complainants will withdraw their case because they give up waiting for the payments to be made. Most problematic is the fact that in the small number of cases where the reported breach was struck from the roll (33/346; 9.5%), in half of these cases (17/33; 51.5%) it was because the defendant had not been summoned to court or because there was no proof that the summons had been served. Problems regarding the service of documents are discussed in more detail on page 196. In three instances the case was struck from the roll because the complainant failed to attend.

In the cases where the outcome was unclear (176/346; 50.9%), there was limited information in the files. **It is a matter of concern that 10% of all files (176/1 687; 10.4%) contained reports of a breach in the payment of maintenance but no record of follow-up or outcome.**

## 15.3 Timeline for outcome of cases in arrears

**The median time between the date a breach was reported and the date an outcome were recorded for the breach was 3.5 months (mean 7.5 months; range 0-79 months).** However this information is available for only 80 of the cases involving arrears.

### CASE STUDY

#### A visit to the maintenance court

*The Legal Assistance Centre assisted a client to deal with arrears in the payment of maintenance. The following is an account of a visit to the maintenance court made by one of the researchers for this project.*

#### A meeting with the maintenance officer

P was supposed to be receiving monthly maintenance payments of N\$300 in total for three children. However the complainant only paid once in a year and a half and then paid N\$600 in the month when P told the father that she was going back to the maintenance court.

P had tried to recover the arrears. She had gone to the court, only to find that they had lost her docket. Fortunately, the docket was later found, and P returned to press her claim. The maintenance court had told the father that he needed to pay (although we do not know whether this was through a summons or informally), but he refused and the arrears continued piling up. In the meantime, the father had, against P's wishes, taken the eldest child to live in his household. He then convinced P that he was only supposed to pay R\$200 as he was already maintaining the third child, though he refused to pay that monthly sum as well.

What finally drove P back to the court was the pressing need for funds to pay the School Development Fund contribution for her middle child. Upon hearing of P's renewed requests for the money he owed, the father demanded a paternity test (paid for by him). They were still waiting for the results, but P was certain that he was the father of all three children.

The staff at the Windhoek maintenance court were supposed to start seeing walk-in complainants at 14h00. However, they did not open their offices until about 14h20. Although the waiting room was filling rapidly with anxious complainants, the process was painfully slow. Even when the offices were fully open there were only about three court staff who were seeing people. There was also very little order to whom was being seen first. The court staff did not necessarily take the people who had been waiting the longest, but rather those who had positioned themselves closest to the office doors. There was thus much jostling amongst those waiting (almost entirely female, although there were two men) to stand or sit in the coveted positions near the door.

After about an hour, complainant P and I sat down with the maintenance clerk, who was a young friendly woman. Most of the interview was conducted in a language that I didn't understand, but P seemed very satisfied with the responses she was getting from the maintenance officer. When the maintenance officer left the room to bring in P's file, P leaned over to me and said, *"She understands everything, my whole story."*

The maintenance clerk was very sympathetic to P's story. She told P that she would arrange for P and the defendant to meet with a maintenance officer and suggested that P should request a warrant of execution against the father's property. Unfortunately, attachment of the father's wages was impossible as the father was a self-employed mechanic and shebeen owner. She also told P that P had full custodial rights of her eldest child, and that P should insist on the child's return. However, the maintenance officer gave P no advice on the legal steps which she could take to ensure the child's return. (She could have been referred to the children's court to apply for an order confirming that she is the custodian.)

Although the maintenance clerk had no immediate power to help with P's case, P seemed much heartened by the assurances that she was in the right. However, P essentially spent an hour and a half of waiting in exchange for reassurance that the law was on her side, without any actual action. Everything, it seemed, would have to wait until the meeting with the father. The law allows the court to issue a warrant of execution in the defendant's absence, which the defendant can then oppose if he chooses to do so. Given that this defendant had not paid maintenance for over a year despite promises that he would, the court should not consider it unreasonable to issue a warrant for execution against his property.

### **A hearing before the magistrate**

The Legal Assistance Centre did not attend the informal discussion between the complainant and defendant but was invited to attend the ensuing hearing before the magistrate.

I arrived at the maintenance court at appointed time of 08h30. There were around 30 people waiting in the crowded room. Many sat on the floor or simply hovered outside the doorway. About three-quarters of the people were women. Several of the women had brought their children with them. Around 09h45 a court official called out a list of names (including P's). The court official asked the people to follow him to an empty court room where we, again, sat and waited (although this time everyone got a seat). Around 10h30 another court official entered the room and announced the specific courtrooms for each case. We then waited a further two hours for the case to start. The father of P's children was also present, waiting in the same area. I can imagine that, in some situations, the complainant could feel intimidated by the defendant whilst waiting for such a prolonged time together.

At the end of our four-hour wait, the case was finally heard by the magistrate. I sat in the gallery, along with P, the father, the father's "supporter" (a male, probably a friend or family member) and another woman who was also having her maintenance case heard that day (and the woman's baby). Clearly, this was not a closed court as the law requires. Also present were a translator and a translator-in-training.

The maintenance officer entered, and called the father to stand in the witness box to the right of the judge's chair. Leafing through the parties' maintenance file, he asked the father a few questions in Afrikaans. When the magistrate (a young woman) entered, the enquiry commenced in earnest.

Despite the fact that the court proceeding was totally in English, it was hard for me to understand what was going on. The magistrate asked the father a few questions about his payment of the contribution towards the children's School Development Fund and then dismissed him from the stand. She spoke in English which was translated for the father. The father did speak English, but I think the translator was simplifying the language the magistrate had used, for example explaining the meaning of statements like *"it is not within the ability of this court to consider that aspect right now"*.

The other woman who had also been waiting then had her case heard. Her case was also about failure to pay maintenance. The defendant in her case had failed to attend court. The maintenance officer recommended that the magistrate execute a warrant of arrest, which she did. The magistrate also told the woman not to bring her baby into the court again.

Following the hearing, the maintenance officer spoke with P and the father in Afrikaans. P became more and more angry and agitated as the prosecutor tried to explain things to her. The father was also getting angry and his friend was laughing at certain moments, but the maintenance officer remained calm. Finally P walked away, upset with the conclusion.

The translator explained that the two parents had been getting very heated over the subject of custody of the eldest son. The translator seemed to think that the father had agreed to return the child, provided that the child stayed in school. The maintenance officer explained that the court had ordered the father to continue paying N\$600 for maintenance and arrears. The court was satisfied by the display of good faith the father had already shown by the first payment of N\$600 (as a result of P's warning to the father that she would go to court), particularly as the father was self-employed and would probably have struggled to get the money. There appeared to be no consideration of the fact that the mother was owed N\$4 300 in arrears.

The prosecutor had not pressed for an attachment of property because the father owned only two cows and given the good faith he had shown in paying "double maintenance" in the preceding month to start reducing the arrears. P had not told me the father owned two cows and I asked the maintenance officer to check the file. It turned out that the father actually owned two cars, not cows, but the handwriting had been difficult to read.

Remembering the questions that the magistrate had asked about the payment of the School Development Fund, I asked the maintenance officer if this payment was in addition to the N\$600 or part of it. The maintenance officer said it was to be part of the N\$600 because the father hadn't initially been asked to pay for the School Development Fund on top of the other maintenance. But, when he checked the file again, he saw he had made another mistake – the original order had been for N\$300 *and* the payment of the School Development Fund. Unfortunately, the maintenance officer noted these mistakes too late; both parties had left the court.

Whilst an order to increase the monthly maintenance payments in order to cover the arrears is probably unrealistic, the danger remains that the father will stop paying as he had done in the past, so that P will be forced to repeatedly return to the court. Given the time and expense involved just for her to come to the court (which required either paying taxi fare or making a two-hour walk), P may easily not return to court to pursue further enforcement. Although P was pleased that a payment would be made, she was frustrated that she would have to come back to the court the following day to pick up the arrears money the father had left because the relevant office is open only in the morning.

Legal Assistance Centre volunteer lawyer

## 15.4 Overview of civil enforcement mechanisms

**Civil enforcement mechanisms were used in approximately one-quarter of the arrears cases that had a positive outcome for the complainant (27/120; 22.5%).** This information must be viewed in the context of the finding that only one-third of the cases where there was a breach had a positive outcome – in approximately half of the cases, the outcome of the reported breach was not clear and in approximately one-sixth of the cases there was a negative outcome for the complainant.

If the complainant would like the court to use one of the civil enforcement mechanisms (a warrant of execution or attach emoluments or debts), the complainant must request this using one of the forms provided in the regulations.<sup>14</sup> However, of the 346 instances where a defendant fell into arrears

<sup>14</sup> Maintenance Regulations, regulation 18.



with maintenance payments, **complainants requested the use of a civil enforcement mechanism in only a handful of situations (15/346; 4.3%)**. These applications were made at a limited number of courts (seven courts in total but predominantly at the Walvis Bay court, which accounted for eight of the fifteen requests). Twelve of the fifteen requests for civil enforcement were for the attachment of wages and two were for a warrant of execution. Data on the type of request is missing in one case. We did not find any records in our files of requests or orders for the attachment of debts and the court personnel interviewed did not discuss this as an option that is commonly used by the courts.

**Given the limited number of requests for civil enforcement, we recommend that the Ministry of Justice revise the Act to give the court a greater discretion to address arrears. Complainants should be asked to provide the relevant information about non-payment, and the maintenance officer should investigate the defendant's employment status and assets to determine whether civil enforcement is feasible.**

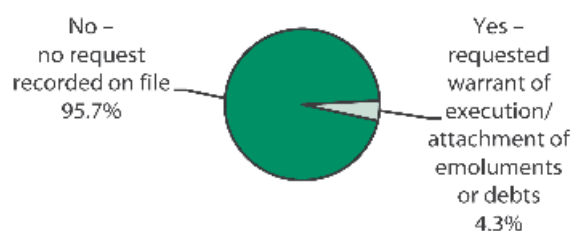
Twelve of the 14 forms contained information on the amount of maintenance outstanding. The median amount of maintenance outstanding was N\$1 725. This is similar to the amount of maintenance outstanding for all breaches (N\$1 500, reported under section 15.1), indicating that there does not appear to be anything particular about these cases that led to an application for civil enforcement – keeping in mind that the sample here is very small.

Of the existing civil enforcement options, one maintenance officer stated that the attachment of property is the most effective way to discourage the defendant from defaulting on maintenance payments, since people never want to lose their property. This statement was corroborated by the participants at the Keetmanshoop male focus group discussion, who were opposed to both attachment of wages and sale of property. The example of selling a man's car was particularly worrisome for them.

Many court officials found the attachment of wages to be problematic. For example one clerk explained that employers will send cheques rather than cash. This adds a delay to the process as the cheque must be cleared before the payment can be made to the complainant. The clerks at another court stated that it takes too long to arrange for the attachment of wages of a government employee. The court officials at another court stated that they do not use orders for the attachment of wages due to the challenges involved in arranging these payments, although they did not specify what these challenges are. One maintenance officer stated that they give employers three different options for payment, but each is problematic – employers are able to make payments through postal orders (which may cost up to \$30 each), electronic transfers (although some employers may not be set up to do this), or in person (which the prosecutor described as costly, time-consuming and generally inconvenient since employers may be based some distance from the court). The maintenance officer was of the opinion that some employers dismiss defendants when an attachment of wages order is made by the court. However when she calls the employer and tells them such action is not permitted by law, the employer responds by fabricating a 'legitimate' reason for the defendant's dismissal.<sup>15</sup> The maintenance officer cited four instances over three years where employers were fined N\$1 000 for not paying money to the court as ordered.<sup>16</sup>

A further problem with the attachment of wages arise when files containing such orders are transferred (see page 243). Some court officials said that it can take the employer some time to arrange for the payments to be transferred from one court to the other. During the intervening period, the payments continue to be made to the original court, causing delays in getting the money to the complainant.

**Chart 83: Following a breach did the complainant request civil enforcement (warrant of execution or attachment of emoluments or debts? (n=346)**



<sup>15</sup> The dismissal of an employee due to an emolument order would constitute unfair dismissal under the Labour Act 11 of 2007, section 33. An employer must not dismiss an employee without a valid and fair reason.

<sup>16</sup> The court could have given a fine of up to N\$2 000 or up to six months imprisonment (Maintenance Act 9 of 2003, section 44).

The issues noted are clearly problematic. However there is nothing in the Act or the regulations that says that employer must pay the money to the court. In many cases it could be far more efficient for the employer to arrange payment of maintenance directly to the bank account of the complainant or even for the complainant to collect the payment from the employer. **We recommend that the Ministry of Justice send a circular to the maintenance courts to clarify the mechanisms of payment that an employer can use to fulfil an order for the attachment of wages. We also recommend that a simple pamphlet about the Maintenance Act is created for employers to inform them of their obligations and the different alternatives they have to transmit payments.**

## 15.5 Orders for the attachment of wages

Although we identified only 346 reported breaches from 276 files, within which there were 12 applications for the attachment of wages and 27 orders for the attachment of wages, the entire sample contained 469 orders for the attachment of wages in 416 files. This means that **approximately one-quarter of the files contained an order for the attachment of wages** (416/1 687; 24.7%).

It is possible that these orders were agreed to by the defendant as part of a consent order. For example, at the Walvis Bay court almost all consent forms are accompanied by a letter requesting the employer to deduct the amount of maintenance owed from the employee's wages. Alternatively the courts may not be recording the incidence of a breach in the case file before addressing it with an order for the attachment of wages.

### Consent orders and attachment of wages

**It appears competent for a defendant to agree to an attachment of wages as part of a consent order made under section 18 of the Maintenance Act, which states that a defendant may** consent to the granting of the maintenance order applied for and submit the written consent to the maintenance officer. The maintenance court may then make a maintenance order in accordance with this written consent. The Act does not place any limits on what the defendant may agree to.

Another route to an order for the attachment of wages is via section 30, which provides for such an order on application by the complainant after the defendant has breached a maintenance order, or as an alternative to a warrant of execution.

Section 31 provides for notice to the employer of an order for the attachment of wages, obligates the employer to give notice to the court if the defendant leaves employment, provides that an order to attachment of wages in respect of maintenance will take priority over any other court order for attachment of wages and authorises the employer to deduct an additional amount for administration costs as determined in the court order. Section 30 also gives an employer the option of applying for the order for attachment of wages to be suspended, amended or rescinded. But all of these procedures apply only to orders for the attachment of wages **made under section 30**. Similarly, regulation 22 on the attachment of wages applies only to orders **made under section 30**.

Thus, it appears that a consent order incorporating attachment of wages, made in terms of section 18, would depend on the voluntary compliance of the employer.

The large number of orders for attachment of wages found in the files suggest that many of these must be associated with consent orders. It is likely that such orders are being treated in the same manner as orders for attachment of wages made under section 30.

**We recommend that the Maintenance Act be amended to apply the same procedures to orders for the attachment of wages agreed to by the defendant and incorporated into consent orders, as for any other order for attachment of wages made in terms of the Act.**

The majority of the files containing orders for the attachment of wages contained one such order (370/416; 88.9%), although some files contained two (41/416; 9.9%), three (3/416; 0.7%) or four (2/416; 0.5%). The files often contained more than one order for the attachment of wages when the amount of maintenance to be paid was changed or when the place of employment changed.

The time taken to serve the order for the attachment of wages on the employer is recorded in 66 files. The median time taken was 7 days (range 0-307 days).

The cost of return of service was recorded for 18 of the emolument orders. The median cost of service was N\$55.50 (range N\$39-N\$914). However, due to the small sample size this information can only be used as an indication of cost of service as the information is not statistically robust. Although the defendant can be ordered to pay the cost of service, we did not find any examples where this occurred in practice.<sup>17</sup>

**Table 148: Number of orders for the attachment of wages per file**

Number of emolument orders	Number of files	Percentage
1	370	88.9
2	41	9.9
3	3	0.7
4	2	0.5
<b>Total</b>	<b>416</b>	<b>100.0</b>

The defendant or the employer may apply for an order for the attachment of wages to be suspended, amended or rescinded.<sup>18</sup> The sample contained one application for the suspension of an emolument order. However the request was made by the complainant rather than the defendant or employer. The complainant requested the suspension because she wished to wait for the defendant to receive a pay increase before continuing her complaint. A final order was made two months later, intended to remain in force until a pending divorce hearing between the complainant and defendant.

### Contribution Orders

Seven files from the Ondangwa court opened in 2005/06 contained orders for the attachment of wages using a form from the Children's Act of 1960 to make a contribution order. A further fifteen orders for the attachment of wages using the correct form from the Maintenance Act were also made at the Ondangwa court in 2005/06. It is not clear why the incorrect form was used on seven occasions. It is possible that the court did not have copies of the form from the Maintenance Act available.

The Children's Act 33 of 1960 defines a contribution order as an *"order for the payment or recurrent payment of a sum of money as a contribution towards the maintenance of a child in a place of safety or in any custody wherein he was placed under this Act or the Criminal Procedure Act, 1955, or towards the maintenance of a pupil"*.

The Ministry of Gender Equality and Child Welfare has prepared a Child Care and Protection Bill which is expected to replace the Children's Act. The Child Care and Protection Bill provides a system for contribution orders that is similar to the one in the Children's Act, with some technical adjustments.

## 15.6 Warrants of execution

Two warrants of execution were recorded in the sample. One was accompanied by an application for such a warrant, the other was not. One warrant of execution ordered N\$1 400 to be levied, the other N\$10 200.

Part D of the warrant of execution provides a space for the messenger of court and the debtor to sign that the amount has been paid within half an hour of the messenger entering. This timeline appears

<sup>17</sup> Maintenance Act 9 of 2003, section 20.

<sup>18</sup> Maintenance Act 9 of 2003, section 30(2).

unrealistic given that the debtor may not be expecting to receive the warrant and is unlikely to be able to raise the sum of money requested within 30 minutes. In the two cases identified in our sample, neither Part D was signed. **We recommend that the warrant of execution is amended to allow for a more realistic period of time for the defendant to raise the amount of money/property requested.**

## 15.7 Warrants of arrest

The Maintenance Act lists a number of offences for which the court may issue a warrant of arrest, including failure to make a specific maintenance payment. These are summarised on page 94.

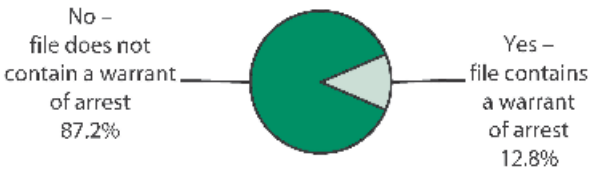
**Approximately one in 10 files contained a warrant of arrest.** A total of 278 warrants of arrest were found in 216 different files. This represents 12.8% of all the files in the sample (216/1 687). The number of arrest warrants on file ranged from one to six. The majority of files contained one (172/216; 79.6%) or two (33/216; 15.3%). Eleven files contained three, four or six. The number of warrants of arrest on file is not the same as the number of arrests. Page 287 discusses whether or not arrests were made.

The prosecutor at one court stated that he intends to create a register of files containing warrants of arrest. This will help with the tracking of cases. **We recommend that other courts also create a register for warrants of arrest for maintenance orders and keep better records of the outcome of the warrants of arrest.**

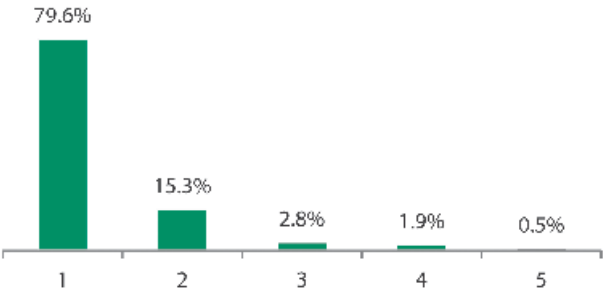
**Table 149: Files containing a warrant of arrest: number on file**

Number of arrests on file	Number of files	Percentage
1	172	79.6
2	33	15.3
3	6	2.8
4	4	1.9
6	1	0.5
Total	216	100.0

**Chart 84: Does the file contain a warrant of arrest? (n=1 687)**



**Chart 85: Number of warrants of arrest on file (n=175)**



### Person to be arrested

The majority of warrants of arrest were issued for the defendant (266/278; 95.7%), and a small minority were issued for the complainant (12/278; 4.3%).

**Chart 86: Who was to be arrested? (n=278)**

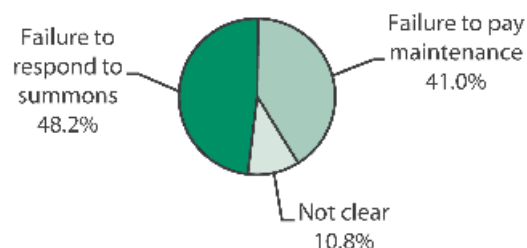


All of the warrants of arrest for the complainant were issued from the Windhoek court over all four years of the study. Only two of the twelve files in which a warrant of arrest was issued for the complainant contained details of why the warrant of arrest was issued. In both cases, the warrant was issued because the complainant failed to attend the enquiry. As discussed on page 194, the Windhoek court often summons the complainants to hearings and enquiries, which explains why the court is then able to issue a warrant of arrest when the complainant does not attend court. The records available do not allow us to confirm whether or not any of the complainants for whom a warrant of arrest was issued were arrested, but we can confirm that the complainant was *not* arrested in respect of four of the warrants issued, although the files do not contain details about why these complainants were not arrested.

## Reason for warrant of arrest

Approximately half of the warrants of arrest (134/278; 48.2%) were issued for failure to respond to a summons to attend court and approximately 40% were issued for a failure to pay maintenance (114/278; 41.0%). It is not clear why the warrants of arrest were issued in the remaining files (30/278; 10.8%). However the differentiation between the two main reasons for arrest is not exclusive; in some instances the warrants of arrest for failure to attend court were issued because the defendant failed to attend court to explain why maintenance payments had stopped. A lack of clarity in the files makes it difficult to differentiate the reasons for the warrants of arrest into more clearcut categories.

**Chart 87: Reason warrant of arrest issued (n=278)**



**Table 150: Reason warrant of arrest issued**

Reason for warrant of arrest	Frequency	Percentage
Failure to respond to summons	134	48.2
Failure to pay	114	41.0
Not clear	30	10.8
<b>Total</b>	<b>278</b>	<b>100.0</b>

It is not surprising that more warrants of arrest were issued for failure to attend court than for failure to pay maintenance. Failure to attend court can be enforced by court officials. Failure to pay maintenance will be enforced only upon application by the complainant, who has the option of requesting civil or criminal proceedings.

We can also assess warrants of arrest in cases where there was a reported breach. The results show that in approximately one-quarter of the cases of reported breaches, at least one warrant of arrest was issued (94/346; 27.2%).<sup>19</sup> The proportion of cases that went into arrears and resulted in the issue of a warrant of arrest is substantially lower than that found in the 1995 study where a warrant of arrest was issued in 89% of the cases where the defendant fell into arrears.<sup>20</sup> This suggests that the courts may be attempting to use civil mechanisms to resolve failures to pay maintenance, despite the small number of files containing applications for such enforcement measures (29/346; 8.4%).

We can also assess the correlation between the incidence of warrants of arrest and the incidence of breaches by court. For example, over one-quarter of the warrants of arrest were recorded at the Rehoboth court. This finding is consistent with the fact that this court also recorded a high incidence of breaches (15.6% of the breaches recorded in the sample). We also identified a number of courts where the percentage of breaches is much higher than the percentage of warrants of arrest, namely Keetmanshoop (8.1% vs 4.0%) and Oshakati (13.3% vs 5.0%). It is possible that these courts are effectively dealing with breaches in other ways; alternatively it may mean that these courts are struggling to deal with the problem of breaches. Unfortunately the sample size is too small to assess whether or not individual courts are effectively dealing with cases of maintenance arrears. The Outapi (3.8% vs 7.2%) and Rundu (0.0% vs 2.9%) courts both had notably fewer breaches than warrants of arrest. This may indicate that these courts ensure that the defendant is able to pay the amount ordered on the first order, or that the courts ensure that the defendant clearly understands the consequences of not paying maintenance. Alternatively it may be that record-keeping on files that went into arrears is not good at these courts.

<sup>19</sup> There is a slight discrepancy between the number of warrants of arrest issued for failure to pay maintenance (114) and the number of warrants of arrest issued in reported breaches (96). This may be because some of the files did not contain an arrears declaration although there is some other information in the file to suggest that failure to pay maintenance is associated with the criminal proceedings. The difference is not large enough to affect the analysis.

<sup>20</sup> D Hubbard, *Maintenance: A Study of the Operation of Namibia's Maintenance Courts*, Windhoek: Legal Assistance Centre, 1995 at 110.



**Table 151: Comparison between the total sample size and incidence of warrant of arrest on file**

Court	Number of files in sample	Percentage of files in sample	Records of breaches	Percentage of breaches in sample	Record of one or more warrants of arrest on file	Percentage of warrants in sample
Bethanie	15	0.9	5	1.4	2	0.7
Eenhana	46	2.7	6	1.7	4	1.4
Gobabis	97	5.7	15	1.7	8	2.9
Karasburg	73	4.3	1	0.3	2	0.7
Keetmanshoop	111	6.6	28	8.1	11	4.0
Khorixas	34	2.0	2	0.6	1	0.4
Mariental	101	6.0	9	2.6	4	1.4
Okakarara	17	1.0	4	1.2	4	1.4
Ondangwa	93	5.5	4	1.2	6	2.2
Oshakati	136	8.1	46	13.3	14	5.0
Otjiwarongo	108	6.4	23	6.6	9	3.2
Outapi	93	5.5	13	3.8	20	7.2
Rehoboth	111	6.6	54	15.6	65	23.4
Rundu	121	7.2	0.0	0.0	8	2.9
Swakopmund	121	7.2	24	6.9	27	9.7
Tsumeb	66	3.9	4	1.2	2	0.7
Walvis Bay	109	6.5	33	9.5	19	6.8
Windhoek	235	13.9	75	21.7	72	25.9
<b>Total</b>	<b>1 687</b>	<b>100.0</b>	<b>346</b>	<b>100.0</b>	<b>278</b>	<b>100.0</b>

## Outcome of warrants of arrest

We can confirm that the person named in the warrant of arrest was arrested in only one in 10 cases (30/278; 10.8%). In each instance, the arrests were made for the defendant. Of the 30 arrests that were made, 27 were for the first or only warrant of arrest on file. Overall, out of the entire sample, arrests were made in less than 2% of the files (27/1 687; 1.6%).

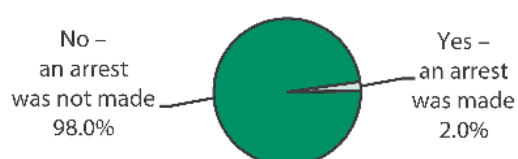
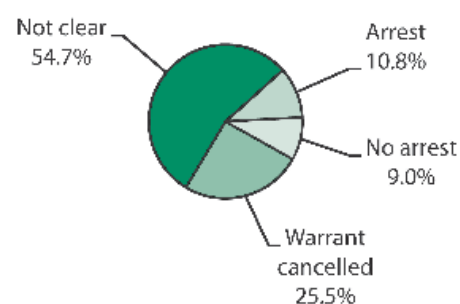
We can confirm that the person named in the warrant of arrest was *not* arrested in 25 instances (9.0%), and one-quarter of the warrants of arrest were cancelled (71/278; 25.5%). For the remainder of the warrants of arrest (152/278; 54.7%), the outcome is not clear. It is not necessarily a failure that a warrant of arrest was cancelled; it could mean that the person in question attended court voluntarily. However it is a concern that we do not know the outcome for half of the warrants.

**Table 153: Outcome for the warrant of arrest**

Outcome for arrest warrant	Frequency	Percentage
Arrest	30	10.8
No arrest	25	9.0
Warrant cancelled	71	25.5
Not clear	152	54.7
<b>Total</b>	<b>278</b>	<b>100.0</b>

**Table 152: Number of warrants of arrest issued before recipient arrested**

Warrant of arrest	Successful arrests
1	27
2	3
3	0
4	0
6	0
<b>Total</b>	<b>30</b>

**Chart 88: Does the file contain details that the defendant was arrested at some point? (n=1 687)****Chart 89: Outcome for the warrant of arrest**

In 10 of the 30 instances where the defendant was arrested, records show that bail was posted. The amount set for bail ranged from N\$200-N\$1 000.

We can assess the timeline for files that contained more than one warrant of arrest. However the number of files is very small and therefore the data can give a flavour of the timelines for some cases but cannot provide statistically-valid information.

**Table 154: Time between warrants of arrest (days)**

Interval measured	Number of files	Minimum	Maximum
First and second warrant of arrest	44	0	1 022
Second and third warrant of arrest	11	29	798
Third and fourth warrant of arrest	5	0	224
Fourth and fifth warrant of arrest	1	98	98
Fifth and sixth warrant of arrest	1	0	0

We are only able to determine why the person in question was not arrested for a small number of warrants (14/25; 14.6%), because this information was not recorded in many cases. Reasons are similar to those for the warrants being cancelled, suggesting that there is overlap between these categories. The warrants of arrest were not enforced or canceled because the defendant attended court, the defendant was warned rather than arrested, the defendant paid the arrears or the defendant was excused. In one case the police did not respond to the court. Regarding the use of warnings, one file contained a note to the police saying that the warrant of arrest should be lifted if the defendant appeared before the court on a specified date. If the police served the warrant of arrest before this time, the police should “give the defendant a warning and tell date of new hearing”. In other files, the records show that if the defendant failed to attend a hearing, the court would set a new enquiry date and draft a warrant of arrest in case the defendant failed to attend the new date. It also appears that the complainants sometimes requested the court to cancel the warrants of arrest. For example, during one interview with a court official, one of the researchers witnessed a complainant requesting that a warrant of arrest be cancelled. The complainant told the magistrate that the defendant had repented. The magistrate said that he commonly sees such situations, describing the defendants as “sweet talking” the complainants into withdrawing cases.

It is possible that for the instances where the outcome of the warrant of arrest is unclear, the defendant may have attended court, settled the arrears or made contact with the court, but that this information is not recorded on the file.

The fact that so few arrests are being made suggests that there are failures in the system. The Maintenance Act allows maintenance court officials to keep a photo and copy of the identification document of the defendant on file in an effort to ensure clear identification of the defendant. However as discussed in section 12.12, only 67 of the 1 687 files (4.0%) contained identification documents belonging to the defendant and only 14 of the 1 687 files contained a photograph of the defendant (0.05%). Better utilisation of this option might help increase the success rate of arrests.

Another problem may be when the defendant has moved to another magisterial district. Notes in some of the files suggest that there were often delays in these cases. As noted on page 198, **we recommend the Ministry of Justice develop a protocol for how courts can best work together on maintenance enquiries.**

The 1995 study found that approximately 51% of warrants of arrest resulted in an arrest. This is still low but substantially higher than the arrest rate in the current study. The study summarised the various reasons for arrests not always being made – in approximately 30% of the unsuccessful warrants, there were difficulties locating the person in question; the warrant expired without an arrest in another 10% of cases, which may also have been due to difficulties in tracking down the defendant. In 11% of these cases, warrants of arrest were cancelled, perhaps because the amount owing was paid into the court voluntarily. In one-third (30%) of these cases, no reason was recorded and the reason in the remainder was unclear.<sup>21</sup>

<sup>21</sup> Id at 111.

*“Systemic failures to enforce maintenance orders have a negative impact on the rule of law. The courts are there to ensure that the rights of all are protected. The judiciary must endeavour to secure for vulnerable children and disempowered women their small but life sustaining legal entitlements. If court orders are habitually evaded and defied with relative impunity the justice system is discredited and the constitutional promise of human dignity and equality is seriously compromised for those dependent on the law. It is a function of the State not only to provide a good legal framework but to put in place systems that will enable these frameworks to operate effectively. Our maintenance courts and the laws that they implement are important mechanisms to give effect to the rights of children ... Failure to ensure their effective operation amounts to a failure to protect children against those who take advantage of the weaknesses of the system.”*

South African case of *S v November and Three Similar Cases* 2006 (1) SACR 213 (C) at para (10), quoting *Bannatyne v Bannatyne* (Commission for Gender Equality, as *Amicus Curiae*) 2003 (2) SA 363 (CC) (Mokgoro J), quoted with approval in *S v Gaweeseb* [2006] NAHC 27 (Damaseb, JP) at para 11

## Time between date warrant of arrest issued and date of arrest

For 25 of the 30 arrests, we can determine the time between the date the warrant was issued and the date of the arrest. **The median time between the date the warrant was issued and the date the defendant was arrested was 43 days (mean 71.5 days; range 6-245 days).** The arrests were fairly evenly divided between being made within the same month (36.0%), within 1-2 months (20.0%), within 2-3 months (20.0%) and longer than three months (24.0%). Given that nearly half of the arrests took over two months, the protracted timelines suggest that police may not be giving arrest warrants issued by the maintenance court the priority they deserve. Whilst the police force is understandably busy, it is not in the best interests of children for these delays to exist. **We recommend that the Ministry of Justice and Ministry of Safety and Security meet to discuss how best to expedite arrests in respect of warrants issued by the maintenance court.**

**Table 155: Time between date warrant of arrest issued and date of arrest**

Time between date of issue and arrest	Frequency	Percentage
Within the same month	9	36.0
1-2 months	5	20.0
2-3 months	5	20.0
More than three months	6	24.0
<b>Total</b>	<b>25</b>	<b>100.0</b>

The 1995 study found that the majority of successful arrests were made within one month although there were many problem cases that resulted in delays – the report states that 10% of the arrests took 2-6 months and 30% took three months or longer.<sup>22</sup> However the findings from the current sample show that a greater proportion of warrants now take longer to be implemented.

For 40 of the 71 warrants of arrests that were issued but subsequently cancelled, we can calculate the timeline between the date the warrant was issued and the date of cancellation. **The median time between the date the warrant was issued and the date the warrant was cancelled was 19 days (mean 61 days; range 0-483 days).** For the warrants of arrest that were cancelled on the same day they were issued, one possibility may be that the warrant was issued at the time the enquiry should have been held and the defendant attended court later in the day.

## 15.8 Amount of maintenance owed in cases involving criminal proceedings

For some of the cases that involved criminal proceedings and arrears in maintenance payments, we can calculate the amount of maintenance owed. **The median amount of maintenance owed in cases involving arrests was N\$1 343 (mean N\$2 995.62; range N\$50-N\$65 992; n=124).** The arrears were

<sup>22</sup> Id at 113.

outstanding for a median duration of 5 months although the sample size used to calculate this figure is small (n=43), and the range is very wide (from 1 month to over 4 years).

Information is also available for a smaller number of cases where there was more than one breach. In some instances the amount of maintenance owed is an accumulation of maintenance that has been unpaid rather than a separate breach. Given the small sample size it is not useful to split the cases that fell into arrears multiple times into these two categories.

**Table 156: Amount of maintenance owed and number of months outstanding for cases involving arrears (where this information is available)**

Instance of arrears	Amount of arrears should have paid	Number of months maintenance outstanding
<b>First arrears</b>	<b>n=124</b>	<b>n=35</b>
Median	1 343	5.0
Mean	2 996	9.4
Minimum	50	1.0
Maximum	65 992	51.0
<b>Second arrears</b>	<b>n=51</b>	<b>n=5</b>
Median	2 350	7.0
Mean	3 102	7.1
Minimum	200	4.5
Maximum	12 200	12.0
<b>Third arrears</b>	<b>n=25</b>	<b>n=1</b>
Median	3 000	6.0
Mean	4 725	6.0
Minimum	200	6.0
Maximum	14 200	6.0
<b>Fourth arrears</b>	<b>n=13</b>	
Median	4 900	
Mean	6 458	
Minimum	755	
Maximum	17 400	
<b>Fifth arrears</b>	<b>n=5</b>	<b>n=1</b>
Median	5 800	33.0
Mean	2 942	33.0
Minimum	900	33.0
Maximum	2 250	33.0
<b>Sixth arrears</b>	<b>n=4</b>	<b>n=1</b>
Median	6 700	36.0
Mean	5 423	36.0
Minimum	190	36.0
Maximum	8 100	36.0

## 15.9 Criminal trials

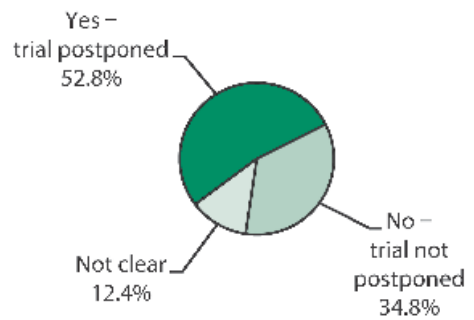
Overall a total of 89 files contained details of a criminal trial. This represents **5% of the maintenance files in the sample** (89/1 687). We do not have details as to why the criminal trials were held.

### Incidence of postponements

**Approximately half of the trials involved postponements** (47/89; 52.8%). The median number of postponements was three (range 1-18). This resulted in a total of 203 postponements recorded in the sample.

In the case involving 18 postponements, the details on file showed that the complainant persistently reported problems with the receipt of maintenance for over three years. The case shows at times the defendant was not employed, and at other times he explains that he was not paying maintenance because he is paying maintenance for another child. On four occasions the case was postponed for further investigation. The defendant failed to attend court many times and on one occasion the defendant was arrested. In a case such as this where the defendant continually promised to pay maintenance but failed to do so, it may have been appropriate for the court to take stricter measures, such as the use of periodical imprisonment. Whilst the defendant faced challenges in having money to pay for maintenance – such as unemployment and the need to pay maintenance for another child – it does not excuse his obligations and the fact that the court persisted with the case shows that the court considered that the defendant had the means to pay maintenance.

**Chart 90: Did the criminal trial involve a postponement? (n=89)**



**Table 157: Postponements**

Status of trial	Frequency	Percentage
Trial postponed	47	52.8
Trial not postponed	31	34.8
Not clear	11	12.4
<b>Total</b>	<b>89</b>	<b>100.0</b>

**Table 158: Number of postponements**

Number of postponements	Number of trials containing this number of postponements	Total number of postponements	Percentage of trials containing this number of postponements
1	13	13	27.7
2	10	20	21.3
3	3	9	6.4
4	5	20	10.6
5	2	10	4.3
6	5	30	10.6
7	2	14	4.3
8	1	8	2.1
11	2	22	4.3
12	2	24	4.3
15	1	15	2.1
18	1	18	2.1
<b>Total</b>	<b>47</b>	<b>203</b>	<b>100.0</b>

**Table 159: Average number of postponements in criminal proceedings trials that were held**

Number of trials with postponements	Median number of postponements	Mean number of postponements	Minimum number of postponements	Maximum number of postponements
47	3	4.3	1	18

## Reason for postponements

A total of 212 reasons for postponements were recorded (in some instances more than one reason was recorded). On nearly half of the occasions where an postponement was ordered, it was to allow the defendant to bring proof of payment or other unspecified proof (91/212; 42.9%). In approximately one-fifth of the cases the defendant did not attend court for unspecified reasons (42/212; 19.8%). In a further eight cases (8/212; 3.8%), the defendant and complainant were both absent, the defendant could not be traced, the summons was not served on the defendant, or the defendant was ill or hospitalised.



**Table 160: Reason for the postponement**

Reason	Frequency	Percentage
Defendant to bring proof of payment / additional proof unspecified	91	42.9
Failure of defendant to appear in court (reason unspecified)	42	19.8
For enquiry	10	4.7
Defendant to seek employment / bring proof of employment	8	3.8
For plea	4	1.9
Failure of complainant to appear in court	4	1.9
Defendant requests legal representation	3	1.4
Both parties failed to attend	2	0.9
Defendant could not be traced	2	0.9
Defendant not summoned by police	2	0.9
Defendant hospitalised/ill	2	0.9
Complainant hospitalised/ill	1	0.5
Case changed through a divorce order	1	0.5
Magistrate absent	1	0.5
Other/unknown reasons	39	18.4
<b>Total</b>	<b>212</b>	<b>100.0</b>

## Time between postponements

The median time between a postponement and the date on which the trial resumed was 42 days (mean 56.6 days; range 1-567 days). Analysis of the time between individual postponements does not show a particular pattern, suggesting that the time between postponements is dependant on the individual characteristics of the cases.

**Table 161: Average time between date of postponement and date of new enquiry (days)**

Postponement number	Number	Median	Mean	Minimum	Maximum
Postponement 1	47	56	64.9	7	321
Postponement 2	31	35	48.8	14	132
Postponement 3	24	57	66.7	7	161
Postponement 4	20	38.5	68.4	1	567
Postponement 5	14	22	25.9	2	62
Postponement 6	14	51	57.6	7	168
Postponement 7	8	29.5	45.4	7	126
Postponement 8	6	35	39.8	7	92
Postponement 9	6	77	67.2	21	98
Postponement 10	6	31.5	46.3	20	91
Postponement 11	6	42	55.0	1	133
Postponement 12	4	34	31.0	7	49
Postponement 13	2	52.5	52.5	35	70
Postponement 14	2	70	70.0	63	77
Postponement 15	2	87.5	87.5	84	91
Postponement 16	1	7	7.0	7	7
Postponement 17	1	133	133.0	133	133
Postponement 18	1	28	28.0	28	28
<b>Average time between all postponements</b>	<b>195</b>	<b>42</b>	<b>56.6</b>	<b>1</b>	<b>567</b>

## 15.10 Outcome of criminal trials

We can determine some form of outcome for just over half of the cases that went to trial (54/89; 60.7%). No outcome was reported in 40% of cases (35/89; 39.3).

- In approximately 25% of the cases, the accused paid or partially paid the arrears and did not receive a penalty.
- In over 10% of the cases a new maintenance order was made which incorporated the payment of the arrears over time.
- In 9% of the case the defendant was ordered to pay a fine.
- In over 6% of cases the case was struck from the roll.
- In nearly 4% of cases the complainant withdrew the case.
- The payment of the arrears was cancelled/reduced/suspended in approximately 3% of the cases.

In the eight cases where the defendant was ordered to pay a fine, two of the fines were levied because the defendant failed to attend court. One of the defendants stated that he did not attend the enquiry because he had been travelling for work. The court still enforced the penalty, a reasonable judgement given that the defendant should have informed the court that he could not attend rather than ignoring the summons. In another case the defendant explained that he “*did not know that summons was so important and so I did not care about it*”. The court (reasonably) still enforced the penalty. We know the size of the fines on seven of these eight cases:

- two fines of N\$300;
- one fine of N\$200 or 40 days imprisonment;
- two fines of N\$100 or 30 days imprisonment (recipients selected the fine in both cases);
- one fine of N\$100 or 2 weeks imprisonment (recipient selected fine); and
- one fine of N\$100 and 10 days imprisonment.

In one case the defendant was sentenced to pay arrears and a fine but the judgement was overturned following an appeal.

Only one case file contained any evidence of imprisonment – a sentence of 10 days imprisonment combined with a fine of N\$100.

None of the files with information on criminal trials contained any information on recovery of arrears after conviction.

There was no information in the files about cases where criminal trials were converted into enquiries, although this may have taken place in the 11 cases where new maintenance orders were made. A conversion of a criminal trial into an enquiry is discussed in a 1995 Namibian High Court case.<sup>23</sup>

*“Where the criminal proceedings have been converted to a maintenance enquiry I can see no reason why the maintenance court cannot include the issue of any payment towards the arrears when it conducts the enquiry into whether the existing maintenance order should be substituted.”*

*S v Kalundu* [2012] NAHC 325 (30 November 2012)

The 1995 study also identified only a small number of cases where penalties were imposed – two cases involving imprisonment and nine involving fines. The remaining cases that involved criminal proceedings resulted in warnings or suspended sentences. The highest sentence of imprisonment imposed without suspension was for six months. The fines issued ranged from N\$50-N\$500.<sup>24</sup>

<sup>23</sup> *Bingel v Salionga and Another* [1995] NAHC 23 (29 November 1995), discussed at page 82.

<sup>24</sup> D Hubbard, *Maintenance: A Study of the Operation of Namibia's Maintenance Courts*, Windhoek: Legal Assistance Centre, 1995 at 118-120.

The 2003 Maintenance Act introduced stronger penalties. However, a comparison between the results of the two studies shows that there has been little change in the number or strength of the penalties enforced. Whilst imprisoning or fining a defendant may not result in the payment of maintenance, the courts should consider these options where defendants persistently fail to pay maintenance or clearly avoid attending court. Of particular relevance is the fact that the court has the option to implement periodic imprisonments or punishment through community service, which could be effective in ensuring that defendants take their maintenance obligations seriously.

**Table 162: Outcome of trial**

Outcome of trial	Frequency	Percentage
Accused pays the arrears / pays part of the arrears	22	24.7
New order made including for the payment of arrears	11	12.4
Accused ordered to pay a fine	8	9.0
Struck from roll	6	6.7
Complainant withdraws the case	4	4.5
Arrears cancelled/reduced/suspended	3	3.4
No outcome reported	35	39.3
<b>Total</b>	<b>89</b>	<b>100</b>

*"If the sentence is to be imposed which makes sure that an errant parent does not default again and/or one which seeks to recover arrear payments, it must be given serious and careful consideration, based, of course, on the facts of each case before Court."*

*S v Gaweseb [2006] NAHC 27 (26 July 2006)*

## The use of periodic imprisonment as a penalty for failing to pay maintenance

Although the files record only one short instance of imprisonment, other information shows that periodic imprisonment is occasionally given. See also page 76.

*The Namibian*, 3 February 2011

### Maintenance deadbeat gets weekends in jail

By: Werner Menges

A DEADBEAT dad who failed to make his child maintenance payments as ordered by a court is now facing the prospect of spending the next few weekends locked up in prison.

On Friday at 18h00, bank employee Jackson Mesipo must report at Windhoek Central Prison to start his first weekend in jail, Magistrate Conchita Olivier ordered in the Windhoek Magistrate's Court in Katutura on Tuesday. Mesipo will have to stay in the prison up to 20h00 on Sunday, she ordered.

The three weekends after this will look the same for Mesipo – until he has served the 200 hours of periodical imprisonment that he was sentenced to in June last year.

Mesipo's sentence was suspended last year on condition that he has to pay the N\$6 600 in maintenance arrears that he had failed to pay to the mother of one of his four children at that stage.

Since receiving the suspended sentence, though, Mesipo failed to clear the arrears as ordered.

This prompted the prosecution to place his case back on the court roll in September last year so that the suspended sentence could be put into operation. At that stage, Mesipo

had paid nothing of the N\$4 800 that he was supposed to have paid to start cleaning the maintenance arrears. By November, N\$3 600 was still outstanding on the maintenance payments he should have made.

On Tuesday this week, State prosecutor Roxzaan Witbooi again asked the court to put Mesipo's suspended sentence into operation. She told the court that Mesipo is now in arrears to the tune of N\$6 300.

The mother of Mesipo's child told the court that she is struggling to survive without the monthly maintenance payment of N\$400 that Mesipo is supposed to make for his child, who is now ten years old.

Mesipo told the magistrate that he is employed as an insurance agent with a bank, where he earns only commission instead of a fixed salary. He promised to pay N\$1 500 on his maintenance arrears by the end of this week, and to clear all the arrears by the end of February.

Magistrate Olivier however said it was the court's opinion that Mesipo is indeed reluctant to pay the arrears. As a result, she decided to put the suspended sentence into operation – and with that sealed Mesipo's fate of a February of weekends in prison.

## CASE STUDY

### Desperate measures in the absence of maintenance

The Appellant was charged in the Magistrate's Court with the crimes of fraud and theft. She pleaded guilty to both charges. On the first charge of fraud she was sentenced to 30 months imprisonment of which 15 months were suspended for 5 years on the usual conditions. On the second count the Appellant was sentenced to pay a fine of N\$ 100-00 or, in default of payment, to imprisonment of 50 days ...

From the evidence and documents placed before the Magistrate it seems that the Appellant stole a blank page out of a cheque book. She then completed the cheque and was able to withdraw N\$1500-00 from the bank ... The Appellant is 26 years old and is the mother of three children. At the time when the Appellant was sentenced these children were respectively 4 months, 3 years and 6 years old. The Appellant furthermore informed the Court that when she committed the crimes she had financial problems. She was at that time estranged from her husband and he was not contributing anything towards the upkeep of the three children. She stated that she had to provide for the children. This included paying rent for the house in which they lived, for day care of the children so that she could work and other incidental expenses. The Appellant further informed the Court that she and her husband had, in the meantime, become reconciled and although she was still unemployed her husband was willing to assist her to repay the N\$ 1500-00. The State did not prove any previous convictions and it is clear that the Appellant is a first offender ...

... Looking at the circumstances of the Appellant in the present instance one is struck by the fact that the crime was committed at a time when she had become estranged from her husband and had lost the financial support for her three young children. Because of the unwillingness of her husband to fulfil his duties the Appellant landed in financial difficulty which caused her to commit the crimes of which she was convicted. This motive must be distinguished from those cases where a person steals or commits fraud to satisfy his or her own personal greed ... Furthermore, the Appellant has become reconciled with her estranged husband and she and the children are again supported by him. This, to a great extent, removed the reason for possible further criminal activity by the Appellant ...

On top of this the Appellant also offered, with the assistance of her husband, to repay the amount of N\$1500-00 ...

Bearing in mind all the above circumstances and the fact that the amount involved is not big I am of the opinion that this was an instance where the Court should have imposed a sentence other than direct imprisonment. Again I want to state that I am not thereby saying that a person who defrauded or stole N\$1500-00 from another cannot or should not be sent to prison. What I am saying is that in the circumstances of this particular case and the circumstances of this particular accused a sentence of 30 months imprisonment of which 15 months were suspended is disturbingly inappropriate.

In the result the appeal succeeds and the sentence imposed by the magistrate is set aside and the following sentence is substituted:

N\$1000-00 or in default of payment 1 (one) year imprisonment, plus further imprisonment of 1 (one) year which is suspended for 4 (four) years on condition that she is not again convicted of fraud or theft committed during the period of suspension; and that the amount of N\$1 500-00 is repaid ... in six monthly instalments of N\$250-00 each.

*S v Van Rooyen* [1998] NAHC 9 (31 August 1998)

## Applications for the recovery of arrears

The Maintenance Act states that where a defendant was convicted of a failure to pay maintenance, the public prosecutor may apply to the court for recovery of the arrears owing.<sup>25</sup> However, of the 346 instances where a breach was recorded, only half were accompanied by such applications (187 applications from 144 files; 54.0%). It appears that in some cases the recovery of arrears was taken forward without the

<sup>25</sup> Maintenance Act 9 of 2003, section 33. This application must be accompanied by a complaint from the complainant in Form Q, Maintenance Regulations, regulation 24.

requisite formal application. As it appears that some court officials are not familiar with the process for the enforcement of maintenance orders, **we recommend that the Ministry of Justice send a circular to the courts outlining the procedure for the recovery of arrears in criminal cases.**

The median amount of maintenance in arrears in these cases was N\$1 350 (similar to the median amount of arrears outstanding (N\$1 500 as discussed under section 15.1)) indicating that there is nothing particular about these cases which appears to have warranted an application from the prosecutor.

**Table 163: Applications made by the public prosecutor for the recovery of arrears**

Number of applications by the public prosecutor for recovery of arrears	Number of files	Percentage of files
1	109	75.7
2	28	19.4
3	6	4.2
4	1	0.7
<b>Total</b>	<b>144</b>	<b>100.0</b>

### **Summary of breaches in the payment of maintenance, civil enforcement measures and criminal proceedings**

#### **Arrears**

- Approximately one in six files contained at least one reported breach in the payment of maintenance.
- The number of reported breaches per file ranged from one to four.
- The median amount of maintenance outstanding when a breach was reported was N\$1 500. The defendant appeared to be in arrears for 6-9 months before the case was reported to the court.

#### **Civil enforcement**

- There was a positive outcome for the complainant in only one-third of the cases where there was a reported breach.
- Orders for the attachment of wages or property were used in approximately one-quarter of the cases of a reported breach that had a positive outcome for the complainant.
- However, approximately one-quarter of all of the files contained an order for the attachment of wages, suggesting that some may have been part of consent orders.

#### **Warrants of arrest**

- Approximately one in 10 files contained a warrant of arrest.
- Approximately half of the warrants of arrest were issued for failure to respond to a summons to attend court and approximately 40% were issued for a failure to pay maintenance, although there is some overlap between these categories.
- The warrant resulted in arrest in only one in 10 cases, although one-quarter of the warrants of arrest were cancelled (which could mean that the person in question attended court voluntarily, or could be due to some other reason).
- The median amount of maintenance owed in cases involving arrests was N\$1 343.
- The median time between the date the warrant was issued and the date the person in question was arrested was 43 days.

#### **Criminal trials**

- Only five percent of all maintenance cases resulted in a criminal trial.
- Approximately half of the criminal trials involved postponements.
- The median time between postponements and the date on which the trial resumed was 42 days.
- In approximately 25% of the criminal trials, the accused paid or partially paid the arrears and did not receive a penalty. In 12.5% of the criminal trials, a new maintenance order was made which incorporated the payment of the arrears over time.
- The defendant was ordered to pay a fine in approximately 9% of the criminal trials.
- There was only one criminal trial which resulted in imprisonment, for a very short period. None of these cases applied periodical imprisonment or community service, although other evidence indicates that periodical imprisonment has occasionally been used in respect of failure to pay maintenance.





# Chapter 16

## INTERNATIONAL PERSPECTIVES

**A**bSENT parents are required to pay child support in a number of countries across the world, but the means by which this process is administered and enforced varies widely between countries. This chapter reviews some of the general principles and practical mechanisms used in various countries to facilitate maintenance payments, in search of ideas which might be useful in Namibia.

### 16.1 Principles regarding the duty to maintain

#### 16.1.1 Maintenance for expenses incurred during pregnancy

In Namibia, a maintenance order can be made for pregnancy and birth-related expenses such as medical and hospital expenses incurred by the mother. Unless there is a reasonable explanation for a delayed claim, requests for pregnancy and birth-related expenses must be made within 12 months from the date of birth of the child.<sup>1</sup> Similar practice is seen in other countries across the world.

In **Australia**, a father may be liable to pay maintenance for the mother and reasonable medical expenses in relation to the pregnancy and the birth of the child, usually covering a period of 2 months prior to the birth and 3 months after the birth.<sup>2</sup> Additionally, in the event that the mother dies in childbirth or the child is stillborn, the father is liable to pay the reasonable costs of the mother's or child's funeral, respectively.<sup>3</sup> The liability is determined through application to the courts.<sup>4</sup>

Similarly, in **Denmark**, the Regional State Administration may decide that a father must pay a contribution towards costs associated with childbirth – a so-called birth contribution of DKK 758 (N\$1 325; as of 2013). The father may also be asked provide support for the mother for two months prior to and one month following childbirth (DKK 1,322 per month / N\$2 311).<sup>5</sup>

In **Ghana**, a maintenance order requires fathers to meet medical expenses for the duration of the mother's pregnancy, as well as expenses relating to the delivery or death of the child. A periodic

<sup>1</sup> Maintenance Act 9 of 2003, section 17(3). On the question of whether a maintenance complaint can be made before a child's birth, see chapter 4 at page 33.

<sup>2</sup> Australian Government Child Support Agency, "The Guide: CSA's online guide to the new child support scheme", 2.6.15: Reason 9 – the duty to maintain a child or any other person, 28 February 2013, <[http://guide.csa.gov.au/part\\_2/2\\_6\\_15.php](http://guide.csa.gov.au/part_2/2_6_15.php)>, accessed 31 May 2013.

<sup>3</sup> See Section 135 of the Family Court Act 1997 (WA) (or Section 67B of the Family Law Act), available online at <[www.slp.wa.gov.au/pco/prod/FileStore.nsf/Documents/MRDdocument:16606P/\\$FILE/FamilyCourtAct1997-03-g0-01.pdf?OpenElement](http://www.slp.wa.gov.au/pco/prod/FileStore.nsf/Documents/MRDdocument:16606P/$FILE/FamilyCourtAct1997-03-g0-01.pdf?OpenElement)>, accessed 24 September 2013.

<sup>4</sup> See Section 136 of the Family Court Act 1997 (WA) (or Section 67C of the Family Law Act) for more information on this process.

<sup>5</sup> "Child Support", 12 March 2013, <[www.statsforvaltning.dk/site.aspx?p=6404](http://www.statsforvaltning.dk/site.aspx?p=6404)>, accessed 29 May 2013. Only limited information is available in English, but more information on child support may be found in Danish at this site.

allowance for maintenance of the mother during her period of pregnancy and for a further period of nine months after the delivery of the child is also required, as well as payment of a reasonable sum to be determined by the District Court for continued education if the mother is still a child herself.<sup>6</sup>

## 16.1.2 Duration of child maintenance obligations

In Namibia, a maintenance order for the support of a child will normally remain in force until (1) the child dies or is adopted; (2) the parents divorce or annul the marriage (at which point a new order would likely be made between the parties); (3) the child marries; (4) the child reaches the age of 18. However if the child is attending an educational institution for the purpose of acquiring a course which would enable him or her to support himself or herself, the maintenance order does not terminate until the child reaches the age of 21.<sup>7</sup> Under common law, the duty to maintain a child may extend beyond these ages, until the child is able to be self-supporting.<sup>8</sup> Again similar practice is seen in other countries although there is considerable variability in the normal duration of a maintenance order.

In the **UK**, support ends at age 16 or 20 if the child is in full-time education (support is limited to the child finishing secondary education, there is no obligation to support a child through university studies).<sup>9</sup>

In **Ghana**, a child support obligation ends when the child reaches the age of 18 years, with two exceptions; the obligation may lapse before this date if the child is 'gainfully employed', or the obligation may be extended beyond 18 years if the child is engaged in a course of continued education or training after that age.<sup>10</sup>

In **Poland**, support ends at 18 years, or 21 years if the person is in full-time education,<sup>11</sup> or 24 years if the person is disabled.<sup>12</sup>

In **New Zealand**, support ends at age 19 or before this age if the child marries (or begins living with another person in a civil union or *de facto* marriage relationship) or becomes financially independent, for example, if the child is in permanent employment, receives a student allowance, or leaves the care of the custodian.<sup>13</sup>

In **Romania**, a child having reached the age of majority and whose education is still in progress is entitled to receive a maintenance allowance from his/her parent until he or she reaches the age of 25 or (where he/she is attending a course of advanced education of more than 5 years' duration) the age of 26.<sup>14</sup>

In **South Africa**, as in Namibia, maintenance is required to be paid until the child is 'self-supporting', even if over the age of 18 years.<sup>15</sup>

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<sup>6</sup> Children's Act, 1998 (Act 560), section 51(1).

<sup>7</sup> Maintenance Act 9 of 2003, section 26(1).

<sup>8</sup> See chapter 4, section 4.3.9.

<sup>9</sup> Arranging child maintenance through the Child Support Agency or Child Maintenance Service, 30 May 2013, <[www.gov.uk/child-maintenance/overview](http://www.gov.uk/child-maintenance/overview)>, accessed 6 June 2013.

<sup>10</sup> Children's Act, 1998 (Act 560), section 53 and 54(1).

<sup>11</sup> This is based on the condition that upon reaching their 18<sup>th</sup> birthday, the child wishes to pursue further study and their results to date justify this choice. A parent is not required to pay maintenance if their child, although prepared for employment, chooses to take up further study and subsequently neglects their studies or does not make satisfactory progress. See Maintenance Claims – Poland, European Juridical Network for more information: <[http://ec.europa.eu/civiljustice/maintenance\\_claim/maintenance\\_claim\\_pol\\_en.htm](http://ec.europa.eu/civiljustice/maintenance_claim/maintenance_claim_pol_en.htm)>, accessed 24 September 2013.

<sup>12</sup> OECD Family Database, PF1.5 Child Support, 1 July 2010, <[www.oecd.org/els/family/41920285.pdf](http://www.oecd.org/els/family/41920285.pdf)>, accessed 28 May 2013.

<sup>13</sup> Inland Revenue New Zealand, What is Child Support?, <[www.ird.govt.nz/childsupport/background/](http://www.ird.govt.nz/childsupport/background/)>, and <[www.ird.govt.nz/childsupport/paying-parents/questions/](http://www.ird.govt.nz/childsupport/paying-parents/questions/)>, accessed 28 May 2013.

<sup>14</sup> European Judicial Network, Maintenance Claims – Romania, 29 September 2007, <[http://ec.europa.eu/civiljustice/maintenance\\_claim/maintenance\\_claim\\_rom\\_en.htm](http://ec.europa.eu/civiljustice/maintenance_claim/maintenance_claim_rom_en.htm)>, accessed 29 May 2013.

<sup>15</sup> Maintenance FAQ, undated, <[www.justice.gov.za/vg/mnt-faq.html](http://www.justice.gov.za/vg/mnt-faq.html)>, accessed 6 June 2013.

### 16.1.3 Cohabitation relationships and same-sex partnerships

Namibian law recognises no duty of support between cohabiting partners of different or the same sexes (in the absence of a private agreement to maintain, which cannot bind third parties).<sup>16</sup> However some other countries do recognise maintenance obligations between such partners in certain circumstances. For example, in **Finland** the provisions on spousal maintenance are also applied to same-sex couples in registered partnerships. In **New Zealand**, there is duty of maintenance between opposite-sex or same-sex partners in civil unions.<sup>17</sup> In **Germany**, maintenance duties apply to partners in registered conjugal relationships.<sup>18</sup> In other jurisdictions – such as **Tanzania, Malawi and New South Wales, Australia** – certain maintenance obligations can arise automatically when couples live together in such a way as to acquire the repute of being married.<sup>19</sup>

### 16.1.5 Maintenance duties of other family members

In Namibia there is a mutual duty of support between close blood relatives, starting with the family members who are closest to each other, but there is no duty of support between persons (other than spouses) who are related only by marriage.<sup>20</sup>

The customary law in different communities may apply different rules about the duty of support between extended family members. However the Maintenance Act overrules any customary law which is inconsistent with its basic principles regarding the duty of support.<sup>21</sup>

The law in **South Africa** is similar to that in Namibia, with maintenance obligations extending to various blood relations, but not to persons (other than the spouses themselves) who are related solely by marriage.<sup>22</sup>

However the duty of support applies to a wider range of family members in a number of other countries.

In **Italy**, “*the duty to provide maintenance falls within the duties of family solidarity*”.<sup>23</sup> Those liable to provide maintenance, in order, are:

- the spouse, in cases where there is no duty to provide “*mantenimento*”, ie spouses separated through fault and spouses who have received the money awarded in the divorce settlement;
- children, including adopted children, or in their absence, direct relatives in the descending line;
- parents, or in their absence, direct relatives in the ascending line, and including adoptive parents;
- sons-in-law and daughters-in-law;
- fathers-in-law and mothers-in-law;
- full brothers and sisters, and half-brothers and half-sisters.

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<sup>16</sup> See the discussion above at page 39.

<sup>17</sup> European Judicial Network, Maintenance Claims – Finland, 5 April 2006, <[http://ec.europa.eu/civiljustice/maintenance\\_claim/maintenance\\_claim\\_fin\\_en.htm](http://ec.europa.eu/civiljustice/maintenance_claim/maintenance_claim_fin_en.htm)>, accessed 29 May 2013. Barnardos New Zealand, Same-sex couples, undated, <[www.barnardos.org.nz/Family%20Advice/Relationships/Same%20sex%20couples](http://www.barnardos.org.nz/Family%20Advice/Relationships/Same%20sex%20couples)>, accessed 31 May 2013. Same-sex marriage in New Zealand became legal on 19 August 2013.

<sup>18</sup> European Judicial Network, Maintenance Claims – Germany, 27 July 2006, <[http://ec.europa.eu/civiljustice/maintenance\\_claim/maintenance\\_claim\\_ger\\_en.htm](http://ec.europa.eu/civiljustice/maintenance_claim/maintenance_claim_ger_en.htm)>, accessed 29 May 2013.

<sup>19</sup> See Legal Assistance Centre (LAC), *A Family Affair: The Status of Cohabitation in Namibia and Recommendations for Law Reform (Full Report)*, Windhoek: LAC at section 11.3.1, available on LAC website: <[www.lac.org.na](http://www.lac.org.na)>.

<sup>20</sup> See chapter 4, section 39.

<sup>21</sup> Maintenance Act 9 of 2003, sections 3(1)(c), 3(2), 3(4)

<sup>22</sup> The common law on this point in South Africa is the same as that which applies to Namibia.

<sup>23</sup> European Judicial Network, Maintenance Claims – Italy, 25 May 2006, <[http://ec.europa.eu/civiljustice/maintenance\\_claim/maintenance\\_claim\\_ita\\_en.htm](http://ec.europa.eu/civiljustice/maintenance_claim/maintenance_claim_ita_en.htm)>, accessed 29 May 2013.

The closest relative according to the above ranking is liable to provide maintenance; should there be more than one person at the same level, liability is divided between them according to their financial situations.<sup>24</sup>

In **Romania** the maintenance obligation exists between spouses, parents and children, adopters and adoptees, grandparents and grandchildren, great-grandparents and great-grandchildren, brothers and sisters, as well as between other persons specifically defined by law.<sup>25</sup>

In **France** maintenance obligations exist between parents and children; spouses during the marriage, including in the case of legal separation; divorced spouses only if the divorce is granted on the grounds of the breakdown of the marriage, in which case the spouse who took the initiative in the divorce proceedings is required to make maintenance payments to the respondent; all descendants and direct relatives in the ascending line; and sons-in-law and daughters-in-law vis-à-vis their fathers-in-law and mothers-in-law, and vice-versa.<sup>26</sup>

In **Canada**, in cases of divorce or separation, a step-parent can be obligated to pay child maintenance if it is established that the step-parent had been acting *in loco parentis* and had in fact contributed to the support of the child for at least one year – although a step-parent is likely to be liable to contribute a lesser amount of maintenance than a biological parent. Step-parents can be obliged to pay child support even when the other biological parent is already paying child support. This principle applies regardless of whether there was a formal marriage between persons acting as step-parents. The application must be brought within one year of the step-parent's last voluntary contribution to child support.<sup>27</sup>

## 16.1.6 Maintenance according to different customs

In **Nigeria**, there are three types of law (English law, customary law, Islamic law) – and three corresponding types of marriage – and the obligation to pay maintenance depends on which legal system applies. Under English law, maintenance obligations must conform to the provisions of the Matrimonial Causes Act and Rules and the Child's Rights Act; these laws place a duty of maintenance on both parents, with the amount of maintenance in individual cases being determined by the Family Court. Maintenance under customary law varies. Under customary law in Eastern Nigeria, women reportedly have no custody rights to children except those still being breastfed and the mother is under no obligation to pay maintenance or contribute to the child's upbringing (based upon bride price having been paid). Under Islamic law, the father has a duty to provide maintenance to his daughter for as long as she remains unmarried and under parental care.<sup>28</sup>

This contrasts to the situation in Namibia, where the Maintenance Act establishes certain common principles regarding maintenance which apply to everyone in the country, regardless of any customary law to the contrary.

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<sup>24</sup> European Judicial Network, Maintenance Claims – Italy, 25 May 2006, <[http://ec.europa.eu/civiljustice/maintenance\\_claim/maintenance\\_claim\\_ita\\_en.htm](http://ec.europa.eu/civiljustice/maintenance_claim/maintenance_claim_ita_en.htm)>, accessed 29 May 2013.

<sup>25</sup> European Judicial Network, Maintenance Claims – Romania, 21 September 2007, <[http://ec.europa.eu/civiljustice/maintenance\\_claim/maintenance\\_claim\\_rom\\_en.htm](http://ec.europa.eu/civiljustice/maintenance_claim/maintenance_claim_rom_en.htm)>, accessed 29 May 2013. Other persons defined by law to pay maintenance can include the heir of a person who had been under the obligation to pay maintenance for a minor who, without any obligation to pay themselves, has provided maintenance for that minor.

<sup>26</sup> European Judicial Network, Maintenance Claims – France, 6 August 2007, <[http://ec.europa.eu/civiljustice/maintenance\\_claim/maintenance\\_claim\\_fra\\_en.htm](http://ec.europa.eu/civiljustice/maintenance_claim/maintenance_claim_fra_en.htm)>, accessed 29 May 2013.

<sup>27</sup> The Canadian Bar Association (British Columbia Branch), “Child Support”, March 2013, <[www.cba.org/BC/public\\_media/family/117.aspx](http://www.cba.org/BC/public_media/family/117.aspx)>, accessed 31 July 2013.

<sup>28</sup> O Odewale, “Situation report on child maintenance in Africa: report on Nigeria”, 3 March 2013, <[www.heidelberg-conference2013.de/tl\\_files/downloads-abstracts/abstracts-ab-3-3-2013/Abstract\\_Odewale.pdf](http://www.heidelberg-conference2013.de/tl_files/downloads-abstracts/abstracts-ab-3-3-2013/Abstract_Odewale.pdf)>, accessed 11 June 2013.

## Summary of comparative principles about maintenance

- In some countries, fathers have a clear obligation to contribute to the maintenance of the mother in respect of the period shortly before or after birth (such as in Australia), or to medical expenses for the duration of the pregnancy (as in Ghana).
- The point at which a maintenance obligation ends varies between countries. In some countries it may end as early as 16 if the child has finished education and is self-supporting. Many countries specify an end date that is between 18-21, although some countries allow payments to continue until age 24 or 26 or do not set an age limit, specifying only that the person must be self-supporting.
- Some countries recognise maintenance obligations between cohabiting couples of different sexes or the same sex.
- In some countries the duty of support between family members can be extensive – and can include step-parents and in-laws.
- Some countries allow for the application of customary law to determine maintenance obligations.

## Co-parenthood

Co-parenthood is a term sometimes used to describe the relationship of parents of a child who are not married, cohabiting or in a relationship together. According to Skinner and Davidson, there has been an increasing focus in several countries on ensuring that the child maintains a relationship with the non-custodian parent in cases of parental separation or divorce.

In **France**, “*coparentalite*” (co-parenthood) has been promoted following the development of a new law in 2002, to ensure that both parents retain strong personal relationships with their children. **Belgium** is another country to have introduced co-parenting, or “*co-ouderschap*”, where child care can be equally shared – in which case neither parent is required to pay maintenance. Similarly, **Germany** also introduced the principle of co-parenthood in the Child Law Reform Act of 1998, where shared custody is now the norm and sole custody the exception. Authorities in the **UK** and **Australia** have also voiced concerns about the need to foster better relationships between separated parents.<sup>a</sup>

Namibia allows joint custody of children by divorced parents. The concept of co-parenthood is not otherwise recognised, although with the passage of the Child Care and Protection Bill, parents will be able to make parenting plans which could be used as a means of defining co-parenthood obligations. Parenting plans are written agreements between co-holders of parental responsibilities and rights, confirmed by two witnesses, about things such as –

- where and with whom the child will live;
- maintenance;
- contact with various persons;
- schooling and religious upbringing; and
- medical care, medical expenses and medical aid coverage.

They are voluntary agreements which are intended to help prevent disputes, although provision is made for getting help to mediate a plan where there is disagreement. Parenting plans can be registered with the children’s court, which makes them enforceable in court.<sup>b</sup>

<sup>a</sup> C Skinner and J Davidson, “Recent Trends in Child Maintenance Schemes in 14 Countries”, 23 *International Journal of Law, Policy and the Family* 25-52 (2009).

<sup>b</sup> Child Care and Protection Bill, draft dated 12 January 2012, chapter 9.



## 16.2 Processes for claiming maintenance

The approaches to determining and claiming child support payments fall into three broad categories: judicial processes, systems managed by administrative agencies, and hybrid systems. Payments may also be determined privately and informally by the parents. Countries that predominately use a judicial process in maintenance cases include Namibia, Austria, Belgium, France, Germany, Ghana, Sweden, Canada (Ontario) and some US states (eg Massachusetts, Arizona). In contrast, countries that rely on administrative agencies to facilitate maintenance payments include Australia, Denmark, New Zealand, Norway, the UK and other US states (eg Maine, Oregon).<sup>29</sup> Even where different countries use the same mechanism (such as administrative agencies), there is variation in how each process is implemented. In addition, there are some countries where the state provides “advance maintenance” which may be recovered from the absent parent, as a strategy for providing more secure child support.

### 16.2.1 Judicial processes

Child support is claimed through a judicial process in a number of countries, including Namibia. The court’s role is somewhat different in different countries.

In **Germany**, child maintenance can be determined by parents themselves or, failing agreement, by the courts. Courts play a role in deciding the amount of maintenance in cases of parental disagreement or non-payment, or where the determination of child maintenance is part of divorce proceedings.

The process for determining child support in Germany underwent substantial change in 1998 following the introduction of several new laws, including the Child Law Reform Act which provided that child maintenance was no longer compulsory in the event of a divorce. The court now acts on maintenance obligations only at the request of a parent. All maintenance cases go through the Family Court.

While there are no strict rules, judges are strongly influenced by formal guidelines in determining maintenance payments. Several informal guidelines and ‘support tables’ exist, of which the “*Düsseldorfer Tabelle*” is the best known. This is used to calculate child maintenance payments based on the age of the child (separated into four age brackets: 0-5, 6-11, 12-17, above 18) and the income of the non-custodian parent. A new Child Maintenance Law enacted in 1998 introduced a “dynamic maintenance amount” (“*dynamischer Unterhalt*”), from which a standard minimum amount of maintenance (“*Regelbeträge*”) per month is determined.<sup>30</sup> The non-custodian parent’s net income (with taxes, health care and other costs deducted) is then used to determine which payment level should apply.<sup>31</sup> The income of the custodian parent is not taken into account.

The “*Jugendamt*” (Youth Welfare Office) provides free legal advice to parents who care for children, especially unmarried parents.

In **France** child maintenance is determined by a civil procedure in the courts, if voluntary agreement is not reached by parents themselves. This is systematic after a divorce, but only occurs if demanded by separated or unmarried parents. The “*juge aux affaires familiales*” (judge of family issues) is responsible for hearing the case and determining amounts of maintenance support. The system is based on the broad juridical principle of “*solidarité familiale*” (family solidarity), which applies to

<sup>29</sup> OECD Family Database, PF1.5 Child Support, 1 July 2010, <[www.oecd.org/els/family/41920285.pdf](http://www.oecd.org/els/family/41920285.pdf)>, accessed 28 May 2013.

<sup>30</sup> The standard minimum amounts for 2013 are: €317 (N\$4262) for 0-5 year olds; €364 (N\$4853) for 6-11 year olds; €426 (N\$5673) for 12-17 year olds; and €488 (N\$6499) for those over 18 years old. See *Düsseldorfer Tabelle*, <[www.olg-duesseldorf.nrw.de/infos/Duesseldorfer\\_tabelle/Tabelle-2013/Duesseldorfer-Tabelle-Stand-01\\_01\\_2013.pdf](http://www.olg-duesseldorf.nrw.de/infos/Duesseldorfer_tabelle/Tabelle-2013/Duesseldorfer-Tabelle-Stand-01_01_2013.pdf)>, accessed 24 September 2013.

<sup>31</sup> Social Policy Research Unit at the University of York, A Comparative Study of Child Maintenance Regimes: National Questionnaire for Germany, 30 June 2006, <[www.york.ac.uk/inst/spru/research/childsupport/Germany.pdf](http://www.york.ac.uk/inst/spru/research/childsupport/Germany.pdf)>, accessed 30 May 2013.

all family members but with more specific obligations between spouses and from parent to child. All parents are treated equally regardless of whether they have been married, have cohabited or have never lived together. There are four types of divorce and two types of legal separation in France, for which the decision process by the judge may vary. The use of lawyers is compulsory in cases of divorce, while they may help if requested when courts are determining child maintenance outside of divorce cases.

No formal guidelines are in place regarding maintenance amounts and decisions are largely at the discretion of the judge, taking into account the needs of the child and the resources of each parent (based on net income). For this reason, the amount of child maintenance can vary significantly across the country.

There are no government agencies assisting with this process in France. Parents may consult private associations for mediation (of which there are around 200), but these services may not be free.

Child maintenance in **Belgium** is determined either by voluntary agreement between parents or by the courts. The courts can be asked to determine the exact amount of maintenance, and there are no fixed rules to determine the amount of child maintenance due. Judges make discretionary decisions based on two principles: the capacity of the parents and the needs of the child. The judge may ask parents for a proposal. Both parents' net earnings are taken into consideration (income minus taxes and social security).

Demands for child maintenance are brought before the Juvenile Court. This happens automatically after divorce but must be brought to the court by parents in other situations. There is no distinction between the child maintenance obligations of parents who have been married, have cohabited, or have never lived together.

There are no agencies which assist in determining child maintenance, but there are organisations where parents can get help from mediators.<sup>32</sup> Lawyers and notaries can also be used as mediators.

There is no maximum amount of child maintenance that may be ordered. Payments are likely to vary with age, but there is no fixed rate.<sup>33</sup>

In **Canada (Ontario)** maintenance payments are decided through the courts if no agreement is reached by the parents. The exact process varies slightly in different Canadian provinces. The federal government is not directly involved with maintenance cases, but provides financial support to the provinces for this purpose. It is the provinces, not the federal government, that are responsible for enforcing support awards.

The court does not get involved in cases where there is no dispute, but voluntary agreements can be reviewed by the court. Lawyers and mediation services are often used to assist with voluntary agreements (of which there are two types: an agreement and a consent order, the latter having been reviewed by a judge).

Maintenance payments are generally determined using federal child support guidelines<sup>34</sup> and most provinces have adopted amended federal guidelines (except Québec, which has its own unique set of guidelines<sup>35</sup>).

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<sup>32</sup> One such organisation is the *Centrum voor Algemeen Welzijnswerk* (Social Work Centre; CAW) CAW is an organisation that provides counsellors and mediation services to help with a variety of personal and family problems, including disputes over maintenance. Counsellors offer practical information advice, as well as care and counselling. See the CAW website for more information on their services: <[www.caw.be/themas](http://www.caw.be/themas)> (in Dutch), accessed 24 September 2013.

<sup>33</sup> Social Policy Research Unit at the University of York, A Comparative Study of Child Maintenance Regimes: National Questionnaire for Belgium, 30 June 2006, <[www.york.ac.uk/inst/spru/research/childsupport/Belgium.pdf](http://www.york.ac.uk/inst/spru/research/childsupport/Belgium.pdf)>, accessed 30 May 2013.

<sup>34</sup> See Federal Support Guidelines at <[www.justice.gc.ca/eng/rp-pr/fl-lf/child-enfant/guide/](http://www.justice.gc.ca/eng/rp-pr/fl-lf/child-enfant/guide/)>, accessed 24 September 2013.

<sup>35</sup> Québec uses civil law, while the rest of Canada uses common law.

Child support is calculated with a complicated formula using several different tables and taking into account the needs of the child and the net income of both parents. Once parents have determined what kind of parenting arrangement they will have, they then use the relevant table to decide the appropriate amount of maintenance. There are two initial tables, based on whether one parent will have sole custody or if the parents will share custody. Parents then use the relevant provincial or federal guidelines based on where both will be living (eg they may live in different provinces or territories, or one parent may reside outside of Canada). There are five circumstances in which an amount of child support different to that provided in the formal guidelines may be imposed: (1) if the child is over the age of majority;<sup>36</sup> (2) if the non-custodian parent's income is over \$150 000;<sup>37</sup> (3) if there is equally shared custody;<sup>38</sup> (4) if payment would cause undue hardship to the non-custodian parent; and (5) where another contributor stands in place of a parent (eg a step-parent).<sup>39</sup> (See excerpt from Ontario table on the next page.)

There is an additional rule in Québec that child support liability cannot exceed 50% of disposable income. There are also adjustments for shared care in Québec, where each parent's basic liability is calculated and then multiplied by the time the child spends with the other parent; liabilities are offset, then additional costs (such as music lessons or child care) are divided according to the income ratio. In other provinces, shared care usually only applies when each parent has at least 40% care.

There is no government agency which assists with the initial process, but there are provincial Maintenance Enforcement Programmes which assist with enforcement in the event of non-payment. These bodies monitor and enforce maintenance orders and agreements (for both child and spousal support). If payments are not made, they will contact the non-custodian parent and try to obtain the overdue payments voluntarily. If the parent does not comply, the agencies can use a number of enforcement measures, including suspending the parent's driving license or deducting funds from his or her bank account.<sup>40</sup>

In **Ghana**, where parents cannot come to an agreement, they can apply to the District Court, formerly the Family Tribunal, for a maintenance order. In determining maintenance obligations, the District Court considers the income and wealth of both parents; any impairment of earning capacity of the person with a duty to maintain the child; financial responsibility with respect to other children; the costs of living in the area; and the rights of the child. The District Court may request a probation officer or social welfare officer to prepare a social enquiry report on the issue of maintenance before making a decision. Other non-judicial institutions that can be involved in mediating maintenance disputes include the Department of Social Welfare and community-based Child Panels.<sup>41</sup>

<sup>36</sup> Most child support payments end when the child reaches the age of majority, which can be 18 or 19 years depending on the relevant province or territory. However, maintenance obligation can be extended beyond this age, depending on the child's particular living situation and circumstances. If there is an end date on the maintenance order, non-custodian parents are liable to pay support up to this date only. If there is no end date specified, the authorities will ask the parent with custody for information regarding the child's present circumstances and may choose to extend the maintenance order (for example, a college student or child with serious health problems may require maintenance beyond the age of majority).

<sup>37</sup> Section 4 of the Guidelines gives the judge discretion to decide maintenance obligations for parents earning over \$150 000.

<sup>38</sup> Where parents share custody equally (ie a non-resident parent looks after the child at least 40% of the time), the court can make an order for child support to be paid in a lower amount than the Guidelines require.

<sup>39</sup> Social Policy Research Unit at the University of York, "A Comparative Study of Child Maintenance Regimes: National Questionnaire for Canada", 30 June 2006, <[www.york.ac.uk/inst/spru/research/childsupport/Canada.pdf](http://www.york.ac.uk/inst/spru/research/childsupport/Canada.pdf)>, accessed 30 May 2013.

<sup>40</sup> See <[www.justice.gc.ca/eng/fl-df/enforce-execution/provpro.html](http://www.justice.gc.ca/eng/fl-df/enforce-execution/provpro.html)>, accessed 24 September 2013. The agency for enforcing support orders in Ontario is the Family Responsibility Office.

<sup>41</sup> Children's Act, 1998 (Act 560), sections 49 and 50. A Child Panel is a district body with community representation. It includes the Chairman of the Social Services Sub-Committee of the District Assembly, a member of the Justice and Security Sub-Committee of the District Assembly, a member of a women's organisation, a representative of the Traditional Council, the district social worker, and two other citizens from the community of high moral character and proven integrity one of whom must be an educationalist. Section 29. The Child Panel mediates matters concerning children and is bound by principle of child participation: "A Child Panel shall permit a child to express his opinion and participate in any decision which affects the child's well being commensurate with the level of the understanding of the child concerned." Section 30.



**Excerpt from one of the tables used to calculate the relevant contribution in Ontario, Canada (figures in Canadian dollars).<sup>42</sup>**

Ontario

Federal Child Support Amounts: Simplified Tables  
Montants fédéraux de pensions alimentaires pour enfants: Tables simplifiées

Income/ Revenu (\$)	Monthly Award/ Paieement mensuel (\$)				Income/ Revenu (\$)	Monthly Award/ Paieement mensuel (\$)				Income/ Revenu (\$)	Monthly Award/ Paieement mensuel (\$)				Income/ Revenu (\$)	Monthly Award/ Paieement mensuel (\$)			
	No. of Children/ N <sup>bre</sup> d'enfants					No. of Children/ N <sup>bre</sup> d'enfants					No. of Children/ N <sup>bre</sup> d'enfants					No. of Children/ N <sup>bre</sup> d'enfants			
	1	2	3	4		1	2	3	4		1	2	3	4		1	2	3	4
10820	0	0	0	0	16200	120	231	249	266	21600	173	328	452	499	27000	219	397	545	666
10900	2	4	4	4	16300	122	234	252	270	21700	174	329	454	503	27100	220	398	547	668
11000	21	50	54	58	16400	123	237	256	274	21800	174	331	455	508	27200	221	399	548	670
11100	23	54	59	63	16500	125	241	259	277	21900	175	332	457	512	27300	222	400	550	672
11200	25	59	63	68	16600	127	244	262	281	22000	176	333	459	516	27400	223	402	551	674
11300	27	63	68	73	16700	129	247	266	285	22100	177	334	461	520	27500	223	403	553	676
11400	29	68	73	78	16800	131	250	269	288	22200	178	336	462	524	27600	224	404	554	678
11500	31	72	78	83	16900	133	253	273	292	22300	178	337	464	528	27700	225	405	556	680
11600	32	76	82	88	17000	135	256	276	296	22400	179	338	466	533	27800	226	406	557	682
11700	34	81	87	93	17100	136	258	280	300	22500	180	340	468	537	27900	227	407	559	684
11800	36	85	92	98	17200	136	260	284	305	22600	181	341	469	541	28000	228	408	560	686
11900	38	90	96	103	17300	137	262	288	309	22700	182	342	471	545	28100	229	409	562	688
12000	40	94	101	108	17400	138	264	292	314	22800	183	343	473	549	28200	230	411	563	690
12100	42	98	105	112	17500	138	266	296	318	22900	183	345	475	553	28300	231	412	565	692
12200	44	101	109	116	17600	139	268	301	322	23000	184	346	476	557	28400	232	414	566	694
12300	46	105	113	121	17700	140	270	305	327	23100	185	347	478	561	28500	233	415	568	696
12400	48	109	117	125	17800	140	272	309	331	23200	186	349	479	565	28600	234	417	569	698
12500	49	112	121	129	17900	141	275	313	336	23300	186	350	481	570	28700	234	418	571	700
12600	51	116	125	133	18000	142	277	317	340	23400	187	351	483	574	28800	235	420	573	702
12700	53	120	128	137	18100	143	278	321	345	23500	188	352	485	578	28900	236	421	574	703
12800	55	123	132	142	18200	144	280	326	349	23600	189	354	486	582	29000	237	423	576	705
12900	57	127	136	146	18300	145	281	330	354	23700	190	355	488	586	29100	238	425	578	707
13000	59	130	140	150	18400	146	283	334	359	23800	191	356	490	590	29200	239	426	579	709
13100	61	134	144	154	18500	146	284	339	363	23900	191	358	491	595	29300	240	428	581	711
13200	63	137	147	158	18600	147	286	343	368	24000	192	359	493	599	29400	240	429	582	713
13300	65	141	151	162	18700	148	287	347	373	24100	193	360	495	602	29500	241	431	584	715
13400	67	144	155	166	18800	149	288	351	377	24200	194	362	497	604	29600	242	432	585	717
13500	68	148	159	170	18900	150	290	356	382	24300	194	363	498	607	29700	243	434	587	719
13600	70	151	162	174	19000	151	291	360	386	24400	195	364	500	609	29800	244	435	588	721
13700	72	155	166	178	19100	152	292	364	391	24500	196	366	502	612	29900	245	437	590	723
13800	74	158	170	182	19200	153	294	369	395	24600	197	367	504	614	30000	245	438	591	725
13900	76	162	173	186	19300	154	295	373	400	24700	198	369	505	617	30100	246	439	593	727
14000	78	165	177	190	19400	155	297	378	404	24800	199	370	507	619	30200	247	441	595	729
14100	80	168	180	193	19500	156	298	382	409	24900	199	371	509	622	30300	249	442	597	731
14200	82	171	184	197	19600	156	300	386	414	25000	200	373	511	624	30400	250	444	599	733
14300	84	174	187	200	19700	157	301	391	418	25100	201	374	513	626	30500	251	445	601	735
14400	86	177	190	204	19800	158	303	395	423	25200	202	376	515	628	30600	252	447	603	737
14500	87	180	193	207	19900	159	304	400	428	25300	203	377	516	631	30700	253	448	605	739
14600	89	183	197	211	20000	160	306	404	432	25400	204	378	518	633	30800	254	450	607	741
14700	91	186	200	214	20100	161	307	408	436	25500	205	380	520	635	30900	256	451	609	743
14800	93	189	203	218	20200	162	309	411	440	25600	206	381	522	637	31000	257	452	611	745
14900	95	192	206	221	20300	162	310	415	444	25700	207	382	524	639	31100	258	453	613	747
15000	97	195	210	225	20400	163	311	419	449	25800	208	384	525	642	31200	259	455	615	749
15100	99	198	213	228	20500	164	313	423	453	25900	209	385	527	644	31300	261	456	617	751
15200	101	201	216	232	20600	165	314	426	457	26000	210	386	529	646	31400	262	458	619	753
15300	103	204	220	235	20700	166	316	430	461	26100	211	387	531	648	31500	263	459	621	755
15400	105	207	223	239	20800	166	317	434	465	26200	212	388	532	650	31600	264	461	622	757
15500	106	210	226	242	20900	167	318	438	469	26300	213	389	534	652	31700	265	462	624	759
15600	108	213	229	245	21000	168	320	441	474	26400	213	390	535	654	31800	266	464	626	761
15700	110	216	232	249	21100	169	321	443	478	26500	214	391	537	656	31900	268	465	628	763
15800	112	219	236	252	21200	170	323	445	482	26600	215	392	538	658	32000	269	467	630	765
15900	114	222	239	256	21300	170	324	446	487	26700	216	393	540	660	32100	270	468	632	767
16000	116	225	242	259	21400	171	325	448	491	26800	217	394	541	662	32200	271	470	634	769
16100	118	228	245	263	21500	172	327	450	495	26900	218	395	543	664	32300	273	471	636	771

<sup>42</sup> Department of Justice "2011 Simplified Tables in PDF Format", <[www.justice.gc.ca/eng/fl-df/child-enfant/fcsg-lfpae/2011/index.html](http://www.justice.gc.ca/eng/fl-df/child-enfant/fcsg-lfpae/2011/index.html)>, accessed 17 September 2013.

## 16.2.2 Administrative processes

The processing of claims for child support is carried out by means of an administrative process in a number of countries, including Australia, the UK, Denmark, Norway and New Zealand.

In **Australia** child support payments can be agreed privately or arranged through the Department of Human Services (DHS). The paying parent can choose to make weekly, fortnightly, or monthly payments to the DHS, which will then pay the receiving parent directly. Payment methods are flexible and can include direct credit, transfers through the Australian Post Office, employment deductions, mail and other methods. A range of tools are available online to help parents estimate appropriate child support payments, including an online calculator with interactive worksheets.<sup>43</sup>

### The online maintenance calculator used by the Australian Government's Department of Human Services<sup>44</sup>

In the **UK**, if maintenance is not agreed privately, the primary agencies for arranging maintenance payments are the Child Support Agency (CSA) or the Child Maintenance Service (CMS). The CSA manages the child maintenance schemes that were introduced in 1993 and 2003, while the CMS manages the 2012 scheme.

The CSA looks at several factors to determine maintenance payments, including the paying parent's net weekly income; the number of children needing maintenance; how often those children stay overnight with the paying parent; if the paying parent or that parent's partner receives government child benefit payments<sup>45</sup> for any other children; and if the paying parent is paying child



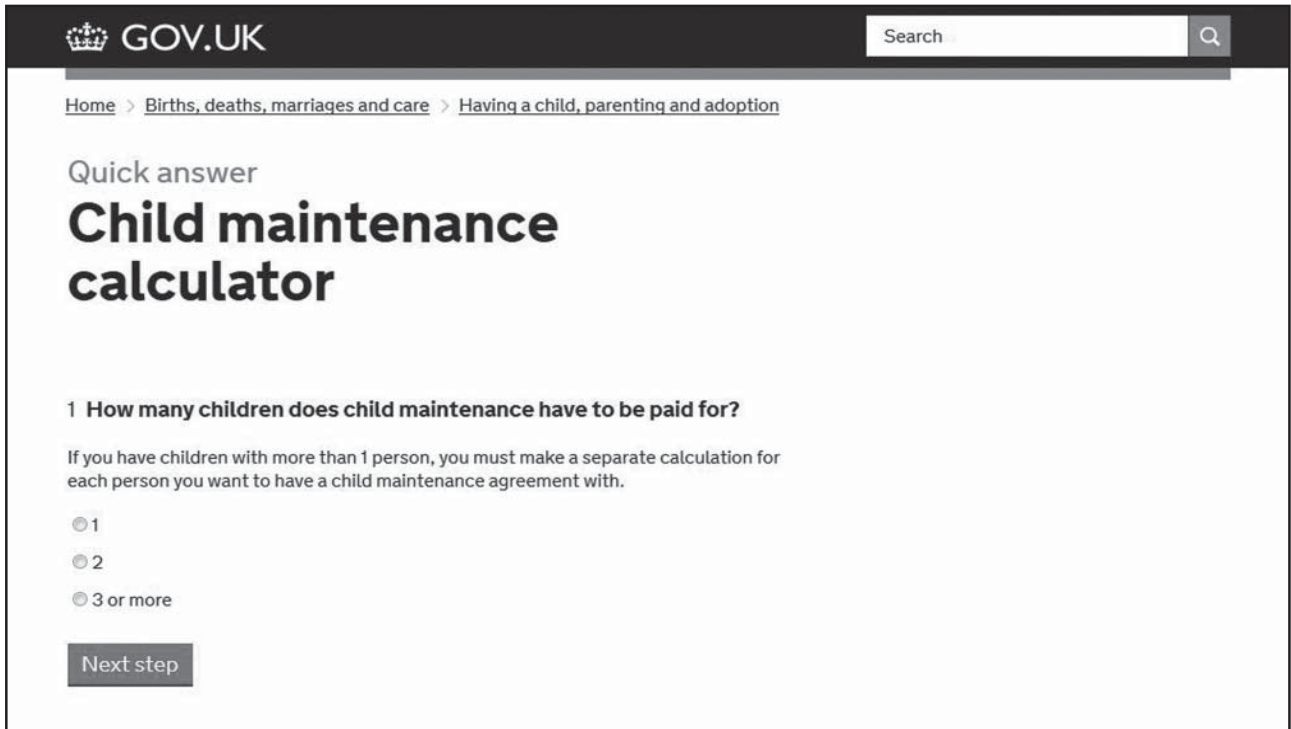
<sup>43</sup> Australian Government Department of Human Services, Child Support Payment, <[www.humanservices.gov.au/customer/services/child-support/child-support-payment](http://www.humanservices.gov.au/customer/services/child-support/child-support-payment)>, accessed 29 May 2013.

<sup>44</sup> Australian Government Department of Human Services, Child Support/FTB Estimator, <<https://processing.csa.gov.au/estimator/About.aspx>>, accessed 11 June 2013.

<sup>45</sup> Child benefit payments are a universal government payment that parents can claim for their children, usually paid every four weeks. There are two separate amounts of child benefit payments; £20.30 (N\$314.51) for the eldest child and £13.40 (N\$207.61) for all other children. For more information, see <[www.hmrc.gov.uk/childbenefit/start/who-qualifies/index.htm](http://www.hmrc.gov.uk/childbenefit/start/who-qualifies/index.htm)>, accessed 24 September 2013.



maintenance for other children. Rigid rules are in place to determine maintenance amounts. For example, where care is shared, child support payments are reduced by 1/7 for each night of weekly shared care. The CSA has produced a leaflet explaining in detail how child maintenance is worked out and an online calculator is available to help parents work out how much child maintenance payments should be.<sup>46</sup>



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Quick answer

## Child maintenance calculator

1 How many children does child maintenance have to be paid for?

If you have children with more than 1 person, you must make a separate calculation for each person you want to have a child maintenance agreement with.

☐ 1

☐ 2

☐ 3 or more

Next step

There are four rates of child maintenance used by the CSA: nil rate, flat rate, reduced rate and basic rate. These are based on the paying parent's income and applied as follows:

- The *nil rate* is for parents who do not live with the child and do not have to pay child maintenance because they are a student, a child aged 16 or under (or 18 or under if in full-time education) or a prisoner; get an allowance for work-based training; live in a care home and get help with fees; or are 16 or 17 and they or their partner get certain government benefits.
- The *flat rate* is £5 (N\$74.98) per week regardless of how many children are involved. It is used if the paying parent's weekly income is between £5 and £100 (N\$1 502.03), where that parent does not qualify for the nil rate. It is also used if the parent gets certain government benefits, including incapacity benefit, income support, jobseeker's allowance, and others.
- The *reduced rate* is used if the paying parent's net weekly income is more than £100 but less than £200 (N\$2 999.14). The parent pays the flat rate of £5 plus a percentage of the net weekly income (25% for one child, 35% for two children, 45% for 3 or more children).
- The *basic rate* is a percentage of the paying parent's net income, where this parent has a net weekly income of £200 or more. The percentage depends on the number of children needing maintenance (15% for one child, 20% for two children, 25% for three or more) and the number of other children for whom the paying parent or that parent's partner receives a child benefit allowance.

The CMS (which applies the child maintenance scheme in place from 2012 onward) follows similar steps to calculate child maintenance, but uses five rates, based on the gross weekly income of the parent (nil, flat, reduced, basic and basic plus).<sup>47</sup>

<sup>46</sup> Child Support Agency, "How is child maintenance worked out?", 12 April 2010, <www.direct.gov.uk/prod\_consum\_dg/groups/dg\_digitalassets/@dg/@en/@benefits/documents/digitalasset/dg\_198849.pdf>, accessed 11 June 2013; "Child maintenance calculator", <www.gov.uk/calculate-your-child-maintenance/y>, accessed 11 June 2013.

<sup>47</sup> "How child maintenance is worked out", 4 April 2013, <www.gov.uk/how-child-maintenance-is-worked-out/overview>, accessed 29 May 2013. The thresholds for gross weekly income for each rate for 2013 are: nil – below £5 (N\$74.98); flat – £100 or less (N\$1 500.29), or if the parent gets certain benefits; reduced – £100.01 to £199.99 (N\$1 504.55 to N\$3 000.80); basic – £200 to £800 (N\$3 008.80 to N\$11 996.80); and basic plus – £800.01 to £3 000 (N\$12 035.35 to N\$45 132.00).

The court plays a residual role in special cases (eg when the non-custodian parent lives abroad, to establish the maintenance obligations of a step-parent, or where payment liability may be disputed).

Private lawyers can also be used to facilitate private agreements.

In **Denmark**, parents can prepare and sign an “*aftale om børnebidrag*” (agreement on child maintenance). Where the parents request it, private agreements made during divorce or separation can be mediated by the Regional State Administration (“*Statsamt*”, a quasi-judicial regional body). When agreements break down, the parent with care of the child sends an “*Ansøgning om Børnebidrag*” (Petition for Child Maintenance) to the Statsamt. The parent with care may ask for the highest rate of maintenance, the standard rate, or a lesser amount. Where parents request the highest amount and when they cannot agree, the Statsamt uses rigid guidelines to determine payment amounts.<sup>48</sup>

Child support consists of three parts: a fixed basic amount, a fixed supplement, and a possible additional supplement depending on the gross income of the relevant parent and the number of children.

Standard maintenance consists of a fixed basic amount and a fixed supplement. The total amount is DKK 1,247 (N\$2198) per month, or DKK 14,964 (N\$26380) per year. The fixed basic amount is DKK 13,248 (N\$23355) and the fixed supplement is DKK 1,716 (N\$3019) per year. This corresponds to a fixed basic amount of DKK 1,104 (N\$1946) and a fixed supplement of DKK 143 (N\$252) per month.

Depending on the relevant parent’s gross income and the number of children this parent is required to support, a further supplement may be added. This supplement is calculated on the basis of the fixed basic amount.

Supplementary contributions may also be required in connection with childbirth and special occasions such as baptisms and christenings.<sup>49</sup>

Parents in **Norway** are encouraged to make private voluntary agreements. If this is not possible, either party can use the agency “*Ny Arbeids-og Velferdsetat*” (NAV) to make a decision for them. The use of NAV is now considered a public service, for which each parent must pay 860 Norwegian Krone (N\$1488). NAV charges only for the determination of maintenance amounts; forwarding and reclaiming services are provided free of charge.<sup>50</sup>

The maintenance system in Norway uses several stages to determine payment amounts. The starting point for maintenance assessment is based on the “actual costs” of children, which are “standard” estimates based on a family with “reasonable” living standards, as calculated by the National Institute for Consumer Research. The assessed costs of children increase with the age of the child and are divided into three age groups (0-5 years, 6-10 years and 11 years and over).<sup>51</sup> Child benefits and tax deductions for child care are then deducted from these standard estimates (as these costs are covered by the state). The second step is to share these costs between the parents. The non-custodian parent’s income is calculated as a percentage of the total income of the parents combined and this is then related to a six-step scale. This means, for example, that if the parents earn about the same income, the non-custodian parent will pay half of the costs of child maintenance. Or, if the non-custodian parent’s income is twice that of the parent with custody, the non-custodian parent will pay twice as much towards the costs of child maintenance as the custodian parent. As a third

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<sup>48</sup> C Skinner, J Bradshaw and J Davidson, “Child Support Policy: an international perspective”, Leeds, UK: Department of Work and Pensions, 2007, at 38.

<sup>49</sup> “Child Support”, 12 March 2013, <[www.statsforvaltning.dk/site.aspx?p=6404](http://www.statsforvaltning.dk/site.aspx?p=6404)>, accessed 29 May 2013.

<sup>50</sup> C Skinner, J Bradshaw and J Davidson, “Child Support Policy: an international perspective”, Leeds, UK: Department of Work and Pensions, 2007, at 37.

<sup>51</sup> Australian Government Department of Families, Housing, Community Services and Indigenous Affairs, “A Comparison of Child Support Schemes in Selected Countries”, 30 April 2012, <[www.fahcsia.gov.au/our-responsibilities/families-and-children/publications-articles/a-comparison-of-child-support-schemes-in-selected-countries?HTML](http://www.fahcsia.gov.au/our-responsibilities/families-and-children/publications-articles/a-comparison-of-child-support-schemes-in-selected-countries?HTML)>, accessed 29 May 2013. See NAV website for more information: <[www.nav.no/Forsiden](http://www.nav.no/Forsiden)> (in Norwegian), accessed 24 September 2013.

step, the non-custodian parent's ability to pay is assessed using fixed estimates for taxes, housing costs, and other factors. The maintenance amount is then adjusted accordingly (for example, if that parent's income after expenses is less than the maintenance assessment, then the amount which that parent is expected to pay will be reduced). A maintenance obligation is also adjusted with relation to the non-custodian parent's contact with the child, based on the number of nights spent with the child. The minimum contact for deduction is two nights per week.<sup>52</sup>

In **New Zealand** child maintenance is overseen by the Inland Revenue Child Support (IRCS) agency. The IRCS has wide powers to collect information from tax payers and third parties and is the only agency that is legally charged with determining child maintenance and related matters. The functions of the IRCS include determining amounts of maintenance according to specified formulas, registering private agreements on maintenance, receiving and paying over funds and enforcing payments.<sup>53</sup>

The child support scheme in New Zealand works by first determining the non-custodian parent's taxable income, then deducting the parent's living allowance from that income<sup>54</sup> and multiplying the remaining figure by a percentage based on how many children are to receive maintenance. If the non-custodian parent is not sharing care of the children (meaning that this parent has care of the children less than 40% of the time), the applicable percentages are:

- 18% for one child
- 24% for two children
- 27% for three children
- 30% for four or more children.

Where care is shared (meaning that this parent has care of the children on more than 40% of nights), each parent can apply for child support from the other and the percentages are adjusted accordingly.<sup>55</sup>

## 16.2.3 Hybrid processes

Some countries have hybrid processes that involve both administrative agencies and the courts.<sup>56</sup>

**The Netherlands** uses a tripartite system to determine maintenance payments using the courts, the "*Landelijk Bureau Inning Onderhoudsbijdragen*" (LBIO, a national collection and support agency), and municipal social assistance offices. Parents can come to a private agreement under the supervision of their lawyers. If parents cannot agree, or are receiving social assistance from the government, then a judge will make the decision concerning the amount of maintenance due, based on the national index on the cost of raising a child and taking into account any specific needs of the child as well as the non-custodian parent's income and expenditures. The municipal social assistance office is involved in determining whether the parent(s) will be able to support themselves and the child who is entitled to maintenance.<sup>57</sup>

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<sup>52</sup> A Skevik, "Family Policies in Norway", NOVA-Norwegian Social Research, 2003, <[www.york.ac.uk/inst/spru/research/nordic/norwpoli.PDF](http://www.york.ac.uk/inst/spru/research/nordic/norwpoli.PDF)>, accessed 11 June 2013.

<sup>53</sup> C Skinner and J Davidson, "Recent Trends in Child Maintenance Schemes in 14 Countries", 23 *International Journal of Law, Policy and the Family* 25-52 (2009).

<sup>54</sup> The living allowance is graded depending on the number of children living with the paying parent. Allowances range from \$14 960 (N\$118 471) if the paying parent is single with no children living with him or her, to \$37 762 (N\$299 044) for a paying parent who is single, married, in a civil union or with a de facto partner with 4 or more children living with the paying parent (correct for 1 April 2013 – 31 March 2014). See <[www.ird.govt.nz/childsupport/paying-parents/workout-payments/living-allowances/](http://www.ird.govt.nz/childsupport/paying-parents/workout-payments/living-allowances/)>, accessed 24 September 2013.

<sup>55</sup> Australian Government Department of Families, Housing, Community Services and Indigenous Affairs, A Comparison of Child Support Schemes in Selected Countries, 30 April 2012, <[www.fahcsia.gov.au/our-responsibilities/families-and-children/publications-articles/a-comparison-of-child-support-schemes-in-selected-countries?HTML](http://www.fahcsia.gov.au/our-responsibilities/families-and-children/publications-articles/a-comparison-of-child-support-schemes-in-selected-countries?HTML)>, accessed 29 May 2013.

<sup>56</sup> C Skinner and J Davidson, "Recent Trends in Child Maintenance Schemes in 14 Countries", 23 *International Journal of Law, Policy and the Family* 25-52 (2009).

<sup>57</sup> C Skinner, J Bradshaw and J Davidson, "Child Support Policy: an international perspective", Leeds, UK: Department of Work and Pensions, 2007. See LBIO website for more information: <[www.lbio.nl/](http://www.lbio.nl/)> (in Dutch), accessed 24 September 2013.

In **Finland**, parents who cannot reach agreement must seek advice from the municipal social welfare board or the court, which both use the same formal guidelines. Most often, parents will seek mediation through the municipal social welfare board. Divorcing parents must file a statement of arrangement for children in the court, which may as a result be involved in mediation in the case.<sup>58</sup>

### Comparative points from a 2009 study on methods of child support in 14 countries

All of the countries assessed in the study use the non-custodian parent's income as an important factor in calculating maintenance. Pre-tax gross income is used most often, although some countries use net income. The Netherlands is the only country that sets a threshold for whether gross or net income is used.

Several countries take into account the impact of shared care when determining maintenance obligations. Where children spent equal time living with both parents, the child maintenance obligation could be overruled in principle in 10 of the 14 countries analysed (excluding Australia, Austria, New Zealand and the UK).

There are two main methods for transmitting payments: money can be transferred privately or payments may be mediated by some agency. In countries such as France and Belgium, all payments are direct between parents and there is no collection agency. In the Netherlands, direct payments account for 94% of all child maintenance payments. In contrast, payments mediated through agencies are much more common in New Zealand and the USA.

information from C Skinner and J Davidson, "Recent Trends in Child Maintenance Schemes in 14 Countries", *23 International Journal of Law, Policy and the Family* 25-52 (2009) at 45

## 16.2.4 Advance maintenance schemes

In Namibia the concept of maintenance provided by the parent is separate from maintenance provided by the state<sup>59</sup> – although there is a possibility of seeking a contribution order from one or both parents to reimburse state expenditure on children in some circumstances.<sup>60</sup>

In approximately **half of OECD<sup>61</sup> countries**, the custodian parent can apply to the government to receive advance child support payments, which can be reimbursed to the state. These systems are in place to ensure that children receive a minimum amount of money from the state, to prevent instability in situations where non-custodian parents do not regularly meet their maintenance obligations. Such

<sup>58</sup> C Skinner, J Bradshaw and J Davidson, "Child Support Policy: an international perspective", Leeds, UK: Department of Work and Pensions, 2007, at 39.

<sup>59</sup> The Ministry of Gender Equality and Child Welfare provides a state maintenance grant. A biological parent who earns less than N\$1 000 per month and supports a child under 18 years of age is eligible for a state grant of N\$250 per child per month in situations where the other parent receives an old-age pension or a disability grant, is unemployed, is in prison for six months or longer or has died, (Ministry of Gender Equality and Child Welfare, *Child Welfare Grants in Namibia* (pamphlet), 2010).

<sup>60</sup> In terms of Namibia's Children's Act 33 of 1960 (section 1 and chapter VI), a "contribution order" is an order to contribute towards the costs of maintaining a child who is in a place of safety or in any other court-ordered custody, or towards the maintenance of a pupil. Namibia's forthcoming Child Care and Protection Act is expected to retain the concept of a contribution order as a contribution towards the maintenance of a child who is placed in foster care or a residential child care facility by court order, or temporarily removed from the family by court order for treatment, rehabilitation, counselling or another reason. A parental contribution may also be sought as a short-term emergency contribution towards the maintenance of a child or for any urgent needs of the child, or to reimburse state expenditure on a state maintenance grant where the parent could have contributed towards the maintenance of the child. Child Care and Protection Bill, draft dated 12 January 2013, chapter 13.

<sup>61</sup> The Organisation for Economic Co-operation and Development (OECD) is a forum of states in place to promote policies that will improve the economic and social well-being of people around the world. It currently has a membership of 34 states, including the UK, USA, Australia and others. Namibia is not an OECD country. See the OECD website for more information: <[www.oecd.org/about/](http://www.oecd.org/about/)>, accessed 24 September 2013.



advance payments are available for a limited number of years and the government takes on the cost of pursuing the non-custodian parent for the payments owed, if applicable. In Sweden and Norway, custodian parents may apply to the relevant authorities to advance a standard level of maintenance (and take over responsibility for attempting to collect contributions from the non-custodian parent), while in other countries this service is available to a parent only where formal agreements have broken down.<sup>62</sup> Advance maintenance systems play a significant role in poverty alleviation, but they can mean that governments incur a high expenditure in attempting to recover the maintenance payments – which is not always possible.

*“Advance maintenance schemes ensure the regularity of at least a portion of entitlement.”*

Joseph Rowntree Foundation, “Findings: European Approaches to Maintenance Payments”, June 1999.

In **Germany**, a system for the advance payment of maintenance (“*Unterhaltvorschuss*”) was set up in 1979. Payments can be made for children under the age of 13, for a maximum of six years.<sup>63</sup>

In **France**, the “*allocation de soutien familial*” (ASF) is a government social benefit for single parents. In cases where maintenance payments have been agreed in court but the paying parent has failed to contribute, the ASF can also be used as an advance payment to the receiving parent, which is then recovered from the other parent.<sup>64</sup>

In **Norway**, low-to-middle-income parents are eligible for “advance maintenance” from government where payers have a poor history of payment. The government then attempts to recoup the payments from the parent who is liable to contribute. The payment is also available to a mother who is caring for a child in cases where the father is unknown.<sup>65</sup> Levels of government assistance to families in Norway are generally higher than in many countries, with a universal child benefit, substantial public day care services, paid parental leave to cover the first year of the child’s life and benefits for single parents where the government provides more than it recoups from absent parents.

*“Advance maintenance schemes ensure the regularity of at least a portion of entitlement. The direction of developments in advance schemes has been towards improvements and increasing their efficiency. There are some problems associated with advance schemes, including non-take-up and high costs, but there is strong support for the contribution made to the maintenance of children’s living standards and their protection from poverty. ...*

*Increasingly, in all countries, concern about relationships between parents, and between parents and children, is entering the debate about child maintenance. In all countries, there is much to learn about links perceived by parents between the maintenance due, their contacts with children and the way parents who live apart may share the care of their children.”*

European approaches to child maintenance payments, Joseph Rowntree Foundation 1999, available at <[www.jrf.org.uk/sites/files/jrf/F619.pdf](http://www.jrf.org.uk/sites/files/jrf/F619.pdf)>, last accessed 30 September 2013

<sup>62</sup> Joseph Rowntree Foundation, “Findings: European Approaches to Maintenance Payments”, June 1999, <[www.jrf.org.uk/sites/files/jrf/F619.pdf](http://www.jrf.org.uk/sites/files/jrf/F619.pdf)>, accessed 7 June 2013.

<sup>63</sup> Child Policy International, “1.104 Child Support: Germany”, undated, <[www.childpolicyintl.org/childsupporttables/1.104Germany.html](http://www.childpolicyintl.org/childsupporttables/1.104Germany.html)>, accessed 7 June 2013.

<sup>64</sup> Social Policy Research Unit at the University of York, “A Comparative Study of Child Maintenance Regimes: National Questionnaire for France”, July 2006, <[www.york.ac.uk/inst/spru/research/childsupport/France.pdf](http://www.york.ac.uk/inst/spru/research/childsupport/France.pdf)>, accessed 30 May 2013.

<sup>65</sup> Australian Government Department of Families, Housing, Community Services and Indigenous Affairs, A Comparison of Child Support Schemes in Selected Countries, 30 April 2012, <[www.fahcsia.gov.au/our-responsibilities/families-and-children/publications-articles/a-comparison-of-child-support-schemes-in-selected-countries?HTML](http://www.fahcsia.gov.au/our-responsibilities/families-and-children/publications-articles/a-comparison-of-child-support-schemes-in-selected-countries?HTML)>, accessed 29 May 2013. See also <[www.nav.no/Familie](http://www.nav.no/Familie)> for more detailed information (in Norwegian), , accessed 24 September 2013.



### Summary of judicial, administrative, hybrid and advance processes for claiming maintenance

- The approaches to determining and claiming child support payments fall into three broad categories: judicial processes, systems managed by administrative agencies, and hybrid systems. Most countries encourage parents to reach private agreements on maintenance obligations before involving other actors.
- A judicial process, like that used in Namibia, involves the courts determining maintenance obligations. Countries that use similar processes include Ghana, Austria, Belgium, France, Germany, Sweden, Canada (Ontario), and some US states. Some countries that use a judicial process follow very strict guidelines and regulations, like Germany, which uses the “*Düsseldorfer Tabelle*” to help calculate maintenance payments. Other countries, like France, use no formal guidelines and leave decisions on maintenance largely to the discretion of the presiding officer in the case.
- An administrative process involves using government-affiliated agencies to help calculate and facilitate maintenance payments. Countries that use administrative agencies include Australia, the United Kingdom, Denmark, Norway, and New Zealand. Typically, administrative agencies use very formal rules to determine payments. Many have online tools which parents can use to calculate maintenance payments and apply for assistance in claiming them. Such agencies include the Child Maintenance Service in the UK and the Department of Human Services in Australia.
- Countries that use hybrid systems include the Netherlands, which uses a tripartite system of courts, a national collection and support agency, and municipal social assistance offices. In Finland, parents can turn to a municipal social welfare board or a court for assistance, depending on their situation.
- Some countries provide for advance maintenance payments where the government pays maintenance for the child and then recovers the amount owed from the absent parent.

## 16.3 Mechanisms for enforcing maintenance payments

Regulations and laws on the enforcement of child maintenance vary by country (and by state or province in the US and Canada, respectively). Some countries, such as Australia, have a national office to oversee enforcement of payments, while in other countries, such as Canada, the responsibility rests with individual provinces.

In **Canada**, federal, provincial and territorial laws set out a variety of tools to enforce support. The Government of Canada has the authority to trace defaulting parents through federal databases to attach federal salaries or to divert federal pension benefits to satisfy maintenance orders. Where parents consistently fail to pay, there is a special provision to allow pensions to be diverted before they become payable.<sup>66</sup> As a last resort to respond to failure to pay, a Maintenance Enforcement Program can apply to have the parent’s Canadian passport or certain federal licences suspended.<sup>67</sup> Defiance of a court order can also result in imprisonment. Various provinces also have access to provincial databases, including motor vehicle registries, and can trace and suspend car registrations where the owner is in violation of maintenance order.<sup>68</sup>

<sup>66</sup> Australian Government Department of Families, Housing, Community Services and Indigenous Affairs, “A Comparison of Child Support Schemes in Selected Countries”, 30 April 2012, <[www.fahcsia.gov.au/our-responsibilities/families-and-children/publications-articles/a-comparison-of-child-support-schemes-in-selected-countries?HTML](http://www.fahcsia.gov.au/our-responsibilities/families-and-children/publications-articles/a-comparison-of-child-support-schemes-in-selected-countries?HTML)>, accessed 29 May 2013.

<sup>67</sup> This can happen while the parent in question is abroad, in which case they must either pay their support debt or obtain an emergency travel document to get back to Canada.

<sup>68</sup> Australian Government Department of Families, Housing, Community Services and Indigenous Affairs, “A Comparison of Child Support Schemes in Selected Countries”, 30 April 2012, <[www.fahcsia.gov.au/our-responsibilities/families-and-children/publications-articles/a-comparison-of-child-support-schemes-in-selected-countries?HTML](http://www.fahcsia.gov.au/our-responsibilities/families-and-children/publications-articles/a-comparison-of-child-support-schemes-in-selected-countries?HTML)>, accessed 29 May 2013.

In **Australia**, where payments are not made in full and on time, penalties are set at the amount of arrear maintenance outstanding. These penalties are paid to the Australian government rather than to the receiving parent, over and above the arrear maintenance owing.<sup>69</sup> Additional ways of recovering overdue payments include:

- automatically deducting maintenance from wages or state income support payments;
- working with banks to deduct money directly from bank accounts;
- benefit deductions;
- working with third parties to pay the money over on behalf of the parent in question;
- enforcing the requirement that the parent in question lodge a tax return, to enable an assessment of the assets available to pay the maintenance owing;
- intercepting tax refunds;
- stopping the parent in question from leaving the country; or
- taking the parent in question to court.<sup>70</sup>

In the **UK**, the statutory child maintenance services – the Child Support Agency (CSA) and the Child Maintenance Service (CMS) – will take action if child maintenance is not paid. When a child maintenance payment is missed, the CSA or CMS will contact the parent in question to find out why the parent has not paid, arrange for payment of the amount owing and warn of action which will be taken in the case of future non-payment. The parent in default has a week to respond. If there is no response, the service can take further action to recover the arrear maintenance in the following ways:

- by deducting money directly from wages;
- by deducting money directly from government benefits such as a State Pension or War Pension;
- by working with banks to deduct money directly from bank accounts;
- by applying to the court for a liability order (a court order taken out against parents who fail to pay child maintenance when obligated); or
- by applying to court for a charging order (a further court order that can charge the debt owed for child maintenance against a person's property or home).

If all other enforcement methods have failed, the CSA or CMS can apply to court for the person to be disqualified from driving or sent to prison.<sup>71</sup>

In the **USA**, child maintenance regulations and enforcement vary between different state authorities. Parents who fail to pay child support can be imprisoned. Other penalties for non-payment used by several states include suspending various licences (such as driving licences, business licences and contractor licences) where the parent owes significant amounts. The Office of Child Support Enforcement partners with federal, state and local governments to promote parental responsibility and ensure that children receive support from both parents. A Passport Denial Program is also in force, allowing the Department of State to deny parents a US passport if they have child support debts exceeding \$2,500 (N\$24 743.75).<sup>72</sup>

The following are examples of enforcement mechanisms used in the US state of Massachusetts. The State Department of Revenue (DOR) is authorised by federal and state law to collect maintenance arrears without going to court. The DOR may use one or more of the following methods to collect arrears:

- increasing the amount withheld from a paycheque by 25%;
- securing the debt against real estate or other property;
- seizing financial assets;
- suspending business, trade, professional or driver's license or motor vehicle registration;
- referring the case to the US Department of State for denial of a passport;

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<sup>69</sup> As discussed on the Department of Human Service's website, child support payments can be agreed privately or arranged through the Department of Human Services (DHS). The parent in question can choose to make weekly, fortnightly, or monthly payments to the DHS, which will then pay the receiving parent directly. See DHS website: <[www.humanservices.gov.au/customer/services/child-support/child-support-payment](http://www.humanservices.gov.au/customer/services/child-support/child-support-payment)>, accessed 24 September 2013.

<sup>70</sup> Australian Government Department of Human Services, "Overdue Child Support Payments", undated, <[www.humanservices.gov.au/customer/enablers/child-support/child-support-payment/overdue-child-support-payments](http://www.humanservices.gov.au/customer/enablers/child-support/child-support-payment/overdue-child-support-payments)>, accessed 28 May 2013.

<sup>71</sup> "Arranging child maintenance through the Child Support Agency or Child Maintenance Service", <[www.gov.uk/child-maintenance/nonpayment-what-happens](http://www.gov.uk/child-maintenance/nonpayment-what-happens)>, accessed 29 May 2013.

<sup>72</sup> See <[www.acf.hhs.gov/programs/css](http://www.acf.hhs.gov/programs/css)>, accessed 24 September 2013.

- seizing a car, vacation home, boat, lottery winnings, funds from bank accounts and any business or personal property; or
- intercepting state and federal tax refunds, insurance claims, Worker's Compensation or Unemployment Compensation payments.<sup>73</sup>

In extreme cases, the Office of the Inspector General may intervene in child support cases, under the authority of the unambiguously named Deadbeat Parents Punishment Act of 1998. This applies to situations where:

- the parent in question has willfully failed to pay maintenance for more than one year and the state where the child lives is different from the state where the parent in question lives;
- the amount the parent in question owes is more than US\$5,000 and the state where the child lives is different from the state where the parent in question lives; or
- the parent in question travels to another state or country to avoid paying maintenance.

Punishment for a first offence for failure to pay child support is a fine, up to six months in prison, or both. In the case of a second or subsequent offence or a case when the obligation has been unpaid for longer than two years or is more than \$10,000 (N\$98975), the punishment increases to a fine of up to \$250,000 (N\$2474375), two years in prison, or both. Parents convicted of these offences must also pay restitution and/or settlements of the arrear maintenance owed.

“Project Save Our Children” is a multiagency law enforcement initiative that investigates and prosecutes the most egregious child support cases. Its members include investigative analysts from the Administration for Children and Families, Office of Child Support Enforcement, Special Agents from the Office of the Inspector-General, the US Marshals Service, US Attorneys’ Offices, and the Department of Justice, along with child support agencies across the United States. These entities identify, investigate, and prosecute parents who knowingly fail to comply with their maintenance obligations and meet the criteria for federal prosecution under the Deadbeat Parents Punishment Act.<sup>74</sup>

### Summary of mechanisms for the enforcement of maintenance orders

- Mechanisms for enforcing maintenance payments vary significantly between countries. Some countries have a national office to oversee the enforcement of payments, such as in Australia, while others place responsibility for enforcing payments on the bodies that grant the maintenance orders.
- Common methods to recover unpaid maintenance include automatically deducting child support payments from the salary of the parent in question, or deducting the money owed directly from that parent’s bank account or from other government benefits he or she receives. The UK, Australia, and Canada all use these methods.
- In the event of continued non-payment of maintenance, some authorities will also suspend the parent’s passport to prevent him or her from leaving the country, or suspend other licenses such as driving or business licenses. The province of Ontario in Canada and some states in the USA are examples of jurisdictions which use these methods.
- Defiance of a maintenance order can also involve the payment of a fine, and ultimately, imprisonment, as in Namibia and the USA.

<sup>73</sup> “Information for parents who pay child support”, <[www.mass.gov/dor/docs/cse/parents/pay.pdf](http://www.mass.gov/dor/docs/cse/parents/pay.pdf)>, accessed 29 May 2013.

<sup>74</sup> Office of Inspector General, “Child Support Enforcement”, <<http://oig.hhs.gov/fraud/child-support-enforcement/>>, accessed 29 May 2013.

## 16.4 Lessons for Namibia from international practice

### Maintenance during pregnancy

Namibia's provision on the duty of both parents to provide pregnancy- and birth-related expenses is similar to that found in many other countries across the world. However, **we note that some other countries conceptualise the provision of pregnancy-related expenses as maintenance for the mother during the pregnancy. This is a useful way to avoid the problematic question of whether child maintenance can be claimed before the birth of the child – and this approach could be considered by Namibia as a way of ensuring that contributions to pregnancy-related expenses can be sought during pregnancy.**

### Duty of support

To a great extent, the duty of support in Namibia is governed by case law. This can mean that members of the public and maintenance court personnel may not have a clear understanding of who has a duty of support. **We recommend that the duty of support for some common relationships be further clarified in legislation, as in a range of other countries, without limiting the common law rules on liability to maintain.**

For example, the Legal Assistance Centre published a report on stepchildren.<sup>75</sup> In this report, we recommend imposing a legal duty of maintenance upon stepparents who are married to the biological parent of the child, if such a stepparent treats the stepchild as “a child of the family”. We suggest that this duty should be secondary to that of the biological parents and apply only upon application to the court, after consideration of specific factors. In addition, we recommend imposing a reciprocal duty upon stepchildren to maintain elderly or ill stepparents in specified circumstances.<sup>76</sup>

The Legal Assistance Centre has also published a report on cohabitation.<sup>77</sup> In this report, we recommend that persons in a cohabitation relationship in the nature of marriage which has lasted for at least two years should have a mutual duty of support which would open up some limited possibilities for maintenance after the relationships breaks down (where one partner suffered economic disadvantage because of the relationship) and give cohabiting partners the possibility of claiming against third parties for loss of support in cases of accident or illness of one partner.<sup>78</sup>

In cases where such a relationship is terminated by the death of one partner, we recommend giving that partner a right to apply for maintenance from the deceased estate if the surviving partner was in fact financially dependent on the deceased – if equity cannot be achieved through a fair distribution of assets which takes into account the contributions of the cohabiting partner and the claims of other family members.<sup>79</sup>

Some countries recognise an extremely broad duty of support, for example in France where there is a possible duty of support between sons- and daughters-in-law vis-à-vis their fathers-in-law and

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<sup>75</sup> Gender Research and Advocacy Project, *Stepfamilies in Namibia: A Study of the Situation of Stepparents and Stepchildren and Recommendations for Law Reform*, Windhoek: Legal Assistance Centre, 2011.

<sup>76</sup> Id at 156.

<sup>77</sup> Gender Research and Advocacy Project, *A Family Affair: The Status of Cohabitation in Namibia and Recommendations for Law Reform*, Windhoek: Legal Assistance Centre, 2011.

<sup>78</sup> Id at 105.

<sup>79</sup> Id at 106.

mothers-in-law and vice-versa.<sup>80</sup> However, given the significant economic pressures on people in Namibia, we do not recommend that such extended maintenance duties be established in Namibia apart from the duties of support which already exist under common law or customary law.

**As an interim measure whilst reforms in respect of stepfamilies and cohabiting couples are under discussion, we recommend popularising the possibility of utilising the Maintenance Act as it now stands to enforce private contractual agreements on maintenance (as discussed on page 317).**

## **Administrative or hybrid systems for claiming maintenance**

The determination of whether a judicial, administrative or hybrid system is best for Namibia is perhaps less about the system and more about the level of resource provision. Some countries such as the United Kingdom and Australia have impressive administrative systems due to the level of information and support that is provided. Namibia could learn from these examples simply by providing greater resources to the current judicial system – and particularly if dedicated maintenance investigators were employed, trained and equipped with guidelines and investigative tools as in South Africa. As recommended in this study, it would also be beneficial if there were greater voluntary involvement from civil society, churches and church-based organisations in providing support for parties involved in maintenance complaints.

## **Advance maintenance schemes**

Many countries across the world allow parents to apply to the government to receive advance child support payments. Whilst the Legal Assistance Centre would like to recommend such an option for Namibia, given the numerous economic challenges faced by government and the many competing requirements for resources, we do not believe such a system would be feasible at present. However, this possibility should be noted for future consideration.

## **Additional enforcement options**

Some countries use extremely practical methods to enforce the payment of maintenance – such as suspending or revoking driving licences or business licenses. Such techniques seem likely to focus the minds of maintenance defaulters without the need to resort to imprisonment. **We recommend that the possibility of revoking driving licences, and liquor and other business licences, or cancelling eligibility for tender awards, be considered as additional enforcement techniques in Namibia – particularly for repeat offenders, and in cases where such a penalty would not unduly undermine the defaulter’s ability to pay.**

### **Summary of lessons from international practice**

- An examination of the approaches to maintenance in other countries suggests some areas where the Namibian law could usefully be clarified or amended:
  - to provide a clearer entitlement to contributions towards pregnancy-related expenses during the pregnancy;
  - to incorporate the common-law rule that the parental duty to maintain a child can extend past the age of majority if the child is for some reasons unable to become self-supporting;
  - to extend legal liability to maintain to a broader range of relationships, such as relationships between cohabitants, or between step-parents and step-children, even in the absence of a contractual agreement to maintain; and
  - to provide new penalties for non-payment of maintenance such as suspension of driving licences, liquor licences or other licences, or cancelling eligibility for tender awards - particularly in the case of repeat offenders.

<sup>80</sup> European Judicial Network, Maintenance Claims – France, 6 August 2007, <[http://ec.europa.eu/civiljustice/maintenance\\_claim/maintenance\\_claim\\_fra\\_en.htm](http://ec.europa.eu/civiljustice/maintenance_claim/maintenance_claim_fra_en.htm)>, accessed 29 May 2013.



## 16.5 Lessons from South Africa

Because Namibia's Maintenance Act 9 of 2003 is modelled closely on South Africa's Maintenance Act 99 of 1998, it is instructive to look at some of the innovations and approaches which have been introduced in South Africa but not applied in Namibia.

### The period at which maintenance ends

Maintenance in Namibia usually ends between the age of 18-21 although it can continue for longer if the child is indigent or has a disability. However many young adults aged 21 and over struggle financially and the LAC receives many requests from such persons, particularly from tertiary students, for assistance with accessing maintenance payments. However, whilst many young adults are undeniably struggling, many parents face similar if not greater financial burdens – and in terms of the current common law, a child over the age of majority would be likely to establish a parental duty to maintain only in circumstances of extreme necessity. As has already been discussed above, the overlap between Namibia's statutory provisions and the common law is somewhat confusing. Therefore, **we recommend that the Namibian Maintenance Act be amended to indicate more clearly, as in South Africa,<sup>81</sup> that maintenance can be claimed until a child is self-supporting, even if the child is over the age of 18 years or over the age of majority;<sup>82</sup> however, we recommend that standard orders (for example those not involving a child with a disability) should initially extend only up until age 18, or age 21 – thus requiring the complainant or the beneficiary to return to court if necessary to demonstrate that some unusual circumstances exist which would warrant an order for maintenance beyond that stage.** We also recommend that the law should make it clear that a child who is over the age of majority can utilise the Maintenance Act to enforce the common-law right to maintenance in cases of extreme indigency, even if no maintenance order was in place before the child reached the age of majority.

### Enforcing contractual agreements to maintain

The South African Maintenance Act can apparently be utilised to enforce a contractual duty of support between persons unrelated to each other by blood or marriage, such as cohabitees or stepparents and stepchildren.<sup>83</sup> The Namibian Maintenance Act has a provision on the application of the Act which is worded similarly to that in South Africa,<sup>84</sup> but the Namibian statute has not yet been interpreted or applied to contractual agreements, to the best of our knowledge. **We recommend that the Ministry of Justice send a circular to the maintenance courts on the possibility of using the Maintenance Act to enforce private contractual agreements for maintenance between persons**

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<sup>81</sup> The South African Maintenance Act 99 of 1998 states, in section 15 on “Duty of parents to support their children”: “(1) Without derogating from the law relating to the liability of persons to support children who are unable to support themselves, a maintenance order for the maintenance of a child is directed at the enforcement of the common law duty of the child's parents to support that child, as the duty in question exists at the time of the issue of the maintenance order and is expected to continue.” (emphasis added). The Namibian Maintenance Act 9 of 2003 similarly states in section 3: “(1) Subject to section 26 and to the law relating the duty of a parent to maintain a child who is unable to support himself or herself, both parents of a child are liable to maintain that child...” (emphasis added). There is no definition of the terms “child” or “children” in either country's law, meaning that the term “children” could encompass adult offspring. However, in Namibia, the Act makes reference to the termination of maintenance orders at age 18 or age 21 (in section 26(1)-(2)), thus creating some confusion as to the basis for extending a maintenance order past these points. The South African Act contains no corresponding references to termination of orders for child maintenance at specific ages.

<sup>82</sup> “Maintenance FAQ”, undated, <[www.justice.gov.za/vg/mnt-faq.html](http://www.justice.gov.za/vg/mnt-faq.html)>, accessed 6 June 2013.

<sup>83</sup> South African Maintenance Act 99 of 1998, section 2: “(1) The provisions of this Act shall apply in respect of the legal duty of any person to maintain any other person, irrespective of the nature of the relationship between those persons giving rise to that duty. (2) This Act shall not be interpreted so as to derogate from the law relating to the liability of persons to maintain other persons.”; DSP Cronje and J Heaton, *South African Family Law*, Durban: Butterworths, 1999 at 72: “... the application of the new Act clearly extends even to a contractual duty of support between persons who are not related to each other by blood or marriage (such as cohabitants)”.

<sup>84</sup> Namibian Maintenance Act 9 of 2003, section 2: “This Act – (a) applies where a person has a legal duty to maintain another person, regardless of the nature of the relationship which creates the duty to maintain; and (b) must not be interpreted so as to derogate from the law relating to the duty of persons to maintain other persons.”

who have no other legal liability to maintain each other. This option should also be explained to the public by means of a simple factsheet or pamphlet.

## Lump-sum payments

Another innovation in South Africa is that the law there allows for payment of maintenance by means of a once-off lump sum.<sup>85</sup> There is nothing in the Namibian statute which would prohibit this, and we identified two examples of it in our study. However, this may not be clear to all role-players since once-off payments are not explicitly authorised.<sup>86</sup> **We recommend that the Ministry of Justice send a circular to the maintenance courts on the possibility of providing for maintenance by means of a once-off lump sum payment. This option should also be explained to the public by means of a simple factsheet or pamphlet.** One concern with this option is that the money might be rapidly spent, leaving the child without sufficient support in future years. The courts should allow lump-sum payments only in special circumstances – for example if there is a history of non-payment but the defendant has money available and the court is satisfied that the complainant will be able to administer the money in the best interests of the beneficiary until the beneficiary is self-sufficient.

## Maintenance investigators

In South Africa, unlike in Namibia, significant numbers of maintenance investigators have been appointed – although their numbers are still insufficient to meet the needs of the maintenance courts.<sup>87</sup> The South African government reported that the first maintenance investigators were appointed in 2003, with 150 being in place by 2005.<sup>88</sup> Nonetheless, the following achievements have been attributed to the increased use of maintenance investigators:

- *reducing the turnaround time of the maintenance case backlog in general*
- *reducing or eliminating backlogs of untraced defaulters, particularly those who had eluded tracing for years*
- *moving large amounts of money into the hands of beneficiaries*
- *uncovering dishonesty or fraud by defaulters who tried to escape their obligations that way*
- *tracing beneficiaries who would otherwise not have received the payments due to them*
- *exposing dishonesty or fraud on the side of complainants.*<sup>89</sup>

It has also been reported that “*the greatest successes resulting from the appointment of maintenance investigators were that they gained better access to communities and to information than had been achieved without them, thereby greatly improving the enforcement of maintenance orders.*”<sup>90</sup>

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<sup>85</sup> Section 1 of the South African Maintenance Act 99 of 1998, defines “*maintenance order*” as “*any order for the payment, including the periodical payment, of sums of money towards the maintenance of any person ...*”. See Madelene de Jong, “Ten-year Anniversary of the Maintenance Act 99 of 1998 – A time to reflect on improvements, shortcomings and the way forward”, 126 (3) *South African Law Journal* 590 (2009) at 594.

<sup>86</sup> Section 1 of the Namibian Maintenance Act 9 of 2003 defines “*maintenance order*” with reference to the sections of the Act on consent orders, default orders and orders made after a hearing. Section 17(2)(b) of the Act, on orders made after a hearing, states that such an order “*must specify the period or periods and the time or times within which contributions must be made*” (emphasis added), thus arguably authorising a once-off payment; there is no indication that a maintenance order is limited to an order for periodical payments. This would also appear to be possible in respect of a consent order made pursuant to section 18 (which places no limits on what the complainant and defendant can agree to), or a default order made in terms of section 19 (which can include any order that could be made under section 17).

<sup>87</sup> Madelene de Jong, “Ten-year Anniversary of the Maintenance Act 99 of 1998 – A time to reflect on improvements, shortcomings and the way forward”, 126 (3) *South African Law Journal* 590 (2009) at 601 (statistics on courts which lack maintenance officers) and 605 (information on sharing of investigators across courts).

<sup>88</sup> Paul Mthimunya, “Improved Access to the Maintenance System” in South African Department of Justice and Constitutional Development, *Justice Today*, Vol 1, December 2005 at 21.

<sup>89</sup> Madelene de Jong, “Ten-year Anniversary of the Maintenance Act 99 of 1998 – A time to reflect on improvements, shortcomings and the way forward”, 126 (3) *South African Law Journal* 590 (2009) at 607-608.

<sup>90</sup> Id at 601.

One of the most helpful steps to improve the operation of the maintenance courts in Namibia will be the progressive appointment of maintenance investigators, as the law requires.<sup>91</sup>

*"These maintenance investigators have played a pivotal role in dealing with backlogs in the maintenance courts identified as hotspot areas for maintenance. The majority of outstanding cases for investigation in maintenance have been successfully dealt with. There is already a remarkable success in a number of centres with the tracing of maintenance defaulters.*

*There is an estimated 65% improvement in the last 8 months in the reduction of the cycle time of the hearing of maintenance cases in those courts [in] which Maintenance Investigators, Maintenance Officers and Clerks have been appointed. There are cases that have been dragging on for many years due to the unavailability of maintenance investigators where sheriffs could not assist due to their limited role which is restricted to serving of court processes.*

*The estimated cycle times have been reduced from six (6) months to three (3) months in cases where there were major backlogs, and from four (4) to two (2) months in courts where there [was] maximum administrative support of maintenance officers, maintenance clerks and dedicated magistrates and maintenance prosecutors ..."*

Paul Mthimunye, "Improved Access to the Maintenance System" in South African Department of Justice and Constitutional Development, *Justice Today*, Vol 1, December 2005 at 21-22.

## Electronic database on assets and finances

South Africa has also established an electronic database, known as the "Transunion ITC Information Support Service", which can assist maintenance investigators to do their jobs. This database includes information on property ownership and value, credit profiles, company directorships, vehicle ownership, individuals' financial status and particulars of individuals on file at the Ministry of Home Affairs.<sup>92</sup> Such a database on assets may not immediately be within the capacity of Namibia, but it could be a goal for the future.

*"The Transunion ITC Information Support Service provides an extra tool towards the effective and efficient tracing of maintenance defaulters."*

Paul Mthimunye, "Improved Access to the Maintenance System" in South African Department of Justice and Constitutional Development, *Justice Today*, Vol 1, December 2005 at 22.

## Maintenance officers

Research in South Africa found a direct correlation between maintenance officers who have legal qualifications and use of the full range of enforcement mechanisms provided by the law. The researchers recommended that all courts should be equipped with maintenance officers who are legally qualified and have received further specialised training in relevant procedures, and that these officials should be dedicated maintenance officers and not prosecutors who are doubling as maintenance officers.<sup>93</sup> Although maintenance officers in Namibia are legally qualified, they often have numerous other duties in addition to their responsibilities as maintenance officers and so are often stretched beyond capacity.

<sup>91</sup> Maintenance Act 9 of 2003, section 8(4).

<sup>92</sup> Madelene de Jong, "Ten-year Anniversary of the Maintenance Act 99 of 1998 – A time to reflect on improvements, shortcomings and the way forward", 126 (3) *South African Law Journal* 590 (2009) at 596.

<sup>93</sup> Id at 611-612.

Despite the progress made in increasing the number and qualifications of maintenance court officials in South Africa, ten years after the law was passed the shortage of dedicated maintenance court officials was still identified as the biggest obstacle to the recovery of maintenance.<sup>94</sup>

*“The crux of the matter is that it has been established that a well-trained and specialized corps of maintenance court officials is most definitely a prerequisite for the establishment of a fair and equitable maintenance system in South Africa.”*

Madelene de Jong, “Ten-year Anniversary of the Maintenance Act 99 of 1998 – A time to reflect on improvements, shortcomings and the way forward”, 126 (3) *South African Law Journal* 590 (2009) at 596

## Better training of maintenance court personnel

The South African Maintenance Act requires that the National Director of Public Prosecutions must, in consultation with the Minister of Justice –

*“issue policy directions with a view to –*

- (i) establishing uniform norms and standards to be observed by public prosecutors in the performance of their functions as maintenance officers under this Act;*
- (ii) building a more dedicated and experienced pool of trained and specialised maintenance officers.”<sup>95</sup>*

Many court officials interviewed for this study requested more training and support to help them better implement the Act.

*“In order to fulfil their task adequately, maintenance officers need to be given basic social training so that they can understand the stresses of family life, the costs of raising a family, gender-sensitivity issues, and accounting issues. The new Act therefore stipulates that policy directions be introduced to determine the functions of maintenance officers, to establish uniform norms and standards for maintenance officers, and to build a more experienced pool of trained and specialised maintenance officers.”*

Waheeda Amien and Mohamed Paleker, “Women and the Law” at 33 (footnotes omitted), <[www.engender.org.za/publications/Women&TheLaw.pdf](http://www.engender.org.za/publications/Women&TheLaw.pdf)>, accessed 16 September 2013

## Improved payment systems

In South Africa, court processing of maintenance payments, along with bail payments and fines, has been made more efficient by the introducing of a Justice Deposits Account System which is an electronic tool for tracking payments made to and through the courts. Maintenance payments can be transferred from the court to the bank accounts of complainants by means of electronic transfers, and maintenance complainants without bank accounts are encouraged to open accounts through an initiative for “banking the unbanked”. Commercial banks have assisted by making staff with application forms available at various courts, and by placing ATMs in locations where they were most needed to serve maintenance complainants.<sup>96</sup> This use of such an electronic system, and improved cooperation with commercial banks, could be models for Namibia for the future.

<sup>94</sup> Id at 602.

<sup>95</sup> South African Maintenance Act 99 of 1998, section 4(1)(b).

<sup>96</sup> Madelene de Jong, “Ten-year Anniversary of the Maintenance Act 99 of 1998 – A time to reflect on improvements, shortcomings and the way forward”, 126 (3) *South African Law Journal* 590 (2009) at 598.

## Enforcement and awareness campaigns

In 2005, the South African government launched a campaign called “Operation Isondlo” which was intended to address a number of weaknesses of the maintenance system through capacity-building of maintenance officials; stricter enforcement of maintenance orders by focusing on civil servant defaulters and by using police roadblocks to catch defaulters with long-outstanding arrest warrants; and a multi-media public awareness campaign on the right to maintenance and the procedures for claiming it. Maintenance court officials believe that this initiative has resulted in a better public understanding of the law and increased use of the maintenance court by women, as well as increased public confidence in the system.<sup>97</sup> Here again, this South African success could be a useful model for a commitment by the Namibian government to improve public understanding of maintenance and to enhance the operation of the Namibian maintenance courts.

### Summary of lessons from South Africa

- Because Namibia’s Maintenance Act 9 of 2003 is modelled closely on South Africa’s Maintenance Act 99 of 1998, some innovations and approaches which have been introduced in South Africa could be usefully applied in Namibia.
  - Commentary on the South African Maintenance Act reports that it can be utilised to enforce a contractual duty of support between persons unrelated to each other by blood or marriage, such as agreements between cohabitantes or agreements between stepparents regarding the maintenance of stepchildren. Since Namibia’s law uses the same language as South Africa’s in the relevant provision, this would appear to be possible in Namibia as well. This option appears to be generally unknown and should be popularised.
  - The South African Act also allows for payment of maintenance by means of a once-off lump sum. Nothing in the Namibian law appears to prevent this, but the possibility could be clarified for use in appropriate cases.
- In South Africa, unlike Namibia, significant numbers of maintenance investigators have been appointed. A number of improvements in the system have been attributed to this increase in human resources, suggesting that progressive appointment of maintenance investigators in Namibia could similarly be of enormous benefit.
- South Africa has established an electronic database with information on individual financial status and assets which can assist maintenance investigators. A similar database might be considered as a long-term goal in Namibia.
- The South African Maintenance Act requires that the National Director of Public Prosecutions in consultation with the Minister of Justice to issue policy directions on the implementation of the Act. Such guidelines could be useful in Namibia, as many court officials interviewed for this study requested support for improved implementation.
- In South Africa, maintenance payments received by the court can be transferred electronically to complainants’ bank accounts, reducing court administration and increasing convenience for complainants. The courts use an electronic tool for tracking payments to monitor this process. If the direct payments already authorised by Namibian law do not become more well-utilised, this could be an option for Namibia for the future.
- In South African, government commitment to the maintenance system was signalled by “Operation Isondlo”, an initiative which incorporated capacity-building of maintenance officials, a public awareness-raising campaign, and stricter enforcement of maintenance orders by focusing on civil servant defaulters and by using police roadblocks to catch defaulters with long-outstanding arrest warrants – which led to better public utilisation of the law and increased public confidence in the system. An initiative of this nature could be useful in Namibia.

<sup>97</sup> Id at 596-598, 601-602.





Will you disappear when your  
baby is born?

Be a man. Be responsible!

Child Maintenance Campaign coordinated by:



Legal Assistance Centre in consultation with Doufi Namalambo and Nepeti Nicanor  
Pictures courtesy of Marcus Weiss

Funded by the United States Government and the Austrian North-South Institute for Development Cooperation

One of the posters produced for the Child Maintenance Campaign coordinated by the Legal Assistance Centre in 1998-1999.



# Chapter 17

## RECOMMENDATIONS

This chapter summarises the recommendations that have been made in this report. Further information on why the recommendations have been made can be found in the relevant chapters.

The recommendations have been grouped under the following categories:

- Improving implementation of the law
- Promotion of partnerships
- Public information and awareness-raising
- Providing trained volunteers to assist with maintenance cases
- Amendments to the Maintenance Act and regulations
- International enforcement
- Further research

### Improving implementation of the law

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*The Maintenance Act already contains a number of provisions and procedures that would facilitate better management of maintenance complaints, but many of the innovations introduced by this law are unfortunately not being adequately utilised. We recommend that the Ministry of Justice provide additional information and training to maintenance court officials on the implementation of the Act, with specific attention to certain topics identified in the research as particular problem areas. Supervisory personnel should also be tasked to spot-check files to improve implementation. We also suggest some measures pertaining to cooperation between maintenance courts, identification of best practices and improved communication with parties to maintenance cases.*

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### Additional resources

- **Budget to hire maintenance investigators:** We recommend that the Ministry of Justice review its budget allocations to assess whether the operation of the maintenance courts is receiving sufficient funding. One of the most helpful steps to improve the operation of the maintenance courts in Namibia will be the progressive appointment of maintenance investigators, as the law requires.
- **Extra personnel at busy times:** This study identified the fact that the maintenance courts receive a higher number of complaints at the start of the year compared to other months. We recommend that magistrates' courts allocate increased staff to the maintenance court at the start of the year to assist with the increase in the caseload at this time. We combine this recommendation with a suggestion that the public be encouraged to apply for maintenance early enough to allow sufficient time for investigation and resolution before pressing costs such as childcare and education-related costs must be paid.

## Information and training for maintenance court officials

- **Key topics for improved information and training:** The study suggests information circulars and/or training on a number of aspects of the Maintenance Act which do not seem to be well-understood or well-utilised. Information on these topics could also be compiled into a **procedural manual for maintenance court officials**, or used as the basis for curriculum for a **specialised training course**. Information and training appear to be needed particularly on the following topics:
  - the right of minor children to claim maintenance on their own;
  - the possibility of using the Maintenance Act to enforce private contractual agreements for maintenance between persons who have no other legal liability to maintain each other (such as agreements between cohabitees, or agreements between step-parents for the maintenance of step-children);
  - guidelines on the procedure for opening, investigating and maintaining maintenance files, including procedures for comparing information on income and expenditure and investigating the defendant's financial position;
  - the appropriate use of directives versus summonses to call witnesses to give information at an investigation or an enquiry;
  - the procedure to follow when a default order should be made, including information on the process a defendant can use to challenge such an order;
  - appropriate duration of a maintenance order for a child with a chronic illness or disability;
  - the different payment arrangements permitted under the Act and the various records which can serve as acceptable proof of payment;
  - the permissible possibility of ordering the provision of maintenance by means of a once-off lump sum payment;
  - the mechanisms of payment an employer can use to fulfil an order for the attachment of wages;
  - the importance of keeping photographs of the defendant or copies of the defendant's identification documents on file as an aid to future enforcement;
  - the use of Form J for minor changes to an order which can be made by a maintenance officer without the involvement of the magistrate;
  - the process and mechanisms for the enforcement of maintenance orders, particularly the use of civil enforcement mechanisms, and the importance of reviewing cases where breaches occur to ensure that the best possible payment arrangement is in place;
  - the procedure to follow when a complainant seeks to withdraw a maintenance complaint;
  - the differences between the procedure for granting maintenance as part of a protection order under the Combating of Domestic Violence Act and the procedure for granting maintenance under the Maintenance Act;
  - the procedure for addressing the misuse of maintenance money, including the importance of documenting complaints, investigations and outcomes; and
  - the procedure for the recovery of arrears in criminal cases.

## Utilising more efficient payment options

- **Encouraging increased use of direct payments:** Maintenance court officials should inform complainants of the different payment options which are possible, and assure them that breaches can be addressed regardless of the payment option chosen. More use of direct payments between the defendant and complainant, particularly through electronic bank transfers (including cellphone banking), could reduce administration on the part of the court and save time and costs for complainants and defendants by eliminating monthly trips to the court to make and collect payments.

## Improving communication between maintenance court and parties

- **Preventing large amounts of arrears:** Maintenance officers should inform complainants at the time the order is granted that arrears can be reported as soon as a single payment has been outstanding for 10 days, to prevent arrear amounts from piling up. Defendants should also be fully informed about the implications of not paying maintenance, including the various enforcement possibilities which may be utilised in the event of non-payment.



- **Promoting the use of procedures for substitution or discharge:** The Ministry of Justice should develop a simple factsheet or pamphlet (which could be produced in multiple languages) explaining the process for applying for the increase, decrease or discharge of a maintenance order. Court officials could give this information to both parties to a maintenance complaint during the initial application process, so that they are informed from the start. To ensure that the defendant receives this information, the pamphlet could be enclosed with the original summons. Improved dissemination of this information could prevent the defendant from falling into arrears as a result of lack of means by encouraging substitution proceedings where there are genuine changed circumstances.

## Improved investigations

- **Full utilisation of existing powers of investigation:** As recommended in the 1995 maintenance study, maintenance officers need to be encouraged to use their powers of investigation more assertively to help locate defendants or to obtain accurate information about the defendants' income and means, utilising their ability to summon witnesses to court for this purpose if necessary. However, this recommendation is likely to be effective only if maintenance investigators are appointed to support maintenance officers.

## Cooperation between different maintenance courts

- **Dealing with parties residing in different jurisdictions:** Maintenance courts should develop a protocol for procedures to facilitate payments and enforcement in cases where the defendant and complaint live in different magisterial jurisdictions.
- **Efficient transfer of files:** The Ministry of Justice should review the steps taken by clerks when transferring files to identify problems with the transfer of files (for example to minimise delays and to ensure that steps are not missed – eg if the file in question contains an order for the attachment of wages, the employer must be notified that the court which must receive the payment has changed).

## Identifying best practices

- **Sharing for success:** Problems and solutions on the implementation of the Maintenance Act should be discussed at conferences convened by the Magistrates Commission and at meetings of court officials from different courts. For example, such forums could be used to discuss best practice on the use of directives versus summonses, on how to prevent delays in service of process and on the application of civil enforcement mechanisms.

## Promotion of partnerships

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*We recommend the Ministry of Justice develop closer partnerships with other government and non-government stakeholders on specific implementation issues.*

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- **Specific areas for improved cooperation:** Closer partnerships between the Ministry of Justice and the following stakeholders could improve implementation of the law:
  - **Ministry of Gender Equality and Child Welfare**, so that social workers may be more involved in maintenance enquiries and in addressing any concerns that emerge in such enquiries about children at risk of neglect or abuse;
  - **Ministry of Home Affairs and Immigration**, to assist clients who apply for maintenance in respect of children who lack birth registration documents and to supply public information materials on birth registration to the courts;
  - **Ministry of Safety and Security**, to involve police personnel in discussing how best to expedite arrests in respect of warrants issued by the maintenance court;

- **banks and other financial service providers**, to encourage them to leave public information materials at magistrates' courts to encourage complainants and defendants to open bank accounts in order to take advantage of electronic transfers of maintenance payments or attachments of wages; and
- **traditional leaders**, to encourage them to assist in negotiating maintenance agreements and referring families to maintenance courts where appropriate, with priority given to traditional leaders in the Kavango Region, where utilisation of traditional courts for maintenance seems particularly common (the research was conducted before the division of the Kavango Region into the two regions of Kavango East and Kavango West).

## Public information and awareness-raising

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*We recommend that the Ministry of Justice take the lead in ensuring that information is disseminated to the public on particular issues, with the involvement in some cases of other relevant government stakeholders and NGOs.*

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### Information for the general public

- **Information about the basic principles of maintenance and the Maintenance Act:** There is a need for more information on maintenance aimed at the general public. Such information could be disseminated by the Ministry of Justice, or by NGOs working in partnership with the Ministry, by means of radio and television, news articles or advertisements, and pamphlets or posters placed at popular public places and at maintenance courts. The topics which seem to be in particular need of popularisation include the following:
  - the importance of child maintenance, including the following concepts:
    - maintenance as part of the responsibility of every parent;
    - maintenance as a child-centred concept, encouraging mothers to apply for maintenance where the child's needs are not being satisfied;
    - children with disabilities may need maintenance for their entire life;
    - how the failure to pay maintenance can affect a child;
  - the possibility of applying for pregnancy- and birth-related expenses, which is currently under-utilised;
  - the possibility of seeking the provision of maintenance by means of a once-off lump sum payment (which might be particularly appropriate where a defendant receives a lump sum such as a pension payment, a retrenchment package, a workers' compensation payment or a payment from the Motor Vehicle Accident Fund) but only in cases where the court is satisfied that the complainant will be able to administer the money in the best interests of the beneficiary until the child is self-sufficient;
  - how to apply for substitution, suspension or discharge of a maintenance order;
  - the right to report a failure to pay maintenance 10 days after a single payment is missed, and the possibility of utilising civil enforcement mechanisms;
  - the possibility of using the Maintenance Act to enforce private contractual agreements for maintenance between persons who have no other legal liability to maintain each other (such as agreements between cohabitees, or agreements between step-parents for the maintenance of step-children).

### Information for targeted audiences

- **Children:** The Ministry of Justice and NGOs working with children should disseminate information to children on how they can apply for maintenance for themselves.



- **Extended family members caring for children:** The **Ministry of Justice** and the **Ministry of Gender Equality and Child Welfare** should target this audience to ensure that extended family members are aware that they can use the Maintenance Act to apply for maintenance from one or both parents rather than applying for state grants, since the primary duty to maintain a child lies with the child's parents.
- **Pensioners and recipients of disability grants:** The **Ministry of Labour and Social Welfare** should produce a simple factsheet or poster aimed at pensioners and recipients of disability grants about the duty of children to provide maintenance to their parents in certain circumstances.
- **Employers:** The **Ministry of Justice** and **employers' organisations** should disseminate materials to employers to inform them of their obligations in terms of the Maintenance Act, such as an employer's duty to comply with an order for the attachment of wages and the different mechanisms an employer can use to comply with an order for the attachment of wages.
- **Communities who often utilise the law:** Based on analysis of the apparent language groups of people who often use the maintenance courts, we recommend that educational materials are produced in Oshiwambo and Damara/Nama to support complainants who most commonly make maintenance complaints.
- **Communities under-utilising the law:** Based on the analysis of the apparent language groups of people who under-utilise the maintenance courts, we also recommend that materials should be produced in Rukwangali to ensure that people from this language group are aware of how to apply for maintenance.
- **Rural communities:** We recommend that the **Ministry of Justice** and **other stakeholders** hold information sessions on the law in rural areas, to discuss specific obstacles to utilisation of the law by rural communities and to involve traditional leaders in popularising the law. Priority should be given to traditional leaders in the Kavango Region, where utilisation of traditional courts for maintenance seems particularly common.

## Providing trained volunteers to assist with maintenance cases

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*Experience from South Africa and other countries shows that when parties to maintenance complaints are assisted by trained volunteers, they are more likely to positively resolve their application in the form appropriate for their situation. This assistance is particularly important given the resource limitations at the maintenance courts. We recommend that NGOs consider applying to donors for funding for programmes whereby trained volunteers are placed at the maintenance courts. The Ministry of Justice should be a partner in these programmes with a view to possibly integrating the programme into government services, or employing the volunteers as maintenance investigators in the long term.*

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

# Amendments to Maintenance Act and regulations

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

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## General principles

- **Best interests of the child:** Include a provision to recognise the best interests of a child as the paramount consideration when considering maintenance orders for child beneficiaries.
  - **Duty of maintenance officer:** A separate provision should be included to assign the maintenance officer a particular duty to place information about the child's interests before the court.
  - **Legal representation for child if necessary:** Give the court discretion to order the parents to fund independent legal representation for the child (with the costs divided appropriately between them), or to order state-funded representation in cases where the child's interests are not being well-represented in the case and no private legal representation for the child is feasible.
- **Child participation:** Include a provision to recognise the role of child participation where appropriate in maintenance hearings – keeping in mind that child participation in this context will not always be in the child's best interests.
- **Religious marriages:** Amend the Act to place marriages concluded in accordance with generally-recognised religions on the same footing as civil and customary marriages for purposes of enforcing a mutual duty of support between spouses.
- **Clarify common-law duty of support:** Amend the Act to clarify the duty of support for some common relationships, such as between grandparents and grandchildren or between siblings, without limiting the common law rules on liability to maintain.
- **Claims for reimbursement of contributions to past maintenance:** Currently the Act does not clearly allow retrospective claims for maintenance, although it is possible under the common law to claim reimbursement in respect of past maintenance where one person paid more than his or her fair share of a joint liability to maintain. We recommend the Act is amended to clearly provide that a maintenance order may include an amount to reimburse the complainant for excess contributions towards a child's maintenance from the date of the child's birth.

## Maintenance for persons with disabilities

- **Contents of costs of care for persons with disabilities:** Amend the Act to provide greater clarity on costs included under the heading of “other care” for a person with a disability. The Act currently states that court should take into account the costs of medical and other care incurred by the beneficiary as a result of the disability. To give guidance to the courts on the meaning of this term, we suggest that the Act be clarified to indicate that such “other care” can include medical care and equipment, medication or services incurred by the beneficiary as a result of the disability, in addition to other items.

## Pregnancy and birth-related expenses

- **Claiming contributions to pregnancy-related expenses during pregnancy:** Currently it is not clear whether pregnancy-related expenses can be claimed before the birth of the child. As a result,

some courts allow such claims whilst others do not. The Act should be amended to make it clear that contributions to pregnancy-related expenses may be claimed before the child is born, and to provide for a procedure for refunds should paternity be disproved at a later stage. We note that some other countries conceptualise the provision of pregnancy-related expenses as maintenance for the mother during the pregnancy. This is a useful way to avoid the problematic question of whether child maintenance can be claimed before the birth of the child, and this approach could be considered by Namibia as a way of ensuring that contributions to pregnancy-related expenses can be sought during pregnancy. Allowing such claims during pregnancy could improve the health of mother and baby, by ensuring that there is money for expenses such as antenatal check-ups and vitamins.

## Duration of duty to support

- **Maintenance for major children:** Amend the Act to state clearly, as in South Africa, that maintenance can be claimed until a child is ‘self-supporting’, even if the child is over the age of 18 years or over the age of majority – since this is already the position at common law, although the legal duty to maintain for adult children generally comes into play only in cases of extreme indigence. We recommend that maintenance orders in standard cases (for example, not involving a child with a disability or a chronic illness) should initially extend only up until age 18 or age 21 – thus requiring the complainant or the beneficiary to return to court if necessary to demonstrate that some unusual circumstances exist which would warrant an order for maintenance beyond that stage.
- **Termination of duty to maintain a parent:** Amend the Act to state that a maintenance order for the support of a parent also comes to an end if the parent dies (currently this is not clear even though the Act states that a maintenance order for a child comes to an end if the child dies).

## Maintenance investigations and enquiries

- **Directives versus summonses during investigations:** The distinctions between directives and summonses need to be re-examined with a corresponding review and clarifications of the forms and procedures, to ensure that these two methods of obtaining information during investigations are correctly and effectively utilised.
- **Rules on witness expenses:** The Act currently allows for the defendant to claim expenses to attend court for an enquiry but not when summoned to an investigation before the enquiry. There is no such distinction for the complainant. Given this unusual disparity, the rules on the payment of witness expenses in connection with summonses should be re-examined.
- **Clarity on privacy or maintenance enquiries:** The Act contains conflicting provisions about whether a maintenance enquiry must be held in a closed or open court; the provisions on privacy should be clarified.
- **Procedure for submission of written evidence:** Currently when a party wishes to submit written evidence to the court, the person submitting the evidence must give advance notice to the other parties. This procedure should be abandoned in favour of a more practical alternative. Where a party would like to submit written evidence at a maintenance enquiry, the presiding officer should enquire as to whether the opposing party has any objections – and specifically whether that party would like a postponement in order to have the court summon the person making the written statement to give their information in person and be cross-examined.

## Harmonising laws on maintenance, custody and parentage

- **Allow for consideration of maintenance together with custody challenges:** Align the Maintenance Act with the Children’s Status Act (and forthcoming Child Care and Protection Act) to allow maintenance and custody proceedings to operate in unison when required. For example, it should

be possible to convert a maintenance case to a custody hearing should the situation require this, with the possibility of ordering temporary maintenance in the meantime whilst the question of a possible change in custody is pending.

- **Proof of parentage proceedings:** The Act should be amended to incorporate the proof of parentage proceedings contained in the Children's Status Act, while retaining the flexible approach to orders for costs of scientific testing contained in the current Maintenance Act. It would make sense to have a single approach to proof of parentage in all magistrates' court proceedings where this issue arises.

## Challenges to default orders

- **Procedure for notice to complainant of challenge to default order:** A defendant who wants to challenge a default order has the responsibility to give notice of this challenge to the complainant. We believe this is unwise given that most parties do not have legal representation and that maintenance disputes can be flashpoints that lead to incidents of domestic violence. We recommend that this procedure be adapted so as not to encourage personal contact between the complainant and the defendant in this context.

## Appeals

- **Enforcement while appeal is pending:** The Act should clarify that civil enforcement of a maintenance order is possible while an appeal is pending, unless the maintenance order is suspended while the appeal is underway because it challenges the finding that the defendant is legally liable to maintain the beneficiary.

## Changes to maintenance orders

- **Automatic increases or decreases:** Most complainants do not return to court for an increase in maintenance ordered even though the cost of living increases each year – often at a faster rate than salary increases. Amend the Act to allow the maintenance court to order automatic increases or decreases in maintenance orders on the basis of rises and falls in the consumer price index.
- **Temporary reductions during visits to non-custodian parent:** It might be useful to provide for a simple procedure whereby the complainant and the defendant may agree on a temporary reduction of maintenance during periods where the beneficiary visits the defendant for a period longer than one month. Such agreements could be placed on file with the court. However, this should not be allowed in cases where the maintenance payments are being satisfied by an attachment order (such as attachment of wages) because of the administrative burden which would accrue to third parties by such a temporary reduction. It must also be remembered that some expenses – such as rent and school-related expenses – would not be affected during such periods and the provision of maintenance should still cover these costs as the underlying order envisages.

## Enforcement measures – civil enforcement

- **Allow attachment of wages before there is a breach:** Amend the Act to allow the court to attach the wages of the defendant at the time of making an initial order rather than only when a breach has occurred, even in the absence of the defendant's consent to this measure, as a means of ensuring compliance.
- **Notice to complainant of opposition to civil enforcement measures:** The regulations should prescribe procedures for notice to the complainant in the case of a challenge to a warrant of execution, attachment of wages or attachment of debts.

- **Civil enforcement while appeal is pending:** Clarify that civil enforcement of a maintenance order is possible while an appeal is pending, unless the maintenance order is suspended while the appeal is underway because the appeal is challenging the finding that the defendant is legally liable to maintain the beneficiary.
- **Civil enforcement involving pension pay-outs:** There is a need to harmonise the Maintenance Act and the Pensions Funds Act on attachment of, or execution against, pension payments.

## Enforcement measures – criminal enforcement

- **Burden of proof of lack of means:** In situations where failure to pay maintenance results in a criminal trial, we suggest an amendment to the Act to clarify who bears the onus of proving lack of means – where the defendant raises this defence, he/she should bear the burden of proving lack of means, with the prosecution then having the possibility of overcoming this defence by proving that the lack of means was due to unwillingness to work or misconduct.
- **Stay of criminal proceedings upon payment of arrears:** Amend the Act to allow the court to stay the criminal proceedings where the defendant and the complainant enter into a consent order for the payment of arrears which is made into an order of court (in addition to the maintenance order which was breached). The criminal prosecution could then easily proceed if payment of arrears was not forthcoming as agreed. This would be similar to the stay of a criminal prosecution in respect of a young offender conditional on participation in a diversion programme, and it could help to resolve the breach in payment of maintenance without leaving the defendant with a criminal record.
- **Order to pay arrears upon criminal conviction:** At present, an order for payment of arrears may accompany a criminal conviction only on application by a public prosecutor. We suggest amending the Act so that such an order can also be made on the court's own motion.
- **Additional sanctions:** The possibility of revoking driving licences, and liquor and other business licences, or cancelling eligibility for tender awards, should be considered as additional enforcement techniques in Namibia – particularly for repeat offenders, and in cases where such a penalty would not undermine the defaulter's ability to pay.

## Maintenance orders by other courts, including maintenance in divorces

- **Jurisdiction over other maintenance orders:** Amend the Act to include a more straightforward statement of the maintenance court's jurisdiction to enforce, vary, suspend or set aside orders for maintenance made by any court, including the High Court. For example, the Maintenance Act should make it clear that the enforcement and variation measures provided by the Act are available in respect of –
  - provisions on maintenance in divorce orders made by the High Court, alongside any existing High Court procedures that apply to such orders;
  - interim orders for maintenance issued by the High Court while a divorce is pending; and
  - orders for temporary maintenance in protection orders made in terms of the Combating of Domestic Violence Act, including explicit provision for the possibility that a person with such a temporary maintenance order will approach the maintenance court for enforcement of a temporary order or a longer-term maintenance order.

## Maintenance in traditional courts

- The possibility of empowering traditional courts to deal with maintenance questions in terms of the Maintenance Act should be considered, provided that their decisions are ratified by a magistrate's court. This was recommended in the 1995 maintenance study, and continues to be a possibility deserving investigation.



## Other technical issues

- **Timelines:** Amend the Act to include specific timelines allowable for postponements (unless special circumstances exist). It would also be advisable to amend the timeline for a warrant of execution, which when served currently requires the debtor to raise the sum of money requested within 30 minutes.
- **Change of address by complainant:** Require the complainant to notify the court of *any* change of address. It currently seems to contemplate notification by the complainant only in cases of a move from one court's jurisdiction to another. However, a complainant may not be aware of jurisdictional boundaries. Furthermore, the court should have the complainant's current contact details on file in case there is an application by the defendant for a change to the order.

## Revisions to forms

- **Improved collection of information on financial position:** Simplify the method for collecting information on income, assets and expenditure of both the complainant and the defendant.
- **Contributions in kind and payments to third parties (such as school hostels and medical aid schemes):** Form A, which is used for applications for maintenance, mixes these contributions which are covered by separate provisions of the Act. As a result, complainants may not be aware of what kinds of contributions they may request aside from periodic cash contributions towards monthly maintenance. Form A should separate the different categories of possible "*other contributions*" and explain more clearly what can be requested.
- **New case management form:** We also recommend that a new form is introduced to assist maintenance court personnel to monitor the management of cases. This recommendation is based on the example of the Eehana court where the maintenance officer informed researchers that he plans to introduce a register of withdrawn files. He had also drafted a form to be filled in for each file withdrawn, which specifies all actions taken by the maintenance officer or the maintenance clerk with regard to the case. A form of this nature would be of great assistance in tracking changes and enforcement measures in individual cases, and could facilitate monitoring by control magistrates and other supervisory personnel.
- **Simplified form for applications by children:** The law allows child beneficiaries to apply for maintenance for themselves, and this does occasionally happen in practice. We suggest providing a simplified application form for children to use in such cases. An alternative solution could be to produce a simple pamphlet for children on how to apply for maintenance for themselves, and to ensure that clerks of court and maintenance officers prioritise assistance to child complainants.

## International enforcement

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*We recommend the Ministry of Justice arrange for Namibia to take steps to improve the management of maintenance complaints that involve parties living in different countries through the signing of both international agreements and agreements with individual countries.*

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- **International conventions on maintenance:** We recommend that Namibia become a party to the relevant international conventions on maintenance, in order to secure the widest possible mechanisms for recovery of maintenance across national borders:
  - Hague Convention on the International Recovery of Child Support;
  - 1956 UN Convention on the Recovery Abroad of Maintenance;

- 1958 UN Convention Concerning the Recognition and Enforcement of Decisions Relating to Maintenance Obligations Towards Children;
  - 1973 Convention on the Law Applicable to Maintenance Obligations; and
  - 1973 Convention on Recognition and Enforcement of Decisions Relating to Maintenance Obligations.
- **Reciprocal agreement with a wider range of countries:** Under the Reciprocal Enforcement of Maintenance Orders Act 3 of 1995, Namibia can also make agreements for the enforcement of maintenance with individual countries. Namibia could make agreements with countries where requests for the enforcement of maintenance across borders are most commonly made. This would be a useful interim measure whilst the processes for signing the above international conventions are put in place, or to provide a means of enforcement in respect of a country which is not party to any of the multilateral agreements.

## Further research

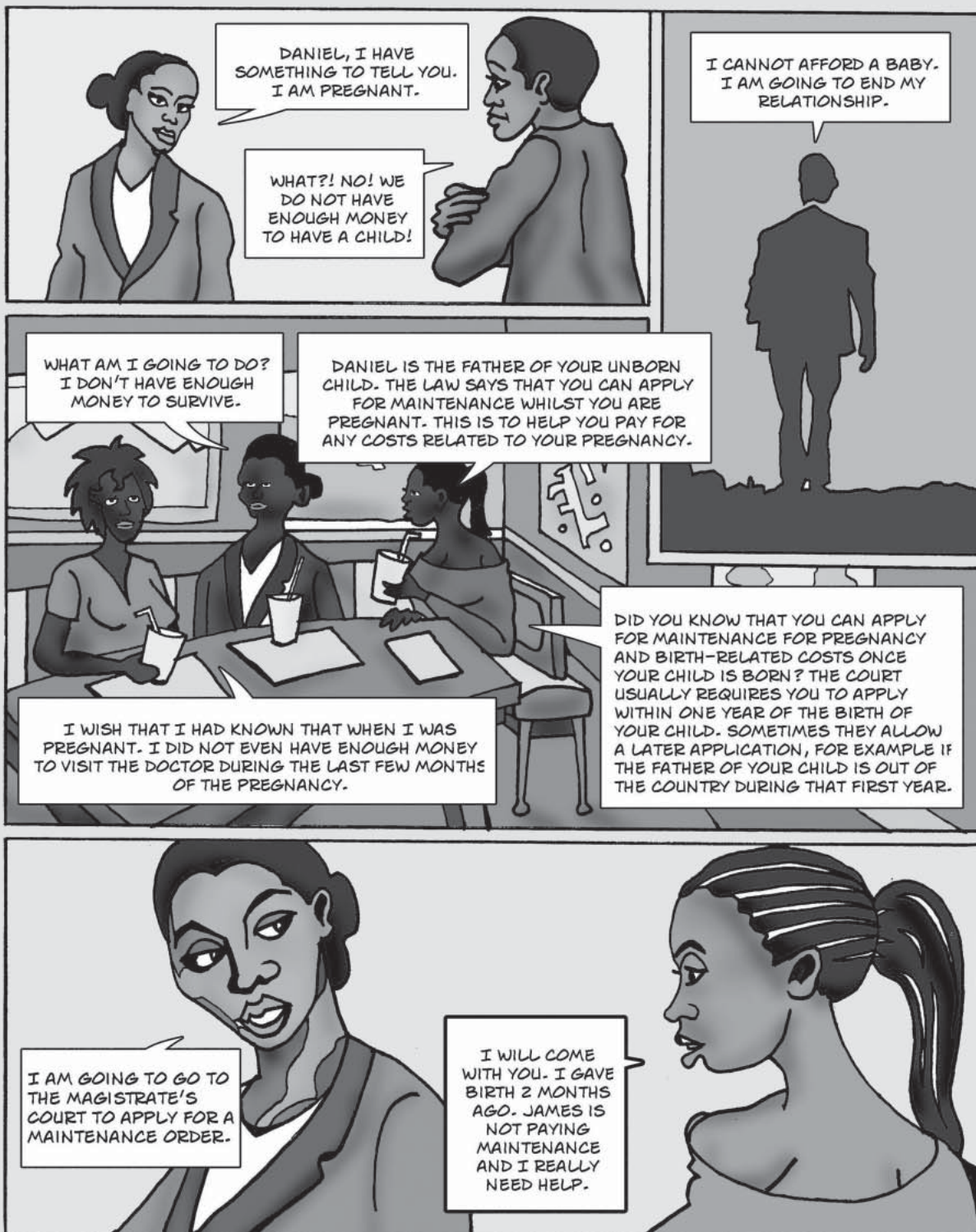
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*We suggest that the Ministry of Justice or the Ministry of Gender Equality and Child Welfare consider commissioning further research on specific topics arising from findings of the current study. These topics could have implications for the uptake of state maintenance grants provided by the Ministry of Gender Equality and Child Welfare.*

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- **Maintenance in cases where children live with extended family members:** Data from a number of reports shows that children often live with extended family or caregivers and in many situations one or both parents are still living. This study identified only a small number of maintenance complaints made by members of the extended family. Therefore we recommend that qualitative research is conducted on how children living separately from their parents are supported.
- **Maintenance in Kavango Region:** This study also identified a particularly low number of maintenance complaints in Kavango Region. We recommend that qualitative research is conducted in Kavango East and Kavango West Regions to assess what child support mechanisms are utilised in these communities, and what barriers may exist to utilisation of the general maintenance system.

# HOW TO CLAIM MAINTENANCE DURING PREGNANCY



Gender Research & Advocacy Project, Legal Assistance Centre. Windhoek Namibia 2010



Development Cooperation  
Ministry of Foreign Affairs



One of the one-page comics produced by the Legal Assistance Centre for publication in newspapers.

# Appendix



**Appendix A (page 336)**  
**OUTLINE OF MAINTENANCE**  
**FOCUS GROUP DISCUSSIONS**

**Appendix B (page 341)**  
**QUESTIONNAIRE FOR CLERKS OF COURT**

**Appendix C (page 344)**  
**QUESTIONNAIRE FOR MAINTENANCE OFFICERS**

**Appendix D (page 348)**  
**QUESTIONNAIRE FOR MAGISTRATES**

**Appendix E (page 351)**  
**MAINTENANCE ACT 9 OF 2003**

**Appendix F (page 382)**  
**MAINTENANCE ACT 9 OF 2003 REGULATIONS**



# Appendix A

## OUTLINE OF MAINTENANCE FOCUS GROUP DISCUSSIONS

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### Agenda

Time	Activity
8.00-8.20	Welcome, introduction and fishbowl questions
8.20-8.40	Agree/disagree energizer
8.40-9.00	Brainstorming about maintenance
9.00-10.00	Open-ended discussion
10.00-11.00	Role-plays
11.00-11.15	Break
11.15-11.45	Listing of problems and discussion of solutions
11.45-12.00	Presentation about maintenance
12.00-12.15	Answering of fishbowl questions
13.00	Lunch

### Introduction

#### Introduction of research

The LAC is doing a nationwide study of how the maintenance courts are working, whether people generally understand the maintenance laws and whether the courts are easily accessible to most people. We are just hoping to find out what are some of the problems with the maintenance law so that we can make recommendation to amend the law. Please give us your honest opinions about the problems you've seen and hopefully we can make a better system.

#### Introduction of the participants

*Ask each participant to tell the group her name, where she's from, and one thing about herself, e.g. "My name is Maria, I'm from Windhoek, and I like to sing."*

### Fishbowl questions (part 1)

This activity has three purposes: Firstly, it is an energising activity which will allow the participants to get to know each other and feel more comfortable. Secondly, it is a tool to find out what parts of the maintenance law and court process the participants are confused about. Thirdly, part 2 of this activity will help to educate participants about the law on maintenance.

*Ask the participants pair up into groups of two or three and ask each group to think of three questions about the maintenance law or application process for a maintenance order. Ask the participants to write the questions on scraps of paper and then put all questions into a bowl.*



*Tell the participants that at the end of the day the group will come back to the bowl. Hopefully by then the participants will be able to answer the questions.*

## Energiser: Do you agree or disagree?

*Put up two signs in the room: Agree and Disagree. Read the questions below and ask the participants to walk to each sign depending on their opinion. This exercise is designed to get a basic idea of the general understandings, misunderstandings and opinions about the maintenance law and the court process.*

- A father's duty of maintenance towards his children ends when he leaves the mother of the children.
- Mothers and fathers share financial responsibility for their children regardless of who the children live with.
- Most fathers default on maintenance payments.
- The maintenance system is unfair because it expects fathers to pay maintenance even if they are unemployed.
- The maintenance officer can choose whether or not to investigate the mother's claim.
- A step-father has a duty of maintenance towards his wife's children.
- Many women abuse maintenance payments by using the money for things for themselves.
- If a man misses a maintenance payment, the woman goes running quickly to the maintenance courts so she can get him in trouble.
- Asking for maintenance is a form of begging.
- A woman can request maintenance for herself from her boyfriend.

## Brainstorming

*Write the following headings on the board and ask the participants to brainstorm ideas under each one. Do not try to prompt the participants; the ideas should come entirely from them. Write up every suggestion that is thrown out; underline or circle the suggestions that seem to have wide consensus.*

- WHAT IS MAINTENANCE?
- WHO CAN RECEIVE MAINTENANCE?
- HOW DO YOU GET MAINTENANCE?  
*Under this heading, split the board into another two topics:*
  - CUSTOMARY WAYS OF GETTING MAINTENANCE
  - APPLICATIONS FOR MAINTENANCE THROUGH THE COURT
- HOW CAN YOU PAY MAINTENANCE?  
*(Looking for knowledge about payment in kind, etc.)*

## Open-ended discussion

*Read the story below to the participants. Ask the questions in bold, but only ask the non-bolded questions if the participants need a prompt for their discussion. The point of this exercise is not to suggest the problems, but to find out what the participants know or don't know about the maintenance process, and what they immediately identify as problems.*

Grace and Lucas have one child together. Lucas has not been paying maintenance. Yesterday, Grace went to the maintenance court to file an application.

1. **What happens next?**
  - a) Who does Grace meet with?
  - b) What questions do they ask Grace?
2. **What expenses should Grace ask for?**
  - a) If her child is a newborn? *Do they know you that she can be asked for pregnancy and birth-related expenses?*
  - b) If her child is 17 years old? *Do they know that she might be able to ask for university expenses?*
  - c) If her child is disabled?
3. **What is the relationship between Grace and Lucas?**
  - a) Boyfriend/girlfriend? Husband/wife?
  - b) Ex-boyfriend/ ex-girlfriend? Ex-husband/ex-wife?
  - c) Bitter? Friendly?
4. **Why hasn't Lucas paid maintenance?**
  - a) They are not his children?
  - b) He is worried Grace will misuse payments?
  - c) He does not have any money?
  - d) He takes care of the children in other ways?
  - e) Grace has a new boyfriend who should provide for her and her child?
5. **If Lucas and Grace are married, does she ask for maintenance for herself?**
6. **Grace's child is six years old. She has never been to the maintenance court before even though Lucas has never paid maintenance.**
  - a) Why didn't she go before?
  - b) Why does she go now?
7. **Did Grace first try to get maintenance in other ways? If so, how?**
  - a) Did she approach him outside of court?
  - b) Did she go to a traditional leader?
  - c) Did she go through family members?
8. **What are some problems that Lucas encounters when he goes to the maintenance courts?**
  - a) Unfriendly clerks / maintenance officers?
  - b) Maintenance officers do not understand his financial situation?
  - c) Complicated process?
  - d) Biased maintenance officers / magistrates?
9. **If Lucas is confused by the process, what does he do?**
  - a) Gets help from the maintenance officer / clerk?
  - b) Brings a lawyer with him?
10. **What happens if Lucas denies paternity?**
  - a) Who will pay for a paternity test?
11. **After the maintenance officer has spoken with Grace, what will the officer do?**
12. **What happens if the maintenance officer can't find Lucas?**
13. **Do Lucas and Grace come to an agreement, or do they bring their case before the judge?**
  - a) What happens if Lucas tries to delay the proceedings by not showing up for court?
14. **Does Grace get a maintenance order?**
  - a) If not, why not? What does she do? Do they know that she can appeal?
  - b) If so, does she get everything she asked for?
  - c) Is the agreement fair to Lucas?

15. **Does Lucas pay the maintenance order? If not, why not?**
  - a) He doesn't want to pay?
  - b) He doesn't think the order is fair?
  - c) He doesn't have the funds?
16. **If Lucas thinks the maintenance order is unfair, what does he do? Does he know he can appeal?**
17. **If Lucas doesn't make maintenance payments in terms of the maintenance order, what does Grace do?**
  - a) Goes back to the court?
    - i) Ask for an attachment of wages, pensions, etc?
    - ii) Ask for a criminal charge to be made?
  - b) Will Grace be able to force him to pay in the end?
18. **Does Grace misuse the money?**
  - a) If so, what does Lucas do?
19. **If Grace gets a maintenance order, how long does it last?**
20. **If Lucas loses his job and decides that he can no longer afford to pay maintenance, what can he do?**

## Role-plays

*Ask the participants to pair up into groups of two or three. Give each group a role and a prompt to follow. Allow participants 10 minutes to prepare their role-plays. Ask them to prepare 3-5 minutes of content. After the performances, ask the group what they thought of the issues presented in the role-plays.*

**Group 1 (2 people):** Lucas tells his friend John that he has been called to court for a maintenance hearing. John thinks that Lucas shouldn't have to pay maintenance and tries to convince Lucas not to go to court.

**Group 2 (2 people):** Lucas tells his friend John that he has been called to court for a maintenance hearing. John thinks that Lucas should pay maintenance and tries to convince Lucas to go to court.

**Which scenario is more realistic? In which scenario is Lucas more likely to go to court?**

**Group 3 (2 people):** Lucas thinks the maintenance order is for too much money. His friend John tries to convince him not to pay.

**Group 4 (2 people):** Lucas thinks the maintenance order is for too much money. He meets with the maintenance officer who discusses Lucas's options.

**Which scenario is more realistic?**

**Group 5 (3 people):** Grace and Lucas are in a negotiation with maintenance officer about how much maintenance Lucas should pay. The maintenance officer has not carried out his responsibilities well and supports Grace's claim, even though she is asking for too much.

**Group 6 (3 people):** Grace and Lucas are in a negotiation with maintenance officer about how much maintenance Lucas should pay. The maintenance officer has not carried out his responsibilities well and supports Lucas's side, even though Grace is asking for the proper amount.

**Is either scenario realistic?**

**Group 7 (2 people):** Grace meets with the maintenance officer. The maintenance officer asks her why she is applying for maintenance. Grace explains why Lucas should pay her maintenance.

**Group 8 (2 people):** Lucas meets with the maintenance officer and Grace. The maintenance officer tells Lucas that Grace is applying for maintenance. Lucas tries to explain why he should not have to pay maintenance.

**After these two meetings, what should the maintenance officer's next step be?**

## Debriefing

*Using a flipchart ask the participants to compile a list of the top ten problems associated with claiming maintenance. Then, on a new sheet of paper, ask the participants to propose solutions for each of the problems.*

## Presentation on the maintenance law

*Present the participants with a short explanation of the principles of the law, what maintenance is, who can apply for maintenance, how the maintenance application process works, etc*

## Fishbowl questions (part 2) / closure

*Read out the questions in the bowl that the participants had compiled earlier. Ask the participants to try to answer the questions. If the participants don't know the answer (or are still answering incorrectly), provide the correct information. This activity should serve as a review of the day, and as an empowering exercise for the participants.*

Some of the questions asked during focus group discussions:

1. What is maintenance money used for?
2. When should I claim maintenance? Should I claim even if we are living together?
3. If one parent who is living in the house is not supporting the child, can the other parent get a court order for maintenance from that parent?
4. Grandmothers are being turned away by the court. The court says that the mother must request maintenance. Is this correct?
5. Can a woman claim for pregnancy expenses?
6. Why isn't maintenance equal?
7. What if the defendant is unemployed? Can the mother still make a maintenance complaint?
8. What can you do if you want a paternity test but you cannot afford the cost of the test?
9. What can I do in the case where I do not have the full information about the contact details of the father?
10. What can a woman do about delaying tactics by father such as not attending court, requesting a paternity test, etc?
11. What happens if the father does not attend court when he has been summoned?
12. What if there is a default order but the defendant still refuses to pay?
13. Is it fair to pay for maintenance for your child but as a father you are denied custody of your child?

# Appendix B

## QUESTIONNAIRE FOR CLERKS OF COURT

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1. How long have you been a Clerk of the Court?
2. How long have you been based in X court?
3. What are the qualifications required to become a Clerk of Court?
4. Have you received any training regarding the new Maintenance Act?
  - a) Was this training helpful?
  - b) Regardless of whether or not you have had training, do you feel that your understanding of the Maintenance Act is adequate for your work?
  - c) Do you think that, in general, magistrates, clerks of the courts, maintenance officers or lawyers have a good understanding of the process?
  - d) Do you think that the general public has a good understanding of the process?
5. What are your duties and responsibilities in respect of maintenance?
6. Do you think that failure to support dependents is a problem in your community?
  - a) If so do you think the maintenance system is adequate for dealing with this problem? *Probe for details.*
7. What are the most common reasons that drive people to seek maintenance orders?
8. Approximately how many applications for maintenance have you handled in the last year?
9. Are the current forms easy to work with? *If not, probe for specific areas which need improvement.*
  - a) *If the clerk has worked before 2003.* How do the new forms compare to the old ones (are they easier/harder to work with?)
    - i) What are, if any, the major issues with the new forms?
    - ii) Have the new forms changed the system?
    - iii) Is the new system more efficient than the old?
  - b) Are you a Commissioner of Oaths? If not, who commissions the forms?
10. Are there any fees for making an application for a maintenance order?
11. When a person comes to the court seeking a maintenance order, what is the first thing that happens?
  - a) When does the complainant fill out an application?
12. What happens if the complainant comes to the court seeking a maintenance order, but she doesn't know where to find the defendant?
  - a) Is a file opened?
  - b) Is an application filled out?



13. **Does the court have a register somewhere that lists the names of all of the maintenance files?**
  - a) If so, how does a case advance from the register to have its own file?
  - b) Is it possible for a case to be on the register, but not have its own file? Why would this happen?
14. **Is there a record of all the cases that were withdrawn?**
  - a) What does the paperwork look like for a case that had been withdrawn before an inquiry? (Is there an application present? etc)
15. **What is the most common relationship involved in maintenance applications that you handle?** (*eg, mothers requesting maintenance for their children*)
  - a) Have you had any cases involving male complainants?
  - b) Have you had any cases involving children as complainants?
  - c) Have you handled any cases with the elderly or the disabled as beneficiaries?
  - d) Have you had any cases where maintenance is being requested from grandparents, siblings or other blood relatives (as opposed to a parent)?
  - e) Have you had any cases where maintenance is being requested by grandparents, siblings or other blood relatives (as opposed to a parent)?
16. **If children are the beneficiaries, how old are they usually when the application for the maintenance order is made?**
  - a) Have you had any cases where women request contributions to pregnancy and childbirth expenses?
17. **What problems have you encountered with maintenance order applications (*probe for details here*)?**
18. **What are the most common questions that you are asked?**
19. **Do the complainants require much help when filling in the forms?**
  - a) What is usually the most confusing part?
  - b) Are you able to help them effectively?
  - c) Is it time consuming for you to assist complainants with the forms?
  - d) Who else assists (or could assist) complainants with the forms?
20. **Do you ever assist defendants by answering questions about the process or helping them to fill in forms?**
  - a) Do you assist defendants who want to oppose default orders?
  - b) Who else assists (or could assist) defendants with the process?
21. **Who usually serves summonses in maintenance cases? Is this effective? (*If not, probe for possible improvements.*)**
22. **Do complainants often make a complaint and then withdraw it or abandon it before it goes to the maintenance officer?**
  - a) If so, why do you think this happens?
  - b) Have you ever encountered a complainant who is being pressured or threatened to withdraw her maintenance application?
    - i) If so, who is pressuring her? How is she being pressured?
    - ii) What happens to the person who pressured her?
23. **Do you assist defendants or complainants who want to appeal maintenance orders? If so, how?**
  - a) Do you think that the parties understand the procedure for appealing the orders?
24. **Do complainants often try to substitute or withdraw a maintenance order? Defendants?**
  - a) Is the paperwork for requesting a substitution confusing?
  - b) Do you assist with this process? If so, how?

- 25. Are the forms and other information about the case kept completely confidential?**  
a) Have you heard of any problems with this?
- 26. Do you experience any problems when maintenance files are transferred from one court to another?** (*probe for details.*)  
a) Is the paperwork for transferring a file difficult?
- 27. Have you experienced any situations where people try to misuse or abuse the maintenance order procedure?** (*Probe for details.*)
- 28. Only ask in a court with a high volume of cases where there is a dedicated maintenance officer apart from the prosecutor. What is the usual role of the prosecutor in maintenance cases?**
- 29. Do the maintenance officers communicate much with you or the magistrate/prosecutor about specific cases?**  
a) Is it common for the magistrate to order or suggest further attempts at reaching an agreement between the parties?  
b) Do you feel in general that different maintenance court staff communicate to each other well?
- 30. Have you ever had a complaint that someone is abusing maintenance payments instead of using them for the beneficiary?**  
a) What is your role if someone comes to the court with such a complaint?
- 31. Do you think that the law on maintenance needs to be improved in any way?** (*Probe for details.*)
- 32. How do you think the implementation of the law could be improved?** (*Probe for details.*)
- 33. Has there been any movement to computerise the maintenance files?** (*Probe for whether this would be perceived as being useful or a burden.*)
- 34. What is the one thing you would like to change about the system?**
- 35. Do you have any other comments about maintenance?**

# Appendix C

## QUESTIONNAIRE FOR MAINTENANCE OFFICERS

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1. How long have you been a maintenance officer?
2. How long have you been based in X court?
3. What are the qualifications required to become a maintenance officer?
4. Have you received any training regarding the new Maintenance Act? *If so, please describe the training. Probe to see if the LAC training video has been viewed.*
  - a) Was this training helpful?
  - b) Regardless of whether or not you have had training, do you feel that your understanding of the Maintenance Act is adequate for your work?
  - c) Do you think that, in general, magistrates, maintenance officers and lawyers have a good understanding of the process?
  - d) Do you think that the general public has a good understanding of the process?
5. What are your main duties and responsibilities as a maintenance officer?
6. Do you think that failure to support dependents is a problem in your community?
7. What are the most common reasons that drive people to seek maintenance orders?
8. Approximately how many applications for maintenance orders have you handled in the last year?
  - a) How many of these cases would you estimated have resulted in maintenance orders?
9. When a person comes to the court seeking a maintenance order, what is the first thing that happens?
  - a) When does the complainant fill out an application?
10. What happens if the complainant comes to the court seeking a maintenance order, but she doesn't know where to find the DF?
  - a) Is a file opened?
  - b) Is an application filled out?
11. Does the court have a register somewhere that lists the names of all of the maintenance files?
  - a) If so, how does a case advance from the register to have its own file?
  - b) Is it possible for a case to be on the register, but not have its own file? Why would this happen?
12. Is there are a record of all the cases that were withdrawn?
  - a) What does the paperwork look like for a case that had been withdrawn before an inquiry? (Is there an application present? etc)

13. **Do you find the forms clear or difficult to work with?**
  - a) *If the maintenance officer has worked before 2003.* How do the new forms compare to the old ones (are they easier/harder to work with?)
    - i) What are, if any, the major issues with the new forms?
    - ii) Have the new forms changed the system?
    - iii) Is the new system more efficient than the old?
  - b) Are you a Commissioner of Oaths? If not, who commissions the forms?
14. **What is the most common relationship involved in maintenance applications that you handle?** *(eg, mothers requesting maintenance for their children)*
  - a) Have you had any cases involving male complainants?
  - b) Have you had any cases involving children as complainants?
  - c) Have you handled any cases with the elderly or the disabled as beneficiaries?
  - d) Have you had any cases where maintenance is being requested from grandparents, siblings or other blood relatives (as opposed to a parent)?
  - e) Have you had any cases where maintenance is being requested by grandparents, siblings or other blood relatives (as opposed to a parent)?
15. **Have you handled many maintenance orders against people who live outside of Namibia?**
  - a) Are you able to enforce maintenance orders against people outside the country?
16. **If children are the beneficiaries, how old are they usually when the application for the maintenance order is made?**
  - a) Have you had any cases where women request contributions to pregnancy and childbirth expenses? If so, are such requests usually successful? *Probe for details.*
17. **Are there any fees for making an application for a maintenance order?**
18. **What problems have you encountered with maintenance order applications** *(probe for details here)?*
19. **What are the most common questions that you receive from complainants?**
20. **What are the most common questions that you receive from defendants?**
21. **Is the relationship between the complainant and the defendant usually hostile?**
22. **What percentage of complainants and defendants come to an agreement about maintenance instead of going before a magistrate for an enquiry?**
  - a) What are some factors that get taken into account when the two parties are trying to come to an agreement on how much maintenance will be paid?
  - b) What is your role in the negotiation between a complainant and a defendant about maintenance?
23. **Have you had any situations where the complainant has made the process difficult?**
  - a) By lying about child-rearing expenses?
  - b) By not showing up on the scheduled date?
  - c) By failing to provide supporting documentation?
  - d) By lying about paternity?
24. **Do you think that the complainant usually starts off asking for too much money?**
  - a) Have you ever seen a maintenance order which awarded more money than the complainant initially asked for?
  - b) Have you ever seen a maintenance order which allows the defendant to pay in kind (with cattle, transportation, etc)?

- 25. What are the most common problems you have had with defendants?**
- Not providing truthful information?
  - Not showing up the scheduled date? If not, what do you do?
  - Failing to provide supporting documentation?
  - Demanding paternity tests as a dallying tactic?
  - If a defendant is uncooperative, what steps do you take:
    - if the defendant is lying about his assets/employment?
    - if the defendant tries to delay the proceedings?
    - if the defendant threatens the complainant?
- 26. What do you do if the defendant cannot be located?**
- 27. Who usually serves summonses in maintenance cases? Is this effective? (If not, probe for possible improvements)**
- 28. Do you experience any problems when maintenance files are transferred from one court to another? (probe for details).**
- Is the paperwork for transferring a file difficult?
- 29. Do you usually investigate the defendant's finances? The complainant's finances?**
- How do you investigate financial information?
  - What other types of investigation do you do?
  - Do you feel you have enough time to investigate thoroughly?
  - What is usually the hardest part of any investigation?
  - Would it be helpful to you if there were a maintenance investigator at your court? If so, what would the investigator do?
- 30. Do you experience any problems with paternity tests?**
- Are paternity tests often requested?
  - How much does a paternity test cost?
  - Who usually pays?
  - How long does it take to get the test results back?
- 31. Do complainants often make a complaint and then withdraw it or abandon it before there is a maintenance order?**
- If so, why do you think this happens?
  - Have you ever encountered a complainant who is being pressured or threatened to withdraw her maintenance application?
    - If so, who is pressuring her? How is she being pressured?
    - What happens to the person who pressured her?
- 32. When there is an enquiry, do you accompany the complainant or defendant into the court?**
- Do complainants or defendants often have lawyers to represent them?
  - How does it affect the case outcome if one party has a lawyer and the other does not?
- 33. Do maintenance order hearings take place in closed court?**
- If no, why not?
  - Who else might be present?
- 34. Do you think that magistrates handle maintenance enquiries effectively? Why or why not?**
- 35. Does the magistrate make default maintenance orders when the defendant does not show up for the enquiry?**
- What do you think of the system of default orders?
  - Do defendants usually oppose default orders?



- 36. Do defendants or complainants ever appeal final maintenance orders?**
- Do you think that the parties understand the procedure for appealing the orders?
  - What usually happens when parties appeal the orders?
- 37. Do defendants obey the maintenance orders in most cases?**
- What is the most common reason that defendants disobey the order?
  - Is the complainant usually the person that brings defendant's non-compliance to your attention?
  - If so, how long is usually after the defendant stops paying before the complainant makes a complaint to you?
  - What does the court do if a defendant disobeys the order? (*probe for details*)
    - Attachment of wages or property?
    - Criminal prosecution?
  - Is it difficult to enforce maintenance orders effectively?
  - What enforcement mechanism is most effective?
  - Does the complainant usually get the arrear maintenance in the end?
  - Is interest paid on arrears?
  - Do you think that defendants take a maintenance order more seriously if results from a court enquiry rather than a consent agreement?
  - Do you ever arrange to put a photograph or a copy of the defendant's ID in the file to facilitate enforcement?
  - Do you have any problems with employers when there is an order for attachment of wages?
- 38. Do complainants often request substitution or cancellation of a maintenance order?**
- What are the most common reasons for trying to change an award?
  - What are the most common outcomes? (*probe for details*)
- 39. Do defendants often request substitution or cancellation of a maintenance order?**
- What are the most common reasons for trying to change an award?
  - What are the most common outcomes? (*probe for details*)
- 40. How soon after the complainant approaches you is a maintenance order normally made or denied?**
- 41. Only ask in a court with a high volume of cases where there is a dedicated maintenance officer apart from the prosecutor. What is the usual role of the prosecutor in maintenance cases?**
- 42. Do the maintenance officers communicate much with the magistrate/prosecutor about specific cases?**
- Is it common for the magistrate to order or suggest further attempts at reaching an agreement between the parties?
  - Do you feel in general that different maintenance court staff communicate to each other well?
- 43. Have you experienced any situations where people try to misuse or abuse the maintenance order procedure? (*Probe for details.*)**
- 44. Have you ever had a complaint that someone is abusing maintenance payments instead of using them for the beneficiary? (*If so, how was this dealt with? Was there in fact abuse?*)**
- 45. Do you think that the law on maintenance needs to be improved in any way? (*Probe for details.*)**
- 46. How do you think the implementation of the law could be improved? (*Probe for details*)**
- 47. Has there been any movement to computerise the maintenance files? (*Probe for whether this would be perceived as being useful or a burden?*)**
- 48. What is the one thing you would like to change about the system?**
- 49. Do you have any other comments about maintenance?**

# Appendix D

## QUESTIONNAIRE FOR MAGISTRATES

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1. How long have you been a magistrate?
2. How long have you been based in X court?
3. Do you have a law degree?
4. Have you received any training regarding the new Maintenance Act? *If so, please describe the training. Probe to see if the LAC training video has been viewed.*
  - a) Was this training helpful?
  - b) Regardless of whether or not you have had training, do you feel that your understanding of the Maintenance Act is adequate for your work?
  - c) Do you think that, in general, magistrates, maintenance officers and lawyers have a good understanding of the process?
  - d) Do you think that the general public has a good understanding of the process?
5. Approximately how many maintenance enquiries have you heard in the last year?
6. How many of these cases would you estimate have resulted in maintenance orders?
7. What is the most common relationship involved in maintenance applications that you handle?  
*(eg, mothers requesting maintenance for their children)*
  - a) Have you had any cases involving male complainants?
  - b) Have you had any cases involving children as complainants?
  - c) Have you handled any cases with the elderly or the disabled as beneficiaries?
  - d) Have you had any cases where maintenance is being requested from grandparents, siblings or other blood relatives (as opposed to a parent)?
  - e) Have you had any cases where maintenance is being requested by grandparents, siblings or other blood relatives (as opposed to a parent)?
8. Have you handled many maintenance orders against people who live outside of Namibia?
  - a) Is it difficult to enforce maintenance orders against people outside the country?
  - b) Does Namibia need agreements for reciprocal enforcement of maintenance with more countries?  
*If so, any countries in particular?*
  - c) Do you experience any problems with the Reciprocal Enforcement of Maintenance Act?
9. Do lawyers usually represent the defendant in maintenance enquiries? the complainant?
  - a) How does it affect the case when one or both parties have legal representation?
  - b) Do you feel that the maintenance officers are effective in putting relevant information before the court?
10. Does it often happen that the defendant does not show up in court for the enquiry?
  - a) What do you usually do in such a case?
  - b) Do you often make use of default orders in these circumstances? Why or why not?
  - c) Do you experience any problems with default orders?

11. **Does it often happen that the complainant does not show up in court for the enquiry?**
  - a) What do you usually do in such a case?
  - b) What do you do if you suspect that there might be intimidation of the complainant?
12. **Have you ever encountered a complainant who is being pressured or threatened to withdraw her maintenance application?**
  - a) If so, who is pressuring her? How is she being pressured?
  - b) What happened to the person pressuring her?
13. **Are complainants and defendants usually cooperative in providing truthful and complete information?**
  - a) What are the most common problems you have had in this regard?
  - b) Do the maintenance officers carry out adequate investigations of the parties' financial positions?
  - c) If not, how could this be improved?
14. **Do maintenance enquiries take place in closed court?**
  - a) If no, why not?
  - b) Who else might be present?
15. **What factors do you find most relevant in making a decision on an application for maintenance?**  
(*open ended question, but then probe for details*).
  - a) Respective financial situation of the two parties?
  - b) Attitude of the two parties?
  - c) Special circumstances/age/other needs of the child?
  - d) Other financial obligations of the defendant?
16. **Do you think that the complainant normally starts off asking for too much money?**
  - a) Have you ever given an order for more maintenance order than the complainant initially asked for?
  - b) Have you ever given a maintenance order for the defendant to pay in kind (with cattle, transportation, etc)?
17. **Do complainants or defendants ever appeal maintenance orders after an enquiry?**
  - a) Do you think that the parties understand the procedure for appealing the orders?
  - b) What usually happens when parties do appeal the orders?
18. **Do you often handle enquiries where complainants or defendants try to substitute or cancel a maintenance order?**
  - a) Do such requests usually come from complainants or defendants?
  - b) What are the most common reasons for trying to change a maintenance order?
  - c) What are the most common outcomes? (*probe for details*)
19. **Have you heard any criminal cases for non-compliance with maintenance orders in the last year?**
  - a) Have you ever imposed jail time or a fine on a defendant who was in default?
    - (i) If so, what was the sentence?
    - (ii) Do you think the penalty was effective in getting the defendant to pay?
    - (iii) Do you ever make use of weekend imprisonment on community service in such cases?
  - b) Do complainants usually succeed in getting arrears if there is a default?
  - c) Do they get interest on the arrears?
  - d) Is it common for defendants to default on their maintenance payments?
20. **Have you been involved with any other forms of enforcement such as warrants of execution or attachment of wages? Probe for details; these usually happen without magistrate's involvement, but magistrate might have handled challenges to such proceedings.**
21. **Do you feel that most complainants have valid reasons for seeking maintenance orders?**

- 22. Have you experienced any situations where people try to misuse or abuse the maintenance system?**  
 a) Have you ever dealt with a case involving allegations that maintenance payments were being misused instead of being used for the beneficiary? *If so, probe for details and outcomes.*
- 23. What is the usual role of the prosecutor in maintenance cases?** *Only ask in a court with a high volume of cases where there is a dedicated maintenance officers apart from the prosecutor.*
- 24. Do the maintenance officers communicate much with you/the prosecutor about specific cases?**  
 a) Is it common for the you to order or suggest further attempts at reaching an agreement between the parties?  
 b) Do you feel in general that different maintenance court staff communicate to each other well?
- 25. What problems have you encountered with implementation of the new Maintenance Act?** *Probe for details here.*
- 26. (If the magistrate has been around since before 2003): Has the Maintenance Act of 2003 made any difference to the way your court handles maintenance cases?** *Probe for details.*  
 a) Are there the same, more or fewer maintenance cases coming to the court now?  
 b) In what ways has it made the handling maintenance cases harder or easier?  
 c) Has the new law affected the outcome of cases in any way?  
 d) Is there any trend towards the same, more or fewer cases being settled by consent as opposed to requiring an enquiry?  
 e) What is your opinion of the new forms? Are they easy or difficult to work with in enquiries?
- 27. Do you think that the law on maintenance orders needs to be improved in any way?** *Probe for details.*
- 28. What is the one think you would like to change about the system?**
- 29. Do you have any other comments about maintenance?**
- 30. How long are maintenance orders usually made for? The law says that a maintenance order can be extended up to the age of 21 if the complainant requests this. How does this work in practice- for example are all orders made until 18 and then adjusted if needed? Do many people come to apply for an extension of an order to age 21?**
- 31. Maintenance and access to children**  
 a) Does the same magistrate deal with cases under the Children's Status Act and the Maintenance Act?  
 b) Are these proceedings ever handled consecutively in the same court date for convenience?  
 c) Do the maintenance clerks assist parents involved in maintenance claims who have problems with securing access to the child in question?
- 32. Children applying for maintenance orders**  
 We would like to ask the court whether they make any special provisions to assist minors who apply for maintenance? If so we would like to find out more so that we can give children the correct information.
- 33. What to do if the parent is not working?**  
 What do you usually order in this instance?
- 34. What to do if the father denies responsibility?**  
 What do you usually order in this instance?

# Appendix E

## MAINTENANCE ACT 9 OF 2003

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### GOVERNMENT GAZETTE

#### OF THE

### REPUBLIC OF NAMIBIA

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N\$6.20

WINDHOEK - 18 August 2003

No.3043

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#### CONTENTS

*Page*

#### GOVERNMENT NOTICE

No. 184	Promulgation of Maintenance Act, 2003 (Act No. 9 of 2003), of the Parliament .....	1
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### Government Notice

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#### OFFICE OF THE PRIME MINISTER

No. 184

2003

#### PROMULGATION OF ACT OF PARLIAMENT

The following Act which has been passed by the Parliament and signed by the President in terms of the Namibian Constitution is hereby published in terms of Article 56 of that Constitution.

No. 9 of 2003: Maintenance Act, 2003.

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# ACT

**To provide for the payment of maintenance; to provide for the holding of maintenance enquiries and the enforcement of maintenance orders; to repeal the Maintenance Act, 1963; and to deal with incidental matters**

*(Signed by the President on 31 July 2003)*

## ARRANGEMENT OF SECTIONS

### PART I PRELIMINARY

1. Definitions

### PART II DUTY TO MAINTAIN

2. Legal duty to maintain
3. Parental duty to maintain children
4. Principles to be applied in respect of maintenance
5. Conditions precedent to granting of maintenance order

### PART III ADMINISTRATION OF ACT

6. Maintenance courts
7. Maintenance officers
8. Maintenance investigators

### PART IV MAINTENANCE COMPLAINTS AND ENQUIRIES

9. Maintenance complaints
10. Powers of officers when investigating maintenance matters
11. Examination of persons by maintenance officer
12. Attendance of witnesses at maintenance enquiries
13. Maintenance enquiry
14. Production of written statements as evidence
15. Evidence from previous maintenance proceedings

### PART V MAINTENANCE AND ANCILLARY ORDERS

16. Factors to be considered when making maintenance orders
17. Maintenance orders
18. Consent maintenance orders
19. Default maintenance orders
20. Order as to costs
21. Orders for scientific tests

### PART VI FURTHER PROVISIONS RELATING TO MAINTENANCE ORDERS

22. Variation or setting aside of certain orders

23. Effect of substitution or discharge of maintenance orders
24. Transfer of maintenance orders
25. Effect of maintenance order
26. Termination of maintenance order

## **PART VII ENFORCEMENT OF MAINTENANCE ORDERS**

27. Registration of maintenance orders
28. Maintenance order enforceable by civil action
29. Warrants of execution
30. Attachment of emoluments
31. Notice of attachment of emoluments
32. Attachment of debts
33. Recovery of arrear maintenance
34. Conversion of criminal proceedings into maintenance enquiry

## **PART VIII OFFENCES AND PENALTIES**

35. Offences relating to examinations by maintenance officer
36. Offences relating to witnesses
37. Offences relating to false information
38. Offences relating to maintenance enquiries
39. Offences relating to maintenance order
40. Offences relating to misuse of maintenance money
41. Offences relating to intimidation
42. Offences relating to information in respect of children
43. Offences relating to disclosure
44. Offences relating to notices
45. Offences relating to change of address

## **PART IX GENERAL AND SUPPLEMENTARY**

46. Record of proceedings to be kept
47. Appeals
48. Photographs of persons
49. Regulations
50. Repeals and savings
51. Transitional arrangements
52. Short title and commencement

**BE IT ENACTED** by the Parliament of the Republic of Namibia as follows:-

## **PART I PRELIMINARY**

### **Definitions**

1. this Act, unless the context indicates otherwise -

“beneficiary” means any person for whose benefit a maintenance order may, by law, be made or has been made;

“complainant” means -

- (a) a beneficiary;
- (b) a parent or other legal custodian or primary caretaker of a beneficiary; or
- (c) any other person who has an interest in the well-being of the beneficiary, including but not limited to a relative, social worker, health care provider, teacher, traditional leader, religious leader or an employer;

“custodian” means a parent or other person who has legal custody of a child;

“defendant” means any person against whom a maintenance order may, by law, be made or has been made;

“default maintenance order” means an order made under section 19;

“emoluments” includes any salary, wages, allowances, or any other form of remuneration or any other income which is paid periodically to any person, whether expressed in money or not;

“emoluments attachment notice” means a notice issued under section 31;

“financial institution” means any institution which carries on business as a bank or building society;

“maintenance court” means the maintenance court contemplated in section 6 or any other court which is authorised by law to grant maintenance orders;

“maintenance enquiry” means an enquiry conducted under section 13;

“maintenance investigator” means an investigator appointed under section 8;

“maintenance officer” means any person appointed under section 7(1) or deemed to have been appointed under section 7(3);

“maintenance order” means a maintenance order made under section 17, a consent order made under section 18 and a default maintenance order made under section 19, or a maintenance order made by a maintenance court under any other law and includes any sentence suspended on condition that the convicted person makes payments of sums of money towards the maintenance of any other person;

“medical expenses” means expenses incurred in respect of medical, dental, psychiatric and psychological services rendered to any person and includes any pharmaceutical services given on prescription by a person authorised by law to make those prescriptions and “medical services” has a corresponding meaning;

“messenger of the court” means a messenger of the magistrate’s court;

“Minister” means the Minister responsible for Justice;

“prescribed” means prescribed by regulation made under this Act;

“primary caretaker” means -

- (a) a person, other than a parent or other custodian of a child, whether or not related to the child, who; or
- (b) any institution which;

takes primary responsibility for the daily care of a child with or without the express or implied permission of the child's parent or other custodian;

“register” and its derivatives, means register in the prescribed register as contemplated in section 27;

“this Act” includes the regulations.

“witness” for the purposes of this Act means any person summoned or requested to give evidence at a maintenance enquiry and includes the complainant and defendant.

## **PART II DUTY TO MAINTAIN**

### **Legal duty to maintain**

**2.** This Act -

- (a) applies where a person has a legal duty to maintain another person, regardless of the nature of the relationship which creates the duty to maintain; and
- (b) must not be interpreted so as to derogate from the law relating to the duty of persons to maintain other persons.

### **Parental duty to maintain children**

**3.** (1) Subject to section 26 and to the law relating the duty of a parent to maintain a child who is unable to support himself or herself, both parents of a child are liable to maintain that child regardless of whether the -

- (a) child in question is born inside or outside the marriage of the parents;
- (b) child is born of a first, current or subsequent marriage; and
- (c) parents are subject to any system of customary law which does not recognise both parents' liability to maintain a child.

(2) For the purpose of determining whether or not a person who is subject to customary law is legally liable to maintain another person, a maintenance court must, notwithstanding anything to the contrary at customary law, have regard to the following principles -

- (a) husbands and wives are primarily responsible for each other's maintenance;
- (b) subject to subsection (1), the parents of a child are primarily and jointly responsible for the maintenance of that child;
- (c) subject to section 4(2), the legal principle, which imposes a legal duty on children to maintain their parents must be applied to children and parents who are subject to customary law.

(3) The parental duty to maintain a child includes the rendering of support which the child reasonably requires for his or her proper living and upbringing and this includes provision of food, accommodation, clothing, medical care and education.

(4) From the date of coming into operation of this Act, any law which requires a parent to give priority to the maintenance of children of a first marriage becomes invalid.

**Principles to be applied in respect of maintenance**

4. (1) Where a beneficiary is a child, the maintenance court must, in determining the nature or amount of maintenance payable to that beneficiary, have regard to the following principles -

- (a) both parents of the child are primarily responsible for the maintenance of that child;
- (b) the parents must, in accordance with their respective means, fairly share the duty to maintain their child or children;
- (c) the parental duty to maintain one particular child does not rank any higher than the duty to maintain any other child of that parent or any other person;
- (d) where a parent has more than one child, all the children are entitled to a fair share of that parent's resources; and
- (e) the duty of a parent to maintain a child has priority over all other commitments of the parent except those commitments which are necessary to enable the parent to support himself or herself or any other person in respect of whom the parent has a legal duty to maintain.

(2) Where a beneficiary is a parent, the maintenance court must, in determining the liability of a child to maintain a parent or the nature or amount of maintenance payable to the beneficiary, have regard to the following principles -

- (a) the liability of the child arises where the parent is unable to maintain himself or herself due to circumstances beyond that parent's control;
- (b) the child must, having regard to his or her own needs, be able to support the parent; and
- (c) the right of a parent to be maintained arises only where that parent's spouse or other person who is legally liable to maintain that parent is unable to do so.

**Conditions precedent to granting of maintenance order**

5. A maintenance court must not make a maintenance order unless it is satisfied that the person against whom the order is sought -

- (a) is legally liable to maintain the beneficiary;
- (b) is able to contribute to the maintenance of the beneficiary; and
- (c) fails or neglects to provide reasonable maintenance for the beneficiary.

**PART III  
ADMINISTRATION OF ACT**

**Maintenance courts**

6. For the purposes of this Act every magistrate's court, other than a regional magistrates' court, is, within its area of jurisdiction, a maintenance court.



**Maintenance officers**

7. (1) Subject to the Public Service Act, 1995, the Minister, or any staff member delegated in writing by the Minister, may, for every maintenance court, appoint a maintenance officer who must perform the functions and duties assigned to or exercise the powers conferred on maintenance officers by this Act.

(2) The Prosecutor-General may, under section 4 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), appoint a maintenance officer appointed under subsection (1), to conduct, on behalf of the State, any prosecution in criminal proceedings under or arising from this Act.

(3) Any person on whom the Prosecutor-General has delegated authority to conduct criminal proceedings in any magistrate's court is deemed to have been appointed a maintenance officer for the relevant maintenance court.

**Maintenance investigators**

8. (1) The Minister, or any staff member delegated by the Minister, may, for a maintenance court or maintenance courts, appoint a maintenance investigator who must, subject to subsection (2), perform the functions and duties assigned to or exercise the powers conferred on maintenance investigators by this Act.

(2) Without derogating from the generality of subsection (1), the functions and duties of a maintenance investigator include -

- (a) locating the whereabouts of a person required to attend a maintenance enquiry under section 13 or of a person required to attend at a maintenance prosecution under this Act;
- (b) serving of court process on the persons referred to in paragraph (a);
- (c) tracing and evaluating of assets of responsible persons; and
- (d) performance of other functions and duties which may be specified in his or her appointment.

(3) Where a maintenance investigator serves any court process which has been issued in connection with a maintenance enquiry or a maintenance prosecution under this Act, that service is as good service as service effected by a messenger of the court.

(4) The Minister must take all reasonable steps within the available resources of the Ministry of Justice to achieve the progressive realisation of the appointment of at least one maintenance investigator for each maintenance court.

(5) If a maintenance investigator has not been appointed for a maintenance court, the court may, where it considers it necessary having regard to the nature of the case and other surrounding circumstances, authorize that any maintenance court process be served by the messenger of that court.

## **PART IV MAINTENANCE COMPLAINTS AND ENQUIRIES**

**Maintenance complaints**

9. (1) Subject to subsection (3), a person who wants to lodge a complaint under this Act must, in the prescribed form and manner, lodge the complaint with the maintenance officer of the maintenance court which has jurisdiction in the area where the complainant or beneficiary resides or, in the case where there is an existing maintenance order, with the maintenance officer of the maintenance court where the order is registered.

(2) The complaint referred to in subsection (1) must be made under oath or affirmation and must state that -

- (a) the person against whom the complaint is made is legally liable to maintain the beneficiary of the claim but that he or she fails to maintain that other person; or
- (b) sufficient cause exists for the suspension, substitution or discharge of an existing maintenance order,

(3) A complaint made under subsection (1) may be made by a complainant, beneficiary, defendant or any person who is affected by a maintenance order or any other order, directive or notice issued under this Act.

(4) On receipt of a complaint made under subsection (1), the maintenance officer must -

- (a) where there is no existing maintenance order, investigate the complaint and institute a maintenance enquiry in the relevant maintenance court; or
- (b) where there is an existing maintenance order, investigate the complaint for evidence of -
  - (i) the existence of new circumstances which developed since the date of the order; or
  - (ii) misuse, by any person, of any payment made in terms of a maintenance order;

and if evidence to prove those new circumstances or the misuse is found, institute an enquiry in the relevant maintenance court.

(5) For the purposes of this section “misuse” means failure, without a reasonable or lawful excuse, to use any maintenance payment for the benefit of a beneficiary.

#### **Powers of officers when investigating maintenance matters**

**10.** (1) When investigating any complaint relating to maintenance, a maintenance officer may -

- (a) cause any person, including the defendant or complainant, to be directed to appear before that maintenance officer and to give information or produce any book, document, statement or other relevant information;
- (b) obtain statements under oath or affirmation from persons who may be able to give relevant information concerning the subject of that complaint;
- (c) gather information concerning -
  - (i) the identification or whereabouts of any person who is legally liable to maintain the person mentioned in such complaint or who is allegedly so liable;
  - (ii) the financial position of any person referred to in subparagraph (i); or
  - (iii) any other matter which may be relevant concerning the subject of that complaint;

- (d) request a maintenance officer of any other maintenance court to obtain, within the area of jurisdiction of that maintenance officer, information which is relevant to the complaint; or
  - (e) require a maintenance investigator of the maintenance court concerned to perform functions which are necessary or expedient to achieve the objects of this Act.
- (2) A maintenance investigator must, subject to the directions and control of a maintenance officer -
- (a) locate the whereabouts of persons who are -
    - (i) required to appear before a maintenance court;
    - (ii) to be summoned or who have been summoned to appear at a maintenance enquiry;
    - (iii) to be summoned or who have been summoned to appear in a criminal trial for contravening this Act; or
    - (iv) accused of the failure to comply with this Act,
  - (b) serve or execute the process of any maintenance court;
  - (c) serve summons in respect of criminal proceedings instituted for the failure to comply with a maintenance order as if the maintenance investigator has been appointed as a person who is authorised to serve summons in criminal proceedings;
  - (d) take statements under oath or affirmation from persons who may be able to give relevant information concerning the subject of any complaint relating to maintenance;
  - (e) gather information concerning -
    - (i) the identification or whereabouts of any person who is legally liable to maintain the person mentioned in such complaint or who is allegedly so liable;
    - (ii) the financial position of any person referred to in subparagraph (i); or
    - (iii) any other matter which may be relevant concerning the subject of that a complaint; or
  - (f) gather relevant information concerning a request referred to in subsection (1)(d).

#### **Examination of persons by maintenance officer**

**11.** (1) A magistrate may, before or during a maintenance enquiry and at the request of a maintenance officer, require the summoning and appearance before him or her or before another magistrate, for examination by the maintenance officer, of any person who is likely to give relevant information concerning -

- (a) the identification or the place of residence or employment of any person who is legally liable to maintain any other person or who is allegedly so liable; or

(b) the financial position of the person referred to in paragraph (a).

(2) Sections 162, 163, 164(1), 165, 179 to 181, 187, 191 and 204 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), do, with the necessary changes, apply in respect of the examination of any person under this section.

(3) If the person who is required to appear before a magistrate furnishes the information in question to the satisfaction of the maintenance officer concerned before the day on which he or she is required so to appear, the maintenance officer may discharge him or her from the obligation so to appear.

(4) The examination of any person under this section may be conducted in private at a place designated by the magistrate.

#### **Attendance of witnesses at maintenance enquiries**

**12.** (1) A maintenance officer who has instituted a maintenance enquiry in a maintenance court must cause any person, including the complainant and defendant, to be summoned to appear before the maintenance court and give evidence or to produce any book, document or statement in his or her possession or under his or her control.

(2) The book, document or statement referred to in subsection (1) includes -

- (a) any book, document or statement relating to the financial position of the defendant; and
- (b) in the case where the person referred to in paragraph (a) is in the service of an employer, a statement which gives full particulars of that person's earnings and which is signed by the employer.

(3) The summoning of any person to attend at a maintenance enquiry must be done, subject to paragraph (4), in the same manner that witnesses are summoned to appear before a magistrate's court in a criminal trial.

(4) The Minister may prescribe the manner in which process of the maintenance court is to be prepared and served and the form of the summons to be used under this Act.

(5) Section 181 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), does not, subject to subsection (7), apply to a person against whom a maintenance order may be made under this Act.

(6) The clerk of the maintenance court must, in the prescribed manner and subject to subsection (7), pay the prescribed allowances to a person who attends a maintenance enquiry as a witness.

(7) The allowances payable under subsection (5) or (6) must not be paid to the defendant in the maintenance case unless the maintenance court has directed that the allowances be paid to the defendant.

#### **Maintenance enquiry**

**13.** (1) On the date specified in the summons issued under section 12 the maintenance court must enquire into the matter of the complaint.

(2) The enquiry referred to in subsection (1) must be held in the presence of the defendant, or if he or she is absent, on production of proof that the defendant was served with the summons referred to in section 12.

(3) The person presiding at the maintenance court must conduct the maintenance enquiry in a manner that is aimed at ensuring that substantial justice is achieved between the parties as well as the beneficiary of the maintenance claim.

(4) Subject to subsection (5), the Civil Proceedings Evidence Act, 1965 (Act No. 25 of 1965) in so far as it relates to the admissibility and sufficiency of evidence, the competency, compellability and privileges of witnesses, subject to necessary changes, applies to an enquiry conducted under this Act and any matter relating to the conduct of proceedings at an enquiry which is not provided for in that Act or this Act must be dealt with in accordance with the practice and procedure followed in civil proceedings in a magistrates court.

(5) Section 236 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) does, with necessary changes, apply to accounting records and documents of banks produced or to be produced under this Act.

(6) The maintenance court holding an enquiry may at any time during the enquiry cause any person to be summoned as a witness or examine any person who is present at the enquiry, although that person was not summoned as a witness, and may recall and re-examine any person already examined.

(7) Subject to subsection (4), the maintenance court must administer an oath to, or accept an affirmation from, any witness appearing before the maintenance court and must record the evidence of that witness.

(8) Any party to proceedings under this Act has the right to be represented by a legal practitioner.

(9) A person whose presence is not necessary must not be present at a maintenance enquiry, except where that person has been given permission to be present by the maintenance court.

(10) Where a maintenance court considers that it would be in the interests of justice or the interests of any persons who have an interest in the enquiry, it may direct that a maintenance enquiry be held in private at the maintenance court or at a place designated by the maintenance court.

#### **Production of written statements as evidence**

**14.** (1) Notwithstanding anything to the contrary in this Act or in any law, at a maintenance enquiry, a written statement made in the prescribed manner by any person, other than the defendant or complainant is, subject to subsection (2), admissible as evidence to the same extent as oral evidence by that person is admissible in a court.

(2) A party to a maintenance case who wants to produce the statement referred in subsection (1) as evidence must, in the prescribed manner and at least 14 days before the date on which the statement is to be produced, serve, on the other party, a copy of the statement, together with a copy of every document referred to in the statement.

(3) The statement referred to in subsection (2) must be accompanied by a prescribed notice which requests the other party to, if he or she so wishes, at least seven days before the commencement of the enquiry, object to the statement being produced as evidence at the enquiry.

(4) If a party to a maintenance case -

(a) objects to the production of a statement as contemplated in subsection (3) that statement must not be produced as evidence at the enquiry but that party may still call the person who made that statement to give oral evidence; or



- (b) does not object to the production of the statement referred to in subsection (1) or has entered into an agreement contemplated in subsection (5), that statement may be produced and admitted as evidence at the enquiry.

(5) A party against whom a statement referred to in subsection (1) is to be produced may, before or during the enquiry, come to an agreement with the maintenance officer or the defendant that any statement referred to in subsection (1), even if the statement was not served as contemplated in subsection (2), be produced and admitted as evidence at an enquiry.

(4) Any document referred to or identified as an exhibit in the statement produced and admitted as evidence under this section must be regarded as an exhibit produced and identified by the person who made the statement.

### **Evidence from previous maintenance proceedings**

**15.** (1) Subject to subsection (2), the maintenance court holding a maintenance enquiry may take into consideration evidence produced in any proceedings in respect of an existing maintenance order or, in the absence of evidence to the contrary, accept any finding of fact made in those proceedings as proof of any of those facts.

- (2) For the purposes of subsection (1) -
  - (a) the record of any evidence or finding of fact in any proceedings in respect of the existing maintenance order; or
  - (b) any copy, transcription or extract certified as a true copy of the original by the registrar or clerk of the court or other officer having the custody of the records of the court where the order in question was issued,

is, on its production at the maintenance enquiry, admissible as evidence.

## **PART V MAINTENANCE AND ANCILLARY ORDERS**

### **Factors to be considered when making maintenance orders**

- 16.** (1) In this section a “relevant person” means -
- (a) the defendant;
  - (b) the beneficiary; and
  - (c) any person, other than the defendant, who is liable to maintain the beneficiary.

(2) When making a maintenance order under this Act or exercising any of the powers conferred on it by this Act, a maintenance court must have regard to the evidence adduced at the maintenance enquiry, all the circumstances of the case, and in particular to -

- (a) the lifestyle, income and earning capacity which each of the relevant persons has and is likely to have in the foreseeable future, including any increase in earning capacity, which the court considers a relevant person should reasonably take steps to acquire;
- (b) the property and resources which each of the relevant persons has and is likely to have in the foreseeable future;

- (c) the responsibilities and financial needs which each of the relevant persons has and is likely to have in the foreseeable future; and
  - (d) the fact that the defendant delayed the process since filing of the complaint or that he or she contributed partially to the delay.
- (3) Where the beneficiary is a child, the court must also have particular regard to -
- (a) the financial, educational and developmental needs of the beneficiary, including but not limited to housing, water, electricity, food, clothing, transport, toiletries, child care services, education (including pre-school education) and medical services;
  - (b) the age of the beneficiary;
  - (c) the manner in which the beneficiary is being, and in which his or her parents reasonably expect him or her to be, educated or trained;
  - (d) any special needs of the beneficiary, including but not limited to needs arising from a disability or other special condition;
  - (e) the direct and indirect costs incurred by the complainant in providing care for the beneficiary, including the income and earning capacity forgone by the complainant in providing that care; and
  - (f) the value of the labour expended by the complainant in the daily care of the child.
- (4) Where the beneficiary has disabilities, the court must have particular regard to -
- (a) the extent of the disability;
  - (b) the life expectancy of the beneficiary;
  - (c) the period that the beneficiary would in all likelihood require maintenance; and
  - (d) the costs of medical and other care incurred by the beneficiary as a result of the disability.
- (5) When considering a complaint relating to the substitution or discharge of an existing maintenance order, the maintenance court must have regard to the evidence adduced at the enquiry, and all the circumstances of the case, and in particular to -
- (a) whether there has been any change in the circumstances of the case since the date on which the existing maintenance order was made, including any change in the matters set out in subsections (2) and (3); and
  - (b) whether sufficient cause exists for the suspension, substitution or discharge of the existing maintenance order.

### Maintenance orders

**17.** (1) At the conclusion of a maintenance enquiry and after consideration of the matters referred to in section 16, the maintenance court may, subject to Part II -

- (a) in the case where no maintenance order is in force, make a maintenance order against the person who has been proved to be legally liable to maintain a beneficiary;
  - (b) in the case where a maintenance order is in force -
    - (i) substitute that maintenance order by another maintenance order; or
    - (ii) discharge such maintenance order; or
    - (iii) suspend such maintenance order on such conditions which the maintenance court determines;
  - (c) make no maintenance order.
- (2) An order made under subsection (1) -
- (a) must direct the defendant to contribute to the maintenance of the beneficiary from the date specified in the order;
  - (b) must specify the period or periods and the time or times within which contributions must be made;
  - (c) must specify the person to whom or organisation, financial institution or other institution to which the contributions may be made; and
  - (d) must, subject to rules or regulations made under this Act, specify the manner in which the contributions may be made to the person or institution referred to in paragraph (c); or
  - (e) may specify that all or part of contributions made under the order be made to a specific person or institution for a purpose specified in the order.

(3) If the beneficiary of a maintenance order is a child, the maintenance court may order that maintenance contributions be made to the mother of the child for expenses incurred by the mother in connection with the pregnancy and birth of the child, including but not limited to medical and hospital expenses, but a claim under this subsection must be made within 12 months from the date of birth of the child or within such other reasonable period as the court may allow on sufficient grounds shown by the mother.

(4) A maintenance order may direct that payment be made in kind by specified goods or livestock, for all or some portion of the settlement of amounts already owing or the future payment of instalments.

(5) If a defendant changes his or her place of residence or employment during the existence of the maintenance order, he or she must, within seven days after the day of such change and in the prescribed manner, give written notice to the maintenance officer of the court where the maintenance order is registered, and, if payment in terms of that order is to be made to any person, organisation or institution, then also to the person, organisation or institution to whom payment is to be made, and must state fully and clearly where his or her new place of residence or employment is situated.

### **Consent maintenance orders**

**18.** (1) A defendant on whom a directive issued under section 10 or a summons issued under section 12 has been served may, on or before the date of the maintenance enquiry and in writing, consent to the granting of the maintenance order applied for and submit the written consent to the maintenance officer.

(2) On the date of the hearing the maintenance court may, without hearing or taking any evidence, make a maintenance order in accordance with the written consent referred to in subsection (1).

(3) A copy of the maintenance order referred to in subsection (2) must, in the prescribed manner, be served on the defendant by any maintenance officer, messenger of the court or maintenance investigator, and proof of service by that officer, messenger or investigator is sufficient evidence that the defendant was aware of the terms of the order in question.

#### **Default maintenance orders**

**19.** (1) If a defendant who, under section 12, has been properly summoned to appear at a maintenance enquiry fails so appear at the place and on the date specified in the summons, the maintenance court must, at the request of a maintenance officer for a default maintenance order, call on the complainant or any other person whose evidence might be relevant to, either in writing or orally, adduce evidence which would assist the court in making an order.

(2) At the conclusion of the enquiry contemplated in subsection (1) the maintenance court must consider the evidence adduced at that enquiry after which the maintenance court may, in default, make any of the orders contemplated in sections 17 and 20 or any other order which the court considers appropriate in the circumstances of the case.

(3) A copy of the default maintenance order referred to in subsection (2) must, in the prescribed manner, be served on the defendant by any maintenance officer, messenger of the court or maintenance investigator, and proof of service by that officer, messenger or investigator is sufficient evidence that the defendant was aware of the terms of the order in question.

(4) A person against whom a default maintenance order as contemplated in this section has been made may, in the prescribed form and manner and within 10 days of his or her becoming aware of the order, apply to the maintenance court for the substitution or setting aside of the default maintenance order.

(5) If, after an application has been made to it, a court is satisfied that a person against whom a default maintenance order was made had reasonable grounds for failing to make an application for substitution or setting aside of the default maintenance order within the period contemplated in subsection (4), the court may extend that period for such a longer period which the court determines.

(6) The application referred to in subsection (4) must specify the date on which the application is to be heard and determined.

(7) After making an application under subsection (4) the defendant must, in the prescribed form and manner, give to the complainant notice of the application and that notice must be served on the complainant at least 14 days before the day on which the application is to be heard.

(8) On the date set for the hearing of the application, the maintenance court may call on -

- (a) the defendant to adduce such evidence, either in writing or orally, in support of his or her application as the court may consider necessary; or
- (b) the complainant to adduce such evidence, either in writing or orally, in rebuttal of the application as the court may consider necessary.

(9) At the conclusion of the hearing contemplated in subsection (8), the maintenance court must consider the evidence adduced, after which the maintenance court may -

- (a) make an order confirming the default maintenance order referred to in subsection (2); or
- (b) vary the order referred to in subsection (2), if it appears to the court that good cause exists for the variation; or
- (c) set aside the order referred to in subsection (2), if it appears to the court that good cause exists for the setting aside, and convert the proceedings into a maintenance enquiry.

(10) A complainant who has been served with the application referred to in subsection (4), may, before or at the hearing of the application, consent in writing to the variation or setting aside of the order and that consent must be submitted to the maintenance officer of the relevant maintenance court before or at the hearing of the application.

#### **Orders as to costs**

**20.** (1) The maintenance court holding a maintenance enquiry may, having regard to the conduct of the persons involved in the enquiry so far as it may be relevant, make such order as the court may consider just relating to the costs of the service of process and wasted costs due to a party's failure without good cause to attend an enquiry.

(2) In making the order contemplated in subsection (1), the court must have regard to the conduct and means of the person against whom the order for costs is to be made.

(3) An order for payment of costs made under this section has the same effect as a civil judgment and it may be enforced by any of the methods specified in Part VII.

#### **Orders for scientific tests**

**21.** (1) If a maintenance officer reasonably believes that -

- (a) the paternity of any child is in dispute;
- (b) the mother of that child as well as the person who is alleged to be the father are prepared to submit themselves as well as that child to the taking of blood or tissue samples in order to carry out scientific tests regarding the paternity of that child; and
- (c) the mother or the alleged father or both the mother and the alleged father are unable to pay the costs involved in the carrying out of the scientific tests,

the maintenance officer may at any time during a maintenance enquiry, but before the maintenance court makes any order, request the court to hold an enquiry referred to in subsection (2).

(2) On receipt of a request made under subsection (1), the maintenance court may enquire into the -

- (a) means of the mother as well as that of the alleged father; and
- (b) other circumstances which the maintenance court reasonably believes should be taken into consideration.



(3) At the conclusion of the enquiry referred to in subsection (2), the maintenance court may -

- (a) make a provisional order that both the mother and alleged father or that either of them pay or pays part or all of the costs to be incurred in the scientific tests;
- (b) make a provisional order directing the State to pay the whole or any part of the costs of the scientific tests; or
- (c) make no order.

(4) When the maintenance court subsequently makes any maintenance order, it may -

- (a) make an order confirming the provisional order referred to in subsection (3)(a) or (b); or
- (b) set aside any provisional order or substitute therefore any order which the court considers just relating to the payment of the costs incurred in the carrying out of the scientific tests in question.

## **PART VI FURTHER PROVISIONS RELATING TO MAINTENANCE ORDERS**

### **Variation or setting aside of certain orders**

**22.** A maintenance court that has made an order under section 17(1)(a) or (b) may, at the request of the maintenance officer -

- (a) vary such order by designating as the person, officer, organisation, institution or account to whom, to which or into which payment is to be made, any other person, officer, organisation, institution or account at a financial institution or by determining any other manner in which payment is to be made; or
- (b) if the maintenance court has made an order referred to in section 17(4), set aside that order,

and the maintenance officer must, in the prescribed manner, inform the defendant, the complainant or the person on whom a notice referred to in section 31(1) has been served of the variation or setting aside of the order in question.

### **Effect of substitution or discharge of maintenance orders**

**23.** If a maintenance court has, under this Act or under any other law, suspended, varied, rescinded, substituted or discharged a maintenance order or direction -

- (a) the original maintenance order becomes ineffective; and
- (b) the maintenance officer must give notice of the decision to the clerk of the court where the maintenance order is registered and that clerk of the court must accordingly amend the relevant register in the prescribed manner.

### **Transfer of maintenance orders**

**24.** (1) Where a complainant in whose favour a maintenance order or any other order under this Act was made or given changes his or her place of residence he or she must, within the prescribed period and in the prescribed manner, notify the

maintenance officer of the maintenance court which has jurisdiction in the area where the complainant now resides.

(2) On receipt of a notice made under subsection (1) the relevant maintenance officer must request the clerk of the court of the maintenance court where the maintenance order or other order is registered to forward the order to the clerk of the court of the maintenance court which has jurisdiction in the area where the complainant now resides.

(3) On receipt of the order requested for under subsection (2), the clerk of the court of the maintenance court where the complainant resides must register that order in the prescribed manner after which he or she must, in the prescribed manner, notify the defendant and any person who, in terms of a maintenance order or direction or a writ of the court, is required to pay or deliver any money or other property to the complainant.

(4) Any maintenance order registered in terms of subsection (3) must for the purposes of this Act be deemed to be a maintenance order made by the maintenance court where the order has been so registered.

### **Effect of maintenance order**

**25.** (1) Save as otherwise provided in this Act, any order or direction made by a maintenance court under this Act has the effect of an order or direction of the said court made in a civil action.

(2) An order made under section 17(3), 20 or 21(4) is independent of and may be enforced separately from any other order made under this Act.

### **Termination of maintenance order**

**26.** (1) A maintenance order made in favour of a child must, unless the order otherwise provides, with respect to that child, cease if and when -

- (a) the child dies or is adopted by another person;
- (b) in respect of the marriage between the child's parents, an order of divorce or a decree of nullity, which includes an order for the maintenance of the child is made;
- (c) the child marries; or
- (d) subject to subsection (2), the child attains the age of 18 years, but if the child is attending an educational institution for the purpose of acquiring a course which would enable him or her to maintain himself or herself, the maintenance order does not terminate until the child attains the age of 21 years.

(2) Where a child in whose favour a maintenance order was made attains the age of 18 years, the child or any person acting on the child's behalf, may, in the prescribed manner, apply to the maintenance court for an extension of the maintenance order beyond the age of 18 years.

(3) On receipt of an application made under subsection (2), the maintenance court must -

- (a) in the prescribed manner, notify the person who is liable to maintain the child to appear before the maintenance court on a date specified in the notice and to show cause why the maintenance order should not be extended; and

- (b) on the date referred to in paragraph (a), inquire into the matter and -
  - (i) grant the application conditionally or unconditionally; or
  - (ii) refuse the application.
- (4) A maintenance order made in favour of a spouse must, with respect to that spouse, cease if and when -
  - (a) that spouse dies or remarries; or
  - (b) subject to the law relating to divorce, an order of divorce or a decree of nullity is made in respect of the marriage.
- (5) A maintenance order made in respect of a parent remains in force for as long as -
  - (a) the parent is unable to maintain himself or herself;
  - (b) no other person has become liable to maintain the parent; and
  - (c) the child is able to support the parent.

## **PART VII ENFORCEMENT OF MAINTENANCE ORDERS**

### **Registration of maintenance orders**

- 27.** (1) The clerk of the maintenance court must, in the prescribed manner, register all maintenance orders -
- (a) made under this Act or made by any other maintenance court;
  - (b) transferred to the maintenance court under section 24; and
  - (c) emanating from foreign courts and which, in terms of any law, are required to be enforced in Namibia.
- (2) An order registered under subsection (1) may, subject to anything to the contrary in that order, be dealt with or enforced as if it were an order made by the maintenance court where it is registered.
- (3) An order registered under subsection (1)(b) or (c) may, subject to anything to the contrary in that order, be dealt with or enforced as if it were an order made by the maintenance court where it is registered.

### **Maintenance order enforceable by civil action**

- 28.** (1) Where a defendant against whom a maintenance order or an order under section 17(3), 20 or 21(4) has been made fails, within 10 days from the date on which payment becomes due, to comply with the order, the complainant may apply to the maintenance court where the order is registered for enforcement of the order.
- (2) An application made under subsection (1) must be in the prescribed manner and must be accompanied by -
- (a) a copy of the maintenance order in question; and

- (b) a statement under oath or affirmation setting forth the amount which the defendant has failed to pay; and
- (c) a statement indicating the manner in which the order is sought to be enforced; and
- (d) any other information or document which may be prescribed.

(3) On receipt of an application made under subsection (1), the maintenance court may authorise enforcement of the order in order to recover the amount due together with any prescribed interest which has accrued on the amount and the only means by which the order may be enforced are -

- (a) by execution against property as contemplated in section 29;
- (b) by the attachment of emoluments as contemplated in section 30; or
- (c) by attachment of any debt as contemplated in section 32.

(4) A maintenance court must not, in the circumstances contemplated in section 47(5), authorize the issue of a warrant of execution or make any order for the attachment of emoluments or any debt in order to satisfy a maintenance order until the appeal has been finalised.

(5) Notwithstanding anything to the contrary contained in any law, any pension, annuity, gratuity or compassionate allowance or other similar benefit is liable to be attached or subjected to execution under a warrant of execution or an order issued or made under this Part in order to satisfy a maintenance order.

### **Warrants of execution**

**29.** (1) On receipt of an application made under section 28 the maintenance court may authorise the issue of a warrant of execution against the movable property of the defendant and, if the movable property is insufficient to satisfy the amount outstanding, then, subject to subsection (2), against the immovable property of the defendant to the amount necessary to cover the amount outstanding, together with any interest thereon and the costs of execution.

(2) Where the warrant of execution contemplated in subsection (1) is issued against the immovable property of a defendant who is married in community of property to another person, that warrant of execution is valid and may be executed only in respect of the share of the property which the defendant is entitled to in terms of the marriage in community of property.

(3) The -

- (a) complainant must prepare;
- (b) clerk of the maintenance court must issue; and

(c) the messenger of the court must execute,  
the warrant of execution authorised under this section in the prescribed manner.

(4) The maintenance investigator, or in his or her absence, the maintenance officer of the maintenance court where a maintenance order is to be enforced must assist the complainant in preparing the warrant of execution and in taking the prescribed steps to facilitate the execution of the warrant.

(5) A defendant against whom a warrant of execution has been issued may, within 10 days of becoming aware of the existence of the warrant of execution and in the prescribed manner, apply to the maintenance court where the warrant was issued to set aside the warrant of execution.

(6) An application made under subsection (5) must -

- (a) state the grounds on which the warrant of execution should be set aside; and
- (b) be served by the defendant on the complainant at least 14 days before the date on which the application is to be heard.

(7) On the date set for the hearing of an application made under subsection (5) the court, must, subject to subsection (12), consider the matter and, if it is satisfied that the defendant has complied with the maintenance order, it may set aside the warrant of execution in question.

(8) A defendant against whom a warrant of execution was issued under this section may at any time, in the prescribed manner, apply to the maintenance court for substitution or suspension of the warrant of execution.

(9) An application made under subsection (8) must -

- (a) state the grounds on which the warrant is sought to be substituted or suspended; and
- (b) be served by the defendant on the complainant at least 14 days before the date on which the application is to be heard.

(10) On the date set for the hearing of an application made under subsection (8) the court may, subject to subsection (11) and (12), in a summary manner enquire into the matter, suspend the warrant of execution and substitute the warrant with an order -

- (a) for the attachment of emoluments referred to in section 30(1); or
- (b) for the attachment of any debt referred to in section 32(1).

(11) In making an enquiry under subsection (10) the maintenance court must take into consideration -

- (a) the existing and prospective means of the defendant;
- (b) the financial needs and obligations of, or in respect of other persons maintained by the defendant;
- (c) the conduct of the defendant in so far as it may be relevant concerning his or her failure to satisfy the maintenance or other order in question; and
- (d) any other circumstances which should, in the opinion of the court, be taken into consideration.

(12) Before determining an application made under subsection (5) or (8), the maintenance court may call on -

- (a) the defendant to adduce such evidence, either in writing or orally, in support of his or her application as the maintenance court may consider necessary; or
- (b) the complainant to adduce such evidence, either in writing or orally, in rebuttal of the application as the court may consider necessary.



**Attachment of emoluments**

**30.** (1) A maintenance court may -

- (a) on receipt of an application made under section 28; or
- (b) when the court suspends the warrant of execution under section 29(10),

make an order for the attachment of any emoluments at present or in future owing or accruing to the defendant to the amount needed to cover the amount which the defendant has failed to pay, together with any interest thereon, as well as the prescribed costs of the attachment or execution, which order authorises any employer of the defendant or any person who, in terms of a contract is obliged to make periodical payments to the defendant, notwithstanding section 37(g)(i) of the Labour Act, 1992 (Act No. 6 of 1992), to deduct from the defendant's emoluments and to make on his or her behalf such payments as specified in the order until such amount, interest and costs have been paid in full.

(2) The maintenance court may, on application by the defendant or his or her employer or the person who is obliged to make periodical payments to the defendant and on good cause shown, suspend, amend or rescind an order made under this section.

(3) A person who wishes to make an application for the suspension, amendment or rescission of an order as contemplated in subsection (2) must submit the application to the clerk of the maintenance court and that person must, in the prescribed manner, give notice of his or her intention to make the application to the complainant, which notice must be served at least 14 days before the day on which the application is to be heard.

(4) On the date set for the hearing of the matter the maintenance court may, before suspending, amending or rescinding an order as contemplated in subsection (2), call on -

- (a) the defendant or the defendant's employer or the person who is obliged to make periodical payments to the defendant to adduce such evidence, either in writing or orally, in support of his or her application as the court may consider necessary; or
- (b) the complainant to adduce such evidence, either in writing or orally, in rebuttal of the application as the court may consider necessary.

**Notice of attachment of emoluments**

**31.** (1) After an order for the attachment of emoluments has been made under section 30(1), the maintenance officer must, within seven days after the date on which the order was made, in the prescribed manner cause a notice, together with a copy of such order, to be served on the employer concerned or the person who is obliged to make periodical payments to the defendant directing that employer or person to make the payments specified in the notice at the times and in the manner so specified.

(2) If -

- (a) the defendant leaves the service of the employer on whom a notice has been served under subsection (1); or
- (b) the person against whom a notice has been served under subsection (1) is discharged from the liability to make periodical payments to the defendant,

that employer or person must, within seven days after the day on which the defendant leaves the service or that person is discharged from the obligation, give notice thereof in the prescribed manner to the maintenance officer of the court where the order is registered.

(3) A person on whom a notice has been served under subsection (1), must give priority to the payments specified in that notice over any order of court requiring payments to be made from the emoluments due to the defendant.

(4) The defendant's employer, or the person who, under this section, is required to make periodic payments on behalf of the defendant, may for each payment that is made on behalf of the defendant, deduct such amount which the court has, under section 30(1) determined to the prescribed costs of attachment.

#### **Attachment of debts**

**32.** (1) A maintenance court may -

- (a) on receipt of an application made under section 28; or
- (b) when the court suspends the warrant of execution under section 29(10),

make an order for the attachment of any debt at present or in future owing or accruing to the defendant to the amount needed to cover the amount which the defendant has failed to pay, together with any interest thereon, as well as the costs of the attachment or execution, which order directs the person who has incurred the obligation to pay the debt to make such payment as may be specified in that order within the time and in the manner so specified.

(2) The maintenance court may, on application by the defendant or the person against whom a debt attachment order has been made under this section and on good cause shown, suspend, amend or rescind an order made under this section.

(3) A person who wishes to make an application for the suspension, amendment or rescission of an order as contemplated in subsection (2) must submit the application to the clerk of the maintenance court and that person must, in the prescribed manner, give notice of his or her intention to make the application to the complainant, which notice must be served at least 14 days before the day on which the application is to be heard.

(8) On the date set for the hearing of the matter, the maintenance court may, before suspending, amending or rescinding an order as contemplated in subsection (2), call on -

- (a) the defendant or the person against whom an order was made to adduce such evidence, either in writing or orally, in support of his or her application as the court may consider necessary; or
- (b) the complainant to adduce such evidence, either in writing or orally, in rebuttal of the application as the court may consider necessary.

(9) An order made under subsection (1) may be enforced by the complainant in the same manner that a civil judgment of the magistrates' court is enforced.

#### **Recovery of arrear maintenance**

**33.** (1) Where a magistrate's court has convicted a defendant of an offence under section 39(1) the court may, on the application of the public prosecutor, in addition to the penalty which the court may impose in respect of that offence, grant an order for the recovery from the defendant of any amount he or she has failed to pay in accordance with the maintenance order, together with any interest thereon, and the order so granted has the effect of a civil judgment of that court and that order may, subject to subsection (2), be executed in the same way as a maintenance order made under this Act may be executed.

(2) In considering the granting of an order under subsection (1) the court may -

- (a) in a summary manner enquire into the circumstances mentioned in subsection (3); and
- (b) if the court so decides, authorise the issue of a warrant of execution against the movable or immovable property of the defendant in order to satisfy such order.

(3) In making an enquiry under subsection (2)(a) the court must take into consideration -

- (a) the existing and prospective means of the defendant;
- (b) the financial needs and obligations of, or in respect of, the beneficiary;
- (c) the conduct of the defendant in so far as it may be relevant concerning his or her failure to pay in accordance with the maintenance order; and
- (d) any other circumstance which should, in the opinion of the court, be taken into consideration.

(4) Notwithstanding anything to the contrary contained in any law, any pension, annuity, gratuity or compassionate allowance or other similar benefit is liable to be attached or subjected to execution under an order granted under this section.

#### **Conversion of criminal proceedings into maintenance enquiry**

**34.** If during the course of criminal proceedings in a magistrate's court in respect of -

- (a) an offence referred to in section 39(1); or
- (b) the enforcement of a sentence suspended on condition that the convicted defendant make periodical payments of sums of money towards the maintenance of the beneficiary,

it appears to the court that it is desirable that a maintenance enquiry be held, or when the public prosecutor so requests, the court must convert the proceedings into such enquiry.

### **PART VIII OFFENCES AND PENALTIES**

#### **Offences relating to examinations by maintenance officer**

**35.** At an examination conducted under section 11 any person who -

- (a) after having been sworn or admonished to tell the truth by the magistrate or after having taken an affirmation, intentionally makes a false statement at the proceedings;
- (b) is summoned to attend the examination but who, without reasonable excuse, fails to attend or to remain in attendance at the examination;
- (c) is warned by the magistrate to remain in attendance at the examination but fails to remain in attendance;

- (d) is summoned or warned to appear but who, without reasonable excuse, fails to appear at a place and on a date and time to which the examination was postponed to or fails to remain in attendance at the postponed examination;
- (e) is required to give evidence at the examination but refuses to be sworn or to take affirmation as a witness, or after having been sworn or having taken affirmation, refuses or fails, without lawful excuse, to answer any question put to him or her or to produce any evidence to be produced by him or her;

commits an offence, and is liable to a fine which does not exceed N\$4 000 or to be imprisoned for a period which does not exceed 12 months.

#### **Offences relating to witnesses**

**36.** (1) Subject to subsection (2), any person who -

- (a) after having been sworn or admonished to tell the truth by the presiding officer or after having taken an affirmation, at a maintenance enquiry held under section 13, intentionally makes a false statement at the proceedings;
- (b) is, under section 12, summoned to attend at a maintenance enquiry but who, without reasonable excuse, fails to attend or to remain in attendance at the enquiry;
- (c) is warned by the court to remain in attendance at a maintenance enquiry held under section 13 but fails to remain in attendance;
- (d) is summoned or warned to appear but who, without reasonable excuse, fails to appear at a place and on a date and time to which the maintenance enquiry was postponed to or fails to remain in attendance at the postponed enquiry; or
- (e) is required to give evidence at the maintenance enquiry but refuses to be sworn or take affirmation, as a witness or after having been sworn, or having taken affirmation, refuses or fails, without lawful excuse, to answer any question put to him or her or to produce any evidence to be produced by him or her

commits an offence and is liable, to a fine which does not exceed N\$4 000 or to be imprisoned for a period which does not exceed 12 months.

(2) Subsection (1)(b) does not apply to a complainant or defendant who has been summoned to attend a maintenance enquiry.

#### **Offences relating to false information**

**37.** (1) Any person who, in a statement which is admitted as evidence under section 14, intentionally makes a false statement commits an offence and liable to a fine which does not exceed N\$4 000 or to a period of imprisonment which does not exceed 12 months.

(2) Any person who is requested by a maintenance investigator or a maintenance officer to furnish information in the performance of the maintenance investigator's or maintenance officer's functions under this Act, and who intentionally furnishes information which he or she knows to be false or does not know or believe to be true, commits an offence and is liable a fine which does not exceed N\$4 000 or to a period of imprisonment which does not exceed 12 months.

**Offences relating to maintenance enquiries**

**38.** A person who intentionally -

- (a) insults or obstructs the person presiding at a maintenance enquiry, the clerk of the maintenance court, a maintenance investigator or maintenance officer in the course of his or her duties during a maintenance enquiry;
- (b) interrupts the proceedings at a maintenance enquiry or otherwise misbehaves himself or herself at the place where the maintenance enquiry is held;

commits an offence and is liable to a fine which does not exceed N\$4 000 or to be imprisoned for a period which does not exceed 12 months.

**Offences relating to maintenance orders**

**39.** (1) Subject to subsection (2), any person who disobeys a court order by failing to make a particular payment in accordance with a maintenance order commits an offence and is liable to a fine which does not exceed N\$4 000, to be imprisoned for a period which does not exceed 12 months or to periodical imprisonment in accordance with section 285 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977).

(2) If the defence is raised in any prosecution for an offence under this section that any failure to pay maintenance in accordance with a maintenance order was due to lack of means on the part of the person charged, he or she is not, merely on the grounds of such defence entitled to an acquittal if it is proved that the failure was due to his or her unwillingness to work or to his or her misconduct.

(3) If the name of a person stated in a maintenance order as the person against whom the maintenance order has been made corresponds substantially with the name of the particular person prosecuted for an offence under this section, any copy of the maintenance order certified as a true copy by a person who purports to be the registrar or clerk of the court or other officer having the custody of the records of the court where the maintenance order was made, is, on its production, evidence which in the absence of evidence to the contrary, will prove that the maintenance order was made against the person so prosecuted.

(4) If a person has been convicted of an offence under this section, the maintenance officer may, notwithstanding anything to the contrary contained in any law, furnish that person's personal particulars to any business which has as its object the granting of credit or is involved in the credit rating of persons.

**Offences relating to misuse of maintenance money**

**40.** Any person who receives payment of money or payment in kind on behalf of a beneficiary in terms of a maintenance order and misuses the said payment by failing to use it for the benefit of the beneficiary, commits an offence and is liable to a fine which does not exceed N\$4 000 or imprisonment for a period which does not exceed 12 months.

**Offences relating to intimidation**

**41.** Any person who with intent to compel or induce a complainant not to file a complaint at the maintenance court or not to lay a criminal charge against a defendant for his or her failure to support a specific person, in any manner threatens by whatever means, including the use of witchcraft, to kill, assault, injure the complainant or any other person or to cause damage to that complainant or any other person, or that complainant's property or another person's property, commits an offence and is liable to a fine which does not exceed N\$20 000 or to imprisonment for a period which does not exceed five years.



**Offences relating to publication of information in respect of children**

**42.** (1) Save as otherwise provided for in subsection (3), a person must not publish in any manner whatsoever the name or address of any person under the age of 18 years who is or was involved in any proceedings at a maintenance enquiry or the name of that person's school or any other information likely to reveal the identity of that person.

(2) A person who contravenes subsection (1) commits an offence and is liable to a fine which does not exceed N\$8 000 or to imprisonment for a period which does not exceed two years.

(3) Notwithstanding subsection (1), if the magistrate presiding at the maintenance enquiry or the Minister reasonably believes that the publication of information in respect of a particular person under the age of 18 years would be just and in his or her interest, the magistrate or the Minister, as the case maybe, may in writing authorise the publication of information specified in the authorisation.

**Offences relating to disclosure**

**43.** (1) A person must not disclose to another person any information acquired by that person in the performance of that person's functions under this Act, unless the disclosure is made for the purpose of performing functions under this Act or is authorised by a court of law or by any law.

(2) A person who contravenes subsection (1) commits an offence and is liable to a fine which does not exceed N\$4 000 or to imprisonment for a period which does not exceed 12 months.

**Offences relating to notices**

**44.** Any person who, without sufficient cause, refuses or fails to -

(a) make any payment in accordance with an order made under section 30(1) or 32(1); or

(b) give notice to a maintenance officer as required by section 31(2),

commits an offence and is liable to a fine not exceeding N\$2 000 or to imprisonment for a period not exceeding six months.

**Offences relating to notice of change of address**

**45.** Any person who refuses or fails to give notice of any change of his or her place of residence or employment as required by section 17(5) commits an offence and is liable to a fine not exceeding N\$2 000 or to imprisonment for a period not exceeding six months.

**PART IX  
GENERAL AND SUPPLEMENTARY**

**Record of proceedings to be kept**

**46.** (1) The presiding officer must keep a record of the proceedings at maintenance enquiries and those records must be accessible to people on conditions and payment of fees as prescribed.

(2) Any fees payable under this section must be prescribed by the Minister in consultation with the Minister responsible for Finance.

## Appeals

**47.** (1) A person who is aggrieved by any order made by a maintenance court under this Act may, within the prescribed period and in the prescribed manner, appeal against that order to the High Court.

(2) If the aggrieved person is a child, or the custodian or primary caretaker of a child, and that aggrieved person so requests -

- (a) the maintenance officer must prepare and submit the notice of appeal on behalf of the aggrieved person; and
- (b) the Prosecutor-General, or a person designated by the Prosecutor-General, must, in the High Court, act on behalf of the aggrieved person.

(3) If an appeal is noted against a person who is a child, or the custodian or primary caretaker of a child, and if that person so requests, the Prosecutor-General, or a person designated by the Prosecutor-General, must, in the High Court, act on behalf of that person.

(4) In determining an appeal made under subsection (1), the High Court may, subject to section 19 of the High Court Act, 1977 (Act No. 16 of 1990), make any order which is appropriate in the matter.

(5) Notwithstanding anything to the contrary contained in any law, an appeal under this section does not suspend the payment of maintenance in accordance with the order in question, unless the appeal is noted against a finding that the appellant is legally liable to maintain the complainant.

(6) For the purposes of subsection (1) “order” -

- (a) does not include a consent maintenance order referred to in section 18, a default maintenance order referred to in section 19(2) or a provisional order referred to in section 21(3);
- (b) includes a discharge, confirmation, setting aside, substitution or variation of a maintenance order or of any of the orders referred to in paragraph (a); and
- (c) includes any refusal to make a maintenance order as well as a refusal -
  - (i) to make a provisional order; or
  - (ii) to make a default maintenance order.

## Photographs of persons

**48.** (1) After making a maintenance order under this Act, the maintenance court must, at the request of the maintenance officer, direct that photographs of the defendant be taken and handed to the maintenance officer, or that a certified copy of the defendant's identity document be handed to the maintenance officer.

(2) The photographs referred to in subsection (1) must be taken in the prescribed manner and the maintenance officer must deal with them or the copy of the identity document in the prescribed manner.

## Regulations

**49.** (1) The Minister may make regulations relating to -

- (a) the powers, duties and functions of the maintenance officer, the maintenance investigator or the clerk of the maintenance court;
- (b) the procedure to be followed at or in connection with a maintenance enquiry;
- (c) the guidelines or the factors to be taken into account by a maintenance court when making a maintenance order;
- (d) the enforcement of maintenance or other orders of a maintenance court;
- (e) any matter required or permitted to be prescribed by regulation under this Act;
- (f) any matter which the Minister may consider necessary or expedient to prescribe in order that the objects of this Act may be achieved.

(2) Regulations made under subsection (1) may prescribe penalties for any contravention thereof or failure to comply therewith not exceeding a fine of N\$4 000 or imprisonment for a period of 12 months.

(3) Any regulation made under this section which may result in financial expenditure for the State must be made in consultation with the Minister responsible for Finance.

#### **Repeals, amendments and savings**

**50.** (1) The following laws are repealed -

- (a) the Support of Dependents (Natives) Proclamation, 1936 (Proclamation No. 9 of 1936);
- (b) the Maintenance Act, 1963 (Act No. 23 of 1963),
- (c) the Maintenance Amendment Act, 1967 (Act No. 19 of 1967); and
- (d) the Maintenance Amendment Act, 1970 (Act No. 39 of 1970).

(2) The Pension Fund Act, 1956 (Act No. 24 of 1956) is amended in section 37A by the substitution in subsection (1) for the phrase “Maintenance Act, 1963 (Act No. 23 of 1963)” of the phrase “Maintenance Act, 2003 (Act No. 9 of 2003);

(3) The Reciprocal Enforcement of Maintenance Orders Act, 1995 (Act No. 3 of 1995) is amended -

- (a) in section 1 -
  - (i) by the substitution for the definition of “Maintenance Act” of:  
“Maintenance Act” means the Maintenance Act, 2003 (Act No. 9 of 2003); and
  - (ii) by the substitution for the definition of “maintenance court” of:  
“maintenance court” means a maintenance court referred to in section 6 of the Maintenance Act;”;
- (b) in subsection (1) of section 5 by the substitution for the words “section 5 of the Maintenance Act” of the words “section 13 of the Maintenance Act”;

- (c) in subsection (6) of section 6 by the substitution for the phrase “sections 8, 9 and 10” of the phrase “sections 12, 13, 14, 15, 36 and 38”;
- (d) by the substitution for section 7 of the following section:

“7. Any maintenance order registered in terms of section 4 or confirmed under section 6 shall, for the purposes of sections **[11, 12 and 14]** 17(5), 28, 29, 30, 31, 32, 33, 39 and 45 of the Maintenance Act, be deemed to be a maintenance order made under section **[5(4)]** 17 of the said Act by the Maintenance court where such order has been so registered or confirmed, as the case may be: Provided that the provisions of section **[13]** 34 of the said Act shall not apply to any proceedings in respect of a contravention of **[subsection (1) of the said section 11]** section 39 of the said Act in so far as such proceedings relate to a maintenance order registered in terms of section 4 of this Act.”;

- (e) in section 8 by the substitution for the phrase “section 12(1)” of the phrase “section 30”; and
- (f) in section 9 by the substitution for subsection (3) of the following subsection:

“(3) Any order registered in terms of subsection (1) and any notice served in terms of subsection (2) shall, for the purposes of **[section 12(2) and (3)]** sections 31(3) and 44 of the Maintenance Act, be deemed to be an order made or a notice served under **[section 12(1)]** section 30(1) or 31(1) of the said Act.”.

(3) The Criminal Procedure Act, 1977 (Act No. 51 of 1977) is amended in section 195 by the substitution for paragraph (c) of subsection (1) of the following paragraph:

- “(c) any contravention of any provision of **[section 11(1)]** Part VIII of the Maintenance Act, **[1963 (Act No. 23 of 1963)]** 2003, or of such provision as applied by any other law;”.

(4) Notwithstanding the repeal of any law by subsection (1), anything done under any such law and which could be done under this Act, is deemed to have been done under this Act.

(5) Notwithstanding the repeal of the Maintenance Act, 1963 (Act No. 23 of 1963) by subsection (1) the rules which were made under that Act and were in force immediately before the commencement of this Act and which are not inconsistent with this Act, continue in force until repealed, withdrawn or amended by regulations made under section 49.

### Transitional arrangements

**51.** Until such time as regulations relating to the enforcement of maintenance or other orders of maintenance courts made under section 49 come into operation, the -

- (a) Magistrates’ Courts Act, 1944 (Act No. 32 of 1944) in so far as it relates to the enforcement of any judgment or order of a magistrate’s court; or
- (b) rules made under section 25 of the Magistrates’ Courts Act in respect thereof, must, in so far as it or they are not inconsistent with this Act or are not otherwise clearly inappropriate, apply in respect of the enforcement of maintenance or other orders of maintenance courts as if the Act or the rules were regulations made under section 49, and any enforcement of any maintenance or other order of a maintenance court commenced

under the Act or rules immediately before the coming into operation of regulations made under section 49 must continue and be disposed of under the Act or rules.

**Short title and commencement**

**52.** (1) This Act is called the Maintenance Act, 2003 and it will come into operation on a date fixed by the Minister by notice in the *Gazette*.

(2) For the purposes of subsection (1), different dates may be fixed for the coming into operation of different parts or sections of this Act.

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# GOVERNMENT GAZETTE

## OF THE

# REPUBLIC OF NAMIBIA

N\$13.40

WINDHOEK - 17 November 2003

No.3093

### CONTENTS

*Page*

#### GOVERNMENT NOTICES

No. 232	Commencement of the Maintenance Act, 2003 (Act No. 9 of 2003) .....	1
No. 233	Maintenance Act, 2003: Regulations relating to Maintenance .....	1

### Government Notices

#### MINISTRY OF JUSTICE

No. 232 2003

#### COMMENCEMENT OF THE MAINTENANCE ACT, 2003 (ACT NO. 9 OF 2003)

In terms of section 52 of the Maintenance Act, 2003 (Act No. 9 of 2003), I hereby determine that the said Act will come into operation on the 17th November 2003.

**A. KAWANA**  
**MINISTER OF JUSTICE**

Windhoek, 7 November 2003

#### MINISTRY OF JUSTICE

No. 233 2003

#### MAINTENANCE ACT, 2003: REGULATIONS RELATING TO MAINTENANCE

The Minister of Justice has, under section 49 of the Maintenance Act, 2003 (Act No. 9 of 2003), -

- made the regulations set out in the Schedule;
- repealed Government Notices Nos. R97 and R99 published in the Government Gazette of the Republic of South Africa on 22 January 1965 and Government

Notices Nos. R2331 and R2332 published in the Government Gazette of the Republic of South Africa on 24 December 1970.

## **SCHEDULE**

### **ARRANGEMENT OF REGULATIONS**

#### **CHAPTER 1 DEFINITIONS**

1. Definitions

#### **CHAPTER 2 COMPLAINTS AND INVESTIGATIONS**

2. Complaints
3. Investigation by maintenance officer
4. Summons
5. Subsistence and travel allowances
6. Statements by witnesses
7. Notification to admit statements by witnesses

#### **CHAPTER 3 MAINTENANCE AND OTHER ORDERS**

8. Maintenance and ancillary orders
9. Notices
10. Orders by consent
11. Default maintenance order
12. Variation or setting aside of orders
13. Substitution or discharge of maintenance orders
14. Transfer of maintenance orders
15. Notice of change of address by defendant
16. Registration of maintenance orders
17. Appeals against orders

#### **CHAPTER 4 CIVIL EXECUTION**

18. Application for enforcement of maintenance or other orders
19. Warrant of execution
20. Persons authorised to execute a warrant of execution
21. Application for the setting aside of a warrant of execution
22. Attachment of emoluments
23. Attachments of debts

#### **CHAPTER 5 OFFENCES AND ORDERS RELATING TO PROSECUTIONS**

24. Complaints of failure to comply with orders
25. Recovery of arrear maintenance

#### **CHAPTER 6 GENERAL AND SUPPLEMENTARY PROVISIONS**

26. Record of proceedings
27. Photographs of persons subject to maintenance orders
28. Service of documents
29. Access to records and fees

## 30. Misuse of maintenance money

**CHAPTER 1  
DEFINITIONS****Definitions**

1. In these regulations any word or expression to which a meaning has been given in the Act bears that meaning and, unless the context otherwise indicates -

“the Act” means the Maintenance Act, 2003 (Act No. 9 of 2003).

**CHAPTER 2  
COMPLAINTS AND INVESTIGATIONS****Complaints**

2. A person who lodges a complaint as contemplated in section 9(1) of the Act must -

- (a) in the case of a new complaint, lodge the complaint on a form corresponding substantially to Form A of the Annexure; or
- (b) in a case where there is an existing maintenance order, lodge the complaint on a form corresponding substantially to Form B of the Annexure.

**Investigation by maintenance officer**

3. (1) The directive which a maintenance officer may issue under section 10(1) of the Act must be in a form corresponding substantially to Form C 1A of the Annexure.

(2) A maintenance officer must keep a record of all directives issued under section 10 of the Act.

(3) Any person who fails to comply with a direction contemplated in subregulation (1) commits an offence and liable on conviction to a fine not exceeding N\$2000 or to imprisonment for a period not exceeding six months.

**Summons**

4. (1) The summons, contemplated in section 11 or 12 of the Act must -

- (a) in the case of the complainant and the defendant, be in a form corresponding substantially to Part A of Form C1 of the Annexure; and
- (b) in the case of other witnesses, be in a form corresponding substantially to Part A of Form C11 of the Annexure.

(2) The defendant must complete Part B of Form C1 of the Annexure.

(3) The service of a summons referred to in sub-regulation (1) must be done in accordance with regulation 28(1).

(4) A return of service must, in the case of a summons referred to in -

- (a) subregulation (1)(a), be in a form corresponding substantially to Part C of Form C1 of the Annexure; and



- (b) subregulation 1(b), be in a form corresponding substantially to Part B of Form C11 of the Annexure.

(5) A summons to the defendant must be accompanied by a document in a form corresponding substantially to Form G of the Annexure.

#### **Subsistence and travelling allowances**

5. Any person who, under section 12(6) of the Act, is entitled to receive an allowance for attending an enquiry as a witness must be paid the allowances which are payable under section 191 of the Criminal Procedure Act, No. 51 of 1977, to a person attending criminal proceedings as a witness for the State.

#### **Statements by witnesses**

6. (1) The written statement contemplated in section 14(1) of the Act, must -

- (a) be signed by the person who made it; and
- (b) contain a declaration by such a person to the effect that it is true to the best of his or her knowledge and belief and that he or she made the statement knowing that he or she commits an offence if he or she intentionally includes anything therein which he or she knows to be false or did not know or believe to be true.

(2) If the person who makes a statement in terms of subregulation (1) cannot read the statement, that statement must -

- (a) be read to him or her by the person taking down the statement before the statement is signed by the person making the statement; and
- (b) be endorsed by the person who so read the statement to the effect that it was read.

#### **Notification to admit statements by witnesses**

7. A notification, contemplated in section 14(3) of the Act, requiring any party to consent to the admission of a statement as evidence, must be in a form corresponding substantially to Form D of the Annexure.

### **CHAPTER 3 MAINTENANCE AND OTHER ORDERS**

#### **Maintenance and ancillary orders**

8. An order of the maintenance court contemplated in section 17 of the Act, must be in a form corresponding substantially to Form E of the Annexure.

#### **Notices**

9. (1) The directive, contemplated in section 32(1) of the Act, to any person who is indebted to the defendant, must be in a form corresponding substantially to Part A of Form F of the Annexure.

(2) The service of a notice referred to in subregulation (1) must be done in accordance with regulation 28(1) or (5), as the case may be.

(3) The return of service on a notice referred to subregulation (1) must be in a form corresponding substantially to Part B of Form F of the Annexure.

(4) Where the person indebted to the defendant is discharged from the liability, he or she must give notice to the maintenance in a form corresponding substantially to Part C of Form F of the Annexure.

#### **Orders by consent**

10. (1) The consent of a defendant contemplated in section 18 of the Act must be in a form corresponding substantially to Part A of Form G of the Annexure.

(2) An order made in accordance with the consent referred to in subregulation (1) must be in a form corresponding substantially to Part B of Form G of the Annexure.

(3) The return of service of a maintenance officer, messenger of the court or maintenance investigator showing that a copy of an order by consent referred to in subregulation (2) was delivered or tendered to the defendant must be in a form corresponding substantially to Part C of Form G of the Annexure.

#### **Default maintenance order**

11. (1) A default maintenance order, contemplated in section 19(1) of the Act, must be in a form corresponding substantially to Part A of Form H of the Annexure.

(2) A notice to the defendant against whom a default order, has been made, must be in a form corresponding substantially to Part B of Form H of the Annexure.

(3) The return of service of a maintenance officer, messenger of the court or maintenance investigator showing that a copy of a default maintenance referred to in subregulation (1) was delivered or tendered to the defendant must be in a form corresponding substantially to Part C of Form H of the Annexure.

(4) An application for the substitution or setting aside of a default order, contemplated in section 19(4) of the Act, must be in a form corresponding substantially to Part A of Form I of the Annexure.

(5) The notice to be given by the defendant to the complainant as, contemplated in section 19(7) of the Act, must be in a form corresponding substantially to Part B of Form I of the Annexure.

(6) Any notice under subregulation (5) must be served on the complainant in any manner which is convenient to the defendant but the defendant must keep proof of service of the notice.

#### **Variation or setting aside of orders**

12. (1) The notice of variation or the setting aside of an order as contemplated in section 22 of the Act must, in the manner which is reasonable and appropriate in the circumstances, inform -

- (a) the defendant;
- (b) the complainant; and
- (c) the person referred to in section 31(1) or 32(1) of the Act,

of the variation or the setting aside of the order and that notice which must be in a form corresponding substantially to Form J of the Annexure.

(2) The maintenance officer must keep record of all notices issued under this regulation.



**Substitution or discharge of maintenance orders**

**13.** On receipt of a notice of the substitution or discharge of a maintenance order, as contemplated in section 23 of the Act, the clerk of the court must -

- (a) file the notice with the original documents applicable to the case;
- (b) in the case of an order substituting a maintenance order, record the particulars of the new order on the order which is being substituted; and
- (c) in the case of an order discharging the maintenance order, endorse the original order to that effect.

**Transfer of maintenance orders**

**14.** (1) Where a complainant in whose favour a maintenance order or any other order under the Act was made or given changes his or her place of residence he or she must, within 30 days of such change of place of residence notify the maintenance officer of the maintenance court which has jurisdiction in the area where the complainant now resides.

(2) A notice contemplated in subregulation must be in a form substantially corresponding to Part A of Form R of the Annexure.

(3) On receipt of a request made under subregulation (1), the clerk of the court where the maintenance order is registered must -

- (a) retain certified copies of all orders or judgments, including previous amended orders, and documents with regard to the record of payment which are applicable to the particular case; and
- (b) send by hand or registered post all the original documents on the file to the clerk of the maintenance court which requested the transfer.

(4) On receipt of the maintenance order referred to in subregulation (1), the clerk of the maintenance court where the complainant now resides must register the order by numbering it with the following consecutive number for maintenance cases for the year during which it was received.

(5) The clerk of the court referred to in subregulation (4) must give notice to the defendant and any person who is required under the Act to deliver money or property of such transfer on a form corresponding substantially to Part B of Form R of the Annexure.

**Notice of change of address by defendant**

**15.** Where the defendant has changed his or her place of residence or employment as contemplated in section 17(5) of the Act he or she must give notice in a form corresponding substantially to Form S of the Annexure.

**Registration of maintenance orders**

**16.** The clerk of the maintenance court must maintain the register of maintenance orders referred to in section 27 of the Act by -

- (a) retaining certified copies of all orders or judgements, including previous amended orders, and documents with regard to the record of payment which are applicable to the particular case; and
- (b) on receipt of a maintenance order as contemplated in section 27 of the Act, registering that order by numbering it with the following consecutive number for maintenance cases for the year during the year which it was received.

### Appeal against orders

17. (1) An appeal in terms of section 47 of the Act must be noted within 21 days of the granting of the order appealed against and any cross-appeal must be noted within seven days of the noting of the appeal.

(2) An appeal or cross-appeal must be noted by delivery, within the period prescribed in subregulation (1), to the clerk of the maintenance court concerned and to the other party, of a notice stating -

- (a) whether the whole or part only of the order is appealed against and, if part only, which part; and
  - (b) the grounds of appeal, specifying the findings of fact or rulings of law appealed against.
- (3) The judicial officer who presided at the enquiry must -
- (a) within 14 days of the noting of an appeal; or
  - (b) if the proceedings at the enquiry were recorded by mechanical means, within 14 days after the transcription of the mechanical record of the proceedings has been placed before him or her by the clerk of the maintenance court,

transmit to the clerk of the maintenance court a statement in writing setting out -

- (i) the facts he or she found to be proved;
- (ii) his or her reasons for any finding of fact specified in the notice of appeal ; and
- (iii) his or her reasons for any ruling on a question of law or for the admission or rejection of any evidence specified in the notice of appeal.

(4) Where an appeal has been noted under this regulation, the clerk of the relevant maintenance court must, notwithstanding regulation 26, if the proceedings at an enquiry were recorded by mechanical means, forthwith cause the mechanical record of the proceedings to be transcribed.

(5) The person who has noted an appeal bears the cost of the transcription contemplated in subregulation (4), but, if the magistrate of the relevant maintenance court is satisfied that such person is unable to pay the costs, the costs must be paid by the State.

(6) After an appeal has been noted in terms of sub-regulation (1), the appeal must be prosecuted as if it were an appeal against the decision of a magistrates' court in a civil case and the rules regulating the conduct of the proceedings of the High Court in so far as they relate to civil appeals from the magistrates' courts do, with the necessary changes, apply to such an appeal.

(7) The clerk of the maintenance court must, within seven days of the receipt by that clerk of court of a notice that an appeal has been set down for hearing, transmit to the Registrar of the High Court, the record of the proceedings at the enquiry, certified by the presiding judicial officer as a true record of the proceedings and a transcription of that part of the proceedings mechanically recorded, certified as provided for in regulation 26.

(8) If the complainant notes an appeal or cross-appeal, as the case may be, and he or she cannot afford a legal practitioner, the complainant must notify the clerk of the maintenance court accordingly.



- (9) The clerk of the court must -
  - (a) on receipt of the notice referred to in subregulation (8), immediately inform the Prosecutor-General of the appeal or cross-appeal and that the complainant cannot afford a legal practitioner;
  - (b) on receipt of the statement of the presiding judicial officer referred to in subregulation (3), furnish the Prosecutor-General with copies of all relevant documentation; and
  - (c) within seven days of the receipt by him or her of a notice that the appeal has been set down for hearing submit the original record as prescribed in subregulation (7) and a copy of the record to the Prosecutor-General.

#### **CHAPTER 4 CIVIL EXECUTION**

##### **Application for enforcement of maintenance or other orders**

- 18. The application for -
  - (a) the authorisation of the issue of a warrant of execution;
  - (b) an order for the attachment of emoluments; or
  - (c) an order for the attachment of any debt,

contemplated in section 28 of the Act, must be in a form corresponding substantially to Form K of the Annexure.

##### **Warrant of execution**

- 19. (1) A warrant of execution, contemplated in section 29 of the Act, must be -
  - (a) in a form corresponding substantially to Form L of the Annexure; and
  - (b) prepared in triplicate.
- (2) The complainant must complete Part A of Form L of the annexure and thereafter lodge that form with the clerk of the maintenance court concerned.
- (3) On receipt of the partly completed form referred to in subregulation (2) the clerk of the maintenance court must issue the warrant of execution by completing Part B of Form L of the Annexure if he or she is satisfied that -
  - (a) authorisation for the issuing of a warrant of execution was granted; and
  - (b) the warrant of execution has been properly prepared.
- (4) The clerk of the maintenance court must, after the warrant of execution has been issued -
  - (a) return the original warrant of execution and one copy thereof to the complainant; and
  - (b) file the second copy of the warrant of execution on the relevant maintenance file.
- (5) Any alteration on the warrant of execution must be initialled by the clerk of the maintenance court.

(6) The messenger of the court executing the warrant of execution must complete Part C and, if applicable, Part D of Form L of the Annexure and return the form to the clerk of the maintenance court.

(7) The messenger of the court must pay the proceeds of the execution directly to the complainant who is the execution creditor in the case.

#### **Persons authorised to execute a warrant of execution**

20. The messenger of the court for the district in which the property subject to execution is found is authorised to execute a warrant of execution against that property.

#### **Application for the setting aside of a warrant of execution**

21. (1) An application for the setting aside of a warrant of execution by a person against whom such a warrant has been issued, as contemplated in section 29(5) of the Act, must be in a form corresponding substantially to Part A of Form M of the Annexure.

(2) An application for the substitution or suspension of a warrant of execution, contemplated in section 29(8) of the Act, must be in a form corresponding substantially to Part B of Form M of the Annexure.

(3) A notice of application for the substitution or suspension of a warrant of execution contemplated in section 29(9)b) of the Act must be in a form corresponding substantially to Part C of Form M of the Annexure.

(4) A defendant who makes an application under this regulation must serve the notice referred to in subregulation (3) on the complainant in any manner convenient to him or her, and he or she must keep a record of proof of service.

#### **Attachment of emoluments**

22. (1) An application for the suspension, amendment or rescission of an order for the attachment of emoluments, contemplated in section 30(2) of the Act, must be in a form corresponding substantially to Part A of Form N of the Annexure.

(2) A notice of an application for the suspension, amendment or rescission of an order for the attachment of emoluments, contemplated in section 30(3) of the Act, must be in a form corresponding substantially to Part B of Form N of the Annexure.

(3) A person who makes an application under this regulation must serve the notice referred to in subregulation (2) on the complainant in any manner convenient to him or her, and he or she must keep a record of proof of service.

(4) A notice to an employer or the person contemplated in section 31(1) of the Act, must be in a form corresponding substantially to Part A of Form O of the Annexure.

(5) The service of a notice referred to in subregulation (4) must be done in accordance with regulation 28(1) or (5), as the case may be.

(6) The return of service of a notice referred to in subregulation (4), must be in a form corresponding substantially to Part B of Form O of the Annexure

(7) A notice by the employer or the person contemplated in section 31(2) of the Act that the defendant has left his or her service or that the person has been discharged from liability, must be in a form corresponding substantially to Part C of Form O of the Annexure.

(8) The notice referred to in subregulation (7) must be submitted to the maintenance officer of the court where the order was made in any manner convenient to the employer or person, and that employer or person must keep a record of the notice.



**Attachment of debts**

23. (1) An application for the suspension, amendment or rescission of an order for the attachment of debts, contemplated in section 32(2) of the Act, must be in a form corresponding substantially to Part A of Form P of the Annexure.

(2) A notice of an application for the suspension, amendment or rescission of an order for the attachment of debts, contemplated in section 32(3) of the Act, must be in a form corresponding substantially to Part B of Form P of the Annexure.

(3) A person who makes an application under this regulation must serve the notice referred to in subregulation (2) on the complainant in any manner convenient to him or her, and he or she must keep a record of proof of service.

**CHAPTER 5**  
**OFFENCES AND ORDERS RELATING TO PROSECUTIONS**

**Complaints of failure to comply with orders**

24. Where the public prosecutor makes the application contemplated in section 33(1) of the Act, that application must be accompanied by a complaint by the complainant which complaint must be in a form corresponding substantially to Form Q of the Annexure.

**Recovery of arrear maintenance**

25. (1) The clerk of the court which has convicted a person must submit a certified copy of an order made by the court in terms of section 33(1) of the Act to the clerk of the civil court for registration of such order, as contemplated in section 27(1) of the Act.

(2) The clerk of the civil court must -

- (a) register the order referred to in sub-regulation (1) by numbering it with the following consecutive case number for the year during which it is registered; and
- (b) inform the maintenance officer of the maintenance court where the order was made and the complainant of the registration and the number of the case.

**CHAPTER 6**  
**GENERAL AND SUPPLEMENTARY PROVISIONS**

**Record of proceedings**

26. (1) The proceedings at an enquiry must be recorded by keeping minutes of -

- (a) the proceedings generally;
- (b) any evidence given at the enquiry and of any objection to any evidence given or tendered at the enquiry and of any ruling by the court;
- (c) any variation of a maintenance order; and
- (d) any maintenance order, including any provisional maintenance order as defined in the Reciprocal Enforcement of Maintenance Orders Act, 1995 (Act No. 3 of 1995), made at any enquiry, and of any refusal to make such a maintenance order.



(2) The maintenance court must mark each document admitted as evidence and note such mark on the record.

(3) The statement by judicial officer presiding at an enquiry referred to in regulation 17(3) becomes part of the record.

(4) The judicial officer presiding at an enquiry must record the proceedings of the enquiry or appoint or designate any person, either generally or specially for the purpose of a particular enquiry, to record the proceedings by mechanical means.

(5) A mechanical record of the proceedings must not be transcribed unless a judicial officer designated to preside in the court concerned has so directed or an appeal has been noted in terms of regulation 17.

(6) The person making a transcription of a mechanical record of the proceedings at an enquiry must certify it as a true transcription of such record and any such transcription becomes part of the record of the proceedings.

#### **Photographs of persons subject to maintenance orders**

27. (1) On receipt of photographs or a copy of the identity document of a defendant against whom the maintenance court has made a maintenance order, the maintenance officer must -

- (a) endorse on the back of each photograph or copy of identity document the personal particulars of the defendant;
- (b) file one photograph or copy of the identity document in the relevant maintenance file; and
- (c) attach the second photograph or copy of identity document to the relevant register of payments.

(2) The maintenance officer may make a photograph or copy of the identity document of the defendant available to any person executing a court order or serving a document on the defendant in terms of the Act.

#### **Service of documents**

28. (1) A document, which under the Act or these regulations is required to be served by the maintenance investigator or the messenger of court must, together with any copy, be handed over to the maintenance investigator or messenger of the court who must, subject this regulation, forthwith serve it on the person referred to in that document by delivering a copy of the document in one of the following ways -

- (a) to that person personally;
- (b) at that person's residence or place of business to a person apparently not less than 16 years of age and apparently residing or employed there;
- (c) at that person's place of employment to a person apparently not less than 16 years of age and apparently in authority over that person or, in the absence of such a person in authority, to a person apparently not less than 16 years of age and apparently in charge at that person's place of employment; and
- (d) in the case of a juristic person, at its registered office or main place of business within the area of jurisdiction of the court concerned, to a director or a responsible employee of the juristic person.

(2) For the purpose of subregulation (1)(b), "residence" means, where the building is occupied by more than one person or family, that portion of the building occupied by the person on whom service is to be effected.

(3) A messenger of the court or maintenance investigator must, if requested by the person on whom a document is or is to be served, show him or her the original of the document.

(4) Where the person on whom a document is to be or may be served keeps his or her residence, place of business or place of employment closed and thereby prevents the messenger of the court or maintenance investigator from serving the document, it is sufficient service to affix a copy of the document to the outer or principal door or security gate of such residence, place of business or place of employment, or to place a copy of such document in the mail box at such residence, place of business or employment.

(5) A notice referred to in regulation 9(2) or 22(5) may be served by the maintenance investigator or messenger of court on the person referred to in that notice by -

- (a) handing a copy of that notice to that person personally and endorsing the original notice to that effect; or
- (b) sending the notice by facsimile to that person, in which case proof thereof must be kept, and by sending a copy of the notice by registered post to that person.

#### **Access to records and fees**

**29.** (1) For the purposes of section 46(1) of the Act the record of proceedings is only accessible to -

- (a) the defendant or his or her legal practitioner;
- (b) the complainant or his or her legal practitioner;
- (c) a judicial officer, maintenance officer, maintenance investigator or clerk of court; or
- (c) any person who has been permitted to have access by the maintenance court.

(2) The fees payable in terms of section 46(2) of the Act must be the same as those prescribed in Rule 34 of the Magistrates Court Rules of Court promulgated by Government Notice No.R1108 of 21 June 1968.

#### **Misuse of maintenance money**

**30.** (1) Any person who is aware of the fact that a recipient of maintenance money on behalf and for the benefit of another person is misusing such money by failing to use it for the benefit of the beneficiary, may lodge a complaint at the court at which the maintenance order was issued.

(2) A person who lodges a complaint as contemplated in subregulation (1) must lodge the complaint on a form corresponding substantially to Form T of the Annexure.



**ANNEXURE INDEX  
FORMS**

<b>FORM A -</b>	COMPLAINT IN TERMS OF SECTION 9(1) OF THE ACT (NEW COMPLAINT)
<b>FORM B -</b>	COMPLAINT IN TERMS OF SECTION 9(1) OF THE ACT (CHANGES TO EXISTING MAINTENANCE ORDER)
<b>FORM C 1 -</b>	SUMMONS IN TERMS OF SECTION 11(1) OR 12(1) OF THE ACT (COMPLAINANT OR DEFENDANT)
<b>FORM C1A</b>	DIRECTIVE IN TERMS OF SECTION 10(1)(a) OF THE ACT
<b>FORM C11</b>	SUMMONS IN TERMS OF SECTION 11 OR 12 OF THE ACT (WITNESSES)
<b>FORM D</b>	NOTICE IN TERMS OF SECTION 14(3) OF THE ACT (NOTICE TO ADMIT STATEMENT AS EVIDENCE)
<b>FORM E</b>	ORDER IN TERMS OF SECTION 17 OF THE ACT
<b>FORM F</b>	NOTICE IN TERMS OF SECTION 32 OF THE ACT
<b>FORM G</b>	CONSENT IN TERMS OF SECTION 18 OF THE ACT
<b>FORM H</b>	DEFAULT MAINTENANCE ORDER IN TERMS OF SECTION 19 READ WITH SECTION 17 OF THE ACT
<b>FORM I</b>	APPLICATION FOR VARIATION/SETTING ASIDE OF A DEFAULT MAINTENANCE ORDER IN TERMS OF SECTION 19 OF THE ACT
<b>FORM J</b>	NOTICE OF VARIATION OR SETTING ASIDE OF CERTAIN ORDERS (SECTION 22 OF THE ACT)
<b>FORM K</b>	APPLICATION FOR ENFORCEMENT OF MAINTENANCE ORDER OR OTHER ORDER IN TERMS OF SECTION 28 OF THE ACT
<b>FORM L</b>	WARRANT OF EXECUTION AGAINST PROPERTY IN TERMS OF SECTION 29 OF THE ACT
<b>FORM M</b>	APPLICATION FOR SETTING ASIDE OF A WARRANT OF EXECUTION IN TERMS OF SECTION 29(5) OF THE ACT
<b>FORM N</b>	APPLICATION FOR SUSPENSION, AMENDMENT OR RESCISSION OF AN ORDER FOR THE ATTACHMENT OF EMOLUMENTS IN TERMS OF SECTION 30(2) OF THE ACT
<b>FORM O</b>	NOTICE TO AND BY EMPLOYER IN TERMS OF SECTION 31 OF THE ACT
<b>FORM P</b>	APPLICATION FOR SUSPENSION, AMENDMENT OR RESCISSION OF AN ORDER FOR THE ATTACHMENT OF DEBTS IN TERMS OF SECTION 32(2) OF THE ACT
<b>FORM Q</b>	COMPLAINT FOR THE PURPOSES OF SECTION 33 OF THE ACT
<b>FORM R</b>	NOTICE IN TERMS OF SECTION 24 OF THE ACT

**FORM S** NOTICE IN TERMS OF SECTION 17(5) OF THE ACT

**FORM T** COMPLAINT OF MISUSE OF MAINTENANCE FOR THE  
PURPOSES OF SECTION 40 OF THE ACT

**The forms are available at the maintenance court.**



Gender Research and Advocacy Project  
LEGAL ASSISTANCE CENTRE

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