

MAINTENANCE MATTERS



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



Legal
Assistance
Centre

Research Brief
2016

Why does maintenance matter?

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

Most children live apart from one or both parents. According to the 2013 Demographic and Health Survey, approximately two-thirds of children live apart from one or both parents while the absent parent or parents are still living. These children may be in particular need of maintenance.

Children are more likely than adults to live in poverty. According to the 2006-2007 Demographic and Health Survey, only 50% of children between 5 and 17 years of age have a pair of shoes, two sets of clothing and a blanket. Many of these children might be able to acquire such bare necessities of life through an absent parent's payment of maintenance. Unfortunately this question was not repeated in the 2013 Demographic and Health Survey so more recent statistics are not available. However there are few indications that the situation has substantially changed.

Why did LAC conduct research on maintenance?

The purpose of the study entitled *Maintenance Matters* was to collect information on the implementation of the Maintenance Act 9 of 2003, to see if it is serving its intended purpose in practice.

How was the study conducted?

The research included an assessment of data from a large national sample of court files, focus group discussions and interviews with magistrates, maintenance officers and clerks in 11 of the then 13 regions.

Maintenance Matters

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



Gender Research and Advocacy Project
LEGAL ASSISTANCE CENTRE
2013

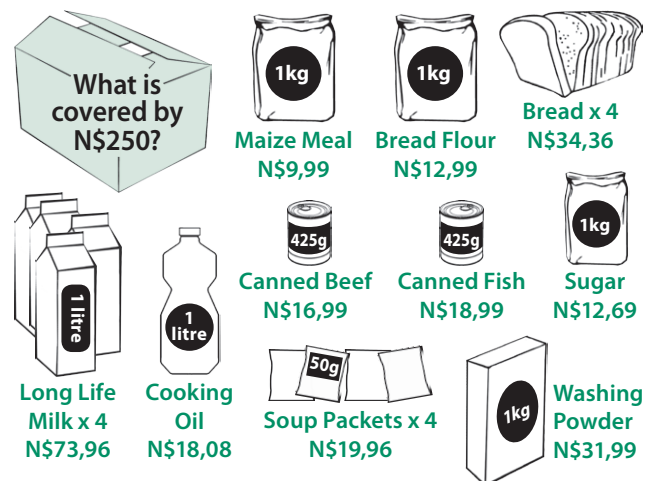


More detailed information is available from
the Legal Assistance Centre.

What does the study show?

Around two-thirds of maintenance complaints result in an order. The amount of maintenance ordered is typically about N\$250 per 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 is relatively quick and easy. However, if there are challenges along the way, the process can be very difficult.



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 the law on the part of maintenance court officials and the public.

For example, not all maintenance court officials are aware that minor children can claim maintenance on their own – meaning that children may be turned away even though the law says that they can seek maintenance for themselves.

The current system often fails to get defendants into court; the study found that one in five summons issued to defendants are not served. Maintenance officers do not seem to utilise their powers of investigation to locate defendants – or to obtain accurate information about the defendants’ income and means. This enables defendants in maintenance cases to get away with hiding themselves or their assets to avoid contributing towards the support of their children. This problem is further compounded by the fact that not a single maintenance investigator has been appointed in the twelve years since the Act came into force.

“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.”

Maintenance Act, section 8(4)

The study showed that maintenance payments are usually made to the court. The option of receiving the payments directly, through electronic or cell phone transfers, is not common. However, if there is no need to spend money on transport to get to the court to collect monthly payments, more money will be available for meeting the children’s needs.

We also found that maintenance court officials and members of the public do not make effective use of the mechanisms for enforcing maintenance orders. A defendant who breaches a maintenance order is usually in arrears for six to nine months before the complainant informs the court – even though the law states that the court can take action after only 10 days.

And breaches are seldom dealt with effectively. Orders for the attachment of property or wages are rarely made and criminal proceedings are seldom initiated – and even where there is a criminal trial, punishment is seldom imposed, not even weekend imprisonment. This is a serious concern, because effective enforcement mechanisms are fundamental to the overall success of the system.

The Maintenance Act includes a specific mechanism for addressing suspected abuse of maintenance money, but we found just 2 cases of possible misuse of maintenance in the entire sample of almost 1700 cases.

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 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 in maintenance cases 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.

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 of 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.

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 always effectively implemented.

Key areas for action

- 1. Appoint maintenance investigators:** 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. Use powers of investigation more fully:** Maintenance officers need to be encouraged to use their powers of investigation more assertively to ensure that both parents are supporting the child in accordance with their actual means.
- 3. Provide trained volunteers to assist with maintenance cases:** NGOs can provide volunteers to assist with maintenance cases. Such volunteers 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.
- 4. Prevent arrears:** When a maintenance order is made, maintenance officers should inform the complainant that arrears can be reported as soon as a single payment has been outstanding for ten days, to prevent arrear amounts from piling up. Defendants should also be fully informed about the consequences of failure to make regular payments on time.
- 5. Information about the Maintenance Act:** Information about the law on maintenance should be disseminated by the Ministry of Justice as well as civil society, through radio and television, news articles or advertisements, and pamphlets or posters placed at popular public places and at maintenance courts. People need to know –
 - what documents to bring to court
 - that parents are expected to share pregnancy- and birth-related expenses
 - that default orders can be made where a defendant fails to appear in court
 - the different ways in which monthly payments can be received
 - that both complainants and defendants can apply for increases or decreases in maintenance orders to deal with changed circumstances.
- 6. Amendments to the Maintenance Act and regulations:** The Law Reform and Development Commission and the Ministry of Justice should consider amendments to the Maintenance Act and regulations to clarify and fine-tune some issues, including revision of some of the key forms to make them simpler and easier to use. Another positive change would be to allow attachment of wages from the beginning, removing the requirement that this can be ordered only after there has been a breach, to encourage regular and reliable payments.

Parents need to remember that maintenance should not be a tug-of-war between the mother and the father – when maintenance is not paid, it is the child who suffers.

This research brief was produced by the **Legal Assistance Centre**
with support from the **Embassy of Finland in Windhoek**.

LEGAL ASSISTANCE CENTRE

4 Marien Ngouabi Street (former name Körner Street), Windhoek ● PO Box 604, Windhoek, Namibia
Phone 061-223356 ● Fax 061-234953 ● Email info@lac.org.na ● Website www.lac.org.na

Digital versions (PDFs) of LAC publications are available on the website.



EMBASSY OF FINLAND
WINDHOEK