

SOME HURDLES IN THE IMPLEMENTATION OF THE MAINTENANCE ACT 99 OF 1998*

1 Introduction

This note discusses some hurdles in the implementation of the Maintenance Act 99 of 1998 (hereinafter "the 1998 Act") in the Pietermaritzburg maintenance court. I argue that the introduction of changes in the 1998 Act without adequate personnel and budget has had a deleterious effect. For instance, the shifting of the burden of proof of lack of means from the accused to the state and the requirement that the state should prove that the accused had the requisite *mens rea*, without the appointment of the required maintenance investigators, means that there is no person to assist the complainant in the collection of relevant information for the successful prosecution of her case. With regard to the conversion of a maintenance trial into a maintenance inquiry for arrears, introduced by the current Act, some magistrates confuse it with the conversion of a criminal trial into an inquiry for lack of means thus making the process longer.

These changes, which are arbitrarily divided into three categories, namely, procedural, personnel and administrative changes, will be highlighted and summarized in this note. The shift of the burden of proof of lack of means from the accused to the state and the conversion of a criminal trial into a maintenance inquiry for arrears maintenance fall under substantive changes. The new position of the maintenance investigator and the maintenance officer are discussed under personnel changes. The discussion of administrative changes includes the maintenance forms, the enforcement of emolument attachments and warrants of execution. I conclude that these changes have prolonged and complicated the court process and continue to frustrate the enforcement machinery.

* The note is based on a study conducted by the author in 2001 on the implementation of the Maintenance Act 99 of 1998. Some magistrates, attorneys, court administrators and the maintenance officer of the Pietermaritzburg Maintenance Court were interviewed on the implementation of the new Act, as well as the staff of two NGOs that assist women with maintenance problems, namely, Justice for Women (JAW) and the Centre for Criminal Justice (CCJ). In 2005 a further telephone conversation was held with the same role players. See Mamashela "The Implementation of the Maintenance Act 99, 1998" 2002 The Centre for Criminal Justice (the CCJ) Legal Series; "The implementation of the Maintenance Act 99, 1998: Two NGOs Throw Down the Gauntlet. A Model for the Country?" 2005 21(3) *SAJHR* 490.

2 Procedural changes

2.1 *The burden of proof of lack of means*

In the following sections the changes introduced by the current Act are highlighted and summarised, the hurdles posed by the changes are discussed, and some ways in which the problem/s could be dealt with are suggested.

In the Maintenance Act of 1963, the predecessor to the 1998 Act, the accused bore the onus of proof of lack of means (s 11(3)). Moreover, he had to show that such lack of means was not caused by his unwillingness to work (s 11(3)). The current Act has changed the law in this regard; it has shifted the burden of proof of the lack of means from the accused to the prosecution (s 31(2)). This shift envisages a new innovation, the appointment of a maintenance investigator (MI) for every maintenance court (ss 5(1) and (2), of the 1998 Act). (For an exhaustive discussion of the functions of the maintenance investigator see Mamashela "The Courts' Interpretation of the Maintenance Act, 1998 and its Predecessors" 2005 122(1) *SALJ* 217.) Due to budgetary constraints, the Minister of Justice has not appointed the MIs country wide (Kelly "Onderhoud – Eers Weeskind, Nou Stiefkind" 2000 XXXI(1) *Codicillus* 53 54; Meyer "The 1998 Maintenance Act: An Improvement on its Predecessor?" 1999 *The Judicial Officer* 121).

According to the current Act, if the accused pleads lack of means, the MI must investigate the truthfulness of the accused's story as his (the accused's) changed personal and financial circumstances could result in his lack of means to comply with the maintenance order. For instance, he could have remarried, been demoted or lost his job through retrenchment. As soon as the accused puts up such a defence, the MI must verify the alleged changed personal and financial circumstances. Has the accused really remarried? Has he lost his job? Why did he lose the job? If the accused claims to be unemployed, the MI has to find out why the accused is unemployed. Is it because he is unemployable or is he just idle and is not seriously looking for a job? If, on investigation, the MI confirms the accused's story of unemployment, the magistrate will have no option but to acquit the accused. Where the accused had pleaded not guilty to the offence of failure to maintain his children because he was unemployed but the magistrate had convicted him, the conviction was set aside on review because the state had failed to prove that the accused's lack of means was due to his unwillingness to work (*S v Tonyela* 2002 *JDR* 0008 (E)). However, if the accused's unemployment was because of his unwillingness to work, he would be found guilty of an offence.

There is widespread abuse of this change by some employed accused who deliberately stop paying the maintenance instalments and claim lack of means, because of loss of a job, (interview with the maintenance magistrate, the court administrator and JAW staff). The practical implication of the non-appointment of maintenance investigators is that the accused's story of non-employment cannot be verified. In the absence of the MI to investigate the

truthfulness of the accused's story, the magistrate must go by his (the accused's) story and acquit him. The maintenance investigators are key to the verification of the accused's story and to the collection of evidence from other sources (s 7(2)(e)(i)-(iii)). The importance of the MI in the implementation of the current Act is reiterated by Grieve *et al* ("Defining the Functions of Maintenance Investigators and Setting Out Proposals for their Remuneration" 2005 Part B *Cornerstone* 67). This study was commissioned by the Ministry of Justice to cost the implementation of the 1998 Act.

Obviously, the accused will successfully evade the enforcement machinery because of the failure of the prosecution (due to non-appointment of the MI) to contradict his story.

In the absence of investigators, what some magistrates do if the accused claims he has no job is to postpone the trial and ask the accused to prove that he is unemployed by getting a letter from a previous employer corroborating his story (interview with magistrate). Technically the court is asking the accused to prove that he is unemployed, a misinterpretation of the current law. Thus, the trial will not proceed and will be postponed for say, two months (interview with the magistrate). If there is evidence that the accused is unemployed or is looking for a job, the matter will be converted into an inquiry, in terms of section 41, and will be remitted to the maintenance court for it to investigate the veracity of the accused's lack of means. Section 41 provides for conversion of criminal proceedings into a maintenance inquiry in a maintenance court in respect of an offence in terms of section 31(1) which creates an offence for failure to make payments in respect of a maintenance order.

The advantage of a conversion in terms of section 41 is that the proceedings become civil once more which means that the state bears a lesser burden of proof, on a balance of probabilities. As both parties have a duty to produce evidence during a maintenance inquiry, the complainant may adduce evidence showing that the defendant is employed. In turn, the defendant is allowed to produce whatever evidence he has. Obviously, remitting the matter back to the maintenance court (for an inquiry) is re-inventing the wheel all over again with the attendant waste of the state's inadequate human and financial resources. As a result, one case is heard several times over, first as a maintenance inquiry, second as criminal proceedings and the third time as a maintenance inquiry once more!!

2.2 Conversion of criminal proceedings into an inquiry for arrears maintenance (section 40(2) of the 1998 Act)

If the accused defaults in the payment of maintenance instalments, the plaintiff must go back to the maintenance court to report the default. The magistrate will issue a summons and a warrant of arrest which means that the defendant must be sought, arrested and brought to court to explain why he is in breach of the maintenance order. He might have a number of reasons for the default. For instance, he might have been ill and did not go

to work and was therefore not paid or lost his job because of retrenchment. If there is evidence to support the accused's story of unemployment, the court must convert the criminal proceedings into an inquiry to determine if and how the accused can pay the arrears maintenance.

Section 40(2) of the 1998 Act enables the court to convert the criminal proceedings into an inquiry for arrears maintenance. This conversion is different from the one discussed above in that it relates only to the arrears the accused failed to pay. Section 40(2) allows the court to hold a summary inquiry into the means of the convicted person and the needs of the person he must maintain. Although this conversion is similar to the one held when a criminal trial is converted into a maintenance inquiry, it is legally different.

The main purpose of the conversion for arrears maintenance is to enable the court to look into the accused's changed circumstances (*S v Mabona* 2001 2 SACR 306). In this case the accused was convicted of contravening section 31(1) of the 1998 Act in that he failed to make maintenance payments ordered by the court. On review, the judge observed that the accused's circumstances had changed and that was the reason he was in breach of the court order. Consequently, the judge said, the magistrate had erred in convicting the accused. Where the accused has been ordered to pay maintenance instalments and fails to do so because he, for instance, has re-married and has more children to maintain, the magistrate will have to convert the criminal proceedings into a maintenance inquiry in order to find out how the accused's situation has changed and how much he can afford to pay.

The magistrate will make an inquiry into whether the accused is in a position to settle the unpaid arrears maintenance (s 40(2)(a)). This second inquiry will also enable the court to establish if the accused has assets to justify an order under section 40(1) having the effect of a civil judgment for the amount of arrears. The conversion for arrears maintenance also enables the magistrate to establish if she/he can authorise a warrant of execution against the accused's property (s 27(1)). If the court feels the accused earns enough to pay the arrears maintenance, it will order him to do so. The implementation of this section depends to a large extent on the MI to investigate and verify the accused's alleged changed circumstances. Where the accused was ordered to pay arrears maintenance of R29 000 and it was unclear how much and when, the order was set aside on review, and an inquiry was ordered (*S v Pietersen* 2005 JDR 1086 (T)).

Tracing, locating, arresting and arranging for a date for the accused to explain why he has not paid arrears maintenance can be a long process which may take several months (interview with magistrate, JAW and CCJ staff). Realising the magnitude of the work the MI has to do, the Cornerstone study suggests the establishment of a National Information and Tracing Service to trace and secure information in the form of databases for use by the MI.

Some magistrates confuse conversion for arrears maintenance (s 40(2)) with conversion for lack of means (s 31(2)). The former is "a trial within a

trial” in that the magistrate must investigate the accused’s changed circumstances and not remit the matter to the maintenance court for an inquiry. However, some magistrates convert the proceedings into an inquiry and remit the case to the maintenance court instead of investigating or inquiring into the accused’s ability to pay the arrears. Remittal of the case means that the maintenance court must hold a second inquiry thus repeating and prolonging the whole process of a maintenance case.

It is submitted that, contrary to the objectives and ideals espoused in the 1998 Act, the practical effects of the changes discussed above have been confusion of the role players in the implementation of the 1998 Act, complication of the procedure, prolongation of the process of a maintenance case, letting defaulters off the hook and more frustration of the enforcement machinery.

3 Personnel

3.1 The maintenance investigator (the MI)

The 1998 Act creates the position of the MI and provides for appointment of at least one MI for each maintenance court (s 5(1) and (2); and Kelly 2000 XXXXI(1) *Codicillus* 54). Her/his job is to assist the complainant from the beginning to the end of a maintenance process (Mthimunye “Staying in Line with the Intentions of the Legislature” in Budlender and Moyo (eds) *What About the Children? The Silent Voices in Maintenance* (2004) Tshwaranang Legal Advocacy Centre 119; and Grieve *et al* 2005 Part B *Cornerstone* 67). If the complainant does not have the defendant’s personal and work particulars, the investigator must look for the defendant, locate him and warn him about the pending suit (s 7(2)(a)(i)-(iv)). The MI must also locate persons who have been subpoenaed by the court to appear in either a maintenance inquiry or a criminal trial where the accused has failed to comply with a maintenance order (7(2)(a)(i)-(iv)). She/he should trace and locate any other person who may give information about the accused. She/he must serve or execute the process of a maintenance court (s 7(2)(b); and Kelly 2000 XXXXI(1) *Codicillus* 54), namely, subpoenas and/or summons in respect of criminal proceedings (s 7(2)(c); and Kelly 2000 XXXXI(1) *Codicillus* 54).

Furthermore, the MI must take statements from persons who may give relevant information concerning the maintenance inquiry (7(2)(d)). She/he is charged with the duty of gathering information about the identification, whereabouts, financial position and any other matter concerning the person liable to pay maintenance (s 7(2)(e)(ii)). If the defendant defaults, the MI should find out the reasons for default. As a last resort, the MI has a discretion to initiate maintenance proceedings if the defendant is avoiding responsibility to maintain his partner and children. Where an execution order has been issued, the MI has to locate the defendant’s house (s 7(2)(e)(i)-(iii)(f); and Kelly 2000 XXXXI(1) *Codicillus* 54), effect service and make an inventory of the defendant’s property (s 7 (1)(b)(iii); and Kelly 2000 XXXXI(1)

Codicillus 54). The Cornerstone study suggests that service and execution should be left to the sheriffs (Grieve *et al* 2005 Part B *Cornerstone* 66). In case the defendant has registered his property in a relative's or girlfriend's name in order to evade execution, the MI must investigate and expose the fraud.

3 1 1 The maintenance officer's (MO's) lack of legal training

According to the 1998 Act, a prosecutor is the maintenance officer of the court she/he works in (s 4(1); and Kelly 2000 XXXXI(1) *Codicillus* 55). The maintenance clerks are typically called "maintenance officers" in most courts although the same term also generally applies to prosecutors, who are more often qualified attorneys. Wamhoff observed that the phrase was used interchangeably in Cape Town magistrates' courts ("South Africa's New Maintenance System: Problems and Suggestions" The Centre for Socio-Legal Research UCT 4). The MO collects legally relevant information from the complainant, decides whether to hold an inquiry or not (s 6(i)(a)(b)), and presents the evidence before the magistrate according to the rules of procedure and evidence (s 6(2)). In a nutshell, the MO is the complainant's "attorney" who can either make or destroy her case. She/he represents the complainant during an inquiry before a magistrate and must produce all relevant oral and documentary evidence (s 6(1)(a), (b) and (2) of the 1998 Act). Although the procedure in a maintenance inquiry is a civil one, the onus is on the MO to convince the court, on a balance of probabilities, of the liability of the defendant to maintain the complainant and the children. The magistrate must also be satisfied that the defendant can afford to maintain them. In other words, the defendant must have a job and earn a salary or a wage, in the absence of which the inquiry will fail because the accused will lack the means to maintain the complainant and children.

3 2 Problems

The MO at the Pietermaritzburg maintenance court is not a legally trained prosecutor (interview with the court administrator and magistrate). The Act puts a lot of responsibility on the prosecutor in her/his capacity as an MO (s 7(1)(a)-(d); and Mills "Women's Poverty and the Failure of the Judicial System: Research Findings on the Maintenance System in the Johannesburg Family Court" in Budlender and Moyo (eds) *What About the Children? The Silent Voices in Maintenance* Tshwaranang Legal Advocacy Centre 36). Consequently, the MO should have legal training because a maintenance case has a number of legal implications. These include proving the liability of the defendant, advising the complainant of her common law duty to maintain her children, apportioning the duty between the two disputants, assessing the needs of the children and many other issues pertaining to both parents' legal responsibility towards their children. It is highly probable that an MO without legal training might inadvertently leave out some vital information which might result in an unsuccessful claim.

Where the defendant is represented by an attorney during an inquiry, the untrained MO might feel intimidated and outclassed in court. Reiterating the same point Mills noted that:

“Maintenance officers, whose function in contested maintenance applications is to protect the interests of the child, are *inadequately qualified for this function, and do not cope well when arguing against lawyers representing the father*” (own emphasis) (Mills 36).

It could be argued that such inadequate representation compromises the complainant’s constitutional right to adequate and fair representation, a grave miscarriage of justice. It would be interesting to find out how many maintenance cases are thrown out of court for lack of cogent evidence against the defendant.

It could be argued that the Department of Justice and Constitutional Development is partly to blame for the above-mentioned problem in its policy directives. In November 1999, the National Director of Public Prosecutions (NDPP) issued Policy Directives as Part 1 of the Policy Manual. Part 26(b)(1) of the Policy Directives takes prosecutors out of the maintenance inquiry process and administrative functions. Consequently, they only get involved in maintenance issues when a case goes to trial. According to the Policy Directives:

“[T]he role of the prosecutors in maintenance inquiries should be limited to instances where:

- No maintenance officer has been appointed for a particular district (court) under s 4(2) of the 1998 Act;
- the maintenance officer appointed in terms of s 4(2) is not available and no other substitute arrangements can be made;
- such involvement is justified by the quantity and distribution of work in a particular office; or the matter is of an exceptionally difficult and contentious nature” (Whamhoff *The Centre for Socio-Legal Research UCT* 13-14; and Mills 36).

Following the above directives, the NDPP then suggested to the Magistrates’ Commission that maintenance clerks be appointed as MOs to make up for the loss of the prosecutors. The suggestion would not have posed a problem if all court clerks were attorneys or had legal training. However, as observed at the Pietermaritzburg magistrate’s court, some court clerks do not have any legal training. Whamhoff shared the same view with regard to the clerks in the magistrates’ courts in the Cape Town area.

He further argued that it would be illegal for the NDPP to remove prosecutors (except on a temporary basis) as the current Act specifically states that “any public prosecutor to whom a Director of Public Prosecutions has delegated the general power to institute and conduct prosecutions ... shall be deemed to have been appointed as a maintenance officer ...” (s 4(1)(a); and Kelly 2000 XXXI(1) *Codicillus* 54). Moreover, Whamhoff adds, the NDPP is to “in consultation with the Minister, issue policy directives with a view to building a more dedicated and experienced pool of trained and specialized maintenance officers ...” The part of the Act that the NDPP relies on to justify its action is section 4(2) that allows the Minister to “appoint one

or more persons as maintenance officer” without specifying that they must be prosecutors. However, opponents of the NDPP’s new policy argue that section 4(2) is to be used as a back-up measure in a situation in which a prosecutor is not available or needs administrative assistance (Whamhoff *The Centre for Socio-Legal Research UCT* 14).

Generally, maintenance cases are not given the same priority as criminal cases, hence the shoddy treatment given to the complainants (Burman and Berger “When Family Support Fails: The Problems of Maintenance Payments in Apartheid South Africa: Part 1 1988 *SAJHR* 194; Mills 38; Kelly 2000 XXXXI(1) *Codicillus* 55). It is well known that many prosecutors would rather not deal with maintenance cases and find other criminal cases more attractive (Whamhoff *The Centre for Socio-Legal Research UCT* 5; and Kelly 2000 XXXXI(1) *Codicillus* 58). According to the Cornerstone report, maintenance matters “are only attended to when there is time after attending to the ordinary criminal roll” (Grieve *et al* 2005 Part B *Cornerstone* 69). It is submitted that maintenance cases are equally important because they involve the rights of children. If they are not properly maintained, the duty to maintain them will, in the long run, be shifted to the state as a child support grant. Furthermore, if the children’s school fees are not paid, they will drop out of school, roam the streets and end up committing crime, another serious problem facing the government and society at large. It is therefore important for the government to make sure that the parents maintain their children so that it will not have to take over that responsibility to the detriment of its other more pressing social welfare commitments.

The case of *Bannatyne v Bannatyne* (2003 2 BCLR 111 (CC)) emphasises the role that the judiciary should play in making sure that maintenance orders are respected and observed. Such respect would be in line with section 28(2) of the Constitution of the Republic of South Africa, 1996, which provides that the best interests of the child be given paramount importance in all matters affecting them. The Constitutional Court held that the High Court had jurisdiction to make an order committing the recalcitrant husband for contempt of court on the grounds of failing to comply with the maintenance order. It went on to say that all courts must ensure that constitutional rights are adhered to and enforced. It held that, first and foremost, parents owed their children a duty of care and the state had the obligation to create the necessary environment for parents to fulfill their obligation (*Government of the RSA v Grootboom* 2001 1 SA 46 CC par 78). Reiterating the evidence given by the Commission for Gender Equality (CGE) the court noted that it had the duty to protect vulnerable children and women by enforcing maintenance orders and ensuring that the justice system is not discredited (par 27). Furthermore, the court pointed out, if maintenance orders are routinely avoided, the rights of the child and the promotion of gender equality will be an elusive goal (par 29-30).

3 2 1 One maintenance court, one magistrate and one MO

In Pietermaritzburg there is only one maintenance court, one magistrate and one MO (interview with court administrator, magistrate and JAW staff). The magistrate deals with first applications for maintenance, variation of maintenance orders and domestic violence interdict applications which take precedence over maintenance cases (Burman and Berger 1988 *SAJHR* 194; Whamhoff *The Centre for Socio-Legal Research UCT*; and Grieve *et al* 2005 Part B *Cornerstone*). As a result, there are long delays in processing maintenance cases (Mthimunye 116; and Kelly 2000 XXXXI(1) *Codicillus* 55), with serious implications for families in desperate need of maintenance. Shortage of staff results in unnecessary postponements (Whamhoff *The Centre for Socio-Legal Research UCT* 5; and Kelly 2000 XXXXI(1) *Codicillus* 56) if either one is indisposed. Unexpected postponements caused by shortage and/or the absence of staff in turn cause hardships to the families. If the matter is defended, the attorney will be inconvenienced. Finding a mutually acceptable date for the complainant, the MO and the attorney might be a nightmare. Shortage of staff also means that attorneys who want a trial date have to wait for three to four months before their cases are heard (interview with an attorney, magistrate and MO). It may take another month or two to finalise the trial, an extremely long wait for a hungry family.

3 2 2 Recommendations

Newly-appointed MOs must be legally trained, and the existing staff should be given in-service legal training. Besides legal training generally, they should also be given courses in line with the spirit of the current Act which is conciliatory and tries to mediate between the disputants/partners. A MO must be competent and confident in representing the complainant. Any mistake s/he makes because of lack of legal training is an injustice to the complainant and the children. The government must make funding available to enable the courts to employ more staff who are going to do the work suggested in the current Act. New appointments in line with the Act have not been made because of budgetary constraints in the Ministry of Justice. Hopefully, the Ministry of Justice will analyse and implement the Cornerstone study which gives a detailed costing of the Act. The study further suggests additional positions which were not envisaged by the Act.

4 Administrative and logistical matters

4 1 *The maintenance forms*

A difficult, complicated maintenance case will run through the gamut of seven maintenance forms in the following sequence: the Application for a Maintenance Order, a Subpoena in terms of Section 9(2) of the Maintenance Act, 1998, Substitution or discharge of an existing Maintenance Order, a

Complaint of failure to comply with a Maintenance Order, Summons, an Application for enforcement of Maintenance or other Orders, and a Notice to and by an employer. I will describe the forms, discuss the stage at which each one is used in the prosecution of a maintenance case and point out its shortcomings, if any.

(a) The application for a maintenance order

This form initiates the maintenance proceedings; a complainant who wants to apply for maintenance must fill in this form. It consists of four A4-size pages. The form provides for the complainant's and the defendant's detailed particulars, namely, their names, dates of birth, age, identity numbers, work and home addresses, telephone numbers and the address of the nearest police station. It requires the complainant to state the reasons she is applying for maintenance and why the child is under her care. In other words, is she the mother, grandmother or guardian of the child? She must state the number of children, the year each child was born and the amount of maintenance money she needs for each one. The form provides for when the first payment of maintenance should be paid and for the complainant's detailed assets and expenditure.

(b) A subpoena in terms of section 9(2) of the Maintenance Act, 1998

A subpoena, not a summons, is used in a maintenance inquiry. It is divided into two parts, Part A and B. It notifies the defendant of the complainant's claim and invites him to come to court on a specified date. It indicates the number and type of documents the defendant must bring and produce in court on the day of the hearing. Like the Application for a Maintenance Order form discussed under (a), the subpoena also makes provision for the complainant's and defendant's detailed personal particulars. Part A provides for the names of the children and the amount requested for each one of them. Part B provides for the defendant's detailed assets, income and expenditure.

(c) A substitution or discharge of an existing maintenance order

This form may be used by both the complainant and/or the defendant for a variation of the existing maintenance order. For instance, the complainant may apply for an increase in the maintenance because of her or the children's changed circumstances. The defendant may also apply for a variation of the order if he either cannot afford to pay the amount he was ordered to pay or if he feels generous and is able to pay more than the amount specified in the order. It provides for the number of children that the defendant was ordered to maintain, the amount he pays in respect of each child and the date he was ordered to do so. The defendant must give

reason/s for the substitution of the original order and indicate by how much the present amount/s should be increased/reduced.

(d) Complaint of failure to comply with a maintenance order

This form is used by the complainant to report the defendant's failure to comply with the maintenance order. She must state when and how the accused was supposed to pay the maintenance money and the total arrears he owes. The defendant must indicate the date the existing order was made and the amount he was ordered to pay. Like the subpoena, this form also makes provision for the personal details of the complainant and the defendant.

(e) A summons

Failure by the accused to comply with the order of the court is a criminal offence which will be heard in a criminal court not in a maintenance court. If the defendant defaults in paying maintenance instalments, a summons will be issued against him instructing him to come to a criminal court, on a specified date, to explain why he failed to comply with the maintenance order.

(f) An application for enforcement of maintenance or other orders

This form enables a magistrate to issue a warrant of execution against the accused's property or to implement a garnishee order against his salary. In this form the court officer must fill in the names of the parties concerned and the accused's personal details, his identity and employee numbers, and the name of his employer. At the end of the form there is provision for the complainant to make an affidavit confirming that the accused has not complied with the order.

(g) A notice to and by an employer

This is a notification to the accused's employer of a garnishee order made against an employee who has defaulted in payment of maintenance instalments. It gives the employer the accused's detailed personal particulars and requests the employer to deduct the maintenance instalments directly from the accused's salary and send them to the clerk of the maintenance court.

4 1 1 Problems

Of the seven forms discussed above the complainant must fill out three – (a), (b) and (c). The rest are filled in either by the clerk of the court or the

maintenance officer. Complainants experience a number of problems in filling in these maintenance forms. The main one is the language, all the seven forms are written in English (Mamashela 2005 21(3) *SAJHR* 497; and JAW staff). The same problem is encountered by applicants when they apply for protection orders under the Domestic Violence Act 116 of 1998 (see Parenzee, Artz and Moults "Monitoring The Implementation of the Domestic Violence Act" First Research Report 2000-2001; and The Commission on Gender Equality (CGE)). The summons is in two languages, English and Afrikaans, a good thing for Afrikaans-speaking litigants. However, most women who have maintenance problems in the Pietermaritzburg maintenance court and the surrounding areas can neither read nor write English and Afrikaans. As a result, a person who can read English must translate the forms to them and assist them to fill them out. Assisting first-time complainants to fill in the forms can be very time-consuming and may take one to two hours depending on each case (interview with JAW staff member; and Meyer 1999 *The Judicial Officer* 121).

Although the complainants do not have to fill out the rest of the forms, as the main role players in the proceedings, it would be useful if they could read all the forms that are used in the process of their maintenance proceedings. In terms of clause 6 of the Constitution all the indigenous languages of South Africa are official languages. It is incumbent upon the government to write maintenance forms in indigenous languages. Given the fact that translating the forms into nine recognized indigenous languages might not be financially feasible, the government could kick-start or experiment with the three major languages in the country, namely Zulu, Xhosa and Sesotho, spoken predominantly, in KwaZulu-Natal, the Cape provinces and the Free State, respectively.

Three forms, namely (a), (b) and (c) discussed above, require the complainant's and the defendant's detailed personal information which means that the same *detailed* information is supplied *three* times (name, address, age and identity number of the complainant; name, address, age and identity number of the defendant; dates the defendant failed to maintain children; list of children to be maintained with name, date of birth, amount of maintenance sought; and the complainant's detailed list of assets and expenditure). At first glance, this may seem to be an unnecessary repetition of the same information. However, duplication of the same information in the subpoena (form b) could be justified by the fact that it (the subpoena) has to be properly served and the defendant must be fully informed of the charge against him. However, the repetition of the same information in form (c) is superfluous and could be done away with. Minus repetition, form (c) would be much shorter. According to Meyer (1999 *The Judicial Officer* 123), the reason for such detailed forms was to inform the court of the relative financial positions of the parties.

The type of assets listed in these forms are fixed property, investments, savings, shares and motor vehicle/s. Expenditure includes household expenditure, clothing, transport, educational expenditure, medical expenditure, insurance, holidays, entertainment and recreation, security

alarm system, membership fees, religious contributions, gifts, TV licence, reading materials, credit/lease agreements *etcetera*.

4 1 2 Defendant's physical address

The 1998 Act requires a physical home/work address for service of court documents to the defendant. However, as observed elsewhere (Burman and Berger 1988 *SAJHR* 201; and Kelly 2000 XXXXI(1) *Codicillus* 54), maintenance defaulters are usually deserters which means the wives/partners would not know their whereabouts let alone their physical (home or work) addresses. Consequently, most complainants produce postal addresses which make tracing the accused very difficult, if not impossible. It could be argued that the reason for producing post office box numbers is because with the old Maintenance Act (1963), the clerk of the court wrote a letter to the husband or partner of the complainant informing him of the inquiry and posted it to his current address (interview with magistrate, court administrator). A post office box number was acceptable in the 1963 Act.

According to the 1998 Act, a subpoena inviting the husband to court must be served on him personally (s 7(2)(ii)). In the circumstances, the complainant is expected to supply a physical address for service, not a post office box number. Since some complainants did not know where their partners worked they could not supply their addresses. This created a service hurdle; in the absence of a physical address, where was the subpoena to be served? Under such circumstances, someone must trace the defendant, locate him and find out where he works/lives for service of court documents (s 7(2)(a)(i)). According to the 1998 Act this is the work of a maintenance investigator. The unintended effect of this new requirement is that a substantial number of subpoenas are not served for lack of the defendants' physical addresses. Grieve *et al* (2005 Part B *Cornerstone*) state that the sheriffs' greatest drawback is non-service returns and suggests non-payment of such returns. The study recommends that sheriffs should not be used to serve maintenance subpoenas as "they cannot do the work they already have satisfactorily" (59). In turn, a vicious cycle of poverty is propagated. Reiterating the same problem of non-service, Kelly (2000 XXXXI(1) *Codicillus* 54) points out that, previously, if the accused changed his address he did not communicate that information to the clerk of the court and the maintenance officer.

4 1 3 Recommendations

If the maintenance forms were in Zulu most women who can read and write Zulu would fill them in themselves and would be in a position to assist their semi-literate friends. Since there would be no need to translate the forms from English, it is highly probable that the complainants would pursue their maintenance cases in their respective jurisdictions instead of traveling to Pietermaritzburg for such assistance, thereby solving the problem of congestion in that maintenance court (interview with magistrate,

administrator and JAW staff). If the complainants do not have to travel to the maintenance court in the city to prosecute their cases, they would be able to save the little money they have. Another indirect advantage in having forms written in Zulu would be the empowerment of women to fill in the forms on their own. The number of women who need translation and assistance to fill in the forms would definitely decrease (interview with JAW staff).

Detailed information on the particulars of the parties should be given in form (a). Once this information has been captured in the database (from form (a)), its requirement in form (c) is an unnecessary duplication. Form (c) could therefore be much shorter without the complainant's and the defendant's detailed information. After all, all these forms are a process in the same proceedings. With regard to the types of assets and expenditure, a much shorter and simpler form could be designed for village assets and expenditure. The type of assets and the items of expenditure listed in the current forms do not reflect rural life reality (CGE P25).

4 2 Enforcement of emoluments attachment order

A magistrate may make an order instructing the defendant to pay monthly instalments to the court for collection by the complainant. However, if the defendant defaults and becomes in arrears, the court can make an order for the attachment of emoluments requesting the defendant's employer to deduct the outstanding amount and future payments from the defendant's salary (s 28(1)(a) and (b) of the 1998 Act). The employer then makes a cheque for the said amount and posts it to the clerk of the maintenance court where the complainant collects it.

4 2 1 Problems

This method of payment works well if the accused is employed. However, there are a number of drawbacks. For instance, if the accused is self-employed and, for example, operates a taxi service, it is very difficult to find out how much he makes a month. Even assuming it was possible to estimate his monthly income, the next problem would be to ask him to enforce a garnishee order against himself. If he is avoiding paying maintenance and is in arrears, it is highly unlikely that he will comply with a garnishee order.

Another unexpected hurdle in enforcing an attachment of emoluments order is either non-cooperation or refusal of some employers to follow the courts' instructions because of administrative costs. In practice, an attachment of emoluments order requires an employer to instruct an employee to identify all the employees in the company against whom attachment of emolument orders have been made. She/he must then add up the amounts of the emolument orders and make one cheque for the clerk of the court. Some employers argue that this administrative work is tedious, time-consuming and costly. It takes the employee in question away from her/his routine job. In other words, collation of the attachment of emoluments

orders is extra work for the company for which it has not budgeted. Depending on the size of the business concern in question, these costs can have budgetary implications for the company. The employers' main complaint is extra/additional administrative work for staff caused by the defendant's irresponsibility, that is, failure to pay maintenance. Thus, the main question is, who should pay for the administrative costs of the attachment of emolument orders, namely, identifying the accused persons, finding out how much maintenance instalment each must pay, adding up all the amounts and finally making a cheque for the clerk of the maintenance court?

Some employers go to the extent of dismissing an accused against whom a garnishee order has been made (interview with JAW staff and court administrator). Once an accused loses his job, he has no means to pay for maintenance instalments and the family he is supposed to maintain is in a worse off position. Whamhoff states that sometimes the employer will change the status of the employee to a contracted worker so that the company is no longer the "employer" (Whamhoff *The Centre for Socio-Legal Research UCT 28*). Other companies simply refuse to enforce garnishee orders because of administration costs. Some respondents simply resign their jobs in order to frustrate the court order (interview with JAW and CCJ staff).

4 2 2 Recommendations

With regard to the administrative costs of garnishee orders, the magistrate could add at least ten percent of the maintenance instalment for administration. For instance, if the accused has been ordered to pay R300 a month, the actual amount that should be deducted from his salary would be R330 so that the employer can then keep R30 for administration costs. This suggestion might necessitate an amendment to the regulations of the Act to add at least ten percent of the outstanding maintenance instalment for administration costs.

4 3 *Enforcement of a warrant of execution*

If the defendant fails to pay the maintenance arrears for no apparent reason, the applicant may apply for a warrant of execution against the respondent's property (s 27(1) of the 1998 Act). The value of the attached property must not be in excess of the amount owed. If the property is successfully auctioned, the sale money will go to the applicant via the clerk of the maintenance court. The Act says the applicant will pay the costs of the attachment and presumably for the storage.

4 3 1 Problem areas

One of the major hurdles in enforcing this section is the (sheriff's) attachment and storage costs. Because the sheriff is not part of the maintenance court staff, he asks for his fees for attachment upfront, before

he actually attaches the property which means that the applicant must pay the fees. The standard execution fee within Pietermaritzburg is R600 (interview with court administrator and attorneys). Bearing in mind that around eighty per cent (80%) of women who claim maintenance are either unemployed or in lowly paying jobs, most applicants do not have the money to pay the fees. Consequently, the sheriff will not serve the order of execution. It is only women who are employed in jobs that pay well and can afford to pay attachment costs who apply for warrants of execution. Storage costs for the attached property present yet another problem.

Ownership of the property to be attached may present yet another problem. For instance, if the respondent lives in a girl-friend's or relative's house, the furniture in the house may belong to the owner of the house, not to the respondent (interview with an attorney, JAW and CCJ staff). Some respondents deliberately frustrated the attachment of their property by registering it in a relative's, new girl-friend's or new wife's name. Under such circumstances, the true owner denies ownership of the car in order to frustrate attachment.

5 Conclusion

The note discusses procedural, administrative and personnel changes that were introduced by the Maintenance Act 99 of 1998. It points out that the introduction of these changes without a concomitant budget is at the heart of non-implementation of parts of the Act. Contrary to the objectives and ideals stated in the Act, the practical effect of these changes has been confusion of the role-players, complication of the procedure, prolongation of the process of a maintenance case, letting the defaulters off the hook and more frustration of the enforcement machinery.

From the above discussion it is obvious that the MI plays a very important role in the enforcement of the Act. His/her position must be funded as a matter of urgency. Most of the work to be done in implementing the Act depends on the MI. The non-appointment of maintenance investigators and lack of legal training of some of the maintenance officers also has an adverse effect on the implementation of the Act. The current maintenance forms are too many and too long. They could be shorter, simpler and written in the language most users understand. The Regulations to the new Act could be amended to factor in the administrative costs of emolument attachments.

Mothokoa Mamashela
University of KwaZulu-Natal, Pietermaritzburg