

EBOOK

CHILD MAINTENANCE

**KNOW YOUR
RIGHTS!**



Your kids can't eat excuses for lunch.

CHILD MAINTENANCE

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Written by Bertus Preller

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CHILD MAINTENANCE

When it comes to maintenance, the law is fairly straightforward. It is in the application of the law that difficulties lie.

Bertus Preller - Family Law Attorney

One of the basic principles of child maintenance is that the extent of the obligation is based on the standard of living, income and means of the person/s obliged to pay.

The obligation does not rest solely on the father; it rests on both parents, according to their respective means. The fact that the father can adequately support the child on his own does not mean that the mother can avoid contributing.

In fact, it would be contrary to public policy and invalid to insert a clause into a divorce settlement agreement stating that only one parent need maintain the child.

Once a child has reached the age of 18, a parent cannot claim maintenance on their behalf. The child must institute action in his/her personal capacity. The fact that a child is visiting a parent temporarily does not entitle that parent to suspend or reduce his/her maintenance during that period, unless a court order contains a specific provision to the effect that this may happen. A parent's duty of support towards his/her child is not affected in any way by a remarriage and a stepparent is also under no obligation to support a stepchild.

Similarly, a child from a first marriage does not have priority over a child from a second marriage when it comes to maintenance obligations. The refusal to allow a parent contact does not entitle that parent to stop paying maintenance.

When maintenance court makes an order regarding maintenance, such an order is not fixed forever. If circumstances change, an application for an increase or reduction in maintenance can be made. In order to fulfill their obligations to support their child, parents must use both of their incomes and, if necessary, their capital.

This means that if a father/mother has no income but has assets, he/she will not be able to avoid paying maintenance.

A court may order that the assets be sold to satisfy the obligation to pay maintenance.

This also prevents a parent from evading his/her duty to pay maintenance by giving up work and becoming, for example, a full-time student. The ordinary rules relating to parents' duty to support also apply in respect of children born out of wedlock.

CHILD MAINTENANCE

A child is entitled to reasonable maintenance to provide for clothing, housing, dental and medical care, education and training, and, where applicable, recreation. Both parents have a duty to maintain the child according to their respective means. The duty exists irrespective of whether the child is adopted, born in or out of wedlock, or born of the first or a subsequent marriage. What is 'reasonable' will depend on the family's standard of living, their income and the cost of living. The standard of living usually determines whether expenses for recreation, and secondary- and tertiary-level education will be awarded. In practice, maintenance will include:

Monthly cash payments

A cash portion is usually paid to the parent who has primary care of the child. The divorce agreement or maintenance order will stipulate that one parent must pay to the other a sum of money each month.

The payments are made in advance, on or before a certain day of every month, usually by way of a debit order/electronic transfer, into an account nominated by the parent with primary care.

The maintenance payable normally increases annually on the anniversary date of the divorce order or first maintenance order by the percentage change in the headline inflation rate (also known as the headline Consumer Price Index), as notified by Statistics SA (or its equivalent) in respect of South Africa for the preceding 12 months. Similarly, a child from a first marriage does not have priority over a child from a second marriage when it comes to maintenance obligations. The refusal to allow a parent contact does not entitle that parent to stop paying maintenance.

When maintenance court makes an order regarding maintenance, such an order is not fixed forever. If circumstances change, an application for an increase or reduction in maintenance can be made. In order to fulfill their obligations to support their child, parents must use both of their incomes and, if necessary, their capital. This means that if a father/mother has no income but has assets, he/she will not be able to avoid paying maintenance. A court may order that the assets be sold to satisfy the obligation to pay maintenance. This also prevents a parent from evading his/her duty to pay maintenance by giving up work and becoming, for example, a full-time student. The ordinary rules relating to parents' duty to support also apply in respect of children born out of wedlock.

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Medical expenses

According to their means, parents must pay for any medical, dental, surgical, hospital, orthodontic and ophthalmological treatment needed by the child, as well as any sums payable to a physiotherapist, occupational therapist, speech therapist, practitioner of holistic medicine, psychiatrist/psychologist and chiropractor. Parents must also cover the cost of any medications and the provision, where necessary, of spectacles and/or contact lenses. Usually one parent will cover the child, at his/her cost on his/her medical scheme, and pay the monthly subscriptions (and escalations thereon). In circumstances where medical aid does not cover all the expenses or where the parents do not have medical aid, the parents usually pay these expenses in a ratio according to their means.

Educational costs

Educational costs normally include, but are not limited to, all pre-school and aftercare fees, school fees, additional tuition fees, school outings, camps, school lunches, extra-curricular school and sport activities, all extramural activities in which the child participates, including club fees and sport tours (and the travel and accommodation expenses related thereto), school books, stationery, uniforms and any equipment (including computers) needed by the child at or relating to school.

Tertiary educational costs

Assuming the child wants a tertiary education, where it is within their means, parents are obliged to pay all or part of the reasonable costs of the child's tertiary education, for as long as the child shows due diligence and continues to make satisfactory progress.

Such costs can include university fees and/or fees for any institution of higher learning attended by the child, accommodation and travel/transport expenses, and any books and equipment required.

The duty of support only comes to an end when the child becomes self-supporting. Although 18 is the age of majority, the duty to support can continue after this age, but the child must then claim maintenance directly from the non-resident parent.

The fact that a child is working does not necessarily mean that he/she is self-supporting and continued but reduced maintenance may be necessary.

FREQUENTLY ASKED QUESTIONS

What will a court take into account when making a maintenance order?

- the reasonable maintenance needs of the child;
- that both parents jointly have a duty to support the child; and
- that the parents' respective shares of their obligation are apportioned between them according to their means or ability.

Which parent must support the child?

As stated earlier, both parents must support their child proportionally according to their means. The fact that the father may be in a stronger financial position does not mean that the mother has no liability, even though the father may have adequate means. The duty rests on both parents.

In cases where both parents earn substantial incomes almost on par, and where a child spends an equal amount of time with both parents, as in a shared parenting scenario where the child lives with a different parent every alternate week and spends equal time with each of the parents during holidays, the parent in whose care the child is at that given time will be liable for the child's financial needs.

In such circumstances, parents usually agree that one parent will not pay maintenance to the other, but that they will both make equal contributions towards the child's school, medical and tertiary expenses.

Can I withhold maintenance payments if I am denied contact to my child?

Your view of the other parent's behaviour has no effect on your child's right to maintenance. You still have to pay maintenance, even if the other parent:

- remarries;
- is involved in another relationship;
- does not allow you to see the child; and/or
- later has more children.

Your duty to pay maintenance and your right of contact to your child are two entirely separate matters, and one has no relation to the other. Furthermore, if you have children with someone else, it does not negate your duty to pay maintenance for your child with your ex. However, an application to vary or amend the current maintenance order can be made.

FREQUENTLY ASKED QUESTIONS

Until when must a parent pay maintenance for his/her child?

The duty to pay maintenance continues regardless of the child's age, and endures until the child is self-supporting, adopted or dead. Once the child reaches the age of 18 years, the onus is on the child to prove how much maintenance he/she needs. A child that is self-supporting cannot claim maintenance from his/her parents. The duty to support a child ends at the child's death but not at the parent's death. In the event of the parent's death, the child may lodge a claim for maintenance against the deceased parent's estate.

In many instances, a settlement agreement in a divorce or a maintenance order will stipulate that maintenance be paid until the child reaches a certain age. The order will automatically cease to operate once the child has reached that age, however, if the child is not yet self-supporting, the parent must continue to maintain the child.

The maintenance claim must now be made by the child in person (who is now an adult) and not by the custodial parent.

Is there an obligation on grandparents to support a child?

It is accepted in our law that if neither parent can support or maintain the child, the duty passes on to the grandparents, both maternal and paternal. In circumstances where a father/mother does not pay maintenance to his/her child, the parent holding primary care of the child may lodge an application against the paternal/maternal grandparents.

Is there a duty on siblings to support a child?

If neither the child's parents nor grandparents are in a position to provide support, then that duty will pass to the child's siblings, according to their respective means.

This is on the proviso that the child who claims maintenance is indeed indigent. This duty of support between siblings applies to sisters, brothers, half-sisters and half-brothers.

Is there a duty on stepparents to support a child?

A stepparent is not by law obliged to maintain his/her stepchild. The reason for this is that the duty to support a child rests on a blood relationship and not necessarily on affinity.

FAILURE TO PAY MAINTENANCE

Offences and penalties for not paying maintenance

Subject to the defense that failure to make a payment in terms of a maintenance order is due to lack of means, a person who fails to make a particular payment in accordance with a maintenance order is guilty of a criminal offence and liable on conviction to a fine or to imprisonment. A parent is therefore fully entitled to lay a criminal charge against a person who is obliged to pay maintenance in terms of a court order if he/she fails to stick to the terms of the order. Although this step will likely result in a person's arrest, it will not necessarily result in receiving payment. The enforcement of maintenance payments is a highly problematic area. Often people liable to pay maintenance either refuse or simply neglect to fulfill their obligation. There are no clear guidelines on the enforcement of maintenance for children. A court may impose some of the following sanctions upon a maintenance defaulter:

Fine

Usually the defaulter cannot pay the fine, but even if he/she can, it is undesirable that the money should go to the state.

Imprisonment

The sentence for failure to pay maintenance arises from failure to obey a court order, which is a criminal offence. Defaulters can be imprisoned for a period not exceeding one year.

Suspended sentence

One of the principal objects of the maintenance act is to ensure that minor children are properly supported by their parents and therefore it is often inappropriate to send transgressors to prison.

A court may make an order along the following lines: 60 days imprisonment, 50 days of which are suspended on condition that the accused:

- is not convicted of a similar offence during the period of suspension;
- pays the arrear maintenance at the rate of X amount per month; and
- pays the state for the sheriff fees.

Correctional supervision

Correctional supervision is community-based punishment and highly suitable for maintenance defaulters. It may include house arrest, compensation, employment when possible and necessary, and supervision by a probation officer.

THE MAINTENANCE AMENDMENT ACT 9 OF 2015

The Act amended certain clauses and incorporated new clauses into the existing Maintenance Act 99 of 1998.

The jurisdiction of Maintenance Court has been extended allowing the person applying for maintenance to apply either where he/she resides, or where he/she is employed, rather than only where a person was domiciled. The Court can now direct certain service providers to disclose information about interested parties, such as their residential address, should other efforts to obtain such information prove fruitless.

A maintenance officer can now subpoena the beneficiary of a maintenance order as well, such as in instances where the respondent is applying for the reduction or discharge of the maintenance order. The Maintenance Court must now conclude maintenance enquiries speedily by enabling the maintenance officers to make interim orders, pending the finalization of the matter.

A Magistrate contemplating an order for the attachment of emoluments, should now afford an employer an opportunity to comment on the feasibility of such an order before it is made. The current Act has been amended to bring it in line with these judgments. So the Court must now hear the views of the person who is obliged to make payments on behalf of the person who has the maintenance liability, before making such an order.

A Maintenance Court can now make an order in the absence of the respondent or beneficiary, or both, if written consent is given by the absentee party. A copy of the order must then be served on such party.

Defaulters will now be reported to one of the various credit bureaus. This means that as soon as a complaint of non-payment is made, the defaulter's personal details must be submitted to the relevant credit bureau. This will prevent maintenance defaulters from incurring further debt whilst in arrears with maintenance.

CLAIMING MAINTENANCE

In order to claim for maintenance, you must first determine the reasonable needs of the child on a monthly basis. There is no hard and fast rule, but generally the child's share of the common expenses in the household is determined by allocating one-part per child and two-parts per adult or older child. The following table may be used as an example of how to calculate these expenses properly. In this example, each child will be allocated 20 per cent of the total expense shared by all members of the household.

ITEM	SELF	CHILD	CHILD	CHILD	TOTAL
Running of home					
Lodging (bond/levy/rent/board)					
Groceries/personal (hair care/cosmetics, etc.)					
Toiletries					
Electricity					
Laundry/dry cleaning					
Telephone					
Domestic worker					
Garden services					
Insurance (short term)					
Clothing					
Clothes and shoes					
Work/school uniforms					
Sports clothes					
Transport					
Bus/taxi/lift					
Motor vehicle instalments					
Motor vehicle insurance					
Motor vehicle maintenance					
Fuel					
Licences					
Parking					
Educational expenditure					
University/college/tech fees					
Textbooks					
Insurance (study policy)					
Stationery					
Medical expenditure					
Doctor/dentist, etc.					
Medications					
Hospital					
Medical aid					
Insurance					
Life					
House owners/householders					
Burial policy					
Pocket money/allowances					

CLAIMING MAINTENANCE

Holidays/entertainment/recreation					
Maintenance/repairs of household items					
House					
Household appliances					
Kitchenware					
Linen, towels, etc.					
Bicycles/bikes/scooters/boats					
Personal loans					
Security alarm system					
Membership fees					
Religious contributions					
Gifts					
TV licence					
Reading material					
Lease/credit agreement payments					
Furniture					
Appliances					
Pets					
Food					
Veterinary surgeon					
Licence					
TOTAL EXPENDITURE					
					R00.00 Expenses for the children

Only once the child's reasonable monthly needs have been determined will one be able to establish the contribution that each parent is required to make to meet those needs. The formula applied in practice to determine this contribution is as follows:

$$\begin{array}{rcl}
 \frac{\text{(parent's gross income)}}{\text{(total gross income of both parents)}} & \times & \frac{\text{(child's needs)}}{1} \\
 & & \\
 & & = \text{R00.00 (parent's contribution)}
 \end{array}$$



Maintenance cannot be measured in monetary terms alone. Usually, the parent who cares for the child on a daily basis indirectly contributes towards maintenance because of the time they spend together.

Notwithstanding this, both parents still have a financial obligation to pay maintenance in accordance with their means, income and expenditures.

Maintenance may need to be adjusted regularly, depending on the changing needs of the child or the financial position of the parents.



Once the need for a change in maintenance arises, whether filing a new application or seeking to vary an existing court order/settlement agreement, the applicant can request that the maintenance court:

- set aside an existing maintenance order;
- make a new maintenance order;
- decrease a current order;
- amend a current order; or
- change an existing order.



HOW TO APPLY FOR MAINTENANCE

How to apply for a maintenance order in the maintenance court:

Maintenance courts, also called family courts, deal specifically with maintenance and family law-related issues. Every court has a maintenance officer who has unique powers to deal with maintenance disputes. The services of the maintenance court are free. The state pays for everything to ensure that those in need of maintenance receive the necessary support. If you decide to employ an attorney, you will have to pay for his/her services; however, the procedures of the maintenance court are relatively uncomplicated and easy to follow.



Step 1: Gather information

Make a list of all your monthly expenses (as in the table on page 00), and gather together any proof of your income and expenses, including:

- doctors' bills;
- receipts for school fees, books and uniforms, rent, water and electricity accounts, groceries and clothing till slips;
- proof of transport or any other travelling expenses;
- if you are working, a copy of your most recent payslip;
- your ID document, birth certificates of your children;
- if the child is at school, a letter from the school saying that the child attends the school;
- if divorced, a copy of the divorce order; and
- any information you may have about the respondent, for example, an ID number, home/work/postal address.

HOW TO APPLY FOR MAINTENANCE



Step 2: The Application

Go to your local magistrate's or family court (in the jurisdiction where you or your children reside) with your list and proof of expenses. You will need to fill in a form (the maintenance application) detailing your complaint, either J107E or J101E.

These forms are obtainable from the clerk of the maintenance court. Ask him/her to help you fill it in. It is very important that you provide supporting documentation for any income and expenses stated on the form. In the complaint, you must state why the person from whom maintenance is being claimed is legally liable to maintain the child.

Once you have filed the maintenance application, a maintenance officer will issue a subpoena against the person you are seeking maintenance from (the respondent) and set a preliminary date for the respondent to appear.

The maintenance officer is usually a public prosecutor who works for the state. He/she investigates maintenance complaints, helps the complainant (the person claiming maintenance) and represents the complainant in court.

HOW TO APPLY FOR MAINTENANCE



Step 3 The Investigation

Once the complaint has been lodged, the maintenance officer will investigate. If the maintenance officer needs any information about the respondent, he/she can ask a magistrate to call anyone with information to appear before him/her. The maintenance officer may also task a maintenance investigator with:

- finding the respondent and witnesses;
- giving any maintenance court documents to the respondent; and
- taking statements and gathering relevant information.

After the investigation, the maintenance officer will decide whether to hold an informal enquiry or a formal enquiry in the maintenance court. If he/she feels that there might be an opportunity to settle, the enquiry will be informal. It is desirable to avoid going to court, so an informal enquiry will usually be encouraged.

A summons will be served on the respondent giving a particular date and time that he/she is to appear before the maintenance officer. As the complainant, you will receive written notification of the enquiry.

HOW TO APPLY FOR MAINTENANCE



Step 4 The Informal Enquiry

The purpose of the informal enquiry is to attempt, with the involvement of the maintenance officer, to resolve the dispute by mutual agreement. As mediator, the maintenance officer plays an active role in the process. The respondent must provide information regarding the financial position of the people affected by the maintenance application, as well as any supporting documentation such as bank statements, salary slips and a list of monthly expenses.

You, the maintenance officer and the respondent will then discuss and decide how much maintenance should be paid. This is essentially a settlement negotiation, whereby the maintenance officer mediates between the parties in order to arrive at a settlement. The respondent will ideally agree to paying maintenance, thus avoiding having to appear in court. He/she will have to sign a J214E form in triplicate, which will then be made an order of court.

If no settlement is reached, the maintenance officer will refer the matter to the maintenance court for an enquiry before a magistrate, who will then postpone the matter and summons you and the respondent to a formal enquiry.

HOW TO APPLY FOR MAINTENANCE



Step 5: The formal enquiry

The formal enquiry takes place before a magistrate in a maintenance court, which essentially performs the functions of a civil court. The normal rules of civil proceedings in a magistrate's court apply.

At the formal enquiry, you, the maintenance officer and the respondent will put all the relevant information before the magistrate. The magistrate will decide how much money is required to meet the child's needs, and then issue a maintenance order that will ensure that each party makes a fair contribution. During the enquiry, you and the respondent are both entitled to legal representation by an attorney or advocate, but at your own expense.

On the day of the enquiry, it is important that you arrive at court early and report to the maintenance officer. When you are called to give testimony, the magistrate will ask you to swear that your testimony will be truthful. After that, you will be questioned by the maintenance officer and then by the respondent's lawyer. Answer all questions truthfully and only talk about what you know. It is very important to stay calm and not to argue. The magistrate may also ask you questions to clear up issues. Address the magistrate as 'your worship'.

The magistrate plays an active role during the proceedings, and once it has been established that the respondent is obliged to pay maintenance, he/she will be compelled to rebut or give evidence as to why he/she should not pay maintenance.

HOW TO APPLY FOR MAINTENANCE



Who must be present at the maintenance enquiry?

The person claiming maintenance and the person who must pay maintenance must be present at the enquiry. The maintenance officer must also be present to represent the complainant and act in their interest. In addition, the maintenance officer can, by his/her own volition or at the request of either party's attorney, issue a written notice, called a subpoena, ordering anyone else to appear before the court as a witness to:

- give evidence;
- produce any book, document or statement relating to the financial position of any of the affected parties; and/or
- produce full particulars of either party's earnings, signed by his/her employer.

These witnesses may be recalled and re-examined by the court. Apart from legal representatives, no one else may be present unless granted permission by the court. Note that the court may examine anyone who is present at the enquiry, regardless of whether they were subpoenaed as a witness or not.

FREQUENTLY ASKED QUESTIONS

Who must be present at the maintenance enquiry?

The person claiming maintenance and the person who must pay maintenance must be present at the enquiry. The maintenance officer must also be present to represent the complainant and act in their interest. In addition, the maintenance officer can, by his/her own volition or at the request of either party's attorney, issue a written notice, called a subpoena, ordering anyone else to appear before the court as a witness to:

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These witnesses may be recalled and re-examined by the court. Apart from legal representatives, no one else may be present unless granted permission by the court. Note that the court may examine anyone who is present at the enquiry, regardless of whether they were subpoenaed as a witness or not.

What if one cannot afford the transport costs to get to court?

Subpoenaed witnesses who live far from the maintenance court and cannot afford the transport costs can either ask the person who subpoenaed them to cover their travel expenses to and from court, or can claim at court for expenses incurred. The respondent is not entitled to such a claim, unless the court makes an order allowing payment.

FREQUENTLY ASKED QUESTIONS

What procedure must be followed when submitting evidence?

At the enquiry, documentary evidence in the form of a statement in writing by anyone other than the respondent may be placed before the court as evidence, provided that a copy of the statement together with any documents referred to in the statement are served on the respondent at least 14 days before the date on which the statement is to be submitted as evidence.

The respondent may, at least seven days before the commencement of the enquiry, object to the statement being submitted as evidence.

It is important to note that the maintenance court may take into account any evidence in any proceedings in respect of an existing maintenance order, or accept as prima facie proof any finding of fact in such proceedings.

In other words, evidence and findings of fact in a divorce action may, at a later stage, be used in proceedings in the maintenance court. The record of such evidence or findings will be admissible as evidence, as will any copy/transcription/extract from it certified as a true copy, or any transcription/extract by the registrar or clerk of the court or any other officer having custody of the records of the court where the existing maintenance order in question was issued.

FREQUENTLY ASKED QUESTIONS

The maintenance order

After considering the evidence, the court may decide as follows:

Where no maintenance order is in force, and the respondent is found legally liable to pay maintenance, the court may make a maintenance order against the respondent to maintain the applicant and/or the child. The order can include:

- The amount of maintenance to be paid, as well as any yearly increases.
- Directions about when and where the money should be paid. The court can order the respondent to pay maintenance on a weekly or monthly basis. The court may order that the maintenance either be paid at the maintenance court, where the complainant will then have to collect the payments from month to month, or be paid into an account at a financial institution by stop order or in any other manner.
- An order that, if the respondent is a member of a medical scheme, the child be placed as a dependant on that scheme.
- Where the mother was pregnant, the magistrate can order the respondent to back pay all expenses, plus interest, relating to the child's birth; as well as all expenses relating to the child's maintenance from the date of birth up to the date of the enquiry.

Where there is already a maintenance order in force, the court may substitute the existing maintenance order with a new order or discharge the existing maintenance order. The court may also make no order.

FREQUENTLY ASKED QUESTIONS

Can parties agree to a maintenance order?

A maintenance order may be obtained by consent. This usually happens during the informal enquiry, where the parties consent to an order among themselves or with the input of the maintenance officer. The respondent must consent in writing to the maintenance order and a copy must be handed to the maintenance officer. The respondent does not have to be present at the enquiry, but a copy of the order must be delivered to him/her by a maintenance officer, police officer, sheriff or maintenance investigator. The respondent must acknowledge receipt of the order in writing, and the officer, sheriff or investigator who served the papers must submit a written statement called a return of service showing that a copy of the documents was served on the respondent. The return of service is sufficient proof that the respondent is aware of the terms of the order.

Can the maintenance amount be reduced?

The respondent can apply to the courts for a reduction, but this will be subject to a financial investigation to determine if the applicant really can no longer afford to pay the amount in terms of the order. The other party's circumstances, which may have changed, will be taken into account.

What if the respondent is unemployed?

If the respondent is unemployed, the magistrate will postpone the enquiry, allowing the respondent to look for work. He/she will need to get employers to sign a form proving that work was sought. If the respondent is unemployed but has hire-purchase agreements, the magistrate may order that the furniture be attached and sold to pay maintenance. It is up to the complainant to inform the maintenance officer if they know about any such agreements. If the respondent is unemployed, one may get a child-support grant from the Department of Social Development to help support the child.

FREQUENTLY ASKED QUESTIONS

Can one appeal against a maintenance order?

If a party is aggrieved about an order that was made by the maintenance court or about the court's failure to make an order, he/she can appeal the decision to the High Court in the province where the order was made. A notice of the intention to appeal must be given to the clerk of the maintenance court and delivered to the other party within 20 days of the order being made. The magistrate who made the order then has 14 days in which to give a statement to the clerk of the maintenance court, setting out his/her reasons for the order.

If the applicant cannot afford legal representation, they must inform the clerk of the maintenance court who will approach the Director of Public Prosecutions with a copy of the relevant documentation. The Director of Public Prosecutions will then decide whether to assist in the appeal.

It is important to note that any appeal in terms of the Maintenance Act does not suspend the payment of maintenance in accordance with the current maintenance order, unless the appeal is made against the finding that the applicant is legally liable to pay maintenance. If a court changes the original order at appeal, it will stipulate that the revised maintenance, if any, only be paid from the date of the order of appeal.

An appeal cannot be noted against:

- an order that was made by consent;
- a provisional order relating to the costs of scientific tests regarding paternity; and
- an order by default.

FREQUENTLY ASKED QUESTIONS

What happens if the respondent doesn't pay?

When the respondent fails to comply with the terms of the order, and the order remains unsatisfied for a period of 10 days, the complainant may apply to the maintenance court where the respondent is resident for:

- authorisation to issue a warrant of execution;
- an order for the attachment of emoluments (garnishee order); or
- an order for the attachment of debt.

Remember, not paying maintenance is a criminal offence and the respondent can be fined or imprisoned for up to 1 year, or both. The maintenance officer may also have the respondent blacklisted. To escape punishment, the respondent must show to the satisfaction of the court that he/she could not pay maintenance due to a lack of money or income.

How is a warrant of execution issued?

The maintenance court may, on application, authorise the issuing of a warrant of execution. A warrant of execution is a method of enforcing judgments and empowers a court sheriff to attend a judgment debtor's address to take goods for sale. If the movable property is insufficient, only then will it be issued against his/her immovable property. The complainant must prepare Part A of Form L of the annexure to the Maintenance Regulations. Three copies must be lodged with the clerk of the maintenance court, who will issue the warrant of execution by preparing Part B of Form L, provided he/she is satisfied that authorisation was granted and the warrant has been properly prepared.

The clerk will return the original warrant of execution and one copy to the complainant and file the second copy in the relevant court file. The original warrant and the copy must then be handed to the sheriff or maintenance investigator for execution. Once the warrant has been executed, the sheriff or investigator must complete Part C and, if applicable, Part D of Form L and return it to the clerk.

FREQUENTLY ASKED QUESTIONS

Can a warrant of execution be set aside once granted?

The respondent may apply to the maintenance court to have the warrant of execution set aside or suspended. The respondent must give notice of his/her intention to apply to the complainant at least 14 days prior to the application being heard. The court may, at the hearing of the application, request either or both parties to give evidence orally or in writing.

When suspending a warrant of execution, the court may grant an order for the attachment of emoluments or the attachment of debt.

Can a garnishee order be issued against the respondent's salary?

Garnisheeing or the attaching of emoluments is the process of deducting money from an employee's monetary compensation (including his/her salary), sometimes as a result of a court order. A garnishee order can be issued where an order made by the maintenance court remains unsatisfied for a period of 10 days or when the court suspends a warrant of execution.

The court may issue a garnishee order immediately or in the future against the respondent for the amount he/she has failed to pay, plus interest, as well as for the costs of the attachment. Within seven days of the order, the maintenance officer must give notice and a copy of the order to the respondent's employer. The notice to the employer must substantially correspond with (i.e. be similar to) Part A of Form O of the annexure to the Maintenance Regulations. The order authorises the employer to deduct the amount mentioned in the order in monthly instalments from the respondent's salary and to pay this money to the complainant, until the full amount has been paid.

If the respondent becomes unemployed, the employer must give notice to the maintenance officer within seven days. If the employer fails to pay as stated in the order, the order may be enforced against the employer.

FREQUENTLY ASKED QUESTIONS

Can an attachment of emoluments be suspended or amended?

If the aggrieved party can show good cause, an order for the attachment of emoluments may be suspended, amended or set aside by the maintenance court. The respondent must give notice of his/her intention to apply for suspension or amendment to the complainant at least 14 days prior to the application being heard. After hearing such an application, the maintenance court may call either or both parties to give written or oral evidence.

The application must substantially correspond with Part A of Form N of the annexure to the Maintenance Regulations, whereas the notice must substantially correspond with Part B of Form N.

Can one attach a debt owed to the respondent?

If the complainant knows that someone else owes the respondent money, for example, an attachment of debt order can be granted, which will order the respondent's debtor to pay the monies owed to the complainant instead. An application for the attachment of debt can be granted where an order made by the maintenance court remains unsatisfied for a period of 10 days or when the court suspends a warrant of execution. The maintenance court may on application by the person in whose favour a maintenance order was made, or when it suspends a warrant of execution, make an order for the attachment of any debt at present or in future owing or accruing to the person against whom the maintenance order was made, for the amount necessary to cover that which the creditor (respondent) failed to pay, together with interest thereon as well as the costs of the attachment. This order will direct the person who has incurred the obligation to make the payment specified in the order.

Notice of such application must be given at least 14 days prior to the date on which the application is to be heard. The application must be similar to the example shown in Part A of Form P of the annexure to the Maintenance Regulations, whereas the notice must correspond with Part B of Form P.

FREQUENTLY ASKED QUESTIONS

Can I attach someone's pension benefits for the payment of future maintenance in respect of minor children?

Yes, but subject to certain prohibitions as set out in the Pension Funds Act. In one such case, the applicant was an unemployed mother of two minor children. The children's father was ordered to pay maintenance, but defaulted on his payments. He then attempted to withdraw his pension benefits, informing his ex-wife that he resigned primarily to avoid paying maintenance. The court ordered the pension fund to retain such an amount of the withdrawal benefits payable to the husband as was required for the children to have a dignified life.

What can be done if the man says he will not pay maintenance because the child is not his?

If a man refuses to pay maintenance because he says or believes that the child is not his, the court can order scientific paternity tests. If the court is satisfied that neither party can afford to pay for the tests, the state will pay. Once paternity is determined, the maintenance court can make an order for payment of all the mother's expenses in connection with the birth and care for the child, from the date that the child was born to the date of the maintenance enquiry.

What must you do if you move to another part of the country?

You must notify the maintenance officer at the court that made the order that you are moving, and give him/her your new address. The maintenance order and the prescribed records will be transferred and registered at the court in the area where you are moving to. This is important because if maintenance is not paid, you have to make your complaint at the maintenance court where you live.

FREQUENTLY ASKED QUESTIONS

Can a maintenance order made in a South African court be enforced in a foreign country and vice versa?

South African law allows citizens to claim maintenance from a parent living in a foreign country. The Reciprocal Enforcement of Maintenance Orders Act 80 of 1963 regulates foreign maintenance processes. However, not all foreign countries are recognised under the Act. The Chief Directorate: International Legal Relations in the Department of Justice and Constitutional Development has a list of proclaimed countries, meaning those countries that have a special arrangement with South Africa whereby maintenance orders granted in one country can be enforced in another.

South Africa has reciprocal enforcement agreements with the following countries: Australia, Canada, Cocoa (Keeling) Islands, Cyprus, Fiji, Germany, Guernsey (Bailiwick of Hong Kong), Isle of Jersey, Isle of Man, Kenya, Lesotho, Malawi, Mauritius, Namibia, New Zealand, Nigeria, Norfolk Island, Sarawak, Singapore, St Helena, Swaziland, United Kingdom, United States of America, Zambia and Zimbabwe.

Can a complaint be laid against court officials?

Yes. If a police officer who has been authorised to enforce a warrant of execution or arrest fails to do so, he/she can be reported to the station commissioner. If a maintenance officer fails in his/her duties, or treats a complainant badly, they can be reported to the court manager or the senior prosecutor at the court, or at the Directorate of Public Prosecutions in the province. Attorneys can be reported to the Law Society in the province in which they practise.

To report a magistrate, ask to speak to the chief magistrate at the court. You can also inform the maintenance officer. If a sheriff who has been authorised to enforce a warrant of execution fails to do so, he/she can be reported to the South African Board for Sheriffs. All sheriffs and deputy sheriffs must carry valid ID cards issued by the board and must produce them if asked.

FORMS

Forms

The following forms are obtainable at <http://www.divorcelaws.co.za>, the forms marked with an x are issued by court officials only.

Form A: Application for Maintenance Order (J101E)

Form B: Substitution or Discharge of existing Maintenance (J107E)

Form C1: Subpoena (J126)

Form C2: Subpoena (J130)

Form D: Notification to admit Statements by Witnesses (J167)

Form E: Maintenance Order (J168)

Form F: Notice to make Maintenance Payments on behalf of person against whom Maintenance (J176)

Form G: Consent and Maintenance Order (J214E)

Form H: Order by Default and Notice (J252E)

Form I: Application for Variation/Setting Aside of an Order by Default (J256E)

Form J: Notice (J280)

Form L: Warrant of execution against Property (J397)

Form M: Application for Setting Aside of a warrant of a Warrant of Execution (J435E)

Form N: Application for Suspension, Amendment or Rescission of an Order for the attachment of Emoluments (J438E)

Form O: Notices to and by Employer (J448)

Form P: Application for Suspension, Amendment or Rescission of an Order for the attachment of Debts (J458E)