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The Maintenance Amendment Bill: the "burden" on employers and third parties to pay

Introduction

Maintenance law is of high relevance and importance in South Africa. A census taken in 2011 highlighted that approximately 48% of minor children are being raised by one parent households. The objective of the Maintenance Act 88 of 1998 (the "Act") is to ensure that children receive the necessary maintenance to assist in their upbringing and well-being and that parents are held accountable to their duty to maintain their children. This is in line with section 28(2) of the Constitution which states that a child's best interest are of paramount importance in every matter concerning the child and, more specifically sections 28(1)(b) and 28(1)(c) stipulates that *every child* has the right to family care, nutrition and shelter.

The Act aims to protect and secure the rights of some of the most vulnerable people in our society, generally women and children, who for reasons out of their control are unable to financially support themselves. In South Africa over 90% of parents defaulting on their maintenance requirements are men. Without derogating into gender specifics, the current maintenance system aims to have both parents equally support their children, by ensuring that maintenance is paid in accordance to ones means. However, it does not factor in the emotional, mental and physical contributions parents make. Nevertheless, the Act is seen as an improvement on the previous maintenance legislation, which failed to provide effective enforcement mechanisms, and plays a pivotal role in the maintenance system. Some of the Acts successes include the increased use of the civil and criminal enforcement mechanisms and the regular use of default orders. However, certain improvements are necessary which have resulted in the Act's proposed amendment.

The need to amend

The maintenance system as a whole suffers from a number of difficulties and one of the problems well noted is the pressure on the Courts and maintenance officers in ensuring the system operates efficiently. One of the central aims of the Maintenance Amendment Bill ("Bill") is to alleviate this pressure by introducing mechanisms that are more efficient, simpler and longer term. Added to this, the Bill aims to reduce the delay in obtaining orders, and the legal expenses incurred by claimants/applicants. The idea is for a person claiming maintenance not to have to make a dozen trips to the Court to ensure they receive the maintenance awarded to them. The Bill is now with the

National Council of Provinces having being passed by the National Assembly with no additional amendments, and should be passed into law shortly.

This article will focus on sections 26, 16 and section 28 of the Bill. The sections set out some of the civil actions that can be taken against defaulters of maintenance orders, who continue to fail to pay arrear maintenance and who need to account for future maintenance.

Commented [PD1]: Discuss? Set out?

A brief look at the rather controversial "blacklisting" of defaulters

There has been vast commentary on the Bill, specifically concerning the amendment of Section 26. Section 26 currently bestows a maintenance officer with the discretion to hand over the details of a person against whom a maintenance order has been granted to any business which grants credit or is involved in the credit rating of persons, for blacklisting. The Bill no longer gives a maintenance officer a discretion but instead makes it a necessary step. The Bill states that a maintenance officer "must" submit the details to a credit bureau rather than "may'. Simply stated the Bill obliges maintenance officers to have maintenance defaulters blacklisted.

There has been mixed reactions thus far to this particular amendment. Certain schools of thought believe that the action would actually further inhibit payment to the claimant/applicant as the defaulter would be blacklisted. For example, having an adverse credit listing would make it even more difficult for the defaulter to access funds which may in turn mean that the defaulter is unable to meet his or her maintenance obligations.

However, the object of the amendment is to place maintenance defaulters on the same level as a normal defaulter in a civil case. Blacklisting is a mechanism which is practically not extended to maintenance defaulters, despite the provisions of section 26 giving the maintenance officer a discretion to do so. The aim remains to encourage parents to comply with maintenance orders and it is hoped that having an additional mechanism such as a possible blacklisting will go a long way in ensuring that parents take their maintenance obligations seriously.

Courts ability to order third parties, notably employers to make payment on behalf of the defaulter and the extension to the granting of emoluments

As it stands, the following sections in the Act, namely section 16(2) and section 28 provide the mechanisms in which third parties can attend to pay outstanding and future maintenance.

Ordering payment by third parties

The relevant portion of section 16(2) states the following:

"(2) (a) Any court- [shall] …

(iii) …make an order directing any person, including any administrator of a pension fund, who is obliged under any contract to pay any sums of money on a periodical basis to the person against whom the maintenance order in question has been or is made, to make on behalf of the latter person such periodical payments from moneys at present or in future owing or accruing to the latter person as may be required to be made in accordance with that maintenance order if that court is satisfied-…

(cc) …that it is not impracticable in the circumstances of the case."

The section as it is grants the courts the discretion to order that a third party, (e.g. an employer or pension fund administrator) after having assessed the practicality thereof, to make payments to the claimant/applicant on behalf of the defaulter. Currently the courts are not expressly required to hear directly from the third parties whom would be ordered to make the payments.

The amendment to section 16(2) will require the courts to consider the views of the third party by oral or written evidence. Case law appears to be the driving force behind this amendment. In *S v Nkoele* SACR 2000 (2) 420, the court noted the importance of hearing from the person or organisation being ordered to make payment. Since the Act does not set out what constitutes "impracticable", it seems that by requesting evidence of the third party, this will assist in determining whether this is indeed feasible and practical in terms of the Act.

In reality people facing maintenance claims can be deceitful. For example, people lie about what they earn; submit false documents or no documents; and sometimes give false evidence. In the matter between *Strydom v Strydom* 2012 (6) SA (KZP), the applicant applied to have his maintenance payments reduced. He claimed that his salary had decreased and submitted his bank statement and payslips. The High Court found that the Magistrate at the maintenance court had failed to properly apply his mind to the documents before him. After studying the documents and, importantly, after the employer confirmed the applicant's salary, his application for reduction was denied. Although there was no need for the Court to order that the applicant's employer make the payments, the evidence of the employer went a long way in ensuring that the applicant continued to pay the correct amount of maintenance.

The Bill also allows courts to order that payments be made where the third party fails to give evidence or appear at court. The practical effect of this amendment, if enforced properly, could be very positive in that it increases the chances of a successful maintenance claim. This is because payment would be out of the defaulter's hands. The defaulter's employer or pension fund could be ordered to effect payment. Furthermore, persons or organisations that are being requested to make payment would be going on record that the maintenance payments can and/or would be made to the claimant/applicant.

However, there may be some difficulty in enforcing this requirement. The Bill does not set out whether a party (i.e. the applicant/claimant) can subpoena a third party to give evidence. Since the words used are merely "*afford an employer an opportunity to comment*…" in situations where the employer is reluctant there could be difficulties.

Granting of attachment of emoluments extended

Section 28(1) provides for the attachment of emoluments. Currently attachments of emoluments can only granted:-

> "*(a) on the application of a person referred in section 26 (2) (a); or*
> *(b) when such court suspends the warrant of execution under section 27 (4), make an order for the attachment of any emoluments at present or in future owing or accruing to the person against whom the maintenance or other order in question was made to the amount necessary to cover the amount which the latter person has failed to pay, together with any interest thereon, as well as the costs of the attachment or execution, which order shall authorise any employer of the latter person to make on behalf of the latter person such payments as may be specified in the order from the emoluments of the latter person until such amount, interest and costs have been paid in full."*

The Bill expands section 28 to include instances where a court has ordered an attachment of debt under section 30. This will be the new section 28(1)(c). This means that in addition to section 28(1)(a) and 28(1)(b), a court may order the attachment of emoluments when the court suspends the order for the attachment of debt. Furthermore, in terms of the Bill, an attachment of emoluments can only be granted if one of the above requirements is met *and* the Court has heard from the employer (new section 28(1)(d)). The evidence from the employer can either be in writing or given orally.

The Bill does not set out why an employer must give evidence, only that it can only order attachment of emoluments after hearing the employer of the defaulter. I would surmise that the reasoning is the same as that set out when requesting a section 16 order, which is to ensure the feasibility and reduction in delay of the granting of such order.

The Bill does not provide for situations in which the employer does not give evidence. It is unclear if the Court can still order the attachment of emoluments without having heard from the defaulter's employer. It appears that this is now a prerequisite.

The question that remains is whether the additional requirement of receiving the evidence of an employer will assist in ensuring payment is made or whether the Courts will have to consider further difficulties the employers may have with the process which may in effect become more burdensome.

The recent judgment, in *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others* has put attachment of emoluments under the spotlight. The court found that emolument attachment orders in terms of section 65J (2)(b)(i) and section 65J(2)(b)(ii) of the Magistrates' Court Act 32 of 1944 ("MCA") are constitutionally invalid. The ruling came after the court found that the current system provided for in the MCA fails to provide for judicial oversight over the issuing of emolument attachment orders against judgment debtors. This results in judgment debtors having their entire or an unnecessarily large part of their salary or wages attached. In some instances it leaves the debtor unable to maintain himself or his family with dignity. However, the judgment in the abovementioned case does not outlaw emolument attachment orders, what it did is to provide a judgment debtor with more options to rescind the order or have the emolument found invalid and therefore set aside. Until the ruling is confirmed by the Constitutional Court, the legislation remains valid.

In terms of the Act, emolument attachment orders can only be granted by a Maintenance Court or High Court or Divorce Court. Unlike in the MCA, a clerk (see para 85 of the abovementioned case "Section 65J(2)(b)(i) and section 65J(2)(b)(ii) of the MCA are in the circumstances constitutionally invalid to the extent that they allow for EAOs to be issued by a clerk of the court without judicial oversight" cannot grant emolument attachment orders. The Maintenance Act and the Bill provide the defaulter with more than one opportunity to provide evidence regarding how much he or she

can afford to pay and section 28(1) encourages evidence to be given by all affected parties including the employers. However the Bill and the Act similar to the MCA do not set limitations or a cap as to how much the defaulter must pay. This is problematic and unless guidelines are set, emoluments attachment orders are open to abuse.

Why an Employer's role does matter?

Attachment of emoluments is one of the best mechanisms to secure maintenance payments.

The additional requirement that an employer's evidence be heard will hopefully mean the process is more efficient, transparent and curtails difficulties. Section 16(2) similarly is a good way to have overdue and future maintenance paid. The amendments require that the Court consider the views of the third-party who will make payment on behalf of its employee but unlike section 28(1), the clause gives the Courts the discretion to order payment be made even where a third party gives no evidence.

The request to hear from an employer or other third party should not be seen as a burden or be allowed to be used as a delaying tactic. Third parties should not view their evidence as burdensome but rather as an opportunity to confirm the defaulters' salary or wages and to confirm that they can indeed assist with making the payments. Moving forward this information ought to be helpful in building a better maintenance system. However, only time will tell whether these amendments assist claimants/applicants and curtail the number of defaulters.

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