

Opinion Piece: Commentary on the Current Review of the Maintenance Act¹

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1 Overview of the Maintenance Act of 1998

The Maintenance Act no 99 of 1998 (the Act or current Act) was passed in November 1998 with the aim of improving certain aspects of the maintenance system in South Africa including the challenges associated with the implementation of the repealed Maintenance Act no 23 of 1963 (the 1963 Maintenance Act). The Act is also aimed at ensuring that South Africa complies with its obligations as enshrined in the Constitution and further that it is in line with its international commitments and instruments that it has ratified.

The 1963 Maintenance Act regulated issues around maintenance but was regarded by many as lacking in many respects, especially, in ensuring proper implementation of its provisions. The biggest challenge with the 1963 Maintenance Act was its enforcement mechanisms, which were regarded as ineffective.

When the current Act was passed it was regarded as a stopgap mechanism while research was being conducted to provide a comprehensive maintenance system. Some commentators hailed the passing of the Act as an improvement to its predecessor, as it introduced new features that were not provided for in the 1963 Maintenance Act. Some of the significant aspects introduced in the Act relate to the appointment of maintenance investigators; the developing of guidelines for factors to be taken into account by the court

¹ This Opinion Piece was written by Ms J Joni a State Law Advisor at the SALRC responsible for the review of the Maintenance Act and is writing in her personal capacity. January 2013

when making maintenance orders; attachment of emoluments; attachment of debts; orders by default; civil enforcement mechanisms; taking of photographs of maintenance debtors and stringent penalties and offences. The new features in the Act are aimed at ensuring a 'simpler, speedier, cheaper and more effective enforcement mechanism'.

Despite the undertaking to deal decisively with maintenance debtors, the Act is still viewed by many as problematic. Various academic writers and commentators still lament the challenges faced by many women who rely on the maintenance system for their maintenance and that of their children. In a review of the Act that was conducted by Professor Leentjie de Jong for the Department of Justice and Constitutional Development (the Department) in 2009 (on the 10 year anniversary of the Act), an analysis of the challenges that have been encountered and the successes that have been achieved through the provisions of the Act is provided. The 10 year Review Report (Review Report) by Professor de Jong, among other things, highlights the successes that have been accomplished through the implementation of the Act relating to the regular use of default orders; the use of civil and criminal enforcement mechanisms; the positive role that maintenance investigators play in the maintenance system and the positive results achieved due to other interventions introduced by the Department. Notwithstanding the improvements introduced by the Act and the successes achieved, the Review Report also identifies areas that still require improvement in the maintenance system. That is, personnel capacity, practices and procedures, training, infrastructure, attitudes and the dynamics between different court officials.

2 The need for the review of the Act

From the outset a distinction needs to be made between a review dealing with implementation challenges and that dealing with gaps in the legislation that can only be

cured through legislative reform. With regard to the former the South African Law Reform Commission (SALRC) does not get involved. A law reform process is undertaken where there is a need to close the gaps identified in existing legislation. The SALRC is currently undertaking a review to address gaps that may be identified therein. It is hoped that this review process will result in the reform proposals that will form the basis of reforming the Act in order to ensure that the maintenance system helps the beneficiaries that it is meant to assist.

As identified in the Review Report referred to above, by users of the maintenance system and as can be gathered from the sentiments of various academic writers, there are challenges in the maintenance system. Some of the challenges identified by the Department form the basis of the law reform process undertaken by the SALRC.

As sponsor of the current investigation, the Department has requested the SALRC to conduct a review of the Act on specific aspects. During the preliminary stage of the investigation process, the SALRC identified some issues that require law reform whilst deciding not to look into other issues not requiring reform. The issues that the SALRC recommended investigation into will be researched and consultations will be undertaken with relevant stakeholders before a final recommendation is made to the Department.

3 Areas flagged for possible revision

In its request, the Department outlined certain areas requiring revision to ensure that the Act meets its objectives. The areas relate to: future maintenance; *locus standi*; appointment of maintenance officers; appointment of maintenance investigators; the power of arrest by maintenance investigators; civil execution; trusts; cost orders and choice of remedy.

The areas that the Department has identified fall into two categories. First, are those areas that are not provided for or addressed in the Act? Second, are areas currently provided for in the Act, of which the Department require clarity and tighter regulation?

Details of the nature and extent of reform that is requested by the Department in the various areas identified above will be dealt with in the opinion pieces that will follow.

4 Analysis of the upcoming process and associated challenges

The SALRC's investigative process is based on its internally approved work methodology that is applied to all investigations conducted by the SALRC. This investigative process is multi-pronged and involves the development of various research reports and thorough consultation with relevant stakeholders. In the first stage of the process, the SALRC conducts a preliminary investigation to determine whether the issue identified for legislative reform should be included on its law reform programme. During the preliminary investigation, which is an internal process, a predetermined set of criteria is used to assess whether the law reform proposal should be recommended for inclusion on the SALRC's programme. Once a recommendation is made it has to be approved by the Commission. This is done in the form of a Proposal Paper. When the Commission approves a recommendation for inclusion of an investigation in its programme, that law reform proposal becomes a project of the SALRC. The second stage, which involves the development of an Issue Paper, is regarded as the first step in the consultation process. The purpose of this phase is to, among other things, announce an investigation, clarify the aim of the investigation and suggest options for resolving the problems presented for law reform. The Issue Paper invites submissions from identified relevant stakeholders on possible solutions to the issues under consideration. Upon receipt of submissions from stakeholders, a third stage is embarked upon, which involves the development of a

Discussion Paper reflecting the existing legal position on the issues at hand, deficiencies in the law, a comparative legal study, the SALRC's preliminary recommendations and a draft Bill. Even during the Discussion Paper stage members of the public are invited to make submissions that will inform the law reform process at that stage, by publishing the Discussion Paper for comments or representations. After receipt of submissions on the Discussion Paper a Report, together with a draft Bill is developed. The Report contains the final recommendations of the SALRC on the issues under investigation. All the Papers that are developed during the investigation have to be approved by the Commission.

As has been gleaned from comments of various academic writers, the problems that surround the maintenance system in South Africa centre mostly on implementation of the Act, and not necessarily the actual legal provisions themselves. Indeed, while there are areas still that need fine-tuning in the Act, the bulk of the problems experienced by the users of the maintenance system arise because of challenges associated with implementation.

It is true that the current Act is an improvement of its predecessor in that it has introduced various mechanisms that have assisted in strengthening enforcement processes. However, not all the loopholes have been closed by the current Act. The 1963 Maintenance Act was more concerned with criminal enforcement that did not necessarily ensure that those who claimed maintenance benefits were assisted. In remedying the situation, the current Act has introduced civil enforcement mechanisms that include, among other things, execution against emoluments, property and debt and default orders.

Many working in the field of maintenance law are pinning their hopes on the current review of the Act, hoping that once this process is complete, the challenges will dissipate. As has been stated elsewhere in this opinion piece, the review might not live up to the expectations of many as the challenges that plague the maintenance system revolve around the implementation of the provisions in the Act. While the SALRC is working at ensuring



that the Act meets its objectives delivers on its promises as articulated in its Preamble, a lot of hard work needs to be undertaken by implementers of the Act based at South Africa's maintenance courts to ensure that maintenance monies timeously reach intended beneficiaries; the hundreds of women and children who rely solely on maintenance for their sustenance.

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Any comments on this Opinion Piece can be sent to children.pan@hsrc.ac.za

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