

SOUTH AFRICAN LAW COMMISSION

ISSUE PAPER 5

Project 100

REVIEW OF THE MAINTENANCE SYSTEM

Closing date for comment: 30 May 1997

ISBN: 0-621-17651-6

(ii)

INTRODUCTION

The South African Law Commission was established by the South African Law Commission Act, 1973 (Act 19 of 1973).

The members of the Commission are -

The Honourable Mr Justice I Mahomed (Chairperson)

The Honourable Mr Justice P J J Olivier (Vice-Chairperson)

The Honourable Madam Justice Y Mokgoro

Adv J J Gauntlett SC

Mr P Mojabelo

Prof R T Nhlapo

Ms Z Seedat

The Secretary is Mr W Henegan. The Commission's offices are on the 8th floor, 228 Visagie Street, Pretoria. Correspondence should be addressed to:

The Secretary

South African Law Commission

Private Bag X668

PRETORIA

0001

Telephone : (012) 322-6440

Fax : (012) 320-0936

E-mail : salawcom@cis.co.za

This document is available on the Internet under "The South African Law Commission" at <http://www.uct.ac.za/law>.

PREFACE

This issue paper (which reflects information gathered up to the end of January 1997), was prepared to elicit responses and to serve as a basis for the Commission's deliberations, taking into account any responses received. The views, conclusions and recommendations contained herein should not, at this stage, be regarded as the Commission's final views. The paper is published in full so as to provide persons and bodies wishing to comment or make suggestions for the reform of this particular branch of the law with sufficient background information to enable them to place focussed submissions before the Commission.

The Commission will assume that respondents agree to the Commission's quoting from or referring to comments and attributing comments to respondents, unless representations are marked confidential. Respondents should be aware that the Commission may in any event be required to release information contained in representations under the Constitution of the Republic of South Africa, Act 108 of 1996.

Respondents are requested to submit written comments, representations or requests to the Commission by 30 May 1997 at the address appearing on the previous page. The researcher will endeavour to assist you with particular difficulties you may have. Comment already forwarded to the Commission should not be repeated; in such event respondents should merely indicate that they abide by their previous comment, if this is the position.

The researcher allocated to this project, who may be contacted for further information, is Pieter Smit. The project leader responsible for this project is Ms Zubeda Seedat.

CONTENTS

	Page
Introduction	(ii)
Preface	(iii)
Sources and citation	(vi)
Table of cases	(viii)
Select legislation	(viii)

CHAPTER 1

Origin of the investigation and introduction	1
---	----------

CHAPTER 2

The problem	2
--------------------	----------

CHAPTER 3

Identifying issues	7
Procedure for implementation of duty of support	7
Human resources	7
Investigation by maintenance officer	8
Orders by maintenance courts	9
Enforcing maintenance orders	10
Maintenance pending divorce	13

CHAPTER 4

Options for reform	15
Procedure for implementation of duty of support	15
Human resources	20
Investigation by maintenance officer	22
Orders by maintenance courts	23
Enforcing maintenance orders	24
Maintenance pending divorce	29

CHAPTER 5

Conclusion	31
-------------------	-----------

SOURCES AND CITATION

Boberg

Boberg PQR **The Law of Persons and the Family** Cape Town: Juta 1977

Bowen

Bowen J **Child Support A Practitioner's Guide** Sydney: 1994
The Law Book Company Ltd

Burman

Burman S Capitalising on African Strengths: Women, Welfare, and the Law 1991 **South African Journal on Human Rights** (vol 7 part 2) 215

Burman & Berger

Burman S and Berger S When Family Support Fails: The Problems of Maintenance Payments in Apartheid South Africa (Part I) 1988 **South African Journal on Human Rights** (vol 4 part 2) 194

Burman & Berger

Burman S and Berger S When Family Support Fails: The Problems of Maintenance Payments in Apartheid South Africa (Part II) 1988 **South African Journal on Human Rights** (vol 4 part 3) 334

Burrows

Burrows D **The Child Support Act 1991 — A Practitioner's Guide** London: Butterworths 1993

Du Toit

(vii)

Du Toit E, De Jager F, Paizes A, Skeen A St Q, Van der Merwe S
Commentary on the Criminal Procedure Act Cape Town: Juta
& Co, Ltd 1996

Hoexter Report

Commission of Inquiry into the Structure and Functioning of the
Courts (Chairperson: Mr Justice GG Hoexter) **Fifth and Final
Report** (Vol III) RP 78/1983 Pretoria: Government Printer 1983

Lotriet

Lotriet MM Die effektiwiteit van onderhoudsbevele in
familieregtelike konteks (Deel1) 1996 **The Magistrate**
(no. 4) 123

Lund Committee Report

Lund Committee on Child and Family Support (Chairperson Ms F
Lund) **Report of the Lund Committee on Child and Family
Support** 1996

Montgomery J **Child Support Act 1991** London: Sweet &
Maxwell 1991

Spiro

Spiro E **The Law of Parent and Child** fourth ed Cape Town:
Juta & Co, Ltd 1985

Van der Vyver JD, Joubert DJ **Persone- en Familiereg** third ed
Cape Town: Juta & Co, Ltd 1991

TABLE OF CASES

Buch v Buch 1967 (3) SA 83 (T)

Coetzee v Government of the Republic of South Africa; Commanding Officer, Port Elizabeth
Prison, and Others v Matiso and Others 1995 (4) SA 631 (CC)

Duncan v Duncan 1984 (2) SA 310 (C)

Kruger v Ferreira 1979 (1) SA 915 (NC)

R v Becker 1951 (2) SA 162 (T)

S v Botha 1988 (4) SA 402 (C)

S v Dadabhai 1969 (3) SA 520 (N)

S v Miller 1976 (1) SA 12 (C)

S v Petersen 1966 (4) SA 675 (C)

SELECT LEGISLATION

Australia

1975 Family Law Act, 1975

1988 Child Support (Registration and Collection) Act, 1988

1989 Child Support (Assessment) Act, 1989

Republic of South Africa

Primary Legislation:

1959 Correctional Services Act, 1959 (Act 8 of 1959)

1963 Maintenance Act, 1963 (Act 23 of 1963)

1977 Criminal Procedure Act, 1977 (Act 51 of 1977)

1987 Mediation in Certain Divorce Matters Act, 1987 (Act 24 of 1987)

1992 Attorney-General Act, 1992 (Act 92 of 1992)

1993 Constitution of the Republic of South Africa, 1993 (Act 200 of 1993)

Rules of Court:

Rule 43 of the Uniform Rules of Court

United Kingdom

Child Support Act 1991

CHAPTER 1

1. ORIGIN OF THE INVESTIGATION AND INTRODUCTION

1.1 The maintenance system in South Africa rests upon two legs. On the one hand there is the judicial maintenance system which is based on the legal duty to support one's dependents. On the other hand there is the State Maintenance Grant which is meant to act as a safeguard by providing support where the procedures of the judicial maintenance system fails to do so. In August 1996 the Lund Committee on Child and Family Support (henceforth "the Lund Committee") completed its report dealing with various issues concerning the maintenance system in South Africa. In this report the Lund Committee identified several areas where the law of maintenance and its administration is in need of reform.¹ Apart from this the Lund Committee also made recommendations with regard to the replacement of the State Maintenance Grant with a flat-rate child support benefit and the continuation of certain other welfare grants.²

1.2 The areas of concern with regard to the law of maintenance were brought to the attention of the Minister of Justice following a workshop organised by the Lund Committee. This, coupled with the numerous representations by members of the public concerning maintenance related problems, prompted the Minister to request the Commission to investigate the Maintenance Act, 1963, and to recommend steps to ensure an effective maintenance system.

CHAPTER 2

1 The Lund Committee Report 131 *et seq.*

2 The Lund Committee Report 87*et seq.*

2. THE PROBLEM

2.1 The duty of one person to support another exists at common law.³ This duty arises whenever the relationship between the parties is such as to create such a duty between them.⁴ The relationships which give rise to a duty of support by operation of law are that of husband and wife, parent and child, grandparents and grandchildren and brothers and sisters.⁵ The common law duty of support is further dependent on the fact that the person claiming support is unable to support himself or herself, and that the person from whom support is claimed is able to provide the required support.⁶

2.2 The South African Law also contains statutory provisions with regard to maintenance. The main provision in this regard is the Maintenance Act, 1963, (Act 23 of 1963, henceforth “the Act”). The Act does not create a duty of support. Instead it endeavours to create a speedy procedure to ensure fulfilment of a legal duty to maintain another without causing costs to the person making use of this procedure.⁷ The measures employed by the Act to accomplish this are both civil and criminal in nature.

2.3 The Act constitutes every magistrate’s court as a maintenance court in its area of jurisdiction.⁸ The Act further provides for the appointment by the Minister of Justice (henceforth “the Minister”) of “maintenance officers”. Apart from this every public prosecutor shall be deemed to be a maintenance officer.⁹ The task of the maintenance officer is to investigate a complaint on oath that a person legally liable to maintain another fails to do so, or that sufficient

3 Boberg 249, Spiro 385

4 Boberg 249.

5 Boberg 250.

6 Boberg 249.

7 Boberg 290, Spiro 420.

8 Section 3 of the Act.

9 *Ibid.*

cause exists for the substitution or discharge of a maintenance order.¹⁰ After the investigation the maintenance officer may institute an inquiry in a maintenance court and must assist with the conduct of such an inquiry.¹¹ According to Spiro the maintenance officer does not have a discretion to decide whether to institute an inquiry or not and must do so whenever he or she receives a complaint.¹² In **Buch v Buch**¹³ Claassen J held the contrary view in respect of an inquiry into the substitution of a maintenance order, stating that the maintenance officer may refuse to institute an inquiry if he or she is not satisfied that sufficient cause exists for the substitution of the order.¹⁴

2.4 The purpose of the inquiry is to enable the maintenance court to crystallise a person's duty to maintain another person in the form of a maintenance order where no such order exists, or to substitute or discharge an existing order.¹⁵ The orders the maintenance court may make may relate to the payment of sums of money towards the maintenance of the person requiring support, to the payment of money to the mother of a child requiring support, in respect of expenses associated with the birth of the child and of arrear maintenance and to the payment of money in respect of medical expenses of the person requiring support.¹⁶

2.5 The nature of the enquiry is neither civil nor criminal and can best be described as inquisitorial. The following phrases from **Buch v Buch**¹⁷ serves to illustrate the differences between an inquiry in terms of the Act and normal civil proceedings:

“Ordinarily under common law procedure the whole matter is left to the parties to call such evidence as they may decide, except that the court as upper guardian of minors

10 Section 4(1) of the Act.

11 *Ibid.*

12 Spiro 421.

13 1967 (3) SA 83 (T).

14 At 87A - B of the judgment.

15 Section 5(4) of the Act.

16 *Ibid.*

17 *Supra.*

would be entitled in the interests of such minors to call for further evidence. The court would then, at the conclusion of the case, be guided to a considerable extent by the consideration whether the plaintiff or applicant has proved his case on a balance of probabilities. The question of onus is then of great importance.

In my opinion the Act has introduced new concepts. It is no longer a party who is dominus litis and who launches the action or application.”¹⁸

And also:

“In view of these provisions it seems to me it is no longer correct to speak of an onus resting on a party in connection with proceedings before a maintenance court. The responsibility of placing evidence before the court no longer rests only on the parties concerned, but is shared by the maintenance officer and the presiding judicial officer. Thus even where the parties are legally represented the maintenance officer and the presiding officer may have to call relevant evidence not called by the legal representatives. Then at the conclusion of all the evidence the presiding officer will decide whether to make an order to pay maintenance or vary an existing order to pay maintenance. In doing so he will no doubt consider all the relevant factors. These I need not enlarge on here, but in general he will look after the interests of children and see that justice is done between the parties in accordance with their means and ability to pay.”¹⁹

2.6 An order made by a maintenance court is enforced through the medium of the criminal law. The Act provides that a person who fails to make “any particular payment in accordance with a maintenance order” is guilty of an offence.²⁰ According to the decision in **S v Miller**²¹ the words “maintenance order” in section 11(1) includes an agreement made an order of a court at divorce proceedings.²² According to Spiro this does, however, not include maintenance that the court could not have ordered without the consent of the parties, ie a maintenance order that is based solely on a contractual duty of support.²³

18 At 86G - H of the judgment.

19 At 87D - G of the judgment. See also **Kruger v Ferreira** 1979 (1) SA 915 (NC) at 916D -E where Van den Heever J expressly states that the inquiry is neither a civil nor a criminal case.

20 Section 11(1) of the Act.

21 1976 (1) SA 12 (C).

22 At 14 B - C of the judgment.

23 Spiro 421.

2.7 The Act prescribes a penalty of a fine of R4000 or imprisonment for a period of one year for a failure to comply with a maintenance order.²⁴ Apart from the criminal penalty a court convicting the accused may also make certain other orders: The Court may, if it has civil jurisdiction, make an order for the recovery of the unpaid maintenance.²⁵ The court may furthermore authorise a warrant of execution against the movable and immovable property of the offender in order to satisfy such an order.²⁶ Any pension, annuity, gratuity or compassionate allowance is liable to be attached or subjected to such execution.²⁷ The court convicting the offender may also order that future maintenance payments will be made by the offender's employer from the remuneration due to the offender.²⁸

2.8 During the course of a prosecution in terms of section 11 of the Act the court may convert the proceedings into an enquiry in terms of section 5.²⁹ The court may do so if satisfied that it is desirable to hold such an inquiry and must do so if requested by the prosecutor.³⁰ No judgment is passed in respect of the charges against the accused and the court proceeds with the inquiry as discussed earlier.³¹

2.9 At the practical level a number of problems arise with the administration of the system described above. Complaints range from the treatment, attitudes and facilities encountered at maintenance courts by persons wishing to lay complaints, to the seeming impunity with which persons manage to evade their legal duty to maintain their dependents, even where maintenance orders are in force. The underlying problem seems to be a social attitude that there is no responsibility upon persons to support their dependents, especially where children are brought up

24 Section 11(1) of the Act.

25 Section 11(2)(a) of the Act.

26 Section 11(2)(b) of the Act.

27 Section 11(2)(d) of the Act.

28 Section 12 of the Act.

29 Section 13 of the Act.

30 *Ibid.*

31 See parr 2.3 to 2.6 *supra*.

in single-parent households. The low measure of social disapproval with which a non-custodial parent's failure to support his or her children is met (especially if the non-custodial parent is the farther) is indicative of this attitude. This attitude has pervaded not only society in general but also the administration of the maintenance system. This has led the Lund Committee and other commentators to observe that it is widely acknowledged that the judicial maintenance system is in disarray.³² The consequence of the failure of the judicial maintenance system to ensure that support is given to those who are entitled thereto, is that increasing numbers of people are turning to the State Maintenance Grant as their means of subsistence.³³ This places an unbearable strain on the welfare resources of South Africa.

32 The Lund Committee Report 49.

33 The Lund Committee Report 49.

CHAPTER 3

3. IDENTIFYING ISSUES

3.1 The main problem of the ineffectiveness of the judicial maintenance system manifests itself in various forms. In this chapter some issues concerning these manifestations are identified. In the next chapter the options in respect of these issues are considered.

Procedure for implementation of duty of support

3.2 The perceived ineffectiveness of the judicial maintenance system has led some commentators to question the merits of its continued existence.³⁴ The first issue seems therefore to be whether judicial procedures should be continued to be relied upon as the vehicle for the implementation of the legal duty to support one's dependents.

Human resources

3.3 The Act provides for the appointment of maintenance officers.³⁵ The Act further provides that any public prosecutor may be deemed to have been appointed as a maintenance officer. The importance of the maintenance officer in the structure of the Act can be seen from the following passage:

“The maintenance officer is in an extremely powerful position within the maintenance system. In acting as facilitator of negotiations between the parties, he has considerable influence on decisions made – for example, the amount of maintenance to be awarded and whether a case should be referred to court.”³⁶

34 Burman 1991 (2) **SAJHR** 215 at 217 remarks that “[i]t could well be argued that the system of obtaining maintenance from fathers is patently not working and that therefore it would make more sense to abolish it”.

35 Section 3(1) of the Act.

36 Burman & Berger 1988 (2) **SAJHR** 194 at 200.

3.4 In practice positions of maintenance officers are, nearly without exception, filled by public prosecutors and in the larger sentra those prosecutors will deal exclusively with maintenance matters. The Lund Committee Report contains the following passage that aptly describes the attitude of the majority of officials associated with maintenance courts:

“An ex-magistrate with extensive experience in maintenance matters commented on some of the contradictions which emerge when issues like maintenance are dealt with by legal people through legal methods: ...

Attorneys, prosecutors and magistrates alike, are of the belief that they are wasting their talents and time in the Maintenance Court ... It has been my experience that, as a result of the impression created by senior officials and possibly (albeit inadvertently) by the Department itself, that maintenance enquiries are not really difficult or important, few ambitious prosecutors or magistrates wish to be part of these proceedings ... Combine this with the prospect of the typical ‘legal personality’ being required to enter into a more personal and emotional field, and the result is that officials moreover have to be compelled to work at the Maintenance section - often to serve as a *quid pro quo* for some mistake they have made in another section.”³⁷

3.5 The general shortage of resources and funds is probably the reason for the fact that prosecutorial staff is seen as a convenient source from which the maintenance courts can be staffed with maintenance officers. As was pointed out earlier a maintenance inquiry is not by nature a criminal matter.³⁸ It is therefore understandable that compelling public prosecutors to serve as maintenance officers can give rise to the belief referred to in the previous paragraph.

Investigation by maintenance officer

3.6 After receiving a complaint a maintenance officer must do an investigation of that complaint.³⁹ The Act does, however, not indicate the scope or aim of the investigation that the maintenance officer is required to do. It appears that maintenance officers do not follow a

37 The Lund Committee Report 50 to 51.

38 See par 2.5 *supra*.

39 Section 4(1) of the Act.

standardised procedure for this investigation and that practices vary considerably from one maintenance court to another.⁴⁰

3.7 Before the institution of the inquiry the parties are requested to attend a joint interview with the maintenance officer. The aim of this interview is to assist the parties in reaching an agreement as to the payment of maintenance by the respondent to the applicant without necessitating an inquiry by the maintenance court.⁴¹ Where no agreement is reached, or the respondent does not attend the interview, an inquiry should be instituted in the maintenance court.⁴² In the present circumstances it appears, however, that instances do occur where no inquiry is instituted in spite of the fact that no agreement was reached. Thus the Lund Committee recommends that maintenance officers should institute an inquiry in all cases where no agreement can be reached.⁴³

Orders by maintenance courts

3.8 A court conducting a maintenance inquiry may make orders as to the payment of money towards the maintenance of a person, expenses in connection with the birth of a child and maintenance for the period since the birth up to the date of the order and future medical expenses of a person.⁴⁴ The Act does, however, not allow the court to make any ancillary orders to ensure compliance with these orders. This diminishes the efficacy of the maintenance order to the point where the making of the order, in many cases, simply becomes a prelude to the institution of criminal proceedings aimed at its enforcement.

3.9 The making of an order by the maintenance court requires that both parties are present at the inquiry. It is notoriously difficult to obtain the presence of a respondent at a maintenance

40 The Lund Committee Report 55.

41 Burman & Berger 1988 (2) **SAJHR** 194 at 198.

42 *Ibid.* See also par 2.3 *supra* for the discussion of Spiro's point of view that the maintenance officer must institute an inquiry.

43 The Lund Committee Report 131.

44 Section 5(4)(a) of the Act.

inquiry. The problems vary between a low success rate in serving the summonses, to the respondents simply ignoring them when they are served.⁴⁵ If a respondent fails to adhere to a duly served summons a warrant for his or her arrest may be issued. The success rate of the execution of such warrants is, however, also very low.⁴⁶ It appears that the tracing and bringing to court of a respondent is one of the greatest stumbling blocks of the application of provisions of the Act.

Enforcing maintenance orders

3.10 Failure to comply with a maintenance order constitutes an offence.⁴⁷ In theory the threat of criminal sanction should have the effect of ensuring compliance with the provisions of a maintenance order. Thus Dowling J remarked in **R v Becker**⁴⁸ that “[f]ew men would elect to serve a prison sentence of hard labour rather than make payments under maintenance orders which are within their means”.⁴⁹

3.11 The courts have, however, developed a tradition of routinely suspending sentences for the failure to comply with maintenance orders, whether the sentence is one of a fine or of a term of imprisonment.⁵⁰ The rationale behind this approach lies “the traditional injunction against killing the goose that lays the golden eggs”.⁵¹ The dictum in **S v Botha**⁵² is a telling example of the courts’ view of the matter:

45 Burman & Berger 1988 (2) **SAJHR** 194 at 201.

46 Burman Berger 1988 (2) **SAJHR** 194 at 202.

47 Section 11(1) of the Act. See also parr 2.6 and 2.7 *supra*.

48 1951 (2) SA 162 (T).

49 At 165 A-B of the judgment.

50 Boberg 299, Burman & Berger 1988 (3) **SAJHR** 334 at 344, **S v Petersen** 1966 (4) SA 675 (C), **S v Dadabhai** 1969 (3) SA 520 (N), **S v Botha** 1988 (4) SA 402 (C).

51 Boberg 299.

52 *Supra*.

*“Al is die versuim van 'n eerste oortreder in 'n onderhoudsaangeleentheid moedswillig, help dit glad nie diegene waarvoor hy onderhoud moet betaal om hom tronk toe te stuur nie. In die tyd wat hy in die gevangenis is kry hulle hoegenaamd geen onderhoud nie. Die landdros se stelling dat dit irrelevant is aangesien die beskuldigde in elk geval nog nooit betaal het nie is 'n non sequitur. Dit is juis om te verseker dat die beskuldigde van nou af en in die toekoms sy verpligtinge teenoor sy kinders moet nakom en dat hulle hul onderhoud gereeld moet kry dat 'n opgeskorte vonnis oor sy kop moet hang. Om hom tronk toe te stuur sou geen baat vir sy kinders inhou nie. Die kinders wat die mense is wie se belange veral deur die Hof se vonnis beskerm moet wees, sal ook benadeel word as die beskuldigde sy werk verloor, wat 'n heel waarskynlike gevolg sal wees van 'n tydperk van gevangenissetting. Dit sal ook wel moontlik moeilik wees vir hom om weer werk te bekom wat hom in staat sal stel om die R120 per maand aan sy kinders te betaal. Daar sal dus, na my mening, geen doel bereik word om 'n beskuldigde soos in die huidige geval tronk toe te stuur nie. So 'n vonnis sal alleen vergeldend, wat die beskuldigde betref, wees en sal geen ander doel dien nie. Dit sal sy kinders glad nie help nie.”(italics added).*⁵³

3.12 The consequence of this approach is, however, that defaulters realise that the chances of them receiving anything else than a suspended sentence are very slim. This causes the criminal sanctions to lose their deterrent effect.⁵⁴ As a result the threat of criminal sanction has become a hollow one which undermines the potency of provisions to enforce maintenance orders.⁵⁵

3.13 Apart from the sentence which may be imposed upon conviction the court may also make certain other orders to ensure that the arrear maintenance is paid and that future maintenance payments will be made in accordance with the initial order. These orders may, however, only be made upon conviction for the offence of failure to comply with a maintenance order.

3.14 One such order is for the payment of arrears and interest. The court may, on the application of the public prosecutor, order the recovery from the offender of the amount that he or she failed to pay plus interest thereon.⁵⁶ The making of such an order is dependent, firstly on

53 At 406 E-G of the judgment.

54 Burman & Berger 1988 (3) **SAJHR** 334 at 344, Lotriet 1996 (4) **The Magistrate** 123 at 130.

55 Burman & Berger 1988 (3) **SAJHR** 334 at 344: “Although an official said ‘jou have to threaten people with the law or else no one will pay maintenance’ it appears that this threat is a hollow one. It is almost impossible to enforce a maintenance order”.

56 Section 12(2)(a) of the Act.

the conviction of the defaulter, and secondly on the application by the public prosecutor. The fact that the court may not automatically make this type of order places a restriction on its application. Thus the payment of interest on arrears is hardly ever ordered.⁵⁷

3.15 Coupled with an order for the recovery of arrears and interest the court may also authorise the issue of warrants of execution against the movable and immovable property of the offender in order to satisfy such order.⁵⁸ The issue of warrants of execution are therefore also dependent on the conviction of the offender and the application of the above-mentioned order by the public prosecutor. Situations may arise where the defaulter cannot be convicted of a contravention of section 11(1) of the Act in spite of the fact that it has been established that he or she did not comply with the maintenance order while being in a position to do so. In such cases payment of the arrears cannot be ordered and warrants of execution cannot be authorised.⁵⁹ The same applies where a prosecution for failure to comply with a maintenance order is transformed, before conviction of the defaulter, into an inquiry in terms of section 13 of the Act.

3.16 The effectiveness of a warrant of execution, especially in respect of immovable property, is illustrated by the circumstances encountered in **Duncan v Duncan**⁶⁰ where a woman obtained a warrant of execution against the house of her ex-husband in respect of arrear maintenance of R1 600,00. Faced with the prospect of losing his house the ex-husband made an offer of paying the arrears from the proceeds of a sale of certain assets. Against the background of this offer he applied to the court for a stay of the execution of the warrant. This application was refused. One commentator quotes a number of cases where the maintenance court has authorised warrants of execution and suspended its operation in order to give the offender an opportunity to pay the arrears, or even just warned the offender that it is considering to do so. In all these cases the result was that the arrear maintenance had been paid.⁶¹

57 Lotriet 1996 (4) **The Magistrate** 123 at 136.

58 Section 11(2)(b) of the Act.

59 Lotriet 1996 (4) **The Magistrate** 123 at 137.

60 1984 (2) SA 310 (C).

61 Lotriet 1996 (4) **The Magistrate** 123 at 137 to 138.

3.17 This extremely powerful mechanism of the maintenance court loses some of its potency in that it may only be applied after the conviction of the defaulter.

3.18 Another order which may be made upon conviction for the failure to comply with a maintenance order is a so-called garnishee order. This authorises the payment of the maintenance from the respondent's earnings.⁶² Garnishee orders appear to have a certain amount of success.⁶³ Three main issues, however, impact negatively on the effectiveness of garnishee orders: These orders are only applicable where the offender is employed and do not cater for self-employed persons.⁶⁴ Garnishee orders lose effectiveness if the offender changes employment in order to avoid the operation of the order, or loses his or her work as a result of victimisation by the employer because of the order or for any other reason.⁶⁵ Garnishee orders may only be made by a maintenance court upon conviction of an offender.⁶⁶

Maintenance pending divorce

3.19 Rule 43 of the Uniform Rules of Court provides for a procedure by means of which relief can be sought from the Supreme Court while a divorce action is pending. This relief can include the payment of maintenance while the matter is pending.⁶⁷

3.20 The procedure provided for by Rule 43 is aimed at being a fast interim measure and the costs that may be charged in relation to such proceedings is limited by this provisions.⁶⁸

62 Section 12(1) of the Act.

63 Lotriet 1996 (4) **The Magistrate** 123 at 139.

64 *Ibid*, section 12(1) of the Act.

65 Burman & Berger 1988 (2) **SAJHR** 198 at 205, Lotriet 1996 (4) **The Magistrate** 123 at 139 to 140.

66 Section 12(1) of the Act, Lotriet 1996 (4) **The Magistrate** 123 at 139.

67 Rule 43(1) of the Uniform Rules of Court. Other forms of relief include orders as to a contribution towards the pending divorce matter, interim custody of a child and interim access to a child.

68 Rule 43(8) of the Uniform Rules of Court.

Nevertheless there still seems to be a need for a faster and cheaper procedure to obtain interim maintenance payments pending a divorce matter.

3.21 All of the issues mentioned in the preceding paragraphs causes the application of the judicial maintenance system to suffer. This not only results in hardship for those who are dependent on maintenance payments but also affects the whole of society as it places an increased burden on scarce State resources.

CHAPTER 4

4. OPTIONS FOR REFORM

4.1 Against the background of the issues identified in the previous chapter various options for reform will now be discussed.

Procedure for implementation of duty of support

4.2 The many problems experienced in the administration of the judicial maintenance system (some of which are inherent to the implementation of judicial procedures) and the consequent ineffectiveness of the system to provide relief to those dependent upon maintenance payments, have prompted certain commentators to question its continued use as a vehicle to enforce the legal duty to support one's dependents.⁶⁹ Thus the first option which needs to be discussed seems to be the replacement of the judicial maintenance system with an administrative or other system. If the judicial maintenance system is not to be replaced by another system, methods need to be investigated to address the issues raised concerning the functioning of the system.

4.3 The question arises if the judicial procedures to obtain and enforce maintenance orders are to be abolished, with what should they be replaced. In Australia the Child Support Scheme (henceforth "the Scheme") was established by the Child Support (Registration and Collection) Act 1988 and the Child Support (Assessment) Act 1989.⁷⁰ The Scheme was designed as a result of a realisation that the system by means of which the courts dealt with maintenance on a case by case basis had failed.⁷¹ It provides for an administrative procedure to determine the extent of a person's liability to pay child support as well as to collect and disseminate child support payments. The Scheme does not apply to the payment of spousal maintenance, however in

69 Burman 1991 (2) **SAJHR** 215 at 217.

70 Bowen 4.

71 *Ibid.*

certain instances the structures of the Scheme may be used for the collection and disbursement of spousal maintenance payments⁷².

4.4 The administration of the Scheme falls under the tax authorities of Australia.⁷³ A government institution named the Child Support Agency (henceforth “the Agency”) which forms part of the Tax Office, performs this function.⁷⁴ This means that the Agency has access to the necessary information and structures to collect child support payments in the same manner as PAYE tax. Disbursement of payments to custodial parents is done through the Department of Social Security. The Agency therefore functions as a conduit for child support payments from the non-custodial parent to the custodial parent. The Agency does not form part of the Australian Government’s social security system and does not guarantee payment of child support as it does not have funds of its own to be used for this purpose. If the non-custodial parent fails to pay or cannot be traced there will not be money available to pay to the custodial parent. The Agency will, however, take on the responsibility of pursuing the matter further in an attempt to obtain the payments.⁷⁵

72 Bowen 17.

73 Section 10(2) of the Child Support (Registration and Collection Act) 1988.

74 Bowen 5.

75 *Ibid.*

4.5 The Child Support (Assessment) Act 1989 lays down a formula by means of which the Agency calculates the amount that is payable as child support in each specific case. This Act applies to all cases where parents separated on or after 1 October 1989 or where the youngest child of the relationship was born on or after that date.⁷⁶ If parents to whom the Child Support (Assessment) Act 1989 applies cannot agree to an amount to be payed as child support the amount will be determined administratively by the Agency according to the formula. The court will not be involved in any determination of payments as to child support.⁷⁷ In fact, in cases where the Child Support (Assessment) Act 1989 applies the court is precluded from making any order for the periodic payment of child maintenance.⁷⁸ The Family Law Act 1975 in terms of which the court may make an order for the maintenance of a child is not an alternative to the provisions of the Child Support (Assessment) Act 1989.⁷⁹ The Child Support (Assessment) Act 1989 does provide for a review of an assessment of a parent's duty of support, but this will only be done on "special grounds".⁸⁰

4.6 Where the parents to whom the Child Support (Assessment) Act 1989 applies can come to an agreement as to the amount of child support payable, the agreement may be lodged with the Agency in order to be enforced by the Agency.⁸¹

4.7 In cases where the Child Support (Assessment) Act 1989 does not apply parents will have to go the route of obtaining a court order as to maintenance in terms of the Family Law Act 1975 or of having an agreement registered by a court in terms of that Act.⁸² The Agency can then collect and disseminate maintenance payments in terms of such an order or agreement.

76 Sections 19 to 21 of the Child Support (Assessment) Act 1989.

77 Section 35 of the Child Support (Assessment) Act 1989, Bowen 4 to 5.

78 Section 66 BA of the Family Law Act 1975, Bowen 11.

79 Bowen 17.

80 Sections 98A to 98M of the Child Support (Assessment) Act 1989, Bowen 12.

81 Sections 80 to 95 of the Child Support (Assessment) Act 1989, Bowen 10.

82 Bowen 17.

4.8 The aim of the Scheme is clearly to relieve the burden placed on custodial parents to follow the judicial procedures in order to cast the non-custodial parent's duty of support into explicit terms and then again at a later stage in order to have that duty enforced.

4.9 In the United Kingdom a similar system has been in place since 1991. The Child Support Act 1991 provides for an administrative procedure to determine maintenance payments by means of an assessment.⁸³ The assessments are done by child support officers and where such an officer has jurisdiction to make an assessment the courts are precluded from making, varying or reviving any maintenance order.⁸⁴ The Child Support Act 1991 is administered by the Secretary of State for Social Security whose tasks include appointing the child support officers.⁸⁵ In practice the Act is administered by the Child Support Agency on behalf of the Secretary of State.⁸⁶

4.10 Collection of maintenance payments may be done by the Secretary of State upon application for him or her to do so.⁸⁷ Where the person entitled to maintenance is receiving any form of state benefit the collection of maintenance must take place through the Secretary of State.⁸⁸ This may be done by means of a "deduction from earnings order" issued by the Secretary of State against the person liable to pay maintenance.⁸⁹ Where such an order is inappropriate the Secretary of State may apply to the appropriate court for certain orders, collectively referred to as liability orders, directed at the person and property of the liable person.⁹⁰

83 Section 4 of the Child Support Act 1991.

84 Section 8(3) of the Child Support Act 1991.

85 Burrows 14. Section 13 of the Child Support Act 1991.

86 Burrows 14.

87 Section 29(1)(b) of the Child Support Act 1991.

88 Section 29(1)(a) of the Child Support Act 1991.

89 Section 31 of the Child Support Act 1991.

90 Burrows 96.

4.11 It is clear that the failure of judicial procedures to ensure the proper functioning of a maintenance system is a universal problem.⁹¹ Unrealistically low awards and uncertainty in predicting maintenance amounts are inherent to a system where the determination of such amounts are left to the discretion of the courts.⁹² Problems of cumbersome court processes, poor court administration and inaccessibility of those processes are common to judicial procedures for the enforcement of maintenance payments.⁹³ If the examples of countries such as Australia and the United Kingdom are considered the idea of abolishing the judicial maintenance system does not seem so far fetched. These examples seem to indicate that there are viable alternatives to the judicial system.

4.12 An administrative system for the determination of maintenance amounts will result in removing the determination of maintenance amounts from the discretion of judicial authorities. Thus cases will no longer be individualised. The main danger of such a system is that a general formula, even with a number of inbuilt variations, cannot provide for every contingency. In practice the amounts awarded by maintenance courts under the current system are generally low. This seems to indicate that the individual consideration given to maintenance cases by judicial authorities does not ensure that the amounts awarded are adequate⁹⁴. If a system of administrative assessment is to be implemented in South Africa the formula or formulae by means of which maintenance amounts are to be determined will have to be designed taking the circumstances of the South African society into account.

4.13 In the South African situation an administrative collection system may be implemented by making use of government structures that are already in place such as the records and the systems of the Revenue Service and the Department of Internal Affairs. The main benefit of such a system is that the burden of taking the necessary steps to enforce a duty to pay maintenance is taken off the person entitled to receive such payments. By making use of the

91 Lotriet 1996 (4) **The Magistrate** 123 at 123.

92 Bowen 4, Burrows 104.

93 Burrows 105 to 106.

94 Berman & Berger 1988(2) **SAJHR** 194 at 204 and 205.

government structures and resources to enforce the duty to pay maintenance a much higher success rate can be achieved.

4.14 Another option for replacing the judicial maintenance system is through the introduction of a so-called Dad-Tax. This entails that a tax levy be imposed on non-custodial parents from which funds are obtained to pay a form of pension or grant to custodial parents. This approach needs to be very carefully considered.

4.15 Such a system negates the parental duty of support which exists at common law.⁹⁵ At the same time, however, it does not take cognisance of other duties to maintain dependents.

4.16 The structure of such a system is very rigid. It does not take account of the possibility of agreed maintenance payments, payments in kind or lump sum payments. It also does not allow for maintenance amounts to be individually determined in order to suit specific circumstances.

4.17 Such a system will increase the tax burden on a large part of the South African society. Apart from this it may also serve to increase the burden on government resources. Any form of taxation is likely to become a target for evasion. A tax system will therefore necessitate a system for its enforcement and administration which entails government spending. The likelihood exists that the amounts to be payed out to custodial parents, plus the amounts spent on the administration of the system, will exceed the amounts received through the system.

4.18 The discussion of the various issues which follows will be based on the premise that the judicial maintenance system is maintained, and will explore options for its reform in accordance with each issue raised. It may, however, be that the replacement of the judicial maintenance system will also provide a solution to some of these issues.

Human resources

4.19 The issue of human resources seems to be a practical one that does not easily lend itself to a solution by means of law reform. Part of the problem experienced in this regard is that there

95 See par 2.1 *supra*.

are simply not enough personnel to deal with all the complaints presented at maintenance courts. Furthermore the government does not have the financial resources at its disposal to increase the numbers of personnel at maintenance courts. This problem seems to be compounded by the practice of drawing on the ranks of the public prosecutors to fill the posts of maintenance officers. This not only creates problems of a higher personnel turnover at maintenance courts and a consequent loss of continuity in maintenance matters, but also leads to the dissatisfied attitude among such personnel alluded to earlier.⁹⁶

4.20 An option for the reform of the present situation seems to be to separate the office of maintenance officer from that of public prosecutor. This may be achieved by the deletion from the Act of the provision deeming a public prosecutor to be a maintenance officer.⁹⁷ Career-oriented maintenance officers should then be appointed to this office instead of compelling public prosecutors to serve in this capacity. It is acknowledged that in some areas the caseload of maintenance courts are not enough to warrant the appointment of a fulltime maintenance officer. In respect of such sentra consideration can be given to the use of maintenance officers from larger offices who periodically visit smaller offices as the demand dictates.

4.21 The advantage of a separation of the offices of public prosecutor and maintenance officer lies in the establishment of a better motivated and more dedicated compliment of maintenance officers. The maintenance officer fulfills a very important role in the current maintenance system.⁹⁸ A maintenance officer's dedication to his or her functions is therefore crucial to the smooth running of the judicial maintenance system. The maintenance inquiry is not a criminal procedure and therefore does not necessitate the involvement of a public prosecutor.⁹⁹

4.22 In so far as the criminal law is to be relied upon for the enforcement of maintenance orders, two options exists. This task could be left to the criminal courts and the public prosecutors, or the authority to prosecute the relevant offences can be delegated to persons

96 See par 3.3 *supra*.

97 Section 3(2) of the Act.

98 Burman & Berger 1988 (2) **SAJHR** 194 at 200.

99 See par 2.5 *supra*.

appointed as maintenance officers.¹⁰⁰ The difference between this approach and the current position should then be that the emphasis should fall on the officials being maintenance officers who are also delegated to prosecute certain offences and not, as is currently the case, those officials being public prosecutors who are temporarily acting as maintenance officers.

4.23 Of course the recruitment of career-oriented maintenance officers will entail the development of a suitable career structure and career prospects for such persons. This brings us back to the problem of a shortage of resources. The possibility of uniting the office of maintenance officer with that of family advocate may be considered in this regard.¹⁰¹ In its fifth and final report the Commission of Inquiry into the Structure and Functioning of the Courts (henceforth the “Hoexter Commission”) recommended that family courts be established and that, among others, those matters that currently come before the maintenance courts should be adjudicated by a family court.¹⁰² This would mean that the family court will replace the current maintenance court. This can provide a further avenue for the proper utilisation of career-oriented maintenance officers.

Investigation by maintenance officer

4.24 In the absence of a clear indication in the Act as to the scope and aim of the investigation by the maintenance officer such officers have to rely on guidance given by the Department of Justice through training and guidelines. In spite of the Department’s efforts the manner in which this investigation is done seems to be largely in the discretion of the particular official. This also pertains to the subsequent determining of the amount awarded as a periodical maintenance payment.¹⁰³

100 Section 6 of the Attorney-General Act, 1992 (Act 92 of 1992) provides for the delegation of the authority to prosecute.

101 Section 2(1) of the Mediation in Certain Divorce Matters Act, 1987 (Act 24 of 1987), provides for the appointment of civil servants to the office of family advocate.

102 RP78/1983 at 525.

103 Burman & Berger 1988 (2) **SAJHR** 194 at 203, the Lund Committee Report 55.

4.25 A possible solution to this problem may be to prescribe the steps to be taken in the course of the investigation in the Act or by means of secondary legislation. What these steps should be will be largely determined by the aim of the investigation. If the purpose of the investigation is to be to assist the complainant in making his or her application to the maintenance court, the scope of the investigation should be as wide as possible. This may then include locating respondents, determining the levels of income of all interested parties and the needs in respect of maintenance of the interested parties. Steps to determine the income of a person can include gaining access to the records of the Revenue Service, doing a search of the deeds registry or consulting the records of the Department of Internal Affairs and of local authorities.

4.26 The Act seems to allow the maintenance officer a discretion to decide whether to institute a maintenance inquiry or not, although there is also a contrary point of view.¹⁰⁴ A possible solution is for the Act to provide that an inquiry must be instituted in all cases where no agreement can be reached between the parties involved. Such a provision may, however, cause a substantial increase in the caseloads of maintenance courts.

4.27 The alternative is to provide that the maintenance officer has a discretion to decide that a particular complaint does not merit the institution of a formal inquiry. This places a large responsibility on the maintenance officer as his or her decision can have grave consequences for the applicant. This option presupposes a corps of well-trained and dedicated maintenance officers who will be able to sift the unsubstantiated complaints from the meritorious ones.

Orders by maintenance courts

4.28 The efficacy of a maintenance order is undermined by the fact that the maintenance court is not allowed to make ancillary orders to ensure compliance with the principal order. An option that may be explored in this regard would be to allow the maintenance court to make an order for the deduction of the relevant amount from the income of the respondent when it makes an order for the periodical payment of maintenance. This will be referred to as a garnishee order.

104 See parr 2.3 and 3.7 *supra*.

4.29 The garnishee order should be structured in such a manner that it does not apply to a specific employer. It should remain in effect where the respondent changes employment. A method of deducting the relevant amount from the respondent's income in the same manner as PAYE or SITE tax payments are made, may be considered. This will necessitate the establishment of an administration to deal with the collecting and channelling of such payments.

4.30 The effectiveness of the garnishee order may be further strengthened by criminalising any act of victimisation of an employee by an employer because of the imposition of the order.

4.31 Failure to obtain the presence of the parties, especially the respondent, at an enquiry where an order may be made, is a major cause for the low success rate of the judicial maintenance system. This is a problem that is inherent to judicial processes and does not easily lend itself to a solution by means of law reform. The use of deputy-sheriffs and of private tracing agents have in certain cases proved to increase effectiveness.

4.32 An option that may be considered in order to provide for those cases where the respondent is traced but simply refuses to attend any court proceedings, is to allow the maintenance court to make an order for the payment of maintenance in the absence of the respondent. The making of such an order should, however, be subject to the court being satisfied that the respondent was duly notified of the inquiry. A maintenance court should be allowed to receive any evidence it may consider necessary in the making of an order in the absence of the respondent. A maintenance order made in the absence of a respondent should have the same effect as an order of the maintenance court made in the presence of all interested parties. In this regard it should be kept in mind that any order made by a maintenance court may subsequently be substituted or discharged upon application by the respondent.¹⁰⁵

Enforcing maintenance orders

4.33 It is clear that the criminal law is not a successful medium for the enforcement of orders made by the maintenance court. This issue may be approached from two different sides. On the one hand the sword that is suspended over the head of a possible defaulter may be sharpened by

105 Section 5(4)(b) of the Act.

examining the courts' sentencing options in respect of a failure to comply with a maintenance order. On the other hand the procedures that may be used in order to execute a maintenance order may be examined.

4.34 The Act only provides for sentences of imprisonment or a fine for the failure to comply with a maintenance order.¹⁰⁶ This does, however, not mean that there are no other sentencing options available to a court in respect of this offence. The Criminal Procedure Act, 1977 (Act 51 of 1977), provides for a sentence of periodical imprisonment.¹⁰⁷ This may be imposed by any court convicting a person of an offence for which no minimum punishment is prescribed.¹⁰⁸

4.35 The advantage of periodical imprisonment is that it can strike a balance between the need for prevention through deterrence and the preservation of the productivity and family life of an offender.¹⁰⁹ Other advantages are that it costs the state less than ordinary imprisonment and the offender is not as exposed to the negative prison environment.¹¹⁰ The fact that it can have much less of an impact on the earning power of a person who is under a duty to maintain other persons should make periodical imprisonment a sentence option well-suited to maintenance related matters. A factor that may further enhance periodical imprisonment as a sentencing option would be to allow the court to determine the periods when a person is to serve the sentence. Options in this respect are to make use of public holidays or of the accused's annual leave.¹¹¹

4.36 The Criminal Procedure Act provides for correctional supervision as a sentencing option.¹¹² This provides the court with another avenue through which a rehabilitative or

106 Section 11(1) of the Act.

107 Section 285 of the Criminal Procedure Act, 1977.

108 Section 285(1) of the Criminal Procedure Act, 1977.

109 Du Toit 28—22.

110 Lotriet 1996 (4) **The Magistrate** 123 at 132.

111 *Ibid.*

112 Section 276(1)(h) and (i) of the Criminal Procedure Act, 1977.

punitive sentence may be imposed without placing an offender in prison.¹¹³ The Criminal Procedure Act also grants the court the discretion to impose a sentence of imprisonment from which the offender can be placed under correctional supervision.¹¹⁴

4.37 The Correctional Services Act, 1959 (Act 8 of 1959), provides for a number of measures to which an offender may be subjected including monitoring, placement in employment as well as any “other programmes as may be determined by the court or the Commissioner or prescribed by or under this Act, and to any such other form of treatment, control or supervision, including supervision by a probation officer, as the Commissioner may determine after consultation with the social welfare authority concerned in order to realize the objects of correctional supervision”.¹¹⁵

4.38 In respect of persons who fail to comply with maintenance orders correctional supervision may be a truly suitable sentence as such persons can be subjected to monitoring and control over their financial affairs in order to ensure compliance. Such persons may further be subjected to educational programmes in order to provide them with the necessary skills to manage their financial affairs in such a manner that they will have sufficient funds available to comply with the maintenance order.¹¹⁶ Submission to correctional service may furthermore be set as a condition for the postponement of the passing of a sentence or the suspension of a sentence.¹¹⁷

4.39 The options discussed above are currently available to maintenance courts but are not frequently used. It seems therefore that training of the relevant officials can provide an avenue through which the use of these measures can be promoted. Another option is to limit the maintenance court’s discretion to suspend or postpone sentences. This may be done by requiring

113 Section 276(1)(h) of the Criminal Procedure Act, 1977 allows the trial court to place the offender under correctional supervision. See also Du Toit 28—10C.

114 Section 276(1)(i) of the Criminal Procedure Act, 1977.

115 Section 84(1) of the Correctional Services Act, 1959.

116 Lotriet 1996 (4) **The Magistrate** 123 at 134.

117 Section 297(1) of the Criminal Procedure Act, 1977.

the court to set submission to correctional supervision as a condition for the postponement or suspension of any sentence. It is, however, not desirable to restrict the sentencing options of the court as situations may arise where the court is then prevented from imposing a suitable sentence.

4.40 An option that was raised in respect of imprisonment as a sentencing option is to allow the offender who is serving a prison sentence to remedy his or her position by paying the arrear maintenance and then to apply to the court to be released from prison.¹¹⁸ The remaining part of the prison term may then be suspended on any of the conditions provided for by the Criminal Procedure Act, 1977.

4.41 This option need to be carefully considered in the light of the decision of the Constitutional Court in **Coetzee v Government of the Republic of South Africa; Commanding Officer, Port Elizabeth Prison, and Others v Matiso and Others**.¹¹⁹ In this case it was decided that the provisions of the Magistrate's Courts Act, 1944 (Act 32 of 1944), providing for imprisonment of a judgment debtor are unconstitutional as it offends against the right to freedom as provided for in section 11(1) of the Constitution of South Africa, 1993 (Act 200 of 1993, henceforth the "Interim Constitution"). Kriegler J lists a total of seven aspects concerning these provisions which are found to rule out the possibility that this infringement may be justified by section 33(1) of the Interim Constitution.¹²⁰ The phenomenon of imprisonment for the failure to pay a debt was, however, not in principle held to be unconstitutional.¹²¹

4.42 The court's power to imprison a person because of a failure to pay maintenance can furthermore be distinguished from an imprisonment for the failure to pay a debt. In the first instance the person concerned will have committed an offence (viz a contravention of section 11(1) of the Act) for which he or she will have been charged, tried and convicted before his or her imprisonment will have become a possibility. In the case of an imprisonment for the failure

118 Lotriet 1996 (4) **The Magistrate** 123 at 131.

119 1995 (4) SA 631 (CC).

120 At 643D-644H of the judgment.

121 See the remarks of Didcott J at 646F-J and Sachs J at 672D-H of the judgment.

to pay a debt no criminal charge or prosecution will have preceded the imprisonment. Another factor to be kept in mind is that a person can only be convicted of the failure to pay maintenance if the court is satisfied that the such failure is not due to a lack of means.¹²²

4.43 It is therefore clear that the court has the power to send a person to prison because of a failure to pay maintenance by virtue of the fact that such a failure constitutes an offence. If the court is granted the discretion to reconsider its sentence of imprisonment where the offender pays the arrears for which he or she was convicted that discretion will work in the offender's favour in that the term of imprisonment may thereby be shortened. It is submitted that the granting of such a discretion cannot render the court's power to impose a sentence of imprisonment for a failure to comply with a maintenance order unconstitutional.

4.44 A possibility to be explored in respect of the execution of maintenance orders is to separate this procedure from the criminal sanctions attached to the failure to comply with such an order. This means that the processes to ensure payment in accordance with a maintenance order should not be dependent on the conviction of the defaulter to whom it applies. If the order for the periodical payment of maintenance is treated as something akin to a judgment by a civil court in favour of the applicant, more use could be made of measures such as warrants of execution against the respondent's property. Various options exist for the form which the procedures to implement such an order may take.

4.45 The maintenance order may be statutorily accorded the effect of a civil judgment for the payment of an amount in installments. Such an order may then be registered with the clerk of the civil court which has jurisdiction in the area where the maintenance order was made, and be executed in the same manner as a judgment of that court. A major drawback of such a system may be that the process to enforce a civil judgment is not cheap nor simple enough to provide an easily applicable solution to the low levels of enforcement of maintenance orders. Furthermore the procedure for the execution of a judgment is aimed at bringing finality to a civil suit. An important difference between a maintenance order and a civil judgment is, however, that a civil judgment is made for a fixed amount which can be amortised while a periodical payment of

122 Section 11(3) of the Act.

maintenance is an ongoing obligation which will only terminate with the occurrence of a particular event. This means that a maintenance order will not be discharged with the execution for a warrant of attachment of movable property of a defaulter. The debt in terms of that order will continue to exist and will accumulate as each payment becomes due, even after the execution of a warrant.

4.46 Another option is to allow an applicant to approach the maintenance court with an application to authorise the issue of a warrant of execution in respect of any payment that has become due in terms of a maintenance order plus interest on such a payment. This should be an *ex parte* application. The court may be granted the discretion to authorise the issue of a warrant for the payment of an amount of money, or for the attachment of the defaulter's movable or immovable property. The court's authorisation of the issue of such a warrant may be coupled to a return date upon which the respondent must show cause why the issue of the warrant should not be authorised. This procedure will retain judicial control over the issue of warrants for execution but will provide a quicker and more dependable mechanism for the enforcement of maintenance orders than that which is currently in place.

4.47 A third option is to allow the applicant to sue for a warrant of execution out of the office of the clerk of the maintenance court. This will have the effect that the applicant will be entitled to approach the clerk of the maintenance court to have a warrant for the payment of an amount of money or for the attachment of movable or immovable property issued. The respondent should be entitled to approach the maintenance court with an application for a stay of execution of the warrant. This procedure will provide a quicker mechanism than the one discussed in the preceding paragraph to ensure compliance with the maintenance order. Whichever option is preferred, the issue of a warrant of execution should be competent irrespective of any prosecution because of the failure to comply with the maintenance order.

4.48 As was previously discussed the making of a so-called garnishee order is something that may be considered as part of the making of the initial order of the maintenance court following a maintenance inquiry.¹²³ In cases where this is not done the making of a garnishee order may be

123 See parr 4.28 to 4.30 *supra*.

dealt with by means of similar procedures for the issuing of a warrant of execution discussed in the preceding paragraphs. The previous remarks concerning the structure of the garnishee order will also apply in this instance.¹²⁴

Maintenance pending divorce

4.49 An option to provide faster and cheaper relief in respect of maintenance pending divorce would be to allow maintenance courts to hear such applications. This may improve accessibility to such procedures as the maintenance courts are more evenly distributed than the divisions of the Supreme Court. In the present circumstances the full court rolls and shortage of staff which are encountered at most maintenance courts, especially in the larger sentra, may, however, cause delays in the hearing of such applications.

4.50 The institution of family courts may be a more suitable solution for this problem. The Hoexter Commission recommended that family courts should adjudicate, among others, matters associated with divorce proceedings including applications for maintenance *pendente lite*.¹²⁵ The efficiency of such courts to deal with these matters will be largely dependent on the availability of sufficient resources for its staffing and operation.

124 See par 4.30 *supra*.

125 RP78/1983 at 524.

CHAPTER 5

5. CONCLUSION

5.1 It is clear that the implementation of some of the options discussed in the preceding chapter will require the spending of large amounts of money by Government. This will in turn be borne by the taxpayer. It is suggested that the situation in which the maintenance system finds itself warrants the allocation of sufficient resources by Government to alleviate the plight of those who are dependent upon its proper functioning. It must be borne in mind that the breakdown of the judicial maintenance system results in an increased reliance on the State Maintenance Grant which is funded solely with taxpayers' money and is an ongoing expense to the state. By investing sufficient resources in establishing a system by means of which the common law duty to support one's dependents can be efficiently implemented, reliance on the State Maintenance Grant can be greatly reduced.

5.2 The discussion in this paper does not purport to be exhaustive of all the issues and options pertaining to maintenance. The Commission invites respondents to indicate whether there are other issues and/or options to be explored.

5.3 It is suggested that the issues and options outlined above as well as those suggested by respondents ought to be debated thoroughly before any particular direction is embarked upon. Based on the outcome of such discussions legislation to effect a review of the maintenance system will be proposed. The comments of all parties who feel that they have an interest in this topic or may be affected by the type of measures discussed in this paper are therefore of vital importance to the Commission. All respondents are invited to indicate their preferences in respect of the options examined. All the relevant role players and institutions that are likely to be affected by regulatory measures should participate in this debate.