

- FINAL SUBMISSION -

A CRITICAL REVIEW OF THE MAINTENACE PROCESS

by

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1. INTRODUCTION

“It is widely acknowledged that South Africa’s maintenance system is in disarray. Complaints range from the treatment, attitudes and facilities encountered at maintenance courts to the seeming impunity with which persons manage to evade their legal duty to maintain their dependants.”¹

The purpose of this dissertation will be to identify certain challenges in the South African maintenance system and process by examining the history of maintenance law in South Africa as well as the current law and processes. Alternative dispute resolution will be considered as a possible solution to the identified challenges and more specifically the process utilised in the Commission for Conciliation, Mediation and Arbitration (herein after referred to as the CCMA) as a model to consider. The discussion will conclude with a recommendation on whether or not alternative dispute resolution as applied in the CCMA could be a plausible solution to the identified challenges.

Maintenance courts were established to assist the person on the street to obtain maintenance from a party who is liable to pay maintenance in an effective and cost efficient manner. However; obtaining a maintenance order as well as enforcing same could prove to be troublesome. In an Annual Report² issued by the Department of Justice and Constitutional Development it is stated that: *“In line with our [the Department of Justice and Constitutional Development] strategic commitments made in the 2011/12 financial year, we have improved maintenance and Guardian’s Fund services for the benefit of vulnerable groups, who often are in dire need of these resources.”³*

¹ SALC Bulletin, June 1997.

² Department of Justice and Constitutional Development Annual Report 2012/2013.

³ See *id* at 11.

According to the abovementioned report there were 174 875⁴ new maintenance applications during the 2012/2013 financial year. During the same financial year 334 218 maintenance enquiries were held and only 185 497 orders were granted. Of the orders granted, 86 592 were orders by consent and 8 562 were default orders, this means that only 90 343 orders, less than 50%, were granted subsequent to a dispute and a formal enquiry by the court. The remainder of the orders granted were orders by consent, which means that approximately 46% of matters were settled.

A maintenance order may be enforced in two ways, civil execution and criminal execution. Both execution-processes are mostly governed by the Maintenance Act⁵ in conjunction with several other pieces of legislation⁶. A brief discussion on the execution process and the challenges experienced will follow below in Chapters 2 and 4.

The annual report further indicates that 14 372⁷ new section 31⁸ cases were opened for defaulting on payment of maintenance orders. This entails a criminal matter being instituted at court in order to “enforce” a maintenance order. Although this is not the ideal manner in which to enforce an order it is commonly used and will be briefly discussed in Chapter 4 below. Of the 14 372 reported complaints only 1 681 cases were solved by way of court order and 11 225 cases were resolved through other mechanisms. Thus only 11% of the complaints lodged were dealt with in an official court process. The report was silent on the enforcement of maintenance orders through civil execution mechanisms such as emolument attachment orders etcetera.

⁴ See *id* at 28.

⁵ Act 99 of 1998.

⁶ Amongst others the Constitution of the Republic of South Africa, 1996; The Children’s Act 38 of 2005; The General Law of Amendments Act 49 of 1996; The Law of Evidence Act 45 of 1988; The Criminal Procedure Act 51 of 1977 etc.

⁷ See *id* at 29.

⁸ Section 31 of the Maintenance Act 99 of 1998 as amended by Act 9 of 2015.

Not only does the overburdened and ineffective maintenance process negatively affect the person on the street but it also adds to the burden on the state in providing social grants by contributing to the pool of underprivileged. Thus not only will an improved maintenance process be beneficial to the people who utilise the process but also the state and ultimately the tax payer. Due to limitations, this dissertation will not delve into the implications on social security and additional burdens in the tax payer, but the ripple effect of a crippled maintenance system on society as a whole should not be taken lightly.

Based on what has been stated above it is accepted that the maintenance process requires a thorough and stern review of how it fits into the South African civil procedure. This dissertation will be limited to the processes used in the Magistrates' Courts, as well as their relevant Rules, even though the High Court can also be seen as a maintenance court in the broad sense.

2. HISTORICAL OVERVIEW OF THE MAINTENANCE LAW

Before one can critique the *status quo*, one has to consider the origin. As will be demonstrated below, maintenance law in South Africa has its origins in Roman-Dutch Law. Roman law being more unyielding, seeing children and women as mere possessions with the accompanying rights law of property allows, and the German Law allowing for more equal rights. Ultimately the British had some influence during the colonisation of South Africa leaving family law in South Africa a kaleidoscope of influences.

2.1. Roman Law

The law of maintenance as we know it did not exist during Roman law times. The closest equivalent was the *potestas* which consisted of *jus vitae necisque*⁹ and the power to sell ones child into bondage. The *paterfamilias*, being the one entrusted with the *patria potestas*, could give his children away in marriage, divorce them, agree to adoption, emancipate them and recover them at his leisure. *Patria potestas* lasted until death of the *paterfamilias*, when the *filiusfamilias* stepped up and became *paterfamilias*. The *paterfamilias* had *patria potestas* over all the children even if they were married. A wife would become part of her husband's *patria potestas* if he was the *partriofamilia* alternatively she would form part of his *partriofamilia's patria potestas*.¹⁰

A mother could never acquire the *patria potestas* even after a father's custody over a child was removed due to dissolution of the marriage. In 138 – 161 AD, the first real duty of care came about. The duty was reciprocal in nature, as children also had a duty to maintain parents, and saw the diminishing of the right

⁹ The power of life and death.

¹⁰ Spiro E (1985) 1.

of disposal in respect of the members of the household which resulted from the *patria potestas*.¹¹

2.2. German Law

Similar to the *patria potestas* was the German “*munt*”. It initially also consisted out of the right of a father to decide over the life and death, sale of a child or to compel a daughter to get married. The development of the “*munt*” however differs from that of the *patria potestas* in that it did not give the right to a father to sell a child’s property. A father had an *usufruct* over a minor child’s property but could not alienate it without the child’s consent which could only be obtained at majority. Unlike in the case of the *patria potestas* the “*munt*” came to an end at the age that the child reached majority or at marriage. The duty on the father to protect his children was also more prominent and he could not abandon the “*munt*”.¹²

Unlike in Roman law a mother had certain rights in respect of her children but the development of such rights was hindered by the Roman law influences during the sixteenth century. Courts had right of supervision and control and fathers were subject to the duty to maintain their children.¹³

2.3. Roman-Dutch Law

The Roman-Dutch law rather followed German customs than Roman law and differed from the Roman approach in that a mother had certain rights in respect of her child which were secondary to those of the child’s father. This was referred to as parental power. Upon the death of one parent full parental power would vest in the surviving parent even if the surviving parent was the mother.

¹¹ Spiro E (1985) 2.

¹² Spiro E (1985) 2.

¹³ Spiro E (1985) 3.

The Roman-Dutch system also vested all parental power in the mother of an illegitimate child. Parental power also ceased upon majority or marriage of the child as in the case of the German law.¹⁴

Parental power entailed that parents had to raise their children, educate them and discipline them appropriately. It allowed the court to decide in whose household and care the children would remain after divorce. Parents had to administer the property of their minor children and did not have an *usufruct* over same. The parents still had to consent to marriage if the child was still a minor and children were represented by their parents in court. Parents were allowed to provide for the guardianship of their children after death. Parents had a duty to maintain their children even if they were of age and as long as they could not provide for themselves. The duty was reciprocal in that children had to show their parents obedience even after becoming of age and had to support their parents if the need arose.¹⁵

2.4. South African Law

During 1806, when the British rule came into being in the Cape, Roman-Dutch law was the common law of the country. This meant that apart from legislation, Roman-Dutch law was and remained the common law of the Cape, particularly in respect of the law of parent and child. The court held in *Van Rooyen v Werner*¹⁶ that the law of parent and child did not differ much from the break down given above, under Roman-Dutch law, save for certain statutory changes like the age when majority terminated parental power.¹⁷

Natal, the Transvaal Republic, the Orange Free State Republic, South West Africa, Marion Island, Prince Edward Island, Rhodesia, Basutoland (now Lesotho), Bechuanaland (now Botswana) and Swaziland soon followed suit and

¹⁴ Spiro E (1985) 4.

¹⁵ Spiro E (1985) 4 – 5.

¹⁶ (1892) 9 SC 425 at 428.

¹⁷ Spiro E (1985) 5.

adopted the Roman-Dutch law, as administered in the Cape, into law. The Union and subsequent Republic of South Africa kept the Roman-Dutch law until repealed by the competent authorities.¹⁸

Since the inception of Roman-Dutch law into South Africa the common law has regulated the law of parent and child.

The enforcement of maintenance duties have been a problem even as early as 1987¹⁹. During the late seventies and early eighties the laws regulating divorce saw reform as the numbers in divorces internationally raised as well as in South Africa²⁰. This automatically brought about the need for law reform in maintenance law as the current laws could no longer meet the demands of the people. The new Maintenance Act²¹ came into operation on 26 November 1999 following a Law Commission interim report given to the Minister during 1998 and the repeal of the previous Maintenance Act²².

Next the challenges experienced and which lead to the revolt of maintenance law in South Africa will be discussed. This will also be the basis for the challenges to be addressed in the ensuing discussion.

2.5. The challenges experienced in the South African Law of Maintenance

During 1997 the Law Commission published an Issue Paper on Project 100²³ dealing with the South African Maintenance System. The investigation was initiated by a report published by the Lund Committee on Child and Family Support²⁴ which identified certain challenges in the law of maintenance and the

¹⁸ Spiro E (1985) 6 – 7.

¹⁹ Van Zyl (1987) 3.

²⁰ Van Zyl (1987) 1.

²¹ Maintenance Act 99 of 1998 as amended by Act 9 of 2015.

²² Maintenance Act 99 of 1998 as amended by Act 9 of 2015.

²³ South African Law Commission Issue Paper 5 Project 100.

²⁴ Report of the Lund Committee on Child and Family Support (1996).

administration thereof and made recommendations to remedy same. The Issue Paper identified the following short falls.²⁵

- a) The procedure used to enforce the duty to maintain – the effectiveness of the maintenance system was questioned as well as its continued existence.
- b) Human resource constraints – The Act provides that every public prosecutor is also a maintenance officer. The maintenance officer plays a crucial role during the maintenance enquiry as will be explained below and thus requires a form of expertise and commitment which is not currently existent. It is also mentioned that maintenance enquiries are not exclusively criminal by nature and thus could prove to be challenging for a person trained solely in criminal law.
- c) The maintenance officer's investigation – It was established that there is no universal procedure to be followed during a maintenance investigation. The paper further indicated that in certain instances no court enquiry was requested in which case the parties could not reach a settlement leaving the inquiry undecided.
- d) Enforcement of maintenance orders – The 1963 Maintenance Act²⁶ only allowed for the making of an order directing payment of money towards maintenance, a contribution or payment in respect of the birth of a child and maintenance for the period since the birth of the child to date of the order and future medical expenses of a person. Should a person default on an ordered payment a criminal sanction was the only remedy available and no money could be recovered by way of attaching property or monies. This rendered the enforcement of a maintenance order futile. The securing of parties at court has proven to be challenging resulting in matters not being finalised as order could not be granted without both parties present. The issuing of warrants of arrest also proved to be unsuccessful.
- e) The effectiveness of sanctions used to enforce maintenance orders – The criminal sanction of a fine or imprisonment has been played down by the

²⁵ South African Law Commission Issue Paper 5 Project 100 at 7.

²⁶ The Maintenance Act 23 of 1963.

awarding of suspended sentences. The rationale behind the suspended sentence being that a person in incarceration cannot effectively contribute to maintenance neither does it make sense to sanction the payment of a fine if the defaulter is not contributing to maintenance. This has a negative effect on the criminal sanctions and allows the defaulter to escape liability without penalty. The court may make an order for the payment of arrears plus interest however this can only be done upon conviction and on application by the prosecutor; the court may not make the order on its own account. The same goes for order for the attachment of property or monies which may only be granted after a conviction. This renders the remedies feeble.

- f) Maintenance applications pending divorce proceedings – A Rule 43 application for interim maintenance was the only mechanism available should a person wish to claim maintenance during divorce proceedings. The application had to be made to the High Court which in itself had serious financial implications.

The Law Commission then proceeded to recommend options for reform and proposed the following:²⁷

- a) The procedure utilised to enforce the duty to maintain – The commission considered replacing the judicial maintenance system with an administrative or other system. Upon considering an administrative approach, such as in the United Kingdom and Australia, the commission concluded that it would be problematic to use a set formula to determine maintenance as it would mean that each case would not be treated as an individual case based on its own merits. It was noted that the benefit would be that burden to enforce the duty to maintain would be taken away from the person entitled to maintenance and would be borne by the state and in doing so state resources may be utilised to achieve a higher success rate. Other possibilities were also considered, such as the so-called Dad-Tax system,

²⁷ South African Law Commission Issue Paper 5 Project 100 at 15.

but due to its rigidity it was not considered as a true possibility. The commission decided not to recommend the replacement of the judicial maintenance system but rather to consider amending the system at the time to improve its effectiveness.

- b) Human resources – It was proposed by the commission that a separate office be created for maintenance officers and that prosecutors not be utilised as maintenance officers. This would mean that the Act would have to be amended to exclude prosecutors as maintenance officers and that separate training or career paths would have to be provided for maintenance officers. Subsequently, maintenance applications as well as the enforcement of orders would be dealt with by maintenance officers and not by prosecutors which would take a burden off the heavy case load that prosecutors need to deal with, however it would place a burden on the already stretched state budget. The commission noted the recommendation by the Hoexter Commission in its report²⁸ to consolidate the Maintenance Courts into Family Courts and by doing so creating a specialised court.
- c) Investigation conducted by the maintenance officer – The commission noted that the lack of investigation guidelines results in cases being dealt with in different ways depending on the court or maintenance officer dealing with the matter. The commission proposed that prescribed steps be taken when an investigation is done depending on the reason for the investigation in order to create uniformity.
- d) Orders by maintenance courts – The commission identified that the effectiveness of maintenance orders could be promoted if the maintenance court could make maintenance orders without both parties being present (default judgements) or if it could make ancillary orders ensuring compliance with orders, such as monies being deducted from a person's salary (garnishee orders).
- e) Criminal enforcement of maintenance orders – The commission proposed correctional supervision or periodical imprisonment as existing mechanisms

²⁸ Commission of Inquiry into the Structure and Functioning of the Courts (Chairperson: Mr Justice GG Hoexter) Fifth and Final Report (Vol III) PR 78/1983 Pretoria: Government Printer 1983.

which may be utilised to punish maintenance defaulters for failing to pay in terms of a maintenance order without jeopardising the defaulter's revenue stream or livelihood.

- f) Civil enforcement of maintenance orders – The commission proposed the separation of the application and the enforcement of maintenance orders in order to afford the maintenance court the opportunity to utilise existing civil enforcement mechanisms, such as the attachment of property, to ensure compliance with orders. In the alternative the commission proposed that an applicant be allowed to approach the maintenance court or the clerk of the court for an *ex parte* application for a warrant of execution. A return date should be allocated in order to ensure judicial oversight of the execution process.
- g) Maintenance pending divorce – The commission proposed that applications for interim maintenance, pending a divorce action, in the high court be permitted to be brought in the Maintenance Court in order to mitigate the costs involved in High Court Rule 43²⁹ applications and to improve the accessibility of the courts.

In its annual report³⁰ the commission indicated that an interim report was submitted to the Minister on 6 May 1998 and that, following responses received, the problems experienced by in the maintenance courts were of such a pressing nature that it proposed interim recommendations. It stated that the major problems experienced were twofold. Firstly the procedure leading up to the granting of an order was riddled with postponements for attendance at the maintenance officer's office as well as during the maintenance enquiries. Secondly, the conviction of a defaulter for not adhering to a maintenance order was widely reported to be ineffective.

²⁹ This proposal was made before the interim maintenance could be applied for in terms of Magistrates' Court Rule 58, which is the equivalent of a High Court Rule 43 for interim maintenance, amongst other relief, but which is applied for in the Regional Court.

³⁰ South African Law Commission, Twenty Sixth Annual Report 1998 at 56.

The commission then proposed the following solutions:³¹

- a) That maintenance investigators be appointed on a statutory basis;
- b) The extension of the maintenance court's power to include default judgements;
- c) The introduction of garnishee orders against defaulters;
- d) The introduction of a procedure for the enforcement of maintenance orders functioning separately from that of prosecution of the failure to comply with a maintenance order (civil enforcement mechanisms);
- e) The extension of the definition of "maintenance order" to include the payment of non-periodical expenses towards a person's maintenance.

Most of the Commission's proposed recommendations were implemented in the Maintenance Act of 1998.³² Save for the Issue Paper and the Annual Report the commission made no further recommendations or investigations in respect of the maintenance system until 2014 when it issued another paper.³³

Today, the Maintenance Act³⁴ recognises that in order to give effect to the democratic values, social and economic justice, equality and fundamental human rights as enshrined in the Constitution³⁵ and in order to improve the quality of life of all citizens and to free the potential of all persons by every means possible a fair and equitable maintenance system should be established and maintained. The Act further recognises Article 27 of the Convention on the Rights of the Child³⁶ which specifically requires signatory parties to: "...recognise the right of every child to a standard of living which is adequate for the child's physical, mental, spiritual, moral and social development and to take all appropriate

³¹ South African Law Commission, Twenty Sixth Annual Report 1998 at 57.

³² Maintenance Act 99 of 1998 as amended by Act 9 of 2015.

³³ South African Law Commission Issue Paper 28 Project 100.

³⁴ Maintenance Act 99 of 1998 as amended by Act 9 of 2015.

³⁵ The Constitution of the Republic of South Africa, 1996.

³⁶ Convention on the Rights of the Child, signed at New York on 20 November 1989.

measures in order to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child.”³⁷

The preamble to the Act³⁸ further concedes to the fact that the recovery of maintenance in South Africa possibly falls short of the obligations created by the said Convention and pending the Law Commission’s final investigation and recommendations certain interim amendments are required to existing laws in order to reiterate the importance of a sensitive and fair approach to the determination and recovery of maintenance.

Even after the amendment of the Maintenance Act more challenges were observed. During 2014, upon request from the Department of Justice and Constitutional Development, the Law Reform Commission again investigated the maintenance system and subsequently issued a Paper calling for submissions and comments.³⁹

In the paper the Commission indicated that the Department of Justice and Constitutional Development expressly identified certain challenges. Of the challenges identified the following were considered and investigated by the Commission:⁴⁰

- a) Future maintenance – the Act is silent on application for future maintenance and whether the Maintenance Court may entertain same;⁴¹
- b) *Locus standi* of minors – whether child beneficiaries should have *locus standi* in maintenance cases;⁴²

³⁷ Preamble to the Maintenance Act 99 of 1998 as amended by Act 9 of 2015.

³⁸ Maintenance Act 99 of 1998 as amended by Act 9 of 2015.

³⁹ South African Law Commission Issue Paper 28 Project 100.

⁴⁰ South African Law Commission Issue Paper 28 Project 100 at 28.

⁴¹ Future maintenance refers to the payment of maintenance by securing, for example, an investment held by a maintenance defaulter and obtaining an order directing that maintenance should be paid from such an investment in order to ensure that the maintenance order is honoured.

⁴² This refers to the “right” of a minor child to effectively sue his or her parent in his or her own name and thus have standing to appear before a court and direct his or her own case.

- c) The simplification of the appointment process of maintenance investigators;
- d) The broadening of investigating officers' powers to include power of arrest;
- e) Civil execution of maintenance orders and other procedural matters - on execution of movable property, whether the Act should provide for the identification of movable property that is susceptible to execution. In matters dealing with holding a financial inquiry, whether the Act should specifically provide for the holding of a financial inquiry;
- f) Rules governing the execution process – whether the Act should provide for the promulgation of rules regulating execution and whether the Act should regulate trusts, especially trusts established to evade maintenance obligations;
- g) Costs – the awarding of costs in maintenance matters; and
- h) Remedies available to beneficiaries of maintenance.

The Commission also identified some of its own challenges in the maintenance system as:⁴³

- a) Whether mediation is a plausible solution to dealing with maintenance enquiries;
- b) The determination of a set formula or method to determine maintenance amounts;
- c) Possible additional forms of maintenance payment; and
- d) The broadening of the consequences for defaulting on maintenance obligations.

⁴³ South African Law Commission Issue Paper 28 Project 100 at 12.

The Commission did not propose any solutions but rather provided discussions on the challenges. On 9 September 2015 the Maintenance Amendment Act⁴⁴ was enacted, amending several sections of the Act⁴⁵ including sections 6, 9, 10, 16, 17, 18, 20, 22, 23, 28, 35, 38, 39, 39(A), 41.⁴⁶

It is in light of the abovementioned challenges faced, recommendations made and the international obligation created by the Convention on the Rights of the Child that it is of utmost importance that the current South African maintenance system be reviewed and cured.

⁴⁴ Maintenance Amendment Act 9 of 2015.

⁴⁵ Maintenance Act 99 of 1998 as amended by Act 9 of 2015.

⁴⁶ The relevant amendments are discussed in Chapter 3 below.

3. LAW OF MAINTENANCE IN SOUTH AFRICA

The duty to support another person originated from common law and is based on a certain relationship which creates such a duty. This duty arise *ex jure naturae et sanguinis* or out of a sense of dutifulness; *ex ratione pietatis, ex officio pietatis* or *ex natura necessitates* which in essence refers to a natural affection following a blood relational link and which may be subject to rebuttal.⁴⁷ By operation of the law parents have a duty to maintain their children.⁴⁸ The common law duty of support is based on two requirements: 1) the maintenance claimant should not be able to support him- or herself and 2) the maintenance debtor should have the means to support the claimant. The Maintenance Act does not create a duty to maintain as such but is rather a mechanism utilised to enforce the common law duty in an expeditious manner.⁴⁹

In South Africa the words “maintenance”, “support” and “alimony” all refer to the same concept.⁵⁰ The duty to maintain includes food, housing, clothing, medical and other necessities of life and is dependent on the standard of living of the person claiming maintenance, the social position and the financial resources of the parties.⁵¹

3.1. Obtaining a maintenance order

Before obtaining a maintenance order one has to establish a duty to support. The duty to support is founded in common law and enforced by way of legislation.⁵²

The duty to support is based on the following:

- a) The existence of a relationship recognised in law;

⁴⁷ Spiro E (1985) 385.

⁴⁸ South African Law Commission Issue Paper 5 Project 100.

⁴⁹ Boberg (1977) 290.

⁵⁰ Van Zyl (2010) 1.

⁵¹ Van Zyl (2010) 1; Voet 25 3 4.

⁵² Section 2 of the Maintenance Act 99 of 1998 (as amended by Act 9 of 2015) and section 7 of the Divorce Act 70 of 1979.

- b) A need to be supported and
- c) Adequate resources on the part of the person called upon to provide support.⁵³

The inception of a parent's duty to support his or her child is, normally, at birth and coincides with parental rights and responsibilities (or parental power as pervious referred to).⁵⁴ Of course an adoptive parent's duty to support will be established only later at adoption but he or she will have a duty nonetheless.

3.1.1. *Relationship*

The duty to support rests on the closer relative rather on the more distant one and the duty is reciprocal. The relationship is not limited to blood relations and also includes an *ex lege* (through the operation of law) duty to support, such as in the case of adoption and marriage.⁵⁵ The fact that the duty is reciprocal means that the duty to support goes both ways. It is further based on devotion or affection, to arise *ex ration pietatis* (by reason of respect) or *ex aequitate sanguinis* (out of fairness and the affection of a blood relationship).⁵⁶ The Children's Act further solidifies the duty of a parent to support his or her child by providing specific parental rights and responsibilities and by identifying maintenance as one of the parental responsibilities.⁵⁷

3.1.2. *Need to be supported*

The Oxford dictionary defines the word "need" as: "[Verb -] require (something) because it is essential or very important rather than just desirable" or "[Noun -] circumstances in which something is necessary; necessity".⁵⁸ "Need" in this context does not only refer to what one would require to survive but also to whether there are reasons (circumstances) which warrant a maintenance order.

⁵³ Van Zyl (2010) 4.

⁵⁴ Spiro E (1985) 392.

⁵⁵ Section 242(2) and (3) of the Children's Act 38 of 2005.

⁵⁶ Van Zyl (2010) 4.

⁵⁷ Section 18(2)(d) of the Children's Act 38 of 2005.

⁵⁸ Oxford Dictionaries < <http://oxforddictionaries.com/definition/english/need> > (accessed 4 June 2013).

In *Harlech-Jones v Harlech-Jones*⁵⁹ the Supreme Court of Appeal held that the fact that the person claiming maintenance (the ex-wife of the appellant in this case) was being maintained by two separate men did not as such go against the norms of society and warranted a refusal of maintenance but rather that it proved that she did not have a *need* for maintenance. The court found that there were no grounds which warranted an order for maintenance since there was no *need* for maintenance proven and that the reciprocal duty of spouses, to maintain each other, ended at divorce.⁶⁰

A child's "*need*" to be supported consists out of various factors such as food, housing, clothing, medical care, education and so forth.⁶¹ Thus "*need*" comprise of more than just the necessities of life and what is needed to make it from day to day.⁶² A child's maintenance "*need*" is determined based on his or her own circumstances and what counts for one does not in principle count for the other.

The "*best interest of the child*" principle is often used to determine the need of a child in relation to his or her circumstances and that of the person obligated to provide maintenance.⁶³ The High Court has held that the parents had to provide educational opportunities, for example a tertiary education, for their child in order to afford him the opportunity to enter the same socio-economic group as his parents, particularly since in the circumstances both parents were earning large incomes and enjoyed comfortable lifestyles.⁶⁴

3.1.3. Adequate resources

It would follow that one should also take into consideration the resources of the parent or party liable to pay maintenance in order not to meet the maintenance applicant's need just to have it all come to nothing due to a lack of resources.

⁵⁹ [2012] ZASCA 19; 2012 (4) SA 164 (SCA) at 11.

⁶⁰ See *id* at 12.

⁶¹ *Du Toit v Du Toit* [1991] 4 All SA 716 (O), 1991(3) SA 856 (O) at 861.

⁶² *Prophet v Prophet* [1948] 4 All SA 249 (O), 1948 (4) SA 325 (O) at 328.

⁶³ Van Zyl (2010) 8.

⁶⁴ *Frossman v Frossman* [2007] 4 All SA 1145 (W).

Thus should a person be completely unable to work and support a child due to medical or economic reasons, which are out of his or her control, he or she should not be forced to maintain a child or person claiming maintenance.⁶⁵ It is noteworthy to mention that a parent cannot escape his or her obligation to maintain by resigning from his or her employment or by not utilising his or her assets to its optimal in order to gain less therefor.⁶⁶

There is no longer a duty on a person to support a child or person claiming maintenance once the child or person becomes self-supportive as this would mean that there would no longer be a “need” as per the second prerequisite mentioned above.⁶⁷

3.2. The process in terms of the Maintenance Act⁶⁸

After determining that there is a maintenance obligation the maintenance officer has to investigate the complaint in the prescribed manner as provided in the Act.⁶⁹

3.2.1. *The Complaint and Investigation*

The “*maintenance court forum*” consists out of a maintenance investigator, maintenance officer and the presiding officer or magistrate. Upon receiving a complaint (on the prescribed form) from a complainant (the person claiming maintenance), the maintenance officer has to investigate the complaint and decide whether to institute a maintenance enquiry or not.⁷⁰ This means that the maintenance officer becomes *dominus litis* and not the complainant as would usually be the case.⁷¹ During his investigation and before initiating the enquiry the maintenance officer has to determine whether 1) there is an omission or lack

⁶⁵ *S v Pitsj* [1964] 4 All SA 423 (T), 1964 (4) SA 583 (T) at 587 and section 31(2) of Act 99 of 1998.

⁶⁶ Section 31(2) of the Maintenance Act 99 of 1998 as amended by Act 9 of 2015.

⁶⁷ Par 3.1.2. above.

⁶⁸ The Maintenance Act 99 of 1998 as amended by Act 9 of 2015.

⁶⁹ The Maintenance Act 99 of 1998 as amended by Act 9 of 2015.

⁷⁰ Section 6(2) of the Maintenance Act 99 of 1998 as amended by Act 9 of 2015.

⁷¹ Van Zyl (2000) 72.

of support by a person legally obligated to do so or 2) whether good cause exist for the variation or discharge of an existing maintenance order.⁷² This section has been amended to include written or verbal agreements in respect of maintenance and in terms of which no maintenance order exists.

During the investigation stage the maintenance officer may obtain sworn statements from persons with information pertaining to the complaint; obtain information regarding the whereabouts of a person obligated to pay maintenance, the financial position of any person being affected by a the liability to maintain, any other matter which may concern the complaint; request assistance from any other maintenance officer to obtain information which may fall within his jurisdiction and which relates to the complaint or require of the maintenance investigator of the court concerned to assist with anything necessary to achieve the objects of the act.⁷³

In turn the maintenance investigator, in accordance with the directives of the maintenance officer, has to:

- a) Locate the whereabouts of persons required to appear before a magistrate for examination in terms of section 8(1), anyone who has been subpoenaed to appear at a maintenance enquiry or at a criminal trial in respect of failure to comply with a maintenance order or anyone accused of failure to comply with a maintenance order;
- b) Serve or execute the process of any maintenance court;
- c) Serve subpoenas or summonses in respect of criminal proceedings in respect of failure to comply with a maintenance order;
- d) Obtain statements under oath from persons who may have information relating to a maintenance complaint;

⁷² Section 6(1) of the Maintenance Act 99 of 1998 as amended by Act 9 of 2015.

⁷³ Section 7(1) of the Maintenance Act 99 of 1998 as amended by Act 9 of 2015.

- e) Obtain information regarding the whereabouts of a person obligated to pay maintenance, the financial position of any person being affected by a the liability to maintain, any other matter which may concern the complaint or
- f) Obtain information from another maintenance officer relating to a maintenance complaint.⁷⁴

Thus, the maintenance officer will be responsible for guiding the maintenance investigator and for dealing with the complaint in court whilst the maintenance investigator will execute the maintenance officers instructions and be responsible for doing the actual investigation. To an extent this relationship can be closely compared to that of a prosecutor and police investigation in criminal proceedings. It is also important to remember, as stated previously, that the maintenance officer become *dominus litis* and does not act on behalf of either of the parties but serves more as a “*friend of the court*”.

3.2.2. *The Enquiry*

The enquiry in terms of the Maintenance Act is of a *sui generis* nature and allows a person to enforce their rights and those of their children at State expense. It goes as far as to allow parties wishing to appeal to utilise the Attorney General should they not be able to afford an attorney. The process applied is neither wholly civil nor criminal of nature and the burden of proof is, like in a civil matter, on a balance of probabilities.⁷⁵

The courts have agreed that the proceedings are predominantly civil in nature.⁷⁶ This is supported by section 10(5) of the Maintenance Act⁷⁷ which stipulates that the law of evidence as used in civil proceedings in the magistrate court will apply to a maintenance enquiry. The proceedings are inquisitorial by nature meaning that the court plays an active role in the attaining of information

⁷⁴ Section 7(2) of the Maintenance Act (as amended by Act 9 of 2015) read with section 3 of the Regulations.

⁷⁵ Van Zyl (2000) 72.

⁷⁶ *Moodley v Gramani* 1967 1 SA 118 (N) and *Govender v Amurtham* 1979 3 SA 358 (N).

⁷⁷ The Maintenance Act 99 of 1998 as amended by Act 9 of 2015.

as oppose to the normal adversarial approach where the court acts as a mere adjudicator of the facts presented. The maintenance officer is duty bound, even when the parties are represented, to provide the court with all relevant information which is obtainable and relevant to the matter before the court. Section 10 has been amended⁷⁸ to add that maintenance matters should be finalised as speedily as possible and should ensure that postponements are limited in numbers and time. The amendment also allows for the granting of interim maintenance orders during postponements as well as the amendment, confirmation or setting aside of such interim order.

During the enquiry the full financial position of all the relevant parties should be established⁷⁹ and once a duty to maintain has been proven a person may be compelled to submit any documentary proof of his or her financial position in order to determine the amount of maintenance that should be paid. A party may also be requested to provide documentary evidence to prove the need of the person in respect of whom maintenance is being claimed.⁸⁰ In the *Mgumane* case⁸¹ the court stated that the maintenance court need to do a proper and complete enquiry in order to properly determine the children's' needs and the parents ability to proportionally contribute to that need. The court further stated that the need of the children is an abstract term which is dependent mostly on an intelligent decision by the court, but that this decision cannot be made properly without full disclosure of all the relevant facts.

During the enquiry the court may at any time cause a person to be subpoenaed as a witness or cause any person present at the enquiry to testify.⁸² The court has to administer the oath or affirmation before a witness's testimony is lead.⁸³

⁷⁸ Section 4 of the Maintenance Amendment Act 9 of 2015

⁷⁹ This may be done by the maintenance officer by subpoenaing witnesses and documents in terms of section 9, which has now been amended to include a person in whose favour an existing maintenance order has been made was granted or any documents of such a person.

⁸⁰ Van Zyl (2000) 73.

⁸¹ *Mgumane v Setemane* 1998 (2) SA 39 (C).

⁸² Section 10(1) of the Maintenance Act 99 of 1998 as amended by Act 9 of 2015.

⁸³ Section 10(2) of the Maintenance Act 99 of 1998 as amended by Act 9 of 2015.

Both parties to the enquiry may be legally represented and the courts have found that it is preferred for parties to be represented.⁸⁴ The enquiry should be held *in camera* unless ordered otherwise by the court.⁸⁵

3.2.3. Orders in Terms of the Maintenance Act⁸⁶

Section 16 of the Act⁸⁷ makes provision for certain maintenance and ancillary orders. In terms of this section the court may where there is no existing maintenance order:

- a) order that a person, liable to pay maintenance, pay money towards another's maintenance;
- b) order the method, period and times of payment;
- c) order that payment be made to a designated person or institution and/ or that such payment is made by way of an arrangement such as a debit order;
- d) make an additional order for medical expenses or that a person should be registered on the liable person's medical aid scheme;
- e) in the event of maintenance in respect of a child, a contribution order towards the medical expenses of the birth as well as expenses in relation to the child's upbringing from birth to date of the order may be made.

Section 16 further provides for where there is an existing order in place, albeit an order granted by a High Court or any other court, that the maintenance court may:

- a) make an order replacing the existing one;
- b) discharge the maintenance order;

⁸⁴ Section 10(3) of the Maintenance Act 99 of 1998 (as amended by Act 9 of 2015); *Knight v Die Voorzittende Beampte die Onderhoudshof* 1978 3 SA 572 (T).

⁸⁵ Section 10(4) of the Maintenance Act 99 of 1998 as amended by Act 9 of 2015.

⁸⁶ The Maintenance Act 99 of 1998 as amended by Act 9 of 2015.

⁸⁷ The Maintenance Act 99 of 1998 as amended by Act 9 of 2015.

c) make no order.

A new order made by a court may not be made with retrospective effect but one that replaces an existing order may.⁸⁸ Section 16(2) allows for a court to order an administrator of pension, or any person obligated under a contract to pay money on a periodical basis to the maintenance debtor, to pay monies in respect of future maintenance, maintenance in arrears or interest in respect of maintenance in arrears to the person entitled to such payment. This section has now been amended⁸⁹ to allow for evidence in respect of the contractual payment is made to the maintenance debtor to be lead in writing or *viva voce* on the condition that it is not impracticable in the circumstances of the case and should the court feel that a postponement to obtain the evidence would be detrimental to the person being maintained.

The Act makes provision for orders by consent between the parties and has been amended to include instances where neither one of the parties are present before the court which, now allow for the court to still make an order as per the agreement between the parties.⁹⁰

⁸⁸ Van Zyl (2000) 81.

⁸⁹ Section 5 of the Maintenance Amendment Act 9 of 2015.

⁹⁰ Section 17 of the Maintenance Act as amended by section 6 of the Maintenance Amendment Act 9 of 2015.

4. ENFORCEMENT OF MAINTENANCE ORDERS

A maintenance order does not create a new debt that is unalterable, it is subject to variation and cannot, unlike a normal civil order relating to debt, be sued on in another court.⁹¹

4.1. Civil Enforcement

Previously the only court having jurisdiction to enforce a maintenance order was the court which had jurisdiction over the person being sued for maintenance either by way of *domicillium*, residence, presence of property within the court's jurisdiction or by way of submission.⁹² There was no form of civil enforcement of a maintenance order in terms of the 1963 Act.⁹³ One could however, sue out of the office of the registrar and writ of execution and proceed with the normal consequences which flow from an unsatisfied writ but the procedure as enshrined in the Maintenance Act was generally followed.⁹⁴

However the Law Commission recommended certain amendments be made to the Act which lead to certain civil mechanisms being born.

According to Chapter 5 of the new Act⁹⁵ whenever a person, against who a maintenance order has been made, has failed to make payment in accordance with the order, irrespective of the type of maintenance order made, such an order may be enforced by way of:

- a) Execution against property,⁹⁶
- b) By the attachment of emoluments⁹⁷ or

⁹¹ Spiro E (1985) 415.

⁹² Spiro E (1971) 492.

⁹³ Maintenance Act 23 of 1963.

⁹⁴ Spiro E (1985) 416; Van Heerden *et al* (1999) 291.

⁹⁵ The Maintenance Act 99 of 1998 as amended by Act 9 of 2015.

⁹⁶ Section 27 of the Maintenance Act 99 of 1998 as amended by Act 9 of 2015.

c) By the attachment of debt.⁹⁸

The above remedies may only be applied for once the order to pay maintenance has remained unsatisfied for 10 days after the payment became due in terms of the order.⁹⁹ The applications for said remedies have to be accompanied by a copy of the maintenance order and a statement under oath or affirmation stating the amount that has been defaulted on.¹⁰⁰ The purpose of Chapter 5 was to provide a streamlined process in terms of which a maintenance order could be enforced without following the usual route of criminal prosecution. It allowed for any pension, annuity, gratuity or compassionate allowance or any similar benefit to be attached or become subject to execution in respect of a warrant of execution or an order made in terms of Chapter 5.

The Act provides that where any order is granted against a person, for periodical payment of maintenance or for a specified amount of money, and that person fails to pay in terms of the order, the order may be enforced in respect of the amount outstanding plus interest. The outstanding amount, also commonly referred to as maintenance in arrears, may be recovered by: execution against property, attachment of emoluments or attachment of any debt owed to that person. These orders may be applied for and granted if any order remains unsatisfied for a period of ten (10) days.¹⁰¹

It is possible to argue that some of the people being charged with defaulting on payments in terms of maintenance orders do not wilfully or intentionally default but rather as a result of a lack of financial means. Following that argument it could very well be then that a person defaulting on a payment in terms of a maintenance order may not have movable or immovable property in their names, permanent employment or even any debts owed to them but rather owes monies to lenders and banks.

⁹⁷ Section 28 of the Maintenance Act 99 of 1998 as amended by Act 9 of 2015.

⁹⁸ Section 30 of the Maintenance Act 99 of 1998 as amended by Act 9 of 2015.

⁹⁹ Section 26(2)(a) of the Maintenance Act 99 of 1998 as amended by Act 9 of 2015.

¹⁰⁰ Section 26(2)(b) of the Maintenance Act 99 of 1998 as amended by Act 9 of 2015.

¹⁰¹ Sections 26 – 30 of the Maintenance Act 99 of 1998 as amended by Act 9 of 2015.

This would mean that the civil execution of maintenance orders could be close to impossible and the only remaining remedy would be criminal execution.

A warrant of execution against immovable property may be granted should the movable property of the defaulting party prove to be insufficient.¹⁰² This would mean that in the event that a defaulting party has more than one family and one of them are dependent on the or reside in the only immovable asset, an RDP house for example, it may be sold in order to provide for children from a previous marriage or relationship. The question then arises: May one child be left destitute, and lose his/her home, in order to provide for another? Further any pension, annuity, gratuity, compassionate allowance or any other similar benefit may be attached which could have a similar outcome.¹⁰³

When an emolument attachment order is granted the employer of a party is cited and served with the application and thus becomes a party to the proceedings.¹⁰⁴ The implication is that the employer becomes, without choice, involved and this could result in the relationship between the employer and his defaulting employee being jeopardised and could even result in dismissal. The Act goes so far as to hold the employer liable should he not pay in accordance with the emolument attachment order.

The problem with the above is that, as previously stated, very few of the people against whom orders are executed in terms of the civil process have property to execute or emoluments and debts which may be attached and which renders these remedies fruitless, resulting in no maintenance being paid in respect of the child. The only other option is then to attempt criminal execution of the order.

¹⁰² Section 27(1) of the Maintenance Act 99 of 1998 as amended by Act 9 of 2015.

¹⁰³ Section 26(4) of the Maintenance Act 99 of 1998 as amended by Act 9 of 2015.

¹⁰⁴ Section 29(3) of the Maintenance Act 99 of 1998 as amended by Act 9 of 2015.

4.2. Criminal Enforcement

It was common practice that maintenance orders were enforced by way of criminal prosecution for contempt of court. It has always been and still is a criminal offence to not to either maintain a person or child where there is a legal duty to do so.

Previously it was referred to as the offence of not supporting a child. This was based on the common law duty to maintain. The ability of a person to adequately provide for a person he or she was legally obliged to maintain was presumed and the person on trial had to prove a lack of resources should he or she wish to avoid a conviction.¹⁰⁵ The offence was not reliant of the existence of maintenance or a contribution order but the existence of either did not prevent prosecution of same.¹⁰⁶ This offence was in terms of section 1(v) of the Child Care Act.¹⁰⁷ The Act has since been repealed and replaced by the Children's Act¹⁰⁸ which does not make provision for a similar criminal offence.

Non-compliance with a maintenance order was and is an offence under the old and new Maintenance Acts. The new Act stipulates that any person that fails to make payment in terms of an order would be guilty of an offence and liable, on conviction, to a fine or imprisonment for a period not exceeding two¹⁰⁹ year or to such imprisonment without the option of a fine.¹¹⁰

The Act provides for a defence in the event of a person being charged with failure to pay maintenance.¹¹¹ In terms of this defence a person failing to comply with the maintenance order due to lack of means on his or her part and such lack of means is not due to his or her own unwillingness to work or misconduct, such a person will not be guilty of an offence. For example when a person is

¹⁰⁵ Spiro E (1985) 433.

¹⁰⁶ Spiro E (1985) 434.

¹⁰⁷ Child Care Act 74 of 1983.

¹⁰⁸ Children's Act 38 of 2005.

¹⁰⁹ Section 38 of the Maintenance Act 99 of 1998 as amended by section 15 of the Maintenance Amendment Act 9 of 2015. After the new amendments introduced in September 2015, new criminal offences relating to maintenance officers have been created by section 39(A).

¹¹⁰ Section 31(1) of the Maintenance Act 99 of 1998 as amended by Act 9 of 2015.

¹¹¹ Section 31(2) of the Maintenance Act 99 of 1998 as amended by Act 9 of 2015.

retrenched due to operational requirements and thereafter cannot comply with the order and even after attempting to obtain further employment but is unsuccessful; he would not be guilty of an offence.

This would mean that should the accused be successful in his defence the child would again not receive maintenance. Should however, the defence fail the person will be convicted and sentenced.

As stated above the accused, upon conviction, may receive a fine or a sentence of imprisonment. However, taking into account that the person before the court already has a lack of financial means and thus could not afford to pay the maintenance he or she would most likely not be in a position to pay a fine which would result in imprisonment.

In *S v Seroke*¹¹² the court stated that *“There is greater equity and fairness in ensuring that whatever money a person is obliged to pay maintenance has, is paid towards maintenance rather than legal representation o[r] fine imposed by courts.”* It would seem that the courts are thus not in favour of imposing fines and imprisonment but rather in recovering whatever maintenance possible. The problem is that not all courts exercise or support this view and perceives this particular charge to be a mere contempt of court charge which should be treated and sentenced as such. The result being imprisonment; possible loss of employment and ultimately loss of any portion of maintenance previously received or recovered.

Another aspect to take into consideration is our criminal judicial system, which with all due respect, is a lengthy and complicated process.

¹¹² 2004 (1) SACR 456 (T).

This would automatically mean that the accused's employment will be effected and he or she would have to incur legal costs which would ultimately have a negative impact on the payment of maintenance.

Upon conviction of an offence, in terms of section 31(1), a prosecutor may apply for an order for the recovery of the maintenance in arrears and the court may order that the convicted person pay any amount he or she has failed to pay together with interest. Such an order will have the effect of a civil judgement and may be executed as such.¹¹³ Once again the lack of means creates a problem and renders even the criminal execution of orders uncertain.

An alternative to the conviction of a defaulter is that the court may during the course of the proceedings in terms of section 31(1) or after conviction convert the matter to a maintenance enquiry. Before the amendment this could only be done upon application by the prosecutor but now the court may do so on its own accord but only if good cause has been shown that the conversion is desirable.¹¹⁴

4.3. The Constitution and International Commitments

South Africa has become party to and has ratified several international covenants which have created certain international obligations in respect of child support. We signed the International Covenant on Economic, Social and Cultural Rights on 3 October 1994 and were due to be ratified by cabinet on 10 December 1998 but have not been ratified to date. The covenant recognizes the right of everyone to social security, including social insurance. Article 11 of the covenant creates the obligation on states, which have ratified the covenant, to report to the UN on measures taken to achieve the rights guaranteed under it.

¹¹³ Section 40 (1) of the Maintenance Act 99 of 1998 as amended by Act 9 of 2015.

¹¹⁴ Section 41 of the Maintenance Act 99 of 1998 as amended by section 18 of the Maintenance Amendment Act 9 of 2015.

The right to social security is further promoted by the United Nations Convention on the Rights of the Child. This convention recognizes every child's right to benefit from social security and was ratified by South Africa in 1995. Article 27 of the convention confirms the right of a child to an adequate standard of living and articles 5, 18, 27(1) and (20) places the primary responsibility of upbringing and development of a child on the parents. State parties still have a duty, within their means, to assist and support parents and people who have duty to support in order to realise the right and in some instance provide material help and support programmes. The State Parties are further obligated to ensure the recovery of maintenance for children both locally and internationally.

Looking at it locally the Constitution provides children with the right to basic nutrition, shelter, basic health and social services.¹¹⁵ Internationally the family structure as the primary source of support and security has declined. The issue of child poverty along with single-parent or child headed households has taken a turn for the worst even in the wealthier countries. This ultimately leads to greater responsibility on the state to provide resources to families and children in the form of social support system and state involvement in the maintenance enforcement process.¹¹⁶ In South Africa the increase in the weakening of family ties and support can be attributed to amongst others, the migrant labour system, influx control, the long period of urbanization and the high divorce rate. Further the South African climate relating to economic, social and administrative conditions are similar to those of a developing country rather than those of a first world country.¹¹⁷ The duty to support is further complicated by customary marriages which allow for men to have more than one wife resulting in bigger families and greater obligations.¹¹⁸ Ultimately the responsibility to step in when there is a failure to maintain will have to be borne by the state and indirectly by society.

¹¹⁵ Section 28(1)(c) of the Constitution, 1996.

¹¹⁶ Van Heerden *et al* (1999) 262.

¹¹⁷ Van Heerden *et al* (1999) 262.

¹¹⁸ Report of the Lund Committee on Child and Family Support (1996) 16-17.

Previously poverty-stricken families could rely on the State Maintenance Grant in terms of the Social Assistance Act¹¹⁹ if they supported a child, were South African citizens and complied with certain prerequisites. During 1996, and due to a fear that the State Maintenance Grant system might not be financially viable, the Lund Commission was commissioned to: investigate the existing state support system in all government departments; the possibility of increased parental support through a private maintenance system; explore alternative policy options in relation to social security for children and families; develop effective approaches for effective targeting of programmes for children and families and present findings and recommendations.¹²⁰ After the Lund Committee report was submitted and accepted the State Maintenance Grant system was phased out and the new Child Support Grant system was introduced during April 1998.¹²¹ The purpose of the new grant system was to eradicate certain unfair discriminations from the past, to be more flexible and accessible and to reach as many children as possible. The Child Support Grant is based on a means test and aims in particular to assist children in rural areas and in formal settlements.

Due to the limitation of the scope of this dissertation the grant system and its consequences will not be discussed in further detail. However; It is safe to say that any grant system should rather be a secondary source of support and it is preferential for the parents of a child to support and maintain their child than for the state to do so. An over bearing grant system along with an over loaded maintenance enforcement system could lead to serious detrimental consequences for the state and society as a whole as it has great taxation and other implications.

¹¹⁹ Social Assistance Act 59 of 1992.

¹²⁰ Van Heerden *et al* (1999) 264.

¹²¹ This was done in terms of the Welfare Amendment Act 106 of 1997.

5. ALTERNATIVE DISPUTE RESOLUTION

Alternative dispute resolution (ADR), also referred to as appropriate dispute resolution, is not a new concept in South African law. ADR simply defined is any manner in which a dispute is resolved save for litigation or adjudication by a court. One of the most vital characteristics of ADR is that it provides the opportunity for a dispute to be resolved through application of the most suitable process, thus giving it the more apt name *appropriate dispute resolution*.¹²²

The goals of ADR as described by Pretorius are to relieve court congestion, prevent undue legal costs and undue delays; encourage party involvement in the dispute resolution process; promote access to justice and to provide more effective dispute resolution.¹²³ In essence there are three key methods of dispute resolution:¹²⁴

- a) The dispute resolution process used between the private parties themselves, this would include negotiation and mediation;
- b) The process by which a third party privately adjudicates the dispute, this would be arbitration and
- c) The third process being a formal process involving adjudication by a public authority such as an administrative decision or formal litigation.

Private decision-making mechanisms by the parties include:¹²⁵

- a) Informal discussion and problem solving – involves the parties privately discussing and resolving the dispute between themselves without any external influences;
- b) More structured and planned negotiations;

¹²² Pretorius (1993) 1.

¹²³ Pretorius (1993) 2.

¹²⁴ Pretorius (1993) 3.

¹²⁵ Pretorius (1993) 4.

- c) Mediation - a form of negotiation while allowing a third party to assist in resolving the dispute, making suggestions and entering the playing field;
- d) Conciliation – allows for negotiation, mediation and ultimately an independent recommendation by the independent mediator or third party;
- e) Facilitation - is very close to mediation allowing the facilitator to act as a chairman by guiding the negotiations and discussions or
- f) A mini-trial - a structured settlement process requiring each party to very briefly state his or her case before a senior official of the parties and who is authorised to settle the matter. An independent third party may preside and assist in reaching an agreement.

Methods involving decision making by a third party as mentioned in b) above include:¹²⁶

- a) Arbitration – an impartial third party decides on the issue after considering evidence and arguments submitted by the parties. The decision is binding on both parties. The process can be designed to suit the relevant situation and can be inquisitorial and adversarial by nature;
- b) Commission of enquiry – entails the appointment of an independent third party to investigate circumstances which have given rise to a dispute and to provide recommendations to both parties for future compliance;
- c) Fact finding – is the appointment of a person or persons, normally specialists in a field, mandated to evaluate evidence and submissions made by the parties to a dispute and to report on the facts which have been established. The fact finder does not pronounce or adjudicate the dispute but rather the facts allowing the parties to then negotiate or decide on the way forward.

¹²⁶ Pretorius (1993) 5.

As stated above ADR should not be seen as a stringent set of rules and procedures, but rather as methods which may be bent and shaped to suit specific disputes. This then means that so called hybrid procedures or methods exist. One such a hybrid process is mediation-arbitration (med-arb). Med-arb involves a mediator assisting parties in negotiating with the view on settling the dispute. Should the parties not be able to settle the matter the mediator then steps in as an arbitrator and adjudicate on the remaining issues or disputes. The arbitrator's decision is final and binding on the parties.¹²⁷

When deciding on which ADR process to follow one should take certain factors into consideration. Obviously not all disputes may be resolved by way of ADR and attempting ADR in such circumstances or even attempting the incorrect method of ADR may be detrimental to both parties. Some factors to take into consideration when considering ADR methods are:¹²⁸

- a) The formalities, cost and delays associated with the process;
- b) The privacy required and afforded by the process;
- c) The extent to which a third person's involvement is required;
- d) The type of decision and consequences required;
- e) The extent of choice and influence exercised by the parties in the outcome;
- f) The degree of knowledge and understanding of the procedures by the parties and
- g) The amount of coercion required to influence the parties in co-operating, continuing or initiating the process.

¹²⁷ Pretorius (1993) 5.

¹²⁸ Pretorius (1993) 6.

When considering the challenges as identified in the Law Reform Commission's papers¹²⁹ and taking into consideration that litigation in respect of the law of maintenance is proving to be ineffective, one has to consider whether an ADR approach would not be more suitable. In this regard the CCMA will be considered below as an already existing platform and which may be an appropriate solution. As early as 1997 the Law Reform Commission begged to ask the question whether the CCMA could lend itself to an application for other types of civil and commercial disputes.¹³⁰ In the same paper the Commission admits that ADR in family law matters had, even at that stage, become a developing trend and that the Family Advocate's office, for example, had been established to deal with custody and access matters by way of ADR¹³¹. Based on the fact that ADR is already being utilised in custody and access¹³² matters it will also now be considered as a possible solution for maintenance disputes, focusing on the CCMA as a model.

5.1. The *Commission for Conciliation, Mediation and Arbitration*

When looking at a solution one should consider established international and local forums. In an attempt to address the challenges identified above the CCMA, as an alternative dispute resolution model, will be considered and discussed. The process and alternative dispute resolution mechanisms, being conciliation through mediation and arbitration, will be discussed. Then the processes will be considered as a possible solution. First a brief overview of the CCMA and its history will be given.

The CCMA's predecessor, the Industrial Court, was based on an adversarial model, whereas the CCMA is based on one promoting greater co-operation, industrial peace and social justice. The Industrial Court was also not amicable to

¹²⁹ The South African Law Commission Issue Paper 5 Project 100 and the South African Law Commission Paper Issue Paper 28 Project 100.

¹³⁰ South African Law Reform Commission Issue Paper 8 Project 94 at 27.

¹³¹ Arbitration as an alternative dispute resolution method was also considered by the Law Reform Commission in its paper on Islamic Marriages and Related Matters, Discussion Paper 101 Project 59.

¹³² Now referred to as "*residency and contact*" since the inception of the Children's Act 38 of 2005.

settling matters, with a settlement rate of only 20%. This was mostly due to the legislative structure not being supportive of settlement. This in turn resulted in the Industrial Court having to deal with an excessively high workload resulting in strikes and lockouts. The legislative structure aimed at providing a basis for relations among citizens, but often impeded the promotion of good relations instead.

The CCMA was established by sections 112 – 125 of the Labour Relations Act¹³³, which sets out the founding provisions¹³⁴, the jurisdiction¹³⁵, functions,¹³⁶ etcetera of the CCMA. In terms of the Labour Relations Act, 66 of 1995, the CCMA has compulsory functions such as to:

- a) conciliate workplace disputes;
- b) arbitrate certain categories of disputes that remain unresolved after conciliation;
- c) establish picketing rules;
- d) facilitate the establishment of workplace forums and statutory councils;
- e) compile and publish information and statistics about its activities;
- f) consider applications for accreditation and subsidy by bargaining councils and private agencies; and
- g) provide support for the Essential Services Committee.

Section 115(2A)¹³⁷ empowers the CCMA to make rules regulating, amongst others, the practice and procedure relating to the resolution of disputes through conciliation and arbitration, on how conciliation and arbitration process are

¹³³ Labour Relations Act 66 of 1995.

¹³⁴ Section 112 of Labour Relations Act 66 of 1995.

¹³⁵ Section 114 of Labour Relations Act 66 of 1995.

¹³⁶ Section 115 of Labour Relations Act 66 of 1995.

¹³⁷ Labour Relations Act 66 of 1995.

initiated and conducted, costs awards in arbitration proceedings etcetera.¹³⁸ The rules may be divided into eight parts:¹³⁹ Serving and filing of documents;¹⁴⁰ conciliation of disputes;¹⁴¹ con-arb;¹⁴² arbitration;¹⁴³ general rules applicable to conciliation, arbitration and con-arbs;¹⁴⁴ applications;¹⁴⁵ pre-dismissal arbitrations¹⁴⁶ and general rules¹⁴⁷.

5.1.1. *Initiating a dispute*

A case, more often referred to as a dispute, is referred to the CCMA on a set form called “LRA Form 7.11”. The form may be obtained from the CCMA or the department of Labour or on the internet and makes referring a dispute easy and more accessible. The form is very detailed and consists of a Part A and a Part B. The form has been drafted to include all relevant information pertaining to the parties and the dispute and complies with all the rules and requirements as set out in the Act¹⁴⁸ in a manner that is simple for a lay person to understand and complete. The form also contains a segment in which each step is explained and the relevant section or rule is mentioned. This ensures that the process is properly explained to the parties.

Service of the referral form may be done by registered mail, per courier, fax or delivering a copy in person. In each instance proof of service should be submitted with the form when it is submitted to the CCMA.¹⁴⁹ This means that the usual way of service by means of a sheriff is avoided thus cutting cost and time.

¹³⁸ The Rules for the Conduct of Proceedings before the CCMA, herein after referred to the “CCMA Rules”.

¹³⁹ Van Zyl B (2005) *et al* 547.

¹⁴⁰ Rules 1-9 of the CCMA Rules.

¹⁴¹ Rules 10-16 of the CCMA Rules.

¹⁴² Rule 17 of the CCMA Rules.

¹⁴³ Rule 18 – 23 of the CCMA Rules.

¹⁴⁴ Rules 24 – 30 of the CCMA Rules.

¹⁴⁵ Rules 31 – 33 of the CCMA Rules.

¹⁴⁶ Rules 34 of the CCMA Rules.

¹⁴⁷ Rules 35 – 41 of the CCMA Rules.

¹⁴⁸ Labour Relations Act 66 of 1995.

¹⁴⁹ Rule 5 of the CCMA Rules.

It also allows for more modern and accessible means of service to be utilised thus making initiation of the process easier and more available to the man on the street.

5.1.2. Conciliation

In essence the process used to facilitate the resolution of disputes are conciliation through mediation, should conciliation not succeed the parties are referred for an arbitration hearing.

During conciliation the presiding officer, known as the commissioner, meets with the parties and consider different ways to settle the dispute between the parties. During conciliation a party may represent himself or be represented by a director, employee of the party, or any member or office bearer or official of that party's registered trade union or employer's organisation. Conciliation is conducted in an informal way with the goal being to reach early settlement and no legal representation is allowed.¹⁵⁰ Should a party not attend the conciliation meeting the commissioner may continue with the proceedings, adjourn or dismiss the matter by issuing a written ruling.¹⁵¹

In terms of Rule 12¹⁵² the Commissioner may contact the parties before the conciliation by any means in order to attempt and resolve the dispute. This is referred to a pre-con and is useful in less complicated disputes.

¹⁵⁰ Rule 25(1) of the CCMA Rules. Rule 25(5) allows for the a commissioner to exclude representation during the conciliation process should he or she believe that the representative joined the employer's organisation or employee's union for the sole purpose to be a representative in the proceedings; the representative's participation in the conciliation process would not promote expeditious and inexpensive resolution of the dispute, is not in line with the objections of the Labour Relations Act or may result in an unfair advantage to the party being represented. This rule allows the commissioner to promote fairness during the proceedings and protects a party from being prejudiced should he or she not be able to afford representation or should the other party, for example, have legally qualified representatives that do not fall within the definition of legal representatives *per se*.

¹⁵¹ Rule 13(2) of the CCMA Rules.

¹⁵² The Rules for the Conduct of Proceedings before the CCMA.

The commissioner may meet with the parties separately or together and request them to share information. The parties are expected and encouraged to provide possible solutions to the dispute and the commissioner may also provide possible solutions. Negotiations between the parties are used to reach a settlement.¹⁵³ The commissioner has a very wide scope of functions during conciliation and may determine the process to be followed and which may include mediation, facilitation or making recommendations in the form of an advisory arbitration award.¹⁵⁴

The conciliation proceedings are treated as confidential as the purpose of the conciliation process is to allow the parties to resolve the matter by communicating freely.¹⁵⁵ This means that what is said and negotiated during the conciliation process is done without prejudice and may not be repeated or used during subsequent arbitration or Labour Court proceedings.¹⁵⁶

Once the conciliation process has come to an end, the commissioner will issue a certificate in terms of section 135(5)¹⁵⁷ identifying the nature of the dispute and whether the dispute has been resolved or not.¹⁵⁸

5.1.3. Arbitration

Should the parties not be able to reach settlement they may request the CCMA to resolve the dispute by way of arbitration¹⁵⁹ alternatively, depending on the circumstance may approach the Labour Court for assistance.

¹⁵³ Rule 12 of the CCMA Rules.

¹⁵⁴ Section 135. Resolution of disputes through conciliation:

- “
- ...
- (2) *The appointed commissioner must attempt to resolve the dispute through conciliation within 30 days of the date the Commission received the referral: However the parties may agree to extend the 30-day period.*
- (3) *The commissioner must determine a process to attempt to resolve the dispute, which may include*
- (a) *mediating the dispute;*
 - (b) *conducting a fact-finding exercise; and*
 - (c) *making a recommendation.*”

¹⁵⁵ Rule 16 of the CCMA Rules.

¹⁵⁶ Fouche M (2014) 21.

¹⁵⁷ Labour Relations Act 66 of 1995.

¹⁵⁸ Rule 15 of the CCMA Rules.

An arbitration hearing entails each party stating his or her case and the commissioner then makes a decision in the form of an arbitration award. A copy of the arbitration award, with brief reasons for the award, should be sent to each party and their respective representatives, if applicable, and the original award should be filed with the Labour Court, within 14 days of the arbitration.¹⁶⁰

The commissioner may require the parties to file statements of their respective cases.¹⁶¹ The purpose is to define the issues in dispute and in doing so allow the other party to answer it. A pre-arbitration conference may be held upon agreement between the parties, by direction of the Director or a Senior Commissioner. The purpose of the conference is to determine the facts in dispute, common cause facts, issues to be decided on and the relief sought. It also allows for the exchange of documents that will be used during arbitration. Minutes of the pre-arbitration conference should be drafted and submitted to the Commission.¹⁶²

The same representation afforded during conciliation is allowed in arbitration with the addition of legal representation.¹⁶³ This right is however limited as a party may not be represented by a legal practitioner if the dispute relates to the fairness of the dismissal and a party alleges that the dismissal relates to the employee's conduct or capacity. In the latter event legal representation may only be permitted should the commissioner and all the parties agree or the commissioner concludes that it is unreasonable to expect a party to represent him- or herself.¹⁶⁴

¹⁵⁹ Rule 18 of the CCMA Rules.

¹⁶⁰ Section 138(7) of the Labour Relations Act 66 of 1995.

¹⁶¹ Rule 19 of the CCMA Rules.

¹⁶² Rule 20 of the CCMA Rules.

¹⁶³ Section 138(4) of the Labour Relations Act 66 of 1995 read with Rule 25(1)(b)(i) of the CCMA Rules.

¹⁶⁴ Rule 25(1)(c) of the CCMA Rules.

Although the arbitration process is more formal in nature, section 138(3)¹⁶⁵ allows for conciliation during the arbitration process and settlement is viewed as the desirable outcome.

A cost order may only be granted during the arbitration phase and may be granted in respect of any type of representation.¹⁶⁶ In terms of legal representation there are prescribed amounts that must be awarded and may only be ordered if the other party also had legal representation.¹⁶⁷ This discourages unnecessary postponements and legal representation which may hinder the process. This is however limited to the arbitration process only and not allowed during conciliation.

5.1.4. *Con-arb*

The Act¹⁶⁸ allows for con-arb, which is a speedier hybrid-process involving conciliation and arbitration in respect of individual unfair labour and unfair dismissal matters. This process allows for conciliation and arbitration as a continuous process in one sitting on the same day. The process is compulsory in matters relating to unfair labour practice or dismissals for any reason relating to probation.¹⁶⁹

Con-arb may be used in any dispute should none of the parties object to it.¹⁷⁰ Unless the employee has alleged that the reason for dismissal is automatically unfair; retrenchment due to operational requirements; the employee's participation in an unprotected strike or because the employee refused to join, was refused membership of or was expelled from a trade union party to a closed

¹⁶⁵ Labour Relations Act, 66 of 1995.

¹⁶⁶ Rule 39(1) – (2) of the CCMA Rules.

¹⁶⁷ Rule 39(3) – (4) of the CCMA Rules.

¹⁶⁸ Section 191(5A) of the Labour Relations Act 66 of 1995.

¹⁶⁹ Rule 17(3) of the CCMA Rules and section 191(5A) of the Labour relations Act 66 of 1995.

¹⁷⁰ Fouche M (2014) 22.

shop agreement, the matter has to be referred to the Labour Court after conciliation proved to be unsuccessful.¹⁷¹

As mentioned above, con-arb may only be followed if no objection is lodged or unless it is a matter relating to probation in which case no objection is allowed. A party should object in writing and no less than 7 days prior to the date indicated on the notice.¹⁷² Even if a party objects to con-arb they still have to appear before a commissioner for conciliation on the date indicated in the notice.¹⁷³

Rule 17(6) and (7) of the CCMA Rules makes special provision for legal representation during con-arb unless it is a dispute relating to dismissal due to misconduct or incapacity, in which case an application for legal representation should be brought. It is unclear whether legal representation will be allowed during conciliation; however it is common practice that it is not as sub-rule(8)¹⁷⁴ is relied on which states that the provisions in respect of conciliation and arbitration respectively will apply.¹⁷⁵

5.1.5. *General Conciliation, Con-arb and Arbitration Rules*

Rule 25 of the CCMA Rules deals with representation during all phases of the process. As explained above representation is allowed but only by certain persons and legal representation is only allowed in certain circumstances.

Rules 26, 27 and 28 of the CCMA Rules provides for the processes used to join or substitute parties, correct citations and to consolidate disputes. The Commissioner may during any phase order that documents be disclosed or a

¹⁷¹ Section 191(5)(b) of the Labour Relations Act, 66 of 1995.

¹⁷² Rule 17(2) of the CCMA Rules.

¹⁷³ Rule 17 (5) of the CCMA Rules.

¹⁷⁴ The Rules for the Conduct of Proceedings before the CCMA.

¹⁷⁵ Fouche M (2014) 23.

party may request for the disclosure.¹⁷⁶ The parties are also permitted to agree¹⁷⁷ to the disclosure of documents meaning that some of the process is still governed by them.

Rule 30 allows for the Commissioner to dismiss the matter, continue with the proceeding or adjourn the matter to a later date should either of the parties not appear before the Commissioner during any phase of the proceedings.

An application to have an award varied or rescinded may be brought within 14 days, after the date that the person seeking the variation or recession, became aware of it. A rescission or variation application may only be brought on certain grounds, being:¹⁷⁸

- a) The award or ruling was erroneously granted in the absence of the party concerned;
- b) The award or ruling is ambiguous or contains an obvious error or omission
- c) The award or ruling was granted as a result of a mistake common to the parties.

The CCMA Rules makes provision for condonation should the parties not comply with any of the prescribed time frames or rules during any of the phases of the process.¹⁷⁹ The commissioner may, on his own accord or on request of a party, cause persons and documents to be subpoenaed and witness fees to be paid.¹⁸⁰

¹⁷⁶ Rule 29(1) of the CCMA Rules.

¹⁷⁷ Rule 29(2) of the CCMA Rules.

¹⁷⁸ Section 144 of Labour Relations Act 66 of 1995.

¹⁷⁹ Rule 35 of the CCMA Rules.

¹⁸⁰ Rules 37 – 38 of the CCMA Rules.

The enforcement of an award is done by way of a certification process.¹⁸¹ This entails an application by the CCMA for the award to be certified in terms of section 143 of the Act¹⁸² and may allow for the execution of property in respect of an employer against whom a monetary award was granted or for performance by way of contempt proceedings instituted in the Labour Court.¹⁸³ Most of the initial work is done by the CCMA upon application of the certification of the award and the referral to the Labour Court providing the aggrieved party with assistance after the matter has been concluded in the CCMA.

As with most things in law, there are limitations to the types of labour disputes that may be heard by the CCMA, but for the purposes of this dissertation they will not be explored. It will suffice to say that the CCMA's jurisdiction is limited in certain regards and that certain matters and disputes remain the sole jurisdiction of the Labour Court. A matter may also be directly referred to the Labour Court, upon good cause, and by doing so circumvent the ADR process. Once this has been done the matter may not be referred back for arbitration.¹⁸⁴

¹⁸¹ Rule 40 of the CCMA Rules.

¹⁸² Labour Relations Act 66 of 1995.

¹⁸³ Rule 40(2) and (3) of the CCMA Rules.

¹⁸⁴ Rule 33 of the CCMA Rules.

6. CONCLUSION

The history of the law of maintenance in South Africa has developed over the years with influences from Roman, German and Roman-Dutch law. It has developed over the years into what is today known as the law of parent and child and is regulated by Common Law and Legislation.

The 1997 Law Commission Issue Paper identified certain challenges and proposed solutions. In essence the system had two major flaws; the first being the process of obtaining a maintenance order and the second the enforcement of the order. Already in 1997 when the Law Commission first considered the maintenance system it considered replacing the judicial maintenance system with an administrative or other system, such as in the United Kingdom and Australia, and the so-called Dad-Tax system but both were rejected. It was then decided not to recommend the replacement of the judicial maintenance system but rather to consider amending the system at the time to improve its effectiveness. Amendments were made to the existing legislation in the hope that it would improve the situation.

Then during 2014 the Law Commission again looked at the system and found that some of the old challenges still prevail and some new challenges that have come about. The Act was once again amended, but no real material changes were made to the system or the process as such. The Commission did however again consider ADR, a set formula for determining maintenance, additional forms of maintenance and greater consequences for defaulting parties. Again the challenges identified relate mostly to the process of obtaining an order and the effectiveness of the enforcement of orders. It is too early to determine whether the new amendments will have the desired effect.

The procedure in the Maintenance court may only start once it has been established that there is a relationship between the person in respect of whom maintenance is claimed and the person against whom the application is brought, that the former has a need and that the latter has adequate resources to support the need.

As discussed above¹⁸⁵ the current process relating to the obtaining and enforcing of maintenance orders are complicated, not uniformed and creates several challenges. Currently the process is initiated by the applicant but thereafter the maintenance officer becomes *dominus litis* which means that the proceedings and responsibility to press the matter reside with the maintenance officer and not with the parties. Not only does the investigating officer have to pursue the matter but he or she has to investigate and obtain evidence, with or without the assistance of the parties.

Further, once a formal enquiry has been instituted before the court the presiding magistrate may enter the ring as a matter of speaking to ensure that the dispute is resolved and that the interest of justice prevails. This means that the proceedings do not conform to the normal proceedings followed in either a civil or criminal court. The absence of express rules regulating the proceedings and identifying clear roles of each party, adds to the complexity of the process.

The proceedings require at least five role players, which contribute the need for human resources. Often there will only be two to three maintenance officers and maintenance investigators and possibly only one or two presiding officers servicing one court and all the applications. Applications for maintenance orders and applications to enforce same, civil and sometimes criminal enforcement, is done by the same court which means that the work load borne by the court is very high.

¹⁸⁵ Chapters 2- 4 above.

Taking into consideration the cumbersome process, the high work load and lack of human resources it is understandable that the maintenance system is close to collapse and why so many people have lost faith in it. Furthermore, it is not just the person on the street who has to be assisted, but there is a Constitutional obligation and International commitment that needs to be met.

It is submitted that once the process of obtaining an order has become more effective and efficient, the number of defaults will also lessen. The reasoning being that an agreement reached by parties based on mutual consent and understanding of each other's circumstances will more likely be adhered to and in the event that defaulting is unavoidable a party will be more likely to approach the court or forum as a means of preventing a dispute and pre-empting same with precautionary or interim measures.

As discussed previously the purpose of ADR is to relieve court congestion, prevent undue legal costs and undue delays; encourage party involvement in the dispute resolution process; promote access to justice and to provide more effective dispute resolution. ADR by way of third party adjudication and as applied in the CCMA has proved to be successful within the South African legal system. ADR not only encourages party participation but uses different processes to resolve disputes.

When considering ADR one has to consider several factors in order to determine which process of ADR to apply. One would require a process that has a certain amount of formality to it but that is still flexible; it must be cost effective and discourage delays. It should also allow for a certain measure of privacy to allow parties to negotiate without fear but not to the extent that transparency and fairness is compromised. The involvement of a third person (mediator or presiding officer) should be defined in order to protect objectivity but should allow for the party to assist and join in at any stage for the sake of equitably settling the dispute. The type of decision and its consequences should be of an enforceable

nature and the process of enforcement should be accessible and expeditious. The parties should be allowed to either represent themselves or be represented if the circumstances allow for it. Party participation should be encouraged in reaching a solution but the process should also allow for a third party to step in and assist should the need arise. The process and procedures should be simple and easy to comply with as the level of knowledge or competency of the parties may range from being experts to being completely uneducated people.

The CCMA not only have the function of resolving disputes through ADR, but also has to take preventative measures such as establishing picketing rules and establish workplace forums and statutory councils. This function could be of great assistance in resolving maintenance disputes at an early stage before they have to be referred for ADR. This in turn will lessen the workload on the maintenance officials and court. The CCMA also has the duty to approve the accreditation of and subsidy of bargaining councils and private agencies. This would mean that the procedure and rules applied will be universal and the same standard will be applied to each dispute. It also allows for a form of controlled privatisation of dispute resolution which will again lessen the workload.

It is submitted that the challenges identified in the maintenance system can be solved by shifting from the current procedure to an ADR approach, much like the one followed in the Commission for Conciliation, Mediation and Arbitration.

There are advantages and disadvantages to the ADR and the Commission for Conciliation, Mediation and Arbitration-process and which will now be considered below specifically keeping in mind the procedural challenges identified in the maintenance system above.¹⁸⁶

¹⁸⁶ Chapter 2 above.

6.1. *The procedure used in the maintenance system, it's effectiveness and the lack of universal procedures*

As can be denoted from the above discussion on the process in the Maintenance Courts it is obvious that the process is complicated and cumbersome. Although the idea is to place the burden on the maintenance officer to assist with and prove the claim, it does not follow through in practice. The process is still very adversarial in nature and the parties, often illiterate or uneducated in law, are expected to understand and act upon a complicated set of rules and Act.

It is submitted that the process followed in the CCMA is more conducive to party involvement and control. The process is much simpler and easier to understand and does not lend itself to strict rules yet makes provision for most possible outcomes and/or scenarios. This leaves the manner in which to obtain an order more accessible than the stringent court procedures. Although there is no set procedure the phases followed and the rules in the CCMA allows for a certain amount of consistency which gives more certainty to the procedures to be used in resolving a matter. This could also create a problem as it leaves the procedure easy to manipulate should the presiding officer not control same within bounds and could lead to the presiding officer losing his or her objectivity.

6.2. *Lack of human resource constraints*

Human resource constraints will always be a challenge as it is mostly dependant on receiving funds from government to fund the positions but also due to a lack of skills in a particular field. It is unclear what qualification a maintenance officer or investigator should hold, but it is accepted that a maintenance officer should at least hold a degree in law or an equivalent.

In the CCMA commissioners may be appointed on a periodical basis and mostly consists of legal practitioners. This means that the pool from which commissioners may be appointed is much bigger. Since the process is party driven and the commissioner may assist where needed or even obtain evidence, this would eliminate the need for a maintenance officer. Since conciliation and mediation is the first phase of the process it could be argued that social workers

and family councillors would be more appropriate to deal with the resolution of the dispute which will again widen the pool of possible candidates. Partial controlled privatisation as discussed previously could also assist with human resource constraints.

The challenge is that it could prove to be expensive and costs may ultimately have to be borne by the already financially strained parties or the tax payer.

6.3. *Enforcement of maintenance orders and the effectiveness of sanctions*

The enforcement of orders has been proven to be exceptionally difficult. The amount of orders being defaulted on and the subsequent civil and criminal enforcement mechanisms is clogging the maintenance courts and proving to be difficult to execute.

In the CCMA the negotiation, mediation and adjudication of the award is dealt with by the commissioner and the enforcement referred to the Labour Court. This leaves the adjudication of awards to be dealt with one body and the execution for another, in effect splitting the work and making it easier. The fact that the CCMA assists with the certification of the award and the subsequent initiation of the enforcement or execution in the Labour Court makes the process more accessible.

Should ADR prove to be more effective the need for sanctions in respect of defaulting parties, especially criminal sanctions, will lessen as the process followed would allow for a settlement orientated approach and not an adversarial where one party may feel forced to comply against his or her will. Further, an approach where the parties are encouraged to mediate and settle would result in awards or orders to which the parties will comply.

Separating the two processes could lead to problems as it would mean that two forums with different rules and implications should be approached and applied. There is also no guarantee that parties will always comply with an agreement and the risk still persists that a party may over commit him or herself and then later default no matter what the procedure used in reaching the settlement.

6.4. *Locus standi of minors*

The Constitution as well as the Children's Act allows for minors to have *locus standi*. The question is whether minors should be allowed to partake in litigation, taking into consideration its aggressive nature and the best interest of the child? When looking at the ADR process, it could be argued that it is much more conducive to allowing a minor to act on his own behalf as the normal adversarial procedures of cross examination and so will only be utilised should the matter go for arbitration. It could also be that the minor only be allowed to join the conciliation and mediation phase and be excluded from the arbitration. Even should the minor want to partake in the arbitration process, the flexibility of the process would provide for some form of protection for the minor.

On the other hand a minor might not be able to assist in the financial enquiry of the parties, which is usually the issue in dispute. The minor may very well only be able to assist in what he wants and not as such in what he or she *needs*.

6.5. *The simplification of the appointment process of maintenance investigators*

ADR would not assist with the simplification of the appointment of maintenance investigators. In fact it could add to the problem as a whole new field of professionals with additional skills will be required.

6.6. Costs

Since cost orders cannot be awarded in terms of the current maintenance law, it is submitted that the rules that apply and as discussed above in respect of arbitrations and con-arb would be highly beneficial. It not only serves as a deterrent to unnecessarily postpone matters and institute vexatious claims but also helps parties to obtain legal or other representation if needed.

6.7. *Remedies available to beneficiaries of maintenance and possible additional forms of maintenance payment*

The same remedies afforded to parties in terms of the current maintenance system could be available. In fact the remedies far exceed those afforded in the CCMA and thus would be even more of use in an ADR process if made part of the conciliation and negotiation.

6.8. *The determination of a set formula or method to determine maintenance amounts*

This has been a topic for debate and was not explored in this dissertation due to the limitations on the research, but it is submitted that once the process of dispute resolution has been uniformed there will be less of a need for a set formula.

6.9. *Other critique*

6.9.1. *Financial implications*

The financial implications of remodelling the maintenance system on that of the CCMA will be astronomical as it would in practice require extensive redrafting of rules and act as well as creating new procedures, positions and training for officials.

6.9.2. *Opposition to change*

The maintenance system as we know it has a rich history in South Africa and there might be some reluctance in accepting new procedures and processes, especially from those who currently occupy positions within the system. It could be that a more informal approach could create an impression of less legal certainty which will be detrimental to the system as a whole.

6.9.3. *Expansion of the current system vs amendment*

The expansion and amendment of the current system might be more inexpensive. It may be argued that reinventing the wheel would be a waste of time and money. The time it would take for to transition between the two models might be of such a devastating nature that it may leave the new model crippled from the start. As service delivery in South Africa already is at a decline such a burden might prove to be very detrimental resulting in reverting back to the old system with a greater workload.

7. RECOMMENDATIONS

It is submitted that the current maintenance process is failing and that mere amendments to the current legislation may once again prove to be academic. ADR as a replacement of the current procedure will be more effective and will address the challenges identified even when considering the advantages and disadvantages of ADR.

It is recommended that the process be initiated and be driven by the parties but the presiding officer be allowed to play an active role in the dispute resolution process. First the maintenance dispute should be conciliated by way of a round table between the parties and the commissioner. No representation will be necessary as the commissioner will act as a referee and the negotiations will be confidential which would mean that the parties cannot prejudice themselves by making concessions and statements or submitting evidence.

Should conciliation not work arbitration will be the next step. Here representation will be allowed but it does not have to be limited to legal representation which will cut down on costs. Certain limitations or qualifications should be placed on the form of representation in order to allow for a form of minimum standard. Each party will be allowed to present their case based on evidence and will be allowed to question the opposing party's case. The procedure will be streamlined by the submission of statements and a pre-arbitration hearing. Throughout the process the presiding officer may encourage and assist the parties to settle the dispute. This procedure will also apply to variations and suspensions of existing orders.

Once the arbitration has been finalised a binding award will be given to the parties which may or may not be challenged within a set timeframe. Should a party default the Maintenance Court will step in to enforce the award. Thus the

obtaining of the award and the enforcement thereof will be separated leaving the maintenance court to deal only with defaults and reviews.

It is submitted that the ADR process as a whole is more prone to resolving disputes and settlement compared to the current system which is adversarial in nature with some notion of inquisitorial characteristics. A complete change in the system might seem extreme but in the end that was what was necessary when the Industrial Court was done away with and the CCMA and Labour Court introduced.

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