Maintenance Matters

An Assessment of the Operation of Namibia’s Maintenance Act 9 of 2003

Gender Research and Advocacy Project
LEGAL ASSISTANCE CENTRE
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Maintenance Matters:
An Assessment of the Operation of Namibia’s Maintenance Act 9 of 2003

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Appendix F: MAINTENANCE ACT 9 OF 2003 REGULATIONS
Rachel Coomer is the primary author of this report. Dianne Hubbard supervised the project, wrote Chapters 3-4 and edited the report.

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The primary purpose of this study is to assess the application of the Maintenance Act with a view to assessing whether the law is serving its intended purpose effectively. The study begins with a review of the importance of maintenance and a summary of how the Maintenance Act was developed. This is followed by a discussion of the Maintenance Act and a review of reports that have commented on the implementation of the Maintenance Act.

The study then presents the findings of the field research which included data from:

- 1687 court files opened in the period 2005-2008 from 19 of the 31 magistrates’ courts in place at the time of the study, located in 12 of Namibia’s 13 regions;
- 34 interviews with magistrates, maintenance officers and clerks from 11 regions;
- 6 focus group discussions with a total of 62 people;
- an examination of reported and unreported cases that cite the Maintenance Act; and
- relevant statistics, judicial developments and examples from other countries.

The study concludes with recommendations for fine-tuning the law and regulations, and for improving the implementation of the law.

The study is the third in a series conducted by the Legal Assistance Centre on the operation of key gender laws in Namibia. The study is also a follow-up to a study published by the LAC in 1995 on the operation of the previous Maintenance Act (the Maintenance Act 23 of 1963). Therefore this study differs from the previous two in the series as it is the only one in the set which is able to compare the operation of a pre-independence law with a post-independence law.

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1 In mid-2013 the government split Kavango Region into two regions, naming them Kavango East and Kavango West. As the analysis for this report was completed before this change and all contextual data (eg number of people per region) is still based on 13 regions rather than 14, we have not amended our reference to 13 regions. This is also why the report refers to Caprivi Region and Karas Region rather than the new names of Zambezi and ||Karas which were given in 2013.

2 No interviews were conducted in Oshikoto and Caprivi Regions.

3 In some cases we have corrected quotes from discussion participants (and text messages from LAC clients) for spelling, grammar and clarity without changing the meaning of the communication.

4 Legal Assistance Centre (LAC), Rape in Namibia: An Assessment of the Operation of the Combating of Rape Act 8 of 2000, Windhoek: LAC, 2006. This extensive study was published in two parts – a full report and a summary of key findings.

Key findings

On average, someone makes a maintenance complaint in Namibia every thirty minutes during working hours, since 4000-5000 complaints are filed at the maintenance courts each year. However, only approximately two-thirds of complaints ever result in an order being made. This is despite the fact that all children need maintenance and most claims for maintenance present a clear need for financial support. Maintenance matters because children have a constitutional right to be cared for by their parents, and parents have a duty to act in the best interests of their children.

Overall, the findings show that if the maintenance complaint is a simple one and the absent parent is willing to pay maintenance, the process of making an order will be as quick and easy as the law intends it to be. However, if there are challenges along the way, the outcome is very different – the process will probably take much longer with numerous causes for delay, and an order may not even be made. Problematic areas may be where the complainant does not have details of the absent parent’s whereabouts or financial position, where there are repeated postponements resulting from evasions on the part of the absent parent, or some other reason that complicates the process.

When an order is made, it is typically for low monthly payments, averaging N$250/month for a single pre-school age child. In many cases, the amount of maintenance ordered is not a realistic reflection of need but rather a generic amount that changes little according to rural or urban residence or other factors. This appears to be in part due to the lack of thorough investigation of the financial situation of defendants, a problem that is mostly due to the lack of maintenance investigators appointed to the courts.

It therefore comes as no surprise that one key concern arising from this report is the critical need to hire maintenance investigators. In South Africa, the improved operation of the country’s maintenance courts has been attributed primarily to the appointment of maintenance investigators. Amongst other things, the provision of maintenance investigators will allow the maintenance courts to ensure that defendants and witnesses are found and that the financial status of the parties is properly investigated, resulting in a higher success rate for maintenance complaints and the making of orders that reflect the real situation of the complainant and defendant.

Another major concern identified in this report is that many of the innovative options included in the 2003 Act are not being utilised. For example, the options of making payments directly to the complainant, or into the complainant’s bank or post office savings account rather than to the court, are seldom utilised. Concerns about proof of payment and perceptions about what will be most likely to influence the defendant to comply seem to have influenced the low uptake of alternative methods of payment, despite the fact that no form of payment is more “official” than another. Also, few courts use the innovation of default orders in cases where a defendant who was properly summoned fails to appear in court. Another problem is that few complainants or defendants are utilising the option for substitution, suspension or discharge of a maintenance order to deal with changed circumstances.
Probably the greatest failure of the new Act has been the infrequent use of the available civil enforcement mechanisms. The Act allows the court to attach wages or debts or order the sale of property if the defendant has breached a maintenance order but these options are rarely used, despite the fact that such mechanisms could result in the immediate payment of arrears or ensure reliable future payments. The reason behind their infrequent use seems to be a lack of knowledge of their availability combined with a lack of confidence in the law on the part of both maintenance court officials and the public. The implementation of the law could be improved by the provision of information on civil enforcement mechanisms, and the law itself could be improved by providing for the attachment of wages in respect of any maintenance order rather than only after a breach. This could ensure reliable payments from the start and prevent large amounts of arrears from accumulating.

Amendments to the law are also needed to incorporate the best interests of the child and the concept of child participation, where appropriate, to ensure that maintenance for child beneficiaries is more child-centred.

The law should also ensure that women can apply for pregnancy-related expenses during pregnancy as opposed to after the child’s birth, to ensure that pregnant women are not forced to skimp on expenses such as antenatal care and proper nutrition during pregnancy, which can help to ensure the birth of a healthy child.

One little-known fact is that it is already possible under Namibia’s common law for one parent to claim reimbursement from the other parent where past contributions to child maintenance have not been fairly allocated in proportion to each parent’s financial position. It is not clear if such retrospective claims can be brought under the Maintenance Act, suggesting the need for an amendment to clearly authorise the maintenance court to order reimbursement for excess contributions towards the child’s maintenance since the date of the child’s birth, as has been done in South Africa. This would make the procedure for recovering such maintenance more accessible, and encourage parents to take their maintenance responsibilities more seriously from the moment a child is born.

As in all areas of law, there are multiple stakeholders involved and we recommend that partnerships are developed to better support the maintenance courts – for example, through increased involvement of social workers from the Ministry of Gender Equality and Social Welfare and through support from civil society. We recommend that civil society liaise with the maintenance courts on the possible provision of how volunteer assistance to complainants and defendants, using the models from the region discussed in this report as examples of how such services can successfully benefit the public and the courts. Community volunteers trained and supported by NGOs could assist complainants in making maintenance complaints, or help defendants present relevant information to the court. This could reduce the burden on court staff and help to make the process more child-centred, particularly in cases where the parents are in conflict with each other. Volunteers could also draw the attention of maintenance court personnel to relevant provisions in the Act where necessary, thus helping hold maintenance court officials accountable to implement the law correctly. Such volunteers might be well-placed to become maintenance investigators or maintenance officers in due course, thus providing paid employment for community members.

Namibia could also look to other countries for examples of how maintenance payments are enforced. One idea that might be particularly effective would be to respond to arrears by revoking driving licences, or liquor and other business licences, or by cancelling eligibility for tender awards – in cases where such measures would not undermine the defendant’s income-earning capacity.

So, are maintenance orders working? The answer is a qualified yes – they are working but there is considerable scope for more thorough utilisation of the various options and mechanisms provided by the law. The portions of the new law which are being used in practice are primarily those which are familiar to the public and to court officials from the previous law. We hope that this report will help to ensure that the Maintenance Act 9 of 2003 is better implemented and that the innovative provisions contained in the law are put into practice.
Summary of the key findings

What does the study show?

Approximately two-thirds of maintenance complaints result in an order, typically for about N$250/month for a single pre-school age child.

If the maintenance complaint is a simple one and the absent parent is willing to pay maintenance, the process of making an order will be as quick and easy as the law intends it to be. However, if there are challenges along the way, the outcome is very different.

What do the findings tell us?

The findings suggest that many of the innovative provisions included in the 2003 Act are not being utilised. This appears to be due to a lack of understanding of and confidence in the law by maintenance court officials and the public. This problem is further compounded by a lack of resources for the implementation of the law – particularly the fact that not a single maintenance investigator has been appointed in the ten years since the Act came into force.

What is the way forward?

The Maintenance Act 9 of 2003 has introduced positive changes in the application of maintenance and many people are benefiting from the new law. However the study has shown that the Act is not being effectively implemented. This means that we have the situation often encountered in respect of gender-related laws, where the law is providing the legal framework intended to support a strong system but the practical application is lacking.

This report provides a number of recommendations for improving the implementation of the Act. These recommendations fall under seven main areas for action, namely (1) improving implementation of the law; (2) promotion of partnerships; (3) providing information for the public and awareness-raising; (4) providing trained volunteers to assist with maintenance cases; (5) amendments to the Maintenance Act and regulations; (6) international enforcement; and (7) further research.
Complaint to conclusion:  
The typical maintenance case in Namibia

Complaints are usually made by a mother against a father. Most complainants are made in urban areas, and 40% involve complainants and defendants who live in same town or village.

The majority of maintenance complaints are made for a single pre-school age child. On average complainants request N$500 for the maintenance of their child – approximately half the estimated cost of caring for the child.

The typical defendant does not have a history of providing any maintenance voluntarily.

Few maintenance complaints are withdrawn.

The vast majority of maintenance orders are consent orders, meaning that they result from an agreement between the complainant and defendant before a court enquiry is held.

Most maintenance enquiries are completed without postponements. Both parties usually represent themselves without the help of legal practitioners.

The paternity of the child for whom maintenance is requested is not usually disputed.

A typical maintenance order will be made for N$250 per month. This is typically half the amount the complainant requested and one quarter of the estimated costs of caring for the child.

Although the 2003 Act allows payments to be made directly to the beneficiary, or paid to an organisation or institution such as a bank or a post offices savings account, approximately 90% of payments are still made directly to the court and collected each month by the complainant.

The time between the date of an initial complaint and the date on which maintenance payments begin in terms of an order is typically 2-3 months.

Appeals of maintenance orders are rare.

There is no indication that complainants have a tendency to misuse maintenance money.

Neither the complainant nor the defendant is likely to ask for the order to be substituted or discharged. If a change is requested, it will usually be made by the complainant over one year after the initial order. If a request for an increase in maintenance payments is made, it will usually be granted and will usually be for double the amount of maintenance awarded in the initial order - which is typically similar to the original amount of maintenance requested. Two-thirds of the requests for a decrease were granted but this figure is based on just 12 cases.

The typical defendant will not be reported to the court for defaulting on maintenance payments, whatever the reality may be. If the defendant does breach the maintenance order, he will usually be in arrears for 6-9 months before the complainant informs the court. Once the defendant breaches an order, the typical complainant will not receive a positive resolution to the problem.

Civil enforcement mechanisms, such as orders for the attachment of property or wages, are rarely applied requested or utilised.

Criminal proceedings are also rarely invoked to deal with breaches. In the rare cases where a criminal trial is held (only 5% of all cases in the sample), the defendant will not usually receive any punishment.
Maintenance matters

The provision of maintenance is a human rights issue. Children have a constitutional right to be cared for by their parents, and parents have a duty to act in the best interests of their children under the international agreements which Namibia has ratified, thus making them part of Namibian law.

The social context of maintenance is particularly relevant in Namibia. Approximately two-thirds of children live apart from one or both parents while the absent parent or parents are still living, and these children may be in particular need of support.

The economic context of maintenance is also important. For example, children are more likely than adults to live in poverty – and only 50% of children between 5 and 17 years of age have a pair of shoes, two sets of clothing and a blanket; many of these children might be able to acquire such bare necessities of life through an absent parent’s payment of maintenance.

However many parents may struggle to provide for their children – the difference between income and expenditure is small for all households, which suggests that many people live on a survival basis. Furthermore, approximately 50% of the population do not receive a regular salaried monthly income. This may explain why so many women are in need of maintenance, but it may also explain why many fathers struggle to pay maintenance.

Study design and methodology

The purpose of this study was to collect comprehensive information on the implementation of the Maintenance Act of 2003 through a quantitative assessment of data extracted from court files and a qualitative assessment of data collected in focus group discussions and key informant interviews.

Data was collected from maintenance files opened during the years 2005 to 2008. During this four-year period, nearly 19,000 maintenance complaints were opened nationwide. This study is based on data from 1,687 files from 18 of the 31 magistrates’ courts that were in place at the time, representing 9% of the files opened during the years covered by the study. Data was collected from over half (58%) of all magistrates’ courts in the country, from 12 of Namibia’s 13 (now 14) regions.

The study also includes data from 34 key informant interviews with magistrates, maintenance officers and clerks from 11 regions, and six focus group discussions with a total of 62 people from two regions.

Maintenance complaints

Maintenance complaints are usually made by a mother against a father. Under one percent of complaints are made by fathers and just over one percent of complaints are made by children seeking maintenance for themselves.

The complainant typically lives in an urban area, and in 40% of cases she and the defendant live in the same town or village. Complainants most often make maintenance complaints early in the year, probably because of the burden of expenses relating to schooling or child care.

The majority of maintenance complaints are made for a single pre-school age child, with no sign of any differences based on the sex of the beneficiary.

On average complainants request N$500 for the maintenance of their child – approximately half the estimated cost of caring for the child.

The average amount of maintenance requested does not differ by rural/urban residence or by requests made by persons of different language groups. Neither does the amount of maintenance requested increase over the years examined in our sample, despite annual inflation.
The more beneficiaries there are, the lower the amount of maintenance requested per beneficiary – perhaps because of economies of scale (since expenses like rent and electricity do not necessarily increase proportionally for larger numbers of beneficiaries).

Very few complainants request special forms of maintenance either in the form of contributions in kind or payments to be made directly to third parties (such as payments for hostel fees or medical expenses). Almost no complainants seek contributions for pregnancy- and birth-related expenses.

The typical defendant does not have a history of providing maintenance voluntarily. In approximately 15% of cases the defendant will have provided some maintenance, but the contribution will have ceased more than two years prior to the complaint.

A typical maintenance complaint makes no mention of domestic violence even though nearly 40% of applicants for a protection order ask for temporary maintenance to be incorporated into that order.

Fewer than ten percent of maintenance complaints are withdrawn.

**Summons to the court**

Nearly 70% of all the files contained a summons issued to the defendant or complainant, most of which were issued to the defendant. Few files summoned or directed witnesses to attend court. This may be because the court is able to resolve the complaint between the complainant and defendant without involving other witnesses or because witnesses attend voluntarily.

Nearly one in five summonses, almost all of which were directed to defendant, were not served.

**The maintenance enquiry**

Because most maintenance cases are resolved by consent between the parties, full maintenance enquiries are not very common.

Most maintenance enquiries are completed without postponements. In the one in five cases where postponements do occur, half will be postponed just once, although some may be postponed more than ten times. The postponements will most often be caused by the defendant.

Although the court may make a default order if the defendant has been correctly summoned to court but has failed to attend, such orders are rarely made.

Both parties usually represent themselves without the help of legal practitioners.

The paternity of the child for whom maintenance is requested is not usually disputed.

**The maintenance order**

A typical maintenance complaint will result in a consent order, which is agreed between the parties without a court enquiry. The remainder are similarly small proportions of default orders and orders following a hearing.

However, approximately one-third of maintenance complaints will not result in an order. In many cases this will be because the application process has fallen by the wayside rather than because the magistrate refused to make an order. We did not find a single file where an application was refused, although the outcome of the application could not always be determined.
A typical maintenance order will be for N$250 per month, typically for a single pre-school age child. This is usually about half the amount the complainant requested and one quarter of the estimated costs of caring for the child.

A maintenance order is unlikely to contain any of the special forms of maintenance which are possible under the law – in-kind payments, payments directly to third parties for specified purposes (such as hostel fees or medical aid contributions) or payments for pregnancy- and birth-related expenses.

Although the 2003 Act allows payments to be made directly to the beneficiary, or paid to an organisation or institution such as a bank or a post offices savings account, approximately 90% of payments are still made directly to the court.

The typical maintenance complainant will receive her first payment some 2-3 months after making the application.

Particulars which could be used to identify the defendant later – such as a copy of his ID card or a photograph – are unlikely to be attached to the order even though the Act allows for this. This omission deprives court officials of a tool which could be useful in enforcement actions.

Appeals are rare, and only one in 10 recipients of a default order will apply for it to be varied or set aside (keeping in mind that the total number of default orders is very small).

There is no indication that complainants have a tendency to misuse the maintenance money, with only two allegations of this nature found in the entire sample studied.

**Changes to a maintenance order**

Neither the complainant or the defendant is likely to ask for the order to be substituted, suspended or discharged. However, if such a change is requested, it will usually be made by the complainant more than one year after the initial order. The request will usually be to increase the amount of maintenance, often because of the pressure of school-related costs.

If a request for an increase is made, it will usually be granted and the amended order will usually be for double the amount of maintenance awarded in the initial order – however the amount requested is unlikely to differ substantially in size from the average amount of maintenance requested in respect of initial orders. This suggests that complainants are basing their requests on the actual costs of child-rearing.

Where a decrease in maintenance is requested, the defendant typically seeks to to reduce the payments to approximately 60% of the amount of maintenance originally ordered.

**Enforcement of maintenance orders**

The typical defendant will not be reported to the court for defaulting on maintenance payments, whatever the reality may be.

If a defendant is reported for a breach, he will usually be in arrears for 6-9 months before the complainant informs the court – this is despite the fact that the court can take action ten days after a single payment has been missed.

Once the defendant breaches an order, the typical complainant will not receive a positive resolution to the problem.

The use of civil enforcement mechanisms – such as orders for the attachment of property or wages– is rare, even though one of the innovations of the new Act was to make provision for this kind of enforcement.
Criminal proceedings are rarely utilised to deal with breaches.

In the one in ten cases where a warrant of arrest is issued, it will often be for failure to respond to a summons, although the reason for the summons may be failure to pay maintenance. Even where a warrant of arrest is issued, the recipient will rarely be arrested – although this could be because the person in question attended court in the meantime.

In the rare cases where a criminal trial is held (only 5% of all cases in the sample), the defendant will not usually receive any punishment. It is more likely that the defendant will pay the arrears or that a new maintenance order will be made incorporating payment of the arrears after conversion of the criminal case into a fresh enquiry.

**International perspectives**

The approaches to determining and claiming child support payments fall into three broad categories: judicial processes, systems managed by administrative agencies, and hybrid systems. Most countries encourage parents to reach private agreements on maintenance obligations before involving other actors.

Some countries that use a judicial process follow very strict guidelines and regulations, like Germany, which uses a table to help calculate maintenance payments based on the defendant's income. Other countries, like France, have no formal guidelines and leave decisions on maintenance largely to the discretion of the presiding officer in the case.

Administrative agencies typically use formal rules to determine payment amounts. Many have online tools which parents can use to calculate maintenance payments and apply for assistance in claiming them.

Some countries provide for advance maintenance payments, where the government pays maintenance for the child and then recovers the amount owed from the absent parent.

Mechanisms for enforcing maintenance payments vary significantly between countries. Some countries have a national office to oversee the enforcement of payments, such as in Australia, while others place responsibility for enforcing payments on the bodies that grant the maintenance orders, as in Namibia.

In the event of continued non-payment of maintenance, some authorities will also suspend the parent’s passport to prevent them from leaving the country, or suspend other licenses such as driving or business licenses.

**Recommendations**

Recommendations to improve the implementation of the Maintenance Act are made throughout this report. The recommendations have been grouped under the following categories:

- Improving implementation of the law
- Promotion of partnerships
- Public information and awareness-raising
- Providing trained volunteers to assist with maintenance cases
- Amendments to the Maintenance Act and regulations
- International enforcement
- Further research

Six key areas for action are summarised on the next page.
Summary of the six key areas for action

1. **Maintenance investigators**: We recommend that the Ministry of Justice review its budget allocations to assess whether the operation of the maintenance courts is receiving sufficient funding. One of the most helpful steps to improve the operation of the maintenance courts in Namibia will be the progressive appointment of maintenance investigators, as the law requires.

2. **Full utilisation of existing powers of investigation**: As recommended in the 1995 maintenance study, maintenance officers need to be encouraged to use their powers of investigation more assertively to help locate defendants or to obtain accurate information about the defendants’ income and means, utilising their ability to summon witnesses to court for this purpose if necessary. However, this recommendation is likely to be effective only if maintenance investigators are appointed to support maintenance officers.

3. **Providing trained volunteers to assist with maintenance cases**: NGOs can provide volunteers to assist complainants to make maintenance complaints, or to give information to defendants who lack means on how to present information to the court or request a substitution or discharge where appropriate. Such volunteers will reduce the burden on court staff and help to make the process more child-centred, particularly in cases where the parents are in conflict with each other. If, as in South Africa, there can be a progression from volunteer to employed court staff member, the role of volunteers would not only have altruistic benefits for the community, but would also provide economic benefits for the volunteers in the long term.

4. **Preventing large amounts of arrears**: Maintenance officers should inform complainants at the time the order is granted that arrears can be reported as soon as a single payment has been outstanding for 10 days, to prevent arrear amounts from piling up. Defendants should also be fully informed about the implications of not paying maintenance, including the various civil and criminal enforcement possibilities which may be utilised in the event of non-payment.

5. **Information about the Maintenance Act**: The study suggests that there are areas of the Act that are not well-understood or well-utilised by either maintenance court officials or the public. For example it would be helpful to ensure that all maintenance court officials are aware of the fact that the minor children can claim maintenance on their own, and the process and mechanisms for the enforcement of maintenance orders. There is also a need for more information on maintenance aimed at the general public. Such information could be disseminated by the Ministry of Justice, or by NGOs working in partnership with the Ministry, by means of radio and television, news articles or advertisements, and pamphlets or posters placed at popular public places and at maintenance courts.

6. **Amendments to the Maintenance Act and regulations**: We recommend that the Law Reform and Development Commission and the Ministry of Justice consider amendments to the Maintenance Act to clarify and fine-tune some issues, including revision of some of the key forms. These recommendations do not introduce new principles or innovations, since the Act already provides the key tools required for a successful maintenance system.
BASIC FACTS ON THE MAINTENANCE ACT

What is maintenance?

- Maintenance is money or goods that a person has a legal duty to provide for the basic living expenses of his or her dependants.
- Maintenance is used for basic living expenses such as housing, water, electricity, food, clothes, transport, medical expenses and school fees. Maintenance may also be provided for pregnancy and birth-related expenses.
- All children have a right to maintenance.
- All children are treated equally before the law.
- Both parents are responsible for their children, even if a child is being cared for by someone else.
- The amount of money each parent must pay will depend on how much money they have and how much money they earn.
- The payment of maintenance must come before anything else except for payments parents make to support themselves.

What to do if maintenance is not paid

If you do not receive a maintenance payment 10 days after it should have been paid, you should contact the Clerk of the Court. The court can take the money directly from the defendant's wages, or sell some of his or her property.

Who can claim maintenance?

A parent, the person who looks after the child (such as the grandmother) or any other person who is worried about the child (such as a teacher) can apply for maintenance. A child can also claim maintenance from a parent without assistance from an adult.

How long must a parent pay maintenance for a child?

A maintenance order generally ends when a child is able to look after him- or herself. This is usually when the child reaches 18. But if a child marries or starts work before the age of 18, a maintenance order will stop. If a child goes to university, maintenance may need to be paid for longer.

How to claim maintenance

Go to the Magistrate's Court

- The Clerk of the Court will help you to fill in the forms. The entire process should be private and you do not need a lawyer.

Meeting with the Maintenance Officer

- Both parents will be asked to attend an informal meeting. Most cases are settled at this meeting. The maintenance officer will try to help the parents come to an agreement. If the parents cannot agree, a Magistrate will have to decide the case.

Enquiry by the Magistrate

- If the Magistrate has to decide the case, both parents must come back on another day to explain their position to the Magistrate.

See the Legal Assistance Centre's Guide to the Maintenance Act 9 of 2003 for more details.