Chapter 1
INTRODUCTION
TO MAINTENANCE

Maintenance is money or goods that a person has a legal duty to provide for the support of his or her dependants. Maintenance is used for basic living expenses such as housing, food, clothing, medicine and school-related expenses. The concept of maintenance is most commonly associated with the provision of maintenance for a minor child. However, a duty of maintenance may also be applicable between spouses, between an adult child and an elderly parent, and between a parent and an indigent or disabled adult child.

The provision of maintenance helps to ensure that the needs of a child are met. The provision of maintenance can be particularly important for a parent, often a woman, who is struggling to provide for the needs of her children by herself. The provision of maintenance is designed to ensure that the child has access to resources for day-to-day costs of living such as rent, electricity, water and food, as well as medical care and treatment and education-related costs such as the purchase of new school uniforms and school stationery.

Failure to pay maintenance is an offence that may be punished by a prison sentence or fine. It is also a form of child abuse if the parent can provide for the needs of the child, but is failing to do so.¹

The provision of maintenance can also be important for a parent, again often a woman, who is in a violent relationship but is too afraid to leave because she does not have enough money to care for her children. Fear that she will be unable to support her children on her own should never prevent a woman from walking away from an abuser.

Even in cases where a parent can cover the basic costs of caring for a child, the provision of maintenance can help to cover these costs and perhaps allow the parent to set aside money to pay for the child’s future needs, such as the cost of tertiary education or unexpected health care costs that may arise. The key principle is that the costs of child-rearing should be shared by both parents, in accordance with their respective assets.

¹ Children’s Act 33 of 1960, section 18. This offence is expected to be repeated in the forthcoming Child Care and Protection Act which will replace the outdated Children’s Act.
Despite the fact that the provision of maintenance should be a norm within the fabric of society, problems with accessing maintenance have been ongoing for many years in Namibia, and the need to improve access to maintenance has been regularly and frequently highlighted since Independence.

For many years the law on maintenance was governed by the Maintenance Act 23 of 1963. In 2003 the Government passed a new law on maintenance, and the Maintenance Act of 9 of 2003 introduced many positive changes. Despite these improvements, problems with accessing maintenance continue, leaving multitudes of children vulnerable and undermining their wellbeing and development. This study is intended to provide a detailed examination of the implementation of the new law, with a view to identifying shortcomings and improving its effectiveness.
2.1 Maintenance as a human right

A child’s right to maintenance is made clear in national and international law. The Namibian Constitution and international agreements show that there has been a shift away from the traditional understanding that caring for children is a women’s rights issue towards placing the right to maintenance as central to the children’s rights agenda – something that has also been noted in court decisions on maintenance in South Africa.¹

The parental duty to maintain children is recognised in the Namibian Constitution. Article 15(1) states that children have a right to be cared for by their parents. The right to be cared for includes the provision of maintenance.

The right of a child to be cared for is also recognised in the United Nations Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination Against Women, the African Charter on Human and People’s Rights, and the African Charter on the Rights and Welfare of the Child, as illustrated by the provisions quoted below.

1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.

   United Nations Convention on the Rights of the Child, Article 18

1. States Parties recognize the right of every child to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development.

2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child’s development.

3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.

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4. States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad. In particular, where the person having financial responsibility for the child lives in a State different from that of the child, States Parties shall promote the accession to international agreements or the conclusion of such agreements, as well as the making of other appropriate arrangements.

   United Nations Convention on the Rights of the Child, Article 27

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States Parties shall take all appropriate measures …

(b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.

   Convention on the Elimination of All Forms of Discrimination Against Women, Article 5(b)

States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women …

(d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount …

   Convention on the Elimination of All Forms of Discrimination Against Women, Article 16(d)

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1. Every individual shall have duties towards his family and society …

   African Charter of Human and Peoples Rights, Article 27

The individual shall also have the duty:

1. to preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need …

   African Charter of Human and Peoples Rights, Article 29(1)

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Parental Responsibilities

1. Parents or other persons responsible for the child shall have the primary responsibility of the upbringing and development the child and shall have the duty:

(a) to ensure that the best interests of the child are their basic concern at all times –

(b) to secure, within their abilities and financial capacities, conditions of living necessary to the child’s development …

   African Charter on the Rights and Welfare of the Child, Article 20(1)

Responsibility of the Child

Every child shall have responsibilities towards his family and society … The child, subject to his age and ability … shall have the duty:

(a) to work for the cohesion of the family, to respect his parents, superiors and elders at all times and to assist them in case of need …

   African Charter on the Rights and Welfare of the Child, Article 30
Maintenance for children must also conform to the international principle that makes all actions concerning children subject to the principle that the **best interests of the child** is the paramount concern.

The Convention on the Rights of the Child was not the first international agreement to articulate the principle of the child’s best interests, but it is one of the most significant in that it makes this principle a centrepiece of child protection:

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

The Committee on the Rights of the Child further expands on the best interests concept in General Comment 5, stating:

> The principle requires active measures throughout Government, parliament and the judiciary. Every legislative, administrative and judicial body or institution is required to apply the best interests principle by systematically considering how children’s rights and interests are or will be affected by their decisions and actions – by, for example, a proposed or existing law or policy or administrative action or court decision, including those which are not directly concerned with children, but indirectly affect children.

The African Charter on the Rights and Welfare of the Child also refers to the principle of the best interests of the child:

> In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.

The Convention on the Rights of the Child uses the words “shall be a primary consideration” when referring to the best interests principle, meaning that the principle is not an overriding factor but one that should be considered in respect to additional factors and principles. In contrast, the African Charter using stronger wording, saying that the principle “shall be the primary consideration”. Namibia has signed both conventions and has used the wording “the best interests of the child concerned is the paramount consideration” in the draft Child Care and Protection Bill, indicating Namibia’s commitment to recognise the importance of the best interests of the child as the overriding concern in all decisions related to a child.

Although the Maintenance Act of 2003 recognises the right of a child to be cared for, the Act does not explicitly ensure that the best interests of the child are considered. However, case law from the South African Constitutional Court, which is a persuasive authority in Namibia, shows that the best interests of the child are of importance in maintenance matters. To be in line with the international

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2 For example, see the 1959 Declaration of the Rights of the Child and Article 5(b) of the 1979 Convention on the Elimination of All Forms of Discrimination Against Women.


6 Emphasis added to both quotations.

7 Child Care and Protection Bill, draft dated 12 January 2012, section 4.

8 See P Moodley, “Maintenance as a child’s rights issue – an analysis of recent decisions that give substance to the ‘best interests of the child standard’”, in J Sloth-Nielsen and Z du Toit (eds), *Trials and Tribulations, Trends and Triumphs: Developments in International, African and South African Child and Family Law*, Cape Town: Juta Law, 2010 at 188-193. It should be noted that the standard is embodied in the South African Constitution, Article 28(2) of which states: “A child’s best interests are of paramount importance in every matter concerning the child.” In Namibia the international standards are part of Namibian law by virtue of Article 144 of the Constitution, which states: “Unless otherwise provided
standards which bind Namibia, we recommend amending the Maintenance Act to recognise the best interests of the child as the paramount consideration when determining a maintenance order.

The concept of child participation is also relevant to maintenance complaints. Article 12 of the Convention on the Rights of the Child states that a child who is “capable of forming his or her own views” should have the right to express those views freely in all matters affecting the child, with “the views of the child being given due weight in accordance with the age and maturity of the child”. In particular, a child should “be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law”. Namibia is a signatory of the Convention on the Rights of the Child and so should be taking steps to involve child participation.

The forthcoming Child Care and Protection Bill (as the draft bill stood in January 2012) incorporates the principles outlined in the Convention on the Rights of the Child by stating that “[e]very child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child in terms of this Act has the right to participate in an appropriate way and views expressed by the child, verbally or non-verbally, must be given due consideration”. In contrast, the Maintenance Act does not specifically recognise the role of a child who is not the complainant to participate in a maintenance hearing, but neither does it prohibit this.

In a Swedish report assessing the role of children in welfare benefit appeals, the authors considered cases where the needs of a child were denied and argued that this was because the child was not involved in the hearing. The authors asserted that failure to listen to the voice of the child is a problem as “children’s well-being can be heavily influenced by exclusion from social relations and peer-related activities due to financial restraints in the household …. Not being able, for instance, to participate in organized activities may, then, be damaging for children in low-income families. Thus, the possibility to participate in activities like a football trip may seem trite from an adult perspective but to a child be of great significance – and have multiple dimensions – which ought to be taken into consideration”. A similar argument could be made for some maintenance complaint enquiries.

One argument against the involvement of children is the fact that the process is time-consuming and the child would possibly have to miss school to attend court. However, the courts could overcome this issue by holding hearings involving child participants only in the afternoons, or by meeting with children outside of the court. However, this might only be possible if the courts increased their human resources capacity.

Overall, although it will not be necessary for the court to always require children to participate, as at times this may not be in the best interests of the child, child participation could be beneficial in some cases. We recommend that the Maintenance Act is revised to include a provision recognising the role of child participation where appropriate in maintenance hearings.

The provision of maintenance has also been linked to the right to property and the right to gender equality. At the 2006 National Conference on Women’s Land and Property Rights and Livelihood, with a Special Focus on HIV/AIDS, Debbie LeBeau presented a paper arguing that women’s access to child maintenance is a right to property. She asserted that women’s right to property, particularly in urban areas, includes a right to child maintenance and that this right forms an important component of gender equality. LeBeau explained the consequences of women being denied access to child maintenance:

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9 S Fernqvist, “Redefining participation? On the positioning of children in Swedish welfare benefits appeals”, in Childhood, 2011, 18(2) at 227-241. Note that the study assessed benefit appeals for maintenance from the State rather than applications for maintenance from the other parent of the child. However, the principles discussed are relevant to this study.


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Women’s right to property – in the form of child maintenance – enable women to support themselves and their children. A denial of this right can expose women to exploitation, food insecurity, homelessness and HIV infection.\textsuperscript{11}

Thus, as stated in the Legal Assistance Centre’s study on the previous Maintenance Act in 1995, “the effectiveness of the maintenance court procedure is an important factor in determining the household resources of households headed by single mothers. More broadly, providing effective assistance to mothers raising children on their own is a step towards the social and economic empowerment of women”.\textsuperscript{12}

2.2 The social context of maintenance

Maintenance is most often needed when the parents of a child live separately and one parent fails to provide for the needs of the child. However, the law can also be used by a person who has charge of the day-to-day care of a child (the primary caretaker) to seek contributions for the child’s maintenance from one or both parents.

Family structures in Namibia show that it is common for children to live apart from one or both parents. The 2006 Demographic and Health Survey reports that only approximately one-quarter of children live with both parents. In contrast, approximately two-thirds of children live either with one parent and the other parent is still living, or with another caregiver and one or both parents are still living.\textsuperscript{13} In these situations the payment of maintenance may be most relevant.\textsuperscript{14} This means that accessing maintenance is an issue that may be particularly relevant for approximately 60% of children in Namibia.

\textbf{Chart 1: Children’s living arrangements}

<table>
<thead>
<tr>
<th>Living Arrangement</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Child lives with both parents</td>
<td>25.8%</td>
</tr>
<tr>
<td>Child lives with mother – father is alive</td>
<td>27.2%</td>
</tr>
<tr>
<td>Child lives with mother – father is dead</td>
<td>5.6%</td>
</tr>
<tr>
<td>Child lives with father – mother is alive</td>
<td>4.2%</td>
</tr>
<tr>
<td>Child lives with father – mother is dead</td>
<td>0.8%</td>
</tr>
<tr>
<td>Child does not live with either parent – one or both parents alive</td>
<td>31.5%</td>
</tr>
<tr>
<td>Child does not live with either parent – both parents are dead</td>
<td>2.5%</td>
</tr>
<tr>
<td>Information missing</td>
<td>2%</td>
</tr>
</tbody>
</table>

\textit{Approximately two-thirds of children live either with one parent and the other parent is still living, or with another caregiver and one or both parents are still living. In these situations the payment of maintenance may be most relevant. This means that accessing maintenance is an issue that may be particularly relevant for approximately 60\% of children in Namibia.}

Ministry of Health and Social Services (MoHSS), Namibia Demographic and Health Survey 2006-07, MoHSS, 2008

\textsuperscript{11} Id, Annexure 3 at 15.

\textsuperscript{12} D Hubbard, Maintenance: A Study of the Operation of Namibia’s Maintenance Courts, Windhoek: Legal Assistance Centre, 1995 at 1.

\textsuperscript{13} Ministry of Health and Social Services (MoHSS), Namibia Demographic and Health Survey 2006-07, Windhoek: MoHSS, 2008 at 255. See Chart 1 on this page.

\textsuperscript{14} This does not mean that maintenance is not relevant in other living arrangements: the payment of maintenance may still be applicable in cases where one or both parents are dead as the duty of maintenance may pass to the extended family. Most of the law on the maintenance duties of different family members is contained in cases decided by the courts instead of in the Maintenance Act, because every family situation is different. The law on the duty of support between extended family members is summarised in S v Koyoko 1991 NR 369 (HC).
2.3 The economic context of maintenance

The status of the labour market

In the majority of cases where the child is living with one parent, the parent is the mother of the child. Therefore the economic status of women is particularly relevant.

Women are more likely than men to be unemployed, as only 68.2% of the working-age population are employed, compared to 77.1% of men.

One reason for the lower proportion of women in the workforce may be that as women usually take primary responsibility for caring for children, they may be unable to take advantage of competitive employment opportunities – especially in a labour market where unemployment is high. Another reason may be that many areas of employment, such as engineering, manufacturing, science and technology, continue to be male-dominated.

The fact that women are disproportionately represented in the workforce illustrates why a mother who claims maintenance may do so not just because it is her child’s right, but also because she is unable to meet the cost of child care alone. Many women would probably prefer to cover the costs themselves to avoid the conflict and irregularity of payment that is often attached to the maintenance agreements – even those which are arranged through the court.

To gain a better understanding of the underlying financial realities, we can also consider the average wage of people working in certain sectors. Unfortunately this information is outdated for many sectors.

In 2004 one report estimated that most workers in the informal sectors earn less than N$1 000 per month, with almost a third earning between N$300 and N$400 per month. Reports published in 2005 and 2006 also showed that most labour-hire workers earned between N$520 and N$1 037 per month, and domestic and farm workers earned between N$200 and N$500 per month.

For people in the most lowly paid sectors there appears to be little change in the rate of pay, as in 2008 14% of domestic workers continued to report earning under N$200 per month. Data from 2008 also shows that petrol attendants are another low-paid employment group, earning between N$500

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15 A total of 27.2% of children live with the mother and the father is living, and 5.6% live with the mother and the father is dead. A total of 4.2% of children live with the father and the mother is living, and 0.8% live with the father and the mother is dead. (Ministry of Health and Social Services (MoHSS), Namibia Demographic and Health Survey 2006-07, Windhoek, MoHSS, 2008 at 255)


and N$1 500 per month, with women in this sector tending to be concentrated in the lower income categories. The 2012 Labour Force Survey shows that 28.3% of women earn less than N$1 000 compared to 22.2% of men. The reality is that many people do not earn a living wage – defined as the minimum amount of money required to meet their basic needs.

Another way to assess the situation is to look at annual income and expenditure. Only about half of all households in Namibia (49.2%) name salaries/wages as their main source of income; this is followed by subsistence farming (23.1%), pensions (11.1%) and business income (8.8%). The finding that so many households do not receive a regular monthly income may explain why so many women are in need of maintenance, but it may also explain why it may be a struggle for so many women to access this support.

Analysis of household income and expenditure also shows that the difference between income and expenditure is larger in male-headed households than in female-headed households. This is reflected in practical differences such as a difference in housing quality: male-headed households tend to have better-quality housing than female-headed households.

<table>
<thead>
<tr>
<th>Table 1: Main sources of income</th>
</tr>
</thead>
<tbody>
<tr>
<td>Income source</td>
</tr>
<tr>
<td>Salaries/wages</td>
</tr>
<tr>
<td>Subsistence farming</td>
</tr>
<tr>
<td>Pensions</td>
</tr>
<tr>
<td>Business income</td>
</tr>
<tr>
<td>Remittances/grants</td>
</tr>
<tr>
<td>Drought/in-kind receipts</td>
</tr>
<tr>
<td>Commercial farming</td>
</tr>
<tr>
<td>Other</td>
</tr>
<tr>
<td><strong>Total</strong></td>
</tr>
</tbody>
</table>


Table 2: Household income and expenditure

<table>
<thead>
<tr>
<th>Household</th>
<th>Average income</th>
<th>Average consumption</th>
<th>Difference</th>
</tr>
</thead>
<tbody>
<tr>
<td>Male-headed households</td>
<td>84 141</td>
<td>79 586</td>
<td>4 555</td>
</tr>
<tr>
<td>Female-headed households</td>
<td>48 663</td>
<td>46 474</td>
<td>2 189</td>
</tr>
<tr>
<td>All households</td>
<td>68 878</td>
<td>65 348</td>
<td>3 530</td>
</tr>
</tbody>
</table>


Table 3: Household types

<table>
<thead>
<tr>
<th>Household</th>
<th>Modern houses</th>
<th>Traditional houses</th>
<th>Improvised houses</th>
<th>Other</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Detached houses</td>
<td>Semi-detached houses</td>
<td>Flats</td>
<td>Mobile homes</td>
</tr>
<tr>
<td>Female-headed</td>
<td>29.3</td>
<td>4.9</td>
<td>3.8</td>
<td>0.3</td>
</tr>
<tr>
<td>Male-headed</td>
<td>34.9</td>
<td>5.2</td>
<td>3.7</td>
<td>0.5</td>
</tr>
<tr>
<td>All households</td>
<td>32.6</td>
<td>5.1</td>
<td>3.7</td>
<td>0.4</td>
</tr>
</tbody>
</table>


Although there are clear disparities between the economic status of men and women, the data also shows that for all households, income and expenditure is fairly close. This suggests that many people live on a survival basis and have limited opportunity to set aside money for future needs. This is a concern as it means that families will struggle to meet unexpected expenses such as unplanned health care costs. It also presents a challenge for the increasing cost of caring for children as they grow.

The finding that many households are vulnerable to financial challenges is reiterated in a study that assessed the impact of the increase in food prices in Namibia. The researcher found that the increase

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22 Id at 134 and 145.

23 Id at 65.
in food prices disproportionately affects low-income households because these households spend a proportionately higher amount of their income on food.\(^{24}\)

**Other economic indicators**

Other indicators of economic wellbeing are access to services such as water and sanitation. While half (51.3\%) of Namibia’s households have water on their premises, **people living in approximately one-third of households (28.9\%) have to travel for up to 30 minutes to collect water**, and people living in approximately one-fifth (18.5\%) of the households have to travel for more than 30 minutes. It is usually an adult female who collects water.\(^{25}\) Having to allocate time each day to access water may affect the type of employment that a mother caring for her children can take up. This may mean that a woman earns less than she is able to, and may be yet another reason for her being in need of maintenance support for her children. Alternatively children may be asked to collect water when they should be attending school or doing homework. In such situations, maintenance may be most needed to enable the family to live in an area that has running water and sanitation facilities to ensure that some of the most basic needs of the children are met.

Another indicator is access to improved sanitation facilities, which refers to a toilet used only by the members of the household which separates waste from human contact. **Only 32.9\% of Namibia’s households have improved sanitation facilities.\(^{26}\)** Access to clean water and adequate sanitation facilities has obvious implications for children’s health.

Of further concern is the fact that **only 50\% of children aged between 5 and 17 have basic material goods in the form of a pair of shoes, two sets of clothing and a blanket.\(^{27}\)** This data is not disaggregated by family structure, so we cannot determine whether these children are under the care of one, both or neither parent. However, it illustrates the fact that there are many children whose basic needs are not being met and whose needs might be met through an absent parent’s payment of maintenance.

Access to resources such as a television, radio and cellphone is another indicator of wellbeing. Data for Namibia shows that female-headed households are less likely than male-headed households to own or have access to a radio and television.\(^{28}\) Interestingly, there is little difference between male- and female-headed households regarding owning or having access to a cellphone, suggesting that this means of communication in particular may be important for providing information to women, and in turn their children.

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\(^{24}\) S Levine, “The 2007/2008 food price acceleration in Namibia: An overview of impacts and policy responses”, in *Food Security*, 2012, 4 at 59-71. The increases also affect urban households to a greater extent than rural households as the latter may be more likely to live on own-grown foods.

\(^{25}\) Ministry of Health and Social Services (MoHSS), *Namibia Demographic and Health Survey 2006-07*, Windhoek: MoHSS, 2008 at 17.

\(^{26}\) Id at 18.

\(^{27}\) Id at 260 and 261.

**Table 4: Households that own or have access to a radio, television and cellphone**

<table>
<thead>
<tr>
<th>Household</th>
<th>Own a radio</th>
<th>Access to a radio</th>
<th>Own a television</th>
<th>Access to a television</th>
<th>Own a cellphone</th>
<th>Access to a cellphone</th>
</tr>
</thead>
<tbody>
<tr>
<td>Male-headed households</td>
<td>74.2</td>
<td>10.2</td>
<td>41.4</td>
<td>9.8</td>
<td>78.8</td>
<td>8.2</td>
</tr>
<tr>
<td>Female-headed households</td>
<td>68.5</td>
<td>13.4</td>
<td>34.0</td>
<td>10.4</td>
<td>78.9</td>
<td>10.9</td>
</tr>
<tr>
<td>Both sexes</td>
<td>71.1</td>
<td>11.6</td>
<td>38.0</td>
<td>10.1</td>
<td>78.8</td>
<td>9.4</td>
</tr>
</tbody>
</table>


**Linkages between living standards and child development**

In a study to assess the impact of living standards on child development, researchers examined the relationship of a country’s Human Development Index (which measures a country’s social and economic status, indicated by life expectancy, education and gross domestic product) with four aspects of the home environment that have been associated with child wellbeing: household quality (such as access to toilet facilities); material resources (such as radios, TV, electricity and telephones); formal learning resources (such as books and store-bought toys); and informal resources (such as makeshift toys). The total sample consisted of 127 347 households with children under age 5 in 28 developing countries. Unfortunately Namibia was not one of the countries studied. As would be expected, the study identified a positive relationship between a high score on the Human Development Index and child wellbeing. The findings emphasise the importance of social supports, including maintenance payments, to ensure that families are able to maintain a basic standard of living.

RH Bradley and DL Putnick, “Housing quality and access to material and learning resources within the home environment in developing countries”, in *Child Development*, Vol 83, No 1, 2012 at 76-91

**Poverty**

Poverty affects a child’s development in many ways – affecting access to sufficient nutritional food, health care and education and exposing the child to additional emotional and psychological stressors such as the strains experienced by a family living in poverty. Furthermore, children living in poverty are more likely to continue to do so for the rest of their lives and are more likely to pass on the impact of their situation to their own children.29

As of 2009/10, the poverty line in Namibia is calculated by the government as being N$377.96 per adult. This means that anyone whose monthly consumption is less than this is living in poverty. Analysis shows that approximately 30% of the population are poor (28.7%), and 15.3% are severely poor. Female-headed households in particular are vulnerable to poverty. The poverty gap is the percentage change or amount of money it would take to get out of poverty. The poverty gap is currently 8.8% – or an additional consumption of just N$33.26 per month.30 This means that many people living in poverty could easily move out of this trap if they received a small amount of additional financial support – which for some could be most appropriately provided in the form of maintenance.

**Table 5: Poverty measures**

<table>
<thead>
<tr>
<th>Measure</th>
<th>Percentage female-headed households</th>
<th>Percentage male-headed households</th>
<th>Percentage total households</th>
</tr>
</thead>
<tbody>
<tr>
<td>Households living in poverty</td>
<td>40.4</td>
<td>36.4</td>
<td>28.7</td>
</tr>
</tbody>
</table>

*Source: Namibia Statistics Agency (NSA), Poverty dynamics in Namibia, Windhoek: NSA, 2012 at 12.*


Child poverty

In 2012 the Namibia Statistics Agency published a child-focused analysis of the 2009/10 Namibia Household Income and Expenditure Survey. The report found the following:

- One in three children in Namibia grow up in households that are poor.
- Children are more likely to live in poverty than adults.
  - While 15.3% of the population are in severe poverty, 18.3% of children are in severe poverty.
  - While 28.7% of the entire population find themselves below the upper poverty line, this is true for 34% of children. (The upper poverty line is the cut-off point between poor and non-poor. The lower poverty line is the cut-off point between poor and severely poor.)

The report noted that although there has been a sharp decline in poverty levels since the 2003/04 Household Income and Expenditure Survey, child poverty in particular remains alarmingly high. The Namibia Statistics Agency noted that “child poverty in Namibia needs to be addressed immediately if the country is to achieve its Vision 2030”. This call to action includes a need to ensure that the maintenance system is operating effectively.

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According to a brief report released by the United Nations Office of the Resident Coordinator in Namibia in collaboration with humanitarian partners in May 2013, the 2012-2013 drought has led to over 100,000 children under the age of 5 being at risk of malnutrition due to reduced availability, access and utilisation of food, compounded by limited access to safe water and improved sanitation. A further 20,000 pregnant women living in rural households classified as food insecure are also at risk of malnutrition, compromising the health of their unborn children.

Namibia: Drought, Office of the Resident Coordinator Situation Report No. 01 (as of 24 May 2013)

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2.4 The benefits of financial support

The only information that indicates the impact of financial support for children comes from the assessment of the Basic Income Grant (BIG). A BIG pilot project was run in a single small community, Otjivero-Omitara, for a period of 24 months up to December 2009. All residents below the age of 60 living in the trial project area received a grant of N$100 per person per month, without any conditions being attached. The project was designed and implemented by the Namibian Basic Income Grant Coalition and is the first universal cash-transfer pilot project in the world. Funds to start the pilot project were raised through voluntary contributions.

The grant resulted in a significant drop in household poverty. Looking at the indicators which showed specific results that benefited children:

- The BIG resulted in a huge reduction in child malnutrition. Using a World Health Organisation measurement technique, the data shows that children’s weight-for-age improved rapidly and significantly, from 42% of underweight children in November 2007 to 17% in June 2008 and 10% in November 2008.
- Before the introduction of the BIG, almost half of the school-going children did not attend school regularly. Pass rates stood at about 40% and dropout rates were high. Many parents were unable to pay school fees. After the introduction of the BIG, more than double the number of parents paid school fees (90%) and most of the children acquired school uniforms. Non-attendance due to financial reasons dropped by 42% and this rate would have been even higher without the effects of


32 The BIG Coalition consists of four major civil society umbrella bodies in Namibia, namely the Council of Churches (CCN), the National Union of Namibian Workers (NUNW), the Namibian Non-Governmental Organisations Forum (NANGOF) and the Namibian Network of AIDS Service Organisations (NANASO).
migration towards Otjivero-Omitara. Dropout rates at the local school fell from almost 40% in November 2007 to 5% in June 2008 and almost 0% in November 2008.\textsuperscript{33}

The results illustrate the significant benefits to children that financial support can provide.

### 2.5 The wider implications of maintenance

Access to maintenance is a human right and is particularly important in the social and economic context of Namibia. Access to maintenance or a lack thereof also has other wider implications. The implications of failing to provide maintenance for a child can be most clearly seen with respect to social problems such as baby dumping and child labour, both of which are problematic issues in Namibia.

#### Babydumping

Although baby dumping is acknowledged to be a problem in Namibia, data on the incidence of baby dumping and infanticide is not readily available as neither actions are categorised as separate crimes but instead are usually recorded as charges of concealment of birth, abandonment, culpable homicide or murder. Statistics provided by the police show that approximately 19 cases of concealment of birth are reported each year. This is based on data from the last five years.\textsuperscript{34}

During 2010 and 2011 the LAC distributed 19 different comics on a variety of family law issues. In response to a comic on What to do if you are pregnant and do not want the baby, the most common request for further information was about maintenance. Furthermore, the most comments and enquiries overall were in response to the comic on What to do if someone stops paying maintenance. This suggests that improved systems for maintenance, and better public information on this topic, could be an important strategy for combating baby dumping.

#### Child labour

Reports suggest that child labour does occur in Namibia. Data from the 2007 child labour survey suggests that nearly 40% of children aged 6-17 engaged in some form of child labour.\textsuperscript{35} The linkage between better parental support and the incidence of child labour was highlighted in a report on the need to eliminate the worst forms of child labour. The authors noted that the Maintenance Act is an important tool in combating child labour, “as children who get appropriate financial support may be less likely to have to revert to working to support themselves”.\textsuperscript{36}

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\textsuperscript{33} C Haarmann et al, Making the difference! The BIG in Namibia: Basic income grant assessment report, April 2009, Windhoek: Basic Income Grant Coalition, 2009 at 13-17.

\textsuperscript{34} Based on statistics provided by the Namibian Police, 2012.


\textsuperscript{36} D Lebeau and S Iipinge, “Towards the Development of Time-Bound Programmes for the Elimination of the Worst Forms of Child Labour in Namibia” (discussion paper), 2003 at 19.
Summary of information about the importance of maintenance

Maintenance as a human right
The provision of maintenance is a human rights issue. It is important for the rights of a child because children have the right to be cared for by their parents and the best interests of all children should be met. Children also have the right to participate in maintenance proceedings, if appropriate and in their best interests. Maintenance is also associated with the right to gender equality.

The social context of maintenance
Accessing maintenance may be particularly relevant for the approximately two-thirds of children in Namibia who live apart from one or both parents while the absent parent or parents are still living.

The economic context of maintenance
Women are more likely than men to be unemployed.
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.
The difference between income and expenditure is larger in male-headed households than in female-headed households. However, income and expenditure are close together for all households, which suggests that many people live on a survival basis and have limited opportunity to set aside money for future needs.

Other economic indicators
People living in approximately one-third of Namibia’s households have to travel for up to 30 minutes to collect water, and only one-third of Namibia’s households have improved sanitation facilities. Access to clean water and adequate sanitation facilities have obvious implications for children’s health and should be considered part of a child’s basic needs.
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 have their needs met through an absent parent’s payment of maintenance.

Poverty
Female-headed households are particularly vulnerable to poverty. Children are more likely than adults to live in poverty. The payment of maintenance may be critical in helping a family out of poverty.

The benefits of financial support
A pilot for the Basic Income Grant (BIG) showed a huge reduction in child malnutrition and an increase in school attendance rates. The results illustrate the significant benefits to children that financial support can provide.

The wider implications of maintenance
Babydumping is a regular occurrence in Namibia, with approximately 19 cases of concealment of birth reported each year. The most common question posed by readers of the LAC comic on What to do if you are pregnant and do not want the baby is about maintenance.
Nearly 40% of children aged 6-17 engage in some form of child labour. Lack of sufficient financial support may push children into child labour.
Chapter 3
THE DEVELOPMENT OF A NEW LAW ON MAINTENANCE

For many years practical mechanisms for enforcing the legal liability to pay maintenance were governed by the Maintenance Act of 23 of 1963, which was inherited from South Africa. However inadequacies of the Act were identified as a priority concern shortly after Independence. Many women complained about the difficulty of securing maintenance for their children and about the inefficient operation of the maintenance courts.

In 1993, the Legal Assistance Centre began extensive research into the operation of the maintenance courts in consultation with the Law Reform and Development Commission. The LAC conducted this study because maintenance “was identified by members of the public as an urgent priority. In the Legal Assistance Centre’s advice offices in Windhoek, Ongwediva, Rundu, Walvis Bay and Keetmanshoop,[1] maintenance comes second only to labour issues as the topic on which clients most often seek help. Maintenance was also identified as a pressing issue by the Department of Women Affairs,[2] by the Women and Law Committee of the Law Reform and Development Commission, and by numerous women’s groups throughout the country”.[3] The research findings, which included draft legislation, were published in September 1995. This study will be hereinafter referred to as “the 1995 maintenance study”.

Participatory research on maintenance

As part of the work conducted for the 1995 maintenance study, the Legal Assistance Centre attempted to stimulate public awareness and discussion of the maintenance courts and their function. The LAC produced educational materials about the law in force at the time, and preceded group discussions convened for research purposes with explanations of the law. In fact, the group discussions and public meetings were primarily educational in nature, with information-gathering playing a secondary role. Facts about maintenance were also highlighted by LAC staff members in a number of radio and television programmes during this period, as another method of stimulating public discussion.

During the course of the research, the LAC organised a meeting at which some of the women who had approached the LAC with maintenance problems could voice their complaints directly to representatives of the Ministry of Justice and the Namibian Police, as a mechanism for empowering clients to hold government accountable. The LAC was also operating on the theory that government officials might be more sympathetic to the issues raised if they were forced to confront the users of the system directly instead of through intermediaries.

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1 Sadly, due to a lack of funds, the LAC now has offices only in Windhoek and Ongwediva.
2 Now the Ministry of Gender Equality and Child Welfare.
This meeting was considered to be a success by all parties. Some of the misunderstandings which had developed were due to miscommunication. For example, some women had complained to the LAC that the police were telling them they must trace the defendant in the maintenance case themselves. They interpreted this as an unwillingness to help on the part of the police. However, after discussing the issue further, it became clear that what the police were really asking for was more information to help them try to locate the men in question.

As a result of the discussion, some staff members at the Windhoek maintenance court were replaced and certain administrative procedures were improved. Liaison between the LAC and the police on maintenance issues improved somewhat after the meeting, and our clients reported that maintenance officers in Windhoek were making more effort to explain court procedures.

Results aside, the clients who attended this meeting gained valuable practice in asserting their rights, and the government officials involved learned more about how women perceive the maintenance process. The exercise proved that significant improvements in legal processes can be achieved in advance of formal law reform, through negotiation and follow-up. It also gave the researchers insight into what data should be extracted from the court files.

based on D Hubbard, “Engaging in Engaging Research”, conference paper, March 1996

The LAC has conducted similar activist research as part of the work conducted for the current study. For example, within the research period the LAC developed an animation, a film, radio adverts and one-page comics on various aspects of the maintenance law with the intention of raising public awareness of the law, stimulating public discussion and empowering community members to access maintenance orders on their own. As part of the research methodology, the LAC again preceded group discussions convened for research purposes with explanations of the law. The LAC also gave educational presentations about the law on maintenance at workshops and conferences on numerous occasions during the study period.

3.1 Timeline for developing the bill

Following the publication of the 1995 maintenance study, the Legal Assistance Centre met to discuss recommendations from the report with members of a subcommittee appointed by the Law Reform and Development Commission specifically for this purpose.

The subcommittee submitted a report on maintenance to the full Law Reform and Development Commission in August 1996, and in September 1997, the Law Reform and Development Commission published a report which incorporated these recommendations. The report, which made over twenty recommendations for the improvement of the law on maintenance, was approved by the Minister of Justice.

Further consultation took place between 1997 and 2000. A Maintenance Bill was drafted in 2000 and approved by Cabinet in August 2001. The Maintenance Bill was introduced into Parliament in 2002. It was referred to the National Assembly’s Committee on Human Resources, Equality and Gender Development, which held public hearings on the topic in 12 locations. The bill was passed in 2003, incorporating some amendments proposed by the Parliamentary Committee. The Maintenance Act 9 of 2003 came into force on 17 November 2003.


5 The second reading speech by the Deputy Minister of Justice (Hon Kanawa) cites the Legal Assistance Centre research as being the starting point for the bill: “The preparation of the Bill came at the end of a long, but useful, process, involving a number of stakeholders. Preliminary research was undertaken by the Legal Assistance Centre before the Law Reform and Development Commission was tasked by the Ministry to undertake the necessary research.” National Assembly, 26 February 2002, at page 22.

6 Hearings were held in Katimo Mulilo, Rundu, Tsumeb, Oshakati, Outapi, Keetmanshoop, Mariental, Rehoboth, Gobabis, Otjiwarongo, Swakopmund and Windhoek.

7 These are discussed below at page 24.

Chapter 3: The Development of a New Law on Maintenance

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Chart 3: The new Maintenance Act: eight years in process

1995: LAC study on the operation of the Maintenance Act 1963

1996: LRDC subcommittee report on amendments to the law on maintenance

1997: LRDC final report and recommendations for amendments to the law on maintenance

1998-1999: NGO Child Maintenance campaign

2000: Ongoing consultations on proposed amendments to the Maintenance Act

2001: New Maintenance Bill introduced in Parliament

2003: New Maintenance Act passed and enacted

Legal Assistance Centre Child Maintenance Campaign 1998-99

During 1998 and 1999, the Legal Assistance Centre spearheaded a Child Maintenance Campaign which involved the broader NGO community. Its objectives were to speed up the passage of the new Maintenance Act and to raise public awareness of the importance of financial and emotional support from parents, especially fathers.

The campaign included:
- a range of lobbying activities;
- regular radio programmes on maintenance on most of the language services of NBC national radio;
- television appearances;
- community meetings and workshops in 14 locations covering almost every region;
- a series of 4 posters in 8 languages prepared for distribution through local organisations;
- the utilisation of poetry and oral performance groups; and
- six dramatic television “shorts” aimed at fathers and shown repeatedly on NBC, as well as a variety of other television appearances to discuss the issue of maintenance.

The campaign resulted in an increase in the number of maintenance complaints being brought to the Legal Assistance Centre, increased discussions of maintenance on radio call-in shows and increased networking around the topic with community-based organisations. However, the fact that maintenance consistently continued to be a serious problem during this period indicates that interventions such as this type of campaign are insufficient on their own to produce lasting attitudinal change on the part of absent fathers in particular.

The LAC continues to engage in efforts to raise awareness about the importance of child maintenance; the LAC recently produced a film and an animation on maintenance and continues to produce accessible educational materials, including posters, pamphlets and comics, in a range of Namibian languages.

“… all people should be encouraged to be responsible. Women should be advised not to have more children with men who already neglect their maintenance obligations towards other children. Men who do not earn a lot of money should be advised not to have more children. Parents’ earning capacities need to be taken into consideration when family planning is done.”

3.2 Parliamentary debates

3.2.1 National Assembly

Fears of abuse of the system by women

During the Parliamentary debates, there were repeated allegations that women misuse the maintenance system – by having children just to get maintenance payments, by spending maintenance money on themselves or by demanding payment from men who are not in fact the fathers of the children.

Ironically, several strong statements on this point came from a female MP (who was subsequently appointed as Deputy Minister of Women Affairs):

[S]ome mothers claim maintenance money from their ex-partners and squander this money on other things, rather than using it for the benefit of the child it was claimed for. Moreover, these very mothers who claim money, dump the children with their mothers while claiming money from the fathers, which the children do not benefit from at all. It is equally true that those mothers refuse to give such children to their fathers who are financially strong and willing to take responsibility for the well-being of their children. This refusal comes as a means to suck money from the partner which, without any doubt, makes one thing that mothers want to make business with the children … I would like to propose that measures be taken to curb the milking of men while the money ends up being used for something totally different from benefiting that particular child.9

Another female MP also gave strong emphasis to this point:

I welcome the fact that the bill lays responsibility for child maintenance on the shoulders of both parents. Men are not always to blame. Some women try to have as many children from different fathers as possible so that they can claim maintenance from all of them … So, working mothers and those who can afford it should be made to take equal responsibility for their children. We are talking about gender equality here and not a one-way street where only one party should bear responsibility for child maintenance.10

However, most of the other speakers on this point were male:

It is quite clear that women keep the children hostage in order to receive money from men.11

I am afraid that cases of mistaken paternity will become numerous, especially if the enforcement of this law proves to be effective. Would-be mothers would seal and secure their children’s future by deciding, only on the basis of income, not genetics, who the fathers of the children will be.12

This piece of legislation is very important because this is the first time that a law on maintenance is impartial when it comes to parents. In the past, only fathers were regarded

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9 Hon Muharukua, National Assembly, 6 March 2002. Her strong statement inspired one male MP to say: “I am at a loss as to the contribution of the Hon. Member, whether her speech was written by a male member …?” (Hon. T. Gurirab). Hon Muharukua also singled out stepmothers who do not give proper care to the children of their husbands by other women, but did not mention any problems with step-fathers and the children their wives have by other men.

10 Deputy Minister of Labour (Hon Nghindinwa), National Assembly, 26 March 2002. Another female speaker acknowledged the problem of abuse of maintenance money, but stated that “these cases are more the exception than the rule”. Hon Schimming-Chase, National Assembly, 27 March 2002.

11 Hon Riruako, National Assembly, 12 March 2002.

12 Hon Chata, National Assembly, 12 March 2002.
as culprits, even in cases where mothers and/or grandmothers of the beneficiaries were misappropriating the money that was given them for the purpose of maintaining the child. Nowadays we have young mothers, especially the unmarried ones, dumping their children to be taken care of by their grandmothers in their respective villages of origin. When given money by the fathers of the children, the young mothers would normally spend this money for their own personal needs and would not give anything to the grandmother.  

Some mothers forbid their children to have any relationships with their so-called fathers who never accepted them. You blame the people who have been taking care of their children, but some mothers put their foot down and forbid them.

We are tired of women who misbehave. They need clothes, they need to support those children who do not belong to that man. We are tired of this. Some even make money from men by falling pregnant deliberately so that they can claim maintenance from the fathers. Unfortunately, they don't use this maintenance money to support their children, they dump them with the grandmothers while they spend the money on themselves, buying make-up in order to look for other men.

Such objections were anticipated, and the initial bill already contained provisions which criminalised both abuse of maintenance money and providing false information in connection with a maintenance claim.

Also to this point, two female MPs noted:

There has been a lot of publicity about the new provision which can be used to punish abuse of maintenance money. It needs to be said that the research, which was conducted, found that this is not a widespread problem. The typical maintenance payments are too low to be abused. They are N$20, N$50.

It is not about men taking care of every child of a woman they are in a relationship with, and for people to take advantage of this Bill and throw insults at women is unacceptable. I think that is really just not acceptable, especially for him to go as far as saying women are now having children to make business out of maintenance. Which maintenance? The N$70 that I am given per month? That is not acceptable.

The bill was referred to the Parliamentary Standing Committee on Human Resources, Equality and Gender Development, which held public hearings throughout the country in June 2002. The Committee report proposed several amendments to the bill – most of which were technical in nature. However, one of these amendments proposed quarterly monitoring by social workers to prevent abuse

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13 Deputy Minister of Prisons and Correctional Services (Hon Nambinga), 26 March 2002.
14 Hon Rirauko, National Assembly, 26 March 2002.
15 Hon Moongo, National Assembly, 12 March 2002. (See also Conrad Angula, “Sex talk fires up NA”, The Namibian, 13 March 2002.) In response to Hon Moongo’s statement, Hon Namises (female) noted: “On a point of order. I think Hon Moongo should go into more analysis on who is raping the children, who is proposing and having relationships with women, because culturally we don’t go around and we are not allowed by culture to propose to men. Then also, they are impregnated by men. So, if you want to discuss this matter, go and do a deeper analysis before you come and accuse us. The males are the prostitutes in this country, they are the ones who go out.”
16 Hon Namises, National Assembly, 12 March 2002.
17 Hon Kuugongelwa, National Assembly, 12 March 2002, in response to Hon Moongo who had repeatedly made sexist jokes along with his allegations that women abuse their maintenance money.
18 One radical suggestion was the compulsory sterilisation of any parent with more than four children who is unable to provide maintenance for these children. This recommendation appeared to be a gender-neutral one. This proposal was rejected by the Ministry of Justice on the grounds that such a step would be unconstitutional. “Report of the Parliamentary Standing Committee on Human Resources, Equality and Gender Development on the Maintenance Bill [B.1-2002]”, November 2002 at 9; Ministry of Justice, “Report of the Parliamentary Standing Committee on Human Resources, Equality and Gender Development, Maintenance Bill, 2002, Comments and action taken on the proposed amendments”.
of maintenance payments. This idea was considered impractical, but an amendment was made to authorise maintenance officers to investigate complaints of misuse of maintenance payments, and to make it clear that such complaints could be made by any person, including a social worker.

**Other gender issues**

As in the case of other bills, many Parliamentarians – particularly but not exclusively men – were concerned about what they perceived as ‘gender neutrality’. The maintenance system, under both the old law and the new one, is gender-neutral on its face, but in practice is used almost exclusively by mothers seeking maintenance from absent fathers. Male MPs tried to even the score by citing failings by mothers, to counterbalance the obvious emphasis on fathers’ failure to take financial responsibility for their children:

**I must say that the Bill leaves no room for fathers to run away from their parental responsibilities, and so are the ropes equally tightened around the necks of those who divorce to double their incomes as well as those who bring forth unwanted children for the sole purpose of improving their cash flows.**

**[I]t is commonly known that those should pay maintenance for the children are the men, but in most cases it excludes the woman who is working while the child is with the father. I think that we should also look into this situation, that mothers who are working should take responsibility for the children when they are under the custody of their fathers.**

**[A]lthough fathers were regarded as the only culprits of child maintenance, I would like to recognise some loving and caring fathers who take care of sometimes more than ten children as single parents and these children are very well looked after without any assistance whatsoever from the different mothers of the children, while some mothers are even well-off.**

In supporting the bill, the Minister of Women Affairs emphasised its even-handedness:

**[B]oth parents have an equal responsibility towards their children ... It, therefore, goes without saying that there are parents who deliberately neglect their children and honestly, as members of this House we should not defend those irresponsible citizens of Namibia, being men or women. I agree, it is true, there are some women who receive maintenance benefits and do not use it in the best interest of the children. At the same time, it is also true that there are men who do not maintain their children. It is a fact, and that is why this law is clearly focusing on both parents, that we must take care of our children and not to think that somebody else will do it for us. The maintenance law will empower both men and women who are suffering at the hands of other partners. A man who is not getting maintenance from his partner will benefit, and a woman who is not getting maintenance from her partner, will also benefit. Therefore, this law should not really be seen as a law for women, it is a national law because everybody is going to benefit.**

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19 “Report of the Parliamentary Standing Committee on Human Resources, Equality and Gender Development on the Maintenance Bill [B.1-2002]”, November 2002 at 7. The proposed amendment read as follows: “The maintenance officer must instruct a social worker on a quarterly basis to investigate the circumstance of a child receiving maintenance in terms of a maintenance order and such investigation must particularly determine if the money paid in respect of the maintenance of that child is used for the child’s benefit or in accordance with the conditions set out in the maintenance order.”


22 Hon Biwa, National Assembly, 6 March 2002.

23 Minister of Lands, Resettlement and Rehabilitation (Hon Pohamba), National Assembly, 6 March 2002.

24 Hon Katjita, National Assembly, 4 April 2002.

At the end of this speech, she added that “by and large, it is women who suffer, because men tend to run away from their responsibility”. However, she also noted that it is only women who turn to the maintenance courts because of the “gender imbalance in our thinking”, but that men could use the courts to get maintenance from their children’s mothers if they wished.  

A female opposition MP tied concerns about maintenance to the economically-weaker position of women in society, saying that it would help to ensure that women and children were getting access to family resources, and that it would “strengthen the power of women within the family and society, in order for them not only to rely on the ‘goodwill’ of men”. These statements inspired the Minister of Justice to emphasise once again the fact that the bill was “gender-neutral”: “It doesn’t declare war against men, it is neutral gender and was, after all, drafted by men.” The response from the female MP who had been speaking was that “The Bill is gender neutral, but we have to address the reality.” She noted:

... Talking of strategic long-term policies, it is important that government is again reminded of Article 14(3) and Article 23 of our Constitution. Members can read it. Half of the population lives under the breadline. Households headed by women are twice poorer than household headed by men. The results are abusive relationships which women cannot escape due to poverty. They remain not because they want to, but because of poverty ... One big problem has been men – and they are usually the problem – who ignore the summons to come to court. This is sometimes used as a delaying tactic, and sometimes as an attempt to duck responsibility altogether.

Many other Parliamentarians praised the bill’s neutrality, with several mistakenly under the impression that the bill introduced for the first time the principle that both mothers and fathers are responsible for the maintenance of their child in accordance with their respective means. (In fact the new law simply articulated this long-standing legal principle for the sake of clarity). In wrapping up the Second Reading debate in the National Assembly, the Deputy Minister of Justice assured the House that “nowhere in the Bill can any persons find gender bias in favour of one sex at the expense of the other ... A man can claim maintenance from the mother of the child if that mother has the means once the Bill becomes law.”

A few male MPs also acknowledged that while the bill was gender-neutral, it clearly addressed the group that disproportionately bears the responsibility of childrearing:

I can safely say that this kind of child neglect cuts across the marital status barrier. Most men are guilty of this crime, which the traditional gender-biased division of labour in society helps to promote, as child-care is seen as the woman’s job.

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26 Id.
27 Hon Namises, National Assembly, 12 March 2002. The underlying economics were also discussed from another angle, as several speakers related maintenance to the phenomenon of “sugar daddies”, where young girls date older men with an eye on the financial resources which such men can offer.
28 Hon Tjiriange, National Assembly, 12 March 2002. In a response to this comment, Hon Namises (female) replied: “With the research that women have done. It is because of our experience that you have drafted the Bill. The information and knowledge which you have received have been created by women. The Bill is gender neutral, why should they compete here and say it was drafted by men? It was drafted by all of us.”
29 Hon Namises, National Assembly, 12 March 2002.
30 Ibid.
31 See for example, Hon !Nareseb, Hon Junius, National Assembly, 6 March 2002; Hon Nghindinwa, National Assembly, 26 March 2002; Hon Katjita, National Assembly, 4 April 2002. Hon Siska pointed to “lack of responsibility” by both parents: “I support the punishment of the mother who misuses the maintenance funds, because if the father is begin punished, and the father pays, the money is supposed to be used solely for the purpose that it has been paid for.” National Assembly, 4 April 2002.
32 Hon Kawana, 8 April 2002.
33 Hon Amukugo, National Assembly, 13 March 2002.
I hereby call to order the thousands of men … who run around and make lots of children without any thought about who will care for those children.34

At one point, the debate inspired a series of sexist jokes and hand signals made by one male MP regarding the sexual prowess of men.35 He was rebuked by several female MPs, with one stating:

I don’t know whether Hon. Moongo is serious in his behaviour and I would like him to withdraw the signs, which is an insult to all of us. We are laughing about it, but it is a matter of how respectful we are towards women.36

There was also some discussion of who should bear the burden of proof of paternity in a maintenance claim, with several female MPs stating that this responsibility should lie with the father. For example:

Also that it should be up to the father to prove that he is not the father … not for the mother to prove that he is the father. It should, therefore, become the responsibility of the party denying paternity to provide scientific proof why he should not be considered the father of the child and hence, not liable to pay maintenance as the law requires.37

What I know is that when I fall pregnant, I know who impregnated me and it is not something that would be disputed and it isn’t something that can be debated. I know exactly you are responsible and it is true.38

Additionally, one female MP cited cultural concepts of gender-appropriate behaviour which could affect implementation of the new law in rural areas:

In the villages in the regions I know well, such as in the Kavango and the four northern regions, including the Caprivi, unmarried mothers do not claim child maintenance from the men who give them children. This is regarded as shame or a form of begging. So, unmarried mothers raise their children on their own, no matter how poor they may be.39

Reciprocity between parents and children

The search for a sense of even-handedness eventually moved to reciprocity between parents and children, instead of between men and women. Several Parliamentarians worried about the maintenance of elderly parents by their children, arguing that the bill was too focused on the reverse situation.40 For example:

We as parents must be mindful of the fact that children may be vulnerable today and, therefore, be dependent on us for material and emotional care, but there will definitely come that inevitable day when the roles will be reversed.41

Children should also be responsible for the maintenance of their parents, if the parents are not in a position to maintain themselves, and the children are able to do so.42

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34 Hon Moongo, 12 March 2002. Hon Moongo also said, even-handedly, at a different point in the discussion on the same date: “I hope that this Maintenance Bill will help to make men realise that they have a duty towards every child they father, and to make women realise that having children is not an easy way to get an income.”

35 Hon Moongo, 12 March 2002.

36 Hon Namises, National Assembly 12 March, 2002. He was also rebuked by several other female MPs, including Hon. Amukugom, Hon Kuugongelwa, and Hon Sioka. He was not rebuked by any male MPs.

37 Attorney-General (Hon Ithana), National Assembly, 13 March 2002.

38 Hon Siska, National Assembly, 13 March 2002.

39 Deputy Minister of Labour (Hon Nghindinwa), National Assembly, 13 March 2002.

40 Hon B Amathila, Hon !Naruseb, National Assembly, 13 March 2002.

41 Deputy Minister of Fisheries and Marine Resources (Hon !Naruseb), National Assembly, 13 March 2002.

42 Hon Junius, National Assembly, 13 March 2002.
By the end of the Second Reading debate in the National Assembly, the Deputy Minister of Justice was assuring the House that the bill was not only intended “to face head on the irresponsible attitude of some of the parents, especially fathers” but also “equally intended to force irresponsible children who neglect to maintain their parents, our senior citizens”. 44

The Parliamentary Standing Committee which dealt with the bill recommended an amendment to clarify children’s duties to maintain their parents, 45 and the National Assembly approved an amendment confirming reciprocal duties of support to parents and children under both common law and customary law. 46

Although it was generally conceded that taking care of children is in line with “African custom”, one female MP felt that the bill focused too much on “European values” and not enough on “African customary practices”. 47 One male MP praised the bill for making reference to customary law, but complained that it did not clearly address liabilities under customary law to maintain extended family members. 48

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43 Attorney-General (Hon Ithana), National Assembly, 26 March 2002.
44 Hon Kawana, National Assembly, 8 April 2002.
45 “Report of the Parliamentary Standing Committee on Human Resources, Equality and Gender Development on the Maintenance Bill [B.1-2002]”, November 2002 at 3-4: “Parents are under duty to maintain their children. However, the Committee often finds that parents especially as they grow older are neglected by their children. The current social pension is not adequate to provide for the needs of such parents. This duty should apply also under customary law.”
46 The common law of Namibia already placed a legal liability on children to maintain their parents in appropriate circumstances, so the effect of the amendment was to ensure that this principle also applied to persons subject to customary law. The amendment to section 3(2)(c) stated that “For the purpose of determining whether or not a person who is subject to customary law is legally liable to maintain another person ... the legal principle, which imposes a legal duty on children to maintain their parents must be applied to children and parents who are subject to customary law.” This principle probably existed under the customary law of some communities prior to the Act’s articulation of it.
47 Hon Lucas, National Assembly, 6 March 2002. See also Hon Kaura on the same date.
Key amendments to the Maintenance Bill

The following amendments were proposed by the Parliamentary Standing Committee on Human Resources, Equality and Gender Development and adopted by the National Assembly.

1) The definition of “complainant” and “primary caretaker” were broadened to allow a wider range of persons to seek maintenance on behalf of a child – making it more clear that maintenance is about children’s well-being and not about a tug-of-war between parents and children, and making it possible for institutions which care for children to seek maintenance from the child’s parents.

2) An amendment was added to clarify children’s reciprocal duty to maintain their parents under both common law and customary law, along with guidelines for the application of this principle.

3) The practice of having maintenance summonses served by the maintenance investigator or messenger of the court instead of by police, which had proved in practice to be more efficient, was institutionalised.

4) Factors to guide the provision of maintenance for persons with disabilities were added.

5) The amendments added a new option of suspending a maintenance order for a temporary period (in addition to the options of enforcing, substituting, or discharging it), on the theory that this might be particularly appropriate where the person who is supposed to pay maintenance is temporarily unable to work because of an injury or illness, or is between jobs.

6) The initial bill included a provision allowing claims for contributions to pregnancy and birth expenses to be made within 12 months of the child’s birth. This was amended to make it possible for the court to allow a claim after that time period if the mother can show a good reason for the delay.

7) An amendment explicitly authorised the extension of maintenance orders past the time when a beneficiary turns 18 if that beneficiary is continuing his or her education – a question which had given rise to some confusion in the past.

8) The original bill allowed an employer to deduct administration costs for attaching wages from the amount which was supposed to be paid over to the beneficiary. The Legal Assistance Centre and others objected to this, and an amendment provided administration costs (in an amount prescribed by the court) would be a further deduction from the wages of the person responsible for paying the maintenance.

3.2.2 National Council

The subsequent discussion in the National Council was very short, but followed similar lines as the National Assembly debate – praise for the bill’s even-handedness on the responsibilities of mothers and fathers, praise for attention to children’s reciprocal duties to support their parents, and greater criticism of various behaviours by mothers than of fathers who fail to pay maintenance – with the sharpest censure of women coming from female MPs.49

One female MP complained about women who dump children with grandparents and about the misuse of maintenance money “by the parent in most cases ladies”, but also criticised young men who “pretend as though they don’t have any dependents” despite “how many African men like to have lots of children”.50

49 National Council, 2 June 2003, 3 June 2003, 9 June 2003. The debate was sprinkled with a few Biblical references to the preciousness of children (Hon Tuhadeleni, 2 June 2003; Hon Shangeta, 9 June 2003).


50 Hon Andowa, National Council, 3 June 2003.
Another female MP criticised a range of female behaviour: stepmothers who refuse to accept a man’s children from other women, women who deny fathers access to their children as punishment for their failure to pay maintenance, babydumping, women who fail to take responsibility for contraception, women who indulge in such irresponsible sexual behaviour that they cannot identify the fathers of their children, and women who “use the money to entertain our newly found boyfriends or husbands instead of using it for that child”.51

One male MP also pointed a finger at women: “When we talk about people failing in their duties to support children we do not just mean men. Today we have women who are endlessly giving birth and dump[ing] the children [on] their elderly parents, yet they do not contribute a cent. The bill should seek what to do with those irresponsible ones”.52

However, another male MP emphasised the bill’s recognition of “shared responsibilities” of parents, and gave fairly even-handed criticism of fathers who “relinquish their responsibility” and mothers who abuse maintenance money.53

The National Council passed the bill without amendments on 11 June 2003.

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**Vision 2030**

Vision 2030 was published in 2004 after the Maintenance Act was passed but was written whilst the Act was still a bill; thus, it referred to the need for a new law on maintenance:

*Non-maintenance from fathers is a serious problem, contributing to poverty in female-headed households and the poor quality of life of many children. Existing methods of obtaining maintenance through the courts are not very effective, and need some changes. Maintenance and inheritance laws will be updated and promulgated to provide the maximum benefits to women and children. These laws will be enforced more diligently than at present.*

Part of the vision for 2030 in connection with the family was that the maintenance law would “provide the maximum benefits to women and children within and outside marriage” and be “diligently enforced”.56

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51 Vice Chairperson (Hon Mensah), 3 June 2003.
52 Hon Shangheta, 9 June 2003.
A THUMBNAIL SKETCH OF LAW REFORM ON MAINTENANCE

The South African Maintenance Act [23 of 1963] (the Act) was made applicable to Namibia in 1970. The administration of the Act was transferred to ‘South West Africa’ (Namibia) in 1977, which had the effect of ‘freezing’ the Act as it stood at that date. As in the case of all such South African statutes, South African amendments after the date of transfer applied to ‘South West Africa’ only if this was explicitly stated. The maintenance procedure is thus similar to the South African procedure before the amendments to the South African Maintenance Act.

It became apparent through community dissatisfaction expressed \textit{inter alia} to the Namibian Law Commission [Law Reform and Development Commission] through its Women and Law Committee, Women’s Groups, the Department of Women’s Affairs and the offices of the Legal Assistance Centre that the maintenance rules and procedures were largely inadequate and ineffective. Consequently, the Commission initiated an investigation with the aim of addressing the shortcomings through law reform. During 1993, the Women and Law Committee of the Commission identified the procedure in obtaining and executing maintenance orders as a priority for law reform. At about the same time, the Ministry of Justice forwarded some proposals on this issue to the Commission for its comments. The Legal Assistance Centre in Windhoek was willing to conduct research in this field and to recommend the necessary reforms. Discussions were held by the Legal Assistance Centre, the Women and Law Committee, maintenance officers and magistrates, persons in the Ministry of Justice who are involved in the administration of the maintenance courts, the Office of the Prosecutor General and lower courts in the Ministry of Justice. The Legal Assistance Centre embarked on field research encompassing various regions of the country. The research involved an examination of maintenance court files; interviews with individuals and maintenance court personnel; group discussions, public meetings and consultations with community members.

During 1995, the Legal Assistance Centre published a report entitled ‘Maintenance, a Study of the Operation of Namibia’s Maintenance Courts’. The report covered the legal background, field research, recommendations and a draft bill. The Minister of Justice handed this report to the Commission and its Women and Law Committee for review during late 1995. In many cases, the amendments introduced to the South African maintenance law were followed, where they were considered useful. In the light of the reciprocal enforcement of maintenance orders between Namibia and South African, uniformity was encouraged. Additional amendments provided for unique Namibian situations. The various consultations and the research results indicated that the reforms were required, not so much in the substantive legal rules, but more in the procedural rules and the manner in which these substantive rules are enforced. For this reason, not much comparative legal research was done. Practical solutions had to be found for the local problems experienced by maintenance officers, magistrates, complainants and respondents.

It became apparent that a lack of practical experience and direction contributed to the general inefficacy of the maintenance system. A comprehensive set of regulations providing guidelines for each step in the maintenance process was considered essential and required from the Ministry of Justice without delay. However, it was acknowledged that many of the problems could not be addressed through amendments to the Act nor by the drafting of rules. Many problems are caused by both the social perceptions of the role and the purpose of maintenance courts and the lack of dedication of maintenance officers and officers serving and executing maintenance processes.

Overview of key changes in the 2003 Maintenance Act

The basic principles of the 2003 Maintenance Act are the same as those which previously applied. However, the new law articulated and clarified some of the relevant common law principles, and included mechanisms aimed at more efficient and effective application. It also incorporated more detailed guidelines for maintenance officers and magistrates with the intention of harmonising the work of different maintenance courts. Its other key innovations were:

- the introduction of maintenance investigators, intended to make it harder for people to hide themselves or their assets;
- the possibility of imposing default orders where defendants ignore the summons to come to court to discuss maintenance;
- a wider range of enforcement mechanisms for cases where a person ignores a maintenance order, with greater emphasis on civil enforcement remedies (such as attaching the property, wages or debts of the person who is in arrears) as an alternative to criminal charges;
- the option of requiring payment in kind when someone does not have a cash income to use for maintenance;
- the option of allowing maintenance to be paid directly to the recipient, for example into the recipient’s bank account, instead of requiring all recipients to come to the court to collect the maintenance payments in person (which entails transport costs and sometimes lost working time);
- a new provision allowing claims for contributions to pregnancy and birth-related expenses;
- new provisions making it possible to punish abuse of maintenance money by using it for some purpose other than the beneficiary for whom it was intended; and
- a new provision restricting the publication of any information about maintenance proceedings which might reveal the identity of any child who is involved, to protect the child’s privacy.
Terminology

The term **beneficiary** refers to the person who benefits from a maintenance order. This will usually be a child, but it could also be a disabled or indigent adult, a parent or a husband or wife. The beneficiary is sometimes called a ‘dependant’.

The term **complainant** refers to the person who applies for a maintenance order. The person could be applying on behalf of a beneficiary (such as a child), or for themselves. The complainant will usually be a parent, often the mother, applying for maintenance for her child. Any relative or person who is caring for a child can request maintenance from one or both of the child’s parents. The complainant could also be anyone who has an interest in the wellbeing of the beneficiary, such as a social worker, health care provider, teacher, traditional leader or employer. A child can also make an application for himself or herself.

The term **defendant** refers to the person being requested to pay maintenance.

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4.1 General principles

4.1.1 Purpose of the Maintenance Act

The Maintenance Act provides mechanisms and guidelines for enforcing maintenance responsibilities. It does not create any new legal liabilities for maintenance between family members, although it harmonises customary law with the common law principles on maintenance.

“The purpose of maintenance orders is to help children with day-to-day necessities.”

*S v Gaweseb 2007 (2) NR 600 (HC) (Damaseb, JP) at para 14*

4.1.2 What is maintenance?

Child maintenance

The Act describes child maintenance in these terms:

*The parental duty to maintain a child includes the rendering of support which the child reasonably requires for his or her proper living and upbringing and this includes provision of food, accommodation, clothing, medical care and education.*

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*a Maintenance Act 9 of 2003, section 1.

*b Id, section 1.

*c In most situations, a child cannot bring a case before the court without the assistance of an adult. However this rule is not applied to maintenance hearings due to the unique role played by the maintenance officer in terms of the Maintenance Act; in essence, the maintenance officer performs the functions that would usually be carried out by a legal representative. See pages 51-52.

*d Maintenance Act 9 of 2003, section 1.

1 Id, section 2.

2 Id, section 3(3).
Spousal maintenance

The Act does not provide a corresponding definition of spousal maintenance even though it covers the payment of such maintenance. However, according to a recent High Court divorce case:

_The common law duty to support a spouse includes the provision of accommodation, food, clothing, medical and dental attention and other necessaries of life on a scale commensurate with the social position, lifestyle and resources of the spouses. It is trite that the scope of this duty is determined by the spouses’ standard of living and their standing in the community. The duty to support is not limited to household necessaries. How the support is to be provided will depend on the discretion of the spouses … [T]he obligation to maintain need not necessarily be executed by way of payment of money. A parent is also entitled to tender support in kind, e.g. by providing accommodation or by undertaking to be responsible for certain specified obligations. There is also authority that an order for maintenance may include sufficient money to maintain a motor vehicle._

4.1.3 Legal liability to pay maintenance

The Act states that the duty to provide maintenance is applicable to any relationship where one person has a legal duty to maintain another person. However the statute comes into play only if the person who has a duty to provide maintenance is failing or neglecting to provide reasonable maintenance for the beneficiary despite being able to do so.

Duty of parents to maintain children

Both parents of a child are primarily and jointly responsible for maintaining the child regardless of whether the child is born "inside or outside the marriage of the parents", and regardless of whether the child is from a "first, current or subsequent marriage". Furthermore, the Act makes it clear that all children are equal, in the sense that maintenance must be measured in connection with the child's needs regardless of any other factors such as the order of birth. The Act clearly states that "where a parent has more than one child, all the children are entitled to a fair share of that parent's resources", and that the duty to maintain a particular child does not rank higher than the duty to maintain any other child of the parent (or any other person the defendant has a legal duty to maintain). These principles override any customary laws that may not recognise the duty of both parents to maintain a child.

Despite the common misconception that the Act is biased towards women, the Act is gender neutral. The fact that women utilise the law more than men is not related to anything in the law itself, but stems from gender roles in Namibian society, where women still play the primary role in child care and at the same time suffer greater economic disadvantages than men.

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3 For example, the Act states that husbands and wives are primarily responsible for each other's maintenance regardless of any customary law to the contrary. Id, section 3(2)(a). See also section 26(4) on the period which may be covered by an order for spousal maintenance.


5 Maintenance Act 9 of 2003, section 2(a).

6 Id, section 5.

7 Id, section 3(1)(a) and (b).

8 Id, section 4(1)(d).

9 Id, section 4(1)(c).

10 Id, section 3(1)(c) and (2)(b).

11 The relative economic position of men and women in Namibia is discussed in chapter 2.
“Why should men be subjected to pay maintenance? Are all people equal before the law in Namibia? ... The Maintenance Act should be revised.”

“I’m a single father ... The mother of the kid works. Does she also have to pay maintenance?”

Text message queries sent to the Legal Assistance Centre in 2010, showing that some people are not aware that the Act is gender neutral.

However, joint parental responsibility for child maintenance does not necessarily mean that both parents’ contributions to the cost of raising a child will be equal. The parent’s respective resources must be applied according to the needs of the child. The duty must be shared on the basis of how much money each parent earns and what assets they possess. Therefore the cost of raising a child will not necessarily be divided equally between the mother and the father.

**Sharing the duty of maintenance in accordance with respective resources**

- If one parent has no income or property at all, then the other parent will have to carry 100% of the costs of maintenance.
- If one parent has some small income and the other parent earns more, then the child’s expenses might be divided accordingly – such as 20% for the parent with the small income and 80% for the other parent.

**How the court decides what is fair: An example**

The Namibian case of Van Zyl v Fourie (decided under the previous Maintenance Act of 23 of 1963) explains how the court considers the parent’s respective financial needs and resources. This case involved maintenance for a 5-year-old child.

According to this case, a good starting point is to see what monthly amount is needed to maintain the child. The mother provided information on the cost of rent, water and electricity, child care, pre-primary school fees, clothing, groceries and the cost of putting the child on her medical aid scheme. She did not provide documentation for all of these expenses, but this was not necessary. For example, the magistrate found that a monthly expenditure of N$1,400 on groceries in Mariental was reasonable, on the basis of his own experience that prices are high there due to the lack of competition. The mother said that she might be able to reduce the grocery bill if the family cut back to bare basics. But the court said that there is no reason for the mother and child to cut back on their standard of living unless it is unreasonable or beyond the means of the parties.

The next step is to look at the financial resources and circumstances of each parent. The father was a single man, and his monthly salary was more than three times what the mother was earning. The Court found that he could afford to pay maintenance of about N$1,000/month. The father claimed that he was in debt and was not able to make ends meet. But the Court found that he could afford the maintenance payments if he made some adjustments to his lifestyle, such as finding cheaper accommodation. He was paying over N$4,000/month on a bond for his house, so the Court suggested that he could sell the house and rent a flat for about N$2,000/month. According to the Court, “he should do so if the needs of his child require it”.

To test the fairness of the respective contributions from each parent, the Court calculated what percentage of their respective incomes the mother and father would be paying towards their child’s basic needs. The mother would be paying 12% of her monthly income and the father would be paying 11% of his monthly income. This would clearly be fair.

Van Zyl v Fourie 1997 NR 85 (HC)

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12 Maintenance Act 9 of 2003, section 3(2)(b) and 4(1)(b).
13 Id, section 3(3) and section 4(1)(d).
Retrospective maintenance

Under the Maintenance Act 23 of 1963, a complainant could not apply for the retrospective costs of caring for a child – but a parent who has contributed more than his or her fair share towards past maintenance has a right under the common law to recover the excess amount from the other parent.

The theory on this issue was set forth in detail in the 1990 South African case of S v Frieslaar. A child has a claim for maintenance against each of his or her parents based on their legal liability to maintain their child. This claim is not based on a court order setting a particular amount of contribution. The purpose of such a court order is not to establish the duty to maintain, but to apportion the maintenance obligation between the parents based on the needs of the child and the ability of each parent to contribute. Since maintenance is a joint liability between the parents, the general principles on joint liability are applicable; this means that a parent who has contributed more than his or her fair share towards a child’s maintenance is entitled to recover the excess from the other parent.

The Frieslaar case noted that the definition of “maintenance order” in the 1968 Act included two features important to the question of whether or not such an order could include an amount for recovery of past maintenance: the requirement (a) that such an order must provide for periodical payments and (b) that these payments must be towards the maintenance of another person. The Court then concluded: “Where the purpose of an order for periodical payments is not to maintain another person, but to reimburse another person for having maintained a third person, the order does not, in my view, qualify as a maintenance order. Such an order is not directed towards the payment of maintenance for any person but towards the reimbursement of such person.”

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14 S v Frieslaar 1990 (4) SA 437 (C). The Maintenance Act 23 of 1963 was applicable at that time to both Namibia and South Africa.

15 At 438F-G, citing Herfst v Herfst 1964 (4) SA 127 (W) at 130C – D.

16 On this point, the Frieslaar case cites Herfst v Herfst 1964 (4) SA 127 (W) at 130F, Farrel v Hankey 1921 TPD 590 at 596, Woodhead v Woodhead 1955 (3) SA 138 (SR), Williams v Shub 1976 (4) SA 567 (C) and Harwood v Harwood 1976 (4) SA 586 (C). Farrel v Hankey 1921 TPD 590 at 596 states:

The Roman-Dutch authorities are quite clear that the burden of supporting the children, whether before or after a divorce, is a burden common to the two spouses, the only qualification being that it is distributable between them according to their means. An order of Court determines that distribution, but, where there is no order, it seems to me that the usual principles of joint obligations apply. If one of the spouses contributes more than his or her share – at any rate where they are divorced, that spouse is entitled to recover the proportion due by the other spouse according to their means. To hold that there can be no recovery unless a prior order of Court has been obtained would mean that the spouse really prepared to perform the natural obligation of supporting the children is to be penalised.

On this common law right of recovery, see also JG v CG 2012 (3) SA 103 (GSJ), Africa v Africa 1985 (1) SA 792 (SWA) and Van der Harst v Viljoen 1977 (1) SA 795 (C). In Van der Harst v Viljoen 1977 (1) SA 795 (C), which was brought under the common law rather than under the Maintenance Act 23 of 1968, a mother recovered lying-in expenses, a contribution to “past maintenance” up to the date of summons, a sum in respect of “maintenance from the date of summons to the date of judgment”, interest on all these amounts from the date of judgment to the date of payment and an order for future monthly maintenance contributions commencing from the date of judgment.

A similar approach was taken in Williams v Shub 1976 (4) SA 567 (C), in respect of a common-law claim for recovery of payments towards a child’s maintenance in excess of that parent’s proper proportionate share; the Court said at 570: “Although the claim might not strictly be called one for maintenance it is so closely connected with it as to be substantially the same thing.” However, the Frieslaar case followed Herfst v Herfst 1964 (4) SA 127 (W) in holding that a claim for recovery of excessive past contributions to maintenance “is not strictly for arrear maintenance, but for the indemnification by one joint debtor for the expenditure or indebtedness actually incurred at the time the need therefor arose by the other joint debtor” (Frieslaar at 438H, quoting Herfst at 130F). See also Boberg at 243.

17 Section 1 of the Maintenance Act 23 of 1963 defined “maintenance order” as “any order for the periodical payment of sums of money towards the maintenance of any person made by any court (including the Supreme Court of South Africa) in the Republic and, except for the purposes of s 11, includes any sentence suspended on condition that the convicted person make periodical payments of sums of money towards the maintenance of any other person”.

18 S v Frieslaar 1990 (4) SA 437 (C) at 439F-H. The Court further noted that section 5(4) of the Maintenance Act 23 of 1963 allows a court to make a maintenance order where no such order is in force “against any person proved to be legally liable to maintain any other person for the payment during such period and at such times and to such officer, organisation or institution and in such manner as may be specified in the order, of sums of money so specified, towards the maintenance of such other person”. The Court found that the phrase “proved to be legally liable to maintain any other person” would seem to refer only to current and future maintenance, and was “inapt” for the recovery of arrear maintenance which preceded the court order. At 4391-440A.
The Court, however, also acknowledged that past and present situations cannot always be neatly separated:

*Of course, arrear maintenance could very easily impact on current maintenance. The present financial needs of a claimant are often shaped by his financial history. The more a claimant’s resources have been depleted by a defendant’s neglect in the past to contribute to maintenance, the greater her need for future maintenance might be. This means that although a maintenance order cannot be made in respect of the past it can take the past into account.*

In contrast, a maintenance order made in terms of the Maintenance Act 23 of 1963 in substitution of an existing maintenance order could have retrospective effect.

This situation was subsequently changed in South Africa, where the Maintenance Act 99 of 1998 explicitly allows a complainant to apply for “expenditure incurred by the mother in connection with the maintenance of the child from the date of the child’s birth to the date of the enquiry”. It is not clear why this possibility is limited to mothers; the provision in question couples this retrospective maintenance with birth expenses, but it is not hard to imagine a situation where a father takes over the care of a child from birth.

In Namibia, the current law is somewhat ambiguous. Section 17(2)(a) states that a maintenance order “must direct the defendant to contribute to the maintenance of the beneficiary from the date specified in the order”. There is nothing in the Act which limits “the date specified in the order” to a future time period only, and the definition of “maintenance order” no longer makes reference to periodical payment towards the maintenance of another person. No Namibian case law could be located on the question of including retrospective maintenance contributions in a maintenance order. Therefore, it is still an open question as to whether the 2003 Act allows initial maintenance orders to have a retrospective effect.

However, even if the 2003 Act is interpreted not to allow a maintenance order with retrospective effect, the persuasive South African precedents discussed above indicate that the parent who contributed more than his or her fair share in the past would have a right to bring a civil action against the other parent to recover the excess amount already paid for maintenance. In practice, however, such a legal proceeding would be impractical for most persons in Namibia. It would make more sense to allow the reimbursement for past maintenance to be dealt with by the maintenance court at the time of making a maintenance order.

We recommend an amendment to the Maintenance Act to clearly provide that a maintenance order may include an amount to reimburse the complainant 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 not be creating any new legal right, since recovery of such maintenance is already possible under the common law. But it would make the procedure for recovering such maintenance more realistically accessible, and it might encourage parents to take maintenance responsibilities more seriously.

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19 *S v Frieslaar* 1990 (4) SA 437 (C) at 438-440 (some citations omitted).
20 *Strime v Strime* 1983 (4) SA 850 (C). In the *Frieslaar* case, the court noted this and then stated that “it does not follow” that a maintenance order made for the first time can similarly have retrospective effect. At 440C-F.
21 Maintenance Act 99 of 1998 (South Africa), section 16(1)(a) (ii).
22 Maintenance Act 9 of 2003, section 17(2)(a), emphasis added.
23 Section 5(a) of the current law states, in wording similar but not identical to that of the 1963 Act, –

* A maintenance court must not make a maintenance order unless it is satisfied that the person against whom the order is sought –
  (a) is legally liable to maintain the beneficiary ...

However, this language does not appear to point in one way or the other on the question of recovery of retrospective maintenance contributions.
24 Maintenance Act 9 of 2003, section 1 (definition of “maintenance order”).
Pregnancy and birth-related expenses

A maintenance order can also include an order for contributions to pregnancy and birth-related expenses, such as medical and hospital expenses incurred by the mother. Unless there is a reasonable explanation for a delayed claim, requests for pregnancy and birth-related expenses must be made within 12 months from the date of birth of the child.25

Can a woman apply for pregnancy-related expense prior to the birth of the child? The Act is not clear on this point. The relevant provision, section 17(3), reads:

*If the beneficiary of a maintenance order is a child, the maintenance court may order that maintenance contributions be made to the mother of the child for expenses incurred by the mother in connection with the pregnancy and birth of the child, including but not limited to medical and hospital expenses, but a claim under this subsection must be made within 12 months from the date of birth of the child or within such other reasonable period as the court may allow on sufficient grounds shown by the mother [emphasis added].*

The phrases emphasised in the passage above could arguably be used to argue either approach – and in practice, it appears that some courts allow claims during pregnancy whilst other courts do not.

The provision is conditioned on the fact that the beneficiary is a *child*. The ultimate beneficiary of contributions towards pregnancy and birth-related expenses is the child who is to be born, but in the eyes of the law, a foetus is not the same as a “child” since Namibian law considers personhood for legal purposes to begin only at birth.

Foetuses are protected by a legal concept called the *nasciturus* fiction, whereby the rights and interests of a foetus are “kept in abeyance” until after live birth, at which point the child is then able to exercise them; in other words, the foetus does not have legal rights, but after birth certain rights accrue to the child as if they dated from the time of his or her conception rather than the time of his or her birth. For example, if a pregnant woman is injured and these injuries result in injuries to the child subsequently born, the child is entitled to compensation for the injuries originally obtained as a foetus. The *nasciturus* fiction can also operate in the area of succession. Normally an heir can only inherit if he or she is alive at the death of the testator – but where an unborn foetus would be an heir after birth, the division of the estate is postponed to determine if there is a live birth; if so, the child will share in the estate as if he or she had been alive when the testator died.26 This fiction could also be understood to apply in respect of pregnancy expenses which can affect the health and wellbeing of the child to be born – such as expenses associated with ante-natal clinic visits, nutritious food and vitamin supplements. However, applying the *nasciturus* fiction, the rights could not be claimed until there was a live birth resulting in a “child”.

Whether or not this would bar a claim of pregnancy-related expenses before the birth would depend on whether the right to claim contributions was viewed as a right which must be asserted by or on behalf of the *child*, or a right which accrues to the *mother* as a co-parent.

The provision suggests that the claim is for reimbursement to the mother, as a right accruing to the mother, when it refers to the provisions also refers to contributions being made “to the mother” for expenses “incurred by the mother” – suggesting that she could claim reimbursement at any time after the expenses have been incurred, regardless of whether or not the child has already been born.

25 Id, section 17(3).

If a mother can only claim reimbursement for such expenses after the fact, then she may not be able to afford them at all. In such cases, pregnancy-related expenses which might have benefitted the child will not be incurred, and the child to be born will not experience the benefits which he or she could have enjoyed. Even more concerning is the fact that the mother’s inability to afford critical expenses during pregnancy could lead to developmental problems and result in a baby that is born prematurely or with a detrimental condition that could have been avoided. In these cases the maintenance required to care for the child will probably be far higher than if maintenance had been paid during pregnancy.27

One problem with allowing a claim for pregnancy-related expenses to be made before the child’s birth concerns cases where the paternity of the unborn child is contested. Whilst it is theoretically possible to obtain samples of DNA from a foetus, this entails risks to the foetus and would not normally be done.28 However, the standard presumptions regarding paternity could be applied and the defendant given a chance to disprove them (even after the child’s birth if necessary).29

It would be in the child’s best interest to allow claims for pregnancy-related contributions to be made before birth, even if mothers in cases where paternity is mistaken or falsified subsequently have to refund these payments to the defendant (perhaps after claiming them from the actual father). The possibility of having to make a future refund if paternity was subsequently disproved would probably deter false representations of paternity by pregnant women.

We recommend that the Maintenance Act be amended to make it clear that contributions to pregnancy-related expenses may be claimed before the child is born, and to provide for a procedure for refunds should paternity be disproved at a later stage. The failure to repay such contributions if paternity is later disproved could have the same penalties as the failure to pay maintenance. A complainant who was required to repay such contributions should also have a clear right to make a claim for corresponding contributions to pregnancy-related expenses from the person who has been identified as the actual biological parent.

Major children

At common law, the legal duty to maintain a child extends beyond the age of majority, as the need for support rather than the child’s status as a minor is the determining factor.30 The duty of support could extend indefinitely in the case of a child who is chronically ill or disabled, but it can also apply in a case where there is simply a need for support. If the child is a major, the onus of providing that parental support is required lies with the child, and a major child is not entitled to support on such a generous a scale as a minor child.31

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27 In contrast, South Africa’s Maintenance Act 99 of 1998 does not clearly cover pregnancy-related expenses, but only “expenses incurred by the mother in connection with the birth of the child”. Maintenance Act 99 of 1998 (South Africa), section 16(1)(a) (ii). The regulations shed no further light on this phrase, and we have not been able to locate any case law interpreting it.

28 A paternity test can be done during pregnancy but the process is invasive and so has some risk. Prenatal paternity tests do not appear to be available in Namibia. Furthermore some doctors may not be willing to conduct a prenatal paternity test, on the grounds that a mother who finds that the father is not who she thought may wish to have an abortion – which is available only under limited circumstances in Namibia. Even in countries where abortion is more widely available, some doctors may be unwilling to conduct a prenatal paternity test for this reason. For more information see “What is a prenatal paternity test?” <www.nhs.uk/chq/Pages/what-is-a-prenatal-paternity-test.aspx?CategoryID=61&SubCategoryID=615>, accessed 22 September 2013.

29 As discussed on page 55, the provisions in the Children’s Status Act on the presumption of paternity under certain conditions are relevant to maintenance complaints.

30 See Ex parte Jacobs 1982 (3) SA 276 (O); Bursey v Bursey 1999 (3) SA 33 (SCA).

31 See Gliksman v Talekinsky 1955 (4) SA 468 (W); Kemp v Kemp 1958 (3) SA 736 (D); Hoffmann v Herdan NO 1982 (2) SA 274 (T); Ex parte Jacobs 1982 (2) SA 276 (O); Sikatele v Sikatele [1996] 1 All SA 445 (Tk); B v B 1997 (4) SA 1018 (SE); Bursey v Bursey 1999 (3) SA 33 (SCA).
The Maintenance Act contains no bar to maintenance orders in respect of major “children” since the basic requirements for a maintenance complaint are that there is a legal liability to maintain and that maintenance is not being provided in practice.32

**Maintenance of major children**

“Although the duty of support persists into the child’s majority, the nature thereof changes. It is then confined to necessaries; in other words, the child must be in indigent circumstances in the sense that he or she is in need of a contribution towards his or her maintenance.”

*B v B* 1997 (4) SA 1018 (SE)

**Duty of children to maintain parents**

Children have a duty under certain circumstances to maintain their parents. This will usually apply only after the children have become adults themselves, but minor children can in theory be expected to contribute towards the maintenance of their parents in appropriate circumstances.33

The duty of a child to maintain a parent applies only where all of the following circumstances apply:

1. the parent is unable to maintain himself or herself due to circumstances beyond that parent’s control;
2. the child is able to maintain him or herself and be able to support the parent; and
3. there is no other person who is legally liable to maintain the parent, such as a spouse.34

As in the case of the duty of parents to maintain their children, this principle overrides any customary laws to the contrary.35

Some South African cases have held that the duty of a child to maintain a parent arises only where the parent would be otherwise indigent, in “extreme need or want for the basic necessities of life”.36 However, other cases have taken the view that what constitutes “necessities” depends on the parent’s station in life.37 The Maintenance Act 9 of 2003 seems to accord with the latter approach, seeing that it specifies that the “lifestyle” of each of the relevant persons must be taken into account as a factor in any maintenance order.38

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32 Maintenance Act 9 of 2003, section 9(2). The term “child” is not defined, leaving open the possibility of interpreting it in context. The references to “child” in section 26 on the duration of maintenance orders make sense only if they refer to minors (“when … the child attains the age of 18 years”, “until the child attains the age of 21 years”, etc.) Thus, they would not appear to apply to a major “child” who is unable support himself or herself. In contrast, the references to “child” in section 4(2), which concerns a “child’s” duty to maintain parents, would make sense only if they encompassed adult offspring.

33 Oosthuizen v Stanley 1938 AD 322: “The fact that a child is a minor does not absolve him from his duty, if he is able to provide or contribute to the required support.” See also the discussion of this issue by Milne AJA in *Anthony and Another v Cape Town Municipality* 1967 (4) SA 445 (A).

34 Maintenance Act 9 of 2003, section 4(2). The primacy of looking to spousal support also applies at common law. See *Manuel v African Guarantee and Indemnity Co Ltd and Another* 1967 (2) SA 417 (R).

35 Maintenance Act 9 of 2003, section 3(2)(c).

36 Smith v Mutual & Federal Insurance Co Ltd 1998 (4) SA 626 (C) at 632D-E. See also Petersen v South British Insurance Co Ltd 1967 (2) SA 235 (C), *Anthony and Another v Cape Town City Council* 1967 (4) SA 445 (A) and *Van Vuuren v Sam* 1972 (2) SA 633 (A).

37 Jacobs v Road Accident Fund 2010 (3) SA 263 (SE) at para 20, citing *Wigham v British Traders Insurance Co Ltd* 1963 (3) SA 151 (W) at 153H – 154A: “[T]he authorities furthermore make it clear that in order to succeed a plaintiff is not required to show that she would be reduced to abject poverty or starvation and be a fit candidate for admission to a poor house unless she received a contribution. The Court must have regard to her status in life, to what she has been used to in the past and the comforts, conveniences and advantages to which she has been accustomed …” and Oosthuizen v Stanley 1938 AD 322 at 327-328: “Support (alimenta) includes not only food and clothing in accordance with the quality and condition of the persons to be supported, but also lodging and care in sickness … Whether a parent is in such a state of comparative indigency or destitution that a Court of law can compel a child to supplement the parent’s income is a question of fact depending on the circumstances of each case …”

38 Maintenance Act 9 of 2003, section 16(2)(a).
In the past, under the common law, children born outside marriage did not have a duty to maintain their fathers even though their fathers had a duty to maintain them. This was changed by the Children’s Status Act 6 of 2006, which states that despite anything to the contrary contained in any law, no distinction may be made between persons born inside and outside “in respect of the legal duty to maintain a child or any other person”. This means that the duty of support between children born outside of marriage and their parents is now completely reciprocal, in the same manner as for children born inside marriage.

A child’s duty to maintain a parent applies only in blood relationships, not in informal “foster parent” relationships

In the Koyoka case, a man took in a young boy who was not related to him. The boy’s parents were poor, so the man gave him a home, paid his school fees and treated him like his own son. The boy eventually graduated from college and got a job as a teacher. The man who had helped him ran into hard times as he aged and his business failed, leaving him in dire need of help. However, the Court ruled that the teacher who had once received assistance from him had no legal duty of support towards him. The two had no blood relationship, and there was no formal adoption. There might be a moral duty of support, but the elderly man was not entitled to utilise the Maintenance Act.

S v Koyoka 1991 NR 369 (HC)

Duty of a husband and wife to maintain each other

The Maintenance Act makes it clear that husbands and wives are “primarily responsible for each other’s maintenance”, regardless of any customary law to the contrary. However, it leaves open the question of the duty of support in religious marriages which may not fit under the umbrella of either civil or customary marriage – such as Muslim or Hindu marriages.

The duty of maintenance in religious “marriages”

In recent years, the South African courts have recognised the legality of Muslim marriages for several specific purposes – including the duty of maintenance between spouses. Before South Africa’s new constitutional order was in place, such marriages were not afforded recognition, primarily on the basis that this would be against public policy because of their polygamous or potentially polygamous nature. After South Africa became a constitutional democracy, the courts gradually recognised unregistered Muslim marriages as marriages for a range of purposes, including the duty of spousal maintenance; initially only de facto monogamous Muslim marriages were given such recognition, but then de facto polygamous Muslim marriages also began to receive such recognition.

The first case to address maintenance in a Muslim marriage in light of constitutional principles was Ryland v Edros, where a woman who had been married and divorced in terms of Muslim rites succeeded in asserting a right to maintenance on the basis of the contractual agreement which formed

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40 Children’s Status Act 6 of 2003, section 17(1). In South Africa, the common-law distinction in respect of children born outside marriage was found to constitute an unjustifiable form of unfair discrimination on the ground of birth and an unjustifiable infringement of the dignity of such children, as well as being clearly contrary to the best interests of extra-marital children. Petersen v Maintenance Officer, Simon’s Town Maintenance Court, and Others 2004 (2) SA 56 (C).
41 Maintenance Act 9 of 2003, section 3(2)(a).
42 See Esop v Union Government (Minister of the Interior) 1913 CPD 133 and Ismail v Ismail 1983 (1) SA 1006 (A). Dicta in case of Fraser v The Children’s Court, Pretoria North 1997 (2) SA 261 (CC) summarised the prevailing legal view in the pre-constitutional era: “Unions which have been solemnised in terms of the tenets of the Islamic faith for example are not recognised in our law because such a system permits polygamy in marriage. It matters not that the actual union is in fact monogamous. As long as the religion permits polygamy, the union is “potentially polygamous” and for that reason, said to be against public policy ...” (at paragraph 21, footnotes omitted).
Chapter 4: Overview and Critique of the Maintenance Act 9 of 2003

the basis of the marriage, with the Court stressing that its ruling need not necessarily be followed in the case of an Islamic marriage which was in fact polygamous (as opposed to being merely potentially polygamous).43

In *Amod v Multilateral Motor Vehicle Accidents Fund*, the South African Supreme Court of Appeal took a more generalised approach to Muslim marriage, considering whether the common law should be developed to recognise a general duty of support arising from such marriages for the purposes of supporting a claim for loss of support. The Court applied a two-pronged test, asking firstly, whether a Muslim marriage created a legal duty of support, and secondly, whether the right to support deserved legal recognition and protection for the purposes of an action against a third party.44 The Court here again emphasised the *de facto* monogamous nature of the particular marriage in question:

*The insistence that the duty of support which such a serious de facto monogamous marriage imposes on the husband is not worthy of protection can only be justified on the basis that the only duty of support which the law will protect in such circumstances is a duty flowing from a marriage solemnized and recognised by one faith or philosophy to the exclusion of others. This is an untenable basis for the determination of the boni mores of society. It is inconsistent with the new ethos of tolerance, pluralism and religious freedom ...* 45

The Court specifically refrained from comment on whether a spouse in a *de facto* polygamous Muslim marriage could make a similar claim for loss of support.46

However, in *Khan v Khan*, a duty of support was found to exist in a *de facto* polygamous Muslim marriage. In this case, a male appellant claimed that the polygamous nature of his marriage meant that he was not liable during the course of the marriage to provide spousal maintenance.47 In dismissing this claim, the High Court stated that it would be “blatant discrimination to grant, in the one instance, a Muslim wife in a monogamous Muslim marriage, a right to maintenance, but to deny a Muslim wife married in terms of the same Islamic rites and who has the same rights and beliefs as the one in the monogamous marriage, a right to maintenance” – noting that public policy considerations involved in the task of interpreting legislation such as South Africa’s Maintenance Act 99 of 1998 “have changed with the advent of the Constitution”.48 Significantly, the court noted in this case that the “common-law duty of support is a flexible concept that has been developed and extended over time by our Courts to cover a wide range of relationships”.49

The same result occurred in the unreported 2006 case of *Cassim v Cassim*, where a defendant married in accordance with Islamic law was held to be under a duty to maintain his spouse by “providing for her reasonable needs in terms of the *Maintenance Act*”.50 Various recent South African cases have also found a spouse in a Muslim marriage eligible for interim maintenance pending a divorce in terms of Rule 43 of the Uniform Rules of Court.51

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43 *Ryland v Edros* 1997 (2) SA 690 (C).
45 At paragraph 20 (citations omitted).
46 At paragraph 24: “I have deliberately emphasised in this judgment the *de facto* monogamous character of the Muslim marriage between the appellant and the deceased in the present matter. I do not thereby wish to be understood as saying that if the deceased had been party to a plurality of continuing unions, his dependants would necessarily fail in a dependant’s action based on any duty which the deceased might have towards such dependants. I prefer to leave that issue entirely open.”
47 *Khan v Khan* 2005 (2) SA 272 (F).
48 At paragraph 11.11.
49 At para 10.1.
50 *Cassim v Cassim* Part A, TPD, unreported 2006-12-15; case number 3954/06, as discussed and referenced in in para 7 of *AM v RM* [2009] ZAECPEHC 31 (29 May 2009).
51 For instance, in *H v D* 2010 (4) BCLR 362 (WCC) ; [2010] 2 All SA 55 (WCC), a defendant responded to a claimant’s application for maintenance by asserting that Islamic marriages are excluded from Rule 43 because it uses the words “matrimonial action” and “spouse”. The High Court disagreed, holding that the term “spouse” in this context includes
Furthermore, in *Daniels v Campbell and Others*, the South African Constitutional Court held that the term “spouse” in the Intestate Succession Act 81 of 1987 must be read to include the surviving partner to a monogamous Muslim marriage and that the term “survivor” in the Maintenance of Surviving Spouses Act 27 of 1990 must also be read in this way. The holding in the *Daniels* case was limited to Muslim marriages which are de facto monogamous. However, polygamous Muslim marriages were addressed by the Constitutional Court in *Hassam v Jacobs*, which held that the Marriage Act 25 of 1961 and the Intestate Succession Act 81 of 1987 violate the constitutional prohibitions on discrimination if they are interpreted to provide for only one Muslim spouse to be an heir to the estate of a deceased husband.

Judicial consideration of Hindu marriages in South Africa has followed a similar line to that of Muslim marriage, although the specific issue of the duty of maintenance in such marriages has not yet been canvassed.

Although we could locate no Namibian cases on the duty of support between husband and wife in such religious “marriages”, it is likely that the law would develop similarly in Namibia as in South Africa given the two countries’ similar constitutional regimes as well as the similarity of the respective Maintenance Acts. However, the very fact that this question would arise only amongst tiny religious minorities in Namibia means that jurisprudential development could be extremely slow to materialise.

Therefore we recommend that the Maintenance Act be amended to place marriages concluded in accordance with generally-recognised religions on the same footing as civil and customary marriages for purposes of the mutual duty of support of spouses. In this regard, it should be noted that there are already several Namibian statutes which define spouse or marriage or related terms to include a partner in an unregistered “marriage” which is recognised under a particular religion.

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52 *Daniels v Campbell NO and Others* 2004 (5) SA 331 (CC).
53 At para 376.
54 *Hassam v Jacobs NO and Others* 2009 (5) SA 572 (CC). In discussing the failure of the Intestate Succession Act to afford benefits to widows of polygamous Muslim marriages, the Court noted: “By discriminating against women in polygamous Muslim marriages on the grounds of religion, gender and marital status, the Act clearly reinforces a pattern of stereotyping and patriarchal practices that relegates women in these marriages to being unworthy of protection … by so discriminating against those women, the provisions in the Act conflict with the principle of gender equality which the Constitution strives to achieve. That cannot, and ought not, be countenanced in a society based on democratic values, social justice and fundamental human rights.” At para 37.
55 A claim for a broad recognition of Hindu marriages failed in the 2007 case of *Singh v Ramparsad* 2007 (3) SA 445 (D), where the wife sought an order recognising the marriage under the Marriage Act 25 of 1961 and the Divorce Act 70 of 1979. The court noted that the couple had the option to register their marriage under the South African Marriage Act, either after the celebration of the Hindu rites and rituals or by having a civil marriage performed by a marriage officer in tandem with the Hindu rites. Furthermore, the Court was not prepared to become involved in religious matters by pronouncing a divorce from a marriage where the parties took religious vows which did not countenance divorce. Because the Marriage Act “provides a compromise which permits parties to marry according to the tenets of their religion and obtain secular recognition through the process of registration”, the Court found that there was no violation of the plaintiff’s dignity or equality rights. However, despite this refusal to give general recognition to an unregistered Hindu marriage, in *Govender v Ragavayah NO and Others* 2009 (3) SA 178 (D), the same court ruled that an unregistered Hindu marriage falls within the meaning of “spouse” in the Intestate Succession Act 81 of 1987, even though such marriages are not generally valid in law.
56 The Pension Funds Act 24 of 1956 in section 1 defines “dependant” in relation to a member of the fund to include certain persons not legally liable to maintenance from the fund member, including “the spouse of the member, including a party to a customary union according to Black law and custom or to a union recognized as a marriage under the tenets of any
Cohabitation and maintenance

Cohabitation refers to people who are living together as husband and wife without being formally married. This is a type of intimate relationship which is relevant to significant numbers of Namibians. While it is difficult to gauge the precise prevalence of cohabitation relationships in Namibia, the practice is certainly common. National surveys indicate that at least one-fifth of Namibians in the prime of their adulthood are living together without being formally married, and this is likely to be an underestimate. The lowest figure of all the national surveys considered comes from the 2001 census, which found that 7% of the population age 15 and over was living together informally; in the 2011 census, this figure was 8%. Other surveys have produced much higher figures. Even if the relatively low estimates from the censuses are correct, this means that over 107,000 adults in Namibia were cohabiting at the time of the most recent census.

The current Namibian law on cohabitation is based primarily on common law principles. In terms of the common law, there is no legal duty of support between cohabitants either during the relationship or when it ends.1

In 2010 the Legal Assistance Centre released a study on the status of cohabitation in Namibia. The purpose of the report was to gauge public opinion on the need for law reform and to make recommendations for legislative change.

One of the report’s recommendations is that certain automatic protections should apply to couples who have lived together for at least 2 years (or couples who have lived together for a shorter time period but fulfill specified criteria) – with one of these protections being a mutual duty of support during the relationship and a limited right to maintenance after the relationship ends, where this is necessary to compensate for some economic disadvantage suffered by one partner as a result of the relationship.

However, as the law now stands, cohabiting partners have no legal liability to maintain each other and thus cannot make use of the Maintenance Act (unless they conclude a contract between themselves in respect of maintenance).2

Duty of maintenance between other family members

There is also a mutual duty of support between certain blood relatives, starting with the family members who are closest to each other.

The mutual duty of support that exists between parents and children can extend to other living ancestors and descendants. But this applies only if the parents or children cannot fulfill their duty of maintenance for some reason. For example, if a child’s parents are deceased or unable to maintain the child, the duty of support next passes to the grandparents (both paternal and maternal grandparents),

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1 See, for example, Volks NO v Robinson and Others 2005 (5) BCLR 446 (CC), dictum in paras 54-55, applied in McDonald v Young 2012 (3) SA 1 (SCA).

then to the great-grandparents and so on. In the same way, the child’s duty to support his or her parents would pass next to grandchildren, then great-grandchildren and so on.  

In the past, the common-law rules made a distinction between children born inside and outside marriage on this point: only the maternal grandparents had a duty to maintain a child born outside of marriage; the father’s duty to maintain a child born outside marriage did not pass to the paternal grandparents. Furthermore, the reciprocal duty of support on the part of children born outside of marriage applied only to their blood relations on the mother’s side. This situation was changed by the Children's Status Act 6 of 2003, which has as one of its objectives “to ensure that no child suffers any discrimination or disadvantage because of the marital status of his or her parents”. More specifically, this Act states that despite anything to the contrary contained in any law, no distinction may be made between persons born inside and outside “in respect of the legal duty to maintain a child or any other person”. This means that the duty of support in respect of children born outside marriage applies reciprocally to family members on both the mother’s side and the father’s side of the family, in the same way as for children born inside marriage.  

The duty of support can also extend to other blood relatives. For example, if the parents cannot provide maintenance, brothers and sisters (and half-brothers and half-sisters) also have a duty to maintain each other – but their duty is not as strong as that of parents and grandparents. For example, in a case where a parent might be expected to provide for university education for a child, this level of maintenance might not be expected from a brother or sister. The duty to provide maintenance spreads outward in the family. Nearer blood relatives are expected to help if they can, before the duty passes on to more distant blood relatives. For example, a brother would be expected to help before the duty of support would pass to a half-brother. However, the common law duty of support amongst collateral relatives does not extend to uncles/aunts and nieces/nephews.

In terms of the common law, the duty of support between parents and children does not extend to family members who are related only by marriage. This means that there is no duty of maintenance on step-parents, although where a couple are married in community of property, their joint estate is liable for the maintenance of a biological child of either of them.

The custom law in different communities may apply different rules about the duty of support between extended family members which could be the basis for a legal liability to maintain. However the Maintenance Act overrules any customary law which is inconsistent with its basic principles regarding the duty of support.

58 Motan and Another v Joosub 1930 AD 61.
59 Children’s Status Act 6 of 2003, section 2.
60 Id, section 17(1). In South Africa, the common-law distinction in respect of children born outside marriage was found to constitute an unjustifiable form of unfair discrimination on the ground of birth and an unjustifiable infringement of the dignity of such children, as well as being clearly contrary to the best interests of extra-marital children. Petersen v Maintenance Officer, Simon’s Town Maintenance Court, and Others 2004 (2) SA 56 (C).
64 Schäfer, Family Law Service, Issue 34, Cape Town: Butterworth Publishers (Pty) Ltd, 2000, “Division C- Maintenance”, section C16. See Stepfamilies in Namibia: A Study of the Situation of Steppeparents and Stepchildren and Recommendations for Law Reform, Windhoek: Legal Assistance Centre (LAC), 2011, for a discussion of whether stepparents should be liable to pay maintenance. The recent case of MB v NB 2010 (3) SA 220 (GSJ) placed a liability on a stepparent to provide a limited degree of maintenance (in the form of contributions to school fees) based on the stepfather’s treatment of the stepson as his own, including participation in the step-son’s assumption of his surname, and his promise to share in the costs of this schooling. However, the Court did not equate recognise the relationship as being a “de facto adoption” (see para 22-27), nor did it find a “general duty to support” (at para 28). See also Flynn v Farr NO and Others 2009 (1) SA 584 (C), which refused to find a de facto adoption for purposes of inheritance by a stepson.
65 Maintenance Act 9 of 2003, sections 3(1)(c), 3(2), 3(4)
“As far as other relatives are concerned … an indigent person, if there are no ascendants or descendants who can provide support, can also claim support from his brothers and sisters, including half-brothers and half-sisters. There is, however, no duty of support between more remote blood relations in the collateral line or between relations by affinity such as stepfather and stepchild or father-in-law and son-in-law.”

S v Koyoka 1991 NR 369 (HC)

Maintenance of persons with infirmities or disabilities

A legal duty to maintain persons with infirmities or disabilities applies at any age, because such persons may not ever be able to become self-supporting.66

When determining whether a maintenance order for a person with disabilities should be made, the Maintenance Act 9 of 2003 requires that the court take into account the following factors:

- the extent of the disability;
- the life expectancy of the beneficiary;
- the period for which the beneficiary is likely to require maintenance; and
- the costs of medical and other care resulting from the disability.67

When the 2003 Act was being developed, the LAC recommended that the wording in point (d) should be clarified to read “the costs of medical care and equipment, medication or services incurred by the beneficiary as a result of the disability”.

We recommend that the law be revised to indicate that “other care” can include medical care and equipment, medication or services incurred in addition to other items.

Factors to be considered when making maintenance orders

The Maintenance Act 9 of 2003 states that the maintenance court will consider the following criteria when considering any application for a maintenance order:68

- the current and future lifestyle, income and earning capacity of the relevant persons;69
- the current and future property and resources of the relevant persons;
- the current and future responsibilities and financial needs of the relevant persons; and
- whether the defendant has delayed the process.

If the beneficiary is a child, the court will also take into account the following factors:70

- the financial, educational and developmental needs of the child, including but not limited to housing, water, electricity, food, clothing, transport, toiletries, child care services, education (including pre-school education) and medical services;
- the age of the child;
- the manner in which the child is, or the parents should reasonably expect, the child to be educated or trained;
- any special needs of the child, including but not limited to needs arising from a disability or other special condition;

66 Boberg’s Law of Persons and the Family, Second Edition, Kenwyn, South Africa: Juta & Co, 1999 at 253-257, citing Kemp v Kemp 1958 (2) SA 736 (D) at 737. See also In re Knoop (1983) 10 SC 198 at 199, and Hoffmann v Herdan NO and Another 1982 (2) SA 274 (T), where a major child unable to support herself due to ill health was allow to make a claim for maintenance from her deceased father’s estate.

67 Maintenance Act 9 of 2003, section 16(4).

68 Id, section 16(2).

69 A relevant person includes the defendant, beneficiary and any person other than the defendant who is liable to maintain the beneficiary. Id, section 16(1).

70 Id, section 16(3).
direct and indirect costs incurred by the complainant in providing care for the beneficiary, including the income and earning capacity foregone by the complainant in providing that care; and

- the value of labour expended by the complainant in the daily care of the child.

The Act states that the duty to maintain a child takes priority over all financial commitments, except for financial commitments which are necessary to the parent’s ability to support himself or herself or other dependants.71 The Act does not make a similar statement for the duty of maintenance between husband and wife, or between child and parent.

4.2 Administration of the Act

All magistrates’ courts (excluding regional magistrates’ courts) operate as maintenance courts.72

The administrative functions of a maintenance court are supposed to be carried out by maintenance officers and maintenance investigators. The Act states that the Minister of Justice (or any staff member delegated by the Minister) may appoint persons to these positions, and the Minister is required to take all reasonable steps within the available resources of the Ministry of Justice to appoint at least one maintenance investigator for each maintenance court.73 The Prosecutor-General may also appoint a maintenance officer to conduct prosecutions on behalf of the state in criminal proceedings that arise from the Maintenance Act. Any prosecutor authorised to conduct prosecutions in a magistrate’s court is automatically a maintenance officer for the relevant maintenance court.74

The function of a **maintenance officer** is to investigate maintenance complaints and institute enquiries, or if there is an order in place, investigate the existence of new circumstances since the date of the order, including any reports of the misuse of maintenance funds.75 A maintenance investigation may include gathering information about the identity, whereabouts and financial position of the defendant, as well as any other relevant information pertaining to the defendant. The maintenance officer may also request any person, including the defendant or complainant, to give information or produce any document or other relevant item. The maintenance officer may also request a maintenance officer from another court to obtain information relevant to the complaint or require a maintenance investigator to assist with the case.76

The function of a **maintenance investigator** is to locate the whereabouts of a person required to attend a maintenance enquiry or criminal trial held in terms of the Act; to serve court orders (a function that may also be carried out by the messenger of the court if there is no maintenance investigator77); to trace and evaluate assets of people involved in maintenance applications; and to perform other duties as specified by the court.78 The Act further stipulates that, acting under the direction and control of the maintenance officer, a maintenance investigator must serve or execute the process of any maintenance court, serve summonses in respect of criminal proceedings pertaining to the Act and take sworn statements relevant to a case.79

Both maintenance officers and maintenance investigators have very wide powers of investigation. For example, both can contact employers to get information about wages. Both can contact banks to

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71 Id, section 4(1)(e).
72 Id, section 6.
73 Id, sections 7(1), 8(1) and 8(4).
74 Id, section 7(2-3).
75 Id, section 9(4). The misuse of maintenance funds is the failure, without reasonable or lawful excuse to use any maintenance payment for the benefit of the beneficiary. Section 9 (5).
76 Id, section 10(1).
77 Id, section 8(5).
78 Id, section 8(2).
79 Id, section 10(2).
get information about assets. The idea behind having a dedicated maintenance investigator is that this person will have more time for collecting information, without having to attend to other responsibilities at the same time.

### Successes of maintenance investigators in South Africa

“According to regional heads [of the maintenance courts], the greatest successes resulting from the appointment of maintenance investigators were that they gained better access to communities and to information than had been achieved without them, thereby greatly improving the enforcement of maintenance orders. They further reported that maintenance investigators were more active and visible in communities than was possible with the use of independent tracing agents or the sheriff.

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All the maintenance officers who participated in this survey seek the assistance of a maintenance investigator on a daily basis … Furthermore, all maintenance officers agree that the maintenance investigators contribute to their success. Maintenance investigators were particularly helpful in tracing defendants and serving subpoenas. Maintenance investigators were also helpful in gathering information concerning the financial position of maintenance defaulters and attaching emoluments and pension funds. It is therefore not surprising that 74.3 per cent of the participating maintenance officers concluded that the appointment of more maintenance investigators to their courts would make the recovery of maintenance and the enforcement of maintenance orders more effective.”


The function of the clerk of the court is to register all maintenance orders.80 While this sounds like a straightforward administrative task, as our field research shows, clerks sometimes play an unauthorised screening function by refusing to register complaints in some cases – particularly where the absence of dedicated maintenance personnel mean that investigation of the case is unlikely to be practically possible.81

The broad functions assigned to these court officials illustrate the high degree of official participation expected when investigating maintenance complaints. This is appropriate since maintenance claims normally involve children in need, and because complainants seeking maintenance are usually unable to afford legal representation.

However, practice has not kept pace with promise. Almost ten years after the enactment of the Maintenance Act, there is not a single maintenance investigator in Namibia.82 Due to the large volume of maintenance applications in Windhoek, this magistrate’s court has a magistrate designated to hear only maintenance cases and maintenance officers with no duties other than dealing with maintenance cases; but in other parts of the country, prosecutors double as maintenance officers and the same magistrates who handle other cases preside over maintenance enquiries.

The absence of dedicated personnel means that maintenance cases often do not receive the attention which they warrant.83 The lack of maintenance investigators was questioned in Parliament in 2008; in response, the Deputy Minister of Justice claimed that “practice has thus far not required or necessitated the appointment of fulltime maintenance investigators provided for in subsection 4

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80 Id, section 27.
81 See chapter 7, section 7.5.
82 Personal communication, Ministry of Justice, August 2013.
83 See chapter 7, section 7.5.
We recommend that the Ministry of Justice re-assess this conclusion in light of the information provided in this study, and consider the appointment of maintenance investigators, particularly in the busiest courts.

**CASE STUDY**

The importance of proper investigation

The case discussed below illustrates how shortfalls in the current administration of the [South African] Maintenance Act could have been circumvented if more women were given the opportunity to relate their experiences with maintenance claims. A holistic analysis of a basic issue such as maintenance reinforces the emptiness of ‘equality’ for women when it is hampered by the lack of appropriate budget allocations and does not take into account women’s experiences …

The case of Mgumane v Setemane 1998 (2) SA 247 (Tk D), illustrates the effects of the breakdown between law reform, implementation and administration of the law that could be avoided if consultation was actively promoted. Here maintenance was claimed for five children by an unrepresented mother, married under customary law. In an appeal from an order of magistrate it was found that the magistrate and the maintenance officer should have conducted a thorough enquiry to establish the financial circumstances of both parties and the validity of the mother’s maintenance claim and her personal expenses. In particular, evidence should have been heard for her reason for claiming the same amount of maintenance in regard to the two children who were not at the time living with her, as for the other children. The father, who was a businessman, alleged that he did not earn sufficient income to meet the maintenance claim. His evidence should not have been accepted. Instead the magistrate and maintenance officer should have inquired into and if necessary, subpoenaed witnesses to establish the true income from his various business ventures. The responsibility of placing evidence before the court was not only that of the parties concerned but was shared by the maintenance officer and the presiding judicial officer. The court further held that where the facts demonstrate this to be possible, a parent should be required to expand his or her economic activities in order to meet the needs of dependent children and that parent’s inability to pay maintenance should be real and not apparent.

In this case a decision on inability to pay could not be taken as there had been a failure to adequately enquire into the income of the father or to summon witnesses to give evidence on income as was possible in terms of the Act. The court therefore referred the matter back to the magistrates court for a fresh hearing, and ordered the father to pay R500 per month towards the maintenance of the five children pending the finalisation of the fresh enquiry. Despite clear provisions in the law, the officers entrusted with administering the law failed to do so in this case (and in many others) simply because time, lack of staff or adequate incentives, do not motivate them to conduct thorough investigations for each maintenance enquiry.

Recognising these factors, women’s groups emphasised the importance of the appointment of maintenance investigators and it was included in the Maintenance Act [99] of 1998. This case highlights some of the inadequate maintenance enforcement mechanisms that the new Maintenance Act intends to remedy. A maintenance investigator would have gathered the facts and necessary financial evidence to provide the court with the necessary information in this case, thereby ensuring the expeditious finalisation of the maintenance claim.

However, despite cases such as these clogging up the justice system and resulting in untold prejudice to users of the relevant laws, our government has still not taken steps to ensure the implementation of section 15 of the Maintenance Act [99] of 1998 that provides for the appointment of maintenance investigators. Apparently due to budgetary constraints, this portion of the Act has yet to be implemented. Once again we see how ‘equal laws’ do not necessarily improve the lives of disadvantaged women, unless accompanied by a commitment of resources such as a budget, that will ensure effective use of the law by women …


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84 Question 3 put by Hon Dienda, National Assembly, 5 June 2008 and reply of Hon Deputy Minister of Justice (Mr U Nujoma), National Assembly, 12 June 2008.
4.3 Procedure for claiming maintenance

4.3.1 Maintenance complaints

A person seeking maintenance makes a complaint to the maintenance officer. The party is then referred to as the complainant. The definition of complainant in the Maintenance Act includes the beneficiary.\(^{85}\) This means that persons, including children, can apply for maintenance for themselves. An initial maintenance complaint may be made at the court in the area where the complainant or beneficiary resides.\(^{86}\) The person making an initial complaint must confirm under oath or affirmation that the person against whom the complaint is made is legally liable to maintain the beneficiary but is failing to do so.\(^{87}\)

Where a maintenance order is already in place, a maintenance complaint concerning it can be made by a complainant, beneficiary, defendant or any other person affected by the order.\(^{88}\) Such a complaint must be made at the court where the existing order is registered.\(^{89}\) Where a maintenance order is already in force, the complaint must allege that there is sufficient cause for the substitution, suspension, or discharge of the existing order.\(^{90}\)

4.3.2 Investigation by maintenance officer

Once a maintenance complaint has been made, the maintenance officer is empowered to direct the complainant and defendant to appear before him or her for investigation. The maintenance officer may also direct any other person with relevant information to appear before him or her – such as someone who has information relating to the defendant’s financial position or earnings. Directives to appear for purposes of the investigation by the maintenance officer are covered by section 10(1)(a) of the Act, which states:

> When investigating any complaint relating to maintenance, a maintenance officer may cause any person, including the defendant or complainant, to be directed to appear before that maintenance officer and to give information or produce any book, document, statement or other relevant information.\(^{91}\)

Although the Act states that the maintenance officer may “cause” a person to be directed to appear, the regulations indicate that the maintenance officer is empowered to issue this directive personally.\(^{92}\) Further confusion appears from the form which is to be used for such a directive; it is labelled “DIRECTIVE IN TERMS OF 10(1)(a) OF THE MAINTENANCE ACT”, but the text addressed to the recipient states: “You are hereby summoned to appear in person before the maintenance officer ...”.\(^{93}\) It is

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\(^{85}\) Maintenance Act 9 of 2003, section 1.

\(^{86}\) Id, section 9(1).


\(^{88}\) Maintenance Act 9 of 2003, section 9(3).

\(^{89}\) Id, section 9(1).

\(^{90}\) Id, section 9(2)(b). An application relating to an existing maintenance order must be made on Form B. Maintenance Regulations, regulation 2.

\(^{91}\) Maintenance Act 9 of 2003, section 10(1)(a). The Maintenance Regulations provide that Form C1A should be used for this purpose (regulation 3(1)). The regulations also make it an offence for any person to fail to comply with a direction issued by the maintenance officer, punishable by a fine not exceeding N$2000 or to imprisonment for a period not exceeding six months (regulation 3(3)).

\(^{92}\) Regulation 3(1) states: “The directive which a maintenance officer may issue under section 10(1) of the Act must be in a form corresponding substantially to Form C1A of the Annexure.”

\(^{93}\) Form C1A appended to the Maintenance Regulations, emphasis added.
not clear how this directive is supposed to be communicated to the person who is directed to appear, ie by service of process or some other procedure.  

There is an overlap between this provision and section 11(1), which states:

A magistrate may, before or during a maintenance enquiry and at the request of a maintenance officer, require the summoning and appearance before him or her or before another magistrate, for examination by the maintenance officer, of any person who is likely to give relevant information concerning –

(a) the identification or the place of residence or employment of any person who is legally liable to maintain any other person or who is allegedly so liable; or
(b) the financial position of the person referred to in paragraph (a).

The form designed for use in connection with this provision includes a space to write the “date of enquiry”, but it also allows for the option of summoning the recipient “to appear in person before the above-mentioned court or maintenance officer of the abovementioned court on the stated date, and “to be examined by the maintenance officer in terms of section 11 of the Act or to give evidence at an enquiry, in terms of section 12 of the Act”. Thus, a summons under section 11 can apparently be used for the purposes of summoning someone to appear before the maintenance officer or to appear before the magistrate at an enquiry.

The summons is clearly designed to be served in accordance with the provisions on service of process, and it contains a return of service. The summons, unlike the directive which can be issued by the maintenance officer, contains a space for the defendant to provide information about his or her financial position and assets.

If the information required of the defendant or any other person who is summoned is provided to the satisfaction of the maintenance officer before the day on which the person in question is required to appear, that person can be excused from appearing at court. The examination of any of these persons may be conducted in private at a place designated by the magistrate.

Despite the areas of confusion in the Act, there are some clear differences between a summons and a directive. A directive can be issued by a maintenance officer, while a summons can be issued only by a magistrate. Failure to obey either a directive or a summons is a criminal offence, but the punishment differs; the punishment for ignoring a directive is a fine of up to N$2000 or imprisonment for up to six months, while the punishment for ignoring a summons is a fine of up to N$4000 or imprisonment for up to 12 months. The complainant and the defendant are somewhat peculiarly exempted from the criminal offence of failing to comply with a summons to attend a maintenance

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94 Regulation 28 covers service of process generally, but neither section 10 nor regulation 2 refers to “service” of a directive from the maintenance officer.
95 Maintenance Act 9 of 2003, section 11(1), emphasis added. The regulations states that the Form C1 should be used to summon the defendant and complainant and Form C11 to summon witnesses. The defendant should complete part B of Form C1 (assets of the opposing party). Part C of Form C1 is a return of service.
96 Form C1 (for defendant and complainant). Form C11 (for witnesses) contains the same options.
97 Maintenance Act 9 of 2003, sections 10(1)(a) (“When investigating any complaint relating to maintenance, a maintenance officer may cause any person, including the defendant or complainant, to be directed to appear before that maintenance officer and to give information or produce any book, document, statement or other relevant information.”) and 11(1) (“A magistrate may, before or during a maintenance enquiry and at the request of a maintenance officer, require the summoning and appearance before him or her or before another magistrate, for examination by the maintenance officer, of any person who is likely to give relevant information ...”).
98 Maintenance Regulations, regulation 28.
99 Form C1, Part C-Return of service. Form C11 (for witnesses other than the complainant or defendant) also contains Part B-Return of service.
100 Form C1, Part B-Particulars regarding assets, income and expenditure of opposing party.
101 Maintenance Act 9 of 2003, section 11(3).
102 Id, section 11(4).
103 Maintenance Regulations, regulation 3(3); Maintenance Act, section 36(1).
enquiry, but not from the criminal offence of failing to comply with a directive to appear before a maintenance officer.¹⁰⁴

The relevant provisions of the Criminal Procedure Act 51 of 1977 apply to anyone who is summoned under section 11 for the purposes of investigation by a maintenance officer¹⁰⁵ — but apparently not to someone who is directed to appear before a maintenance officer.¹⁰⁶ One such provision which may be of particular relevance in some cases is section 181 of the Criminal Procedure Act 51 of 1977 which covers pre-payment of witness expenses where a witness is served with a summons outside the magisterial district from which the summons was issued; if the witness is required to travel to the magistrate's court which issued the summons, the witness can demand payments at the time of service of “the necessary expenses to travel to and from such court and of sojourn at the court in question”.¹⁰⁷ Even if pre-payment of such expenses is not applicable, a person summoned to appear before the maintenance officer is entitled to the prescribed witness allowances which apply in criminal cases.¹⁰⁸ The persons eligible for these payments would include the complainant and the defendant. The Maintenance Act states that a defendant who is summoned to attend an enquiry is not eligible for pre-paid expenses or witness allowances unless the court specifically orders this,¹⁰⁹ but this exception does not appear to apply where a defendant is summoned to appear before a maintenance officer as part of an investigation which takes place before an enquiry.¹¹⁰

Where the defendant is summoned to appear before the maintenance officer or the court in terms of section 11, the summons is supposed to be accompanied by a form on which the defendant can give written consent to the proposed maintenance order if he or she chooses not to oppose it.¹¹¹ There is no provision for including this form with a directive issued by the maintenance officer in terms of section 10(1).

<table>
<thead>
<tr>
<th>Summary of differences between directives and summonses</th>
</tr>
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<tbody>
<tr>
<td>Directive (section 10)</td>
</tr>
<tr>
<td>issued by maintenance officer</td>
</tr>
<tr>
<td>method of communication not clear</td>
</tr>
<tr>
<td>can direct appearance before maintenance officer</td>
</tr>
<tr>
<td>penalty for non-compliance</td>
</tr>
<tr>
<td>no exemption for complainant and defendant from criminal offence of failing to comply with directive to appear before a maintenance officer</td>
</tr>
<tr>
<td>no provision for providing information by some other means</td>
</tr>
<tr>
<td>no reference to Criminal Procedure Act 51 of 1977; travel expenses may not be claimed</td>
</tr>
<tr>
<td>no mechanism for consenting to requested maintenance</td>
</tr>
</tbody>
</table>

¹⁰⁴ Id, section 36(2).
¹⁰⁵ Id, section 11(2).
¹⁰⁶ Section 11(2) applies only where someone has been examined pursuant to section 11 – which deals with summonses. A directive to appear for questioning is covered by section 10.
¹⁰⁷ Criminal Procedure Act 51 of 1977, section 181.
¹⁰⁸ Id, section 191.
¹⁰⁹ Maintenance Act 9 of 2003, section 12(5)-(7).
¹¹⁰ Id, section 11(2).
¹¹¹ Maintenance Regulations, regulation 4(5).
No provisions specific to evidence at investigations were contained in the 1963 Maintenance Act; these provisions were apparently included in the 2003 Maintenance Act as a means to help the court trace respondents whose whereabouts are unknown and to ascertain better information about defendants’ finances.

The use of directives and summonses in practice is discussed in chapter 9. In brief, summonses are utilised much more frequently than directives – although we were not able to determine which avenue is more-often utilised for pre-enquiry investigations.

We recommend that the Act and the regulations be clarified on the procedure for directing persons to attend court for the purpose of an investigation by the maintenance officer in advance of the enquiry. In particular, the forms and procedures for the use of directives (in contrast to summonses) need to be clarified. The distinctions between directives and summonses also need to be re-examined, to provide more clarity on the intended functions of these two methods of obtaining information during investigations which take place prior to an enquiry.

Furthermore, the rules on the payment of witness expenses in connection with summonses should be re-examined – particularly the fact that the Act provides for automatic pre-paid travel expenditures for defendants who are summoned from outside the relevant magisterial district for pre-enquiry investigation as well as automatic witness allowances for all defendants summoned for pre-enquiry investigation – while providing for allowances for defendants only by order of court in respect of the enquiry itself.

4.3.3 Consent orders – a speedy resolution to maintenance complaints

The normal practice in maintenance courts in Namibia is to bring the parties together to see whether it is possible to negotiate an agreement without a formal hearing before a magistrate. If the parties reach an agreement, the terms are made into a consent maintenance order which, when signed by the magistrate, has the same force as any other type of maintenance order.

The defendant does not even have to attend court if he or she accepts the proposed content of a maintenance order. The defendant is informed of a maintenance complaint by means of a summons which includes details of the proposed maintenance order,112 and the defendant may return a section of this form to indicate in writing that he or she is in agreement with the proposed order.113 In this case, on the date the defendant has been summoned to court, the maintenance court may make a consent order without considering any further evidence.114 A copy of the consent order must be then served on the defendant, with proof of service constituting sufficient evidence that the defendant is aware of the terms of the order.115

In practice, however, it appears that most defendants attend court and discuss the content of the consent order before accepting its terms.116

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112 This will be on Form G, which must accompany a summons to the defendant. Id, regulation 4(5).
113 When the defendant chooses to consent, he or she should provide written consent to the maintenance officer using Part A of Form G. The defendant must do this on or before the date of the enquiry. Id, regulation 10.
114 A consent maintenance order should be completed on Part B of Form G. Id, regulation 10.
115 Maintenance Act 9 of 2003, section 18. The return of service showing that the copy of the consent order was served on the defendant should be Part C of Form G. Maintenance Regulations, regulation 10.
116 Based on information from an informant previously employed as a maintenance clerk. This was also found to be the case in respect of unopposed protection orders. Legal Assistance Centre (LAC), Seeking Safety: Domestic Violence in Namibia and the Combating of the Domestic Violence Act 4 of 2003, Windhoek: LAC, 2012 at 473.
4.3.4 Procedure at maintenance enquiries

“… the enquiry should be a full and proper one to enable the magistrate to arrive at an informed decision as to the needs of the children and the proportionate ability of the parents to contribute towards such needs.”

Mgumane v Setemane 1998 (2) SA 247 (Tk D)

If a complainant and a defendant cannot agree on a consent order, the case will be considered by a magistrate at a hearing called a maintenance enquiry. A maintenance enquiry must be held in the presence of the defendant, or if held in the absence of the defendant, with proof that he or she was summoned to attend.117

Privacy

There are two somewhat conflicting provisions in the Maintenance Act on the privacy of maintenance enquiries.

Section 13(9) of the Act states:

(9) A person whose presence is not necessary must not be present at a maintenance enquiry, except where that person has been given permission to be present by the maintenance court.118

This implies that the default position is for the enquiry to be held in closed court, unless the presiding officer has given permission for someone whose presence in not necessary to be present.

In contrast, section 13(10) states:

(10) Where a maintenance court considers that it would be in the interests of justice or the interests of any persons who have an interest in the enquiry, it may direct that a maintenance enquiry be held in private at the maintenance court or at a place designated by the maintenance court.119

This provision implies that the default position is for the enquiry to be held in open court, unless the presiding officer directs that it be held “in private” at the court or in some other more informal location.

In practice, it appears to be standard procedure for maintenance enquiries to be held in close court.120 Nonetheless, we recommend that the provisions on privacy be clarified to avoid potential confusion.

Summons

Witnesses, including the complainant and the defendant, are summoned for a maintenance enquiry in the same manner as for a criminal trial in a magistrate’s court.121 The maintenance court may summon a witness at any time during the enquiry or examine any person who is present at the enquiry even if he or she has not been summoned as a witness. The court may also recall and re-examine any person already examined.122 This flexibility gives the court considerable discretion, which is consistent with the relative informality of a maintenance enquiry.

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117 Maintenance Act 9 of 2003, section 13(2).
118 Emphasis added.
119 Emphasis added.
120 Personal communication, Ministry of Justice, August 2013.
121 Maintenance Act 9 of 2003, section 12(3). The Minister of Justice may also prescribe the manner in which the process of the maintenance court is prepared and served and prescribe the form of the summons used under this Act. Id, section 12(4). This has been done in the Maintenance Regulations, regulations 4 and 28.
122 Id, section 12(6).
Section 181 of the Criminal Procedure Act 51 of 1977, which covers pre-payment of witness expenses where a witness is served with a summons outside the magisterial district from which the summons was issued, applies to summonses issued for maintenance enquiries; as noted above, this means that if a witness is required to travel to the magistrate’s court which issued the summons, the witness can demand payments at the time of service of “the necessary expenses to travel to and from such court and of sojourn at the court in question”\(^{123}\). In addition, any person summoned to appear before the maintenance officer is entitled to the prescribed witness allowances which apply in criminal cases.\(^{124}\) The persons eligible for these payments would include the complainant and the defendant. However, the defendant is not eligible for pre-paid expenses or witness allowances unless the court specifically orders this.\(^{125}\)

**Written evidence**

The Maintenance Act also includes procedures for the use of written evidence to be submitted without accompanying oral evidence.\(^{126}\) For example, this might be used to admit a written report on blood tests to prove paternity without accompanying oral evidence by the lab technician, or a written confirmation of wages or assets without accompanying oral evidence from the employer or bank.

If written evidence is submitted, the party submitting the evidence must serve it on the other party at least 14 days before the document is to be produced.\(^{127}\) The other party has the opportunity to object to the submission of this evidence, provided that this objection is made at least seven days before the commencement of the enquiry.\(^{128}\) If an objection is made, the written evidence may not be produced, although the person who made the statement may give oral evidence.\(^{129}\) Even if the procedure for advance arrangements for the submission of written evidence has not been utilised, the party against whom the evidence is to be used may still give permission for its admission at the enquiry.\(^{130}\)

As discussed in chapter 10, this procedure is seldom if ever used, so we recommend that the procedure for submitting advance notice of written evidence to a party be abandoned in favour of a more practical alternative. Where a party would like to submit written evidence at a maintenance enquiry, the presiding officer should enquire as to whether the opposing party has any objections – and specifically whether that party would like a postponement in order to have the court summons the person making the written statement to give their information in person and be cross-examined.

**Privilege**

The general rules relating to privilege in civil proceedings apply to maintenance enquiries – including rules which protect spouses from being compelled to testify against each other.\(^{131}\)

\(^{123}\) Maintenance Act 9 of 2003, sections 11(2) and 12 (5); Criminal Procedure Act 51 of 1977, section 181.

\(^{124}\) Maintenance Act 9 of 2003, sections 12(6); Criminal Procedure Act 51 of 1977, section 191.

\(^{125}\) Maintenance Act 9 of 2003, section 12(7).

\(^{126}\) Maintenance Regulations, regulations 6 and 26(5); Maintenance Act 9 of 2003, section 14-15 (3).

\(^{127}\) Maintenance Act 9 of 2003, section 14(2) and Maintenance Regulations, regulation 26(5). This should be done using Form D.

\(^{128}\) Maintenance Act 9 of 2003, section 14(3).

\(^{129}\) Id, section 14(4)(a).

\(^{130}\) Id, section 14(5).

\(^{131}\) Id, section 13(4). See also Namibian Constitution, Art 12(f): “No persons shall be compelled to give testimony against themselves or their spouses, who shall include partners in a marriage by customary law ...” and Civil Proceedings Evidence Act 25 of 1965, section 10: “No husband shall be compelled to disclose any communication made to him by his wife during the marriage and no wife shall be compelled to disclose any communication made to her by her husband during the marriage.”
Inquisitorial approach

The Act stipulates that maintenance enquiries must be conducted in a manner that will ensure that substantial justice is achieved between the parties as well as with respect to the beneficiary of the maintenance claim.132 This statement reinforces the idea that the presiding magistrate and the maintenance officer are both expected to play an active role in eliciting the relevant facts of the case, as under the previous statute.133 Case law has also held that the maintenance court, with the assistance of the maintenance officer, has a responsibility to determine the amount of maintenance to which a child beneficiary is entitled, even if this entails action on the court’s own initiative.134

Procedure for maintenance enquiries

These excerpts describe the procedure under the Maintenance Act 23 of 1963, but the basic procedure for enquiries remains the same under the Maintenance Act 9 of 2003.

“The responsibility of placing evidence before the court no longer rests only on the parties concerned, but is shared by the maintenance officer and the presiding judicial officer. Thus, even where the parties are legally represented, the maintenance officer and the presiding officer may have to call relevant evidence not called by the legal representatives … [T]he presiding officer will decide whether to make an order to pay maintenance or vary an existing order to pay maintenance. In doing so he will no doubt consider all the relevant factors … in general he will look after the interests of children and see that justice is done between the parties in accordance with their means and ability to pay.”

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

“The proceedings … are inquisitorial in character. The court is enjoined to hold and conduct the necessary enquiry, which has as its object the determination of important questions relating to the duty to support. Often the interested parties … are without legal representation. In the circumstances it is clearly the duty of the maintenance officer to ensure that a thorough investigation is carried out.”

Perumal v Naidoo 1975 (3) SA 901 (N)

“… there is an obligation on the magistrate to conduct a thorough enquiry and not to play the role of an umpire.”

Mgumane v Setemane 1998 (2) SA 247 (Tk D)

“A complaint on oath must be made to a maintenance officer alleging that a person legally liable to pay maintenance has failed to do so and the maintenance officer, after investigating the complaint, may institute an enquiry in a maintenance court having jurisdiction to deal with the matter. The person alleged to have a duty to maintain is summoned to appear before that court together with any other person who can give relevant evidence bearing on the matter. The maintenance court then holds an enquiry, witnesses give evidence under oath and a proper record is kept. The proceedings are inquisitorial in nature and it is the duty of the maintenance officer and the judicial officer who presides at the hearing to ensure that a proper enquiry is held. The presiding officer, in general, will endeavour to look after the interests of the children concerned and see that justice is done between the parties in accordance with their means and ability to pay. As may be seen from this summary, the procedure is relatively uncomplicated and based on common-sense.”

Tsauseb v Geingos 1995 NR 107 (HC)

132 Maintenance Act 9 of 2003, section 13(3).
133 In addition to the authorities quoted in the box on this page, see Beukes v Beukes 1995 (4) SA 429 (O). The case is reported in Afrikaans, but the headnote states the following: “Where an increase in maintenance is sought in an enquiry in terms of … the Maintenance Act 23 of 1963, the presiding officer him/herself should play an active role. The responsibility of adducing evidence does not rest only on the parties but also on the maintenance officer and the presiding officer. That applies even where the parties have legal representation. Where important evidence is lacking (such as, in casu, evidence of the income and financial position of the party having the duty to pay maintenance), the presiding officer must ensure that that evidence is adduced.”
134 Van Zyl v Steyn 1976 (2) SA 108 (O).
Role of maintenance officer in an enquiry

The maintenance officer is not expected to be impartial like the magistrate, but has a duty to assist the complainant to present his or her case. These excerpts describe the situation under the Maintenance Act 23 of 1963, but would be equally applicable to the similar situation under the Maintenance Act 9 of 2003.

“When the parties are unrepresented … the maintenance officer … must really enquire into all relevant aspects of the case. Ordinarily laymen do not know how to conduct an enquiry of this nature. It therefore unfortunately becomes, where there is no legal representation, the duty of the maintenance officer to do the things normally done by legal representatives.”

*Pieterse v Pieterse* 1965 (4) SA 344 (T)

“… the maintenance officer conducts the case for the complainant in the same manner as the prosecutor does for the State, and the complainant, in a criminal trial …”

*Nodala v The Magistrate, Umtata* 1992 (2) SA 696 (Tk)

Unique nature of maintenance proceedings

A maintenance enquiry is not strictly a civil proceeding or a criminal proceeding; it has been described as a unique hybrid of these two categories of cases. The Maintenance Act 9 of 2003 references both criminal and civil law in its enquiry procedures, and maintenance orders are enforceable by both civil and criminal action. However, it has been noted that a maintenance enquiry is more akin to civil proceedings than to criminal ones.

“An enquiry in terms … of the Maintenance Act is neither a criminal trial nor a civil trial; the procedure is a hybrid of these two types of trials. On the one hand the maintenance officer conducts the case for the complainant in the same manner as the prosecutor does for the State, and the complainant, in a criminal trial; on the other hand, the tribunal has no punitive jurisdiction. It performs, essentially, within its limited sphere, the functions of a civil trial court … The enquiry in a maintenance court has been referred to as ‘a sui generis procedure’ and ‘not, strictly speaking, criminal proceedings’. It can therefore safely be said that the Maintenance Act creates a tribunal for the inexpensive adjudication of maintenance disputes by means of a sui generis procedure, which is more akin to procedure in the civil courts than in the criminal courts.”

*Nodala v The Magistrate, Umtata* 1992 (2) SA 696 (Tk) at 699F-I, referring to the Maintenance Act 23 of 1963

Legal representation

All parties to the proceedings have the right to legal representation. This provision is made clearer in the 2003 Act (“*Any party to proceedings under this Act has the right to be represented by a legal practitioner*” than in the 1963 Act (which stated that “*any person against whom an order may be may be made under this section may be represented by counsel or an attorney*” but was silent on the complainant’s right to legal representation).
However, although “all parties” have the right to legal representation, the law does not provide sufficient clarity of the right of a child to legal representation where the child is not a party to the case. Because maintenance disputes often pit parents against each other, it is possible that both sides may lose sight of the child's best interest. We recommend that the law should assign the maintenance officer a particular duty to place information about the child’s interests before the court, and to give the court discretion to order the parents to fund independent legal representation for the child (with the costs divided appropriately between them), or to order state-funded representation in cases where the child’s interests are not being well-represented in the case and no private legal representation for the child is feasible.

An adult party to a maintenance enquiry who cannot afford legal representation could apply for legal aid. However in practice, such an application is likely to succeed only if there appears to be some special difficulty with the case. We were not able to find out how many people received legal aid in respect of maintenance cases since the 2003 Act came into force, but the 1995 maintenance study reported that only three people received legal aid for maintenance enquiries between 1 April 1994 and 31 March 1995.

Evidence from previous proceedings

The maintenance court may take into consideration evidence produced in any previous proceedings concerning an existing maintenance order and accept the findings of fact from any such previous proceedings in the absence of evidence to the contrary.

Costs

Depending on the conduct and means of the defendant and complainant, the court can order the payment of costs for service of process or wasted time due to either party's failure to attend an enquiry without a good reason.

4.3.5 Disputes about parentage

The Maintenance Act allows for paternity tests, provided that the mother and the person alleged to be the father are prepared to voluntarily submit themselves – and the child – to the taking of samples for scientific tests (usually a DNA test). If the mother and the father, or both, are unable to pay the costs of such tests, the maintenance officer may ask the court to hold an enquiry into how to cover the costs of the test. This mini-enquiry can take place at any time during the underlying maintenance enquiry, before the court makes an order in respect of the application. During these proceedings, the maintenance court may enquire into the respective means of the parents, and any other circumstances which it believes may have a bearing on the allocation of the costs of the tests. At the end of the mini-enquiry, the court may make a provisional order directing the mother, father or both to pay all or part of the costs, or a provisional order directing the State to pay all or part of the costs. Then, “when the maintenance court subsequently makes any maintenance order”, it may confirm or set aside any provisional order made in respect of costs, or substitute a new order in respect of the costs of scientific testing.

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141 According to the Director of the Legal Aid Board, this information is not available.
143 Maintenance Act 9 of 2003, section 15.
144 Id, section 20.
145 Id, section 21.
Orders for scientific tests

21. (1) If a maintenance officer reasonably believes that –
(a) the paternity of any child is in dispute;
(b) the mother of that child as well as the person who is alleged to be the father are prepared to submit themselves as well as that child to the taking of blood or tissue samples in order to carry out scientific tests regarding the paternity of that child; and
(c) the mother or the alleged father or both the mother and the alleged father are unable to pay the costs involved in the carrying out of the scientific tests,

the maintenance officer may at any time during a maintenance enquiry, but before the maintenance court makes any order, request the court to hold an enquiry referred to in subsection (2).

(2) On receipt of a request made under subsection (1), the maintenance court may enquire into the –
(a) means of the mother as well as that of the alleged father; and
(b) other circumstances which the maintenance court reasonably believes should be taken into consideration.

(3) At the conclusion of the enquiry referred to in subsection (2), the maintenance court may –
(a) make a provisional order that both the mother and alleged father or that either of them pay or pays part or all of the costs to be incurred in the scientific tests;
(b) make a provisional order directing the State to pay the whole or any part of the costs of the scientific tests; or
(c) make no order.

(4) When the maintenance court subsequently makes any maintenance order, it may –
(a) make an order confirming the provisional order referred to in subsection (3)(a) or (b); or
(b) set aside any provisional order or substitute therefore any order which the court considers just relating to the payment of the costs incurred in the carrying out of the scientific tests in question.

There are several technical problems with these provisions:

a) The statute covers only paternity tests. Although maternity is less often in doubt, there could be instances where this is the case – such as where a child has been abandoned.

b) The statute assumes that the maintenance proceedings will involve the two parents, in respect of both testing and the allocation of costs. But there could be cases where question of parentage arise when a primary caretaker other than a parent is seeking maintenance contributions from one or both parents.

c) The statute requires that mother, father and child all be prepared to submit themselves to the taking of samples for the purposes of testing. However, for a DNA test, samples are needed only from the child and from the parent whose parentage is in dispute. Samples from the other parent would not be required, unless the connection of both parents to the child was in doubt.

d) The statute provides no remedy for the situation where a parent refuses to provide a sample of his or her own DNA or the DNA of the child in question. It would be possible for the party seeking to prove parentage to make an application to the High Court to order that samples be provided for testing on the grounds that this was in the child’s best interests, but this would be expensive and cumbersome.

146 The High Court would have authority to make such an order in respect of a child as part of its inherent jurisdiction as the upper guardian of all children.
e) The statute allows a provisional order on costs to be finalised, set aside or adjusted only “when the maintenance court subsequently makes any maintenance order”. It should be possible for the court to do this at the point when it makes a decision on the application for maintenance – even if that decision does not result in a maintenance order. For example, suppose that a mother applies for maintenance from a man who is proven by the paternity test not to be the child’s father. No maintenance order would result in such a case, but the court might still want to finalise an appropriate order on the costs of the scientific tests.

f) The Maintenance Act was not amended to refer to the provisions on proof of parentage in the Children’s Status Act when the Children’s Status Act was enacted, leaving the relationship between the two laws unclear.

The Children’s Status Act, which was passed three years after the Maintenance Act, contains a general section on proof of parentage. These provisions, which appear in the box below together with the one regulation on this topic, have several advantages over the approach taken by the Maintenance Act:

- They are gender neutral.
- They allow a broad range of persons to initiate a proceeding to prove parentage: the mother, the father, the person whose parentage is in doubt, the primary caretaker of that person or someone authorised by the Ministry responsible for child welfare to act on behalf of that person (such as a social worker).
- They codify and expand the pre-existing common law presumptions on paternity to serve as a starting point.
- They discourage refusals to submit to testing by providing that such refusals will be presumed, unless the contrary is proved, to be aimed at concealing the truth concerning parentage. This presumption would in many cases obviate the need to order that samples be taken.

There are, however, several weak points to this alternative regime:

- There is an apparent contradiction between the Act and the regulations: The Act states that the High Court (as the upper guardian of all children) may order a child to be submitted to testing, while Regulation 12 empowers the children’s court to order that the putative mother, father or child submit to testing.
- Regulation 12 takes a more rigid approach to the allocation of costs than the Maintenance Act, providing that the costs of the testing must be borne by the person who is disputing parentage unless it is proved that this party is unable to pay, in which case the court may order that the costs be shared between that party and the State or borne fully by the State. This would mean, for instance, that even where a party maliciously or recklessly names someone as a parent of a child without any reasonable foundation for this assertion, the person who did this could not be ordered to share any of the costs of the tests even if he or she could afford to do so.
- Another problem is that it is not clear if the provisions on proof of parentage in the Children’s Status Act are intended to be ancillary to the other proceedings in that Act, or if they can be utilised in any matter where parentage is in dispute – including a maintenance case. The provisions refer to “proceedings to establish parentage” and to “any legal proceeding at which the parentage of any person has been placed in issue”, suggesting general applicability – but even though the

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147 Children’s Status Act 6 of 2006. It is expected that the Children’s Status Act will be repealed and replaced by a chapter in the forthcoming Child Care and Protection Act. The current provisions of the Children’s Status Act on parentage are expected to be substantially the same in the new law, with minor technical amendments.

148 Id, section 8(2), with similar language in section 8(3).

149 Id, section 10(1).
magistrate’s court and the children’s court would in most cases be the self-same court,\textsuperscript{150} it appears that a separate application would be required to utilise the proof of parentage proceedings under the Children’s Status Act if parentage were questioned in a maintenance proceeding.

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### Children’s Status Act 6 of 2006

**Proof of Parentage**

8. (1) For the purpose of this section-
   - (a) “putative father” means a man who claims or is alleged to be the father of a person for whom paternity has not yet been established or acknowledged without dispute; and
   - (b) “putative mother” means a woman who claims or is alleged to be the mother of a person for whom maternity has not yet been established or acknowledged without dispute.

   (2) Proceedings to establish parentage may be brought by-
   - (a) the mother or putative mother of the person whose parentage is in question;
   - (b) the father or putative father of the person whose parentage is in question;
   - (c) the person whose parentage is in question;
   - (d) someone, other than the mother or father of the person whose parentage is in question, who is acting as the primary caretaker of such person; or
   - (e) a person authorised in writing by the Minister to act on behalf of the person whose parentage is in question.

   (3) The mother or putative mother and the father or putative father of a person whose parentage is in question are competent and compellable witnesses in any proceedings in which the issue of parentage is raised, but nothing in this section is to be construed as compelling a person to testify against his or her spouse.

   (4) Proof on a balance of probabilities is required in order to establish parentage in proceedings brought under subsection (2).

### Presumption of paternity

9. (1) Despite anything to the contrary contained in any law, a rebuttable presumption that a man is the father of a person whose parentage is in question exists if-
   - (a) he was at the approximate time of the conception, or at the time of the birth, of the person in question, or at any time between those two points in time, married to the mother of such person;
   - (b) he cohabited with the mother of the person in question at the approximate time of conception of such person;
   - (c) he is registered as the father of the person in question in accordance with the provisions of the Births, Marriages and Deaths Registration Act, 1963 (Act 81 of 1963);
   - (d) both he and the mother acknowledge that he is the father of the person in question; or
   - (e) he admits or it is otherwise proved that he had sexual intercourse with the mother of the person in question at any time when such person could have been conceived.

   (2) Corroboration of evidence led to establish a presumption of paternity is not required and no special cautionary rules of evidence are applicable to such evidence.

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\textsuperscript{150} Section 4 of the Children’s Act 33 of 1960 establishes children’s courts:

4. Children’s courts
   - (1) The Minister of Justice ... may establish a children’s court for any district or for any area comprising two or more districts or portions of districts.
   - (2) Every magistrate’s court shall be a children’s court for any part of the area of its jurisdiction for which no children’s court has been established under subsection (1)

They are expected to be similarly described under the forthcoming Child Care and Protection Act which will replace the 1963 Children’s Act.
**Presumption on refusal to submit to scientific tests**

10. (1) At any legal proceeding at which the parentage of any person has been placed in issue, the refusal by either party –
   (a) to submit himself or herself; or
   (b) to cause any child over whom he or she has parental authority to be submitted, to any procedure which is required to carry out scientific tests relating to the parentage of the person in question, must be presumed, until the contrary is proved, to be aimed at concealing the truth concerning the parentage of that person.

(2) Regardless of anything contained in subsection (1), the High Court as the upper guardian of all children has the power to order that a child be submitted to a physical procedure referred to in subsection (1) if this is in the opinion of that Court in the best interests of the child.

**Proof of parentage**

12. (1) In order to establish parentage in proceedings brought under section 8(2) of the Act, the children’s court may order that the putative mother or putative father as well as the child in question undergo a DNA testing.

(2) Any costs incurred in carrying out a DNA testing must be borne by the party who is disputing paternity or maternity but in cases where it is proved that the party is unable to pay, the court may order that the costs be shared between that party and the State or that all the costs be borne fully by the State.

We recommend that the Maintenance Act be amended to incorporate the proof of parentage proceedings contained in the Children’s Status Act (with the appropriate clarifications discussed above), while retaining the flexible approach to orders for costs of scientific testing contained in the current Maintenance Act.151

### 4.3.6 Outcome of maintenance enquiries

At the conclusion of a maintenance enquiry, the court may:
- if there is no maintenance order in force, order the defendant to pay maintenance for the beneficiary;
- if there is a maintenance order in force, substitute, discharge or suspend the order; or
- decide to make no order.152

There are three ways in which a maintenance order may result from a maintenance complaint:
1) a consent maintenance order;
2) a default maintenance order; or
3) a maintenance order following a hearing attended by both parties.

All have the same force and effect, and are subject to the same options for enforcement.

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151 The main shortcomings of the proceedings for proof of parentage in the Children's Status Act pertain to the regulations. Therefore, we recommend that appropriate revisions be made to the new regulations which are likely to be enacted when these provisions are repealed and re-enacted as part of the Child Care and Protection Bill.

152 Maintenance Act 9 of 2003, section 17(1).
Consent maintenance orders

As discussed under section 4.3.3, the defendant may agree to the terms of the order proposed by the maintenance officer before any enquiry is held. In such a case, a consent maintenance order is made by the court and served on the defendant.153

Default maintenance orders

A default maintenance order is made when the defendant has been properly summoned to attend the maintenance enquiry but fails to appear. In this situation the maintenance officer must request the maintenance court for a default maintenance order. The maintenance officer must then call on the complainant or any other person whose evidence might be relevant, to either orally or in writing, adduce evidence which would assist the court in making an order. The maintenance court may then make a default maintenance order, an order for costs or any other order the court considers to be appropriate in the circumstances. The default order must be served on the defendant.154

There is a special procedure whereby the defendant can apply for a default order to be substituted or set aside. The defendant is supposed to apply for substitution or to have the order set aside within ten days of being served with the order, but the court may consider an application received after

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153 Id, section 18. Form G is used for a consent maintenance order. Maintenance Regulations, regulation 10.
154 Maintenance Act 9 of 2003, section 19(1)-(3). Form H is used for a consent maintenance order. Maintenance Regulations, regulation 11(1)-(3).
the expiry of the 10-day deadline if there is good reason to do so. Oddly, the application from the defendant is expected to specify the date on which the application is to be heard and determined. The defendant is also responsible for giving notice of this application to the complainant at least 14 days before the day on which it will be heard.155

The complainant may consent in writing to the defendant’s proposal to vary or set aside the order before or at the hearing, and submit this consent to the maintenance officer.156 If the complainant does not consent to the defendant’s application to vary or set aside the default order, a hearing is held and the court may call upon both the defendant and complainant to provide evidence. The court may then confirm the default order, vary it or set it aside and convert the proceedings into a full maintenance enquiry which considers the matter afresh.157

We believe that placing responsibility on the defendant for giving notice to the complainant about a challenge to the default order is unwise, given that most parties do not have legal representation and given that maintenance disputes can be flashpoints that lead to incidents of domestic violence. We recommend that this procedure be adapted so as not to encourage personal contact between the complainant and the defendant in this context.

**Maintenance order following a hearing**

If there is no consent order, and both parties are present at the enquiry, then the magistrate will hear the case and can make a maintenance order at the conclusion of the hearing.158

### 4.3.7 Contents of a maintenance order

A maintenance order must contain the following information:159
- the date on which maintenance payments must begin;
- the intervals at which maintenance payments must be made (eg weekly or monthly);
- to whom and where the maintenance payment must be made (eg to a person, organisation or financial institution); and
- the manner in which the maintenance payments must be made (eg cash or direct deposit).

It is possible for the order to specify that a portion of the maintenance to be paid to a specific person or institution for a specific purpose – such as payments for hostel fees or medical expenses – with the remainder going to the complainant or beneficiary.160

One South African case has suggested that it is competent for a maintenance court to include a provision in a maintenance order providing for an automatic annual increase tied to a specified

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155 Maintenance Act 9 of 2003, section 19(4-7). The defendant applies to vary or set aside a default maintenance using Part A of Form I. The defendant is required to serve notice of this application on the complainant using Part B of Form I. This notice can be served on the complainant in any manner that is convenient to the defendant, but the defendant must keep proof of service. Maintenance Regulations, regulation 11 (4)-(6).

156 Maintenance Act 9 of 2003, section 19(10). There is no specific form for this consent.

157 Id, section 19(8-9).

158 Id, section 17. Form E is used for this purpose. Maintenance Regulations, regulation 8.

159 Maintenance Act 9 of 2003, section 17(2).

160 Id, section 17(2)(e). See also Schmidt v Schmidt 1996 (2) SA 211 (W).
measure (in that case, the percentage increase in the rate of inflation during the preceding 12-month period) even without an explicit provision in the Act contemplating such increases.\textsuperscript{161}

Whilst the payment of money is the most common form of paying maintenance, the Act also allows for payments in kind in the form of specified goods or livestock.\textsuperscript{162}

\begin{quote}
"I think the new Maintenance Act is brilliant in that it creates many remedies for the complainant. Even if the defendant says he is unemployed, I can go into the enquiry and ask him questions such as: "Do you have any property?" "Are you married in community of property to a spouse that has a source of income?"
\end{quote}

Magistrate, Rundu

### 4.3.8 Photographs or ID documents

A maintenance officer may request the court to order that photographs of the defendant or a copy of the defendant’s identification document be attached to the maintenance order.\textsuperscript{163} The maintenance officer must endorse or copy the personal particulars of the defendant onto the back of the photographs. One copy of the photograph should be kept in the maintenance file, and the other attached to the relevant register of payments. A copy of the photograph may be provided to anyone executing a court order or serving a document to the defendant.\textsuperscript{164} This provision was included to provide tools for tracking defendants who might try to evade a maintenance order.

As a point of comparison, a 2008 survey of maintenance court personnel in South African found that 97% of maintenance investigators interviewed in South Africa said that no photographs of defendants are ever included in maintenance files at their courts. The assessment recommended: “Maintenance courts should immediately start using this extremely helpful enforcement mechanism expressly provided for in the Maintenance Act … Surely each maintenance court can afford a digital camera for use by its maintenance investigator.”

\begin{quote}
\end{quote}

### 4.3.9 Duration of a maintenance order

**Duration of a maintenance order for a child**

At common law, the legal duty to maintain a child extends beyond the age of majority, as the need for support rather than the child’s status as a minor is the determining factor.\textsuperscript{165} As discussed on page 34,

\begin{itemize}
\item\textsuperscript{161} Martin v Martin 1997 (1) SA 491 (N). The Court did not actually decide this point: “Counsel for the appellant also contended that the order of the maintenance court could not validly include the provision for the amount of R250 a month to be increased annually with effect from 1 October 1989 by an amount equal to the percentage increase in the rate of inflation during the preceding 12-month period. This is because s 5(4) of the Act only empowered the maintenance court to make a maintenance order for the payment of sums of money specified in the order. He submitted that an order for the payment of an increase the amount of which was uncertain, and which could only be established by evidence of the rate of inflation each year, was not an order for the payment of sums of money specified in the order. The only authority cited for this submission was the judgment of a magistrate quoted in Davis v Davis 1993 (1) SA 621 (C) at 625E-F. I prefer the reasoning of Wunsh J in Schmidt v Schmidt [1996 (2) SA 211 (W)] to the effect that such an order would specify the amount in question on the basis of the maxim id certum est quod certum reddi potest. However, it is unnecessary to express a final opinion on the point. I assume for the purposes of this judgment that it was competent for the maintenance court to incorporate in its order the whole of clause 4 of the agreement, including the provision for escalation of the monthly payment on account of inflation and the payment of medical and allied expenses.” At 49SC-G.
\item\textsuperscript{162} Id, section 17(4).
\item\textsuperscript{163} Id, section 48.
\item\textsuperscript{164} Maintenance Regulations, regulation 27.
\item\textsuperscript{165} See Ex parte Jacobs 1982 (3) SA 276 (O); Bursey v Bursey 1999 (3) SA 33 (SCA).
\end{itemize}
the duty of support could extend indefinitely in the case of a child who is chronically ill or disabled, but it can also apply in a case where there is simply a need for support.

The Maintenance Act provides that a maintenance order for the support of a child will normally remain in force until (1) the child dies or is adopted; (2) the parents divorce or annul the marriage (at which point a new order would likely be made between the parties); (3) the child marries; or (4) the child reaches the age of 18. However if the child is attending an educational institution for the purpose of acquiring a course which would enable him or her to support himself or herself, the maintenance order may be extended until the child reaches the age of 21. These are the usual circumstances, but the law also gives the court discretion to provide a different termination point; the guidelines on termination of an order for maintenance of a child apply “unless the order otherwise provides”.166

Even if the child is not attending an educational institution when he or she reaches the age of 18, the child or any person acting on behalf of the child, may apply to the court for an extension of the maintenance order beyond age 18. The defendant must then respond to the court as to why the order should not be extended. The court will consider the application and grant the application conditionally, unconditionally, or refuse the application.167 An application for an extension of the original order would presumably not be necessary if the original order explicitly applied beyond age 18, but we recommend that the wording of the provisions on termination should be clarified on this point.168

Section 26(2) of the Maintenance Act 9 of 2003, in what the court describes as a “progressively humanitarian approach”, “embeds into statute law the obligation at common law for a parent, on application to court and subject to proof of need, to maintain a child well beyond the age of majority”.

Main NO v Van Tonder NO and Another 2006 (1) NR 389 (HC) at para 25

It is important for magistrates to specify an appropriate duration for the order when drafting maintenance orders for children with chronic illnesses or disabilities who may never be able to become self-supporting, to prevent unintended termination at age 18 and unnecessary effort on the part of the child’s caretaker and the courts in considering extensions. We recommend that the Ministry of Justice send a circular to the magistrates’ courts, highlighting the need to specify an appropriate duration of a maintenance order for a child with ill health or a disability.169

Duration of a maintenance order for a spouse

A maintenance order for the support of a spouse will remain in force until (1) the spouse dies or remarries; or (2) the couple divorce or annul the marriage.170 There is no discretion for a maintenance court to extend maintenance for a spouse beyond these points, as the cited events terminate the legal duty of support between spouses.

In the case of a divorce, the liability to maintain can be extended beyond the divorce only by a court order for maintenance issued at the time of the divorce. This is why divorce orders will occasionally incorporate an order for spousal maintenance for a nominal amount, so as to keep the door open

166 Id, section 26(1).
167 Id, section 26(2)-(3).
168 Section 26(1) states, in relevant part: “A maintenance order made in favour of a child must, unless the order otherwise provides, with respect to that child, cease if and when … subject to subsection (2), the child attains the age of 18 years, but if the child is attending an educational institution for the purpose of acquiring a course which would enable him or her to maintain himself or herself, the maintenance order does not terminate until the child attains the age of 21 years.” Section 26(2) reads: “Where a child in whose favour a maintenance order was made attains the age of 18 years, the child or any person acting on the child’s behalf, may, in the prescribed manner, apply to the maintenance court for an extension of the maintenance order beyond the age of 18 years.” (Emphasis added.)
169 As discussed on page 143, we found a record of only one case involving a child with disabilities. In this instance an order was not made as the child went to live with the defendant and the court stated that a maintenance order was not required.
for future maintenance by way of substitution if circumstances change; if no order is made for spousal maintenance at the time of the divorce, the option of claiming such maintenance in future is foreclosed.171

“In several decisions courts have in the past granted a “nominal” or “token” amount in respect of maintenance [in a divorce order] in order to preserve the right of the person entitled to maintenance. Where the right of maintenance is reserved, the person entitled thereto can then in future apply for an increase of such maintenance if he/she can prove what he/she needs, as well as that the other party is able to pay it. Such an application can of course then be brought in the Maintenance Court and does not have to be instituted in this Court. To bring this matter closer to home; if the Plaintiff’s right to maintenance is reserved by awarding a nominal amount to her, she can always in future approach the Maintenance Court depending thereon that the Defendant’s circumstances in respect of employment has improved and she can prove that she needs that maintenance.”

Schneider v Schneider [2010] NAHC 191 (17 November 2010) at para 11 (citations omitted)

Duration of a maintenance order for a parent

A maintenance order for the support of a parent will remain in force as long as the parent is (1) unable to maintain himself or herself; (2) no other person has become liable to maintain the parent (such as a new spouse); and (3) the child is able to support the parent.172

The statute specifically states that a maintenance order for a child or a spouse terminates when the beneficiary dies, but does not state this explicitly in respect of maintenance for a parent. We recommend the law is revised to state that a maintenance order for the support of a parent also comes to an end if the parent dies.

4.4 Appeals

The Act allows a person who is aggrieved by an order made by a maintenance court (including a refusal to make an order) to appeal to the High Court.

The orders which can be appealed include orders for confirmation, discharge, setting aside, substitution or variation of a maintenance order. However, it is not possible to appeal a consent order (which is by definition made with the agreement of the parties), a default order (where the Act includes a procedure for challenge by the defendant) or a provisional order for payment of the costs of paternity testing (which will be reconsidered and incorporated into the final maintenance order upon the conclusion of the enquiry). However, it is possible to appeal a court’s refusal to make a provisional costs order or a default maintenance order.173

An appeal must be made within 21 days of the decision in question, and a cross-appeal must be made within 7 days of an appeal.174

A maintenance order is not suspended pending an appeal, unless the appeal is based on the argument that the appellant is not legally liable to pay maintenance.175 This rule was a new addition to the 2003 Act to protect the interests of the beneficiaries.

171 See Schneider v Schneider [2010] NAHC 191 (17 November 2010), where spousal maintenance was awarded in the amount of N$1 per month; see also Buttner v Buttner 2006 (3) SA 23 (SCA).

172 Maintenance Act 9 of 2003, section 26(5).

173 Id, section 47. An order made by the High Court in respect of an appeal is subject to section 19 of the High Court Act 16 of 1977, which empowers the High Court to receive further evidence on the hearing of an appeal, to remit the case to the court of first instance for further hearing, or to confirm, amend or set aside the judgment or order which is the subject of the appeal and to give any judgment or make any order which the circumstances may require.

174 Maintenance Regulations, regulation 17.

175 Maintenance Act 9 of 2003, section 47(5).
If the appeal involves maintenance for a child, a complainant who cannot afford legal representation can be represented by a prosecutor.\textsuperscript{176} If the beneficiary is not a child, the complainant could apply for legal aid. A defendant who cannot afford legal representation could apply for legal aid. However, the availability of legal aid in maintenance cases is subject to government policy and budgetary constraints.

The High Court may make any appropriate order at the conclusion of the appeal.\textsuperscript{177} Furthermore, even though there is no explicit provision in the Maintenance Act for a costs order, the High Court can award costs against the unsuccessful party in the appeal.\textsuperscript{178}

### 4.5 Civil enforcement of maintenance orders

Under the previous Maintenance Act, the only avenue for enforcement was to lay a criminal charge. Case law held that a maintenance order could be enforced in the same manner as any other civil judgement,\textsuperscript{179} but civil enforcement was rare with some courts being unsure that it was proper.

The current law emphasises civil enforcement remedies – such as attaching the property, income or debts of the person who is in arrears. The theory behind the changed emphasis is that criminal charges should be used only as a last resort. This makes sense for everyone – the enforcement procedure is simpler for complainants, and defendants can be forced to pay without getting a criminal record. Furthermore, criminal punishment in the form of a fine or imprisonment is likely to reduce the defendant's ability to pay the maintenance owing, which would disadvantage the intended beneficiary. It was also assumed that if criminal cases are used only as a last resort against people who wilfully refuse to pay, the failure to pay maintenance in such circumstances is likely to be treated more seriously.

The 2003 Maintenance Act allows the complainant to apply to the maintenance court for enforcement if maintenance is not paid, 10 days after the date the missed payment was due. This short time period

\textsuperscript{176} Id, section 47(2)-(3).

\textsuperscript{177} Id, section 47(4). For examples of appeals (under the previous Maintenance Act) see Vedovato v Vedovato 1980 (1) SA 772 (T) and Van Zyl v Fourie 1997 NR 85 (HC). See also Muruko v Mieze [2013] NAHCMD 228 (31 July 2013), where it was held that a party who is not satisfied with the order made by a magistrate in a maintenance enquiry may seek relief either by way of civil appeal or by way of review in terms of the provisions of section 20 of the High Court Act 16 of 1990.

\textsuperscript{178} See, for example, Buch v Buch 1967 (3) SA 83 (T); Vedovato v Vedovato 1980 (1) SA 772 (T); Mgumane v Setemane 1998 (2) SA 247 (Tk D).

\textsuperscript{179} In South Africa, the Maintenance Act 23 of 1963 was amended by Act 2 of 1991, to provide in section 14C that "... any order or direction made by a maintenance court under this Act shall have the effect of an order or direction of that court made in a civil action". However, the import of this provision continued to raise some questions.

See, for example, Butchart v Butchart 1996 (2) SA 581 (W), confirmed on appeal at 1997 (4) SA 108 (W). According to this case, court orders were traditionally classed as either an obligation to pay (\textit{ad pecuniam solvendam}) or an obligation to do something (\textit{ad factum praestandum}). Traditionally, the remedy for non-payment of the first type of order was a writ, while the remedy for non-performance of the second type of order was proceedings for contempt of court. However, according to the appeal court, the remedies available under the Maintenance Act 23 of 1963 blur this distinction, with a long line of cases holding that that a maintenance order has characteristics of both the obligation to make payments and the obligation to do something. Although there is a degree of uncertainty due to the possibility of escalation or variation, the amount of arrear maintenance owing under such an order can easily be quantified. Even where there is an unspecified amount, such as payment of medical expenses, this can be the subject of a writ if the amount is easily ascertainable and verified by an affidavit from the judgment creditor.

As the lower court explained: “According to some of the earlier cases, starting with Slade v Slade (1884-1885) 4 EDC 243, a maintenance order in the broad sense was regarded as an order \textit{ad factum praestandum}, from which it followed that amounts payable thereunder could not be recovered by a writ. The original reason for so regarding maintenance orders was not to deprive a judgment creditor of the use of a writ as a weapon of recovery but to afford him or her the additional remedy of contempt of court proceedings. It is now generally accepted that a writ may be issued for unpaid maintenance. See Williams v Carrick 1938 TPD 147; Manley v Manley 1941 CPD 95; Bam v Bhadha (II) 1947 (1) SA 399 (N); Du Preez v Du Preez 1977 (2) SA 400 (C).” At 583B-E.

However, not all authorities were in agreement about this. See Martin v Martin 1997 (1) SA 491 (N), dicta at 496A.
was consciously added to prevent the hardships which occurred under the previous policy of requiring complainants to wait for three months before enforcement proceedings could be commenced.\textsuperscript{180}

Civil enforcement can take the form of –
(a) execution against property;
(b) the attachment of emoluments,\textsuperscript{181} or
(c) the attachment of any debt owed to the defendant.
Any pension, annuity, gratuity, compassionate allowance or other similar benefit may also be attached or subjected to execution to fulfil a maintenance order.\textsuperscript{182}

The complainant may choose the enforcement mechanism most likely to achieve results.\textsuperscript{183} However, the court is not bound to employ the method of enforcement sought by the complainant, but may utilise any of the three methods of civil enforcement provided for in the Act.\textsuperscript{184}

The procedures to enforce an order may not be implemented if there is an appeal in process – although this appears to apply only to an appeal against a finding that the defendant is legally liable to maintain the beneficiary in question.\textsuperscript{185} The explicit statement that a maintenance order is not suspended pending any other form of appeal would be meaningless if enforcement were not possible pending the appeal. The South African Maintenance Act, which contains a similar principle, makes it clear that enforcement is prohibited while an appeal is pending only where an appeal has the effect of suspending the underlying maintenance order.\textsuperscript{186} We recommend that this issue be similarly

\begin{quote}... if the respondent had a choice of remedies she was perfectly entitled to choose the one which she considered the more efficacious, regardless of any supposed advantages which the other may have had for the [defendant] …\end{quote}

\textit{Martin v Martin} 1997 (1) SA 491 (NPD)
(addressing enforcement of maintenance in South Africa under similar statutory provisions)

\textsuperscript{180} The 1963 law did not specify any time period, but some courts imposed a waiting period of three months before they would act on complaints about non-payment of maintenance. See D Hubbard, “Engaging in Engaging Research”, conference paper, March 1996.

- Case law in Zimbabwe states that the fact that late payments had been accepted by the maintenance complainant in the past does not affect the respondent’s obligation to make the maintenance payments on the stipulated day. \textit{R v Moss} 1959 (2) SA 738 (SR).

\textsuperscript{181} In terms of section 1 of the Maintenance Act 9 of 2003, “emoluments” includes “any salary, wages, allowances, or any other form of remuneration or any other income which is paid periodically to any person, whether expressed in money or not”.

\textsuperscript{182} Maintenance Act 9 of 2003, section 28(4).

\textsuperscript{183} An application for civil enforcement of a maintenance order should be made using Form K. The application must include a copy of the maintenance order, a statement under oath or affirmation confirming the amount of money that has not been paid and a statement indicating the preferred form of enforcement. Maintenance Regulations, regulation 18. A South African court held (in a slightly different context) that the person to whom the maintenance is owing, if there is a choice of remedies, is “perfectly entitled to choose the one which she considered the more efficacious”, regardless of any supposed advantages which another remedy may have had for the person who owes the maintenance. \textit{Martin v Martin} 1997 (1) SA 491 (N) at 497.

\textsuperscript{184} Maintenance Act 9 of 2003, section 28.

\textsuperscript{185} Id, section 28(4). Section 28(4) states: “A maintenance court must not, in the circumstances contemplated in section 47(5), authorize the issue of a warrant of execution or make any order for the attachment of emoluments or any debt in order to satisfy a maintenance order until the appeal has been finalised.” (emphasis added). Section 47(5) states: “Notwithstanding anything to the contrary contained in any law, an appeal under this section does not suspend the payment of maintenance in accordance with the order in question, unless the appeal is noted against a finding that the appellant is legally liable to maintain the complainant.”

\textsuperscript{186} Section 23(3) of the South African Maintenance Act 99 of 1998 has a similar rule on suspensions while appeals are pending as in the Namibian statute: “Notwithstanding anything to the contrary contained in any law, an appeal under this section shall not suspend the payment of maintenance in accordance with the maintenance order in question, unless the appeal is noted against a finding that the appellant is legally liable to maintain the person in whose favour the order was made.” Section 26(3) states: “A maintenance court shall not authorise the issue of a warrant of execution or make any order for the attachment of emoluments or any debt in order to satisfy a maintenance order- (a) if the payment of maintenance in accordance with that maintenance order has been suspended by an appeal against the order under section 25; or (b) if that maintenance court has made an order referred to in section 16(2) [which refers to the attachment of pensions and similar payments].” (emphasis added). This, it is clear that civil enforcement is possible where the filing of an appeal has not had the result of suspending the underlying maintenance order.
addressed in the Namibian Maintenance Act, to clarify that civil enforcement of a maintenance order is possible while an appeal is pending, unless the maintenance order is suspended while the appeal is underway because the appeal is challenging the finding that the defendant is legally liable to maintain the beneficiary.

Warrants of execution

The court may issue a warrant of execution against moveable property, and if this is insufficient to meet the amount owed, against immovable property. A warrant of execution against the immovable property of a person married in community of property is only applicable to the share of the property to which the defendant is entitled.\(^{187}\)

Normally, such warrants would be prepared with the assistance of a legal practitioner. However, in the case of maintenance, the maintenance investigator (or maintenance officer when there is no investigator) must assist the complainant in preparing the warrant and in taking the prescribed steps to execute the warrant.\(^{188}\) The clerk of the maintenance court and the messenger of the court also play specified roles in the execution of the warrant.\(^{189}\) The messenger of the court must pay the proceeds of the execution directly to the complainant.\(^{190}\)

The defendant may apply to have a warrant of execution set aside, if he or she acts within ten days of becoming aware of the warrant. The defendant may also apply at any time for the warrant to be substituted or suspended.\(^{191}\)

Where the defendant has applied to have the warrant of execution set aside, he or she must serve notice of this on the complainant at least 14 days before the date on which the application is to be heard.\(^{192}\) However, there is no form provided for this and no specific directions for the manner of service.\(^{193}\)

In contrast, where the defendant has applied to have the warrant of execution substituted or suspended, he or she must serve notice of this on the complainant at least 14 days before the application for substitution or suspension is to be heard, in “any manner convenient” to the defendant – and there is a specific form for this purpose.\(^{194}\)

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\(^{187}\) Maintenance Act 9 of 2003, section 29(1 and 2).

\(^{188}\) Id, section 29 and Maintenance Regulations, regulation 19.

\(^{189}\) The warrant is completed on Form L. The complainant must complete Part A of Form L, giving information about the amount of maintenance owing plus interest and the address of the defendant, in triplicate (a version for the defendant, the complainant and the court). The clerk of the maintenance court must complete Part B of Form L, directing the messenger of the court to execute the warrant. The messenger of the court executing the warrant must complete Part C (return of service), and where relevant Part D (certifying that execution of the warrant was averted by payment of the amount owing), and return this to the court. Maintenance Regulations, regulations 19-20.

\(^{190}\) Id, regulation 19(7).

\(^{191}\) Maintenance Act 9 of 2003, section 29(5) and (8). To apply to have the warrant of execution set aside, the defendant must complete Part A of Form M (motivating the application with reasons). To apply to have the warrant of execution substituted or suspended, the defendant must complete Part B of Form M (motivating the application with reasons). Maintenance Regulations, regulation 21(1)-(2).

In a 2009 Namibian case, a divorced man who had been convicted of failure to pay maintenance brought an urgent application challenging a warrant of execution brought in respect of the arrear maintenance. Despite an agreement which was in the process of negotiation between the parties on the gradual payment of the arrears over time, the wife obtained a warrant of execution. The issue which fell to be determined by the High Court was whether the ex-husband could challenge the warrant through an urgent application. The Court found no basis for urgency given that no date for the sale in execution had yet been set, and given that the procedures provided by the Act for applying to have the warrant of execution set aside, substituted or suspended were available to the defendant. Mondo v Messenger of Court: Grootfontein and Others [2009] NAHC 96 (13 March 2009).

\(^{192}\) Maintenance Act 9 of 2003, section 29(6)(b).

\(^{193}\) Regulation 28 is a general provision on service of process, but it applies only to documents which are to be served by the maintenance investigator or messenger of court.

\(^{194}\) Maintenance Act 9 of 2003, section 29(9)(b). When the defendant is applying to have the warrant of execution substituted or suspended, the defendant must complete Part C of Form M (notice to the complainant), and keep a record of how this notice was submitted to the complainant (with no form for this record being provided). Maintenance Regulations, regulation 21(3)-(4).
It is likely that the distinction between the approaches to notice in respect of the two procedures is an oversight, since there would not seem to be any logical reasons for treating notice differently in these different forms of objection to a warrant of execution.

Furthermore, in the context of maintenance, placing responsibility on the defendant (who will usually be unrepresented) to serve notice on the complainant (who will usually be unrepresented) seems a bad idea because of the context of possible domestic violence or acrimony. We recommend that the regulations which prescribe procedures for notice to the complainant in the case of a challenge to a warrant of execution be re-examined.

The court must then consider the defendant’s application. It may require the defendant or the complainant to give evidence. When considering the defendant’s application, the court must consider (1) the existing and prospective means of the defendant; (2) the financial needs and obligations of other persons maintained by the defendant; (3) the conduct of the defendant relevant to his or her failure to satisfy the maintenance or other order in question; and (4) any other circumstances which should, in the opinion of the court, be taken into consideration. The court may set aside the warrant of execution if the defendant has complied with the maintenance order, or it may after a summary enquiry suspend the warrant of execution and substitute it with an order for the attachment of emoluments or the attachment of a debt.

Attachment of emoluments

The court may make an attachment of emoluments (in most case, wages) either upon application of the complainant due to unpaid maintenance, or as an alternative when a warrant of execution is suspended. The attachment of emoluments may include the amount of maintenance owed, interest on the unpaid maintenance and any costs associated with the enforcement of the order. The attachment of emoluments for a maintenance order takes priority over the attachment of emoluments for any other court order. The employer is entitled to deduct administrative costs from the employee as well as the amount of maintenance which is owing, to the extent authorised in the court order.

The maintenance officer must give notice of an order for the attachment of emoluments to the employer within seven days of the date on which it was issued.

If the defendant ceases to work for an employer on whom such a notice has been served, the employer must give notice to the court within seven days after the defendant leaves. The employer should keep a record of having provided this notice to the court. The defendant also has a duty to give notice to the court if he or she changes employment.

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195 Somewhat analogously, in rape cases, the Legal Assistance Centre suggested amending section 64 of the Criminal Procedure Act 25 of 2004 to remove subsection (3), which gives the accused responsibility for asking the station commander to inform the complainant of the time and place of the bail application in certain circumstances. It is probably not to the accused’s advantage to ensure that the complainant is timeously aware of the bail application, so this requirement works against logic and interest. Rape in Namibia: An Assessment of the Operation of the Combating of Rape Act 8 of 2000, Windhoek: Legal Assistance Centre, 2006 at 354.

196 Maintenance Act 9 of 2003, section 29(12).
197 Id, section 29(11).
198 Id, section 29(7).
199 Id, section 29(10).
200 Id, section 30(1). As noted on page 24, the original Maintenance Bill allowed an employer to deduct administration costs for attaching wages from the amount which was supposed to be paid over to the beneficiary. The Legal Assistance Centre and others objected to this, and an amendment provided administration costs (in an amount to be prescribed by regulation) to be a further deduction from the wages of the person responsible for paying the maintenance.
201 Id, section 31(3).
202 Id, section 31(4).
203 Id, section 31(1). This notice must be made on Part A of Form O, with the return of service from the employer completed using Part B of Form O. Maintenance Regulations, regulation 22(4)–(6).
204 Maintenance Act 9 of 2003, section 31(2). This notice from the employer must be completed on Part C of Form O. Maintenance Regulations, regulation 22.
205 Maintenance Regulations, regulation 22.
206 Maintenance Act 9 of 2003, sections 17(5) and 45.
The defendant or the employer may apply to have an order for attachment of emoluments suspended, amended or rescinded.207 The applicant must give notice of the application to the clerk of the maintenance court, and to the complainant at least 14 days before the application is to be heard.208 As in the case of applications to suspend or substitute warrants of execution, the applicant must serve notice to the complainant in “any manner convenient” and keep proof of service209 – which could, for the same reasons cited in respect of warrants of execution, be problematic. We recommend that the regulations which prescribe procedures for notice to the complainant in the case of a challenge to an attachment of wages be re-examined.

The court may require the defendant, the employer or the complainant to give oral or written evidence during the hearing in support or rebuttal of the application for an order for the attachment of emoluments.210 The Namibian High Court has held that where a defendant does not attend the proceedings at which the attachment of emoluments is considered (in this case after the conviction of the defendant for failure to comply with the maintenance order), the resulting order should be treated in the same manner as a default maintenance order (in terms of section 19 and 28 of the Act).211

There are several South African cases which have held that the magistrate should give the employer an opportunity to comment on the feasibility of an emoluments order before any such order is imposed. According to one of these cases, “As the employer, in truth, is made a party to the matter, he is entitled to be heard.”212 Another argument for giving the employer a right to be heard is the fact that criminal penalties apply to an employer who fails to comply with an emoluments order.213 However, another South African case suggests that this may not be necessary if there is no doubt about the amount paid to the defendant by the employer, or about the amount of any other possible deductions from the defendant’s wages.214

The court may, on good cause shown, suspend, amend or rescind an order for the attachment of emoluments.215 The employer may also bring such an application in respect of an emoluments order216 – which could be viewed as an alternative to giving the employer a chance to be heard before the emoluments order is made.

**Attachment of debts**

The court may make an attachment of debts owed to the defendant either upon application of the complainant, as a method for securing maintenance or as an alternative when a warrant of execution is suspended. The order may include the amount of maintenance owed, interest on the unpaid maintenance and any costs associated with the enforcement of the order.217

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207 Maintenance Act 9 of 2003, section 30(2). A defendant who applies for the suspension, amendment or rescission of an order for attachment of emoluments must complete Part A of Form N. Maintenance Regulations, regulation 21(1).

208 Maintenance Act 9 of 2003, section 30(3).

209 Id, section 30(3). Notice must be given using Part B of Form N. Maintenance Regulations, regulation 21(2).

210 Maintenance Act 9 of 2003, section 30(4).


212 S v Raseemela 2000 (2) SACR 98 (T) at 99g-h (considering a similar procedure under the South African Maintenance Act 99 of 1998). See also S v Nkgoele 2000 (2) SACR 420 (T).

213 S v Raseemela 2000 (2) SACR 98 (T) at 99e-f, h.

214 S v Botha 2001 (2) SACR 281 (E) at 286c-e (dicta). This case, decided under the South African Maintenance Act 99 of 1998, dealt with the attachment of pension payments owing to a defendant.

215 Maintenance Act 9 of 2003, section 30(2).

216 Ibid.

217 Id, section 32(1). If the court makes an order for an attachment of debts, Part A of Form F must be completed and served on the person who is indebted to the defendant. Part B of Form F constitutes the return of service. An indebted person who has repaid the debt in full should communicate this by submitting Part C of Form F to the court. Maintenance Regulations, regulation 9.
This order is directed to the person who has incurred the obligation, and it will require payments in respect of the debt to be made as specified in the court order.\textsuperscript{218}

The defendant or the creditor may apply for the attachment of debts to be suspended, amended or rescinded with 14 days’ notice to the complainant – as in the case of the other civil enforcement orders discussed.\textsuperscript{219} We recommend that the regulations which prescribe procedures for notice to the complainant in the case of a challenge to an attachment of debts be re-examined.

The court may require the defendant or the complainant to give oral or written evidence during the hearing in support or rebuttal of the application.\textsuperscript{220}

The court may, on good cause shown, suspend, amend or rescind the order for attachment of debts.\textsuperscript{221}

**Attachment of pensions and similar benefits**

It should be noted that the statute explicitly authorises the attachment of “any pension, annuity, gratuity or compassionate allowance or other similar benefit” in order “to satisfy a maintenance order”, as well as providing that such funds may be subjected to execution under a warrant of execution or any other order issued under the Act’s provisions on civil enforcement.\textsuperscript{222}

South African cases have held that the corresponding provision in the South African Maintenance Act (which uses virtually identical language to the Namibian one\textsuperscript{223}) allows such funds to be attached for the payment of arrear maintenance, but not in respect of amounts of maintenance which will become applicable in the future.\textsuperscript{224} (However, as discussed in the following section, it has been held in South African that attachment of such funds to secure future maintenance is possible in the High Court – and even in the maintenance court – as a civil remedy falling outside the parameters of the Act.)

However, it has also been held that the South African Maintenance Act authorises a continuing order for regular periodical payments from a defendant’s pension fund – and the Namibian Act again contains similar wording.\textsuperscript{225}

The attachment of pensions and similar payments is authorised “notwithstanding anything to the contrary contained in any law”.\textsuperscript{226} This statement is clear. However, the Pensions Funds Act 24 of 1956 protects pensions and annuities from attachment or from being subjected to execution save to the extent permitted by (amongst other laws) the Maintenance Act 23 of 1963.\textsuperscript{227} This provision, which was added in 1980, would present no bar to the attachment of pensions under the Maintenance Act 9 of 2003, as it would have to be read in light of the sweeping authorising provision in the 2003 Maintenance Act, but nonetheless it would be best to harmonise the Pensions Funds Act 24 of 1956 and the Maintenance Act 9 of 2003 on attachment of or execution against pension payments.

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\textsuperscript{218} Maintenance Act 9 of 2003, section 32(1).

\textsuperscript{219} Id, section 32(2). To make such an application, the defendant must complete Part A of Form P (motivating the application with reasons). Id, section 32(8); Maintenance Regulations, regulation 23. The defendant must serve this notice on the complainant and keep a record of having done so. Maintenance Regulations, regulation 23(3).

\textsuperscript{220} Maintenance Act 9 of 2003, section 30(4).

\textsuperscript{221} Id, section 32(2).

\textsuperscript{222} Id, section 28(5).


\textsuperscript{224} Mngadi v Beacon Sweets & Chocolates Provident Fund and Others 2004 (5) SA 388 (D).

\textsuperscript{225} S v Botha 2001 (2) SACR 281 (E). The court found that such an order was authorised by the provision which refers (as does the corresponding provision in Namibia) to “any person who, in terms of a contract is obliged to make periodical payments to the defendant”. Compare South African Maintenance Act 99 of 1998, section 16(2) to Maintenance Act 9 of 2003, section 30(1). In Namibia, such an order would be a form of attachment of emoluments.

\textsuperscript{226} Maintenance Act 9 of 2003, section 30(5).

\textsuperscript{227} Pension Funds Act 24 of 1956, section 37A(1).
Other civil remedies

A line of South African cases has held that although magistrates’ courts are limited by the enforcement mechanisms provided by the statute, the High Court is not limited from utilising civil remedies other than those set forth in the statute in order to secure future maintenance. One South African case has gone even further, finding that the maintenance court itself is not bound by the remedies enumerated in the statute.

More specifically, a 2004 South African case allowed the attachment of withdrawal benefits from a pension fund in order to secure future maintenance from a defendant who had had resigned from his job to avoid paying maintenance. The Court stated:

\[\text{The Maintenance Act created some new rights it is true. The right to prosecute a person, who fails to pay maintenance, in breach of an order, is one such new right. But the obligation to pay maintenance to children in need thereof dates from time immemorial and the Maintenance Act creates a cheap and hopefully effective means of obtaining relief from those unable to afford the costs of a High Court application or action. In addition the maintenance court can easily deal with arrear maintenance as no complicated legal issues arise. I do not believe that in enacting the Maintenance Act the Legislature was restricting the applicant to the remedies contained therein. The Maintenance Act is still a partial codification of the father's and mother's obligations to maintain their children. The residual rights of the parties remain within the jurisdiction of the High Court.}\]

Similarly, a 2006 South African case held that future maintenance could be secured from an unemployed defendant by attaching a lump sum due to him in respect of the sale of immovable property. As in the previous case, the Court found that the remedies in the Maintenance Act do not restrict the High Court from using its inherent power to secure future maintenance:

\[\ldots\text{although the Maintenance Act 99 of 1998 has taken significant strides in devising new mechanisms to address the problem of recovery of maintenance from recalcitrant parents, the limitations of its mechanisms do not permit of its use to secure future maintenance from the fund of the nature in issue in casu. There is no provision or precedent for the proposition that a lump sum be attached in order to secure future monthly maintenance payments ...}\]

\[\ldots\text{In this regard, this Court has a duty which enjoins it to summon its inherent powers }\]

\[\ldots\text{so that, apart from powers specifically conferred by statutory enactments and subject to any deprivations of power by the same source, (it) can entertain any claim or give any order which at common law it would be entitled so to entertain or give’}\ldots\text{and, in doing so, to hold the scales of justice, where no specific law provides for the given situation.}\]

\[\ldots\text{I consider this to be a proper case in which the arm of the Maintenance Act must be extended where it, by way of its recovery mechanisms, falls short in its endeavours to reach the desired results.}\]

\[\text{228 Mngadi v Beacon Sweets & Chocolates Provident Fund and Others 2004 (5) SA 388 (D).}\]

\[\text{229 At 396G-J. The Court took note of the provision in the South African Pension Funds Act 24 of 1956 which states that a pension benefit in terms of a registered fund may not be reduced, transferred or otherwise ceded, pledged or hypothecated, or attached or subjected to any form of execution under a judgment or order of court of law ”[s]ave to the extent permitted by this Act, the Income Tax Act 58 of 1962 and the Maintenance Act, 1998” (section 37A(1)). Namibia's version of the Pensions Funds Act 24 of 1956 contains this same provision. However, the Court did not find this to be a bar to using the pensions fund to secure the payment of future maintenance, even though such a civil remedy was not explicitly provided for in the Maintenance Act. Firstly, the Court found that this was covered by the proviso to section 37A(1), which states that the fund may pay benefits “to any one or more of the dependants of the member or beneficiary or to a guardian or trustee for the benefit of such dependant or dependants during such period as it may determine”, and secondly that the Maintenance Act itself provides that it may not be interpreted as allowing any person liable to maintain another from being excused from doing so, thus preserving by its own terms the joint common-law duty of support.}\]

\[\text{See section 2(2) of the South African Maintenance Act 99 of 1998: “This Act shall not be interpreted so as to derogate from the law relating to the liability of persons to maintain other persons.” Compare section 2(b) of the Namibian Maintenance Act 9 of 2003: “This Act ... must not be interpreted so as to derogate from the law relating to the duty of persons to maintain other persons.”}\]

\[\text{230 Burger v Burger and Another 2006 (4) SA 414 (D).}\]

\[\text{231 At paras 15, 18, 23.}\]
In a subsequent South African case, it was held that the High Court can bind pension funds to secure future maintenance even where the defendant is not already in arrears.²³²

A later South African case went even further, finding that a maintenance court has power to secure future maintenance in this way.²³³ Here, the complainant sought an order prohibiting the defendant from making any withdrawals from his annuity until such time as the child who was the beneficiary of the maintenance order in question becomes self-supporting, except with the leave of the maintenance complainant or the maintenance court. The purpose of this order was to prevent the maintenance defendant, who had a history of repeatedly being in default on maintenance payments, from depleting or dissipate the funds of the annuity, from which periodical payments were to be made for the maintenance of the beneficiary. The Court found that the maintenance court had the authority to make such an order, even though the Maintenance Act did not explicitly provide for such a remedy, saying that the Act “clearly does not provide for all the remedies maintenance courts may be called upon to grant, in which event innovative remedies should be considered”.²³⁴ The Court’s reasoning was that a magistrate’s court functioning as a maintenance court is “sui generis”, with “wide-ranging powers in enforcing the duty of parents to support their children”.²³⁵ Furthermore, a maintenance court must have the authority to fulfil the constitutional duty to protect the best interests of the child.²³⁶ The Court held that this duty “overrides any real or ostensible limitation relating to the jurisdiction of magistrates’ courts”.²³⁷

It would be absurd, and a costly time-wasting exercise, if an applicant for relief in a maintenance court should be compelled to approach the High Court for such relief because of jurisdictional limitations adhering to the magistrate’s court. This could never have been the intention of the Legislature in enacting the Maintenance Act ...²³⁸

Thus, South African precedent asserts that the High Court and the maintenance courts have broad powers to take action to secure future maintenance payments for child beneficiaries.

“...It would be fair to expect that any parent who pleads poverty by reason of unemployment, or from any other cause, would, upon coming into fortune, selflessly seize the windfall and preserve and commit it towards the provision of the necessities of life for his or her children, and that this would be without need to be coerced...”

Burger v Burger and Another 2006 (4) SA 414 (D).

Offsets

There is much precedent to the effect that a person who is subject to a maintenance order is not allowed to unilaterally decide to make offsets against the maintenance owing in respect of periods when a child beneficiary resides with him or her, or in respect of amounts voluntarily paid for other purposes or items supplied to the beneficiary.²³⁹

²³² Magewu v Zozo and Others 2004 (4) SA 578 (C).
²³³ Soller v Maintenance Magistrate, Wynberg, and Others 2006 (2) SA 66 (C).
²³⁴ At para 29.
²³⁵ At para 20.
²³⁶ The Namibian Constitution does not make reference to the best interests of the child, but this principle from the Convention on the Rights of the Child is part of Namibian law by virtue of Art 144 of the Namibian Constitution, which states: “Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.”
²³⁷ At para 29-30.
²³⁸ At para 30.
²³⁹ See Jantjies v Jantjies and Others [2000] NAHC 16 (22 May 2000), citing Kanis v Kanis 1974 (2) SA 606 (RA) (“It is [of] the utmost importance that orders made by the High Court for the maintenance of a wife or children should be strictly observed until varied or discharged by order of a competent Court.” At page 609G)); S v Olivier 1976 (3) SA 186; R v Glasser 1944 EDL 227.
One concern about potentially providing for offsets in cases where a child visits a non-custodial parent for a substantial period is that certain expenses which accrue to the custodial parent remain constant nonetheless. For example, the rent on a house suitable to accommodate the child does not change during temporary absences. School-related expenses are not affected by where the child stays during school holidays. Thus, it would be reasonable to expect that only regular consumables (such as water or groceries) would be affected by temporary absences of a child beneficiary.

Keeping this caveat in mind, it might be useful to provide for a simple procedure whereby the complainant and the defendant may agree on a temporary reduction of maintenance during periods where the beneficiary visits the defendant for a period longer than one month, which could be placed on file with the court. However, this should not be allowed in cases where the maintenance payments are being satisfied by an attachment order (such as attachment of emoluments) because of the administrative burden which would accrue to third parties by such a temporary reduction. If the parties could not reach agreement on this issue, the defendant could approach the court under the normal procedures with a request to suspend (or partially suspend) the order for the temporary period in question.

Chart 8: Civil enforcement mechanisms for the failure to comply with a maintenance order

4.6 Criminal enforcement

4.6.1 Failure to pay as a criminal offence under the Maintenance Act

Failing to obey a maintenance order is a criminal offence. Although the 2003 Maintenance Act focuses on other approaches to enforce the payment of maintenance, if criminal enforcement seems to be the best option, the defendant will be charged and summoned to appear in court. The case then becomes a criminal case that will be dealt with in the criminal court by a prosecutor.

Mens rea (guilty mind)

South African precedent is not in full agreement as to whether mens rea is an element of the offence of failure to pay maintenance, or whether the offence is a “strict liability” one where the accused’s

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240 Maintenance Act 9 of 2003, section 39(1). In terms of section 106 of the Magistrates Courts Act 32 of 1944, it is an offence to willfully disobey or neglect to comply with an order or judgment of a magistrate’s court. This is a form of contempt of court, punishable by a fine of up to N$1000 or imprisonment for up to three months. However, the terms “order” or “judgment” do not include a judgment to pay a sum of money. Given that the Maintenance Act 9 of 2003 provides that failure to comply with a maintenance order is a criminal offence, it is not necessary to determine whether or not a maintenance order is excluded from the coverage of the provisions on contempt of court in respect of disobedience of a magistrate’s court order.
erroneous belief that he had a right to withhold maintenance payments would be irrelevant. In one South African case, the appellate court found that a father could be convicted of failure to pay maintenance even though he believed in good faith (but erroneously) that he was entitled to withhold payments in respect of the period when the child visited him.241 However, a subsequent South African case (citing other South African precedents) held that the prosecution should be required to prove that an accused failed to make the required maintenance payments with a guilty mind, asserting that this is part of the constitutional right to be presumed innocent until presumed guilty as well as the right not to be deprived of liberty arbitrarily and without just cause.242 This case also held that the requirement of a guilty mind could be satisfied by “wilful intention, constructive intention or negligence”.243

Defences

Lack of means to pay maintenance is a defence to a charge of failure to comply with a maintenance order, unless it is proven that such lack of means was due to the defendant’s unwillingness to work or misconduct.244 This is the sole defence articulated in the statute.

What defences can be raised?

The bulk of South African case law (on South Africa’s similar statutory offence) has taken the view that the statutory defence of lack of means is the only one that can be raised in response to a criminal charge for non-compliance with a maintenance order – unless the proceedings are converted into an enquiry.245 More specifically, it has been held that a defendant is not allowed to assert as a defence for non-payment that maintenance was not owing during temporary periods when the child was visiting the non-custodian parent; if there is a change in circumstances, then the defendant can proceed by way of a request for substitution of the order, but he has no right to decide on his own not to comply with the court order.246 It has also been held that a criminal trial should not be the forum for re-evaluating the duty of maintenance or the correctness of the maintenance order. This should be done by way of an appeal rather than being raised as a defence to a criminal prosecution. If the accused contends that he is no longer liable to pay maintenance because of new circumstances which arose after the order was made, then the criminal proceedings should be converted into an enquiry.247

On the other hand, there is also some South African authority stating that an accused would be permitted to raise the defence that he is not liable in law to pay maintenance because he is not the beneficiary’s father, even though a maintenance order was already in place, provided that this

241 S v Olivier 1976 (3) SA 186 (O).
242 S v Magagula 2001 (2) SACR 123 (TPD) at 145g-147c. This case also asserted that the language used in respect of the offence in section 31(1) of the South African Maintenance Act (which is similar to the language used in sections 39(1) and (2) of the Namibian Maintenance Act 9 of 2003) implies a guilty state of mind through words such as “fails”, “unwillingness to work” and “misconduct”. See also S v Mngxaso; S v Polo 1991 (2) SACR 647 (Ck), which came to the same conclusion regarding the Maintenance Act 23 of 1963.
243 S v Magagula 2001 (2) SACR 123 (TPD) at 147d-155d. These three states of mind are referred to in Latin as dolus directus, dolus eventualis or culpa.
244 Id, section 39(2).
245 S v Oliver 1973 (3) SA 186 (O) at 189-191 (referring to the similar provision in the 1963 Act); S v Magugula 2001 (2) SACR 123 (TPD) at 160d-161d and S v Driescher 2010 (1) SACR 443 (WCC) (both referring to the similar provision in the South African Maintenance Act 99 of 1998).
246 S v Pieterse 1993 (3) SA 275 (C); S v Sohlezi 2000 (2) SACR 231 (NC); S v Magagula 2001 (2) SACR 123 (TPD).
issue had not already been determined by the maintenance court – although the court also held that
the proper course of action in such circumstances would be to convert the criminal case into an
enquiry.248 This approach has been criticised.249

Who bears the burden of proof in respect of the defence of lack of means?

A further question is whether lack of means is a defence which must be raised and proved by the
accused, or whether the prosecution must prove as an element of the crime that the failure to pay was
not due to an unexcused lack of means.

One South African report suggests that placing the onus on the accused to show that failure to pay
was due to a lack of means would constitute a “reverse onus” which would be unconstitutional.250

One South African case has taken the view that the accused may raise lack of means as a defence
without bearing any burden of proof, which then places the burden on the prosecution to disprove the
defence.251 According to this case, the prosecution would have three avenues for doing this: a) to
show that the accused did in fact have means to make the payments; b) to show that the lack of means
was due the accused’s to unwillingness to work or misconduct; c) to show that the lack of means was due to the
accused’s misconduct. This case asserts that proof that the lack of means is due to unwillingness to work
is sufficient to overcome the defence, meaning that nothing further needs to be shown about the
accused’s state of mind in respect to the lack of means (only that the accused was aware that failure to
comply with the maintenance order would be unlawful). However, this case asserts further that proof
of misconduct overcomes the defence of lack of means only if coupled with a guilty mind relating to the
obligation to comply with the maintenance order – such as committing a criminal offence resulting in
imprisonment with the awareness that this might prevent compliance with the maintenance order (or
at least that the accused should have found this reasonably foreseeable), or by negligently spending so
much money on luxuries as to be left with insufficient means to comply with the order.252

In contrast, another South African case has held that an accused who raises the defence of lack of
means must first prove this alleged lack of means. The prosecution may then overcome the defence by
showing that the lack of means was attributable to unwillingness to work or misconduct.253 Similarly,

another South African case noted (without having to decide the point) that while the State clearly
bears the burden of proving that failure to pay maintenance which results from conviction for another crime would constitute double punishment for
the accused who

raises the defence of lack of means as a defence is entitled to an acquittal
unless it is established beyond reasonable
doubt, by the prosecution, that the lack of means was due to the accused’s unwillingness to work or misconduct. The
section (section 11(3) of the South African Maintenance Act 99 of 1998) does not require the accused to show that the
lack of means was not caused by his/her unwillingness to work or misconduct before he/she can successfully raise the
defence, instead it places the onus upon the prosecution to prove that the lack of means was self-created by the accused
him or herself in refusing to work or committing misconduct which led to his/her dismissal."

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248 S v Gunya 1990 (4) SA 282 (CK) (dealing with Act 23 of 1963). See also R v van der Merwe 1952 (1) SA 647 (O) (dealing
with a similar offence under another law).
249 The Gunya holding was criticised in S v Pieterse 1993 (3) SA 275 (C) and S v Magagula 2001 (2) SACR 123 (TPD) at
footnote 55. R v van der Merwe 1952 (1) SA 647 (O) was distinguished in S v Olivier 1976 (3) SA 186 (O) on the basis that
the possibility of converting a criminal trial into a maintenance enquiry meant that there was no longer any need to
consider issues such as legal liability to maintain in the context of a criminal defence. See the detailed discussion of the
various precedents in S v Magagula 2001 (2) SACR 123 (TPD), which took the same approach as S v Olivier 1973 (3) SA
186 (O).
250 Madelene de Jong, “Ten-year Anniversary of the Maintenance Act 99 of 1998 – A time to reflect on improvements,
251 S v Magagula 2001 (2) SACR 123 (TPD) at 156d-157b
252 Id at 156d-157b and footnotes 53-54. According to this case and a few other cases cited therein, punishing the accused
for failure to pay maintenance which results from conviction for another crime would constitute double punishment for
a single crime if the accused lacked mens rea in respect of the failure to pay maintenance.
253 S v Nduku 2000 (2) SACR 382 (Tk) at 384b-385d, criticised in S v Magagula 2001 (2) SACR 123 (TPD) at footnotes 56 and
58. S v Nduku states (at para 6, emphasis added): “… on a charge of failure to make payments under a maintenance order
the accused who proves lack of means as a defence is entitled to an acquittal unless it is established beyond reasonable
doubt, by the prosecution, that the lack of means was due to the accused’s unwillingness to work or misconduct. The
section [section 11(3) of the South African Maintenance Act 99 of 1998] does not require the accused to show that the
lack of means was not caused by his/her unwillingness to work or misconduct before he/she can successfully raise the
defence, instead it places the onus upon the prosecution to prove that the lack of means was self-created by the accused
him or herself in refusing to work or committing misconduct which led to his/her dismissal.”
254 S v Cloete 2001 (2) SACR 347 (C).
It should be noted that the wording of the 1963 Maintenance Act provided more clarity on this issue, stating:

*Proof that any failure which is the subject of a charge under sub-section 1 [the offence of failing to make a particular payment in terms of a maintenance order] was due to lack of means and that such lack of means was not due to unwillingness to work or misconduct on the part of the person charged, shall be a good defence to any such charge.*

As a result, several South African cases held that the court had a duty to assist an unrepresented accused with this burden of proof.

The contrasting language in the Namibian Maintenance Act 9 of 2003 (like that of the South African Maintenance Act 99 of 1998) appears to place a burden on the accused only to *raise* the defence:

*If the defence is raised in any prosecution for an offence under this section [the offence of failing to make a particular payment in accordance with a maintenance order] that any failure to pay maintenance in accordance with a maintenance order was due to lack of means on the part of the person charged, he or she is not, merely on the grounds of such defence entitled to an acquittal if it is proved that the failure was due to his or her unwillingness to work or to his or her misconduct.*

We would suggest an amendment to the Act to clarify who bears the onus of proving lack of means, and we would suggest that the defendant who raises the defence of lack of means should initially bear the burden of proof, with the prosecution then having the possibility of overcoming this defence by proving that the lack of means was due to unwillingness to work or misconduct.

Regardless of where the burden of proof lies, the maintenance court still has a duty to assist an unrepresented accused to understand the elements of the offence, the defences available and the possibility of converting the criminal trial into an enquiry.

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**Lack of means: Dealing with irregular income**

In a 1999 South African case, a man who was accused of failure to pay maintenance raised the defence of lack of means. The magistrate found that his income consisted of irregular (although occasionally substantial) payments for professional services, and averaged this irregular income to determine a monthly income during the relevant period. The magistrate then proceeded to convict him on the basis that he had the requisite means to pay the maintenance in question, based on this average monthly income. On appeal, it was held that this approach was improper provided that the accused attempted to discharge his maintenance obligations (including payment of arrears) in accordance with the irregular nature of his income.

*S v Murray 1999 (1) SACR 554 (W)*

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255 Maintenance Act 23 of 1963, section 11(3), emphasis added; see also *R v Van der Merwe* 1952 (10 SA 647 (O) at 650E-D; *S v Malgas* 1987 (1) SA 194 (NC) at 195E-G; *S v Moeti* 1989 (4) SA 1053 (O) at 1054I-J; *S v Nylstroom an Andere* 1993 (1) SACR 543 (C) at 544d-i; *S v Leonards* 1997 (1) SACR (C) at 308h; *S v Goetsch* 1999 (1) SACR 558 (C) at 561k.

256 See summary in *S v Magagula* 2001 (2) SACR 123 (TPD) at 161d-162b.

257 Maintenance Act 9 of 2003, section 39(2), emphasis added.

258 *S v Magagula* 2001 (2) SACR 123 (TPD) at 162d-164a (referring to the similar provision in the South African Maintenance Act 99 of 1998).
What counts as misconduct in respect of lack of means to pay maintenance?

Some examples

A 1957 South African case held that the misconduct “must relate to wrongful or improper conduct inspired by a motive to defeat or disobey an order made by a Court”, finding that failure to make maintenance payments whilst serving a sentence for fraud did not qualify as this kind of misconduct.\(^a\)

A 1959 Zimbabwean case did not find misconduct where a man subject to a maintenance order left one job in hopes of securing another one, at which he expected to earn a lower salary:

The appellant said he left [his existing job at] Lever Brothers because he was unhappy there; he did not state the reason for his unhappiness, whether it was because he felt there was no prospect of promotion or because he considered the work too onerous or some such circumstance. His reason for wanting to join the Staff Corps [the new job he sought] may have been a desire to advance his position or to find a more congenial occupation or to be assured of secure employment. The fact that he was to receive a smaller salary does not necessarily indicate that he would be worse off; the position he hoped to get might well have carried with it certain advantages which he did not enjoy with his former employers. These are matters which might influence a man, fully aware of his obligations to his family, to terminate his employment; if he does so, the propriety of his action can hardly be called in question; provided he acts in good faith, the fact that a maintenance order is operative against him cannot, in my view, affect the position. In any event, it would be at least arguable that the real cause of his lack of means (and, in my opinion, the immediate and not the remote cause should be regarded) was the fact that he was unable to secure employment in the Staff Corps; what occasioned that circumstance is unknown – whether it was due to the absence of a vacancy or, possibly, because of some disability, the appellant was not considered a suitable person. I agree that the appellant acted unwisely but that, by itself, did not constitute misconduct within the meaning of the Act.\(^b\)

Similarly, a 1971 Zimbabwean case held that it was not misconduct for the accused to have made a decision to work on his own farm and then try to sell that farm, rather than taking up employment, as he was not unwilling to work nor trying to avoid complying with the court order.\(^c\)

In 1979, a South African case found no misconduct where the lack of means resulted from a drug offence, since there had been no guilty mind with respect to the failure to make maintenance payments.\(^d\) Subsequent cases found that losing a job because of fighting or alcohol abuse also did not constitute misconduct in respect of failure to pay maintenance, for the same reason.\(^e\)

In a 1999 South African case, the accused received a substantial lump-sum pension payment upon his resignation from employment, applied part of that payment towards discharging his future maintenance obligations and then invested and lost the balance in a \textit{bona fide} business venture. The Court found that his failure to apply an even larger part of the pension payment towards discharging his future maintenance obligations did not constitute misconduct.\(^f\)

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\(^a\) \textit{R v Kinnear} 1957(2) SA 105 (T) (dealing with an analogous law). See also \textit{S v Sigalo} 1973 (4) SA 469 (NC) and \textit{S v Leonards} 1997 (1) SACR 307 (C) (both dealing with the South African Maintenance Act 23 of 1963).

\(^b\) \textit{R v Moss} 1959 (2) SA 738 (SR) (dealing with an analogous law).

\(^c\) \textit{S v Jarvis} 1971 (1) SA 243 (RA) (dealing with an analogous law).

\(^d\) \textit{S v Jinguandela} 1979 (2) SA 565 (C).

\(^e\) \textit{S v Nyilstroom en Andere} 1993 (1) SACR 543 (C) (which involved a review of several cases together; the reference is to the \textit{Ellie} case);

\(^f\) \textit{S v Blaauw} 1997 (2) SACR 623 (C).

\(^f\) \textit{S v Goetsch} 1999 (1) SACR 558 (C).
Multiple counts of failure to pay maintenance?

One point to note on criminal enforcement is that the criminal offence in the Act is “failing to make a particular payment in accordance with a maintenance order”. This suggests that it would be possible for a defendant who had missed multiple monthly payments to be charged with multiple counts of the offence in question – although we have not encountered any criminal case where this has been done in practice. Separate charges in respect of each payment would be similar to continuing offences, where a penalty is imposed in respect of each day that the offence persists after conviction. The possibility of using multiple charges could be kept in mind as a possibility for particularly recalcitrant defendants.

Punishment on conviction

Failure to comply with a maintenance order is punishable by a fine of up to N$4 000, imprisonment for up to 12 years or periodical imprisonment.259

“It must be clear therefore that failure to pay maintenance for a child is not a peccadillo to be visited with a slap on the wrist – even for first offenders.”

Izack v The State (CA 15/2013)[2013] NAHCMD 207 (23 July 2013)

In a 2006 Namibian case where the defendant was in arrears in respect of 138 instalments, the magistrate’s court imposed a sentence of the maximum fine of N$4 000 or fourteen months imprisonment. The magistrate also ordered the convicted defendant to pay a lump sum of N$10 000 towards the arrears by a given date, as well as N$1 000 per month until the arrears were paid off. The defendant appealed against the fine imposed on the grounds that there was no evidence before Court that the appellant possessed readily realisable assets he could sell to pay the fine or any other means of payment – meaning that paying the fine was not in fact a realistic option for him. The state conceded this point, and the court referred the case back to the magistrate’s court for further factual enquiry to ensure that the sentence imposed does not induce the errant parent to default again.260

In another Namibian case, the magistrate’s court imposed a fine and then ordered that this fine be applied towards the arrear maintenance. On appeal, it was held that this procedure was not competent as conviction and sentence have “no connection with the question of how the arrears maintenance will be settled”.261

Another attempt at innovation in South African also fell afoul of technicalities, but was saved by a reformulation on appeal. A magistrate sentenced a recalcitrant offender to 1 440 hours of weekend imprisonment, to be reduced by the Department of Correctional Services by 15 hours for every R500 of arrear maintenance which the appellant paid off. The High Court found that the proposed mechanism for reduction, “innovative and imaginative as it may be”, could not legally be carried out by the relevant department. However, it substituted the magistrate’s sentence with a reformulated one with similar effect, imposing 1 440 hours of periodical imprisonment, 1 160 hours of which were suspended for five years on condition that the accused was not convicted of failure to comply with any maintenance order against him during that time and also on condition that he paid arrear maintenance in specified monthly instalments during that period.262

259 Maintenance Act 9 of 2003, section 39(1).

260 S v Gaweseb [2006] NAHC 27 (26 July 2006). The state also conceded that the order for payment of the arrears was invalid because it was not based on application by a public prosecutor as section 33(1) of the Act requires.


Periodical imprisonment or a sentence of community service\textsuperscript{263} may often be more appropriate than the usual form of imprisonment, which would prevent the defendant from working to get the money to pay maintenance.\textsuperscript{264} For example, the defendant could be given a sentence of imprisonment on weekends only. In one Namibian case, the High Court approved of the use of periodical imprisonment on weekends, but required that the sentence be re-considered after the magistrate's court ascertained whether the defendant’s job required him to work on any part of the weekend.\textsuperscript{265}

\begin{center}
\textbf{CASE STUDY}
\end{center}

\textbf{Periodical imprisonment as a punishment for failure to pay maintenance and failure to pay maintenance as a form of domestic violence}

This an appeal from the maintenance court for the Windhoek district. The appellant (whom I shall hereafter refer to as the ‘accused’) was properly convicted on his own plea of guilty for failing to pay maintenance in respect of his minor child. After his conviction, the magistrate imposed a sentence of 1 000 hours of periodical imprisonment on Fridays at 18H00 until Sunday at 16H00; and, in addition, ordered the accused to pay the arrear maintenance of N\$12 900 in the amount of N\$300 per month with interest at the rate of 20\% per annum. The effect of the sentence is that he reports for incarceration on a Friday at 18h00 and is then released at 16H00 on Sunday.

At the plea proceeding, the magistrate first explained to the accused that the law allows him the defence of ‘no means’, being the inability to pay and then asked him why he did not pay maintenance. The accused’s answer was startling: He initially stated that it was through human error that he did not pay, but upon further questioning said that that he really did not have any reason for not paying.

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In his reasons for sentencing, the magistrate stated that failure by fathers to pay maintenance is very prevalent and has become a serious problem in our society. He added that those most detrimentally affected by this failure are the children for whose benefit maintenance orders are granted.

The accused comes to this court on appeal, claiming that the sentence imposed on him was shockingly severe. He says that the magistrate ought to have imposed a fine in preference to periodical imprisonment, considering that he is a first offender who pleaded guilty.

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The court a quo correctly took into account the neglect of children by fathers and the effect that has on children.

The accused is not a man who had difficulty raising money to pay for the maintenance. He just chose not to do so, while knowing there was a court order obliging him to pay. He was completely unperturbed by the consequence this had on his child …

\textsuperscript{263} See Criminal Procedure Act 51 of 1977, section 285.

\textsuperscript{264} See, for example, S v Koopman, 1998 (1) SACR 621 (C) where the Court held (under the Maintenance Act 23 of 1963) that it was a senseless punishment to impose a fine on an impoverished person for failure to pay maintenance, since such persons should be permitted to apply every cent available to their own and their children’s maintenance, and S v Mentoor 1998 (2) SACR 659 (C), where the Court found (under the Maintenance Act 23 of 1963) that it would run counter to the best interests of the children in question to imprison an accused who has a prospect of permanent employment which he would probably lose if sentenced to imprisonment.

\textsuperscript{265} Izack v The State [2013] NAHCMD 207 (23 July 2013).
Considering that the court order requiring accused to pay maintenance took effect on 1 September 2003, he only made payments for three months and ceased payment. He had therefore not paid maintenance for the child for a staggering period of eight years. What is more, the amount he was ordered to pay was very small in my view and probably counts for nothing in today’s money value. A maintenance order is for the benefit of a child and not the custodian parent.

It is important that fathers realise that the tide has turned against those who neglect their children; and that this court will not readily interfere with trial courts’ sentences against those who are found guilty of the malpractice. The Combating of Domestic Violence Act [4 of 2003] defines domestic abuse (in section 2(1)(c)) to, amongst others, include:

‘the unreasonable deprivation of any economic or financial resources to which the complainant or a family member or dependant of the complainant is entitled under any law, requires out of necessity or has a reasonable expectation of use …’

A child is in a domestic relationship with its biological father in terms of s 3[(1)(d)] of the Combating of Domestic Violence Act.

It must be clear therefore that failure to pay maintenance for a child is not a peccadillo to be visited with a slap on the wrist – even for first offenders. Economic abuse is a species of domestic violence as the Combating of Domestic Violence Act stipulates …

The intent clearly behind the sentence imposed by the magistrate was two fold:
(i) to on the one hand ensure that he remains employed to earn an income from which to pay maintenance, and
(ii) to send a clear message, by imposing periodical imprisonment, that failure to pay maintenance will not be countenanced by the courts.

… [G]iven that the accused was unrepresented at his trial, the magistrate ought to have elicited more information to establish if imposing periodical imprisonment would not in the circumstances have the contrary effect. Although the court can take judicial notice that an employee such as the accused does not work on Sundays, it cannot take judicial notice that he does not work on Saturdays until at least the lunch hour. Had the magistrate elicited more information in that regard, it is possible that the accused works, on the very least, on Saturdays until the lunch hour. In that case, the court might either not have imposed periodical imprisonment, or might have fashioned its order to meet the circumstances of the case. That failure constitutes a material misdirection.

We feel this is an appropriate case to remit the matter to the court a quo to consider the sentence afresh in the light of this judgment. We wish to make clear that our reversal of the sentence imposed is in no way a disapproval of the imposition of periodical imprisonment but is only intended to ensure that one of the key objects intended by the sentence is not defeated …

Izack v The State [2013] NAHCMD 207 (23 July 2013)
(footnotes omitted)

“To impose sentence in matters of this nature is an extremely difficult task. All people do not have the ability to handle their financial affairs properly. Some people out of principle do not want to pay maintenance for dependants. Others relegate that obligation to last in the line. In the majority of cases the maintenance is to be paid out of the income which is to be earned in the market. In the majority of those cases the liberty of that person is paramount. In most of the cases also the effect of direct imprisonment diminishes the earning capacity of such a person, if not destroys it. It follows that in cases where a parent pays maintenance but defaults from time to time it is in the interest of the child to threaten him with imprisonment but to try and retain his income earning capacity.”

S v Morekhure 2000 (2) SACR 730 (T)
Of course, there may also be instances where other forms of imprisonment are appropriate. For example, a South African appellate court upheld a sentence imposing the maximum period of imprisonment on an accused who had been convicted for the offence of failure to pay maintenance four times in four years.266 In contrast, it has been held in several South African cases that imprisonment will usually not appropriate for a first offender.267

Any sentence imposed may be suspended. A suspended sentence is a sentence the accused does not have to serve, provided that certain conditions are obeyed. For example, the court could order that the defendant does not have to serve the sentence imposed so long as he or she makes the required maintenance payments regularly in future. It is also common for courts to suspend a sentence in a criminal case on the condition that the defendant pays off the arrears owing.268 Even if the sentence is never served, the conviction will remain on the defendant’s record – which could affect future employment prospects or credit ratings.269

“A some educated men do not pay maintenance because they think that the mother isn’t smart enough to get help from the court.”

Women at the focus group discussion in Ongwediva

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266 S v Philander 1997 (2) SACR 529 (C). The Court overturned a portion of the sentence which exceeded the maximum penalty authorised by the Act.

267 See, for example, S v Grosch 1993 (2) SACR 373 (C) (The accused was a first offender who had failed to pay maintenance for his children for a period of four months. The magistrate sentenced him to nine months’ imprisonment, with four months conditionally suspended. On appeal, this was altered to a sentence of six months’ imprisonment totally suspended for a period of three years. Another example is See also S v Adams 1994 (1) SACR 400 (C).

268 See S v November and Three Similar Cases 2006 (1) SACR 213 (C) at para 12-14.

269 Section 39(4) of the Maintenance Act 9 of 2003 provides explicitly for communication about a conviction to persons who maintain credit ratings: “If a person has been convicted of an offence under this section, the maintenance officer may, notwithstanding anything to the contrary contained in any law, furnish that person’s personal particulars to any business which has as its object the granting of credit or is involved in the credit rating of persons.”
Suspended sentences and payment of arrears: The importance of not being too lenient

“...[A] court sentencing for a contravention of [section 31(1) of the South African Maintenance Act, which is similar to section s 39(1) of the Namibian Maintenance Act 9 of 2003] will always retain the power to order, as an appropriate condition of suspension of imprisonment, that the defaulter pays off his arrears by way of regular instalments. Needless to say, no such order or condition should be made without a proper enquiry being conducted by the court into the accused’s financial circumstances. Furthermore, the instalment should be set on the basis that maintenance is a primary obligation on the part of the defaulter and not one which ranks equally with every other expense which the defaulter may have...”

S v November and Three Similar Cases 2006 (1) SACR 213 (C) at para 12-14 (emphasis added)

Recovery of arrear maintenance payments

If the defendant is convicted of a failure to comply with a maintenance order, in addition to the penalty associated with this offence, the court may upon application by the prosecutor issue an order for payment of the arrears owing.270 Such an order for the recovery of arrears can be enforced through any of the civil enforcement mechanisms discussed above.271 In practice, it is common for a sentence of imprisonment to be suspended on the condition that the arrears are paid off immediately or on the condition that regular instalments are paid towards the amount of arrears owing.272 It has been held in South Africa that a court can, on suspending a sentence, order that this be done on condition that the

270 Maintenance Act 9 of 2003, section 33(1). A prosecutor who wishes to apply for an order for recovery of arrear maintenance should complete Form Q, Maintenance Regulations, regulation 24. The clerk of the criminal court which has convicted the defendant must submit a copy of the order for recovery of arrears to the clerk of the civil court, who should register the order and provide this information to the complainant and the clerk of the maintenance court where the underlying maintenance order was made. Id, regulation 25. These will often be the same magistrate’s court.

271 Id, section 33(1).

272 See, for example, S v November and Three Similar Cases 2006 (1) SACR 213 (C).
convicted persons pays the arrears due at the time of the trial, and not merely in respect of the time period covered by the charge sheet.273

When considering whether to grant an order to recover arrear maintenance, the court must consider (1) the existing and prospective means of the defendant; (2) the financial needs and obligations of, or in respect of the beneficiary; (3) the conduct of the defendant relevant to his or her failure to satisfy the maintenance or other order in question; and (4) any other circumstances which should, in the opinion of the court, be taken into consideration.274

One question which arises is the appropriateness of the requirement that an order for recovery of the arrears owing must be issued only on application by a public prosecutor.275 Surely it would make sense to authorise the court to make such an order on its own motion at the time of sentencing, provided that there was sufficient evidence of the amount in arrears before the court. We recommend that the Act be amended to delete the requirement that an order for payment of arrears may accompany a criminal conviction only on application by a public prosecutor.

It was held in one recent Namibian case that it was acceptable for the accused and the complainant to agree that the accused will make payments aimed at reducing arrears as an interim measure when the criminal case was postponed before conviction. The High Court found that there was no prejudice to anyone if the arrears were reduced while the criminal case was pending, even though the exact amount of arrears was in dispute.276

Expanding on this logic, we recommend that the Act be amended to allow the court to stay the criminal proceedings where the defendant and the complainant enter into a consent order for the payment of arrears which is made into an order of court in addition to the maintenance order which was breached. This could take place as an alternative to conversion of the criminal trial into an enquiry, where there is no assertion of changed circumstances and no indication that the defendant is unable to pay – and thus no real purpose in holding an additional enquiry. If the consent order was not complied with, the criminal proceedings could recommence. This would work in a similar manner as a suspended sentence where payment of the arrears owing is a condition of the suspension – but without the need for the defendant to bear a criminal conviction.

Conversion of criminal trial to enquiry

As noted above, it is possible for a criminal hearing to be converted into a new maintenance enquiry. This is the appropriate course of action where the defendant shows a genuine lack of means to pay the existing order.277 It may also be appropriate in other circumstances, such as where the accused alleges that the beneficiary has become self-supporting278 or that some doubt about paternity has come to light.279

“... the accused proved that his failure to comply with the maintenance order was due to lack of means and that such lack of means was not due to his unwillingness to work or to his misconduct. His evidence, therefore, substantiated a good defence and he should not have been found guilty. In this case it is advisable and desirable that proceedings in the magistrate’s court be converted ... into an enquiry.”

S v Dikwidi 1979 (4) SA 646 (B) (regarding similar conversion procedure under Maintenance Act 23 of 1963, citations omitted)

273 S v Sigalo 1973 (4) SA 469 (NC).
274 Id, section 33(3).
275 See S v Gaweseb [2006] NAHC 27 (26 July 2006), where an order for payment of arrears was invalidated on this basis.
277 Id, section 34.
278 S v Dannhauser 1993 (2) SACR 398 (O).
“But if the evidence should leave open as a reasonable possibility that the accused complied with the maintenance order to the best of his ability, but lacked the means to comply to a greater extent than he did, or at all; and if it fails to show that his lack of means was his own fault …; and it fails to show that his lack of means is merely temporary and that he will shortly be in a position to resume payment in terms of the maintenance order, the trial should be converted … into a maintenance enquiry.”  

S v Magagula 2001 (2) SACR 123 (TPD) at para 104 (regarding similar conversion procedure under the South African Maintenance Act 99 of 1998)

The provisions on conversion are virtually identical in the 2003 Act and the 1963 Act. The procedure is summarised in a 1995 Namibian High Court case:

_In terms of section 13 of the Maintenance Act 23 of 1963, it is the duty of the trial magistrate to convert criminal proceedings … for an alleged failure to comply with a maintenance order into an enquiry … if it appears to the magistrate that such enquiry is desirable eg, by reason of the excessively high maintenance payments imposed on an accused in terms of an existing maintenance order, having regard to the accused's income, assets and obligations towards all his dependants at the time of the hearing of the criminal case. This duty of the magistrate mero motu to devote his attention to the desirability or otherwise, of the criminal case being converted, and to act accordingly, exists independently of the right of the accused himself to apply … for the substitution of an existing maintenance order. The trial magistrate himself is obliged to act if he finds it desirable, even though the accused takes no steps in this connection._

The same Namibian case explains the logic of the procedure:

_The desirability of converting a prosecution into an enquiry where it is clear that the accused is unable to comply with an existing maintenance order is self-evident as “failure by an accused to apply for a reduction could result in him being repeatedly tried on an unamended order and repeatedly acquitted of inability to pay; which serves no purpose and wastes the resources of the State”. _

When a criminal proceeding is converted into an enquiry, the criminal trial ceases to exist. However, if the conversion takes place in the context of a court proceeding to enforce a suspended sentence, only the enforcement proceeding is affected; the underlying sentence is not cancelled.

Conversion of the trial into an enquiry could raise confusion on the treatment of arrears. Orders for recovery of arrears are possible in terms of section 33 of the Maintenance Act only where there has been a conviction for failure to pay maintenance. This could be problematic on its own, as the conversion into an enquiry could take place where a defendant raises the defence of inability to pay – but the ensuing enquiry could determine that the defendant does in fact have sufficient means to pay the amount in question.

However, under the Namibian law, arrears could be addressed even if the criminal trial were converted into an enquiry, in the absence of a conviction, by drawing on section 28 which authorises

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See also S v Pieterse 1993 (3) SA 275 (C)

281 Id, quoting S v Munro 1986(2)SA 19 (C) at 21H.

282 S v Vermeulen 1981 (2) SA 486 (E).

283 See S v Lübbe 1998 (2) SACR 552 (T). It has been pointed out in South Africa that if the conversion of a criminal trial into a maintenance enquiry did not produce a favourable outcome for the accused (in other words, if the original order was confirmed), there would be no bar to a renewed prosecution for the original offence – which could then address arrear maintenance if it resulted in a conviction. See S v Magagula 2001 (2) SACR 123 (TPD) at 141i-142a.
civil enforcement measures for any arrears owing. So, in the situation where a criminal trial has been converted into an enquiry, there would seem to be nothing to prevent the complainant from applying at that enquiry for civil enforcement of arrears owing – unless the maintenance court has substituted or discharged the maintenance order with retroactive effect.

### 4.6.2 Contempt of court

“Although money judgments cannot ordinarily be enforced by contempt proceedings, it is well established that maintenance orders are in a special category in which such relief is competent.”

This is clear in instances where the order to pay maintenance is embodied in a High Court order (such as a divorce order). However, it has also been held in South Africa that it is competent for the High Court to make an order for contempt of court for failure to comply with an order made by a magistrate’s court. The South African Constitutional Court held that this is permissible as “process-in-aid”, which is the means whereby a court enforces a judgment of another court which cannot be effectively enforced through its own process. Process-in-aid “will not ordinarily be granted for the enforcement of a judgment of another court if there are effective remedies in that court which can be used”, but in this case the Court found that no effective redress had been possible through the mechanisms available at the maintenance court because of flaws in the implementation of the Maintenance Act.

As in the case with a criminal prosecution under the Maintenance Act, the respondent can raise the defence that breach of the court order was due to a good faith inability to pay the maintenance owing.

### 4.6.3 Failure to maintain as a criminal offence under child protection laws

Failure to maintain a child is also a criminal offence under Namibia’s child protection laws. The Children’s Act 33 of 1960 states:

> Any person legally liable to maintain a child who, while able to do so, fails to provide that child with adequate food, clothing, lodging and medical aid, shall be guilty of an offence.

If someone is charged with this offence, it is assumed that he or she had the ability to provide the child in question with adequate maintenance; the accused bears the onus of proving lack of means.

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284 Maintenance Act 9 of 2003, section 28. Section 28(1) states: “Where a defendant against whom a maintenance order or an order under section 17(3) [pregnancy and birth-related expenses], 20 [costs] or 21(4) [costs of scientific tests] has been made fails, within 10 days from the date on which payment becomes due, to comply with the order, the complainant may apply to the maintenance court where the order is registered for enforcement of the order”. Section 28(3) states that “the maintenance court may authorise enforcement of the order in order to recover the amount due together with any prescribed interest which has accrued on the amount” (ie any arrears owing) by means of a execution against property, attachment of emoluments or attachment of a debt owed to the defendant.

285 In South Africa, it has been held that it is not competent for a magistrate to make an order in respect of arrears at the conclusion of a criminal trial that has been converted into an enquiry. S v Lübke 1998 (2) SACR 552 (T). However, what we contemplate here is not an “order” in respect of arrears, but civil enforcement in respect of those arrears.

286 Bannatyne v Bannatyne (Commission for Gender Equality, as amicus curiae) 2003 (2) SA 363 (CC) at para 18.

287 Contempt of court in a magistrate’s court is limited to situations where a person “wilfully insults a judicial officer during his sitting or a clerk or messenger or other officer during his attendance at such sitting, or wilfully interrupts the proceedings of the court or otherwise misbehaves himself in the place where such court is held”. Magistrates Courts Act 32 of 1944, section 108(1).

288 Bannatyne v Bannatyne (Commission for Gender Equality, as amicus curiae) 2003 (2) SA 363 (CC) at para 20.

289 Id at para 22.

290 Id at paras 26-32.

291 See Dezius v Dezius 2006 (6) SA 395 (T), which involved a contempt of court proceeding for maintenance pendente lite in a divorce matter.

292 Children’s Act 33 of 1960, section 18(2).
which is not due to the accused’s own fault or negligence. It is also a form of criminal neglect if the indigent accused has failed to take reasonable steps to get assistance with maintaining the child from State authorities or charities, such as applying for a state maintenance grant if eligible.

The punishment for this offence is a fine of up to 200 pounds (N$400), or imprisonment for up to two years, or both – with the possibility of an increase sentence if the accused stood to benefit in any way in the event that the child died.

The forthcoming Child Care and Protection Act is expected to include a similar criminal offence. The draft bill states:

**A person who is legally liable to maintain a child commits an offence if that person, while able to do so, fails to provide the child with adequate food, clothing, lodging and medical assistance and is liable on conviction to a fine not exceeding N$50 000 or to imprisonment for a period not exceeding ten years or to both the fine and imprisonment.**

### 4.7 Changes to a maintenance order (substitution, suspension or discharge)

When an application is made to amend an existing maintenance order, the court will consider whether there have been changes in the relevant circumstances and whether there is sufficient cause for the substitution, suspension or discharge of the order. The applicant must show changed circumstances to ensure that the application for change is not simply an appeal of the underlying decision in disguise. The procedure for a request for the suspension, substitution or discharge of an existing maintenance order is the same as for an initial maintenance complaint.

It has been noted in a South African case (in the context of variation of maintenance in terms of a divorce order) that substitutions should not be made lightly because of the importance of certainty for financial planning:

*In my opinion a divorced wife in whose favour such a maintenance order has been made is entitled, particularly when the custody of a minor child or children has in addition been awarded to her, to an expectation of reasonable stability as regards the monthly income of her new household, so as to enable her to plan ahead and even to effect such savings as may be prudent and reasonable with a view to the future of herself and the child or children; and she would be deprived of this most important benefit if some change or changes in the relative financial position of the parties were too readily to be acceded to as justification for a complete revision of the maintenance arrangements.*

The same principle could reasonably be applied to maintenance cases.

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293 Id, section 18(3).
294 Id, section 18(4).
295 Id, section 18(5); see S v George (CR 25/2010) [2010] NAHC 149 (12 October 2010) at para 8. The pound was the currency of the Union of South Africa from the time the country became a British Dominion in 1910 until it was replaced by the rand shortly before South Africa became a Republic in 1961. The South African pound was replaced by the rand on 14 February 1961 in terms of the Decimal Coinage Act 61 of 1959, at a rate of 2 rand = 1 pound. See also South African Reserve Bank Act 90 of 1989, section 15(2), and its predecessor, the South Africa Reserve Bank Act 29 of 1944, section 10A.
296 Id, section 18(5).
297 Child Care and Protection Bill, draft dated 12 January 2012, section 235(2).
298 Maintenance Act 9 of 2003, section 16(5).
299 Id, section 9(2)(b). A request to change an existing maintenance order is made on Form B, which is entitled “Changes to existing maintenance order”. See Maintenance Regulations, regulation 2(b).
300 Loubser v Loubser 1985 (4) SA 687 (CPD) at 684F-G.
CASE STUDY
Substitution

A 2009 Namibian case which involved an appeal against the outcome of a request for substitution of a maintenance order illustrates the procedure and the factors to be considered.

A maintenance order for N$450/month was in place for a single child, “S.” The mother requested an increase to N$1 000/month. The maintenance court granted an increase to N$600/month which the mother appealed. The motivation for the request for the increase was that the child was now attending high school, which involved additional expenses in driving to and from the school, and that the cost of living had gone up. Furthermore, the mother asserted that the respondent had the financial means to contribute more to the maintenance of the child.

In the proceedings before the magistrate’s court, the mother stated that she was an unmarried primary school teacher with a net salary of N$5 620/month. She shared her accommodation with a friend who contributed to the household expenses, plus S and two other minor children. The mother reported that she paid S’s school fees of N$3 548 per year as well as varying sums of money on clothes, shoes, school and sports uniforms, toiletries, cosmetics and holidays – but was unable to report precise expenditures.

The father was a married public servant with five children, who was also supporting a sixth stepson. His pay slip showed that he received a net salary of N$5 914/month. He argued that the amount being claimed for S's maintenance was excessive. Under the original maintenance order of N$450/month, if the mother contributed an equal amount this would provide S with N$10 800/year. If both parents contributed N$600/month, the figure would be N$14 400/year. The father submitted that this would be a reasonable contribution to S’s maintenance, particularly considering his expenses for supporting his other five children and his stepson, as well as his general household expenses. He also argued that N$1 000/month would be unaffordable for him, even if the support of his stepson was not taken into account in the calculation.

The mother argued that his current wife was employed and able to assist with the maintenance of the children born of their marriage, but no evidence of the wife’s income or the couple’s marital property regime was placed before the court (which would have been relevant since a duty to support a stepchild rests on the joint estate where a stepparent is married in community of property to the child’s biological parent).

The High Court held that it “evident that, at the level of today’s cost of living, it stretches the respondent’s salary of about N$5 000 per month to breaking point to support the size of his family … The increased maintenance claimed by the [mother] is clearly beyond the means of the parties and the [father] is not in a position to meet the claim.” Thus, the High Court found that the mother had not discharged the onus for variation of the order.


Chart 9: The process of substituting, suspending or discharging a maintenance order

Defendant or complainant applies to substitute, suspend or discharge an order. (Application made on Form B)

- Maintenance officer may vary the manner of the maintenance payment or set aside an order for payments in kind. Maintenance officer must notify all relevant parties.
- Other party to the case informed of request for change and can consent to change or attend court.
  - Parties agree to requested change or negotiate another change; new order made.
  - One or both parties request a hearing before a magistrate.
  - Request granted; amended request granted; or request dismissed.

Chapter 4: Overview and Critique of the Maintenance Act 9 of 2003 85
4.8 Administrative variations to a maintenance order

The maintenance court is authorised at the request of the maintenance officer, to make simple administrative changes such as changing the details of the bank where maintenance money is to be paid, or changing the recipient of the maintenance money in appropriate circumstances (for example, where the child is going to stay with the grandmother for a while or where the complainant would like the defendant to pay some of the costs directly to a school hostel or a day care centre). The court can also, at the request of the maintenance officer, set aside an order for payment of all or part of the maintenance owing in kind. These changes can be made without the necessity for an enquiry or a formal substitution proceeding.

The Act and regulations also make provision for notification and procedures to be followed if the defendant changes his/her place of residence or employment while a maintenance order is in place, and for the procedures for transferring a maintenance file if the complainant changes his or her place of residence to a residence in a new jurisdiction.

The wording of the rule regarding notification and file transfer is confusing. It refers to any change of residence (“Where a complainant in whose favour a maintenance order or any other order under this Act was made or given changes his or her place of residence …”), but requires that such a complainant give notice of the change of address to the “maintenance officer of the maintenance court which has jurisdiction in the area where the complainant now resides” – suggesting that notice is required only if the complainant’s new residence is in a different magisterial district from the one where the order was initially made. However, complainants cannot be expected to know the boundaries of magisterial districts. It might be obvious in some cases that a complainant has moved from one magisterial district to another (such as a move from Windhoek to Keetmanshoop), but in other cases (such as a move from one village to another), this might not be clear. It would be helpful to amend this provision to require the complainant to notify the court where the maintenance order was initially registered of any change of address. This would be helpful if the complainant needs to be located in respect of a subsequent request for change, or for purposes of an investigation into alleged misuse of maintenance money. The clerk of the original court could then have a duty to effect a transfer of the file if the change of address results in a change of jurisdiction.

Administrative variations to maintenance orders are discussed in more detail in sections 13.15 and 13.16.

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301 Maintenance Act 9 of 2003, section 22. The maintenance officer must inform the complainant and the defendant of any such change, and if relevant the employer or person paying debts directly to the court, using Form J. Maintenance Regulations, regulation 12.

302 Maintenance Act 9 of 2003, section 22 read together with section 17(4).

303 Id, section 17(5). A defendant who changes residence or employment must give notice to the court using Form S. Maintenance Regulations, regulation 15.

304 Maintenance Act 9 of 2003, section 24(1). A complainant who changes his or her place of residence must notify the court of this change using Part A of Form R. The clerk of the court where the maintenance order was made then follows a specified procedure for transfer of the relevant files to the maintenance court which will now have jurisdiction over the matter as a result of the move. The clerk at the original court must retain copies of orders, judgements and records of payments and send the original documents by hand or registered post to the clerk of the new court. The clerk at the new court must number the case with the next consecutive number for maintenance cases for the year in which the file is received. The clerk of the new maintenance court must then give notice of the transfer, using Part B of Form R, to the defendant and any person who is required under the Act to deliver money or property (such as an employer where there is an attachment of emoluments in place). Maintenance Regulations, regulation 14.
4.9 The Maintenance Act and High Court orders in divorce cases

4.9.1 Jurisdiction of maintenance court over High Court orders for maintenance

The Maintenance Act 23 of 1963 clearly gave the maintenance court jurisdiction to substitute or enforce orders for maintenance made by the High Court in divorce cases. It defined “maintenance order” as “any order for the periodical payment of sums of money towards the maintenance of any person made by any court (including the Supreme Court of South Africa) in the Republic”.

The position remains the same under the Maintenance Act 9 of 2003, although the approach used to achieve this is somewhat circuitous. Section 1 of the 2003 Act defines a “maintenance order” as “a maintenance order made under section 17, a consent order made under section 18 and a default maintenance order made under section 19, or a maintenance order made by a maintenance court under any other law ...”. It defines “maintenance court” to include “any other court which is authorised by law to grant maintenance orders” – which would include the High Court acting in divorce proceedings or in any other context where maintenance was at issue.

This more cumbersome approach has caused some confusion in practice, so we recommend that the Act be amended to include a more straightforward statement of the maintenance court’s jurisdiction to enforce, vary, suspend or set aside orders for maintenance made by any court, including the High Court.

The Law Reform and Development Commission has put forward a proposal for a new law on divorce. The proposed Divorce Bill would explicitly authorise the maintenance court to deal with a High Court order for child maintenance or spousal maintenance:

A maintenance order issued in terms of this clause [the clauses authorizing orders for child maintenance and spousal maintenance by a court issuing a decree of divorce] shall be a “maintenance order” for the purposes of the Maintenance Act, 1960 (Act 23 of 1960), and may be substituted, varied, discharged or enforced by a maintenance court in terms of that Act.

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305 Maintenance Act 23 of 1963, section 1, emphasis added. See Sher v Sher 1978 (4) SA 728 (W) at 729; Havenga v Havenga 1988 (2) SA 438 (T) at 443A; Rubenstein v Rubenstein 1992 (2) SA 709 (T) (overruling Jerrard v Jerrard 1992 (1) SA 426 (T)).

306 Maintenance Act 9 of 2003, section 1, emphasis added.

307 Ibid.

308 As evidenced by enquiries made by clients and magistrates to the Legal Assistance Centre.

309 As a point of comparison, section 5(1) of the Children’s Status Act 6 of 2006 gives a children’s court power, if circumstances have changed, to “alter an order of the High Court pertaining to custody, guardianship or access made in connection with a divorce or in any other proceedings”.

Another example of a more direct statement can be found in the Child Care and Protection Bill (draft dated January 2012, section 93): “Procedures for certain orders apply to children of divorced parents. The procedures for orders pertaining to custody in section 95, orders pertaining to guardianship in section 96(3) to (6), orders restricting or denying access to a parent not having custody of a child in section 97(5) to (8) and orders dealing with the unreasonable denial or restriction of access in section 97(11) and (13) apply with the changes required by the context to children of divorced or estranged parents.”

310 Law Reform and Development Commission, Report on Divorce, Project 8, Windhoek: Law Reform and Development Commission, 2004 (sections 17(2) and 18(2) of the Divorce Bill appended to that report, which are identical save for the clause referred to). Although the report was published after the enactment of the 2003 Maintenance Act, the bill was drafted at an earlier date and therefore refers to the 1963 Maintenance Act.
This provision as it currently stands would make it very clear that the maintenance court can amend or enforce a High Court order for child maintenance or spousal maintenance that is made as part of a divorce order – and it could be replicated in the Maintenance Act to leave no doubt.\footnote{311}

If a divorce order does not contain any reference to child maintenance, the maintenance court can process the application for maintenance in the same way as any other new application for child maintenance. However, a divorced person cannot apply for spousal maintenance after a divorce is final if the divorce order made no provision for spousal maintenance.\footnote{312}

The maintenance court has the authority to change or enforce a maintenance order arising from a divorce regardless of whether the maintenance was simply an order of the court, or an agreement between the parties which was made into an order of court.\footnote{313}

One challenge for a maintenance court dealing with a maintenance order in a divorce case is that maintenance in the context of such cases is generally considered together with the division of property and claims to the custody of minor children. For example, it was noted in one Namibian case that although division of property was the main bone of contention, the issues of property, custody and maintenance have to be “collectively considered”.\footnote{314}

\subsection*{4.9.2 Effect of substitution of a High Court order by a maintenance court}

It has been held that orders for variation or enforcement of a High Court order for maintenance should, “save in exceptional circumstances”, be pursued in the maintenance court rather than in the High Court.\footnote{315} Several South African cases have explored the effect of a substitution of a High Court order for maintenance by a maintenance court.

\textit{Purnell v Purnell} (decided in terms of the 1963 Maintenance Act) held that where a High Court order has been varied by a maintenance court, the original High Court order has ceased to exist.\footnote{316} However, it was held in \textit{Cohen v Cohen} that a maintenance court order causes a pre-existing higher court order to cease to be of force and effect only insofar as the maintenance court order expressly, or by necessary implication, replaces such order.\footnote{317}

\footnote{311} The Law Reform and Development Commission has also developed a Recognition of Customary Marriages Bill which contains a specific provision relating to maintenance. This Bill as currently drafted requires that before a customary marriage can be dissolved, the parties must show that they have made an agreement with respect to the maintenance of any children of the marriage, or that there is a court order to this effect, to ensure that the best interests of the children are met. With respect to enforcement, however, the Bill states: “\textit{A person who had been a party to a valid customary law marriage that was dissolved in accordance with the provisions of this section may approach the High Court to settle any dispute or enforce any agreement that resulted from the dissolution of the marriage concerned.}” \textit{Law Reform and Development Commission, Report on Customary Law, Project 12, Windhoek: Law Reform and Development Commission, 2006, at section 12(4) and (5) of the proposed bill. It would be useful if this Bill is harmonised with the Divorce Bill, by giving explicit authorisation to maintenance courts to deal with maintenance agreements or maintenance orders arising out of customary divorces.}

\footnote{312} See, for example, \textit{Schneider v Schneider} [2010] NAHC 191 (17 November 2010), where a token amount of spousal maintenance was awarded at the time of the divorce so that the possibility of future maintenance would not be foreclosed.

\footnote{313} See \textit{Rubenstein v Rubenstein} 1992 (2) SA 709 (T), which overruled \textit{Jerrard v Jerrard} 1992 (1) SA 426 (T).

\footnote{314} \textit{A v A} [2010] NAHC 176 (29 October 2010).

\footnote{315} \textit{Schmidt v Schmidt} 1996 (2) SA 211 (W), which stated at 220F-H: “\textit{It would be anomalous if a party seeking to enforce an order or have it replaced, which occurs frequently in matrimonial and post-matrimonial proceedings, incorporating an undertaking to pay a quantified monthly amount and medical expenses and also an undertaking to pay other unquantified obligations, would have to have recourse to different courts or that two ‘maintenance orders’ would be extant dealing with the maintenance (using the word in a neutral sense) obligations between the same two parties. It is also not practical or in the interests of justice that two different courts enquire into and deal with separate components of a general maintenance obligation.”}

\footnote{316} \textit{Purnell v Purnell} 1993 (2) SA 662 (A). See also \textit{Stinnes v Stinnes} 1996 (4) SA 1024 (T).

\footnote{317} \textit{Cohen v Cohen} 2003 (3) SA 337 (SCA): “\textit{The point of departure is to identify the issue between the parties that the maintenance court has been called upon to decide and then to compare the order made with that issue. If there is any...}”
Where the original High Court order has been completely substituted by a maintenance court – and therefore ceased to be of any force or effect – the question arises as to whether the beneficiary of the pre-existing order still has a right to enforce arrears in periodic payments that accrued under that order prior to its substitution. It has been held that this is possible:

By stating that when a maintenance court makes an order in substitution for an existing order the latter ‘shall cease to be of force and effect’, s 22 of the Maintenance Act does not denote that the existing order shall be deemed never to have existed. On the contrary, the language bears the plain meaning that the existing order shall cease to be of force or effect from the moment it is substituted, in other words ex nunc. The substitution effected by the maintenance court order occurs when the order is made, and according to its tenor. Thus, unless, and only to the extent that the substituting order is expressed to have retrospective effect, it operates prospectively and does not derogate from the fact of the existence of the prior order, nor from any of the rights of the beneficiary of the pre-existing order which had already fully accrued.  

4.9.3 Enforcement of a High Court order by a maintenance court

There appear to be no problems with enforcing a High Court order for maintenance by means of the mechanisms in the Maintenance Act. In the Namibian case of *S v Gaweseb*, the appellant appeared in the Windhoek Magistrate’s Court charged with a contravention of section 39(1) of the Maintenance Act 9 of 2003 in respect of failure to comply with a provision on child maintenance in a divorce order dating from 4 December 1992 (before the new Act came into force). Neither party nor the court raised the issue of the magistrate’s court’s jurisdiction. Similarly, the Namibian case of *Mondo v Messenger of Court: Grootfontein and others* concerned a writ of execution issued in terms of the Maintenance Act 9 of 2003 for failure to pay child maintenance in terms of a divorce order dating from 24 February 2004 (after the new Act came into force). Again, neither party nor the court raised the issue of the magistrate’s court’s jurisdiction to implement this enforcement proceeding.

However, one question which has arisen is whether the civil enforcement mechanisms in the maintenance court co-exist with those which normally apply to a High Court order for maintenance. In South Africa, the case of *Thomson v Thomson* asserted that all the possible enforcement mechanisms continue to co-exist:

*The Maintenance Act of 1998 does not preclude a party from issuing a writ of execution out of the High Court for failure to pay maintenance. This procedure remains competent … When the party resists such a writ in the High Court on the ground that it should not be enforced, for example, because of inability to pay, lack of need on the claimant’s part or on some other ground of fairness or equity, it would be appropriate for the High Court to order that the matter be referred to the maintenance court for an enquiry …*.  

In contrast, the South African case of *PT v LT and Another* held that the South African Maintenance Act “provides for a unified system of civil enforcement” of maintenance orders, and that the...
enforcement mechanisms in the Maintenance Act are “intended to comprehensively regulate the civil enforcement of maintenance orders (as defined) made by any court in the Republic.”\textsuperscript{325} The Court’s reasoning was as follows:

\textit{It is unlikely to have been the legislature’s intention that there should be two different systems of civil enforcement of High Court maintenance orders in existence parallel to each other; the one with a 10-day moratorium on enforcement, the other having no such moratorium; the one providing for a statutory procedure to convert the enforcement process into an enquiry; the other attended by no statutory restraints. An ability by a maintenance creditor to choose between such alternative enforcement processes, if the choice were available, would introduce an arbitrariness in respect of the consequences for the debtor that would be difficult to reconcile with rationality and equality before the law. Moreover, having regard to the expressed intention of the Act, being the creation of a fair and equitable maintenance system under the framework of the statute, the achievement of that objective would not be assisted if s 26(1) [which is similar to section 28(1)-(3) of the Namibian Maintenance Act 9 of 2003] were read as merely permissive or enabling in nature, and as allowing for disparate but parallel means of enforcement of High Court maintenance orders – the one under the Act, and the other outside it.”\textsuperscript{326}

Another question which is unsettled is whether the Maintenance Act applies to interim orders for maintenance made by the High Court while a divorce is pending (under Rule 43 of the High Court rules). In \textit{PT v LT and Another}, the Court provided the following description of the differing case law on this point (in \textit{dicta}).\textsuperscript{327}

\textit{Rule 43 is a procedural provision. It regulates the procedure to be followed in applications of an interim nature in matrimonial matters. Relief obtained under the procedure is not final in nature and is directed at a regulation of the relevant issues, including maintenance, only pending the determination of the principal matrimonial case. Section 20(7) of the Supreme Court Act 59 of 1959 precludes any appeal from an order of the High Court given in terms of rule 43. [In Namibia, section 18(7) of the High Court Act 16 of 1990 has the same effect.] In De Witt v De Witt 1995 (3) SA 700 (T), it was held that a maintenance order made in terms of rule 43 was amenable to replacement, upliftment or suspension by the maintenance court in terms of the provisions of the 1963 Maintenance Act, despite the anomalous consequences of such a reading of the statute in the face of the provisions of s 20(7) of the Supreme Court Act. The basis for the court’s conclusion appears to have been that there was no warrant for reading in the word ‘final’ before the word ‘order’ in the definition of ‘maintenance order’. A two-judge bench of the Transvaal Provincial Division subsequently held that this conclusion could not be faulted: see Thompson v Thompson 1998 (4) SA 463 (T). It is not necessary for me to determine whether these judgments were correct. Without so deciding, it nonetheless seems to me, with respect, however, that it might be that the judgments failed to give sufficient weight to the qualification to the statutory definition requiring regard to the context. In this regard context could arguably include not only the four corners of the Act, but also its evident purpose and position in the applicable broader statutory framework. Approached in that manner it does not appear to me to be at all certain that the legislature intended to bring orders made for maintenance pendente lite in terms of rule within the embrace of ‘maintenance order’ as defined in s 1 of the Maintenance Act.} \textsuperscript{328}

We recommend that the role of the maintenance court in enforcing High Court orders be clarified to remove all doubt. We suggest that the Maintenance Act should make it clear (a) that the enforcement measures under the Act are available in respect of maintenance in divorce orders, alongside any other existing enforcement measures that apply to High Court orders; and (b) that the civil

\textsuperscript{325} At para 24.

\textsuperscript{326} At para 19 (footnotes omitted).

\textsuperscript{327} PT v LT and Another 2012 (2) SA 623 (WCC).

\textsuperscript{328} At para 14.
enforcement measures under the Maintenance Act are available in respect of interim orders for maintenance issued while a divorce is pending.

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**CASE STUDY**

**Enforcement through the courts and not between the parties**

The Legal Assistance Centre received the following query from a client:

> I was wondering if you could give me advice on how to handle my ex-husband’s maintenance and visitation rights as I have moved to [another town]. It is almost impossible to have a normal, civil conversation with him myself and I cannot afford to take the matter to court every time we have an argument or disagreement since I am currently a housewife (in other words I do not have a fixed income) to my second husband. I was divorced about 5 years ago and was awarded custody and control” of our minor child (8 years now). It is my responsibility to “deliver” the child to him in [the other town] for the school holidays and what can I do since he does not pay the full monthly school fees?

We informed the client that if the father is not complying with the maintenance order, she can report this to the maintenance court. She does not have to return to the High Court to seek enforcement of the maintenance provisions on the divorce order. However, she should not withhold access to the child even if the ex-husband does not pay maintenance, but rather seek a remedy through the court.

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**4.10 The Maintenance Act and maintenance as a component of protection orders**

As noted in the section above, the Maintenance Act 9 of 2003 defines a “maintenance order” to include “a maintenance order made by a maintenance court under any other law ...” and defines “maintenance court” to include “any other court which is authorised by law to grant maintenance orders”. In addition to including maintenance orders made as part of divorce orders by the High Court, this would include orders for temporary maintenance incorporated in protection orders issued by magistrate’s courts in terms of the Combating of Domestic Violence Act 4 of 2003.

Protection orders are court orders which are issued in situations of domestic violence (or threats of such violence) directing the respondent to refrain from any further violent acts. Protection orders may include a range of provisions depending on the situation. A protection order may include “a provision temporarily directing the respondent to make periodic payments in respect of the maintenance of the complainant, and of any child of the complainant, if the respondent is legally liable to support the complainant or the child, as an emergency measure where no such maintenance order is already in force”. Such an order may remain in force for remains in force for any period set by the court up to a maximum of six months. The time limit stems from the fact that these temporary maintenance orders are not meant to be a substitute for the procedure outlined in the Maintenance Act, but are rather meant to be utilised as emergency measures, to prevent a complainant who has suffered violence from having to initiate multiple court procedures at once.

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329 Maintenance Act 9 of 2003, section 1 (emphasis added).
331 Id, section 15(e). A study of protection orders by the Legal Assistance Centre found that this six-month maximum period was ignored in a substantial number of cases (about 13% of the cases for which the intended duration of the maintenance order can be ascertained) – with some courts contemplating orders with the same sorts of durations as ordinary maintenance orders issued in terms of the Maintenance Act (such as until the child turns 18, or becomes self-supporting). Legal Assistance Centre (LAC), *Seeking Safety: Domestic Violence in Namibia and the Combating of Domestic Violence Act 4 of 2003*, Windhoek: LAC, 2012 at 437.
In a study of a national sample of protection orders issued during 2004-2006, the Legal Assistance Centre found that orders for temporary maintenance were included in protection orders in 34% of cases – with three-fourths (76%) of these being maintenance for children, 15% for the complainant and children together, and 9% for the complainant alone.333

The criminal enforcement measures provided under the Maintenance Act would not be of much use in respect of maintenance provisions in protection orders, since the Combating of Domestic Violence Act provides that violation of a protection order is a criminal offence punishable by a fine of up to N$8,000, imprisonment for up to two years or both – a higher maximum penalty than the Maintenance Act provides.334 However, the civil enforcement mechanisms or the substitution proceedings in the Maintenance Act could be useful additions to the criminal enforcement mechanism in the Combating of Domestic Violence Act.

We recommend that the Maintenance Act make explicit provision for the possibility that a person with a protection order providing for maintenance will approach the maintenance court for a longer term maintenance order. It should be possible in such circumstances for the maintenance court to have reference to the maintenance provision in the protection order, and to have reference to any arrears owing under such a provision in deciding on the terms of a maintenance order which will operate in future. It should also be possible for the maintenance court to replace, substitute or set aside any provision on maintenance in a protection order to ensure a seamless transition between a protection order’s provisions on maintenance and a maintenance order issued under the Maintenance Act.

4.11 Other offences and penalties

The crime of failure to comply with a maintenance order has already been discussed above. However, the Act also provides for a number of additional offences. The highest penalty in the Act is for intimidating a complainant not to lay a maintenance complaint or a criminal charge for failure to pay maintenance. This illustrates the fact that, in the eyes of the law, the right of a person to seek maintenance is extremely important.

Crimes relating to maintenance investigations

The following are crimes:

• giving false information to a maintenance investigator or maintenance officer or magistrate during the maintenance investigation
• failing to obey a summons to appear before a magistrate to give information about a maintenance case without a reasonable excuse
• refusing to answer questions or to provide information without a lawful excuse while being questioned by a magistrate.

The penalty is a fine of up to N$4,000 or imprisonment for up to 12 months.335

Failure to comply with a directive issued by a maintenance officer is punishable by a fine of up to N$2,000 or up to six months imprisonment.336

"We shouldn’t take it personally when women claim maintenance from us."

Participant in the male focus group discussion in Ongwediva
**Crimes relating to maintenance enquiries**

The following are crimes:

- giving false information relating to the enquiry
- failing to obey a summons to attend a maintenance enquiry without a reasonable excuse (for any witness other than the complainant or the defendant)
- refusing to answer questions or to provide information at a maintenance enquiry without a lawful excuse
- insulting or obstructing the work of the magistrate, the maintenance officer, the maintenance investigator or the clerk of the court
- interrupting the proceedings or otherwise misbehaving at the enquiry.

The penalty is a fine of up to N$4000 or imprisonment for up to 12 months.\(^\text{337}\)

**Failure to comply with order for attachment of emoluments or debts**

Refusing or failing to make a payment under an emoluments order or an order for the attachment of debts without a sufficient reason is punishable by a fine of up to N$2000 or up to six months imprisonment.\(^\text{338}\)

A defendant who fails to inform the court that he or she has left employment where an order for the attachment of emoluments is in force could receive a fine of up to N$2000 or up to six months imprisonment. The same applies to an employer who fails to inform the court that a defendant subject to an emoluments order has left employment with that employer.\(^\text{339}\)

**Misuse of maintenance money**

It is a crime to misuse maintenance money. The penalty is a fine of up to N$4000 or imprisonment for up to 12 months.\(^\text{340}\) Any person may make a complaint about the misuse of maintenance money.\(^\text{341}\)

> “Many liable parents renege on their obligations to maintain their dependants, especially where children are brought up in single-parents households. In particular, parents who do not take care of the children on a daily basis perceive the other parent, the caregiver, as squandering the maintenance money she (or he) receives and spending on herself (or himself) rather than on their children. This perception is totally wrong.”

Madelene de Jong, “Ten-year Anniversary of the Maintenance Act 99 of 1998 – A time to reflect on improvements, shortcomings and the way forward”, 126 (3) South African Law Journal 590 (2009) at 613 (footnotes omitted), reporting on a survey of maintenance officials in courts across the country to assess the practical effect of the South African Act

**Intimidation**

It is a crime to compel or induce a complainant not to file a complaint at the maintenance court or not to lay a criminal charge against a defendant for his or her failure to support a specific person, with any manner of threats (including the use of witchcraft) to kill, assault or injure the complainant or any other person, or to cause damage to that complainant or any other person, or to cause damage to that complainant’s property or another person’s property. The penalty is a fine of up to N$20000 or up to 5 years imprisonment.\(^\text{342}\)

\(^{337}\) Maintenance Act 9 of 2003, sections 36-38.

\(^{338}\) Id, section 44.

\(^{339}\) Id, section 44.

\(^{340}\) Id, section 40.

\(^{341}\) Maintenance Regulations, regulation 30. Such a complaint should be made on Form T.

\(^{342}\) Maintenance Act 9 of 2003, section 41.
Other crimes

It is an offence for the defendant to fail to inform the court of a change of address or employment, punishable by a fine of up to N$2000 or six months imprisonment.\textsuperscript{343}

Publishing identifying information about any person under the age of 18 who is or was involved in any proceedings at a maintenance enquiry can be punished by a fine of up to N$8000 or up to two years imprisonment. Such information could include the name and address of the minor, or details, such as the school the child is attending or any other information that is likely to reveal the identity of the child. A magistrate or the Minister of Justice may give permission for information about a child to be published if it is in the interest of the child.\textsuperscript{344}

It is an offence for a court official or any other person fulfilling a function under the Maintenance Act to disclose any information acquired during his or her duties, unless it is part of his or her function or is required by the law or the court. The penalty is a fine of up to N$4000 or imprisonment for up to 12 months.\textsuperscript{345}

<table>
<thead>
<tr>
<th>Summary of criminal offences under the Maintenance Act</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Any person</strong></td>
</tr>
<tr>
<td>• failing to obey a directive to appear before a maintenance officer to give information about a maintenance case (regulation 3(3))</td>
</tr>
<tr>
<td>• giving false information during the maintenance investigation (s. 37(2))</td>
</tr>
<tr>
<td>• failing to obey a summons or a warning to appear or remain at an investigation by a maintenance officer or a maintenance enquiry (ss. 35(1)(b)-(d); 36(1)(b)-(d)); although the offence of failing to obey a summons to attend a maintenance enquiry does not apply to the complainant or defendant, the offence of failing to remain in attendance or to return after a postponement does (s. 36(2))</td>
</tr>
<tr>
<td>• refusing to answer questions or to provide information without a lawful excuse while being questioned in examination by a maintenance officer or at an enquiry (ss. 35(1)(e); 36(1)(e))</td>
</tr>
<tr>
<td>• giving false information to a maintenance officer or at an enquiry (ss. 35(1)(a); 36(1)(a))</td>
</tr>
<tr>
<td>• otherwise providing false information (s. 37)</td>
</tr>
<tr>
<td>• insulting or obstructing the work of the magistrate, the maintenance officer, the maintenance investigator or the clerk of the court, or interrupting the proceedings or otherwise misbehaving at the enquiry (s. 38)</td>
</tr>
<tr>
<td>• intimidating a complainant not to lay a maintenance complaint or a criminal charge for failure to pay maintenance (s. 41)</td>
</tr>
<tr>
<td>• publishing the name or address of a child under 18 involved in maintenance proceedings (s. 42)</td>
</tr>
<tr>
<td><strong>Defendant</strong></td>
</tr>
<tr>
<td>• failing to make a particular payment in accordance with a maintenance order (s. 39(1))</td>
</tr>
<tr>
<td>• failing to inform the court that he or she has left employment where an order for the attachment of emoluments is in force (s. 44)</td>
</tr>
<tr>
<td>• failing to give notice of change of residence or employment while maintenance order is in force (s. 45)</td>
</tr>
<tr>
<td><strong>Complainant</strong></td>
</tr>
<tr>
<td>• misusing a maintenance payment by failing to use it for the benefit of the beneficiary (s. 40)</td>
</tr>
<tr>
<td><strong>Employer</strong></td>
</tr>
<tr>
<td>• refusing or failing to make a payment under an emolument order without a sufficient reason (s. 44)</td>
</tr>
<tr>
<td>• failing to notify court if defendant leaves employment while emolument order is in force (s. 44)</td>
</tr>
<tr>
<td><strong>Debtor</strong></td>
</tr>
<tr>
<td>• refusing or failing to make a payment under an order for the attachment of debts without a sufficient reason (s. 44)</td>
</tr>
<tr>
<td><strong>Court officials</strong></td>
</tr>
<tr>
<td>• disclosing information acquired in the performance of functions under the Act for unauthorised purposes (s. 43)</td>
</tr>
</tbody>
</table>

\textsuperscript{343} Id, section 45.

\textsuperscript{344} Id, section 42.

\textsuperscript{345} Maintenance Act 9 of 2003, section 43.
4.12 Reciprocal enforcement of maintenance orders

4.12.1 Enforcement via Reciprocal Enforcement of Maintenance Orders Act

It is sometimes possible to claim maintenance from a person who is living in another country. In terms of the Reciprocal Enforcement of Maintenance Orders Act 3 of 1995, maintenance orders may be enforced between Namibia and countries with which Namibia has made specific agreements for this purpose.\(^\text{346}\) The Reciprocal Enforcement of Maintenance Orders Act 3 of 1995 replaced the similar Reciprocal Enforcement of Maintenance Orders Act 80 of 1963.\(^\text{347}\)

**Designated countries**

The 1995 Act specifically provides that any country which had been declared as a proclaimed country under the 1963 Act for the purposes of that Act is to be taken to be a designated country for the purposes of the 1995 Act.\(^\text{348}\) The result of the declaration of a proclaimed country is that any maintenance order made by a court either in the proclaimed country or in Namibia will, on a basis of reciprocity, be recognised and enforceable by a competent authority of the other country against any person to whom the maintenance order relates and who happens to be in that particular country.\(^\text{349}\)

South Africa is the only country that was designated under the 1963 Act by an independent Namibian government.\(^\text{350}\) However, some of the designations made prior to Namibian independence by the State President of South Africa were applicable to “South West Africa” and thus survive in independent Namibia.\(^\text{351}\)

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\(^{347}\) Reciprocal Enforcement of Maintenance Orders Act 3 of 1995. Sections 1, 5, 6, 7, 8, and 9 are amended by the Maintenance Act 9 of 2003. Section 13 of the 1995 Act provides that any country designated under the 1963 Act will be deemed to be a designated country for the purposes of the 1995 Act.

Under the 1963 Act, the right and obligation to enforce a maintenance order made by a court of a proclaimed country against a person in Namibia did not stem from, and was not governed by, the existence of a reciprocal agreement between Namibia and such other country. That right and obligation arise from the exercise of the statutory power conferred by the 1963 Act – namely the declaration/designation of the relevant country as a proclaimed/designated country to which the Act is applicable. The 1995 Act takes a somewhat different approach, authorising the Minister of Justice to declare as a designated country “any country with which Namibia has in terms of the Namibian Constitution entered into an agreement providing for the reciprocal enforcement of maintenance orders”. (section 2(1)).


\(^{349}\) Id, sections 3-7


\(^{351}\) The 1963 Act was an Act of the South African Parliament that was made applicable to the “territory of South West Africa” by the Reciprocal Enforcement of Maintenance Orders Amendment Act 40 of 1970, with effect from 1 March 1971.

During the years 1977 to 1980, the administration of some South African statutes was transferred from South African government departments to the Administrator-General of South West Africa. Most of these transfers were effected by “Transfer Proclamations” promulgated by the Administrator-General, in respect of all South African statutes administered by a specific South African government department, with some exceptions listed in the individual Transfer Proclamations. The individual Transfer Proclamations often refer to the “General Proclamation” – the Executive Powers Transfer (General Provisions) Proclamation, 1977 (AG. 7/1977, as amended), which sets forth the mechanics of the transfer of powers.

The 1963 Act was administered by the Minister of Justice of South Africa with respect to both South Africa and the territory of “South West Africa”. The administration of South African laws applicable in the territory and administered by the Minister of Justice of South Africa was transferred to the Administrator-General of South West Africa by the Executive Powers (Justice) Proclamation No. 33 of 1979. Section 3(1)(k) of this Proclamation explicitly excluded the Reciprocal Enforcement of Maintenance Orders Act 80 of 1963 from the provisions of section 3(1) of the General Proclamation – meaning that the functions of the Minister were not transferred. Nevertheless, as of 1979, section 2 of the 1963 Act empowered the State President to issue Proclamations designating countries to which the Act was applicable. This power was not affected by the exclusion from section 3(1) of the General Proclamation, but was governed by section 3(4) of the General Proclamation which states that any proclamation issued by the State President after the commencement of any transfer proclamation
The countries in question are as follows:  
- North-West Territories, Canada
- State of California, USA
- Province of Alberta, Canada
- United Kingdom

It appears that most people are unaware that Namibia has these reciprocal arrangements in place and as a result few requests for reciprocal enforcement are made. The only information we could source on reciprocal enforcement indicates that Namibia deals with approximately three-four reciprocal maintenance orders involving South Africa each year. The Ministry of Justice has also reportedly dealt with other countries such as Cuba through diplomatic channels, even where no formal agreements are in place.

**Applications for maintenance orders against persons in designated countries**

If there is no maintenance order in force, the applicant can apply for maintenance from a person living in a designated country in the same way as if this defendant lived in Namibia. The maintenance court in Namibia and the maintenance court in the designated country will work as partners to deal with the case.

A defendant living outside the country should be given notice of the Namibian enquiry if possible. The defendant can consent to the maintenance that is requested, just as if he or she were living in Namibia, by signing a consent form. If it is not possible to give notice to the person living outside the country, or if this person got notice but did not attend the enquiry, then the enquiry can go ahead in Namibia in the usual way in the defendant’s absence. The information which is given to the court will be written down and signed by the witnesses who provide the information.

The magistrate can make a provisional maintenance order at the end of the enquiry. The Namibian government will send a copy of the provisional maintenance order and the evidence that was given at the enquiry to the government of the designated country. The person who is being asked to pay...

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352 This list excludes the South African “homelands” which existed as semi-autonomous political units under apartheid but are now part of a unitary South Africa, as declarations in respect of these “homelands” are of no ongoing relevance.
357 Personal communication, Ministry of Justice official, 2013.
358 Ibid.
360 Id, section 5(1).
361 Id, section 5(2)(a).
maintenance will then have a chance to tell his or her side of the story in the country where he or she
lives. In other words, a court in the designated country will hold “the other half” of the enquiry. The
magistrate in this court will decide whether to confirm the provisional maintenance order, to change
it, or to send the case back to the maintenance court in Namibia for more information. If the
defendant received fair notice of the enquiry which was held in Namibia – whether or not he or she
attended the enquiry – then the court in the designated country can limit its portion of the enquiry
to a consideration of the amount of maintenance to be paid.

Where the maintenance order in question is made by a Namibian court, that court will transmit a
copy of the order to the Permanent Secretary of the Ministry of Justice, who will then transmit it to
the administrative head of the Department of Justice in the designated country in question.

A maintenance order made in this way can be enforced in the designated country in a similar way as
a maintenance order made in Namibia.

The procedure works in the opposite direction when an order is made in the designated country in
question and the defendant is resident in Namibia.

**Enforcement of a maintenance order in another country**

If a Namibian maintenance order is already in force against a person who moves to another country,
the complainant can go to the maintenance court to ask for help in enforcing the order if necessary.
The Namibian government will work together with the government in the designated country to
enforce the order, using the same mechanisms as those for the registration of a new order.

A similar procedure is applied to cases where an order for the attachment of wages is made against
a person who lives in Namibia but receives wages in a designated country. The two governments will
work together to make sure that the complainant gets the money.


In future, Namibia may manage maintenance applications across countries differently. This is
because the Namibian government is reportedly in the process of preparing to accede to the Hague

The object of this new international convention is “to ensure the effective international recovery of
child support and other forms of family maintenance”. It is designed to offer children and other
dependants a simple, swift and cost-effective international system for the recovery of maintenance.
The Convention pursues these objectives by a combination of means:

- an efficient and responsive system of co-operation between Contracting States in the
  processing of international applications;
- a requirement that Contracting States make available applications for establishment and
  modification, as well as for recognition and enforcement, of maintenance decisions;
- provisions which ensure effective access to cross-border maintenance procedures;

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362 Id, section 5(3) and 6(1).
363 Id, section 6(2).
364 Id, section 3.
365 Id, section 7.
366 Id, section 4.
367 Id, sections 3 and 4.
368 Id, section 8.
The Convention addresses many practical matters that can affect the efficiency with which international claims are pursued – such as language requirements, standardised forms and the exchange of information on national laws. It also allows and encourages the use of new information technologies to reduce the costs and delays which have in the past plagued international maintenance claims.\textsuperscript{371}

The final text of the Convention was approved by 70 states in 2007.\textsuperscript{372} The Convention came into force on 1 January 2013 but has so far been ratified by only four individual countries – although it has also been signed by Burkina Faso, the European Union and the USA.\textsuperscript{373} The Namibian government is reportedly considering ratification of this Convention as part of its process to strengthen child protection measures through the enactment of the Child Care and Protection Bill.\textsuperscript{374}

4.12.3 Other international conventions on maintenance

Several international conventions have been enacted to help dependents enforce claims for maintenance abroad. The older maintenance conventions are potentially relevant, given the fact that there are as yet few signatories to the new Hague Convention on the Recovery of Child Support.

The 1956 UN Convention on the Recovery Abroad of Maintenance has been signed by the vast majority of UN member states, including South Africa (prior to Namibian independence, as the Union of South Africa) – which means that Namibia could succeed to this Convention if it chose to do so.\textsuperscript{375} The purpose of this Convention is to “facilitate the recovery of maintenance to which a person [the claimant] who is in the territory of one of the Contracting Parties, claims to be entitled from another person [the respondent] who is subject to the jurisdiction of another Contracting Party”.\textsuperscript{376} The recovery of maintenance is facilitated through the use of “Transmitting and Receiving Agencies”.\textsuperscript{377} This Convention was largely a response by the international community to improve the lives of dependents, mostly

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\textsuperscript{370} Excerpt from an outline to the Hague Child Support Convention available at \(<www.hcch.net/upload/outline38e.pdf>\), accessed 29 August 2013.

\textsuperscript{371} Ibid.

\textsuperscript{372} Ibid.

\textsuperscript{373} The Convention has been signed and ratified by (1) Albania (2) Bosnia and Herzegovina (3) Norway and (4) the Ukraine. Burkina Faso, the European Union and the United States of America have signed but not ratified the Convention. Status Table \(<www.hcch.net/index_en.php?act=conventions.status&cid=131>\), accessed 29 August 2013.


\textsuperscript{376} 1956 UN Convention on the Recovery Abroad of Maintenance, Art 1.

\textsuperscript{377} Excerpt from the Convention of the Recovery Abroad of Maintenance. Available at \(www.refworld.org/cgi-bin/texis/vtx/rwmain?page=type&type=MULTILATERALTREATY&publisher=UNGA&col=\&docid=3dda24184&skip=0\), accessed 3 June 2013.
women and children, left behind without support when their partners moved to another country – a significant problem following the return of overseas soldiers at the end of the Second World War.378 The 1956 convention can be applied in combination with the 1958 or 1973 conventions discussed below.379

The **1958 UN Convention Concerning the Recognition and Enforcement of Decisions Relating to Maintenance Obligations Towards Children** was concluded in April 1958 and came into force in 1962. This Convention is applicable only to the recognition and enforcement of maintenance obligations towards children. There are 20 contracting states to this convention, but neither South Africa nor Namibia is a party.380

The **1958 UN Convention Concerning the Recognition and Enforcement of Decisions Relating to Maintenance Obligations Towards Children** was concluded in April 1958 and came into force in 1962. This Convention is applicable only to the recognition and enforcement of maintenance obligations towards children. There are 20 contracting states to this convention, but neither South Africa nor Namibia is a party.380

The **1973 Convention on the Law Applicable to Maintenance Obligations and the accompanying 1973 Convention on Recognition and Enforcement of Decisions Relating to Maintenance Obligations** established common provisions for adult and child maintenance in line with the 1956 and 1958 conventions.381 These Conventions expand the international application of maintenance agreements in that they apply even if the applicable law is that of a non-contracting State.382 Neither South Africa nor Namibia is a party to these Conventions.

Thus, Namibia has a number of international tools which it could apply to facilitate international recognition and enforcement of maintenance orders. We recommend that Namibia become a party to all of these conventions on maintenance, in order to secure the widest possible mechanisms for recovery of maintenance across national borders.

### 4.13 Child maintenance in relation to the laws on custody and access

For many people the concepts of maintenance, custody and access are interlinked. The Legal Assistance Centre frequently receives queries in this regard. In some cases the parent with custody of the child wants to restrict the other parent from having access because of that parent’s refusal to pay maintenance. In other cases the non-custodian parent wants to refuse to pay maintenance because the custodian parent is withholding access. Sometimes the parent who has been asked to pay maintenance will seek custody of the child to avoid maintenance payments.

Although problems associated with maintenance, custody and access are often related, a parent with custody should not refuse access if the non-custodial parent refuses to pay maintenance and a non-custodial parent should not refuse to pay maintenance if the parent with custody is refusing access. Instead problems with failure to pay maintenance should be dealt with through the maintenance court, while problems with custody or access can be dealt with through the children’s court or the High Court.383 The guiding principle in all these forums should be what is best for the child.

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380 See the following website for more information (in French): <www.hcch.net/upload/conventions/txt09en.pdf>, accessed 23 September 2013.


383 Maintenance Act 9 of 2003, section 9; Children’s Status Act 6 of 2006, section 14. The High Court as the upper guardian of all minors has inherent jurisdiction over these issues.
Custody and access

Custody is the responsibility for the day-to-day care of a child. If the parents are married, they have joint custody of the child.\(^a\) If the parents are not married, only one parent will be the custodian of the child, even if the parents live together. The law does not say which parent must be the custodian – it is up to the parents to decide.\(^b\) If the parents cannot agree who will be the custodian of their child, they can ask the court to decide. Someone who has been authorised to act on behalf of the child can also apply to the court to make this decision. The court will consider the facts of the case and make a decision based on the best interests of the child.\(^c\) If there is no agreement between the parents and no court order, then the position is governed by common law, which makes the mother the child’s guardian and custodian.\(^d\)

Where the parents are unmarried, the non-custodian parent has an automatic right of access to the child.\(^e\) Where a dispute arises (for example if the custodial parent is unreasonably preventing the other parent from seeing the child, or the non-custodian parent is not caring for the child properly during period of access), either parent can apply to the court for an appropriate order.\(^f\)

When considering which parent should have custody of a child, the court may not approve an application for the custody of a child if the application is based on a desire to avoid the payment of maintenance in respect of that child.\(^g\)

\(^a\) Married Persons Equality Act 1 of 1996, section 14, read together with the common law on custody of the children of a marriage.

\(^b\) Children’s Status Act 6 of 2006, section 11. The parents can make a verbal or written agreement.

\(^c\) Id, sections 11 and 12. A decision about custody can also be changed. A request to change custody works in the same way as an initial application for custody. The court will consider the facts of the case and make a decision based on the best interests of the child.

\(^d\) The statute does not repeal the common law provision which gives the mother sole custody and guardianship of a child born outside marriage. See Bobberg’s Law of Persons and the Family, Second Edition, Kenwyn, South Africa: Juta & Co, 1999 at 391. Therefore the common law would survive to govern a situation not covered by the provisions of the Act.

\(^e\) Access means having contact with the child. Access can include visiting the child, taking the child on trips, having telephone conversations or exchanging letters. The right of access is automatic if this parent has voluntarily acknowledged that he or she is the parent. If the parent without custody did not voluntarily acknowledge the child, this parent can still apply to the court for access. Children’s Status Act 6 of 2006, section 14. The right of access is subject to the reasonable control by the person caring for the child and the parent with access may not remove the child from the usual place of residence without the custodian’s consent.

\(^f\) Ibid.

\(^g\) Id, section 3(2)(b).

Interviews with court officials showed that the courts also receive queries where the questions of access and maintenance are interlinked. The maintenance officer at the Keetmanshoop court stated that defendants commonly ask whether they can have custody of the child as an alternative to paying maintenance. He explained that many defendants do not understand why they should pay maintenance when it can be avoided by, for example, sending the child to live with a grandmother. Similar opinions were expressed by the participants at the male focus group discussion held in Keetmanshoop. The maintenance officer at one court described the solution she had found to address such cases – if the father takes custody of the children and takes them to live with the grandmother and the complainant then seeks to withdraw the case, she requests that the grandmother come to court and transfer the case into her name.\(^384\)

The maintenance officer at another court discussed the fact there are some cases where she believes the child would be better off with the defendant. In these cases she advises the complainant to give custody of the child to the defendant and tells the complainant that she is not willing to proceed with the application for maintenance. She viewed this as a practical solution to a very difficult situation, made after assessing what is in the best interests of the children. However, this is a matter of concern as the Maintenance Act says that a maintenance officer must investigate an application

\(^384\) The primary caretaker of a child may apply for maintenance. See the definition of “complainant” in section 1 of the Maintenance Act 9 of 2003.
for maintenance. Furthermore a decision about custody is extremely serious and when brought to the court, the decision must be made by a magistrate in terms of the Children’s Status Act after all interested parties have been given an opportunity to be heard – not by a maintenance officer on the basis of possibly incomplete information. In fact, when the Children’s Status Act is re-enacted as part of the Child Care and Protection Act, it is anticipated that a social worker assessment will be required before the court makes a decision on custody. By ignoring these legal requirements, the maintenance officer may be preventing the complainant from having access to the proper legal channels for such a decision. A particular concern is that the complainant may feel intimidated by the maintenance officer and may not be aware of the legal right to have the case heard before a magistrate.

We recommend the Maintenance Act is amended to allow a maintenance case to be diverted to a custody hearing should the situation require this, with the possibility of ordering temporary maintenance in the meantime whilst the question of a possible change in custody is pending.

As another option, the magistrate at the Mariental court recommended that rather than having the issues of maintenance and other children’s issues dealt with separately, the two “courts” should be amalgamated into a family court which could handle maintenance, domestic violence, and child care/adoption/custody issues in combination. We recommend that a helpful streamlining of procedures could be accomplished by amending the Maintenance Act and the Children’s Status Act (or the forthcoming Child Care and Protection Act which is expected to incorporate the Children’s Status Act) to provide for the amalgamation of proceedings on maintenance and custody – in a manner somewhat similar to the current procedure for converting a criminal trial for non-payment of maintenance into an enquiry which investigates possible changes to the maintenance order.

**Summary of information about the Maintenance Act**

- The Maintenance Act provides mechanisms and guidelines for enforcing maintenance responsibilities. It does not create any new legal liabilities for maintenance between family members, although it harmonises customary law with the common law principles on maintenance.
- The duty to provide maintenance is applicable to any relationship where one person has a legal duty to maintain another person. However the statute comes into play only if the person who has a duty to provide maintenance is failing or neglecting to provide reasonable maintenance despite being able to do so.
- Since maintenance is a joint liability between the parents, the common-law principles on joint liability allow a parent who has contributed more than his or her fair share towards a child’s maintenance to recover the excess from the other parent. It is possible that this could be done by means of a maintenance order, since the Maintenance Act provides for an order directing the defendant “to contribute to the maintenance of the beneficiary from the date specified in the order” – although it not entirely clear that this provision authorises retrospective recovery of excess contributions.
- Maintenance is money or goods that a person has a legal duty to provide for the support of his or her dependants. A maintenance order can include an order for contributions to pregnancy and birth-related expenses. However the Act is currently unclear on whether a mother can claim pregnancy-related expenses before the child is born. As a result some courts allow such claims whilst other courts require the mother to return after the child’s birth.

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385 In cases where a maintenance order is not already in place, a maintenance officer must “investigate the complaint and institute a maintenance enquiry”. The law sets out a number of steps that must be followed during the enquiry. For example, under the direction and control of the maintenance officer, the maintenance investigator must take statements under oath or affirmation from persons who may be able to give relevant information concerning the subject of any complaint relating to maintenance. The maintenance officer must also gather information concerning the identification or whereabouts of any person who is legally liable to maintain the person mentioned in such complaint or who is allegedly so liable and information about the financial position of such person and any other relevant information (emphasis added). Maintenance Act 9 of 2003, section 9(4a) and 10(2d and e). A maintenance officer must also investigate complaints pertaining to existing orders (section 9 (4b))

386 Children’s Status Act 6 of 2006, section 12.

387 Child Care and Protection Bill, draft dated 12 January 2012, section 95.

388 This would be similar to a “Rule 43” application for maintenance during the period that a divorce case is pending in the High Court. See page 90.
Although maintenance orders usually end between the ages of 18-21, the Maintenance Act contains no bar to maintenance orders in respect of major “children” since the basic requirements for a maintenance complaint are that there is a legal liability to maintain and that maintenance is not being provided in practice.

A legal duty to maintain persons with infirmities or disabilities applies at any age, because such persons may not ever be able to become self-supporting.

Children have a duty under certain circumstances to maintain their parents. This will usually apply only after the children have become adults themselves, but minor children can in theory be expected to contribute. There is also a mutual duty of support between certain blood relatives, starting with the family members who are closest to each other.

The Maintenance Act makes it clear that husbands and wives have a duty of maintenance towards each other under both civil and customary law. However, cohabiting partners have no legal liability to maintain each other and thus cannot make use of the Maintenance Act (unless they conclude a contract between themselves in respect of maintenance). There is also no automatic legal liability for maintenance between spouses in religious marriages which do not satisfy the requirements for civil marriage, such as some Muslim or Hindu marriages.

**Claiming maintenance**

- Once a maintenance complaint has been made, the maintenance officer must investigate the case.
- The normal practice is to bring the parties together to see whether it is possible to negotiate an agreement without a formal hearing before a magistrate. If the parties reach an agreement, the terms are made into a consent maintenance order.
- If a complainant and a defendant cannot agree on a consent order, the case will be considered by a magistrate at a hearing called a maintenance enquiry.
- If the court is satisfied that a defendant received notice to attend an enquiry but failed to do so, a default maintenance order can be made.

**Appeals**

- The Act allows a person who is aggrieved by an order made by a maintenance court (including a refusal to make an order) to appeal to the High Court.

**Enforcement**

- The current law provides for a range of enforcement remedies – such as attaching the property, income or debts of the person who is in arrears.
- Failing to obey a maintenance order is a criminal offence. The Maintenance Act also provides for a number of additional offences. The highest penalty in the Act is for intimidating a complainant not to lay a maintenance complaint for failure to pay maintenance. Failure to maintain a child is also a criminal offence under Namibia’s child protection laws.
- Case law disagrees on the question of who bears the onus of proving lack of means in a criminal trial for failure to pay maintenance; the wording in the current law, in contrast to the situation under the 1963 Act, does not make it clear if the defendant is required merely to raise such a defence, or must prove lack of means, thus shifting the burden to the prosecution to overcome the defence by proving that the lack of means was due to unwillingness to work or misconduct.

**Changes to maintenance orders**

- A complainant or defendant can apply for an order to be substituted, suspended or discharged.
- The maintenance court may amend or enforce a maintenance order contained in a divorce order issued by the High Court, and possibly an interim order made by the High Court while a divorce is pending (case law on this issue varies). The maintenance court may also enforce, change or replace a temporary maintenance order contained in a protection order.

**Maintenance across international borders**

- Maintenance orders may be enforced between Namibia and countries with which Namibia has made specific agreements for this purpose. If Namibia becomes a signatory to the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, the Namibian courts will be able to work with a greater number of countries to recover maintenance.
Chapter 5
REPORTS ON THE IMPLEMENTATION OF MAINTENANCE ACT 9 OF 2003

There is a shortage of information on the operation of the Maintenance Act. The 1995 report on maintenance noted that there is a “dearth of information about maintenance” – noting in particular that the 1991 Population and Housing Census did not include any questions about maintenance, something that was not remedied in the 2001 or 2011 censuses. Other reports which make reference to the Maintenance Act 9 of 2003 do so only in passing, without providing any critical analysis or factual information about its operation.

Following the enactment of the new law, the first detailed report on problems still faced accessing maintenance was at the 2006 National Conference on Women’s Land and Property Rights and Livelihood, with a Special Focus on HIV/AIDS. One of the presenters discussed some problems with the application of the Maintenance Act, with a focus on one detailed case study. She asserted that some men cause unnecessary delays as a tactic to avoid paying maintenance, such as refusing to produce proof of income or denying paternity, which can mean that women struggle to maintain their children on their own for months or even years. The consequences for women are problematic:

The sum total effect of these tactics means that it often falls on the woman to continually go back to court to enforce the maintenance order. All of this time costing the woman money and time – wearing her down until many women give up the quest for child maintenance. Often times the women are poorly educated and do not, themselves, understand the process or what has been said in court. But they do understand one thing – that these delaying tactics mean insecurity in child maintenance leading to home and food insecurity and indeed, an insecurity of life. One never knows when the next meal will come.

The case study presented to illustrate some of the problems in the implementation of the Maintenance Act described the experiences of Hennely, a single mother of five children living in Katutura. She separated from her partner of 15 years due to his abusive behaviour. He refused to assist with

3 Ibid.
4 Ibid.
maintenance, forcing her to turn to prostitution to earn money to feed her children. She became infected with HIV/AIDS as a result, and she unknowingly passed HIV on to one of her children.\(^5\)

Hennely’s attempts to make her former partner contribute to the children’s maintenance have been very difficult, as described in the case study:

_Hennely has been to maintenance court many times, but they keep postponing the case. The father of her children has used every tactic there is to get out of paying maintenance. He has filed affidavits alleging that the children are not his (the Magistrate would have none of this). He has refused to bring his pay slips to court. He has alleged to make far less money than is probable. He has claimed that he has other economic obligations. He has said that he does not have a house, car and satellite dish (I have seen these with my own eyes). He has not shown up for his court dates. He pays one payment, just before his court date and then goes to court and tells the Magistrate that he has been paying._\(^6\)

Two of Hennely’s children reportedly died of malnutrition,\(^7\) illustrating the potentially dire consequences of a failure to obtain maintenance.

The conference delegates adopted several recommendations pertaining to maintenance issues. The final report recommended that the courts increase their capacity to enforce maintenance orders.\(^8\) More specifically, the report highlighted the need for maintenance investigators and the need to inform community members of their rights and responsibilities under the Maintenance Act.\(^9\) In addition, the conference recognised entitlement to child maintenance contributions as a right to property.\(^10\)

In the same year, the government put in place a _specialised prosecution unit_ under the auspices of the Prosecutor-General to address sexual offences, domestic violence, maintenance and serious offences. The Ministry of Gender Equality and Child Welfare reports that this unit gives guidance to police investigating cases and assists women who are experiencing difficulty claiming maintenance from their partners. The unit collaborates with prosecutors to ensure that maintenance orders are obtained and enforced, and assists clients to invoke criminal proceedings under the Maintenance Act where appropriate.\(^11\) According to the Office of the Prosecutor-General, the unit deals with maintenance cases that have been taken to the High Court on appeal, as well as cases where the defendant has gone into arrears. The unit may also deal with cases where there is alleged corruption, such as where the defendant is a high-ranking official who is refusing to comply with a maintenance order. Cases can be brought directly to the specialised prosecution unit, although it is not clear how well-known the unit is to the general public, as it does not appear that complainants are commonly informed about the unit by the maintenance courts. Aside from a brief reference to the unit in Namibia’s _Beijing 10+_ report, we were not able to source any documented information about the unit’s operation or effectiveness – and as discussed in chapter 4, few cases about maintenance issues are taken beyond the maintenance court, meaning that there are few Namibian court judgements on maintenance which can be consulted.

Another source of information about the operation of the Maintenance Act comes from the response by the Ministry of Justice to a _question raised in Parliament_ in 2008. On 5 June 2008 a female member of the opposition party posed a question to the National Assembly about the implementation of the

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\(^5\) Id at 19.

\(^6\) Ibid.

\(^7\) Hennely was one of the persons interviewed by the Legal Assistance Centre for a study on sex workers: “Whose Body Is It?: Commercial Sex Work and the Law in Namibia,” Windhoek: Legal Assistance Centre, 2002.


\(^9\) Id at 22.

\(^10\) Ibid.

Maintenance Act after its first five years of operation. Specifically, the question asked about initial and in-service training of maintenance officers; the accessibility and transparency of maintenance services, including adequate and accessible record-keeping; supervision of maintenance officers to assure proper conduct; salary of maintenance officers; and whether an adequate number of maintenance officers have been appointed throughout the country.

In answer to this question, the Deputy Minister of Justice first responded with statistics on maintenance complaints lodged with the Windhoek Magistrate’s Court since the current Maintenance Act came into operation in 2003. He noted that the following number of complaints had been lodged at this one court:

- 2003: 2,159 complaints lodged
- 2004: 1,292 complaints lodged
- 2005: 1,292 complaints lodged
- 2006: 1,260 complaints lodged
- 2007: 1,072 complaints lodged
- 2008 (from 2 January to 5 March): 260 complaints lodged.

The Deputy Minister then proceeded to give the following information:

*In Windhoek there is one magistrate assigned solely for the Maintenance Court, who handles enquiries and consequently criminal hearings. A fulltime prosecutor, a maintenance officer and four legal clerks support this Magistrate. In all other districts countrywide, district magistrates also handle maintenance matters and the prosecutor assigned to these courts is the maintenance officer.*

*The Maintenance Court was established with the specific purpose to ensure that the necessary support is provided when children are neglected by one or both of their biological parents.*

The Deputy Minister also described the process which usually takes place in a criminal case for non-compliance with a maintenance order:

*Where the respondent offers to pay an amount, the case is postponed for a reasonable time, as requested by the respondent, to make the required payments.*

*Where a complaint is received, the person liable for the support of a child is summoned to appear before Court for a full enquiry into such person's financial ability to provide the required support.*

*The Court attempts do everything possible to convince the respondent of his/her duty to support his/her children and in all possible ways encourage the respondent to provide such support without imprisoning the latter.*

*Only when it is clear that the respondent is able but refuses to provide such support to his/her children, the Court, in terms of the Act, is allowed to imprison such respondent for the failing to comply with a court order.*

The Deputy Minister went on to address several specific points of the question:

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12 At the request of Hon Dienda, the Legal Assistance Centre assisted with the drafting of this question.

13 Question 3 put by Hon Dienda, National Assembly, 5 June 2008.

14 The data is the same as that reported by the LAC on page 112, except for 2004 where we report 1,297 maintenance files were opened. The discrepancy could be a typographical error.

15 The Maintenance Act 9 of 2003 came into force in November 2003. We assume the data cited is for applications for the entire year.

16 Hon Deputy Minister of Justice (Mr U Nujoma), 12 June 2008.
No initial training is provided but in-service training is provided on a daily basis to the maintenance officer and other administrative clerks in the Maintenance Division. It is expected of the maintenance officer and clerks to acquaint themselves with the Maintenance Act (Act 9 of 2003) on a regular basis.

The Magistrate, with the assistance of support staff, is responsible for record-keeping and a file is opened for every maintenance complaint. Complaints from the public can be reported to the magistrate.

The work of maintenance officers in this office is personally observed by supervisory officials for monitoring purposes.

Supervisory officials include the head of office in the case of Windhoek, the Magistrate, the maintenance officer, the administrative head as well as the prosecutor who is an ex-officio maintenance officer.

Supervising officials check case files on a regular basis.

Supervising officials do not necessarily interview complainants. Complainants are interviewed by maintenance officer or members of the support staff who assist with maintenance matters. Complaints about the performance of staff members or lack thereof are handled by the Magistrate.

Support dealing with the maintenance matters is supervised by a maintenance officer who is supervised by the Maintenance Magistrate.

Maintenance officers are legal clerks and legal officers appointed of different grades and levels in the respective job categories in the Public Service with different scales of salaries.

No investigators have been appointed since the Maintenance Act came into operation because this job was done by the police and we have budgetary constraints.

At the time of promulgation of this Act, the Police assisted the Courts to trace defendants. When the Police were no longer available for these purposes, messengers of the Civil Court were and are still utilised to serve the Court process when the whereabouts of a defendant is known. This practice has thus far not required or necessitated the appointment of fulltime maintenance investigators provided for in subsection (4) of the Act.

Should reports be received from investigators, it would not be available to the general public because the contents of the reports are confidential.

In 2008, the Situational Analysis for Women and Children published by the National Planning Commission recognised the importance of the Maintenance Act, stating that “the Maintenance Act 2003 assists children by improving the system whereby caregivers can obtain maintenance for children from absent parents”. However, there is no discussion of the Act at all in the latest situation analysis of children and adolescents published in 2010.

The first National Gender Policy, published in 1997, makes no specific mention of maintenance, but the accompanying National Gender Plan of Action (1998-2003) recommended law reform on
maintenance, the use of media to disseminate legal information on various gender-related topics, including child maintenance, and research on the implementation of various laws relevant to women (presumably including the Maintenance Act).\(^{22}\)

The **second National Gender Policy** recognises the importance of maintenance throughout the document. In the situation analysis, the government recognises challenges in implementation:

> Most critically, implementation of progressive gender-related laws remains ineffective, owing to shortages in funding and human resources, inadequate training and insufficient monitoring. For example, many magistrates' courts lack the proper forms under the new Maintenance Act of 2003, and are still using the old forms, denying women and children in those regions effective protection under the new maintenance laws. Furthermore, important legal battles remain, such as those confronting issues of customary laws and harmful social practices; protection of children, particularly step-children; power-sharing and decision-making; and equality in the family.\(^{23}\)

The policy connects maintenance with gender equality in the family in one of the thirteen objectives of the policy:

> - Promote gender equality in family relationships, and provide greater protection for women in all spheres of family life, including marriage, divorce, maintenance and inheritance.\(^{24}\)

Access to maintenance is also included as part of the specific policy objective for one of the twelve areas of concern, “Equality in the Family”:

> **Policy objective:** Ensure gender equality and respect for the important role of women in all aspects of family life, including steps to protect women's rights in respect of marriage, divorce, maintenance, inheritance and cohabitation.

This section notes: “The issue of maintenance should also be highlighted, since this is one of the concerns most often cited by women. The new law on the Maintenance Act No. 9 of 2003 is a strong one, but it is not well implemented in practice.”\(^{25}\) It calls for more effective implementation of a range of laws which are aimed at promoting equality in the family, including the Maintenance Act.\(^{26}\)

It then lists three “Strategies for maintenance”:

> - Lobby for increased funding to ensure the hiring of maintenance investigators in all magistrates courts.
> - Equip all magistrates' courts with proper maintenance forms, and provide intensified training on the Maintenance Act to magistrates, maintenance clerks and maintenance officers.
> - Develop an education campaign to inform women, men and caregivers of their rights regarding child maintenance, and to inform men and women of their obligations under the Maintenance Act.\(^{27}\)

The average amount of maintenance ordered is included as an indicator for monitoring the success of the strategies in this policy section.\(^{28}\)

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24 Id at 22 (para 3.3.2.13, emphasis added).

25 Id at 42 (emphasis added).

26 Id at 43 (para 4.12.1)

27 Id at 43 (paras 4.12.3-4.12.5).

28 Id at 50.
The current National Gender Policy also includes provisions on maintenance as a component of access to justice in the section on “Gender, Legal Affairs and Human Rights”:

- **Encourage increased procedural access to justice; this will entail providing facilities geographically accessible to women, and ensuring that facilities are adequately staffed and stocked with documents and forms – such as maintenance complaint forms and domestic violence protection order applications – which are mostly utilised by women.**
- **Encourage substantive access to justice by ensuring that all laws and policies are being enforced to the fullest, and that actors within the justice system are given the resources, education, ongoing training and support to effectively uphold the laws.**
- **Work with the Ministry of Justice and civil actors to ensure that legal aid is available for women who cannot afford legal representation, including representation in matters which affect women particularly such as divorce, maintenance and domestic violence cases.**

There is little mention of parental responsibilities to provide for maintenance in Namibia’s policies on children, indicating that maintenance is still thought of as a woman’s issue instead of an issue which is central to the best interests of children. However, brief commentary on the operation of the Maintenance Act is included in Namibia’s consolidated second and third periodic report to the Committee that monitors the Convention on the Rights of the Child. The government’s report explains that the Maintenance Act 9 of 2003 “was passed in order to establish a framework for holding parents accountable for the maintenance of their children”. It states that effective implementation of several laws – including the Maintenance Act 2003 “remains problematical”; however, it also asserts, without elaboration, that the problems which have been experienced with implementation of the Maintenance Act “are now being addressed”. The lack of detail is concerning given the great value maintenance can have in protecting the best interests of a child.

The Legal Assistance Centre commented on this omission in its alternative report to the Committee that monitors the Convention, noting that:

> We do not believe that the problems with the implementation of this Act are being addressed. Clerks or court, magistrates and prosecutors need more training on the Act, with better follow-up, monitoring and supervision following training. The Act also provides for maintenance investigators, but there is no maintenance investigator in the country nine years after the Act came into force.

The LAC recommended “continued and intensified attention to the implementation of this key law on maintenance”. However the Committee did not make any specific reference to the implementation of the Maintenance Act in its final recommendations.

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29 Id at 40 (paras 4.10.6-4.10.8).
32 Ibid.
34 Ibid.
Does Namibia’s Maintenance Act meet the standards outlined in the Convention on the Rights of the Child?

The following checklist is taken from the implementation handbook for the Convention on the Rights of the Child. We have completed the checklist based on our assessment of Namibia’s adherence:

Article 27: Child’s Right to an Adequate Standard of Living

Maintenance

☑ Is legislation implemented to ensure that children can recover maintenance from both parents and from any others who have responsibility for their conditions of living?

✘ Does such legislation make the child’s best interests a primary or paramount consideration?

☑ Is such legislation simple and cheap for the child or child’s caregiver to enforce?

☑ Does it include measures to obtain income or assets from those who default on their maintenance responsibilities?

✘ Has the State acceded to all appropriate international or bilateral agreements and treaties relating to the recovery of maintenance abroad?

This simple assessment shows that in many ways Namibia is adhering to the standards outlined in the Convention on the Rights of the Child. We have recommended that the Maintenance Act be amended to specifically recognise the best interests of the child (see page 6). We understand that Namibia intends to sign the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance (see page 97). However whilst at face value Namibia may appear to be meeting international requirements, the inadequacies in the implementation of the Act continue to be problematic.
Can a child claim maintenance?

MY FATHER HAS DIED AND I AM LIVING WITH MY GRANDMOTHER. MY MOTHER HAS A GOOD JOB BUT SHE NEVER COMES TO SEE ME AND SHE NEVER GIVES US ANY MONEY. WE ARE REALLY SUFFERING.

YOUR STORY MAKES ME SAD. BUT I THINK I HAVE A SOLUTION.

DID YOU KNOW THAT YOU CAN CLAIM MAINTENANCE BY YOURSELF? YOU DON’T NEED AN ADULT TO DO IT FOR YOU.

YES, THE LAW SAYS THAT PARENTS HAVE A DUTY TO CARE FOR THEIR CHILDREN. YOUR MOTHER SHOULD BE PAYING MAINTENANCE TO YOUR GRANDMOTHER. YOUR GRANDMOTHER CAN GO TO THE MAGISTRATES COURT TO APPLY FOR A MAINTENANCE ORDER, OR YOU CAN GO YOURSELF.

YOU MEAN I CAN GO TO COURT ON MY OWN AND ASK FOR MAINTENANCE FOR MYSELF?

HELLO, I WOULD LIKE TO APPLY FOR A MAINTENANCE ORDER.

OK. I WILL HELP YOU FILL IN ALL THE FORMS. I AM GLAD THAT YOU HAVE COME BECAUSE ALL CHILDREN HAVE A RIGHT TO MAINTENANCE.

HOW LONG MUST A PARENT PAY MAINTENANCE FOR A CHILD?


Gender Research & Advocacy Project, Legal Assistance Centre. Windhoek Namibia 2010

One of the one-page comics produced by the Legal Assistance Centre for publication in newspapers.
6.1 Purpose and scope of the study

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.

In 1995 the Legal Assistance Centre published a report on its study of the operation of the previous Maintenance Act (the Maintenance Act 23 of 1963). Therefore we are able to compare findings from the current data set with data from the previous study. This information provides an important perspective on how changes to the law on maintenance have affected access to maintenance, and a general understanding of how access to maintenance has changed over time. Comparisons with the findings of the previous research, referred to as “the 1995 maintenance study”, are made throughout the report.

As Namibia and South Africa share a common history, many of their laws are the same or similar, and some of the problems and challenges experienced are similar. This is true of maintenance. Therefore, where relevant a study on the operation of South Africa’s Maintenance Act, published in 2004, is repeatedly cited in this report. The study is referred to as “the 2004 study on the South African Maintenance Act”.

6.2 Sample of maintenance complaints

Quantitative data was collected from court files accessed from a national selection of Namibia’s magistrates’ courts. We applied for and received permission from the Chief of the Lower Courts to access the court files for this purpose.

We chose to collect data from maintenance files opened between 2005 and 2008. The starting point of 2005 was chosen because this is two years after the Maintenance Act of 2003 came into operation. We estimated that the interval of two years should have given the courts sufficient time to effectively adopt the requirements of the new law. The end-point of 2008 was chosen because we planned to start data collection in 2009.

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3 The Chief of the Lower Courts is now known as the Chief Magistrate.
The sample was prepared by collecting information on the total number of maintenance order applications from every court in Namibia between 2005 and 2008. The data was collected by contacting all magistrates’ courts by telephone to request this information. A total of 18,683 maintenance order applications were received by magistrates’ courts nationwide between 2005 and 2008. We subsequently collected data on the total number of maintenance applications opened in 2004, 2009 and 2010.

Table 7: Maintenance order applications at all magistrates’ courts, 2005–08  
(total universe of maintenance order applications)

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<th>2007</th>
<th>2008</th>
<th>Total</th>
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<td>4,571</td>
<td>4,590</td>
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</table>

Table 8: Maintenance order applications for all magistrates’ courts, 2004–10

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<th>2006</th>
<th>2007</th>
<th>2008</th>
<th>2009</th>
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<td>123</td>
<td>65</td>
<td>72</td>
<td>93</td>
<td>132</td>
<td>689</td>
</tr>
<tr>
<td>Usakos</td>
<td>32</td>
<td>35</td>
<td>27</td>
<td>24</td>
<td>17</td>
<td>19</td>
<td>26</td>
<td>180</td>
</tr>
<tr>
<td>Walvis Bay</td>
<td>128</td>
<td>145</td>
<td>167</td>
<td>196</td>
<td>339</td>
<td>341</td>
<td>317</td>
<td>1,633</td>
</tr>
<tr>
<td>Windhoek</td>
<td>1,297</td>
<td>1,292</td>
<td>1,060</td>
<td>1,072</td>
<td>1,347</td>
<td>1,236</td>
<td>1,275</td>
<td>8,579</td>
</tr>
<tr>
<td>Total</td>
<td>4,683</td>
<td>4,832</td>
<td>4,571</td>
<td>4,590</td>
<td>4,690</td>
<td>4,905</td>
<td>4,888</td>
<td>33,159</td>
</tr>
</tbody>
</table>

Percentage per year

| Year | 14.1 | 14.6 | 13.8 | 13.8 | 14.1 | 14.8 | 14.7 | 100.0 |

\[4\] We collected data on the total number of maintenance files opened at the courts at the start of the study (data collected on files opened between 2005 and 2008) and the end of the study (data collected on files opened between 2004 and 2009 and 2010). On some occasions we were given overlapping data and noted that there were differences in the total number of files recorded. However, this is a standard limitation of this type of research and may be due to a wide range of reasons such as clerical errors in counting files, files being in use at the time of counting and files being moved between courts. The data in this table is based on the final information we received from each of the courts.
The total number of files opened between 2005 and 2008 was clearly too large to sample in its entirety (18,683). Therefore we designed a sample to assess a representative proportion of the cases. **Data was collected from 1,687 files from 18 of the 31 magistrates’ courts that were in place at the time.** This represents over half (58%) of all magistrates’ courts in the country, from 12 of Namibia’s 13 regions.5

The sample was designed to reflect a representative proportion of cases opened in different parts of the country and to be a reasonable sample in terms of financial and human resource capacity limitations. The selection of courts was based on (1) ensuring that we included the nine courts sampled for the 1995 maintenance study6 and (2) including a sample of large and small courts in a diverse range of communities.

The number of files sampled per court was determined by a sliding scale as shown in Table 10. The purpose of this approach was to ensure that information from the larger courts would not be so dominant that the situation in smaller courts was obscured.

<table>
<thead>
<tr>
<th>Region</th>
<th>Location</th>
</tr>
</thead>
<tbody>
<tr>
<td>Karas</td>
<td>Bethanie, Karasburg, Keetmanshoop</td>
</tr>
<tr>
<td>Hardap</td>
<td>Mariental, Rehoboth</td>
</tr>
<tr>
<td>Khomas</td>
<td>Katutura</td>
</tr>
<tr>
<td>Erongo</td>
<td>Swakopmund, Walvis Bay</td>
</tr>
<tr>
<td>Omaheke</td>
<td>Gobabis</td>
</tr>
<tr>
<td>Otjozondjupa</td>
<td>Okakarara, Otjiwarongo</td>
</tr>
<tr>
<td>Oshikoto</td>
<td>Tsumeb</td>
</tr>
<tr>
<td>Oshana</td>
<td>Ondangwa, Oshakati</td>
</tr>
<tr>
<td>Ohangwena</td>
<td>Eenhana</td>
</tr>
<tr>
<td>Kunene</td>
<td>Khorixas</td>
</tr>
<tr>
<td>Omusati</td>
<td>Outapi</td>
</tr>
<tr>
<td>Kavango</td>
<td>Rundu</td>
</tr>
</tbody>
</table>

Based on the data for the total number of maintenance files per court in our sample (Table 8), we expected to sample a total of 1,726 files. The actual number of files collected was 1,687. This change is due to clerical errors in counting files, files not accessible to the researchers because they were in use at the time of sampling, and files being moved between courts.

Data collection was started in 2008 through a preliminary sample of data from the Katutura Magistrate’s Court and the Karasburg Magistrate’s Court. Full data collection was conducted during 2009 and 2010. It took two years to collect the data as the data was collected by visiting law students and volunteers at the Legal Assistance Centre to keep the field research budget manageable. The data was analysed in 2011-12 and published in 2013.

Data from the 1995 maintenance study was collected from 618 files from nine courts. The case files studied covered initial complaints brought to the courts between 1989 and 1993.

### Summary of the sample

The final sample consisted of 1,687 maintenance order applications opened between 2005 and 2008 from 18 of the 31 magistrates’ courts. The courts which were sampled were located in 12 of Namibia’s 13 regions.

---

5 As of 2013 there are 39 magistrates’ courts in Namibia. Data was not collected from Caprivi Region.

6 The following courts were sampled in the 1995 study: Gobabis, Keetmanshoop, Mariental, Otjiwarongo, Rehoboth, Rundu, Swakopmund, Tsumeb and Windhoek. These courts were chosen to reflect data collected from north, south, east, west and central Namibia with the choice of courts in each area partly influenced by the location of the advice offices of the Legal Assistance Centre at the time.
6.3 Representivity of sample

Information was collected from a total of 1687 maintenance complaints from 18 of Namibia’s 31 magistrates’ courts, in 12 of the country’s 13 regions. This sample represents 9.0% of the files opened during the years covered by the study: 2005-08 (1687/18683).

The percentage of maintenance complaints per region included in the sample is largely similar to the total percentage of maintenance complaints per region, as illustrated by Table 12. However, there are some variances. This is because the universe was so large that we had to limit the sample to a workable size. If we had used the same interval everywhere, courts with small numbers of maintenance files would have been under-sampled even though the population in these areas is high. We were also limited by resource constraints which meant we could not visit all areas that we would ideally like to have sampled.

<table>
<thead>
<tr>
<th>Table 12: Representivity of sample by region</th>
</tr>
</thead>
<tbody>
<tr>
<td>Region</td>
</tr>
<tr>
<td>--------------------------</td>
</tr>
<tr>
<td>Caprivi</td>
</tr>
<tr>
<td>Erongo</td>
</tr>
<tr>
<td>Hardap</td>
</tr>
<tr>
<td>Karas</td>
</tr>
<tr>
<td>Kavango</td>
</tr>
<tr>
<td>Khomas</td>
</tr>
<tr>
<td>Kunene</td>
</tr>
<tr>
<td>Ohangwena</td>
</tr>
<tr>
<td>Omaheke</td>
</tr>
<tr>
<td>Omusati</td>
</tr>
<tr>
<td>Oshana</td>
</tr>
<tr>
<td>Oshikoto</td>
</tr>
<tr>
<td>Otjozondjupa</td>
</tr>
<tr>
<td>Namibia</td>
</tr>
</tbody>
</table>

The percentage of maintenance complaints per year included in the sample is largely similar to the total percentage of maintenance complaints per year, as Table 13 illustrates.

It is also relevant to assess the proportional representation of files from specific courts, as during the analysis we identified some practices that occurred more than would be expected at some courts. Reference to such findings are made later in the text.

<table>
<thead>
<tr>
<th>Table 13: Representivity by year</th>
</tr>
</thead>
<tbody>
<tr>
<td>Year</td>
</tr>
<tr>
<td>---------------------------</td>
</tr>
<tr>
<td>2005</td>
</tr>
<tr>
<td>2006</td>
</tr>
<tr>
<td>2007</td>
</tr>
<tr>
<td>2008</td>
</tr>
<tr>
<td>Total</td>
</tr>
</tbody>
</table>

Summary of the representivity of the sample

Overall, the correspondence between the distribution of our sample and the distribution of the total universe of maintenance complaints ensures that our findings present an accurate picture of the overall situation.
Table 14: Sampling by court

<table>
<thead>
<tr>
<th>Court</th>
<th>Number of files sampled</th>
<th>Total number of files in universe</th>
<th>Proportion of total universe</th>
<th>Proportion of sample</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bethanie</td>
<td>15</td>
<td>83</td>
<td>0.9</td>
<td>0.6</td>
</tr>
<tr>
<td>Eenhana</td>
<td>17</td>
<td>132</td>
<td>1.0</td>
<td>1.0</td>
</tr>
<tr>
<td>Gobabis</td>
<td>46</td>
<td>587</td>
<td>3.9</td>
<td>2.7</td>
</tr>
<tr>
<td>Karasburg</td>
<td>34</td>
<td>547</td>
<td>3.7</td>
<td>2.0</td>
</tr>
<tr>
<td>Keetmanshoop</td>
<td>66</td>
<td>849</td>
<td>5.7</td>
<td>3.9</td>
</tr>
<tr>
<td>Mariental</td>
<td>93</td>
<td>562</td>
<td>3.8</td>
<td>5.5</td>
</tr>
<tr>
<td>Okakarara</td>
<td>101</td>
<td>88</td>
<td>0.6</td>
<td>6.0</td>
</tr>
<tr>
<td>Ondangwa</td>
<td>73</td>
<td>679</td>
<td>4.6</td>
<td>4.3</td>
</tr>
<tr>
<td>Oshakati</td>
<td>97</td>
<td>1034</td>
<td>6.9</td>
<td>5.7</td>
</tr>
<tr>
<td>Otavi</td>
<td>109</td>
<td>193</td>
<td>1.3</td>
<td>6.5</td>
</tr>
<tr>
<td>Outapi</td>
<td>93</td>
<td>473</td>
<td>3.2</td>
<td>5.5</td>
</tr>
<tr>
<td>Otjiwarongo</td>
<td>108</td>
<td>793</td>
<td>5.3</td>
<td>6.4</td>
</tr>
<tr>
<td>Rehoboth</td>
<td>111</td>
<td>872</td>
<td>5.9</td>
<td>6.6</td>
</tr>
<tr>
<td>Rundu</td>
<td>111</td>
<td>1279</td>
<td>8.6</td>
<td>6.6</td>
</tr>
<tr>
<td>Swakopmund</td>
<td>121</td>
<td>1027</td>
<td>6.9</td>
<td>7.2</td>
</tr>
<tr>
<td>Tsumeb</td>
<td>136</td>
<td>376</td>
<td>2.5</td>
<td>8.1</td>
</tr>
<tr>
<td>Walvis</td>
<td>121</td>
<td>847</td>
<td>5.7</td>
<td>7.2</td>
</tr>
<tr>
<td>Windhoek</td>
<td>235</td>
<td>4471</td>
<td>30.0</td>
<td>13.9</td>
</tr>
<tr>
<td>Total</td>
<td>1687</td>
<td>14892</td>
<td>100.0</td>
<td>100.0</td>
</tr>
</tbody>
</table>

6.4 Key informant interviews and focus group discussions

The data from the court files was supplemented by key informant interviews and focus group discussions conducted during the same time period. The key informants were clerks of the court, maintenance officers and magistrates. Focus group participants were community members from the towns served by some courts in the sample. Focus groups were organised according to feasibility – choice of location was based on the availability of participants and the time available to the researchers to conduct a discussion alongside collecting the data from the courts.

Table 15: Details of key informant interviews and focus group discussions

<table>
<thead>
<tr>
<th>Category of informant</th>
<th>Number</th>
<th>Locations</th>
<th>Regions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Key informant interviews</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Magistrates</td>
<td>10</td>
<td>8 locations: Gobabis, Karasburg, Mariental x 3, Ondangwa, Otjiwarongo, Outapi, Rundu, Walvis Bay</td>
<td>8 regions: Omaheke, Karas, Hardap, Oshana, Otjozondjupa, Omusati, Kavango, Erongo</td>
</tr>
<tr>
<td>Maintenance officers (all were prosecutors with additional responsibilities)</td>
<td>10</td>
<td>9 locations: Eenhana, Gobabis, Keetmanshoop, Mariental, Ondangwa, Oshakati x 2, Rehoboth, Rundu</td>
<td>6 regions: Ohangwena, Omaheke, Karas, Hardap x 2, Oshana x 2, Kavango</td>
</tr>
<tr>
<td>Clerks of court</td>
<td>14</td>
<td>12 locations: Bethanie, Eenhana, Gobabis, Karasburg, Keetmanshoop, Khorixas, Mariental x 2, Okakarara x 2, Ondangwa, Oshakati, Rehoboth, Rundu</td>
<td>8 regions: Karas x 3, Ohangwena, Omaheke, Kunene, Hardap x 2, Otjozondjupa, Oshana x 2, Kavango</td>
</tr>
<tr>
<td>Total</td>
<td>34</td>
<td>15 locations</td>
<td>11 regions*</td>
</tr>
<tr>
<td>Focus group discussions</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Community members</td>
<td>6 groups: 32 women, 30 men</td>
<td>3 locations: Karasburg (11 women, 13 men), Keetmanshoop (10 women, 8 men), Ondangwa (11 women, 9 men)</td>
<td>2 regions: Karas, Oshana</td>
</tr>
<tr>
<td>Total</td>
<td>62</td>
<td>3 locations</td>
<td>2 regions</td>
</tr>
</tbody>
</table>

* Interviews were conducted in every region other than Oshikoto and Caprivi.
Interviews were also conducted in the 1995 maintenance study; interviews with maintenance court personnel were conducted in 10 regions (interviews were not conducted in Oshikoto, Ohangwena and Omusati Regions) and group discussions with community members were conducted in three regions (Karas, Omusati and Oshana).  

Summary of information collected through key informant interviews and focus group discussions

- 34 key informant interviews with magistrates, maintenance officers and clerks from 11 regions (no interviews conducted in Oshikoto and Caprivi Regions)
- 6 focus group discussions with a total of 62 people from two regions (Karas and Oshana Regions)

6.4.1 Interviews with key informants

Semi-structured questionnaires were prepared for interviews with magistrates, maintenance officers and clerks of court. The key informants were asked a series of questions about their role in the operation of the Act. The interview guides are included in the Appendix. The researchers exercised flexibility to allow for personalised interviews according to the key informant’s areas of knowledge and experience.

6.4.2 Format of the focus groups

Focus group discussions were conducted with community members with the aim of offering a safe and collaborative environment for people to provide opinions. The focus groups were assembled with the assistance of local organisations and community leaders. We invited people involved in maintenance cases but were happy to include people who knew about maintenance problems but were not themselves involved in a case. Both men and women were invited to attend the focus group discussions, in separate sessions. This was because the Legal Assistance Centre is aware that there are pressures between the sexes about claiming maintenance – some men may feel defensive about their duty to pay maintenance and some women may feel vulnerable about discussing problems with claiming maintenance in front of men. Therefore, to avoid possible situations where participants were not comfortable to speak about gender-related issues, we organised single-sex focus group discussions.

“He has offered to pay maintenance if she sleeps with him.”

Text message to the Legal Assistance Centre, 27 February 2013

Each focus group discussion was designed to last for approximately half a day and included a variety of activities, namely brainstorming, open-ended discussions, role plays and listing of problems and solutions. The structure of the discussions was the same for the male and female groups. A detailed focus group discussion plan is included in the Appendix. In some cases, time constraints meant that only some of the activities were completed.

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7 Interviews with maintenance court personnel were conducted in Gobabis, Katima Mulilo, Keetmanshoop, Mariental, Oshakati, Ombalantu, Ondangwa, Otjiwarongo, Rehoboth, Rundu, Swakopmund, Tsumeb and Windhoek. Interviews with community members were conducted in Keetmanshoop, Swakopmund, Tsumeb and Windhoek. Information was also collected in group discussions and public meetings in Keetmanshoop, Onamula, Oniimwandi, Oshikuku, Mariental, Windhoek and Uukwangula. However, these meetings were primarily educational forums in which information-gathering played a secondary role. Information was also recorded from a meeting organised by the LAC in Windhoek between women who were experiencing problems with the maintenance court and officials from the Ministry of Justice and the Namibian Police. (D Hubbard, Maintenance: A Study of the Operation of Namibia’s Maintenance Courts, Windhoek: Legal Assistance Centre, 1995 at 54-55)
6.5 Terminology and statistics

The term ‘beneficiary’ refers to the person who benefits from a maintenance order. This will usually be a child, but it could also be a destitute or disabled adult, a parent or a spouse. The beneficiary is sometimes called a ‘dependant’. The term ‘complainant’ refers to the person who applies for a maintenance order. The person could be applying on behalf of a beneficiary (such as a child), for themselves, or for themselves and another beneficiary together. The complainant will usually be a parent, often the mother, applying for maintenance for her child. Any relative or person who is caring for a child can request maintenance from one or both of the child’s parents. The complainant could also be anyone who has an interest in the wellbeing of the beneficiary, such as a social worker, health care provider, teacher, traditional leader or employer. The term ‘defendant’ refers to the person being requested to pay maintenance.

<table>
<thead>
<tr>
<th>BENEFICIARY</th>
<th>COMPLAINANT</th>
<th>DEFENDANT</th>
</tr>
</thead>
<tbody>
<tr>
<td>Person who benefits from a</td>
<td>Person who applies for a</td>
<td>Person requested to pay</td>
</tr>
<tr>
<td>maintenance order</td>
<td>maintenance order</td>
<td>maintenance</td>
</tr>
</tbody>
</table>

The ‘mean’ is what is commonly referred to as the average. It is calculated by taking all the values, adding them up and dividing by the total number of cases. The weakness of this measure is that one very high or low number can skew the mean in one direction or another. The ‘median’ is the middle value. It is calculated by listing all the values in order from lowest to highest value, and picking out the value in the middle of the list. The median is a particularly useful measure when there are some very high or low values which may have distorted the average. The ‘mode’ is the value on the list which is repeated most frequently. This can be a particularly useful measure for showing the most typical statistic. Looking at all these measures together helps to give a clear profile of case characteristics.

<table>
<thead>
<tr>
<th>MEAN</th>
<th>MEDIAN</th>
<th>MODE</th>
</tr>
</thead>
<tbody>
<tr>
<td>The average value</td>
<td>The value in the middle of the list</td>
<td>The value which occurs most frequently</td>
</tr>
</tbody>
</table>

Most of the statistical information presented in this study was drawn from information recorded on the official forms contained in the court files, supplemented by information from notations on or in the files. We have also included information from interviews and discussions which provides insights into how to interpret the statistics and how to address the issues they raise.

As per standard convention, statistics cited in this study have been rounded to one decimal point. Decimal places of less than 0.5 are rounded down and decimal places of 0.5 or greater are rounded up.

6.6 Confidentiality

All researchers who extracted information from court files were required to sign an oath of confidentiality. During data analysis, case files were identified by number. No names of any parties are included in this report except where they appear in press accounts. We have taken care throughout our research not to compromise the confidentiality of any party to a maintenance order application or any client of the Legal Assistance Centre.

43. (1) A person must not disclose to another person any information acquired by that person in the performance of that person’s functions under this Act, unless the disclosure is made for the purpose of performing functions under this Act or is authorised by a court of law or by any law.

Maintenance Act 9 of 2003
One of the posters produced for the Child Maintenance Campaign coordinated by the Legal Assistance Centre in 1998-1999.
7.1 Total maintenance complaints in Namibia

As discussed in section 6.2, we collected data on the total number of maintenance complaints nationwide between 2004 and 2010.

Change in the number of complaints over time

Analysis of the number of files opened in all courts shows that there is little change in the number of files opened each year. Overall there is a difference of approximately 1% between the number of files opened each year, and the change does not indicate a gradual increase in case numbers over time. This contrasts with findings from the Legal Assistance Centre report on the operation of the Combating of Domestic Violence Act, *Seeking Safety*, which found that more and more applications for protection orders were opened each year.\(^1\) The reason for this is probably that, while the Maintenance Act and the Combating of Domestic Violence Act both came into force in 2003, there was a previous law on maintenance that was being utilised by the public to claim maintenance, whereas prior to the Combating of Domestic Violence Act there was no law aimed specifically at domestic violence.\(^2\) Therefore the new Maintenance Act did not have a dramatic effect on the number of people opening cases, whereas the enactment of the Combating of Domestic Violence Act did influence the number of people seeking assistance in cases of domestic violence.

Differences in the number of files opened by region

When analysed by region, there is a large difference between the percentage of the population living in some regions and the percentage of maintenance complaints. The number of maintenance complaints can be expressed as a percentage of the regional population. The results show a range

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\(^1\) The number of applications increased dramatically over the course of the study, more than trebling nationwide between 2004 and 2006, from 211 applications in 2004 to 747 in 2006. (Legal Assistance Centre (LAC), * Seeking Safety: Domestic Violence in Namibia and the Combating of the Domestic Violence Act 4 of 2003*, Windhoek: LAC, 2012 at 250)

\(^2\) Prior to the Combating of Domestic Violence Act of 2003, a person experiencing domestic violence would have had the option to lay a criminal charge, obtain an interdict from the High Court, obtain a peace order, get a divorce or start a civil action. (Legal Assistance Centre (LAC), * Seeking Safety: Domestic Violence in Namibia and the Combating of the Domestic Violence Act 4 of 2003*, Windhoek: LAC, 2012 at 14)
from 4.4% in Karas (and similar percentages in neighbouring regions Hardap (3.1%) and Erongo (3.0%)) to 0.1% in Ohangwena (again with similar percentages in neighbouring regions Omusati (0.3%) and Oshikoto (0.4)).

There are a number of reasons for this pattern. Consideration must be given to the size and population density of the region. Karas, which has the highest proportion of maintenance complaints by population, has the lowest population density. In contrast, Ohangwena, which is the second most populous region, is a relatively small region with a high population density but a low percentage of maintenance complaints. Similar findings are seen for Omusati and Oshikoto. This suggests that cultural factors in northern Namibia may deter people from claiming maintenance.

The accessibility of courts appears to be another important determining factor. The 2009/2010 Namibia Household Income and Expenditure Survey assesses distance from magistrates' courts. Tables 16 and 17 reproduce this data and show the regional differences. The table shows that people in Ohangwena, Omusati and Oshikoto Regions live further from the courts than the national average. This is likely to be a contributing factor to explain why there are fewer maintenance complaints than would be expected for these regions. In contrast, there are higher proportions of maintenance complaints in Karas, Hardap, Erongo and Khomas, where a majority (or at least almost half) of the population lives within 10 km of a magistrate’s court.4 A link between accessibility and utilisation of the court is to be expected as people who claim maintenance do so because they need financial support – if they do not have the resources to access the courts, they may not be able to make a complaint. The problem of unequal distribution of courts as a general barrier to accessing justice has been noted previously.5

### Table 16: Maintenance complaints by region, 2004-10

<table>
<thead>
<tr>
<th>Region</th>
<th>Number of courts in region</th>
<th>Area in square kilometres*</th>
<th>Population density*</th>
<th>Population in region (all ages)*</th>
<th>Number of maintenance complaints 2004-10</th>
<th>Percentage of all maintenance complaints 2004-10</th>
<th>Number of maintenance complaints expressed as a percentage of the regional population</th>
</tr>
</thead>
<tbody>
<tr>
<td>Karas</td>
<td>6</td>
<td>161 514</td>
<td>0.5</td>
<td>76 000</td>
<td>3 371</td>
<td>10.2</td>
<td>4.4</td>
</tr>
<tr>
<td>Hardap</td>
<td>3</td>
<td>109 781</td>
<td>0.7</td>
<td>79 000</td>
<td>2 456</td>
<td>7.5</td>
<td>3.1</td>
</tr>
<tr>
<td>Erongo</td>
<td>6</td>
<td>63 539</td>
<td>2.4</td>
<td>150 400</td>
<td>4 522</td>
<td>13.8</td>
<td>3.0</td>
</tr>
<tr>
<td>Khomas</td>
<td>1</td>
<td>36 964</td>
<td>9.2</td>
<td>340 900</td>
<td>8 579</td>
<td>26.1</td>
<td>2.5</td>
</tr>
<tr>
<td>Otjozondjupa</td>
<td>5</td>
<td>73 600</td>
<td>1.4</td>
<td>142 400</td>
<td>3 325</td>
<td>10.1</td>
<td>2.3</td>
</tr>
<tr>
<td>Caprivi</td>
<td>1</td>
<td>14 785</td>
<td>6.1</td>
<td>90 100</td>
<td>1 948</td>
<td>5.9</td>
<td>2.2</td>
</tr>
<tr>
<td>Oshana</td>
<td>2</td>
<td>79 800</td>
<td>20.3</td>
<td>174 900</td>
<td>2 952</td>
<td>9.0</td>
<td>1.7</td>
</tr>
<tr>
<td>Omaheke</td>
<td>1</td>
<td>84 981</td>
<td>0.8</td>
<td>70 800</td>
<td>1 024</td>
<td>3.1</td>
<td>1.4</td>
</tr>
<tr>
<td>Kavango</td>
<td>1</td>
<td>48 742</td>
<td>8.6</td>
<td>222 500</td>
<td>2 548</td>
<td>7.7</td>
<td>1.1</td>
</tr>
<tr>
<td>Kunene</td>
<td>2</td>
<td>115 260</td>
<td>0.8</td>
<td>88 300</td>
<td>639</td>
<td>1.9</td>
<td>0.7</td>
</tr>
<tr>
<td>Oshikoto</td>
<td>1</td>
<td>87 000</td>
<td>4.7</td>
<td>181 600</td>
<td>689</td>
<td>2.1</td>
<td>0.4</td>
</tr>
<tr>
<td>Omusati</td>
<td>1</td>
<td>26 551</td>
<td>9.1</td>
<td>242 900</td>
<td>828</td>
<td>2.5</td>
<td>0.3</td>
</tr>
<tr>
<td>Ohangwena</td>
<td>1</td>
<td>10 706</td>
<td>22.9</td>
<td>245 100</td>
<td>278</td>
<td>0.8</td>
<td>0.1</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>31</strong></td>
<td><strong>825 615</strong></td>
<td><strong>2.5</strong></td>
<td><strong>2 104 900</strong></td>
<td><strong>33 159</strong></td>
<td><strong>100.0</strong></td>
<td><strong>NA</strong></td>
</tr>
</tbody>
</table>


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4 Oshana, Kavango, Kunene and Otjozondjupa Regions are exceptions to this pattern; the percentage of their populations living within 10 km of a magistrate’s court is comparable to or higher than that of Karas, but these regions have a much smaller proportion of maintenance complaints relative to their populations than Karas. Accessibility to courts is likely to be a factor which interacts with other factors.

Table 17: Percentage of households by distance to magistrate’s court (reproduced data)

<table>
<thead>
<tr>
<th>Region</th>
<th>Distance to magistrate’s court in kilometres</th>
<th>Percentage of population living within 10 km of magistrate’s court</th>
<th>Total number of households</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>0-1</td>
<td>2-5</td>
<td>6-10</td>
</tr>
<tr>
<td>Caprivi</td>
<td>5.1</td>
<td>21.9</td>
<td>9.9</td>
</tr>
<tr>
<td>Erongo</td>
<td>16.9</td>
<td>65.5</td>
<td>6.1</td>
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<tr>
<td>Hardap</td>
<td>14.5</td>
<td>40.7</td>
<td>4.8</td>
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<td>Karas</td>
<td>15.3</td>
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<td>Kavango</td>
<td>7.1</td>
<td>22.1</td>
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<td>Khomas</td>
<td>13.6</td>
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<td>29.6</td>
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<tr>
<td>Kunene</td>
<td>17.7</td>
<td>19.6</td>
<td>3.9</td>
</tr>
<tr>
<td>Ohangwena</td>
<td>7.1</td>
<td>7.2</td>
<td>12.4</td>
</tr>
<tr>
<td>Omaheke</td>
<td>7.1</td>
<td>28.0</td>
<td>2.0</td>
</tr>
<tr>
<td>Omusati</td>
<td>3.7</td>
<td>7.8</td>
<td>8.9</td>
</tr>
<tr>
<td>Oshana</td>
<td>14.4</td>
<td>29.6</td>
<td>20.2</td>
</tr>
<tr>
<td>Oshikoto</td>
<td>4.2</td>
<td>11.0</td>
<td>2.2</td>
</tr>
<tr>
<td>Otjozondjupa</td>
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<td>3.8</td>
</tr>
<tr>
<td>Namibia</td>
<td>10.6</td>
<td>29.5</td>
<td>12.5</td>
</tr>
</tbody>
</table>


7.2 The concept of maintenance payment

The Maintenance Act states that both parents of a child are primarily and jointly responsible and liable to maintain their child.6 The primary purpose of the Maintenance Act is to provide assistance for situations when both parents do not voluntarily provide for their children.

The Act is clearly needed as assessment of the number of maintenance complaints opened per year (approximately 4,7377) illustrates how common it is for people to approach the courts for assistance to access support for their children. Indeed, analysed another way, the figures suggest that on average someone makes a maintenance complaint every thirty minutes in Namibia.8 In contrast, between 2006 and 2008 (the most recent years for which data was collected by the Legal Assistance Centre), there was an average of over 900 protection order applications per year nationwide. The number of maintenance order complaints is five times higher than the number of protection order applications.9

Public opinion about the need for and role of maintenance is mixed. The focus group discussions and individual conversations with community members held for this study provide a good illustration of how some people in Namibia perceive maintenance. We often found that while both men and women agreed that children need support, male participants often became increasingly defensive about their personal obligations to provide maintenance. A female participant summarised how some men feel: “Many men say to women, ‘Go to court, I don’t care,’ but when you actually go to court, the man is so angry, he wants to strangle you.”

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6 Maintenance Act 9 of 2003, section 3.
7 Total number of maintenance complaints opened between 2004 and 2010 (7 years) = 33,159.
8 There are 52 weeks in the year and 5 working days per week = 260 days. Each working day is 8 hours = 2,080 working hours in a year. 4,737/2,080 = 1.7 per hour or 1 every 30 minutes.
The male participants also often discussed the problem of misuse of maintenance money. However, as discussed under section 14.2, we identified only a very small number of situations where misuse of maintenance money was noted in the files. This suggests that the misuse of maintenance money is not as big a problem as it is perceived to be.

In contrast, the female participants were very clear about the fact that both parents have a duty to provide maintenance and that there is no stigma or shame in submitting a maintenance complaint to the court. However, some women said that if they could provide support for their children without having to ask for maintenance, they would. The reasons they gave included the numerous difficulties to get the money, the constant delayed payments and the fact that the father will often make it seem as though the mother is asking for money for herself, even when the amount of maintenance paid is not a realistic reflection of the costs incurred in the care of the child.

One maintenance officer, who is not a Namibian citizen, said that there is a “cultural thing about maintenance” which he had not seen in his own country. He described Namibian society as “maternalistic”, saying that the child is thought to belong to the mother with the father leaving all the responsibility to the mother because, to the men, “being a father is not a real responsibility”. Indeed, one maintenance officer who had received training on the Maintenance Act stated that “it taught us how to be sensitive to the need for maintenance, since maintenance has not been a part of our traditional culture”. Another maintenance officer described the process of applying for maintenance as “the complainant says how much she wants, and he [the defendant] has to prove why he can’t pay it”. A maintenance officer from another court described a related attitude: “defendants often believe that they grew up not eating well, so they don’t believe that they need to pay for their children to eat well.” For example, in one file the defendant tried to explain why it was difficult to pay maintenance: “Yesterday I bought fish, but they finish food fast.” This complaint was brought by a young man for his six teenage siblings.

Even though the provisions in the Maintenance Act are intended to help alleviate conflict and put the needs of the child first, some court officials reported that maintenance investigations can still result in strife between the parents. One maintenance officer explained that “court orders create a hostile relationship between the mother and father and between the father and the child”. Another clerk said that “sometimes women come in clearly looking for revenge; this is mostly when a man has had a few girlfriends and has chosen to marry one rather than the other, then the scorned women will come and ask even if she has enough money”. Due to the gender-based conflict that can be involved, one female maintenance officer said that she asks a male maintenance officer to assist with defendants or asks the magistrate to assist as “the defendants complain that it is all women ganging up on them and that the maintenance officers have already decided before the defendants even come in that they are in the wrong”. She explained that asking the male magistrate to discuss the
law “calms them down”. In the focus group discussion in Karasburg, the participants also described problems of conflict between parents. The female participants described men as “negligent” at making payments or “devious” in the way that they manage to refuse to pay adequate maintenance. Conversely, the male participants felt that women receive an unfair sum for maintenance that is usually not spent on the children.

“Education is needed so people know that maintenance is not punishment, but a responsibility.”

Maintenance officer

CASE STUDY

We received the following query by fax from a client. The story has been edited for grammar and to protect the confidentiality of the client.

The mother needed N$150 per child [for 4 children] which I couldn’t afford. We agreed upon N$100 per child. Time after time she came in for increments but couldn’t succeed. Ironically the instruction which made me pay this amount cannot be found on my file. One of the kids was enrolled in another school without informing me. I even don’t see their school reports. Two of the older children finished school of which one was working for more than two years. I made a sworn declaration at the Namibian Police and handed it in with certified copies of the birth certificates but it got lost at the Maintenance Office. I suppose the mother should pay back the monies I overpaid, but instead I was in arrears with N$1 1 000 according to them. I made a sworn declaration at the Namibian Police and handed it in with certified copies of the birth certificates but it got lost at the Maintenance Office. I suppose the mother should pay back the monies I overpaid, but instead I was in arrears with N$1 1 000 according to them. I brought all my receipts from the date I started paying maintenance from. They couldn’t convince me on this amount in arrears after calculations for more than an hour. The amount to pay was increased to N$300. It happens when the defendant is against three women (the mother, the maintenance officer and the prosecutor).

Again this same strange thing happened when I came to the court for a reduction. This time the magistrate (also a woman), instructed me to go ahead with the payment of N$500. I was never given the time to state that I can’t afford this amount. I am also the father of two [other] school-going kids. Again three women against one man.

In this story, the client experienced a number of problems including poor communication from the mother of his children and poor file management by the clerk of the court. This appears to have led to the defendant feeling resentful against women. We recommended that he make a complaint to the court and also discuss his needs in more detail. The case is an example of the importance of open communication to help ensure that parties to the case understand why they must contribute. The court must also ensure that the defendant is really able to pay the amount in the order, and is aware of the possibility of substitution or discharge of the order should circumstances change.

While some people in Namibia resent or do not understand the principles behind maintenance, there are also many positive stories of parents supporting their children. For example, the maintenance officer at the Ondangwa court said that they sometimes have cases where fathers will come to court on their own accord and make a pre-emptive offer to pay maintenance.

“Maintenance money is just the basics – a place to stay, education – it’s not so much.”

“It is not about breaking up with your girlfriend; this responsibility is with the child.”

“It’s to keep the child going. It’s for food and education. It’s your duty to take care of your child regardless of whether you are with the lady.”

Participants in the male focus group discussion in Keetmanshoop
This editorial, published in *The Namibian* newspaper, illustrates the need for better community understanding about the provision of maintenance.

**Raising Children, Building A Country**

**WHAT happened to the practice and the philosophical approach that the entire village, location, or township would raise a child?**

Last week Friday, the police found an ‘abandoned child’ at a shebeen in Katutura. Unable to trace the parents, the police took the three-month-old baby with them.

Only on Monday morning, after the media had reported the matter in headline news, were both mother and father reminded, seemingly, to claim back their child.

The baby boy’s mother said she gave the child to the father’s friend in order to demand maintenance for the infant.

But that incident is a microcosm of the decay in the country and further indicative of the breakdown in our communities.

It left just way too many questions unanswered even as the police reported that the boy and his parents were reunited after a weekend apart. It was by choice, the choice of his own parents. What a scandal for them but even more so for society.

At the rate we are going, Namibia’s moral fabric is tearing apart very fast and the country’s citizens do not appear concerned enough to address the issue about what values we will bequeath to the young and future generations.

People with lots of money look only after themselves and their nuclear families most of the time. Many are complacent in the belief that they pay taxes and are thus only too happy to pass the buck onto elected officials/politicians and government employees.

The not-so-well-to-do are also just too comfortable leaving their loved ones, especially the vulnerable members, in the care of the government – the ever-increasing social welfare grants (about N$3 billion in the current budget for orphans and vulnerable children, pensioners and the ‘war veterans’) is a testimony to that.

While it is correct to expect the government to use taxpayers’ money frugally, Namibians seem to have signed over their personal responsibilities to the State.

How often does one hear people calling the radio shows and imploring that *epangelo nali talepo nawa opo* (the government must look into it)? Societies, which at independence received zero assistance from the government, have come to rely heavily and almost exclusively on the State.

The government has also made it too easy to dish out largesse, thus encouraging a culture of entitlement and handouts, when we all know that this is counter-productive. Many people in rural areas no longer till the land as their parents did just 20 years ago in order to subsist from their farming because they receive *oshikukuta* (drought aid). Neighbours and extended families don’t bother anymore to take in children of their struggling kith and kin or simply check in as to how the others are coping.

In fact, parenting has become a selfish individualistic exercise where adults are only concerned with the wellbeing of their biological children, nieces and nephews and grandchildren. Parents actually get upset when others make any move to show some disciplinary path for their children.

The result is a breakdown of the African family and the cohesion of good ethics and hard work in many communities across the Land of the Brave.

It leaves one to wonder whether the ‘grown-ups’ ever ponder about where the country is headed and what to do about the issues.

Is Namibia ever going to regain those moral values that underpinned the humaneness habitually associated with Africa, and which the Bantu or Nguni people encapsulate in *Ubuntu, uuntu womuntu*?

It is about time that individuals stop expecting too much from the government and start organising themselves into practical structures to take the country to where we all know it should be.

We can’t do that by abandoning our parental responsibilities (read that as citizens) and adopting foreign concepts of caring only about one’s personal wellbeing.

The sooner we realise that no one else can get us to our destination but ourselves the more easily we can face the obstacles.

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**The mother of my firstborn child wants me to pay maintenance. But the mother of my other two children already have maintenance orders against me. I can’t afford this!**

**You should have thought of that before you had so many children! You will have to share your resources with ALL your children. They are your responsibility!**
7.3 Incomplete information

Many of the files sampled for this study contained very little information, much of which was incomplete. This made the analysis extremely difficult as the sample size for specific pieces of information was sometimes too small to be statistically relevant, and in many cases we were unable to determine the outcome of enquiries. As one researcher wrote in her feedback notes:

*The files were generally quite thin, frequently containing only a Form A, a Form C1, and a return of service. Often there was no indication as to what ultimately happened in the case; for example, there would be a complaint that the defendant was in arrears on the initial C1, but no documents indicating how the court had followed up.*

The regulations of the Maintenance Act prescribe the forms on which a maintenance complaint must be made, but do not detail any explicit procedures for opening case files or keeping records. At one court, the maintenance officer/clerk would only open a file when a maintenance order is made, although all applications are listed on the register. At another court, the clerk would only open a maintenance file when the defendant had been summoned. The maintenance officer at another court said that she will sometimes not complete a maintenance application if the defendant is unemployed and does not have any money – but explained that “this is very rare and only in hopeless cases”.

It is a matter of concern that the courts are not operating in line with the provisions in the Act. The Act states that a maintenance officer *must* investigate an application for maintenance. It is important for the course of justice, transparency and accountability that the maintenance complaints are recorded and investigated even if they do not result in a maintenance order. Furthermore, unemployment is not in itself decisive as the Maintenance Act allows for payments to be made in kind, or for property to be attached or sold. The reality of life in Namibia is that some defendants may be unable to pay maintenance, and due to the burden of work on court staff, some officials may feel that completing the extensive amount of information required on the application form is not necessary. However, it is a miscarriage of justice for a maintenance officer to fail to investigate a maintenance complaint, and this leaves courts open to accusations of partiality towards defendants or nepotism towards friends, even if this is not the case.

Furthermore, in light of the variability of practice across courts, we recommend that the Ministry of Justice consider the development of guidelines or a revision of the regulations to clarify the procedure for opening, investigating and maintaining maintenance files. Supervisory personnel should also be tasked to spot-check files to ensure that the guidelines are adhered to. For example, as suggested in the 1995 maintenance report, the rules issued under the Act should be expanded to set forth standardised procedures for administrative matters, such as summoning respondents to court, guidelines for consent negotiations, steps which can be taken when the respondent alleges misuse of maintenance money, procedures for getting in touch with complainants who have not come to court to collect their payments, and filing systems.

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10 Field notes of Christina Beninger, 2010. All of the researchers were asked to prepare field notes on their personal observations. Form A is the application form to make a maintenance complaint and Form C1 is a summons.


12 In cases where a maintenance order is not already in place, a maintenance officer *must* “investigate the complaint and institute a maintenance enquiry”. The law sets out a number of steps that must be followed during the enquiry. For example, under the direction and control of the maintenance officer, the maintenance investigator *must* take statements under oath or affirmation from persons who may be able to give relevant information concerning the subject of any complaint relating to maintenance. The maintenance officer *must* also gather information concerning the identification or whereabouts of any person who is legally liable to maintain the person mentioned in such complaint, or who is allegedly so liable, and information about the financial position of such person and any other relevant information (Maintenance Act 9 of 2003, sections 9(4a) and 10(2d and e)). A maintenance officer *must* also investigate complaints pertaining to existing orders (section 9(4b)).

13 Maintenance Act 9 of 2003, sections 17(4) and 29.

7.4 Birth certificates

The regulations of the Maintenance Act state that for a new complaint, the complainant must “lodge the complaint on a form corresponding substantially to Form A of the Annexure”.\(^{15}\) However, it appears that a number of courts also require the complainant to submit copies of the birth certificates of the proposed beneficiaries. At one court our researchers saw a sign stating that birth certificates must be provided. The court officials’ justification for this practice was that it helps them to ensure that the children really exist.

However, although all children in Namibia should have a birth certificate, the reality is that many do not.\(^{16}\) The courts should not make it a mandatory requirement for the complainant to provide a copy of the birth certificate to open a case as this may be a barrier that prevents some people from accessing maintenance. The courts should instead process maintenance complaints whilst waiting for the complainant to provide a birth certificate. One concern cited by the courts is that people may give false information about their children. However, the Act already includes a penalty of up to N$4000 or 12 months imprisonment for providing false information for a maintenance complaint.\(^{17}\)

Furthermore, the Act states that the maintenance officer may request any person to give information or produce any book, document, statement or other relevant information for the investigation.\(^{18}\) This provision allows the maintenance officer to request the complainant to provide copies of the birth certificate(s) or other documentation if there is cause for suspicion.

As a practical step towards addressing this problem, we recommend that the Ministry of Justice and Ministry of Home Affairs and Immigration develop a closer working relationship. For example, clerks of the court could be sent for training at the nearest Ministry of Home Affairs and Immigration office to help them to understand the procedure for obtaining birth certificates, so that, if someone applying for maintenance does not have this information, the clerk is able to give basic guidance, and can direct the complainant to the appropriate person at the Ministry office if there are particular problems with the case.

Finally, although it is a matter of concern that some courts require complainants to provide birth certificates, it should be noted that we also learnt that where this requirement is in place, the courts do often try to assist the complainant to get the certificates. For example, the maintenance officer at one court stated that she requires a birth certificate to open a maintenance case, and regularly gives complainants N$6 of her own money to obtain a copy of their child’s birth certificate from the Ministry of Home Affairs and Immigration.\(^{19}\) Despite this altruistic gesture, the requirement to have a birth certificate should not be tied to opening a case.

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\(^{15}\) Maintenance Regulations, regulation 2.

\(^{16}\) According to the 2006-07 Namibia Demographic and Health Survey, only 60.4% of births from 2001-06 were registered – a slight decline from 70.5% reported in the 2000 Demographic and Health Survey. However, the Government is making praiseworthy efforts to improve this situation. For example, in 2008 the total number of children registered at hospital-based facilities was 1748. This rose to 23575 in 2010. (Ministry of Health and Social Services (MoHSS), Namibia Demographic and Health Survey 2006-07, Windhoek: MoHSS, 2008 at 23-24; and Ministry of Home Affairs and Immigration (MHAI), Ministry of Home Affairs and Immigration Operational Framework for 2012-2013, Windhoek: MHAI, 2011 at 18)

\(^{17}\) Maintenance Act 9 of 2003, section 37(1).

\(^{18}\) Id, section 10(1).

\(^{19}\) It is not clear what the N$6 is for. Section 2 of the 2001 amendment of the regulations under the Births, Marriages and Deaths Registration Act 81 of 1963 (contained in Government Notice 2564 of 2001) states that it costs N$30 to obtain a copy of a birth certificate. There is no charge to register the birth of a child for the first time. It is possible that the money was given for transport between the offices.
7.5 Problems with investigations

Locating the defendant

The Maintenance Act states that one of the functions of a maintenance investigator is to locate the whereabouts of a person required to attend a maintenance enquiry.\(^\text{20}\)

The Act states that the Minister must take all reasonable steps within the available resources of the Ministry of Justice to appoint at least one maintenance investigator for each maintenance court.\(^\text{21}\) Despite this provision, ten years after the enactment of the Maintenance Act, there are no maintenance investigators in Namibia, and in most courts prosecutors function as maintenance officers as one of their many duties. This burden of work means that the maintenance officers (prosecutors) have limited time available to investigate the whereabouts of a defendant and the defendant’s financial position if the complainant is not able to provide this information.

Due to the fact there are no maintenance investigators, it appears that in a number of courts, if the complainant does not have information about the whereabouts of the defendant, the complaint will not be taken forward. As one clerk of court explained:

> “We usually try to ask them to get a phone number for the father if they don’t know where he is. We usually just take the phone number and name of the father, and before we open the file we try to find him. If we can’t find him, then we don’t open a file. If we do find him, then we ask the complainant to come back and we open the file. If we don’t know where the father is, then we don’t complete an application. We don’t fill anything out unless we have everything together.”

The maintenance officer from another court stated:

> “It is the complainant’s responsibility to find the defendant. If she cannot find him, then she cannot make a claim, but it shouldn’t be the end of the road. The complainant technically has recourse to the police, but the police in reality do not conduct such investigations.”\(^\text{22}\)

A clerk made a similar comment, stating that in order to not waste court time, she does not get complainants to fill in a maintenance complaint unless they can give a physical address for the defendant. At another court the clerk said that if the complainant does not have details about the defendant, “normally they are sent away. This is where the maintenance investigator is supposed to come in. We don’t have the power to do this – this is outside my duties.”

At another court, the clerk will only open a maintenance complaint if the defendant has not voluntarily paid maintenance for four to five months. We were told that if the defendant has failed to support the child for less than four to five months, the complainant is sent away and told to come back only after the child has not been supported for this amount of time. The court’s justification for this was that often the defendant lives some distance from the court, and rather than implement inconvenient court proceedings, the complainant and defendant should seek to resolve the matter between themselves before coming to court. The clerk stated that this helps to avoid wasting the court’s time and resources. While it is possible that some people may choose to resolve maintenance disputes outside of court, the Act does not state a time period for when someone can apply for maintenance. Forcing complainants to wait for such a long time can disadvantage the child if the parent with custody has no money for food, clothing or school expenses.

\(^{20}\) Maintenance Act 9 of 2003, section 8(2a).

\(^{21}\) Id, section 8(4).

\(^{22}\) As noted in this section, the maintenance investigator has a duty to locate the whereabouts of the defendant. It is not clear what recourse with the police the maintenance officer is envisaging – perhaps a missing persons search.
The clerks from some courts noted that they are not allowed to use the telephone in attempting to find a defendant, while at other courts the cost of issuing a summons was noted as a problem.

The Legal Assistance Centre has been aware of this problem for some time as we regularly receive complaints from clients who have not been helped by the maintenance court. The lack of maintenance investigators was discussed in Parliament in 2008 (see chapter 5). The Deputy Minister of Justice claimed that “practice has thus far not required or necessitated the appointment of fulltime maintenance investigators provided for in subsection 4 of the Act”. The reality appears to suggest otherwise.

“When the parties are unrepresented … the maintenance officer … must really enquire into all relevant aspects of the case. Ordinary laymen do not know how to conduct an enquiry of this nature. It therefore … becomes, where there is no legal representation, the duty of the maintenance officer to do the things normally done by legal representatives … .”

Pieterse v Pieterse 1965 (4) SA 344 (T)

**CASE STUDY**

We received the following email from a client. The story has been edited for grammar and to protect the confidentiality of the client.

I have a problem with the father of my son. He refuses to tell me where he is employed or where he lives. He used to show up every second month after I call him to tell him that the child needs clothes or food for school, and when he shows up he gives me N$200 or buys snacks for him.

The last time I saw him was a few days before the schools opened when I begged him to buy a pair of shoes for the child which he did, but after that he went silent.

A friend of mine spoke to a cousin of his and told her that I was going to take him to court about the child and the same night he called me from a different number and told me that his phone got lost. I explained to him why I was looking for him and that we need to talk. All he said was that he will get back to me. His phone is still off and I do not know how to get hold of him.

I called his brother and he could not give me any info as to where the brother is.

All I want is for him to assist me; the child needs clothes, he must eat, school must be paid and there must be food for him to eat at school.

I called the court three weeks back and I spoke to a lady, but did not get her name. She told me I should have an address of where he works or lives.

We suggested that the client inform the court about the provision in the Maintenance Act that allows the maintenance officer to summon any person to provide relevant information on the case. The maintenance officer could summon the brother to provide this information as provided for under section 10(1) of the Act.

"I just want to know what to do if the wife of this person don't want to give info about the father of the child or children."

Text message sent to the Legal Assistance Centre

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23 Question 3 put by Hon Dienda, National Assembly, 5 June 2008.
The fact that many courts refuse to open a case if the complainant does not provide contact details for the defendant, or otherwise put limited effort into finding the defendant, is a matter of concern. The Act states that the maintenance officer may request any person to give information or produce any book, document, statement or other relevant information for the investigation. For example, as in the case study on the previous page, if the complainant has contact with the family of the defendant but they will not tell her where the defendant is, the court can summon a family member to court to provide this information.

The clerk at another court said that they ask the defendant’s relatives for contact information, or, if the complainant knows where the defendant is but does not have contact details, the messenger will take her with him to be shown where the defendant can be contacted. If the defendant lives outside the area, the court advises the complainant to ask a friend or relative of the defendant to find him. Although these are practical solutions to the problem, it is important that the burden of finding the defendant is not placed on the complainant.

Many of the court officials recommended the involvement of the police – either as a place where complainants can make an application for maintenance (as police stations are more numerous than courthouses) or to assist with maintenance investigations. A similar proposal was made by court officials in the Legal Assistance Centre study on the operation of the Combating of Domestic Violence Act, but the police opposed this recommendation as “it would be unrealistic to expect the police to be trained to assist with this on top of their other duties – especially since the police might only receive such applications infrequently”. A similar comment regarding police involvement with maintenance cases could be made, so it seems unrealistic to recommend the transfer of duties from one over-burdened government office to another.

Although a number of courts reported problems locating defendants, some courts also reported examples of how they have found solutions to this problem. For example, the clerk of the court in Eenhana explained that she sends the names of the defendants who cannot be found to the local radio station(s). The names and court dates are broadcast and this is often very effective. Another positive story came from the Rundu court, where we were told that the prosecutor and magistrates met with the head of the region’s police force to request help from the police in locating and serving defendants.

**Investigating the defendant’s financial situation**

The Maintenance Act, through its provision for maintenance investigators, and case law both envisage that the maintenance court will investigate the maintenance complaint. However, the reality is that many court officials have limited time to investigate the cases. As one maintenance officer stated, “people liable to pay maintenance often slip through the cracks”. The maintenance officer from the Ondangwa court gave a practical example to illustrate this: “Taxi drivers are especially difficult because there is no maintenance investigator to find out exactly how much they earn. You can call up the taxi owner, who might be the defendant’s brother, and the taxi owner/brother will lie about how much is earned.” One maintenance officer said that his “number one” suggestion for improving the operation of the Act would be to have “an exclusive maintenance officer, who can work on these files 2-3 days per week instead of 2-3 days per month … I don’t have the time”. One magistrate also noted that it can be difficult to access the information required for a maintenance investigation, explaining that the maintenance officer will ask the defendant two or three times to bring in his payslip, “but even at the enquiry he still does not bring evidence of his income”. As discussed under Section 10.5, one reason for cases being postponed is that the court requires further

24 Maintenance Act 9 of 2003, section 10(1).
26 For example, it has been held (S v Bedi 1971 (4) SA 501 (N)) that it is not proper for the court to make a maintenance order in the absence of evidence about the earnings or financial position of the respondent. See also Piterse v Piterse 1965 (4) SA 344 (T) and Nodala v The Magistrate, Umtata 1992 (2) SA 696 (TK).
information. Court officials also said that some defendants will use fake or old payslips. We were told of one example where the defendant forged his payslip, but the complainant arranged for the bank statements to be provided to the court (the couple were married) and these showed that the true income of the defendant differed from his payslip. As one maintenance officer said, “it is very easy for the defendant to mislead the prosecutors who don’t have enough time to investigate thoroughly”. The 2004 study on the South African Maintenance Act also noted that it is common for both parties to lie about their financial situation, with some employers also lying in order to help their employees.27

Overall it is clear that the courts experience a number of problems with the investigation of cases. We recommend that the Ministry of Justice review its budget allocations to assess whether the operation of the maintenance courts is receiving sufficient funding, particularly to allow for the appointment of maintenance investigators in the busiest courts.

We also carry forward the recommendation made in the 1995 maintenance report that 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.28 For example, the court can access bank statements even if the complainant and defendant are not married, as the Act allows the maintenance officer to cause any person, including the defendant and the complainant, to be directed to appear before that maintenance officer and to give information or produce any book, document, statement or other relevant information.29 This would include summoning a staff member at a bank to provide bank statements belonging to the defendant or asking an employer to provide the defendant’s payslip.

Getting information from banks

Either the complainant or the defendant might benefit from access to information about each other’s financial position.

Banks have a duty of confidentiality to their customers, but they can still be ordered by law to provide the courts with information about their clients in some circumstances. Maintenance officers have the power to trace and evaluate the assets of responsible persons, and to gather information concerning the financial position of any person who is responsible for maintaining someone else. These powers appear to overrule a bank’s duty to keep client information confidential.

Banks can be ordered to produce account books as evidence in court cases. At least 10 days written notice must be given to the person on the other side of the case. This person can ask the magistrate to order that the financial information be kept confidential. It is up to the magistrate to decide.

A bank cannot be forced to produce accounts and other financial documents without a court order. Section 31 of the Civil Proceedings and Evidence Act states:

“No bank shall be compelled to produce its ledgers, day-books, cash-books or other account books in any civil proceedings unless the person presiding at such proceedings orders that they shall be so produced.” (emphasis added)

Maintenance Act 9 of 2003, sections 8 and 10
Civil Proceedings and Evidence Act 25 of 1965, sections 27-32
Swart & Another v Marais & Others 1992 NR 47 (HC)

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29 Maintenance Act 9 of 2003, section 10(1)(a).
7.6 Filing

Our original plan was to sample data until mid 2008, but due to delays in finalising the data collection, we extended the data collection period to the end of 2008. This required us to revisit some of the first courts sampled to collect the remaining data. We were concerned to find that forms which had been identified during the first visit had gone missing at one court at least. As noted by one researcher:

“Since the previous researchers visited the court, many files they sampled have been removed from the office. The present location of the files is unknown. The prosecutor/maintenance officer has only been at the court for one month and was unable to help. Other staff members insisted the files found in the prosecutor’s office were the only files in the court and that no files were kept in storage except archived files from before 2000.”

At some courts we also encountered problems with filing. For example, at one court the researchers could not find any files for 2007. When we enquired about this, the clerk suggested that when court records were moved to a new building during the previous year, these files may have been lost in transit. The researchers also struggled at many courts to find the files required for our sample because the files were not located in a single place but rather were stored haphazardly in various offices. In some cases the files did not contain all the information, and our researchers found forms which should have been in the files amongst the papers lying in loose piles stored in a disorganised manner in various offices. The loss of a single file should be a matter of concern, and the fact that a substantial number of files appeared to be missing from some courts is a serious worry.

7.7 Training for court staff

“We need trainings with information on how to communicate with clients, and about new changes in the law – especially for those of us who didn’t study law. We need more books and pamphlets and trainings.”

The purpose of the Maintenance Act 9 of 2003 was to improve on many of the limitations identified in the Maintenance Act 23 of 1963. In many ways, this goal appears to have been achieved – as one maintenance officer commented, “the Act is self-explanatory and user-friendly”. Another maintenance officer described the 2003 Maintenance Act as “a big improvement on the previous legislation. The civil law style of the procedures and processes introduced by the Act are very good.”

However, the 2003 Act has also created some challenges, particularly regarding the forms that must be completed. As one clerk of court explained:

“The new forms are so … [unfinished sentence]. They didn’t even come to explain how to use the new forms. We found out from another office how to use some of them and those are the ones that we use. I think the new forms are very hard. We need someone to come and explain to us how to use them. We want more training on the forms and the Act.

I don’t like the new forms, for one I don’t know what form to use for arrears. We had to find out from Keetmanshoop how to garnish wages. Before they told us how, we didn’t know.
The old forms were really easy to complete – they were few and they were shorter. Maybe these ones are easy, but no one ever told us how to fill them out.”

30 Field notes of Laila Hassan, 2010. All of the researchers were asked to prepare field notes on their personal observations.
31 Clerk of a maintenance court.
Similar comments were made by other court officials. However, some court officials were of the opposite opinion – one maintenance officer found the forms “clear and easy to work with”, and easier to use than the previous forms.

Some court officials noted that there is a need for social workers to assist with some of the cases. An alternative suggestion is for clerks to receive training on how to deal with the emotional aspect of some applications. As one clerk said, “we need people with patience and understanding, because it can be very emotional for the complainants”. Another clerk made a similar comment:

“I definitely think there should be more training, especially for you to work with maintenance clients. You need training to understand client needs. Everyone has a different reason for applying for maintenance. Psychological training is needed. Some people think that maintenance is a solution to marital problems. Some women try to punish men. The man thinks you are taking sides when you talk to the woman and vice versa. Men take it personally. Both men and women are your clients – you need to listen to both.”

The clerk of the Rehoboth court stated that the town council had arranged for social workers to be at the court every Tuesday for screening. This is an excellent example of how the community identified a need and made provisions to help address the problem.

Many of the court staff appear to be learning on the job. As one clerk of the court said, “We were given a copy of the Act and told to go through it ourselves.” While it is essential that all court officials are familiar with the wording of the Act – something that can best be achieved by reading the Act – the failure of the Ministry of Justice to provide sufficient training on the Maintenance Act places an unfair and unrealistic burden on staff. Worryingly, one clerk of the court informed us that she did not even have a copy of the Act to refer to, and another described the process of learning on the job as “trial and error”. The 2004 study on the South African Maintenance Act noted similar problems, stating that, “[f]ormal training for maintenance staff at all levels was reportedly very rare and most of the maintenance staff relied on their own initiative and learning from more experienced colleagues”.32

The lack of training and understanding of the Maintenance Act cited by some court officials may be one reason for our finding such poor record-keeping. We recommend that the Ministry of Justice should ensure that adequate training is provided for all maintenance court officials.

A person seeking maintenance should make a complaint to the maintenance officer at the maintenance court. A maintenance complaint may be made either at the court in the area where the complainant or beneficiary resides or at the court where an existing complaint is lodged.¹

## 8.1 Overview of the sample

A maintenance complaint should be made on a form that is the same as or substantially similar to Form A² (see Form A excerpt next page). This study is based on data collected from 1,687 files. The files contained 1,711 maintenance complaints. The vast majority of files contained one complaint or the details of one complaint (1,542/1,687; 91.4%). A small number of files contained two (22/1,687; 1.3%) or three complaints (1/1,687; 0.1%). Reasons for finding multiple forms in a single file varied. For example, in some cases it was because the complainant changed (such as from the mother to the grandmother). In other cases it was because a request for maintenance for another child (such as a newborn baby) was added. Applications to change the recipient should have been made on a different application form (Form B, changes to an existing maintenance order). However, we have not excluded this information as it does not compromise the overall analysis, and in general we have assessed information as it was presented in the files, even though there were sometimes errors in the use of some forms. In a handful of files (122/1,687; 7.2%) there was no complaint form on file. The existence of the file clearly means that a complaint was made, but there was no documentation for the complaint itself. Information about the application was gleaned from other forms and documents contained in the file.

<table>
<thead>
<tr>
<th>Number of forms on file</th>
<th>Total based on cases</th>
<th>Percentage</th>
<th>Total number of forms</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>None</td>
<td>122</td>
<td>7.2</td>
<td>122</td>
<td>7.1</td>
</tr>
<tr>
<td>Contained 1 Form A</td>
<td>1,542</td>
<td>91.4</td>
<td>1,542</td>
<td>90.1</td>
</tr>
<tr>
<td>Contained 2 Form As</td>
<td>22</td>
<td>1.3</td>
<td>44</td>
<td>2.6</td>
</tr>
<tr>
<td>Contained 3 Form As</td>
<td>1</td>
<td>0.1</td>
<td>3</td>
<td>0.2</td>
</tr>
<tr>
<td><strong>Total number of cases</strong></td>
<td><strong>1,687</strong></td>
<td><strong>100.0</strong></td>
<td><strong>1,711</strong></td>
<td><strong>100.0</strong></td>
</tr>
</tbody>
</table>

Data from the 1995 maintenance study was collected from 618 files. The study does not report a difference between the number of files and the number of complaints on file.³ As a point of comparison, the 2004 study on the South African Maintenance Act analysed a total of 432 court files.⁴

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¹ Maintenance Act 9 of 2003, section 9(1).
### Maintenance complaint

**COMPLAINT IN TERMS OF SECTION 9(1) OF THE ACT (NEW COMPLAINT)**

(This information should, as far as possible, be given in order to investigate the complaint)

1. ................................................................................................................................. (full name of complainant)
   
   born on ...........................................................(date) / age .................................................................
   
   identity number ........................................................................................................................
   
   living at ..............................................................................................................................
   
   telephone number ..............................................................................................................
   
   working at ..........................................................................................................................

   Hereby declare under oath/truly affirm as follows:

1. ................................................................................................................................. (full name of defendant)
   
   born on ...........................................................(date) / age .................................................................
   
   identity number ........................................................................................................................
   
   living at ..............................................................................................................................
   
   telephone number ..............................................................................................................
   
   working at ..........................................................................................................................

   is legally liable to maintain *me and/or the following beneficiary(ies), who is/are under my care:

   .................................................................................................................................

   born on ..............................................................

   .................................................................................................................................

   .................................................................................................................................

   .................................................................................................................................

   2. *The defendant is legally liable to maintain me or the beneficiary(ies) because .................................................................

   .................................................................................................................................

   .................................................................................................................................

   .................................................................................................................................

   3. *The beneficiary(ies) mentioned in paragraph 1 is/are under my care because .................................................................

   .................................................................................................................................

   .................................................................................................................................

   .................................................................................................................................

   4. The defendant has since ...................................................... not supported *myself/the said beneficiary(ies) and has made

   .................................................................................................................................

   .................................................................................................................................

   .................................................................................................................................

   .................................................................................................................................

   .................................................................................................................................

   I request that the defendant be ordered to make the following contribution(s) towards maintenance:

   (a) A*weekly/monthly contribution of –

<table>
<thead>
<tr>
<th>N$</th>
<th>Name of Beneficiary</th>
</tr>
</thead>
<tbody>
<tr>
<td>N$</td>
<td>In respect of myself (complainant)</td>
</tr>
<tr>
<td>N$</td>
<td>In respect of</td>
</tr>
<tr>
<td>[...]</td>
<td>In respect of</td>
</tr>
</tbody>
</table>

   (b) The first payment should be made on ......................... and after that on or before the ....... day of each succeeding *week/month. All payments should be made

   to .................................................................................................................................

   in favour of ........................................................................................................................

   and/or

   (c) Other contributions (for example medical and dental costs, school fees, fees to tertiary institutions, school clothes,

   expenses for sport and/or cultural activities, birth expenses and maintenance for beneficiary(ies) from birth):

   .................................................................................................................................

   .................................................................................................................................

   

   (This information should, as far as possible, be given in order to investigate the complaint)
Whilst the majority of files in the sample contained information completed on forms from the 2003 Maintenance Act (1 589/1 711; 92.9%), some of the complaints were made on forms from the 1963 Maintenance Act (81/1 711; 4.7%). Old forms were used in three courts, namely Karasburg, Okakarara and Rundu. Only a handful of applications were made on old forms at the courts in Okakarara (1/17; 5.9%) and Rundu (13/121; 10.7%), whereas the majority of the maintenance complaints sampled in the Karasburg court over all four years were made on old forms (67/73; 91.8%). It is concerning that the Maintenance Act came into operation in 2003 and yet the Karasburg court continued to use old forms in 2008. One staff member said that they had not been trained on how to use the new forms, and that the forms for the old Act were “few and they were shorter”.

8.2 Completion of forms when making a maintenance complaint

Form A requires the complainant to provide a fairly extensive amount of quantitative information. Many of the clerks interviewed for this study said that Form A was too long. This comment is reflected by the fact that on many forms a substantial amount of information that should have been provided was missing. As one clerk explained, the application process is more of a discussion where the complainant is “just here to sit and talk to you about the problem”. As a result of the high incidence of incomplete complaints, we can compile only a partial picture of maintenance complaints. Therefore, whilst the sample size for the data presented in this section should be 1 687 (number of files) or 1 711 applications (number of applications), in the following tables the total sample available for specific data is often lower than this.

Court officials are often required to fulfil multiple functions and this can mean that they are overstretched. This may be one reason that the forms are often not properly completed. Some of the court officials requested more training so that they can better assist parties to complete maintenance complaints. They also requested more information materials to enable complainants to better understand the process for themselves.

“We need more information. For example, booklets about the process that we could hand out. It would be easier because then we don’t have to explain everything in person, especially when there are lots of people waiting. Some people need a lot of explanation because they don’t know what to do.”

One court official suggested that more support should be made available for complainants to help them complete the application form. The court official cited the example of Women and Law in Southern Africa (WLSA), a civil society organisation in Zimbabwe that helps women make claims for maintenance.5 The 2004 study on the South African Maintenance Act reported a similar practice at some South African courts. For example, in Pietermaritzburg the NGO Justice and Women (JAW) at one point had offices at the court premises. JAW deals with a range of matters relating to women’s rights, including maintenance issues. The organisation tries to educate women about the maintenance system, as well as helping complainants with maintenance complaints. Many of the JAW staff members are maintenance recipients themselves, so they have first-hand knowledge of the maintenance system. JAW also works with court officials to better understand the problems they encounter in carrying out their duties. JAW staff note many problems with the process of applying for maintenance, such as literacy or language barriers (the maintenance forms are available only in

5 Women and Law in Southern Africa (WLSA) is an action-oriented research organisation founded in 1989. Its main objective is to conduct research that supports action to improve the socio-legal position of women. WLSA has offices in seven countries of Southern Africa: Malawi, Botswana, Lesotho, Mozambique, Swaziland, Zambia and Zimbabwe <www.wlsazim.co.zw>, accessed 23 September 2013. WLSA works in conjunction with the courts by helping complainants to fill in application forms and draft papers needed for court applications. By providing free assistance, WLSA relieves the workload of the clerk of the court and also ensures that the complainant receives information which will be to the benefit of her case. WLSA also distributes pamphlets and guides on maintenance. (Personal communication with WLSA, 2012)
English) and the fact that some clerks focus on completing the required paperwork without ensuring that the complainants understand the process.\(^6\)

The organisation Mosaic, which operates in Cape Town, provides another model for assistance. Although Mosaic's main focus is on domestic violence with an objective of increased availability and accessibility of high-quality services for domestic violence and abuse survivors, related issues such as maintenance inevitably become part of its work. For example, Mosaic educates women about their rights and about economic abuse, and aims to increase their awareness of what they are entitled to, and where in the court system they can go to get it. At the Paarl court, the Mosaic volunteers help women to fill out maintenance claims and protection orders at the same time. As noted in the 2004 study on the South African Maintenance Act, “at any of the courts, especially those on low budgets, unpaid volunteers appeared to be a vital and very much appreciated part of the maintenance staff”.\(^7\)

Participants at the focus group discussion held in Karasburg recommended that volunteers assist at the maintenance court, and that they be afforded recognition of their work, including some form of financial benefit. The focus group also suggested that the church has an important role in addressing family matters, and could help to support maintenance complainants. The group noted that the community often turns to the church as a first point of contact to address family problems. Therefore, as an alternative to placing volunteers in the court, bodies such as the Council of Churches in Namibia could offer practical training on the Maintenance Act to pastors and church leaders.

The 2004 South African study noted that volunteer work could lead to formal employment, finding that some court staff had previously been volunteers for NGOs that worked at the courts. The experience they had gained had obviously made them more attractive as potential court employees.\(^8\)

We recommend that courts or NGOs consider recruiting volunteers to assist complainants to make maintenance complaints. 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. This could be particularly beneficial given Namibia’s high rate of unemployment.\(^9\)

### 8.3 Profile of beneficiaries

The term ‘beneficiary’ refers to the person who benefits from a maintenance order. This will usually be a child, but it could also be a disabled adult, a parent or a spouse. The beneficiary is sometimes called a ‘dependant’.\(^10\)

#### Number of beneficiaries

The median number of beneficiaries per order, including complainants who are also themselves beneficiaries, was one (mean 1.5; range 1-8). Very few applications were made for more than three beneficiaries – 2.7% of the applications were made for four beneficiaries and 2.2% were made for

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\(^6\) Summarised from Community Agency for Social Equality (CASE), *Implementation of the Maintenance Act in the South African Magistrate’s Courts*, Braamfontein: CASE, 2004 at 23-24. Currently, JAW no longer holds an office at the Court in Pietermaritzburg, but still strives to educate women on maintenance issues and their rights. They do this by conducting workshops and providing a paralegal service which offers information to complainants. The information offered includes a summary of legal rights, understanding budgets, what complainants are entitled to under a maintenance order as well as strategising to ensure the success of a complainant’s case. (Personal communication with JAW, 2012; <www.justiceandwomen.blogspot.com/p/about-justice-and-women.html>, accessed 23 September 2013)


\(^8\) Id at 15.


\(^10\) Maintenance Act 9 of 2003, section 1.
five to eight beneficiaries. The figures are almost the same if complainants who were themselves beneficiaries are excluded. It is difficult for us to determine the total number of beneficiaries included in the sample as the information is sometimes unclear – for example, when there was no application form or when dependants were listed but it was not clear whether or not maintenance complaints were being made for all of the children listed. Overall we are able to say that the sample includes at least 2,254 beneficiaries excluding complainants and 2,411 beneficiaries including complainants.

Table 19: Number of beneficiaries in maintenance complaints

<table>
<thead>
<tr>
<th>Application or order</th>
<th>Total</th>
<th>Median</th>
<th>Mean</th>
<th>Minimum</th>
<th>Maximum</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of beneficiaries including complainants as beneficiaries</td>
<td>2,411</td>
<td>1</td>
<td>1.5</td>
<td>1</td>
<td>8</td>
</tr>
</tbody>
</table>

The majority of complaints were made for a beneficiary or beneficiaries excluding the complainant (1,306/1,463; 89.2%). However, this still means that in approximately one in 10 cases, the complainant was also a beneficiary (157/1,463; 10.7%). In some cases the beneficiary-complainant was a minor applying for maintenance from his or her parent. In other cases the beneficiary-complainant was a spouse applying for maintenance from the other spouse, sometimes for herself alone and sometimes for the children as well. In one case a grandmother applied for maintenance for herself and her grandchild from her child, who was the parent of the grandchild. Overall there were 157 cases where the complainant applied for maintenance for himself or herself. In 41 cases the complainant applied only for maintenance for himself or herself. In 116 cases the complainant applied for maintenance for himself or herself and one or more beneficiaries. Thus the typical maintenance complaint encountered is that of a woman seeking maintenance for either one or two beneficiaries, but not for herself, with requests for maintenance for a single beneficiary being most common. The profile of beneficiary-complainants is further discussed in section 141.

Due to the fact that information about the beneficiary-complainants will affect the overall picture of beneficiaries (for example adult beneficiary-complainants will raise the average age of beneficiaries), in some instances we have analysed the data for beneficiaries excluding beneficiary-complainants. However, given the small number of cases where a complainant applied for maintenance for himself or herself as well, this is not always necessary. We also separately assess cases where the complainant-beneficiary is a minor.

Table 20: Type of beneficiary in maintenance complaints

<table>
<thead>
<tr>
<th>Type of beneficiary</th>
<th>Number</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Beneficiary/ies but not complainant</td>
<td>1,306</td>
<td>89.2</td>
</tr>
<tr>
<td>Beneficiary/ies and complainant</td>
<td>116</td>
<td>7.9</td>
</tr>
<tr>
<td>Complainant alone</td>
<td>41</td>
<td>2.8</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>1,463</strong></td>
<td><strong>100.0</strong></td>
</tr>
<tr>
<td><strong>Missing</strong></td>
<td><strong>248</strong></td>
<td><strong>14.5</strong></td>
</tr>
<tr>
<td><strong>Total number of maintenance complaints</strong></td>
<td><strong>1,711</strong></td>
<td><strong>100.0</strong></td>
</tr>
</tbody>
</table>
Chart 11: Number of beneficiaries applied for per application – including complainant (n=1,565)

Table 21: Number of beneficiaries

<table>
<thead>
<tr>
<th>Number of beneficiaries per application (including complainant)</th>
<th>Percentage of applications</th>
<th>Number of beneficiaries per application (excluding complainant)</th>
<th>Percentage of applications</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of beneficiaries</td>
<td>Number of applications</td>
<td>Percentage of applications</td>
<td>Number of beneficiaries</td>
</tr>
<tr>
<td>1*</td>
<td>1,049</td>
<td>67.0</td>
<td>1*</td>
</tr>
<tr>
<td>2</td>
<td>327</td>
<td>20.9</td>
<td>3</td>
</tr>
<tr>
<td>3</td>
<td>112</td>
<td>7.2</td>
<td>4</td>
</tr>
<tr>
<td>4</td>
<td>43</td>
<td>2.7</td>
<td>5</td>
</tr>
<tr>
<td>5</td>
<td>14</td>
<td>0.9</td>
<td>6</td>
</tr>
<tr>
<td>6</td>
<td>12</td>
<td>0.8</td>
<td>7</td>
</tr>
<tr>
<td>7</td>
<td>6</td>
<td>0.4</td>
<td>8</td>
</tr>
<tr>
<td>8</td>
<td>2</td>
<td>0.1</td>
<td>Missing</td>
</tr>
<tr>
<td>Total**</td>
<td>1,565</td>
<td>100.0</td>
<td>Total**</td>
</tr>
<tr>
<td>Missing</td>
<td>146</td>
<td>8.5</td>
<td>Missing</td>
</tr>
<tr>
<td>Total</td>
<td>1,711</td>
<td>100.0</td>
<td>Total</td>
</tr>
</tbody>
</table>

* When the number of beneficiaries including the complainant is calculated and equals 1, this could refer to a complainant who applied for maintenance for herself only, or to a complainant who applied for only one beneficiary but not for herself. There were 1,055 applications where there was only one beneficiary who was not the complainant.

** Total number of beneficiaries including the complainant = 2,411; total number of beneficiaries excluding the complainant = 2,254; total number of complainants who applied for maintenance = 157.

This finding is similar to the results of the 1995 study which also found that in the majority of cases, women sought maintenance for either one child (68%) or two children (18%).11 The 2004 study on the South African Maintenance Act also found that the majority of maintenance cases (70%) were filed on behalf of one child.12

The total fertility rate in Namibia is 3.6 and the average household size is 4.4 people.13 The mean number of children born to women is 1.91.14 Whichever indicator is used, the majority of maintenance complaints are for fewer children than the average family size. This shows that contrary to the popular belief that women have children to access maintenance payments, women do not keep having children simply to access more money. However, it should be noted that complainants could have multiple children with different fathers, and could have a number of different maintenance cases open.

Furthermore, although the majority of complainants apply for maintenance for only one beneficiary, this does not always mean that the defendant has a duty to this child only. Some files show that the defendant was a parent of many children. For example, in one of the files sampled, the defendant

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14 Ministry of Health and Social Services (MoHSS), Namibia Demographic and Health Survey 2006-07, Windhoek: MoHSS, 2008 at page 46.
supplied birth certificates for twelve other biological children as evidence of expenses. Another file contained the following statement from the defendant: “I am willing to pay maintenance. I propose that I pay N$150 as I have 7 dependants and am the sole bread winner. I am a Police Officer and earn N$1900. [I am] married and have 7 children.” The court agreed to this request and an order was made for N$150 for the child.

Similar examples were cited by court officials. For example, one maintenance officer stated, “There are men in here that say they can’t pay N$200, because they are already have say 10 other kids. One guy had 16 kids.” The maintenance officer from another court said that some defendants will try to pretend that they have more dependants than they really do have; he cited the example of cases where defendants will bring the birth certificates of their brother’s children.

A case brought to the Legal Assistance Centre is an example of a maintenance situation involving a large family. The client, who has 10 children from different women, stated that he has to support these children from a salary of N$3600, and that, after deductions and travel expenses (taxi fares), he is left with N$60. He asked for advice on how to manage his obligations to provide maintenance. We suggested that he discuss his situation with the maintenance officer dealing with his case so that the court can assess what is a reasonable amount of maintenance for him to pay.

Another client sent the following query by text message to the LAC information line:

“Hi. I have a one year old daughter and her father who has 5 other children hasn’t paid maintenance since last year. I haven’t been to the maintenance people ‘cause he said that they will only look at how many kids he have then I will only get N$50. Is that true?”

We informed the client that the court will take into consideration the fact that the father has five children to support, but this does not necessarily mean that maintenance will be set at N$50. The amount of maintenance to be paid is decided on a case-by-case basis.

We have received similar queries by email, such as the following:

“I have a kid of 12 years now and his father does not want to help with anything, he keeps on making empty promises but does not keep them and every time I ask him he is saying he have many children. I don’t know whether he is contributing towards the other children’s wellbeing or not, and if he does why not mine? I really don’t know what to do now since the boy is very fond of him?”

We explained that the client can still apply for maintenance as the father has a duty to provide support. Providing maintenance should not be seen as an area for conflict between the parents but rather as a necessity to provide for the needs of the child.

The Legal Assistance Centre has published a comic on what to do if someone stops paying maintenance. In the story, the defendant tells the four different mothers of his children that he cannot pay maintenance. However, when the fifth mother goes to the maintenance court, the defendant learns that he has a duty to provide maintenance to all his children. We chose this storyline in response to the cases we hear where some parents who have many children think that they do not have to provide for them.

"This’s a very beautiful story, we do have many many girls who’s just suffering from their children while fathers [are] nowhere to be found. It must be advertised on all newspaper and TV, to let all poor girls to know this, then no children will suffer anymore!"

Text message sent to the Legal Assistance Centre
"I would like to know if someone has more than 4 children does he stop paying child support? The father of my baby sent me a text message saying that he is making a lot of children from different women so he don’t need to pay support for them. He allegedly has four children now the youngest one is now one month old and my son is ten months."

Email sent to the Legal Assistance Centre

Age of beneficiaries

A maintenance complaint for a child can be made at any time from the start of the pregnancy or from birth. The majority of maintenance orders will remain in place until the child is 18-21 years of age.\(^\text{15}\) If the child has a disability, the order may continue for life.

The typical beneficiary is a child of pre-school or primary school age, with younger children predominating.\(^\text{16}\) Nearly half of the beneficiaries were pre-school age at the time when the maintenance complaint was made (982/2180; 45.0%). Approximately one-third of the beneficiaries were primary school age (6-12; 780/2180; 35.8%) and one-sixth were secondary school age (13-17; 342/2180; 15.7%). Of the beneficiaries aged 0-5 (n=982), the age range was fairly evenly spread.

In a small proportion of cases, the beneficiaries were aged 18-20 (58 cases; 2.7%) or age 21 or older (18 cases; 0.8%). The median age of the beneficiaries was 6.0 (mean 7.1; range 0-31).

The 1995 study also found that most beneficiaries were pre-school age (about 65%).\(^\text{17}\)

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|}
\hline
Age & Number & Percentage \\
\hline
0-5 & 982 & 45.0 \\
6-12 & 780 & 35.8 \\
13-17 & 342 & 15.7 \\
18-20 & 58 & 2.7 \\
21 and over & 18 & 0.8 \\
Total* & 2180 & 100.0 \\
\hline
\end{tabular}
\caption{Age of beneficiaries when the maintenance complaint was made (excluding cases where the complainant applied for himself or herself)}
\end{table}

\begin{figure}[h]
\centering
\includegraphics[width=\linewidth]{chart12.png}
\caption{Age of beneficiaries (excluding cases where complainant applies for himself or herself; n=2180)}
\end{figure}

\begin{figure}[h]
\centering
\includegraphics[width=\linewidth]{chart13.png}
\caption{Number of beneficiaries aged 0-5 (n=982)}
\end{figure}

\(^{15}\) On the question of whether a maintenance complaint can be made before the child’s birth, see chapter 4 at page 33. Once a maintenance order is made, it will usually remain in force until: (1) the child dies or is adopted; (2) the parents divorce or annul the marriage (at which point a new order would likely be made between the parties); (3) the child marries; or (4) the child reaches the age of 18. However, if the child is attending an educational institution for the purpose of acquiring a course which would enable him or her to maintain himself or herself, the maintenance order does not terminate until the child reaches the age of 21. Even if the child is not attending an educational institution when he or she reaches the age of 18, the child, or any person acting on behalf of the child, may apply to the court for an extension of the maintenance order. The defendant must then respond to the court as to why the order should not be extended. The court will consider the application and grant the application conditionally or unconditionally, or will refuse the application. (Maintenance Act 9 of 2003, section 26 (1-3))

\(^{16}\) The ages of the complainant-beneficiaries have been excluded so that we may assess the average age of child beneficiaries only. Only 18 applications were made where the complainant was under the age of 18. The exclusion of this amount of data from the sample is not sufficient to affect the analysis. Analysis of the age of the complainant in cases where he or she claimed maintenance for him or herself is presented on page 141.

Complainant-beneficiaries

One in 10 maintenance complaints included an application for maintenance for the complainant (157/1463; 10.7%; data missing in 248 cases). In some cases such applications were made by a spouse for spousal maintenance; we can confirm that the defendant was the spouse of a complainant who applied for maintenance for himself or herself in 50 applications. In other cases it was a child applying for maintenance for himself or herself. Data on the relationship between the complainant and defendant is missing in the remainder of the cases. In many instances this is because the application described the relationship between the defendant and the other beneficiaries (e.g., parent-child relationship) but did not clarify the relationship between the complainant and defendant.

The age of the beneficiary-complainant can be determined in 122 of the 157 applications. The median age of the beneficiary-complainant was 37 (mean 35.0; range 12-58).

In the entire sample there were 18 applications where the complainant was under the age of 18 (although not all applications specified the age of the beneficiary-complainant). Of these there were nine maintenance complaints where a complainant under the age of 18 applied for maintenance for himself or herself. In six of the other nine cases, the child was a minor mother claiming for her own child and in three cases information is missing. The age of these complainants ranged from 12-17.

The 1995 study did not include any applications made by complainants under the age of 18, but noted that “interviews and observations indicated that this does happen – although rarely”. As the data from the current study shows, it is still rare for children to claim maintenance. Child complainants are discussed further on page 150.

Requests for maintenance for adult beneficiaries

The sample included requests for maintenance for 16 beneficiaries aged 21 or older in 12 different maintenance complaints. None of the complaints explained why the complainant was asking for maintenance for adult children. In 10 of the 12 applications, the complainant requested maintenance for beneficiaries under the age of 21 as well as beneficiaries over the age of 21. This suggests that the complainants hoped to receive maintenance for their adult children as well. The oldest beneficiary who was not also a complainant was 31 years of age.

The number of beneficiaries in complaints including over-age beneficiaries ranged from one to eight (see Table 24.)

This suggests that the applicants may have been under financial pressure due to the number of children they had to care for. It is possible that some requested maintenance for all their offspring, even whilst knowing that this would be unlikely. Some may have been aware that maintenance can

<table>
<thead>
<tr>
<th>Relationship to beneficiary</th>
<th>Number</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Complainant is the beneficiary</td>
<td>9</td>
<td>50.0</td>
</tr>
<tr>
<td>Complainant is the parent applying for maintenance from the other parent</td>
<td>6</td>
<td>33.3</td>
</tr>
<tr>
<td>Information missing</td>
<td>3</td>
<td>16.7</td>
</tr>
<tr>
<td>Total</td>
<td>18</td>
<td>100.0</td>
</tr>
</tbody>
</table>

Table 24: Number of beneficiaries in complaints including adult beneficiaries

<table>
<thead>
<tr>
<th>Number of complaints</th>
<th>Total number of beneficiaries (including adult beneficiaries)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>5</td>
<td>2</td>
</tr>
<tr>
<td>1</td>
<td>3</td>
</tr>
<tr>
<td>1</td>
<td>4</td>
</tr>
<tr>
<td>2</td>
<td>6</td>
</tr>
<tr>
<td>1</td>
<td>7</td>
</tr>
<tr>
<td>1</td>
<td>8</td>
</tr>
</tbody>
</table>

18 A maintenance order for the support of a spouse will remain in force until: (1) the spouse dies or remarries; or (2) the spouses divorce or annul their marriage. (Maintenance Act 9 of 2003, section 26(4))

be secured for adult offspring who are dependent upon their parents because of disability, poverty or unemployment (although, as explained in chapter 4 at page 34, the level of need required in most such cases will often mean that no maintenance order will be made).

Of the 12 complaints made, orders were made in only three cases. The outcome of the 12 cases is as follows:

- Three orders were made that appear to cover beneficiaries over the age of 21.
- Two orders were made for children under the age of 18, but seemingly not for the adult beneficiaries.
- Two cases were removed from the roll.
- One case was withdrawn.
- Four files contained only a complaint (three of these cases contained a record of a summons but no further information).

### CASE STUDY

**The ongoing need for maintenance**

Many young adults continue to need financial support, particularly if they are engaged in tertiary education. The LAC commonly receives requests for assistance from university students. Here is one example:

"Am a boy of 20 years old. I have a problem with my father, he does not support us or my brother. I am at UNAM while my brother is at the Namibian Institute of Mining and Technology. Our father never pays our school fees or buys books for us. He is always saying that our surname will change from his apparently we are no more his children. Only our mother takes care of us, but she is a cleaner while father is a teacher. Is there no legal action that we can take to support us financially?"

We told the client that he could apply for a maintenance order, and that, although maintenance is normally provided only up to age 18, maintenance orders are also generally available up to age 21 if the beneficiary is still studying.

Regarding the surname issue, we explained that in practice it is extremely unlikely that the father would be able to change his child’s surname without the mother’s consent in terms of the laws on birth registration.

Here is another example, from 2012:

"I am a girl of 21 years doing my diploma at UNAM as my first year but I have registered 2009 and I was supposed to be graduated by now just that my dad does not want to support me plus my siblings, is it possible for him to pay maintenance even though they are married with my mom? My mom tried her level best to get me back again in school since I have been two year down cos she can’t afford my tuition fees plus that of my siblings back home. Sometimes I have to dodge classes since I don’t have taxi money. Whenever I ask him for taxi money he answer me badly or ignore me totally. They are both soldiers."

We told the client that although a maintenance order usually ceases when the child reaches age 18, the court could order that it remains in force until the child is 21 if the child is attending an educational institution for the purpose of acquiring a qualification which would enable the child to become self-supporting. Although the Act does not discuss maintenance after age 21, at common law the legal liability to maintain can extend past this point in unusual cases. The client, her mother or the siblings could apply for a maintenance order for any of the children who are unable to support themselves, although maintenance orders for children over age 18 who are not studying would generally be available only in cases of extreme indigency.

"I’m a 19-year-old student. I want to know if I can report my father for not paying maintenance as I’m a single parent child and I struggle to pay tuition fees. Where can I get help? Plz help.

Text message sent to the Legal Assistance Centre
Sex of beneficiaries

Our assessment regarding the sex of the beneficiaries, excluding beneficiary-complainants, established that a similar proportion of applications were made for male and female beneficiaries. However, this information is available for only about half of the complaints. The Legal Assistance Centre rarely comes across situations where the girl-child is treated significantly less favourably than the boy-child, but it should be noted that some interviewees suggested that this may occur in some instances. The clerk of the Eenhana court stated that “people are more willing to get their sons through school sometimes”. Another clerk thought that boys were more expensive to maintain than girls and that complainants should request more money for a boy-child, but did not expand on why boys cost more than girls.

When we assessed the sex of the beneficiary-complainants separately, we found that the vast majority were female (152/156; 97.4%; data missing in one case). In the 50 applications where we can confirm that the complainant and defendant were married and the complainant was included as a beneficiary, the complainants were all female. This means that we do not have any records of a man applying for spousal maintenance. This is not surprising, given that it is rare for men to apply for child maintenance, let alone spousal maintenance. In the four cases where the beneficiary-complainants were male, they were aged 16, 17 and 21 (data missing in one case). All four of these cases involved complainants applying for maintenance from a parent.

Children with disabilities

We found a record of only one case involving a child with disabilities. It states, “[T]he child is paralysed but does not need special care. A charity gave him a wheelchair. He use[d] to go to a physical training centre but the child made no progress.” The case involved a custody dispute between the unmarried parents as well as a maintenance claim. The complainant appeared to want the defendant to have custody of the child, and because the defendant agreed to this, the court stated that a maintenance order was not required. There is no record of a social worker assessment, even though this might have been warranted. The forum for a custody or child protection hearing is in the children’s court, not the maintenance court; currently when a maintenance court sees that an investigation into the child’s situation is needed, it should refer the case to a social worker to deal with in terms of the Children’s Status Act 6 of 2006 or the Children’s Act 33 of 1960. The Child Care and Protection Bill which is expected to replace the Children’s Act clarifies child protection referrals by providing that cases can be referred to the children’s court from a range of sources, including the maintenance court.20 In this instance the child’s wellbeing should possibly have been assessed by means of a social worker report submitted to the children’s court. See section 10.4 for a discussion of cases involving social workers.

20 Child Care and Protection Bill, draft dated 12 January 2012, section 37(2):
(2) If in the course of any proceedings before any court relating to divorce, maintenance or domestic violence or, in the case of proceedings before the children’s court relating to custody, access to a child or guardianship, such court forms the opinion that a child of any of the parties to the proceedings has been abused or neglected, the court –
(a) may suspend the proceedings pending an investigation contemplated in section 135 into the question whether the child is in need of protective services; and
(b) must request the Prosecutor-General to attend to any allegations of criminal conduct.
It is a matter of concern that we found only one case that dealt with a child with a disability. Data from the Ministry of Education shows that in 2012, 32404 learners with disabilities were enrolled in the education system.\textsuperscript{21} Therefore, the fact that we could identify only one application for a child with a disability in our sample suggests that parents of children with disabilities may be a vulnerable group regarding awareness of the provisions of the Maintenance Act. We recommend that the government or civil society develop communication materials for parents of children with disabilities to inform them of the provisions of the Maintenance Act.

### Beneficiary profile

**Number of beneficiaries**

In the majority of maintenance complaints, the complainant sought maintenance for one beneficiary. This is followed by complaints for either two or three beneficiaries. Very few complaints were made for more than three beneficiaries.

**Age of beneficiaries (excluding cases where the complainant applied for maintenance for himself or herself)**

- Nearly half of the beneficiaries were pre-school age when the first application for maintenance was made. Approximately one-third were primary school age and one-sixth were secondary school age. In a small proportion of cases the beneficiaries were 18 years old or older.
- The median age of beneficiaries was 6.0 and the mean age 7.1.

**Sex of beneficiaries (excluding cases where the complainant applied for maintenance for himself or herself)**

A similar proportion of maintenance complaints were made for maintenance of male and female beneficiaries, suggesting that there is no difference in the treatment of boys and girls on this score.

**Complainants as beneficiaries**

- Approximately one in 10 maintenance complaints included a claim for maintenance for the complainant.
- Nine applications were made by a complainant-beneficiary under the age of 18.
- The vast majority of beneficiary-complainants were female.
- In 50 applications the beneficiary-complainant was the defendant’s spouse.

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8.4 Months when maintenance complaints are made

Maintenance complaints were made most frequently in January (11.2%) and February (10.6%), and least frequently in December (3.4%). The numbers of applications made at the start versus the end of the year differ significantly.

<table>
<thead>
<tr>
<th>Month</th>
<th>Number</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>January</td>
<td>146</td>
<td>11.2%</td>
</tr>
<tr>
<td>February</td>
<td>139</td>
<td>10.6%</td>
</tr>
<tr>
<td>March</td>
<td>99</td>
<td>7.6%</td>
</tr>
<tr>
<td>April</td>
<td>114</td>
<td>8.7%</td>
</tr>
<tr>
<td>May</td>
<td>110</td>
<td>8.4%</td>
</tr>
<tr>
<td>June</td>
<td>116</td>
<td>8.9%</td>
</tr>
<tr>
<td>July</td>
<td>114</td>
<td>8.7%</td>
</tr>
<tr>
<td>August</td>
<td>96</td>
<td>7.4%</td>
</tr>
<tr>
<td>September</td>
<td>113</td>
<td>8.7%</td>
</tr>
<tr>
<td>October</td>
<td>123</td>
<td>9.4%</td>
</tr>
<tr>
<td>November</td>
<td>91</td>
<td>7.0%</td>
</tr>
<tr>
<td>December</td>
<td>45</td>
<td>3.4%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>1306</td>
<td>100.0%</td>
</tr>
<tr>
<td><strong>Missing</strong></td>
<td>405</td>
<td>23.7%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>1711</td>
<td>100.0%</td>
</tr>
</tbody>
</table>

The pattern relates to the school calendar, suggesting that complainants probably need money to pay for school-related costs. As discussed under section 8.3, approximately half of the applications were made for children of pre-school age (0-5 years). Although school-related costs are not relevant for these children, it is still possible that parents incur costs for kindergarten or other child care arrangements. In 2010, parents contributed an average of N$208 per child to School Development Funds (SDF). Given that some domestic workers and farm workers may earn only N$200 to N$500 per month, the average cost of the SDF could be equivalent to one month’s wage. Fortunately, in 2013 payments to SDFs were abolished, although fees are still payable at private schools, and some state schools appear to have found alternative ways to oblige parents to provide additional funds to cover school costs.

There are also a number of other costs associated with school attendance, including the costs of uniforms, transport and hostel accommodation. There are also opportunity costs associated with sending children to school, such as children being less available to assist with household chores and other activities that are important for the survival of some households, particularly in rural areas. And so, “as the private costs of schooling mount, there comes a tipping point for the parent

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22 Private schools are excluded from this average. The maximum annual fee for state schools is set at N$250, unless the Minister of Education approves a higher amount. In practice the amount charged varies widely. For instance, the lowest annual charge in 2010 for all schools (primary, combined and secondary) was N$2 per learner, and the highest N$3600. There was a substantial variation between the amounts charged by rural and urban schools. (J Ellis, Free Primary Education in Namibia: Current Context, 2011, Windhoek: Ministry of Education, 2011 at 2)


24 Take for example this sms published in The Namibian on 16 January 2013. “At Nau-Aib Primary School in Okahandja, we were told that teachers don’t know how to give us the school fee money back, and that they will take N$100 to buy exercise books and copy paper. Why don’t the people want to give us our money back? They are telling us to donate the money to the school. Minister Iyambo, we need answers and solutions to this matter.” Many other people have sent similar complaints to the newspaper (see <www.namibian.com.na/index.php?id=28&tx_ttnews[tt_news]=106117&no_cache=1>, last accessed 16 January 2013).
or guardian, forcing a decision that a child will not go to school”. Due to a combination of these factors, the fact that complainants apply for maintenance at the start of the school year but do not receive the money for some time may influence whether or not a child is sent to school. Although it was possible in the past to apply for an exemption from SDF payments, many people were not aware of this option. Furthermore, although schools were not legally permitted to exclude a child from school due to inability to make SDF payments, a school may have been reluctant to grant an exemption if it was aware that one parent was earning sufficient income to pay the SDF contribution. Such circumstances could have inspired some complainants to seek maintenance orders.

The average time lapse between complaint and maintenance order is 2.5 months, as explained in section 12.9. We recommend that magistrates’ courts allocate increased staff time to the maintenance court at the start of the year to assist with the increase in the caseload at this time; even though SDF contributions have been eliminated, other school expenses such as uniforms and transport are likely to continue to inspire higher numbers of maintenance applications early in the year. We further recommend encouraging members of public to apply for maintenance early enough to allow sufficient time for investigation and resolution before pressing costs such as child-care and education-related costs must be paid. To allow sufficient time for investigation, complainants should make a maintenance complaint at least three months before they need to pay education-related costs (for example in September/October if the expenses are anticipated in January, or in May if the expenses are anticipated in August).

The 1995 maintenance study did not assess the months in which maintenance complaints were made.

<table>
<thead>
<tr>
<th>Months in which maintenance complaints are made</th>
</tr>
</thead>
<tbody>
<tr>
<td>Applications for maintenance orders are made most frequently in January and February, and least frequently in December.</td>
</tr>
</tbody>
</table>

8.5 Profile of complainants

The term ‘complainant’ refers to the person who applies for a maintenance order. The complainant can apply on behalf of one or more beneficiaries, or for herself or himself alone or in addition to other beneficiaries. The complainant will usually be a parent applying for maintenance for his or her child. Any relative or other person who is caring for a child can also request maintenance from one or both of the child’s parents. The complainant could also be anyone who has an interest in the wellbeing of the beneficiary, such as a social worker, health care provider, teacher, traditional leader or employer. A child can also make an application for himself or herself.

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26 It should be noted that parents do not have a choice about sending their children to school. The Education Act states that following receipt of notice to send a child to school, failure to send the child to school could result in a fine of up to N$6000 or imprisonment for up to 2 years, or both. (Education Act, 53(5) and 77(2)(b))
27 Primary education shall be compulsory and the State shall provide reasonable facilities to render effective this right for every resident within Namibia, by establishing and maintaining State schools at which primary education will be provided free of charge (Constitution of Namibia, Article 20(c)).
29 Maintenance Act 9 of 2003, section 1, definition of “complainant”.
30 In most situations a child cannot bring a case before the court without the assistance of an adult. However, this rule is not applied to maintenance hearings due to the unique role played by the maintenance officer in terms of the Maintenance Act, as in essence the maintenance officer performs the functions that would usually be carried out by a legal representative. The Maintenance Act also states that a beneficiary can apply for maintenance (Maintenance Act 9 of 2003, section 9(3)).
A large majority of maintenance complaints were made by the parent of the beneficiary (1,045/1,185; 88.2%; data missing in 526 applications). A small percentage of applications were made by a grandparent (55/1,185; 4.6%) or by another member of the extended family (25/1,185; 2.1%). Members of the extended family who made applications were aunts (19), siblings (5) and a cousin. A similarly small minority of complainants were guardians or primary caretakers (17/1,185; 1.4%). The father made the application in only 0.9% of the complaints sampled (see page 153 for a discussion on the sex of the complainant). In the majority of the remaining files (n=32), the relationship between the complainant and the beneficiary was unclear (for example, several files reflected that the beneficiary was a minor but did not specify the relationship between the complainant and the beneficiary).

Although the sample included only 25 maintenance complaints made by members of the extended family (in addition to 55 applications made by a grandparent), this is still a positive finding as it shows that some people are aware that they can apply for maintenance for relatives in their care. However, given that we identified so few complaints of this nature, we recommend that qualitative research is conducted on how children living separately from their parents are supported. This information could be used to inform stakeholders as to whether or not public awareness-raising is needed to convey the fact that anyone who has an interest in the wellbeing of a beneficiary can apply for maintenance on their behalf. This might be useful in situations where the child is living with the grandmother but the mother and father are in conflict and the mother is unwilling to apply for maintenance. The grandmother could then decide that she will apply for maintenance to ensure that the children receive the support they need. As the clerk of the Ondangwa court explained, “People think it is only the biological mother and father that can claim maintenance for their children; 95% of people don’t know that anyone else can claim maintenance.”

Some extended family members may not apply for maintenance from the parents because they know that if they are registered as the child’s foster parent, the child will receive a foster care grant from the Ministry of Gender Equality and Child Welfare (N$250 per month per child). In these cases, the primary caretaker may feel that this money is easier to access. It also may be that the child is living with an extended family member because the parent cannot afford to care for the child and so the family feels that there is no point in applying for a maintenance order. However, given that the foster care grant places a financial burden on the Government, it would be in the interest of the Ministry of Gender Equality and Child Welfare to ensure that primary caregivers are aware that they can claim maintenance from either parent of a child. We recommend that the Ministry of Gender Equality and Child Welfare produce a simple factsheet or pamphlet aimed at extended family members who can apply for a maintenance order instead of a foster care grant.

Another reason for the low number of maintenance complaints from people other than the biological parents may be that in some cases court officials are resistant to applications that are not made by a biological parent. For example, one clerk of court said that he could not assist with applications made by grandparents. He said that he refers these cases for hearings on guardianship. This is likely to be another misunderstanding: it is likely that the clerk meant to refer to who will be the primary caretaker of the child.
for a custody/guardianship hearing, the courts should not prevent grandparents acting as primary caretakers from making applications for maintenance, as the Maintenance Act clearly allows for this.\(^{36}\)

### Chart 16: Complainant’s relationship to beneficiary (n=1185)

<table>
<thead>
<tr>
<th>Relationship</th>
<th>Number</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mother</td>
<td>1,045</td>
<td>88.2%</td>
</tr>
<tr>
<td>Grandmother/grandfather</td>
<td>55</td>
<td>4.6%</td>
</tr>
<tr>
<td>Other member of extended family</td>
<td>25</td>
<td>2.1%</td>
</tr>
<tr>
<td>Guardian/primary caretaker</td>
<td>17</td>
<td>1.4%</td>
</tr>
<tr>
<td>Father</td>
<td>11</td>
<td>0.9%</td>
</tr>
<tr>
<td>Another relationship</td>
<td>32</td>
<td>2.7%</td>
</tr>
<tr>
<td>Total</td>
<td>1,185</td>
<td>100.0%</td>
</tr>
<tr>
<td>Missing data</td>
<td>526</td>
<td>30.7%</td>
</tr>
<tr>
<td>Total</td>
<td>1,711</td>
<td>100.0%</td>
</tr>
</tbody>
</table>

### Table 27: Complainant’s relationship to beneficiary

<table>
<thead>
<tr>
<th>Relationship</th>
<th>Number</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mother</td>
<td>1,045</td>
<td>88.2%</td>
</tr>
<tr>
<td>Grandmother/grandfather</td>
<td>55</td>
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</tr>
<tr>
<td>Other member of extended family</td>
<td>25</td>
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</tr>
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<td>17</td>
<td>1.4%</td>
</tr>
<tr>
<td>Father</td>
<td>11</td>
<td>0.9%</td>
</tr>
<tr>
<td>Another relationship</td>
<td>32</td>
<td>2.7%</td>
</tr>
<tr>
<td>Total</td>
<td>1,185</td>
<td>100.0%</td>
</tr>
<tr>
<td>Missing data</td>
<td>526</td>
<td>30.7%</td>
</tr>
<tr>
<td>Total</td>
<td>1,711</td>
<td>100.0%</td>
</tr>
</tbody>
</table>

### Spousal maintenance

It is not surprising that there were so few applications for spousal maintenance (50/1711; 2.9%) because, according to the 2011 census, only 28% of people are married under civil or customary law.\(^{37}\) The female focus group in Keetmanshoop gave this explanation for the rarity of applications for spousal maintenance: “It’s legal; we just don’t do it because we feel scandalous … . We are proud.” Furthermore, where there is a dispute between spouses over maintenance, it is possible that the relationship has broken down to the extent that divorce proceedings may ensue – and maintenance can then be addressed through the divorce process. Although maintenance complaints for spousal maintenance are rare, the maintenance officer at the Ondangwa court gave an example of when a spouse might want to claim maintenance:

> “Fathers don’t want to take responsibility. Some fathers think maintenance is not necessary. Especially when a wife is living with her husband, he will think that there is no need for her to claim maintenance. Many husbands work in Windhoek while their wives live in town [Ondangwa] and they think that the wives shouldn’t claim maintenance. But they forget about all of those months that the woman is alone without help. Women often bring cases against their husbands.”

We identified one case in our sample that involved an application for spousal and child maintenance by a woman married under customary law.\(^{38}\) The court initially ordered maintenance of N$600 (N$300 for the complainant and N$150 each for two children). However, one month after the order was made, the defendant applied for a discharge of the order on the grounds that he was not obliged to maintain the complainant because they were not actually married under customary law. At the

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\(^{36}\) Maintenance Act 9 of 2003, section 1 (definition of “complainant”).

\(^{37}\) The census does not provide information on the percentage of people who are separated as the report combines the percentages of people who are divorced and separated – 2.0% being the combined percentage (Namibia Statistics Agency (NSA), Namibia 2011 Population and Housing Census Basic Report, Windhoek: NSA, undated at 8).

\(^{38}\) According to the Maintenance Act, husbands and wives are primarily responsible for each other’s maintenance regardless of any customary law to the contrary (Maintenance Act 9 of 2003, section 3(2)(a)).

Customary marriage is a marriage which takes place in terms of the customs of the community. This differs from civil marriage, which takes place in a church or in front of a magistrate. Since Independence, customary marriages and civil marriages have been treated equally for many purposes, such as citizenship rights and employees’ compensation. However, customary marriages are not fully recognised in the eyes of the law. For example, in some instances people married under customary law are unable to benefit from pension schemes, medical aid schemes or housing schemes in the same way as people married under civil law.

Law reform proposals currently under discussion would ensure that customary marriages will enjoy full legal recognition, in the same way as civil marriages and would institute a system of marriage certificates which can serve as proof of the existence of the customary marriage. However, these proposals have not been taken forward in recent years and the current two-tier system of marriage remains in place. See Legal Assistance Centre, Recognition of Customary Marriages: A Summary of the Law Reform and Development Commission Proposal, Windhoek: LAC, 2005.
enquiry, which was held approximately one month later, the complainant claimed that they were married under customary law by the chief of the traditional authority. To support this argument, the complainant produced a document purporting to substantiate the marriage, signed by two witnesses to the marriage ceremony. However, the defendant claimed that there was no ceremony and that the document was forged. The complainant then admitted that the defendant was not present when she obtained the purported traditional marriage declaration. The magistrate postponed making a decision for approximately two weeks, and then reduced the maintenance order to an order for the children only (N$150 each for the two children), on the grounds that the purported traditional marriage declaration was not authentic and that a customary marriage did not take place.

The file also contained a letter from the Office of the Prosecutor-General referring to a possible appeal on the grounds that the magistrate did not sufficiently investigate the validity of the marriage by, for example, summoning the chief who was said to have solemnised the marriage, or the witnesses to the alleged marriage. However, there is no further information in the file.39

**Other relationships: maintenance for a parent from a child**

The Maintenance Act states that children have a duty under certain circumstances to maintain their parents. This will usually apply only after the children have become adults themselves, and only when all of the following circumstances are present:

1. the parent is unable to maintain himself or herself due to circumstances beyond that parent’s control;
2. the child is able to maintain himself or herself and able to support the parent; and
3. there is no other person who is legally liable to maintain the parent, such as a spouse.40

We identified only one file in our sample containing an application by a parent seeking maintenance from a child. In this case the grandmother was claiming maintenance for her grandchild and herself. Unfortunately we do not know the outcome of this case as the file contained only details of the complaint and a summons.

One magistrate explained that parents seldom need to exercise the option of applying for maintenance because, “When a man is confronted by an elder he will be sort of submissive and will agree. Normally elderly people do not have such complicated demands and will accept whatever the man wants to give.” A male participant in the Ondangwa focus group discussion suggested that when there is a good relationship between parent and child, maintenance will be provided when needed: “If the woman is the only one supporting the child, then when the child grows up and has a job, the child will only support the mother, not the father. The mother instills this in the child.”

Despite this feedback, we believe that more people would utilise the option of applying for maintenance if there were greater public awareness of this option. To increase public awareness of the fact that a parent can apply for maintenance from a child, we recommend that the Ministry of Labour and Social Welfare (which administers old-age pensions) produce a simple factsheet or poster about the duty of children to provide maintenance to their parents in certain circumstances, and ensure that this information is widely circulated to pensioners.

The 1963 Maintenance Act did not define the term ‘complainant’. Therefore the law lacked clarity as to who could apply for maintenance. As a result, the 1995 maintenance study did not formally assess the relationship between the complainant and the beneficiary,41 although it did assess the relationship between complainant and defendant, as discussed in section 8.12.

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39 The Act allows the maintenance officer to cause any person to be directed to appear before that maintenance officer and to give information or produce any book, document, statement or other relevant information (Maintenance Act 9 of 2003, section 10(1)(a)).

40 Maintenance Act 9 of 2003, section 4(2).

Age of complainants

The majority of complainants (1 082/1 382; 78.3%; data missing from 329 applications) were between 18 and 39 years of age at the time of the complaint. The median age of the complainants was 31 (mean 32.8; range 12-85).

The 1995 maintenance study did not analyse the age of the complainants.42

Table 28: Age of complainants (years)

<table>
<thead>
<tr>
<th>Age group</th>
<th>Number</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Under 18</td>
<td>18</td>
<td>1.3</td>
</tr>
<tr>
<td>18-24</td>
<td>250</td>
<td>18.1</td>
</tr>
<tr>
<td>25-29</td>
<td>333</td>
<td>24.1</td>
</tr>
<tr>
<td>30-34</td>
<td>285</td>
<td>20.6</td>
</tr>
<tr>
<td>35-39</td>
<td>214</td>
<td>15.5</td>
</tr>
<tr>
<td>40-44</td>
<td>125</td>
<td>9.0</td>
</tr>
<tr>
<td>45-49</td>
<td>70</td>
<td>5.1</td>
</tr>
<tr>
<td>50-54</td>
<td>36</td>
<td>2.6</td>
</tr>
<tr>
<td>55-59</td>
<td>17</td>
<td>1.2</td>
</tr>
<tr>
<td>60-64</td>
<td>12</td>
<td>0.9</td>
</tr>
<tr>
<td>65-69</td>
<td>11</td>
<td>0.8</td>
</tr>
<tr>
<td>70-74</td>
<td>5</td>
<td>0.4</td>
</tr>
<tr>
<td>75-79</td>
<td>5</td>
<td>0.4</td>
</tr>
<tr>
<td>80-84</td>
<td>0</td>
<td>0.0</td>
</tr>
<tr>
<td>85-90</td>
<td>1</td>
<td>0.1</td>
</tr>
<tr>
<td>Total</td>
<td>1382</td>
<td>100.0</td>
</tr>
</tbody>
</table>

Not recorded 329 19.2

Total 1711 100.0

The definition of ‘complainant’ in the current Maintenance Act includes the beneficiary.43 This means that a child can apply for maintenance. However, only a very small minority of maintenance complaints were made by child-complainants (18/1 382; 1.3%). All of the applications were made by children in their teens, bar one application made by a 12-year-old child. The majority of these applications (12/18) were made by older teenagers aged 16-17.

It is not surprising that very few applications were made by children, as children will usually have someone who can make the application on their behalf. However, there may be situations when a child needs to apply for himself or herself – for example, one clerk cited two cases where children had made applications for maintenance for themselves because “the mother doesn’t want to come and complain”. In nine cases, the child complainant was claiming maintenance for himself or herself; in six cases the child complainant was a mother claiming for her own child; and in three cases information is missing.

In over half (11) of the 18 maintenance complaints made by children, a maintenance order was made. The amount of maintenance ordered ranged from N$200 to N$500 plus payment of School Development Fund contributions. Six of the files did not contain any record of a maintenance order being made; some files ended with the failure of the defendant to attend a hearing. In two cases the applications were withdrawn or struck from the roll. In one of these cases the beneficiary, a baby, had died, and in the other, the court determined

42 Ibid.
43 Maintenance Act 9 of 2003, Definitions.
that the defendant’s income was insufficient to justify an order.\textsuperscript{44} The complainant in the case where the beneficiary was an infant who died, a 12-year-old mother, was the youngest complainant in the sample.

\begin{quote}
\textbf{CASE STUDY}

\textbf{An application for maintenance made by an 18-year-old child}

In 2009 an 18-year-old girl approached the Legal Assistance Centre to ask for help to obtain increased maintenance payments from her father. The LAC usually refers people directly to the maintenance court as the process to make a maintenance complaint should be straightforward and the clerk of the court or maintenance officer can assist. However, in this instance, given that the complainant was a minor, the LAC was happy to assist. The client was also assisted by her grandmother. The details of her case are as follows.

When the client was five years old, the court had ordered the father to pay N$200 in maintenance every month. However, the father paid this N$200 for only a few months before going into arrears. The State instituted criminal charges against the father for failure to pay maintenance, but the father repeatedly failed to appear in court. The court ordered an attachment of wages, which resulted in maintenance being paid for some time, but the payments stopped again when the father changed jobs.\textsuperscript{a} The client reported having a troubled relationship with her father. Her mother had passed away in 2008.

The client sought to have the monthly maintenance amount increased to N$1 500 to better suit her needs. With the LAC’s help, she provided the court with a list of her expenditures along with receipts and supporting letters as proof. She also provided a list of her father’s known assets and expenditures in order to show that he would be capable of paying the increased amount.

At the first hearing in February 2009, the father did not appear in court, instead sending a note explaining that he was medically unable to participate in hearings for two months. The magistrate therefore decided not to issue default judgement and instead postponed the matter for two months.

The client informed us that the court eventually ordered the father to pay N$900 per term plus N$3 000 for the purchase of clothes.

The LAC followed up with the client several months later, and was informed that the father had not defaulted with the maintenance payments since the judgement was made. Although parent and child did not seek counselling as recommended, it appeared that the relationship between them had improved and they were on good speaking terms. We followed up again on the case at a later date, and the client informed us that the father had stopped paying towards the N$3 000. The client returned to the court to report this, but the magistrate cancelled this part of the order, stating that it was for “luxuries”. We were also told that the father wanted to recover the money he had already paid to the child, expecting the child to pay back N$900 per month until he has recovered what he had already paid. It is unlikely that the father could legally force his daughter to repay the money, but in any event, this case exemplifies the emotional complexities that maintenance cases can involve.

\textsuperscript{a} This should not have happened: the employer has a duty to contact the court when an employee who has his wages attached for maintenance leaves the place of employment. The court could then transfer the order to the next place of employment. (Maintenance Act 9 of 2003, section 31(2))

We believe that more children would apply for maintenance if there were greater public awareness about this option. For example, when the Legal Assistance Centre published a comic on what to do if someone stops paying maintenance, we received queries from children asking if they may claim maintenance. In an effort to bring clarity to this issue, the LAC placed a one-page cartoon in \textit{The Namibian} on this topic. The story is about a child who is living with her grandmother. Her father is dead and her mother lives separately. The mother has a good job but does not provide maintenance

\textsuperscript{44} In this case a sister applied for maintenance for herself and her four siblings. The family were living with their aunt. However, the father was earning only N$427.39 per month and the court decided that it could not make an order. Instead, the court advised the children to seek assistance from a social worker.
for her daughter. A friend tells the child that she can apply for maintenance on her own. The child goes to court and applies for a maintenance order. The LAC also included a subplot about a child applying for maintenance in its 2011 film entitled Maintenance Matters. In this story, Melody’s mother is afraid to apply for maintenance because her ex-partner (Melody’s father) has been abusive in the past and she does not want the maintenance complaint to restart the violence. Melody asks if she can apply for maintenance herself, and does so with the help of the maintenance officer. The maintenance officer also explains to Melody’s mother that if she is afraid of further violence, she can apply for a protection order. The father is initially surprised and angry that he has been asked to pay maintenance, but when he learns more about his duty to support his child, he changes his mind and consents to the maintenance order. The film has been widely shown at workshops and trainings and on the Namibian Broadcasting Corporation television channel.

Another reason for the low number of maintenance complaints made by children appears to be that some courts actively discourage applications from minors. For example, one clerk said, “If there is a case with a child, then it would be a child of maybe 16. If younger than that, then it must be the guardian or the mother.” A maintenance officer from a different court said, “The child must be over 18 or the child needs a guardian to request and receive maintenance.” The court officials at another court also discourage applications from minors, for this reason:

“The court doesn’t want the children to have direct access to money because they [court officials] worry that it might encourage the children to drop out of school. So, if a child comes in trying to fill out an application, they are told that their guardian must lay the complaint.”

This court also stated that children cannot represent themselves in court or receive maintenance payments directly – with both of these perceptions ignoring the special provisions which have been made in the Maintenance Act for child complainants.45 Given the misunderstandings about who can claim maintenance, we recommend that the Ministry of Justice issue a circular to the maintenance courts to clarify the fact that minor children can claim maintenance on their own.

Whilst the courts may have realistic concerns about children possibly misusing maintenance money, this problem should be addressed through means other than a refusal to process a maintenance complaint made by a child – such as by involving a social worker. The forthcoming Child Care and Protection Bill will allow for child-headed households to exist independently and to manage their own budgets, with some adult supervision and support.46 This is an example of how the concept of child participation is being increasingly recognised in Namibia’s legislation.

Fortunately some courts do willingly allow children to claim maintenance. For example, the clerk of the Rehoboth court stated that he sometimes sees one or two claims made by children per month.

45 Maintenance Act 9 of 2003, section 1 (definition of “complainant”) and section 9(3) (“A complaint … may be made by … a beneficiary …”).
46 Child Care and Protection Bill, draft dated 12 January 2012, section 205.
Rundu court officials also stated that they process claims from minors. This statement was verified by the fact that four of the 18 maintenance applications made by minors in our sample came from the Rundu court. One magistrate recommended that a separate, child-friendly application form should be provided for child applicants. We recommend that the Ministry of Justice consider producing a simplified application form for children. An alternative solution could be to produce a simple pamphlet for children on how to apply for maintenance for themselves. The pamphlet could include a step-by-step guide on how to complete the application form. Adults would also find such a pamphlet useful.

Sex of complainants

The vast majority of complainants were women (1 541/1 569; 98.2%; data missing in 142 applications), whilst only 1.8% were men (28/1 569).

This is a slight improvement on the 1995 study finding that not a single maintenance complaint in the sample had been initiated by a man. However, the small proportion of male complainants in our sample suggests that the notion that men should not claim maintenance continues to prevail in Namibia.

The quantitative finding that few men are making maintenance complaints is substantiated by comments made by court officials. For example, the clerk of the Ondangwa court said, “We have never seen a man come to the court to claim maintenance against a woman. It is taboo. It is a matter of pride for men.” However, at the nearby Oshakati court, the maintenance officer cited a case where an uncle claimed maintenance for his nephew from the child’s father (his brother) after the death of the mother. As these courts are located close together, the clerk’s perception that men will not claim maintenance is not entirely true, although the data from this study does show that applications from men are not common. It should be noted that in the case cited, the man was not claiming from a woman but from another male relative, which may have been culturally more acceptable.

The Legal Assistance Centre film about maintenance (Maintenance Matters) features a subplot about a father claiming maintenance from his ex-girlfriend for his two children. He is teased by her new boyfriend about wanting maintenance for the children, but with the encouragement of his neighbour and the maintenance officer, he persists with the application. The new boyfriend tries to shame the man into not applying for maintenance, but learns that it is an offence to intimidate a complainant. After the maintenance hearing, the mother admits that the process has taught her that she should be contributing towards the care of their children. We chose to include this subplot to help change public opinion about men applying for maintenance.

Language group

It is interesting to attempt to assess access to the courts by language group as there may be some cultural groups that are more or less likely to access the maintenance system. Reasons for such differences may stem from differences in cultural attitudes about child maintenance, differences

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48 It is an offence to threaten to kill, assault or injure a complainant or any other person by any means (including the use of witchcraft), or to cause damage to the complainant or any other person, or to the property of the complainant or another person, with the intention of compelling or inducing the complainant not to file a complaint at the maintenance court or not to lay a criminal charge against a defendant who fails to support a specific person. The penalty is a fine of up to N$20000 or imprisonment for up to 5 years. (Maintenance Act 9 of 2003, section 41)
in the adequacy of family and community backup systems to ensure that children are sufficiently maintained, or different levels of need or awareness across the country.

Analysis of the language group of the complainant and defendant is based on their surname as this is the only means of identifying language group based on the standard information recorded in the files. However, there are a number of limitations to assessing the data in this way. For example, if a Nama woman is married to a Herero man and applies for maintenance using her married surname, she will be recorded in this study as a Herero complainant. Furthermore, not all surnames are clearly associated with a cultural group. Therefore the assessment of language group must be treated with caution.

Approximately one-third of complainants were Oshiwambo speakers and another third Damara/Nama speakers. Approximately one-sixth were Afrikaans speakers and one-twelfth were Otjiherero speakers. The remaining language groups (German, Setswana, English, Rukwangali and Silozi) were identified in only a minority of files (each in less than 2% of the files). In 11.9% of the files we were unable to determine the language spoken by the complainant. The proportional differences between language groups are similar to the proportion of language speakers in the entire population, although it seems that Afrikaans speakers are slightly more likely to claim maintenance (constituting 15% of the people accessing the maintenance court compared to representing 7.2% of the population) and Rukwangali speakers are much less likely to claim maintenance (constituting only 0.4% of the people accessing the maintenance courts but constituting 15% of the population). Rukwangali speakers also have the lowest per capita income when income is assessed by language group.\(^49\)

The low number of maintenance cases brought by Rukwangali speakers has three possible explanations:
(1) Rukwangali-speaking complainants may lack the funds to access the courts (see page 120 for a discussion on accessibility of courts).
(2) Because income is so low, Rukwangali-speaking complainants may feel that it is not worthwhile to make a maintenance complaint.
(3) The community may utilise alternative channels; according to the magistrate at the Rundu court, “most people in the Kavango region go to the traditional courts rather than the maintenance court. Only educated complainants approach our office. Most people in the Kavango region prefer speaking to a traditional authority, such as a headman.”

Other court officials did not comment on differences in the incidence of maintenance complaints between different cultural groups in Namibia. In light of the low number of maintenance complaints made in Kavango Region, we recommend that a small qualitative study is conducted in Kavango to assess child support mechanisms in these communities. We also recommend that training be given to traditional leaders in Kavango on the law on maintenance, including the role of traditional leaders in negotiating maintenance agreements outside of court and when to refer problem cases to the maintenance court.

The results here differ to those reported in the 1995 study. The 1995 study found that nationwide, Damara/Nama-speaking complainants were involved in 37% of all cases, followed closely by Afrikaans-speaking complainants (which may include white Afrikaans speakers, “Coloured” Afrikaans speakers and Rehoboth Baster Afrikaans speakers), who were complainants in 33% of all cases. Oshiwambo speakers were complainants in only 16% of all cases, although this figure was affected by the study’s inability to include case files from the courts in the predominantly Oshiwambo-speaking regions of the country. Rukavango speakers were complainants in only 5% of all cases, and Herero speakers were complainants in only 4% of all cases. Only a negligible number of cases involved English speakers or German speakers.\(^50\) Given that the sample for the 1995 study under-represented files from northern Namibia, it is not surprising that the results differ. However, similarities still exist in terms of the low prevalence of maintenance complaints made by Rukwangali/Rukavango speakers.

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49 Namibia Statistics Agency (NSA), *Namibia Household Income and Expenditure Survey 2009/2010*, Windhoek: NSA, 2012 at 126. The per capita income for German speakers is 26 times higher than the per capita income for Rukwangali speakers.

This confirms the need for more to be done to ensure that people from this language group are aware of how to make a maintenance complaint.

The 1995 maintenance report recommended that a relationship between traditional courts and the maintenance courts on issues of maintenance should be considered. Whilst such courts have not traditionally dealt with maintenance cases in many communities, there are some regions (such as Caprivi) where cooperation between the two court systems to ensure that children are properly maintained seems to have been effective in the past. In rural areas, involving the traditional courts might help to make the maintenance procedure more accessible. For example, traditional courts could be empowered to deal with maintenance questions in terms of the Maintenance Act, provided that their decisions are ratified by a magistrate’s court.\(^{51}\)

### Table 31: Language groups of complainants

<table>
<thead>
<tr>
<th>Language groups of complainant</th>
<th>Number</th>
<th>Percentage</th>
<th>Percentage in the population*</th>
<th>Is the sample higher or lower than the general population distribution?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Oshiwambo</td>
<td>532</td>
<td>31.1</td>
<td>48.3</td>
<td>Lower</td>
</tr>
<tr>
<td>Damara/Nama</td>
<td>517</td>
<td>30.2</td>
<td>11.8</td>
<td>Higher</td>
</tr>
<tr>
<td>Afrikaans</td>
<td>256</td>
<td>15.0</td>
<td>7.2</td>
<td>Higher</td>
</tr>
<tr>
<td>Otjiherero</td>
<td>136</td>
<td>7.9</td>
<td>8.4</td>
<td>Similar</td>
</tr>
<tr>
<td>German</td>
<td>21</td>
<td>1.2</td>
<td>0.4</td>
<td>Similar</td>
</tr>
<tr>
<td>Setswana</td>
<td>18</td>
<td>1.1</td>
<td>0.2</td>
<td>Similar</td>
</tr>
<tr>
<td>English</td>
<td>16</td>
<td>0.9</td>
<td>1.4</td>
<td>Similar</td>
</tr>
<tr>
<td>Rukwangali</td>
<td>7</td>
<td>0.4</td>
<td>15.0</td>
<td>Lower</td>
</tr>
<tr>
<td>Silozi</td>
<td>4</td>
<td>0.2</td>
<td>Counted under other</td>
<td>–</td>
</tr>
<tr>
<td>Other / language group unclear</td>
<td>204</td>
<td>11.9</td>
<td>7.1**</td>
<td>–</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>1,711</td>
<td>100.0</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>


** Includes Khoisan and Caprivi languages, and other European and other African languages.

Many of the recommendations in this report relate to the need for increased awareness about the law on maintenance. The differences in the language spoken by the complainants can be used to identify the languages to prioritise for educational materials. We recommend that educational materials should be produced in Oshiwambo and Damara/Nama to support complainants who most commonly make maintenance complaints. We also recommend that materials should be produced in Rukwangali to ensure that people from this language group are aware of how to apply for maintenance. The LAC has previously produced simplified materials on maintenance in a number of indigenous languages and these materials could be updated, reproduced and translated as necessary.

\(^{51}\) Id at 146.
It is interesting to look at the data for the Windhoek court alone, given that due to in-migration and urbanisation, a wide range of cultural groups reside in Windhoek. This means that the pattern of language groups of complainants in Windhoek may indicate that some cultural groups are more or less likely to claim maintenance. However, the data shows that there is no difference in the distribution of the language groups accessing the maintenance court than in the national sample, although the differences between the different groups is slightly smaller.

Table 32: Language group of complainants – Windhoek court only

<table>
<thead>
<tr>
<th>Language group of complainant</th>
<th>Number</th>
<th>Percentage of Windhoek sample (242)</th>
<th>Percentage of overall sample</th>
</tr>
</thead>
<tbody>
<tr>
<td>Oshiwambo</td>
<td>67</td>
<td>27.7</td>
<td>31.1</td>
</tr>
<tr>
<td>Damara/Nama</td>
<td>63</td>
<td>26.0</td>
<td>30.2</td>
</tr>
<tr>
<td>Afrikaans</td>
<td>36</td>
<td>14.9</td>
<td>15.0</td>
</tr>
<tr>
<td>Otjiherero</td>
<td>24</td>
<td>9.9</td>
<td>7.9</td>
</tr>
<tr>
<td>German</td>
<td>11</td>
<td>4.5</td>
<td>1.2</td>
</tr>
<tr>
<td>Setswana</td>
<td>8</td>
<td>3.3</td>
<td>1.1</td>
</tr>
<tr>
<td>English</td>
<td>7</td>
<td>2.9</td>
<td>0.9</td>
</tr>
<tr>
<td>Rukwangali</td>
<td>4</td>
<td>1.7</td>
<td>0.4</td>
</tr>
<tr>
<td>Silozi</td>
<td>0</td>
<td>0</td>
<td>0.2</td>
</tr>
<tr>
<td>Other / language group unclear</td>
<td>22</td>
<td>9.1</td>
<td>11.9</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>242</td>
<td>100.0</td>
<td>100.0</td>
</tr>
</tbody>
</table>

Residence in a rural versus urban area

The vast majority of maintenance complaints (1 235/1 446; 85.4%; data missing for 265 complaints) were made by people living in urban areas. The remainder were made by people living in rural areas (211/1 446; 14.6%).

As discussed in section 7.1, distance to the nearest magistrate’s court is a relevant factor in terms of accessing maintenance payments in many regions. This factor probably helps to explain why the majority of applications for maintenance are made by people living in urban areas. The majority of people who apply for maintenance do so because they have insufficient money to meet the day-to-day costs of caring for their child. People living in rural areas may be unlikely to have the money needed to travel to the nearest court to apply for maintenance. The maintenance officer in Eenhana made such a comment, saying that the number of maintenance applications is low in his court because mothers cannot find the money to come to court to make the application.

A further problem, cited in a report on Namibia’s justice sector, is that “[t]he distribution of courts in Namibia is not geographically balanced, leading to limited physical access to justice depending on which part of the country one resides in. Courts are mainly found in areas with high concentrations of economic activity. This anomaly is partly addressed through the system of circuiting Regional and High Courts.” Unfortunately, as regional magistrates’ courts are not maintenance courts, the circuit courts do not provide a solution in this instance.

52 Categorisation into larger urban, smaller urban or rural areas is based on the designation of urban centres as per the preliminary results for the 2011 census (National Planning Commission, Namibia 2011 Population and Housing Census Preliminary Results, Windhoek, Namibia: National Planning Commission, 2012 at 57).


The Legal Assistance Centre study on the operation of the Combating of Domestic Violence Act reported a similar rural/urban divide to that identified in this study. The report states that the vast majority of protection order applications (92%) come from people living in urban areas. The report suggests that this is probably because of lower public awareness in rural areas and difficulty in accessing courts. Several key informants interviewed for the study also said that this may be because rural people are more likely to seek help from community elders or traditional leaders in terms of customary law. Similar reasons are applicable for maintenance complaints.

Given the scarcity of maintenance order applications by rural dwellers, we recommend that the Ministry of Justice and other stakeholders hold information sessions on the law in rural areas, to discuss specific obstacles to utilisation of the law with rural communities and to involve traditional leaders in popularising the law.

The 1995 study did not assess the residence maintenance complainants.

### 8.6 Income, assets and expenditure of complainant

#### Income and assets of complainant

Form A requires the complainant to complete information about his or her income, assets and expenditure. (See Form A excerpt on the next two pages.)

However, this information was only provided in a small minority of cases. Some files contained separate information about the income, assets and expenditure of the complainant. The finding that so few cases contained details of the complainant's income is a matter of concern as the court should be using such information to determine the amount of maintenance that should be paid. Although the information may be discussed orally, given that maintenance cases take some months to be concluded and are often amended in years to come, it is important that the files contain an appropriate record of the process followed in determining the amount of maintenance that should be paid. The 2004 study on the South African Maintenance Act similarly found that very few applications contained information about the complainant's income. The 1995 maintenance study did not assess the income or assets of the complainant as this was not recorded in detail on the forms in use at that stage.

We recommend that the Ministry of Justice consider the development of guidelines or a revision of the regulations to clarify the procedure for opening a maintenance complaint and comparing information on income and expenditure. Supervisory personnel should also be tasked to spot-check files to ensure that the guidelines are adhered to.

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55 The methodology used to analyse the data was different in the two studies (an expanded analysis was used in Seeking Safety), therefore the percentages are not directly comparable. However, both studies found that the majority of applications are made by people living in urban areas, and this trend implies that people living in rural areas have problems with accessing justice.

56 Legal Assistance Centre (LAC), Seeking Safety: Domestic Violence in Namibia and the Combating of the Domestic Violence Act 4 of 2003, Windhoek: LAC at 269.

57 The Legal Assistance Centre made a similar recommendation in respect of the Combating of Domestic Violence Act (ibid). Popularisation of the two laws would take place simultaneously.


Excerpt from Form A
Income, assets and expenditure of complainant

6. Particulars of my assets and *weekly/monthly income and expenditures (supported by documentary proof, where possible) are as follows:

<table>
<thead>
<tr>
<th>Assets</th>
<th>N$</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fixed property</td>
<td></td>
</tr>
<tr>
<td>Investments</td>
<td></td>
</tr>
<tr>
<td>Savings</td>
<td></td>
</tr>
<tr>
<td>Shares</td>
<td></td>
</tr>
<tr>
<td>Motor vehicles</td>
<td></td>
</tr>
<tr>
<td>Other:</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td>Total value of Assets</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Income</th>
<th>N$</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gross salary</td>
<td></td>
</tr>
<tr>
<td>Minus deductions:</td>
<td></td>
</tr>
<tr>
<td>Tax</td>
<td></td>
</tr>
<tr>
<td>Medical Aid</td>
<td></td>
</tr>
<tr>
<td>Pension</td>
<td></td>
</tr>
<tr>
<td>Other:</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td>Total nett salary</td>
<td></td>
</tr>
<tr>
<td>Other income (state source)</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td>Total income</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Expenditure</th>
<th>Self</th>
<th>Beneficiary(ies)</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Lodging (bond repayment/levy/rent/board)</td>
<td>N$</td>
<td>N$</td>
<td>N$</td>
</tr>
<tr>
<td>2. Food:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Groceries</td>
<td>N$</td>
<td>N$</td>
<td>N$</td>
</tr>
<tr>
<td>Meat</td>
<td>N$</td>
<td>N$</td>
<td>N$</td>
</tr>
<tr>
<td>Bread and milk</td>
<td>N$</td>
<td>N$</td>
<td>N$</td>
</tr>
<tr>
<td>Fruit and vegetables</td>
<td>N$</td>
<td>N$</td>
<td>N$</td>
</tr>
<tr>
<td>Baby food</td>
<td>N$</td>
<td>N$</td>
<td>N$</td>
</tr>
<tr>
<td>Lunches</td>
<td>N$</td>
<td>N$</td>
<td>N$</td>
</tr>
<tr>
<td>3. Household expenditure:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Water and electricity/</td>
<td>N$</td>
<td>N$</td>
<td>N$</td>
</tr>
<tr>
<td>Gas/paraffin</td>
<td>N$</td>
<td>N$</td>
<td>N$</td>
</tr>
<tr>
<td>Rates and taxes</td>
<td>N$</td>
<td>N$</td>
<td>N$</td>
</tr>
<tr>
<td>Cleaning materials</td>
<td>N$</td>
<td>N$</td>
<td>N$</td>
</tr>
<tr>
<td>Laundry/Dry-cleaning</td>
<td>N$</td>
<td>N$</td>
<td>N$</td>
</tr>
<tr>
<td>Toiletries</td>
<td>N$</td>
<td>N$</td>
<td>N$</td>
</tr>
<tr>
<td>Telephone</td>
<td>N$</td>
<td>N$</td>
<td>N$</td>
</tr>
<tr>
<td>Domestic worker</td>
<td>N$</td>
<td>N$</td>
<td>N$</td>
</tr>
<tr>
<td>Garden services</td>
<td>N$</td>
<td>N$</td>
<td>N$</td>
</tr>
<tr>
<td>Insurance (short term)</td>
<td>N$</td>
<td>N$</td>
<td>N$</td>
</tr>
<tr>
<td>4. Clothing:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Clothes and shoes</td>
<td>N$</td>
<td>N$</td>
<td>N$</td>
</tr>
<tr>
<td>School uniforms</td>
<td>N$</td>
<td>N$</td>
<td>N$</td>
</tr>
<tr>
<td>Sports clothes</td>
<td>N$</td>
<td>N$</td>
<td>N$</td>
</tr>
<tr>
<td>5. Personal care (including hair care/ cosmetics, etc.):</td>
<td>N$</td>
<td></td>
<td></td>
</tr>
<tr>
<td>6. Transport:</td>
<td>N$</td>
<td>N$</td>
<td>N$</td>
</tr>
<tr>
<td>---------------</td>
<td>----</td>
<td>----</td>
<td>----</td>
</tr>
<tr>
<td>Bus</td>
<td>N$</td>
<td>N$</td>
<td>N$</td>
</tr>
<tr>
<td>Car: Installments</td>
<td>N$</td>
<td>N$</td>
<td>N$</td>
</tr>
<tr>
<td>Maintenance</td>
<td>N$</td>
<td>N$</td>
<td>N$</td>
</tr>
<tr>
<td>Fuel</td>
<td>N$</td>
<td>N$</td>
<td>N$</td>
</tr>
<tr>
<td>Licenses</td>
<td>N$</td>
<td>N$</td>
<td>N$</td>
</tr>
<tr>
<td>Insurance</td>
<td>N$</td>
<td>N$</td>
<td>N$</td>
</tr>
<tr>
<td>Taxi</td>
<td>N$</td>
<td>N$</td>
<td>N$</td>
</tr>
<tr>
<td>Lift Club</td>
<td>N$</td>
<td>N$</td>
<td>N$</td>
</tr>
<tr>
<td>Parking</td>
<td>N$</td>
<td>N$</td>
<td>N$</td>
</tr>
<tr>
<td>Other</td>
<td>N$</td>
<td>N$</td>
<td>N$</td>
</tr>
<tr>
<td>7. Educational expenditure:</td>
<td>N$</td>
<td>N$</td>
<td>N$</td>
</tr>
<tr>
<td>School fees</td>
<td>N$</td>
<td>N$</td>
<td>N$</td>
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<tr>
<td>After school care</td>
<td>N$</td>
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<td>N$</td>
</tr>
<tr>
<td>Day care</td>
<td>N$</td>
<td>N$</td>
<td>N$</td>
</tr>
<tr>
<td>Study policy (insurance)</td>
<td>N$</td>
<td>N$</td>
<td>N$</td>
</tr>
<tr>
<td>Books</td>
<td>N$</td>
<td>N$</td>
<td>N$</td>
</tr>
<tr>
<td>Stationery</td>
<td>N$</td>
<td>N$</td>
<td>N$</td>
</tr>
<tr>
<td>Outings</td>
<td>N$</td>
<td>N$</td>
<td>N$</td>
</tr>
<tr>
<td>Sports</td>
<td>N$</td>
<td>N$</td>
<td>N$</td>
</tr>
<tr>
<td>Extramural</td>
<td>N$</td>
<td>N$</td>
<td>N$</td>
</tr>
<tr>
<td>Other school expenditure</td>
<td>N$</td>
<td>N$</td>
<td>N$</td>
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<tr>
<td>8. Medical expenditure:</td>
<td>N$</td>
<td>N$</td>
<td>N$</td>
</tr>
<tr>
<td>Doctor/dentist/etc</td>
<td>N$</td>
<td>N$</td>
<td>N$</td>
</tr>
<tr>
<td>Medication (prescription)</td>
<td>N$</td>
<td>N$</td>
<td>N$</td>
</tr>
<tr>
<td>Hospital</td>
<td>N$</td>
<td>N$</td>
<td>N$</td>
</tr>
<tr>
<td>Other medical expenditure</td>
<td>N$</td>
<td>N$</td>
<td>N$</td>
</tr>
<tr>
<td>9. Insurance:</td>
<td>N$</td>
<td>N$</td>
<td>N$</td>
</tr>
<tr>
<td>Life</td>
<td>N$</td>
<td>N$</td>
<td>N$</td>
</tr>
<tr>
<td>Annuity</td>
<td>N$</td>
<td>N$</td>
<td>N$</td>
</tr>
<tr>
<td>House owners/holders</td>
<td>N$</td>
<td>N$</td>
<td>N$</td>
</tr>
<tr>
<td>10. Pocket money/allowances:</td>
<td>N$</td>
<td>N$</td>
<td>N$</td>
</tr>
<tr>
<td>Holidays:</td>
<td>N$</td>
<td>N$</td>
<td>N$</td>
</tr>
<tr>
<td>12. Maintenance, replacement and repairs of items:</td>
<td>N$</td>
<td>N$</td>
<td>N$</td>
</tr>
<tr>
<td>House</td>
<td>N$</td>
<td>N$</td>
<td>N$</td>
</tr>
<tr>
<td>Household appliances</td>
<td>N$</td>
<td>N$</td>
<td>N$</td>
</tr>
<tr>
<td>Kitchenware</td>
<td>N$</td>
<td>N$</td>
<td>N$</td>
</tr>
<tr>
<td>Linen, towels, etc.</td>
<td>N$</td>
<td>N$</td>
<td>N$</td>
</tr>
<tr>
<td>Bicycles/bikes/scooters</td>
<td>N$</td>
<td>N$</td>
<td>N$</td>
</tr>
<tr>
<td>Other items</td>
<td>N$</td>
<td>N$</td>
<td>N$</td>
</tr>
<tr>
<td>13. Entertainment and recreation:</td>
<td>N$</td>
<td>N$</td>
<td>N$</td>
</tr>
<tr>
<td>14. Personal loans:</td>
<td>N$</td>
<td>N$</td>
<td>N$</td>
</tr>
<tr>
<td>15. Security alarm system:</td>
<td>N$</td>
<td>N$</td>
<td>N$</td>
</tr>
<tr>
<td>16. Membership fees:</td>
<td>N$</td>
<td>N$</td>
<td>N$</td>
</tr>
<tr>
<td>17. Religious contributions/charities:</td>
<td>N$</td>
<td>N$</td>
<td>N$</td>
</tr>
<tr>
<td>18. Gifts:</td>
<td>N$</td>
<td>N$</td>
<td>N$</td>
</tr>
<tr>
<td>19. TV license:</td>
<td>N$</td>
<td>N$</td>
<td>N$</td>
</tr>
<tr>
<td>20. Reading materials: Books</td>
<td>N$</td>
<td>N$</td>
<td>N$</td>
</tr>
<tr>
<td>Newspapers</td>
<td>N$</td>
<td>N$</td>
<td>N$</td>
</tr>
<tr>
<td>Periodicals</td>
<td>N$</td>
<td>N$</td>
<td>N$</td>
</tr>
<tr>
<td>21. Lease/installment sales payments: Furniture</td>
<td>N$</td>
<td>N$</td>
<td>N$</td>
</tr>
<tr>
<td>Appliances</td>
<td>N$</td>
<td>N$</td>
<td>N$</td>
</tr>
<tr>
<td>Other</td>
<td>N$</td>
<td>N$</td>
<td>N$</td>
</tr>
<tr>
<td>22. Pets: Food</td>
<td>N$</td>
<td>N$</td>
<td>N$</td>
</tr>
<tr>
<td>Veterinary surgeon</td>
<td>N$</td>
<td>N$</td>
<td>N$</td>
</tr>
<tr>
<td>Licence</td>
<td>N$</td>
<td>N$</td>
<td>N$</td>
</tr>
<tr>
<td>23. Other (not specified above):</td>
<td>N$</td>
<td>N$</td>
<td>N$</td>
</tr>
<tr>
<td><strong>Total expenditure</strong>:</td>
<td>N$</td>
<td>N$</td>
<td>N$</td>
</tr>
</tbody>
</table>
Details of gross income were recorded in 156 files, net income in 68 files and total income in 102 files. Due to the wide range of data reported in this section, the median is the most representative average to use to analyse the data. The median gross income was N$1 000 per month (range N$80-N$24 000). The median net income was N$1 259 per month (range N$300-N$19 175). The median total income was N$813 (range N$80-N$19 175). The range of income is fairly large, which suggests that people from a range of economic brackets are applying for maintenance. However, the median shows that the majority of applicants are from low-income brackets.

According to the 2009/2010 Namibia Household Income and Expenditure Survey, the average annual household income in Namibia is N$68 878 (N$5 740 per month).61 Female-headed households report an average annual household income of N$48 663 (N$4 055), whilst male-headed households have an average annual income of N$64 141 (N$5 345 per month).62 Our study reports that the median gross monthly income for complainants is N$1 000. This is approximately one-quarter of the national average monthly income for female-headed households. This average income for complainants is based on a very small sample and so must be treated with caution, but it suggests that the maintenance court is typically utilised by people at the lower end of the income spectrum.

| Table 34: Income of complainant (N$) |
|-------------------------------|------------------|----------|----------|----------|
| Income            | Number | Median | Mean  | Minimum | Maximum |
| Gross             | 156    | 1 000  | 2 002 | 80      | 24 000  |
| Net               | 68     | 1 259  | 2 112 | 300     | 19 175  |
| Total*            | 102    | 813    | 1 436 | 80      | 19 175  |

* Total income is where gross/net income details were not provided separately.

Only 34 cases included information on assets and 27 of these reported the value of these assets. The type of assets recorded included property, shares and investments, savings, motor vehicles, household goods and insurance policies. Although the median value of the assets is reported, it must be treated with caution due to the extremely small sample size. The median value was N$5 000 (range N$100-N$105 000). The large range in the size of assets owned by complainants, like the range of income, shows that people from a range of economic brackets are applying for maintenance.

| Table 35: Assets owned by complainant |
|--------------------------------------|------------------|
| Type of asset                        | Number of applications where recorded* |
| Fixed property                       | 24               |
| Shares and investments               | 3                |
| Shares                               | 2                |
| Motor vehicles                       | 5                |
| Other (household goods,             | 11               |
| insurance policies, rental income)   |                  |

* Total is greater than 27 because complainants reported more than one type of asset.

Expenditure of complainant

Whilst information on expenditure was completed more often than details of income or assets, it was still only completed in a minority of applications (232/1 711; 13.6%).

The median estimated monthly expenditure was N$1 158 in total. When analysed separately, this figure was N$1 170 for complainants and N$715 for beneficiaries. The most commonly reported forms of expenditure were food, household expenses, educational expenses and medical expenses. Interestingly the cost of accommodation was reported in only one in five of the applications where details of expenditure were recorded (52/232; 22.4%). Other expenses such as gifts, entertainment, security and membership fees were listed in a minority of applications.

Some files contained supplementary information about expenditure. For example, one file contained letters from the principals of the children’s schools, stating that the children were attending the school.

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62 Ibid.
and detailing the cost of the School Development Fund (for three children attending the primary school N$200 each per year, and N$380 for the child attending junior secondary school). Another file from the same court contained a letter from the child’s school stating that learners would be sent home if payment for the SDF remained in arrears. A file at another court stated that the children (in Grades 3 and 5) were attending the school and the parent owed N$21 and N$30 respectively for the children. Although payment of the SDF has been abolished at state primary schools as of 2013, parents may continue to incur education-related costs such as payments for school uniforms, stationery and the child’s participation in extra-curricular activities.

### Table 36: Expenditure of complainant (N$)

<table>
<thead>
<tr>
<th>Expenditure*</th>
<th>Number</th>
<th>Median</th>
<th>Mean</th>
<th>Minimum</th>
<th>Maximum</th>
</tr>
</thead>
<tbody>
<tr>
<td>Food (total)</td>
<td>232</td>
<td>400</td>
<td>569</td>
<td>40</td>
<td>4000</td>
</tr>
<tr>
<td>Food (complainant)</td>
<td>85</td>
<td>400</td>
<td>641</td>
<td>35</td>
<td>3600</td>
</tr>
<tr>
<td>Food (beneficiary)</td>
<td>148</td>
<td>300</td>
<td>421</td>
<td>31</td>
<td>3976</td>
</tr>
<tr>
<td>Household expenses (total)</td>
<td>174</td>
<td>300</td>
<td>504</td>
<td>10</td>
<td>9700</td>
</tr>
<tr>
<td>Household expenses (complainant)</td>
<td>76</td>
<td>371</td>
<td>624</td>
<td>10</td>
<td>9700</td>
</tr>
<tr>
<td>Household expenses (beneficiary)</td>
<td>97</td>
<td>200</td>
<td>265</td>
<td>0</td>
<td>1800</td>
</tr>
<tr>
<td>Educational expenditure (total)</td>
<td>165</td>
<td>280</td>
<td>427</td>
<td>13</td>
<td>3125</td>
</tr>
<tr>
<td>Educational expenditure (complainant)</td>
<td>36</td>
<td>325</td>
<td>453</td>
<td>0</td>
<td>1980</td>
</tr>
<tr>
<td>Educational expenditure (beneficiary)</td>
<td>131</td>
<td>240</td>
<td>399</td>
<td>0</td>
<td>3125</td>
</tr>
<tr>
<td>Medical expenditure (total)</td>
<td>130</td>
<td>53</td>
<td>148</td>
<td>4</td>
<td>2636</td>
</tr>
<tr>
<td>Medical expenditure (complainant)</td>
<td>40</td>
<td>90</td>
<td>183</td>
<td>8</td>
<td>1625</td>
</tr>
<tr>
<td>Medical expenditure (beneficiary)</td>
<td>90</td>
<td>60</td>
<td>135</td>
<td>4</td>
<td>1346</td>
</tr>
<tr>
<td>Accommodation (total)</td>
<td>52</td>
<td>400</td>
<td>5486</td>
<td>80</td>
<td>231460</td>
</tr>
<tr>
<td>Accommodation (complainant)</td>
<td>34</td>
<td>470</td>
<td>8153</td>
<td>140</td>
<td>231460</td>
</tr>
<tr>
<td>Accommodation (beneficiary)</td>
<td>17</td>
<td>250</td>
<td>336</td>
<td>0</td>
<td>2000</td>
</tr>
<tr>
<td>Other expenses (total)</td>
<td>21</td>
<td>430</td>
<td>1000</td>
<td>50</td>
<td>7075</td>
</tr>
<tr>
<td>Other expenses (complainant)</td>
<td>10</td>
<td>650</td>
<td>1514</td>
<td>0</td>
<td>5850</td>
</tr>
<tr>
<td>Other expenses (beneficiary)</td>
<td>15</td>
<td>281</td>
<td>374</td>
<td>50</td>
<td>1175</td>
</tr>
<tr>
<td>Total (total)</td>
<td>262</td>
<td>1158</td>
<td>2237</td>
<td>8</td>
<td>44210</td>
</tr>
<tr>
<td>Total (complainant)</td>
<td>77</td>
<td>1170</td>
<td>2817</td>
<td>70</td>
<td>44210</td>
</tr>
<tr>
<td>Total (beneficiary)</td>
<td>169</td>
<td>715</td>
<td>1204</td>
<td>8</td>
<td>15533</td>
</tr>
</tbody>
</table>

* The total expenditure is calculated by adding together the expenditure for the complainant and the beneficiary. However, in some applications, only a combined expenditure was recorded for the complainant and beneficiary/ies. This has been included in the total expenditure. Therefore sub-categories do not always add up to the total expenditure.

The relationship between income and expenditure seems to be a realistic reflection of the overall cost of living in Namibia; it also shows that income and expenditure are not far apart. The median gross income was N$1000 per month and the median total estimated expenditure was N$1158. According to the 2009/2010 Namibia Household Income and Expenditure Survey, female-headed households have an average annual household income of N$48663 (N$4055.25 per month) and an annual consumption of N$46474 (N$3872 per month). Male-headed households have an average household average annual income of N$64141 (N$5345 per month) and an annual consumption of N$79586 (N$6632 per month). The fact that income and expenditure in all these assessments are so close together demonstrates how maintenance payments can be important for survival.

Although the majority of estimated expenditures appear realistic, some amounts do appear to be unusual. Some complainants stated that they spent a very low amount on food per month for themselves (N$35) or for the beneficiary (N$31), although it is possible that some of these may be cases where the complainant grows the majority of the family’s food or where food is supplied by extended family members. At the other end of the scale, one complainant claimed that she spent N$3976 per month on food for one beneficiary.

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63 Id at 125 and 134.
Many of the court officials commented that completing the expenses section on the maintenance complaint form is problematic as the section is complicated, time-consuming and unnecessary. As one maintenance officer explained, “the forms are complicated when it comes to expenditure. The women aren’t employed and their husbands have irregular jobs, so income and expenditure can be difficult to calculate.” Another maintenance officer said that complainants can be unrealistic when making their claims, explaining that some complainants say they buy clothes for their children every month, something he did not believe to be true. However, the maintenance officer noted that as the form only allows for monthly expenses, there is nowhere else to record the irregular payments. One magistrate said that some women may exaggerate issues if the defendant has been unfaithful in their relationship. The maintenance officer from another court said that they do not ask for supporting documents because this delays the process and often the parties do not have the necessary receipts, particularly when the expenses are for payments that may only be made irregularly.

In light of the fact that few files contained detailed information about the financial position of the complainant, and the fact that the forms are complicated to complete, we recommend that the Ministry of Justice consider revising the method for collecting information on income, assets and expenditure of parties in respect of maintenance complaints.

The 1995 maintenance study did not assess the expenses of the complainant as again there was little information recorded in the files.64

**Summary of the profile of complainants**

- Almost all maintenance complaints were made by one of the parents of the beneficiaries, usually by the mother of the child. Fewer than 1% of maintenance complaints were made by fathers.
- The majority of complainants were between the ages of 18 and 39 at the time of the complaint. Only 1.3% of maintenance complaints were made by children seeking maintenance for themselves.
- More maintenance complainants were made by children seeking maintenance for themselves than by fathers applying for maintenance, although the difference is very small (18 versus 11).
- Approximately one-third of the complainants were Oshiwambo speakers and another third were Damara/Nama speakers. Approximately one-sixth were Afrikaans speakers and one-twelfth were Ovambo speakers. The proportions of language groups are similar to the proportion of language speakers in the entire population, although it seems that Afrikaans speakers are slightly more likely to claim maintenance than others, while Rukwangali speakers are much less likely to claim maintenance.
- The vast majority of maintenance complaints were made by people living in urban areas.
- The median income for the complainant ranged between N$813 and N$1 259.
- The median total estimated expenditure was N$1 158 (N$1 170 for complainants and N$715 for beneficiaries).

### 8.7 Amount of maintenance requested

Form A allows the complainant to request a specific amount of maintenance. This section was completed in the majority of complaints (1 391/1 687; 82.5%; information missing from 24 complaints). As discussed in section 8.3, the majority of maintenance applications were made for one beneficiary, therefore the median amount of maintenance requested does not have to be adjusted for the number of beneficiaries. The median amount of maintenance requested for beneficiaries, excluding beneficiary-complainants, was N$500 (mean N$584; range N$50-N$7 000). The amount of maintenance requested per beneficiary is discussed later in this section.

---

Excerpt from Form A, section 1

Maintenance complaint

5. I request that the defendant be ordered to make the following contribution(s) towards maintenance:

(a) A weekly/monthly contribution of –

<table>
<thead>
<tr>
<th>N$</th>
<th>Name of Beneficiary</th>
</tr>
</thead>
<tbody>
<tr>
<td>N$</td>
<td>In respect of myself (complainant)</td>
</tr>
<tr>
<td>N$</td>
<td>In respect of</td>
</tr>
<tr>
<td>N$</td>
<td>In respect of</td>
</tr>
<tr>
<td>[…]</td>
<td>[…]</td>
</tr>
</tbody>
</table>

(b) The first payment should be made on ......................... and after that on or before the .......... day of each succeeding *week/month. All payments should be made to ........................................................................................................................

and/or

(c) Other contributions (for example medical and dental costs, school fees, fees to tertiary institutions, school clothes, expenses for sport and/or cultural activities, birth expenses and maintenance for beneficiary(ies) from birth):

...........................................................................................................................

...........................................................................................................................

As discussed in section 8.6, the total median expenditure was N$1 158. This means that the amount of maintenance requested is approximately half of the estimated expenditure of caring for the beneficiary. However, the sample sizes for the two pieces of data is very different: 1 375 for the requested maintenance, compared to 232 for expenditure. Therefore the comparison must be treated with caution.

The complainant requested an amount of maintenance for himself or herself in 157 applications, although data was available on the amount of maintenance requested for only 109 of these applications. The median amount of maintenance requested for the complainant alone was N$500 (mean N$805; range N$100-N$4 000). As discussed, the estimated expenditure on the complainant is N$1 170. Therefore the amount of maintenance requested for the complainant is also approximately half of the estimated expenses. In this instance the sample sizes are more comparable: 109 for the requested maintenance, compared to 77 for expenditure.

The median amount of maintenance requested for child complainant-beneficiaries was N$425 (mean N$521; n=14). This is slightly less than the median and mean for other child beneficiaries. However, the two sample sizes vary widely: 14 for the amount requested by child-complainants, compared to 1 375 for the amount requested for all child beneficiaries. Therefore the comparison must be treated with caution.

The amount of maintenance requested can also be compared with the amount of maintenance that the defendant has previously provided. The median amount of maintenance requested (N$500) is not substantially higher than the median amount of maintenance previously provided (N$300; see section 8.14). However, again this comparison should be treated with caution as the amount of maintenance previously provided is calculated from a small subset of the files (74 compared to 1 375).

In the 1995 maintenance study, the median total amount of maintenance applied for was N$150 (mean N$187; range N$20-N$1 100). The median amount of maintenance requested per child was N$100 (mean N$135; range N$8-N$100). Changes in the value of maintenance payments, considering factors such as inflation, are discussed on page 165.

65 Id at 69.
Maintenance payments should not be based on minimal subsistence levels, but on the standard of living of the members of the family in question.\textsuperscript{66} However, comparison to minimal subsistence levels can give an indication of the reality of the amount of maintenance applied for or provided. The 1995 maintenance study cited a report which calculated the amount of money needed to meet most basic daily subsistence requirements in 1992 as N$115 for an adult, N$86 (75\%) for a child aged 6-15 and N$58 (50\%) for a child aged 0-5.\textsuperscript{67} The majority of beneficiaries in the 1995 study were of pre-school age and the median amount of maintenance requested per child was N$100 – this is just slightly more than the basic subsistence level.\textsuperscript{68}

According to the 2008 Review of Poverty and Inequality in Namibia, for 2003/04, people were defined as poor if they subsisted on less than N$262 per day and severely poor if they subsisted on N$185 per day. As of 2009/10, the poverty line (calculated using a more refined methodology) was N$377.96.\textsuperscript{69} Given that our sample assessed files from 2005-08, the poverty line will have been a midpoint between these two figures (N$319.98). Using the same calculations as cited in the 1995 study (ie assuming that the amount of money needed for a child aged 0-5 is 50\% of that needed for an adult), the minimal amount of money needed for a child in this age bracket is N$159.99. The median amount of maintenance requested in this study is N$500 – approximately three times the estimated poverty level for a child. This is a positive finding for the wellbeing of children. Although the methodologies used to calculate subsistence in the underlying reference documents are different, the difference between the poverty level and the amount of money requested for maintenance appears to be increasing over time. This suggests that maintenance complainants are providing children with more than the absolute bare necessities. However, as discussed in the following section, this finding must be considered in the context of the cost of living.

\begin{quote}
"I'm a 19 year-old lady with a kid of 1 year 9 months. The father stopped sending money since he was only 3 months old. I don't know what to do."
\end{quote}

Text message sent to the Legal Assistance Centre

\textsuperscript{66} Case law on this issue has been codified in the Maintenance Act 9 of 2003, section 16(3)(c): “Where the beneficiary is a child, the court must also have particular regard to ... the manner in which the beneficiary is being, and in which his or her parents reasonably expect him or her to be, educated or trained.”


\textsuperscript{68} D Hubbard, Maintenance: A Study of the Operation of Namibia’s Maintenance Courts, Windhoek: Legal Assistance Centre, 1995 at 66.

\textsuperscript{69} The poverty line is set by computing the cost of a food basket which enables a household to meet a minimum nutritional requirement, and then adding an allowance for the consumption of basic non-food items. This is because, whilst having sufficient resources in the household to meet food requirements is critical, it is not enough to classify a household as poor or non-poor. This, in turn, is because households that can afford to meet the food requirements of all members but lack resources to purchase clothing and shelter, for example, should be considered deprived in a very basic sense.

The food poverty line was calculated by assessing the monetary value of a minimum nutritional intake of 2100 kilocalories in a low-income household based on available prices, taking into account regional price differences (N$127).

Two approaches to estimating the non-food components of the poverty line were used in the analysis. In the first approach, non-food expenditure is calculated from actual expenditure on non-food items by households where food expenditure is approximately equal to the food poverty line. This component is then added to the food poverty line. In the second approach, non-food expenditure is calculated from actual non-food expenditure of households whose total expenditure is equal to the food poverty line. Similarly, this component is then added to the food poverty line. The rationale for the latter, more austere approach is that if these households are able to obtain a minimum food basket but choose to divert resources to buy non-food items, then the household must clearly view these items as essential.

The choice of this poverty line differs to those used in previous national poverty reports. Previously, the official poverty line was defined using the relative share of food expenditure to total expenditure of households. A household was considered “poor” if food expenditure made up 60\% or more of total expenditure. The household was classified as “severely poor” if food expenditure made up 80\% or more of total expenditure.

The method used to define poverty was changed for a number of reasons, including methodological problems. According to the report, the new method of determining the poverty line is used widely in the SADC region and in developing countries more generally.

### Table 37: Amount of maintenance applied for (N$)

<table>
<thead>
<tr>
<th>Beneficiary</th>
<th>Number*</th>
<th>Median</th>
<th>Mean</th>
<th>Minimum</th>
<th>Maximum</th>
</tr>
</thead>
<tbody>
<tr>
<td>Complainant only</td>
<td>109</td>
<td>500</td>
<td>805</td>
<td>100</td>
<td>4 000</td>
</tr>
<tr>
<td>Complainant only; complainant under age 21</td>
<td>14</td>
<td>425</td>
<td>521</td>
<td>100</td>
<td>1 300</td>
</tr>
<tr>
<td>Beneficiaries excluding complainant</td>
<td>1 375</td>
<td>500</td>
<td>584</td>
<td>50</td>
<td>7 000</td>
</tr>
<tr>
<td>All applications</td>
<td>1 471</td>
<td>500</td>
<td>632</td>
<td>50</td>
<td>10 000</td>
</tr>
<tr>
<td>1995 maintenance study; per beneficiary</td>
<td>Not reported</td>
<td>Not reported</td>
<td>135</td>
<td>8</td>
<td>1 000</td>
</tr>
</tbody>
</table>

* The number of applications used to calculate the average amount of maintenance requested for the complainant alone added to the number of applications used to calculate the average amount of maintenance requested for beneficiaries alone does not equal the number of applications used to calculate the average amount of maintenance for all beneficiaries. This is because in some cases the amount of maintenance for the complainant or beneficiaries alone could not be determined.

### Chart 21: Median amount of maintenance requested versus expenditure (N$)

Let us sit together and discuss everyone’s income and expenses. Maybe then you will be able to agree on how to share the costs of the things your children need.

### Chart 22: Median income and expenditure of the complainant and amount of maintenance requested (N$)

Amount of maintenance requested over time

The median amount of maintenance requested did not change over the four years that files were sampled. This is despite the fact that inflation increased over the same time period. In contrast, between 1988 and 1993 the median amount of maintenance requested did increase slightly. Therefore, whilst the amount of maintenance requested between 2005 and 2008 is above the poverty level, it is not keeping pace with inflation, which means that the impact of the maintenance payments decreases with time.

### Table 38: Median amount of maintenance requested for all beneficiaries analysed by year 2005-08 (N$)

<table>
<thead>
<tr>
<th>Year</th>
<th>Valid Number*</th>
<th>Median</th>
<th>Inflation**</th>
<th>Minimum</th>
<th>Maximum</th>
</tr>
</thead>
<tbody>
<tr>
<td>2005</td>
<td>334</td>
<td>500</td>
<td>2.2</td>
<td>150</td>
<td>4 000</td>
</tr>
<tr>
<td>2006</td>
<td>375</td>
<td>500</td>
<td>5.1</td>
<td>150</td>
<td>7 500</td>
</tr>
<tr>
<td>2007</td>
<td>383</td>
<td>500</td>
<td>6.7</td>
<td>50</td>
<td>10 000</td>
</tr>
<tr>
<td>2008</td>
<td>379</td>
<td>500</td>
<td>10.3</td>
<td>100</td>
<td>6 500</td>
</tr>
<tr>
<td>Total</td>
<td>1 471</td>
<td>500</td>
<td>–</td>
<td>50</td>
<td>10 000</td>
</tr>
</tbody>
</table>

* The numbers do not amount to 1 711 because some information is missing for each year.

Table 39: Median amount of maintenance requested for all beneficiaries analysed by year 1988–93 (N$)

<table>
<thead>
<tr>
<th>Year</th>
<th>Valid Number</th>
<th>Median</th>
<th>Inflation*</th>
<th>Minimum</th>
<th>Maximum</th>
</tr>
</thead>
<tbody>
<tr>
<td>1988</td>
<td>Not reported</td>
<td>100</td>
<td>12.9</td>
<td>30</td>
<td>600</td>
</tr>
<tr>
<td>1989</td>
<td>100</td>
<td>15.1</td>
<td>30</td>
<td>780</td>
<td></td>
</tr>
<tr>
<td>1990</td>
<td>150</td>
<td>12.0</td>
<td>30</td>
<td>1 000</td>
<td></td>
</tr>
<tr>
<td>1991</td>
<td>150</td>
<td>11.9</td>
<td>20</td>
<td>500</td>
<td></td>
</tr>
<tr>
<td>1992</td>
<td>165</td>
<td>17.7</td>
<td>50</td>
<td>1 100</td>
<td></td>
</tr>
<tr>
<td>1993</td>
<td>200</td>
<td>8.5</td>
<td>50</td>
<td>750</td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>150</td>
<td>–</td>
<td>20</td>
<td>1 100</td>
<td></td>
</tr>
</tbody>
</table>


The change over time should also be assessed according to the dynamic economic profile of Namibia. For example, the National Statistics Agency reports that average monthly expenditure has increased over time since 1993/94 from N$556.21 to N$1 288.07 in 2009/10 (with expenditure adjusted for 2009/10 prices).\(^70\)

**Is the amount of maintenance applied for realistic?**

Maintenance is intended to be used for basic living expenses such as housing, food, clothing, medicine and school expenses. The Maintenance Act states that the persons legally liable to maintain a child must provide “reasonable” support for the child. One purpose of the maintenance enquiry is to determine what constitutes reasonable support.

At one of the focus group discussions, the participants were told a basic fictional story about a woman applying for maintenance:

*Grace’s child is six years old. She has never been to the maintenance courts before even though Lucas [the child’s father] has never paid maintenance.*

The participants were asked to say whether her maintenance complaint was successful and whether she received the amount of maintenance that she requested, although no specific amount of money was specified. The female participants stated that she would receive a maintenance order but that the amount ordered would be less than requested.

The Legal Assistance Centre asked the court officials whether they think the complainants ask for too little, too much, or the right amount of maintenance. The overall response was that the complainants often ask for more money than the defendant will be able to provide but this does not necessarily mean that the request is unrealistic. As one magistrate explained, the request “is often justified [but the] means of the father [are] not sufficient usually”. Some of the court officials felt that the complainants sometimes apply for an inflated amount of maintenance: “Sometimes women are unreasonable, when the man can't afford and they refuse to negotiate. Then I have to make clear that we are not there to bash on the guy; if he can't afford it, I will explain that to her; I will recommend an amount that I think is reasonable.” Another court official explained, “It depends on the type of job that the defendant does – if the complainant is trying to claim $600 from a goat-herd, I will know if they are trying to ask for too much.” An ex-court official felt that people sometimes see maintenance complainants as a type of bargaining exercise – the complainant will request an amount higher than she expects to get in anticipation of the amount being lowered during negotiations. However one maintenance officer was of the opposite opinion, explaining that the complainants sometimes apply for too little maintenance: “Women more often don’t really know how much they need; N$200 seems like a lot in a lump but isn’t really sufficient to feed a child for a month.” This analysis of the situation appears to be relevant to many of the applications.

\(^70\) Prices are calculated as average monthly expenditure per capita. This takes into account differences in household size and composition. (Namibia Statistics Agency (NSA), Poverty Dynamics in Namibia, Windhoek: NSA, 2012 at 8.)
One clerk explained the concept of a reasonable amount as one where the defendant will sign a consent maintenance order rather than ask for a hearing. We are concerned by this definition as the request for a reasonable amount should be based on the needs of the child and the ability of the defendant to provide this sum, rather than an estimation of an amount that will not cause conflict between the complainant and defendant, or result in a formal enquiry which will be a longer process. But one challenge in determining a reasonable amount of maintenance is balancing the needs of the child with the timeline of the process.

The 2004 study on the South African Maintenance Act also noted that some complainants request an inflated amount of maintenance whilst others request only very low amounts of money because they are unable to accurately estimate the financial needs of their children. This study also noted that some complainants are unwilling to accept that the defendant cannot provide the requested amount of maintenance, whilst in other cases the defendants offer unreasonably low amounts of maintenance.71

### Amount of maintenance requested per beneficiary

The maintenance complaints can also be analysed to assess the amount of maintenance claimed per beneficiary by dividing the total amount of maintenance by the number of beneficiaries. The results show that the more beneficiaries there are, the lower the amount of maintenance requested per beneficiary. This is not surprising given that there may be some economies of scale, such as where several children share one house or can hand clothes down from older to younger children.

The 1995 study did not analyse the data in this manner.

<table>
<thead>
<tr>
<th>Number of beneficiaries (excluding complainant)</th>
<th>Number</th>
<th>Median</th>
<th>Mean</th>
<th>Minimum</th>
<th>Maximum</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>951</td>
<td>400</td>
<td>484</td>
<td>50</td>
<td>6500</td>
</tr>
<tr>
<td>2</td>
<td>289</td>
<td>300</td>
<td>364</td>
<td>75</td>
<td>3500</td>
</tr>
<tr>
<td>3</td>
<td>79</td>
<td>200</td>
<td>279</td>
<td>33</td>
<td>1167</td>
</tr>
<tr>
<td>4</td>
<td>30</td>
<td>200</td>
<td>257</td>
<td>50</td>
<td>750</td>
</tr>
<tr>
<td>5</td>
<td>11</td>
<td>300</td>
<td>265</td>
<td>100</td>
<td>500</td>
</tr>
<tr>
<td>6</td>
<td>9</td>
<td>200</td>
<td>271</td>
<td>33</td>
<td>700</td>
</tr>
<tr>
<td>7</td>
<td>4</td>
<td>175</td>
<td>166</td>
<td>57</td>
<td>257</td>
</tr>
<tr>
<td>8</td>
<td>2</td>
<td>63</td>
<td>63</td>
<td>25</td>
<td>100</td>
</tr>
</tbody>
</table>

**Chart 23:** Median amount of maintenance requested per beneficiary
(total amount of maintenance divided by number of beneficiaries)

---

**Amount of maintenance requested by rural/urban residence**

The amount of maintenance requested can also be analysed by rural/urban residence.\(^{72}\) The results show that there is very little difference, despite the fact that there are more people living in poverty in rural than in urban areas.\(^{73}\) However, the proportion of people living in smaller urban or rural areas represents only one-fifth of the complainants (22.4%). Therefore we cannot draw any conclusions from this information.

### Table 41: Amount of maintenance requested by rural/urban residence of the complainant for all beneficiaries (N$)

<table>
<thead>
<tr>
<th>Rural/urban residence</th>
<th>Number</th>
<th>Median</th>
<th>Mean</th>
<th>Minimum</th>
<th>Maximum</th>
</tr>
</thead>
<tbody>
<tr>
<td>Larger urban areas</td>
<td>1 042</td>
<td>500</td>
<td>670</td>
<td>100</td>
<td>10 000</td>
</tr>
<tr>
<td>Smaller urban areas</td>
<td>103</td>
<td>400</td>
<td>519</td>
<td>150</td>
<td>4 000</td>
</tr>
<tr>
<td>Rural areas</td>
<td>198</td>
<td>500</td>
<td>542</td>
<td>100</td>
<td>3 000</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>1 343</strong></td>
<td><strong>500</strong></td>
<td><strong>639</strong></td>
<td><strong>100</strong></td>
<td><strong>10 000</strong></td>
</tr>
</tbody>
</table>

**Amount of maintenance requested by language group**

The amount of maintenance requested can also be analysed by language group. However there is very little variation when analysed in this way.

This is despite the fact that the poverty profile of Namibia shows that 68% of Khoisan speakers and 53.7% of Rukwangali speakers are poor. This is compared to 6.9% of Afrikaans people who are poor. Analysed by region, 55.2% of people in Kavango Region and 50.2% of people in Caprivi Region live in poverty, compared to 7.1% of people in Erongo Region and 10.7% of people in Khomas Region.\(^{74}\)

The amount of maintenance requested by language group can also be assessed per beneficiary. However again there is little difference (and there is only a small sample size for some of the groups).

### 8.8 Requests for special forms of maintenance

#### 8.8.1 Requests for contributions in kind

The option to make an order for maintenance in kind was an innovation of the 2003 Maintenance Act. It states that “a maintenance order may direct that payment be made in kind by specified goods or livestock, for all or some portion of the settlement of amounts already owing or the future payment of instalments”.\(^{75}\) The purpose of this provision is to provide a remedy in instances where the defendant is able to provide support for the child but cannot provide this support as a financial contribution. Payments in kind can also be used to supplement a financial order. For example, a farmer may be able to provide food rather than financial support and a salaried worker who may only be able to provide a small amount of financial support can include the child on a medical aid scheme that is part of the package of employment. The need for in-kind options is relevant, as according to the 2009/2010 Namibia Household Income and Expenditure Survey, whilst the main source of income in Namibia is salaries/wages (49.2% of the households), the second most common source of income is subsistence farming (28.1% of households). However, Form A does not

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\(^{72}\) Categorisation into larger urban, smaller urban or rural areas is based on the designation of urban centres as per the preliminary results for the 2011 census (National Planning Commission, *Namibia 2011 Population and Housing Census Preliminary Results*, Windhoek, Namibia: National Planning Commission, 2012 at 57).

\(^{73}\) A total of 14.6% of people in rural areas live in poverty compared to 37.4% of people in rural areas (Namibia Statistics Agency (NSA), *Poverty Dynamics in Namibia*, Windhoek: NSA, 2012 at 13).


\(^{75}\) Maintenance Act 9 of 2003, section 17(4).
clearly provide a space for suggesting in-kind payments, so complainants may not understand that this option is available.76

A minority of requests contained an application for payments in kind (1/1 711; 0.01%) or for in-kind payments and specified financial payments (a further 53 files; 53/1 711; 3.1%). There is some ambiguity between in-kind and specified payments as the details on file are not always clear. For example, a request for clothes could mean clothes or money for clothes.

### 8.8.2 Requests for specified payments to third parties

The Maintenance Act also envisages that a maintenance order “may specify that all or part of contributions made under the order be made to a specific person or institution for a purpose specified in the order”.77 Form A focuses primarily on this possibility in the section on “other contributions”, giving examples of medical and dental costs, school fees, fees to tertiary institutions, school clothes, expenses for sport and/or cultural activities, birth expenses and maintenance for beneficiary/ies from birth. The option of direct payment is useful because if the money is paid as part of the maintenance order, the complainant may have competing uses for the money.

Only a minority of requests contained an application for specified financial payments (67/1 711; 3.9%).

There were 79 requests for the payment of medical expenses. It is likely that the majority of these were for the defendant to add the beneficiary to his or her medical aid scheme. A local study which sampled data from households in the greater Windhoek area in 2006 reported that in the poorest consumption quintile, only 5.27% of people were enrolled in a medical aid fund compared to 69.14% in the wealthiest quintile.78 Given this contextual information, it is not surprising that there were few requests for this option.

One reason for the small number of such requests may be that complainants are confused about what they can request under this section. **We recommend that the explanation of other contributions on Form A be revised to make it clearer what can be requested here. Form A should also include a separate section for requesting contributions in kind** The small number of applications for other forms of maintenance could also be due to the fact that some court officials do not like to facilitate alternative forms of payment because of problems that complainants report in accessing them.

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77 Id, section 17(2)(e).

8.8.3 Pregnancy and birth-related expenses

The Maintenance Act allows for maintenance orders to be made for the payment of pregnancy and birth-related expenses such as medical and hospital expenses incurred by the mother:

If the beneficiary of a maintenance order is a child, the maintenance court may order that maintenance contributions be made to the mother of the child for expenses incurred by the mother in connection with the pregnancy and birth of the child, including but not limited to medical and hospital expenses, but a claim under this subsection must be made within 12 months from the date of birth of the child or within such other reasonable period as the court may allow on sufficient grounds shown by the mother.79

Only a very limited number of applications contained claims for pregnancy and birth-related expenses (9/1 711; 0.5%). As discussed on page 33, this may be because there appears to be some confusion about the precise meaning of the provision in the Act. Some courts appear to interpret the provision to mean that the mother may only claim these pregnancy-related expenses once the child has been born; court officials from four courts stated that they do not process complaints from pregnant women. In contrast, other courts interpret the provision to allow a pregnant woman to claim maintenance for pregnancy-related expenses; the maintenance officer at one court stated that he had processed 10-15 such cases in the last year. As discussed on page 33, it is not clear what is the correct interpretation of the Maintenance Act on this point.

Another reason why complainants seldom apply for maintenance during pregnancy may be that the defendant is unwilling to contribute towards the cost of an unborn child. For example, one clerk of court said that defendants insist on waiting until the child is born to make sure that the mothers are not faking the pregnancy. The courts should not accept this excuse as the complainant could submit a doctor’s note as proof if really necessary, for example before the pregnancy is visible. The clerk also said that the fathers will refuse to help with medical expenses in case there is a miscarriage or something goes wrong. Again this is an unfair reason not to pay maintenance and counterintuitive, as assistance with maintenance could help the mother improve her quality of health or allow her time to rest rather than working, which in turn could increase the likelihood that the pregnancy will progress safely. Another reason for there being so few applications may be that complainants do not feel that they have a moral right to apply. One community member explained that she would not apply during pregnancy as the expenses are for her rather than the unborn child. All of these responses suggest that there is a need for greater public discourse on when the duty of maintenance starts. However, whilst there is a need to increase public awareness about this option, not all people may wish to take advantage of the option; according to a magistrate at the Rundu court, “There are traditional beliefs here in the north that many people follow. If you do things without seeing the baby, the baby can die.” However, it is important that people are aware that the option to apply for maintenance during pregnancy is (at least arguably) available if they so choose.

When the Legal Assistance Centre published its comic on what to do if someone stops paying maintenance, we received a number of queries about whether claims can be made during pregnancy. Some people cited problems they had experienced at the courts when they tried to make such a complaint. In an effort to bring clarity to this issue, the LAC placed a one-page comic in The Namibian on this topic. The comic showed friends discussing the problem, with one friend explaining that it is possible to claim maintenance during pregnancy. We recommend that further awareness-raising is needed to encourage people to apply for maintenance during pregnancy. We also recommend that the Maintenance Act be clarified to remove the ambiguities on this issues, making it clear that claims for pregnancy-related expenses can be made before the child’s birth.79

79 Maintenance Act 9 of 2003, section 17(3).
and to provide for a procedure for adjustments should paternity be disproved at a later stage. Form A should also be revised accordingly.

**CASE STUDY**

**What to do if you are pregnant but do not know how to support the child**

The Legal Assistance Centre received the following email from a client:

*Hi. I need your help I’m pregnant and the baby’s father told me to abort it but I refused. Now he is denying it, I’m not working to support this baby and he is working, I want this baby but I don’t want a baby without a father. PLEASE HELP*

We told the client that she has many options. We suggested that she consider involving her family to see if they can help to mediate with the father. We also told her about her option to apply for a maintenance order, including for pregnancy-related expenses. We also gave the client information about other options such as foster care and put her in contact with counselling support.

The 1995 study also found that only a tiny number of applications were made before the child’s birth (6 cases – about 1%). The provision on pregnancy and birth-related expenses in the 2003 Maintenance Act was intended to bring clarity in this area and to encourage more women to utilise this option. However this appears not to have worked, perhaps because of the lack of clarity which remains.

**The importance of maternal health – the bigger picture**

The health of mothers is a major determinant of that of their children, and thus indirectly affects the formation of human capital. Motherless children die more frequently, are more at risk of becoming malnourished and are less likely to enrol at school. The babies of ill or undernourished pregnant women are more likely to have a low birth weight and impaired development. Low birth-weight children in turn are at greater risk of dying and of suffering from infections and growth retardation, have lower scores on cognitive tests and may be at higher risk of developing chronic diseases in adulthood.

Healthy children are at the core of the formation of human capital. Child illnesses and malnutrition reduce cognitive development and intellectual performance, school enrolment and attendance, which impairs final educational achievement. Intrauterine growth retardation and malnutrition during early childhood have long-term effects on body size and strength with implications for productivity in adulthood. In addition, with the death or illness of a woman, society loses a member whose labour and activities are essential to the life and cohesion of families and communities.

Healthy mothers have more time and are more available for the social interaction and the creation of the bonds that are the prerequisite of social capital. They also play an important social role in caring for those who are ill. The economic costs of poor maternal and child health are high; substantial savings in future expenditure are likely through family planning programmes and interventions that improve maternal and child health in the long term. Consequent gains in human and social capital translate into long-term economic benefits. There is evidence of economic returns on investment in immunization, nutrition programmes, interventions to reduce low birth weight, and integrated health and social development programmes.


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Maternal mortality in Namibia

Data shows that the maternal mortality rate in Namibia is rising (from 0.38 in 2000 to 0.52 in 2006-07). There are many possible explanations for this situation.

- Research shows that approximately 70% of women have at least four antenatal checkups during pregnancy; however this means that 30% of pregnant women in Namibia are not receiving the recommended number of checkups during their pregnancy.
- Although most women make their first antenatal visit in either their first or second trimesters (32.6% and 38.3% respectively), this also means that approximately 30% of women do not see a health care provider until their third trimester.
- Whilst a high percentage of pregnant women receive assisted deliveries by trained personnel (81.4%), approximately 20% of pregnant women give birth without assistance from a trained professional.
- Whilst free maternal health care is available, only 11.7% of women do not pay for the delivery of their child.
- Although most women receive post-natal care, approximately 20% of women do not receive any post-natal care.
- Many people in Namibia live in poor socio-economic conditions, meaning that unemployment and hunger can have adverse affects on the weakened mothers.

Research has also shown that other factors contributing towards the rising rate of maternal mortality include insufficient availability of emergency care facilities and inequitable distribution of services across the country. The high rate of HIV infection in the country is also a contributing factor, as HIV-positive mothers are more susceptible to malaria, tuberculosis and other diseases due to immunodeficiency and these diseases contribute to the increase in maternal mortality. Women also report lack of money to pay for medical treatment, or trouble accessing health care services due to the distance and need for transport, as barriers to accessing health care services.

Many of the factors contributing to maternal mortality are related to financial need. This illustrates the importance of ensuring that women can apply for maintenance when they are pregnant and ensuring that fathers understand that their obligations towards their children start during pregnancy.

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a It must be recognised that there are large sampling errors associated with the data, but in spite of this caveat, it is clear that maternal mortality has risen (Ministry of Health and Social Services (MoHSS), Namibia Demographic and Health Survey 2006-07, Windhoek: MoHSS, 2008 at 113).

b For those who paid for delivery, the cost of delivery was less than N$50 for 84.9% of the women surveyed, although 5.6% paid more than N$300. Analysis of the data shows that the younger the mother and the lower her education level, the less money she paid for delivery.

c Ministry of Health and Social Services (MoHSS), Namibia Demographic and Health Survey 2006-07, Windhoek: MoHSS, 2008 at 125.


e Ministry of Health and Social Services (MoHSS), Report on Needs Assessment for Emergency Obstetrics Care, Windhoek: MoHSS, 2006 at 87.


g Id at 128.

“I would like to know [what to do] in the case of a baby that has not yet been born. I am a month before giving birth and do not have anything for the baby yet.”

Text message sent to the Legal Assistance Centre
8.9 Timeline for when the first maintenance payment should be made

The maintenance application allows the complainant to request when the first maintenance payment should be made. This date is needed as an order does not come into force until it is served.

Excerpt from Form A, section 1

Maintenance complaint

5. I request that the defendant be ordered to make the following contribution(s) towards maintenance:

(a) A *weekly/monthly contribution of – 

[...]

(b) The first payment should be made on ..................................... and after that on or before the ............... day of each succeeding *week/month. All payments should be made 

to ............................................................................................................................ ....................................................................................

in favour of ..................................................................................................................

On average, complainants requested that maintenance payments should start approximately 58 days after their application (range 0-165 days). Given that the data shows that the median time between the application and the maintenance order is 81 days (see section 12.9; approximately 2.5 months; n=772), the requested timeline appears to be fairly realistic although somewhat ambitious.

8.10 Details of how the maintenance payments should be made and frequency of maintenance payments

The complainant may also specify whether she would like to receive maintenance on a weekly or monthly basis. This was recorded on most maintenance complaints (1095/1711; 64.0%). In all but one complaint, the request was for monthly payments. In a single case, the complainant requested weekly payments but the outcome of the complaint was not recorded in the file.

8.11 Payment to be made to and in favour of

The Maintenance Act states that a maintenance order “must specify the person to whom or organisation, financial institution or other institution to which the contributions may be made”, and “must, subject to rules or regulations made under this Act, specify the manner in which the contributions may be made”. The regulations do not contain any further details. The payment options under the Act are broader than in the 1963 Act which did not allow payments to be made directly to the beneficiary. Under the 1963 Act payments had to be made directly to the court and collected by the appropriate person.

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81 Maintenance Act 9 of 2003, section 17(2)(b)-(c).
The primary purpose of the cited provision in the 2003 Act was to allow for payments to be deposited directly in bank accounts, post office accounts, or via other such methods, to save complainants the trouble and expense of monthly trips to the court.

Details of whom the payment should be made to were completed in approximately half of the applications (819/1711; 47.9%). Although the complainant has as wide range of options, the majority of requests were for maintenance to be paid to the clerk of the court (716/819; 87.4%) followed by requests for the maintenance to be paid directly to the complainant (95/819; 11.6%). Payments were made to an organisation, financial institution or directly to the beneficiary in a minority of cases.

Some courts appeared to be unaware of the flexibility provided by the Act. For example the clerks at the Rundu and Karasburg courts both noted that people who live far from the court face challenges in terms of both cost and time when they have to pay money to or collect money from the court. The clerk of the Rundu court also stated she cannot process all the maintenance payments for complainants in a single day. However these courts do not appear to be implementing the alternative mechanisms offered by the 2003 Act. Another clerk also said that sometimes the complainants do not come to the court for some months and need to be reminded to come in. This suggests that collecting the money from the court is a burden for some complainants. The clerk at a different court said that they do not like orders for payment via bank transfers because the defendant can simply close the bank account to avoid future payments. However this point is not relevant because defendants who pay directly to the court could also just stop making these payments.

Interviews with court officials showed that some courts have developed practical solutions to the problems of payment and collection of maintenance. For example the clerk of the court in Eenhana explained that she telephones the complainants when the defendants make monthly payments because the defendants will often make payments on different days each month and it is too expensive for the complainants to travel to the court from the villages if they are not assured that the payment has been made.

Another problem appears to be when the defendant is not living in the same region as the complainant. The clerk of the Karasburg court explained that “many people work in Windhoek, and even though they make a salary it is also difficult to get the money here”, whilst another court official asked “why isn’t it possible for a defendant living in Lüderitz to make his maintenance payments to the nearest court? The delay of maintenance payments is due to having to send them across the country.” One person explained that the defendant may send the money by bank transfer to someone he knows who lives near the court, who then pays the money to the court. This seems far more labour intensive than necessary. In such situations, the courts could recommend that the defendant makes payments to the complainant’s bank account.

### Chart 25: Who should the payment be made to?

<table>
<thead>
<tr>
<th>Recipient</th>
<th>Number</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Clerk of the court</td>
<td>716</td>
<td>87.4%</td>
</tr>
<tr>
<td>Complainant</td>
<td>95</td>
<td>11.6%</td>
</tr>
<tr>
<td>Other person (relationship of person unclear)</td>
<td>3</td>
<td>0.4%</td>
</tr>
<tr>
<td>Financial institution</td>
<td>3</td>
<td>0.4%</td>
</tr>
<tr>
<td>Beneficiary</td>
<td>1</td>
<td>0.1%</td>
</tr>
<tr>
<td>Clerk of the court and beneficiary</td>
<td>1</td>
<td>0.1%</td>
</tr>
<tr>
<td>Total</td>
<td>819</td>
<td>100.0%</td>
</tr>
<tr>
<td>Missing</td>
<td>892</td>
<td>52.1%</td>
</tr>
<tr>
<td>Total</td>
<td>1711</td>
<td>100.0%</td>
</tr>
</tbody>
</table>

* It is not clear why the complainant requested both clerk and beneficiary – it is probably an error or confusion on the part of the complainant.
One clerk stated that “the payment system outlined in the new Maintenance Act must be improved”, seemingly not recognising that the Act itself is not the problem. Instead it appears to be a lack of awareness of, and confidence in, the options. The Legal Assistance Centre often hears of cases where complainants ask for the money to be paid to the court because they think that this is a more formal arrangement. However there is no hierarchy of formality or enforceability in respect of payment methods – the consequences of not making a payment into the complainant’s bank account are the same as not making a payment to the court.

Some court officials said that although they are aware of the different payment options, they prefer that payments are made to the court so that the maintenance officer can monitor them. One clerk explained that when the complainant comes to collect the money and it is not there, this triggers the court’s knowledge of a non-payment. The clerk at another court made a similar statement, saying that the court prefers to receive the money directly so that they can have a record of whether maintenance is paid, which is useful if problems arise in the future.

The Maintenance Act states that if maintenance is not paid, the complainant may apply for enforcement procedures after any payment is 10 days late. It would be less burdensome for complainants to receive maintenance directly and travel to the court only if they need to report a breach of the order, than to have to travel to the court each month to collect regular payments. Utilising direct payment methods could also free up the time of clerks for functions other than receiving and distributing maintenance payments.

Records of payments made can be provided in various ways. If the defendant makes a bank transfer, this transaction will be recorded on the bank statement of both the complainant and the defendant. If the defendant pays in cash, the court could encourage the complainant and defendant to use a simple receipt book to record the transactions. New cellphone facilities for transferring money could also be a low-cost option for making maintenance payments.

We recommend that complainants should be informed of the different payment options which are possible. Banks and other financial service providers could also be encouraged to leave public information materials at magistrates’ courts to help complainants and defendants know what options they could utilise for making payments. Secondly, when a maintenance order is made, the defendant should be clearly informed of the consequences of failing to pay maintenance regardless of the payment method, and the complainant should be clearly informed of how to report a breach of the order. We also recommend that the Ministry of Justice send a circular to the courts to confirm the different type of payment arrangements permitted under the Act and the various forms of records which can serve as acceptable proof of payments.

We posted the following question on the LAC Facebook page to gauge public opinion:

If you applied for [a] maintenance order and the court granted this order, would you prefer the other person to pay the money directly into your bank account or to the court?

One person responded that she thought payments directly to the complainant are best:

The courts are useless. Either the money will mysteriously get lost or they will never process the documentation and hold on to it for the interest for as long as possible. Rather have it put directly into my account and if payments are missed the courts should offer quick, easy, affordable and effective recourse.

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82 Although banking costs vary between banks, at one bank in Namibia (First National Bank), it costs the sender N$0.99 to transfer money to a cellphone. The recipient receives a pin number and can then withdraw the money from a First National Bank ATM at no cost. (First National Bank pricing guide for 2013/2014, available at <www.fnbnamibia.com.na/about-fnb/pricing-guide.html>, last accessed 23 September 2013)

83 The comment about the courts gaining interest from the money seems unrealistic. Most money will be held as cash in
However in contrast, another person responded that payments to the court are best:

*I would rather have him pay it to the court then it’s guaranteed that he will definitely pay.*

Discussion with community members has also shown that people perceive payments made to the court as having more “authority” and many people prefer this option, despite the fact that collecting the payments will be more of an inconvenience to them.

Although payment to the court is the most popular option, it is not without its problems. In 2012 the Legal Assistance Centre received a complaint that the Omaruru court had stopped making maintenance payments. The client informed us that the court had been unable to make maintenance payments for three months due to a broken computer.

We followed up on the complaint with the Omaruru court. The clerk at the court stated that the court was at that time unable to make maintenance payments but that it had been only for one month, not three, that payments had not been processed. The broken piece of equipment had been sent to Windhoek for repairs. The clerk noted that the machine was “worn out” and that she had requested a replacement. The court had tried to make manual payments but apparently this was incompatible with the system. The clerk anticipated that they would be able to make payments again the following week.

The LAC followed up on the story a few weeks later. The court had received a new machine. Part of the reason for this may have been the publicity that had ensued when one frustrated community member sent a text message to *The Namibian* newspaper:

> "WE, mothers from Omaruru, have been struggling without maintenance payments for four months because the computer is out of order. We are being told to wait but nothing has been done. Our children are suffering."

Published on *The Namibian* sms page on 10 August 2012

The application form also allows the complainant to specify whom the payment will be made in favour of. This is probably for situations where the payment is made to someone other than the beneficiary – for example where the payment is made to the mother or grandmother in favour of the beneficiary.

Details of whom the payment should be made in favour of were completed in only approximately half of the applications (803/1711; 46.9%). The majority of payments were to be made in favour of the beneficiary (509/803; 63.4%) or complainant (276/803; 34.4%). A few cases (13) confusingly requested payment to the complainant and the beneficiary (probably resulting from a misunderstanding of the question). Payments were made in favour of another person in only a minority of cases. Other people receiving the payments included an aunt, the mother of the child (where the complaint was made by the grandmother) and a person whose relationship was unspecified.

<table>
<thead>
<tr>
<th>Recipient</th>
<th>Number</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Beneficiary</td>
<td>509</td>
<td>63.4</td>
</tr>
<tr>
<td>Complainant</td>
<td>276</td>
<td>34.4</td>
</tr>
<tr>
<td>Complainant and beneficiary</td>
<td>13</td>
<td>1.6</td>
</tr>
<tr>
<td>Other person</td>
<td>3</td>
<td>0.4</td>
</tr>
<tr>
<td>Clerk of the Court*</td>
<td>2</td>
<td>0.2</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>803</td>
<td><strong>100.0</strong></td>
</tr>
<tr>
<td><strong>Missing</strong></td>
<td>908</td>
<td>53.1</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>1711</td>
<td><strong>100.0</strong></td>
</tr>
</tbody>
</table>

* It is not clear why clerk of the court is completed – it is probably an error or confusion on the part of the complainant.

Even if money is channelled through a bank account, the cost of running the bank account is likely to be higher than the interest received.
Summary of the amount of maintenance requested

- The median total amount of maintenance requested for one beneficiary was N$500. The amount of maintenance applied for is approximately half of the estimated expenditure required to maintain the beneficiary.
- Between 2005 and 2008 there was no change in the amount of maintenance requested despite increases in the cost of living.
- The more beneficiaries there are, the lower the amount of maintenance requested per beneficiary.
- No patterns were identified when the amount of maintenance requested was assessed by rural/urban residence or by language group.
- Very few complainants requested maintenance in the form of in-kind payments or payments directly to institutions (such as schools).
- Very few complainants made claims for contributions to pregnancy or birth-related expenses.
- All but one request was for the maintenance to be paid on a monthly basis.
- The vast majority of requests were for maintenance to be paid to the clerk of the court, meaning that other payment options intended to be more convenient for complainants are not being utilised.

8.12 Profile of defendants

The term defendant refers to the person being requested to pay maintenance.84

Relationship between defendant and beneficiary

In a large majority of complaints, the defendant was liable to maintain the beneficiary because he was the father of the child (1 199/1 264; 94.9%, data missing from 447 applications). There were a small number of files where the defendant was liable because she was the mother (26/1 264; 2.1%). The defendant was listed as the spouse, or spouse of the complainant and parent of the beneficiary, in a total of 52 applications (52/1 264; 4.1%).85

Although there were only a few cases where the defendant was the mother of the child (26), this is still a positive finding as in the 1995 study there were no maintenance complaints made by a father against a mother.86

Table 47: Defendants’ relationship to beneficiary

<table>
<thead>
<tr>
<th>Relationship</th>
<th>Number</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Father</td>
<td>1 169</td>
<td>92.5</td>
</tr>
<tr>
<td>Father and spouse</td>
<td>30</td>
<td>2.4</td>
</tr>
<tr>
<td>Mother</td>
<td>26</td>
<td>2.1</td>
</tr>
<tr>
<td>Spouse</td>
<td>22</td>
<td>1.7</td>
</tr>
<tr>
<td>Parent</td>
<td>17</td>
<td>1.3</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>1 264</td>
<td><strong>100.0</strong></td>
</tr>
</tbody>
</table>

| Missing data     | 447    | 26.1 |
| **Total**        | 1 711  | **100.0** |

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84 Maintenance Act 9 of 2003, section 1, definition of “defendant”.

85 This is in line with the finding on page 141 that there were 50 complaints where a complainant requesting maintenance for himself or herself was identified as the spouse of the defendant.

When the relationship between defendant and beneficiary is compared to that of the relationship between complainant and beneficiary, in the majority of cases both parties were the parents of the child (1030/1185; 86.0%). In 5.1% of cases, an extended family member (including a grandparent) applied for maintenance from the father (60/1185) and in 1.4% of cases, a guardian or primary caretaker applied for maintenance from the father (17/1185). Extended family members applied for maintenance from the mother of the child in 1.3% of cases (15/1185).

<table>
<thead>
<tr>
<th>Relationship between complainant and beneficiary</th>
<th>I am the mother</th>
<th>I am the grandmother</th>
<th>I am another extended family member</th>
<th>I am the father</th>
<th>I am a guardian/primary caretaker</th>
<th>Other</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Information missing for the defendant</td>
<td>22</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td></td>
<td>2</td>
</tr>
<tr>
<td>He is the father of my child</td>
<td>991</td>
<td>47</td>
<td>13</td>
<td>0</td>
<td>17</td>
<td>11</td>
<td>1079</td>
</tr>
<tr>
<td>He/she is my spouse</td>
<td>2</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>7</td>
<td>9</td>
</tr>
<tr>
<td>He is the father of my child and my spouse</td>
<td>30</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>30</td>
</tr>
<tr>
<td>She is the mother of my child</td>
<td>0</td>
<td>8</td>
<td>7</td>
<td>9</td>
<td>0</td>
<td>2</td>
<td>26</td>
</tr>
<tr>
<td>He/she is my/our parent</td>
<td>0</td>
<td>0</td>
<td>4</td>
<td>0</td>
<td>0</td>
<td>10</td>
<td>14</td>
</tr>
<tr>
<td>Total*</td>
<td>1045</td>
<td>56</td>
<td>25</td>
<td>10</td>
<td>17</td>
<td>32</td>
<td>1185</td>
</tr>
</tbody>
</table>

### Age of defendant

The majority of defendants (630/811; 77.7%; data missing from 900 applications) were between the ages of 25 and 44. The median age of the defendants was 35 (mean 36.47; range 18-65). This is a slightly older age bracket compared to the majority of complainants, who were mainly between the ages of 18 and 39. The range in the age of the defendants (18-65) is also smaller than the range in age of the complainants (12-85). This is to be expected given the fact that the defendant must be able, but failing or neglecting, to provide reasonable maintenance for the beneficiary. It is also logical in light of the fact that children are sometimes cared for by grandparents, who may become maintenance complainants.

There were seven cases where the defendant was under the age of 21 (a minor). These defendants were all 18-20 years old. A minor may be able to provide support if he has left school and is working. Alternatively, if the minor defendant is still attending school or is unemployed, the mutual duty of support that exists between parents and children can extend to other family members. For example, the grandparents could be ordered to assist.

In five of the seven cases a consent order was made. In each of these cases the defendant was working. In the two remaining cases, the outcome of the cases was not recorded in the file.

The 1995 maintenance study did not analyse the age of the defendants.

---

87 Maintenance Act 9 of 2003, section 5.
88 See page 29 for a discussion on legal liability to maintain.
### Chart 27: Age of defendant (n=811)

<table>
<thead>
<tr>
<th>Age group</th>
<th>Number</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Under 18</td>
<td>0</td>
<td>0.0%</td>
</tr>
<tr>
<td>18-24</td>
<td>39</td>
<td>4.8%</td>
</tr>
<tr>
<td>25-29</td>
<td>145</td>
<td>17.9%</td>
</tr>
<tr>
<td>30-34</td>
<td>192</td>
<td>23.7%</td>
</tr>
<tr>
<td>35-39</td>
<td>154</td>
<td>19.0%</td>
</tr>
<tr>
<td>40-44</td>
<td>139</td>
<td>17.1%</td>
</tr>
<tr>
<td>45-49</td>
<td>73</td>
<td>9.0%</td>
</tr>
<tr>
<td>50-54</td>
<td>44</td>
<td>5.4%</td>
</tr>
<tr>
<td>55-59</td>
<td>22</td>
<td>2.7%</td>
</tr>
<tr>
<td>60-64</td>
<td>2</td>
<td>0.2%</td>
</tr>
<tr>
<td>65-69</td>
<td>1</td>
<td>0.1%</td>
</tr>
<tr>
<td>Total</td>
<td>811</td>
<td>100.0%</td>
</tr>
</tbody>
</table>

### Table 49: Age of defendants (years)

<table>
<thead>
<tr>
<th>Age group</th>
<th>Number</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Under 18</td>
<td>0</td>
<td>0.0%</td>
</tr>
<tr>
<td>18-24</td>
<td>39</td>
<td>4.8%</td>
</tr>
<tr>
<td>25-29</td>
<td>145</td>
<td>17.9%</td>
</tr>
<tr>
<td>30-34</td>
<td>192</td>
<td>23.7%</td>
</tr>
<tr>
<td>35-39</td>
<td>154</td>
<td>19.0%</td>
</tr>
<tr>
<td>40-44</td>
<td>139</td>
<td>17.1%</td>
</tr>
<tr>
<td>45-49</td>
<td>73</td>
<td>9.0%</td>
</tr>
<tr>
<td>50-54</td>
<td>44</td>
<td>5.4%</td>
</tr>
<tr>
<td>55-59</td>
<td>22</td>
<td>2.7%</td>
</tr>
<tr>
<td>60-64</td>
<td>2</td>
<td>0.2%</td>
</tr>
<tr>
<td>65-69</td>
<td>1</td>
<td>0.1%</td>
</tr>
<tr>
<td>Total</td>
<td>1 711</td>
<td>100.0%</td>
</tr>
</tbody>
</table>

### Chart 28: Comparison of age of defendant (n=811) and age of complainant (n=1 382)

The vast majority of defendants in the maintenance complaints were men (1 538/1 572; 97.8%; data missing from 139 complaints), whilst only 2.2% were women (34/1 572). This is to be expected given the fact that the vast majority of complainants in maintenance order applications were women (1 540/1 570; 98.1%) and most maintenance complaints involved the child's parents. Although only a very small number of defendants were women, the fact that there were some is a positive sign that some people are aware that the law on maintenance can be utilised by either parent.

### Table 50: Sex of defendant

<table>
<thead>
<tr>
<th>Sex</th>
<th>Number</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Male</td>
<td>1 538</td>
<td>97.8%</td>
</tr>
<tr>
<td>Female</td>
<td>34</td>
<td>2.2%</td>
</tr>
<tr>
<td>Total</td>
<td>1 572</td>
<td>100.0%</td>
</tr>
<tr>
<td>Not recorded</td>
<td>139</td>
<td>8.1%</td>
</tr>
<tr>
<td>Total</td>
<td>1 711</td>
<td>100.0%</td>
</tr>
</tbody>
</table>

---

90 On page 177, the data shows that we can confirm that the mother was the defendant in 26 cases. The relationship to the beneficiary was not specified in the remaining eight cases – the defendant could have been the mother, an extended family member or a guardian of the child.
The 1995 maintenance study did not analyse the sex of the defendant. However the report showed that all maintenance complaints were brought by women.91 From this we can infer that all defendants were probably men given that most maintenance complaints involve the child’s parents, who have the primary duty of support for the child. Therefore there has been a positive change in the increase in understanding in the years between the two studies. This change may also stem from an increase in the number of men who may have custody of their children.

Language group

As stated on page 153, analysis of the language group of the complainant and defendant is based on their surname and as a result the analysis must be treated with caution.

The results for the language group of the defendant are very similar to the language group of the complainant, both when assessed by all courts and when assessed for the files opened in the Windhoek court only.

The results show that nearly 40% of defendants were Oshiwambo speakers and approximately 25% Damara/Nama speakers. Approximately one-seventh were Afrikaans speakers and one-twelfth were Otjiherero speakers. The remaining language groups (German, Setswana, English, Rukwangali and Silozi) were identified in only a minority of files (each in less than 2% of the files). In 12.5% of the files we were unable to determine the language spoken by the defendant. The proportional differences between language groups are similar to the proportion of language speakers in the entire population, although as seen with complainants, Afrikaans speakers seem slightly more likely to be involved in maintenance cases (constituting 13.1% of the defendants compared to representing 7.2% of the population) and Rukwangali speakers less likely (constituting only 0.8% of defendants but representing 15% of the population). Further discussion on the pattern of language groups is provided under the language groups of the complainants.

Table 51: Language group of defendant and complainant

<table>
<thead>
<tr>
<th>Language group</th>
<th>Number – defendant</th>
<th>Percentage</th>
<th>Number – complainant</th>
<th>Percentage</th>
<th>Percentage in the population*</th>
<th>Is the sample higher or lower than the general population distribution?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Oshiwambo</td>
<td>597</td>
<td>34.9</td>
<td>532</td>
<td>31.1</td>
<td>48.3</td>
<td>Higher</td>
</tr>
<tr>
<td>Damara/Nama</td>
<td>458</td>
<td>26.8</td>
<td>517</td>
<td>30.2</td>
<td>11.8</td>
<td>Lower</td>
</tr>
<tr>
<td>Afrikaans</td>
<td>224</td>
<td>13.1</td>
<td>256</td>
<td>15.0</td>
<td>7.2</td>
<td>Higher</td>
</tr>
<tr>
<td>Otjiherero</td>
<td>145</td>
<td>8.5</td>
<td>136</td>
<td>7.9</td>
<td>8.4</td>
<td>Similar</td>
</tr>
<tr>
<td>German</td>
<td>21</td>
<td>1.2</td>
<td>21</td>
<td>1.2</td>
<td>0.4</td>
<td>Similar</td>
</tr>
<tr>
<td>Setswana</td>
<td>19</td>
<td>1.1</td>
<td>18</td>
<td>1.1</td>
<td>0.2</td>
<td>Similar</td>
</tr>
<tr>
<td>English</td>
<td>17</td>
<td>1.0</td>
<td>16</td>
<td>0.9</td>
<td>1.4</td>
<td>Similar</td>
</tr>
<tr>
<td>Rukwangali</td>
<td>14</td>
<td>0.8</td>
<td>7</td>
<td>0.4</td>
<td>15.0</td>
<td>Lower</td>
</tr>
<tr>
<td>Silozi</td>
<td>2</td>
<td>0.1</td>
<td>4</td>
<td>0.2</td>
<td>Combined under other</td>
<td>–</td>
</tr>
<tr>
<td>Other/ language group unclear / information missing</td>
<td>214</td>
<td>12.5</td>
<td>204</td>
<td>11.9</td>
<td>7.1**</td>
<td>–</td>
</tr>
</tbody>
</table>

Total 1 711 100.0 1 711 100.0

** Includes Khoisan and Caprivi languages, and other European and other African languages.

The language spoken by the complainant can be compared with the language spoken by the defendant. Overall the majority of complainants and defendants in each case were of the same language group (1 066/1 492; 71.4%). This finding is not surprising given that the complainants and defendants were most often the child’s parents and intimate relationships often occur between members of the same language group.92 The same-language relationship was highest for complaints made by Oshiwambo-speaking complainants (454/525; 86.5%) and lowest for complaints made by English-speaking complainants (4/16; 25.0%). In approximately one-third of cases (426/1 492; 28.6%) the complainant and defendant were from a different language group. However this information must be treated with an even higher degree of caution due to the small sample sizes for some language groups (such as English). In many cases the parents may also have been bi- or multi-lingual. To avoid misleading results, cases where the language group of the complainant or defendant is missing have been removed from this analysis.

The 1995 maintenance study also noted similar language group distribution between complainants and defendants. Afrikaans-speaking respondents were involved in 31% of all cases followed closely by Damara/Nama-speaking respondents who were involved in 30% of all cases. Oshiwambo speakers were respondents in only 18% of all cases, whilst Herero speakers were respondents in only 7% of all cases and Rukavango speakers were respondents in only 5% of all cases. As in the case of complainants, there were few English speakers or German speakers amongst the respondents in the sample.93

### Table 52: Language group of defendant – Windhoek court only

<table>
<thead>
<tr>
<th>Language group</th>
<th>Number – defendant</th>
<th>Percentage</th>
<th>Number – complainant</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Oshiwambo</td>
<td>86</td>
<td>35.5</td>
<td>67</td>
<td>27.7</td>
</tr>
<tr>
<td>Damara/Nama</td>
<td>64</td>
<td>26.4</td>
<td>63</td>
<td>26.0</td>
</tr>
<tr>
<td>Afrikaans</td>
<td>25</td>
<td>10.3</td>
<td>36</td>
<td>14.9</td>
</tr>
<tr>
<td>Otjiherero</td>
<td>18</td>
<td>7.4</td>
<td>24</td>
<td>9.9</td>
</tr>
<tr>
<td>Rukwangali</td>
<td>9</td>
<td>3.7</td>
<td>4</td>
<td>1.7</td>
</tr>
<tr>
<td>German</td>
<td>7</td>
<td>2.9</td>
<td>11</td>
<td>4.5</td>
</tr>
<tr>
<td>English</td>
<td>7</td>
<td>2.9</td>
<td>7</td>
<td>2.9</td>
</tr>
<tr>
<td>Setswana</td>
<td>6</td>
<td>2.5</td>
<td>8</td>
<td>3.3</td>
</tr>
<tr>
<td>Silozi</td>
<td>0</td>
<td>0.0</td>
<td>0</td>
<td>0.0</td>
</tr>
<tr>
<td>Language group unclear / information missing</td>
<td>20</td>
<td>8.3</td>
<td>22</td>
<td>9.1</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>242</strong></td>
<td><strong>100.0</strong></td>
<td><strong>242</strong></td>
<td><strong>100.0</strong></td>
</tr>
</tbody>
</table>

*Cases where the language group of the complainant or defendant is missing have been removed.

92 A similar pattern was found in the Legal Assistance Centre's domestic violence study (Legal Assistance Centre (LAC) Seeking Safety: Domestic Violence in Namibia and the Combating of the Domestic Violence Act 4 of 2003, Windhoek: LAC at 285).

The amount of maintenance requested by the complainant can be assessed by the language group of the defendants. The results show that the amounts requested do vary between language groups, but the sample size is very small for some groups – such as Setswana or Silozi-speaking defendants. This means that we cannot draw conclusions from this data.

Table 54: Amount of maintenance requested by defendant’s language group for all beneficiaries (N$)

<table>
<thead>
<tr>
<th>Language group</th>
<th>Number</th>
<th>Median</th>
<th>Mean</th>
<th>Minimum</th>
<th>Maximum</th>
</tr>
</thead>
<tbody>
<tr>
<td>Afrikaans</td>
<td>206</td>
<td>600</td>
<td>874</td>
<td>100</td>
<td>10 000</td>
</tr>
<tr>
<td>Damara/Nama</td>
<td>422</td>
<td>400</td>
<td>554</td>
<td>100</td>
<td>5 000</td>
</tr>
<tr>
<td>English</td>
<td>8</td>
<td>325</td>
<td>356</td>
<td>100</td>
<td>750</td>
</tr>
<tr>
<td>German</td>
<td>11</td>
<td>400</td>
<td>810</td>
<td>200</td>
<td>2 655</td>
</tr>
<tr>
<td>Oshiwambo</td>
<td>368</td>
<td>250</td>
<td>295</td>
<td>50</td>
<td>2 000</td>
</tr>
<tr>
<td>Otjiherero</td>
<td>73</td>
<td>250</td>
<td>295</td>
<td>50</td>
<td>2 000</td>
</tr>
<tr>
<td>Rukwangali</td>
<td>19</td>
<td>250</td>
<td>288</td>
<td>50</td>
<td>500</td>
</tr>
<tr>
<td>Setswana</td>
<td>16</td>
<td>215</td>
<td>288</td>
<td>50</td>
<td>750</td>
</tr>
<tr>
<td>Silozi</td>
<td>3</td>
<td>250</td>
<td>200</td>
<td>100</td>
<td>250</td>
</tr>
<tr>
<td>Other / language group unclear</td>
<td>73</td>
<td>500</td>
<td>664</td>
<td>150</td>
<td>4 000</td>
</tr>
</tbody>
</table>

The amount of maintenance requested by language group can also be assessed per beneficiary. However again there is little difference and there is only a small sample size for some of the groups.

Residence in a rural versus urban area

The majority of respondents (1 279/1 404; 91.1%) lived in urban areas. This is similar to the residence of the majority of complainants (85.4%). The rest of the respondents (8.9%) lived in rural areas, as did 14.6% of complainants. One defendant was recorded as living in South Africa. In this case, a maintenance order was successfully obtained under the Reciprocal Enforcement of Maintenance Orders Act 3 of 1995. The law on maintenance across international borders is discussed on page 95.

Chart 30: Residence of defendant (n=1 404)

The 1995 study did not assess the residence patterns of the parties to the maintenance complaints.

Table 55: Defendants’ place of residence: urban or rural area

<table>
<thead>
<tr>
<th>Defendants’ place of residence</th>
<th>Number</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Larger urban area</td>
<td>1 143</td>
<td>81.4</td>
</tr>
<tr>
<td>Smaller urban area</td>
<td>136</td>
<td>9.7</td>
</tr>
<tr>
<td>Rural area</td>
<td>125</td>
<td>8.9</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>1 404</td>
<td>100.0</td>
</tr>
<tr>
<td>Missing</td>
<td>307</td>
<td>17.9</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>1 711</td>
<td>100.0</td>
</tr>
</tbody>
</table>

The analysis of the data shows that the defendant and complainant live in the same town or village in approximately 40% of cases (37.8%). In a similar proportion of applications (39.6%), the complainant and defendant live in a different town or village. Data is missing for the remaining cases. The high proportion of cases where the complainant and defendant live in different places may explain why it is so common for the courts to struggle to locate the defendant and to secure his attendance at court. This factor could also point to difficulties for defendants who are required to make payments into a court which may be different from the one which made the maintenance order.

94 Categorisation into larger urban, smaller urban or rural areas is based on the designation of urban centres as per the preliminary results for the 2011 census (National Planning Commission, Namibia 2011 Population and Housing Census Preliminary Results, Windhoek, Namibia: National Planning Commission, 2012 at 57).

The amount of maintenance requested by the complainant can also be assessed according to whether the defendant was residing in a rural or urban area. The results show that there is little difference.

### Table 57: Amount of maintenance requested by rural/urban residence of defendant for all beneficiaries (N$)

<table>
<thead>
<tr>
<th>Rural/urban residence</th>
<th>Number</th>
<th>Median</th>
<th>Mean</th>
<th>Minimum</th>
<th>Maximum</th>
</tr>
</thead>
<tbody>
<tr>
<td>Larger urban areas</td>
<td>1 065</td>
<td>500</td>
<td>664</td>
<td>100</td>
<td>10 000</td>
</tr>
<tr>
<td>Smaller urban areas</td>
<td>124</td>
<td>400</td>
<td>579</td>
<td>100</td>
<td>4 000</td>
</tr>
<tr>
<td>Rural areas</td>
<td>118</td>
<td>400</td>
<td>497</td>
<td>100</td>
<td>6 500</td>
</tr>
</tbody>
</table>

#### 8.13 Income, assets and expenditure of defendant

##### Income and assets of defendant

As with details of the complainants’ income, assets and expenditure, details of the defendants’ income, assets and expenditure were recorded in only a minority of files. As for complainants, this information was collated both from the relevant section on the application form and from details contained within the file. Therefore this information is not based only on the information provided by the complainant on the initial maintenance complaint; it may also include information provided by the defendant at a later stage. Although there may be some errors in the information provided, particularly if the information was provided only by the complainant, it is the information used by the court to review the application. As noted in the section about the complainant, the fact that so few cases contained details of the defendant’s financial position is a matter of concern as the court should be using such information to determine the amount of maintenance that should be imposed. We recommend that the Ministry of Justice consider the development of guidelines or a revision of the regulations to clarify the procedure for investigating the defendant’s financial position. Supervisory personnel should also be tasked to spot-check files to ensure that this practice is adhered to.

Details of gross income were recorded in 101 files, net income in 157 files and total income in 10 files. The median gross income was N$2 640 per month (range of N$250-N$45 546). The median net income was N$1 784 per month (range of N$112-N$28 666). The median total income was N$3 472 (range N$250-N$12 428). There was one case where the complainant stated that the defendant had a monthly income of N$350 000. The complainant stated that the defendant owned four businesses, three cars and three houses. She estimated that he was earning N$15 000–N$20 000 per day. The file shows that the defendant was ordered to pay N$2 655 per month. The file also contains a note to say that the defendant agreed to give the complainant one of his businesses in lieu of maintenance.
Table 58: Income of defendant (N$)

<table>
<thead>
<tr>
<th>Income</th>
<th>Number</th>
<th>Median</th>
<th>Mean</th>
<th>Minimum</th>
<th>Maximum</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gross</td>
<td>100</td>
<td>2,570</td>
<td>4,004</td>
<td>250</td>
<td>45,546</td>
</tr>
<tr>
<td>Net</td>
<td>157</td>
<td>1,784</td>
<td>2,500</td>
<td>112</td>
<td>28,666</td>
</tr>
<tr>
<td>Total*</td>
<td>10</td>
<td>2,901</td>
<td>3,472</td>
<td>250</td>
<td>12,428</td>
</tr>
</tbody>
</table>

* Total income is where gross/net income details were not provided separately.

The gross income of the complainant and defendant can be compared as the data was collected from a similar number of files, but the numbers of files for net and total income are too varied to allow for a realistic comparison. The comparison of gross income shows that the median income of the defendant is approximately twice the median income of the complainant. It should be noted that although the data can be compared, the sample size is small. Further discussion on national patterns for income and expenditure is provided under the analysis of the complainants' income and expenditure.

Table 59: Gross income of complainant and defendant (N$)

<table>
<thead>
<tr>
<th>Gross income</th>
<th>Number</th>
<th>Median</th>
<th>Mean</th>
<th>Minimum</th>
<th>Maximum</th>
</tr>
</thead>
<tbody>
<tr>
<td>Complainant</td>
<td>158</td>
<td>1,000</td>
<td>1,984</td>
<td>60</td>
<td>24,000</td>
</tr>
<tr>
<td>Defendant</td>
<td>100</td>
<td>2,570</td>
<td>4,004</td>
<td>250</td>
<td>45,546</td>
</tr>
</tbody>
</table>

Details of the defendant’s expenditure were found in only a minority of the files (37/1,711; 2.2%). Therefore analysis of this information would provide an unrealistic picture. The lack of information of the defendant’s expenditure is a matter of concern, particularly since defendants may have a legal liability to support children of different mothers.

8.14 Support previously provided by defendant

Form A requires the complainant to state whether the defendant has provided maintenance in the past, and if so, when the payments ceased. This information is required because the Maintenance Act states that for an order to be made, the defendant must be failing to provide maintenance and the complainant must confirm this under oath. If the defendant has provided maintenance in the past, the complainant must give this information to the court.96

Excerpt from Form A, section 1

**Maintenance complaint**

4. The defendant has since ...................................................... not supported *myself/the said beneficiary(ies) and has made *no contribution towards maintenance/the following contribution towards maintenance:

Defendants had previously provided maintenance in only approximately 15% of complaints (245/1,711; 14.3%). Where this information was recorded, complainants reported one to three forms of support.

---

96 The complainant must confirm under oath or affirmation that the person against whom the complaint is made is legally liable to maintain the beneficiary but is failing to do so, or, if the complaint pertains to an existing order, that there is sufficient cause for the suspension, substitution or discharge of the existing order (Maintenance Act 9 of 2003, section 9(2)).
The support provided was most commonly unspecified support since the child’s birth (n=123), followed by money (n=74) and unspecified support on several occasions only when asked (n=30).

In the applications where previous financial support was quantified (n=74), the median amount provided was N$300 (range N$50-N$1 600). Thus the median amount of maintenance previously provided is 60% of the median amount of maintenance applied for (N$500).

Of the defendants who had previously paid maintenance (n=245), there was a large range in the time periods when the payments had last been made. Approximately one-third had paid within the last year (74/239; 31.0%), but one-fifth had last provided maintenance 5-10 years ago (53/239; 22.2%). Some 15% had not provided maintenance for over 10 years (37/239; 15.5%).

Overall the median time in months between the application and the date maintenance was last paid was two years (28.0 months; mean 55.5 months, range 0-214 months). In the case where maintenance was last paid 214 months ago (nearly 18 years previously), there were no details in the file other than that the defendant had not paid maintenance since the child’s birth. The mother made the complaint in March and a consent order was signed in November of the same year.

The results suggest that complainants do not rush to court to access maintenance payments. This is in line with discussion throughout this report which suggests that many complainants would prefer to provide for the child themselves, if they were able to. The reality appears to be that the complainant tries to provide for the child for as long as possible and then applies for maintenance when she can no longer manage on her own. More awareness-raising is needed to encourage people that it is acceptable to apply for maintenance – mothers who struggle in the interim may not be acting in the best interests of their children. It is also important that people are able to associate the concept of maintenance with meeting the needs of the child and not with the idea that it is used to punish an absentee father.

**Table 60: Support previously provided by defendant**

<table>
<thead>
<tr>
<th>Type of support</th>
<th>Number</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Support since child’s birth</td>
<td>123</td>
<td>46.9</td>
</tr>
<tr>
<td>Money</td>
<td>74</td>
<td>28.2</td>
</tr>
<tr>
<td>Only when asked several times</td>
<td>30</td>
<td>11.5</td>
</tr>
<tr>
<td>Clothing</td>
<td>13</td>
<td>5.0</td>
</tr>
<tr>
<td>Food</td>
<td>8</td>
<td>3.1</td>
</tr>
<tr>
<td>Medical aid</td>
<td>6</td>
<td>2.3</td>
</tr>
<tr>
<td>Support for 3/6/7 months</td>
<td>4</td>
<td>1.5</td>
</tr>
<tr>
<td>School-related expenses</td>
<td>3</td>
<td>1.1</td>
</tr>
<tr>
<td>Since pregnancy</td>
<td>1</td>
<td>0.4</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>262</strong></td>
<td>100.0</td>
</tr>
</tbody>
</table>

*Multiple responses possible

**Table 61: Support previously provided by defendant**

<table>
<thead>
<tr>
<th>Type of support</th>
<th>First form of support listed</th>
<th>Second form of support listed</th>
<th>Third form of support listed</th>
</tr>
</thead>
<tbody>
<tr>
<td>Support since child’s birth</td>
<td>122</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Money</td>
<td>71</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>Only when asked several times</td>
<td>26</td>
<td>4</td>
<td></td>
</tr>
<tr>
<td>Clothing</td>
<td>8</td>
<td>4</td>
<td>1</td>
</tr>
<tr>
<td>Support for 3/6/7 months</td>
<td>4</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Medical aid</td>
<td>3</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>Food</td>
<td>2</td>
<td>5</td>
<td>1</td>
</tr>
<tr>
<td>Since pregnancy</td>
<td>1</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td><strong>Subtotal</strong></td>
<td><strong>237</strong></td>
<td><strong>22</strong></td>
<td><strong>3</strong></td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>262</strong></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Table 62: Time between date maintenance was last paid and application**

<table>
<thead>
<tr>
<th>Period when maintenance was last paid</th>
<th>Number</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>0-12 months ago</td>
<td>74</td>
<td>31.0</td>
</tr>
<tr>
<td>1-2 years ago</td>
<td>39</td>
<td>16.3</td>
</tr>
<tr>
<td>2-3 years ago</td>
<td>14</td>
<td>5.9</td>
</tr>
<tr>
<td>3-5 years ago</td>
<td>22</td>
<td>9.2</td>
</tr>
<tr>
<td>5-10 years ago</td>
<td>53</td>
<td>22.2</td>
</tr>
<tr>
<td>+10 years ago</td>
<td>37</td>
<td>15.5</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>239</strong></td>
<td><strong>100.0</strong></td>
</tr>
</tbody>
</table>
Table 63: Time between date maintenance was last paid and application (days)

<table>
<thead>
<tr>
<th>Number</th>
<th>Median</th>
<th>Mean</th>
<th>Minimum</th>
<th>Maximum</th>
</tr>
</thead>
<tbody>
<tr>
<td>239</td>
<td>26</td>
<td>54.2</td>
<td>0</td>
<td>214</td>
</tr>
</tbody>
</table>

Summary of the profile of the defendant

- In the vast majority of complaints, the defendant was the father of the child.
- The majority of defendants were between the ages of 25 and 44.
- The results show that nearly 40% of defendants were Oshiwambo speakers and approximately 25% Damara/Nama speakers. Approximately one-seventh were Afrikaans speakers and one-twelfth were Otjiherero speakers. This essentially mirrors the language group pattern of the complainants.
- The majority of defendants live in urban areas. Approximately 40% live in the same town or village as the complainant.
- The defendant had previously provided maintenance in approximately 15% of the applications, with contributions typically having ceased two years or longer before the complainant applied for maintenance.
When a maintenance complaint is made, the maintenance officer must investigate the case.\(^1\) During the investigation process, the maintenance officer may, among other tasks, cause any person, including the defendant or complainant, to be directed to appear before that maintenance officer and to give information or produce any book, document, statement or other relevant information.\(^2\) Form C1A is used to direct the relevant person to attend court.

The maintenance officer may also ask the magistrate to issue a summons for the complainant, defendant or witness to attend the court to assist with the investigation. A witness can be summoned in this instance for the purpose of identifying the defendant or the defendant’s place of residence or employment, or to give information about the defendant’s financial position.\(^3\) In addition to the option to summon witnesses for the investigation, the maintenance officer must summon any person, including the complainant and the defendant, to the court to give evidence as required.\(^4\) The summoning of a witness for a maintenance enquiry must be done in the same manner as the summoning of a witness to attend a criminal trial in a magistrate’s court.\(^5\)

---

**The difference between a summons and a directive**

A directive can be issued by a maintenance officer, whereas only a magistrate can issue a summons. However, both a directive and a summons must be obeyed. The punishment for ignoring a directive could be a fine of up to N$2 000 or imprisonment for up to six months,\(^a\) and the punishment for ignoring a summons is a fine of up to N$4 000 or imprisonment for up to 12 months.\(^b\)

---

\(^1\) Maintenance Act 9 of 2003, section 9(4).
\(^2\) Id, section 10(1)(a).
\(^3\) Id, section 11(1). The difference between the use of a directive versus a summons for the purpose of investigation by the maintenance officer are discussed in section 4.3.2.
\(^4\) Id, section 12(1).
\(^5\) Id, section 12(3). The Minister of Justice may also prescribe the manner in which the process of the maintenance court is prepared and served, and the form of the summons used under this Act (section 12(4)). See Maintenance Regulations, regulations 4 and 28.
\(^b\) Maintenance Act 9 of 2003, section 36. However, some courts do not seem to be utilising this provision. For example, at one court, if the defendant does not respond to the summons, the clerk will telephone the defendant in the first month, send a warning letter in the second month, and only in the third month go to the prosecutor for a warrant of arrest.
9.1 Directives to appear before the maintenance officer

Excerpt from Form C1A

**Directive to attend a maintenance enquiry**

In the maintenance inquiry between

............................................................................................................................... ............................................................................................................................... (complainant)

and

............................................................................................................................... ............................................................................................................................... (defendant)

Name of person: ............................................................................................................... ....................................................................................

ID No/Date of birth: .......................................................................................................... ...................................................................................

Work address: ................................................................................................................. .......................................................................................

Home address: ................................................................................................................

You are hereby summoned to appear in person before the maintenance officer at the abovementioned court at 9h00 to:

(a) give evidence and/or

(b) produce the following *book/s *documents/*material (* delete whichever is inapplicable)

If you fail to comply with this directive, you commit an offence and are liable on conviction to a fine of up to N$2000, or to imprisonment up to six months, or to both fine and imprisonment.

[…]

---

**Summary of differences between directives and summonses**

<table>
<thead>
<tr>
<th>Directive (section 10)</th>
<th>Summons (section 11)</th>
</tr>
</thead>
<tbody>
<tr>
<td>issued by maintenance officer</td>
<td>issued by magistrate</td>
</tr>
<tr>
<td>method of communication not clear</td>
<td>formal service of process</td>
</tr>
<tr>
<td>can direct appearance before maintenance officer</td>
<td>can direct appearance for examination by maintenance officer or to give evidence in court</td>
</tr>
<tr>
<td>penalty for non-compliance</td>
<td>stiffer penalty for non-compliance</td>
</tr>
<tr>
<td>no exemption for complainant and defendant from criminal offence of failing to comply with directive to appear before a maintenance officer</td>
<td>complainant and defendant exempted from the criminal offence of failing to comply with a summons to attend a maintenance enquiry</td>
</tr>
<tr>
<td>no provision for providing information by some other means</td>
<td>appearance can be excused if information provided in advance</td>
</tr>
<tr>
<td>no reference to Criminal Procedure Act 51 of 1977; travel expenses may not be claimed</td>
<td>selected provisions of Criminal Procedure Act 51 of 1977 apply, including provision on travel expenses</td>
</tr>
<tr>
<td>no mechanism for consenting to requested maintenance</td>
<td>mechanism for consenting to requested maintenance</td>
</tr>
</tbody>
</table>

“… the difficulties with the operation of the maintenance system … – which imposes disproportionately heavy burdens on mothers – undermines the achievement of the foundational value of gender equality …”

S v Visser 2004 (1) SACR 393 (SCA) (referring to failings in the South African maintenance system similar to those in Namibia)
A small minority of the files contained a C1A form directing someone to appear before the maintenance officer and to give information or produce relevant information (122/1687; 7.2%). Most files contained one (93/122; 76.2%) or two (21/122; 17.2%) directives. A small number of files contained three, four or five directives, resulting in a total of 164 directives being included in the sample.

Table 64: Number of directives on file

<table>
<thead>
<tr>
<th>Number of directives on file</th>
<th>Number of files containing a directive</th>
<th>Number of forms</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>93</td>
<td>93</td>
<td>76.2%</td>
</tr>
<tr>
<td>2</td>
<td>21</td>
<td>42</td>
<td>17.2%</td>
</tr>
<tr>
<td>3</td>
<td>5</td>
<td>15</td>
<td>4.1%</td>
</tr>
<tr>
<td>4</td>
<td>1</td>
<td>4</td>
<td>0.8%</td>
</tr>
<tr>
<td>5</td>
<td>2</td>
<td>10</td>
<td>1.6%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>122</strong></td>
<td><strong>164</strong></td>
<td><strong>100.0%</strong></td>
</tr>
</tbody>
</table>

Directives were issued at five of the 18 courts in the sample. The majority (125/164; 76.2%) were issued from the Keetmanshoop court. A small percentage were issued from the Gobabis court (36/164; 22.0%). At the Katutura, Otavi and Keetmanshoop courts we sampled one file that each contained one directive.

The majority of directives were issued to the defendant (127/139; 91.4%; information missing from 25 directives). The remainder were issued to the complainant (11/139; 7.9%), and in one case to an employer.

Table 65: Person summoned using a directive to attend the maintenance court (Form C1A)

<table>
<thead>
<tr>
<th>Person</th>
<th>Frequency</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Defendant</td>
<td>127</td>
<td>91.4%</td>
</tr>
<tr>
<td>Complainant</td>
<td>11</td>
<td>7.9%</td>
</tr>
<tr>
<td>Employer</td>
<td>1</td>
<td>0.7%</td>
</tr>
<tr>
<td>Total</td>
<td>139</td>
<td>100.0%</td>
</tr>
<tr>
<td>Missing</td>
<td>25</td>
<td>15.2%</td>
</tr>
<tr>
<td>Total</td>
<td>164</td>
<td>100.0%</td>
</tr>
</tbody>
</table>

Form C1A allows the maintenance officer to request the witness to give evidence and/or produce books, documents or material. Approximately a third of the directives issued contained details of the information that the witness should bring (45/164; 27.4%). All of the directives containing this information were issued from the Keetmanshoop court – the persons collecting the data noted that the court printed the message “Please bring your latest pay slip and expenditures” on the bottom of the forms. On the form directed to the employer, the employer was requested to bring proof to the court as to why he/she was not implementing an order for the attachment of wages.

The median time between the date on which the directive was signed by the maintenance officer and the date on which the person was required to attend court was 43 days (mean 42.4 days). As this form does not require a formal return of service, we cannot analyse how long it took for the witness to receive it. The timeline is similar to that for the delivery of summonses (see page 196), and appears to be a realistic estimation of the time taken to investigate cases.

Given that few courts use this form, and that the forms are only partially completed when they are used, we recommend that the Ministry of Justice provide training for maintenance court officials on when it is appropriate to use a directive and how to complete the form. Of particular relevance is clarification of when a directive should be addressed to the defendant/complainant compared to the use of a summons.
The Maintenance Act of 1963 did not allow for issuing directives; therefore comparable information is not available in the 1995 study.*

9.2 Summons issued to a witness

Excerpt from Form C11
Summons to a witness to attend a maintenance enquiry

In the maintenance inquiry between

...........................................................................................................................................................................................................................................(complainant)
and
...........................................................................................................................................................................................................................................(defendant)

PART A
SUMMONS

To any person authorised to serve process:

You are hereby directed to –

1. Summon the following person(s):

   Name of witness: .............................................................................................................. .............................................................................
   Identity number/date of birth: ................................................................................................ .................................................................
   Address: ...................................................................................................................... .....................................................................................
   *Rail warrant attached/not issued:
   and

   Name of witness: .............................................................................................................. .............................................................................
   Identity number/date of birth: ................................................................................................ .................................................................
   Address: ...................................................................................................................... .....................................................................................
   *Rail warrant attached/not issued:
   and

   Name of witness: .............................................................................................................. .............................................................................
   Identity number/date of birth: ................................................................................................ .................................................................
   Address: ...................................................................................................................... .....................................................................................
   *Rail warrant attached/not issued:

   *(a) to appear in person before the above-mentioned court / the maintenance officer of the above-mentioned court
   at 09h00 on the date stated above; and
   *(b) to remain present until excused by the court,
   *(c) to be examined by the maintenance officer in terms of section 11 of the Act or to give evidence at an enquiry in
   terms of section 12 of the Act.

2. Serve on each of the above-mentioned person(s) a copy of this summons and report to this Court what you have
   done with regard to it; and

3. Request the above-mentioned person(s) to produce the following at the enquiry:

   (a) ................................................................................................................................................................................
   (b) ................................................................................................................................................................................
   (c) ................................................................................................................................................................................

Warnings to the person(s) who *is/are hereby summoned as *a witness(es):

1. If your above-mentioned address changes before the proceedings are finalised or before you are officially informed
   that you are no longer required as a witness, you must inform the maintenance officer of the above-mentioned court
   thereof.

2. If you fail to comply with the above-mentioned warning and this summons you may be arrested and on conviction
   be sentenced to a fine or a term of imprisonment.

[...]

A very small minority of the files contained a C11 form (17/1687; 1.0%). This form is used to summon witnesses other than the complainant and the defendant to attend the maintenance court. The majority of files contained one summons to a witness (17/20; 85.0%), and a small number of files contained two summonses (3/20; 15%), giving a total of 20 C11 summonses in the sample. The majority of these forms (16/20; 80.0%) were issued by the Oshakati court. The single summons identified in the sample issued by the Windhoek court in 2005 (two years after the 2003 Act came into effect) used a summons from the 1963 Act.

Eighteen of the 20 summonses were incorrectly used to summon the complainant and defendant rather than summoning other witnesses. Therefore the analysis of these C11 forms has been combined with the analysis of the summonses to the complainant/defendant.

In the remaining two summonses, both of which were issued for the same case, witnesses who were not the complainant and defendant were summoned, although it is not clear who the witnesses were. The witnesses were asked to bring “expenses spent on the kids” and “proof of payment of kid’s school fees”, suggesting that the witnesses were caregivers of the children. On the first summons, three witnesses were summoned, and a fourth witness was summoned on the second summons. All four witnesses were summoned to the same enquiry.

In addition to the completed forms, two files contained additional information about witnesses attending an enquiry. In one case the complainant and defendant could not agree on the details of the case. The complainant requested N$500 per month for one child. The defendant claimed that he already provided N$200-300 per month for the beneficiary and paid some medical expenses, but the complainant said that this was not true. The defendant also stated that he was supporting 12 children, seven of whom were living with him, but the complainant stated that she knew of only three children for whom the defendant was responsible. Given the discrepancies in information, the enquiry was postponed for nine days and the defendant stated that he would bring two witnesses. The file contains details of the second enquiry, but they do not reflect whether or not the witnesses attended. The outcome of the enquiry was an order for N$150 per month. The defendant went into arrears shortly thereafter, and criminal proceedings were initiated. At one point the amount of arrears totalled N$1650. The defendant was eventually ordered to pay N$250 per month. In the other case the defendant and his/her work supervisor attended the maintenance court and agreed to an order for the attachment of wages.

We believe that there are three possible reasons for witnesses rarely being summoned to maintenance investigations or enquiries: (1) the witnesses may have attended voluntarily at the request of the defendant or complainant, so a summons was not required; (2) the magistrate and maintenance officer are satisfied that the complainant/defendant has provided sufficient information; and (3) written evidence is used instead.

The use of written evidence is an innovation of the 2003 Maintenance Act. The change followed similar amendments to the South African law on maintenance. Some of the files showed that this option is used in practice. For example, one file contained a letter from the principal of the child’s school stating that the complainant (the mother) had not paid the School Development Fund contribution for three years because she did not have the resources, although the school was aware that the father did have resources to pay. Another file contained a letter from the principal of the child’s school confirming the cost of the School Development Fund contribution. Other files contained letters from the employer stating the duration and terms of employment. For example, one file contained the following letter:

“To whom it may concern, I confirm that as operational manager [the defendant] started his employment at our company on [date] and [is] still employed as an armed response officer. His salary is N$1 000 pm. [He is a] hardworking, self-disciplined and trustworthy person.”

The 1995 study did not assess the summoning of witnesses to the maintenance court.7

---

7 Ibid.
9.3 Summons issued to the defendant or complainant

Excerpt from Form C1

Summons to a complainant or defendant to attend a maintenance enquiry

PART A
SUMMONS

To any person authorised to serve process:

You are hereby directed to –

1. summon the following persons:

Name of complainant ............................................................................................................................................................
Identity number/Date of birth ..............................................................................................................................................
Address ..................................................................................................................................................................................
Rail warrant attached/not attached* ......................................................................................................................................

And/or

Name of defendant ..............................................................................................................................................................
Identity number/Date of birth ..............................................................................................................................................
Address ..................................................................................................................................................................................
*Rail warrant attached/not attached ......................................................................................................................................

(a) *to appear in person before the above-mentioned court or maintenance officer of the abovementioned court at
09h00 on the date stated above; and

(b) to remain present until excused by the court, or

(c) to be examined by the maintenance officer in terms of section 11 of the Act or to give evidence at an enquiry, in
terms of section 12 of the Act.

2. serve on each of the above-mentioned persons a copy of the summons and report to this Court what you have done
with regard to it; and

3. request the above-mentioned persons to produce the following at the enquiry:

(a) Part B of this form, duly completed by ............................................................ (other party), together with supporting
documents, where possible

(b) ........................................................................................................................... ..........................................................................................

(c) ........................................................................................................................... ..........................................................................................

To the persons who are hereby summoned:

1. Warnings:

(a) If your above-mentioned address changes before the proceedings are finalised or before you are officially advised
that you are no longer required as a witness, you must inform the maintenance officer of the above-mentioned
court thereof.

(b) If you fail to comply with this warning in (a) and this summons you may be arrested and on conviction be
sentenced to a fine or to a term of imprisonment.

2. An application has *been made for –

*(a) the *making of the following maintenance order/substitution of the existing maintenance order

*(i) A *weekly/monthly contribution of

<table>
<thead>
<tr>
<th>N$</th>
<th>Name of Beneficiary</th>
</tr>
</thead>
<tbody>
<tr>
<td>N$</td>
<td>In respect of Complainant</td>
</tr>
<tr>
<td>N$</td>
<td>In respect of [ ]</td>
</tr>
</tbody>
</table>

and/or

*(ii) .................................................................................................................................................................................

(other contributions, for example medical and dental costs, school fees, fees for tertiary institutions, school clothes,
expenses for sport and/or cultural activities, birth expenses and maintenance for beneficiary(ies) from birth); or

(b) the discharge, variation or suspension of the existing maintenance order.

[...]

[...]
### PART B
(To be completed by defendant or on defendant's instructions)

**Particulars regarding assets, income and expenditure of opposing party** Particulars of my assets and *weekly/monthly income and expenditures (supported by documentary proof, where possible) are as follows:

<table>
<thead>
<tr>
<th>Assets</th>
<th>N$</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fixed property</td>
<td></td>
</tr>
<tr>
<td>Investments</td>
<td></td>
</tr>
<tr>
<td>Savings</td>
<td></td>
</tr>
<tr>
<td>Shares</td>
<td></td>
</tr>
<tr>
<td>Motor vehicles</td>
<td></td>
</tr>
<tr>
<td>Other:</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td>Total value of Assets</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Income</th>
<th>N$</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gross salary</td>
<td></td>
</tr>
<tr>
<td>Minus deductions:</td>
<td></td>
</tr>
<tr>
<td>Tax</td>
<td></td>
</tr>
<tr>
<td>Medical Aid</td>
<td></td>
</tr>
<tr>
<td>Pension</td>
<td></td>
</tr>
<tr>
<td>Other:</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td>Total nett salary</td>
<td></td>
</tr>
<tr>
<td>Other income (state source)</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td>Total income</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Expenditure</th>
<th>Self</th>
<th>Beneficiary(ies)</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Lodging (bond repayment/levy/rent/board)</td>
<td>N$...</td>
<td>N$...</td>
<td>N$...</td>
</tr>
<tr>
<td>2. Food [...]</td>
<td>N$...</td>
<td>N$...</td>
<td>N$...</td>
</tr>
<tr>
<td>3. Household expenditure [...]</td>
<td>N$...</td>
<td>N$...</td>
<td>N$...</td>
</tr>
<tr>
<td>4. Clothing [...]</td>
<td>N$...</td>
<td>N$...</td>
<td>N$...</td>
</tr>
<tr>
<td>5. Personal care</td>
<td>N$...</td>
<td>N$...</td>
<td>N$...</td>
</tr>
<tr>
<td>6. Transport [...]</td>
<td>N$...</td>
<td>N$...</td>
<td>N$...</td>
</tr>
<tr>
<td>7. Educational expenditure [...]</td>
<td>N$...</td>
<td>N$...</td>
<td>N$...</td>
</tr>
<tr>
<td>8. Medical expenditure [...]</td>
<td>N$...</td>
<td>N$...</td>
<td>N$...</td>
</tr>
<tr>
<td>9. Insurance [...]</td>
<td>N$...</td>
<td>N$...</td>
<td>N$...</td>
</tr>
<tr>
<td>10. Pocket money/allowances</td>
<td>N$...</td>
<td>N$...</td>
<td>N$...</td>
</tr>
<tr>
<td>11. Holidays</td>
<td>N$...</td>
<td>N$...</td>
<td>N$...</td>
</tr>
<tr>
<td>12. Maintenance, replacement and repairs […]</td>
<td>N$...</td>
<td>N$...</td>
<td>N$...</td>
</tr>
<tr>
<td>13. Entertainment and recreation</td>
<td>N$...</td>
<td>N$...</td>
<td>N$...</td>
</tr>
<tr>
<td>14. Personal loans</td>
<td>N$...</td>
<td>N$...</td>
<td>N$...</td>
</tr>
<tr>
<td>15. Security alarm system</td>
<td>N$...</td>
<td>N$...</td>
<td>N$...</td>
</tr>
<tr>
<td>16. Membership fees</td>
<td>N$...</td>
<td>N$...</td>
<td>N$...</td>
</tr>
<tr>
<td>17. Religious contributions/charities</td>
<td>N$...</td>
<td>N$...</td>
<td>N$...</td>
</tr>
<tr>
<td>18. Gifts</td>
<td>N$...</td>
<td>N$...</td>
<td>N$...</td>
</tr>
<tr>
<td>19. TV license</td>
<td>N$...</td>
<td>N$...</td>
<td>N$...</td>
</tr>
<tr>
<td>20. Reading materials […]</td>
<td>N$...</td>
<td>N$...</td>
<td>N$...</td>
</tr>
<tr>
<td>21. Lease instalments sales payments […]</td>
<td>N$...</td>
<td>N$...</td>
<td>N$...</td>
</tr>
<tr>
<td>22. Pets […]</td>
<td>N$...</td>
<td>N$...</td>
<td>N$...</td>
</tr>
<tr>
<td>23. Other (not specified above)</td>
<td>N$...</td>
<td>N$...</td>
<td>N$...</td>
</tr>
<tr>
<td><strong>Total expenditure</strong></td>
<td>N$...</td>
<td>N$...</td>
<td>N$...</td>
</tr>
</tbody>
</table>

**PART C
RETURN OF SERVICE
[...]**
Nearly 70% of the files contained a summons issued to the defendant or complainant (1,113/1,687; 66.0%). The sample is based on the use of either Form C1 or C11 (where Form C11 was erroneously used for this purpose, as discussed in section 9.2). Over half of the files containing summonses to the defendant or complainant contained only one summons (664/1,113; 59.7%), and nearly a third contained two summonses (328/1,113; 29.5%). The maximum number of summonses per file was eight. This resulted in a total of 1,793 summonses being included in the sample.

Some courts appear to issue summonses in exceptional cases (eg Karasburg and Oshakati), some issue summonses for all maintenance complaints (eg Mariental and Swakopmund), and others appear to issue summonses only in some cases (eg Keetmanshoop and Tsumeb). We recommend that when the Magistrates Commission holds conferences and when court officials from different courts meet, the maintenance court officials should discuss the use of directives and summonses as a means to identify best practice.

Most summonses were issued for the defendant (1,399/1,724; 81.1%; information missing from 69 summonses), and the remaining ones were issued for the complainant (325/1,724; 18.9%). The vast majority of summonses for the complainant came from the Windhoek court (274/325; 84.3%) over all four years for which data was collected. This suggests that it is standard practice for this court to serve summonses on the complainants. In contrast, only a handful of summonses were issued to complainants at other courts, suggesting that there were special circumstances in these cases that warranted the use of a summons. This is logical as the complainant is the one who initiated the maintenance complaint and is likely to be willing to attend court voluntarily. One reason for the Windhoek courts issuing summonses to the complainants may be to give the complainants proof of the court date to show their employers. There may be a lesser need for this in towns with smaller communities where it would be harder to ‘fake’ an appearance at the maintenance court.

<table>
<thead>
<tr>
<th>Number of summonses on file</th>
<th>Number of files</th>
<th>Number of forms</th>
<th>Percentage of files</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>658</td>
<td>1,113</td>
<td>59.1</td>
</tr>
<tr>
<td>2</td>
<td>328</td>
<td>455</td>
<td>29.5</td>
</tr>
<tr>
<td>3</td>
<td>71</td>
<td>127</td>
<td>6.4</td>
</tr>
<tr>
<td>4</td>
<td>32</td>
<td>56</td>
<td>2.9</td>
</tr>
<tr>
<td>5</td>
<td>11</td>
<td>24</td>
<td>1.0</td>
</tr>
<tr>
<td>6</td>
<td>9</td>
<td>13</td>
<td>0.8</td>
</tr>
<tr>
<td>7</td>
<td>3</td>
<td>4</td>
<td>0.3</td>
</tr>
<tr>
<td>8</td>
<td>1</td>
<td>1</td>
<td>0.1</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>1,113</td>
<td>1,793</td>
<td>100.0</td>
</tr>
</tbody>
</table>

Table 66: Summons issued to the defendant or complainant

The majority of summonses were issued as part of a new maintenance enquiry (1,384/1,498; 92.4%; information missing from 295 summonses). In a minority of cases, the summonses were issued as part of an enquiry to substitute (53/1,498; 3.5%) or discharge/suspend (25/1,498; 1.7%) an order. Summons were issued for cases that had gone into arrears in a similarly small proportion of the cases (36/1,498; 2.4%).

---

8 Our sample contains 236 files from the Windhoek court.
9 Summonses to the complainants were also issued at the courts in Eenhana (5), Gobabis (6), Keetmanshoop (1), Khorixas (1), Ondangwa (2), Oshakati (18), Otjiwarongo (1), Outapi (2), Rehoboth (12), Rundu (1), Swakopmund (1) and Walvis Bay (1).
Chapter 9: Summonses and Directives to Give Evidence

The 1995 maintenance study found that summonses were issued for all maintenance complaints sampled. In the majority of the cases, only one summons was issued (82%). Two summonses were issued in 15% of the cases and three or four summonses were issued in a minority of cases (3%).10 Similar to the finding in the current study, the 1995 study noted that many case files involving substitution proceedings did not contain any information about summonses.11 The study did not note any summonses issued for cases that had gone into arrears.

The summonses request the recipient to appear in person before the maintenance officer and to give information, or to appear at a formal hearing before the magistrate. However, it is not always clear from the summons which option has been selected. Therefore, based on the data collected for this study, we are not able to determine whether the witnesses were summoned to see the maintenance officer or the magistrate.

The form also allows the maintenance officer to request the complainant/defendant to bring specific information. On many forms, multiple requests for information were completed, some of which overlap – therefore the percentage totals more than 100%. The complainants/defendants were most commonly requested to bring information about their income in the form of a payslip or statement (or other proof) of earnings and monthly expenditure. Requests to bring identification were also fairly common. In a small number of cases the complainant/defendant was requested to bring bank statements (14 summonses) or proof from a DNA test (2 summonses). One person was requested to bring unspecified information about “arrears”; presumably the summons in this instance was issued for a failure to comply with a maintenance order.

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11 Id at 102.
Service of summonses

A summons to attend a maintenance enquiry is deemed served if it has been: (1) delivered or offered personally to the person in question; (2) delivered to that person’s place of residence or place of business/workplace (including being given to the person in authority or in charge of the person in question at the place of business/workplace); or (3) in the case of a juristic person, delivered to the registered office or main place of business (including to a director or responsible employee of the juristic person). It is sufficient to attach the notice to the door or gate if the residence or place of business/workplace is kept closed.12

The data shows that approximately two-thirds of the summonses were served (1,115/1,793; 62.2%) and 16.7% were not (299/1,793). Information was not clear for 21.1% of the summonses (379/1,793). The 1995 maintenance study reported a similar success rate of 76%.13

However, it should be noted that nearly 20% of the summonses were served on the complainant (see page 194). When analysed separately, the success rate for service of a summons on the defendant is lower. Tables 71 and 72 assess the service of summons by recipient. For the summonses that were not served, all but two were intended for the defendant.14 This finding is to be expected given that the summonses for the complainant were probably given to the complainant in person at the court.

Chart 38: Outcome of service of summonses

<table>
<thead>
<tr>
<th>Outcome</th>
<th>Frequency</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Served</td>
<td>1,115</td>
<td>62.2%</td>
</tr>
<tr>
<td>Information not clear</td>
<td>379</td>
<td>21.1%</td>
</tr>
<tr>
<td>Not served</td>
<td>299</td>
<td>16.7%</td>
</tr>
<tr>
<td>Total</td>
<td>1,793</td>
<td>100.0%</td>
</tr>
</tbody>
</table>

Table 70: Outcome of service of summonses

<table>
<thead>
<tr>
<th>Outcome</th>
<th>Frequency</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Served</td>
<td>261</td>
<td>80.3%</td>
</tr>
<tr>
<td>Information missing</td>
<td>62</td>
<td>19.0%</td>
</tr>
<tr>
<td>Not served</td>
<td>2</td>
<td>0.6%</td>
</tr>
<tr>
<td>Total</td>
<td>325</td>
<td>100.0%</td>
</tr>
</tbody>
</table>

Chart 39: Outcome of service of summonses to the complainant (n=325)

<table>
<thead>
<tr>
<th>Outcome</th>
<th>Frequency</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Served</td>
<td>854</td>
<td>61.0%</td>
</tr>
<tr>
<td>Information missing</td>
<td>248</td>
<td>17.7%</td>
</tr>
<tr>
<td>Not served</td>
<td>297</td>
<td>21.2%</td>
</tr>
<tr>
<td>Total</td>
<td>1,399</td>
<td>100.0%</td>
</tr>
</tbody>
</table>

Table 71: Outcome of service of summonses to the complainant

12 Maintenance Regulations, regulation 28 read with regulation 4.
14 For the two summonses intended for the complainant but not served, in one instance the complainant had moved to another town, and in the other instance the police did not have transport to deliver the summons.
Overall, 98.1% of the summonses successfully served on the complainant (256/261) were served personally, compared to 45.1% of summonses successfully served on the defendant personally. This finding is to be expected.

It is a matter of concern that nearly one in five summonses, almost all of which were directed to defendants (299/1 793; 16.7%), were not served. The main reasons were that the person was not known at the address given (89/299; 29.8%), there was a problem with the address (56/299; 18.7%), or there were logistical problems with service delivery (52/299; 17.4%). The logistical problems include the police not having transport available, needing more information to be able to serve the summons, receiving the summons too late to serve it in time, or the summons being sent to the wrong jurisdiction. For 16.0% of the summonses not served, the reason was not reported, and for 14.0% the person was no longer at the address given. The logistical problems are particularly concerning because the failure to serve the summons is not due to any fault on the part of the defendant or complainant. We recommend that the Ministry of Justice review the matter of service delivery and address any problems identified with the intention of improving both speed and success rate.

Regarding the high proportion of summonses not served because the person was apparently no longer at the address given, 29.8% were not served because the person was not known at that address, and 18.7% were not served because there was a problem with the address. It is to be expected that some complainants will not have information about the defendant’s whereabouts, particularly if the defendant has no contact with the beneficiaries, but this need not prevent the service of a summons as the Maintenance Act allows the court to summon a witness such as a relative to provide the defendant’s contact details.

The 1995 maintenance study reported similar findings. The study found that in 39% of the cases where the summons was not served, this was because the respondent could not be found at the address given by the complainant or the address was insufficient. In 18% of such cases, the summons expired before it could be served. No reason was recorded in 17% of the cases.\textsuperscript{15}

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|}
\hline
Means of service of summons & Frequency & Percentage \\
\hline
Delivered a copy personally* & 256 & 98.1 \\
Delivered a copy to someone other than the complainant & 3 & 1.1 \\
Affixed/placed a copy to/at the door, etc. & 2 & 0.8 \\
\hline
Total & 261 & 100.0 \\
\hline
\end{tabular}
\caption{Table 73: Means of service of summonses to the complainant}
\end{table}

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|}
\hline
Means of service of summons & Frequency & Percentage \\
\hline
Delivered a copy to someone other than the defendant & 419 & 49.1 \\
Delivered a copy personally & 385 & 45.1 \\
Affixed/placed a copy to/at the door, etc. & 50 & 5.9 \\
\hline
Total & 854 & 100.0 \\
\hline
\end{tabular}
\caption{Table 74: Means of service of summonses to the defendant}
\end{table}

\begin{chart}[h]
\centering
\begin{tikzpicture}
\begin{pie}
\def\w{360}
\entry{Delivered a copy personally*}{98.1}{\w}
\entry{Affixed/placed a copy to/at the door, etc.}{0.8}{\w}
\entry{Delivered a copy to someone other than the witness}{1.1}{\w}
\end{pie}
\end{tikzpicture}
\caption{Chart 41: Means of service of summonses to the complainant (n=260)}
\end{chart}

\begin{chart}[h]
\centering
\begin{tikzpicture}
\begin{pie}
\def\w{360}
\entry{Delivered a copy to the defendant personally}{45.1}{\w}
\entry{Affixed/placed a copy to/at the door, etc.}{5.9}{\w}
\entry{Delivered a copy to someone other than the defendant}{49.0}{\w}
\end{pie}
\end{tikzpicture}
\caption{Chart 42: Means of service of summonses to the defendant (n=854)}
\end{chart}

### Table 75: Reasons for failure to serve a summons

<table>
<thead>
<tr>
<th>Reasons summons was not served</th>
<th>Frequency</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Person not known</td>
<td>89</td>
<td>29.8</td>
</tr>
<tr>
<td>Problem with address</td>
<td>56</td>
<td>18.7</td>
</tr>
<tr>
<td>Problems with service delivery*</td>
<td>52</td>
<td>17.4</td>
</tr>
<tr>
<td>Reason not reported</td>
<td>48</td>
<td>16.1</td>
</tr>
<tr>
<td>Person no longer at address</td>
<td>42</td>
<td>14.0</td>
</tr>
<tr>
<td>Person temporarily away from address **</td>
<td>9</td>
<td>3.0</td>
</tr>
<tr>
<td>Other***</td>
<td>3</td>
<td>1.0</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>299</td>
<td>100.0</td>
</tr>
</tbody>
</table>

* no clerk available / no transport available / police require more information / summons received too late / person outside of jurisdiction / error on the summons / police have requested change of date

** travelling for work / sick / hospitalised

*** employer refused the maintenance officer entry / stated person is a casual worker / service suspended by attorney

In the service of one summons, the recipient’s employer refused to allow the person serving the summons to enter the property, and in the service of another summons, the employer refused to accept the summons because the employee was a casual worker. In the first scenario, the Regulations for the Maintenance Act state that if the person on whom a document is to be served keeps the place of residence/business or place of employment closed and thereby prevents the messenger of court or maintenance investigator from serving the document, it is sufficient to attach the notice to the door or gate. Therefore the person delivering the summons should not have returned the summons to the court, but should rather have attached it to the door/gate. In the second scenario the Labour Act 11 of 2007 (which came into force in 2009) now defines an employee as “an individual, other than an independent contractor, who – (a) works for another person and who receives, or is entitled to receive, remuneration for that work; or (b) in any manner assists in carrying on or conducting the business of an employer”. This means that in the eyes of the law, the concept of casual labour no longer exists as it did under the Labour Act 6 of 1992. Therefore an employer now has no basis for refusing to accept the summons on behalf of any employee. It is understandable that some employers may be resistant to the service of summons due to not understanding their potential obligations under the Maintenance Act. We recommend that a simple pamphlet about the Maintenance Act is created for employers, to inform them of their obligations in terms of the law.

Further information about problems with service was obtained from interviews with court officials. The magistrate at the coastal court of Walvis Bay stated that it can be difficult to summon defendants working for the military or as fishermen. In the case of fishermen, they are often stationed in Lüderitz for two years, by which time the complainant will usually have given up. It is not clear why the messenger from the Lüderitz court could not serve the summons, or why the defendant cannot be dealt with at the Lüderitz court, in the same way that a maintenance order across countries is managed. As noted on page 288, we recommend that the courts consider how to better work with each other and then develop an operational protocol. This is particularly relevant given the finding that 39.6% of complainants and defendants do not live in the same area and therefore possibly not in the same jurisdiction (see section 8.12).

A maintenance officer from another court described the problems they have with contacting defendants who work for NamPol or the military. For example, he said that the messenger is not allowed inside the military compound, and if the complainant does not know the force number for the defendant, the Ministry of Defence is uncooperative.

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16 Maintenance Regulations, regulation 28(4) read with regulation 4.
17 Labour Act 11 of 2007, definitions.
The clerk at another court complained that the messengers of court often do not provide proof of service before the date of the court hearing. This means that the court does not know whether the defendant was properly served but chose to ignore the summons, or whether the summons was not delivered in time. The maintenance officer at a different court also noted this problem, stating that problems with service delivery mean that the court cannot make a default maintenance order if it is not clear whether the summons was correctly served.

The Legal Assistance Centre receives complaints about the service of summonses. One example comes from a message sent to our text message line:

“I have a question. I put in maintenance for my kid in 2006 but up to now nothing happen. I am so tired to go to court and they tell me the father did not get the summons up to now.”

We advised the client to return to the court to find out why the court is unable to serve the summons. The client did not make further contact with us.

Analysis of the success of service delivery by region shows a success rate ranging from 27.6% (Oshikoto) to 75.1% (Khomas). The court officials gave reasons for some of the regional differences. For example, the clerk of court at Khorixas reported that the court shares a messenger with the Outjo court and this can lead to delays. Similarly, the messenger used by the Oshakati court is located in Tsumeb. The maintenance officer at the Rundu court was aware that service of documents had been a problem and stated that the court had made an agreement with the police sergeant for the police force to serve the summonses. A number of court officials from different courts also complained that the serving of documents was a problem due to cost. On page 197, we recommend that the Ministry of Justice investigate problems associated with the service of summonses. In this assessment the Ministry should consider why some regions are better able than others to serve summonses, and promote the sharing of best practices.

**Table 76: Service of summonses by region**

<table>
<thead>
<tr>
<th>Region</th>
<th>Court</th>
<th>Served</th>
<th>Not served</th>
<th>Missing</th>
<th>Total</th>
<th>Percentage served</th>
</tr>
</thead>
<tbody>
<tr>
<td>Khomas</td>
<td>Windhoek</td>
<td>455</td>
<td>59</td>
<td>92</td>
<td>606</td>
<td>75.1</td>
</tr>
<tr>
<td>Hardap</td>
<td>Mariental Rehoboth</td>
<td>180</td>
<td>47</td>
<td>31</td>
<td>258</td>
<td>69.8</td>
</tr>
<tr>
<td>Karas</td>
<td>Bethanie</td>
<td>59</td>
<td>14</td>
<td>18</td>
<td>91</td>
<td>64.8</td>
</tr>
<tr>
<td></td>
<td>Karasburg Keetmanshoop</td>
<td>245</td>
<td>74</td>
<td>27</td>
<td>129</td>
<td>57.4</td>
</tr>
<tr>
<td></td>
<td>Otjiwarongo</td>
<td>74</td>
<td>27</td>
<td>28</td>
<td>129</td>
<td>57.4</td>
</tr>
<tr>
<td></td>
<td>Outapi</td>
<td>61</td>
<td>35</td>
<td>11</td>
<td>107</td>
<td>57.0</td>
</tr>
<tr>
<td>Erongo</td>
<td>Swakopmund</td>
<td>143</td>
<td>64</td>
<td>47</td>
<td>254</td>
<td>56.3</td>
</tr>
<tr>
<td></td>
<td>Walvis Bay</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Kunene</td>
<td>Khorixas</td>
<td>10</td>
<td>4</td>
<td>5</td>
<td>19</td>
<td>52.6</td>
</tr>
<tr>
<td>Otjozondjupa</td>
<td>Okakarara Otjiwarongo</td>
<td>141</td>
<td>71</td>
<td>28</td>
<td>141</td>
<td>50.4</td>
</tr>
<tr>
<td>Kavango</td>
<td>Rundu</td>
<td>28</td>
<td>8</td>
<td>37</td>
<td>73</td>
<td>38.4</td>
</tr>
<tr>
<td>Ohangwena</td>
<td>Eenhana</td>
<td>7</td>
<td>0</td>
<td>12</td>
<td>19</td>
<td>36.8</td>
</tr>
<tr>
<td>Oshana</td>
<td>Ondangwa</td>
<td>19</td>
<td>8</td>
<td>40</td>
<td>67</td>
<td>28.4</td>
</tr>
<tr>
<td>Oshikoto</td>
<td>Tsumeb</td>
<td>8</td>
<td>5</td>
<td>16</td>
<td>29</td>
<td>27.6</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td></td>
<td><strong>1 115</strong></td>
<td><strong>299</strong></td>
<td><strong>379</strong></td>
<td><strong>1 793</strong></td>
<td><strong>NA</strong></td>
</tr>
</tbody>
</table>

The 1995 maintenance study also noted some regional differences in the success rates for serving summonses. In the nine locations where data was collected, the success rates for serving first summons ranged from 89-100% in Gobabis, Otjiwarongo and Rundu to 54-56% in Mariental and Tsumeb.
The study postulated that these differences might have been due to the attitude and efficiency of the police in the different locations, or to the ability of complainants in the different locations to accurately identify the respondent’s address.\textsuperscript{18}

In the files that contained more than one summons, we cannot accurately assess the proportion of cases in which a summons was not served at first, but was served on re-issue. This is because the details on file are not reliable enough for us to determine whether a second summons was issued for the same purpose or a different purpose. There are also some files containing records showing that the defendant did not receive the summons but did attend the hearing on the date specified, which suggests that somehow the summons was delivered or the defendant was otherwise successfully contacted.

Despite these limitations, we can assess the success rate for the service of summonses according to the number of forms on file. This analysis shows that the more summonses on file, the better the success rate (a 78.1\% success rate for the first summons on file compared with a 100\% success rate for the service of the sixth to eighth summonses on file; note that the sample size is small for cases with multiple summonses on file). This suggests that in cases where there are multiple summonses on file, this is not because previous attempts to serve documents on the defendant/complainant failed and the clerk repeatedly issues summonses. As noted in the 1995 maintenance study, which observed a similar pattern for the service of multiple summonses per file, the court would be unlikely to persist in issuing summonses if there was no new information about the whereabouts of the respondent who could not be located.\textsuperscript{19}

Another reason for increasing success with the service of summonses may be that once the defendant has been successfully located, the court is able to serve further summonses more easily if required. Alternatively, when the defendant attends court, the court may serve the summons for the next meeting in person.

\textbf{Table 77: Success of the service of summonses by number of summonses on file}

<table>
<thead>
<tr>
<th>Number of summonses on file</th>
<th>Total</th>
<th>Served</th>
<th>Not served</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Number</td>
<td>Number</td>
<td>Percentage</td>
</tr>
<tr>
<td>1</td>
<td>895</td>
<td>699</td>
<td>78.1</td>
</tr>
<tr>
<td>2</td>
<td>355</td>
<td>276</td>
<td>77.7</td>
</tr>
<tr>
<td>3</td>
<td>95</td>
<td>81</td>
<td>85.3</td>
</tr>
<tr>
<td>4</td>
<td>40</td>
<td>34</td>
<td>85.0</td>
</tr>
<tr>
<td>5</td>
<td>20</td>
<td>16</td>
<td>80.0</td>
</tr>
<tr>
<td>6</td>
<td>6</td>
<td>6</td>
<td>100.0</td>
</tr>
<tr>
<td>7</td>
<td>2</td>
<td>2</td>
<td>100.0</td>
</tr>
<tr>
<td>8</td>
<td>1</td>
<td>1</td>
<td>100.0</td>
</tr>
<tr>
<td>Total</td>
<td>1 414</td>
<td>1 115</td>
<td>100.0</td>
</tr>
</tbody>
</table>

The forms can also be assessed on a case-by-case basis to assess the pattern of service. For example, if there is one summons on file, it was either served or not served, or data is missing. If there are two summonses on file, both summonses could have been served, or the first was served and the second was not, or the first was served but data is missing for the second, and so forth. Although this information gives us a picture of the pattern of service in various cases, the variation between the course taken in different cases makes it difficult to extrapolate any useful information from this pattern.


\textsuperscript{19} Id at 74.
### Table 78: Case-by-case analysis of service of summonses

<table>
<thead>
<tr>
<th>Number of summonses on file</th>
<th>Outcome</th>
<th>Frequency</th>
<th>Sub-total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Served</td>
<td>397</td>
<td>658</td>
</tr>
<tr>
<td>1</td>
<td>Not served</td>
<td>113</td>
<td></td>
</tr>
<tr>
<td>1</td>
<td>Missing</td>
<td>148</td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>Served</td>
<td>154</td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>Not served</td>
<td>28</td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>Missing</td>
<td>31</td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>Not served</td>
<td>32</td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>Not served</td>
<td>18</td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>Missing</td>
<td>13</td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>Served</td>
<td>25</td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>Not served</td>
<td>4</td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>Missing</td>
<td>23</td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>Served</td>
<td>22</td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>Served</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>Not served</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>Served</td>
<td>8</td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>Not served</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>Served</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>Missing</td>
<td>6</td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>Served</td>
<td>5</td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>Not served</td>
<td>6</td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>Served</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>Not served</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>Served</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>Missing</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>Served</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>Missing</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>Served</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>Not served</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>Served</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>Missing</td>
<td>4</td>
<td></td>
</tr>
<tr>
<td>4</td>
<td>Served</td>
<td>9</td>
<td></td>
</tr>
<tr>
<td>4</td>
<td>Served</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>4</td>
<td>Served</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>4</td>
<td>Not served</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>4</td>
<td>Served</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>4</td>
<td>Not served</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>4</td>
<td>Served</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>4</td>
<td>Not served</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>4</td>
<td>Served</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>4</td>
<td>Not served</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>4</td>
<td>Served</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>4</td>
<td>Not served</td>
<td>1</td>
<td></td>
</tr>
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<td>Served</td>
<td>11</td>
<td></td>
</tr>
<tr>
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<td>Not served</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>5</td>
<td>Served</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>5</td>
<td>Not served</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>5</td>
<td>Served</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>5</td>
<td>Not served</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>5</td>
<td>Not served</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>5</td>
<td>Served</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>5</td>
<td>Not served</td>
<td>1</td>
<td></td>
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<tr>
<td>5</td>
<td>Not served</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>5</td>
<td>Served</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>5</td>
<td>Missing</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>6</td>
<td>Served</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>6</td>
<td>Not served</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>6</td>
<td>Served</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>6</td>
<td>Not served</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>6</td>
<td>Served</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>6</td>
<td>Not served</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>6</td>
<td>Served</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>6</td>
<td>Not served</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>6</td>
<td>Served</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>6</td>
<td>Not served</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>6</td>
<td>Served</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>6</td>
<td>Not served</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>6</td>
<td>Served</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>6</td>
<td>Not served</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>6</td>
<td>Served</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>6</td>
<td>Not served</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>6</td>
<td>Served</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>6</td>
<td>Not served</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>7</td>
<td>Served</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>7</td>
<td>Served</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>7</td>
<td>Not served</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>7</td>
<td>Served</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>7</td>
<td>Not served</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>8</td>
<td>Served</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>TOTAL</td>
<td></td>
<td>1113</td>
<td></td>
</tr>
</tbody>
</table>
Cost of service

The cost of service was recorded for the majority of the summonses to the complainant/defendant (1,282/1,773; 72.3%). The mean cost of service was N$105.12 (range N$0-N$1,738). The cost of service ranged widely for the summonses served, but the majority cost between N$1 and N$100. The summonses issued at no cost will have been those given to the recipient whilst he/she was at court.

The maintenance officer at one court stated that the cost of service is a problem. As the cost incurred is per kilometre, the cost of serving summonses can be very high. The maintenance officer gave the example of service costing up to N$3,000-N$4,000, although we did not find examples of such costs in the files that we sampled. The clerk of the same court also commented that it can take up to three months for a summons to be served if the defendant lives far from the court, perhaps because other daily duties mean that the messenger struggles to find the time to make a long trip to deliver a single summons.

Table 79: Cost of service for the delivery of summonses (N$)

<table>
<thead>
<tr>
<th>Cost in N$</th>
<th>Frequency</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>0</td>
<td>180</td>
<td>14.0</td>
</tr>
<tr>
<td>1-50</td>
<td>462</td>
<td>36.0</td>
</tr>
<tr>
<td>51-100</td>
<td>405</td>
<td>31.6</td>
</tr>
<tr>
<td>101-150</td>
<td>87</td>
<td>6.8</td>
</tr>
<tr>
<td>151-200</td>
<td>32</td>
<td>2.5</td>
</tr>
<tr>
<td>201-500</td>
<td>61</td>
<td>4.8</td>
</tr>
<tr>
<td>501-1000</td>
<td>33</td>
<td>2.6</td>
</tr>
<tr>
<td>+ 1000</td>
<td>22</td>
<td>1.7</td>
</tr>
<tr>
<td>Total</td>
<td>1,282</td>
<td>100.0</td>
</tr>
</tbody>
</table>

Table 78: Time between signing of summons and date of delivery to defendant

<table>
<thead>
<tr>
<th>Number of days</th>
<th>Frequency</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>0 days</td>
<td>20</td>
<td>2.7</td>
</tr>
<tr>
<td>1-15 days</td>
<td>397</td>
<td>52.9</td>
</tr>
<tr>
<td>16-30 days</td>
<td>209</td>
<td>27.8</td>
</tr>
<tr>
<td>31-45 days</td>
<td>91</td>
<td>12.1</td>
</tr>
<tr>
<td>46-60 days</td>
<td>21</td>
<td>2.8</td>
</tr>
<tr>
<td>61-75 days</td>
<td>9</td>
<td>1.2</td>
</tr>
<tr>
<td>More than 76 days</td>
<td>4</td>
<td>0.5</td>
</tr>
<tr>
<td>Total</td>
<td>751</td>
<td>100.0</td>
</tr>
<tr>
<td>Missing</td>
<td>103</td>
<td>12.1</td>
</tr>
<tr>
<td>Total</td>
<td>854</td>
<td>100.0</td>
</tr>
</tbody>
</table>

Table 79: Cost of service for the delivery of summonses (N$)

Timelines for the delivery of a summons

The timeline between the signing and delivery of a summons is available for the majority of the summonses. As the majority of summonses for the complainant were delivered in person, probably at court, we have analysed the timeline only for the delivery of summonses to the defendant. The median time between the signing of the summons and the date of delivery of the summons for the defendant was 14 days (mean 18.0 days; range 0-113 days) – a fairly short timeline. In some cases it took a long time for the summons to be served, but the majority were delivered within 30 days of being signed by the magistrate. Overall this is a positive finding as it suggests that in general summonses are delivered timeously.

The 1995 maintenance study similarly found that the majority (roughly 95%) of the summonses issued for new maintenance complaints were issued within about one month of the complaint being made.

The LAC study on the operation of the Combating of Domestic Violence Act looked at the timeline for the service of interim protection orders. Although a direct comparison between the service of a protection order and the service of a summons to attend the maintenance court cannot be made (particularly because an interim protection order may help to alleviate immediate and life-threatening violence whereas a summons to attend the maintenance court is less dramatic), it is interesting to

---

20 Form C11 and directives do not include a space to record cost of service.

21 In the case where service took 113 days, the court issued two summonses. The second summons was not served because the defendant’s employer refused to accept the document at the head office and refused to allow the messenger to enter the mining area where the defendant worked to serve the document. However, the defendant was somehow notified as he attended the enquiry.


note that the median time estimated for service was 7 days. As discussed, the median number of days taken to summons the defendant/complainant to a maintenance investigation/enquiry was 14 days. Although both of these timelines are fairly reasonable, there are sometimes delays in the service of both interim protection orders and summonses to maintenance courts, and this suggests that challenges in the service of court documents is endemic across the justice system. As noted on page 197, we recommend that the Ministry of Justice review problems with service delivery and address any problems identified with the intention of improving standards. In this assessment the Ministry should consider why some regions are better able than others to serve summonses, and promote the sharing of best practices.

**Time between the date on which the summons was signed by the court and the date of required attendance at court**

The timeline between the date on which the summons was signed by the court and the date of required attendance at court is available for the majority of the summonses (1,681/1,793; 93.8%). It should be noted that summonses can be issued at any time during the investigation/enquiry, and we do not have enough information to assess at what point in the process the summonses were issued.

The date to attend court was usually between 16 and 60 days after the summons was signed (1,280/1,793; 71.4%). The median time between the date on which the summons was signed and the date to attend the court was 44.0 days (mean 45.9 days; range 0-277 days). Given the time required for the service of the summons (approximately 14 days), the interval between the date on which the summons was probably delivered and the date of the enquiry appears to be fair to the defendant.

![Chart 44: Time between date of signing summonses and date of required attendance at court (n=1681)](chart)

<table>
<thead>
<tr>
<th>Number of days</th>
<th>Frequency</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>0 days</td>
<td>14</td>
<td>0.8</td>
</tr>
<tr>
<td>1-15 days</td>
<td>63</td>
<td>3.7</td>
</tr>
<tr>
<td>16-30 days</td>
<td>261</td>
<td>15.5</td>
</tr>
<tr>
<td>31-45 days</td>
<td>537</td>
<td>31.9</td>
</tr>
<tr>
<td>46-60 days</td>
<td>482</td>
<td>28.7</td>
</tr>
<tr>
<td>61-75 days</td>
<td>208</td>
<td>12.4</td>
</tr>
<tr>
<td>More than 76 days</td>
<td>116</td>
<td>6.9</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>1681</strong></td>
<td><strong>100.0</strong></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Missing</th>
<th>112</th>
<th>6.2</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Total</strong></td>
<td><strong>1793</strong></td>
<td><strong>100.0</strong></td>
</tr>
</tbody>
</table>

**Information to be completed by the person receiving the summons**

The defendant is required to complete section B of the summons, providing information about his/her assets, income and expenditure. However, this information was provided comprehensively on only a small number of summonses. Overall, information about assets was provided on four of the summonses.

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24 Only a very small number of files contained a return of service; in the sample of 1,122 files, only 10 contained documents specifically labelled as returns of service, while 33 other files had sworn declarations or other information from police confirming that service had taken place. Therefore the date on which the notice of intention to oppose was signed by the respondent was used as a proxy for the date of service.

25 In this case, the second summons was signed in August and ordered the defendant to attend court in May the following year. There is no explanation as to why there was such a long time period until the next meeting was held. The file contained a handwritten note dated at the time of the second meeting. The note stated that both parties were present and that the defendant was unemployed. The case was postponed for one month for the defendant to bring proof of employment. A note dated the following month stated that the defendant was still unemployed. The case was postponed for three months to give the defendant time to find employment. A final note, dated three months later, stated that the defendant was still unemployed and the parties agreed to withdraw the matter until the defendant found employment. There are no further details contained in the file.
about income on seven summonses and about expenditure on 12 summonses. We did not analyse any of the information about the defendant’s financial position as the small sample size would make this information statistically misleading.

The 2004 study on the South African Maintenance Act also noted that few files contained information about the respondent’s income, and that this “raises concerns as to how maintenance officers or magistrates decide on the amount to be awarded, without having a notion of what the respondent earns on a monthly basis”.26

<table>
<thead>
<tr>
<th>Summary of the use of summonses and directives</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Use of directives</strong></td>
</tr>
<tr>
<td>• A small minority of the files contained a directive to attend the maintenance court.</td>
</tr>
<tr>
<td>• The majority of directives were issued to the defendant.</td>
</tr>
<tr>
<td>• The median time between the date on which the form was signed by the maintenance officer and the date of investigation was 43 days.</td>
</tr>
</tbody>
</table>

| **Summons issued to witnesses**                |
| • Our sample captured a total of 20 summonses issued to witnesses, 18 of which were incorrectly issued to the defendant or complainant. Courts could better utilise this option to investigate maintenance complaints. |

| **Summons issued to the complainant or defendant** |
| • Nearly 70% of all the files contained a summons issued to the defendant or complainant. |
| • Most summonses were issued to the defendant. |
| • However, only 60% of the summonses issued to the defendant were successfully served. |
| • The median time between the signing of the summons and the date on which the summons was delivered to the defendant was 14 days. This is a reasonable time for service of process. |
| • The median time between the signing of the summons and the date on which the defendant was required to attend court was 44 days. Given that service of process typically takes 14 days, this appears to give defendants reasonable notice to prepare to present their cases. |