

PARLIAMENT OF THE REPUBLIC OF SOUTH AFRICA

NOTICE 709 OF 2021

MR MOGAMAD GANIEF EBRAHIM HENDRICKS, MP

NOTICE OF INTENTION TO INTRODUCE A PRIVATE MEMBER'S BILL AND INVITATION FOR COMMENT ON THE DRAFT BILL, NAMELY THE MAINTENANCE AMENDMENT BILL, 2021

Mr. Mogamad Ganief Ebrahim Hendricks, MP, acting in accordance with section 73(2) of the Constitution of the Republic of South Africa, 1996 ("Constitution"), intends to introduce the Maintenance Amendment Bill, 2021 ("the draft Bill), in the National Assembly of Parliament. An explanatory summary of the member's draft Bill is hereby published in accordance with Rule 276(1)(c) of the Rules of the National Assembly of Parliament (the 9th Edition).

Although the aims of the Maintenance Act, 1998 (Act No. 99 of 1998) ("the Maintenance Act"), were to bring about a fair, equitable and sensitive maintenance service with simplified, speedier and cheaper procedures prioritising the rights of children, as well as to improve effectiveness of enforcement, it was, however, introduced as an interim measure pending a review of the South African maintenance system by the South African Law Reform Commission. This revision or overhaul, if it took place, has not resulted in an effective maintenance system.

While the Maintenance Act gives effect to the rights of children as set out in section 28 of the Constitution, various studies undertaken since the promulgation of the Act have highlighted challenges regarding the effective operation of the law and the maintenance system.¹ A public webinar on maintenance held on 14 August 2021,² has also confirmed the findings of these studies, which continue to plague the system to date, and also identified more concerns. These challenges,

¹ See Coutts, T. L. 2014. "A Critical analysis of the implementation of the Maintenance Act 99 of 1998: Difficulties experienced by the unrepresented public in the Maintenance Court as a result of the poor implementation of the Act", LLM Dissertation, UKZN [Online]. Available at https://researchspace.ukzn.ac.za/bitstream/handle/10413/12124/Coutts_Tamazin_L_2014.pdf?sequence=1&isAllowed=y; See also the following studies as cited in Coutts, 2014: Grieves et al 2005, "Defining the Functions of Maintenance Investigators and setting out Proposals for their Remuneration"; De Jong, M, 2009 "Ten-year anniversary of the Maintenance Act 99 of 1998- a time to reflect on improvements, shortcomings and the way forward", 126 SALJ 590; Budlender, D & Moyo, B (ed) *What about the children?: The Silent Voices in Maintenance* (2004) 72.

²This webinar was hosted by the Al-Jamaa'ah Party.

inter alia, include that the system remains in disarray, is slow, ineffective, clogged up and fairly unproductive to enforce rights; that maintenance debtors evade their legal duty to maintain dependents with seeming impunity despite active maintenance orders; that court dates are shunned without providing reasons, resulting in matters being postponed or struck off the roll - requiring the complainant to start the process afresh; a lack of court resources, disinterested maintenance officers, and the lengthy delays in finalisation of matters; the difficulties experienced by maintenance officers and investigators in obtaining the necessary documentation for the finalisation of matters or maladministration resulting in lost files; and lengthy waiting times at court resulting in complainants being late for work or unable to attend work resulting in loss of income, reduction in annual leave days or even termination of employment. In addition, complainants have to pay their own transport and subsistence costs, while these are paid to respondents.

The lack of women's ability to realise their rights in respect of maintenance has a direct impact on the rights, wellbeing and quality of the lives of their children, who are usually placed in the primary care of their mothers. Improving access to the maintenance system will thus include the improvement of children's health and education prospects, thus improving their employment prospects, and so drive national development.³ Several social justice and women's rights advocates have called for amendments to be made to the Maintenance Act, amongst others, in order to ensure a speedier process and timeous delivery of fair and just rulings.

The draft Bill accordingly seeks to amend the Maintenance Act to, *inter alia*, provide for the following:

- (a) Process and criteria for provisional maintenance: An assessment upon lodgement of a maintenance claim of any undue hardship to the complainant if required to follow the current process, and where *prima facie* evidence is found, application for, and granting and service of, an *ex parte* provisional maintenance order in respect of maintenance for the complainant and children in their care, in the form of a rule *nisi*;
- (b) the duration of the provisional maintenance order be until the final determination of the matter or a formal hearing in terms of Uniform Rule 43 of the High Court or Rule 58 of the Magistrates' Court Rules;

³See the Children's Institute (2020) Child Gauge: Food and Nutrition Security. Available at <http://www.ci.uct.ac.za/cg-2020-food-and-nutrition-security>. Accessed on 15.10.2020.

- (c) application for a garnishee order where the respondent fails to abide the provisional maintenance order;
- (d) the complainant being advised of, and entitled to claim, allowances for subsistence and travel to and from court;
- (e) the option to resolve any maintenance enquiry or investigation related dispute through mediation or arbitration; and
- (f) consequential amendments to other legislation as may be necessary.

The failure to effect the amendments proposed in the draft Bill, would not only result in a failure to give effect to rights enshrined in the Constitution, but will also perpetuate the severe structural oppression and violence against women, and thus the impoverishment and destitution of women and children.

Interested parties and institutions are invited to submit written representations on the proposed content of the draft Bill to the Speaker of the National Assembly of Parliament by **31 January 2022**. Representations can be delivered to the Speaker, New Assembly Building, Parliament Street, Cape Town; mailed to the Speaker, PO Box 15 Cape Town 8000, or emailed to speaker@parliament.gov.za and copied to mhendricks@parliament.gov.za.

Copies of the Maintenance Amendment Bill, 2021, may, after introduction, be obtained from:

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