

CHILD MAINTENANCE AND THE IMPACT OF COVID 19 ON A PARTY'S INABILITY TO PAY

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INTRODUCTION

Uncertain times calls for certain measures and clearly stipulated rules. Innumerable parents by virtue of South Africa's government declaring a State of Disaster, in respect of the National State of Disaster Act, Act No. 57 of 2002, has inherited a degree of fear and anxiety. This also being due to the economic downturn and South Africa's economic grading being "duped" with the classification of "Junk Status".

Parents, caregivers and co-holders of parental responsibilities and rights are faced with lay-offs; retrenchments and deductions in salary -payments which effectively has an impact on their financial ability to pay and contribute to maintenance.

The question on most parents lips, irrespective whether you are on the receiving or actioning -end, is what would the consequence be of a parent; caregiver or co – holder of parental responsibility and rights either losing their income, being paid a reduction thereof or are retrenched?

THE MAINTENANCE ACT, ACT NO. 99 OF 1998 (AS AMENDED) AS DEPARTURE POINT

An important aspect to this discussion would require a reverting back to the basics. The basics taking us to the Maintenance Act, Act No. 99 of 1998 inclusive of its amendments. A child is entitled to reasonable maintenance, which maintenance is a term used to describe a parties duty to provide for clothing, housing, dental and medical care, education and training, and, where applicable, recreation.

It is clear from legislation that both parents have a duty to maintain the child/children according to their respective means. Such duty exists irrespective of whether the child has been adopted or born in/out of wedlock. The Courts in respect of child maintenance ventures on an investigative - journey in regard to the referred to "respective means" of the parties and are *ad idem* that what is "reasonable" will depend on the family's (i) standard of living, (ii) their respective income and the (iii) cost of living, the child/children has/have become accustomed to. The standard of living usually determines whether expenses for recreation, and secondary- and tertiary-level education will be awarded.

An order in respect of maintaining a child/children may be awarded either by virtue of a divorce order (*incorporating the maintenance and contact to the children*); or may be an order by a maintenance court by virtue whereof any party acting on behalf of a child, whom has a right to maintenance, may approach the court and institutes proceedings against the other party (parent) for contribution to said maintenance of the child/children.

Once such order has been made by a competent court, having jurisdiction to entertain such matters, the order will remain in existence, until such time, any of the parties approaches a court for a variation, reduction or setting aside of the existing order. A variation may be brought on grounds such as a "material change in financial circumstances".

WHAT QUALIFIES AS "A MATERIAL CHANGE IN FINANCIAL CIRCUMSTANCES"?

The question which thus remains is, what qualifies as a material change in financial circumstances and would a financial loss suffered due to Covid-19 and the subsequent lockdown suffice? It can be argued that the impacts people suffer due.

to Covid-19 may most certainly qualify as a material change in financial circumstances. However, bear in mind that in law and specifically in this relation for instance a Rule 43 - amendment of maintenance order, called a Rule 43(6) Applications, the change/variation will need to be proved by the person alleging such change^[1]

THE INABILITY OF A PARTY TO MEET OBLIGATION IN TERMS OF AN EXISTING MAINTENANCE ORDER

Practically, should a party to a maintenance order, either by way of Rule 43; Divorce Order or Maintenance order, fall into a situation wherein he/she is no longer able meet his/her obligations in terms of the mentioned orders, he/she may approach the relevant court, such as the High Court, Regional Court or the Maintenance Court for a variation, reduction or setting aside of a maintenance order. This action would be possible by virtue of either an application to the High Court or by virtue of completing a **Form B (J107)** in the Maintenance Court.

It is indeed possible in terms of Section 8 of the Divorce Act 70 of 1979, for a High Court, Regional and Magistrate's Court to vary an existing maintenance order. The grounds upon which the relevant court, with the necessary jurisdiction, will consider such application for variation, reduction or setting aside, is to determine whether there is sufficient reason to do so. The court will in regard to a claim based on sufficient reason consider factors such as (1) the respective income of the parties; (2) the parties ability to contribute or support the child/children and him/her-self; and most importantly (3) the deterioration in the maintenance debtor's financial position^[2]. The court goes further and makes a determination in

regard to the deterioration of the debtor's financial position by investigating whether it is due to circumstances beyond his/her control.

The party bringing the application to court, would have to show to the court his/her inability to pay.

In light of the above, the relevant legislation and legal concepts already interpreted by courts, it would appear as though a loss of income or salary reduction, in this case due to the nationwide lockdown, would suffice in proving that sufficient reason exists to vary an existing maintenance order.

An party approaching a court applying for a reduction of a maintenance order would be successful if such Applicant can prove that the party's (i) income has been reduced; (ii) the party has lost his/her income; (iii) or been temporarily or permanently laid off. Further that due to the circumstances pointed out in (i); (ii) or (iii) the party has the inability to pay the current maintenance in terms of the existing maintenance order.

CURRENT SITUATION UNDER COVID 19 AND A PERSON'S RIGHT TO APPLY FOR A VARIATION OF A MAINTENANCE ORDER

Currently and for the foreseeable future, at least until such time the courts re-open, parties will not be able to approach the court for a variation of reduction in or setting aside of an existing maintenance order. It is thus important to note that a party under court order for maintenance, should continue paying maintenance until such time a court, with the necessary jurisdiction varies; reduces or sets aside the referred to maintenance order.

Should a party under order to pay maintenance during lockdown or due to Covid-19 unilaterally decide to stop paying maintenance without having a varied order in hand, that party will be held liable to pay any arrears in maintenance which the party failed to pay.

The party whom did not receive the maintenance may on this basis approach a court of law to enforce payment of any arrear maintenance either by way of (1) a warrant of execution (Form O); (2) an emolument attachment order (Form L); (3) a complaint of failure to comply with a maintenance order (Form Q – J470) or (4) can be found guilty of a criminal offence and be liable on conviction, to a fine or to be imprisoned.

CONCLUSION

It is thus advisable to continue paying maintenance during lockdown and irrespective the impact of Covid -19. Upon being able to do so and the party applying to court for a variation of an existing maintenance order, being further able to proof a change in financial circumstances, and the court varying the order, then only may a party proceed to pay the varied amount.

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[1] *Bruni v Bruni* [2007] 3 All SA 139 (W).

[2] *Hancock v Hancock* 1957 (2) SA 500 (C)