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**MEDIA STATEMENT BY THE SOUTH AFRICAN LAW REFORM COMMISSION
CONCERNING ITS RELEASE OF REPORT ON PROJECT 100B: REVIEW OF THE
MAINTENANCE ACT, 1998 (ACT NO.99 OF 1998)**

The South African Law Reform Commission (SALRC) was established by the South African Law Reform Commission Act 19 of 1973. It is an advisory body whose aim is the renewal and improvement of the law of South Africa on a continuous basis.

The crux of the problem is that the maintenance recovery system, which is created in the Maintenance Act, 1998 is stifled by budgetary constraints; inefficiencies in the court system; shortage of adequately trained and capacitated maintenance officers and maintenance investigators; as well as a *lacuna* in the legislative framework which adversely affects the fulfilment of the State's obligations in terms of sections 9; 28(1)(b) and (2) of the Constitution and article 27 of the United Nations Convention on the Rights of the Child in a fair and equitable manner.

Women continue to struggle to access maintenance due to inefficiencies in the system and a lack of adequate resources and capacity. The national office of the DOJ&CD remains inundated with complaints from members of the public emanating from the courts nationally. There are logistical difficulties in the maintenance courts that result in the system not functioning effectively. The problems range from inadequately trained staff to insufficient facilities and resources. Some applicants or complainants fail to follow instructions provided by maintenance officers. Clients are generally not satisfied with the

manner in which maintenance officers deal with maintenance matters and/or with the orders made by the courts.

The aim of Project 100B is to investigate the shortcomings in the maintenance recovery system as identified by the Minister and the DOJ&CD with a view to make legislative and non-legislative reform proposals for consideration by the Minister of Justice and Correctional Services. The following are some of the gaps identified in the current legislative framework, and the concomitant Commission's recommendations to fill them, namely:

- (a) The Act only makes provision for arrear maintenance. Future maintenance is not provided for in the Act:

Recommendation: The Draft Maintenance Amendment Bill (Draft Bill) includes a new Chapter 5A which gives the maintenance court the power to make an order for future maintenance. The Draft Bill provides for circumstances under which moneys and assets can be attached for future maintenance, how, when and the institutions that should administer money and assets attached to secure future maintenance.

- (b) The Act does not make provision for mediation in maintenance matters despite the fact that mediation is presently provided to clients in maintenance courts on a voluntary basis:

Recommendation: The Commission recommends that mediation be formally incorporated into the Maintenance Act and that the referral of parties to mediation after the initial investigation of the application or complaint be made mandatory. Vulnerable and poor applicants or complainants do not have to pay for mediation services as such service will be provided to them by maintenance court officials free of charge.

- (c) There is no formula for the determination of maintenance awards. Magistrates have discretion in determining appropriate maintenance awards. In practice, this has led to discontent by some members of society who feel let-down by

maintenance orders that are not in line with the best interest of the child standard as envisaged in section 28(2) of the Constitution:

Recommendation: The Commission recommends that the Minister be empowered to develop and publish guidelines in the Regulations under the Act for the determination of maintenance awards in order to ensure uniformity.

- (d) There is no provision in the Act for indigent maintenance debtors to make a maintenance contribution in kind:

Recommendation: The proposed amended definition of “maintenance order” in the Draft Bill provides for payment of maintenance in kind, either by way of supplying specified goods, like livestock, or providing a personal service, for those defaulters who are unable to contribute cash towards their maintenance obligations.

- (e) Although this has since been addressed in case law, it was unclear who has *locus standi* in a case where a child attains majority but is still dependent on his or her parents:

Recommendation: The Commission recommends that children above the age of 18 who are still dependent on their parents for financial support should be able to bring an application for maintenance against their parent/s in the maintenance court provided that they can prove to court that they do not have the means to support themselves.

- (f) There is no provision in the Act for automatic adjustment of a default arrear maintenance amount created by the delay in the enforcement of a maintenance order:

Recommendation: The Commission recommends that maintenance creditors should be able to make an affidavit before the service of a warrant of execution, an emolument attachment order or the attachment of a debt, in which it is stated

that they had not received maintenance payments from the date on which an order was made. The court may then make an order for an automatic adjustment of the warrant of execution or the amount to be attached in case of the attachment of emolument or a debt.

- (g) There is a need to widen the choice of remedies available to maintenance creditors or to make more than one remedy applicable in one court application:

Recommendation: The Commission recommends that provision be made for choice of remedies in one application. This means that a typical application could contain the following options, namely: execution against property, attachment of emoluments, attachment of debt and/or any other remedy as the court may deem just and equitable in the circumstances.

- (h) The Act does not make provision for interim attachment orders and punitive cost orders:

Recommendation: The Commission recommends that if it can be established that there is a debt/emolument/property belonging to the maintenance debtor, but in possession of a third party, then the court may make an interim attachment order calling on all parties involved to show cause why the money or property should not be attached in lieu of arrears and/or future maintenance. This will assist the maintenance applicant to secure the debt/emolument/property for attachment which could have been used to satisfy the maintenance order, but it was not yet done.

The Commission further recommends that there is a need to provide maintenance courts with the power to award cost orders, including punitive costs, against parties who frivolously, vexatiously or unreasonably abuse court processes with the intention of frustrating the maintenance claims instituted against them. This includes parties who frivolously, vexatiously or unreasonably fail to participate in maintenance mediation as provided for in this Act.

- (i) The Act is silent as to how and when to attach certain category of assets like a living annuity and similar products:

Recommendation: The Commission recommends that in case of attachment of arrear and future maintenance from the benefit paid to the annuitant by the fund/insurer from a living annuity, the maintenance court be empowered to determine the percentage payout, the frequency of such payments towards the respondent, as well as prohibit the respondent to change the rate at which the payout is taxed, in order for the maintenance payments to be made on a monthly basis in terms of the monthly court order. The aim of the proposed amendments is to prevent recalcitrant maintenance payers from using this vehicle to thwart attachment of arrears and future maintenance.

- (j) There is no certainty as to when the assets of a trust can be taken into account for purposes of the determination of a maintenance award and/or the enforcement of a maintenance order:

Recommendation: The Commission recommends that if it can be established that there was an abuse of the trust form, courts are firstly empowered to disregard the ordinary consequences that follow upon the establishment of a trust and pierce the trust veneer. Using the trust as one's *alter ego* is indeed one of the circumstances which can be seen as an abuse of the trust form which can lead to veil-piercing, but it is not the only circumstance under which the common-law remedy of veil piercing may apply. Secondly, courts have the authority to declare a so-called "trust" to be a sham or a simulation in circumstances where the trust was used dishonestly or unconscionably to evade a liability.

This Report contains the SALRC's final recommendations for law reform, including a proposed draft Bill titled Maintenance Amendment Bill, with regard to Project 100B: Review of the Maintenance Act, 1998 (Act No.99 of 1998). The Report takes into account all the input and comments received from the stakeholders and members of the public to Issue Paper 28 and Discussion Paper 157, to the virtual workshops held in July 2022, as well as input obtained at the Maintenance Working Session: Strengthening

Maintenance Service Delivery held on 9-10 June 2023 at *Imvelo* Safari Lodge, Bloemfontein.

The full Report is available is available on the Internet at the following site:

<http://www.justice.gov.za/salrc/reports.htm>

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