

3.3.2 The Maintenance Act 99 of 1998

Though the Maintenance Act is considered the main piece of legislation governing domestic maintenance cases within South Africa, it lacks any mention of cross border maintenance recovery instances.⁴¹⁵ The lack of reference to cross border maintenance recovery in the Maintenance Act could be indicative of the understanding that the above-mentioned REMO and REMO Africa Act are the only legislative means of dealing directly with cross border maintenance issues.⁴¹⁶ This omission in the Maintenance Act allows for a clearly out dated and defective system in dealing with cross border maintenance recovery issues due to the limited number of proclaimed or designated countries stated in the REMO and REMO Africa Act with which South Africa enforces foreign maintenance orders.⁴¹⁷ The above-mentioned oversight could also indicate that cross border maintenance recovery cases are not considered as important to the legislature as domestic recovery cases thereby enabling maintenance debtors to avoid complying with their maintenance obligations by leaving South Africa's borders.

3.3.3 The Maintenance Amendment Act 9 of 2015

The Maintenance Amendment Act 9 of 2015 (hereafter referred to as the Amendment Act) is the legislature's latest addition to the current maintenance law regime in South Africa. While the Amendment Act definitely adds to the domestic position regarding maintenance recovery and enforcement of maintenance payments, like the Maintenance Act, it lacks consideration of the cross border maintenance recovery system.⁴¹⁸ It could be said that the development of the Amendment Act was the perfect opportunity to include improvements to the current South African cross border maintenance recovery system. However, it could also be stated that as the Act is considered an amendment to the Maintenance Act, including any provisions regarding the cross border maintenance recovery system would add an entirely new aspect to the existing Maintenance Act. The cross border maintenance system should rather be considered as a separate piece of legislation; perhaps an updated amendment act to the REMO and REMO Africa Act, which already deals with cross border maintenance recovery, is preferable.

⁴¹⁵ Maintenance Act 99 of 1998.

⁴¹⁶ Clark B (2000) 296; Sinclair J, Heaton J and Hahlo H *The Law of Marriage Vol I* 5ed (1996) 476.

⁴¹⁷ Department of Justice and Constitutional Development 'Maintenance: Reciprocal Enforcement of Maintenance Orders Act 80 of 1963' available at <http://www.justice.gov.za/vg/mnt.html> (Accessed on 30 June 2016).

⁴¹⁸ Maintenance Amendment Act 9 of 2015.

3.4 Bilateral Agreements

A bilateral agreement contains a mutual agreement to either perform or refrain from performing an action.⁴¹⁹ The agreement will be between at least two parties.⁴²⁰ Bilateral agreements made within the field of child maintenance law allow for the parties' residence to be a factor in determining a resolution.⁴²¹ Each country, where a party to the dispute resides, is required to perform an action in terms of a bilateral agreement.⁴²² The performed action is often that each country has a reciprocal duty to recognise and enforce an existing maintenance order made in the other country which is party to the agreement.⁴²³ Other duties involved would be to amend an existing order if deemed necessary and even to create a maintenance order, which is then to be recognised in the country that is also party to the bilateral agreement.

The bilateral agreements that South Africa has entered into regarding maintenance are only those agreements applicable to the proclaimed and designated countries stated in the REMO and REMO Africa Act.⁴²⁴ No new agreements have been concluded outside of the proclaimed countries allowing for cross border maintenance recovery.⁴²⁵ Due to the dates of the REMO and REMO Africa Act, not many persons including legal professionals know about the 1963 or 1989 Act, though particularly the 1963 Act, causing their usage in modern day recovery processes to become near obsolete.⁴²⁶ Due to both Acts being used far less than the current practice methods in dealing with cross border maintenance recovery cases, the use of the bilateral agreements concluded with the proclaimed countries stated in the 1963 Act's

⁴¹⁹ Hutchison A 'Reciprocity in Contract Law' (2013) 1 *Stellenbosch Law Review* 3.

⁴²⁰ Win Global Partners Export and Import Management 'Multinational and Bilateral Trade Agreements and Their Effects on Your Business' available at http://winglobal.ca/multinational_and_bilateral_trade_agreements_and_their_effects_on_your_business/ (Accessed on 17 October 2016).

⁴²¹ NI Direct Government Services 'Reciprocal Enforcement of Maintenance Orders (REMOs)' available at <https://www.nidirect.gov.uk/articles/reciprocal-enforcement-maintenance-orders-remos> (Accessed on 17 October 2016).

⁴²² Vidigal G 'From Bilateral to Multilateral Law-making: Legislation, Practice, Evolution and the Future of Inter Se Agreements in the WTO' (2013) 24 *European Journal on International Law* 1028-1029.

⁴²³ NI Direct Government Services 'Reciprocal Enforcement of Maintenance Orders (REMOs)' available at <https://www.nidirect.gov.uk/articles/reciprocal-enforcement-maintenance-orders-remos> (Accessed on 17 October 2016).

⁴²⁴ Ditshego J 'SA Law Promotes Foreign Maintenance' available at http://www.justice.gov.za/docs/articles/2009_foreign-maintenance.html (Accessed on 6 August 2016); REMO Africa Act, s2.

⁴²⁵ Department of Justice and Constitutional Development 'Maintenance: Reciprocal Enforcement of Maintenance Orders Act 80 of 1963' available at <http://www.justice.gov.za/vg/mnt.html> (Accessed on 30 June 2016).

⁴²⁶ Palmeira N 'Maintenance of Children in Foreign Countries' available at <http://mclarens.co.za/maintenance-children-foreign-countries/> (Accessed on 25 May 2016).

Schedule and designated countries in the 1989 Acts Schedule have lessened.⁴²⁷ The current method of practice in dealing with cross border maintenance recovery cases is to ‘launch formal proceedings in the courts of the foreign country based on an already existing maintenance order.’⁴²⁸ It is important to note that the launching of formal proceedings is an expensive process and takes an indeterminable amount of time to resolve, often leading to unfavourable results as stated previously.

The decrease in using the REMO and REMO Africa Act as well as the bilateral agreements stemming from said Acts in resolving cross border maintenance recovery disputes hinders the effectiveness of the recovery and enforcement of maintenance payments. The REMO and REMO Africa Acts allow for a certain guaranteed process of recognising maintenance orders using diplomatic channels.⁴²⁹ However, even with using the diplomatic channels to get a maintenance order recognised in a proclaimed or designated country, it remains a yearlong process.⁴³⁰ Nevertheless, it is still a faster process than the current method of practice mentioned above.

Due to the current practice method being expensive, tedious, and lengthy in resolving disputes, considering the conclusion of both updated and new bilateral agreements is necessary. These updated and new bilateral agreements should be considered with the proclaimed countries listed in the REMO’s Schedule and the designated countries listed in the REMO Africa Act’s Schedule as well as with countries that fall out of these lists.⁴³¹ However, as the existing bilateral agreements are not widely used in current practice, whether due to a lack of knowledge regarding their existence or to their limitations in applicability in reference to the proclaimed or designated countries lists, it would seem prudent to find an alternative method of dealing with cross border maintenance recovery in South Africa.⁴³²

⁴²⁷ Department of Justice and Constitutional Development ‘Maintenance: Reciprocal Enforcement of Maintenance Orders Act 80 of 1963’ available at <http://www.justice.gov.za/vg/mnt.html> (Accessed on 30 June 2016).

⁴²⁸ Palmeira N ‘Maintenance of Children in Foreign Countries’ available at <http://mclarens.co.za/maintenance-children-foreign-countries/> (Accessed on 25 May 2016).

⁴²⁹ REMO, s3 and 4; REMO Africa Act, s4, 6 and 7.

⁴³⁰ Palmeira N ‘Maintenance of Children in Foreign Countries’ available at <http://mclarens.co.za/maintenance-children-foreign-countries/> (Accessed on 25 May 2016).

⁴³¹ Department of Justice and Constitutional Development ‘Maintenance: Reciprocal Enforcement of Maintenance Orders Act 80 of 1963’ available at <http://www.justice.gov.za/vg/mnt.html> (Accessed on 30 June 2016).

⁴³² Schedule of Countries Recognised under the Reciprocal Enforcement of Maintenance Orders Act 80 of 1963 and Reciprocal Enforcement of Maintenance Orders (Countries in Africa) Act 6 of 1989; Palmeira N ‘Maintenance of Children in Foreign Countries’ available at <http://mclarens.co.za/maintenance-children-foreign-countries/> (Accessed on 25 May 2016).

3.5 Conflict of Law Provisions

A conflict of laws provision concerns relations across different legal jurisdictions between persons, companies, corporations or other legal entities.⁴³³ Within the context of maintenance recovery, conflict of laws provisions would be present when determining which country's laws would be applicable or used to solve a maintenance dispute in cross border recovery circumstances. In such a dispute, it is necessary to determine which legal system will be used in resolving the dispute as the determined legal system will be responsible for ensuring that enforcement takes place and outstanding maintenance is paid.

With regard to cross border maintenance recovery, there are no set conflict of law provisions available for use in dealing solely with maintenance disputes at an international level.⁴³⁴ An assumption can be made that the point of departure in determining which law is applicable in cross border maintenance recovery disputes would be the law of the country where the maintenance order was granted.⁴³⁵ For example, if the maintenance order was granted in South Africa then the laws pertaining to maintenance recovery and enforcement used should be those of South Africa. Additionally reinforcing this is that when the maintenance order is granted, both parties are often in the country at that time. In the case of agreement between the parties' as to the maintenance order, it is necessary that both parties' sign this agreement. The agreement is then confirmed by the courts of the country making it clear that the parties have tacitly agreed to the use of the law of the country where the agreement was made.⁴³⁶

When a party to a maintenance agreement subsequently leaves the jurisdiction of the country in which the maintenance order was made, a conflict arises as to the law applicable to the maintenance recovery dispute, particularly in enforcing an existing maintenance agreement or the enforcement of maintenance payments.⁴³⁷ In continuation of the above mentioned example regarding a South African maintenance order, when the maintenance debtor moves out of South Africa's jurisdiction, enforcing compliance with a maintenance order becomes problematic. When following the above stated position that South African law should be followed, the South African measures available for solving cross border maintenance

⁴³³ CTI Reviews *The Legal and Regulatory Environment of Business: Business, Business Law* 16 ed (2016) 93.

⁴³⁴ Wakefield R *Enforcement of Foreign Jurisdictions in 28 Jurisdictions worldwide: South Africa* (2012) 108.

⁴³⁵ Wakefield R (2012) 108.

⁴³⁶ Preller B 'Family Law Matters...Child Maintenance' available at <http://www.divorcelaws.co.za/child-maintenance-frequently-asked-questions.html> (Accessed on 10 September 2016).

⁴³⁷ Wakefield R (2012) 109.

enforcement disputes (as discussed in 3.6 below) are not able to truly ensure enforcement.⁴³⁸ The measures available for enforcement will be those used when a matter concerns enforcement of a maintenance order at a domestic level, i.e. the attachment of property, emoluments or debts or imprisonment as there are no measures assigned specifically for cross border maintenance recovery.⁴³⁹ As stated previously, the domestic measures available in South Africa lack effectiveness when applied to a domestic maintenance dispute.⁴⁴⁰ Therefore, utilising them in cross border maintenance dispute will not be of assistance to the maintenance creditor in securing the maintenance owed for the child. As a result, the maintenance debtor is able to evade the consequences for not complying with a maintenance order made against him or her.

South Africa's enforcement measures in terms of the Maintenance Act as stated above require the maintenance debtor to be within South Africa's borders in order for the measures to have some form of effectiveness in recovering the monies owed to the maintenance creditor.⁴⁴¹ As the maintenance debtor is most often the party who no longer resides within the country, the measures used to enforce an existing maintenance order would have to be those measures used in the country where the maintenance debtor now resides.⁴⁴² This would indicate that the law applicable to maintenance recovery disputes should be the law of the country in which the maintenance debtor now resides as opposed to the law of the country where the maintenance order was issued. Countries are required to have effective enforcement measures available to be used in all instances of maintenance recovery whether disputes arise domestically within a country or when any disputes have a cross border element. In order to ensure effectiveness in cross border maintenance recovery, each country needs to have rules in place on the recognition of maintenance orders made in a country other than the country now tasked with ensuring enforcement of the order.⁴⁴³ For example, South Africa needs to have rules in place regarding the recognition and enforcement of a maintenance order made in Scotland.

The Convention allows for both recognition and enforcement measures to be efficient in that the processes are uniform in approach.⁴⁴⁴ However, the enforcement measures will be

⁴³⁸ Wakefield R (2012) 109.

⁴³⁹ Maintenance Act 99 of 1998, s26 – 31.

⁴⁴⁰ *Bannatyne v Bannatyne* at paras 26 – 28.

⁴⁴¹ Wakefield R (2012) 109.

⁴⁴² Wakefield R (2012) 110.

⁴⁴³ Clark B (1999) 264.

⁴⁴⁴ Duncan W (2008) 316.

dependent on the measures used by each country when dealing with a maintenance dispute.⁴⁴⁵ Under the Convention, the measures available for enforcement include the attachment of property, the attachment of debts as well as the attachment of emoluments, the revocation of licences and tax refund withholding but to name a few.⁴⁴⁶ Each country is afforded the position to choose the enforcement measures to be used within their borders.⁴⁴⁷ With the choice of which measures to use for the enforcement of decisions afforded to each member country to the Convention, less legal reform is necessary when implementing the Convention's Article 34 measures for enforcement.⁴⁴⁸ For example, with the attachment of property, emoluments and debts already being used in enforcing maintenance decisions at a domestic level, less reform and effort is required to include these measures in its choices for enforcement under Article 34.

Moreover, imprisonment of the maintenance debtor for failing to comply with a maintenance order made against them is one measure that many countries have removed from their array of enforcement measures due to its declining effectiveness.⁴⁴⁹ Imprisonment stalls the process of recovery due to a lack of earnings made by the maintenance debtor during his or her incarceration and as such is not in the best interests of the child for whom maintenance is to be paid.⁴⁵⁰ However, correctional supervision or periodical imprisonment could be considered as a means to combat the lack of employment faced by maintenance debtors when sentenced to prison for defaulting in making maintenance payments.⁴⁵¹ Correctional supervision, for example, allows for the maintenance debtor to leave the confinement of his home to attend work which would then be paid over the maintenance creditor.⁴⁵² Periodical imprisonment offers a similar effect to correctional supervision in that the maintenance debtor, for example, could be permitted to leave the prison on weekdays for employment purposes while having to return to the prison once work is completed.⁴⁵³

⁴⁴⁵ Hague Conference on Private International Law (2013) 168.

⁴⁴⁶ *Hague Convention 2007*, Article 34(2).

⁴⁴⁷ Borrás A and Degeling J (2013) 195.

⁴⁴⁸ Borrás A and Degeling J (2013) 195.

⁴⁴⁹ Magaya I 'Children's Rights: Imprisonment for Maintenance Defaulters?' available at <http://www.hsrc.ac.za/en/review/hsrc-review-april-to-june-2015/child-rights-imprisonment-for-defaulters> (Accessed on 18 October 2016).

⁴⁵⁰ Carnelley M 'A review of the criminal prosecution and sentencing of maintenance defaulters in South Africa, with commentary on sentencing strategies' (2012) 25(3) *South African Journal of Criminal Justice* 356.

⁴⁵¹ Carnelley M (2012) 358.

⁴⁵² Carnelley M (2012) 358.

⁴⁵³ Carnelley M (2012) 358.

It is clear under Article 34 of the Convention that imprisonment is not considered as an effective enforcement measure.⁴⁵⁴ Being a comprehensive legal instrument, the Convention has taken into account the problems surrounding incarceration of a maintenance debtor as being ineffective in recovering monies owing to the creditor for maintenance payments.⁴⁵⁵ It is not a practical outcome due to the imprisoned maintenance debtor not receiving an income.⁴⁵⁶ Incarceration also hinders the maintenance debtor's ability to find employment once released.⁴⁵⁷ Applying the uniform approach to recognition and enforcement measures found in the Convention will allow for a positive increase in resolving cross border maintenance disputes while also decreasing the number of maintenance debtors who are able to avoid compliance with orders made against them.

In resolving cross border maintenance recovery disputes where the Convention is not applicable, it is in the creditor's best interests to request for an existing maintenance order to be recognised in the country where the maintenance debtor now resides.⁴⁵⁸ As the debtor no longer resides in the country that made the original maintenance order, using the enforcement measures available to the State of Origin would be detrimental to the creditor as the effective recovery measures have no bearing on the debtor due to him residing outside the State of Origin's jurisdiction.⁴⁵⁹ The creditor is more likely to succeed in recovery the maintenance owing from the debtor through the recognition and enforcement of the maintenance order in the debtor's country of residence.⁴⁶⁰ Should the Convention be applicable to disputes of cross border maintenance recovery in the countries involved in the matter, the problems regarding the conflict of laws is already resolved. The Convention states that it is the country of the Requested State that has jurisdiction in matters of enforcement, i.e. the country where the debtor is resident.⁴⁶¹

3.6 South Africa's Enforcement Measures for the Recovery of Child Maintenance

Enforcement measures are used to ensure that maintenance payments are made timeously and regularly.⁴⁶² There are varieties of enforcement measures that are used in different

⁴⁵⁴ *Hague Convention 2007*, Article 34(2).

⁴⁵⁵ Walker L (2015) 256.

⁴⁵⁶ *S v Maponya* [2005] JOL 14896 (T) para 5.

⁴⁵⁷ Burman S and Berger S 'When family support fails: the problem of maintenance payments in apartheid South Africa: Part I' (1988) 4 *South African Journal of Human Rights* 205.

⁴⁵⁸ Borrás A and Degeling J (2013) 167.

⁴⁵⁹ Walker L (2015) 73.

⁴⁶⁰ Walker L (2015) 73.

⁴⁶¹ *Hague Convention 2007*, Article 32(1).

⁴⁶² *Bannatyne v Bannatyne* 2003 (2) SA 363 (CC) at para 31.

countries.⁴⁶³ The choice of enforcement measure is dependent on the availability of resources in each country.⁴⁶⁴ For example, the USA makes use of wage-withholding orders to ensure maintenance payments are made to the creditor. The employer will withhold monies from the maintenance debtor's salary or wages and pay the monies to an enforcement authority on the debtor's behalf.⁴⁶⁵ The enforcement authority is a body that acts as an objective intermediary in assisting that the maintenance debtor makes his maintenance payments to the creditor for his child while still taking into account the debtor's circumstances i.e. the reason for the debtor's non-payments and then assists him in complying with a maintenance order made against him.⁴⁶⁶ The enforcement authority keeps records of the payments made by the debtor. Wage withholding using an enforcement authority may be initiated voluntarily by the debtor showing his wish to comply with the order for maintenance made against him.⁴⁶⁷ This allows maintenance payments to be made regularly without the debtor stalling in paying or not making payments at all.⁴⁶⁸

Other enforcement measures include garnishment orders, property attachments, suspension of driver's licences and passports, credit bureau reporting, deducting from social security payments, imprisonment, tax refund withholding, wage withholding and attaching pension benefits.⁴⁶⁹ In addition, the use of mediation and conciliation processes are considered as enforcement measures as it promotes voluntary compliance with maintenance obligations.⁴⁷⁰ The above-mentioned processes are considered effective tools as it can be easily determined which maintenance debtor wishes to maintain their children and which do not.⁴⁷¹ It is important to have a variety of enforcement measures available due to the various and

⁴⁶³ *Hague Convention, 2007*, Art 34.

⁴⁶⁴ Hammond D and Barnes M (2013) 272.

⁴⁶⁵ Potts D – Senior Associate, Centre for the Support of Families, dpotts@csfmail.org – ‘The Nature of Child Support and the Role of Government in its Recovery’ presented at the Hague Conference on the Global Recovery of Child Support and Family Maintenance in Asia Pacific and Worldwide 9 – 11 November 2015 in Hong Kong, presentation slide 8.

⁴⁶⁶ Rosenak L – Sr, Vice President, Child Support Services, Human Services North America, MAXIMUS, childsupportinfo@maximus.com – ‘Early Intervention’ presented at the Hague Conference on the Global Recovery of Child Support and Family Maintenance in Asia Pacific and Worldwide 9 – 11 November 2015 in Hong Kong, presentation slide 5.

⁴⁶⁷ Hague Conference on Private International Law (2013) 169.

⁴⁶⁸ Griffin A – Director at the Californian Department of Child Services, alisha.griffin@dcss.ca.gov – ‘The Evolution of US/North American Enforcement Practices: 20 Years of Learning’ presented at the Hague Conference on the Global Recovery of Child Support and Family Maintenance in Asia Pacific and Worldwide 9 – 11 November 2015 in Hong Kong, presentation slide 7.

⁴⁶⁹ *Hague Convention 2007*, Article 34.

⁴⁷⁰ Hague Conference on Private International Law (2013) 170.

⁴⁷¹ Hague Conference on Private International Law (2013) 166.

individual circumstances surrounding maintenance disputes. South Africa has three civil enforcement measures and one criminal enforcement measure (See 3.6.1 below).⁴⁷²

3.6.1 Domestic Recovery Measures

The three civil law enforcement measures used in South Africa in dealing with domestic maintenance claims are issuing warrants of execution, attaching emoluments and attaching debts.⁴⁷³ The criminal law enforcement measure in dealing with maintenance obligations is imprisonment, paying a fine or both.⁴⁷⁴ Sections 26 to 31 of the Maintenance Act give legislative power to the above-mentioned domestic maintenance recovery measures.⁴⁷⁵

Under the civil execution chapter of the Maintenance Act, section 26 considers the enforcement of maintenance orders.⁴⁷⁶ Any person who does not comply with a maintenance order made under the Maintenance Act in failing to make periodical payments or that of a lump sum, shall be enforceable in respect of the amount the person has failed to pay with the interest thereon.⁴⁷⁷ Enforcing the maintenance debtor to make the maintenance payments owing to the maintenance creditor is done through execution of property, the attachment of emoluments, or the attachment of a debt.⁴⁷⁸ If a maintenance debtor is more than ten days late in making the ordered maintenance payment(s), the maintenance creditor is permitted to apply for a maintenance court to enforce the payment(s).⁴⁷⁹ The court will use the enforcement measures listed in the Maintenance Act.⁴⁸⁰ However, the maintenance court shall refrain from using the enforcement measures when the payments have been suspended by an appeal against the maintenance order.⁴⁸¹ An important aspect to note is that any pension, annuity, gratuity, compassionate allowance, or any other similar benefit shall be liable to be subjected to the civil enforcement measures listed in the Maintenance Act as a means of satisfying the maintenance payments owing.⁴⁸²

⁴⁷² Maintenance Act 99 of 1998, Chapters 5 and 6, s26-31.

⁴⁷³ De Jong M 'Ten Year Anniversary of the Maintenance Act 99 of 1998 – A Time to Reflect on Improvements, Shortcomings and the Way Forward' (2009) 126 *South African Law Journal* 595.

⁴⁷⁴ Mamashela M 'The Courts' Interpretation of Section 31 of the Maintenance Act 99 of 1998 and its Predecessors' (2005) 122 *South African Law Journal* 228.

⁴⁷⁵ Maintenance Act 99 of 1998, s26-31.

⁴⁷⁶ De Jong M (2009) 595.

⁴⁷⁷ *Turton v Turton and Another* [2012] ZAWCHC 2 para 13.

⁴⁷⁸ *Bannatyne v Bannatyne* 2003 (2) SA 363 (CC) at para 4; Maintenance Act 99 of 1998, s26(1)(c)(i)-(iii).

⁴⁷⁹ *Van Dijk v Van Dijk* [2014] ZAKZPHC 5 para 17.

⁴⁸⁰ Maintenance Act 99 of 1998, s26-30.

⁴⁸¹ Maintenance Act 99 of 1998, s26(3)(a).

⁴⁸² *M v Minister of Justice and Constitutional Development and Others* [2014] ZAGPPHC 510 para 15.

Issuing a warrant of execution is one of civil execution methods listed in the Maintenance Act.⁴⁸³ A maintenance court may issue a warrant of execution against the maintenance debtor, upon application by the maintenance creditor.⁴⁸⁴ The warrant of execution will be issued against the maintenance debtor's movable property.⁴⁸⁵ If the maintenance debtor's movable property is insufficient to satisfy the debt owing to the maintenance creditor, the maintenance debtor's immovable property will be attached in order to satisfy the debt.⁴⁸⁶ The debt refers to the amount of maintenance the maintenance debtor owes the maintenance creditor, any interest on the amount of maintenance owing and the costs of the execution.⁴⁸⁷ Before issuing a warrant of execution, the maintenance court will consider the existing and prospective means of the maintenance debtor, the financial needs and obligations of the person who is to be maintained, the conduct of the maintenance debtor relating to his failure to pay maintenance and any other information the court deems necessary before issuing the warrant of execution.⁴⁸⁸ A warrant of execution may be set aside by the court that issued it when the maintenance debtor has shown that the order against him or her is satisfied, i.e. he or she has paid the outstanding debt.⁴⁸⁹

An attachment of emoluments order will be made by a maintenance court when a court suspends a warrant of execution or when the maintenance creditor applies for such an order.⁴⁹⁰ Emoluments for attachment will include present or future owing or accruing monies to the maintenance debtor that is then used to satisfy the maintenance payments outstanding to the maintenance creditor.⁴⁹¹ An order for the attachment of emoluments will authorise the maintenance debtor's employer to make payments to the maintenance creditor on behalf of the maintenance debtor until the debt has been paid in full.⁴⁹² Once again, the debt includes the outstanding maintenance still owing, interest thereon, and the costs of execution. An order for the attachment of emoluments may be suspended, amended, or rescinded at any time by the maintenance court if good cause can be shown.⁴⁹³ What constitutes as good cause is not stated in the Maintenance Act. However, good cause is deemed to have been shown when 'in

⁴⁸³ Maintenance Act 99 of 1998, s27.

⁴⁸⁴ Maintenance Act 99 of 1998, s27(1).

⁴⁸⁵ *Van Dijk v Van Dijk* [2014] ZAKZPHC 5 para 18.

⁴⁸⁶ Maintenance Act 99 of 1998, s27(1).

⁴⁸⁷ De Jong M (2009) 595.

⁴⁸⁸ Maintenance Act 99 of 1998. S27(5)(a)-(d).

⁴⁸⁹ *September v September* [2012] ZAWCHC 8 para 3.

⁴⁹⁰ Maintenance Act 99 of 1998, s28(1)(a) and (b).

⁴⁹¹ De Jong M (2009) 595.

⁴⁹² Maintenance Act 99 of 1998, s28(1).

⁴⁹³ Maintenance Act 99 of 1998, s28(2)(a).

the circumstances of the particular case, the legislative remedies available...are effective in protecting the rights of the complainant and the best interests of the children.⁴⁹⁴

A notice regarding the attachment of emoluments is to be sent along with a copy of the order attaching the emoluments to the maintenance debtor's employer informing the employer that he or she is to make maintenance payments on the maintenance debtor's behalf.⁴⁹⁵ The timing of payments and the manner in which they are to be paid is stated in the notice. If the employer fails to make the maintenance payments stipulated in the notice he or she has received, the maintenance order against the maintenance debtor may be enforced against the employer in respect of any amount that the employer has failed to pay.⁴⁹⁶ A duty is placed on the employer to inform the maintenance officer if the maintenance debtor leaves or is dismissed from that employer's company within seven days of his or her departure.⁴⁹⁷

Another measure of enforcement utilised by a maintenance court when ordering the payment of maintenance to a maintenance creditor is attaching any debts owed to the debtor.⁴⁹⁸ The court is permitted to attach any present or future debt owing or accruing to the maintenance debtor, who has failed to make maintenance payments, as a means of enforcing payment to satisfy the maintenance order given against him or her.⁴⁹⁹ The amount of maintenance monies to be paid to the maintenance creditor includes the outstanding maintenance the maintenance debtor has failed to pay, any interest thereon and the costs of the attachment or execution.⁵⁰⁰ When a maintenance court uses the attachment of debts as a method of enforcement, the order may be enforced as if it were a civil judgement of the court.⁵⁰¹ As is the case when attaching an emolument, an order for the attachment of a debt may be suspended, amended, or rescinded by the maintenance court if good cause can be shown.⁵⁰² As stated previously, what constitutes as good cause is determined considering the circumstances of each individual case.⁵⁰³ Determining if good cause has been shown, is dependent on whether or not

⁴⁹⁴ *Bannatyne v Bannatyne* 2003 (2) SA 363 (CC) at para 23.

⁴⁹⁵ Maintenance Act 99 of 1998, s29(1).

⁴⁹⁶ Maintenance Act 99 of 1998, s29(4).

⁴⁹⁷ Maintenance Act 99 of 1998, s29(2).

⁴⁹⁸ De Jong M (2009) 595.

⁴⁹⁹ *M v Minister of Justice and Constitutional Development and Others* [2014] ZAGPPHC 510 para 16.

⁵⁰⁰ Maintenance Act 99 of 1998, s30(1).

⁵⁰¹ Maintenance Act 99 of 1998, s30(3).

⁵⁰² Maintenance Act 99 of 1998, s30(2)(a).

⁵⁰³ Heaton J (2010) 59

the enforcement remedies found in the Maintenance Act are effective in the best interests of children and in protecting the rights of the complainant.⁵⁰⁴

Regarding criminal enforcement measures, the Maintenance Act permits that a maintenance debtor be incarcerated for failure to pay maintenance.⁵⁰⁵ If convicted of the offence under s31, the maintenance debtor will be liable to a fine or imprisonment that will not exceed a period of three years or ‘to such imprisonment without the option of a fine.’⁵⁰⁶ A maintenance debtor has the opportunity to defend him- or herself against the possible conviction of failing to pay maintenance stating that he or she lacks the means to make the payments.⁵⁰⁷ A lack of means to make payments is not a suitable defence to failing to pay maintenance when the maintenance debtor is unwilling to work or to him or her acting with misconduct.⁵⁰⁸ The prosecution bears the onus of proving that the maintenance debtor’s lack of means stems from misconduct or an unwillingness to work.⁵⁰⁹ For example, an unwillingness to work could be shown through a maintenance debtor refusing employment when it is offered to him or when the maintenance debtor does not actively search for new employment as a means of continuing non-compliance with the maintenance order made against him or her. If a maintenance debtor has been convicted of the offence of failing to pay maintenance, his or her personal particulars shall be sent to any business, which as its objective the granting of credit or is involved in the credit rating of persons.⁵¹⁰

Credit bureau reporting is not a new measure of enforcement to be utilised in South Africa as a means of ensuring the payment of maintenance.⁵¹¹ The measure is adapted to both civil and criminal measures of enforcement.⁵¹² The furnishing of a maintenance debtor’s personal particulars to all businesses involved in granting credit to persons as well as in the credit rating of persons as well as including a copy of the maintenance order against the maintenance debtor will occur when any of the above-mentioned civil means of enforcement is ordered.⁵¹³ However, as of yet, credit bureau reporting for civil means of enforcement has yet to come into operation and will remain non-operational until a date is fixed by the

⁵⁰⁴ *Bannatyne v Bannatyne* 2003 (2) SA 363 (CC) at para 23.

⁵⁰⁵ Maintenance Act 99 of 1998, s31.

⁵⁰⁶ Maintenance Amendment Act 9 of 2015, s13(a).

⁵⁰⁷ *De Haas v Fromentin and Others* 2013 (6) SA 621 (SCA) para 24; *De Jong* (2009) 596.

⁵⁰⁸ *Mamashela M* (2005) 229.

⁵⁰⁹ *De Jong* (2009) 596.

⁵¹⁰ Maintenance Amendment Act 9 of 2015, s13(b).

⁵¹¹ Maintenance Act 99 of 1998, s31(4).

⁵¹² Maintenance Amendment Act 9 of 2015, s11 and 13(b).

⁵¹³ Moodley P ‘Maintenance Amendment Act 2015’ presented at the 19th Annual Family Law Conference 17-18 March 2016 in Cape Town, South Africa, presentation slide 19.

President and proclaimed in the Government Gazette.⁵¹⁴ Under the criminal measures of enforcement, credit bureau reporting has been included within the Maintenance Act since its inception.⁵¹⁵ However, furnishing the personal particulars of a maintenance debtor was to be done at the discretion of the maintenance officer.⁵¹⁶ The Amendment Act now dissolves that discretion and the maintenance officer is obligated to send out the personal particulars of the maintenance debtor to all credit granting and credit rating businesses.⁵¹⁷ Yet, the regulations for handing over the personal particulars of maintenance debtors have not been finalised and until such time as this is completed, this enforcement method is not utilised.⁵¹⁸

3.6.2 International Recovery Measures

Within the South African legal system, there are no specific enforcement measures allocated to the recovery of maintenance when the recovery contains an international element.⁵¹⁹ This being said, it is clear that the above-mentioned enforcement measures used in domestic recovery circumstances can be utilised when dealing with cross border maintenance recovery cases.⁵²⁰ However, the domestic enforcement measures can only be truly effective in cross border instances when the maintenance debtor resides in South Africa and the maintenance creditor, who lives in France, applies for South Africa to recognise and enforce a maintenance order decided in France.⁵²¹

When a cross border court order regarding a maintenance obligation is recognised in South Africa, the domestic enforcement measures available could be used to ensure that the maintenance debtor, who resides in South Africa, comply with the maintenance order made against him or her. As the maintenance debtor currently resides in the jurisdiction of South Africa, the South African courts are able to make orders relating to warrants of execution, attaching emoluments, as well as attaching debts owing or accruing to the maintenance debtor as a means of enforcing compliance with the now recognised French maintenance order.⁵²²

⁵¹⁴ Maintenance Amendment Act 9 of 2015, S11 and 13(b).

⁵¹⁵ Maintenance Act 99 of 1998, s31(4).

⁵¹⁶ Maintenance Act 99 of 1998, s31(4).

⁵¹⁷ Maintenance Amendment Act 9 of 2015, s13(b); Moodley P (2016) 19.

⁵¹⁸ Moodley P (2016) 21.

⁵¹⁹ Maintenance Act 99 of 1998.

⁵²⁰ Wakefield R (2012) 109.

⁵²¹ Wakefield R (2012) 109.

⁵²² De Jong M (2009) 595.

The court is also permitted to convict the maintenance debtor for failing to comply with a maintenance order made against him or her and impose criminal sanctions.⁵²³

The domestic measures for enforcement cannot be utilised when requesting that a South African maintenance order be recognised and enforced in the country where the maintenance debtor now resides.⁵²⁴ For example, when issuing a warrant of execution as a means of enforcing the payment of maintenance, a court cannot attach moveable or immovable property as such property does not exist within South Africa's borders.⁵²⁵ However, it seems possible that issuing a warrant of arrest for failing to pay maintenance could still be ordered by a South African court though it cannot be executed until the maintenance debtor returns to South Africa.

3.7 Conclusion

This chapter has given insight into South Africa's legal position regarding cross border child maintenance recovery processes. Important aspects considered in the chapter include the duty of support, the measures of enforcement South Africa uses when dealing with both domestic and cross border maintenance recovery situations. Bilateral agreements and conflict of laws provisions affecting South Africa's legal position were discussed.

The duty to support one's child is recognised in international instruments including the CRC and ACRWC.⁵²⁶ South Africa's recognition of the duty stems from the common law and continues to grow in importance through its ratification of these above-mentioned instruments and its inclusion of the duty in its national legislation, specifically the Constitution as well as the Children's Act.⁵²⁷ In recognising the duty of support, practical elements relating to ensuring the payment of child maintenance need to be effective. South African judicial precedent acknowledges the importance of ensuring that maintenance payments are enforced when there are lapses in payments in order to promote protecting the rights of children.⁵²⁸ Legislative improvements have been made, in particular reference to the Maintenance Amendment Act now in effect.⁵²⁹ Though improvements have been made in the

⁵²³ Carnelley M (2012) 350.

⁵²⁴ Hague Conference on Private International Law (2013) 168.

⁵²⁵ Wakefield R (2012) 109.

⁵²⁶ Clark B (1999) 24, 259-260.

⁵²⁷ Constitution of the Republic of South Africa, 1996; Children's Act 38 of 2005.

⁵²⁸ *Bannatyne v Bannatyne* 2003 (2) SA 363 (CC) paras 24-32.

⁵²⁹ Maintenance Amendment Act 9 of 2015.

recovery of child maintenance in domestic recovery instances, cross border recovery cases lack any improvement as regards the legislative sphere due to a lack of consideration.

As shown in the chapter, the lack of knowledge of bilateral agreements available for use in cross border recovery circumstances allows for the process of recovery to be drawn out and tedious while it also often yields unfavourable results.⁵³⁰ Creating awareness of bilateral agreements will assist in using those agreements in cross border cases when a proclaimed country is involved in a dispute. However, the use of the already existing bilateral agreements will not aid favourably in all cross border maintenance recovery cases, due to the limited amount of agreements concluded between South Africa and other countries.⁵³¹ While the REMO and REMO Africa Act states a procedure applicable for recognition and enforcement, namely sending the order through diplomatic channels to the Minister of Justice and Director-General respectively, for it to then be forwarded to a maintenance court for recognition, both Acts are silent on what aspects the court will consider in its determination for the order's recognition in South Africa.⁵³²

Using a purely documentary approach to recognition under the REMO or REMO Africa Act, while more efficient and affordable to instituting formal proceedings in a South African maintenance court, it does not allow for parties to the dispute to have any input into the matter of recognition.⁵³³ If the maintenance order is rejected by the maintenance court, there will be an increase in debtors escaping their duty to support their children. Improvements are needed to further the achievement of favourable results in cross border child maintenance recovery cases including determining how to incorporate a CA, possibly the Department of Justice and Correctional Services and / or the Department of Foreign Affairs, into the South African legal structure concerning the recovery of child maintenance. The CA will be able to assist the parties to the dispute and keep them informed of proceedings while also being held accountable if it breaches its specific functions discussed previously (see 2.5).⁵³⁴

⁵³⁰ Palmeira N 'Maintenance of Children in Foreign Countries' available at <http://mclarens.co.za/maintenance-children-foreign-countries/> (Accessed on 25 May 2016).

⁵³¹ Department of Justice and Constitutional Development 'Maintenance: Reciprocal Enforcement of Maintenance Orders Act 80 of 1963' available at <http://www.justice.gov.za/vg/mnt.html> (Accessed on 30 June 2016).

⁵³² REMO, s3; REMO Africa Act, s4 and 6.

⁵³³ Ditshego J 'SA Law Promotes Foreign Maintenance' available at http://www.justice.gov.za/docs/articles/2009_foreign-maintenance.html (Accessed on 6 August 2016).

⁵³⁴ *Hague Convention 2007*, Article 6.

Enforcement measures found in South African domestic legislation are often used in attempting to ensure maintenance payments are made to the maintenance creditor.⁵³⁵ Both civil and criminal measures can be effective in recovering monies owing, yet this is not the case concerning cross border maintenance recovery.⁵³⁶ As it stands currently, South Africa's enforcement measures can be applied to cross border recovery disputes in reality only when the debtor resides in South Africa.⁵³⁷ When the debtor resides elsewhere, the enforcement measures used will be those found in the country where the debtor is presently.⁵³⁸ This means that it may not be possible to, for example, attach a debtor's movable property when the property is not within South Africa.⁵³⁹ The limited number of enforcement measures available to use in maintenance recovery instances hinders improvement in the number of cases attaining favourable results.

The following chapter will focus on South Africa's need to change its current system of recovering child maintenance when dealing with cross border circumstances. Shortfalls of the current cross border recovery system will be considered as well as the already existing improvements made to attempt to solve the existing problems. The chapter will show how the Convention will aid in alleviating the burden placed on the State in making it easier to recover monies from the maintenance debtor. In recovery monies for maintenance owing to the creditor, he or she is able to ensure that the child is well cared for and provided with all the basic amenities needed to maintain the lifestyle they are accustomed to. In ensuring that enforcement occurs, particularly in cross border situations, the maintenance creditor will benefit from the effective, efficient and timely resolution of disputes and enforcement of payments. With enforcement measure being used effectively, the maintenance creditor is able to provide sufficiently for the child's well-being and development as well as alleviating the burden of continuous cycles of court proceedings spanning over many years. Other aspects to be considered within the next chapter will be the economic circumstances relating to the South African people and noting the distinction between the debtor who is unable to pay and the debtor who chooses not to make payments. The distinction will allow for further improvements to an already problematic system.

⁵³⁵ Carnelley M (2012) 345.

⁵³⁶ Heaton J (2010) 55.

⁵³⁷ Wakefield R (2012) 109.

⁵³⁸ Hague Conference on Private International Law (2013) 168.

⁵³⁹ Wakefield R (2012) 109.

CHAPTER 4

THE NEED FOR THE 2007 HAGUE CONVENTION ON THE RECOVERY OF CROSS BORDER CHILD SUPPORT TO BE APPLIED IN SOUTH AFRICA'S LEGAL SYSTEM

4.1 Introduction

As noted by the South African judiciary, the current maintenance recovery system concerning both cross border and domestic positions is riddled with systemic failures.⁵⁴⁰ Mokgoro J in *Bannatyne v Bannatyne*⁵⁴¹ stated:

‘Despite the good intentions of this comprehensive legal framework specifically created for the recovery of maintenance, there is evidence of logistical difficulties in the maintenance courts that result in the system not functioning effectively.’⁵⁴²

While the legal framework governing maintenance is comprehensive and effective in theory, the practical implementation is mostly ineffective in resolving the many disputes brought to the courts each year.⁵⁴³ The systemic failures range from poor enforcement, inadequately trained staff, insufficient facilities and resources.⁵⁴⁴

At present, the issues surrounding a flawed legal system concerning the recovery of maintenance are not limited to the domestic recovery system but to the ability of the South African legal system to effectively resolve cross border maintenance disputes when its domestic system is already unable to operate effectively. It is important to note that while the domestic issues have some bearing on the effective resolution of cross border maintenance disputes, the true focus of this chapter is on the problems found in South Africa regarding cross border maintenance recovery. The issues to be discussed within the chapter include the sorely out of date legislation governing cross border recovery of maintenance, and the limited recognition afforded to foreign maintenance orders as a result.⁵⁴⁵ The lack of effective enforcement measures will be considered as well as how this lack of enforcement contributes to an already expensive and time consuming endeavour.⁵⁴⁶ Knowledge of the system in place

⁵⁴⁰ *Magewu v Zozo* [2004] ZAWCHC 18 at para 19.

⁵⁴¹ 2003 (2) SA 363 (CC).

⁵⁴² *Bannatyne v Bannatyne* at para 26.

⁵⁴³ Parliament of the Republic of South Africa *Briefing Note: Maintenance System in South Africa and Main Portfolio Committee Amendments to the Maintenance Amendment Bill [B16-2014]* (2015) 7.

⁵⁴⁴ *Bannatyne v Bannatyne* at para 26.

⁵⁴⁵ REMO, s3 and 4.

⁵⁴⁶ Heaton J *Casebook on South African Family Law* 3 ed (2010) 93; *Bannatyne v Bannatyne* 2003 (2) SA 363 (CC) at para 30.

for dealing with cross border maintenance recovery is lacking in legal professionals, maintenance officers and court officials resulting in a misinformed public making use of the sometimes incorrect system.⁵⁴⁷ Limited clarity on when a maintenance obligation is terminated adds to an already overburdened court system when it has to make a determination.⁵⁴⁸

Socio economic circumstances are required to be considered when determining whether the Convention will assist South Africa in updating its cross border maintenance recovery system. Contributors such as poverty levels, high unemployment rates and having limited resources available to improve the current system are necessary factors to be considered in determining if the Convention will aid the maintenance legal framework.⁵⁴⁹ For example, if a maintenance creditor lives in an area where there is limited access to legal and court assistance, would the Convention truly assist in resolving her dispute when she is unable to enforce the maintenance order as a result of economic circumstances. Particular focus will be on the Child Support Grant (CSG) when considering the poverty levels in South Africa.⁵⁵⁰

It is important to note that the South African State has acknowledged some of the flaws in the maintenance legal system; however, its concern has been limited to domestic recovery.⁵⁵¹ This chapter will discuss the proposed improvements in an attempt to determine their application in cross border circumstances. The improvements made include requesting the assistance of mobile service providers in locating defaulting debtors and mandatory credit bureau reporting for all defaulters when determined as such by a court, though it is important to note that these improvements have yet to come into operation.⁵⁵²

The need for the Convention will be discussed by explaining its benefits to the South African legal system regarding cross border maintenance recovery. The benefits focused on will include ensuring compliance with international obligations, showing that a uniform approach to recognising foreign orders will reduce the continued confusion in how to resolve a cross

⁵⁴⁷ Palmeira N 'Maintenance of Children in Foreign Countries' available at <http://mclarens.co.za/maintenance-children-foreign-countries/> (Accessed on 25 May 2016).

⁵⁴⁸ Clark B (1999) 246-247.

⁵⁴⁹ Leatt A and Rosa S 'Securing the Means to Live: Children's Financial Security in South Africa' available at www.ci.org.za/depts/ci/enews/June2005/SecuringM2L.pdf (Accessed on 17 August 2016).

⁵⁵⁰ Clark B 'The South African Child's Right to Maintenance – a Constitutionally Enforceable Socio-Economic Right?' available at <https://archive.uea.ac.uk/swp/iccd2006/Presentations/Clark68.pdf> (Accessed on 14 August 2016).

⁵⁵¹ South African Law Reform Commission Issue Paper 28 (Project 100) *Review of the Maintenance Act 99 of 1998* (2014) para 1.1.

⁵⁵² Maintenance Amendment Act 9 of 2015, s2, 11, 13(b) and 19.

border maintenance dispute, and that an updated system for recovery purposes will ensure greater success in achieving favourable results when a dispute arises. Other benefits considered are the improvements to enforcement of foreign maintenance orders with particular reference to the iSupport system, the effective procedural aspects the Convention provides due to its up to date nature, and the clarity it brings to the issue when maintenance obligations cease. Incorporating the Convention into South African law will increase knowledge on the subject of cross border maintenance recovery among not only persons in the legal discipline but also the public. Focusing on State expenditure, specifically the CSG, it is likely to decrease the high dependency on the grant which will in turn show a decrease in the need for State funding.⁵⁵³ The chapter will conclusively show that South Africa is in need of ratifying and implementing the Convention to effectively resolve disputes concerning the cross border recovery of child maintenance.

4.2 Current Problems within the South African Cross Border Child Maintenance Recovery System

Within the South African legal system, many issues arise concerning the recovery of child maintenance in cross border situations. Flaws found within the system itself are the main cause of current recovery problems; however, socio economic factors such as poverty, unemployment and limited resources contribute to the already expansive list of issues surrounding the flawed system.⁵⁵⁴ Other flaws in the system include limited knowledge of professionals in the field of maintenance recovery, out dated legislation governing cross border child maintenance recovery and the minimal recognition of foreign orders in South Africa and abroad.⁵⁵⁵ The current system is ineffective and time-consuming in its procedural aspects for recovery, while the lack of efficient enforcement options available adds to the existing flawed system.⁵⁵⁶

4.2.1 A Flawed System?

Unfortunately, even with the new amendments made to the existing South African legal system regarding maintenance recovery within its borders, the cross border system remains

⁵⁵³ SASSA 'Current Statistics on Grants for Children' available at http://www.childrencount.org.za/social_grants.php (Accessed 3 October 2016).

⁵⁵⁴ Leatt A and Rosa S 'Securing the Means to Live: Children's Financial Security in South Africa' available at www.ci.org.za/depts/ci/enews/June2005/SecuringM2L.pdf (Accessed on 17 August 2016).

⁵⁵⁵ Palmeira N 'Maintenance of Children in Foreign Countries' available at <http://mclarens.co.za/maintenance-children-foreign-countries/> (Accessed on 25 May 2016).

⁵⁵⁶ *Bannatyne v Bannatyne* at para 30.

out dated and for the most part forgotten. Out dated legislation governing maintenance recovery in cross border circumstances is limited in its current application.⁵⁵⁷ The legislation can only be used when a case concerns one of the proclaimed countries and even then, the dispute will remain lengthy and often ineffective in securing the outstanding and future maintenance payments.⁵⁵⁸ Enforcement measures assigned to cross border recovery cases are non-specific and the measures used in domestic disputes lack effectiveness in such circumstances that using them in cross border cases will not allow for improvement in their current state of ineffectiveness.⁵⁵⁹

4.2.1.1 Out dated Legislation

The South African legislation pertaining to cross border maintenance recovery stems from 1963 with the REMO and continues with the REMO Africa Act of 1989.⁵⁶⁰ This 1963 Act as stated previously concerns agreements with proclaimed countries to recognise maintenance orders made in either country while the 1989 Act concern similar agreements but between designated countries.⁵⁶¹ The list of proclaimed or designated countries is minimal and as such, the application of the Acts to cross border maintenance recovery cases is largely limited.⁵⁶² Without recognition and enforcement agreements in place with countries outside the Acts, many disputes with a cross border element will remain difficult to resolve efficiently and timeously. The long and drawn out process of recovering maintenance when dealing with countries not listed in the Acts often leads to unfavourable results, and creates a negative perception of the maintenance recovery system as a whole.⁵⁶³

Legislation is a crucial means of ensuring that maintenance recovery is dealt with consistently while still allowing for unique circumstances to be given due weight in legal proceedings.⁵⁶⁴ When legislation governing a particular topic is out dated, issues arising

⁵⁵⁷ REMO, s7.

⁵⁵⁸ Palmeira N 'Maintenance of Children in Foreign Countries' available at <http://mclarens.co.za/maintenance-children-foreign-countries/> (Accessed on 25 May 2016).

⁵⁵⁹ Wakefield R (2012) 109.

⁵⁶⁰ Ditshego J 'SA Law Promotes Foreign Maintenance' available at http://www.justice.gov.za/docs/articles/2009_foreign-maintenance.html (Accessed on 6 August 2016); Van Zyl (2000) 218 - 220.

⁵⁶¹ Clark B 'Enforcement of the Duty of Support' in Van Heerden B, Cockrell A and Keightley R (eds) *Boberg's Law of Persons and the Family* 2 ed (1999) 295; REMO Africa Act, s2.

⁵⁶² Department of Justice and Constitutional Development 'Maintenance: Reciprocal Enforcement of Maintenance Orders Act 80 of 1963' available at <http://www.justice.gov.za/vg/mnt.html> (Accessed on 30 June 2016).

⁵⁶³ Palmeira N 'Maintenance of Children in Foreign Countries' available at <http://mclarens.co.za/maintenance-children-foreign-countries/> (Accessed on 25 May 2016).

⁵⁶⁴ Skelton A and Carnelley M (2010) 356.

under said topic will suffer when using the ineffective out dated legislation to determine an outcome to the disputes.⁵⁶⁵ For example, a cross border maintenance recovery case needs to be resolved in South Africa and the debtor resides in Greece, a country not on the proclaimed countries list in the Act. As no further legislation has been developed in South Africa regarding cross border maintenance recovery, the creditor has to approach a South African court with the existing maintenance order and the court officials will send the order to Greece for confirmation and recognition.⁵⁶⁶ If the order is recognised, the creditor either has to attend the legal proceedings in Greece or must rely on the South African courts to keep updated with the proceedings in Greece and for them to continually inform the creditor of any progress made.⁵⁶⁷ Unfortunately, without legislative guidance in such a situation, relating to time limits and documentation required by the Grecian courts, the process of recovery is long and tedious, often resulting in an unfavourable outcome for the maintenance creditor.⁵⁶⁸

While focus is placed on the limited application of the REMO and REMO Africa Act, it cannot be ignored that similar issues may be applicable to the Convention due to its limited ratification and implementation. As the Convention has only been ratified by 35 countries presently, with each of these countries found in the northern hemisphere, it retains limited effective application in resolving cross border maintenance disputes currently due to it only being utilised when both countries to a dispute are Contracting States to the Convention.⁵⁶⁹ However, while this may be the position currently, the uniformity offered by the Convention's implementation as well as its gaining of momentum as a result of its classification as an international instrument allows for regular improvements to be made if upon application in the 35 Contracting States or Members any issues arise.⁵⁷⁰ This differs to the REMO and REMO Africa Acts in that both have been placed into operation and then forgotten to a large extent by practitioners allowing for little to no improvement since their inception.⁵⁷¹

⁵⁶⁵ De Jong (2009) 590.

⁵⁶⁶ Palmeira N 'Maintenance of Children in Foreign Countries' available at <http://mclarens.co.za/maintenance-children-foreign-countries/> (Accessed on 25 May 2016).

⁵⁶⁷ Mthethwa S 'Duties of Support' available at <http://www.jlesliesmith.com/articles/legal-articles/Duties-of-Support/default.aspx> (Accessed on 28 May 2016).

⁵⁶⁸ Palmeira N 'Maintenance of Children in Foreign Countries' available at <http://mclarens.co.za/maintenance-children-foreign-countries/> (Accessed on 25 May 2016).

⁵⁶⁹ Long E (2008) 991; Duncan W (2008) 328.

⁵⁷⁰ Hague Conference on Private International Law 'Child Support Specialised Section: Status Table' available at <https://www.hcch.net/en/instruments/conventions/status-table/?cid=131> (Accessed 13 June 2016).

⁵⁷¹ Palmeira N 'Maintenance of Children in Foreign Countries' available at <http://mclarens.co.za/maintenance-children-foreign-countries/> (Accessed on 25 May 2016).

4.2.1.2 Limited Recognition of Foreign Orders

Under the current practices of the courts when dealing with maintenance orders issued outside of South Africa but requiring enforcement within our borders, recognition of these foreign orders is limited and rarely recognised.⁵⁷² When the maintenance order was made in a proclaimed country such as England, Hong Kong, or even Zambia, the order is sent to the Minister of Justice in South Africa through diplomatic channels for recognition and then sent to the courts for a decision determining the appropriate enforcement measure to be used.⁵⁷³ The process of receiving recognition from the Minister of Justice in instances as stated above can take as long as 12 months.⁵⁷⁴ Yet, the process for recognition when an order was made in a country not proclaimed or designated in the REMO or REMO Africa Act can, and often will, take even longer.⁵⁷⁵

4.2.1.3 Lack of Effective Enforcement Measures

The enforcement measures available in South Africa are only applicable to situations where the debtor resides within South Africa's borders.⁵⁷⁶ When the debtor resides outside of South Africa, it is not plausible to attempt to enforce a maintenance order against the debtor using the measures for enforcement found in the South African legal system even though the maintenance order is one made in South Africa.⁵⁷⁷ When the debtor resides outside of South Africa, the measures of enforcement applicable to the country in which he or she now resides will be used to enforce the maintenance order against him or her once the order has been recognised in that country.⁵⁷⁸

As stated in previous chapters, when the debtor resides in South Africa and has a foreign maintenance order made against him or her, the enforcement measures used in South Africa for domestic recovery, at present, will likely be applied to the cross border recovery dispute.⁵⁷⁹ Such measures include imprisonment, attaching property or a debt owing or

⁵⁷² Ditshego J 'SA Law Promotes Foreign Maintenance' available at http://www.justice.gov.za/docs/articles/2009_foreign-maintenance.html (Accessed on 6 August 2016).

⁵⁷³ REMO s3.

⁵⁷⁴ Department of Justice and Constitutional Development 'Maintenance: Reciprocal Enforcement of Maintenance Orders Act 80 of 1963' available at <http://www.justice.gov.za/vg/mnt.html> (Accessed on 30 June 2016).

⁵⁷⁵ Palmeira N 'Maintenance of Children in Foreign Countries' available at <http://mclarens.co.za/maintenance-children-foreign-countries/> (Accessed on 25 May 2016).

⁵⁷⁶ Wakefield R (2012) 109.

⁵⁷⁷ Wakefield R (2012) 109

⁵⁷⁸ Van Zyl L (2000) 135.

⁵⁷⁹ Van Zyl L (2000) 134.

accruing to the debtor, issuing a warrant of execution, or attaching emoluments.⁵⁸⁰ Once a foreign maintenance order has been recognised, the maintenance creditor will, in her application to the court, state which enforcement measure is requested.⁵⁸¹ Proceedings will continue according to the method used in domestic recovery cases.⁵⁸²

When a debtor is imprisoned for his or her failure to comply with a maintenance order made against him, the time he spends in prison does not resolve the main problem, namely ensuring that the debtor meets his maintenance obligations.⁵⁸³ While in prison, the maintenance debtor continues with non-compliance of the maintenance order as he or she is not making payments to the maintenance creditor due to a lack of income.⁵⁸⁴ Once released from prison, the debtor then loses marketability concerning employment, making it more difficult for the debtor to be employed and earn the money needed to comply with the maintenance order against him, thereby risking another period of incarceration.⁵⁸⁵ The continuous cycle of non-payment in such circumstances leaves little to be desired about using imprisonment as a means of resolving a maintenance recovery dispute.⁵⁸⁶

Other options for sentencing maintenance defaulters exist in South African law, namely periodical imprisonment and correctional supervision. Periodical imprisonment involves placing a person in prison for certain periods of time while allowing them to then be released for a particular purpose.⁵⁸⁷ This method of sentencing, which has been endorsed by the Supreme Court of Appeal in *Visser v S*⁵⁸⁸, can be of great benefit to maintenance debtors in that it strikes a balance between the need for 'prevention through deterrence and the preservation of the productivity of a family life of the offender.'⁵⁸⁹ This particular type of sentence can be crafted to suit the offender without placing undue burdens on the offender current employment or potential employment opportunities.⁵⁹⁰ Correctional supervision subjects the offender to 'house arrest, community service, continuous monitoring as well as treatment programmes.'⁵⁹¹ This method of sentencing is less costly than a prison sentence and

⁵⁸⁰ Skelton A and Carnelley M (2010) 358-360.

⁵⁸¹ Van Zyl L (2000) 135.

⁵⁸² REMO, s4(3)(a) – (d).

⁵⁸³ Maintenance Amendment Act 9 of 2015, s13(a).

⁵⁸⁴ Skelton A and Carnelley M (2010) 360; Clark B (1999) 281.

⁵⁸⁵ Clark B (1999) 282.

⁵⁸⁶ Skelton A and Carnelley M (2010) 360.

⁵⁸⁷ Carnelley M (2012) 358.

⁵⁸⁸ [2003] JOL 12204 (SCA).

⁵⁸⁹ Carnelley M (2012) 359.

⁵⁹⁰ Carnelley M (2012) 359.

⁵⁹¹ Correctional Services Act 111 of 1998, s52.

does not disrupt the offender's family and employment life.⁵⁹² The financial position of the offender could also be monitored while also punishing the offender in restricting his or her movement.⁵⁹³ Both of these sentencing options appear to be more effective concerning maintenance defaulters than a direct prison sentence.

Civil execution methods are considered more effective at ensuring payment of maintenance than imprisoning the debtor, as the purpose of the dispute is to recover outstanding maintenance owing to the creditor.⁵⁹⁴ Attaching property, emoluments, or debts owing to the debtor will resolve a current maintenance dispute as payment to the creditor will be ensured.⁵⁹⁵ Regarding the attachment of the debtor's property for settlement of an outstanding maintenance debt, once the property is sold the money necessary to settle the debt is given to the creditor.⁵⁹⁶ The above is also applicable to the attachment of a debt owing or accruing to the debtor.⁵⁹⁷ As emoluments are portions of the debtor's wages or salary, the employer will be required to take the maintenance amount owing to the creditor from the debtor's remuneration each month and send it to the creditor on the debtor's behalf.⁵⁹⁸

It is important to note that regardless of the civil or criminal execution method to enforce maintenance payments, a problem remains in that the resolution of the current dispute using civil means of execution will not ensure payment is maintained after the current outstanding debt is satisfied.⁵⁹⁹ As the debtor has not complied with a maintenance order against him or her at least once, there is a higher chance that the debtor will fall into non-compliance again, requiring that the creditor start new proceedings to deal with the same problem.⁶⁰⁰ The continuous cycle of maintenance proceedings is likely to remain in effect until the debtor's maintenance obligation ceases.

⁵⁹² Carnelley M (2012) 359.

⁵⁹³ Carnelley M (2012) 359.

⁵⁹⁴ South African Law Reform Commission Issue Paper 28 (Project 100) *Review of the Maintenance Act 99 of 1998* (2014) para 2.7.

⁵⁹⁵ Skelton A and Carnelley M (2010) 359.

⁵⁹⁶ De Jong (2009) 595.

⁵⁹⁷ Maintenance Act 99 of 1998, s26(2)(a).

⁵⁹⁸ Heaton J (2010) 56.

⁵⁹⁹ South African Law Reform Commission Issue Paper 28 (Project 100) *Review of the Maintenance Act 99 of 1998* (2014) para 2.23.

⁶⁰⁰ Geach C 'SA's Child Support Shame' available at <http://www.iol.co.za/news/crime-courts/sas-child-support-shame-1719323> (Accessed on 31 October 2016).

4.2.1.4 An Expensive and Time-consuming Procedure

Any form of court proceedings is an expensive and time-consuming endeavour to pursue.⁶⁰¹ Maintenance recovery proceedings when concerning a cross border element are no exception.⁶⁰² Due to the limited application of the REMO and REMO Africa Act in such cases as stated above, the current method used in cross border recovery cases is to launch formal proceedings in the courts of the foreign country based on an already existing maintenance order.⁶⁰³ This particular method is expensive, it takes an indeterminable amount of time to resolve, and when resolving the dispute it is often to the detriment of the creditor.⁶⁰⁴

Changing currency, flying to the other country to instigate and continually attend proceedings which are extended over long periods, and constant postponements and delay tactics used by the debtor only add to an already expensive endeavour. As such, it can be said that with the current means of trying to recover maintenance payments when the debtor resides in another country it is likely to cost more than the amount of maintenance which is outstanding.⁶⁰⁵ If this is the case, maintenance creditors are not likely to claim maintenance from the debtor even when there is an existing maintenance order against him or her.

4.2.1.5 Knowledge is Scarce

Due to the lack of development in the field of cross border maintenance recovery in South Africa over the last five decades, knowledge in how to deal with such a case is limited where legal professionals, maintenance officers, and court officials are concerned.⁶⁰⁶ While South Africa has courts specifically allocated to deal with maintenance disputes alone, the lack of knowledge persists when determining how to deal with a cross border maintenance recovery case.⁶⁰⁷ In the maintenance courts, officials tend to feel that they are wasting their time and talents working there, to such an extent that the officials have to be compelled to do the work

⁶⁰¹ South African Law Reform Commission Issue Paper 28 (Project 100) *Review of the Maintenance Act 99 of 1998* (2014) para 2.18.

⁶⁰² Duncan W (2008) 322.

⁶⁰³ Palmeira N 'Maintenance of Children in Foreign Countries' available at <http://mclarens.co.za/maintenance-children-foreign-countries/> (Accessed on 25 May 2016).

⁶⁰⁴ Palmeira N 'Maintenance of Children in Foreign Countries' available at <http://mclarens.co.za/maintenance-children-foreign-countries/> (Accessed on 25 May 2016).

⁶⁰⁵ Geach C 'SA's Child Support Shame' available at <http://www.iol.co.za/news/crime-courts/sas-child-support-shame-1719323> (Accessed on 31 October 2016).

⁶⁰⁶ Palmeira N 'Maintenance of Children in Foreign Countries' available at <http://mclarens.co.za/maintenance-children-foreign-countries/> (Accessed on 25 May 2016).

⁶⁰⁷ Palmeira N 'Children's Maintenance' available at <http://mclarens.co.za/childrens-maintenance/> (Accessed on 25 May 2016).

they are required to do.⁶⁰⁸ Added to this is the public's minimal knowledge on how to make an application for the recovery of maintenance, where to go, and who to approach to ensure that all the necessary documentation is attached to the application to avoid unnecessary delays in the recovery process.⁶⁰⁹ Particularly legal professionals and maintenance officers, need to be knowledgeable regarding cross border maintenance recovery law and legal principles to avoid adding to an already overburdened court system with incomplete and erroneous applications.

4.2.1.6 Termination of the Duty of Support

All of the above stated flaws in the legal system regarding maintenance disputes can be considered as legal loopholes. Another such loophole is the uncertainty regarding when the duty of support owing to children terminates. Within the South African legal system, one perceived option is when the child attains the age of majority, which in South Africa is 18 years old, though this has never been the true legal position.⁶¹⁰ The true legal position is more ambiguous in nature as it concerns when the child becomes self-supporting.⁶¹¹ The age of majority had no legal certainty in the past; however, debates do surround what it means to be self-supporting.

When a child reaches the age of 18, it is assumed that he or she is no longer dependent on his or her parents or guardians due to his or her adult status.⁶¹² This assumption is often incorrect as many children still require the financial support of their parents or guardians.⁶¹³ Reasons for the continued support include pursuing a tertiary level education, high unemployment rates (to be further discussed in 4.2.2.2 below) and a high cost of living.⁶¹⁴ Children often remain dependent on their parents to support them well into their early to mid-twenties, particularly if attending a tertiary level institution. With this in mind, it seems ill advised to continue to allow the perception that the duty of support to cease at the age of majority to

⁶⁰⁸ South African Law Reform Commission Issue Paper 28 (Project 100) *Review of the Maintenance Act 99 of 1998* (2014) para 2.12.

⁶⁰⁹ De Jong (2009) 597-598.

⁶¹⁰ Van Schalkwyk N (2009) 54.

⁶¹¹ Mthethwa S 'Duties of Support' available at <http://www.jlesliesmith.com/articles/legal-articles/Duties-of-Support/default.aspx> (Accessed on 28 May 2016).

⁶¹² Mc Laren I 'The Reciprocal Duty of Support between Parents and their Children' available at <http://mclarens.co.za/reciprocal-duty-of-support-between-parents-and-their-children/> (Accessed on 17 July 2016).

⁶¹³ De Jong M 'A better way to deal with the maintenance claims of adult dependent children upon their parents' divorce' 2013 (76) *THRHR* 654-655; Clark B (1999) 264.

⁶¹⁴ Mc Laren I 'The Reciprocal Duty of Support between Parents and their Children' available at <http://mclarens.co.za/reciprocal-duty-of-support-between-parents-and-their-children/> (Accessed on 17 July 2016).

prevail. It is important to note that the maintenance order has to stipulate that the duty of support terminates at the child attaining the age of majority, for the duty to truly cease at this point.⁶¹⁵ If not stipulated then the default position will be that it terminates when the child becomes self-supporting.⁶¹⁶

Currently the uncertainty surrounding the legal meaning of ‘self-supporting’ in connection with maintaining a child past the age of majority causes unnecessary legal proceedings to take place when maintenance debtors refuse to continue maintenance payments for a child who has reached the age of 18 years.⁶¹⁷ The refusal to pay in the above circumstances occurs regardless of the wording of the maintenance order made against the debtor.⁶¹⁸ The wording of orders in most maintenance agreements or orders made against a debtor state that the debtor is obligated to pay maintenance for a child until said child becomes self-supporting.⁶¹⁹ Clarity in the meaning of the term ‘self-supporting’ is important to determine when the child is able to support himself or herself.⁶²⁰

At present, there is no legislation that gives meaning to the term ‘self-supporting’, yet the judiciary has defined the concept through case law. A child is considered to be self-supporting once he or she can make a living from his or her income without contributions towards their maintenance from either parent.⁶²¹ Until a child can be considered as able to make a living from her income alone, a maintenance order will remain in effect.⁶²² While there is some degree of clarity on the termination of the duty of support, it remains determined on a case by case basis.⁶²³

4.2.2 Socio Economic Contributors

Issues in establishing and maintaining an effective legal means of resolving maintenance disputes is a problem for many countries. Socio economic factors play a vital role in determining when a system will be effective in resolving disputes.⁶²⁴ High unemployment

⁶¹⁵ Skelton A and Carnelley M (2010) 148.

⁶¹⁶ Van Schalkwyk N (2009) 55.

⁶¹⁷ Van Zyl (2000) 10.

⁶¹⁸ Botha M F T ‘The Duration of the Duty to Maintain and of a Maintenance Order’ (2008) 125 *South African Law Journal* 718.

⁶¹⁹ Skelton A and Carnelley M (2010) 354.

⁶²⁰ *Bursey v Bursey* [1997] 4 All SA 580 (E); Clark B (1999) 247.

⁶²¹ Botha M F T (2008) 717.

⁶²² Botha M F T (2008) 721.

⁶²³ Van Schalkwyk N (2009) 55.

⁶²⁴ Clark B ‘Child Maintenance and the Role of the South African State’ (2000) 8 *International Journal of Children’s Rights* 307.

rates, poverty, and a limited number of state resources available for use are the main factors to be considered when considering South Africa's current issues in its maintenance recovery system for cross border disputes.

4.2.2.1 Poverty and its Alleviation: the Child Support Grant

Within South Africa, the levels of absolute poverty (referring to a lack of disposable income) within the population stand at just under 40 per cent.⁶²⁵ Poverty, when measured in absolute terms, is 'calculated on a minimum income for basic needs of survival.'⁶²⁶ Due to its nature, poverty denies persons their human rights, specifically children.⁶²⁷ The State has a legal obligation to assist parents in caring for a child.⁶²⁸ The South African State's obligation arises from both international instruments and national legislation, particularly the CRC, ACRWC, the Children's Act and the Constitution (discussed in 3.2.2).⁶²⁹

Parents have an obligation to provide financial support to their child proportionately according to their respective means.⁶³⁰ This being stated, when the parent's means are minimal at best, their ability to provide for their children's basic needs are limited exponentially. The State is then obligated to assist parents where they fall short in maintaining the child.⁶³¹ The State's responsibility is subject to the resources it has available at its disposal.⁶³²

In an effort to alleviate poverty in South Africa, the government has focused on improving the lives of people through social security i.e. in the form of monetary grants.⁶³³ The CSG is

⁶²⁵ United Nations development Programme 'Human Development Reports' available at <http://hdr.undp.org/en/countries/profiles/ZAF> (Accessed on 2 October 2016).

⁶²⁶ Mirugi-Mukundi G – *Realising the Social Security Rights of Children in South Africa, with particular reference to the Child Support Grant* (2009) 3.

⁶²⁷ Booth C *Human Rights and Child Poverty* (Speech given at launch of Child Poverty in the Developing World, 2003) 1.

⁶²⁸ Clark B 'The South African Child's Right to Maintenance – a Constitutionally Enforceable Socio-economic Right?' available at <https://archive.uea.ac.uk/swp/iccd2006/Presentations/Clark68.pdf> (Accessed on 14 August 2016).

⁶²⁹ Mirugi-Mukundi G – *Realising the Social Security Rights of Children in South Africa, with particular reference to the Child Support Grant* (2009) 7 and 15.

⁶³⁰ *Bursey v Bursey* 1999 (3) SA 33 (SCA) 36C-D; Carnelley M and Easthorpe J 'Judicial Discretion in the Determination of Post-Divorce Child Support: A Brief Overview of the Application of the South African Maintenance Act 99 of 1998 as Compared to the Canadian Federal Child Support Guidelines of 1997' (2009) *Obiter* 370.

⁶³¹ Leatt A and Rosa S 'Securing the Means to Live: Children's Financial Security in South Africa' available at www.ci.org.za/depts/ci/enews/June2005/SecuringM2L.pdf (Accessed on 17 August 2016).

⁶³² Leatt A and Rosa S 'Securing the Means to Live: Children's Financial Security in South Africa' available at www.ci.org.za/depts/ci/enews/June2005/SecuringM2L.pdf (Accessed on 17 August 2016).

⁶³³ Mirugi-Mukundi G – *Realising the Social Security Rights of Children in South Africa, with particular reference to the Child Support Grant* (2009) 5; Clark B (1999) 261.

offered by the State under the South African Social Security Agency (SASSA). Established in 1998, the CSG's 'sole purpose was to help children acquire basic sustenance.'⁶³⁴ Since its inception, the CSG has increased over the years to the amount of R350 per month due to inflation rates.⁶³⁵ Currently, the CSG is applicable to children under the age of 18 years.⁶³⁶

Under the requirements for eligibility, the CSG is available to the primary caregiver of a child who is over the age of 16 years.⁶³⁷ The limitation of six children to one caregiver fails to take into account that due to the high rates of poverty as well as the HIV/AIDS pandemic within South Africa (which is beyond the scope of this document), many households are headed by children under the age necessary to qualify as a primary caregiver and as such these vulnerable children are excluded from the CSG's benefit.⁶³⁸ The CSG's availability is no longer restricted to South African citizens only.⁶³⁹ Permanent residents and refugees may also qualify for the grant as a means of social relief of distress.⁶⁴⁰ Persons, who do not qualify for the grant due to the primary caregiver's income exceeding a low threshold of R3500, are left to suffer in hunger and continued poverty. In these instances the State fails in its obligation to maintain children when their parents are unable to do so.

The CSG is one of the methods the State uses to ensure that children are maintained financially. The State is still obligated to assist parents when they are unable to provide for their child's basic needs.⁶⁴¹ Unfortunately, with the amount received a month, the grant is limited in how it can truly assist those children who require it. The cost of living is much higher than the amount given by the grant. In cases where a maintenance debtor lacks

⁶³⁴ Mirugi-Mukundi G – *Realising the Social Security Rights of Children in South Africa, with particular reference to the Child Support Grant* (2009) 20.

⁶³⁵ Sello L '#Budget 2016: A little extra for pensioners, disabled and children' available at <https://www.enca.com/life/budget2016-little-extra-pensioners-disabled-and-children> (Accessed on 2 October 2016).

⁶³⁶ Kelly G 'Everything you need to know about social grants: For people who receive a grant or need to receive one' available at <http://www.groundup.org.za/article/everything-you-need-know-about-social-grants-820/> (Accessed on 3 October 2016).

⁶³⁷ Mirugi-Mukundi G – *Realising the Social Security Rights of Children in South Africa, with particular reference to the Child Support Grant* (2009) 20-21.

⁶³⁸ Rosa S *Counting on Children: Realising the right to social assistance for child headed households in South Africa* (2004) 34; Social Assistance Act 13 of 2004, s4, Reg 162.

⁶³⁹ Mirugi-Mukundi G – *Realising the Social Security Rights of Children in South Africa, with particular reference to the Child Support Grant* (2009) 21.

⁶⁴⁰ Mirugi-Mukundi G – *Realising the Social Security Rights of Children in South Africa, with particular reference to the Child Support Grant* (2009) 22.

⁶⁴¹ Clark B (1999) 260.

meeting his or her maintenance obligation, the CSG takes over that responsibility if the maintenance creditor complies with the abovementioned requirements for eligibility.⁶⁴²

4.2.2.2 High Unemployment Rates

At present, South Africa's unemployment rates stand at 26.6 per cent of the population.⁶⁴³ Due to this high number, many people are without a monthly income, thereby adding to the poverty problem found within the country.⁶⁴⁴ It is well documented in the South African legal system that parents who are unable to financially maintain their children due to a lack of means will not be expected to do so.⁶⁴⁵ Yet, unemployment is only considered as a reason for the lack of maintenance payments when the maintenance debtor is actively searching for employment but remains unsuccessful.⁶⁴⁶ The debtor's maintenance obligation will arise once more when he or she secures employment and the payments missed during the debtor's term of unemployment will be written off.⁶⁴⁷

If the maintenance debtor chooses to remain unemployed in order to avoid complying with his or her maintenance obligations, the maintenance creditor will approach the court for an order of enforcement.⁶⁴⁸ The courts in these circumstances have ordered that a lump sum accruing to the maintenance debtor from a provident fund be retained in order to make monthly payments to the maintenance creditor.⁶⁴⁹ Nicholson J in *Mngadi v Beacon Sweets and Chocolate Provident Fund*⁶⁵⁰ stated, in defence of his order for the provident fund to retain the payment owing to Mr Mngadi in respect of his children's future maintenance, that:

‘to refuse the present application would be to further undermine the rights of children and disempower women [while to] grant the application will be to thwart an unreasonable, intransigent father who has no respect for the provisions of the Maintenance Court order or his common-law duties to maintain his own kith or kin.’⁶⁵¹

⁶⁴² Leatt A and Rosa S ‘Securing the Means to Live: Children’s Financial Security in South Africa’ available at www.ci.org.za/depts/ci/eneews/June2005/SecuringM2L.pdf (Accessed on 17 August 2016).

⁶⁴³ Trading Economics ‘South African Unemployment Rate’ available at <http://www.tradingeconomics.com/south-africa/unemployment-rate> (Accessed on 30 September 2016).

⁶⁴⁴ Leatt A and Rosa S ‘Securing the Means to Live: Children’s Financial Security in South Africa’ available at www.ci.org.za/depts/ci/eneews/June2005/SecuringM2L.pdf (Accessed on 17 August 2016).

⁶⁴⁵ Skelton A and Carnelley M (2010) 348.

⁶⁴⁶ Clark B (1999) 245.

⁶⁴⁷ Heaton J (2010) 57

⁶⁴⁸ *Magewu v Zozo* [2004] 3 All SA 235 (C) para 11.

⁶⁴⁹ Heaton J (2010) 57.

⁶⁵⁰ 2004 (5) SA 388 (D).

⁶⁵¹ *Mngadi v Beacon Sweets and Chocolate Provident Fund* 2004 (5) SA 388 (D) at para 289B-C.

In the above stated case, the father resigned from his place of employment in order to escape paying maintenance for his children.⁶⁵² Due to his previous avoidance of making maintenance payments, the court stated that if permitted to withdraw his provident fund benefit he would most probably ‘either secrete it away, spend it on himself or otherwise dissipate it’ instead of ‘nurturing it carefully to preserve it’ for the payment of his future maintenance obligations.⁶⁵³

4.2.2.3 Limited State Resources

The State’s obligation in ensuring the children are maintained is secondary to that of the child’s parents.⁶⁵⁴ However, the State is obligated to provide the necessary resources for parents to be able to comply with their own obligations regarding the maintenance of a child.⁶⁵⁵ The resources provided by each State will differ depending on the monies available.⁶⁵⁶ For example, a State classed as a developing nation, such as South Africa, will have fewer resources available to comply with its maintenance obligations than a State classed as developed, such as the USA. In the many signed and ratified international instruments, including the CRC and ACRWC, to which South Africa is a member, the duty to provide the resources necessary for the maintenance of children is dependent on the country’s resources, which in South Africa is limited.⁶⁵⁷ In ensuring that children are well cared for by their parents or guardians, the State is obligated to indirectly provide for: employment opportunities for parents to earn incomes, housing options to comply with shelter obligations, medical treatment centres, schooling and assisting in providing food.⁶⁵⁸ Parents are then required to ensure that children are fed, housed, clothed, attend school, and seek medical help when necessary using the monies they earn through employment.

⁶⁵² Heaton J (2010) 57.

⁶⁵³ *Mngadi v Beacon Sweets and Chocolate Provident Fund* 2004 (5) SA 388 (D) at para 287D.

⁶⁵⁴ South African Law Reform Commission Issue Paper 28 (Project 100) *Review of the Maintenance Act 99 of 1998* (2014) para 2.5.

⁶⁵⁵ CRC, Article 27(3).

⁶⁵⁶ Clark B (1999) 262.

⁶⁵⁷ Leatt A and Rosa S ‘Securing the Means to Live: Children’s Financial Security in South Africa’ available at www.ci.org.za/depts/ci/enews/June2005/SecuringM2L.pdf (Accessed on 17 August 2016).

⁶⁵⁸ Mirugi-Mukundi G – *Realising the Social Security Rights of Children in South Africa, with particular reference to the Child Support Grant* (2009) 1-2.

4.3 Acknowledgement of Some Issues Plaguing the Maintenance Recovery System and the Improvements to be put into Operation

New developments have been included in the current legal system of maintenance recovery in South Africa. Yet, the progress is solely focused on domestic recovery.⁶⁵⁹ Development in the cross border discipline is necessary for achieving a well-rounded and up to date system of maintenance recovery. Current progress in the domestic maintenance recovery system shows promise in being effective when used and could be utilised in cross border disputes as well. Enforcement has been the focus of the new developments within the South African maintenance legal system.⁶⁶⁰ Extended sentences have been added to the criminal sanctions.⁶⁶¹ Credit bureau reporting is to be used under both criminal and civil sanctions, though not yet in operation.⁶⁶² Debtors will be unable to avoid legal proceedings due to the newest feature in aiding enforcement, namely mobile phone location, when its practical application is operational.⁶⁶³

4.3.1 Legal Amendments made regarding Enforcement Measures

Legal amendments to the current legislation governing domestic maintenance recovery disputes have added potential improvements to enforcement measures. Under the criminal sanction allocated to debtors who do not comply with a maintenance obligation order given against them, the debtor's non-compliance will now, if convicted under s31 of the Maintenance Act, be subjected to a term of imprisonment not exceeding three years as opposed to one year.⁶⁶⁴ Employers who have been served with the required documentation to pay the maintenance amount owing to the maintenance creditor on the debtor's behalf will be subject to a maximum of two years imprisonment for failing to make the debtor's payments on his or her behalf.⁶⁶⁵

Credit bureau reporting, though not a new measure of enforcement in the South African legal system, is no longer a discretionary measure to be used under criminal sanctions alone, when

⁶⁵⁹ Maintenance Amendment Act 9 of 2015.

⁶⁶⁰ Smuts J 'Amendments to the Maintenance Act' available at <http://www.abgross.co.za/amendments-to-the-maintenance-act/> (Accessed on 3 November 2016).

⁶⁶¹ RDM News Wire 'Zuma signs law that will allow maintenance defaulters to be blacklisted' available at <http://www.timeslive.co.za/politics/2015/09/09/Zuma-signs-law-that-will-allow-maintenance-defaulters-to-be-blacklisted/> (Accessed on 4 November 2016); Maintenance Amendment Act 9 of 2015, s13(a) and (b).

⁶⁶² Moodley P (2016) 19; Maintenance Amendment Act 9 of 2015, s19.

⁶⁶³ Maintenance Amendment Act 9 of 2015, s2; Moodley P (2016) 3-8.

⁶⁶⁴ Moodley P (2016) 20; Maintenance Amendment Act 9 of 2015, s13(a).

⁶⁶⁵ Maintenance Amendment Act 9 of 2015, s15.

implemented into the legal system and becoming functioning.⁶⁶⁶ The Amendment Act has removed the discretionary aspect which allowed a court to determine whether it was necessary to furnish any credit granting or credit tracking businesses with debtor's personal particulars.⁶⁶⁷ Credit bureau reporting is now mandatory for both criminal and civil sanctions as outstanding maintenance is seen as a debt.⁶⁶⁸ Though credit bureau reporting is mandatory in the recovery process, due to the newness of the Amendment Act, the regulations required to facilitate the procedure of turning over sensitive information, namely the debtor's personal particulars, have yet to be incorporated into the legal system.⁶⁶⁹ To be incorporated into the legal system, credit bureau reporting requires regulations to ensure it proper functioning and use. At present, no regulations have been determined and until such date as determined by the President in a proclamation in the Government Gazette regarding when and what regulations are to be used, credit bureau reporting remains discretionary for criminal sanctions and non-operational for civil sanctions.⁶⁷⁰

4.3.2 Locating Debtors within South Africa

Courts are now permitted under the Amendment Act to request mobile service providers to furnish the court with the contact information of the maintenance debtor.⁶⁷¹ However, a court may only request this of the mobile service provider if all other reasonable attempts to locate the maintenance debtor have been used and been unsuccessful.⁶⁷² This method to locate the debtor may therefore only be used as a last resort.⁶⁷³ It will also cost the State R80 to use this method, but the amount may be recovered from the debtor if the court orders the debtor to make the reimbursement.⁶⁷⁴ However, as no regulations have been determined as of yet for the practical implementation of this feature catered for in the Amendment Act, it has yet to come into operation.⁶⁷⁵

Using a mobile service provider as a means of locating a debtor, will aid in improving the settlement of maintenance enquiries and of criminal cases pending against debtors who

⁶⁶⁶ Moodley P (2016) 19.

⁶⁶⁷ Maintenance Amendment Act 9 of 2015, s13(b).

⁶⁶⁸ Smuts J 'Amendments to the Maintenance Act' available at <http://www.abgross.co.za/amendments-to-the-maintenance-act/> (Accessed on 3 November 2016).

⁶⁶⁹ Moodley P (2016) 21.

⁶⁷⁰ Maintenance Amendment Act 9 of 2015, s19.

⁶⁷¹ Maintenance Amendment Act 9 of 2015, s2.

⁶⁷² Moodley P (2016) 5.

⁶⁷³ Maintenance Amendment Act 9 of 2015, s2

⁶⁷⁴ Moodley P (2016) 7.

⁶⁷⁵ Maintenance Amendment Act, s19.

contravene maintenance orders made against them, as debtors' non-availability at the enquiries and court proceedings delay their finalisation.⁶⁷⁶ Mobile service providers are permitted to apply for an extension of the time given by the court to furnish the debtor's information to the court.⁶⁷⁷ The extension must be requested in the prescribed manner and can only be requested on the grounds that 'the information cannot be provided timeously' or that the service provider does not provide a service to the person identified in the court's directive.⁶⁷⁸ If the information is not available on the mobile service provider's records then said provider may explain this to the court.⁶⁷⁹ Though the time extension application is necessary when making a request of a third party, the extension could be used as a stalling tactic, thereby delaying the conclusion of the maintenance enquiry.

4.4 Benefits to the Convention's Application in South Africa

When considering the many flaws in the current cross border recovery system in South Africa and the lack of development in cross border disputes for more than five decades, ratifying and implementing the Convention will be beneficial. The Convention will ensure South Africa's compliance with its international obligations, create procedural uniformity, and improve the enforcement of maintenance orders to ensure and track payments.⁶⁸⁰ Legal loopholes will be lessened and knowledge within the legal community will increase due to the Convention's inclusion in the maintenance recovery legal framework.⁶⁸¹ Money paid by the South African State, in fulfilment of its international obligation to provide resources for parents to maintain their children, will decrease as the need for the CSG will lessen with the Convention's implementation. The Convention will aid in amending the domestic legal system pertaining to maintenance recovery, as its provisions could be adapted to fix the flaws found in that system as well.

4.4.1 Ensures South Africa's Compliance with its International Obligations regarding Child Maintenance Recovery

South Africa has many international obligations concerning the duty of support which stem from ratifying international conventions including the CRC and the ACRWC (as discussed in

⁶⁷⁶ Moodley P (2016) 8.

⁶⁷⁷ Maintenance Amendment Act 9 of 2015, s2.

⁶⁷⁸ Moodley P (2016) 6.

⁶⁷⁹ Maintenance Amendment Act 9 of 2015, s2

⁶⁸⁰ Hammond D and Barnes M (2013) 256-257.

⁶⁸¹ Duncan W (2013) 317-319.

the previous chapter).⁶⁸² Ratifying the Convention will add to the assurance that South Africa continues to comply with its obligations concerning the duty of support and the understanding that it would be in the best interests of children to ensure that this duty is met.⁶⁸³ An added benefit to ratifying and implementing the Convention is its flexibility in how to deal with maintenance disputes as well as using its provisions dealing with cross border recovery to aid the domestic system of recovery.⁶⁸⁴

4.4.2 Recognition of Foreign Orders: Uniform Approach

South Africa's recognition of foreign orders lacks a structured uniform approach.⁶⁸⁵ The current approach to recognition is twofold.⁶⁸⁶ If the country's order which is to be recognised is a proclaimed or designated country listed in the Schedule's to the REMO and REMO Africa Act, the order will be sent through diplomatic channels to the Minister of Justice and the Director-General for recognition.⁶⁸⁷ When the maintenance order requiring recognition is not from a proclaimed country, the order needs to be recognised in a court of law.⁶⁸⁸ Unfortunately, for the order to be recognised in South Africa, formal legal proceedings have to be started in the country which made the maintenance order.⁶⁸⁹ Once proceedings have begun, the courts will preside over different aspects of the same dispute in order to come to a resolution.⁶⁹⁰ For example, Ms K has a maintenance order granted in Russia against Mr P, who now resides in South Africa. In order to claim maintenance from Mr P in South Africa, Ms K has to initiate proceedings in Russia. The Russian court will then liaise with the court in South Africa where Mr P now resides in order to have the Russian maintenance order recognised and made enforceable against Mr P, using the enforcement measures available in

⁶⁸² Mirugi-Mukundi G – *Realising the Social Security Rights of Children in South Africa, with particular reference to the Child Support Grant* (2009) 7.

⁶⁸³ Clark B 'The South African Child's Right to Maintenance – a Constitutionally Enforceable Socio-economic Right?' available at <https://archive.uea.ac.uk/swp/iccd2006/Presentations/Clark68.pdf> (Accessed on 14 August 2016).

⁶⁸⁴ Doogue J – Chief District Court Judge of New Zealand, ChiefJudgeJan-Marie.Doogue@justice.govt.nz – 'The Vision and Flexibility of the 2007 Hague Convention' presented at the Hague Conference on the Global Recovery of Child Support and Family Maintenance in Asia Pacific and Worldwide 9 – 11 November 2015 in Hong Kong, presentation slides 3, 6, 11 and 14.

⁶⁸⁵ REMO, s3.

⁶⁸⁶ Palmeira N 'Maintenance of Children in Foreign Countries' available at <http://mclarens.co.za/maintenance-children-foreign-countries/> (Accessed on 25 May 2016).

⁶⁸⁷ REMO, s3; REMO Africa Act, s4 and 6.

⁶⁸⁸ Maintenance Act 99 of 1998, s5 and 8.

⁶⁸⁹ Palmeira N 'Maintenance of Children in Foreign Countries' available at <http://mclarens.co.za/maintenance-children-foreign-countries/> (Accessed on 25 May 2016).

⁶⁹⁰ Clark B (1999) 296.

the South African legal system. Once the Russian maintenance order has been recognised in a South African court, Ms K can apply for enforcement under South African law.

While the approach given in the above example seems simple enough to ensure the successful recognition of a foreign maintenance order, practically the approach most often renders unfavourable outcomes.⁶⁹¹ It is clear that the unsuccessful results stem from a lack of cooperation between countries as they have no legal obligation to assist each other and have the orders recognised.⁶⁹² In cases such as the example stated above, without a legally reciprocal binding obligation to recognise foreign maintenance orders i.e. a bilateral agreement, countries have shown to give limited assistance in resolving the dispute.⁶⁹³ The two approaches found in South African law concerning the recognition of foreign maintenance orders require uniformity. Yet, it would be a long and complex process to acquire a reciprocal recognition and enforcement agreement between the many countries across the globe, without a guarantee for success.

The Convention will give South Africa a more uniform approach to be used concerning the recognition and enforcement of foreign maintenance orders than the REMO and REMO Africa Act due to its growing number of Contracting States, which already exceeds the number of countries party to each of the Acts.⁶⁹⁴ Nevertheless, South Africa can adapt the approach, due to the Convention's flexibility in its implementation, for better integration into its legal system enabling the Convention to act as a guide to dealing with matters when the Convention cannot apply due to a party not being a Contracting State.⁶⁹⁵ While the Convention is new in its conception, its content stems from years of both success and failure concerning the cross border recovery of child maintenance.⁶⁹⁶ Should South Africa become a party to the Convention, it will join a rapidly expanding group of countries which have reformed their cross border maintenance recovery laws to better assist in resolving disputes.⁶⁹⁷ With this in mind, it is clear that becoming a member to the Convention will

⁶⁹¹ Palmeira N 'Maintenance of Children in Foreign Countries' available at <http://mclarens.co.za/maintenance-children-foreign-countries/> (Accessed on 25 May 2016).

⁶⁹² Walker L (2015) 200-201.

⁶⁹³ Ditshego J 'SA Law Promotes Foreign Maintenance' available at http://www.justice.gov.za/docs/articles/2009_foreign-maintenance.html (Accessed on 6 August 2016).

⁶⁹⁴ *Hague Convention 2007*, Chapters II, III and V.

⁶⁹⁵ Doogue J (2015) 14.

⁶⁹⁶ Long E (2008) 985.

⁶⁹⁷ Hague Conference on Private International Law 'Child Support Specialised Section: Status Table' available at <https://www.hcch.net/en/instruments/conventions/status-table/?cid=131> (Accessed on 13 June 2016).

improve South Africa's current legal approach to maintenance recovery in cross border circumstances.

4.4.3 Comprehensive and Up to Date Means of Dealing with Cross Border Child Maintenance Disputes

The Convention is the most recent international instrument that governs cross border maintenance recovery disputes.⁶⁹⁸ In its negotiation stages, spanning over three years, negotiators considered the successful and unsuccessful aspects of previous conventions relating to the topic.⁶⁹⁹ Focus was placed on the failures of the previous Conventions and the issues found in the cross border recovery field through investigation.⁷⁰⁰ New ideas on how to resolve disputes that caused continued problems were considered, such as determining the most efficient means of enforcement.⁷⁰¹ This was achieved using information gathered from countries which have immense success in ensuring maintenance payments in their domestic and international recovery systems.⁷⁰²

Due to the Convention's inclusion of the successful requirements and exclusion of the unsuccessful provisions found in previous instruments concerning maintenance obligations, it is the most comprehensive instrument relating to cross border maintenance recovery worldwide.⁷⁰³ However, the Convention remains flexible enough in its application to allow for improvement and development when the circumstances call for it.⁷⁰⁴ Due to the nature of maintenance disputes being unique in circumstance and decided on a case-by-case basis, room for improvement and development is a necessary factor to ensure the Convention's success.⁷⁰⁵ Using this comprehensive Convention as an aid to the current legislative framework for cross border maintenance recovery in South Africa will not only be beneficial in improving the neglected cross border recovery system in South Africa by providing clarity and certainty within the field, but will also aid in fixing the many flaws found in the domestic recovery system.

⁶⁹⁸ Long E (2008) 985.

⁶⁹⁹ Duncan W (2004) 664 -666.

⁷⁰⁰ Duncan W (2004) 664.

⁷⁰¹ Duncan W (2008) 317.

⁷⁰² Long E (2008) 985.

⁷⁰³ Walker L (2015) 256.

⁷⁰⁴ Doogue J (2015) 14.

⁷⁰⁵ Walker L (2015) 257.

4.4.4 Improving Enforcement

Within South Africa, enforcing a maintenance order against a debtor is the greatest challenge given to the legislature and judiciary regardless of circumstance.⁷⁰⁶ Under domestic law, the South African legislature has increased the measures available to be used to ensure enforcement, yet the regulations surrounding the new measures have yet to be determined, resulting in a limited practical change in ensuring maintenance payments i.e. mobile service tracking, mandatory credit bureau reporting, both which have yet to be implemented, and increased imprisonment sentences (See the discussion of Domestic Recovery Measures in 3.6.1 in the previous chapter).⁷⁰⁷

While the abovementioned measures when combined with the current enforcement measures available for use i.e. the attachment of property, emoluments and debts as well as imprisonment, are certain to assist in resolving maintenance disputes domestically; ensuring that enforcement continues once the order has been made remains problematic.⁷⁰⁸ It has been stated in the previous chapters that, at present, the current measures available for enforcement under domestic law might be applied to cross border disputes. The lack of enforcement once the court has made its judgment remains a problem regardless of the measures used to enforce the owed debt.⁷⁰⁹ Resolving the initial dispute through ensuring compliance with a maintenance order against the debtor using one of the available measures will not break the continued cycle of non-payment as the debtor's non-compliance will in most cases reoccur.⁷¹⁰

The iSupport project is the way forward in resolving this reoccurring situation. As an extension of the Convention, the iSupport system keeps an electronic record of each dispute resolved when the countries involved in the dispute are members to the Convention.⁷¹¹ The system is accessible to each member State and will act as a means of continued enforcement, due to its up to date record of information, once the dispute has been resolved through a court.⁷¹² For example, Ms B has an existing maintenance order issued against Mr H. Both Ms

⁷⁰⁶ De Jong M (2009) 590.

⁷⁰⁷ Maintenance Amendment Act 9 of 2015, s2, 11, 12 and 13; Moodley P (2016) 21.

⁷⁰⁸ South African Law Reform Commission Issue Paper 28 (Project 100) *Review of the Maintenance Act 99 of 1998* (2014) para 2.71 and 2.72.

⁷⁰⁹ South African Law Reform Commission Issue Paper 28 (Project 100) *Review of the Maintenance Act 99 of 1998* (2014) para 2.47.

⁷¹⁰ South African Law Reform Commission Issue Paper 28 (Project 100) *Review of the Maintenance Act 99 of 1998* (2014) 34.

⁷¹¹ Hague Conference on Private International Law 'iSupport: Cross-border recovery of maintenance obligations' available at <https://www.hcch.net/en/instruments/conventions/isupport/> (Accessed 13 June 2016).

⁷¹² Walker L (2015) 196.

B and Mr H live in different member states to the Convention. To ensure compliance with the maintenance order, both Ms B and Mr H's details are added to the iSupport system. The iSupport database then keeps record of when Mr H makes his maintenance payments and how much he pays to Ms B. The system will continue to keep track of Mr H's payments until his maintenance obligation ceases, allowing for a continued assurance of payment without the need to continually approach a court to resolve the same issue of non-compliance with a maintenance order. Having access to such a system will aid in decreasing the need for approaching a court to resolve the same or a similar dispute.⁷¹³ Perhaps giving thought to introducing such a system to the South African domestic law governing maintenance disputes will decrease the number of cases currently overloading the maintenance courts.

4.4.5 Efficient Procedural Aspects

Current procedure under South African law concerning cross border maintenance recovery disputes is out dated and riddled with flaws as a result. The flawed procedural aspects relate to the how to apply for recognition of an existing maintenance order, what documentation is necessary, where and to whom to send the application and the costs involved in the process.⁷¹⁴ The Convention, under Article 12, lists the procedure to be used when tasked with a cross border maintenance dispute.⁷¹⁵ The procedure includes how to start the application process using a Central Authority and which documents are required to be attached to the application to ensure its consideration.⁷¹⁶ The Central Authority is mandated to work expeditiously to aid the applicant in the future resolution of the current claim.⁷¹⁷

Time limitations are stated in the Convention to ensure efficiency.⁷¹⁸ An example would be that Central Authorities are required to respond to each other regarding applications within six weeks from receipt.⁷¹⁹ The addition of time constraints to the application process renders draw out court disputes obsolete. The costs of proceedings are absorbed by the State where the application was initiated.⁷²⁰ This aspect may not be removed by a reservation when a State becomes a member to the Convention.⁷²¹ When absorbing the costs of a dispute, the

⁷¹³ Lortie P (2008) 359.

⁷¹⁴ South African Law Reform Commission Issue Paper 28 (Project 100) *Review of the Maintenance Act 99 of 1998* (2014) para 1.3.

⁷¹⁵ *Hague Convention 2007*, Article 12.

⁷¹⁶ The Hague Conference on Private International Law Permanent Bureau (2013) 66-67.

⁷¹⁷ *Hague Convention 2007*, Article 12.

⁷¹⁸ Duncan W (2008) 322.

⁷¹⁹ *Hague Convention 2007*, Article 12(3).

⁷²⁰ Bariatti S (2011) 1191.

⁷²¹ *Hague Convention 2007*, Article 62.

State allows for the procedure to be beneficial to all persons, regardless of their socio economic standing. The persons relying on maintenance payments in South Africa are the more vulnerable persons in society, namely women and children.⁷²²

4.4.6 Certainty as to when the Duty of Support Terminates

As stated previously, there is uncertainty under South African law as to when the duty of support terminates, i.e. when the child becomes self-supporting.⁷²³ The Convention would provide clarity on the matter at an international level. Under Article 2, a maintenance obligation arises from a parent-child relationship where the child is under the age of 21 years.⁷²⁴ While the Convention gives an age limit to when child maintenance can be claimed at an international level, the South African legal position is that the child needs to be self-supporting as is the position stemming from the South African common law.⁷²⁵ As discussed previously regarding what is considered as self-supporting, it is evident that the concept has not received a specific or concrete meaning. The Convention could be helpful in making the determination of a specific meaning in that there is a perceived notion that the duty of support terminates at the age of majority, namely 18 years old, while the age limit stated in the Convention is three years longer.⁷²⁶ While the age of majority has no bearing on when the duty of support terminates, the perceived notion that the duty ends when the child turns 18 years old, could possibly be elevated to that of 21 years old. This could offer a possible advantage to the child and a longer period of support by the maintenance debtor before he or she looks to the perceived notion that age has a bearing on when the duty of support terminates.

4.4.7 Increased Knowledge in the Cross Border Maintenance Field

At present, many South African legal professionals, maintenance officers and court officials lack sufficient knowledge regarding cross border maintenance recovery disputes.⁷²⁷ Should South Africa ratify the Convention, the topic of cross border maintenance recovery will be placed in the public eye. The focus will be on gaining as much knowledge as possible on the Convention and how it will be implemented in South Africa, allowing for both legal

⁷²² *Bannatyne v Bannatyne* at para 30.

⁷²³ Botha MTF (2008) 716.

⁷²⁴ *Hague Convention 2007*, Article 2(1)(a).

⁷²⁵ Clark B (1999) 260.

⁷²⁶ *Hague Convention 2007*, Article 2(1)(a).

⁷²⁷ Palmeira N 'Maintenance of Children in Foreign Countries' available at <http://mclarens.co.za/maintenance-children-foreign-countries/> (Accessed on 25 May 2016).

professionals and court officials to update their knowledge on the subject.⁷²⁸ Regarding the update, legal professionals, maintenance officers and court officials will be able to assist applicants more effectively than at present.⁷²⁹ As a result applicants will be assisted correctly initially allowing for fewer applications to be erroneous in nature. Applications which do not follow the correct guidelines will only increase the length of time for the dispute to be resolved as an incorrect application will continually be sent back to the applicant until it is corrected.⁷³⁰

4.4.8 State Expense to Decrease: the Child Support Grant

With the CSG applicable to just under twelve million persons in South Africa monthly, a vast amount of State funding is necessary to assist those persons.⁷³¹ While the number does not truly reflect the need for assistance regarding all children who should require it, the CSG is helpful to those who receive it.⁷³² The small stipend given each month of R350, does not factually consider the true financial needs of the primary caregiver in raising a child.⁷³³ The amount will not cover half of the necessities a child requires for a month, for example, schooling, educational supplies, clothing, shelter and food.⁷³⁴ Yet, the money received each month from the CSG is better than not receiving any assistance at all.

Concerning a maintenance debtor that stops making his or her payments, the CSG has assisted those children in fulfilling the role the debtor is neglecting.⁷³⁵ When the creditor is the child's mother and its residential parent, he or she often earns less than the maintenance paying parent due to the additional financial burden placed on him or her having children live with the creditor.⁷³⁶ It is clear that not all persons who require maintenance payments to assist

⁷²⁸ De Jong (2009) 597.

⁷²⁹ De Jong (2009) 601-602.

⁷³⁰ Clark B 'The South African Child's Right to Maintenance – a Constitutionally Enforceable Socio-Economic Right?' available at <https://archive.uea.ac.uk/swp/iccd2006/Presentations/Clark68.pdf> (Accessed on 14 August 2016).

⁷³¹ SASSA 'Current Statistics on Grants for Children' available at http://www.childrencount.org.za/social_grants.php (Accessed 3 October 2016).

⁷³² Mirugi-Mukundi G – *Realising the Social Security Rights of Children in South Africa, with particular reference to the Child Support Grant* (2009) 20.

⁷³³ Sello L '#Budget 2016: A little extra for pensioners, disabled and children' available at <https://www.enca.com/life/budget2016-little-extra-pensioners-disabled-and-children> (Accessed on 2 October 2016).

⁷³⁴ Leatt A and Rosa S 'Securing the Means to Live: Children's Financial Security in South Africa' available at www.ci.org.za/depts/ci/enews/June2005/SecuringM2L.pdf (Accessed on 17 August 2016).

⁷³⁵ Clark B 'The South African Child's Right to Maintenance – a Constitutionally Enforceable Socio-Economic Right?' available at <https://archive.uea.ac.uk/swp/iccd2006/Presentations/Clark68.pdf> (Accessed on 14 August 2016).

⁷³⁶ Heaton J *Casebook on South African Family Law* 3ed (2010) 93.

in caring for children, will receive the payments. Inclusive in this reality is those maintenance creditors who wish to apply for the CSG. If a creditor does not qualify for the grant, he or she remains trapped in his or her struggle to survive financially on his or her own earnings.⁷³⁷

The mother has an additional financial burden placed upon her in having custody of the child and is limited in her ability to ‘obtain remunerative employment.’⁷³⁸ The debtor, being the child’s father, as the non-residential parent is able to focus more on employment thereby allowing him to further his earning potential in his ability to work more hours, becoming more economically enriched.⁷³⁹ With this in mind, it is clear that the residential parent, who is predominantly the mother, is at a ‘double disadvantage in being overburdened in terms of responsibilities and under-resourced in term of means.’⁷⁴⁰ The CSG will not truly aid a child when the possibility is high that the amount owed by the debtor will be of greater value.⁷⁴¹

The Convention can be of assistance in reducing the amount of State funds required to be paid out in place of claiming maintenance from the defaulting debtor.⁷⁴² When using the enforcement measures listed in the Convention, not only for cross border recovery cases, the need for the monthly CSG is likely to decrease. The funding no longer in use by the CSG can be allocated to the funds required to comply with the costs provision in the Convention.⁷⁴³ The funds could also be allocated to numerous other problem areas such as improving the domestic maintenance recovery system, setting up workshops to increase awareness on the cross border maintenance recovery legal system, or beginning a fund the will aid persons in resolving their cross border maintenance recovery disputes.

4.5 Conclusion

With South Africa’s ineffective domestic legal framework regarding maintenance recovery, it is unsurprising that the cross border recovery system is no different. As seen in this chapter, the many issues plaguing the maintenance system stem from both legislative *lacunae* as well socio economic factors. Out dated legislation and inconsistency in application methods are the most common flaws found in the cross border legal framework regarding maintenance recovery.⁷⁴⁴ The inconsistency in how to approach a cross border maintenance claim stems

⁷³⁷ Heaton J *Casebook on South African Family Law* 3ed (2010) 93.

⁷³⁸ *Bannatyne v Bannatyne* at para 29.

⁷³⁹ Heaton J *Casebook on South African Family Law* 3ed (2010) 93.

⁷⁴⁰ *Bannatyne v Bannatyne* at para 29.

⁷⁴¹ Clark B (1996) 84.

⁷⁴² *Hague Convention 2007*, Preamble.

⁷⁴³ *Hague Convention 2007*, Article 14.

⁷⁴⁴ De Jong (2009) 590.

from a lack of knowledge on the part of legal professionals, maintenance officers and court officials leading to an expensive and time consuming means of attempting to claim.⁷⁴⁵ At present, the enforcement measures available for maintenance recovery are those stated in the Maintenance Act and are discussed within this chapter in the hopes of showing their applicability to the cross border recovery system, as no specific measures are allocated for used in such circumstances.⁷⁴⁶ However, the measures used for domestic cases can and are used in cross border circumstances, though with little success.⁷⁴⁷ The additional measures listed in the Convention, particularly the deductions from social security payments, tax refund withholding and lien or forced sales of property will add to the current measures as these measures will rely on a third party to make the necessary payments, leaving the debtor with little choice in whether to make payments.⁷⁴⁸ The payments made using these measures will be annual payments. The termination of the duty of support was given consideration as the uncertainty as to when the duty ceases leads to an often unnecessary court case for determination.⁷⁴⁹

Socio economic factors must be considered when determining whether a current legal framework is operationally defective. While the factors are unique to each country, the socio economic factors found in South Africa include poverty, unemployment and limited State resources.⁷⁵⁰ High poverty levels indicate that access to legal services would be limited for those persons living in poverty stricken areas, often rural regions.⁷⁵¹ Unemployment levels remain elevated, limiting a creditor's opportunity to claim maintenance from a debtor when he or she is unemployed.⁷⁵² Yet, *Mngadi v Beacon Sweets and Chocolate Provident Fund*⁷⁵³ has shown that purposeful unemployment will not permit defaulting in maintenance payments.⁷⁵⁴ As the State has an obligation to provide for the means to recover maintenance

⁷⁴⁵ Palmeira N 'Maintenance of Children in Foreign Countries' available at <http://mclarens.co.za/maintenance-children-foreign-countries/> (Accessed on 25 May 2016).

⁷⁴⁶ Maintenance Act 99 of 1998, s26-31 – *Attachment of property, emoluments, and debts, as well as imprisonment.*

⁷⁴⁷ REMO, s6.

⁷⁴⁸ *Hague Convention 2007*, Article 34.

⁷⁴⁹ Botha M F T (2008) 721.

⁷⁵⁰ Leatt A and Rosa S 'Securing the Means to Live: Children's Financial Security in South Africa' available at www.ci.org.za/depts/ci/eneews/June2005/SecuringM2L.pdf (Accessed on 17 August 2016).

⁷⁵¹ Mirugi-Mukundi G – *Realising the Social Security Rights of Children in South Africa, with particular reference to the Child Support Grant* (2009) 23-24.

⁷⁵² Leatt A and Rosa S 'Securing the Means to Live: Children's Financial Security in South Africa' available at www.ci.org.za/depts/ci/eneews/June2005/SecuringM2L.pdf (Accessed on 17 August 2016); Heaton J (2010) 57.

⁷⁵³ 2004 (5) SA 388 (D).

⁷⁵⁴ Heaton J (2010) 57.

payments in both domestic and cross border settings, the means of meeting this responsibility is diminished when the State has limited resources to do so.⁷⁵⁵

While it is clear that the South African government has acknowledged some of the vast discrepancies found in the maintenance recovery system, it has done so with its primary focus at a domestic level. Solutions stated in the Amendment Act include locating debtors through their mobile service provider and making it mandatory for a court to send the debtors personal particulars to all credit granting and reporting businesses when he or she defaults in payments.⁷⁵⁶ The South African government's recognition of cross border maintenance recovery since the REMO and REMO Africa Act is marginal and severely lacking in acknowledgement of the many aspects and issues found within this out dated system of recovery.

The Convention will assist immensely in its implementation into South African law, should the State choose to ratify it. A particular benefit to the cross border maintenance recovery system is the comprehensive and detailed approach to recovery, due to the insight gathered regarding successful and unsuccessful provisions to previous Conventions as well as information gathered from countries regarding the strengths and weaknesses of their cross border recovery systems.⁷⁵⁷ The uniform approach stated within the Convention in how to handle the application process and resolve issues of recognition, enforcement and inter-country cooperation will assist in resolving the uncertainty within the South African cross border recovery system.⁷⁵⁸ Expensive and time consuming processes disappear as a result of time limits imposed on the application process and the provision stating that costs are to be paid by the State initiating proceedings.⁷⁵⁹ However, as South Africa will not always be the country where a foreign maintenance order requires recognition, the cost to be paid by the South African State when it implements a claim will be vast and burdensome on an already limited in resources State.⁷⁶⁰ The limited knowledge of legal professionals and court officials in how to advise the public regarding cross border recovery will improve due to the awareness created through implementing the Convention.⁷⁶¹ The CSG will decrease in the

⁷⁵⁵ CRC, Article 27(4).

⁷⁵⁶ Maintenance Amendment Act 9 of 2015, s2,11 and 13.

⁷⁵⁷ Duncan W (2004) 664.

⁷⁵⁸ Hammond D and Barnes M (2013) 256-257.

⁷⁵⁹ *Hague Convention 2007*, Article 12 and 14.

⁷⁶⁰ *Hague Convention 2007*, Article 12 and 14.

⁷⁶¹ Palmeira N 'Maintenance of Children in Foreign Countries' available at <http://mclarens.co.za/maintenance-children-foreign-countries/> (Accessed on 25 May 2016).

number of persons currently receiving it monthly, as the Convention will aid in ensuring that maintenance payments are made by the debtor instead of relying on limited State funds.⁷⁶² As a means of further benefitting the position of cross border maintenance recovery in South Africa, the provisions found in the Convention could be applied to the domestic recovery system allowing for further improvements to occur.

The following final chapter will conclude the document entirely. Recommendations will be given on the best approach for South Africa in resolving the many flaws found in its cross border maintenance recovery system. The chapter will affirm that South Africa should ratify and implement the Convention into its maintenance legal framework.



⁷⁶² Clark B (1999) 262.

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

This study has analysed the South Africa's legal position regarding the cross border recovery of child maintenance. Inclusive in this analysis is a detailed discussion on the new international instrument, the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, as well as consideration of aspects of the domestic legal system regarding maintenance in South Africa. Central to this study was focusing on the many flaws in South Africa's legal framework in resolving cross border child maintenance disputes as well as indication how the Convention would aid in removing or correcting the present and future faults. While the study's true focus was to determine whether there is a need for the Convention's application in South Africa, due weight was afforded to the legislative and judicial attempts at resolving the systemic failures of the domestic system. Based on the findings of this study, a detailed conclusion and recommendations follows.

5.2 Conclusion

Over more than the last five decades, cross border recovery of child maintenance as legal discipline has undergone few changes in South Africa, while internationally this field of law has been steadily improved. The principal improvement to the field of cross border maintenance recovery is the addition of the 2007 Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance.⁷⁶³ The aim of this study is to show the need for this Convention to be ratified and implemented into South African law.

The Convention is a well-researched and comprehensive international instrument.⁷⁶⁴ With the conscious effort of negotiator's when determining what to include in the Convention's provisions, their focus on the successes and failures of all previous conventions regarding the cross border recovery of child maintenance made for an up to date Convention with a definite propensity for future triumph.⁷⁶⁵ Included in the Convention is an approach on how to resolve

⁷⁶³ Duncan W (2004) 664.

⁷⁶⁴ Long E (2008) 985.

⁷⁶⁵ Duncan W (2004) 664.

disputes using either CAs or sending a direct request to the Requested State.⁷⁶⁶ It is clear from the analysis given in the second chapter that using the CA method will be of most benefit. Cost and time constraint provisions are included in the Convention when using the CA approach to cross border maintenance recovery.⁷⁶⁷ Certainty in how to address applications is shown using this uniform CA approach i.e. the Article 23 and Article 24 procedures.⁷⁶⁸

As seen in the study, the true problem lies in enforcing a maintenance order, whether at a national or international level.⁷⁶⁹ To this regard, the Convention offers signatories a choice as to which measures to implement within their legal framework.⁷⁷⁰ The flexibility shown throughout the provisions of the Convention allow for its implementation into any existing legal system, with few major changes needed for compliance.⁷⁷¹ South Africa has had minimal consideration for cross border maintenance recovery cases since the enactment of the REMO in 1963 aside from enacting the REMO Africa Act. Yet, its domestic legal framework has undergone a complete reform and further amendment.⁷⁷²

As shown in the study, South Africa has not only a national obligation to ensure that children are financially maintained but also an international obligation. The CRC and ACRWC are two instruments which expressly provide for a child's duty to support.⁷⁷³ Although, this duty is primarily placed on the child's parents in equal measures, the South African State is required to take over that duty when parents are unable to do so.⁷⁷⁴ The State is also required to provide necessary resources for parents to comply with their duty to maintain their children.⁷⁷⁵ With the international obligation in mind, South Africa also has a national legislative duty to maintain children as per the Constitution and Children's Act.⁷⁷⁶ In an attempt to comply with its national and international maintenance obligations, the South African State has used a social security measure, namely the CSG.⁷⁷⁷ While the CSG aids children in awarding a monthly stipend to all primary caregivers of children who meet the

⁷⁶⁶ *Hague Convention 2007*, Article 12 and 37.

⁷⁶⁷ Borrás A and Degeling J (2013)

⁷⁶⁸ Long E (2008) 990.

⁷⁶⁹ De Jong M (2009) 590; Duncan W (2008) 317.

⁷⁷⁰ *Hague Convention 2007*, Article 34.

⁷⁷¹ Doogue J (2015) 14.

⁷⁷² Maintenance Act 99 of 1998; Maintenance Amendment Act 9 of 2015.

⁷⁷³ CRC, Article 27; ACRWC, Articles 18 and 20(1).

⁷⁷⁴ Clark B (1999) 241.

⁷⁷⁵ CRC, Article 27(3); ACRWC, Article 20(1).

⁷⁷⁶ Constitution of the Republic of South Africa, 1996, s28(1)(b) and (c); Children's Act 38 of 2005, s18(2)(d).

⁷⁷⁷ Mirugi-Mukundi G – *Realising the Social Security Rights of Children in South Africa, with particular reference to the Child Support Grant* (2009) 5.

eligibility requirements, the amount given does not remotely resemble the amount to be received should the enforcement of a maintenance order be successful.⁷⁷⁸

One of the methods available for cross border maintenance recovery stems from the use of bilateral agreements. As stated in the study, the use of bilateral agreements limits the number of persons able to claim maintenance internationally.⁷⁷⁹ If the country where the debtor is resident does not have a bilateral agreement in place with South Africa, then the method used for recovery is lengthy, tedious, expensive and for the most part unsuccessful in attaining results.⁷⁸⁰ With a mere twenty-seven states having bilateral agreements with South Africa regarding cross border maintenance recovery, dating back to the REMO and REMO Africa Act, it is clear that the agreements are out dated and forgotten.⁷⁸¹ This is particularly the case in South Africa as many legal professionals, maintenance officers and court officials lack any knowledge of how to use bilateral agreements when the opportunity arises.⁷⁸²

Ensuring enforcement of maintenance orders appears to be the main issue plaguing any legal framework regarding maintenance recovery; South Africa is no different in this regard. While the domestic system has specific measures used for enforcement, the measures are ineffective in resolving disputes at present and are likely to continue in the future.⁷⁸³ It is clear that once a maintenance debtor defaults in payment, he or she is at a higher risk of repetition. With this consideration in mind, solving a present dispute without ensuring compliance with an order to continue payment will only lead to future disputes being brought to courts. The continuous cycle in defaulting in payment only leads to more expensive recovery attempts in future, harming the child's future growth and development.

As stated by the Constitutional Court in *Bannatyne v Bannatyne*⁷⁸⁴ the South African legal framework regarding maintenance recovery is riddled with operational and systemic flaws.⁷⁸⁵ Poor application of legislative provisions and a lack of consideration as to the true victims where there is a failure to ensure maintenance payments, has led to overburdened custodial

⁷⁷⁸ Morei N (2014) 762.

⁷⁷⁹ Keith R (2014) 38 and 108.

⁷⁸⁰ Palmeira N 'Maintenance of Children in Foreign Countries' available at <http://mclarens.co.za/maintenance-children-foreign-countries/> (Accessed on 25 May 2016).

⁷⁸¹ Ditshego J 'SA Law Promotes Foreign Maintenance' available at http://www.justice.gov.za/docs/articles/2009_foreign-maintenance.html (Accessed on 6 August 2016).

⁷⁸² Palmeira N 'Maintenance of Children in Foreign Countries' available at <http://mclarens.co.za/maintenance-children-foreign-countries/> (Accessed on 25 May 2016).

⁷⁸³ Skelton A and Carnelley M (2010) 358-359.

⁷⁸⁴ 2003 (2) SA 363 (CC).

⁷⁸⁵ *Magewu v Zozo* [2004] ZAWCHC 18 at para 19; *Bannatyne v Bannatyne* at para 26.

parents who have little lucrative employment opportunities afforded to them as a result of their responsibilities towards their children.⁷⁸⁶ Repetitive court proceedings to ensure enforcement of a maintenance order against a debtor only adds to the creditor's already overburdened situation. Measures for enforcement need to be effective in any maintenance recovery dispute regardless of whether they are cross border in nature. In South Africa, the domestic recovery measures discussed in this study are ineffective in practical application, while cross border recovery has no specific measures allocated to its resolution of disputes.⁷⁸⁷ However, it is possible to apply the domestic enforcement measures to cross border maintenance recovery disputes.

At present, there are many shortfalls to the cross border maintenance recovery system in South Africa. The main cause of these shortfalls is the out of date legislation governing the matter.⁷⁸⁸ Spiralling from the out dated legislation is a lack of knowledge on that particular method of recovery, i.e. the use of REMO or the REMO Africa Act when a proclaimed or designated country is one of the parties to the dispute.⁷⁸⁹ Unfortunately, a direct result of REMO's and REMO Africa Act's limited application in cross border disputes increases the time and money needed to resolve the dispute when instituting formal proceedings in the country where the maintenance order was made. The expensive method of formal proceedings most often leads to unfavourable results for the creditor or applicant.⁷⁹⁰ Attempted improvements to the domestic recovery process in South Africa are continuing, while cross border recovery process is wholly forgotten. As a result, any possible improvements to the domestic system fail to take into account how these new features will impact cross border recovery disputes.

Socio economic factors cannot be ignored in considering the maintenance recovery legal framework in South Africa. Factors include high poverty levels, high unemployment rates and limited State funding, all of which contribute to the success of a legal system.⁷⁹¹ Maintenance recovery is no different. With a system that is required to assist persons living in

⁷⁸⁶ *Bannatyne v Bannatyne* at para 29.

⁷⁸⁷ Parliament of the Republic of South Africa *Briefing Note: Maintenance System in South Africa and Main Portfolio Committee Amendments to the Maintenance Amendment Bill [B16-2014]* (2015) 7.

⁷⁸⁸ De Jong (2009) 590.

⁷⁸⁹ Palmeira N 'Maintenance of Children in Foreign Countries' available at <http://mclarens.co.za/maintenance-children-foreign-countries/> (Accessed on 25 May 2016).

⁷⁹⁰ Palmeira N 'Maintenance of Children in Foreign Countries' available at <http://mclarens.co.za/maintenance-children-foreign-countries/> (Accessed on 25 May 2016).

⁷⁹¹ Leatt A and Rosa S 'Securing the Means to Live: Children's Financial Security in South Africa' available at www.ci.org.za/depts/ci/enews/June2005/SecuringM2L.pdf (Accessed on 17 August 2016).

complex and unique circumstances, it is impossible to fully aid all persons affected by a lack of maintenance payments, whether there is a cross border element or not. In South Africa, where poverty levels are high, leaving many persons affected by maintenance issues unable to seek legal means of recovery due to traveling long distances, or a lack of money as a result of high unemployment rates, socio economic factors are important to include when considering legislative reform.

5.3 Recommendations

For private international law to be effective in protecting the rights of children regarding their maintenance, the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance needs to be ratified and implemented worldwide. Due to its current and comprehensive considerations of both previous success and failures in the field of cross border maintenance recovery, adding the Convention to South Africa's limited legal framework on the topic will be beneficial.

South Africa's legal framework relating to cross border maintenance recovery is severely outmoded as it dates back to 1963 and 1989 respectively.⁷⁹² With minimal to no changes in the discipline since the commencement of the REMO in 1965 aside for the 1989 REMO Act which specifically focuses on countries in Africa, the Convention will update South Africa's legal position without the need for additional instruments, though enacting new legislation will be necessary to clarify the full nature of application to South African law. Including the Convention's provisions into South Africa's maintenance laws will aid in discovering and improving flaws found in the domestic framework.

While, at first, the implementation of the Convention will be costly, mostly due to limited updates being made to the South African legal system regarding cross border maintenance recovery, the amount of State funding saved from decreases in social security payments and resources needed to ensure that the country adheres to its international maintenance obligations will contribute greatly to outweigh the necessary spending for the enactment.⁷⁹³ Long term savings can then be allocated to other State ventures. For example, the State could use the additional funds to pay for any disputes brought under the Convention, or in an attempt to solve a domestic issue regarding maintenance recovery, or establish its own domestic iSupport modelled system to ensure that maintenance recovery continues after the

⁷⁹² REMO.Act 80 of 1963; REMO Africa Act 6 of 1989.

⁷⁹³ *Hague Convention 2007*, Preamble.

initial court dispute. For the Convention to truly benefit the South African people affected by cross border maintenance claims, the State needs to absolve all costs involved in proceedings, or initiate a system whereby a person qualifies for full or part state funding based on means.⁷⁹⁴ However, should this be considered as a potential option, the amount to qualify needs to be reasonable when considering both factual circumstances of each case and socio economic factors when the cost of living is raised frequently.

Adding the Convention to South Africa's legal framework will clarify many issues found in both the domestic and cross border maintenance situations. For domestic legal issues, for which provisions in the Convention may be adapted, the determination for when the duty of support terminates may be clarified.⁷⁹⁵ At present, the duty terminates when the child becomes self-supporting.⁷⁹⁶ Yet, the age of majority is often taken to indicate the termination of the duty by maintenance debtors as in most cases the child will reach 18 years old before he or she becomes self-supporting, meaning their payments might cease.⁷⁹⁷ A clearer indication of when the duty ceases is found in the Convention, namely the age of 21 years.⁷⁹⁸ In South Africa, the age of majority is the age most children finish secondary school, meaning they are most likely to remain dependent on the maintenance received from both parents.⁷⁹⁹ By the age of 21 years, most children will either have employment, thereby earning an income or will have completed a full or at least half of a degree at a tertiary level institute, improving their chances of future employment. Implementing the Convention will aid in increasing the age for the perceived notion that maintenance debtors as to when their duty of support terminates, thereby catering for a greater number of children and lessening the burden on the State in dealing with maintenance defaulters.

It is clear from this study that South Africa should ratify and implement the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance. Including the Convention in South Africa's legal framework for cross border maintenance recovery will allow for a comprehensive upgrade to a severely out dated system while its uniform approach to the recovery process will aid applicants effectively in initiating

⁷⁹⁴ *Hague Convention 2007*, Article 14 and 15.

⁷⁹⁵ Borrás A and Degeling J (2013) 5; *Hague Convention 2007*, Article 2(1).

⁷⁹⁶ Botha M F T (2008) 717.

⁷⁹⁷ Clark B (1999) 247.

⁷⁹⁸ *Hague Convention 2007*, Article 2(1).

⁷⁹⁹ Mc Laren I 'The Reciprocal Duty of Support between Parents and their Children' available at <http://mclarens.co.za/reciprocal-duty-of-support-between-parents-and-their-children/> (Accessed on 17 July 2016).

their claims. Maintenance debtors will no longer be able to escape their duty of support to their children by fleeing to a country with which South Africa has no reciprocal enforcement agreement. Ensuring that maintenance payments are made will aid children in their growth and development while protecting their right to be maintained by each parent in proportion to the parents' financial means. Improving enforcement within South Africa will decrease the State's burden to support children when the debtor fails to do so. Benefits to the domestic recovery system cannot be ignored, as the Convention's flexibility in its application will allow for its provisions to be adapted as a means of closing gaps found in the current legal system as well as give insight in to effective improvements.

Word Count: 33,268 (excluding bibliography, footnotes, table of contents, acknowledgement, declaration and cover page.)



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