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Non compliance with Maintenance Orders — Civil & Criminal

By Adv. Muhammad Abduroaf

Civil Execution

Should the person against whom a maintenance order has been made not comply with it, such order can be enforced in respect of any amount which that person has so failed to pay together with any interest thereon—

- (1) by execution against property;
- (2) by the attachment of emoluments; and
- (3) by the attachment of any debt.

The complainant must approach the maintenance court and make the necessary application. He or she would fill in a "Form K" which is headed "APPLICATION FOR ENFORCEMENT OF MAINTENANCE OR OTHER ORDER IN TERMS OF SECTION 26 OF THE MAINTENANCE ACT, 1998 (ACT No. 99 OF 1998)". Once the form is filled in, the maintenance officer forwards the application to the magistrate who may issue the order. On the application you should write down all relevant information, including how the amount owed is calculated and the whereabouts of the defaulting party. It is advised that you go to court with proof that the monies were not paid. Therefore, if maintenance had to be paid into your bank account, take a printout of your bank statements with to show that monies were not paid. You must also state what relief you want as outlined above.

Once your application is in order, and by way of example you asked for attachment of emoluments, an order may be made against the defaulter's employer to the effect that he or she makes payment directly to you by deducting it from the defaulting party's salary. If the defaulter is unemployed and has property, then the route to follow is to ask for the execution of property. This means that the property would be sold and what is owing to you would be paid to you.

Criminal procedure

It is a criminal offence not to adhere to a maintenance order and one can be convicted for that. You can be liable on conviction to a fine or to imprisonment for a period not exceeding one year or to such imprisonment without the option of a fine.

Should the person against whom a maintenance order was made not comply with it, the party who should receive maintenance may approach the maintenance court and lay a criminal complaint. The complainant would fill in a "Form Q" headed "COMPLAINT OF FAILURE TO COMPLY WITH A MAINTENANCE ORDER FOR PURPOSES OF SECTION 31(1) OF THE MAINTENANCE ACT, 1998 (ACT No. 99 OF 1998)". On the form you should state how the defaulter failed to comply with the order and also what amount is outstanding. Once you successfully laid your complaint, the maintenance court would subpoena the defaulter to the criminal courts. The defaulter has the right to legal representation prior to a trial date being arranged. Once a date has been arranged for trial you would be subpoenaed as a witness and give evidence as to the maintenance order, the outstanding amount that the defaulter failed to pay and anything else that is relevant. As the proceedings are criminal, the State would prosecute the defaulter and you would be their witness. Therefore, the public prosecutor would ask you questions and then the defaulter or his attorney or advocate will cross-examine you. If a foundation has been laid by the State, then the defaulter would get a chance to outline his defence to the court and the public persecutor would then cross-examine him or her.

Should the court find the defaulter guilty, then on the request of the public prosecutor and in addition to or in lieu of any penalty which the court may have imposed grant an order for the recovery from the convicted person of any amount he or she has failed to pay in accordance with the maintenance order together with any interest thereon. Whereupon the order so granted shall have the effect of a civil judgment of the court. This means that the order may be used to sell the convicted person's property.

Kind regards,

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