Appendix 8

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Maintenance Obligations: Law and Practice in 2008
Non-fulfilment : penal remedies and their shortcomings
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There is no doubt that the problem of maintenance enforcement is not a simple one. It is a matter which gives rise to great concern especially in view of the fact that it affects the so called "cellula fondamentale della vita sociale", this being the family. Although the duty arising from the family unit to pay maintenance is primarily a civil law issue, its prevailing importance is also reflected in the criminal sphere, which imposes penalties in those instances where a person fails to fulfill his or her duty to pay maintenance to his or her spouse or to his or her children born in wedlock after having been so ordered by a court or so bound by a contract. Ultimately, the penal remedy is in most cases the most effective means of enforcement in view of the sanctions which can, and should be imposed by our Courts in cases of non-observance of the duty to pay maintenance, the relatively quick time-frame in which the offender is brought to justice and the cost-effectiveness of the remedy, since the criminal action is instituted by the Executive Police, most often but not necessarily at the instance of the party who is entitled to receive maintenance, who does not have to pay any legal costs to have this remedy exercised.

Before getting into the nitty-gritty of the subject, I believe it is important to have a brief look at the historical background of the provision which governs the duty to pay or supply maintenance under the Maltese Criminal Code, since this will help not only to individualise the shortcomings in the law which were addressed by various amendments throughout the years, but also to highlight the major shortcomings still inherent in the law as it stands today, which in an unbelievable and I dare say a ridiculous manner, in this day and age still makes a distinction between children born in wedlock and those born out of wedlock. This in the sense that whilst it is a criminal offence for a parent not to pay maintenance for the needs of his or her children born in wedlock after having been so ordered by a court or so bound by a contract, a parent who has children born out of wedlock but who is still ordered by a court or bound by a contract to pay maintenance is exonerated from any criminal responsibility if he fails to observe his duty. But on this aspect I shall elaborate later on.

Until 1983, our Criminal Code made no specific reference to the notion of maintenance, but laid down that a person was deemed to be guilty of a

contravention against public order if being the head of the family he left his wife or his children in want whether in consequence of his disorderly living or his indolence. The inadequacy of this provision of the law, which is still in force today but rarely if ever cited by the Executive Police, and the obvious difficulties for the Prosecution to manage to prove guilt under this provision of the law do not need much amplification.

The law was then amended in 1983 where a new provision was introduced to the effect that the failure to pay maintenance when so ordered by a court was deemed to be a contravention against public order, which provision today is basically section 338 (z) of the Criminal Code, Chapter 9 of the Laws of Malta.

It is interesting to note the fact that when the said provision came into force, it was couched in such terms that it was only the husband who could be found guilty under this provision of the law, but eventually in 1986 the law was amended in the sense that both spouses were placed on an equal standing and thus both the husband and the wife could be found guilty under this provision if they failed to obey a court order regarding their duty to pay maintenance.

Unfortunately, the amendments which were introduced on various occasions to this provision of the law, to counter-act the inadequacies of what should have been a clear and straightforward provision of the law from the beginning, highlight the piecemeal approach which is often adopted by our legislator, the lack of foresight of the legislator, or a little bit of both.

This lack of foresight, or may I also add, inadequate drafting of the law, gave rise to a further loop-hole in the interpretation and application of this provision. By a judgement delivered by the Court of Criminal Appeals in 1994 in the names The Police vs Darryl Burr, it was decided that failure of the duty to pay maintenance arising from a public deed of separation by mutual consent did not amount to the contravention contemplated in section 338 (z) of the Criminal Code, even though the publication of a deed of personal separation is authorized by a court decree. In its judgement the Court of Criminal Appeals held that this provision of the law only covered those cases where the duty to pay maintenance to the spouse or in favour of the children emanated from a court order, and that the decree authorizing the parties to proceed to the publication of a deed of personal separation lacked the essential ingredient of a court order.

This anomaly in the law was not addressed before the lapse of eight years from the date when this judgement was delivered, and it was only in 2002 that the law was amended in the sense that failure of the duty to pay maintenance to the spouse or to the children born in wedlock was deemed to be an offence, whether such duty emanated from a court order or from a public deed. During these eight years, hundreds of people who had separated from their spouse by means of a deed of personal separation rather than going through the long-winded process of obtaining a court judgement were left without any penal remedy when their spouse failed to honour his or her duty emanating from a deed of separation to pay maintenance, whilst defaulters had a free ride for eight whole years.

A further difficulty which was often being encountered by the Executive Police when instituting a criminal action against individuals who were not observing their duty to pay maintenance was the short prescriptive period during which the criminal action had to be exercised. Being of a contraventional nature, the offence contemplated under section 338 (z) of the Criminal Code has a prescriptive period of three months, this being the prescriptive period applicable to most contraventions. This means that the charge has to be issued by the Police and duly notified to the accused within three months of the commission of the offence, that is fifteen days after the day on which, according to the court order or contract, the maintenance should have been paid. This short time frame and the fact that persistent defaulters are often very apt and come up with a thousand and one ideas at evading summons, coupled with the fact that the Police were not always issuing the charges in a timely manner, led to a significant number of cases becoming time-barred, with the consequence that spouses and more importantly many young children were left without any financial assistance. A further amendment was thus introduced in 2006 to section 338 (z) whereby the prescriptive period was raised to six months, and this amendment helped in no small manner to alleviate the problem.

Having thus analysed these developments, it is pertinent to analyse how this provision of the law is being interpreted and applied today by our Magistrates Court as a Court of Criminal Judicature in its Family Division, as well as by the Court of Criminal Appeals. There is no doubt that for a support order to be effective, it must be applied rigorously. Being a contravention, the punishments which can be applied are those of detention for a maximum period of two months, a fine or a reprimand and admonition.

Alternative punishments which can, and are often applied, are those of a conditional discharge for a particular period of time coupled with an order to pay maintenance, which is deemed to be an executive title under the Code of Organization and Civil Procedure, or a suspended jail term which is tied to an order to pay the maintenance due, which in default of payment within the time allocated by the court can then be converted into an effective jail term following an application by the interested party.

Unfortunately, the difficult conditions which the Magistrates Court as a Court of Criminal Judicature in its Family Division is working in are creating a scenario where the most suitable manner of dealing with these cases is not being followed. The Court, which is presided by only one magistrate, is literally being inundated by new cases each and every week, not all related to cases falling within the jurisdiction of the Court of Criminal Judicature in its Family Division. This really leaves no option to the Court but to decide the case in one sitting, otherwise a huge backlog of cases would accumulate. The consequence of this is that those who are first-time offenders are getting away lightly, often with a conditional discharge coupled with an order to pay the maintenance due, which in real terms means that the maintenance due for that particular incriminated period is never paid. An effective jail term is usually meted out in the case of repeat offenders, due to the fact that a breach of this section of the law is regarded as a serious offence notwithstanding that it is a contravention, since it amounts to a defiance of a court order. The Magistrates Court has often reiterated that as a Court of Criminal Jurisdiction its function is not to collect the maintenance due but rather to ensure the observance of the court order, but to be honest I fail to apprehend this reasoning as the only way for the Court to ensure the observance of the court order is by ensuring that the person accused before it pays the maintenance due, and in default to apply a suitable punishment. Handing out a conditional discharge coupled with an order to pay the maintenance due is definitely not an effective manner to ensure the observance of the court order, and rather than imposing a jail term in the first sitting an alternative approach should be explored.

I thus propose that the approach which should be adopted by the Magistrates Court, obviously should there be no contestation by the accused that the maintenance was in fact paid by him or her, is to allow the accused one adjournment so as to give him or her enough time to regularise his or her position and pay all arrears due, and if by the second sitting or within a further period which the court may allow, the person accused insists on not

paying the maintenance due, then the Court should apply an effective jail term. This approach, however, can only be adopted if the magistrate presiding the Magistrates Court as a Court of Criminal Judicature in its Family Division is only assigned cases relating to particular offences committed within a family context including the Juvenile Court, which today amount to hundreds of cases annually, and not as is currently happening where the same magistrate is being assigned a boatload of cases not related to offences committed within this family context.

Another aspect which definitely merits due attention is whether a court of criminal jurisdiction can acquit a person accused before it on grounds that there exist circumstances which justify such action, such as that he or she is not in a financial position to pay the maintenance due, which is very often a line of defence which is brought up before the courts of a criminal jurisdiction. The position adopted by our Courts in this regard is well crystallized, and it has been repeatedly decided in a number of judgements that if a person feels that there exist circumstances which justify him to stop paying maintenance, he must file the necessary proceedings before the competent Civil Court to obtain a variation of the original court decree, and the Court of Magistrates as a Court of Criminal Judicature is not competent to decide upon whether there are reasons to justify the non-observance of court order. I concur with this stance taken by our courts since if the Court of Magistrates had to occupy itself of this matter, then it would be usurping the function of the Civil Court, and the function of the Magistrates Court is to ensure the observance of the orders of the Civil Court and not to try and change such orders itself. I am also of the opinion that when there are proceedings pending before the Civil Court for the variation of a particular court order, and at the same time there are also criminal proceedings pending concerning that same court order, than in genuine circumstances but not necessarily in all cases, the Magistrates Court should stay the criminal proceedings pending the outcome of the civil proceedings for the variation of that particular court order, so as to avoid potentially unjust situations.

Another aspect which I propose should be the subject of a legislative amendment is the determination of the validity or otherwise of an order given by the Civil Court ordering the payment of maintenance, by the Magistrates Court itself, particularly in those cases where it is evident that the court order is no longer valid. The civil law, as it stands today, provides that a decree ordering the payment of maintenance shall cease to be enforceable if the action for separation for which leave to proceed is granted

by the Civil Court is not instituted within two months of the date of the decree, or within such longer period as the same court may allow. The said imposition of a specific term is obviously meant to curb abuse, in the sense that the law seeks to deter people from abusively demanding the payment of maintenance through a provisional court order without then duly instituting the necessary proceedings. One would logically assume that once a court order has lost its validity in view of the fact that the proceedings in court have not been instituted within two months, then no criminal proceedings can be instituted in virtue of this court decree under section 338 (z). Through what I respectfully submit is an erroneous interpretation of the law emanating from a judgement which was delivered some years back, this is however not the case. In fact, in the case decided by the Court of Criminal Appeals on the 8 th May 1998 in the names The Police vs Mario Mallia it was established that criminal proceedings may still be instituted on the basis of this court order, even though the proceedings for personal separation have not been instituted within the time frame allowed by law, unless the order contained in the decree has not been expressly revoked or varied by the competent Civil Court. In adopting this approach, our courts of a criminal jurisdiction are, in my opinion, opening the way for abuse. Obviously a remedy exists in that one can file an application before the Civil Court asking it to declare that a particular court order is no longer valid, but why shouldn't this obviously wrong interpretation of the law be addressed by an appropriate legislative enactement which makes it clear that once a decree loses its effects for civil law purposes, then it also loses all its effects for any criminal action which may be instituted in virtue of that decree.

Also another shortcoming is the interpretation which is being given to the word "maintenance" by our courts of criminal jurisdiction. Section 19 of the Civil Code makes it very clear that maintenance, in regard to children, shall also include the expenses necessary for health and education. Yet again however, our courts of criminal jurisdiction have decided to adopt an interpretation of their own of the word maintenance, and the interpretation which is being given is that the remedy exercisable under section 338 (z) of the Criminal Code is not applicable to those expenses which the Civil Court would have ordered the parent to pay for the health and education of his son or daughter. Thus, to illustrate an example, if the Civil Court issues an order where a parent is ordered to pay the sum of € 50 every week as maintenance in addition to half the expenses incurred for the educational and medical needs of the minor, the remedy under section 338 (z) can only be resorted to

if that particular person fails to pay the € 50 but this remedy cannot be used if the educational and medical expenses are not paid.

I have purposely left for last the topic of the anomalous distinction which our Criminal Code makes between children born in wedlock and children born out of wedlock as regards the availability of the penal remedy contemplated under section 338 (z) of the Criminal Code, as this is a subject which I trust should provoke an active discussion and hopefully an immediate amendment to the law.

It is useful in this context to examine the precise wording of Section 338 (z) which states that a person is guilty of a contravention when so ordered by a court or so bound by contract fails to give to **his or her spouse** the sum fixed by that court or laid down in the contract as maintenance for the spouse and, or, the children. In a judgement delivered by the Court of Criminal Appeals on the 16 th December 2003 in the names The Police vs David Scerri, it was decided that in the case of children born out of wedlock, even if there is a court order condemning the father or mother to pay such maintenance to the children, the penal remedy contemplated under section 338 (z) of the Criminal Code cannot be exercised, due to the very reason that there is no spouse to whom one can give the maintenance due for the needs of the children, and that this provision of the law is thus obviously contemplating only those childen born in wedlock! One should reasonably assume that since this judgement was delivered more than four years ago, prompt remedial action has long been taken to correct this enigmatic bad drafting of the law, but unfortunately this has not been the case and the law is still as it was more than four years ago, and defaulters are consistently getting away with it. And to make matters worse, this same provision of the law was last amended in 2006 when the prescriptive period was raised to six months.

I believe that a legislative amendment should be immediately introduced to remove this anomaly or else a constitutional remedy could be explored since in my view the distinction being presently made between children born in wedlock and those born out of wedlock is discriminatory in nature. I sincerely trust that immediate action will be taken to stop the injustice and suffering which is being caused to so many minor children, and that this paper will serve as a small contribution in at least this regard.