

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT 18/02

In the matter between:

NADINE BANNATYNE

Appellant

and

LAURIE NOEL BANNATYNE

Respondent

COMMISSION FOR GENDER EQUALITY

Intervening as amicus curiae

**SUBMISSIONS ON BEHALF OF
THE COMMISSION FOR GENDER EQUALITY**

INTRODUCTION

1. 1 The respondent was ordered by the High Court to pay maintenance to the applicant in respect of the applicant and their two young children.
2. 2 The respondent subsequently obtained an order in the magistrate's court, reducing the maintenance payments which he was obliged to make.
3. 3 The respondent failed to pay the full amounts due, and then stopped paying altogether.

4. 4 If the original High Court order had not been varied, the applicant would have been entitled to bring civil proceedings in the High Court for the committal of the respondent for contempt.
5. 5 However, the variation of the High Court order has the result that it was, as a matter of law, replaced and substituted by the order made by the magistrate's court.
6. 6 There is no procedure in the magistrate's court for civil proceedings for contempt.
7. 7 The result is that unless the applicant is entitled to bring proceedings in the High Court for civil contempt, the effect of the variation of the original High Court order has been to deprive her of a possible remedy through which she can enforce the payment of maintenance.
8. 8 The Supreme Court of Appeal accepted for the purposes of the appeal that the High Court has the power to commit for contempt of the order of the maintenance court.
9. 9 The Supreme Court of Appeal held that if that is so, the High Court had a discretion. That discretion should be exercised sparingly and only in exceptional circumstances, for the legislature has provided effective remedies that were not

intended to be ignored. Under the particular circumstances of this case, there were no adequate circumstances upon which the High Court might have made a committal order.

The scheme of these submissions

10. 10 The submissions on behalf of the amicus curiae are to the following effect:
 1. 10.1 The maintenance system is highly gendered. If it fails to operate effectively, this failure entrenches and exacerbates the existing inequality between women and men.
 2. 10.2 The maintenance system is in disarray. It is often slow and ineffective. Women often find it an ineffective means of enforcing their rights and the rights of their children. The economic consequences of divorce are generally adverse to women.
 3. 10.3 In order for the rights of women and children to be respected, protected, promoted and fulfilled, there should not be any unnecessary limitation of the remedies available to enforce those rights.

4. 10.4 The issue concerning the High Court's jurisdiction to make an order committing the respondent for contempt on the grounds of his failure to comply with a maintenance order made by the Magistrate's Court is either a constitutional matter, or an issue connected with a decision on a constitutional matter.
5. 10.5 The High Courts have this jurisdiction as a result of the proper interpretation of express provisions of the Constitution.
6. 10.6 Under the pre-Constitutional common law, the High Courts have the power to make an order of committal for civil contempt for the breach of a maintenance order of a magistrate's court.
7. 10.7 Alternatively to 10.6, if the pre-Constitutional common law does not confer this power on the High Courts, the common law should be developed so as to confer this power on them.
8. 10.8 The Maintenance Act does not remove the power of the High Court to make an order of committal for contempt for the failure to comply with an order of a magistrate's court.
9. 10.9 The High Court does not have a discretion to refuse to hear a matter which is within its jurisdiction.

10. 10.10 To the extent that a High Court has a discretion as to whether to make an order of committal for contempt, this discretion must be exercised in a manner which has due regard to the constitutional rights of women and children.
11. 10.11 The question whether the High Court should or should not have made a committal order in the circumstances of the present case, therefore raises a constitutional matter.
12. 10.12 In the circumstances of the present case, such an order should have been made by the High Court.
13. 10.13 The Supreme Court of Appeal erred in setting aside the order that had been made.

1 THE GENDERED NATURE OF MAINTENANCE

11. 11 The Commission for Gender Equality (CGE) is a 'State Institution Supporting Constitutional Democracy' established in terms of chapter 9 of the Constitution of the Republic of South Africa Act 108 of 1996.
12. 12 The constitutional mandate of the CGE is set out in section 187 of the Constitution in the following terms:

'(1) *The Commission for Gender Equality must promote respect for gender equality and the protection, development and attainment of gender equality.*

'(2) *The Commission for Gender Equality has the power, as regulated by national legislation, necessary to perform its functions, including the power to monitor, investigate, research, educate, lobby, advise and report on issues concerning gender equality.'*

13. 13 Since its inception, the CGE has viewed the administration of maintenance payments as one of the biggest stumbling blocks to women fully attaining equality. A majority of all of the complaints received by the CGE's Legal Department have related to maintenance and the enforcement of maintenance orders.^{1[1]}

14. 14 In *Hugo*, no statistical or survey evidence was produced to establish the fact that mothers are, generally speaking, primarily responsible for the care of small children in our society. However, Goldstone J saw no reason to doubt the assertion by a witness that mothers, as a matter of fact, bear more responsibilities for child-rearing in our society than do fathers.^{2[2]}

^{1[1]}

Affidavit of B T Ngcobo para 16 and 17

^{2[2]}

President of the Republic of SA and Another v Hugo 1997 (4) SA 1 (CC) at [37]

15. 15 The statistical evidence supports this conclusion. A 1998 report by Central Statistics (the government statistical agency), based on survey and census data, showed that:

1. 15.1 42% of children were living only with their mother; and

2. 15.2 1% of children were living only with their father.^{3[3]}

16. 16 A subsequent study published by Statistics South Africa (the new name for Central Statistics) showed that:

^{3[3]} *Women and Men in South Africa* (Central Statistics, 1998) figure 7 page 9

1. 16.1 The 'expanded' unemployment rate - which includes both those actively seeking work, and those who have given up looking for work - is significantly higher for women than for men, at all levels of education.^{4[4]}
 2. 16.2 The average earnings of employed men are consistently higher than the average earnings of employed women.^{5[5]}
17. 17 Three conclusions flow from this:
1. 17.1 On breakdown of a marriage or other relationship, it is almost always the mother who cares for the children;
 2. 17.2 The resulting child care responsibilities inevitably inhibit the ability of women to obtain employment; and
 3. 17.3 Even where women are able to obtain employment, they are generally in a weaker economic position than men.
18. 18 The result of these factors is that the maintenance system is overwhelmingly one in which it is women who, on the dissolution of a marriage,

^{4[4]} *Women and Men in South Africa: Five Years On* (Statistics South Africa, 2002) figure 31 page 37

^{5[5]} *Women and Men in South Africa: Five Years On* (Statistics South Africa, 2002) figure 40 page 46, figure 41 page 47

have the right to receive maintenance for their children, and for that matter also for themselves.

19. 19 It follows that if the maintenance system fails to function effectively, the predominant impact of that failure is on women and the children for whom women care. Any such failure has a direct impact on the right of women to equality, because it entrenches and exacerbates the existing inequality.

20. 20 These are the underlying reasons why since its inception, the CGE has viewed the administration of maintenance payments as one of the biggest stumbling blocks to women fully attaining equality. They explain why so many of the complaints received by the CGE's Legal Department have related to maintenance and the enforcement of maintenance orders.

2 THE FUNCTIONING OF THE MAINTENANCE SYSTEM - AND THE ECONOMIC CONSEQUENCES OF DIVORCE

21. 21 The enforcement of maintenance orders is a widespread problem in many parts of the world. Statistics from several countries show that on average fewer than half of all maintenance orders are fully complied with.^{6[6]}

22. 22 There is ample evidence that this is a major problem in South Africa.

^{6[6]} Van Zyl 'Post-divorce support - Theory and practice' 1989 *De Jure* 71 at 77; in relation to Southern Africa, see Clark 'Child Support: Public or Private?' (1992) 55 *THRHR* 277 at 284

23. 23 A study in the Cape Peninsula found a default rate of 85,5% in the payment of child support maintenance.^{7[7]}
24. 24 A more recent study in the Cape Peninsula suggests that despite the improvements brought about by the enactment of the Maintenance Act 99 of 1998, the failure to comply with maintenance orders remains a serious problem.^{8[8]}

^{7[7]} Burman and Berger 'When Family Support Fails: The Problem of Maintenance Payments in Apartheid South Africa' (1988) 4 *SAJHR* 194 and 334 at 340.

^{8[8]} Wamhoff *South Africa's New Maintenance System: Problems and Suggestions* (Centre for Socio Legal Research Report No 5, UCT 2001)

25. 25 A study of 2 248 cases in the Johannesburg maintenance court, in which the defaulters had been convicted of failure to comply with a maintenance order, demonstrated that the sanctions provided by the Maintenance Act were not applied strictly in practice.^{9[9]}
26. 26 The Department of Justice is aware of this problem. It has commissioned a study of the cost of appointment of maintenance investigators in terms of the Maintenance Act. The first report of this study was an assessment of the demand for maintenance investigators, based on visits to courts and a review of court records. While the details of the data are tentative because of inadequacies in record systems, the study identified numerous problems in the system. The data showed a 'success rate' of only 16% in Johannesburg, which was the largest court studied. That rate was so low that the investigators suggested that there might be some problems with the data. Whatever the validity of the detailed statistics, it is fair to say that generally the report demonstrates a system which is very often slow and ineffective.^{10[10]}
27. 27 The Lund Committee on Child and Family Support was an expert committee appointed by the Committee of the Minister Welfare and the Provincial Members of the Executive Committee (the Welfare MINMEC). It found that the judicial or private maintenance system functions so poorly that

^{9[9]} Lotriet 'Die effektiwiteit van onderhoudsbevele in familieregetlike konteks (Deel 1)' 1996 *Die Landdross/The Magistrate* 123. In all of the cases studied, the failure to pay was not the result of a lack of resources: note 6 at 124.

^{10[10]} Cornerstone Economic Research 'A baseline cost study on the appointment of maintenance investigators in terms of the Maintenance Act, 1998 (Act no 99 of 1998): Report 1 (July 2002)

many women turn to the state for the support of themselves and their children. There is widespread dissatisfaction with the system. Its considered conclusion, based on the literature and the expert knowledge of its members, summarises the position as follows:

'It is widely acknowledged that the parental maintenance (child support) system in South Africa is in disarray. A great many children are being brought up by single parents. The non-custodial parent rarely contributes to their upkeep, despite a legal obligation to do so. Some non-custodial parents are unable to contribute because they are unemployed and lack the resources themselves. Very many others are able to contribute, but do not do so. Custodial parents who manage to secure payments do so only at great cost in terms of both money and time to themselves.'^{11[11]}

28. 28 The South African Law Commission found that

^{11[11]} *Report of the Lund Committee on Child and Family Support (1996) Executive Summary at 1; Executive Summary at 3; and at 49*

'At the practical level a number of problems arise with the administration of the system described above [the maintenance system in the magistrate's courts]. Complaints range from the treatment, attitudes and facilities encountered at maintenance courts by persons wishing to lay complaints, to the seeming impunity with which persons manage to evade their legal duty to maintain their dependents, even where maintenance orders are in place.'^{12[12]}

29. 29 All of this is consistent with the finding by Burman and Berger:

^{12[12]} South African Law Commission *Issue Paper 5: Project 100: Review of the Maintenance System* (1997) para 2.9 page 10.

'... interviews with women in whose favour maintenance orders had been made indicated that many women did not report non-payment. This was most frequently ascribed by the women to being 'too tired' to start the whole procedure required, as well as their exasperation with the bureaucratic hurdles with which they would have to deal, especially as they doubted the effectiveness of the procedure in finally obtaining the money.'^{13[13]}

30. 30 The difficulties which the Applicant in this case experienced in enforcing compliance with the maintenance order, do not appear to be at all unusual.

The economic consequences of divorce

31. 31 Stereotyped role allocations for women have been a major source of their general disempowerment and financial impoverishment. Because of the unequal relationship between women and men in marriage, divorce often results in economic dependence of the woman on the man. This dependence is exacerbated if the mechanisms for the enforcement of the child support obligations of men are not effective.

^{13[13]} Burman and Berger 'When Family Support Fails: The Problem of Maintenance Payments in Apartheid South Africa' (1988) 4 *SAJHR* 194 and 334 at 339

32. 32 These phenomena have led to what has been termed 'the feminization of poverty'.^{14[14]} This is closely related to the economic consequences of divorce, which has been extensively studied in a number of countries.
33. 33 The virtually inevitable economic inequality resulting from the termination of a marriage which had the conventional marriage and child-rearing roles and patterns has been explained as follows:

'Children require continuing parental support that limits the earning capacity of the custodial parent - and necessitates continuing financial assistance from the non-custodial parent....

^{14[14]} Sinclair *The Law of Marriage Volume 1* (Juta 1996) page 24, and particularly the sources and conclusions referred to at footnote 41; and pages 139-141

If we take out the direct cost of child-rearing and deal with that through child support, what is the ex-wife's position? Her standard of living, unless she remarries, is likely to be lower than her ex-husband's (unless he leaves the labour market, or makes several more child-producing relationships) for three reasons. First, because her earnings as a woman are low. In Leviticus 27: 1-8 it is laid down that the labour of men between 20 and 60 years is worth 50 shekels, but that the labour of a woman of the same age is worth only 30 shekels. Little has changed. Secondly, as a wife she is likely to have altered her job to fit in with her husband's needs, and rarely to her own career advantage. Thirdly, on having children her earnings are likely to have been interrupted by time out of the labour market and by some years of part-time work. In addition, her earning capacity will have been permanently reduced through loss of promotion and fringe benefits, particularly pension entitlements, affected by career interruptions and part-time work, She may also have contributed to her husband's earning capacity - but that is a separate issue. A woman's total earnings by the time of divorce and her capacity to earn in future are reduced directly as a result of marriage. She is in difficulty, even if she works full time and relatively continuously.^{15[15]}

^{15[15]}

Maclean and Weitzman 'Introduction to Income Support' in Weitzman and Maclean *Economic Consequences of Divorce: The international Perspective* (Clarendon Press, Oxford, 1992) at 188-189

34. 34 This inherent inequality is deepened when the woman is, as is usually the case, the custodial parent on divorce. The Lund Committee concluded that

'In practice, the custodial parent is in anything but an enviable position. International studies show that fathers tend to be better off after divorce, while women and their children are worse off, and there is no reason to believe that the situation would be any different in South Africa. The international patterns are related to the loss of the second earner and also to the generally lower earnings of women. These patterns also occur in South Africa.... The patterns also have implications for gender equality which, since 1994, has been entrenched in the South African Constitution.'^{16[16]}

35. 35 Van Zyl summarises the studies on this subject as follows:

'A study by Weitzman has shown that a year after divorce there is a 42 per cent improvement in men's standard of living whilst there is a 73% decline in that of women. Other studies show that the decline in the standard of living of woman may not be quite so severe, but they do confirm the trend.'^{17[17]}

^{16[16]} Report of the Lund Committee on Child and Family Support (1996) at 57

36. 36 The Lund Committee also pointed to a study in the USA which concluded that

¹⁷[17] Van Zyl 'Post-divorce support - Theory and practice' 1989 *De Jure* 71 at 82; see also the studies cited by Sinclair *The Law of Marriage Volume 1* (Juta 1996) at footnote 41 on page 25

'... children of divorce who experience the most psychological stress are those whose post-divorce lives have been impaired by inadequate income... When family income is adequate, there are no differences in anxiety-depression levels between those in divorced families and those in intact families.'^{18[18]}

37. 37 As this Court has found,

'For many South African women, the difficulties of being responsible for the social and economic burdens of child rearing, in circumstances where they have few skills and scant resources, are immense. The failure by fathers to shoulder their share of the financial and social burden of child rearing is a primary cause of this hardship.'^{19[19]}

38. 38 It is submitted that it is against this background that the availability of remedies, and the exercise of any judicial discretion, should be assessed.

^{18[18]} *Report of the Lund Committee on Child and Family Support* (1996) at 57, citing Weitzman 'The Divorce Law Revolution and the Illusion of Inequality: a View from the United States' in Freedman (ed) *Essays in Family Law* (1985)

^{19[19]} *President of the Republic of SA and Another v Hugo* 1997 (4) SA 1 (CC) at [38]

3 THE REMEDIES AVAILABLE SHOULD NOT BE UNNECESSARILY LIMITED OR REDUCED

39. 39 For the reasons set out above, the ability of the custodial parent to enforce the maintenance order has a considerable impact on the extent to which the rights of children will be realised. It also has a considerable impact on the inequality between women and men.

40. 40 It is not submitted that the contempt power is always or even usually the most effective remedy available to the woman. What is the most effective remedy will depend upon all of the circumstances of the particular case. It is however clear that in some cases, of which the present case is one, it will be a significant and important remedy.

41. 41 It is submitted that the right to equality requires that the widest possible range of remedies should be available to ensure the effective operation of that system.

42. 42 Similarly, the rights of children require that the widest possible range of remedies should be available.

4 THE ISSUE CONCERNING THE HIGH COURTS' JURISDICTION TO MAKE A CONTEMPT ORDER FOR FAILURE TO COMPLY WITH A MAINTENANCE ORDER MADE BY THE MAGISTRATE'S COURT IS WITHIN THE JURISDICTION OF THIS COURT

43. 43 It is submitted that there are four reasons why the issue of the High Courts' jurisdiction is within the jurisdiction of this Court:
1. 43.1 This is a question of *vires* or legality, which is inherently a constitutional question;
 2. 43.2 For the reasons which are set out in the next section of these submissions, the High Courts have this jurisdiction as a result of the proper interpretation of express provisions of the Constitution.
 3. 43.3 If the High Courts do not have jurisdiction from an express provision of the Constitution, the next question is whether it has that jurisdiction under the pre-Constitutional common law. This is a matter which is 'connected with a decision on a constitutional matter', in that it is a decision which has to be made in order to enable a decision to be made on a constitutional matter, namely whether the common law should be developed.
 4. 43.4 If the pre-constitutional common law does not confer that jurisdiction on the High Courts, the question is then whether the common law needs to be developed to have regard to the right to equality and the rights of the child. That is a constitutional question.

Vires

44. 44 The rule of law is a fundamental principle of constitutional law, and it is a fundamental principle of the rule of law that the exercise of public power is legitimate only where it is lawful. It is central to the conception of our constitutional order that the Legislature and Executive are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by the law.^{20[20]}
45. 45 One of the duties of the Constitutional Court is 'to determine finally whether public power has been exercised lawfully'.^{21[21]}

^{20[20]} *Fedsure Life Assurance and Others v Greater Johannesburg Transitional Council and Others* 1999 (1) SA 374 (CC) at [56], [58]

^{21[21]} *Pharmaceutical Manufacturers Association of SA and Another: In re ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) at [51]

46. 46 This Court has held further that '(a)ny issue concerning the legality of the exercise of public power is a constitutional matter'.^{22[22]}
47. 47 All of those cases deal with the question of the legality of the exercise of public power by the legislature and the executive. But it is submitted that the same principle must apply to the courts. The powers of the courts arises from, and are to be found in, the Constitution.^{23[23]} The question whether a court has a specific power is therefore in the first instance a constitutional question.
48. 48 This of course does not imply that every question decided by the High Court is a constitutional question. Whether a High Court has exercised its powers correctly is not *per se* a constitutional question,^{24[24]} although it may be in a particular case. But whether the court had the power at all, is inherently a constitutional question.
49. 49 The fact that the exercise of the judicial power is an exercise of public power is implicitly recognised in sec 239 of the Constitution, in paragraph (b)(ii) of the definition of 'organ of state'. An organ of state is defined as

^{22[22]} *MEC for Local and Development Planning of the Western Cape and Another v Paarl Poultry Enterprises CC t/a Rosendal Poultry Farm* 2002 (2) BCLR 133 (CC) at [6]

^{23[23]} In the case of the High Courts, in sec 169

^{24[24]} *S v Boesak* 2001 (1) SA 912 (CC)

'any other functionary or institution exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer.'

50. 50 It is submitted that this exclusion of the courts from the definition of 'organ of state' necessarily implies, and correctly so, that a court is an institution which exercises a public power. The extent of that public power is a constitutional matter, just like the extent any other public power.

The express provisions of the Constitution

51. 51 We submit below that the High Courts have the jurisdiction to make an order of committal for contempt of an order of a magistrate's court as a result of the proper interpretation of express provisions of the Constitution.

52. 52 The proper interpretation of the provisions of the Constitution is a constitutional matter.

The content of the common law is an issue connected with a decision on a constitutional matter

53. 53 The contempt power of the High Court is a power which it holds under the common law.

54. 54 We submit in the next section that under the pre-Constitutional common law, a High Court has the jurisdiction to commit for contempt of court for failure to comply with an order made by a magistrate's court. If that submission is correct, there is no need to develop the common law in this regard.
55. 55 In order to decide whether the common law should be developed - which is a constitutional matter - it is necessary first to determine what the common law is. This is a matter 'connected with a decision on a constitutional matter' in terms of sec 167(3)(c) of the Constitution. It not possible to decide whether, and if so how, the common law should be developed without first determining what the common law is.
56. 56 The phrase 'connected with a decision on a constitutional matter' is not readily definable in comprehensive terms. It is submitted however that this case illustrates a core meaning of that phrase, namely a matter which has to be decided in order to enable a decision on a constitutional matter to be made.

The development of the common law

57. 57 If it is found that the pre-Constitutional common law does not confer this jurisdiction on the High Courts, then the question is whether the common law is to be developed to achieve that result.

58. 58 The question whether the common law should be developed to achieve that result is a constitutional matter.

5 THE CONSTITUTION, PROPERLY INTERPRETED, CONFERS THIS JURISDICTION ON THE HIGH COURTS

59. 59 The powers of a High Court are set out in sec 169 of the Constitution.

Leaving aside constitutional matters, a High Court may decide

'(b) any other matter not assigned to another court by an Act of Parliament.'

60. 60 This may be conveniently contrasted with the Magistrates' Courts and all other courts, which may decide (again leaving aside constitutional matters)

'any matter determined by an Act of Parliament'

61. 61 The word 'any' is a word of the widest meaning:

'In its natural and ordinary sense "any" - unless restricted by the context - is an indefinite term which includes all of the things to which it relates.'^{25[25]}

and

^{25[25]}

Hayne & Co v Kaffrarian Steam Mill Co Ltd 1914 AD 363 at 371

"Any" is, upon the face of it, a word of wide and unqualified generality. It may be restricted by the subject-matter or the context, but prima facie it is unlimited.^{26[26]}

62. 62 It is submitted that it follows that Herbstein and van Winsen are therefore correct in stating that

'whereas lower courts may do nothing that the law does not permit, superior courts [more precisely, High Courts] may do anything that the law does not forbid.^{27[27]}

63. 63 Under the Constitution, the High Courts therefore have the power to make orders of committal for contempt for failure to comply with an order of a magistrate's court. We address below the question whether this power has been removed from them because it is 'a matter assigned to another court by an Act of Parliament'.

6 UNDER THE PRE-CONSTITUTIONAL COMMON LAW, A HIGH COURT HAS THE POWER TO COMMIT FOR CONTEMPT FOR FAILURE TO COMPLY WITH THE ORDER OF A MAINTENANCE COURT

64. 64 Herbstein and Van Winsen state that in contempt proceedings

^{26[26]} *R v Hugo* 1926 AD 268 at 271

^{27[27]} Herbstein and Van Winsen *The Civil Practice of the Supreme Court of South Africa* (4th ed 1997) at 38

'Application should be brought in the court that made the order which the respondent is alleged to be disobeying.'^{28[28]}

65. 65 This must be properly understood as making the proposition that if (for example) an order is made in the Transvaal Provincial Division, and is disobeyed by a person who then moves to the Cape Provincial Division, the application for committal for contempt should be brought in the Transvaal Provincial Division. The cases cited by the authors make this clear. This proposition therefore does not address the question whether a superior court has civil contempt jurisdiction in respect of a failure to comply with an order of a lower court within its area of jurisdiction.

^{28[28]} Herbstein and Van Winsen *The Civil Practice of the Supreme Court of South Africa* (4th ed 1997) at 819

66. 66 The magistrate's courts do not have the power to hear and decide applications for committal for civil contempt. They are limited to the power to hear a criminal prosecution instituted in terms of sec 106 of the Magistrate's Courts Act.^{29[29]} An application for committal for contempt arising from an order of a magistrate's court therefore can not be made in the court which made the order which is being disobeyed.
67. 67 Most of the case law on whether a High Court can commit for contempt of a lower court order pre-dates the 1996 Constitution, and should therefore be treated with some caution. That case law is somewhat equivocal
68. 68 In *Komsane v Komsane*,^{30[30]} the Cape Provincial Division found that it had no jurisdiction to commit for contempt of an order of the Native Divorce Court.
69. 69 *Wright v St Mary's Hospital, Melmoth, and Another*^{31[31]} dealt with the power of the then Supreme Court to make an order of committal for civil contempt for failure to comply with an order of the industrial court.

^{29[29]} Jones and Buckle *The Civil Practice of the Magistrates' Courts in South Africa: Volume 1: The Act* (Ninth edition, 1997; service 7, 2001) at 386B

^{30[30]} 1962 (3) SA 103 (C)

^{31[31]} 1993 (2) SA 226 (D)

70. 70 The court analysed the cases dealing with the power of the Supreme Court to punish summarily an *ex facie* contempt of an inferior court. The judgment demonstrates that the weight of authority is to the effect that a division of the Supreme Court had jurisdiction to punish summarily anyone who *ex facie curiae* commits a contempt of an inferior court which has no power to deal summarily with that contempt.^{32[32]}
71. 71 The Court found that the Industrial Court had the power to commit for contempt, and that accordingly, by analogy, the Supreme Court had no jurisdiction to make such an order.
72. 72 The magistrate's court does not have the power to hear and decide an application for an order of committal for civil contempt. *Wright* and the cases analysed in that judgment are authority for the proposition that the High Court has that power.

^{32[32]}

At 231D to 232J

73. 73 The *Scandia* case similarly concerned an order made by the industrial court, which was not a court of law. The Supreme Court of Appeal assumed (without deciding) that the High Court has the power in a suitable case to order a person bound by an order of another court or tribunal set up under specific legislation to comply with that order, despite the fact that the legislation in question lays down an enforcement procedure in respect of such order which does not include the power of committal for wilful failure to comply with such order. However, the court declined to make such an order, holding that requirements for such an order had not been met.^{33[33]}
74. 74 In the matter now before this Court, the Supreme Court of Appeal assumed for the purposes of the appeal that the High Court is entitled to commit for contempt of an order of a maintenance court.^{34[34]}
75. 75 In *Lombard*,^{35[35]} the question was how a judgment debtor could enforce a judgment obtained in the magistrate's court against the Minister of Defence. The normal execution procedures do not apply to the state, and the court held that the debt collection procedures in sec 65A of the Magistrate's Courts Act were similarly not applicable. A Full Bench held that the correct remedy for the

^{33[33]} *Food and Allied Workers Union and Others v Scandia Delicatessen and Another* 2001 (3) SA 613 (SCA) at [23]

^{34[34]} *Judgment* at [9]

^{35[35]} *Lombard v Minister van Verdediging* 2002 (3) SA 242 (T) at 247G

plaintiff was to apply to court for an order committing the judgment debtor for contempt.

76. 76 It is submitted that the better view (and in fact the predominant view) is that under the pre-Constitutional common law, the High Courts have the power to commit for civil contempt of court for failure to comply with an order made by a lower court in respect of which it has jurisdiction, at least where the lower court does not have that power. This power is closely connected with the inherent jurisdiction of the High Courts to restrain irregularities and deal with abuses in the magistrate's courts.^{36[36]}

7 IF THE COMMON LAW DOES NOT CONFER THIS POWER ON THE HIGH COURTS, IT SHOULD BE DEVELOPED SO AS TO DO SO

77. 77 It is the duty of the High Court to develop the common law to promote the spirit, purport and objects of the Bill of Rights.^{37[37]} Where the common law deviates from the spirit, purport and objects of the Bill of Rights the courts have an obligation to develop it by removing that deviation.^{38[38]}

^{36[36]} Taitz *The Inherent Jurisdiction of the Supreme Court* (Juta 1985) at 26-28; *Santam Insurance Co Ltd v Liebenberg NO and Another* 1976 (4) SA 312 (N) at 323H

^{37[37]} Section 39(2) of the Constitution

^{38[38]} *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC) at [33]

78. 78 If the common law does not permit the High Court to make an order of committal for civil contempt in respect of maintenance orders made by the magistrate's courts, the results include the following:

1. 78.1 A successful application for a variation of a High Court maintenance order has the effect of depriving the custodial parent, and the children, of the remedy of an application to the High Court for committal for civil contempt.
2. 78.2 Whether a custodial parent has the right to approach the High Court for a committal order therefore depends on the arbitrary and logically irrelevant question of whether the original divorce order has been subsequently amended by the High Court.
3. 78.3 The exclusion of this remedy makes it more difficult for some women to enforce the maintenance order which have been made, and entrenches and deepens gender inequality.
4. 78.4 The exclusion of this remedy makes it more difficult for some children to realise their rights under the Constitution.

79. 79 It is submitted that what the 'spirit, purport and objects' of the Constitution require is that the law should maximise the range of options available for the protection of the interests of children and women.

80. 80 It is further submitted that the common law should be developed to give effect to this, by conferring jurisdiction on a High Court to make an order of committal for civil contempt for non-compliance with a maintenance order made by a magistrate's court.

8 THE MAINTENANCE ACT DOES NOT REMOVE THE POWER OF THE HIGH COURT TO COMMIT FOR CONTEMPT FOR FAILURE TO COMPLY WITH AN ORDER OF A MAINTENANCE COURT

81. 81 This raises the question whether the Maintenance Act prevents the High Court from making an order of committal for contempt for failure to comply with a maintenance order..

82. 82 It is well established that maintenance payments are regarded as orders *ad factum praestandum*.^{39[39]} Accordingly, maintenance payments are enforceable not only by ordinary methods of execution but also by way of committal for contempt.^{40[40]}

^{39[39]} See for example Spiro 'Non-Compliance with Order of Court' (1969) 86 SALJ 65 at 66, and the cases cited there

^{40[40]} Herbstein and Van Winsen *The Civil Practice of the Supreme Court of South Africa* (4th ed 1997) at 821

83. 83 The High Court has consistently been held to retain the contempt power in relation to its own maintenance orders, notwithstanding the provisions of the Act and its predecessors relating to execution, criminal prosecution for non-payment of maintenance, and other means of enforcement. Indeed, maintenance cases are 'the most usual cases in practice in which applications for committal arise'.^{41[41]}

84. 84 The criminal offence of failure to comply with a maintenance order was first introduced by sec 110 of the General Law Amendment Act 46 of 1935. This was

^{41[41]} Herbstein and Van Winsen *The Civil Practice of the Supreme Court of South Africa* (4th ed 1997) at 821

'clearly intended to provide a cheap, summary and expeditious remedy supplementary to or concurrent with the more expensive and possibly less expeditious one available at common law to dependants who have obtained orders of court for maintenance. I refer to the remedy of committal for contempt of court ...^{42[42]}

85. 85 This is consistent with the general principle that the ordinary remedies such as being able to execute against the property of the person liable for maintenance, exist alongside the remedy of the remedy of contempt of court proceedings.^{43[43]}
86. 86 There does not appear to be any authority that the execution or criminal provisions of the Maintenance Act deprive the High Courts of their power to commit for civil contempt in respect of their own maintenance orders. The continued existence of those powers does not appear to have been placed in any doubt.
87. 87 It is submitted that under those circumstances, there is no logical basis for the proposition that the provisions of the Act deprive the High Courts of whatever power they hold (under the Constitution or the common law) to commit for civil contempt in respect of maintenance orders made by the magistrate's court. There

^{42[42]} *R v Becker* 1951 (2) SA (T) at 164E-F; *R v Kinnear* 1957 (2) 105 SA (T) at 106F

^{43[43]} Spiro 'Non-Compliance with Order of Court' (1969) 86 SALJ 65 at 73-4 and the cases cited there.

is nothing in the Act which suggests that deprivation of this power was intended in respect of magistrate's court orders - but not High Court orders.

88. 88 The Appellate Division has stated that

'It is a well recognised rule in the interpretation of statutes that, in order to oust the jurisdiction of a court of law, it must be clear that such was the intention of the Legislature.'^{44[44]}

89. 89 If Parliament intended to deprive the High Courts of jurisdiction, it would say so explicitly, and not indirectly or elliptically.^{45[45]}

90. 90 The effect of reading the Act in such a manner as to exclude the jurisdiction of the High Courts would not only be to reserve a particular matter for another court. It would be to destroy an existing remedy entirely, since it is only the High Courts which may grant that remedy. It is submitted that the clearest possible language is required before that intention should be ascribed to the legislature. There is no such language at all in the Act.

^{44[44]} *De Wet v Deetlefs* 1928 AD 286 at 290, dealing with whether the provisions of the Irrigation Act 8 of 112 reserved a particular matter to the Water Courts, to the exclusion of the Supreme Court.

^{45[45]} *Mathope and Others v Soweto Council* 1983 (4) SA 287 (W) at 289F

91. 91 It is submitted that there is no reason of policy for implying an ouster of the jurisdiction of the High Courts. To the extent that the issue is the unnecessary use of a more expensive forum or procedure, this can in a proper case be dealt with by a suitable order as to costs.^{46[46]}
92. 92 In terms of the rules of statutory interpretation, the Maintenance Act has to be read in conformity with the common law rather than against it. There is no reason why common law remedies should not co-exist with statutory remedies for a particular act or omission.
93. 93 It is accordingly submitted that there is nothing in the Maintenance Act which deprives the High Courts of jurisdiction to make an order of committal for contempt of a magistrate's court order.
94. 94 In the present matter the Supreme Court of Appeal, having made the assumption that the High Court is entitled to commit for contempt of a maintenance court order, concluded that if that is so 'then clearly it is a matter which falls within its discretion'.
95. 95 It is not entirely clear what the Supreme Court of Appeal had in mind when it referred to the discretion of a High Court. It could be a discretion in one of two senses: a discretion as to whether to exercise jurisdiction, or a discretion

^{46[46]}

Mathope and Others v Soweto Council 1983 (4) SA 287 (W) at 291C

as to whether to commit for contempt. It seems that the discretion which the court had in mind was the latter kind. However, for the sake of safety we deal with both of those interpretations.

9 A HIGH COURT DOES NOT HAVE A GENERAL DISCRETION TO REFUSE TO HEAR A MATTER WHICH IS WITHIN ITS JURISDICTION

96. 96 It is submitted that the High Court does not have a discretion as to whether to hear a matter within its jurisdiction, except when the proceedings constitute an abuse.

97. 97 In the 1980's there was a judicial debate (or even a polemic) in the Witwatersrand Local Division as to whether as to whether the then Supreme Court could refuse to exercise jurisdiction in a civil claim in which the magistrate's court had jurisdiction. The matter was settled by a decision of the Full Bench that there is no principle which authorises the Supreme Court to exercise a right to refuse to entertain a matter within its jurisdiction simply because a lower court also has jurisdiction. The court held that the Supreme Court should hear a matter properly before it and within its jurisdiction. If a lower court also had jurisdiction in the matter and it could be dealt with in that court at less expense to the litigants, the court could discourage the approach to the Supreme Court by an appropriate order as to costs. The courts should be

'extremely wary' of closing their doors to any litigant entitled to approach a particular court.^{47[47]}

98. 98 The court does have a discretion to refuse to exercise jurisdiction if the proceedings constitute an abuse of court, for example in the sense that the court's procedure is used by a litigant for a purpose for which it was not intended or designed, to the prejudice or potential prejudice of the other party to the proceedings.^{48[48]}

99. 99 It has not been suggested - and nor, with respect could it be - that the applicant has abused the court's process by bringing the contempt application in the High Court. That being the case, it is submitted that the High Court did not have a discretion as to whether to hear the application.

10 THE NATURE OF ANY JUDICIAL DISCRETION

^{47[47]} *Standard Credit Corporation Ltd v Bester* 1987 (1) SA 813 (W) at 818B, 819D, 820H; the judicial rejoinder of Coetzee DJP is *Sealandair Shipping and Forwarding v Slash Clothing Co (Pty) Ltd* 1987 (2) SA 635 (W).

^{48[48]} *Standard Credit Corporation Ltd v Bester* 1987 1) 813 (W) at 820B

100. 100 It may be that a court hearing an application for committal for contempt has a discretion as to whether to grant that remedy, as part of the discretion which courts have with regard to the granting of interdicts. The question then becomes how that discretion is to be exercised.^{49[49]}
101. 101 It is submitted that in the exercise of a discretion, the decision-maker is required to consider whether the outcome may affect the rights in the Bill of Rights. In exercising that discretion, the decision-maker must seek to respect, protect, promote and fulfil the rights in the Bill of Rights.
102. 102 Where the matter concerns the enforcement of the rights of women and children, the decision-maker should have regard to the impact of the decision on those rights.
103. 103 It is submitted that in this regard, sec 28(2) of the Constitution is of particular significance, because of its directive that a child's best interests are of 'paramount importance in every matter concerning the child'.
104. 104 The precise ambit of that directive is difficult to determine. This Court has held that

^{49[49]} Or how, if it is held that there is a discretion as to whether to exercise jurisdiction, how that discretion should be exercised.

'it is necessary that the standard should be flexible as individual circumstances will determine which factors secure the best interests of a particular child.^{50[50]}

105. 105 What sec 28(2) requires in any particular application for committal for failure to comply with a maintenance order, will therefore depend on the facts of that case. However, it is submitted that in considering how to exercise its discretion, a court should give primary consideration to the consequences for the interests of the children, of deciding whether or not to grant an order of committal.

^{50[50]} *Minister of Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC) at [18]

106. 106 It is submitted that a court exercising that discretion should have regard to the consequences of an order for direct imprisonment, a suspended sentence, a postponement of the passing of sentence, an order for periodic imprisonment, and the numerous other options which are available.^{51[51]} A question of fundamental importance should be the likelihood that the applicant will be induced to meet his obligations to pay maintenance.^{52[52]}

107. 107 In a case such as the present, the over-riding question guiding the exercise of the court's discretion should be what order is most likely to result in the respondent's compliance with his legal duty to support the children, and their mother.

^{51[51]} In the USA, a study in Virginia showed that child support compliance clearly improved after incarceration or the prospect of incarceration. Delayed imposition sentences provided both the greatest likelihood of improving child support compliance, and the most consistent increase in payments over time. Suspended sentences were less effective than either delayed sentencing or direct imprisonment, but were nevertheless also effective in improving child support compliance: Swank 'Incarceration's Impact on Child Support Compliance' 2001 *International Family Law* 131

^{52[52]} Applicant *Record* para 15 p 47

108. 108 As has been shown by numerous studies to which reference has been made above, the maintenance court remedies are anything but effective.^{53[53]} This is of further relevance to the exercise of this discretion.

11 THE QUESTION WHETHER THE HIGH COURT SHOULD HAVE MADE A COMMITTAL ORDER IS A CONSTITUTIONAL QUESTION

109. 109 It follows from what has been said above that in order to exercise its discretion properly, the High Court must have proper regard to the constitutional rights which are implicated.

110. 110 Whether the High Court has had such regard, is in its nature a constitutional question.

111. 111 It is not submitted that every exercise of a judicial discretion is a constitutional question. However, where the crisp question is whether the High Court had adequate regard to a requirement of the Constitution, that is a constitutional question, for it requires a determination of what the requirements of the Constitution are.

12 IN THE CIRCUMSTANCES OF THIS CASE, THE HIGH COURT SHOULD HAVE MADE AN ORDER OF COMMITTAL FOR CONTEMPT

^{53[53]} It appears that the attention of the Supreme Court of Appeal may not have been drawn to the literature in this regard.

112. 112 The applicant's uncontested evidence was that she had made a number of efforts to pursue her remedies in the magistrate's courts, without success. She and her children were in financial difficulty. She had used all the capital which she had, she had borrowed against the children's insurance policies, and she simply did not have any more money to support the children or herself. She had a real fear that the respondent might alienate his assets.^{54[54]}
113. 113 The respondent had completely stopped paying maintenance.^{55[55]}
114. 114 The result was inevitably impoverishment of the applicant, and an inability to meet her needs or those of her children. This was plainly not in the best interests of the children.
115. 115 There will always be debate over whether an order for committal or a sentence of imprisonment (and if so what form of imprisonment) is appropriate, if there is a risk that imprisonment may cause a cessation of maintenance. However, there can not be much room for that debate when the respondent is not paying any maintenance at all, and neither shows any inclination to do so, nor gives any explanation for his failure to do so.

^{54[54]} Applicant *Record* para 17 p 48; para 22.1 p 52; para 20 p 50; para 22.3 p 52

^{55[55]} Applicant *Record* para 15 p 47

116. 116 It is submitted that in the circumstances of this case, the words of Didcott J in another context are very apposite:

'Such investigations [into foreign jurisdictions and other statutes] may tend to distract our attention from where it should now be focused, on the particular circumstances that s 66(3) [of the Insolvency Act] has been designed to achieve and on the particular circumstances prevailing in this country which are relevant to those purposes. In that situation, I believe, the threat of a subsequent prosecution ... would not suffice by itself as coercion, however satisfactorily its counterparts may happen to work elsewhere. Here the threat is too remote. The notorious delays in the progress of prosecutions see to that, delays which were experienced even before the current congestion in the criminal courts prolonged them and, given our systems and procedures, are likely to remain inevitable despite any reduction in their duration that may realistically be expected. One cannot safely brush aside the delays as mere inconveniences.... A threat much more immediate is essential, a swift one taking effect before assets of the estate disappear or information about its affairs becomes unobtainable'.^{56[56]}

117. 117 It is submitted that these words are very apposite to a situation where the maintenance system in the magistrate's courts is notoriously, in the measured

^{56[56]}

De Lange v Smuts NO and Others 1998 (3) SA 785 (CC) at [121]

words of the Lund Committee, 'in disarray'. The maintenance payments are urgently needed for the support of two minor children and the applicant. There have already been long delays caused by the applicant's unsuccessful attempts to use the machinery of the magistrate's court. Under those circumstances, a 'threat much more immediate is essential, a swift one' before the children and the applicant suffer serious harm, or the assets are transferred out of the respondent's estate.

118. 118 It is submitted that under these circumstances, the High Court should have made an order of committal for contempt. It does not appear to have had any doubts about the appropriateness of such an order. The doubts which subsequently arose were as to the jurisdiction of the court to make such an order, not as to the merits of the order.

13 THE SUPREME COURT OF APPEAL ERRED IN SETTING ASIDE THE HIGH COURT ORDER

119. 119 The Supreme Court of Appeal does not appear to have had any regard to the relevance of the right to maintenance, the applicant's ability to enforce the maintenance court order in her favour, or the exercise of the court's discretion, to the right of women to equality.

120. 120 More striking still, it is submitted, is the lack of any indication that the Supreme Court of Appeal had any regard to the rights of the children involved,

and more particularly to the constitutional directive that a child's best interests are of 'paramount importance in every matter concerning the child'.

121. 121 The best interests of the children do not appear to have been given any weight at all by the Supreme Court of Appeal, let alone the primary consideration which the Constitution requires.

122. 122 It is further submitted that the Supreme Court of Appeal erred in stating that the court's discretion should be exercised 'sparingly' and 'only in exceptional circumstances'. The Supreme Court of Appeal had accepted for purposes of the appeal that the High Court had jurisdiction to grant an order of committal for contempt. The applicant had met all of the requirements for the granting of an order of committal.^{57[57]} Under those circumstances, the applicant was ordinarily entitled to an order of committal. It is submitted that the proper test was not whether the applicant had shown exceptional circumstances: rather, it was whether there was any legally valid reason why the Court should decline to grant the applicant a remedy to which she was ordinarily entitled.

123. 123 The Court's confident reference to the availability of 'effective remedies' in the magistrate's courts was, with due respect, simply misplaced. But even if

^{57[57]} The requirements are summarised in Herbstein and Van Winsen *The Civil Practice of the Supreme Court of South Africa* (4th ed 1997) at 825. They appear in slightly different form in Spiro 'Non-Compliance with Order of Court' (1969) 86 *SALJ* 65 at 70-1.

that were not the case, it is submitted that the Supreme Court of Appeal applied an incorrect test.

124. 124 It is submitted that the Supreme Court of Appeal erred fundamentally in setting aside the High Court judgment, by failing to have regard to the requirements of the Constitution and the relevance of the Constitution to the exercise of the judicial discretion.

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K PILLAY

15 October 2002

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