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**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case Number: 5578/2022

In the matter between:

C[...] J. A[...]

Applicant

and

H[...] F. A[...]

First Respondent

JUDGMENT DELIVERED: 06 FEBRUARY 2024

NZIWENI, J

Introduction

[1] This is an application in terms of Rule 43 of the Uniform Rules of Court (“Rule 43”) brought by the applicant for interim maintenance in respect of herself, pending divorce. The following facts underlie this application; the applicant and the respondent (“the parties”) got married to each other on 01 July 1995. The marriage is out of community of property with inclusion of an accrual system. On 17 May 2022, the applicant instituted the divorce proceedings against the respondent. In May 2022, the applicant vacated their marital home. Since then, the parties have been living separately. The parties have two children, both of whom are now adults.

The applicant’s state of financial affairs

[2] Amongst others, Rule 43 is aimed at assisting the parties in maintaining the standard of living established over the course of their marriage. As far as the financial position of the parties is concerned, this case presents as an unusual case in relation to the disclosure of material facts, and I shall return to this aspect in some detail later.

[3] The applicant asserts that the respondent [in this application] failed to disclose or reflect his actual income earning capacity. According to the applicant, the respondent sold the marital home in June 2022 and she does not know what he [the respondent] did with the proceeds of the sale.

[4] The applicant has been working as a restaurant manager since February 2022. She earns a net income of R13 518.00 per month. She rents a small bachelor's garden flat from a friend and pays a rental of R3 500.00 per month. She intends to move into a secure two-bedroom town house if she receives a reasonable amount in interim maintenance.

[5] Though the respondent still retains her on his medical aid scheme, she still pays for her own monthly chronic medication in the amount of R2 100.00. The applicant also contends that due to the fact that the current medical aid does not cover her doctor's appointments and dental costs, she has to pay for them. The applicant is also of the view that she requires a medical Gap cover that would cost R370.00 per month. I am now going to detail the applicant's assets as set out in her founding affidavit.

The applicant's financial position as set out in her founding affidavit

[6] The applicant claims that her assets consist of some paintings and a couple of items she could manage to take from the marital house. She asserts that the

paintings are not worth more than R225 000.00. It is also stated in the applicant's founding affidavit that she has no savings or other assets.

[7] The applicant also declares in her founding affidavit that she has a small investment. She stated that the investment comprises of money she had inherited upon the death of her father. She stated that her financial circumstances demanded of her to expend a portion of her inheritance from her father to support herself. To this end, the applicant states that she used the inheritance to supplement her monthly income and to pay her legal fees. She also contends that, as she does not have a pension fund or retirement annuity, she hopes to retain her inheritance as her pension.

[8] According to the applicant, she needs to purchase kitchen appliances and furniture to make the premises she intends to rent, liveable for her.

[9] Consequently, the applicant seeks the following relief:

1. Interim maintenance in the amount of R37 739.00.
2. Use of a Toyota Starlet motor vehicle until the granting of the final decree of divorce;
3. Maintenance, services, tyres, repairs and licencing fees for the Toyota Starlet motor vehicle;
4. The respondent be liable, if not included in the R37 739.00 amount, for applicant's monthly rental up to an amount of R18 000.00 and any increase there on, until the date of divorce;
5. R116 950.00 to enable the applicant to purchase furnisher, household equipment, household items, linen and such other items required for furnishing a home; and

6. An initial contribution towards the applicant's costs in the divorce action in the sum of R250 000.00.

Common cause Issues

[10] I propose to outline some of the incontrovertible salient facts as follows:

1. In 1998, the parties decided that the applicant would be a stay-at-home mother for the sake of their small children.
2. In 2011, the applicant began to operate a home industry business, prior to her assisting in the respondent's business activities.
3. In 2018, whilst she assisted the respondent in his business, she [the applicant] received a monthly salary of R4000,00 for a couple of months.
4. The applicant never asked for financial support from the respondent ever since she left the parties marital home in 2022, up until now, when she brought this application.

[11] The applicant avers in her papers that she was never privy to what the respondent earned from his various business enterprises. She however, states that the respondent was a great provider for the family.

Non-disclosure of information

[12] In an application in terms of Rule 43, the applicant is expected to make a full disclosure in her founding affidavit of all material assets beneficially owned by her.

The question for decision in this matter is therefore reduced to this: whether the applicant was frank with this Court when she set out her financial position.

[13] It is fundamental in our law that the courts generally impose a high duty of disclosure upon an applicant who seeks an equitable relief. Likewise, in every Rule

43 application the parties owe the court a duty; a duty that compels full, honest, and clear disclosure. Full disclosure in Rule 43 proceedings applies with particular force. Therefore, an absolute obligation rests upon the parties in such an application to *inter alia*, disclose the true state of their financial affairs. Hence, in every Rule 43 application, the essential question is: “did the parties make full disclosure of all material facts?” Failure to disclose such material facts to the court, makes it difficult for the court to determine the issues before it.

[14] It follows then that a court will take a dim view if an applicant in Rule 43 is not candid and open with the court. And, as such, it is clear from the authorities that a misstatement or a suppression of a fact in a Rule 43 application is a ground for denial and worthy of a cost order. To show that this is not a new problem, in D.C.S v G.R.S an unreported judgment of this Court, case number 21228/17 by Thulare, J dated 15 September 2023, in paragraph 14, the court made the following remarks:

“[14] The applicant purposefully failed to take the court into her confidence by failing to make an honest disclosure of her monthly income, especially since 2018. She had failed to provide same when the respondent asked for them when she first raised the issue of interim maintenance in 2020. She failed to be honest and did not disclose material and relevant information regarding her true financial position, including her business revenue and the business valuation which was prepared on the basis of information from the financial statements she provided to an independent accountant, which information stood in direct contradiction to the allegations of her financial position. There is no doubt that if the position of revenue was materially different as at 2022, the applicant would have replied to the respondent’s answer. From the past revenue, it being deliberately being withheld from the court, and the general conduct of the applicant including not only dishonesty but attempting to dribble her need and means past the respondent and the court, the conclusion I reach is that the applicant earned sufficiently to cater for her financial needs and did not require interim maintenance.”

[15] In *Du Preez v Du Preez* 2009 (6) SA 28, at page 32 B-J-33A, the following is stated:

“[15] However, before concluding, there is another matter that gives me cause for concern, deserving of mention and brief consideration. In my experience, and I gather my colleagues on the bench have found the same, there is a tendency for parties in rule 43 applications, acting expediently or strategically, to misstate the true nature of their financial affairs. It is not unusual to exaggerate their expenses and to understate their income, only then later in subsequent affidavit or in argument, having being caught out in the face of unassailable contrary evidence, to seek to correct the relevant information. Counsel habitually, acting no doubt on instruction, unabashedly seek to rectify the false information as if the original misstatement was one of those things courts are expected to live with in rule 43 applications. To my mind the practice is distasteful, unacceptable, and should be censured. Such conduct, whatever the motivation behind it, is dishonourable and should find no place in judicial proceedings. Parties should at all times remain aware that the intentional making of a false statement under oath in the course of judicial proceedings constitutes the offence of perjury, and in certain circumstances may be the crime of defeating the course of justice. Should such conduct occur in rule 43 proceedings at the instance of the applicant then relief should be denied. Own underlining.

[16] Moreover, the power of the court in rule 43 proceedings, in terms of Rule 43(5), is to “dismiss the application or make such order as it thinks fit to ensure a just and expeditious decision”. The discretion is essentially an equitable one and has accordingly to be exercised judicially with regard to all relevant considerations. A misstatement of one aspect of relevant information invariably will colour other aspects with the possible (or likely) result that fairness will not be done. Consequently, I would assume, there is a duty on applicants in rule 43 applications seeking equitable redress to act with the utmost good faith (*uberrime fidei*) and to disclose fully all material information regarding their financial affairs. Any false disclosure or material non-disclosure would mean that he or she is not before the court with “clean hands” and on that ground alone the court will be justified in refusing relief.

[17] In paragraph 6.4 of her founding affidavit the applicant stated that she earns a net salary of R7 521, 39 per month. In his answering affidavit the respondent pointed out that the applicant failed to include an amount of approximately R3000 per month

which she earned on an investment of R320 000. Though the applicant mentions that she has received an amount of about R560 000 from the sale of certain shares, she is ambiguous about how the investment augmented her income. One thing is certain: she did not include the return on investment in her income for the purpose of calculating the shortfall between her income and expenditure, being the basis of her claim for maintenance. In my view a material omission of this kind falls short of what may be expected in rule 43 proceedings. Because she failed to take the court fully into her confidence she did not act with utmost good faith and should be denied relief on that score as well.”

[16] I am in entire accord with the above cited authority [*Du Preez* case]. I am also of the firm view that it has a bearing upon this case. In the instant case, the applicant, in her founding affidavit stated that she has a small investment which is money inherited from her late father. On 27 November 2023, this [Rule 43] application was argued. At the same time, it transpired during the arguments that the applicant did not reveal in her founding affidavit, the specific amount she inherited from her late father. I then gave a direction that the applicant should file a supplementary affidavit stating the amount or quantifying the inheritance. I also encouraged the parties to make earnest efforts to settle the matter [including the divorce].

Pursuant to this direction, the applicant filed a substantial eight-page long supplementary affidavit containing 11 annexures and a further affidavit from her employer, with two annexures. Further hearing of the application then took place on 14 December 2023. It is fair to note however, that the supplementary affidavit reveals far more information than the founding affidavit.

Pursuant to the filing of the supplementary affidavit it became evident that the following facts were not disclosed in the founding affidavit:

1. The amount of her inheritance from her father;

2. That when she deposed to the founding affidavit [26 September 2023], a final liquidation and distribution account of her late mother's estate dated 9 March 2022, reflected the amount she stood to inherit from her [late mother's] estate;
3. That at the time she deposed to the founding affidavit she stood to inherit moneys from her late mother;
4. That in total she had inherited R803 945.02, from both her parents;
5. That from her father's inheritance she has invested R400 000.00, in Fairtree;
6. That the R400 000.00 investment had accrued interests;
7. That she had a Capitec Flexible Savings Account ("the savings account") and that at the time she deposed to the founding affidavit, the savings account had a balance of R25 392. 09;

[17] It is noteworthy that in paragraph 46 of the applicant's founding affidavit deposed to on 26 September 2023, the following conclusory assertion is made:

"Apart from the above, I have no savings and no other assets."

However, in the applicant's supplementary affidavit the following is stated in paragraphs 11 - 13:

"11. I have a Capitec Flexible Savings Account . . . and attached hereto my bank statement dated 27 November 2023 marked SHA 10 . . ."

12. I received the payment referred to in the above paragraph 6.3 in the amount of . . . from my mother's estate on the 4th of October 2023. . . . and deposited R190 000.00 into my Capitec Flexible Savings Account with account number: . . . on 5th of October 2023.

13. I have a Capitec Savings Account with account number: . . . and copies of my bank statements are annexure “HA 9” to my founding affidavit and annexures “HA 1” and “HA 3” to the Respondent’s sworn reply. The savings that are reflected on the applicant’s Capitec Flexible Account were not disclosed in the applicant’s founding affidavit, they were only revealed through the supplementary affidavit.

[18] As mentioned earlier, the principle of disclosure is of outmost importance in any Rule 43 applications. Likewise, in a Rule 43 application it is expected of an applicant to demonstrate a measure of candour and diligence in disclosure of his or her personal circumstances. An applicant cannot simply elect to place before a court only those facts which are going to be favourable to his or her case; and withhold those that are detrimental to the case. To that end, it is expected of an applicant to disclose full facts in the founding affidavit which might have influence on the court’s decision.

[19] Likewise, the applicant cannot place misleading and incomplete facts in the founding affidavit. Particularly, if the complete and clear information was available to the applicant at the time he or she deposed to his or her founding affidavit. Therefore, it is something that is generally frowned upon if a party knowingly mislead a court by omission of material that was known or ought to have been known to him or her.

[20] Plainly, the information pertaining to the particulars of the applicant’s inheritance and savings accounts are of vital importance in this application. Hence, it is crucial that a party should state the value, the character and any relevant factor to

the asset. Equally broad and ambiguous is the following assertion in the founding affidavit:

“...I have a small investment which is money I inherited from my father...”

[21] A careful examination of the above citation reveals that it is rather very vague language. This vague assertion fails to demonstrate with any degree of certainty the current portion of the investment account related to the inherited money and the nature of the investment. It is also indefinite as far as the inheritance is concerned.

[22] Clearly, in her founding affidavit, the applicant did not make a full and frank disclosure of her financial position. This Court is of the view that the applicant in her founding affidavit has basically misstated and suppressed relevant facts to this application. In her founding affidavit the applicant failed to be candid and honest with this Court. In this regard, I agree with the counsel on behalf of the respondent.

[23] In so far as the supplementary affidavit is concerned, in the context of this case, there is no question that the contents of the applicant's supplementary affidavit actually unveiled a stark non-disclosure of information by the applicant in her founding affidavit. And it also put bare that it cannot be said that the applicant in the founding affidavit failed to disclose her full financial position because she was unaware of the information contained in the supplementary affidavit. In fact, if one looks at the applicant's Capitec savings account it becomes evident that the applicant failed to disclose in her founding affidavit material information within her knowledge.

[24] Furthermore, I get the distinct impression that the applicant's founding affidavit was meant to give this Court negligible information regarding her [the applicant's] financial means. In the context of this case, the supplementary affidavit cannot by

any stretch of imagination, cure the problem of non-disclosure, in the founding affidavit. As will now be clear, the supplementary affidavit revealed far more than minor additional details.

First and foremost, the supplementary affidavit came up with new evidence, that was never mentioned or contained in the founding affidavit. For instance, the two bank savings accounts; the applicant's inheritance from her mother, the amount of the investment, the nature of the investment etc. Additionally, instead the supplementary affidavit exposed the information that was not contained in the founding affidavit. It is therefore easy to be inferred from this alone that the applicant did not play open cards with this Court.

[25] Likewise, gleaning from the contents of the founding and supplementary affidavit, they lend an impression that the applicant did not want at all to be candid with this Court in her founding affidavit. Otherwise, why would she state in her founding affidavit the following:

1. she has a small investment which is money she invested from her late father. As mentioned previously, this is rather a very vague assertion. Instead, she should have stated from the onset in her founding affidavit that she has an investment of R400 000.00 with Fairtree; she inherited R469 925.45 from her father's estate.
2. she has no savings. Yet, she had two savings accounts and one of which had a balance of R90 392.09, at the time she deposed to her founding affidavit.

[26] In this case, it is undeniable that the undisclosed facts in the founding affidavit by the applicant were material. It is trite that a material fact is a fact that may or might

affect outcome of the case. It is my view that these facts were material, not only because they demonstrate the true financial position of the applicant, but they help in the determination of the matter. They are thus material to the decision which this Court has to make. It follows that this Court in its decision process is entitled to be privy to such information through the founding affidavit. The information should not be sneaked in through the back door in the form of a supplementary affidavit. In any event, when I directed the applicant to file a supplementary affidavit quantifying the inheritance, she was referring to in the founding affidavit, I was not by any measure opening flood gates for new evidence.

[27] In a Rule 43 proceedings, it is prudent that the court should be satisfied that an applicant acts in good faith. Thus, an applicant simply cannot afford to omit facts in the founding affidavit that are vital to the application. Surely, if the applicant was willing not to reveal certain facts in her founding affidavit, she must certainly be willing not to be frank about weighty facts that would reveal the true state of her finances.

[28] In the circumstances of this case, the inference that the applicant provided ambiguous and incomplete information in her founding affidavit is inescapable. The way the applicant conducted her application gives an impression that her financial position could be in a much better position than she has revealed to this Court. In the circumstances, the respondent's counsel cannot be faulted for submitting that the applicant did not play open cards with this Court.

[29] For all the reasons I have already given, it is extremely difficult for this Court to find that the applicant has disclosed everything pertaining to her financial position.

Thus, I emphasise that this Court is not in a position to evaluate the resources of the applicant, *vis-à-vis* those of the respondent.

[30] In view of its finding above, it is not feasible to examine the merits of the applicant's application. I am acutely aware that the courts need to be vigilant to ensure that the court does not become unnecessarily clogged with repetitious litigation. It is thus desirable that there should be an end to this litigation. However, in my mind, though the conduct of the applicant in this particular application deserves strong censure, I consider it to be extremely harsh to finally close the doors to litigate an issue in this kind of an application merely because a party failed to play open cards with the court. Hence, I am not inclined to dismiss the application, as requested. As is clear from the decision of *Du Preez, supra*, that an application can be struck off the roll because, amongst others there is an omission. In the circumstances, it is my firm view that an appropriate order to make would be to strike the application from the roll and to order that each party to pay its own cost.

[31] In the result, I make the following order:

- I. The application is struck from the roll;
- II. Each party to pay its own costs.

C N NZIWENI
JUDGE OF THE HIGH COURT

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