Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

Case no: D3535/2023

In the matter between:

S[redacted] K[redacted] **APPLICANT**

and

C[redacted] K[redacted] **RESPONDENT**

JUDGMENT

Dutton AJ

Introduction

[1] This is an application in terms of Uniform rule 43(1).

[2] At paragraph 8.1 of his sworn statement, the applicant contends that this is an application in terms of Uniform rule 43(6). He alleges that the application has been brought about due to a material change in his circumstances as a result of the respondent's decision to move out and set up a separate household of her own.

[3] This application is manifestly not one brought in terms of Uniform rule 43(6), since there was no Uniform rule 43 order in place when the application was brought.

Factual Background

[4] The brief relevant factual background is:

(a) The parties were married to each other on [redacted] 2005, out of community of property with accrual.

(b) One minor child was born of the marriage, being A[redacted] K[redacted], a minor male born on [redacted] 2010.

(c) The minor child's primary place of residence is with the respondent.

(d) The respondent alleges that all of the minor child's maintenance needs are taken care of by her. There is no allegation made by the applicant that he contributes to the maintenance of the minor child.

(e) The marriage still subsists. However, the respondent vacated the common home with the minor child during approximately August 2021 (i.e. more than two years prior to this judgment).

Relief Sought

[5] Besides a small amount of R500 for the entertainment of the minor child, the applicant seeks maintenance *pendente lite* for himself in the following sums, amounting to a total of R26 270 (a contribution towards bond payments of R15 700 which was claimed in the sworn statement was abandoned at the hearing):

Utilities	R8 500
Food and home essentials	R6 000
Motor vehicle	R4 900
Vehicle tracker	R120
Fuel	R1 800
Internet	R1 050
Housekeeper	R2 400
Gardener	R1 000
Entertainment for the minor child	R500
Total	**R26 270**

[6] The applicant also seeks a contribution to costs in the sum of R50 000. The applicant has not quantified how the sum of R 50 000 has been arrived at.

[7] For the respondent, it was submitted that:

(a) It is evident that the applicant has a more substantial income than disclosed in his sworn statement.

(b) In any event, at a minimum, and on the figures disclosed by the applicant, he earns more than enough income to support himself.

The duty to make disclosure

[8] Before turning to an assessment of the facts, it will be convenient to refer to the principles in our law relating to the duty to make disclosure in Uniform rule 43 proceedings.

[9] In *MB v DB* 2013 (6) SA 86 (KZD) Lopes, J considered the duty of disclosure in divorce proceedings. At paragraph 40, the learned judge held:

'The disclosure of financial information in divorce cases has also, on occasion, been the focus of English courts. In *J v J* [1955] P 215 at 227 Sachs J said:

"In cases of this kind, where the duty of disclosure comes to lie on a husband; where a husband has — and his wife has not — detailed knowledge of his complex affairs; where a husband is fully capable of explaining and has had opportunity to explain, those affairs, and where he seeks to minimise the wife's claim, that husband can hardly complain if, when he leaves gaps in the court's knowledge, the court does not draw inferences in his favour. On the contrary, when he leaves a gap in such a state that two alternative inferences may be drawn, the court will normally draw the less favourable inference — especially where it seems likely that his able legal advisers would have hastened to put forward affirmatively any facts, had they existed, establishing the more favourable alternative.

. . .

(T)he obligation of the husband is to be full, frank and clear in that disclosure. Any shortcomings of the husband from the requisite standard can and normally should be visited at least by the court drawing inferences against the husband on matters the subject of the shortcomings — insofar as such inferences can be properly be drawn."

In *NG v SG* [2011] EWHC 3270 (Fam) Mostyn J began his judgment with these words:

"The law of financial remedies following divorce has many commandments but the greatest of these is the absolute bounden duty imposed on the parties to give, not merely to each other, but, first and foremost to the court, full frank and clear disclosure of their present and likely future financial resources. Non-disclosure is a bane which strikes at the very integrity of the adjudicative process. Without full disclosure the court cannot render a true and certain and just verdict. Indeed, Lord Brandon has stated that, without it the court cannot lawfully exercise

its powers (see *Jenkins v Livesey (Formerly Jenkins)* [1985] FLR 813, HL). It is thrown back on inference and guess-work within an exercise which inevitably costs a fortune and which may well result in an unjust result to one or other party." [Emphasis in the original.]

[10] These principles apply with equal force to applications in terms of Uniform rule 43. In *Du Preez v Du Preez* 2009 (6) SA 28 (TPD), para 15 the following was stated: '. . . there is a tendency for parties in rule 43 applications, acting expediently or strategically, to misstate the true nature of their financial affairs.' Further, the court said in paragraph 16:

'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 (*uberrimae 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.'

Assessment

[11] It was submitted by counsel appearing for the applicant that he has made full disclosure of his financial circumstances, and was unable to maintain his standard of living.

[12] Counsel for the respondent, however, during her argument drew to the attention of the court that the applicant had filed a financial disclosure form (at pages 23 to 42 of the indexed application papers).

[13] At paragraph 2.16 of the financial disclosure form (at page 34 of the application papers) the applicant sets out his income received in the last financial year (that is, the financial year ending February 2023) from self-employment, partnership or other assets/investments. The form indicates that the applicant's income received from one business (N [redacted] (Pty) Ltd a.k.a 'N [redacted]') during that financial year was R150 000. This business trades in CBD oils. The disclosed income equates to income of R12 500 per month. (I pause to mention that the manuscript figures reflected on the page indicate that the applicant's income for the last financial year is R1 500 000;

however, it was submitted by counsel for the respondent that this appeared to be an error, and that the figure was intended to reflect R150 000. In the applicant's favour, I accept this submission, which was not challenged by the applicant's counsel, and approach this judgment on that basis).

[14] No other income from self-employment, partnership or other assets / investments is disclosed by the applicant in his financial disclosure form. Most notably, no income is disclosed from a CC, G[redacted], which trades as D[redacted] W[redacted] D[redacted].

[15] The respondent alleges that the applicant is the sole member of G[redacted]. The respondent alleges that the applicant has run this business for approximately ten years, and it is his main source of income and business interest. These submissions were not challenged.

[16] No bank statements or financials were put up by the applicant in respect of G[redacted].

[17] Disconcertingly, an analysis of the applicant's personal bank account statement with First National Bank for the period 9 December 2022 to 9 January 2023 (which was annexed at pages 43 to 44 of the applicant's sworn statement) reveals numerous credits made to this account - apparently (and most probably) from G[redacted], since they bear the reference 'FNB App Payment from W[redacted]'. These credits total R18 500 for that month.

[18] Furthermore, additional credits to the same account and for the same period totalling R4 850 appear to be from clients of G[redacted].

[19] Therefore, the total income not disclosed in the applicant's financial disclosure form - since the income was most probably from G[redacted], which was not disclosed - over this one month period amounts to R23 350.

[20] The applicant also received additional income.

[21] This consisted of at least a rental income (which was disclosed at page 33 of the application papers) which had at one stage, on the applicant's version, amounted to R6 000, but which I was informed from the bar had subsequently been reduced to R4 500. It is unclear whether the applicant currently receives any rental income.

[22] A particularly disturbing feature of this application relates to the applicant's expenditure. It is apparent from the analysis of the applicant's FNB bank statements, which is annexed as 'A' to the respondent's sworn statement that, over the three-month period covered, the applicant spent R12 730 on purchasing crypto-currency and R4 432.03 on online dating.

[23] The allegation is made by the respondent that many of the crypto-currency purchases and online dating payments were made by the applicant after he had asked for, and received, money from the respondent on the pretext that he had no money to meet his expenses. Bearing in mind that a significant portion of the expenses was incurred for online dating, it is overwhelmingly likely that the respondent was not informed of the true use to which the funds had been put. The allegation of falsely crying poverty therefore seems well substantiated, and points to a level of financial irresponsibility and dishonesty which fatally undermines the entire application, particularly in the light of the applicant's failure to make full and proper disclosure of his income.

[24] The submission was made by the respondent's counsel that these circumstances are certainly not indicative of dire need on the applicant's part. I agree; on the contrary, the nature of these expenses supports the respondent's counsel's submission that the applicant has sufficient income to meet his needs.

Conclusion

[25] In the circumstances, due to his material non-disclosure, the applicant is not before the court with 'clean hands', and I am unable to assess his financial needs. On the test set out in *Du Preez supra*, relief should therefore be refused on this ground alone.

[26] By parity of reasoning, I am unable to assess the merits of the application for a contribution towards costs. In any event, the applicant has failed to itemise his anticipated costs to allow for a proper assessment thereof.

[27] In addition, the probabilities disclosed on the papers - with particular reference to the applicant's expenditure as dealt with above - are that the applicant is in any event able to support himself on the income which he receives and, whatever the true position, there does not appear to be dire need on the applicant's part.

Order

[28] In the circumstances, I make the following order:

1. The application is dismissed.
2. The applicant is to pay the costs of the application.

DUTTON AJ

Appearances

For the applicant:	Advocate T Dlamini
Instructed by:	Dlongolo Attorneys
	Office no 6 Tinsley House
	225 Musgrave
	Durban
	Tel: 031 100 0702
	Cell: 083 893 0257
	Email: dlongoloattorneys@outlook.com

For the respondent:	Advocate Law
Instructed by:	NSG Attorneys
	(JH Nicholson Stiller and Geshen)
	2nd Floor Clifton Place
	19 Hurst Grove
	Musgrave
	Tel: 031 202 9751
	Ref: T LOMBARD/JJ/K1133/1
	Email: tarryn@nsg.co.za

Date of hearing:	17 October 2023
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