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A statutory duty to provide financial information at an early stage in familylaw matters

Madelene De Jong; Elsje Bonthuys

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A STATUTORY DUTY TO PROVIDE FINANCIAL INFORMATION AT AN EARLY STAGE IN FAMILY-LAW MATTERS

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Many people lack current and accurate information about their spouse's financial positions, or even of their marital estates, while they are married. This creates opportunities for spouses with exclusive access to financial information to secrete assets and hide information before and during divorce, resulting in increased animosity between divorcing spouses and even unfair orders for the division of marital assets or maintenance. This article investigates four recent initiatives to create duties to provide accurate financial information in divorce and maintenance litigation between spouses and former spouses. It also discusses similar disclosure mechanisms recently adopted in other jurisdictions. The article argues that there is a clear public policy basis for creating statutory duties of financial disclosure in litigation between spouses or former spouses.

Family law – divorce – maintenance – financial information

I THE CONSEQUENCES OF UNEQUAL ACCESS TO ACCURATE FINANCIAL INFORMATION IN FAMILY-LAW MATTERS

One of the authors of this article was recently made aware of a matter in which the wife of a successful businessman claimed a property to the value of R10 million, five life policies worth R10 million each, a capital amount of R60 million, a new vehicle to the value of R1.2 million every four years, and spousal maintenance of R220 000 per month. In the ensuing mediation process, the husband remarked that his wife's excessive claims indicated that she had absolutely no idea of his actual financial position. He offered her the occupation of a house worth R10 million (which was owned by one of his multiple companies) and maintenance of R60 000 per month. As part of the information-analysis stage of the mediation process, the husband was asked to supply auditors' certificates reflecting his percentage shareholding in all the companies which comprised his business and the value of his shares. He, however, refused to supply any documents. This resulted in the mediation process failing and the continuation of

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the far more expensive, time-consuming and aggressively contested court process.

Possibly even more outrageous was a 2023 case[1] involving a husband, married in community of property, who had embarked upon an extramarital affair with a woman referred to as RS. Two years later, and within a period of less than a week, he withdrew R850 000 from an investment account in his name. R610 000 of that money was given to RS. In his testimony, he admitted that 'he did this to prevent [his wife] from obtaining it in divorce proceedings he was at that time intending to pursue against her'.[2] Approximately a year and a half later, the extramarital relationship had soured, and the adulterous husband had changed his mind, resolving to remain married to his wife. Together, the spouses claimed repayment of the money from RS, who refused to return it because it had been a donation to her and because the claim for the return of the money had prescribed.[3]

The common thread in the two scenarios is that married people often lack accurate information about their spouse's financial positions, even when they are co-owners of the joint matrimonial estate. Instead, they blithely trust that their partners will conduct their financial affairs in both spouses' interests.[4] This tends to be an inaccurate belief when their marriages fall apart, and one which puts them at a distinct disadvantage in divorce proceedings. Those spouses who control the finances and have exclusive access to accurate financial information frequently use this position to obtain unfair advantages during the divorce process, as in the first example above, or even to engage in 'divorce planning', as the second example illustrates. This manipulation of the other party's lack of accurate financial information frequently continues even after the end of marriage, when spousal and child maintenance orders must be obtained or enforced after the divorce.

Spouses' and partners' lack of access to accurate information about financial matters leads to two sets of interrelated problems. The first pertains to the need for speedy and effective resolution of family-law matters. While the adversarial litigation system works well in many other fields of law, it is not well-suited to family-law matters, where both legal and non-legal issues commonly arise.[5] Usually, family members who

[1] *HW v RS* [2023] ZAGPJHC 1354.

[2] Ibid para 1.

[3] Ibid paras 5 and 6.

[4] See for instance Robert Leckey 'Relational contract and other models of marriage' (2002) 40 *Osgoode Hall LJ* 1 at 23 on 'cognitive dissonance' in agreements between family members.

[5] Madelene de Jong 'An acceptable, applicable and accessible family-law system for South Africa — Some suggestions concerning a family court and family mediation' 2005 *TSAR* 33; South African Law Reform Commission Discussion

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litigate against each other have finite financial resources, which should be preserved rather than entirely consumed by costly legal fees caused by protracted litigation. Parties are therefore generally advised to settle family-law disputes as quickly as possible without lengthy contested trials. The United Kingdom Supreme Court has summarised the benefits of early settlement as follows:

> 'It is in everyone's interests that matrimonial claims should be settled by agreement rather than by an adversarial battle in court. The financial resources of the family are not whittled away by the often substantial legal costs involved. The emotional resources of the family are not concentrated on conflict. The future relationship between the adult parties is not soured, or further soured, by that conflict. This is not only good for them but also for their children, whatever their ages, and for the wider family.'[6]

One means of encouraging settlement is mediation. For this reason, the South African Law Reform Commission has proposed mandatory mediation for all family-law disputes before parties can approach the courts.[7] The first scenario in this article illustrates how the deliberate or unintentional withholding of financial information can scupper this potentially useful process.

Another way to promote the settlement of family-law disputes is through precise, succinct and realistic pleadings.[8] However, in the current litigation process, parties and their legal representatives do not have access to accurate financial information to draft their pleadings and formulate their claims.[9] The reason is that formal discovery of documents and information can only be requested after the close of pleadings in High Court matters.[10] Although a judge can permit discovery at an earlier stage, this would require an additional application to court — a costly exercise which is unaffordable to many. The position is the same in magistrates' courts,[11] regional divorce courts, and children's court matters.[12] This can

Paper 148 (Project 100D) *Alternative Dispute Resolution in Family Matters* (2019) para 2.2.1.

[6] *Sharland v Sharland* [2015] UKSC 60 para 17.

[7] South African Law Reform Commission op cit note 5: Draft Family Resolution Bill, cl 17(1).

[8] Julien D Payne 'A practitioner's guide to spousal support in divorce proceedings' (1988) 19 *Revue Générale De Droit* 701 at 705.

[9] Madelene de Jong & Jacqueline Heaton 'Post-divorce maintenance for a spouse or civil union partner' in Jacqueline Heaton (ed) *The Law of Divorce and Dissolution of Life Partnerships in South Africa* (2014) 117.

[10] Rule 35(1) and (13) of the Uniform Rules of Court.

[11] Rule 23(1)*(a)* and *(b)* of the Rules Regulating the Conduct of Proceedings of the Magistrates' Courts of South Africa.

[12] In terms of s 52 of the Children's Act 38 of 2005, the provisions of the Magistrates' Courts Act 32 of 1944, and their corresponding rules together with the rules made under the Rules Board for Courts of Law Act 107 of 1985 that apply in children's court procedures.

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lead to plaintiffs or applicants making speculative, unrealistic, and exorbitant claims and irate defendants or respondents instituting vindictive counterclaims.[13] It stands to reason that people who find themselves in such acrimonious situations will be less willing to settle and, if they have the resources, will be more likely to engage in protracted, obstructive litigation, wasting court time and resources.

The second set of problems stems from the fact that there is usually asymmetrical access to both financial resources and information about these resources. To put it differently, one spouse, usually the wealthier one, will often have information about their own finances and joint 'family' finances, while the other spouse is less readily able to access this information and usually has fewer resources to fund protracted litigation. As a result, the spouse who has better access to information can use this to dissipate assets or obtain procedural advantages over the other. They can also conceal assets that the other spouse may not be able to uncover, except at great expense, and can use their financial resources to bring unnecessary applications. These actions effectively 'starve' the other spouse into agreeing to unfair settlements. This is often a gendered problem, both because during married or intimate relationships, men tend to earn more and amass more assets than women,[14] and because of the stereotypical expectations that men should be in charge of the family finances and that women should sacrifice their own material interests for the emotional and physical well-being of other family members.[15] The result is that court orders or settlement agreements that are based on inaccurate or incomplete information will tend to favour wealthier spouses while less wealthy spouses may not obtain the benefits to which they are legally entitled, leading also to long-term negative consequences for any children who continue to live with poorer spouses — usually, mothers.

Such unfair manipulation of the legal rules and processes to obtain undue benefits cannot be accepted. This article explores the possibility of creating legal mechanisms to ensure that family-law litigation, especially around divorce or separation, is based on fair and accurate information about litigants' real financial positions. It begins by discussing three initiatives to improve access to financial information in recent Law Reform Commission projects that deal with mediation, the distribution of matrimonial property on divorce and maintenance claims, followed by the Practice Directive in rule 43 matters that the Gauteng High Courts

[13] De Jong & Heaton in Heaton (ed) op cit note 9 at 117–18.

[14] Ibid at 119–22.

[15] Elsje Bonthuys, Catherine Albertyn, Deeksha Bhana, Wesahl Domingo, Prinslean Mahery, Lea Mwambene, Sandile Ndelu & Liza Segal 'Women, family and the community' in Elsje Bonthuys & Catherine Albertyn (eds) *Gender, Law and Justice* (2023) 406 at 411–13 and 434.

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have adopted. This is followed by some examples of duties to disclose financial information in other jurisdictions and an examination of the public policy reasons which may justify the creation of such a duty in South Africa. Parts IV and V explore the policy rationales for such a duty in family-law matters and consider some issues that could limit the feasibility of such a duty.

II RECENT INITIATIVES CONCERNING A DUTY TO PROVIDE ACCURATE FINANCIAL INFORMATION AT THE ONSET OF FAMILY LAW PROCEEDINGS

(a) South African Law Reform Commission Discussion Paper on Alternative Dispute Resolution in Family Matters[16]

In this Discussion Paper, the Law Reform Commission's advisory panel argues that the introduction of compulsory mediation in family-law matters would promote access to justice for all family members and ensure a higher rate of settlement of family-law disputes.[17] The accompanying draft Bill provides for mandatory mediation before the institution of legal proceedings in divorce and other family-law matters.[18] Because no decision on any issue can be made or be mediated until all relevant documentation and information has been obtained and understood by the parties, open and honest disclosure of all relevant information and documentation is crucial to the success of the mediation process.[19] Failure to disclose will mean that the mediation process will be unsuccessful, as illustrated by the example in the first part of this article.[20]

Accordingly, the proposed draft Bill requires that, during the information analysis or definition stage of the mediation process,[21] parties must make timeous, full and candid disclosure of information 'related to the family law matter' at the request of the other party and without formal discovery. Parties must also update previously disclosed information that has materially changed.[22] Parties who fail fully and truthfully to disclose will face penalties, such as punitive costs orders, if a court finds in subsequent litigation that such failure prevented an early

[16] Op cit note 5.

[17] Ibid paras 4.1.12–13, 5.3.70–2.

[18] Ibid Draft Family Resolution Bill cl 17(1).

[19] Madelene de Jong 'Mediation and other appropriate forms of alternative dispute resolution upon divorce' in Heaton (ed) op cit note 9 at 600–1; Lynn E MacBeth *The Art of Family Mediation: Theory and Practice* (2010) 291; Janet Walker 'Family mediation' in Julie Macfarlane (ed) *Rethinking Disputes: The Mediation Alternative* (1997) 53 at 68.

[20] See part I.

[21] This follows the orientation and introductory stage and precedes the stage at which parties negotiate. See De Jong in Heaton (ed) op cit note 9 at 600–1.

[22] Clause 5(2).

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settlement of the dispute. Moreover, a court may draw a negative inference about the bona fides of the party who failed to disclose, for example, financial information.[23]

In cases where informal disclosure does take place, but the mediation is nonetheless unsuccessful, the disclosed information will be confidential in terms of cl 16 of the draft Bill, which, in turn, incorporates the yet-to-be-adopted generic Mediation Act.[24] Indeed, one of the core features of mediation is that the process is private and confidential. All negotiations in the mediation process are therefore without prejudice, and parties can candidly disclose any facts or information without fearing that statements or concessions made during mediation could be used against them in subsequent litigation.[25]

(b) South African Law Reform Commission Discussion Paper on Matrimonial Property Law

Discussion Paper 160, entitled *Review of Aspects of Matrimonial Property Law*,[26] covers a wide range of matters related to the division of matrimonial property, mainly at divorce. It observes:

> 'The dissipation of marital assets is a real danger from the time when the marriage relationship starts deteriorating up to the granting of a divorce order. Despite the fact that this practice is frowned upon by our courts, it often happens that when one spouse is contemplating a divorce he or she starts concealing, diminishing or squandering assets that might otherwise be eligible for the division of assets upon divorce. When spouses become aware that a divorce will soon take place, some of them may want to alienate or hide assets in order to prevent sharing these assets with the other spouse at divorce. Women are often disadvantaged by these practices because they often leave the finances to their husbands and are thus unaware of financial matters.'[27]

Similar problems concerning the adequacy and availability of information are identified in respect of assets held in inter vivos trusts, and of the proceeds of pension funds and annuities.[28]

These difficulties are compounded by the incidence of the onus, which imposes a general rule that parties must prove what they aver to be the facts.

[23] Clause 5(3).

[24] Clause 16. In terms of para 4.2.2 of the Discussion Paper, the generic Mediation Act will deal with matters such as the accreditation and training of mediators, fees, prescription, confidentiality, the right to legal representation, termination of mediation, certification of participation and enforcement of a mediated outcome.

[25] De Jong in Heaton (ed) op cit note 9 at 584.

[26] South African Law Reform Commission Discussion Paper 160 (Project 100E) *Review of Aspects of Matrimonial Property Law* (2023).

[27] Ibid para 8.21.

[28] Ibid paras 9.41–2 on trusts and 9.173 on trust funds and annuities.

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In matrimonial property disputes, the party claiming a right to share in particular assets bears the onus to prove that those assets exist and to prove their economic value.[29] The failure to provide information about a spouse's assets means that the other spouse may be totally unaware of those assets to which the spouse may have a claim, especially if they are situated in trusts or are held offshore.[30] This would tend to result in an unfair order for the division of assets in the settlement agreement or court order.

Current provisions to ensure information disclosure and prevent dissipation are not necessarily effective. For instance, the Matrimonial Property Act[31] obliges spouses, upon request, to provide information about the value of their estates to calculate the accrual. However, our courts have made it clear that the determination of the accrual should only be done on the date of the divorce and not at an earlier stage.[32] The duty to provide information therefore only arises at an advanced stage of the legal proceedings, making dissipation and the concealment of assets possible and depriving the parties and the court of the benefits of early disclosure. Moreover, this explicit statutory duty to disclose is limited to marriages subject to the accrual system and does not create a general duty of disclosure.[33]

In response to these problems, the Discussion Paper has suggested mechanisms to ensure the disclosure of certain categories of information by the spouses when divorce is imminent. These duties are characterised as being of the utmost good faith (uberrimae fidei).[34]

A significant feature of the Discussion Paper is the relatively detailed list of the categories of information that must be disclosed. Apart from information about inter vivos trusts, parties should also disclose their local and offshore bank accounts, currencies (including cryptocurrency), investments, pensions and annuities.[35] They must also disclose information about certain transactions, entered into up to two years before the divorce, which could affect the distribution of property, including information about substantial donations and any funds transferred from pension funds to living annuities during this period.[36]

Moreover, the Commission suggests that legal duties be imposed upon third parties — such as trustees and administrators of pension funds and

[29] *ST v CT* 2018 (5) SA 479 (SCA) paras 37–40. The party who argues that assets are not included in the accrual claim bears the onus to prove their exclusion.

[30] See for example the facts in *W v H* 2017 (1) SA 196 (WCC).

[31] Act 88 of 1984, s 7.

[32] *Le Roux v Le Roux* [2010] JOL 26003 (NCK); *JA v DA* 2014 (6) SA 233 (GJ); *AB v JB* 2016 (5) SA 211 (SCA).

[33] Law Reform Commission Discussion Paper op cit note 26 para 9.43.

[34] Ibid para 9.46.

[35] Ibid.

[36] Ibid.

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annuities — to co-operate in order to supply financial information to which they have access. According to the Discussion Paper,

> '[i]f it appears from the disclosed information that a spouse has financial interests in any trusts, pension funds or living annuities the trustees and administrators of the pension funds and annuities have a legal duty to cooperate to supply the relevant information. In the absence of cooperation, the affected spouse can bring an application to compel compliance with this section.'[37]

Although these duties to disclose information can be initiated by way of a court application, the Discussion Paper also moots the creation of a financial disclosure form to be attached to a divorce summons, which must be completed by the spouses soon after the summons is issued.[38] This is akin to the form required by the Practice Directive in the Gauteng High Court.[39]

If these disclosure duties are to have any practical benefits, failure to disclose accurately must be visited with stern legal penalties. The Discussion Paper suggests that where a court finds that a spouse had failed in the duty to disclose it may — under certain circumstances — draw an adverse inference that this was done with the intention to hide assets and may take this into account in exercising its general discretion to redistribute assets, irrespective of the matrimonial property regime governing the marriage.[40]

Finally, to ensure the protection of the disclosed information, the Discussion Paper suggests that it may not be disclosed in the public domain, except under the exceptions set out in s 12 of the Divorce Act.[41]

(c) South African Law Reform Commission Discussion Paper on the Review of the Maintenance Act 99 of 1998

Since the adoption of the 1998 Maintenance Act, statutory requirements for financial disclosure have been considerably extended in maintenance court proceedings, which are more inquisitorial in nature than in other courts.[42] The 1998 Act has also introduced dedicated court personnel — maintenance officers and maintenance investigators — who must assist parties to claim maintenance and enforce existing maintenance orders.[43]

[37] Ibid.

[38] Ibid para 9.5e.

[39] See part II(d). See also the forms required in other jurisdictions in part III.

[40] Law Reform Commission Discussion Paper op cit note 26 para 9.48.

[41] Ibid paras 9.51–2. Section 12 of the Divorce Act 70 of 1979 allows for the anonymous publication of the facts of cases related to the administration of justice in law reports and for knowledge generation in a professional context.

[42] See *Pieterse v Pieterse* 1965 (4) SA 344 (T); *Kruger v Ferreira* 1979 (1) SA 915 (NC); *Johnson v Tiger* 1979 (1) SA 920 (NC); *Beukes v Beukes* 1995 (4) SA 429 (O).

[43] Maintenance Act 99 of 1998, ss 4 and 5.

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Several of the financial disclosure provisions in the Act aim to facilitate their investigations and other functions.

An applicant who lodges a maintenance complaint must complete a form that contains information about their assets, liabilities and income.[44] In addition, both parties must submit documentary proof of their respective financial positions[45] to enable a maintenance officer to conduct an investigation before an enquiry is instituted in the maintenance court.[46] When maintenance officers and investigators investigate maintenance complaints, they may gather information, including statements from third parties, about the parties' financial positions.[47]

During and before maintenance enquiries, magistrates may order third parties to disclose certain information to the court to assist the maintenance officers' examination.[48] For example, banks may be obliged to provide bank statements and employers to provide respondents' payslips. The failure to comply with such orders constitutes a criminal offence.[49] A court may also order electronic communications service providers to supply the parties' contact information in maintenance matters.[50] In maintenance matters, therefore, statutory duties are imposed on third parties to provide financial and other information about maintenance claimants or defendants.

A further amendment that the Law Reform Commission proposes is that a maintenance officer may be requested to identify possible assets that could be attached to enforce a maintenance order before an application for execution is launched.[51]

The extensive duties to disclose information, which are also applicable to people, companies and institutions who are not parties in the maintenance disputes, and which are referred to in the Maintenance Act and the Discussion Paper, reflect an awareness that accurate financial information is crucial to the successful and speedy resolution and enforcement of maintenance claims. In this respect, the statutory provisions in maintenance cases provide a model for other forms of litigation. However, persistent enforcement problems also sound a cautionary note that statutory disclosure duties may be paper tigers. Both anecdotal evidence and academic research suggest that the maintenance system is simply not working because of administrative bungling, maintenance and investigating officers' lack of training about the process, and general incompetence and understaffing

[44] Regulation 2 in terms of the Maintenance Act, Form A.
[45] Regulation 3.
[46] Maintenance Act, ss 6(1) and (2) and 7.
[47] Section 7(1) and (2).
[48] Section 8(1).
[49] Section 8(2).
[50] Maintenance Act, s 7(3)*(b)*. This provision is seldom used, as s 8(1) subpoenas can fulfil the same function.
[51] The new s 26(2)*(c)*, to be inserted in the Maintenance Act.

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in the maintenance courts.[52] This means that the disclosure mechanisms in the Act are not fully used and contribute little to the enforcement of maintenance orders. However, disclosure provisions may be more useful when lawyers invoke them on behalf of clients in private litigation. Unfortunately, this means that, as a result of administrative inefficiency in the state system, the most economically vulnerable people are least likely to benefit from disclosure provisions.

(d) Practice Directive of the Judge President of the Gauteng Division of the High Court in rule 43 Applications and Divorces

Applications for interim maintenance, care of or contact with children, and contributions towards costs pending divorce[53] are supposed to offer speedy, cost-effective and temporary relief until the main divorce action is finalised. In pursuit of these aims, court rules limit the length and nature of the documents submitted. However, this means that courts may have to make interim findings on incomplete or untested facts that are placed before them.[54] Although orders pending divorce are meant to be temporary, it appears in practice that these rulings often decide the entire divorce outcome because few parties can afford to take a contested divorce to trial.[55] In *TS v TS*,[56] Spilg J pointed out that interim applications may lead to injustice and fail to advance children's best interests. The court specifically stated that

> '[w]ithout the requirement of a proper disclosure, and possibly the utilisation of oral evidence in appropriate cases, rule 43 proceedings favour

[52] Steve Wamhoff & Sandra Burman 'Parental maintenance for children: How the private maintenance system might be improved' (2002) 28 *Social Dynamics* 146; CASE *Implementation of the Maintenance Act in the Magistrates' Courts* (2004), study conducted for the Commission of Gender Equality; D Singh, K Naidoo & L Mokolobate 'Coming to court for child support — The policy, the practice and reality. A case study of black women in the maintenance system at the Johannesburg Family Court (2002–2004)' (2004) 17 *Acta Criminologica* 143; Naleen Jeram 'A warning to all maintenance court officials: *Mthimunye v Minister of Justice and Constitutional Development and Others* (GP) (unreported case no 61876/2012, 9-5-2014) (Hiemstra AJ)' (2014) September *De Rebus* 43, discussing an order for damages against the ministry for the failure to attach pension benefits as a result of the negligence of maintenance court officials.

[53] Rule 43 of the Uniform Rules of Court for High Courts and rule 58 in Magistrates' and Regional Divorce Courts available at *https://www.ppv.co.za/wp-content/uploads/2020/01/Judge-President%E2%80%99s-Practice-Directive-2-of-2020.pdf*, accessed on 17 May 2024.

[54] *SH v EH* 2011 (5) SA 496 (ECP) paras 19 and 21.

[55] *TS v TS* 2018 (3) SA 572 (GJ) paras 2, 5, 11, 23 and 32. This is required by the Constitution of the Republic of South Africa, 1996, s 28(2) and the Children's Act 38 of 2005, ss 2, 6(2), 7 and 9.

[56] *TS v TS* ibid paras 7 and 17.

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> the unscrupulous party or the one who takes advantage of a practice that does not insist on upfront disclosure of the true state of financial affairs'.[57]

Referring to the English and Australian court rules, which provide for full, frank, clear and timely disclosure,[58] the court also suggested that an amendment of the rules to make provision for a standardised financial disclosure form, as is required in English law, could be adopted locally.[59]

Similar concerns were expressed in *E v E*[60] with respect to three different rule 43 applications in which the parties had submitted unduly lengthy and irrelevant documentation, potentially subverting the aims of speedy and cost-effective interim legal relief. The court held that rule 43(5) allowed a court, which had already received the parties' affidavits, to issue a directive that parties should file further affidavits that contain full and frank disclosure of their financial positions.[61] The court annexed to its order a financial disclosure form, setting out the parties' financial circumstances, including every class and type of asset, every form of liability, and all their income and expenditure. It proposed that the Judge President issue a practice directive including this form and commented:

> 'Financial disclosure will place the court hearing the application in a better position to decide the matter in a manner that does justice to the parties and takes care of the best interests of the minor children.'[62]

Subsequently, the Judge President of the Gauteng Division of the High Court issued Directive 2 of 2020, which introduced a mandatory financial disclosure form ('FDF'). This FDF must be completed under oath, together with the supporting documentation, by all parties in opposed divorce actions in which maintenance or proprietary relief is in dispute. It must also be completed in opposed rule 43 applications in which maintenance is in dispute. However, it only applies in the Gauteng Division, and the problems referred to in the cases persist in all other divisions. The lack of similar disclosure mechanisms in other jurisdictions could undeniably tempt divorcing parties to 'forum shop' for jurisdictions in which no onerous disclosure provisions exist, supporting an argument for a uniform statutory duty to disclose.

Parties must exchange their respective FDFs no later than ten court days after the defendant delivers their plea, and both the applicant and

[57] Ibid para 15. See also para 84 for the same point relating to interim maintenance.

[58] Ibid paras 39–46.

[59] Ibid paras 67 and 89.

[60] 2019 (5) SA 566 (GJ), also reported as *E v E; R v R; M v M* [2019] ZAGPJHC 180.

[61] Ibid para 55.

[62] Ibid para 57.

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the respondent must exchange their FDFs, together with supporting documents, no later than five days after the respondent has delivered their sworn reply.

The FDF requires parties to disclose both general and financial information. The latter includes information on all capital assets,[63] capital liabilities,[64] income earned from employment, self-employment, partnership or other assets/investments,[65] state benefits,[66] or any other income.[67] Parties must include a detailed monthly expenditure statement pertaining to themselves and their children. Finally, parties must give detailed information on significant changes in assets or income during the past or next twelve months, the standard of living enjoyed during the marriage, and any contributions made by the party making disclosure or anyone else to the family property and assets.

If a litigant fails to deliver their FDF timeously, the other party may apply for an order compelling the defaulting party to deliver the FDF within a short period,[68] failing which the complying party may, on the same papers, apply for the defaulting party's claim or defence to be struck out.[69] A court may also make an adverse costs order in a rule 43 application against a party who did not fully disclose or, if both parties failed to disclose, no costs order.[70] As the disclosures on the FDFs are made under oath, false disclosures may also result in criminal prosecution for perjury and/or fraud. In *JH v AB*,[71] the court expressed severe displeasure with a former advocate's failure to complete the FDF properly. It made several costs orders against him on a punitive scale, ordered him to return to show cause why he should not be imprisoned for contempt of court until his proper completion of the FDFs, and dismissed his applications and counter-applications on the basis that

> '[w]here a party, as here, has failed to properly complete the FDF then the court is justified in not having regard to his or her claims. One of the consequences of failing to properly complete an FDF is that the court does not have the necessary material before it to come to that party's assistance.'[72]

[63] That is, the family home, other properties, bank accounts, investments, policies, loans recoverable, cash, personal belongings, business interests, pension interests, other assets, including trusts.

[64] That is, any liabilities in South Africa or abroad such as money owed on credit cards and store cards, bank loans and hire purchase/finance agreements.

[65] For example, dividends, interest or rental income.

[66] Including state pension, child or disability benefit.

[67] Including living annuities.

[68] See for instance *MS v RS* 2023 JDR 4117 (GJ).

[69] Para 3.5.6 of Directive 2 of 2020.

[70] See for instance *PK v AK* 2023 JDR 4278 (GJ), in which both parties failed to disclose.

[71] 2022 JDR 3214 (GJ) paras 34 and 50.

[72] Ibid para 15.

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The mandatory FDFs therefore provide parties with a snapshot of the financial position long before formal discovery in terms of rule 35(3) takes place, allowing them to consider potential outcomes and the terms of possible settlements earlier in the process.[73] However, the fact that the information must be disclosed only after the exchange of pleadings limits its usefulness somewhat.[74] This is because the information is shared only after parties have already formulated their claims and defences, and the receipt of financial information may require changes to the pleadings, with costs implications. The Discussion Paper on Matrimonial Property suggests that the disclosure process should start with the divorce summons, which could be more effective in ensuring accurate pleadings and could save costs.[75] Another difficulty is the need for an application to compel delivery of the FDF, which could increase costs.

III DUTIES TO DISCLOSE IN OTHER JURISDICTIONS

In *TS v TS*, the court referred approvingly to judgments and disclosure mechanisms in the United Kingdom and Australia.[76] We discuss some highlights of the law in these systems, as well as the position in New Zealand, in this part of the article. Our aim is not to provide detailed comparisons. Rather, we wish to illustrate that similar disclosure duties are widely used in other jurisdictions and to highlight other useful features of these duties to disclose that could be applied in South Africa.

In the United Kingdom, the judgment in *Livesly v Jenkins*[77] led to the introduction of a pre-application duty to disclose certain financial information in family court proceedings, with the object of enabling the parties to settle the case fairly and early.[78] Parties must complete Form E,[79] requiring information similar to the FDF in the Gauteng High Courts.[80] This form must be completed if parties approach a court for a financial order upon divorce.[81] Litigation in terms of the Children and Families Act must be preceded by attendance at a family mediation and assessment

[73] Ibid.

[74] See also *DM v DM* [2023] JOL 58257 (GJ) para 16 for contradictions in the content of the form.

[75] See the text to note 38 above.

[76] Supra note 55 paras 39–46.

[77] [1985] 1 All ER 106 (HL).

[78] Ibid para 42.

[79] Form E1 for divorces obtained abroad and Form E2 for other divorces available at *https://www.gov.uk/government/publications/form-e2-financial-statement-for-a-variation-of-an-order-for-a-financial-remedy*, accessed on 22 March 2024.

[80] See the discussion in part II(d).

[81] In terms of the Matrimonial Causes Act, 1973 or the Civil Partnership Act, 2004.

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meeting.[82] It appears that the disclosure form or an affidavit containing the same financial information is also used in the mediation process.[83]

Form E explicitly warns that failure to provide accurate information can result in criminal prosecution for fraud and that '[a] failure to give full and accurate disclosure may result in any order the court makes being set aside'.[84] The consequence of providing false information flows from the Supreme Court's 2015 judgments in *Sharland v Sharland*[85] and *Gohil v Gohil*.[86] In *Sharland*, the application of the general principle that 'fraud unravels all' was applied to matrimonial matters, and the court held that it had to set aside an order based on fraudulent material non-disclosure, unless the incorrect information provided has no bearing upon the content of the court order or the settlement reached between the parties.[87] In *Gohil*, the court found that a recital in a financial order in divorce proceedings limiting disclosure has no legal effect. The court made this finding on the basis that a party has a duty to the other party and to the court to provide full and frank disclosure. Given this duty, one party cannot exonerate the other from complying with the duty to make full and frank disclosure.[88]

Well-prepared Form Es will enable the professionals involved in a case to understand the family finances fully and will aid negotiations and the early settlement of a case. However, disclosure should be proportionate to the issues in question and the amount at stake. Thus, where the circumstances of the case are particularly complicated, more disclosure than that required by Form E may be necessary.[89]

Australia is known for its progressive approach to the development of alternative dispute resolution in general and mediation in particular. Each party to a prospective case in the Family Court of Australia must make a genuine effort to resolve the dispute by participating in dispute resolution, such as negotiation, conciliation, arbitration and counselling.[90] In these processes, parties must have regard to the need to safeguard the

[82] Children and Families Act, 2014, s 10.

[83] Mediate UK 'What is a Form E divorce and do I need to complete it?' available at *www.mediateuk.co.uk*, accessed on 4 April 2024.

[84] Ibid.

[85] Supra note 6.

[86] [2015] UKSC 61.

[87] *Sharland* supra note 6 paras 15, 23 and 33.

[88] *Gohil* supra note 86 para 22.

[89] Joanna Toloczko 'Full and frank disclosure — Demystifying the Form E' (May 2024), available at *https://bbslaw.co.uk/full-and-frank-disclosure-demystifying-the-form-e/*, accessed on 19 May 2024.

[90] Federal Circuit and Family Court of Australia Rules (2021), available at *https://classic.austlii.edu.au/au/legis/cth/num_reg/fcafcoalr2021202101197559/*, accessed on 21 March 2024, rule 4.01, Schedule 1, cls 1(1) and 3.

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interests of any children involved and the need to resolve the case speedily and amicably.[91]

To enhance and streamline alternative dispute resolution, pre-action procedures inter alia involve the legal duty to disclose information, both in parenting procedures and financial procedures.[92] Parties must acknowledge that they are aware of this duty in written undertakings to this effect.[93]

Financial information that must be disclosed includes liabilities, income, earnings, and interests in property, including interests in the proceeds of certain trusts and companies. Parties must also disclose any sale, donations and transfers of property by the parties or by trusts or companies in which parties have an interest in the twelve months preceding the separation.[94] In maintenance cases, parties must also provide bank statements and salary slips for the previous twelve months.[95] The information must be included from the very start of proceedings in the form of a standard questionnaire, supplemented by statements where necessary.[96] In addition, parties must also supply their three most recent tax returns and assessments, information about retirement benefits in which they have an interest, and three recent financial statements of any companies, trusts or partnerships in which they have financial interests.[97] A party who is unable to provide a document may be ordered to authorise a third party to produce the document in their stead.[98] Employers of parties may also be asked to disclose information relating to their remuneration, conditions of employment, leave entitlements, bonuses and so forth.[99]

The extensive list of transactions in the Australian rules, particularly the inclusion of tax information, may prove useful to guide statutory disclosure provisions in South African law. The failure to participate in pre-action procedures before filing a court case attracts serious consequences. These consequences are wide-ranging and may include punitive costs orders, orders for contempt of court, orders that a party may not use

[91] Schedule 1 cl 1(5).

[92] Rule 6.01 explicitly creates such a legal duty from the start to the finish of proceedings. Rule 6.05 applies to parenting proceedings and rule 6.06 to financial proceedings. Besides the duty to disclose as set out in this pre-action procedure, parties also have such duty in terms of chap 13 of the Family Court Rules once proceedings have been instituted. However, for purposes of this article the emphasis is on the pre-action procedure where parties have a broad duty to disclose even before the institution of proceedings in the family court.

[93] Rule 6.02.

[94] Set out in rule 6.06.

[95] Rule 6.06(9).

[96] Rule 6.06(5).

[97] Rule 6.06(8).

[98] Schedule 1 cl 4(5).

[99] Rule 6.25.

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documents which have not been disclosed, staying of procedures, and dismissal of the non-disclosing party's case. These consequences also include the general provision that a court hearing the matter 'may ensure that the complying party is in no worse position than the party would have been in had the pre-action procedures been complied with'.[100] A court may even make a costs order against a lawyer in a matter 'for failure to comply with a pre-action procedure', including information disclosure.[101]

The provisions for disclosure of financial information follow the same general scheme in New Zealand. Applications for maintenance orders and division of property at the end of marriages or unmarried intimate relationships must be accompanied by forms which require particular information.[102] Under rule 402, courts can also issue summons to third parties to produce certain information as witnesses. The penalties for failure to comply with disclosure duties include adverse costs orders, the stay or dismissal of proceedings, and an order that the offending party should appear before the court together with relevant documents or books so that the court can examine these.[103]

IV THE LEGAL BASIS FOR A DUTY TO DISCLOSE IN THE UTMOST GOOD FAITH

In part II,[104] we noted that the Discussion Papers on family dispute resolution and matrimonial property suggested the creation of a duty to disclose information and that this duty should be one of the utmost good faith — a duty uberrimae fidei. This part of the article considers the meaning of this kind of legal duty in family law and other areas of the law. This is followed by an examination of the basis on which such a duty could be justified in the context of marriages, families and other intimate relationships.

(a) Duties uberrimae fidei

The law recognises that particular contracts, circumstances and relationships impose duties to act in the utmost good faith that are distinct from a (controversial) general contractual duty to negotiate

[100] Rules 6.02(2), 6.17; Schedule 1 cl 2(3-5).

[101] Rule 12.15(1)(b).

[102] In terms of the Family Court Rules of 2002 (SR 2002/261), available at *https://www.legislation.govt.nz/regulation/public/2002/0261/latest/DLM142995.html*, accessed on 22 March 2024. Rule 344 provides form FP18 to be completed in applications for maintenance and rule 389 requires that parties complete form P(R) 1 in matters that concern division of property.

[103] Rule 399.

[104] See part II(a) and (b).

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or act in good faith.[105] These are known as fiduciary duties. In some instances, the fiduciary duties flow from special contractual relationships. Whereas contracting parties can create such duties by including clauses to that effect,[106] they are also automatically implied in particular forms of contracts. For instance, agents have duties uberrimae fidei to disclose material information to their principals.[107] Partnership contracts create fiduciary duties between the partners,[108] as do analogous contracts that create similar relationships.[109] Despite the Appellate Division's dictum that 'uberrima fides is an alien, vague, useless expression without any particular meaning in law',[110] subsequent cases have continued to refer to the insured party's duty uberrimae fidei to disclose certain information in insurance contracts.[111]

Duties uberrimae fidei also arise from certain appointments, termed 'fiduciary offices'.[112] Trustees, for instance, have duties uberrimae fidei to provide certain information to the beneficiaries of inter vivos trusts;[113] trustees and administrators of trust funds created for living relatives have fiduciary duties towards beneficiaries;[114] directors have duties of utmost good faith towards their companies;[115] and business rescue practitioners must conduct themselves with the utmost good faith, impartiality and integrity in the interests of all stakeholders.[116]

Such duties also ensure the effective administration of justice. Legal practitioners have duties uberrimae fidei to disclose all information to the courts, including information that does not favour their clients' interests, and they must be absolutely frank in their dealings with the courts.[117]

[105] See for instance *Eerste Nasionale Bank v Saayman* 1997 (4) SA 302 (SCA); *Brisley v Drotsky* 2002 (4) SA 1 (SCA); *Liberty Group v Mall Space Management CC* 2020 (1) SA 30 (SCA); *Beadica 231 CC v Trustees of the Oregon Trust* 2020 (5) SA 247 (CC).

[106] *Bellairs v Hodnett* 1978 (1) SA 1109 (A) at 1121A–B.

[107] *Stainer v Palmer-Pilgrim* 1982 (4) SA 205 (O) at 210B; *Doyle v Board of Executors* 1999 (2) SA 805 (C) at 813F–H.

[108] *Goldberg v Tremble and Bennett* 1905 TS 255.

[109] *Bellairs* supra note 106 at 1116.

[110] *Mutual & Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 (1) SA 419 (A) at 433F.

[111] *Strydom v Certain Underwriting Members* 2000 (2) SA 482 (W).

[112] *Doyle v Board of Executors* 1999 (2) SA 805 (C) at 813B.

[113] Ibid at 812I–J.

[114] *Living Hands v Old Mutual Trust Managers* 2023 (1) SA 164 (GJ).

[115] *Fisheries Development Corporation of SA Ltd v Jorgenson; Fisheries Development Corporation of SA Ltd v AWJ Investments* 1980 (4) SA 156 (W); *Howard v Herrigal* 1991 (2) SA 660 (A).

[116] *Gupta v Knoop NO* 2020 (4) SA 218 (GP) paras 26, 27 and 32.

[117] *Toto v Special Investigating Unit* 2001 (1) SA 673 (E); *Hayes v The Bar Council* 1981 (3) SA 1070 (ZA).

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Special duties exist to disclose information in patents matters[118] and in ex parte applications.[119]

In *Du Preez v Du Preez*,[120] the court assumed that there was a duty in rule 43 matters

> '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.'

Similarly, in the recent case of *CA v HA*,[121] Sikhwari AJ confirmed the principle that spouses have duties uberrimae fidei to disclose information in rule 43 applications for interim relief upon divorce. The judge held that applicants seeking equitable relief must act with the utmost good faith and fully disclose all material information regarding their financial affairs.[122]

The motivation for the assumption of a duty uberrimae fidei in rule 43 matters flows from the expedited and truncated procedure that limits the opportunities to test the evidence in these matters, but similar duties have also been asserted in surrogacy applications[123] and orders for the recission of adoptions on the basis of the constitutional duty to advance children's best interests.[124]

The exact content of the fiduciary duty varies from one context to the next. It ranges from trustees' duties to provide accurate accounts[125] to duties on agents and partners not to enter into agreements in competition with their principals or partners.[126] Duties to provide full and accurate information, for which we argue, appear to be the least onerous form of such duties.

(b) The public policy considerations which support statutory duties of disclosure

In addition to the numerous legal duties to disclose information that already exist and that have been suggested in family law and other areas of

[118] *EI Du Pont De Nemours & Co v SA Nylon Spinners (Pty) Ltd* 1987 BP 282 (CP); *RB Botha v HL & H Timber Products* 1998 (BP) 160 (CP).

[119] *National Director of Public Prosecutions v Basson* 2001 (2) SACR 712 (SCA); *Thint (Pty) Ltd v National Director of Public Prosecutions; Zuma v National Director of Public Prosecutions* 2009 (1) SA 1 (CC); *Recycling and Economic Development Initiative of SA NPC v Minister of Environmental Affairs* 2019 (3) SA 251 (SCA).

[120] 2009 (6) SA 28 (T) para 16.

[121] [2024] ZAWCHC 25.

[122] Ibid para 16.

[123] *Ex Parte KF* 2019 (2) SA 510 (GJ) para 25.

[124] *T v C* 2003 (2) SA 298 (W) paras 15 and 16.

[125] *Doyle* supra note 112 at 812I–J.

[126] *Bellairs* supra note 106 at 1116F; *Doyle* ibid at 813lF–H.

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law, as discussed above, public policy considerations support the creation of such a duty.

The need to protect marriage or 'the family' as the cornerstone of a healthy society is frequently invoked by courts, and they usually refer to the social value of the mutual emotional, financial and other forms of support which spouses and family members provide to one another.[127] The ideal of marriage or family life implied in these dicta is one in which individuals voluntarily co-operate for the benefit of the family group, requiring from spouses or intimate partners levels of altruism, trust, and honesty in their dealings with each other. These characteristics are valued precisely because they differ from the self-interested and individualistic pursuit of profit expected in commercial dealings.[128] These ideals of altruistic behaviour reflect gendered cultural expectations that men should share the economic fruits of their labour as primary breadwinners with family members, while women should forego or limit the accumulation of wealth outside the home in favour of providing physical and emotional support to family members.[129]

When relationships are about to end, legal rules cannot ignore the expectations of mutual sharing and trust that govern the relationship. Legal and procedural rules that allow partners to get away with dishonesty, secreting assets, withholding information or squandering assets at divorce undermine the very basis of the social protection of marriage and family life and the communitarian values upon which they rest. In other words, the practical and symbolic importance of marriage and family life supports the argument in favour of a statutory duty to disclose information.

This leads to the second public policy imperative — the need to distribute the financial benefits of the relationship justly and equitably at dissolution, which is mentioned repeatedly in the Divorce Act.[130] That a just and fair division of assets should recognise the constitutional imperative of gender equality was most recently confirmed by the Constitutional Court in *EB v ER*.[131] A mandatory disclosure duty would enable courts to make generally fair orders that enhance gender equality because they are based on full and accurate information about the parties' financial positions and needs.

[127] *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) paras 96–103 and the sources referred to in note 40; *Volks NO v Robinson* 2005 (5) BCLR 446 (CC) paras 52–3, 81 and 106; *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs* 2000 (3) SA 936 (CC) paras 30–1.

[128] Elsje Bonthuys 'What's the deal? Women's evidence and gendered negotiations' (2019) 27 *Feminist Legal Studies* 7 at 13; Elsje Bonthuys 'Family contracts' (2004) 121 *SALJ* 879 at 896–7.

[129] Bonthuys 2004 *SALJ* ibid.

[130] Sections 7(2), (4), (6) and 9(1).

[131] 2024 (2) SA 1 (CC) paras 86, 89 and 121–8.

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A third consideration is the efficient administration of justice. Spouses should not unnecessarily protract family matters, thereby wasting time and allowing for the dissipation of resources.[132] When former spouses or partners have children, there is a continuing need to deal openly and honestly with each other in so far as the children are concerned. This is because the family relationships with both parents continue to exist, even after divorce or separation. As a result, any animosity caused by unethical conduct during divorce or separation can influence relationships with children. Moreover, after divorce, children often continue to live with their mothers and will share in the disadvantages caused by unfair financial allocations at divorce and by the failure fully to disclose information in claims for child maintenance. The constitutionally recognised need to take account of the best interests of the child therefore also supports a duty on parents to provide full and accurate information at separation.[133]

V CONSIDERATIONS WHICH COULD LIMIT LEGAL DUTIES ON LITIGANTS AND THIRD PARTIES TO DISCLOSE INFORMATION

Requiring litigants and/or third parties to provide information about a spouse's income or assets may implicate other statutes. In this part of the article, we provide a brief overview of possible obstacles to the creation of disclosure duties.

As we have pointed out above,[134] there is an existing duty on third parties, such as banks, employers, and electronic communications service providers, to provide relevant financial information in maintenance court proceedings in the current Maintenance Act and in proposals for its reform. We have also pointed out that duties to provide information are extended to third parties in Australian family matters and that courts in New Zealand can summons third parties to produce certain information.[135] Therefore, the general principle that third parties could be obliged to provide information in legal matters seems well recognised.

If there is a duty of utmost good faith to disclose all relevant information promptly in family matters, it could be argued that there is no need for additional information from third parties. Unfortunately, numerous reported judgments illustrate that litigating parents, spouses and intimate partners are frequently dishonest, creating at least a need to verify information that third parties have.

One institution which could be of great assistance is the South African Revenue Service ('SARS'). This is because it is likely to have access to

[132] See the quotation from the *Sharland* case supra note 6.
[133] Section 28(2) of the Constitution.
[134] See part II(c).
[135] See part III.

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extensive financial information on the parties. The question whether SARS could be obliged to allow access to tax records was recently highlighted in *Arena Holdings (Pty) Ltd t/a Finacial Mail v SARS*.[136] The case concerned a request by the *Financial Mail* and the amaBhungane Centre for Investigative Journalism for access to former President Jacob Zuma's tax records in terms of the Promotion to Access of Information Act ('PAIA').[137] SARS refused to provide the information on the basis that Mr Zuma's tax records were confidential under ss 34(1) and 35(2) of PAIA and the Tax Administration Act.[138] These sections prohibit information officers of public bodies and SARS employees from divulging personal information and, particularly, the tax information of individuals.

A slim majority of the Constitutional Court ruled that the absolute prohibition on the disclosure of tax information in these statutory provisions is unconstitutional and invalid because the provisions contravene the constitutional right to access to information in s 32 that 'everyone has the right of access to: *(a)* any information held by the state; and *(b)* any information that is held by another person and that is required for the exercise or protection of any rights'. The absolute prohibition on the disclosure of tax information was characterised as

> 'one that cannot be reconciled with the proper constitutional approach to competing rights. It is not open to a consideration of any other means to achieve the purpose of the limitation of the right. … One must be careful not to elevate taxpayer confidentiality to some sacrosanct place where no exception to enable public access to it is possible. … It is difficult to conceive any reasonable basis to hold that taxpayer information cannot be subject to the "public-interest override" in circumstances where the override is potentially available to justify the disclosure of information that may relate to the life and the safety of an individual, the defence or the security interest of the country or the private information of a third party (including their medical records).'[139]

In our opinion, a clearly formulated statutory provision allowing access to another family member's tax records to establish and enforce a party's rights in a family dispute, together with restrictions on the publication of such records, would fall within the limits set by this judgment. This provision would balance the parties' privacy interests with a public interest in the just and effective resolution of family-law matters and enforcing family members' rights to share in marital assets.

Another potential stumbling block is the Protection of Personal Information Act ('the POPI Act').[140] This Act aims to balance rights

[136] 2023 (5) SA 319 (CC).
[137] Act 2 of 2000.
[138] Act 28 of 2011, s 69(1).
[139] *Arena Holdings* supra note 136 paras 171–2.
[140] Act 4 of 2013.

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to information against the protection of privacy and also pertains to information related to litigants' financial and employment history.[141] The basic principles are that financial and employment information may only be collected and distributed[142] lawfully, reasonably, for an 'adequate' purpose and justifiably.[143] Specifically, information may be collected to comply with obligations imposed by law or if it is 'necessary for pursuing the legitimate interests of the responsible party or a third party to whom the information is supplied'.[144] Information can be collected from the persons themselves or from third parties who have such information.[145]

The Act would therefore permit and regulate the collection of information from litigants themselves, and from institutions that possess such information if a specific legal duty to supply this information is created by statute. Where information is collected from third parties, there are obligations to notify the person whose information is collected[146] and to ensure that the information remains confidential and is used only for the purpose of the court process.[147] Any statute or draft legislation which creates rights and duties to obtain financial information from litigants and third parties can be scrutinised by the information regulator in terms of s 40 of the Act. We suggest that these provisions would permit a carefully circumscribed statutory right to financial information in the process of litigating family matters.

VI CONCLUSION: SUGGESTIONS FOR REFORM

We are in favour of creating a general statutory duty uberrimae fidei to provide financial information at an early stage of family legal disputes. This duty should apply in all courts dealing with such matters and, ideally, it should be facilitated by forms mandating the provision of the required information. To facilitate effective mediation and encourage early settlement, the forms should, at the latest, be contained in the summons or application that sets the litigation in motion. The other party should have a limited period to respond by completing a form containing the same information. These disclosures should form the basis for mediation as a first step in the process. Cognisance should also be given to the Australian pre-action procedures, where the duty to disclose forms part of pre-action procedures to enhance alternative dispute resolution processes, such as mediation, before filing an application to start a case.

[141] Definition of personal information in s 1 of the Act.
[142] Which are covered by the term 'processed' in s 1 of the Act.
[143] Sections 9, 10 and 11.
[144] Section 11*(c)* and *(f)*.
[145] Sections 11 and 12.
[146] Section 18.
[147] Sections 19–22.

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We favour a wide range of information to be disclosed, including information about trusts, companies, retirement and annuity benefits, bank statements and any investments in cryptocurrency or offshore financial institutions. Litigants may be encouraged to be more candid by requiring the submission of tax assessments and tax returns for a certain number of years before the matter was instituted. We also recommend the creation of a statutory duty that requires third parties to submit certain information, such as the values of retirement benefits and the financial statements of trusts from which the parties or their children derive benefits. In addition, it would be useful to require information on significant disposals of assets or benefits in a period before the matter is initiated to counter the effects of 'divorce planning' by parties.

Non-compliance should be visited with serious consequences. First, it should be clear that any court order or settlement agreement which was based on or substantially influenced by financial information that is subsequently discovered to be false could be set aside, at the expense of the party providing false information or hiding information. Secondly, where a material lack of information or significant false information is discovered during the litigation process, a court should be able to set aside the claims or defences of the party providing false information, thus settling the matter on the version provided by the other party. In divorces or separations, a court should be able to take cognisance of a party's failure accurately to disclose in making redistributive orders by ordering a forfeiture of benefits and/or punitive costs orders. Finally, to encourage lawyers to ensure disclosure by their clients, the possibility of an order for wasted costs against lawyers who were deliberately remiss or careless in advising their clients, similar to the one contained in the Australian rules, may be useful.

New legislation, however, takes time. In the meantime, a practice directive by the Office of the Chief Justice providing for disclosure mechanisms for all jurisdictions would be appropriate. We recommend that such a directive be similar to the current position in the Gauteng Division of the High Court. Implementing this directive would alleviate the plight of mostly women and children, who are unfortunately often prejudiced upon divorce due to the lack of a statutory duty to disclose financial information at the commencement of legal proceedings, or even at an earlier stage.

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TO CONTRIBUTORS

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- only on the assurance that it has not in whole or in part or in substance been published or offered for publication elsewhere
- on the understanding that it may be submitted in confidence to an expert referee or expert referees for evaluation
- on the understanding that the editors reserve the right to make what changes they consider desirable:
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  - *(b)* to eliminate errors of typing, grammar, syntax, punctuation, spelling, idiom and the like
  - *(c)* to eliminate ambiguity, illogicality, tautology, circumlocution and redundancy
  - *(d)* to produce accuracy and coherence
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