

**THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case 2023-131897

(1) REPORTABLE: No

(2) OF INTEREST TO OTHER JUDGES: No

(3) REVISED

27 February 2025

In the matter between:

C[...] **R[...]** **E[...]**

Applicant

And

M[...] **E[...]**

Respondent

This judgment has been delivered by uploading it to the CaseLines digital database of the Gauteng Division of the High Court of South Africa, Johannesburg, and by emailing the attorneys of record of the parties. The deemed date and time of the delivery are 10H00 on 28 February 2025.

JUDGMENT

DU PLESSIS J

Introduction

[1] The applicant has brought the variation application in terms of Rule 42(1)(b), read with Rule 43(6) of the Uniform Rules of Court. The application seeks to vary a Rule 43 interim maintenance order that Acting Judge Abro granted on 3 February 2025. The applicant contends that the order was granted erroneously due to a patent error or omission and that it must be corrected.

[2] The applicant argues that the Court, when granting the initial maintenance order, failed to consider the financial disclosures of both parties properly. Specifically, he claims that the necessary calculations were not conducted, resulting in an order that exceeds his financial means. Furthermore, he alleges that the Court overlooked that the respondent earns R53,290.31 after tax from her business, significantly affecting the assessment of her need for maintenance. The applicant has engaged a forensic auditor to verify and present an accurate financial analysis to support his position in this application. There was no such report or analysis in the Rule 43 application. The applicant seeks to reduce or eliminate his spousal maintenance obligations as part of the variation application.

[3] The application has been brought on an urgent basis, with the applicant arguing that he will fall into contempt of Court by March 2025 if the order is not varied. He maintains that he is financially incapable of complying with the current maintenance order and that urgent relief is required to prevent legal consequences.

[4] The respondent contends that there is no patent error in the order, thus, Rule 42(1)(b) does not apply. Moreover, she argues that the applicant has failed to demonstrate a material change in circumstances, a prerequisite for variation under Rule 43(6). The respondent also asserts that the applicant is introducing new financial evidence, which he could have presented during the original Rule 43 proceedings. According to her, this constitutes an impermissible attempt to re-argue the Rule 43 application. Lastly, she disputes the urgency of the matter, stating that the applicant had ample opportunity to address these concerns earlier.

Ad urgency

[5] I accept that any delay in adjudicating this application, which is needed to give finality to the Rule 43 outcome, would risk further postponement in the maintenance

payment. Given that Rule 43 orders are intended to provide immediate relief, it is in the interests of justice to address the application without unnecessary delay to ensure that any outstanding obligations are either confirmed or appropriately varied in accordance with the law.

The law

[6] Rule 42(1)(b) allows for a judgment or order to be varied or rescinded where there is an ambiguity, patent error, or omission attributable to the court. Rule 43(6) permits a party to apply for a variation of a maintenance order only if there has been a material change in circumstances.

[7] Rule 43 orders are interim and are not intended to be appealed or frequently amended.¹ A party seeking variation in terms of Rule 43(6) must demonstrate that their financial or personal circumstances have materially changed in a manner that significantly impacts their ability to comply with the order. Courts have consistently emphasised that dissatisfaction with the original order does not justify variation.²

[8] The courts have further held that a re-evaluation of the original order, or a party regretting their initial stance, is insufficient to justify variation. The Constitutional Court recently, in *S v S*,³ reinforced the principle that Rule 43 applications serve as a mechanism for swift and cost-effective interim relief during divorce proceedings. The Court reaffirmed that Rule 43 orders are not subject to appeal, underscoring their interim nature and the necessity for expeditious resolution of disputes. The rationale for non-appealability is to prevent delays and curtail costs. A long, drawn-out appeal process would contradict these objectives.⁴

[9] The Court further acknowledged that litigants are not entirely precluded from seeking a variation under Rule 43(6). However, Rule 43(6) is always available, albeit with restrictions.⁵ And while the current formulation of Rule 43(6) is restrictive, and in

¹ *S v S* [2019] ZACC 22 par 33.

² (see *Smit v Smit* 1980 (3) SA 1010 (O); *Greenspan v Greenspan* 2000 (2) SA 283 (C))

³ [2019] ZACC 22.

⁴ Paragraph 43.

⁵ Paragraph 47.

some cases, this may warrant future reform, at present, variations are only permitted under “changed material circumstances”.

[10] The applicant in the present case does not rely on Rule 43(6), as his financial circumstances have not materially changed. Instead, he seeks to rely on Rule 42(1)(b), arguing that the Court made a patent error in assessing his financial position. The normal rule is that a judgment, once given, is final and not subject to amendment or supplementation by the Court that delivered it – that Court or judge is *functus officio*.⁶ The applicant has a two-pronged argument with regard to Rule 42(1)(b). Firstly, the judge made a patent error that needs to be rectified, and secondly, the order is to be set aside under common law.

[11] However, Rule 42(1)(b) does not permit a party to introduce new evidence or argument that was available but not submitted at the original hearing. Rule 42(1)(b) of provides for the rescission or variation of a judgment or order where there is an ambiguity, patent error, or omission, but only to the extent of such ambiguity, error, or omission. Courts have consistently held that not every error or oversight justifies rescission or variation—the error must be attributable to the Court itself rather than to the parties or their legal representatives.

[12] In *Seattle v Protea Assurance Co Ltd*,⁷ the Court reaffirmed that a patent error or omission must be one that causes the judgment to fail to reflect the judicial officer’s true intention at the time of pronouncement. The Court refused to amend its judgment despite the emergence of an actuarial report that had been available but was not presented before the judgment was delivered. It held that a court’s error must be its own mistake rather than a failure by a party to submit relevant evidence. Furthermore, if a judgment is clear and unambiguous, it cannot be varied simply because new evidence or different calculations later become available. Once a court has issued a final judgment, it becomes *functus officio*. It cannot revisit its decision

⁶ *Public Investment Corporation SOC Ltd v Trencon Construction (Pty) Ltd* 2024 (1) SA 66 (SCA) at para [12] – [14].

⁷ 1984 (2) SA 537 (C).

unless it falls within a recognised exception, such as an ambiguity, clerical mistake, or omission.⁸

[13] In the present case, the order was issued without a written judgment, making it difficult to assess the judge's reasoning in detail. However, the absence of a judgment does not imply an error—instead, the order itself must be examined to determine whether it was unclear, ambiguous, or contained a patent mistake. If the order is clear and reflects what was pronounced in court, there is no basis for variation under Rule 42(1)(b). As in *Seattle*, the applicant is not identifying a mistake by the Court but is instead seeking to introduce new financial information that was either not disclosed or not properly argued during the original hearing. The Court's order must be presumed to reflect its true intention, and unless the applicant can demonstrate that it contains an ambiguity or a manifest error attributable to the Court, the application for variation should fail.

[14] Courts have consistently held that Rule 42 cannot be used to introduce new evidence or re-argue a case that has already been adjudicated. In *First Consolidated Leasing Corporation Ltd v McMullin*,⁹ the Court stated that a patent error causes the judgment to depart from the Court's real intention—it does not cover situations where a party failed to present all relevant evidence at the hearing.

[15] In this case, the applicant does not meet any of these criteria as set out in Rule 42(1)(b). His attempt to reintroduce financial evidence available during the Rule 43 hearing, but not properly presented, does not constitute a patent error under Rule 42(1)(b). As the Court held in *Seattle*, the fact that new financial information emerges later does not render the original judgment erroneous—particularly when the judge ruled based on the evidence placed before the Court.

[16] This leads to the conclusion that the applicant's reliance on Rule 42(1)(b) is misplaced. The Rule does not permit a party to circumvent the principle of finality in litigation by introducing evidence that should have been included in the original

⁸ As outlined in *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A).

⁹ 1975 (3) SA 606 (T) para ?.

hearing. It can also not serve as an appeal mechanism in R43 applications. The Court's order in this case was based on the evidence properly before it at the time. Therefore, any omission or miscalculation resulting from the applicant's inadequate disclosure cannot be corrected under Rule 42(1)(b).

[17] The applicant contends that, in addition to Rule 42(1)(b), he is entitled to common law relief for rescission of judgment on the grounds of fraud. To succeed on this basis, he must establish that the successful litigant was a party to the fraud, that the evidence presented was false, that it was fraudulently made with intent to mislead, and that the false evidence diverged so materially from the actual facts that, had the facts been placed before the Court, a different order would have been granted. Furthermore, he must demonstrate that, but the Court would not have granted the order in question for the fraud. Importantly, courts have held that the mere late discovery of a document that contradicts a judgment does not justify variation—it must be shown that the successful litigant deliberately and fraudulently suppressed the document and that the opposing party only became aware of its existence after judgment.¹⁰

[28] However, the applicant fails to meet this threshold. His forensic audit report relies on evidence before the Court during the Rule 43 proceedings. The respondent fully disclosed her financial position through her statements and financial disclosure form, which were attached to her affidavit in that application. These documents were always available to the applicant and his legal representatives. There is no basis to claim that the evidence was false nor that material financial information was deliberately concealed from the Court. The applicant is, in effect, attempting to re-argue the Rule 43 application by reframing it as a fraud-based rescission despite having had full access to the same financial information during the original proceedings. Consequently, his claim of fraud is without merit and should be dismissed.

¹⁰ *Port Edward Town Board v Kay* 1994 (1) SA 690 (D) para ?.

Conclusion

[18] In *S v S*,¹¹ the Constitutional Court reaffirmed that Rule 43 orders are interim and not subject to appeal to prevent prolonged litigation and escalating costs. While Rule 43(6) allows for variation, this is limited to cases where a material change in circumstances occurs, not as a means to challenge the original ruling.

[19] The applicant's reliance on Rule 42(1)(b) is misplaced, as he is not identifying a patent error by the Court but rather seeking to introduce new forensic audit that was available but not adequately disclosed during the initial proceedings. An order that reflects the Court's actual intention when it was given cannot be varied simply because a party regrets their prior disclosures or wishes to supplement their case with additional evidence. The onus was on the applicant to present a full and accurate financial picture in the Rule 43 application. Having failed to do so, he cannot now seek relief under Rule 42(1)(b). The application must, therefore, be dismissed.

[20] While the respondent has sought a punitive costs order, I do not find that the applicant's conduct warrants such a sanction. A punitive costs order is reserved for cases of frivolous litigation, abuse of process, or conduct that unnecessarily inflates costs, none of which have been established here. Consequently, the applicant will be liable for party and party scale costs. While this is a somewhat unusual point in law in an urgent matter, the R67A scale will be scale B.

Order

[21] The following order is made:

1. The application is dismissed with costs, which costs are to be taxed on scale B.

WJ du Plessis

Judge of the High Court
Gauteng Division, Johannesburg

¹¹ [2019] ZACC 22.

Heard on: 25 February 2025

Decided on: 27 February 2025

For the applicants: H Patel instructed by Rademeyer Attorneys

For the respondents R Andrews instructed by Barnard Incorporated