

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION PRETORIA**

Case Number: 2024/136756

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED

DATE 14 August 2025

SIGNATURE

In the matter between:

S[] M [] M []

Applicant

and

G [] M [] M []

First Respondent

L [] F [] K []

Second Respondent

JUDGMENT

VIVIAN AJ

Introduction

- [1] The applicant and the first respondent were married to each other in community of property. On 22 October 2024, at the instance of the first respondent, Kubushi J granted an order of divorce together with prayers dealing with arrangements for their children and the patrimonial effects of the marriage.
- [2] The first respondent did not attend court on 22 October 2024. She says that she did not have funds to instruct her attorneys. Her attorneys wrote a letter to the applicant's attorneys in which they said that they would not be attending court because they did not have "financial instructions". I take this as a euphemism for not having been placed in funds by the first respondent.
- [3] On 25 November 2024, the applicant launched an application seeking a variation of the 22 October 2024 order. She was represented by the same firm of attorneys who had represented her in the divorce proceedings. She cited her erstwhile husband as the first respondent and the court appointed liquidator as the second respondent. The second respondent did not participate in the proceedings. The first respondent opposes the application.
- [4] The application is expressly brought in terms of Rule 42(1)(a). That Rule reads:
- "(1) The court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary:*
- (a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby ..."*
- [5] It is common cause that the applicant is a person affected by the 22 October 2024 order. However, the first respondent disputes that the order was erroneously sought or granted.

[6] Relying on the Constitutional Court's judgment in **Zuma v Secretary**,¹ the first respondent also disputes that the order was granted in the applicant's absence in the sense intended in Rule 42(1)(a).

[7] Mr Kilifile, who appeared for the applicant, argued that there is a difference between the applicant's conduct in **Zuma v Secretary** and the applicant's conduct in this matter. The applicant was absent from court because she could not afford legal representation. For purposes of this judgment, I will assume that the order was granted in her absence.

[8] The application turns on whether the order was erroneously sought or granted.

The requirement of erroneously sought or erroneously granted

[9] It is a well-known principle that once a court has issued a final order, it is *functus officio* and may not ordinarily vary or rescind its own judgment. That is the function of an appeal court.²

[10] As Jones AJA explained in **Colyn**, Rule 42(1) caters for mistake. It gives the Court the power to rectify a mistake. But that power is limited to the express categories in the three subrules. Rule 42(1) is procedural in nature.³

[11] Rule 42(1)(a) is confined to procedural errors. If there is no procedural error, then the rule finds no application.⁴

[12] In **Lodhi**, Streicher JA held:

“Similarly, in a case where a plaintiff is procedurally entitled to judgment in the absence of the defendant the judgment if granted cannot be said to have been granted erroneously in the light of a subsequently disclosed defence. A Court

¹ *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others* (CCT 52/21) [2021] ZACC 28; 2021 (11) BCLR 1263 (CC) (17 September 2021)

² *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills* (Cape) 2003 (6) SA 1 (SCA) at para 4

³ *Colyn v Tiger Food Industries Ltd*, *supra* at para's 6 to 7

⁴ *Freedom Stationery (Pty) Ltd and Others v Hassam and Others* 2019 (4) SA 459 (SCA) at para 18

which grants a judgment by default like the judgments we are presently concerned with, does not grant the judgment on the basis that the defendant does not have a defence: it grants the judgment on the basis that the defendant has been notified of the plaintiff's claim as required by the Rules, that the defendant, not having given notice of an intention to defend, is not defending the matter and that the plaintiff is in terms of the Rules entitled to the order sought. The existence or non-existence of a defence on the merits is an irrelevant consideration and, if subsequently disclosed, cannot transform a validly obtained judgment into an erroneous judgment.”⁵

The material facts

[13] The applicant's case is that the 22 October 2024 order was erroneously granted because Justice Kubushi's attention was not drawn to a signed settlement agreement between the parties.

[14] The circumstances in which the settlement agreement was signed are essentially common cause. In 2012, the first respondent instituted divorce proceedings in the Randburg Regional Magistrates Court. On 30 November 2015, in the course of those proceedings, the parties signed a settlement agreement. They agreed that the marriage relationship had irretrievably broken down and that there were no reasonable prospects of reconciliation. They agreed that the divorce would proceed on an unopposed basis.

[15] The settlement agreement addressed the care and maintenance of their two children and the patrimonial effects of the marriage.

[16] However, the applicant and the first respondent then reconciled. The divorce did not proceed. During that time, a further child was born of the marriage. According to the first respondent, the matrimonial difficulties resurfaced in 2019. In 2023, he issued summons for divorce in this Court.

⁵ Lodhi 2 Properties Investments CC and Another v Bondev Developments (Pty) Ltd 2007 (6) SA 87 (SCA) at para 27

[17] The applicant opposed the action. The appearance to defend was signed by her attorneys. A notice of bar was delivered on 20 June 2023. On 21 June 2023, the applicant's attorneys delivered a notice of withdrawal. On 28 June 2023, the applicant delivered a plea and a counterclaim. The applicant personally signed the plea and counterclaim.

[18] The applicant made no reference to the settlement agreement in either the plea or the counterclaim. After she was eventually compelled to make discovery, she did not discover the settlement agreement. The filing sheet for the discovery affidavit was signed by the applicant's attorneys, who had by then been reinstated as her attorneys. I have not been able to locate a notice recording such reinstatement, but it is common cause that the attorneys were reinstated.

[19] A pretrial conference was held before Ledwaba DJP on 6 May 2024. The minute was signed by the attorneys for both parties. It recorded that the only issues to be decided by the trial court were the divorce order and division of the joint estate. The minute records that the parties could not agree on the division of the joint estate. There was no reference to the signed settlement agreement.

[20] The matter was allocated for trial on 22 October 2024. The first respondent's attorney duly served a notice of set down on the applicant's attorneys.

[21] On 2 October 2024, the first respondent gave notice of his intention to amend his particulars of claim. The applicant did not object to the amendment, and on 17 October 2024, the first respondent's attorney delivered the amended particulars of claim. The amendment introduced a new paragraph in which it was asserted that the parties had been unable to agree on division of the joint estate, that a liquidator should be appointed, and that the second respondent had consented to be appointed as liquidator. The relief sought was amended accordingly.

[22] On 2 October 2024, the first respondent's attorneys sent an email directly to the applicant. They did so because the applicant's attorneys had failed to respond to correspondence relating to a proposed further pre-trial. The attorneys

informed the applicant that the matter had been set down for 28 October 2024. They also informed her that the particulars of claim had been amended to include the appointment of a liquidator. Neither of these assertions was factually correct. The date was wrong and the amendment had not yet been effected.

[23] The first respondent replied to the email. She said that she was unavailable on 28 October 2024 due to a maintenance trial and that she was writing exams between 17 and 25 October 2024.

[24] The first respondent's attorneys responded and requested the applicant's exam timetable so they could approach the Registrar to seek an alternative date. The applicant provided this information. The first respondent's attorneys then realised their mistake regarding the trial date and sent an email to correct their error. The applicant again responded, reiterating that she was writing exams.

[25] On 3 October 2024, the first respondent's attorneys sent a letter to the applicant. They pointed out that the applicant was not, in fact, writing an exam on 22 October 2024. They stated that, in the circumstances, the first respondent would not agree to a postponement. They reiterated that the particulars of claim had been amended to include the appointment of a liquidator. They explained that the consequence of the appointment would be that the assets of the joint estate, including the matrimonial home, would be sold, and her pension fund would be attached. They asked the applicant to please attend court on 22 October 2024 and informed her that court started at 09h30.

[26] On 21 October 2024, the applicant's attorneys sent a letter to the first respondent's attorneys. They said that they did not have financial instructions and would not be appearing in court. They invited the first respondent's attorneys to contact their client directly, and gave her contact details. They did not, however, formally withdraw as attorneys.

[27] The applicant did not attend court on 22 October 2024. The matter came before Kubushi J. She granted an order that essentially mirrors the relief sought in the amended particulars of claim.

[28] The applicant, once again represented by the same attorneys, then launched this application.

Analysis

[29] The heart of the applicant's case is that the order was erroneously granted because the parties had entered into a binding settlement agreement. She said that, in entering into the settlement agreement, the first respondent had waived any right or claim in respect of her pension interest, the movable property and the debts of the joint estate.

[30] The applicant said that the first respondent failed to disclose the settlement agreement to Kubushi J. During oral argument, Mr Kilifile referred me to the judgment in this Division in **Du Preez v Du Preez**⁶ as authority for the submission that there is a duty on litigants to act with the utmost good faith (*uberrimae fidei*) and to disclose all relevant information, even if it is adverse to them.

[31] This submission has two difficulties. The first is that **Du Preez v Du Preez** was a Rule 43 application. Murphy J said:

“Moreover, the power of the court in rule 43 proceedings in terms of rule 43(5) is to 'dismiss the application or make such order as it thinks fit to ensure a just and expeditious decision'. The discretion is essentially an equitable one and has accordingly to be exercised judicially with regard to all relevant considerations. A misstatement of one aspect of relevant information invariably will colour other aspects with the possible (or likely) result that fairness will not be done. Consequently, I would assume there is a duty on applicants in rule 43

⁶ Du Preez v Du Preez 2009 (6) SA 28 (T)

*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."*⁷

[32] Murphy J confined his statement to Rule 43 applications. He held that because a misstatement of one aspect of relevant information in a Rule 43 application would invariably colour other aspects, which could result in fairness not being done, there is a duty on applicants in Rule 43 applications to act with the utmost good face and fully disclose information relating to their financial affairs. I have noted up the judgment. This passage has been cited in a number of other judgments, but each one is in the context of a Rule 43 application.

[33] There is a similar duty in *ex parte* applications.⁸ The reason is plain – the other party does not get an opportunity to present its case in an *ex parte* application.

[34] There is, however, no such general duty of disclosure in civil proceedings.

[35] The second difficulty with the submission is that the underlying assumption is not only that the first respondent knew he had signed the settlement agreement, but also that he knew it was binding on both parties, despite it not having been made an order of court in the earlier proceedings. There is no evidence from which this assumption can be inferred.

[36] Indeed, the conduct of both the applicant and the first respondent suggests that neither considered that the settlement agreement was binding. Neither discovered the document, neither referred to it in pleadings. The attorneys for both parties met before the Deputy Judge President and agreed that the issue to be decided at trial was the division of the joint estate.

⁷ Du Preez v Du Preez, *supra* at para 16

⁸ Schlesinger v Schlesinger 1979 (4) SA 342 (W); National Director of Public Prosecutions v Basson 2002 (1) SA 419 (SCA) at para 21

[37] This was an agreement that was deliberately reached at a pre-trial conference. As Harms JA explained: *“To allow a party, without special circumstances, to resile from an agreement deliberately reached at a pretrial conference would be to negate the object of Rule 37, which is to limit issues and to curtail the scope of the litigation ... If a party elects to limit the ambit of his case, the election is usually binding.”*⁹

[38] There is a further difficulty with the applicant’s case. When the matter came before Kubushi J, the first respondent was procedurally entitled to judgment. Her attention was not drawn to the settlement agreement. But the settlement agreement is, at best, a defence to the first respondent’s claim. Kubushi J did not make a procedural error in granting the order sought by the first respondent. Reliance on non-disclosure of the settlement agreement as resulting in the order being erroneously granted falls foul of the rule in **Colbyn** and **Lodhi**.

[39] The applicant has accordingly not established the jurisdiction facts for this court to exercise its discretion in terms of Rule 42(1)(a). The application must accordingly be dismissed.

[40] Having reached this conclusion, it is not necessary for me to consider whether the settlement agreement in fact remained in effect and whether reliance on it would have been a defence to the first respondent’s claim.

Counterapplication

[41] The first respondent brought a counterapplication. He sought a variation of paragraph 7 of the 22 October 2024 order.

[42] Paragraph 7 is an order in terms of Section 7(8) of the Divorce Act (Act 70 of 1979). When the pension fund was notified of the order, it indicated that the

⁹ *FiltaMatix (Pty) Limited v Freudenberg & others* [1998] 1 All SA 239 (A) at page 247

order did not sufficiently identify the pension interest that is the subject of the order.

[43] No costs were sought in the counterapplication.

[44] The applicant did not oppose the counterapplication. Mr Kilifile properly conceded that, if the main application did not succeed, the counterapplication should be granted.

[45] The court is entitled in terms of Rule 42(1)(b) to vary an order to correct an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission. I intend to do so. However, the wording proposed by the first respondent is not consistent with the usual form of order in this Division. I will grant an appropriate order in the form granted by the Full Court in **M.A.P v F.M.A.N.**¹⁰

Costs of the main application

[46] In his answering affidavit, the first respondent described the conduct of the applicant's erstwhile attorneys as unethical. The first respondent sought costs against the attorneys *de bonis propriis*.

[47] Mr Baloyi also pointed out that the attorneys withdrew as the applicant's attorneys in this application shortly before the hearing and that new attorneys were appointed on 30 July 2025. He suggested that this was an apparent attempt to avoid a costs order against the attorneys.

[48] At my request, the applicant's erstwhile attorneys uploaded an affidavit in which they explained their conduct. The explanation is not perfect. In particular, there is no proper explanation for their failure to withdraw in the divorce action and their letter of 21 October 2024.

¹⁰ M.A.P v F.M.A.N (A151/2023) [2024] ZAGPPHC 858 (29 August 2024) at para 29

[49] Once an attorney is on record in a matter, the attorney owes both their client and the court, a duty to withdraw from the matter timeously. It is not sufficient to simply inform the other party that the attorney will not be in court. A proper notice of withdrawal must be delivered. The notice must comply with the requirements of Rule 16(4).¹¹ Moreover, as Didcott J explained (in the context of an appeal):

*“If an attorney wishes to carry on, hoping that at the last minute he will be given funds, and does not wish to withdraw at an earlier stage of the case because he will jeopardise his chance of being paid, then he must be willing to take the risk that he will find himself financing the appeal and go on with it. In other words, he either withdraws at an appropriate stage or he takes the risk and carries on and does the work.”*¹²

[50] Despite this, having considered the explanation, I am satisfied that it would not be appropriate to grant costs against the attorneys. This is particularly because the reason for their withdrawal in this application was that the applicant terminated their mandate. They then promptly delivered a notice of withdrawal. There are no facts from which I can draw the inference suggested by Mr Baloyi.

[51] In the circumstances, it is appropriate to order the applicant to pay the costs of the main application. Mr Baloyi asked for counsel's costs on Scale B. I consider that the matter is of sufficient complexity and importance to the parties to justify that scale.

Conclusion

[52] I find that the applicant has not made out a case for the relief sought in the notice of motion. The application should be dismissed. The counterapplication should be granted.

¹¹ Transorient Freight Transporters Corporation v Eurocargo Co-Ordinators (Pty) Ltd 1984 (3) SA 542 (W) at 546B

¹² S v Ndima 1977 (3) SA 1095 (N) at 1097 B to D – as Didcott J pointed out in MacDonald t/a Happy Days Cafe v Neethling 1990 (4) SA 30 (N) at 31D, this was a full bench decision.

[53] I accordingly order as follows:

- 53.1. The application is dismissed.
- 53.2. The applicant is to pay the first respondent's costs in respect of the application, with counsel's fees to be taxed on Scale B.
- 53.3. Paragraph 7 of the order granted on 22 October 2024 in case number 038284/2023 is varied by deleting the existing paragraph and inserting in its place the following:
 - “7.1 It is recorded that the Defendant is a member of the South African Broadcasting Corporation Pension Fund under membership number M[...].
 - 7.2 In section 7(8)(a) of the Divorce Act 70 of 1979, 50% of the Defendant's pension interest in the South African Broadcasting Corporation Pension Fund, calculated as at the date of divorce, is assigned to the Plaintiff.
 - 7.3 An endorsement is to be made in the records of the South African Broadcasting Corporation Pension Fund that the said 50% is payable to the Plaintiff within sixty days of the South African Broadcasting Corporation Pension Fund being informed of how the amount must be dealt with in accordance with the Plaintiff's election.”

S.C VIVIAN
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances

For the Applicant:	AB Kilifile Instructed by Malele Attorneys Inc.
For the Respondents:	F Baloyi Instructed by ET Nkuna Attorneys
Date of hearing:	11 August 2025
Date Delivered:	14 August 2025

MODE OF DELIVERY: *This Judgment was handed down electronically by circulation to the parties' and or parties' representatives by email and by being uploaded to CaseLines. The delivery date and time are deemed to be 10h00 on 14 August 2025.*