



**IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION MAHIKENG**

Not reportable

CASE NO: M415\2017

Reportable: **NO**

Circulate to Judges: **NO**

Circulate to Magistrates: **NO**

Circulate to Regional Magistrates: **NO**

In the matter between:

OSCAR JABULANI SITHOLE N.O

Applicant

(in his capacity as executor of the estate
of the late Priscilla Motsoenyane)

and

**MASTER OF THE NORTH -WEST HIGH
COURT : MAHIKENG**

First Respondent

REGISTRAR OF DEEDS: PRETORIA
Respondent

Second

IMPALA PLATINUM MINE LTD

Third Respondent

CAZEL PIETER ZIETSMAN
Respondent
VALDTIME (Pty) Ltd

Fourth

Fifth Respondent

JONAS R MONTSHO N.O

Sixth Respondent

Coram: Matlhape AJ

Heard: 15 August 2025

Delivered: Judgment was handed down electronically by circulation to the parties' legal representatives by email and released to SAFLII. The date and time for handing down of the judgment are deemed to be 16h00 on 23 March 2026.

Summary: Rule 41(2) of the Uniform Rule of Court – abandonment of judgment – judgment or order can only be abandoned by the party in whose favour the order has been granted – order referring the matter for oral evidence not a judgment in favour of any party– order gives direction on future conduct of proceedings.

ORDER

1. The matter is struck off the roll.
2. Costs reserved.

JUDGMENT

MATLHAPE AJ

Introduction

[1] On 12 September 2017, the Applicant, in his capacity as the Executor in the Estate of the late Priscilla Matsoenyane, approached the Court by way of application proceedings seeking the following substantive relief against the Respondents to wit:

- ‘1. Declaring the sale agreement of the property farm Wildebeest between the 4th and the 5th respondents null and void due to it not being authorised by the representatives of the deceased.
2. Alternatively, if it is found that the sale was authorized, that such authorisation and/or consent was obtained by misrepresentation by the 4th respondent.
3. The transfer of the property from the name of the late Priscilla Mazzoni into the name of the 5th respondent under title Deed number T[...] is declared void and is set aside.
4. That the second respondent be ordered to cancel the title deed number 206752907 in the name of the 5th respondent and to cancel all the rights accorded to the 5th respondent by virtue of the sale and transfer of the property; and
5. Costs order be granted against the first, second, third, fourth and the fifth respondents.
6. Further and alternative relief.’

[2] The matter was heard by my brother, Petersen J, who handed down judgment and an order referring the application to oral evidence in terms of Rule 6(5)(g) of the Uniform Rules of Court on the basis that there were material disputes of fact which could not be resolved on affidavit.

- [3] It is common cause that Petersen J made the referral order *mero motu* and not on the application of either party. This is a crucial fact in this matter.
- [4] Approximately two years after the aforesaid order had been granted, the matter served before me. Counsel for the Applicant requested that this Court determine the very same application that has already been determined by my brother Petersen J who had handed down the aforesaid judgment and order, referring the matter to oral evidence. The request is to the effect that this court should determine the aforesaid application on the same papers as they were before Petersen J, including the heads of argument, supplementary heads of argument and submissions made during the hearing of the application. It was submitted that the Applicant “*abandons*” the judgment and order referring the matter to oral evidence. The Applicant filed a notice to abandon Judgment in terms of Rule 41 of the Uniform Rules of court.
- [5] In the Applicant’s Supplementary Heads of Argument it is stated that
- ‘The applicant and the 5th respondent, through their legal representatives, filed a joint practice note notifying the court about the abandonment of the interlocutory ruling of Petersen J and for the application to be decided on the papers as they stand, the applicant is dominus litis and decides how his matter should be dealt with.’
- [6] I issued a directive to both legal representatives of the parties to file heads of argument addressing the issue of whether it is competent that a party may “*abandon*” judgment and order of another court referring the matter for oral evidence.
- [7] I must mention that Counsel for the Respondents immediately stated that he would not be able to do so as he was doubtful that same can be done.

He went as far as mentioning that he would not be filing such heads of argument and that he might even withdraw from the matter informing the court that he might not even be in attendance on the next hearing date to argue this point. I have since only received submissions from counsel for the Applicant.

- [8] The issue before me is whether such abandonment is competent in law, and whether this Court may disregard the prior order granted by a competent court.
- [9] I did not deal with the merits of this matter at all.

The Order referring the matter to trial

- [10] As stated herein above, on 19 April 2023 my brother, Petersen J handed down a comprehensive judgment and an order referring the matter to trial. The order reads as follows:

- ‘(i) The matter is referred to trial.
- (ii) The notice of motion shall stand a simple summons, the founding affidavit shall stand as the plaintiff’s declaration, the answering affidavit shall stand as the defendant’s plea.
- (iii) The witnesses relevant to the adjudication of the trial, shall be the applicant who deposed to the founding affidavit with all witnesses who have deposed to confirmatory affidavits; the deponent to the answering affidavit and all witnesses who deposed to confirmatory affidavits on behalf of the respondents. Any other witnesses that either party wishes to call may be called after due notice has been given to the other side, but not less than 15 days before trial.
- (iv) Pre- Trial procedures, including discovery and the request for and provision of trial particulars, shall be regulated by the Uniform Rules of Court in respect of action proceedings. Discovery of documents not forming part of the

application papers shall take place in accordance with the provisions of the Rules of Court.

- (v) The parties are granted leave to invoke Rule 28 to amend their papers if they so elect.
- (vi) The issue of costs is reserved for the determination by the trial court.'

[11] The judgment dealt at length with the legal position where a matter cannot be determined on papers due to a material dispute of fact that has arisen. I will not revisit a plethora of case law that has been referred to in the judgment since the applicable law is not in dispute.

[12] Significantly, in the Supplementary Heads of Argument filed by the Applicant, it is conceded that:-

‘During argument neither of the parties asked the Court to refer the matter to oral evidence because the applicant was satisfied with the fact that the application be decided as motion proceedings on paper.’

Rule 41 of the Uniform Rules of Court

[13] The real issue that I have to determine is whether a party can simply disregard an order of a competent court that has not been set aside and more specifically whether the provisions of Rule 41 apply in a case such as the present where the order was granted *mero motu*.

[14] On 18 August 2025 the Applicant filed a notice in terms of Rule 41 stating that ‘The Applicant and the Fifth Respondent abandons the judgment and order of Petersen J in whole delivered on 19 April 2023’.

[15] Rule 41(2) of the Uniform Rules of Court states the following:

‘41. Withdrawal, settlement, discontinuance, postponement and abandonment

- (2) Any party in whose favour any decision or judgment has been given, may abandon such decision or judgment either in whole or in part by delivering notice thereof and such judgment or decision abandoned in part shall have effect subject to such abandonment. The provisions of sub-rule (1) relating to costs shall *mutatis mutandis* apply in the case of a notice delivered in terms of this subrule.’

[16] The Rule is clear regarding who may abandon a decision or judgment. It refers to any party in whose favour the decision or judgment has been granted. This then means that judgment should have been granted in favour of either the Applicant or the Respondent. In this case, the Judgment has not been granted in favour of any of the parties, therefore neither the Applicant nor the Respondent can abandon the Judgment or decision of the court to refer the matter to trial.

[17] In the case of *Coetzer v Wesbank t/a FirstRand Bank Ltd*, the court held that¹:

“An abandonment is an election available to Westbank whether to enforce the rights obtained in terms of the judgment or not. A mere abandonment does not extinguish the existence of the judgment against the applicant’s name. The default judgment is final in effect and stands until it is varied, rescinded or set aside. It is not within the power of the plaintiff to vary or rescind a judgment. It cannot usurp the court’s role in purporting to do so by using Rule 41(2)”.

¹ 2022 (2) SA 178 (GJ) at para 26-27

[18] Furthermore, in *Body Corporate 22 West Road v Erggold Property Number 8 CC*², the court, in equating abandonment of judgment to a waiver held that:

“The waiver is a mechanism whereby a party can limit costs or distance himself from a particular judgment, but it certainly, as I have already indicated above, cannot be equated to a rescission or setting aside of the judgment on appeal...”

[19] In view of the above, it is clear that the Applicant cannot abandon a judgment that was not granted in his favour.

The effect of an order referring the matter for oral evidence

[20] In *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd*³ the Court explained that where genuine disputes of fact arise in motion proceedings, oral evidence or trial procedures may be necessary.

[21] In this case the referral of motion proceedings to oral evidence in terms of Rule 6(5)(g) was a judicial determination that the dispute of fact cannot properly be resolved on the papers. It was not a judgment in favour of either the respondent or the applicant. It is only an order to regulate future conduct of proceedings.

[22] In *Pahad Shipping CC v Commissioner, SARS* a court has a wide discretion in terms of Rule 6(5)(g) of the Uniform Rules of Court regard to referring matters to oral evidence where application proceedings cannot be properly decided by way of affidavit. In certain circumstances,

² JDR 2258 at paragraph 9.

³ 1949 (3) SA 1155 (T)

the court itself may decide that a matter should be referred to oral evidence even where no application for such referral had been made⁴.

[23] The purported abandonment is therefore legally incompetent and of no force or effect.

Conclusion

[24] The provisions of Rule 41(2) of the Uniform Rules of Court are not applicable in this instance since a judgment and order referring the matter for oral evidence is clearly not a judgment or order in favour of any of the parties.

[25] In the absence of a proper rescission, variation, or appeal, this Court cannot disregard or override the order.

[26] Accordingly, the matter is therefore not properly before this Court for determination on the papers unless and until the order referring it to oral evidence is lawfully and validly set aside.

Order

1. The application is struck from the roll.
2. Costs are reserved.

⁴ *Pahad Shipping CC v Commissioner, SARS* [2010] 2 ALL SA 246 (SCA) at para [20]; see also *Tryzone Fourteen (Pty) Ltd v Batchelor N.O and Others* (3535/2013) [2016] ZAECPHC 9 (4 March 2016) at para [38].

MATLHAPE B

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG

Appearances:

For the applicants:	Advocate Mokhare SC
Instructed by:	Kutumela Sithole Inc

For second and third respondents:	Adv Scholtz
Instructed by:	KYRIACOU Incorporated

Date heard:	15 August 2025
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Date reserved:	05 December 2025
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Date handed down:	23 March 2026
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