

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 008246/2025

1. REPORTABLE: NO
2. OF INTEREST TO OTHER JUDGES: NO
3. REVISED: YES

DATE: 13 April 2026

SIGNATURE OF JUDGE:

In the matter between:

M[...] P[...] M[...]

Applicant

and

H[...] S[...] M[...]

Respondent

JUDGMENT

Woodrow, AJ:

Introduction:

[1] This is an application for rescission of a rule 43 order granted by this Court on 24 November 2025 (the “**rule 43 order**”).¹

[2] The rule 43 order provides that primary residence of the parties’ three minor sons is awarded to the respondent and rights of contact to the applicant. The impugned rule 43 order reads as follows:²

1. The Applicant is granted condonation for the filing of a further affidavit in terms of Rule 43(5) of the Uniform Rules of Court.

2. That the applicant and the respondent retain full parental rights and responsibilities as envisaged by section 18(2) of the Children's Act, 28 of 2005, and primary residence of the minor children vest with the Applicant and the respondent be awarded the following contact rights towards the minor children:

2.1 The right of the respondent to remove the minor children every alternate weekend, where she will collect the minor children after school and return the minor children to the applicant's residence by no later than 17h00, on a Sunday.

¹ CaseLines, 013-9

² The ‘applicant’ in the rule 43 order is the respondent in the present rescission application.

The ‘respondent’ in the rule 43 order is the applicant in the present rescission application.

- 2.2 The right of the respondent to remove the minor children every Wednesday after school, where she will spend two (2) hours with them, should her work schedule allow same.
- 2.3 The right of the respondent to exercise contact with the minor children for the entire day on the birthday of the respondent.
- 2.4 The right of the respondent to exercise contact with the minor children on Mother's Day with the specific understanding that the minor children shall spend every birthday of the respondent with the respondent.
- 2.5 The right of the respondent to telephonic contact (including video calls) at all reasonable times.

3. That costs of this application are reserved.

[3] The applicant initially launched the present rescission application as an urgent application. The notice of motion reads as follows:³

1. That the forms, service and time limits prescribed by the Uniform Rules of Court be dispensed with and that this application be heard as one of urgency in terms of Rule 6(12).
2. That the Rule 43 order granted on 24 November 2025 under case number 8246/2025 be suspended with immediate effect pending the final determination of this application and the filing of proper answering papers to the Rule 43 application.
3. That the Rule 43 order granted on 24 November 2025 be rescinded in its entirety.
4. That the Respondent be granted leave to file opposing papers to the Respondent's Rule 43 application within five days of the granting of this order.

³ CaseLines, 021-56

5. That pending the final determination of the Respondent's answering papers in the Rule 43 application the minor children shall remain in the primary care of the Respondent, and the Respondent shall exercise contact by agreement or as determined by this Honourable Court.
6. That the costs of this application be costs in the cause of the Rule 43 proceedings.
7. Further and alternative relief.

[4] On 9 December 2025, the application was struck from the urgent court roll. The applicant was directed to pay costs on a punitive scale.⁴

[5] The applicant thereafter enrolled the rescission application on the family court roll, seeking the aforesaid substantive relief in the ordinary course. It is this application that is before me.

[6] In addition to the usual set of papers filed in an opposed motion, the applicant filed a 'supplementary affidavit' in these proceedings. The respondent responded thereto by objecting to the admission of such supplementary affidavit into evidence, and (without waiver of such objection) filed his own supplementary affidavit. I directed at the hearing that the parties were to argue the matter on the assumed basis that the supplementary affidavits were admitted into evidence, but that a decision in this regard would be handed down with this judgment. Having considered the matter, I am of the view that both supplementary affidavits ought to be admitted into evidence in this matter. The affidavits provide material facts regarding *inter*

⁴ Order of Kyriazis AJ, CaseLines, 000-1

alia the children's current residential arrangements, their schooling and the referral of the matter to the Office of the Family Advocate. The supplementary affidavits are accordingly admitted into evidence.

Background facts

[7] The applicant is the defendant in a pending divorce action in this court in which summons was issued in December 2024. The respondent is the plaintiff in those proceedings. A plea has been filed.⁵ The divorce action is pending.

[8] The parties have three children, three sons. The children currently reside with the respondent in Pretoria in terms of the impugned rule 43 order.

[9] The applicant resides in Barberton, Mpumalanga.

[10] Briefly stated, the following chronology constitutes the lead up to the grant of the impugned rule 43 order:

a. The respondent issued the rule 43 application which was served on the applicant's former attorneys of record on 12 August 2025.

b. On 15 August 2025, the Office of the Family Advocate was provided with *inter alia* the pleadings in the matter and the rule 43 application.

⁵ Divorce pleadings, CaseLines, 002

The respondent further requested the institution of an enquiry by the Office of the Family Advocate in terms of an 'Annexure B' document.

- c. On 21 August 2025, the Office of the Family Advocate issued a letter informing the parties that a consultation would be held at the offices of the Family Advocate on 4 September 2025, and that the children and the parties were to be in attendance.
- d. On 22 August 2025, the applicant's former attorneys of record delivered a notice to oppose. They also requested that the rule 43 application be stayed or withdrawn whilst the Office of the Family Advocate conducted its enquiry and investigation into the best interests of the children.
- e. The attorneys of record of the respondent did not agree to the request and stated that the rule 43 application would proceed.
- f. On 28 August 2025, the respondent's attorneys addressed a letter confirming that the applicant was *ipso facto* barred from delivering an opposing affidavit. The applicant was notified that her time to file a sworn reply had lapsed and that she was *ipso facto* barred. In this regard, rule 43(3)(c) of the uniform rules provides: "*In default of delivery of a reply referred to in paragraph (a), the respondent shall be automatically barred.*"

- g. On 11 November 2025, notice of enrolment of the rule 43 application was served on the applicant's former attorneys of record.
- h. On the same day, a supplementary affidavit (which the respondent sought leave to have admitted into evidence in the rule 43 proceedings) was emailed to the applicant's former attorneys of record. Further facts were addressed in the supplementary affidavit, which the court hearing the rule 43 application admitted into evidence in terms of rule 43(5) of the uniform rules of court.⁶
- i. The applicant was informed of and aware of the court date.
- j. On 24 November 2025 Hassim J granted the rule 43 order.⁷

[11] The children have been living in the care of the respondent in Pretoria since 4 December 2025. They are enrolled in school (Spark school) in Pretoria, and are attending Grade R, Grade 2 and Grade 4 respectively.

[12] In January 2026, the legal representatives of the parties updated the Office of the Family Advocate with the developments in the matter.

The applicant's case for rescission:

⁶ Rule 43 order, par 1, CaseLines, 013-9

⁷ CaseLines, 013-9

[13] The applicant's case for rescission is essentially based on the contention that the rule 43 order was granted without the applicant being heard and without consideration of the facts that she had relayed (in writing) to her attorney. The applicant contends that her version was not placed before the court due to the negligence of her former attorney.

[14] The applicant contends that she has satisfied the requirements for rescission in terms of Rule 42 of the uniform rules of court as well the common law.

Findings:

[15] The rule 43 order was neither erroneously sought nor erroneously granted (as contemplated in rule 42(1) of the uniform rules of court).

[16] No procedural or factual error existed when the Rule 43 order was granted on 24 November 2025. The Court had before it properly issued and served papers, sworn evidence setting out the factual basis for the relief sought, and a supplementary affidavit which was admitted into evidence in terms of rule 43(5). The applicant having failed to deliver her reply in terms of rule 43 was *ipso facto* barred.⁸

[17] The respondent was procedurally entitled to seek, and the court was procedurally entitled to grant, the rule 43 order. The applicant's case – including that the applicant's former attorney failed to appear, failed to notify

⁸ Rule 43(3)(c) of the uniform rules.

her of the hearing date, and failed to act on her express instructions – does not render the rule 43 order erroneously sought or granted.⁹

[18] In **Lodhi 2 Properties Investments CC and Another v Bondev Developments (Pty) Ltd**,¹⁰ the Supreme Court of Appeal held as follows:¹¹
(footnotes excluded)

[25] However, a judgment to which a party is procedurally entitled cannot be considered to have been granted erroneously by reason of facts of which the Judge who granted the judgment, as he was entitled to do, was unaware, as was held to be the case by Neppen J in *Stander*. See in this regard *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) ([2003] 2 All SA 113) in paras 9 - 10 in which an application in terms of Rule 42(1)(a) for rescission of a summary judgment granted in the absence of the defendant was refused notwithstanding the fact that it was accepted that the defendant wanted to defend the application but did not do so because the application had not been brought to the attention of his Bellville attorney. This Court held that no procedural irregularity or mistake in respect of the issue of the order had been committed and that it was not possible to conclude that the order had erroneously been sought or had erroneously been granted by the Judge who granted the order.

[19] The case of the applicant cannot succeed in terms of rule 42(1) of the uniform rules of court.

⁹ Cf. **Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills** (Cape) 2003 (6) SA 1 (SCA) par [9] – [10].

¹⁰ 2007 (6) SA 87 (SCA).

¹¹ At par [25].

[20] Turning then to the common law basis for the application for rescission, in **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**,¹² Kampepe J on behalf of the majority in the Constitutional Court held as follows:¹³

[71] As an alternative to rule 42, Mr Zuma pleads rescission on the basis of the common law, in terms of which an applicant is required to prove that there is “sufficient” or “good cause” to warrant rescission. “Good cause” depends on whether the common law requirements for rescission are met, which requirements were espoused by the erstwhile Appellate Division in *Chetty*, and affirmed in numerous subsequent cases, including by this Court, in *Fick*. In that matter, this Court expressed the common law requirements thus—

“the requirements for rescission of a default judgment are twofold. First, the applicant must furnish a reasonable and satisfactory explanation for its default. Second, it must show that on the merits it has a bona fide defence which prima facie carries some prospect of success. Proof of these requirements is taken as showing that there is sufficient cause for an order to be rescinded. A failure to meet one of them may result in refusal of the request to rescind.”

Thus, the existing common law test is simple: both requirements must be met. Mr Zuma must establish that he had a reasonable and satisfactory

¹² [2021] ZACC 28.

¹³ At par [71].

explanation for his failure to oppose these proceedings, and that he has a bona fide case that carries some prospects of success.

[21] In my view, the applicant has failed to make out a case for rescission in terms of the common law. The applicant has failed to show good cause. The explanation furnished is not reasonable. The applicant was aware of the pending rule 43 proceedings and of the relief sought. When the relief was granted, the applicant was *ipso facto* barred. The applicant's attribution of negligence to her attorney can take the matter only so far.

[22] The context in which the present rescission application is brought is also not without relevance. The rescission relates to rule 43 proceedings and a rule 43 order. Rule 43 orders are interim and are not intended to be appealed or frequently amended.¹⁴ Furthermore, the children have now been in the care of the respondent and attending school in Pretoria for the entirety of this year. Based on these facts, and in the current absence of the report of the Office of the Family Advocate, it is not possible to conclude that the applicant has a bona fide case carrying some prospect of success.

[23] The matter is being investigated by the Office of the Family Advocate. I intend to issue an order requesting the aforesaid Office to report to the court on the best interests of the children in respect of primary residence *pendente lite*. It was held in **S.K v E.B.K** that:¹⁵

¹⁴ **S v S** [2019] ZACC 22 par [33].

¹⁵ (1228/2024) [2024] ZAFSHC 157 (24 May 2024) par [9].

[9] It would be open to anyone of the parties to apply afresh in terms of rule 43(6) for any variation if it appears from the Family Advocate's report to be justified.

[24] In my view, the applicant has failed to make out a case for rescission of the rule 43 order. The application ought to be dismissed.

The investigation of the Family Advocate:

[25] Both parties raise various concerns regarding the children being in the care of the other parent. There are diametrically opposing versions advanced by the parents regarding the best interests of the children.

[26] From the papers it is apparent that the matter is being investigated by the Office of the Family Advocate.

[27] In my view, and in order to ensure that the best interests of the children are safeguarded, the Office of the Family Advocate ought urgently to complete its investigation with reference to the current circumstances and to report to the court in this regard, specifically in relation to the issue of primary residence of the children pending the outcome of the divorce proceedings.

Costs:

[28] The respondent has sought a punitive costs order. In my view, the applicant's conduct does not warrant such a sanction. I do not find that the litigation is frivolous or an abuse of process. The fact that the applicant has failed to make out a case for the relief that she seeks does not warrant punitive costs. Accordingly, the applicant is liable for party and party costs. The matter is not complex. In my view, on a consideration of the relevant facts, costs of counsel ought to be on scale A.

Order:

[29] Accordingly, I make the following order:

1. The application is dismissed with costs.
2. The Office of the Family Advocate is requested urgently to report to the court in respect of the best interests of the children in relation to the issue of the place of primary residence pending the outcome of the divorce proceedings.

WOODROW AJ

ACTING JUDGE OF THE HIGH COURT

This Judgment was handed down electronically by circulation to the parties and or parties' representatives by e-mail and by being uploaded to CaseLines. The date and time for the hand down is deemed to be 10h00 on this 13TH day of April 2026.

Appearances:

Counsel for the Applicant: M Matlapeng

instructed by: Kabinde Attorneys Incorporated

Counsel for the Respondent: GL Kasselmann

instructed by: Barnard Incorporated

Date of Hearing: 12 March 2026

Date of Judgment: 13 April 2026