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**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Not reportable

Case Number: 13207/2024

In the matter between:

S[...] C[...] M[...]

Applicant

and

N[...] L[...] M[...]

Respondent

Coram: Greig AJ

Heard: 12 May 2026

Delivered: 2 June 2026

Summary: Rule 43(6) – application to set aside or vary rule 43 order – no material change in circumstances – application in effect one for rescission – not an exceptional case where there is a need to remedy a patently unjust and erroneous rule 43 order.

ORDER

[1] The application is dismissed.

[2] The applicant is to pay the respondent's costs, such costs to include the costs of counsel on Scale A.

JUDGEMENT

Greig AJ

INTRODUCTION

[1] This is an opposed application in terms of rule 43(6) of the Uniform Rules of Court in which the applicant, S[...] C[...] M[...] ('S[...]'), seeks to vary and set aside a rule 43 order granted by O'Brien AJ on 22 January 2026 ('the O'Brien order').

[2] The respondent, N[...] L[...] M[...] ('N[...]'), opposes the application and raises two points in limine: first, that the application is in truth a disguised rescission and an abuse of process; and second, that S[...] has failed to demonstrate any material change in circumstances occurring after the O'Brien order. In the alternative, she opposes the application on its merits.

[3] The parties were married in community of property on 26 September 1998, and are presently engaged in a divorce action pending before this Court.

[4] The O'Brien order was granted in rule 43 proceedings instituted by N[...]. In those proceedings she was the applicant and S[...] the respondent; in the present rule 43(6) proceedings their procedural roles are reversed.

[5] For the reasons that follow, I have concluded that the application is in substance an application for the rescission of the O'Brien order, dressed up as a variation under rule 43(6), and that it falls to be dismissed on that ground. I have also concluded that, even if I am wrong in that characterisation, and even on the most generous view of this Court's jurisdiction under rule 43(6), there is no proper basis for varying the O'Brien order.

BACKGROUND

The rule 43 application and the postponement from November 2025

[6] N[...] instituted the rule 43 application in June 2024 seeking maintenance pendente lite and a contribution towards her legal costs. The application was served on S[...] personally by Sheriff on 14 June 2024. S[...] did not deliver an opposing affidavit within the time allowed by rule 43(3)(a), and was barred under rule 43(3)(c).

[7] On 28 October 2025 a notice of set down was served, enrolling the rule 43 application for hearing, as an unopposed matter, on 26 November 2025. On 14 November 2025 N[...] deposed to a supplementary founding affidavit, which was served on 18 November 2025. S[...] delivered a notice of opposition on 19 November 2025, four days before the hearing. On 25 November 2025 he launched an application to postpone the hearing, contending that he had had insufficient time to prepare the financial material needed to answer.

[8] At the hearing on 26 November 2025, Mgengwana AJ indicated that the matter would be postponed to 19 January 2026, and that the parties' representatives should endeavour to agree the terms of a draft order and a possible interim contribution. According to N[...], S[...] 'refused to offer anything [and] hence it was the position that the parties should return on 19 January 2026 once the Defendant has responded to the Plaintiff's Founding and Supplementary Affidavits.'

[9] Counsel for S[...] submits that N[...]’s account of what occurred in November 2025 is hearsay, as no confirmatory affidavit was filed. He further contends that the record is silent as to whether the postponement application was granted, or whether the postponement application itself was postponed for hearing on 19 January 2026, as there is no order on file in this regard.

[10] However, S[...] proffers no version of his own in this regard. It further seems unlikely that the postponement application was itself postponed; it is far more likely that the rule 43 application was postponed and that, prior to the resumed hearing, S[...] ought to have filed a sworn reply. There is also no suggestion by S[...] that he in fact approached the matter on the basis that the postponement application was adjourned for hearing on 19 January 2026, and this appears to be belated supposition.

[11] The matter was enrolled on 19 January 2026 and postponed for hearing to 22 January 2026 before O’Brien AJ. On 19 January 2026 N[...]’s attorneys wrote to S[...]’s attorneys informing them that the matter would be heard on 22 January 2026. On 21 January 2026, the day before the hearing, S[...]’s attorneys withdrew as attorneys of record. The O’Brien order was granted, in S[...]’s absence, on 22 January 2026.

The O’Brien order of 22 January 2026

[12] The O’Brien order directed S[...], pendente lite, to:

- (a) Pay an initial contribution of R 30,000 towards N[...]’s legal costs in the divorce, within 14 days;
- (b) Pay maintenance of R 20,000 per month to N[...];
- (c) Continue to pay the bond instalments, rates, taxes and levies in respect of the two immovable properties at 4[...] B[...] Close, Parklands, and Unit 3[...], Hermanus Beach Club; and
- (d) Maintain N[...] as a dependant on his medical aid.

The rescission application

[13] S[...] says that he learned of the O'Brien order on 5 February 2026, through the respondent's attorneys, and that the sheriff served it on him on 17 February 2026. On 27 February 2026 he launched, in person, an application to rescind the O'Brien order in terms of rule 42(1)(a), on the ground that it had been erroneously sought and granted in his absence. However, he withdrew that application on 25 March 2026, two days before the respondent's answering affidavit in that application was due. He then immediately launched this application.

This application in terms of rule 43(6)

[14] The notice of motion in this application seeks the 'variation and setting aside' of the O'Brien order, and costs on the attorney and client scale. During argument I asked counsel for S[...] what, on his version, was to follow a simple setting aside of the O'Brien order. The answer was that the matter could be 'remitted'; alternatively, that there was sufficient material on the papers for this Court itself to decide what interim relief, if any, was appropriate.

[15] It is difficult to see to whom, or on what procedure, the matter could be 'remitted'. However I address the second possibility below in this judgement where I deal with variation.

APPLICABLE LEGAL PRINCIPLES

[16] Rule 43 provides a special expeditious procedure for interim relief in matrimonial matters. Rule 43(5) empowers the court to hear such evidence as it considers necessary and to make such order as it deems fit to ensure a just and expeditious decision. Rule 43(6) provides that the court 'may, on the same procedure, vary its decision in the event of a material change occurring in the circumstances of either party or a child, or the contribution towards costs proving inadequate'.

[17] On its plain terms, rule 43(6) is confined to two situations: a material change in circumstances occurring after the O'Brien order, and a contribution towards costs that has proved inadequate. It is not a vehicle for the rehearing of a rule 43 application. In *Grauman v Grauman*¹ it was held:

‘Rule 43 does not provide for this type of procedure, which is in essence a re-hearing of Rule 43, based on new evidence.’

[18] The change relied upon must thus post-date the order. Where a party contends that an order was obtained on false or incomplete information, in my view the remedy does not generally lie in rule 43(6) but in rescission in ordinary motion proceedings.²

[19] These principles have been applied to dispose of applications comparable to this one. In *MS v DS*³ a rule 43(6) application brought within a month of the original order was dismissed as ‘a rescission application disguised as a rule 43(6) application’. In a second such application, brought less than two months later, the applicant's counsel argued that the application was not a rescission application but rather an application to ‘vary the maintenance amount to zero’. The applicant's sworn statement stated that the application sought to ‘set aside and rescind’ the order. This too was dismissed as a ‘second attempt at rescission of the order’.⁴

[20] S[...] however relied on *S v S*, in which the Constitutional Court considered, and rejected, a challenge to the constitutionality of section 16(3) of the Superior Courts Act 10 of 2013 (which precludes an appeal against a rule 43

¹*Grauman v Grauman* 1984 (3) SA 477 (W) at 479E-F.

²See *Greenspan v Greenspan* 2001 (4) SA 330 (C) at 336B.

³ *M.S. v D.S.* (15002/2020) [2021] ZAGPPHC 167 (29 March 2021)

⁴*MS v DS* supra.

order). For present purposes the significance of the judgement lies in what the Court said about the breadth of rule 43(6):⁵

‘There may be exceptional cases where there is a need to remedy a patently unjust and erroneous order and no changed circumstances exist, however expansively interpreted. In those instances, where strict adherence to the rules is at variance with the interests of justice, a court may exercise its inherent power in terms of s 173 of the Constitution to regulate its own process in the interests of justice.’

[21] I accept that *S v S* recognises a jurisdiction, going beyond the literal terms of rule 43(6), to remedy a ‘patently unjust and erroneous order’ even where no changed circumstances exist, in the exercise of this Court’s inherent power under section 173 of the Constitution. But the Constitutional Court confined this jurisdiction to ‘exceptional cases’. The question is therefore whether this is such an ‘exceptional case’.

[22] S[...] also submitted, on the strength of *Leppan v Leppan*,⁶ that he was constrained to proceed under rule 43 and could not have invoked rule 6 or rule 42 in his aid. It is true that *Leppan v Leppan* holds that rule 6 can find application only on aspects which are not governed by rule 43.⁷

[23] However, I do not read *Leppan* as having the reach that S[...] would have it. It establishes that, for the matters dealt with in rule 43, rule 43 is the procedure to be followed. It does not hold that the rescission of a rule 43 order, a matter for which rule 43 makes no provision, is beyond the reach of rule 42 read with rule 6. On the contrary, the existence of a discrete rescission remedy under rule 42 is the very reason why rule 43(6) cannot be pressed into service as a substitute.

⁵*S v S and Another* [2019] ZACC 22; 2019 (6) SA 1 (CC).

⁶*Leppan v Leppan* 1988 (4) SA 455 (C).

⁷*Leppan v Leppan* supra.

DISCUSSION

The relief seeking to set aside the O'Brien order: disguised rescission

[24] On the first point in limine I am therefore, in large measure, in agreement with the submissions made on behalf of N[...]. Several features of the application, taken together, point unmistakably to its true nature as a rescission application.

[25] First, both the relief sought and the grounds advanced are couched in the language of rescission, not variation. The notice of motion asks for the O'Brien order to be 'set aside'. The founding affidavit complains that S[...]'s 'version or view was not before the court', that the O'Brien order was granted in his absence and rested on material non-disclosure, and that the proceedings amounted to a denial of natural justice. Most of these are quintessentially grounds for rescission under rule 42 or the common law. S[...]'s withdrawn rescission application sought relief identical in effect, on similar grounds.

[26] Second, S[...] cannot really point to a real change in circumstances occurring after the O'Brien order. Everything on which he relies under the rubric 'change in circumstances' pre-dates the O'Brien order of 22 January 2026: his retrenchment on 31 July 2024; his receipt of the severance package in August 2024 and its alleged depletion by May or June 2025; and the loan to Mr Mkaza. His financial position now is, on his own account, the same as it was when the O'Brien order was made. There is therefore no 'material change occurring in the circumstances of either party' within the meaning of rule 43(6).

[27] Third, the relief sought, a bare setting aside unaccompanied by any proposed variation, confirms the point. When pressed, counsel could not explain to whom, or on what procedure, the matter would be 'remitted'. A variation application that does not identify how the O'Brien order should be varied is a

contradiction in terms. What S[...] truly seeks is not the adjustment of the O'Brien order to fit changed circumstances, but its undoing on the footing that it ought never to have been granted in the first place.

[28] It follows that the application is an impermissible attempt to obtain a rehearing, or a rescission, of the rule 43 application under the guise of rule 43(6). On this basis the application falls to be dismissed.

The complaint about the erstwhile attorneys' withdrawal

[29] At the heart of S[...]’s grievance is the fact that his attorneys let him down: they withdrew on 21 January 2026, the day before the hearing, allegedly without complying with rule 16(4). He says he only learned of the withdrawal on 16 February 2026. He relies on *Ngcobo*,⁸ where a plaintiff’s attorneys gave notice of withdrawal to the other side the day before trial, without first notifying their own client.⁹

[30] However, firstly, a litigant can only go so far in relying on the negligence of their own attorney to escape the consequences of a default. There is a limit beyond which a litigant cannot disclaim responsibility for the lack of diligence of the attorney chosen; ‘to hold otherwise might have a disastrous effect upon the observance of the Rules’.¹⁰

[31] Secondly, S[...]’s professed ignorance of what occurred in January 2026 is inadequately explained. He had known of the rule 43 application since June 2024. He himself launched the postponement application in November 2025, and on his own version was in contact with his attorneys about the matter as late as Friday, 16 January 2026, when he provided documents under cover of

⁸ *Ngcobo v Union and South West Africa Insurance Co Ltd* 1964 (1) SA 42 (D)

⁹ *Ngcobo v Union and South West Africa Insurance Co Ltd* 1964 (1) SA 42 (D).

¹⁰ *Saloojee and Another NNO v Minister of Community Development* 1965 (2) SA 135 (A) at 141A-C.

an email acknowledging, if not explicitly the hearing on Monday 19 January, at least urgency such that the ‘affidavit from my friend or bank info will be sent soonest during the weekend’.

[32] Against that background, his claim to have been wholly unaware of the January 2026 hearing does not sit easily. The observation in *Ngcobo* that the litigant’s ignorance there was ‘largely due to the lack of interest which she herself displayed in the proceedings’¹¹ has resonance here.

[33] In any event, the rule 16(4) complaint, even if well founded, is a complaint about the regularity of the process that produced the O’Brien order. That, again, may be a possible candidate as rescission material under rule 42, but not for variation under rule 43(6).

[34] The WhatsApp exchange annexed as ‘SM5’, on which S[...] relies to show that he confronted his attorneys, contains messages emanating from a single number, apparently his own. His own message of 20 March 2026 records the attorney’s position that the attorney withdrew ‘due to my inability to provide ... documentation’. The documents requested of him had been sought as early as 2 December 2025, and he took more than a month to respond. His complaint to the Legal Practice Council refers to supporting material which has not been attached to the founding affidavit. These features leave the impression that the reasons for the withdrawal in January 2026 may not have been fully or frankly disclosed. This incomplete picture also does not incline me in favour of treating this case as ‘exceptional’.

Variation of the O’Brien order

[35] Even if I am wrong in characterising this as a disguised rescission, I am not satisfied that sufficient basis for variation has been laid. Even treating this as one of the 'exceptional cases' recognised in *S v S*, and revisiting the facts on the

¹¹ *Ngcobo v Union & South West African Insurance Co Ltd* 1964 (1) SA 42 (D) at 44A.

basis of the present affidavit, S[...] has not shown that the O'Brien order is patently unjust or erroneous, or even that a different order is warranted on the usual principles applicable to an application of this nature.

[36] As mentioned, counsel for S[...] accepted that all information required to make a decision in this regard is before the Court, and invited me, if persuaded, to make whatever variation the facts justified. I therefore intend to proceed with an analysis as to whether the O'Brien order should be varied based on the financial information provided by the parties in the context of this application.

[37] S[...]’s case is that he is unemployed; that his severance package of R 1,861,215.21 has been exhausted; and that his only income is R 50,000 per month, which he says is a repayment of a ‘soft loan’ of R 730,000 he advanced to a certain Mr Mkaza of Kwanda Construction. He says that he can no longer service the mortgage bonds, insurance and levies.

[38] However, he does not allege that he cannot afford the O'Brien order, as N[...] points out. His complaint is less that he is unable to pay than that he should not have to pay, because (he says) N[...] is self-sustaining and has concealed her means.

[39] Moreover, the income and expenditure he himself discloses do not bear out his professed impecuniosity. On his financial disclosure form his income is R 50,000 per month and his expenditure is of the same order. But the expenditure is heavily discretionary. It includes some R 10,000 per month on holidays (the respondent computes roughly R 120,000 a year for S[...] and his daughter), approximately R 5,000 per month on pets, R 2,700 per month described as ‘personal loans’, and further amounts on entertainment, outings and satellite television. A litigant who can find, on his own figures, R 180,000 a year for holidays and pets, cannot credibly say that R 20,000 a month for rule 43 maintenance for his estranged wife is beyond his means. On any reasonable

reprioritisation of the expenditure he himself lists, the R 20,000 maintenance obligation is affordable on an interim basis until the parties can finalise their divorce.

[40] The position is stronger still when his assets and liabilities are considered. On the disclosure form S[...] holds interests in two immovable properties: 33,5% in Unit 3[...], Hermanus Beach Club which he values at R 490,000, a 100% interest in 4[...] B[...] Close, Parklands (valued at R 2,600,000, against a bond of R 882,945.26). On those figures the net equity in the two properties is in the region of R 2,207,000, being approximately R 490,000 in the Hermanus property and approximately R 1,717,000 in the Parklands property.

[41] S[...] also discloses life and endowment policies worth in the region of R 273,000, and personal belongings (a Mercedes-Benz, watches and household contents) which he values at R 420,000 (he does not disclose the value of a Volkswagen Jetta which he lists only as a liability). Although S[...] estimates the total value of his interest in the assets at R 1,297,528, that figure understates his position. His liabilities (aside from mortgages) are in the comparatively modest sum of between R 129,000 and R 206,000.¹²

[42] It must also be kept in mind that rule 43 maintenance is, by its nature, interim. It endures only until the divorce is finalised, when the parties' respective positions will be determined in a trial of the action. As held in *S v S*,

¹² I should mention in this regard that the relevant disclosure form is partially in handwriting, and contains various inscrutable items including duplications. I have therefore taken the principal figures from the affidavits, and from the form where it can be read sensibly. Nothing turns on the precise arithmetic. On any reading of the form, S[...] is a man of substantial means, and the order is not shown to be beyond them.

“The fact that rule 43 orders may be enforceable for longer periods than was initially anticipated, is the fault of the way divorces are handled, often by litigants and practitioners, rather than a deficiency in the rule itself.”¹³

[43] Moreover, the mechanism in Rule 43(6) remains available to S[...] should there be a change in his circumstances.¹⁴

[44] In this regard I have not forgotten that components of the O’Brien order, mainly the bond, rates and levy payments on the two properties, are in substance directed at the preservation of assets which, the marriage being in community of property, fall within the joint estate. However, viewed against a net asset base in excess of about R 2 million and a present monthly inflow of R 50,000, an interim obligation of R 20,000 per month, coupled with the preservation of the parties’ immovable property, is not shown to be unaffordable for S[...], nor is there any serious challenge to the fact that N[...] is now unemployed and cannot service these essential obligations in relation to the property in the joint estate.

[45] As to the R 50,000 monthly receipt, its existence is common cause: the respondent admits that S[...] receives it as repayment of his loan and applies it to his expenses. Whether it is properly to be characterised as the repayment of capital (as S[...] says) or as an attempt to disguise remuneration or assets, as the respondent submits, is not an issue which I here attempt to resolve. On an interim footing the characterisation makes little difference. If it is loan repayment, it is a present inflow of some R 50,000 per month, behind which stands his substantial capital; if it is remuneration or something akin to it, then S[...] is in fact earning. Either way, the premise of his complaint, that he is without means, is not made out.

¹³ S v S supra para 54.

¹⁴ S v S supra para 57.

[46] To the extent that S[...]’s liquidity has been reduced, that is in material part of his own making. Not long after receiving a severance package of over R 1.8 million he advanced R 730,000 to Mr Mkaza, bought a vehicle for R 170,000 which he then sold for R 80,000. The respondent characterises the loan as a stratagem to diminish his estate and frustrate her claims in the divorce. I make no finding on that characterisation, which is a matter for the trial court. But there is force in the respondent’s submission that a litigant who has himself diminished his means cannot rely on the resulting position to escape an interim maintenance obligation.

[47] There is a further consideration that weighs against the relief sought. S[...] has paid nothing whatsoever under the O’Brien order despite the fact that it has been in place since January 2026. Of course I am aware that, in a similar manner to the applicant in *MS v DS*, S[...] in effect contends that the maintenance should be ‘reduced to zero’; nonetheless, S[...]’s non-compliance is a discretionary factor that tells against the grant of any relief amounting to a downward variation rather than a rescission.

[48] Much of S[...]’s affidavit is devoted to the allegation that N[...] concealed income, from her employment at Fairsure, from a CCMA payout, and from preservation funds. N[...] denies any non-disclosures. Her answer is that she was employed by Fairsure only on a fixed-term contract running from September 2024, which expired by effluxion of time on 30 May 2025; that the schedule S[...] relies upon dates from March 2025, when she was so employed; and that the CCMA payout was received in September 2022 and is no longer relevant.¹⁵ I therefore cannot find that any non-disclosure by N[...], making this case ‘exceptional’, is established on these papers.

¹⁵*Van der Linde v Van der Linde* 2015 JDR 0978 (GP).

[49] I similarly find little in the contentions raised by S[...] which could warrant interference with the contribution of R 30,000 to N[...]’s legal costs. S[...] merely says that there is no reason why he should be saddled with paying a contribution when on his version N[...] is gainfully employed. He also states that the respondent is the sole cause of the divorce ‘not getting anywhere’ and that in the action N[...] is ‘looking for a needle in a haystack’ and on a ‘fishing expedition’, focusing unduly on his severance package and suspicions that he is concealing funds. All these matters are largely beyond what I can reasonably traverse in the course of this judgement; suffice it to say that the amount of R 30,000 would appear to be relatively modest and would in any event not fund an extensive ‘fishing expeditions’.

[50] These are, in any event, matters that were or could have been raised in the rule 43 application and do not constitute a change of circumstances after the O’Brien order. For present, interim purposes, they do not displace the conclusion that the O’Brien order is affordable, and the maintenance justified.

[51] For these reasons, even if the application is not a disguised rescission, and even on the expansive view of jurisdiction recognised in *S v S*, this is not an exceptional case calling for the rectification of a patently unjust and erroneous order.

COSTS

[52] The respondent seeks costs on the attorney and client scale, on two grounds: the prolixity of S[...]’s papers, and the abuse of process constituted by the bringing an application which is in reality one for rescission. There is force in both contentions. The founding affidavit runs to 110 paragraphs, of which paragraphs 7 to 53 have little bearing on a rule 43(6) application; and the papers, with their annexures, run to about 165 pages, many of them irrelevant.

Rule 43 and rule 43(6) applications are intended to be expeditious and inexpensive.¹⁶

[53] However, although I regard S[...]’s papers as unduly prolix, and the application ought not to have been brought in the form or on the basis that it was, I am not persuaded that an award on the punitive scale is warranted, especially in the context of divorce proceedings. In the exercise of my discretion, I consider that the ordinary party and party scale is appropriate.¹⁷

[54] The respondent was represented by counsel, and the matter justified it. The costs of counsel should be allowed on Scale A in terms of rule 67A.

CONCLUSION

[55] In summary, this application is in substance an attempt to rescind the O’Brien order under the guise of a variation under rule 43(6). It falls to be dismissed on this ground alone.

[56] However, S[...] has, in any event, shown no material change in circumstances occurring after the O’Brien order. Even on the broadest view of this Court’s jurisdiction there is no ‘need to remedy a patently unjust and erroneous order’, and no changed circumstances exist.

[57] On his own version S[...] has substantial assets and income of R 50,000 per month, and the maintenance imposed ought to be affordable on an interim basis.

[58] I accordingly make the following order:

(a) The application is dismissed.

(b) The applicant is to pay the respondent’s costs, such costs to include the costs of counsel on Scale A.

¹⁶*E v E* 2019 (5) SA 566 (GJ).

¹⁷*E v E* *supra*.

M. Greig
Acting Judge of the High Court
Western Cape

Appearances

| | |
|---------------------|------------------------|
| For the applicant: | Y Mphahlwa |
| Instructed by: | Mphahlwa and Co. Inc. |
| For the respondent: | Adv G Michel |
| Instructed by: | Greenberg & Associates |