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

CASE NO: 2008-27557

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED: **NO**

25 JUNE 2026

DATE

SIGNATURE

MALULEKE, MAHUA MKHACANA JAMES

Applicant

and

MALULEKE, GEZANI RICHARD

Respondent

JUDGMENT

LINDEQUE, AJ

1. The applicant and the respondent are brothers who have been in protracted litigation against each other since 2008. The applicant brings an application in terms of Rule 42(1) to set aside and vary several

previously granted court orders, while the respondent brings a counter-application to compel the applicant to sign the necessary documentation to effect transfer of an immovable property in terms of a written deed of sale.

2. The disputes relate to the dissolution of the business relationship between the parties which includes ownership of the said immovable property, namely Erf 1[...], Chloorkop Extension 52 Township, Registration Division, I.R. Province of Gauteng held by Deed of Transfer T1[...] in the name of the applicant.
3. The applicant seeks the following relief in his notice of motion:
 - 3.1 A default order by Malan, J (as he then was), dated 9 December 2008, be varied and set aside as it was granted erroneously in the absence of the applicant and a certain Mrs M N Chauke and that it was granted on the premise that a partnership existed “*which was a mistake common to the Respondent*”.
 - 3.2 a default order by Willis, J (as he then was), dated 14 June 2011, be varied and set aside as it was granted erroneously in the

absence of the applicant and Mrs M N Chauke and as it was granted to set aside the order of Malan J, dated 9 December 2008 which was allegedly granted erroneously as set out above;

3.3 a default order/judgment by Modiba, J granted on 30 November 2015 under case number 37541/2015, be varied and set aside as it was allegedly granted erroneously in the absence of the applicant and Mrs M N Chauke and “*was granted erroneously on a mistake common to the parties*”.

4. The applicant further seeks condonation for the late filing of the application. The application was signed on 21 August 2019, almost four years after the last order in respect whereof the applicant was seeking Rule 42 relief, was granted by Modiba, J.

5. The history of the matter is as follows:

5.1 On 9 December 2008, Malan, J granted an order for the dissolution of the partnership between the applicant and the respondent (“the Malan, J order”).

- 5.2 In 2009 the applicant brought an application for the rescission of the Malan order, which application was dismissed by Mayat, AJ on 2 June 2009 (“the Mayat, AJ order”).
- 5.3 On 22 June 2009, the applicant filed a notice of intention for leave to appeal the Mayat, AJ order, but failed to prosecute the notice of intention for leave to appeal and same is still pending.
- 5.4 In October 2009 and under case number 72532/2009, the applicant approached the Gauteng Division of the High Court in Pretoria again seeking rescission of the Malan, J order. This was done despite the unsuccessful application before Mayat, AJ and the notice of application for leave to appeal filed in respect of the order of Mayat, AJ.
- 5.5 The application was dismissed by Webster, J on 2 December 2009.
- 5.6 On 24 March 2010, the applicant set down an application for rescission of the Malan, J order on the unopposed roll, which

order was granted by Mathopo, J (as he then was) on 30 March 2010 (“the Mathopo, J order”).

5.7 When the Mathopo, J order came to the knowledge of the respondent, he approached the court on an urgent basis to set it aside and Mokgoatlheng, J set the Mathopo order aside on 16 April 2010 (“the Mokgoatlheng, J order”).

5.8 On 14 June 2011, the respondent approached this court for a variation of the Malan, J order because the order did not describe the immovable properties in question, which order was granted by Willis, J (as he then was) (“the Willis, J order”).

5.9 As mentioned above this application seeking a variation and setting aside of various of the abovementioned court orders were launched during August 2019.

6. The respondent brings a counter-application seeking an order that the applicant be compelled and directed to sign all necessary documents to facilitate the transfer of the immovable property to himself, failing which

the sheriff be authorised to sign the transfer documents on behalf of the applicant. I will return to the counter-application later.

THE HEARING OF THE APPLICATION ON 22 APRIL 2026

7. When the application was called on 22 April 2026, Ms D H Golele of DH Golele Incorporated Attorneys, appeared on behalf of the applicant. Ms Golele also uploaded the practice note on behalf of the applicant on 11 November 2025 seeking the relief as per the notice of motion.
8. Ms Golele informed the court that she was appointed by the Legal Aid Board and had instructions from the Legal Aid Board to request the court to refer the application for mediation from the bar. Ms Isaaks, who appeared on behalf of the respondent objected on the grounds that Ms Golele was the applicant's fourth set of attorneys in this application and that it was the first occasion that mediation was mentioned. Ms Isaaks further contended that the application was in effect an application for postponement and that it was consistently the respondent who put the matter on the roll for hearing as the applicant neglected to do same.

9. In light of the history of the matter and the nature of a Rule 42 application, where the court has a discretion to vary or set aside a judgement or order only if the jurisdictional factors are present¹, notwithstanding whatever the parties may agree to in mediation, I refused the request to refer the application for mediation.
10. Thereafter Ms Golele brought an application from the bar on behalf of the applicant to withdraw his Rule 42 application.
11. In terms of Rule 41(1)(a) of the Uniform Rules of Court a person instituting any proceedings may at any time before the matter has been set down and thereafter by consent of the parties or leave of the court withdraw such proceedings.
12. Ms Isaaks objected to the withdrawal of the application on the grounds that in light of the history of the matter, a withdrawal would only enable the applicant to again launch an application for the relief sought in the notice of motion.

¹ Van der Merwe v Bonaero Park (Edms) Bpk 1998 (1) SA 697 (T) at 702H; Tshivhase Royal Council and Another v Tshivhase and Another; Tshivhase and Another v Tshivhase and Another 1992 (4) SA 852 (A) op 862G—863E.

13. I agreed with the contentions on behalf of the respondent and refused the applicant leave to withdraw the application.
14. Thereafter, Ms Golele brought another application from the bar on behalf of the applicant that the application be referred for oral evidence in respect of the disputes of fact relating to payment for the immovable property in terms of the written deed of sale concluded between the applicant and the respondent.
15. These disputes of fact, to which I will return later, do not relate to the main application for rescission in terms of Rule 42 of the Uniform Rules of Court, but only to the respondent's counter-application to compel the applicant to sign the necessary documentation for transfer of the immovable property from the applicant to the respondent.
16. I therefore also refused the applicant's application to refer the main application for oral evidence, whereafter Ms Golele indicated that she wanted to take further instructions from the Legal Aid Board.
17. The matter then stood down to afford Ms Golele the opportunity to obtain new instructions. When the matter was called again after the tea

adjournment, Ms Golele conceded the main application on behalf of the applicant, namely that the Rule 42 application be dismissed with costs.

18. There is no coherent explanation in the applicant's founding affidavit why he is entitled to any of the relief claimed in terms of Rule 42, nor why he did not pursue his application for leave to appeal against the Mayat AJ order nor why he launched another application in respect of the Malan J order in Pretoria under another case number.
19. There is furthermore no reasonable explanation for the years' long delay in bringing this application, since the granting of the different orders in question in the notice of motion. The application, even if it had any merit, which it does not have, has not been brought within a reasonable time.²

THE COUNTER-APPLICATION

² Firestone South Africa (Pty) Ltd v Gentiruco AG 1977 (4) SA 298 (A) at 306H;

20. In terms of the Willis, J order, the applicant had to make payment to the respondent of 50% of the fair market value of the immovable property. The parties could not come to an agreement regarding several aspects regarding the execution of the Willis, J order and in the end, the applicant and the respondent entered into a written deed of sale in respect of the immovable property on 4 November 2011. In terms of the deed of sale the applicant sold the immovable property to the respondent and the purchase price of R220 000,00 was payable by the respondent to the applicant's attorneys.
21. The respondent contends that he has complied with all his obligations in the deed of sale and that he has made full payment in the total amount of R255 816,00 to the applicant as follows:
- 21.1 Two payments of R80 000,00 and R25 816,14, which payments are not in dispute;
- 21.2 a further payment of R150 000,00 on 11 November 2011 to the applicant's attorney, namely I Mabunda Attorneys. This payment is in dispute. The respondent attaches an affidavit from Mr Isaac Mabunda who states under oath that the respondent complied

with all the obligations of the offer and made full payment of the purchase price into I Mabunda Attorneys' trust account. Mr Mabunda further states that payment was transferred into the applicant's account in full and final settlement of the matter. This affidavit was signed on 10 July 2019.

22. According to the respondent, upon payment of the purchase price, he could not effect transfer of the property into his name due to the high outstanding amount on the municipal account. He avers that he paid the whole outstanding amount on the municipal account only in November 2018, whereafter the applicant failed and/or refused to sign the necessary documents when he was requested to do so in writing by the respondent's attorney of record on 21 November 2018 in order to effect transfer of the property.
23. The applicant denies the payment of R150 000,00 on 11 November 2011 from the respondent's attorneys, Phungula Incorporated, to I Mabunda Attorneys, although the respondent attaches a Standard Bank deposit slip, dated 11 November 2011 showing a cheque deposit in the amount of

R150 000,00 with Phungula Incorporated as the drawer to I Mabunda Attorneys.

24. The applicant then in turn also attaches a letter from I Mabunda Attorneys, dated 19 March 2020, which states the following:

- “1. *We confirm that we act on behalf of Maluleke Mahua Makhacana James who is the seller in the abovementioned matter.*
2. *On an unknown date, our client entered into an agreement of sale of the property situated at 1928 Maduna Drive, Phomolong, Tembisa.*
3. *In terms of the Deeds of sale, our client being Mr Maluleke Mahua Makhacana (the seller) was to receive 50% of the fair market value of the property in the amount of R220 000,00 from Mr Maluleke Gezani Richard (the purchaser).*
4. *On or about the 15 November 2011, in terms of the deed of sale entered into by the parties, the purchaser paid our client only R80 000,00.*

5. *On 17 December 2011, a further R25 816,14 was paid into our account on behalf of our client by the purchaser's Attorney, following which no other monies were paid by the purchaser to our client and as a result the purchaser was in breach of the Deed of sale that was entered into between him and our client.*
6. *Subsequently a meeting was held between ourselves represented by Mr Victor Machete from our office on behalf of our client and Mr Mcwane from Phumgula Attorneys on behalf of the Purchaser. In the said meeting an agreement was reached between the two parties that since the purchaser was already in breach of the Deed of sale that was entered into, both parties should continue to work together on the said property so as to enable them to collectively pay the rates and taxes on the property as well as the legal costs.*

We hope you find the above in order and we thank you in advance."

25. This letter is signed with a signature which appears to be similar than the one appearing on the affidavit signed by Mr Mabunda, which was

annexed to the respondent's founding affidavit in respect of the counter-application.

26. There are therefore two directly destructive factual versions whether the R150 000, 00 was paid to the applicant's attorneys, I Mabunda Attorneys, who in turn seems to support both versions, which is untenable.
27. On the papers it seems as if the applicant has not expressly disputed payment of the full purchase price in terms of the deed of sale prior these proceedings. In light of the respondent's supporting affidavit from Mr I Mabunda as well as the deposit slip referred to above, I can also not find that the respondent should have realized when launching the counter-application that a serious dispute of fact, incapable of being resolved on the papers, was bound to develop and therefore dismiss the application.³
28. The counter-application cannot not be properly decided on affidavit as material facts, namely whether full payment for the immovable property was effected and whether there was a valid cancellation of the deed of sale by the applicant are in dispute.

³ Room Hire Co (Pty) Ltd v Jeppe Street Mansions 1949 (3) SA 1155 (T) at 1162 and 1168; Gounder v Top Spec Investments (Pty) Ltd 2008 (5) SA 151 (SCA) at paras 9-10.

29. The question therefore arises whether I should in the exercise of my discretion, decide to refer the respondent's counter-application for trial, or direct that oral evidence be placed before the court in respect of specific issues.
30. The question whether the R150 000.00 was paid or not and the documents attached in support of the different contentions in this regard would seem to suggest possible fraud and/or theft or forgery and uttering. I am of the view that proper discovery will have to be undertaken and that bank records would probably have to be subpoenaed to establish the true facts. Subpoenas in respect of different employees of the relevant firms of attorneys mentioned in the papers would also probably have to be issued for oral evidence and cross-examination.
31. In light of the above I am of the view that the counter-application should be referred for trial.

WHEREFORE I make the following order:

1. The applicant's application in terms of Rule 42 is dismissed with costs.

2. The respondent's counter-application to compel the applicant to sign all documents to facilitate the transfer of the immovable property, namely Erf 1[...] Chloorkop Extension 52 Township, Registration Division, I.R. Province of Gauteng, is referred to trial.
3. The respondent's notice of motion in the counter-application will serve as a simple summons.
4. The applicant's notice to oppose will serve as a notice of intention to defend. The respondent shall deliver a declaration within 20 days of this order after which, all court rules regarding actions will apply.
5. The costs of the counter-application are reserved to be determined by the trial court.

I M LINDEQUE
Acting Judge of the High Court
Gauteng Division
JOHANNESBURG

DATE OF HEARING: 22 April 2026

JUDGMENT DELIVERED: 25 June 2026

APPEARANCE FOR APPLICANT:

Ms D H Golele

ATTORNEYS FOR APPLICANT:
D H Golele Attorneys

APPEARANCE FOR RESPONDENT:
Adv W Isaaks

ATTORNEYS FOR RESPONDENT:
Moses Silinda Incorporated Attorneys