



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

CASE NO: 24274/2014

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

Date 3 September 2026

K. La M Manamela

In the matter between:

L[...] Z[...]

Applicant

and

S[...] M[...] Z[...]

Respondent

In re:

S[...] M[...] Z[...]

Plaintiff

and

L[...] Z[...]

Defendant

DATE OF JUDGMENT: This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on CaseLines by the Judge's secretary. The date of the judgment is deemed to be **3 September 2026**.

JUDGMENT

Manamela, J
Introduction

[1] This application - in terms of Rule 42(1)(a) of the Uniform Rules of this Court or the common law - was brought by Mr L[...] Z[...] for rescission of the order granted in favour of Ms S[...] M[...] Z[...] by the Court *per* Skosana AJ on 31 July 2023 ('the Striking Order'). Mr Z[...]’s defence in the divorce action instituted by Ms Z[...] was struck out in terms of the Striking Order. This means that, thenceforth, Ms Z[...] has been entitled to obtain the relief sought on a default basis. It is Mr Z[...]’s primary view that the Striking Order was erroneously sought or erroneously granted in his absence as a party affected thereby. This rescission application is opposed by Ms Z[...].

[2] The divorce action was initiated by Ms Z[...] in terms of summons issued on 25 March 2014. This is more than twelve years ago. A decree of divorce – dissolving the marriage in community of property (with inclusion of accrual) between the parties – was granted on 16 August 2016. The parties had concluded a settlement agreement whose terms were incorporated in the divorce order. The settlement catered for a separation of issues with some of them postponed *sine die* (without (fixing) a day (for a further meeting or hearing)).¹ The latter issues included the accrual of the parties’ respective estates. This issue remains the only one still to be determined in the divorce action.

[3] Henceforth, I refer to Mr Z[...] as the applicant and to Ms Z[...] as the respondent. This, obviously, is in respect of the application for rescission currently before the Court, as the parties swap references in the other related litigation.

[4] In a quest to pave the way for the determination of the accrual issue, the respondent sought the applicant to deliver a discovery affidavit in the divorce action. On 7 November 2022, Moshoana J granted an order compelling the applicant to act on the respondent’s Rule 35(3) notices served already in December 2019. The applicant failed to comply with the

¹ VG Hiemstra and HL Gonin, *Trilingual Legal Dictionary* (3rd edn, Juta 1992).

order. In due course the respondent brought an application to strike out the applicant's defence due to his failure to purge his non-compliance. As stated above, on 31 July 2023 Skosana AJ granted the Striking Order. This is the order the applicant urges the Court to rescind.

[5] The rescission application came before me as an opposed motion on 17 March 2026. Ms A Vosloo-De Witt appeared for the applicant and Ms L van der Westhuizen for the respondent. The matter was stood down to 20 March 2026, due to issues I will turn to in a moment. On the latter date Ms P Bosman replaced Ms Vosloo-De Witt as counsel for the applicant. I reserved this judgment after listening to submissions by counsel.

Costs in respect of the adjournment of the matter on 17 March 2026

[6] The matter was set down for hearing on 16 March 2026. There is a disagreement between the parties whether the set down was provisional or final. It is the essence of the discussion under this part. In terms of a directive I indicated that the matter will be heard on 17 March 2026, but it couldn't proceed on that date due to the unavailability of the applicant's counsel, Ms P Bosman. It was stood down for a hearing on 20 March 2026 under circumstances that I would turn to in a moment. The parties disagreed as to who is liable for costs of the stand down. To assist the Court when ruling on this, I directed that affidavits be filed on the issue. I refer to the material from the affidavits and submissions by counsel, next.

[7] On 15 October 2025, the respondent through her attorneys took steps towards the hearing of this application. Her attorneys delivered (by serving on their counterpart and uploading on CaseLines) a practice note, chronology, list of authorities and heads of argument. They also applied for an opposed motion hearing date by uploading a provisional notice of set down. The notice did not reflect any date and was blank. They, later, also filed an application for a hearing date of the matter on the opposed Family Court roll on 19

January 2025. On 6 February 2026, the respondent's attorneys uploaded a provisional notice of set down of the application for hearing on 16 March 2026.

[8] The applicant or his attorneys complain that because the notice setting down the matter for hearing on 16 March 2026 was clearly marked 'provisional', the applicant and his legal team, including his counsel, Ms Bosman, were of a legitimate belief that the set down was not 'final'. They genuinely expected a final notice of set down to be served in due course. Counsel was nevertheless instructed to prepare heads of argument. The heads were furnished by counsel on 24 February 2026, but had to be somewhat approved by the applicant. The document was only filed on 6 March 2026.

[9] On 11 March 2026, the applicant's attorneys sent an email to their counterpart for the respondent in which they, among others, undertook to apply for a 'final' date of hearing on the opposed motion court roll. They also sought in the email some collaboration by their opponents on the filing of a practice note. It is stated that this confirms that they and counsel were by that stage still unaware that the matter has been finally set down for hearing on 16 March 2026. This is disputed by the respondent including in her attorneys' email of 11 March 2026. The respondent's attorneys indicated in the latter email that their client would oppose any application for postponement, as the applicant as the *dominis litis* (master of the suit)² should have taken the lead in the enrolment of the application.

[10] On 12 March 2026, I caused to be published an allocated roll indicating that the matter would be heard on 17 March 2026 instead of 16 March 2026. Counsel for the applicant - by way of a practice note uploaded on CaseLines on 14 March 2026 and a note sent by the applicant's attorneys to my secretary on 16 March 2026 - requested that the matter be allocated for hearing on 20 March 2026, alternatively, during the week commencing on 23

² Hiemstra and Gonin, *Trilingual Legal Dictionary* (3rd edn, Juta 1992).

March 2026. Counsel had other engagements for which she was briefed earlier. It is denied that she was doubly-briefed. Counsel for the respondent objected against what she considered unilateral attempts by her counterpart for the applicant to move the date of hearing. I indicated through a widely shared note on the CaseLines platform and an email (by my secretary to the legal representatives) that I was amenable to hear the matter on 20 March 2026 provided there was an agreement between the parties. There were further exchanges, but no agreement.

[11] On 17 March 2026, the applicant sought postponement of the hearing of the application to 20 March 2026. This was opposed by the respondent. After listening to counsel, I decided to grant the postponement and stood down the matter for a hearing on 20 March 2026. I directed that the issue of who is liable for costs of the postponement of the proceedings on 17 March 2026 be addressed by way of affidavits. In the end, a ruling on the liability for costs issue, was also reserved with this judgment on the application itself. But I must mention that the material filed regarding the costs issue was unnecessarily voluminous, repetitive and to a large extent argumentative. This contributed to the regrettable delay in the delivery of this judgment.

[12] According to the applicant, on consideration of the full conspectus of the facts in the matter, no basis exists to hold the applicant liable for the respondent's costs of 17 March 2026 on any scale, including a punitive one. The applicant, it is stated, has provided a clear, cogent and *bona fide* explanation of the reason why his legal representatives were not aware that the matter has been set down for 16 March 2026. And the manner in which the respondent conducted the litigation in this application reveals a pattern similar to that which led to the granting of the Striking Order. Therefore, a proper order as to costs is that costs should be in the cause.

[13] Further, the applicant's case includes the following. His counsel had been retained since the inception of the rescission and due to an extremely dense nature of the facts in the matter, it was difficult to brief new counsel on an extremely urgent basis. Besides, the applicant would be prejudiced by the termination or exclusion of his chosen counsel from arguing the matter on his behalf. And the respondent created the ambiguity (whether provisional or final) as to the date of hearing.

[14] The case for the respondent includes what appears next. She criticises the applicant for heavily relying on the use of the word 'provisional' in the notice of set down, but yet he has not bothered to explain to the Court his own understanding of the word in the context of processes of this Court. Further, the applicant did not tell the Court what he understood was to occur on 16 March 2026. The applicant's assertions, it is also contended, are weakened by his delivery of heads of argument and other accompanying material. This does not comport with his declaration that he genuinely believed that the matter will not proceed as enrolled. He could have clarified the issue with the registrar of the Court, as far back as 9 February 2026. Also, it is trite that matters are enrolled for the Monday of the week they are to be heard and the presiding judge will allocate the matters for a hearing on that day or the other days of the week. This is why the notice of set down is stated as being 'provisional' as final enrolment is the prerogative of the presiding judge, it is further contended. Therefore, the respondent seeks that the applicant be held liable for the associated wasted costs on an attorney and client's scale, lest the respondent is left out of pocket.

[15] Upon a review of the facts before me, I am of the view that the applicant is overcapitalising on the inclusion of the word 'provisional' in the respondent's notice(s). This is so, despite the fact that the applicant should have been the one most eager to enrol the matter for determination. But - in the end - the same applicant was before the Court during

the week of 16 March 2026. The only problem was with the availability of his counsel on 17 March 2026, as the date allocated for the matter to be heard. Such unavailability of counsel is not uncommon. The problem here is how counsel (to some extent at both ends) handled the issue, which led to costs being unnecessarily incurred with the stand down. But under the circumstances I am unable to hold liable either of the parties for the costs incurred as a result. I will subsume the costs for the postponement or standing down in the ultimate costs order made.

Brief background

[16] The parties entered a marriage out of community of property (with inclusion of accrual) on 24 September 1994. On 16 August 2016, the marriage was dissolved by the order of this Court. In terms of the settlement agreement (incorporated in the order) the issues in the divorce action were separated and, currently, the accrual remains the issue still to be decided by the Court. Therefore, this background only concerns the interlocutory processes towards the determination of the latter issue, in the main, being the disclosure or discovery of documents by the applicant which led to the granting of the Striking Order. I will strive to constitute the background from the common cause facts between the parties or indicate the area of contestation.

[17] On 3 December 2019, the respondent served seven notices under Rule 35(3) on the applicant. The notices were, earlier on 15 November 2021, attached to communication sent by her attorneys to their counterpart for the applicant. The documents (to be discovered) were required by Mr Johan Ferreira, the respondent's expert, to finalise his report. The documents were referred to in the report by Mr Hardcourt Cook, the applicant's expert. This is why the documents were also needed for the experts to compile a joint minute of their opinions. There, further, was correspondence between the attorneys on the issue. In the end the

applicant was warned that should he persists in his failure to discover the material documents, application(s) to compel would be launched by the respondent and punitive costs would be sought against him.

[18] In July 2022, the respondent indeed launched the application to compel the discovery of documents by the applicant. According to the respondent, on 20 October 2022, the application was served on the applicant's previous attorneys. But the applicant expresses doubts as to the accuracy of this assertion. He doubts the proof of acknowledgement of service of the application uploaded on CaseLines, as it comprises a single page. The entire application ought to have been uploaded. The accusation is rejected by the respondent as being devoid of merit. In the respondent's view (confirmed under oath by her attorney) all that was done was to avoid uploading the entire application as it was already on CaseLines. Further, a notice of 'provisional' set down of the application for a hearing on 7 November 2022 was also served on the respondent on 20 October 2022. The applicant also complains about being afforded only a few days to signal his intention to oppose the application, despite the founding papers reflecting that they were ready three months before, in July 2022.

[19] On 7 November 2022, Moshoana J granted an order compelling the applicant to respond to the Rule 35(3) notices ('Compel Order') in the absence of the applicant. The respondent says that this confirms that the presiding judge was satisfied that the application has been duly served, despite the applicant's lamentation, stated above. The Compel Order was served on the applicant's previous attorneys on 16 November 2022. And the applicant had ten days, until 30 November 2022, to comply therewith.

[20] The respondent says her attorneys were ready to launch the application to strike out the applicant's defence due to his non-compliance with the Compel Order ('the Striking Application'), already at a pre-trial meeting held on 18 May 2023. The applicant's previous

attorneys are said to have refused to accept service of the application at the meeting, citing its voluminous nature, and requested that it rather be served normally at their offices. It was served on them on 24 May 2023 and was to be heard on 31 July 2023. This is, also, noted in the pre-trial minutes. But still the applicant disputes that proper service of the application was effected. This, again, is on the basis that only a single page has been uploaded on CaseLines as proof of service. He, also, denies the accusations and states that the respondent's attorneys were already aware that the late Mr Selwyn Shapiro, from Shapiro and Haasbroek (i.e. the applicant's previous attorneys), was ill-disposed during this period.

[21] On 31 July 2023, the Striking Order was granted by Skosana AJ and, thus, the applicant's defence in the divorce action was struck out. This paved the way for the respondent to pursue to finality the determination of the accrual issue on a default basis.

[22] In November or December 2024, this application was launched to rescind the Striking Order on the basis that it was erroneously sought or erroneously granted in the absence of the applicant, as envisaged in Rule 42(1)(a) or on the basis of the common law. It came before me for determination towards the end of March 2026 when this judgment was reserved.

Applicant's case (summarised)

[23] The rescission application, according to the applicant, is aimed at restoring his capacity or right to defend himself in the divorce proceedings in order to fend off the respondent's accrual claim. It is submitted on his behalf that due to the Striking Order he now faces a default judgment in the amount of R18 347 265.75 plus interest and punitive costs. The Striking Order is drastic, extremely prejudicial and far-reaching in effect. It,

consequently, deprived the applicant of his right to a fair trial in terms of section 34³ of the Constitution.

[24] It is submitted that the applicant has *bona fide* and legitimate grounds to challenge the quantum of the respondent's accrual claim, considered to be grossly overstated, in the amount of R18 347 265.75. According to Mr Johan de Lange ('Mr De Lange'), the applicant's new expert, the total accrual claim is R5 717 453.97. This amount will reduce by payments already made by the applicant to the respondent to only R2 470 858.72 which, evidently, is a fraction of the amount claimed on a default basis. Mr De Lange, it is further submitted, reached his opinion without some documents on the respondent's assets and liabilities.

[25] The Striking Order, it is submitted, was granted under circumstances which include Mr Shapiro of the applicant's erstwhile attorneys being diagnosed with brain cancer in late 2022, taking ill and ultimately passing away on 28 June 2023. Notably, his death was just over a month before the granting of the Striking Order on 31 July 2023, it is pointed out. He had been receiving treatment for cancer from when he was diagnosed to his death and this impeded his involvement in the matter. The applicant came to know of the Striking Order only in May 2024. This was when the respondent launched the application for default judgment. Notably, this was a period of almost a year after the Striking Order was granted.

[26] On 4 November 2024, the applicant terminated the mandate of his previous attorneys and instructed his current attorneys, Jaco Coetzee Attorneys. But there had been challenges in piecing together the chronology of events leading up to the Striking Order due to the condition of the file kept by the previous attorneys. The current attorneys also discussed the

³ Section 34 of the Constitution of the Republic of South Africa, 1996 provides, that: '[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'

matter with Ms Tammy Kaplan ('Ms Kaplan') who worked as an associate of the late Mr Shapiro, but this did not assist in closing all gaps in the chronology, it is declared.

[27] The applicant, as stated above, seriously doubts that the Striking Application was served on his previous attorneys. There is no proof of this in the files obtained from his previous attorneys. Ms Kaplan had advised his new attorneys that the application was not served. It is common cause that a confirmatory affidavit by Ms Kaplan does not form part of the papers before this Court. But, it is submitted for the applicant, that whether or not the Striking Application was served should not be the focus, as the applicant had no knowledge thereof or its enrolment until almost a year later when the default judgment application ensued. This is the basis for the applicant's case based on Rule 42(1)(a) (i.e. that the Striking Order was erroneously sought or erroneously granted in his absence) or the common law.

[28] Overall, it is submitted that, the applicant has provided a reasonable and cogent explanation for his failure to oppose the Striking Application. And, that he has demonstrated a *bona fide* defence towards the merits of the respondent's accrual claim to merit rescission of the Striking Order. Further, that the application for rescission is being pursued *bona fide* and was brought within a reasonable time under the circumstances. It is also submitted that the interests of justice, the rule of law and the applicant's Constitutional right to a fair trial dictate that the prejudicial Striking Order be rescinded to facilitate the applicant's participation in the finalisation of the divorce proceedings.

Respondent's case (summarised)

[29] According to the respondent, the rescission application does not constitute the applicant's genuine quest to rescind the Striking Order. It is a tactical manoeuvre on his part only being pursued after realising that default judgment was imminent. The lack of traction in enrolling the application for hearing confirms this. The rescission application was enrolled by

the respondent after the applicant failed to do so. His failure persisted despite his awareness since December 2024 that the rescission application was to be heard in March 2026, it is contended.

[30] The respondent criticises the applicant's reliance on Rule 42(1)(a). It is submitted on her behalf that the rule specifically protects a litigant whose presence had been precluded and not a litigant who had been afforded procedurally regular judicial process, but only opted to be absent.⁴ Further, that the rule has two separate requirements, that: (a) a party had to be absent and (b) an error ought to have been committed by the court. Regarding the former, it is contended that the applicant cannot just simply - through a blanket statement - claim to have been absent from Court. He ought to have demonstrated that he was precluded from participating due to conduct attributable to the respondent.

[31] It is further submitted that there is no merit in the applicant's assertion that there was failure to serve either the notice or application to compel. The applicant did not merely ignore one notice but several independent notices that he discover the material documents. The notices were accompanied by two substantive applications (i.e. the application to compel and the Striking Application), as well as correspondences exchanged between the attorneys. The respondent, it is contended, was left with no option but to proceed with the Striking Application to halt the applicant's continued non-compliance with the Compel Order. There is also no explanation why it took the applicant more than a year to bring the application.

[32] On the merits it is the respondent's view that even if the version advanced by the applicant's newly retained expert was to be accepted, the applicant would still be liable to pay the respondent R13 920 421, as accrual sharing. In her counterapplication (included in her opposition of the rescission) the respondent seeks payment in the amount of R18 347 265.75.

⁴ *Zuma v The Secretary of the Judicial Commission of Inquiry into Allegations of State Capture* 2021 (11) BCLR 1263 ('*Zuma v Commission of Inquiry into State Capture*') [60]-[64].

But, the respondent actually complains about inclusion of the report compiled by the applicant's new expert in the rescission application. This is considered to be contrary to the rules of this Court, breached without any explanation by the applicant.

[33] The respondent also finds absurd the approach by the applicant to rescind only the Striking Order whilst doing nothing about the Compel Order, granted earlier. After all, it was the applicant's non-compliance with the latter that led to the former. Therefore, this application is an abuse of the process of the Court and simply constitute the applicant's quest to litigate the respondent into submission and to drag out the accrual issue. It ought to be dismissed with costs at a punitive scale.

Issues to be determined

[34] From the facts in the respective cases of the parties, summarised above, the following appears to be the issues requiring determination in this matter: (a) rescission of the Striking Order on the basis of Rule 42(1)(a) or the common law; (b) the counterapplication by the respondent, and (c) costs.

[35] Additional issues to those identified above may arise during the discussion, but the above are the issues I consider dispositive of this matter. Some of the issues will be discussed together due to their interconnection. But, I deal next with the applicable legal principles.

Applicable legal principles

[36] This application for rescission of the Striking Order is premised on Rule 42(1)(a) and the common law. The requirements thereof serve as the principal applicable legal principles for current purposes. Some principles may have already been referred to above.

[37] Rule 42(1)(a) forms part of the grounds or instance for variation and rescission of orders under Rule 42. It reads as follows:

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...

[38] The learned author of *Erasmus: Superior Court Practice*⁵ shares the following commentary with regard to the variation or rescission of orders under Rule 42(1)(a):

There are three ways in which a judgment taken in the absence of one of the parties may be set aside, namely (i) in terms of this subrule; or (ii) in terms of rule 31(2)(b); or (iii) at common law.

...

In *Kgomo v Standard Bank of South Africa* ... [in] granting the application and setting aside the judgment, Dodson J, with reference to *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* and *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd* held that the following principles govern rescission under rule 42(1)(a):

- (a) the rule must be understood against its common-law background;
- (b) ...
- (c) the rule caters for a mistake in the proceedings;
- (d) the mistake may either be one which appears on the record of proceedings or one which subsequently becomes apparent from the information made available in an application for rescission of judgment;
- (e) ...
- (f) the error may arise either in the process of seeking the judgment on the part of the applicant for default judgment or in the process of granting default judgment on the part of the court; and
- (g) the applicant for rescission is not required to show, over and above the error, that there is good cause for the rescission as contemplated in rule 31(2)(b).

...

In general terms a judgment is erroneously granted if there existed at the time of its issue a fact of which the court was unaware, which would have precluded the granting of the judgment and which would have induced the court, if aware of it, not to grant the judgment...⁶

[footnotes omitted]

[39] The application for rescission is also based on the common law. The learned author of *Erasmus: Superior Court Practice* states that a rescission on this basis is possible under various grounds, including where judgment had been granted by default.⁷ The learned author, further, observes:

⁵ DE van Loggerenberg, *Erasmus: Superior Court Practice* (Jutastat e-publications 30 April 2026 (Revision Service 30)) ('*Erasmus: Superior Court Practice*').

⁶ *Erasmus: Superior Court Practice* RS 25, 2024, D1 Rule 42-16 to RS 27, 2025, D1 Rule 42-19.

⁷ *Erasmus: Superior Court Practice* RS 30, 2026, D1 Rule 42-9 (and the authorities cited there).

[a]n application on common-law grounds must be brought within a reasonable time. A court considering an application for rescission under the common law enjoys a wide discretion. It may refuse rescission if justice and equity so demand notwithstanding that an applicant has shown formal compliance with the requirements for granting rescission.⁸ [footnotes omitted]

[40] Under the common law, an applicant for rescission ought to show good cause or sufficient cause.⁹ This, generally, requires that such applicant: (a) provides an acceptable reasonable explanation for her or his default; (b) show that the application is made *bona fide*, and (c) show the existence of a *bona fide* defence on the merits of the matter which - *prima facie* – has some prospect of success.¹⁰ Overall, the court has a discretion to be exercised (following consideration of all the relevant circumstances) in a proper fashion.¹¹ A common-law based rescission ought to be pursued within a reasonable time.¹²

[41] These principles would be applied in the discussion of the issues necessary for the determination of this matter, identified above.

Rescission of the Striking Order

General

[42] To recap, the rescission of the Striking Order is sought on the basis of Rule 42(1)(a) or the common law. The applicable principles or requirements for a successful application in both respect are reflected above.¹³ I use the principles or requirements as self-explanatory rubrics in the discussion below.

⁸ *Ibid.*

⁹ *Erasmus: Superior Court Practice* RS 27, 2025, D1 Rule 42-11 to 42-12 and the authorities cited there. See also *Zuma v Commission of Inquiry into State Capture* [71]; *Neelofar and Another v Pahad and Another* (5277/2020) [2021] ZAGPJHC 596 (4 November 2021) [27].

¹⁰ *De Wet v Western Bank Ltd* 1979 (2) SA 1031 (A) at 1042F–1043A; *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 764J–765D; *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) at 9D–F; *Naidoo v Matlala NO* 2012 (1) SA 143 (GNP) at 152H–153A; *Government of the Republic of Zimbabwe v Fick* 2013 (5) SA 325 (CC) at 350D; *Mukhinindi v Cedar Creek Estate Home Owners Association* [24]; *Zuma v Commission of Inquiry into State Capture* [71]; *Neelofar v Pahad* [27].

¹¹ *Erasmus: Superior Court Practice* RS 27, 2025, D1 Rule 42-11 to 42-12 and the authorities cited there.

¹² *Erasmus: Superior Court Practice* RS 30, 2026, D1 Rule 42-9 and the authorities cited there.

¹³ Pars [37]–[40] above.

[43] As appearing above, the Striking Order is not the first material order of this Court for current purposes. There was the Compel Order granted on 7 November 2022 directing the applicant to discover some documents specified in number of Rule 35(3) notices served by the respondent. The applicant considers the notices a fishing expedition on the part of the respondent and an abuse of the process of the Court. They were not only aimed at documents relating to his personal financial affairs, but also those of companies and other entities in which he was an interest-holder. And, most of the information sought in terms of the notices is irrelevant, the contention concludes. But, objectively considered, the applicant remains in breach of the Compel Order. And, I searched in vain for any merit in the so-called ‘serious questions’ alleged by the applicant regarding the service and launch of the application that yielded the Compel Order.

Rescission of the Striking Order based on Rule 42(1)(a)

[44] Regarding the Striking Application, the following forms part of the applicant’s case for current purposes. The applicant complains about the time lapse between when the papers in the application were finalised (i.e. March 2023) and the service of the application (i.e. on 23 May 2023). He also accuses the respondent and her attorneys of dishonesty regarding the service of the application simply because a one-page proof of service is furnished. The accusations are persisted with despite the respondent’s attorney confirming under oath that he simply avoided uploading the entire application on CaseLines, when it was already there. It is even mentioned that the files received from the applicant’s previous attorneys by his new attorneys did not have proof of such service. But, I find this not less than astounding, as these are the very same files which the applicant blamed elsewhere for their unreliable condition. The same files are now considered a model of reliability. Ms Kaplan is said to have advised Mr Coetzee, the new attorney, that the application was not served. But I do not have her comments on the role played (or that should have been played) by her firm in other respects. I

do not find all these a *bona fide* and unembedded or objective quest to assist the Court. I, thus, agree with the respondent's contention that the presiding judge would not have granted the Compel Order if he was dissatisfied with the service of the papers in the application. It comes as no surprise that the applicant's fall-back position is that even if the application was served, he had no knowledge of it or its enrolment for hearing on 31 July 2023. Therefore, to the extent that the applicant intended the issue of the lack of service to constitute a mistake or error in seeking or granting the Striking Order, his case is without merit. For, the application was properly served on the applicant's previous attorneys and the matter properly enrolled. The proceedings before the Court towards granting the Striking Order, also, appear to have been without anything by way of an error. Therefore, there was no mistake in the proceedings evident from the record thereof or satisfactorily shown in this rescission application to have existed on the part of the respondent in seeking the Striking Order or on the part of the Court when it was granted. This means that rescission of the Striking Order under Rule 42(1)(a) is unavailable. This then leaves rescission on the basis of the common law.

Rescission of the Striking Order based on the common law

[45] As a point of departure, it ought to be mentioned that an application for rescission based on the common law ought to be brought within a reasonable time. The applicant says this was the case. This is disputed by the respondent. Reasonableness in this regard is determined from when an applicant, such as in this matter, became aware of the impugned order (such as the Striking Order) or could have been reasonably aware.

[46] The applicant says he was alerted to the Striking Order around May 2024 when default judgment was sought by the respondent. His previous attorneys emailed him the application on 24 May 2024. He consulted with Ms Kaplan on 4 June 2024 when she advised him that it was prudent to attempt amicable resolution of the matter with the respondent. He

says that he made it clear to her that he is desirous of opposing the application. Correspondences were exchanged between the attorneys regarding possible settlement, still in June 2024. But, the respondent's attorneys categorically informed their counterpart for the applicant that the default judgment application would not be held in abeyance.

[47] In early October 2024, the applicant consulted with his current attorneys. He says that it was around this time that he came to know of the Striking Order, despite the fact that it was a precursor to the default judgment application he had already received months back. He says he had not 'scrutinised' the application enough when he received it in May 2024 to notice the Striking Order. I must say that I find this very bizarre when considering that the applicant also consulted with Ms Kaplan back then when she advised him of the possibility of settlement and he instructed her to oppose the application. Surely, any attorney even of the lowest pedigree in prudence, would have explained that the default judgment is based on the Striking Order. Be that as it may, the applicant says his new attorneys considered the matter at the end of September and consulted with him and counsel on 7 October 2024. But, thereafter, it took them almost a month to formally come on board as the applicant's attorneys of record and to obtain files from the previous attorneys in early November 2024. The files are now described as 'extensive' to work through and Ms Kaplan even had to be engaged to assist. These are the same files described elsewhere as containing 'limited documents' to be of any assistance in drafting the papers in this application. The applicant - during this period - is said to have been advised by his new attorneys of the implications of the Striking Order and the option of an application for rescission. He deposed to the founding papers for this application on 3 November 2024, a date, evidently, earlier than some of his assertions in the founding affidavit to the application. The notice of motion also bears the latter date. But it was served on the respondent only on 3 December 2024.

[48] The respondent says that the applicant's newly appointed attorneys of record had reasonable time to bring this application, but simply failed to do so. They are now blaming their predecessors. Also, despite attributing some statements to Ms Kaplan, they have failed to secure a confirmatory affidavit from her. They were even granted access to the file or matter on CaseLines as far back as 31 July 2024, five months prior to them actually bringing the application. The respondent, as already stated, essentially disputes that the application was brought within a reasonable time.

[49] Overall, the application was launched after more than a year. The explanation given by the applicant for the delay falls short of covering the entire period of the delay. I am not satisfied that the applicant brought the application within a reasonable time. Even if the explanation is stretched, the applicant ought to have been aware of the Striking Order in June 2024 when he contemporaneously gave instructions for the opposition of the default judgment. He just did not bother about the rescission of the Striking Order until after the respondent had applied for a date of hearing of the default judgment application in late October 2024. This, no doubt, made the applicant realise that his lackadaisical approach was getting him deeper and deeper in trouble. The ill-disposition and death of Mr Shapiro, his former attorney on 28 June 2023 – both, no doubt, instances of considerable grief – were by this stage very far back in the past to serve as any form of justification for his indifference to the expanding litigation. But, I will move on other aspects of common-law based rescission.

[50] Another requirement for common law rescission is that the applicant ought to show 'good cause' or 'sufficient cause'. This, generally, entails that the applicant should: (a) furnish a reasonable and acceptable explanation for his default; (b) establish that his application is made *bona fide*, and (c) show that he has *bona fide* defence on the merits with

some *prima facie* prospect of success.¹⁴ These requirements form part of the determination of the application by the Court in the exercise of its wide discretion against the remit of justice and equity.¹⁵

[51] I deal first with whether the applicant has furnished a reasonable and acceptable explanation for his default. I understand this to refer to an explanation by the applicant as to what led to the default. This is different from the requirement that a rescission application be brought within a reasonable time. But, the explanation (constituted by timelines and material activities) proffered by the applicant as to his timing of the launch of the application may be relevant. This is so with regard to the part of the explanation that expands to the events prior to the order sought to be varied.

[52] Essentially, the applicant says he left everything in the hands of his late attorney, Mr Shapiro, who had assisted him from commencement of the matter. It is submitted that the evidence points clearly to an applicant who has been failed by his former attorneys in several critical ways, including the granting of the Striking Order. The applicant, it is also submitted, should not be punished for the conduct of his former attorneys. He made some enquiries about developments in the matter during the material times and was not informed of the Compel Order and the Striking Order. And, the respondent's suggestion as to the applicant delaying finalisation of the matter; abusing process of the Court, or attempting to litigate the respondent into submission, is untrue. The applicant, it is further submitted, has the right to fend off an accrual claim of an immensely inflated nature from being granted in favour of the respondent. Although, it is not entirely without blemish, I accept as reasonable the explanation in this regard based on the circumstances of this matter.

¹⁴ Par [40] above.

¹⁵ Pars [39]-[40] above.

[53] I proceed to deal with whether the application is made *bona fide*. This issue, in my view, comprises both a factual enquiry and a value judgment. It is submitted for the applicant that the Striking Order obliterated the applicant's defence and, thus, has drastic and far-reaching effect including depriving him of his right to a fair trial under section 34¹⁶ of the Constitution by way of defending the divorce action. This is extremely prejudicial to the applicant. Therefore, the rescission application is pursued *bona fide*. And it is also in the interests of justice that the Striking Order should be rescinded, the submission concludes.

[54] The respondent denies that the application is made *bona fide*. The applicant, she says, only tactically acted when he realised that the launch of the default judgment was imminent. He has no genuine attempt to rescind the impugned judgment. This, it is submitted, is confirmed by the lack of traction in the finalisation of this application, until the respondent took the necessary steps to enrol the application. I will rule on this aspect below.

[55] I turn to the issue of whether the applicant has a *bona fide* defence showing some *prima facie* prospect of success. The remaining issue in the divorce is the accrual in the parties' respective estates still to be determined by the Court. After the Striking Order was granted the applicant sought default judgment in the amount of R18 347 265,75 in respect of her accrual claim. But the respondent was candid enough to alert the Court that this figure was arrived at without being privy to the documents still to be furnished in terms of the Compel Order. In the application currently before the Court the respondent – by way of counterapplication – seeks payment in the amount of R9 655 825.75. It is the respondent's view that even if the new version put forward by the applicant's current expert is accepted, the applicant would still be liable to pay to her an amount of R13 920 421 as an accrual sharing. And because the applicant has already made some payment based on the opinion of Mr Hartcourt-Cooke at the time of the divorce. Mr Ferreira, the respondent's expert, is

¹⁶ See footnote 3 above on s 34 of the Constitution.

accused of overstating the value of the applicant's shareholding in a private company known as Southway Refractories ('Southway'). He, apparently, had to revise some of the figures. On the other hand, Mr De Lange, the applicant's expert, in March 2025, valued the applicant's entire estate and did not limit it to the Southway shareholding. If the commencement values are taken into consideration, Mr De Lange concludes, the difference in the estate values of the parties and, therefore, the total amount of the accrual may change once the respondent's documents are verified. I think these figures and the approaches adopted by the experts to arrive at same would need to be reviewed against all available evidence and the respondent is on record that such evidence may be derived from documents forming the subject-matter of the Compel Order. This, clearly, was the very reason why the order was obtained by the respondent in the first place.

[56] It is submitted on behalf of the applicant that there is clear dispute of fact in relation to the quantum of the respondent's accrual claim. This ought to be ventilated lest prejudice befall the applicant should he remain unable to defend the respondent's accrual claim. The applicant's defence is *bona fide* and he has reasonable prospects of success.

[57] Considering what is stated above and in the papers before the Court, there is clearly no unanimity on the figures and expert opinions. This may be significantly attributed to the applicant's non-compliance with the Compel Order. Full and complete disclosure or sharing of documents ought to occur for a proper determination of the accrual issue. This is not the same as overlooking the applicant's non-compliance with the Compel Order. He has no choice but to comply with same as long as it remains the order of the Court. But, for current purposes, I am satisfied that the applicant has disclosed a *bona fide* defence showing some *prima facie* prospect of success. And this application was brought to secure an opportunity to advance such defence and, thus, is *bona fide*. Although, the application fell short in respect of

its timing, which I ruled to be of no reasonable proportion, it is still my view that it would interest justice and equity for the Striking Order to be rescinded on the basis of the common law. The rescission would restore to the applicant his right to participate in the determination of the accrual issue in the divorce proceedings. The path towards finality in this regard is not so clear when viewed from the horizon of each of the parties and the facts in which their respective views are embedded. Therefore, an order will be made rescinding the Striking Order.

[58] I am mindful of the reality that the divorce in this matter is taking a very long time to conclude. But, the process and rules of the Court may continue to be utilised to guard against any form of gamesmanship to frustrate early determination of the accrual issue.

Counterapplication by the respondent for payment of the accrual amount

[59] The respondent, as stated above, seeks payment of the accrual in the amount of R9 655 825,75 plus interest and punitive costs by way of a counterapplication. This, in turn, is opposed by the applicant.

[60] The applicant's view is that the respondent's counterapplication is erroneously premised on the figures contained in the report by his expert Mr De Lange dated 1 December 2024 ('De Lange's December Report'). The report is said to only deal with the valuation of Southway, which is one component of the estate of the applicant, as stated above. The applicant says that Mr De Lange had subsequently explained in his report of 25 March 2025 that there is an error in the De Lange's December Report. The latter report was included in the founding affidavit to demonstrate that the applicant has a *bona fide* defence against the accrual claim by the respondent. Therefore, the applicant disputes that the respondent is entitled to the amount claimed in her counterclaim and even the default judgment application, especially since she has not disclosed the relevant documents previously requested by the

applicant. The latter sounds like the proverbial ‘pot calling the kettle black’. For, this whole matter emanates from the Compel Order in terms of which the applicant was directed by the Court to produce documents or to indicate their whereabouts. But, nothing would turn on this.

[61] For significantly the same reasons as for the rescission of the Striking Order, stated above, I do not consider the facts in the matter to allow for a determination of the accrual issue or part thereof in favour of the respondent. Prime, amongst these, is the clear dispute of fact regarding the figures or the expert opinions in the constitution of the figures. This means, in the absence of an agreement resolution of the material issues would require oral evidence. I do not think that the dispute of fact is fictitious, as suggested by the respondent. And, I do not consider it necessary to express a view on the propriety of the incorporation of new information or report in this application.

[62] Therefore, the counterapplication will be dismissed with costs. It, actually, bears the hallmarks of reactive litigation, launched in response to the rescission by the applicant. But it ought to have been delayed for the attention of the court to be seized with the remaining issue in the divorce proceedings, the accrual sharing. To avoid doubt, I am not saying the counterapplication was not *bona fide*. The respondent appears to have been always motivated by a genuine quest to conclude the divorce.

Conclusion and costs

[63] Considering what appears above, the applicant is successful in his quest to rescind the Striking Order, albeit on the alternative claim based on the common law. Be that as it may, the rescission application represents an indulgence sought by the applicant from the Court. Under the facts of this matter the granting of rescission should not, in any way, adversely affect the respondent beyond the restoration of the *status quo*. The applicant would be held liable for costs of the rescission application. And the costs will include those relating to the

standing down of the hearing of the matter to 20 March 2026, as indicated earlier. The costs of counsel shall be on scale B.

[64] The counterapplication, as already indicated, will be dismissed with costs. Counsel's costs will also be ordered on scale B in this regard.

Order

[65] In the premises, I make the order, that:

1. the application for rescission is granted and the order granted by Acting Justice Skosana dated 31 July 2023 is rescinded;
2. the applicant, Mr L[...] Z[...], is liable for costs of the application for rescission on a party and party scale, with counsel's fees on scale B, and the costs shall include those relating to the standing down of the hearing of the matter to 20 March 2026;
3. the counterapplication by the respondent, Ms S[...] M[...] Z[...], is dismissed with costs on a party and party scale, with counsel's fees on scale B.

Khashane La M. Manamela
Judge of the High Court

Dates of Hearing : **17 and 20 March 2026**
Date of Judgment : **3 September 2026**

Appearances:

For the Applicant : Ms P Bosman (Ms A Vosloo-De Witt on 17 March 2026)
Instructed by : Jaco Coetzee Attorneys, Helderkruijn, Roodepoort
c/o Hack Stupel & Ross Attorneys, Pretoria North

For the Respondent : Ms L van der Westhuizen
Instructed by : Schoeman Esterhuizen Gamberini Attorneys Inc,
Alphen Park, Pretoria