

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION: JOHANNESBURG**

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|-----|-------------------------------------|
| (1) | REPORTABLE: YES/NO |
| (2) | OF INTEREST TO OTHER JUDGES: YES/NO |
| (3) | REVISED. YES/NO |

.....
**SG DOS SANTOS
2023**

15 NOVEMBER

CASE NUMBER: 2023/004515

In the matter between:

L[...] C[...]

Applicant

and

L[...] C[...]

Respondent

JUDGMENT

DOS SANTOS AJ

A. INTRODUCTION

1. This is an opposed rescission application. The applicant seeks to rescind and/or set aside the contempt of court order granted by Acting Justice Moorcraft. The contempt of court order, being an order of this Court, was granted on 11 October 2022 under case number 34367/2019.

2. The rescission application is brought on two grounds, being Rule 42(1)(c) and the common law.
3. The common law ground relied upon by the applicant is that a new document has been discovered *after* the contempt of order was granted. I deal with the different grounds of rescission in turn.

B. THE RELEVANT CONTEXT

4. The applicant and the respondent are involved in divorce proceedings. The divorce proceedings have not been finalised and are presently pending in this Court.
5. On 28 November 2019, Acting Justice Budlender granted an order in terms of Uniform Rule 43 ('the Rule 43 Order'). The Rule 43 Order provides, *pendente lite*, for, inter alia, maintenance for the applicant and the minor child, residency, care and contact with the minor child, and a contribution towards legal costs. The Rule 43 Order has, to date, not been set aside and/or varied by a competent court.
6. In 2022, the respondent instituted contempt of court proceedings against the applicant for his failure to comply with the Rule 43 Order. On 11 October 2022, the applicant was found in contempt of court. In late 2022, the applicant applied for leave to appeal the contempt of court order. The leave to appeal was dismissed.
7. In January 2023, the applicant approached the court for relief to rescind and/or set aside the contempt of court order.
8. Prior to the contempt proceedings, and as long ago as September 2020, the applicant and the respondent signed a settlement agreement. The settlement agreement was in contemplation of the parties finalising their divorce. The settlement agreement regulates, inter alia, the applicant's maintenance obligations post-divorce.

9. The settlement agreement was however never made an order of court. Moreover, and as stated earlier, the parties are still married as the divorce proceedings are still pending in this Court.

10. It is common cause that the existence of the settlement agreement was not made known to the court during the contempt proceedings that served before Moorcraft AJ in October 2022.

11. It is also common cause that both the applicant and the respondent did not bring the existence of the settlement agreement to the court's attention during the contempt proceedings.

C. THE LEGAL PRINCIPLES APPLICABLE TO RESCISSION APPLICATIONS

12. I do not intend herein to provide a treatise on the law of rescission applications, save to point out, as I do below, certain fundamental principles thereof.

13. As a general rule, a court has no power to set aside or alter its own final order, as opposed to an interim or interlocutory order. The reasons for this age-old rule are twofold. First, once a court has pronounced a final judgment, it becomes *functus officio* and its authority over the subject-matter has ceased. The second reason is the principle of finality of litigation expressed in the maxim *interest rei publicae ut sit finis litium* (it is in the public interest that litigation be brought to finality).¹

14. Whether under Uniform Rule 42(1) or at common law, the court's power to rescind a final order is accordingly limited. The circumstances within which the power may be exercised fall within a relatively narrow ambit.²

15. On Rule 42(1) generally, the Supreme Court of Appeal in **Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)**³, held that (footnotes omitted):

¹ **Freedom Stationery (Pty) Ltd v Hassam** 2019 (4) SA 459 (SCA) at para [16]

² **Childerley Estate Stores v Standard Bank of SA Ltd** 124 OPD 163 at 166

³ 2003 (6) SA 1 (SCA) at paras [5] to [8]

[5] ...The Rule [42] caters for mistake. Rescission or variation does not follow automatically upon proof of a mistake. The Rule gives the Courts a discretion to order it, which must be exercised judicially (Theron NO v United Democratic Front (Western Cape Region) and Others) and Tshivhase Royal Council and Another v Tshivhase and Another; Tshivhase and Another v Tshivhase and Another.

[6] Not every mistake or irregularity may be corrected in terms of the Rule. It is, for the most part at any rate, a restatement of the common law. It does not purport to amend or extend the common law. That is why the common law is the proper context for its interpretation. Because it is a Rule of Court its ambit is entirely procedural.

[7] Rule 42 is confined by its wording and context to the rescission or variation of an ambiguous order or an order containing a patent error or omission (Rule 42(1)(b)); or an order resulting from a mistake common to the parties (Rule 42(1)(c)); or 'an order erroneously sought or erroneously granted in the absence of a party affected thereby' (Rule 42(1)(a)) ...

[8] The trend of the Courts over the years is not to give a more extended application to the Rule to include all kinds of mistakes or irregularities."

16. The court accordingly has a discretion whether or not to grant an application for rescission under Rule 42(1).⁴

(a) Uniform Rule 42(1)(c)

17. Uniform Rule 42(1)(c) provides that:

"(1) 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) ...

(b) ...

(c) an order or judgment granted as the result of a mistake common to the parties."

⁴ **Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)** supra and **Tshivhase Royal Council v Tshivhase** 1992 (4) SA 852 (A) at 862J

18. In reference to the phrase ‘a mistake common to the parties’, this means that both parties are mistaken as to the correctness of certain facts; such a mistake occurs where both parties are of one mind and share the mistake.⁵ A unilateral mistake does not give rise to rescission.⁶
19. The mistake must relate to and be based on something relevant to the question to be decided by the court at the time the judgment or order was granted.⁷
20. A common mistake of fact as envisaged in Rule 42(1)(c) is present where both parties labour under the same incorrect perception of fact external to the minds of the parties. In common mistake, the parties are in complete agreement, although their consensus is based on an incorrect factual assumption or supposition.
21. The then-Appellate Division in **Tshivhase Royal Council v Tshivhase; Tshivhase v Tshivhase**⁸ summarised the requirements for a Rule 42(1)(c) rescission as follows:

“In relation to subrule (c) thereof, two broad requirements must be satisfied. One is that there must have been a ‘mistake common to the parties’. I conceive the meaning of this expression to be what is termed, in the field of contract, a common mistake. This occurs where both parties are of one mind and share the same mistake; they are, in this regard, ad idem (see Christie Law of Contract in South Africa 2nd ed at 382 and 397-8). A mistake of fact would be the usual type relied on. Whether a mistake of law and of motive will suffice and whether possibly the mistake must be reasonable are not questions which, on the facts of our matter, arise. Secondly, there must be a causative link between the mistake and the grant of the order or judgment; the latter must have been ‘as the result of’ the mistake. This requires, in the words of Eloff J in Seedat v Arai and Another 1984 (2) SA 198 (T) at 201D, that the mistake relate to and be based on something relevant to the question to be decided by the Court at the time.”

⁵ **Tshivhase Royal Council v Tshivhase** supra at 863A

⁶ **Botha v Road Accident Fund** 2017 (2) SA 50 (SCA)

⁷ **Tshivhase Royal Council v Tshivhase** supra at 863 and **Seedat v Arai** 1984 (2) SA 198 (T)

⁸ **Tshivhase Royal Council v Tshivhase** supra at 863

22. In summary, an applicant in a Rule 42(1)(c) rescission application must therefore establish (i) a mistake common to the parties; and (ii) a causative link between the mistake and the grant of the order or judgment.

(b) The common law – new documents discovered

23. At common law, a judgment can be set aside, in certain exceptional circumstances, when new documents have been discovered.⁹

24. In **Childerley Estate Stores v Standard Bank of SA Ltd**,¹⁰ De Villiers JP held that a judgment could be set aside on the ground of the discovery of new documents after the judgment has been given in *certain exceptional circumstances only*. These exceptional circumstances include:

- 22.1. testamentary suits in which judgment has been given on a will and subsequently a later will/codicil has been discovered;
- 22.2. cases in which it was in consequence of the fraud of the opposite party that the relevant document was not found or produced at the trial;
- 22.3. cases in which it was without the slightest fault on the part of the applicant seeking to introduce the new document or his legal representative(s) that the document was not found and produced before judgment; and
- 22.4. cases in which the judgment was founded on a presumption of law, on the opinion of a *jurisconsult* or on expert evidence.

⁹ **Freedom Stationery (Pty) Ltd v Hassam** supra at 465D

¹⁰ **Childerley Estate Stores** supra at 166–9.

25. As a general rule, a party cannot have a judgment set aside on the basis of evidence that was or ought to have been available to him before judgment.¹¹ The late discovery of a document, which disproves the correctness of a judgment, will only be a ground for setting aside a final judgment if the successful litigant fraudulently suppressed the document and the other party only became aware of it after judgment.¹²
26. Finally, the Supreme Court of Appeal in the unreported judgment of **Fraai Uitzicht 1798 Farm (Pty) Ltd v McCullough**¹³ had to determine the question of *justus error* and whether the appellant in that matter had shown an entitlement to a rescission of the order as a result of four missing (lost) documents.
27. The SCA held that, at the very least, the (lost) documents should be of such significance that they would materially alter the outcome of the case. In other words, the applicant for rescission must allege and prove that, had the new documents been placed before the court which gave judgment, this would have materially altered the outcome.¹⁴

D. THE RELEVANT AND MATERIAL BACKGROUND FACTS

28. In these proceedings, it is common cause that (i) the divorce proceedings are still pending; (ii) a Rule 43 Order was granted in November 2019; (iii) the parties signed a settlement agreement in September 2020; (iv) the applicant has not complied with the terms of the Rule 43 Order or the settlement agreement; (v) the existence of the settlement agreement was not before Moorcraft AJ during the contempt proceedings; and (vi) neither the applicant nor the respondent informed the court of the existence of the settlement agreement in the contempt proceedings.

¹¹ **Port Edward Town Board v Kay** 1994 (1) SA 690 (D) and **CTP Ltd v Independent Newspaper Holdings Ltd** 1999 (1) SA 452 (W) at 462

¹² **Schierhout v Union Government** 1927 AD 94 and **Clark v Van Rensburg** 1964 (4) SA 153 (O)

¹³ (118/2019) [2020] ZASCA 60 (5 June 2020)

¹⁴ **Fraai Uitzicht 1798 Farm (Pty) Ltd** supra at para [20]

29. The applicant states that he only informed his legal representatives of the existence of the settlement agreement *after* the contempt of court order was granted. The applicant explains that he had forgotten¹⁵ about the settlement agreement and that he was not sure how it fit into the contempt proceedings. In my view, these explanations are mutually exclusive.
30. The applicant's position is that the settlement agreement supersedes the Rule 43 Order. The applicant states that the parties, by agreement, altered the terms of the Rule 43 Order.
31. The applicant also states that the respondent asked for performance in accordance with the settlement agreement and accordingly he would have been entitled to raise the defence of estoppel in the contempt proceedings.
32. The applicant states further that the failure by both parties to produce the settlement agreement during the contempt proceedings constitutes a mistake common to the parties as contemplated in Rule 42(1)(c).
33. The respondent's position is that the parties were not mistaken and that she was entitled to enforce her rights in terms of the Rule 43 Order. The respondent states that the settlement agreement is a dead letter in that it has lost its force and authority and has been overtaken by subsequent events.
34. The respondent states further that the reason she did not refer to the settlement agreement in the contempt proceedings is because she believed it was irrelevant because the applicant had not adhered to the settlement agreement. The respondent's position is that the settlement agreement cannot supersede an enforceable court order.

¹⁵ In support of his forgetfulness, the applicant attaches a letter from Dr. Korb. However, the letter is not accompanied by a confirmatory affidavit and accordingly constitutes inadmissible hearsay evidence. Moreover, the applicant did not proffer or advance any case why the letter ought to be admitted in terms of the Law of Evidence Amendment Act 45 of 1988.

35. The respondent denies that she requested performance in terms of the settlement agreement and states that she was in a desperate financial situation and desperately requested maintenance from the applicant on several occasions. The respondent also states that the applicant still refuses to make payment in terms the Rule 43 Order, let alone the settlement agreement.

E. DISCUSSION: THE FACTS AND THE LAW

36. I first deal with the rescission in term of Rule 42(1)(c).

37. In my view, the mistake or oversight by both parties (or election vis-à-vis the respondent) in not placing the existence of the settlement agreement before the court in the contempt proceedings does not constitute a common mistake of *fact* as contemplated in Rule 42(1)(c).

38. As held in **Colyn**, not every mistake or irregularity may be corrected in terms of Rule 42(1). I do not intend to give a more extended application to Rule 42(1) to include the kind of mistake¹⁶ or oversight relied upon by the applicant, being a failure and/or omission by the parties to present certain (available) evidence before the Court.

39. In terms of Rule 42(1)(c), the common mistake of fact means that both parties are mistaken as to the correctness of certain facts that existed at the time that the contempt proceedings were heard by Moorcraft AJ.

40. The situation for which Rule 42(1)(c) provides is that the subsequent evidence is aimed at showing that the factual material which led the Court to make its original order was, contrary to the parties' assumption as to its correctness, incorrect.¹⁷

41. During the contempt proceedings, the parties did not labour under the same incorrect factual assumption or supposition. The parties were both aware (or ought reasonably to have been

¹⁶ **Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)** supra at para [8]

¹⁷ **Tshivhase Royal Council v Tshivhase** supra at 863E

aware) of the settlement agreement. The respondent believed it irrelevant to the contempt proceedings and the applicant had forgotten about it and/or was not sure how it fit into the proceedings.

42. From the affidavits filed of record, and the arguments presented, I find that the parties are only *ad idem* in relation to the fact that the existence of the settlement agreement was not placed before, and not made known to, Moorcraft AJ during the contempt proceedings. The parties however part ways and do not share the same state of mind in relation to the factual status and/or factual consequences of the settlement agreement in light of the existing Rule 43 Order.

43. The contrast in the parties' state of mind is plain. The applicant's position is that the settlement agreement supersedes the Rule 43 Order. The respondent's position is that the settlement agreement is unenforceable and cannot supersede an enforceable court order.

44. Whilst I am not called upon to determine the validity of the settlement agreement in these proceedings, I do not agree with the respondent's proposition that the settlement agreement is a dead letter and unenforceable. In my view, the settlement agreement remains an agreement *inter partes*, until and if the agreement is set aside.

45. I similarly do not agree with the applicant's position that the settlement agreement supersedes the terms of the Rule 43 Order. This position is manifestly wrong. It is trite that an order of a court stands and is binding until set aside by a court of competent jurisdiction.¹⁸ Moreover, until a court order is set aside, the court order must be obeyed even if it may be wrong.¹⁹

46. Separately to the above, and whilst a court order or judgment may be formally abandoned, a mere abandonment does not however, in and of itself, extinguish the existence of the order or judgment. The judgment is still final in effect, and stands until it is varied, rescinded or set aside. It is not within the power of a litigant to vary or rescind a judgment. A litigant cannot

¹⁸ **Minister of Home Affairs v Somali Association of South Africa** 2015 (3) SA 545 (SCA) at 570F–H

¹⁹ Supra at 570F–G and **Bezuidenhout v Patensie Sitrus Beherend Bpk** 2001 (2) SA 224 (E) at 229B–C

usurp the court's role in purporting to vary or rescind a judgment or order by abandoning it by means of rule 41(2)),²⁰ or in this case, by concluding a settlement agreement.

47. Notwithstanding the above, in my exchanges with the applicant's counsel, she was nevertheless unable to point me to an express and/or formal abandonment by the respondent of her rights in terms of the Rule 43 Order (i.e., contained in the settlement agreement).

48. I am accordingly of the view that the settlement agreement does not constitute an abandonment of the respondent's rights in terms of the existing Rule 43 Order.

49. Returning to the applicant's proposition that the settlement agreement supersedes the existing Rule 43 Order, the applicant's counsel referred me to the cases of **Brisley v Drotsky**²¹ and **Napier v Barkhuizen**²² and the principle of a party's freedom of contract. I am unpersuaded by the applicant's submissions. Both the **Brisley** and **Napier** judgments are distinguishable. This is because neither judgment deals with the issue as to whether an agreement – concluded after the grant of a court order – supersedes and/or replaces such existing court order (absent a variation and/or setting aside of the existing court order).

50. In my view, the settlement agreement, in and of itself, does not supersede, replace and/or trump the terms of the existing Rule 43 Order and/or the respondent's rights in terms of the Rule 43 Order.

51. For the above reasons, I am unable to find that the parties laboured under the same incorrect factual assumption of the status and/or consequences of the settlement agreement in the context of the existing Rule 43 Order. I am also unable to find that the factual material which led Moorcraft AJ to make his original order (i) was not contrary to the parties' common assumption as to its correctness; and (ii) was incorrect.

²⁰ **Coetzer v Wesbank t/a FirstRand Bank Ltd** 2022 (2) SA 178 (GJ) at para [26] and [27]

²¹ 2002 (4) SA 1 (SCA)

²² 2006 (4) SA 1 (SCA) and the Constitutional Court's judgment in **Barkhuizen v Napier** 2007 (5) SA 323 (CC)

52. The parties did not jointly assume a factual state of affairs during the contempt proceedings which turned out to be a wrong factual assumption. Otherwise cast, the parties did not labour under a common mistake.
53. Moreover, even if I am incorrect on the aforesaid score, there is no causative link between the mere existence of the settlement agreement and the contempt of court order granted by Moorcraft AJ. This is for two reasons. One, the settlement agreement does not supersede the Rule 43 Order. And two, the applicant has not complied with the settlement agreement.
54. In my view, the settlement agreement may have been relevant in determining whether the applicant was in wilful contempt of the Rule 43 Order, particularly if the applicant had been diligently complying with the terms of the settlement agreement. In my exchanges with the applicant's counsel, she was unable to point me to any portion of the papers where the applicant states that he has complied with the terms of the settlement agreement. Instead, the applicant's counsel submitted that it was not necessary to deal with this issue because the Rule 43 Order has been replaced by the settlement agreement.
55. Again, I do not agree, for two reasons. One, the Rule 43 Order has not been replaced. And two, the applicant's compliance or otherwise with the settlement agreement would have unquestionably been relevant to demonstrate a lack of wilfulness and/or *mala fides* in the contempt proceedings. This, in turn, would have been relevant to determine whether there was a causative link between the mistake and the order granted.
56. Whilst I am mindful that the applicant potentially could have raised the defence of estoppel in the contempt proceedings, I am not convinced that the absence of the estoppel defence constitutes causative link in respect of the contempt of court order granted by Moorcraft AJ. This is because (i) the estoppel defence is not a common mistake; and (ii) the estoppel defence was nevertheless available to the applicant during the contempt proceedings.

57. Accordingly, I find that the applicant has not established case for a rescission of the contempt of court order in terms of Rule 42(1)(c). Even if I am wrong in my rejection of the applicant's submissions, I retain a discretion to refuse his application.
58. Turning now to the common law ground of rescission relied upon by the applicant. The applicant's position is that the settlement agreement constitutes a new document discovered as contemplated in the common law and accordingly constitutes a foundation to justify a rescission in terms of the common law.
59. Whilst the respondent also states that the settlement agreement is a new document, whether a document constitutes a new document is not a factual question, but a legal question.
60. The applicant's counsel submitted that it constituted a new document because it had only been brought to the attention of the applicant's *legal representatives* after the contempt of court order was granted. I do not agree.
61. In my exchanges with the applicant's counsel, she rightly conceded that the question is not when it was brought to the attention of the applicant's legal representatives, but when the applicant himself was aware of the settlement agreement. The applicant's counsel rightly conceded that the settlement agreement was not a new document insofar as the applicant's knowledge was concerned.
62. It is common cause that the settlement agreement was available to the applicant long before the judgment in the contempt proceedings. The late (re)-discovery of the settlement agreement would only be a ground for setting aside a judgment if the respondent fraudulently suppressed the settlement agreement and the applicant only became aware of it after judgment. This is not the applicant's case in the present proceedings.

63. Parties cannot be permitted to rescind judgments every time they conceive of a “possible better argument”.²³ Policy considerations weigh against permitting this.²⁴ This is particularly so having regard to the foundational principle regarding the finality of judgments.

64. This approach of our courts is echoed in the following statement in **Shedden v Patrick and Attorney-General**²⁵ (albeit in the context of a trial):

“It is an invariable rule in all the courts, and one founded upon the clearest principles of reason and justice, that if evidence, which either was in the possession of parties at the time of a trial, or by proper diligence might have been obtained, is either not produced or has not been procured, and the case is decided adversely to the side to which the evidence was available, no opportunity for producing that evidence ought to be given by granting a new trial.”

65. By all accounts, the applicant was in possession of the settlement agreement since September 2020. The settlement agreement was, in the main and at all material times, available and known to the applicant. It was due to the applicant’s own fault that he did not produce the settlement agreement during the contempt proceedings and before judgment was granted.

66. The applicant’s explanation that he had forgotten about the settlement agreement and that he was not sure how it fit into the contempt proceedings is not only unsatisfactory, but mutually exclusive. I am unable to find any exceptional circumstances to justify the rescission on this common law ground.²⁶

67. I am unpersuaded that the settlement agreement constitutes a new document as contemplated in the common law.

²³ **Papageorgio v Wainbergas** 2014 JDR 1848 (GJ) at para [24]

²⁴ **Makings v Makings** 1958 (1) SA 338 (AD) at page 338 at 349

²⁵ (1869) 1 HL Sc 470 at 545

²⁶ As contemplated in **Childerley Estate Stores v Standard Bank of SA Ltd** supra

68. Moreover, and considering **Fraai Uitzicht 1798 Farm (Pty) Ltd v McCullough**, the applicant has not demonstrated that, had the new documents been placed before Moorcraft AJ, it would have materially altered the outcome of the order and judgment.
69. In this regard, the applicant's counsel initially submitted in oral argument that it was not known how the settlement agreement would have possibly affected the outcome of the contempt proceedings. Later in her argument, she submitted that the court need only be convinced that the settlement agreement "perhaps" would have had an impact, and not "definitely" would have had an impact, on the contempt proceedings.
70. On the facts in the present case, I find that the applicant has not established a case for a rescission of the contempt of court order in terms of the common law based on new documents discovered.
71. Finally, and whilst not presently relevant, it appears to me that, properly construed and considered, the applicant's appropriate recourse would have been to apply for leave to adduce further (new) evidence on appeal.²⁷ The applicant provided his legal representatives with the settlement agreement prior to his application for leave to appeal the contempt of court order. There is no satisfactory explanation why this aspect was not dealt with in the application for leave to appeal. Nevertheless, this is not an issue that concerns the present rescission application.
72. In summary therefore, I conclude that the applicant has failed to establish a valid ground for rescinding the judgment and order of Moorcraft AJ under either Rule 42(1)(c) or the common law. Still, even if I am wrong in this regard, in the exercise of my discretion I conclude that the applicant's rescission application should be refused.

²⁷ **De Aguiar v Real People Housing (Pty) Ltd** 2011 (1) SA 16 (SCA)

73. Lastly, as to costs, there is no reason to depart from the usual principle that costs should follow the result. The applicant has been unsuccessful and accordingly he should bear the costs of the application.

ORDER

74. I accordingly make the following order:

1. The rescission application is dismissed.
2. The applicant is ordered to pay the respondent's costs of the application.

SG DOS SANTOS
Acting Judge of the High Court
Gauteng Division, Johannesburg

Heard: 18 October 2023
Judgment: 15 November 2023

Appearances:

For Applicant: Adv. L. van der Westhuizen
Instructed by: F van Wyk Incorporated

For Respondent: Att. D Charles (with right of appearance)
Instructed by: McCormick Londt Incorporated

This judgment was handed down electronically by e-mail circulation to the parties' legal representatives and uploading to CaseLines. The date for hand-down is deemed to be 15 November 2023.