



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

JUDGMENT

Case No. **2026-039481**

REPORTABLE

In the matter between:

ABSA BANK LIMITED

APPLICANT/PLAINTIFF

and

MOSES GE MTHETHWA

RESPONDENT/DEFENDANT

CORAM: ADHIKARI AJ

Heard: 3 March 2026

Delivered: 5 March 2026

ORDER

1. The application is dismissed.
2. Each party shall pay their own costs.

JUDGMENT DELIVERED ELECTRONICALLY ON 5 MARCH 2026

ADHIKARI, AJ

INTRODUCTION AND RELEVANT FACTUAL BACKGROUND

- [1] This is an urgent application in which the defendant ('Mr Mthethwa') seeks an order staying the execution of the summary judgment granted by this Court on 23 February 2026.
- [2] The plaintiff ('ABSA') had instituted action proceedings for, *inter alia*, the return of a motor vehicle sold to Mr Mthethwa, resulting from his failure to make payments in terms of an instalment sale agreement concluded with ABSA in 2021. The action proceedings were defended by Mr Mthethwa who represented himself. He delivered a plea, and subsequently ABSA instituted proceedings seeking summary judgment against him. Mr Mthethwa delivered an affidavit opposing summary judgment in which he set out his defence to ABSA's claim.
- [3] The summary judgment application was set down for hearing on 23 February 2026 in the unopposed motion court of this Division as is customary with such matters. It appears from the record that the summary judgment application was served on Mr Mthethwa by email on 26 January 2026.

[4] On 19 February 2026 Mr Mthethwa delivered an affidavit seeking the postponement of the summary judgment application.¹ It appears from the record that Mr Mthethwa emailed the postponement application to ABSA's attorneys at 11h53 on 19 February 2026 and that he uploaded the postponement application onto the Court Online system at 12h02 on the same date. ABSA's attorneys advised Mr Mthethwa via email on the same date that the summary judgment application would proceed on 23 February 2026 and that in the event that he could not attend the hearing, they would advise the presiding judge of his position.

[5] The summary judgment application was heard on 23 February 2026. It appears from ABSA's answering affidavit filed in response to the stay application, that ABSA's counsel in the summary judgment proceedings drew the presiding judge's attention to the postponement application as well as to various other email correspondences sent to the Registrar by Mr Mthethwa in regard to the postponement application. In addition, ABSA's counsel handed up a copy of the postponement application to the presiding judge. It further appears from ABSA's answering affidavit that the presiding judge had regard to both Mr Mthethwa's opposing affidavit and to the postponement application and found that there was no merit in Mr Mthethwa's contention that he would suffer irreparable prejudice if a postponement was not granted as Mr Mthethwa had delivered an opposing affidavit, and further that the presiding judge found that the opposing affidavit failed to disclose a defence to ABSA's claim. The presiding judge thereafter granted summary judgment having considered all of the affidavits filed by both ABSA and Mr Mthethwa.

¹ In the remainder of this judgment, I refer to Mr Mthethwa's affidavit of 19 February 2026 seeking a postponement of the summary judgment application as *'the postponement application'*.

- [6] ABSA's legal representatives informed Mr Mthethwa at 11h18 on 23 February 2026 that summary judgment had been granted. At 13h03, on the same day Mr Mthethwa deliver the current application seeking to stay the execution of the judgment pending the institution and final determination of an application for rescission of the summary judgment.

THE APPLICABLE LEGAL PRINCIPLES

- [7] In terms of Rule 45A of the Uniform Rules, a court may suspend the execution of any order for such period as it may deem fit.
- [8] The courts have established the following general principles for the granting of a stay of execution:²
- [8.1] A court will grant a stay of execution where real and substantial justice requires it or where injustice would otherwise result.
- [8.2] The court will be guided by considering the factors usually applicable to interim interdicts, except where the applicant is not asserting a right, but attempting to avert injustice.
- [8.3] The court must be satisfied that the applicant has a well-grounded apprehension that the execution is taking place at the instance of the respondent, and that irreparable harm will result if execution is not stayed and the applicant ultimately succeeds in establishing a clear right.
- [8.4] Irreparable harm will invariably result if there is a possibility that the underlying *causa* may ultimately be removed, that is, where the

² *Gois t/a Shakespeare's Pub v Van Zyl and Others* 2011 (1) SA 148 (LC), para 37.

underlying *causa* is the subject-matter of an ongoing dispute between the parties.

[8.5] The court is not concerned with the merits of the underlying dispute — the sole enquiry is simply whether the *causa* is in dispute.

[9] In *BP Southern Africa (Pty) Ltd v Mega Burst Oils and Fuels (Pty) Ltd and Another and a Similar Matter*³ an attempt to interdict the execution of a judgment, pending the outcome of a petition for leave to appeal, failed on the basis that no protectable interest had been established. The court in *BP Southern Africa* nevertheless considered whether execution should be suspended in the interests of justice, either in terms of Rule 45A or based on the inherent jurisdiction of the court.⁴ The court held that in appropriate cases the merits of the underlying dispute should be considered notwithstanding the general guidelines delineated in *Shakespeare's Pub*.⁵

[10] The Constitutional Court in *Provincial Government: North West Province and Another v Tsoga Developers CC and Others*⁶ has held that an applicant for the stay of execution must demonstrate that the proposed claim has prospects of success, quoting with approval the *dictum* of this Court in *Cooper v Feinstein*⁷ that an applicant seeking a stay must show a *prima facie* right to the relief sought because if this were not the case, there would be no point in granting a stay of execution.

³ *BP Southern Africa (Pty) Ltd v Mega Burst Oils and Fuels (Pty) Ltd and Another and a Similar Matter* 2022 (1) SA 162 (GJ), para 14-15.

⁴ *Id.* para 15 and para 27.4.

⁵ *Id.* para 19.

⁶ *Provincial Government: North West Province and Another v Tsoga Developers CC and Others* [2016] ZACC 9; 2016 (5) BCLR 687 (CC), para 54.

⁷ *Cooper v Feinstein* [2005] ZAWCHC, para 27.

THE STAY APPLICATION

- [11] Mr Mthethwa contends that he will suffer irreparable prejudice if a stay of execution is not granted in that he intends to bring an application for rescission of the summary judgment.
- [12] It is well settled that in an application for summary judgment the court is not entitled to ignore an affidavit submitted by a defendant in opposition, and that as a consequence where summary judgment is granted in circumstances where the defendant is not represented but where an opposing affidavit has been delivered, it cannot be said that the defendant is in default.⁸ Thus, where the court has granted summary judgment after considering the defendant's opposing affidavit it cannot be said that judgment was granted by default or in the absence of a defendant.⁹
- [13] Further, it is well settled that in order for an applicant seeking rescission to succeed in showing good cause, they must give a reasonable explanation of their default (and show that the application is made *bona fide*), and they must show that they have a *bona fide* defence to the plaintiff's claim which *prima facie* has some prospect of success.¹⁰ Both requirements must be met - it is not sufficient if only one of these two requirements is met.¹¹
- [14] Given that Mr Mthethwa delivered an opposing affidavit on the merits of the summary judgment application which was considered by the presiding judge who found that no *bona fide* defence to ABSA's claim was disclosed, the

⁸ *Morris v Autoquip (Pty) Ltd* 1985 (4) SA 398 (W) at 400E-H.

⁹ *De Beer v Absa Bank Ltd* (25071/2012) [2016] ZAGPPHC 325 (6 May 2016), para 14.

¹⁰ *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) at 9C, quoted with approval by the Constitutional Court in *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others* 2021 (11) BCLR 1263 (CC), para [71].

¹¹ *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 765B-C.

summary judgment granted against Mr Mthethwa is final and *res judicata*.¹² It is consequently not open to me to find that Mr Mthethwa nonetheless has a *bona fide* defence to ABSA's claim which has some prospect of success. On the settled legal principles, it is clear that it is not open to Mr Mthethwa to apply for rescission of the summary judgment, and his remedy in these circumstances is an appeal.

[15] Further, the events preceding the hearing of the summary judgment on 23 February 2026 as set out in the record of the summary judgment proceedings and in the postponement application, bear all the hallmarks of a deliberate attempt to delay the proceedings. Mr Mthethwa alleges that he was unable to attend the hearing due to a medical condition. However, on the very day of the hearing, approximately two hours after being informed of the summary judgment order, he drafted the present urgent application, procured its commissioning, and transmitted it by email to ABSA's attorneys. This conduct is inconsistent with that of a person who was medically unfit to attend the hearing, whether in person or virtually. In the circumstances I am not persuaded that the explanation advanced by Mr Mthethwa is *bona fide*.

[16] For these reasons Mr Mthethwa has failed to establish any right, even on a *prima facie* basis, to seek rescission and for this reason alone the application for a stay of execution must fail. I will nonetheless consider whether the interests of justice nonetheless require that a stay be granted.

[17] It is common cause on the papers before me that ABSA had engaged with Mr Mthethwa over an extended period of time in an effort to avoid taking judgment, and that repayment arrangements were made with Mr Mthethwa which he repeatedly failed to comply with. It is common cause that he has

¹² See *De Beer* (above) para 14.

failed to make any payments at all since October 2024. It is further evident from the papers that Mr Mthethwa has a history of making promises to pay which he fails to fulfil. In any event, the instalment sale agreement has now been cancelled as is made clear in the particulars of claim in the action proceedings, contrary to Mr Mthethwa's suggestion in his founding affidavit and in the postponement application.

[18] As set out in ABSA's answering affidavit, the vehicle constitutes ABSA's only security for recovery of the debt owed by Mr Mthethwa and his continued use of the vehicle exposes it to the risk of accident or theft. In addition, the vehicle is by its nature a depreciating asset, the value of which diminishes daily through use. Consequently, it is in fact ABSA and not Mr Mthethwa that will suffer irreparable harm if the stay application is granted to enable Mr Mthethwa to pursue a rescission application that is doomed to failure.

[19] For these reasons, Mr Mthethwa has failed to demonstrate that real and substantial justice requires that the execution of the summary judgment be stayed or that he will suffer injustice if the stay is not granted.

[20] For all these reasons the stay application must fail.

COSTS

[21] The instalment sale agreement provides that Mr Mthethwa is liable for the costs of legal proceedings on an attorney client scale. However, costs remain within the discretion of the court.

[22] ABSA and Mr Mthethwa have both delivered further affidavits on the issue of costs at the invitation of the court. In ABSA's affidavit it points out the various procedural deficiencies in the manner in which Mr Mthethwa has conducted these proceedings, and it contends that it has been prejudiced by having to respond to this application on unreasonably truncated timeframes. ABSA seeks a punitive costs order against Mr Mthethwa. Mr Mthethwa in argument and in his further affidavit indicated that he had been placed on unpaid

suspension at work due to family issues, and that intended to use his retirement savings to pay the arrears owed to ABSA.

[23] While it is so that Mr Mthethwa's conduct in these proceedings leaves much to be desired, it is also clear to me from the correspondence annexed to ABSA's further affidavit that Mr Mthethwa who resides in Oudtshoorn sought the assistance of the Registrar on various occasions in order to determine how best to bring the application to the attention of the court and how to set the matter down. In these circumstances Mr Mthethwa's conduct does not rise to the level that warrants a punitive costs order. I am mindful of the fact that Mr Mthethwa is a lay litigant and that he has sought to exercise his right of access to the courts. In addition, he has been ordered to pay the costs of the summary judgment application and it is clear that he is in dire financial distress. In these circumstances I am not persuaded that it would be just and equitable to award costs against him albeit that the application was clearly ill-fated.

In the result I make the following order:

3. The application is dismissed.
4. Each party shall pay their own costs.

M. ADHIKARI
ACTING JUDGE OF THE HIGH COURT

Appearances

For the applicant/plaintiff:

W Jonker

Instructed by:

Sandenbergh Nel Haggard, E Loubser

The defendant/respondent: In person