REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 2024-126147

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

05/06/2026
DATE SIGNATURE

In the matter between:

NEDBANK LIMITED Applicant

and

MSOMI: SIBUSISO First Respondent

MSOMI: SHADY GIRLY Second Respondent

THE CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY Third Respondent

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JUDGMENT

WENTZEL -THOMPSON J

Introduction

[1] This application came before me by way of urgency at the instance of the respondents in the main application brought by Nedbank against them. This was an application for payment of the outstanding amount due and owing to them pursuant to a mortgage bond and an order declaring the mortgaged property specially executable in terms of Rule 46A. That application was granted by Noko J on 27 February 2025 for a money judgment to recover the outstanding balance owing and to declare the mortgaged property specially executable.

[2] The purpose of the present application before me is to stay the sale in execution of the respondents' property scheduled for Friday 5 June 2026 that is their primary residence.

[3] Of some import is that during the hearing the respondents' counsel abandoned entirely the basis for the stay in execution upon which the respondents' application had been premised, and advanced an entirely new basis for the relief sought- not canvassed in the papers or by way of supplementary affidavit. In so doing, the respondents' counsel relied upon the right to property and housing enshrined in sections 25 and 26 of the Constitution and the principles of justice, espoused as the basis upon which a stay of execution could be granted under Rule 45A.

[4] Needless to say, the applicant's counsel bemoaned the absence of fair play and objected to the fact that the applicant was now at the eleventh hour expected to face an entirely different case. This he rightly said infringed the applicant's rights of *audi alteram* and denied it a proper opportunity of dealing with the new case it was now required to meet. The applicant was undeniably ambushed and opposed my granting any indulgence to the respondents at this late stage to settle their long outstanding indebtedness and avoid the imminent sale of their property in execution of that debt.

The relevant background facts

[5] On 27 February 2025, the applicant obtained a money judgment in their favour and an order declaring the respondents' property specially executable.

[6] Following this order, and as early as 25 April 2025, the respondents engaged with the applicant regarding the status of the matter, but took no steps to negotiate with the applicant to enter into a payment arrangement to pay the arrears, attempt to pay the arrears or to seek a rescission of Noko J's order.

[7] On the eve of the impending sale in execution scheduled for 18 July 2025, the respondents presented the applicant with a private offer to purchase the property by an entity, GCDP (Pty) Ltd ("GCDP") for R1.250.00. The applicant refused to accept the offer and advised the respondents to suggest that their private buyer bid at the auction the following day, which it successfully did.

[8] However, on 11 March 2026 the sale to GCDP was cancelled due to non-payment. The applicant has its suspicions that the offer and subsequent bid was made with the sole purpose of avoiding the sale in execution.

[9] Be that as it may, the Rule 46(11) application to set aside the sale to GCDP was served upon the respondents at their chosen *domicilium* on 20 February 2026 and at least at that date, they were aware that the first sale in execution was due to be cancelled on 11 March 2026.

[10] Following the cancellation of the first sale in execution to GCDP, a further sale in execution was scheduled for 5 June 2026.

[11] The respondents state that the first time that they became aware of the impending second sale in execution was on 26 May 2026, and state that they immediately approached their attorney, who advised them to bring an application for rescission of Noko J's judgment and a stay of the sale in execution pending the outcome of their rescission application.

[12] Although the respondents insist that the first time that they became aware of the date of the further sale in execution was on 26 May 2026, the applicant points out that on 30 April 2026, documentation regarding the sale scheduled for 5 June 2026 was served by the Sheriff by affixing them at the door of the property and on 20 May 2026, this documentation was emailed to the respondents.

[13] This notwithstanding, it was not until 28 May 2026 that the present application for a stay in execution was brought and set down for Tuesday 2 June 2026, affording the applicant until 12H00 on Friday 29 May 2026 to indicate whether it intended opposing

the application and directing that it file an answering affidavit by 14H00 on Monday 1 June 2026.

[14] The applicant complains that the extreme urgency with which the application was brought, affording it limited time to respond, was self-created; it's counsel urged me to strike the matter from the roll on this basis.

[15] I will nevertheless consider the merits of the new grounds advanced in argument by the respondents' counsel for a stay in execution. I do so on the basis of a judgment of Modiba J (as she then was) in *10 & 10a Kenmere CC v Ndebele and Others*[1] in which she said in paragraph [17]:

"*Be that as it may, it is trite that an applicant is not denied an urgent hearing solely because it delayed to bring the application. The ultimate test in respect of urgency is whether the applicant will be denied substantive redress in due course if the application is not heard on an urgent basis*."

[16] There can be no doubt that this requirement has been satisfied in this case; once the sale in execution takes place on 5 June 2026 and there is a successful bid above the reserve price, the respondents will have lost their home.

The new basis for the stay of execution

[17] The respondents' counsel was not wrong to jettison the respondents' reliance on its application to rescind Noko's judgment, more than a year after it was granted. The grounds for the rescission were equally unmeritorious and were based upon alleged defects in the valuation of the property that I need not canvass.

[18] At the hearing before me, the respondents' counsel referred me to the payment schedule and quarterly statement that he had uploaded on 2 June 2026 and 3 June 2026 that indicated that on 2 March 2026 the respondents had made two payments of R100 000 each into their bond account totalling R200 000.00. This was the approximate arrears owing as at the date of Noko J's judgment. Hereafter, on 2 May 2026 and on 2 June 2026, the respondents paid their monthly instalments in the amount of R 16 936.61.

[19] The explanation provided by the respondents' counsel for the respondents belated payments was that following Noko's judgment and the first sale in execution, there

[1] (case no 2018/3110)

would have been no point in making any payments towards the outstanding arrears as their property had already been lost. However, on learning that the sale in execution was due to be cancelled on 11 March 2026, the respondents realised that they had a chance of making sufficient payments to stave off a further sale in execution; had they known that a further sale in execution would be scheduled for 5 June 2026, they would never have made these payments as it would have been like throwing their money into a bottomless pit that would have derived them no benefit. The respondents' counsel sought to persuade me that the respondents verily believed that they can settle the outstanding arrears within a six month period and enjoined me to stay the sale of execution for six months to afford the respondents the opportunity to settle the arrears and save their home, that is their primary residence, from a sale in execution.

[20] However, the applicant's counsel pointed out that the payments made were hopelessly insufficient as, since the date of Noko's judgment, the arrears had increased and a further R207 000 was owing on the account. He stressed that the leading case of *Nkata v FirstRand Bank Ltd*[2] required that the full arrears owing must be paid in order to avoid a sale in execution. I was also reminded that the time afforded to litigants in the unopposed default judgment court to award a money judgment, but defer an order declaring the property specially executable in order to allow respondents to pay their arrears and thereby avoid an immediate sale in execution, has been criticised and overruled by a full bench decision in this division.[3] It was also argued that the respondents' payment history evidenced that they were unlikely to be able to honour their commitment and the applicant was entitled to execution in terms of Noko J's judgment and had already incurred costs in arranging the sale in execution.

[21] More fundamentally, it was argued that the respondents' counsel interpretation of the requirements for a sale in execution in terms of Rule 45 A was far-fetched and did not align with the relevant judgments.

The legal requirements to stay a sale in execution

[22] Rule 45A of the Uniform Rules of Court provides:

"The court may, on application, suspend the operation and execution of any order for such period as it may deem fit."

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[2] 2016 (4) SA 257 (CC)
[3]

[23] The language of the Rule is notably broad. It confers a discretion rather than a right and does not prescribe rigid jurisdictional requirements. The recent authorities therefore treat Rule 45A as a procedural manifestation of the court's broader common-law and constitutional power to regulate its own process and prevent abuse and injustice.[4]

[24] However, the authorities consistently emphasise that a stay of execution is an extraordinary remedy. A successful litigant is ordinarily entitled to the fruits of its judgment and a court will not lightly interfere with that entitlement. A stay is therefore not granted merely because a judgment debtor wishes to delay execution or because further litigation is contemplated. Rather, the discretion is exercised where real and substantial justice requires intervention.

[25] The principles to be applied were set out by Waglay J in *Gois t/a Shakespeare's Pub v Van Zyl and Others*: [5]

"(a) A court will grant a stay of execution where real and substantial justice requires it or where injustice would otherwise result.

(b) 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.

(c) The court must be satisfied that:

(i) the applicant has a well-grounded apprehension that the execution is taking place at the instance of the respondent; and

(ii) irreparable harm will result if execution is not stayed and the applicant ultimately succeeds in establishing a clear right.

(d) Irreparable harm will invariably result if there is a possibility that the underlying causa may ultimately be removed, ie where the underlying causa is the subject matter of an ongoing dispute between the parties."

[26] Although the courts have frequently applied the requirements for an interdict in deciding whether to grant a stay in execution, where the applicant for a stay does not

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[4] *Janse van Rensburg v Obiang and Another* 2023 (3) SA 591 (WCC)
[5] 2011 (1) SA 148 (LC)

rely on a substantive right to prevent a stay as required in interdict proceedings, the inquiry is whether the execution itself will occasion injustice or unfairness.[6]

[27] The authorities are clear on what does not constitute injustice; it does not include a mere desire to delay payment, dissatisfaction with the judgment, the existence of a rescission application lacking prospects, financial inconvenience, speculative prejudice or attempts to relitigate issues already finally determined.[7]

[28] In *RAF v Mokoena*,[8] the court cautioned that Rule 45A does not permit courts to suspend execution simply because broad notions of equity or fairness are invoked. The discretion must be exercised judicially and not merely because the applicant would prefer execution to be delayed. This has been confirmed in *MEC for the Department of Public Works and Others v Ikamva*.[9]

[29] However, time and again, in the unopposed default judgment courts, respondents appear in person and plead with the court to grant them an indulgence to satisfy the outstanding arrears. This is generally only agreed to by the banks on the basis that the monetary judgment be granted as well as the declaration that the property may be sold in execution, but that execution be stayed for a period to afford the respondent the opportunity to pay the arrears or sell their house privately on the open market. I have not properly considered the basis for this relief, other than section 173 of the Constitution.

[30] Of course, the matter before me is on a different footing. Here, the judgment has already been granted and the property has been declared executable and thus the respondents now need to satisfy the requirements of Rule 45A in order to stay execution.

[31] Nevertheless, ultimately the power to stay execution forms part of the superior court's jurisdiction to regulate its own process in the interests of justice in terms of section 173 of the Constitution. As was said in *Godwill and Others v Van Rijswijk N.O and Others*.[10]

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[6] *R.A v F.A* [2024] ZAWCHC 35 (9 February 2024)
[7] *RAF v Mokoena and Another; In Re: Mokoena v RAF* (2473/2019) [2022] ZAFSHC 86 (12 July 2022)
[8] supra
[9] ZASCA 95 (13 June 2024)

[10] *Godwill and Others v Van Rijswijk N.O and Others* (10624/2024) [2025] ZAWCHC 42 (11 February 2025)

"[28] The expansive and open-ended language of rule 45A suggests that it was intended to serve as a restatement of the courts' common law discretionary power. The particular power is an instance of the courts' authority to regulate its own process. Being a judicial power, it falls to be exercised judicially with careful consideration. Its exercise will therefore be fact specific, and the guiding principle will be that execution will be suspended where real and substantial justice necessitates it. It is for the court to decide on the facts of each given case whether considerations of real and substantial justice are sufficiently engaged to warrant suspending the execution of a judgment. If so, it must also decide the terms under which any suspension should be granted."

[32] Relying upon this judgment, I have decided in the exercise of my discretion to afford the respondents and final lifeline to stay execution of the judgment provided that they pay all of their arrears within a period of six months. I do so as I fundamentally feel that this would be in the interests of justice. This is particularly so as the respondents have shown good faith in making significant payments towards the arrears and have paid the last two months instalments.

[33] But this is not the extent of their obligations to avoid a stay in execution. Should the full amount of the arrears not be settled within 6 months, the applicant is entitled to forthwith proceed with a sale in execution and no further indulgences will be granted. The applicant need not await for the expiry of the period of six months to schedule a sale in execution and may do so now so that in the event that the arrears are not paid, it may immediately proceed with a sale in execution.

[34] The indulgence granted by me should not be regarded as a precedent. It is based solely upon my discretion on the facts before me and should not be generally applied as a basis to stay execution.

Costs

[35] The respondents have sought a substantial indulgence; even to the extent of changing their grounds for a stay of execution at the last minute. They did not afford the applicant a proper opportunity to oppose the new grounds for relief and thus ought properly to pay the costs of the hearing on 3 June 2026.

[36] In addition, the respondents are ordered to pay the waisted costs incurred by the applicant in scheduling the sale of execution for 5 June 2026.

Order

[37] In the circumstances the following order is made:

(1) Dispensing with the forms, service and time periods prescribed by the Uniform Rules of Court and directing that this matter may be heard by way of urgency.

(2) The sale in execution of the immovable property described as: ERF 2[…] W[…] EXTENSION 3 TOWNSHIP REGISTRATION DIVISION I.Q ., THE PROVINCE OF GAUTENG MEASURING 950 (NINE HUNDRED AND FIFTY) SQUARE METRES HELD BY DEED OF TRANSFER NUMBER T[…] SUBJECT TO THE CONDITIONS THEREIN CONTAINED ("*the property*"), pursuant to the Order granted by the Honourable Mr Justice Noko on 27 February 2025, is stayed and suspended instituted by the Applicants under the above case number for a period of six months until 4 November 2026.

(3) The applicants are entitled to immediately schedule a sale in execution for 5 November 2026 and to proceed therewith should the arrears not have been settled in full by this date.

(4) The respondents are ordered to pay the costs of the application on Scale B.

(5) The respondents are ordered to pay the waisted costs of the sale in execution scheduled for 5 June 2026.

WENTZEL-THOMPSON J
JUDGE OF THE HIGH COURT
JOHANNESBURG

For the Applicant: Adv. L. Peter instructed by Nthabiseng Gambushe Lowndes Dlamini Attorneys

For the Respondents: Adv. I Mureriwa instructed by CSM Attorneys