IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case number: 2025-176109

(1) Not reportable
(2) Not of interest to other judges

Date: 28 July 2026

In the matter between

ABSA BANK LIMITED Applicant/Plaintiff

and

MACDONALD SETATU MAPHAKELA Respondent/Defendant

Order

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1. The cancellation of the agreement between the Plaintiff and the Defendant dated 17 February 2023 is confirmed.

2. The Defendant is ordered to return the 2023 Renault Triber 1.0 Dynamique / Zen, engine number: B[…], chassis number: M[…] (**the Car**) to the Plaintiff or its authorised representative by 17h00 on 4 August 2026, to an address in Johannesburg to be nominated by the Plaintiff and communicated to the Defendant.

3. If the Defendant fails to return the Car to the Plaintiff by 17h00 on 4 August 2026, the sheriff is authorised to attach, seize and hand over the Car to the Plaintiff or its authorised representative.

4. The Defendant is ordered to pay the Plaintiff's costs on the party and party scale taxed on the Magistrates' Court tariff, including the costs of one junior counsel on Scale A.

Judgment

J Mitchell AJ

[1] Mr Maphakela bought a car on instalments from Absa. Mr Maphakela fell behind on the payments. Absa wants the car back. Absa is entitled to summary judgment for that relief.

[2] Mr Maphakela bought the car in 2023. He agreed to pay 71 monthly instalments of about R4 300 plus a balloon payment of R80 000. The standard form contract makes clear that Absa retains ownership of the car until Mr Maphakela pays all the instalments.

[3] In April 2025, a debt counsellor applied for debt review in the Magistrates' Court on Mr Maphakela's behalf under section 86(7)(c) of the National Credit Act. A few months later, the debt review application was withdrawn—seemingly after Absa sent a notice under section 86(10) in June 2025.

[4] In August 2025, Absa demanded payment of the arrears that Mr Maphakela owed, then about R38 000. At the same time, Absa sent a second notice

under section 86(10). A month later, Absa sued Mr Maphakela in this Court. Absa asks for confirmation of the cancellation of the parties' agreement and for an order authorising the sheriff to seize the car and hand it over to Absa.

[5] Mr Maphakela raises two special pleas. The first special plea objects to this Court's jurisdiction because, so the argument goes, Absa claims payment of an amount that falls within the monetary jurisdiction of the Magistrates' Court. The second special plea is that Absa failed to comply with section 129.

[6] Mr Maphakela pleads over and admits the conclusion of the contract and the terms pleaded in the particulars of claim—including that Absa owns the car until Mr Maphakela pays all the instalments. Mr Maphakela admits that he was "unable to pay the exact monthly instalment", admits that he approached a debt counsellor, and admits that the debt counsellor applied for debt review under section 86. Mr Maphakela denies that Absa delivered a section 86(10) notice (and that denial presumably applies to the notice Absa says it delivered in June 2025 and to the notice Absa says it delivered in August 2025).

[7] Absa now applies for summary judgment, asking for the return of the car—or, in the language of rule 32(1)(c), delivery of specified movable property. The contract is clear that Absa can, subject to the relevant provisions of the National Credit Act, take back the car and sell it if Mr Maphakela does not keep up with his payments (and, as mentioned, there is no dispute that Mr Maphakela fell behind). I am satisfied that Absa's application and its verifying affidavit comply with rule 32. For the reasons addressed below, I am also

satisfied that Absa complied with section 86(10) before suing to enforce the contract.

[8] In his heads of argument, Mr Maphakela raises three arguments resisting summary judgment. In my view, none raises a defence that is bona fide and good in law, and there is no reasonable possibility that any would succeed at trial.

[9] Mr Maphakela first complains about "trial by ambush" because Absa's affidavit in support of its application for summary judgment verifies Mr Maphakela's total indebtedness of R327 036.57 based on a certificate of balance. Mr Maphakela argues that Absa raises a "new issue" because that amount is not pleaded in the particulars of claim.

[10] This is not a bona fide defence for two reasons. The first reason is that nothing stops a plaintiff in a summary judgment application referring to an updated certificate of balance. The contract says a certificate is "acceptable proof" of what Mr Maphakela owes. And the Supreme Court of Appeal says this kind of certificate, even if handed up at the hearing, does not amount to new evidence but "merely an arithmetical calculation based on the facts already before the court" and, in this way, a certificate like this "perform[s] a useful function": *Rossouw v FirstRand Bank Limited* 2010 (6) SA 439 (SCA) at para 48. The second reason is that the certificate is irrelevant because Absa does not ask for any money, only for the car back.

[11] Mr Maphakela initially objected to this Court's jurisdiction because the value of Absa's claim falls within the monetary jurisdiction of the Magistrates' Court. The objection was abandoned at the hearing (except for its

implications on costs). Abandoning it was wise. Mr Maphakela is wrong that Absa “claims payment of the arrears in the amount of R37,919.30”. Absa just wants the car back. Mr Maphakela is right that Absa could have sued in the Magistrates’ Court: under section 29(1)(a) of the Magistrates’ Courts Act, a Magistrates’ Court has jurisdiction over “actions in which is claimed the delivery or transfer of any property, movable or immovable, not exceeding in value the amount determined by the Minister from time to time by notice in the Gazette”. But the point does not help Mr Maphakela because this Court still has jurisdiction even if Absa could have sued in the Magistrates’ Court: *South African Human Rights Commission v Standard Bank of South Africa Limited* 2023 (3) SA 36 (CC) at paras 35-6. Mr Maphakela leant on *Nedbank Limited v Thobejane* 2019 (1) SA 594 (GP) in his heads of argument, but the Supreme Court of Appeal overturned the Full Court’s judgment: *Standard Bank of South Africa Limited v Mpongo* 2021 (6) SA 403 (SCA) (which the Constitutional Court then affirmed in the *South African Human Rights Commission*, above).

[12] Mr Maphakela’s third argument is that Absa did not comply with section 129 of the National Credit Act. The roadblock for this argument is section 129(2), which disapplies section 129(1) if a credit agreement is “subject to a debt restructuring order, or to proceedings in a court that could result in such an order”.

[13] There were proceedings in the Magistrates’ Court that could have resulted in a debt restructuring order. Mr Maphakela admits he approached a debt counsellor, which is the railswitch for the application of section 86 instead of section 129. Mr Maphakela’s debt counsellor proposed a rearrangement of

Mr Maphakela's debts under section 86(7)(c). It appears that Absa and the other creditors did not respond to the proposal. In the debt counsellor's affidavit in the debt review proceedings, the debt counsellor says she "enrolled the matter for determination", but no further steps seem to have been taken until the application was withdrawn. The debt counsellor's affidavit also notes that "the credit providers have sent notices of termination of the debt review process in terms of section 86(10)", which presumably includes the section 86(10) notice that Absa delivered in June 2025. For good measure, Absa then delivered another section 86(10) notice in August 2025.

[14] The upshot is that Absa terminated debt review under section 86(10), and the withdrawal of the debt review proceedings means that the bar on termination in subsection (b) fell away.

[15] For that reason, Mr Maphakela's argument about non-delivery of the section 86(10) notice in June 2025 does not, in my view, make any difference. The section 86(10) notice was emailed to p[…], which it was conceded at the hearing is his email address. Mr Maphakela argued that the proof of delivery shows a different email address. It is clear, however, that the email address Mr Maphakela objects to is the email address used for sending emails by registered email.

[16] The contract envisages email as a permissible method of delivering legal notices: in the contract, Mr Maphakela agreed to "always to provide [Absa] … a functioning email address" and Mr Maphakela agreed that Absa "may use any of the contact details that you have last provided to us for all legal

purposes." The contract does not list an email address, so delivery by email may not be enough: see, for example, Stan*dard Bank of South Africa Ltd v Louw* 2024 JDR 3487 (GP); *Nedbank Limited v Mathye* 2026 JDR 2180 (GJ); *SA Taxi Finance Solutions RF (Pty) Ltd v Nzuza* 2026 JDR 2205 (GJ).

[17] None of this matters, though, because Absa later sent another section 86(10) notice by registered mail in August 2025. Absa has track and trace slips that prove the steps it took to send the notice. Mr Maphakela argues that Absa does not do enough to prove delivery. But the track and trace slips show that Absa did all that is needed: see *Kubyana v Standard Bank of South Africa Limited* 2014 (3) SA 56 (CC) at paras 31-5, 54.

[18] In my view, there is no reasonable possibility that a trial court would find that Absa did not comply with its obligations under section 86 before suing Mr Maphakela, nor that Absa still had to follow section 129 after Mr Maphakela approached a debt counsellor and debt review proceedings were launched but later withdrawn. Subsection (2) of section 129 makes clear that subsection (1) does not apply if there are "proceedings in a court that could result in [a debt restructuring order]". The text and purpose of section 86 and section 129 do not, even on the low summary judgment threshold, support an argument that a credit provider must go back to section 129 square one if a consumer already approached a debt counsellor and debt review proceedings were launched and later withdrawn.

[19] At the hearing, it was argued on Mr Maphakela's behalf that he was not aware that the debt review proceedings were withdrawn (and, it follows, any withdrawal was not on his instructions). That allegation is nowhere in

Mr Maphakela's plea. Even if he foreshadows it in his affidavit opposing summary judgment, he "cannot for the first time raise defences in [his] affidavit opposing summary judgment, where no such defences exist in [his] plea": *AHMR Hospitality (Pty) Ltd Winelands Venue v Da Silva* 2024 (3) SA 100 (WCC) at para 14.

[20] As for costs, the agreement says Absa can recover costs on "an attorney-own-client scale". There is no such thing: *Aircraft Completions Centre (Pty) Ltd v Rossouw* 2004 (1) SA 123 (W) at paras 100-1, 116. But attorney and own client costs refuse to die, "[l]ike some ghoul in a late night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried": *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring in judgment).

[21] It is by no means clear to me that Absa can resurrect a different costs order from the attorney and own client zombie that still roams through its standard-form contracts. Even if Absa could, it runs into another problem. This Court recently held that "punitive costs clauses" in consumer credit contracts are "against public policy, potentially unlawful, and should not be granted": *FFS Finance South Africa RF (Pty) Ltd t/a Ford Credit v Lamola* 2024 (2) SA 427 (GP) at para 52. In the exercise of my broad discretion on costs, I see no reason to depart from the ordinary party and party scale. As for the tariff of costs, Absa could have—even if it need not have—sued in the Magistrates' Court, so its costs should be taxed according to the Magistrates' Court tariff. There is no basis to depart from the default Scale A for counsel fees under rule 67A.

[22] Absa's application for summary judgment accordingly succeeds, and I make this order:

1. The cancellation of the agreement between the Plaintiff and the Defendant dated 17 February 2023 is confirmed.

2. The Defendant is ordered to return the 2023 Renault Triber 1.0 Dynamique / Zen, engine number: B[…], chassis number: M[…] ("**the Car**") to the Plaintiff or its authorised representative by 17h00 on 4 August 2026, to an address in Johannesburg to be nominated by the Plaintiff and communicated to the Defendant.

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J Mitchell AJ

Acting Judge of the Gauteng Division, Johannesburg

Date of hearing:	28 July 2026
Date of judgment:	28 July 2026
For the Applicant/Plaintiff:	R Carvalheira instructed by Hammond Pole Attorneys
For the Respondent/Defendant:	N Moropene instructed by Xiviti Attorneys Inc.