



**THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA (MAIN SEAT)**

Case Number: 2022-2793

- (1) Reportable: No
(2) Of interest to other Judges: No
(3) Revised: No

6 August 2026

SIGNATURE

DATE

In the matter between:

**THE MEMBER OF THE EXECUTIVE COUNCIL
FOR HEALTH & SOCIAL DEVELOPMENT
OF THE MPUMALANGA PROVINCE**

Applicant

and

THE SHERIFF OF THE HIGH COURT (MPUMALANGA)

First Respondent

**MAHANUKE RELEASE obo
MAKARINGE CARL MIKHENSO**

Second Respondent

JUDGMENT

LESO AJ,

Introduction

[1] The applicant seeks urgent relief to stay the execution of a default judgment and to rescind the default judgment granted on 28 April 2026. The Applicant launched a hybrid urgent application combining a rescission application and an interdict to stay execution of the judgment on an urgent basis. The Applicant seeks costs against the Respondent only if there is unsuccessful opposition, including costs for two counsel on a punitive scale.

[2] The second respondent opposed the application and raised the preliminary point of a lack of urgency. The Respondent seeks costs in the application.

Background

[3] The plaintiff is the respondent in this application. On 30 June 2022 the respondent served summons on the State Attorney and the applicant. On 11 October 2024 the applicant's defence was struck off, and on 20 April 2026 and 16 March 2026 it was served. On 20 April 2026 a default judgment against the applicant was granted.

[4] The applicant repeatedly failed to respond to requests for discovery and did not oppose applications to compel or strike out their defence. Court orders were granted unopposed as follows:

- i. a compel order (July 2024),
- ii. a strike out order (October 2024), and
- iii. a default judgment (April 2026).

[5] The warrant of execution was served in July 2026, after which the applicant launched the urgent application.

Summary of Submissions

Arguments on Urgency

[6] The second respondent contends that the urgency is self-created due to the applicant's prolonged inaction and failure to respond to legal processes for over 21 months. The Applicant argues that the matter is urgent because the Department's assets are at risk of attachment and sale, which would harm its ability to provide essential medical services.

[7] According to the applicant, the delays were due to missing/incomplete files and the need to gather all relevant information, not due to negligence or wilful default.

[8] The applicant's counsel confirmed in court that the State Attorney issued instructions on 27 May 2026 to rescind the default judgment after the applicant was served with the court order on 20 May 2026. The service of the court order on the applicant on 20 May was confirmed by the respondent.

[9] Applicant argued that the service of the writ of execution by the first respondent on 7 July 2026 triggered the urgent application which was filed on 17 July 2026.

[10] The second respondent's counsel argued that the application must be struck off for lack of urgency because this application is conflated with that of relief sought on rescission and with that of a stay of execution. The counsel for the applicant argued that the hybrid approach was chosen to avoid piecemeal litigation and unnecessary legal costs, as a rescission alone would not stop execution.

[11] The second respondent requests that the application be struck from the roll for lack of urgency, or dismissed on the merits, with costs awarded on an attorney and client scale, including costs for two counsel.

Arguments on Rescission

[12] The second respondent requests that the application be struck from the roll for lack of urgency, or dismissed on the merits, with costs awarded on an attorney and client scale, including costs for two counsel.

[13] The applicant seeks rescission under common law, which requires a satisfactory explanation for default and a *bona fide* defence with prospects of success.

[14] The second respondent argues that the applicant has not provided a reasonable explanation for the default and instead blames the attorneys, which is not a valid excuse under the law. Counsel argued that the application was in bad faith because the respondent did not take any action for 4 years and, even during the application, the applicant still did not provide the medical records which were sought before the default Order was granted. The applicant also failed to demonstrate a *bona fide* defence or exceptional circumstances warranting rescission. The applicant argues that this is not substantiated and that it has acted to protect the Department's interests.

[15] The applicant asserts it has a *bona fide* defence to the underlying claim, referencing its previously filed plea, the discovery affidavit, and the conduct of its medical personnel.

[16] The applicant denies any wilful or negligent conduct by its officials, arguing that any failures were due to the attorneys' actions and should not be imputed to the Department. Further, that there is no evidence that the Department's officials were aware of the proceedings leading to the default judgment.

[17] The applicant disputes the respondent's claim that lack of external medical expert evidence means there is no defence, arguing that internal medical staff are qualified to provide expert opinion. The applicant references legal standards for rescission, a reasonable explanation for default and a *bona fide* defence with prospects of success.

Evidence on Stay of Execution

[18] The second respondent asserts that the applicant has not met the legal test for a stay of execution, as there is no evidence of injustice or exceptional circumstances. The enforcement of the judgment is presented as a matter of access to justice for the respondent. The respondent argued that the stay of execution is moot since the rescission application is before the court. The applicant counters this with the argument that a rescission application does not automatically suspend execution; only a court order can do so.

[19] The applicant claims prejudice on the impact of this litigation on public funds, but the second respondent argues that the applicant's own inaction and disregard for court processes cannot justify relief, and further that the court is urged not to delay justice for the victim (a minor child) due to the applicant's failures.

Issues for Determination

[20] It is apparent from the summary of arguments above that the court is called upon to determine the issues as follows:

- (a) Urgency;
- (b) Whether the filing of a rescission application automatically suspends the execution of a judgment;
- (c) Whether an application for a stay of execution becomes moot merely because rescission proceedings are pending; and
- (d) Whether the applicant makes out a case for a stay of execution.

Analysis

Urgency

[21] The court has the discretion to decide whether a matter is truly urgent and whether to grant the relief sought. *Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another*¹ defines the rules for urgent court applications. This case established that when a litigant bypasses standard court procedures to ask for an urgent hearing, they must explicitly justify the degree of urgency and explain why normal procedures won't provide substantial redress.

[22] In *East Rock Trading 7 (Pty) Ltd v Eagle Valley Granite (Pty) Ltd*² it was held that:

“the delay in instituting proceedings is not, on its own, a ground for refusing to regard the matter as urgent. A court is obliged to consider the circumstances of the case and the explanation given. A crucial test for urgency is whether, if the matter were to follow its normal course as laid down by the rules, an applicant will be afforded substantial redress. If the applicant can be afforded substantial redress in due course, the matter is not urgent.”

[23] The applicant has fully explained the efforts taken since 20 May 2026 to get the matter set down for hearing and placed before the court. The delay in filing the

¹ 1977 (4) SA 135 (W) at 137.

² 2011 JDR 1832 (GSJ) para 8.

application is not unreasonable, and in any event, the delay in getting the matter to be heard was fully explained in the applicant's founding affidavit. The applicant further submitted that the application cannot wait to be heard in the normal course because the execution of the applicant's property is imminent. This submission was confirmed by the second respondent's counsel. This submission accords with the provisions of Rule 6(12)(b) which provides that the applicant's supporting affidavit must "set forth explicitly the circumstances which it is averred render the matter urgent and the reasons why the applicant claims that applicant could not be afforded substantial redress at a hearing in due course."

Rescission application

[24] The issue which arose in court under the above subject was whether the filing of a rescission application automatically suspends the execution of a judgment, and whether an application for a stay of execution becomes moot merely because rescission proceedings are pending.

[25] It is so that the applicant conflated the relief for rescission and stay of execution. The couching of prayers in two parts would have been convenient for the court, however, that is just form that does not warrant striking out the applicant's case or dismissal of the case as the respondents' counsel argued.

[26] There is substance in the applicants' papers in that the court can adjudicate the relief sought separately.

[27] Where an applicant combines a rescission application and an urgent application to stay execution, the court is entitled to determine only the urgent interlocutory relief and postpone the rescission application for hearing in the ordinary course. This accords with the distinction between interim and final relief. The stay merely preserves the *status quo* pending the adjudication of the rescission application. In *South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others*, the Constitutional Court discussed the court's inherent jurisdiction to regulate its own

process³. Consequently, the existence of a pending rescission application does not deprive the court of jurisdiction to determine the interlocutory stay application pending the determination of the rescission proceedings.

[28] .The Respondent's contention that the application for a stay of execution has become moot by virtue of the rescission application cannot be upheld. The relief sought in the same applications is conceptually and legally distinct. A rescission application is directed at setting aside the judgment, whereas a stay of execution merely suspends its enforcement. The institution of rescission proceedings does not, without more, suspend execution of the judgment or render an application for a stay academic. On the contrary, the necessity for a stay arises precisely because execution remains competent until the judgment is rescinded or a court orders otherwise.

[29] Accordingly, the court is not required to determine the rescission application before considering whether execution should be stayed. It may exercise its inherent jurisdiction under section 173 of the Constitution to regulate its own process by adjudicating the urgent relief for suspending execution. The rescission application remains alive and is determined later on its own merits.

Stay of Execution

[30] The applicant seeks a suspension of the execution order under Rule 45A and the court's inherent powers, arguing that real and substantial justice requires it. The true enquiry is whether *real and substantial justice* requires execution to be suspended in the circumstances.

[31] Rule 45A confers a discretionary power upon the Court to suspend the execution of a judgment where justice requires. That discretion must be exercised judicially, having regard to all the relevant facts and the interests of both parties. The Rule does not create a substantive right to a stay of execution.

³ South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others 2007 (1) SACR 408 (CC) (2007 (1) SA 523; 2007 (2) BCLR 167; [2006] ZACC 15) at para 90.

[32] The applicant seeking such relief bears the onus of demonstrating exceptional circumstances or real prejudice warranting the suspension of execution. The mere pendency of rescission proceedings is therefore not sufficient to render an application for a stay of execution.

[33] Without requiring the court to determine, finally, the issue on its merits, it is clear from the facts presented that the rescission application is not in good faith. The application is brought merely to delay enforcement. Whether the application enjoys reasonable prospects of success is not an issue to be determined in an urgent court.

[34] Although the execution would defeat or render nugatory the relief sought in the rescission application, the prejudice to the second respondent outweighs the prejudice to the applicant occasioned by delaying execution.

Costs

[35] The case number speaks volumes. The date of the Order to compel discovery and the date of the Order sought to be varied tell a similar story. The history of this matter tells a story of a litigant, in this case a government entity, which deliberately ignored the plaintiff's requests to discover, to better discover, as well as the court's orders.

[36] The defendant's Stalingrad approach cannot be ignored, given the history of this matter and the nature of the claim. This is not just a commercial dispute involving litigants who have financial resources to litigate for years. This is a claim on behalf of a minor child who was found by the court to have suffered loss on 20 April 2028.

[37] During the arguments in court, counsel for the plaintiff argued that the applicant has now located the medical records sought by the defendant's attorneys; however, the records were not made available to the defence. The discovery affidavit prepared by Mr Makamu on 31 August 2023 does not assist the applicant's case because the deponent discovered the pleaded documents and nothing else.

[38] The applicant's conduct in these proceedings warrants a costs order on a punitive scale. The applicant cannot be allowed to disregard the court's orders nor to decide not to meaningfully participate in the litigation. A plea with a bare denial and a discovery affidavit with nothing discovered except the respondent's pleading is meaningless, and that conduct cannot be condoned by this Court.

Order

[39] Wherefore the order is made as follows:

1. Condonation for non-compliance with the rules relating to service, filing and time limits in the motion proceedings and that the matter should be dealt with as one of urgency in terms of rule 6(12) is granted and the matter is heard on an urgent basis.
2. Stay of the execution of the writ issued pursuant to the judgment dated 20 April 2026 is denied.
3. The rescission application remains alive and is determined later on its own merits.
4. The applicant to pay the second respondent's costs, including the costs of two counsel on attorney and client scale.



JT LESO

Acting Judge of the High Court,
Mbombela, Mpumalanga

Heard : 04 August 2026

Delivered: 06 August 2026

(The judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the CaseLines system of the Mpumalanga Division, Mbombela main seat)

Appearances

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