



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case number: 2025/089172

[1]	REPORTABLE: NO
[2]	OF INTEREST TO OTHER JUDGES: NO
[3]	REVISED: NO
SIGNATURE	DATE: 27.06.2025

In the matter between:

39 VAN DER MERWE STREET HILLBROW CC

First Applicant

47 SOPER ROAD BEREA CC

Second Applicant

and

**THE PARAGON CULLINAN FINANCIAL
SERVICES PARTNERSHIP**

First Respondent

THE SHERIFF: JOHANNESBURG CENTRAL

Second Respondent

ADVOCATE MATTHEW BLUMBERG SC

Third Respondent

Summary:

Application in terms of Rule 45A – Urgent stay of sale of immovable property in execution of a writ.

Authority to institute legal proceedings – Applicants only member married out of community of property – Husbands estate sequestrated – effect of s21 of the Insolvency act vests assets including members interest in the trustee of husband's insolvent estate – trustee not consented to launching urgent application – Authority lacking

Section 21 Insolvency Act – trustee neither approached nor consented to releasing members interest of wife of insolvent – assets vest by operation of law. Applicants lack authority to institute legal proceedings

Section 21 Insolvency Act – no application before Court to release vested assets from control of the Trustee

ORDER OF COURT

1. This Application is dismissed.
2. Costs are reserved.

JUDGMENT

Z KHAN AJ

INTRODUCTION

- [1] The Applicants are the registered owners of certain commercial immovable property in Johannesburg. They seek orders in terms of Uniform Rule 45A to halt the imminent sale of Applicants' immovable property pending rescission

application and other steps that they intend pursuing to set aside the Court orders giving rise to the writ of execution.

- [2] The First Respondent had laid claim against Applicants for payment of monies arising from certain term loan agreements. Arbitration proceedings were instituted on 15 August 2022. Subsequent thereto, the Applicants and First Respondent concluded a written arbitration agreement, the terms of which have now become one of the subject matters of this application.
- [3] The Third Respondent, as Arbitrator, found in favour of the First Respondent on 20 September 2024 for payment of R31 352 699.66. A Notice of Appeal against the Arbitration award was filed by the Applicants previous attorneys on 14 October 2024. The First Respondent disputes that Applicants' right to appeal. Notwithstanding, the arbitration award was made an order of Court on 4 December 2024 in Cape Town and a writ of execution subsequently issued on 12 December 2024 in favour of the First Respondent for the sale of the Applicants immovable property.
- [4] The writ of attachment was served on the First Applicant on 13 March 2025 and the sheriff records that he affixed a copy of the writ to the principal door after being refused entry by 'Mark Faber', presumably referring to Mark Morris Farber, the members spouse. The Sheriff likewise affixed a copy of the writ on the principal door of the Second Applicant on 18 March 2025.
- [5] The sale in execution is due to take place on 30 June 2025.

- [6] The Applicants sole member is Amber Farber. She is the spouse to Mark Morris Farber, and their marital regime is governed by an antenuptial contract. Mark Farber was the sole member of the Applicants until 1 February 2024 whereafter Amber Farber became the sole member of the Applicant. The First Respondent alleges that the transfer of members interest between spouses was a ruse. Amber Farber is not cited as a party to this litigation but does depose to a confirmatory affidavit to the Applicants affidavits, which is deposed to by Mark Farber, in his capacity as manager of the Applicants properties.
- [7] Mark Farber's estate was provisionally sequestered on 26 August 2024 and thereafter finally sequestration on 14 January 2025. A number of provisional trustees were appointed by the Master on 4 September 2024 in respect of the insolvent estate and the appointments finally confirmed on 10 March 2025.
- [8] Section 21 of the Insolvency Act governs the further proprietary aspects of the marriage between the Farber's. Amber Farber's members interest in the Applicants, as part of her assets, then vested with Mark Farber's trustees, who are not parties before this Court. Amber Farber has not sought the release of the members interests in the Applicants from the Trustees of Mark Farber's sequestered estate.
- [9] Mark Farber features large in the papers before Court in that he was the previous member of the Applicants, a party to the arbitration process, is the

deponent to the Founding Affidavit, and is now said to be the manager of the Applicants.

- [10] Central to the Applicants complaint is that they attempted to appeal the arbitration award but the Arbitrator did not respond to their notice to appeal, presumably because the Applicants were not entitled to appeal in terms of certain conditions of the arbitration agreement relating to appeals whilst arbitration fees remain unpaid. The Applicants were thus barred from appealing. Applicants dispute that they owe any fees to the Arbitrator but have not placed this issue beyond dispute with evidence.
- [11] On 21 October 2024, the First Respondents attorneys corresponded with the Applicants erstwhile attorneys and noted delivery of the Notice of Appeal on 14 October 2024. It was recorded that the Applicants were precluded from proceeding with the Appeal due to outstanding payments due in respect of the Arbitration process. First Respondent alleges that a number of the Arbitrators invoices had gone unpaid by Applicants and the Applicants are thus barred from appeal.
- [12] During March 2025, a further firm of attorneys purporting to act for Mark Farber (now under sequestration) and the Applicants wrote to the First Respondents attorneys protesting the arbitration award. On 13 March 2025, the First Respondents responded to the Applicants new attorneys and strongly protested the attorneys lack of authority to represent Farber or the Applicants.

[13] Applicants were also placed under business rescue during March 2025 and this had the effect of stalling any further action by the First Respondent to claim its debt. The First Respondent opposed the proposed business plan of the Rescue Practitioners and indicated that First Respondent was proceeding with the sales in execution. On 14 May 2025, the Rescue Practitioners indicated that they were terminating the rescue proceedings.

[14] The Business Rescue Practitioner exited business rescue on 20 May 2025, some two months after Applicants were placed in business rescue. Applicants claim that the Business Rescue Practitioner undertook to apply to rescind the arbitration order being made an order of Court as well as to appeal the arbitration award, but did not do so.

[15] Applicants say that they now received the notice of the sale in execution on 27 May 2025 and rushed to launch their urgent application some 15 days later on 12 June 2025 and allowing the Respondents an opportunity to file an opposing affidavit 6 days later on 17 June 2025 – or just one Court Day if regard be had to the intervening public holiday.

[16] Applicants seek urgent relief to stay the sale in execution in consideration of the various complaints the Applicants raise, along with a Constitutional Law argument relating to property rights, a claim that the arbitration agreement is contrary to public policy and a general exercise of the Courts discretion in the Applicants favour as well as a general plea for justice and fairness in the process.

[17] The First Respondent complains that the Applicants lack locus standi to institute these proceedings as the members interest in the Applicants vest in the hands of the trustees of the members' insolvent husband. Thus, no resolution could be taken to institute these proceedings. The First Respondent also raises defences to the various other complaints raised by the Applicants, as well as the customary argument related to lack of urgency.

[18] If the authority point is correct then the remaining enquiries need not be entertained, as the matter is not before this Court.

SECTION 21 OF THE INSOLVENCY ACT

[19] Theodore Wilhelm Van Den Heever, a trustees of Mark Farber's sequestrated estate was appointed as the sole member of the Applicants on 4 June 2025 and Amber Farber removed. A copy of the CIPC extract relating to this aspect have been made available. Applicants' legal representatives take issue with the transfer of members interest in the absence of Amber Farber signing such documentation.

[20] The Court order of December 2024 stands until set aside. To date and despite Applicants launching this urgent application and the lengthy intervening period, no application for rescission or draft rescission application is furnished. Conceivably, Applicants face the same hurdle as they do in this application

regarding Section 21 of the Insolvency Act and the vesting of Amber Farber's members interest in the hands of Mark Farber's Trustees

[21] Section 21(1) of the Insolvency Act states:

(1) The additional effect of the sequestration of the separate estate of one of two spouses who are not living apart under a judicial order of separation shall be to vest in the Master, until a trustee has been appointed, and, upon the appointment of a trustee, to vest in him all the property (including property or the proceeds thereof which are in the hands of a sheriff or a messenger under a writ of attachment) of the spouse whose estate has not been sequestrated (hereinafter referred to as the solvent spouse) as if it were property of the sequestrated estate, and to empower the Master or trustee to deal with such property accordingly, but subject to the following provisions of this section.

A number of provisions are thereafter set down to protect the legitimate interests to the solvent spouse.

[22] Section 21(4) of the Insolvency Act states:

(4) The solvent spouse may apply to the Court for an order releasing any property vested in the trustee of the insolvent estate under subsection (1) or for an order staying the sale of such property or, if it has already been sold, but the proceeds thereof not yet distributed among creditors, for an order declaring the

applicant to be entitled to those proceeds; and the Court may make such order on the application as it thinks just.

- [23] There is no application before Court by Amber Farber to release her members interests in the Applicants that vested in the trustees.

- [24] The mischief that section 21 of the Act seeks to address is to hinder collusion between spouses to the detriment of the insolvent spouse's creditors¹.

- [25] There is no allegation by Mark Farber that he is not insolvent or that the sequestration orders against his estate stand to be challenged.

- [26] Section 21 of the Insolvency Act has been scrutinised by the Constitutional Court² and found to be consistent with the aim '*to ensure that property which properly belonged to the insolvent ends up in the estate*'.

- [27] In the event that the Trustee fails to comply with an application for such release of assets, then the solvent spouse may apply to Court for an order releasing any property vested in the trustee. Once released, the solvent spouse may thereafter again deal freely with the asset³. There is no such application made for the release of the members interest in the Applicants.

¹ Beddy No v Van Der Westhuizen 1999 (3) SA 913 (SCA).

² Harksen v Lane NO and Others (CCT9/97) [1997] ZACC 12; 1997 (11) BCLR 1489; 1998 (1) SA 300 (7 October 1997)

³ De Villiers NO v Delta Cables (Pty) Ltd (56/1990) [1991] ZASCA 115; 1992 (1) SA 9 (AD); [1992] 1 All SA 192 (A) (23 September 1991) at [14]

[28] Insofar as the meaning of 'vests' is to be considered, this is clarified as

This can only mean that the property of the solvent spouse vests in the trustee to the same extent as does the property of the insolvent. In my view, therefore, the Legislature made it perfectly clear that a transfer of dominium of the assets of the solvent spouse takes place. (Cf the Afrikaans text of s 21(1) which speaks of the "oorgaan" of such assets.) He or she thus no longer retains any of the attributes of ownership of the property concerned.⁴

[29] Respondents counsel referred me to the dictum of Maier-Frawley in *De Magalhaes v Christensen N.O. and Another* (2020/13195) [2022] ZAGPJHC 504 (27 July 2022). This matter related to a spouse seeking to have her bank accounts released from a vesting in accordance with Section 21. I am in respectful agreement with the dicta relating to the effect of section 21 removing the assets from the control of the solvent spouse until released by the Trustee or a Court.

[30] As matters currently stand, the members interest and control of Applicants fall to the Trustees of the estate of Mark Farber. These Trustees are not cited as parties before this Court, notwithstanding that Mr Theodor vd Heever did furnish the First Respondent with a confirmatory affidavit in which he confirms that he has no intention of pursuing an appeal of the arbitration award or granting the

⁴ De Villiers N.O (*op cit.*) at [18]

Farber's consent to do so and that he has not been approached for permission to launch these urgent proceedings or to release the members interest in the Applicants.

[31] During argument, Counsel for the Applicants correctly conceded that once the members interest in the Applicants vested in the Trustees of the insolvent Estate then Amber Farber lacked authority to act further. He also readily conceded that Amber Farbers estate has vested in the Trustees and have not been released. He also conceded that Amber Farber could not have passed a resolution for Applicants to institute these proceedings nor for Applicants to appoint their attorneys of record.

[32] The argument made was that there was insufficient time to launch an application to release the assets of Amber Farber, even simultaneously with the current application and that the Court to act to cancel the sale in the 'interests of justice'. I am in agreement with the submissions of Mr Botha for the First Respondent that once there is no authority, then there is ostensibly no application before the Court and the question of Uniform Rule 45A and considerations of justice in relation thereto do not arise.

[33] The issue of a lack of authority was for all intents, conceded during argument. I therefore uphold the First Respondents point in limine that this application is not properly before me and I need not deal with the further matters raised by the parties.

APPEARANCES:

COUNSEL FOR THE APPLICANTS:

Adv APRIL

ATTORNEY FOR THE APPLICANTS:

DEMPSTER McKINNON INC

COUNSEL FOR THE 1st RESPONDENT:

Adv AC BOTHA SC

ATTORNEY FOR THE 1st to 7th RESPONDENTS:

HBG SCHINDLERS ATTORNEYS