

SOUTH AFRICA / JUDGMENT

## Starbuck N.O and Another v Friebus and Others (38540/20) [2021] ZAGPPHC 276 (18 March 2021)

[2021] ZAGPPHC 276

COURT

North Gauteng High Court, Pretoria

BEFORE

C.P. Rabie

CASE / FILE NUMBER

38540/20

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### Source record

HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: yes

18

March 2021

CASE NO: 38540/20

Hearing before Rabie J by way of  
Zoom conference.

In

the matter between:

C.A. STARBUCK  
NO  
First Applicant  
M. ROUX NO  
Second Applicant  
and  
H.W.  
FRIEBUS  
First Respondent  
CHANGING TIDES  
(PTY)LTD  
Second Respondent  
THE MASTER OF THE HIGH  
COURT  
Third Respondent

## JUDGMENT

1. In this application the applicants applied for an order terminating the joint ownership held by the first respondent in a certain property in Lilianton, Extension 1; for an order directing the first respondent to sign all the necessary transfer documents to effect transfer; and failing which the Sheriff of this Court would be authorised and directed to sign such documents on behalf of the first respondent.
2. The facts of this matter are briefly the following. On 6 December 2018 the estate of Mr Friebus, the husband of the first respondent and hereinafter referred to as "the insolvent", was accepted as insolvent and placed under sequestration. The applicants were appointed as provisional trustees of the insolvent estate.
3. The only asset in the estate of the insolvent was the aforesaid immovable property. The first respondent and the insolvent were co-owners of the aforesaid immovable property. The application for voluntary surrender was brought on the premise that the total value of the property could be taken into consideration as the first respondent, as the co-owner of the immovable property, consented, under oath, that her half ownership in the immovable property may be dealt with by the appointed trustees. This was confirmed by her in an affidavit which formed part of the application for voluntary surrender of the insolvent. Without renouncing her half undivided share in the property the insolvent could never have established a dividend to concurrent creditors and would not have been successful with the application to surrender his estate.

4. At the second meeting of creditors it was decided that the trustees were authorised to dispose of the immovable property by public auction, private treaty or a public tender in their absolute and sole discretion and that the mode of sale shall be determined by the trustees. The trustees consequently decided to follow a boardroom bid-out process in which the first respondent partook. The first respondent submitted the highest bid on the property and she was afforded the opportunity to submit proof of a deposit to secure the bid.
5. The first respondent, however, failed to secure proof of the deposit, notwithstanding due demand. The trustees consequently offered the property to the second highest offer received at the public tender process. This was a Mr Malinga and a Me Ntuli who then purchased the property for the purchase consideration of R450 000,00. The written sale agreement was entered into on 4 July 2019.
6. On 17 July 2019 the first respondent sought confirmation of the fact that the property was sold, enquired as to the selling price, when she was supposed to relinquish half of the bond, and whether she would be released from the bond. The aforesaid were responded to by the trustees on 18 July 2019 and she was requested to sign the necessary documents.
7. On 22 July 2019 the first respondent, however, informed the trustees that she would not be signing the special power of attorney to effect the transfer as it would not be in their interest to do so.
8. On 5 August 2019 the trustees received a counter offer from the first respondent's father-in-law. The first respondent was informed by the trustees that the property had already been sold and was in the process of being transferred to the purchasers. The offer of her father-in-law could therefore not be considered and could not prevent the transfer of the property into the names of the purchasers.
9. In respect of the present application the first respondent raised a point in limine of lis pendens. It concerns a similar application that was withdrawn by the applicants without, however, tendering the costs occasioned thereby.
10. The first respondent further submitted that as co-owner of the property she has not agreed to the sale nor signed any agreement and/or documents consenting to the sale. It seems that the first respondent is of the view that without her consent or a court order the applicants are unable to deal with her undivided share in the property.
11. Regarding the point in limine the applicant might be entitled to her costs of the withdrawn application, although I make no finding in respect thereof, but there is no pending dispute between the parties. Even if I were to be wrong in this finding, the present application should in my view not be dismissed for that reason and the present application should proceed.
12. The first respondent cannot claim her half undivided share to the extent that it may not be sold without her consent. The first respondent had renounced her rights to the property under oath in the voluntary surrender of her husband and submitted that to the authority of

the trustees to be appointed in the insolvent estate. Given the first respondent's consent there is no room to argue that she ever regained any rights in respect of the property. On sequestration of the insolvent the property, including her one half share, vested in the Master and thereafter in the Trustees. There was consequently nothing that stood in the way of the Trustees to put the property up for sale as they did and to eventually sell the property to the aforesaid purchasers.

13. During the hearing before this court the first respondent argued a different point namely that the trustees did not have the authorisation to enter into the deed of sale. There is no merit in this argument. The deed of sale was subject to a suspensive condition namely that authority be granted at the second meeting of creditors. Such authority was given on 5 July 2019 and only thereafter, on 9 July 2019, was the deed of sale signed by the Trustees.
14. It was further submitted on behalf of the first respondent that her permission was required before the Trustees could enter into the deed of sale. There is no merit in this submission either. Her position was clearly the same as that of the insolvent and she could not object to the sale. She tried to exercise her right to purchase the property but her efforts were not successful. The Trustees were thereafter fully entitled to sell the property to the aforesaid purchasers.
15. Having regard to all the aforesaid the applicants have carried out their duties in accordance with the provisions of the Act, in line with the authority given to them by the second meeting of creditors, and in accordance with the consent granted to them by the first respondent. The applicants are accordingly entitled to the relief sought in the present application. As far as costs are concerned there is no reason why costs should not follow the event and consequently why the first respondent should not pay the applicants' cost of the application.
16. In the result, the following order is made:
  1. It is ordered that the joint ownership in the property described as  
Erf 462 Lilianton Extension 1 Township, Registration Division IR, Province of Gauteng, measuring 795 (seven hundred and ninety five) square metres, held by deed of transfer T 9935/2013, subject to the conditions therein contained or referred to ("the property"), be terminated.
  2. The first respondent is ordered to sign any and all documentation  
necessary to effect transfer within 20 days of service of this order on the first respondent, failing which the Sheriff of this Court is authorised and directed to sign all the above mentioned documentation on behalf of the first respondent.
  3. The net proceeds of the sale of the property shall be paid to the

applicants who shall, if the net proceeds exceed the amount outstanding on the bond, administration costs and outstanding rates

and taxes, immediately settle the outstanding amount owed on the bond to the second respondent by virtue of the mortgage bond held over the property under Bond No. B 33306/2015 and if the net proceeds are equal to or less than the amount owing on the bonds, pay such proceeds, less outstanding rates and taxes, to the second respondent in the reduction of its claim.

4. The remainder (if any) of any net proceeds of the sale of the property after the payments stipulated in paragraph 3 above, shall be paid to the applicants in their capacities as duly appointed trustees

of the insolvent estate; and

4.1 the profits (if any) of the sale of the property after the payments stipulated in paragraph 3 above be paid to the first respondent, and to the applicants on behalf of the insolvent estate of Jacobus Alwyn Friebus.

5. The first respondent is ordered to pay the applicants' costs of the application.

C.P. RABIE

JUDGE OF THE HIGH COURT

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