



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION PIETERMARITZBURG**

CASE NO: 10174/17P

In the matter between:

ROHITH SIVEMANGAL

PLAINTIFF

and

AM GAS & GENERAL SUPPLIERS (PTY) LTD

FIRST DEFENDANT

ASHLEY MAHARAJ

SECOND DEFENDANT

AMANDA MAHARAJ

THIRD DEFENDANT

ORDER

Judgment is granted in favour of the plaintiff against the third defendant for:

1. the sum of R790 607.95 (Seven Hundred and Ninety Thousand Six Hundred and Seven Rand and Ninety-Five Cents).
 2. Interest at a prescribed rate from the date of service of summons to the date of payment;
 3. Costs of suit.
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JUDGMENT

K Govender AJ

Background and Facts

[1] At the hearing before me on 2 March 2020, the parties proceeded by way of a stated case in terms of Rule 33 of the Uniform Rules of Court. The plaintiff was represented by Mr. SN Chetty of Messrs. Siva Chetty and Company and the third defendant was represented by Mr. SN Sangham instructed by Messrs. Sangham Incorporated. I am grateful to both of them for the helpful submissions in this matter.

[2] At all material times, the plaintiff conducted business as a retailer of industrial and domestic gas, hired out various types of gas cylinders and dealt with related products. The first defendant, a company registered under the Company Laws of the Republic of South Africa, conducted business as a retailer of gas and gas related products. The second defendant signed a suretyship agreement in respect of the indebtedness of the first defendant to the plaintiff. The third defendant was married to the second defendant in community of property at the time the suretyship agreement was signed.

[3] The plaintiff hired gas cylinders and sold gas to the first defendant from time to time. As at July 2015, the plaintiff claimed that the first defendant was indebted to him in the sum of R1 498 722. 00 (one million four hundred and ninety eight thousand seven hundred and twenty two rand).

[4] After negotiations, the second defendant acting on behalf of the first defendant, signed an acknowledgment of debt, on 24 July 2015, in favour of the plaintiff in which he admitted to being indebted to the plaintiff in the sum of R1 473 722.00 (one million four hundred and seven three thousand seven hundred and twenty two rand) and agreed to pay the debt in monthly instalments of R50 000 (fifty thousand rand) per month from 7 August 2015. On the same day, the second defendant executed a deed of suretyship in favour of the plaintiff for the sum of R1 473 722.00 in which he bound himself, jointly and severally, as surety and co-principal debtor with the first defendant. This suretyship agreement was signed by

the second defendant only. The second defendant, after making certain monthly payments to the plaintiff, then defaulted and in terms of the acknowledgment of debt, read with the suretyship agreement, the full outstanding amount became immediately due and owing. The amount claimed by the plaintiff, based on the acknowledgment of debt, was R790 607.95 (seven hundred and ninety thousand six hundred and seven rand and ninety five cents).

[5] Plaintiff instituted action against all the defendants in the Pietermaritzburg High Court for the recovery of the sum of R790 607.95. On 26 October 2017, default judgment, in terms of Rule 31(5), was granted against the first and second defendants who chose not to oppose the action. The third defendant opposed the action and entered an appearance to defend on 14 September 2017. The plaintiff's application for summary judgment was refused on 27 February 2018 and the third defendant was given leave to defend the matter. The matter was set down for trial from 2 March 2020 to 3 March 2020 and the parties elected to proceed by way of a stated case in terms of Rule 33 of the Uniform Rules of Court.

[6] The second and third defendants were married in community of property on 10 July 2010. Their marriage was terminated by way of an order of court on 7 June 2017. A Matrimonial Dissolution Agreement ("the Dissolution Agreement") concluded by the second and third defendants on 20 April 2017 was made an order of court. It is thus clear that when the acknowledgment of debt and deed of suretyship were signed by the second defendant in favour of the plaintiff, the second and third defendants were still married in community of property. However, the parties were already divorced at the time default judgment was sought and obtained against the first and second defendants on 26 October 2017.

Issues to be decided

[7] The issue before me is whether the third defendant is liable to the plaintiff as claimed. In essence, the third defendant contended that as she was not a party to the signing of the acknowledgment of debt or the suretyship agreement, she cannot be held liable for or bound by the suretyship agreement signed by the second defendant. Mr. Sangham went on to submit that the third defendant is not liable to

the plaintiff as the second defendant had indemnified the third defendant in the Dissolution Agreement for all debts incurred by him as at the date of the separation of the parties. This Dissolution Agreement was made an order of the Pietermaritzburg Regional Court. According to the third defendant, this order of court is binding on all parties including the plaintiff and effectively disposes of all the proprietary consequences arising from the marriage. The plaintiff submitted that as the acknowledgment of debt and the deed of suretyship was signed during the existence of the marriage, such a debt must in law be deemed to be a debt of the joint estate that existed between the second and third defendants. Further, the plaintiff submitted that the Dissolution Agreement created personal rights that are enforceable only against the second defendant and not against the rest of the world.

Is the third defendant bound by the Suretyship Agreement signed by the second defendant on 24 July 2015?

[8] Both parties agreed that the interpretation and application of s 15(2) of the Matrimonial Property Act 88 of 1984 was necessary to resolve this issue. The relevant provisions of s 15 provides:

‘Powers of spouses. — (1) Subject to the provisions of subsections (2), (3) and (7), a spouse in a marriage in community of property may perform any juristic act with regard to the joint estate without the consent of the other spouse.

(2) Such a spouse shall not without the written consent of the other spouse—

...

(h) bind himself as surety.

...

(6) The provisions of paragraphs (b), (c), (f), (g) and (h) of subsection (2) do not apply where an act contemplated in those paragraphs is performed by a spouse in the ordinary course of his profession, trade or business.’

[9] These subsections were subjected to a careful and detailed analysis by Wallis JA in *Strydom v Engen Petroleum Limited*.¹ After analysing the judgments in *Amalgamated Banks of South Africa Bpk v De Goede & ‘n ander*² and *Investec*

¹ *Strydom v Engen Petroleum Limited* [2012] ZASCA 187; [2013] 1 All SA 563 (SCA); 2013 (2) SA 187 (SCA).

² *Amalgamated Banks of South Africa Bpk v De Goede & ‘n ander* 1997 (4) SA 66 (A).

*Bank Ltd & another v Naidoo & others*³ Wallis J concluded that ss 15(6) is a proviso to the relevant parts of ss 15(2) and 15(3). Thus section 15(2)(h) cannot be read to mean that persons married in community of property cannot bind themselves as surety in any circumstances without the written consent of their spouses. Read together these sections state 'that in respect of certain of those transactions, including binding oneself as surety, section 15(2) does not apply if the act in question is performed in the ordinary course of the spouse's business, trade or profession'.⁴ Thus the spousal consent referred to in section 15(2) is not required if the activity entered into was in the ordinary course of the spouse's profession, trade or business. Wallis J pointed out that the proviso in ss 15(6) was included as the 'limitations in sections 15(2) and (3) had the potential to interfere with the operation of businesses, trades or professions and that the requirement of consent in these cases would unnecessarily interfere with and restrict the ordinary conduct of business' and could have the effect of seriously hampering the 'ability of a spouse married in community of property to function effectively in that profession.'⁵ Thus if the second defendant signed the surety agreement in the ordinary course of his business then there would be no need to obtain the written consent or acquiescence of the third defendant.

[10] The third defendant denied that the suretyship agreement was signed in the ordinary course of business. The first and second defendants conducted business as a retailer of gas and related products. They purchased these products and hired gas canisters from time to time from the plaintiff. The second and third defendants became indebted to the plaintiff in respect of gas purchased and in respect of gas cylinders that were hired but not returned. The plaintiff, represented by his attorney, and the first and second defendants met and discussed the indebtedness of the first and second defendants to the plaintiff. These negotiations culminated in the first defendant, represented by the second defendant, signing an acknowledgment of debt and with the second defendant signing the deed of suretyship. This is an instance of the first and second defendant negotiating and reaching an arrangement with one of their suppliers and creditors.

³ *Investec Bank Ltd & another v Naidoo & others*, unreported, case number 9640/98 (DCLD).

⁴ *Strydom* para 13.

⁵ *Strydom* para 9.

[11] The acknowledgment of debt and the suretyship agreement provided for a structured method of payment of the outstanding debt with the first and second defendants agreeing to pay the sum of R50 000 00 on or before 7 August 2015 with the balance to be paid on or before the seventh day of each succeeding month. I am satisfied in these circumstances that the deed of suretyship was signed by the second defendant in the ordinary course of business. I am therefore satisfied that it was not necessary for the third defendant to consent to the suretyship agreement. I am also satisfied that the second defendant having signed the suretyship agreement in the ordinary course of business during his marriage, which was in community of property, the debt falls to be a debt of the joint estate that existed between the second and third defendants. The joint estate was therefore bound by the suretyship agreement signed by the second defendant even though the third defendant neither consented to nor signed the suretyship agreement.

[12] Section 17(5) of the Matrimonial Property Act states:

‘Where a debt is recoverable from a joint estate, the spouse who incurred the debt or both spouses jointly may be sued therefor, and where a debt has been incurred for necessities for the joint household, the spouses may be sued jointly or severally therefor.’

As this debt was recoverable from the joint estate, the plaintiff had a right to sue both the second and third defendants jointly or severally. I now turn to the next issue of whether this right to sue the third defendant was extinguished as a result of the Dissolution Agreement signed by the second and third defendants.

The effect and consequence of the second and third defendants entering into the Dissolution Agreement.

[13] The third defendant relies on the provisions of the Dissolution Agreement which she contended indemnified her for all debts incurred by the second defendant as at the date of the separation. The Dissolution Agreement was subsequently made an order of court on 7 June 2017. Clause 11 of the Dissolution Agreement which deals with debts states:

‘11.1 Unless this Agreement indicates otherwise:

11.1.1 Amanda hereby assumes sole liability for those debts incurred by her as at the date that the parties separated and indemnifies Ashley against any claim which her creditors may bring against him as from the date of separation.

11.1.2 Ashley hereby assumes sole liability for those debts incurred by himself as at the date of separation of the parties and indemnifies Amanda against any claim which his creditors may bring against her.'

[14] The third defendant submitted that she is not liable to the plaintiff as she was indemnified for the debts incurred by the second defendant for all debts incurred by him. Mr. Sangham pointed out that the Dissolution Agreement was made an order of court and its terms were binding on all parties, including the plaintiff. He argued further that the Dissolution Agreement and order of court effectively disposed of all the proprietary consequences arising from the marriage and the joint estate of the second and third defendants. According to Mr. Sangham, the proprietary consequences of the marriage were disposed of and settled before the plaintiff issued summons against the defendants. Therefore, he concluded that once the Dissolution Agreement containing the indemnity clause was made an order of court, the third defendant is no longer liable to the plaintiff in terms of the deed of suretyship signed on 24 July 2015.

[15] The plaintiff contended that the terms of the Dissolution Agreement created no more than personal rights as far as the contracting parties are concerned. Mr. Chetty submitted that the Dissolution Agreement in general and the indemnity clause specifically created personal rights as far as the third respondent is concerned and that these personal rights are enforceable only against the second defendant and not against the rest of the world.

[16] There is ample authority to support Mr. Chetty's contention that the rights accruing to the third defendant were personal rights enforceable against the second defendant only and not against the plaintiff. In *Reynders v Rand Bank Bpk*,⁶ the court had to deal with a situation which was not dissimilar to the matter before me. In *Reynders*, the applicant sought an order directing that the property be transferred to her children. In terms of a divorce settlement agreement made an order of court, her

⁶ *Reynders v Rand Bank BPK* 1978 (2) SA 630 (T).

former husband undertook to transfer the matrimonial home to her children. However, prior to the transfer, the property was attached in execution at the instance of the respondent. The attachment was made pursuant to a judgment obtained by the respondent against the former husband of the applicant. Based on the divorce settlement agreement which was made an order of court, the applicant sought to stop the sale in execution contending that the immovable property be transferred to her children in accordance with the divorce settlement agreement that was made an order of court. Nestadt J confirmed that the applicant had a personal right:

'The issue that arises in this matter is whether the applicant's claim to the property enjoys a similar preference over that of the respondent. It need hardly be stated that, her claim being to the property itself, no possibility of a sharing of the proceeds arises. Now such claim, as Mr Stretcher on behalf of the respondent pointed out, rests on a purely personal right of the applicant against her ex-husband to implement his contractual obligation to pass transfer of the property to the children. The fact that the divorce settlement was made an order of Court so that applicant has a judgment in her favour ordering, *inter alia*, transfer, does not affect this position (*Allen v Allen* 1951 (3) SA 320 (A) at 330E). One has therefore a situation in which the competing claims in respect of (to use a loose expression) the property, are the real right of the respondent (created by its attachment) and the prior personal right of the applicant (created by her contract with her ex-husband).'⁷

[17] In principle it would be untenable for the second and third defendants effectively to emasculate the right of the plaintiff to claim against their joint estate by entering into an agreement and having it confirmed as a court order without notice to the plaintiff. Pillay J in *Maharaj v Sanlam Life Limited*,⁸ observed that ss 17(5) of the Matrimonial Property Act which was intended to protect creditors against spouses who tried to avoid liability on the basis of arrangements between them of which the creditors are unaware. Thus the interpretation advanced on behalf of the third defendant could have the effect of seriously undermining the objectives of ss 17(5). I need to add that on the facts as stated there was no suggestion that the second and third defendants colluded in this matter. However, an interpretation which undermines the objectives of legislation should be avoided.

⁷ *Reynders* at 634C-F.

⁸ *Maharaj v Sanlam Life Limited & others* [2011] 2 All SA 571 (D).

[18] It is apparent from the perusal of the Dissolution Agreement that it only afforded the third defendant personal rights against the second defendant. This is clear from section 13.1 of the Dissolution Agreement which states:

‘This Dissolution Agreement contains all the terms and conditions of the agreement between the parties and shall be binding upon them on signature by them both.’

The definition section of the Dissolution Agreement defines ‘the parties’ as ‘Ashley’ and ‘Amanda’ which refers to the second and third defendants, respectively. The Dissolution Agreement, as is apparent from Clause 13.1, is binding only on the second and third defendant and the court order making the Dissolution Agreement an order of court was made on that understanding.

[19] Accordingly, the Dissolution Agreement and the court order had no impact on the right of the plaintiff to claim against the joint estate of the second and third defendants.

Conclusion

[20] The acknowledgment of debt and suretyship agreements were signed by the second defendant in July 2015 during the course of his marriage to the third defendant. As the parties were married in community of property and as the debt was incurred in the ordinary course of business, it was not necessary for the second defendant to obtain the consent of the third defendant to bind their joint estate. The suretyship agreement signed by the second defendant in favour of the plaintiff was a debt of the joint estate. As this was a debt recoverable from the joint estate, the plaintiff was entitled in terms of section 17 of the Matrimonial Property Act to sue both the second and third defendants. The Dissolution Agreement and the subsequent order of court confirming its terms created personal rights between the second and third defendants and did not affect the plaintiff’s rights to sue the joint estate in terms of section 17. Clearly the Dissolution Agreement afforded the third defendant the right to recover any amount successfully claimed from her by the plaintiff from the second defendant. Therefore, I am satisfied that the plaintiff has established that the third defendant is liable to it as claimed. As the plaintiff has been successful in pursuing his claim, I am of the view that costs in the ordinary course should follow.

Order

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

Judgment is granted in favour of the plaintiff against the third defendant for:

1. the sum of R790 607.95 (Seven Hundred and Ninety Thousand Six Hundred and Seven Rand and Ninety-Five Cents).
2. Interest at a prescribed rate from the date of service of summons to the date of payment;
3. Costs of suit.

K. Govender AJ

Date of Hearing: 02 March 2020

Date of Judgment: 19 March 2020

CASE INFORMATION**APPEARANCES**

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Date of hearing : 02 March 2020