THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

REPORTABLE

Case no: 184/2012

In the matter between:

Ockie Strydom **Appellant**

and

Engen Petroleum Limited **Respondent**

Neutral citation: *Strydom v Engen Petroleum Limited* (184/2012) [2012] ZASCA 187 (30 November 2012)

Coram: HEHER, TSHIQI et WALLIS JJA et SWAIN et SALDULKER AJJA

Heard: 21 NOVEMBER 2012

Delivered: 30 NOVEMBER 2012

Summary: Suretyship – validity – ss 15(2)*(h)* and 15(6) of the Matrimonial Property Act 88 of 1984.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Southwood J, sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

WALLIS JA (TSHIQI JA et SWAIN et SALDULKER AJJA concurring))

[1] Soutpansberg Petroleum (Pty) Ltd (Soutpansberg) distributed petroleum products on behalf of the respondent, Engen Petroleum Limited (Engen), from depots in Musina and Louis Trichardt in Limpopo. It was provisionally wound up on 13 November 2006 and a final winding-up order was made on 12 November 2007. At that time it owed some R25 million to Engen. Mr Strydom, the appellant, was previously a director of Soutpansberg and, on 15 December 2004, had executed an unlimited deed of suretyship in favour of Engen, binding himself as surety for and co-principal debtor with Soutpansberg for the due and punctual payment of all moneys that were then or might thereafter be owing by Soutpansberg to it. With a view to recovering the amount owed to it, Engen instituted motion proceedings against Mr Strydom and another surety, a Mr Louw, in the North Gauteng High Court, Pretoria. The application was heard by Southwood J who granted judgment against Mr Strydom and Mr Louw (the latter having not defended the proceedings) in the

amount of R25 311 432.21, together with interest and costs of suit on the scale as between attorney and client.

[2] Mr Strydom opposed Engen's application on two grounds. First, he contended that Engen had not proved the amount of its claim. Second, he said that he was married in community of property and that his wife had refused her consent to his signing the deed of suretyship. Engen was not in a position to dispute this and did not do so. He contended that the deed was therefore invalid by virtue of the provisions of s 15(2)*(h)* of the Matrimonial Property Act 88 of 1984 (the Act). Southwood J rejected both defences, but gave leave to appeal to this court in relation to the second defence only.

[3] Under the Roman Dutch common law, marriages were ordinarily in community of property and the husband was vested with the marital power. This enabled the husband to deal with all the assets of the joint estate to the exclusion and without the consent of his wife. That meant that the husband could incur debts and bind the joint estate to those debts irrespective of the views or interests of his wife. Such a patriarchal regime is of course intolerable under our present constitutional dispensation. Even under its oppressive predecessor it was regarded as unacceptable and the provisions of chapter III of the Act were directed at changing it.

[4] The Act did not abolish the institution of marriage in community of property, where the assets of the respective spouses fall into a joint estate. Instead s 11 of the Act abolished the marital power and, in terms of s 12, did away with the restrictions that the husband’s marital power had placed on the

capacity of a wife to contract and litigate. The resultant consequences of marriages in community of property were set out in chapter III of the Act. In construing those provisions it is necessary for us to be conscious that we now live in a society where everyone is equal before the law and has the right to equal protection and benefit of the law, and unfair discrimination on the grounds of gender, sex and marital status has been outlawed.

[5] Under the new legal regime governing marriages in community of property both spouses have the same powers with regard to the disposal of the assets of the joint estate, the contracting of debts which lie against the joint estate and the management of the joint estate (s 14). They are each vested with the powers that previously vested in the husband alone. However, those powers are not entirely unfettered. The Act recognises that, if they were, either spouse would be vulnerable to suffering financial loss in the event of their partner making ill-judged or profligate decisions in relation to their financial affairs. Accordingly, in s 15, a number of limitations are put in place on the exercise of this power.

[6] The starting point under s 15(1) is that either 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. That right is, however, made subject to the limitations contained in ss 15(2) and (3), which impose the requirement of the consent of the other spouse, written in the cases described in s 15(2), but not in the cases described in s 15(3), in order to undertake certain financial transactions. It is with one of these, the prohibition on the one spouse binding him or herself as surety, that this case is concerned.

[7] It is appropriate at this stage to set out the relevant statutory provisions. They are as follows:

(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 paragraph … *(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;'

[8] These provisions were considered by this court in *Amalgamated Banks of South Africa Bpk v De Goede*.[1] There two members, who were employed respectively as a teacher and a clerk, each held a 12 per cent interests in a close corporation. The controlling interest was held by a man who, in the case of the teacher, was his father and, in the case of the clerk, was his father-in-law. The two younger men played no day to day role in the operation of the close corporation. They had, however, contributed small amounts to the close corporation as their members' interests and by way of loans. In order to finance the business activities of the close corporation a loan was sought from the bank and it required all three men to sign suretyships as security for the loan. When the close corporation went into liquidation the bank sued the teacher and the clerk on their suretyships to recover what was owing to it and were met with the defence that these were invalid by reason of s 15(2)*(h)* of the Act.

[1] *Amalgamated Banks of South Africa Bpk v De Goede & 'n ander* 1997 (4) SA 66 (A).

[9] This court rejected that defence on the grounds that, in accordance with the provisions of s 15(6), the suretyships had been furnished by them in the ordinary course of their business. It pointed out that in enacting the legislation the legislature must have been aware that the limitations in ss 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.[2] One can readily see why that might be the case. For example, if an attorney who was a member of a partnership, was married in community of property and the partnership required an overdraft, wished to purchase business premises or conclude agreements to acquire office machinery, which agreements would be subject to the provisions of the National Credit Act 34 of 2005, their spouse's consent would be required in order for the partnership to enter into these ordinary business transactions. To impose such a limitation would seriously hamper the ability of a spouse married in community of property to function effectively in that profession. As a result the protection the statute provides against unilateral conduct by one spouse that may detrimentally affect the joint estate is not absolute.[3]

[2] At 74F-I where F H Grosskopf JA said: 'Waar 'n gade egter in die gewone loop van sy beroep, bedryf of besigheid optree, kan die vereiste van toestemming die normale handelsverkeer onnodig belemmer en beperk. Dit was vermoedelik om daardie beswaar die hoof te bied dat die Wetgewer in art 15(6) bepaal het dat die toestemming van die ander gade nie vereis word waar die gemelde regshandelinge in die gewone loop van 'n gade se beroep, bedryf of besigheid verrig word nie. Borgstelling is een van daardie regshandelinge gemeld in art 15(6). Artikel 17(1)(c) bevat 'n soortgelyke bepaling. Volgens art 17(1) mag litigasie deur of teen 'n gade getroud in gemeenskap van goed normaalweg nie sonder die skriftelike toestemming van die ander gade ingestel of bestry word nie, behalwe geregtelike verrigtinge "(c) ten aansien van 'n aangeleentheid wat betrekking het op sy beroep, bedryf of besigheid".

[3] At 74I, F H Grosskopf JA said: 'Dit is dus duidelik dat die beskerming teen eensydige optrede van 'n gade wat die gemeenskaplike boedel nadelig kan raak, nie volkome is nie.'

[10] Accordingly s 15(6) provides that spousal consent in relation to most of the transactions in s 15(2) and (3) is not required where those transactions are entered into in the ordinary course of a spouse's business, trade or profession. Where a business is carried on through an incorporated vehicle such as a company or close corporation, or even an unincorporated vehicle, such as a partnership or trust, the question to be answered is whether the surety's involvement in that business is his or her business and whether the execution of the suretyship was in the ordinary course of the surety's business, not the business of the company, close corporation, partnership or trust.[4] It may not be the surety's business if they are a mere salaried employee, having no commercial interest in the business' success or failure. However, a person who holds a number of non-executive directorships that are the principal source of their income may well when executing a deed of suretyship for one of those companies be acting in the ordinary course of their business.

[11] This illustrates the fact that whether a deed of suretyship was executed in the ordinary course of business is, as Southwood J held it to be in this case, a question of fact. That is how this court treated it in *De Goede*.[5] It rejected a contention by the sureties that their interest in the close corporation was merely a paper interest. It pointed out that under the Close Corporations Act 69 of 1984 they both owed a fiduciary duty to the close corporation and both were vested with powers of management in respect of its affairs. They had involved themselves in those affairs by investing money to provide it with capital and by being parties to the conclusion of the loan agreement with the bank. Their intention was to profit from their participation in the affairs of the close

[4] At 77A-B.

[5] And how it was treated in *Tesoriero v Bhyjo Investments Share Block (Pty) Ltd* 2000 (1) SA 167 (W) at 173A-175E.

corporation. They were therefore conducting business through the vehicle of the close corporation and the execution of the deeds of suretyship was done in the ordinary course of that business.

[12] That was also the approach of Hurt J in *Investec Bank Ltd & another v Naidoo & others*.[6] That case involved a property syndication, where 50 investors, through the medium of a private company, purchased a property for redevelopment and resale on a sectional title basis. The acquisition was funded by way of a loan from the plaintiff bank repayment of which was secured inter alia by individual deeds of suretyship from the investors. When the scheme collapsed and the bank sued the sureties 14 of them raised a defence under s 15(2)*(h)* of the Act that the deeds of suretyship were invalid because their wives had not consented to their execution. Hurt J held that the question whether they had been granted in the ordinary course of the sureties business 'must be judged objectively with reference to what is to be expected of businessmen (or, these days, businesswomen)'. He stressed the importance attached in *De Goede* to the fact that the sureties' interest in the close corporation was an investment and that the suretyship was given to enable that investment to succeed by providing it with the necessary funding via a loan to pay operating expenses. In those circumstances, even though the shareholders were not directors and were not managing the venture, he held that the only difference in the two cases was that he was dealing with shareholders and not members of a close corporation. Given the nature of the scheme; the obligation of the shareholders to make capital contributions; the fact that they were consulted on the purchase of the property at a higher price than originally contemplated and that the corporate form was adopted for reasons of business convenience in relation to what was in substance a partnership or joint venture,

[6] *Investec Bank Ltd & another v Naidoo & others (unreported)*, Case No 9640/98 (DCLD).

he held that the deeds of suretyship were executed in the ordinary course of the business of the sureties.

[13] The argument before us on behalf of the appellant proceeded on the footing that, once Mr Strydom said that he was married in community of property and that his wife had not consented to his executing the deed of suretyship,[7] an onus rested on Engen to prove that he had nonetheless bound himself as surety in the ordinary course of his business. Whilst in my view the evidence before the court demonstrated that this was indeed the case the approach was in my view wrong. The reason is that it treated the provisions of s 15(2) as distinct from s 15(6). However, that is not appropriate as a matter of interpretation, which requires statutes to be construed in the light of their context not as isolated fragments of words.[8] The requirement that spousal consent be obtained before concluding certain defined financial transactions as set out in ss 15(2) and (3) of the Act cannot be read in isolation. Section 15(6) says expressly 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. What one knows therefore is that ss 15(2) and (3) operate in respect of some, but not other, financial transactions depending on whether or not they are performed in the ordinary course of the spouse's business, trade or profession. Accordingly it does not suffice for a person seeking to rely on s 15(2)*(h)* to say that they were married in community of property and that their spouse did not consent to the transaction to bring themselves within the ambit of the section. That is because the section only operates in certain limited circumstances. If

[7] He in fact said that she refused to agree, something Engen hardly surprisingly, as it was not privy to their matrimonial communications, did not dispute.

[8] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) paras 18 and 19.

they wish to rely upon it they must bring themselves within the full range of operation.

[14] The fallacy underlying the appellant's approach is not far to seek. It lay in a failure to recognise that in substance, if not in form, s 15(6) is a proviso to the relevant parts of ss 15(2) and 15(3). Had it been universally applicable to all transactions dealt with in those sections, no doubt they would have commenced with the qualification that it embodies, in words such as 'Save where the act contemplated in the following paragraphs is performed by a spouse in the ordinary course of his profession, trade or business'. However, that was not possible as a matter of drafting because s 15(6) does not, for example, apply in relation to the transactions in sub-paras *(a) (d)* and *(e)* of s 15(2). Hence it is contained in a separate sub-section. That does not, however, change its essential character. Use of the familiar form 'Provided that …' is not necessary to constitute a provision in a statute or contract a proviso.[9] Any form of words that serves to narrow the scope of another provision by qualifying its scope of operation or excepting from it something that would otherwise fall within it is treated as a proviso.

[15] The correct approach to the interpretation of a proviso and the fallacies that arise in respect thereof was identified in the following passage from the judgment of Botha JA in *Mphosi v Central Board for Co-operative Insurance Ltd*:[10]

[9] See by way of example the judgment of Nicholas AJA in this court in *Hira v Booysen* 1992 (4) SA 69 (A) at 79F-80D.

[10] *Mphosi v Central Board for Co-operative Insurance Ltd* 1974 (4) SA 633 (A) at 645C-F.

‘‘This argument altogether overlooks the true function and effect of a proviso. According to Craies, *Statute Law*, 7th ed., at p. 218 –

"the effect of an excepting or qualifying proviso, according to the ordinary rules of construction, is to except out of the preceding portion of the enactment, or to qualify something enacted therein, which but for the proviso would be within it; and such proviso cannot be construed as enlarging the scope of an enactment when it can be fairly and properly construed without attributing to it that effect".

In *R. v Dibdin*, 1910 P. 57, Lord FLETCHER MOULTON at p. 125, in the Court of Appeal, said –

"The fallacy of the proposed method of interpretation (i.e. to treat a proviso as an independent enacting clause) is not far to seek. It sins against the fundamental rule of construction that a proviso must be considered in relation to the principal matter to which it stands as a proviso. It treats it as if it were an independent enacting clause instead of being dependent on the main enactment. The Courts … have frequently pointed out this fallacy, and have refused to be led astray by arguments such as those which have been addressed to us, which depend solely on taking words absolutely in their strict literal sense, disregarding the fundamental consideration that they appear in a proviso."’

[16] Once it is recognised that it was for Mr Strydom to demonstrate that he was entitled to the protection of s 15(2), and that, in order to do so, he was required to show that he did not bind himself as surety in the ordinary course of his business, it is immediately apparent that he failed dismally to do so. He said that he was a businessman, but other than his involvement in Soutpansberg, he mentioned no other business in which he was involved. He was admittedly a director of Soutpansberg, but he sought to distance himself from this by saying that he was principally involved with the marketing of the product in the Limpopo area and not intimately involved in the day to day running of the business. In the heads of argument on his behalf it was sought to distance himself still further by saying that he was ‘exclusively responsible for the marketing of the principal debtor in a specific area’. However, these allegations

take on a different colour once it is recognised, as appears from the admitted contracts between Soutpansberg and Engen on which the relationship was built, that Soutpansberg's business was the distribution and sale of Engen's products in Limpopo through its depots in Musina and Louis Trichardt. The entire business was the sale of those products. Accordingly the marketing of the business was the heart and soul of its operations. Apart from that there was only the logistical side of delivering product to customers and administration. Far from being involved to a limited extent Mr Strydom worked at the very core of the business.

[17] Then there was Mr Strydom's coy silence on a number of key issues. He was a director of the business. It was a small private company and it is unusual for such companies to have directors who have no share in the company. Yet Mr Strydom did not claim not to be a shareholder. An important part of the agreements that were concluded between Soutpansberg and Engen was the agreement in December 2004 in terms of which Engen required the directors of Soutpansberg to sign deeds of suretyship for the company's indebtedness to Engen. The natural inference underlying this request is that the directors were also the persons having a financial stake in the company, in other words, its shareholders. Yet Mr Strydom merely admits the agreement and his signature to the deed of suretyship without indicating that he signed it on some other basis. Had he been a mere employee given token status as a director that was the obvious thing to say, yet he remained silent. Significantly, on the deed of suretyship, immediately beneath his signature and a little to the left, is a line, under which appear the words 'CONSENT BY SPOUSE (TO THE EXTENT APPLICABLE). Entered on that line is the acronym 'N/A' meaning 'not applicable'. The central issue in this case is whether that was so yet he does not explain that insertion. Various possibilities were postulated in argument, but

these are mere speculation. The document is admitted and this is unexplained. That is a glaring failure if in truth spousal consent was necessary.

[18] Furthermore, annexed to the application papers was the judgment by Mynhardt J in the application for the winding-up of Soutpansberg. That recorded that the opposition by the company was contained in opposing affidavits and that Mr Strydom had signed a confirmatory affidavit. Significantly the judgment reflects that at the time of the application Mr Strydom had a debit loan account with the company in an amount in excess of R3 million. He said nothing about this. Nor did he say anything about the circumstances in which he came to sign directors' resolutions that resulted in Soutpansberg waiving claims against Engen and varying the terms of the sales and distribution agreement. He was silent also on his presence at meetings between Engen and Soutpansberg reflected in the letter the company's attorneys addressed to Engen in October 2006 that led to the final rupture in relations. Any proper explanation of his involvement in Soutpansberg demanded that he deal with issues such as these yet he chose to remain silent. In this case his silence speaks volumes.

[19] The reality of the matter is that the only person who could testify to these matters was Mr Strydom himself. He could explain how he came to be involved in Soutpansberg; why he was appointed a director and why his activities in relation to its operations did not constitute his business. He chose not to do so in the face of an explicit statement on behalf of Engen that he had bound himself as surety in the ordinary course of his business. That was said in the replying affidavit in response to his invocation of s 15(2) and in his supplementary answering affidavit delivered some eight months later he chose not to deal with

it. The obvious inference is that he was unable to do so. Where matters are within the exclusive knowledge of one party less evidence is required to be adduced by the other party to discharge the onus of proof on a point.[11] And sometimes the silence of a witness on a vital point within that person's knowledge is as telling as anything that may be said from the other side.

[20] Even had the onus of proving that Mr Strydom had bound himself as surety in the ordinary course of his business rested on Engen there would still have been a need for Mr Strydom to give evidence to rebut that suggestion. There was certainly sufficient evidence in the nature of the business, Mr Strydom's position as the director in charge of the key area of the company's operations, the fact that he signed the deed of suretyship and, as a result of his directorship, was clearly aware of the nature of the company's relationship with Engen and familiar with the contractual arrangements between Soutpansberg and Engen to require him to explain why he had not been acting in the course of his business. That he failed to do. Accordingly, even if the onus had rested on Engen it was discharged.

[21] That conclusion renders it unnecessary to consider some other matters that were canvassed in argument and in particular the impact of s 15(9) which reads:

'(9) When a spouse enters into a transaction with a person contrary to the provisions of subsection 2 … of this section …, and –

[11] *Union Government (Minister of Railways) v Sykes* 1913 AD 156 at 173-4; *Ex parte The Minister of Justice: In re R v Jacobson & Levy* 1931 AD 466 at 479 where reference is made to 'the nature of the case and the relative ability of the parties to contribute evidence on that issue'. *Hasselbacher Papier Import and Export (Body Corporate) & another v MV Stavroula* 1987 (1) SA 75 (C) at 79A-D.

(a) that person does not know and cannot reasonably know that the transaction is being entered into contrary to those provisions or that order, it is deemed that the transaction concerned has been entered into with the consent required in terms of the said subsection (2) …;

(b) that spouse knows or ought reasonably to know that he will probably not obtain the consent required in terms of the said subsection (2) … and the joint estate suffers a loss as a result of that transaction, an adjustment shall be effected in favour of the other spouse upon the division of the joined estate.'

It is possible that this section might have come into play in different circumstances but as the case can be resolved without needing to deal with it, the better course is to say nothing in regard to its meaning and effect. Any such statement would be obiter and that should if possible be avoided.

[22] My brother Heher, whose imminent retirement is a source of regret to his colleagues on this court, takes a different view of the case to mine. He would place the onus on Engen on the basis that it was obliged to prove that it had a legally enforceable deed of suretyship. I respectfully differ. A person relying on a deed of suretyship need show only that it was executed by a person having full legal capacity in accordance with the requirements of section 6 of the General Laws Amendment Act 50 of 1956. It is no part of their cause of action to allege and prove that the surety was either not married in community of property, or, if they were, that their spouse had consented to the execution of the deed, or that such consent was unnecessary because it was executed in the ordinary course of the surety's profession, trade or business. However, at the end of the day that is neither here nor there, because my colleague holds that Mrs Strydom was a necessary party to this litigation and that her non-joinder has the effect that Engen is non-suited until she has been joined.

[23] Again I find myself in respectful disagreement. Joinder is necessary in the circumstances explained by Corbett J, with his customary lucidity, in *United Watch & Diamond Co (Pty) Ltd & others v Disa Hotels Ltd & another*.[12] He said:

'It is settled law that the right of a defendant to demand the joinder of another party and the duty of the Court to order such joinder or to ensure that there is waiver of the right to be joined (and this right and this duty appear to be co-extensive) are limited to cases of joint owners, joint contractors and partners and where the other party has a direct and substantial interest in the issues involved and the order which the Court might make (see *Amalgamated Engineering Union v Minister of Labour*, 1949 (3) SA 637 (AD); *Koch and Schmidt v Alma Modehuis (Edms.) Bpk.*, 1959 (3) SA 308 (AD). In *Henri Viljoen (Pty.) Ltd. v Awerbuch Brothers*, 1953 (2) SA 151 (O), HORWITZ, A.J.P. (with whom VAN BLERK, J., concurred) analysed the concept of such a 'direct and substantial interest' and after an exhaustive review of the authorities came to the conclusion that it connoted (see p. 169) –

"... an interest in the right which is the subject-matter of the litigation and ... not merely a financial interest which is only an indirect interest in such litigation".

This view of what constitutes a direct and substantial interest has been referred to and adopted in a number of subsequent decisions'.

Corbett J's exposition has been cited countless times as a correct statement of our law including in judgments of this court.[13]

[24] On that basis the question is whether Mrs Strydom has a direct and substantial interest in the subject matter of this litigation, that is, the suretyship and its validity, or whether her interest is merely a financial interest that is only indirect and therefore does not require her joinder. The answer is clear. She has no interest in the suretyship or its validity. She is not a party to it and according to her husband she was opposed to its execution. The fact that he went ahead and executed it notwithstanding her disapproval is a potential source of

[12] *United Watch & Diamond Co (Pty) Ltd & others v Disa Hotels Ltd & another*1972 (4) SA 409 (C) at 415E-H.

[13] The most recent is *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para 85, fn 72.

financial prejudice to her and undoubtedly a source of matrimonial discord. However, that is not a direct and substantial interest in the issues in this case. It is an interest that exists only by virtue of the fact that she and Mr Strydom are married in community of property. I accordingly disagree with the proposition stated in para 43 of my colleague's judgment.

[25] The consequence of my colleague's judgment would be that in every case where the effect of a judgment, or more accurately the execution of a judgment, would be to diminish the joint estate, joinder of the spouse who was not party to the underlying transaction or dispute, would be essential in order that they could protect their interest in the joint estate. Whilst the proposition in para 43 of his judgment is in terms confined to suretyship, I can see no reason why it would not apply in any situation where a claim against one spouse married in community of property would, if successful, detrimentally affect the joint estate. On my colleague's reasoning, particularly that in the final sentence of para 45 of his judgment, the other spouse would have to be joined to enable them to protect the joint estate and their interest in it. Not only has that never been our law, but it would fly in the face of the constitutional guarantee of equality between husband and wife by forcing them to litigate together in all situations where the joint estate could be affected by the outcome of the litigation. Sections 15(5) and 17(1) of the Act make it clear that this is not a requirement. In relation to matters relating to a spouse's profession, trade or business that spouse is free to institute or defend litigation without obtaining the consent of their spouse. This provision would be entirely undercut by a requirement that the other spouse must be joined in that litigation.

[26] For those reasons the appeal is dismissed with costs.

M J D WALLIS

JUDGE OF APPEAL

HEHER JA (dissenting):

[27] This appeal concerns the application of s 15 of the Matrimonial Property Act 88 of 1984 which provides, in so far as here relevant, as follows:

'(1) Subject to the provisions of [subsection (2)] … 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.

…'

[28] The provisions of [paragraph (*h*)] of subsection (2) do not apply where an act contemplated in [that paragraph] is performed by a spouse in the ordinary course of his profession, trade or business.'

[29] The respondent ('Engen') a manufacturer, marketer and distributor of fuel and chemical products concluded a sales and distribution agreement with Soutpansberg Petroleum (Pty) Ltd on 3 December 2004 which amplified earlier contractual arrangements between the parties. Clause 2.10 provided that an undertaking of suretyship for the obligations of the company would be signed by all its directors. The appellant was a director and he duly signed the required

undertaking on 15 December 2004 as did his fellow director, Mr Nico Louw. (Another director did not, but that factor is irrelevant to the issues in this appeal.)

[30] Soutpansberg Petroleum (Pty) Ltd was provisionally wound up upon the application of the respondent on 13 November 2006, the order being made final on 12 November 2007.

[31] In February 2009 the respondent applied on motion to the North Gauteng High Court, Pretoria for an order directing the appellant and Louw jointly and severally to pay to it the sum of R25 311 432.21 together with mora interest on that amount and costs on the attorney and client scale. This amount, the respondent alleged, was due and payable to it by the company and accordingly owed by the sureties.

[32] The application was opposed by the appellant. He essentially raised two defences: that the respondent had refused to furnish him with particulars that established any indebtedness on the part of the company; in consequence he denied that it was a debtor of the respondent; and that he, the appellant, was married in community of property when he signed the deed of suretyship and his spouse had refused to consent to him doing so, with the consequence that his undertaking had been without force and effect by reason of the provisions of s 5(2) of the Act.

[33] The court that heard the application (Southwood J) rejected both grounds. It ordered the relief as claimed. However it granted leave to appeal to this Court ‘in respect of only the [appellant’s] defence based on the provisions of [the Act].’

[34] The onus in the application proceedings rested on the present respondent throughout. That included the burden of establishing that it relied upon a legally enforcible undertaking of suretyship. In the context of s 15(2) that required that Engen prove, on a balance of probabilities, that the appellant's spouse had consented in writing to him incurring the obligations of a surety (which, it was common cause, she had refused to do) or that it exclude the operation of ss (2)(*h*) by proving that the appellant gave the undertaking in the ordinary course of his business. (There was no question of practising a profession or carrying on a trade in this instance.)

[35] Whether Engen knew when it instituted the proceedings that the appellant was married in community is unclear. I shall assume it did not and that it only became aware of that status when he raised the statutory defence in his answering affidavit. It follows that it was only then that the aspect of whether the appellant had acted in the ordinary course of business became relevant. The generalised allegations in the founding affidavit – that the appellant was at all material times a director of Soutpansberg Petroleum (Pty) Ltd and that he entered into the suretyship in that capacity, and the fact that the appellant, as a director, signed a resolution to conclude a waiver of claims with the respondent – therefore contribute little or nothing to the elucidation of an issue that had not then become apparent.

[36] In the answering affidavit, the appellant deposed:

'5. Although I was a director of Soutpansberg, I was never intimately involved in the day to day running of Soutpansberg. I was almost exclusively involved with the marketing on behalf of Soutpansberg in the Limpopo area.'

This was purely an answer to the allegations in the founding affidavit. It was not directed to the applicability of s 15(6) for the simple reason that Engen had not

by then pleaded reliance on that section and there is no indication that the appellant was aware of its existence or its terms.

[37] The statutory defence was raised by the appellant in the following terms:

'I married Hendrina Petronella Jacomina Steyn Crouse on 5 April 1980. We are married in community of property. My wife did not provide her consent to the suretyship, as required in terms of Section 15(2) of the Matrimonial Property Affairs Act, 88 of 1984. She specifically refused to sign the suretyship. As a result thereof the deed of suretyship is invalid.'

[38] In its replying affidavit Engen admitted that the appellant was a director of Soutpansberg but denied in bare terms the remainder of the allegations in para 5 of the answering affidavit. As to para 11 the respondent contended itself with stating that the appellant was, at the time of signature of the deed, a director of Soutpansberg 'and signed the deed in the ordinary course of [the appellant's] trade and business as well as in the ordinary course of business of the principal debtor.'

[39] The learned judge a quo quite correctly held that whether the appellant signed the undertaking in the ordinary course of his business depended on the facts.

[40] Southwood J summarised the facts that he regarded as relevant as follows:

'The first respondent was a director of Soutpansberg when he signed the deed of suretyship. He describes himself as a businessman and states that he was almost exclusively involved in the marketing on behalf of Soutpansberg in the Limpopo area. He refers to no other business in which he was involved. On the information in the affidavits it appears that the directors were all actively involved in the conduct of Soutpansberg's business and in reality conducted business through the vehicle of the company. It appears that when the liquidation proceedings commenced the directors all owed Soutpansberg large amounts on loan account: in the case

of the first respondent this was R3 065 251. When the first respondent signed the deed of suretyship he did so because the applicant had agreed to increase Soutpansberg's credit limit to R21,5 million and in return required deeds of suretyship signed by the directors, something which had not been required before.'

He found on the strength of these 'facts' that the appellant signed the deed in the ordinary course of his business.

[41] I have serious doubts whether, upon a proper application of the principles stated in cases such as *Radebe v Eastern Transvaal Development Board* 1988 (2) SA 785 (A) at 793C-G and *Minister of Land Affairs and Agriculture v D & F Wevell Trust* 2008 (2) SA 184 (SCA) at 200C-E, Engen set up sufficient facts to enable the court to decide in its favour that it had brought its case within the exception for which s 15(6) provides. However, for the reasons which follow, I find it unnecessary to pronounce finally on that question.

[42] When the appeal commenced the court requested counsel to address it as to whether Mrs Strydom, to whom (it was not in dispute) the appellant was married in community of property at the date on which he signed the undertaking of suretyship in favour of Engen, was a necessary party to the proceedings in the court a quo, and should, therefore, have been joined as a respondent in the application.[14] Having heard counsel and considered the matter further, I am persuaded that she was indeed such a party and that it is required of this Court to make an order which addresses that conclusion: *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 663; *Rosebank Mall (Pty) Ltd v Cradock Heights (Pty) Ltd* 2004 (2) SA 353 (W) para 13.

[14] There was no indication in the record on appeal that Mrs Strydom had been notified of the application or the relief claimed in it.

[43] In my view the applicable principles can be stated thus in relation to the proceedings brought by Engen:
When a person is sued for payment of an indebtedness allegedly arising from an undertaking of suretyship signed by that person and he or she was at the time of giving the undertaking married in community of property, the spouse to whom he or she was then married has a material or direct and substantial interest in the relief claimed such as to confer on that spouse the right to be joined in the proceedings and conversely the party suing is obliged to join that spouse unless he or she has waived that right.

[44] The question of joinder does not depend on the nature of the subject-matter of the suit but on the manner in which, and the extent to which, the court's order may affect the interests of third parties: *Amalgamated Engineering Union* at 657. That notwithstanding, where there exists a joint financial or proprietary interest, a 'vermoënsbelang', joinder of a person sharing that interest is insisted upon: *Morgan & Another v Salisbury Municipality* 1935 AD 167 at 171; *Kock & Schmidt v Alma Modehuis (Edms) Bpk* 1959 (3) SA 308 (A) at 318F.

[45] The debts incurred by a spouse married in community of property are (subject to the operation of s 15 of the Matrimonial Property Act 88 of 1984) the joint debts of the common estate, the spouses are joint debtors, the debts are paid out of the estate and execution can be levied against it in the event of non-payment: *De Wet NO v Jurgens* 1970 (3) SA 38 (A) at 47D-F. It follows that any judgment obtained by a creditor in Engen's position could not be carried into effect without prejudicing the financial interests of both spouses.

[46] Moreover a consideration of the purpose and terms of s 15 shows that a spouse in the position of Mrs Strydom possesses a legal interest in the relief

claimed. Section 15(2)*(h)* enacts a prohibition against a husband or wife married in community of property undertaking the obligations of a surety without the consent of his or her spouse. The purpose is plainly to protect both spouses against the unilateral improvidence of one of them. Each spouse has a material interest in the consequences of the prohibition. Neither is deprived of asserting that interest unless and until the creditor seeking to enforce an otherwise prohibited act brings that act within the scope of the exception for which s 15(6) provides (in accordance with the general principle that he or she who asserts must prove: *Pillay v Krishna* 1946 AD 946 at 951; *Tooth & another v Maingard and Mayer (Pty) Ltd* 1960 (3) SA 127 (N) at 134-5). I agree with Kirk-Cohen J, in *Amalgamated Bank of SA Bpk v Lydenburg Passasiersdienste BK* 1995 (3) SA 314 (T) at 322 that ‘’n borgakte deur ‘n gade aangegaan waar subarts (5) en (6) nie van toepassing is nie is nietig’.Just as either spouse has the right to assert his or her interest in the prohibition, so he or she has an equivalent right to resist a creditor’s resort to s 15(6) in order to sustain the benefit of the prohibition. To refuse either spouse his or her right in this regard would be to deprive that spouse of the means to protect his interest in the joint estate which the statute guarantees. To find that it is unnecessary for the creditor to give notice to and join the innocent spouse in proceedings in which s 15(6) is invoked by that creditor would tend to the same deprivation.

[47] Section 15(5) provides:

‘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 necessaries for the joint household, the spouses may be sued jointly or severally therefor.’

Although the general operation of this provision may permit the recovery of debts from a joint estate without joinder of both spouses: *Zake v Nedcor Bank Ltd & another* 1999 (3) SA 767 (SECLD), it should not be so interpreted as to

avoid the requirement of joinder when the issue is whether a spouse enjoys the protection of s 15(2) in relation to one of the prohibited acts.

[48] Section 15(9) provides:

'(9) When a spouse enters into a transaction with a person contrary to the provisions of subsection (2) or (3) of this section, or an order under section 16 (2), and-

…

(b) that spouse knows or ought reasonably to know that he will probably not obtain the consent required in terms of the said subsection (2) or (3),or that the power concerned has been suspended, as the case may be, and the joint estate suffers a loss as a result of that transaction, an adjustment shall be effected in favour of the other spouse upon the division of the joint estate.'

I do not think this provision detracts from the necessity of joining an affected spouse. It operates only once a joint estate has suffered loss, ie subsequent to judgment, and provides simply for an adjustment if and when a division of the joint estate takes place. There is no necessary implication in the section that it ousts the ordinary right of a spouse to take steps to protect the joint estate against the contingency of the loss referred to by resisting proceedings instituted by a creditor.

[49] I find therefore that the appellant's wife possessed an interest that was both financial and direct and substantial (as that phrase is used in the authorities cited) in the relief claimed by Engen which required that Engen join her as a party to the proceedings. Without such joinder any judgment which Engen obtained was ineffective to bind the joint estate.

[50] I would therefore uphold the appeal with costs, set aside the order of the court a quo, and direct that Engen take steps to join the appellant's wife at the time of signing the undertaking of suretyship[15] as a respondent in the

[15] The record discloses nothing about her present status.

application on appropriate terms (which it is unnecessary to spell out here since this is a minority judgment).

J A HEHER

JUDGE OF APPEAL

APPEARANCES

APPELLANT:	N G D Maritz SC (with him A P J Els)
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