

## MARRIAGE IN COMMUNITY OF PROPERTY, DIVORCE AND LIABILITY UNDER SURETYSHIP

### Sivemangal v AM Gas & General Suppliers (Pty) Ltd and Others (10174/17P) [2020] ZAKZPHC 8 (19 March 2020)

*It is generally appreciated that a spouse married in community of property may only sign a suretyship with the written consent of the other spouse. There are exceptions though, notably where the surety was acting in the ordinary course of business. The difficulty that required adjudication in this matter was whether an ex-spouse remains bound to the suretyship he or she did not sign, despite the fact that the creditor issues summons after a divorce and in which the ex-spouses each indemnified the other in respect of their 'own' debts.*

The Judgment can be viewed [here](#).

### FACTS

Mr Sivemangal conducted business as a retailer of industrial and domestic gas. AM Gas & General Suppliers (Pty) Ltd ("AM"), a retailer of gas and gas related products, was a client of Mr Sivemangal.

As at July 2015, AM was indebted to Mr Sivemangal for approximately R1,5 million. After negotiations, Mr Maharaj, acting on behalf of AM, signed an acknowledgment of debt in favour of Mr Sivemangal in respect of a debt of some R 1,4 million. It was also agreed in the acknowledgment that AM (represented by Mr Maharaj) would repay the debt in monthly instalments of R50,000 with effect from 7 August 2015. On the same day, Mr Maharaj executed a deed of suretyship in favour of Mr Sivemangal for R 1,4 million in which he bound himself, jointly and severally, as surety and co-principal debtor with AM.

At the time, Mr Maharaj was married in community of property. The suretyship agreement was signed by Mr Maharaj only.

After making certain monthly payments to Mr Sivemangal, Mr Maharaj defaulted and in terms of the acknowledgment of debt, read with the suretyship agreement, the full outstanding amount became immediately due and owing.

Mr Sivemangal instituted action against AM, Mr Maharaj and Mrs Maharaj for the recovery of the outstanding debt. In October 2017, default judgment was granted against AM and Mr Maharaj, neither of them having opposed the action. Mrs Maharaj however entered appearance to defend.

By this time (June 2017), the marriage between Mr and Mrs Maharaj had terminated. A Matrimonial Dissolution Agreement ("the Dissolution Agreement") concluded on 20 April 2017 was made an order of court.

Thus, when the acknowledgment of debt and deed of suretyship were signed by Mr Maharaj, he was still married in community of property. However, they were divorced at the time default judgment was sought and obtained against AM and Mr Maharaj in October 2017.

The question before the Court was whether Mrs Maharaj was liable to Mr Sivemangal as claimed. Mrs Maharaj contended that as she was not a party to the signing of the acknowledgment of debt or the suretyship agreement, she could not be held liable for or bound by the suretyship agreement signed by her former husband. She claimed further that, in any event, she had been indemnified by Mr Maharaj for all debts incurred by him as at the date of the separation of the parties, as recorded in the Dissolution Agreement, which was made an order of court and which, so she argued, was binding on all parties including AM. AM 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 Mr and Mrs Maharaj and that the Dissolution Agreement created personal rights that are enforceable only between the parties thereto and not third parties.

## HELD

### **Was Mrs Maharaj bound by the suretyship agreement signed by Mr Maharaj in 2015?**

- Section 15(2) of the Matrimonial Property Act 88 of 1984 provides as follows:
 

*'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.'*
- Summarised, section 15(2) provides that 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, except in certain instances, one being that *"such a spouse shall not without the written consent of the other spouse ... bind himself as surety."* The latter provision is further circumscribed in section 15(6) which states that the latter requirement of written consent *"...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."* Section 15(2)(h) does not mean that persons married in community of property cannot bind themselves as surety in any circumstances without the written consent of their spouses. Rather, the section provides '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.'
- Therefore, if Mr Maharaj 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 Mrs Maharaj.
- Mrs Maharaj denied that the suretyship agreement was signed in the ordinary course of business. However, on the facts surrounding the signing of the acknowledgment of debt and the suretyship, it appeared that these were instances of AM and Mr Maharaj negotiating and reaching an arrangement with one of their suppliers and creditors. The acknowledgment of debt and the suretyship agreement provided for a structured method of payment of the outstanding debt. In the circumstances, the conclusion is inescapable that Mr Maharaj signed the deed of suretyship in the ordinary course of business and Mrs Maharaj's consent thereto was not required. Having signed the suretyship in the ordinary course of business during his marriage, which was in community of property, the debt fell to be a debt of the joint estate that existed between Mr and Mrs Maharaj. The joint estate was therefore bound by the suretyship agreement even though Mrs Maharaj neither consented to nor signed the suretyship agreement.
- Section 17(5) of the Matrimonial Property Act states that:
 

*'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.'*

- As this debt was recoverable from the joint estate, AM had a right to sue both Mr and Mrs Maharaj jointly or severally.

#### ***The effect and consequence of the Dissolution Agreement***

- Mrs Maharaj relied on the provisions of the Dissolution Agreement which she contended indemnified her for all debts incurred by Mr Maharaj as at the date of the separation. The Dissolution Agreement was subsequently made an order of court on 7 June 2017. Clause 11 thereof stated that each party would assume sole liability for those debts incurred by him or her as at the date of separation and that each indemnifies the other against any claim from the other spouse's creditors as from the date of separation.
- The rights accruing to Mrs Maharaj in terms of the Dissolution Agreement were personal rights enforceable against Mr Maharaj only and not against Mr Sivemangal. Indeed, section subsection 17(5) of the Matrimonial Property Act 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. The interpretation advanced by Mrs Maharaj would seriously undermine this objective.

#### **CONCLUSION**

Mr Sivemangal's claim accordingly succeeded and Mrs Maharaj was held liable under the suretyship.