



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT**

Case No: I 633/2016

In the matter between:

STANDARD BANK NAMIBIA LIMITED

PLAINTIFF

and

WILLEM JOHANNES GROENEWALD

FIRST DEFENDANT

WILLEM JOHANNES GROENEWALD

SECOND DEFENDANT

CHRISTINA ELIZABETH GROENEWALD

THIRD DEFENDANT

MAROELA FARMING CC

FOURTH DEFENDANT

Neutral citation: *Standard Bank Namibia Limited v Groenewald and Others* (I 633/2016) [2019] NAHCMD 326 (06 September 2019)

Coram: USIKU, J

Heard: 11 and 14 March 2019

Delivered: 06 September 2019

Flynote: Husband and wife – Marriage in community of property – Husband executing deed of suretyship without written consent of wife – *Section 7 (1) and section*

7(2) (b) of Married Persons Equality Act 1996 (Act 1 of 1996) – Husband and wife passing two continuing covering mortgage bonds in respect of the same obligation of suretyship in favour of the creditor – Court held that the deed of suretyship is invalid and unenforceable by reason of the provisions of *s 7(2) (b) of the Act* – Court further held that the two continuing covering mortgage bonds are invalid and unenforceable by reason of absence of a legal obligation which such bonds secure.

Summary: A husband married in community of property executed a deed of suretyship in favour of a creditor, without written consent of his wife. The husband and wife passed two continuing covering mortgage bonds in respect of the same suretyship obligation in favour of the creditor – The principal debtor defaulted on his repayment obligations and the creditor sued the principal debtor and the sureties for the outstanding debt. The court held that the deed of suretyship is invalid and unenforceable by reason of the provisions of *s 7(2) (b) of the Act*. The court held further that the two continuing covering mortgage bonds are invalid and unenforceable by reason of absence of a legal obligation which such bonds secure.

ORDER

1. The plaintiff's claim against the second and the third defendants is dismissed;
2. The plaintiff's alternative claim for enrichment, against the second and third defendants is dismissed;
3. The costs occasioned by the application for rescission of default judgment (which application was granted by this court on 07 December 2016) are ordered to be costs in the cause;
4. The plaintiff is ordered to pay the costs of the second and third defendants, and such costs are to include costs of one instructing and one instructed legal practitioner;
5. The matter is removed from the roll and regarded finalised.

JUDGMENT

USIKU, J:

Introduction

[1] In this matter the plaintiff, Standard Bank Namibia Limited, claims against the second and the third defendants jointly and severally the one paying the other to be absolved for an order in the following terms:

CLAIM 1

1. Payment in the sum of N\$ 12 101 242.02;
2. Payment of interest at the rate of 10.25% per annum on the amount of N\$12 101 242.02 calculated from 20th January 2016 to the date of payment;

CLAIM 2

3. Payment of the sum of N\$ 2 250 490.30;
4. Payment of interest at the rate of 13.25% per annum on the amount of N\$ 2 250 490.30 calculated from 20th January 2016 to the date of payment;

CLAIM 3

5. Payment of the sum of N\$ 1 775 000.94;
6. Payment of interest at the rate of 13.25% per annum on the amount of N\$ 1 775 000.94 calculated from 20th January 2016 to the date of payment;

CLAIMS 1, 2 AND 3

7. An order declaring the following property executable:

CERTAIN	:	Farm Ryneveld No.367
REGISTRATION	:	Division "A"
		KUNENE REGION
MEASURING	:	3488,7118 (Three Four Eight Eight Comma Seven One One Eight) Hectares
HELD BY	:	Deed of Transfer No.T1644/1982
SUBJECT	:	to the conditions therein contained.

8. An order declaring the following property executable:

CERTAIN : Farm Pierre No.345

SITUATE : Registration Division "A"
KUNENE REGION

MEASURING: 3247,8550 (Three Two Four Seven Comma Eight
Five Five Nil) Hectares

HELD BY : Deed of Transfer No. T1650/1968

9. Costs of suit on a scale of attorney and own client;

10. Collection Commission

11. Further and/or alternative relief.

Alternatively to prayers 1 to 11 above, and only in respect of the second and third defendants jointly and severally, the one paying the other to be absolved:

12. Payment of the amount of N\$ 3,780,000.00;

13. Interest on the above amount at the rate of 20% per annum from 24 January 2014 to the date of payment;

14. Costs of suit;

15. Further and/or alternative relief.'

[2] On 03 March 2016 the plaintiff instituted this action against the first, second, third and fourth defendants. All defendants did not enter appearance to defend. Consequently, this court granted default judgment in favour of the plaintiff against the defendants, on 07 April 2016. The second and third defendants applied successfully, for rescission of the default judgment, which application was granted on 07 December 2016.

[3] The present matter concerns only the plaintiff and the second and third defendants. For that reason I shall refer to the second and third defendants as "*the defendants*" except where the context otherwise requires.

Background

[4] The first defendant is the biological son of the second and third defendants. The first defendant is also the principal debtor in this matter.

[5] The second and third defendants are married to each other in community of property and have been so married at all relevant times hereto. The second and third defendants are joint owners of *Farm Ryneveld No. 367* and *Farm Pierre No. 345*.

[6] The fourth defendant is a close corporation of which the first defendant and his erstwhile wife are members. The fourth defendant owns *Farm Jannie No. 365*. This farm was declared specially executable on 06 April 2018 and is not relevant to the present proceedings.

[7] On or about the 19 November 2013 the plaintiff and the first defendant entered into three loan agreements, in terms of which the plaintiff lent and advanced certain amounts of money (as more fully set out in paragraph 1 hereof).

[8] The plaintiff alleges that, on 27 November 2013 the second defendant executed an *unlimited deed of suretyship* in favour of the plaintiff, binding himself as surety for and co-principal debtor with the first defendant for the due and punctual payment of all moneys that were then or might thereafter be owing to the plaintiff. The second defendant acknowledges that he executed the said deed of suretyship in favour of the plaintiff.

[9] The plaintiff further alleges that the third defendant "*tacitly*" bound herself as surety and co-principal debtor with the first defendant, in favour of the plaintiff, undertaking to fulfil the obligations due to the plaintiff by the first defendant in the event the first defendant fails in whole or in part to fulfil the obligations himself.

[10] In addition to the above suretyships the plaintiff alleges that the second and third defendant passed continuing covering mortgage bonds No.B.151/2014 over *Farm Ryneveld No. 367* and No. B. 152/2014 over *Farm Pierre 435*, in favour of the plaintiff. The defendants admit having passed the aforesaid bonds.

[11] On or about June 2015 the first defendant defaulted on his obligations. Subsequently, on 03 March 2016 the plaintiff instituted the present action.

[12] The plaintiff seeks to hold the defendants liable for the relief set out in paragraph 1 hereof on the basis of:

- (a) the deed of suretyship signed by the second defendant on 27 November 2013;
- (b) the alleged "*tacit agreement of suretyship*" entered into by the plaintiff and the third defendant, and on,
- (c) the alleged aforesaid two continuing covering bonds passed by the defendants in favour of the plaintiff.

[13] The defendants defend against the plaintiff's action on two principal grounds, namely; that:

- (a) the defendants are, and were at all material times, married in community of property to each other. The third defendant had failed and/or refused to give written consent to the deed of suretyship executed by the second defendant on 27 November 2013. The plaintiff knew, at all material times, of the marital status of the defendants, as the second defendant had on 21 November 2013 furnished written declaration to the plaintiff of his marital status and the plaintiff was at all material times aware that the provision for spousal consent on the suretyship agreement was blank; and,
- (b) the third defendant denies having entered into a tacit agreement of suretyship with the plaintiff.

[14] In support of its claim the plaintiff called two witnesses, namely: Pierre Human ("Mr Human") and Andreas Petrus Botes ("Mr Botes").

[15] The defendants closed their case without leading oral evidence.

Plaintiff's evidence

[16] In his testimony Mr Human related that he is employed by the plaintiff as Manager: Business Solutions and Recoveries, in Windhoek. He has no personal knowledge of what transpired in respect of this matter prior to 2015, as the affairs of the defendants were handled by other officials of the plaintiff.

[17] In relation to the two continuing covering mortgage bonds registered over the two farms belonging to the defendants, Mr Human asserts that the plaintiff has *not* lent or advanced any money to the defendants. The only basis of the plaintiff's claim against the defendants is the suretyship agreement entered into between the plaintiff and the second defendant. He further deposed that the two continuing covering mortgage bonds were registered as security on the basis of the aforesaid suretyship agreement. Without the agreement of suretyship there would be no basis for the continuing covering mortgage bonds.

[18] Mr Human further testified that the second defendant had availed the plaintiff with a written declaration of marital status, dated 21 November 2013, indicating that the second defendant was married in community of property to the third defendant. Mr Human also confirms that there is no written spousal consent appearing on the special space provided for that purpose on the *pro forma* Suretyship Agreement executed by the second defendant. Mr Human is not aware of any written consent furnished by the third defendant authorising the second defendant to execute the suretyship agreement.

[19] In regard to the continuing covering mortgage bonds, Mr Human confirms that the same make no reference to any:

(a) principal debtor

or

(b) surety.

He further affirms that in absence of the agreement of suretyship, the defendants do not owe any money to the plaintiff. If the plaintiff were to foreclose on the two mortgage bonds, such foreclosure would solely be based on the suretyship agreement entered into between the plaintiff and the second defendant in respect of the debt of the first defendant.

[20] The second witness of the plaintiff, Mr Botes, testified that he was employed by the plaintiff at the material times. He is now employed by Agricultural Bank of Namibia. In late 2012 to early 2013 Mr Botes received and considered a business plan submitted by the first defendant to the plaintiff. The main purpose of the business plan was to obtain funding from the plaintiff, for cattle farming, gasifier power station, feedlot operations, charcoal operations etc.

[21] The first defendant's business plan set out that his business operations were conducted on three farms namely farms *Ryneveld*, *Jannie* and *Pierre*. The first defendant and the second defendant provided the plaintiff with an agreement entered into between themselves, in terms of which the second defendant promised to bequeath farms *Ryneveld* and *Pierre* to the first defendant subject to all mortgages thereon. These two farms were at that time mortgaged in favour of *Bank Windhoek* in the amount of N\$ 3 000 000, for the benefit of the first defendant. The plaintiff took over the first defendant's indebtedness from *Bank Windhoek* and the then existing bonds over the two farms were cancelled.

[22] Mr Botes further testified that the second and third defendants furnished the plaintiff their joint-will dated 15 August 2013 in support of the first defendant's application for the take-over. The joint-will promises, among other things, that the first defendant shall inherit farms *Ryneveld* and *Pierre* upon the death of the defendants.

[24] Mr Botes asserts that the third defendant was aware that a suretyship agreement will be executed by her and the second defendant, in respect of the loans advanced to the first defendant and was party to the negotiations.

[25] The first defendant breached the provisions of the loan agreements in that he failed to pay the instalments as and when they became due and payable.

[26] Under cross-examination, Mr Botes confirmed that the second and third defendants did not apply for nor did they receive any loan from the plaintiff. He further

affirmed that except for the suretyship agreement, the defendants are not indebted to the plaintiff.

Submissions

[27] Counsel for the plaintiff submits that the plaintiff's case against the defendants is founded on the:

- (a) suretyship agreement between the second defendant and the plaintiff;
- (b) tacit agreement of suretyship between the third and the plaintiff; and
- (c) the two continuing covering mortgage bonds passed by the defendants in favour of the plaintiff over the two farms.

[28] According to counsel for the plaintiff, the prohibition against a spouse binding himself as surety without written consent of the other spouse, is aimed at the spouses *inter se*. It is the spouse who is forbidden from entering into the transactions set out in *s7 of the Married Persons Equality Act, 1996 (Act 1 of 1996)*, ("*the Act*"), without the consent of the other spouse.

[29] Counsel paid particular emphasis on the exceptions renounced by the defendants in the mortgage bonds in question. He submits that the onus now is on the defendants to prove that they have not received the funds, alleged in the bonds to have been advanced to the defendants. Furthermore, counsel for the plaintiff argues that the two mortgage bonds are valid since hypothecation can be made in respect of debts incurred by a third party.

[30] Plaintiff's counsel further contends that the context in which the:

- (a) second defendant entered into an agreement with the first defendant;
 - (b) second and third defendants furnished their joint-will to the plaintiff;
 - (c) second defendant executed a deed of suretyship in favour of the plaintiff; and ,
 - (d) second and third defendants passed the two continuing covering mortgage bonds over the two farms in favour of the plaintiff;
- establish a direct link of the defendants indebtedness to the plaintiff.

[31] Counsel for the defendants, on other hand, contends that the plaintiff lent and advanced moneys to the first defendant, a farmer, for his business operations as set out in the first defendant's business plan. It was required that the second defendant executes a deed of suretyship in respect of the obligations of the first defendant to the plaintiff. The second defendant, on 21 November 2013, declared his marital status to the plaintiff. The plaintiff was aware that a party married in community of property requires written spousal consent in order to bind himself/herself as a surety. Such spousal consent was not obtained. As such the alleged deed of suretyship is invalid.

[32] In regard to the alleged tacit suretyship agreement between the third defendant and the plaintiff, counsel for the defendants submits that there is no evidence adduced by the plaintiff supporting such suretyship. There is no other way for a spouse to give consent for his/her spouse to whom he/she is married in community of property to bind himself/herself as surety, other than by written consent.

[33] Insofar as the two continuing covering mortgage bonds are concerned, counsel for the defendants submits that, the only obligation by the second defendant to the plaintiff is in respect of the suretyship agreement. If the suretyship agreement falls away, there would be no basis for the indebtedness of the second defendant to the plaintiff. The mortgage bonds cannot stand on their own without an underlying obligation. If the plaintiff wishes to foreclose on those bonds, plaintiff must show a valid underlying debt secured by the bonds. The agreement of suretyship is invalid for want of compliance with the provisions of s7 of *the Act*, and, therefore, there is no underlying *causa* for the two mortgage bonds in question.

[34] In regard to the plaintiff's alternative claim for enrichment raised in the particulars of claim, counsel submits that the plaintiff did not adduce any evidence on the enrichment claim. Furthermore, the plaintiff did not advance its enrichment claim during closing submissions. The plaintiff did not prove undue enrichment on the part of the defendants nor did plaintiff prove a corresponding impoverishment on the part of the plaintiff. The alternative claim based on enrichment should therefore be dismissed.

[35] Both counsel are in agreement that the provisions of the General Law Amendment Act No 50 of 1956 (which deals with formalities in respect of contracts of suretyship) are not applicable to Namibia.

Analysis

[36] *Section 7 of the Act* provides as follows, insofar as pertinent to the matter at hand:

'Acts requiring other spouse's consent

7.(1) Except in so far as permitted by subsection (4) and (5), and subject to sections 10 and 11, a spouse married in community of property shall not without the consent of the other spouse -

(a).....;

(b).....;

(c).....;

(d).....;

(e).....;

(f).....;

(g).....'

(h) bind himself or herself as surety;

(i).....;

(j).....;

(2) The consent required under subsection (1) for the performance of an act contemplated in that subsection may be given either orally or in writing, but the consent required for the performance of –

(a).....;

(b) an act contemplated in paragraph (h) of that subsection, shall, in respect of each separate performance of such act, be given in writing only.

(3).....;

(4).....;

(5) A spouse married in community of property may, in the ordinary course of his or her profession, trade, occupation, or business perform any of the acts referred to in

paragraphs (b), (c), (f) and (g) of subsection (1), without the consent of the other spouse as required by that subsection.

(6)....'

[37] *Section 8(1) of the Act* provides as follows:

'8. (1) If a spouse married in community of property enters into a transaction with another person without the consent required by the provisions of section 7, or without leave granted by a competent court in terms of section 10 or contrary to an order of a court in terms of section 11, and –

(a) that other person does not know and cannot reasonably know that the transaction is being entered into without such consent or leave or in contravention of that order, as the case may be, such transaction shall be deemed to have been entered into with the required consent or leave or while the power concerned of the spouse has not been suspended, as the case may be;

(b) that spouse knows or ought reasonably to know that he or she will probably not obtain such consent or leave 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 –

(i) upon division or the joint estate; or

(ii) upon demand of the other spouse at any time during the subsistence of the marriage.'

[38] It seems apparent to me that the deed of suretyship executed by the second defendant in favour of the plaintiff, is a transaction contemplated under *s7 (1)(h)* and *s7(2)(b)* of *the Act* which the second defendant could not enter into without written consent of the third defendant.

[39] As I understood the argument articulated by the plaintiff's counsel, the plaintiff does not contend that the deed of suretyship in this matter was executed with written spousal consent. Significantly, on the deed of suretyship, immediately beneath of the signature and other particulars of the second defendant, is a space under which appears the following words:

'Consent of spouse of surety married in community of property. I, the undersigned, being the spouse married in community of property to the

abovementioned surety, do hereby consent to such surety binding himself/herself as surety under the foregoing suretyship.'

[40] Beneath the above words appears a space for signature and other particulars of the consenting spouse. This space is completely blank.

[41] It appears that the plaintiff argues that the provisions of s7(1)(h) and s7(2) (b) are only applicable to the spouses *inter se*. I respectfully differ with such argument. I am of the view that the prohibition enacted by s7(2)(b) is intended to protect both spouses against unilateral conduct of either of them. Either spouse is entitled to assert his/her interest in the joint estate against a creditor seeking to enforce an otherwise prohibited act, unless the creditor can bring the impugned act within the scope of the exceptions provided for in s7(5) or s8(1)(a). Should the creditor not be able to bring the challenged act within the scope of those exceptions, then the prohibited act should be a nullity and unenforceable.¹

[42] In the present matter I find that the plaintiff was, at all material times, aware of the marital status of the second defendant. It is also apparent from the evidence that the plaintiff and the second defendant knew that spousal consent was necessary in respect of a suretyship agreement. Furthermore, it is apparent from the evidence that the plaintiff and the second defendant were aware that the third defendant had not furnished written consent to the execution of suretyship agreement, as the space provided for that purpose remained blank.

[43] The plaintiff does not contend that the suretyship in question falls within the scope of the provisions of s7(5) or s.8(1) (a), therefore, and on the facts of this case, those provisions have no application.

[44] The provisions of s7(2)(b) are framed in peremptory terms and I am of the view that the deed of suretyship entered into by the plaintiff and the second defendant is void and unenforceable, for want of written spousal consent.

¹ Sishuba v Skweyiya (842/2007) [2008] ZAECHC 25 (6 March 2008) para 19.

[45] I now turn to the issue whether the plaintiff may rely on the validity of the continuing covering mortgage bonds registered in its favour by the defendants as security for the suretyship obligation. It is trite law that the real right created by a mortgage bond is accessory in nature and is dependent for its existence on the existence of the obligation which it secures. If there is no valid principal obligation for the mortgage bond to secure, there can be no valid mortgage bond and no real right of security in the hands of the mortgagee.²

[46] In the present case, it is correct, as it was argued, that a principal obligation does not need to exist before a mortgage bond is executed. A mortgage bond may be given as security for a future debt or as a covering mortgage bond. However, when enforcement of a bond is sought, it must be in respect of a valid existing obligation. In respect of the present case, it is common cause that the parties have not entered into any agreement in respect of any loan for which the purported current mortgage bonds serve as security for a future debt or as a covering bond. In other words the current bonds do not secure any valid contractual (or otherwise) obligation, owed by the defendants to the plaintiff.

[47] I am of the opinion that, in the absence of a valid suretyship agreement and there being no other legal basis established for the liability of the defendants to the plaintiff, the continuing covering mortgage bonds in question must suffer the same fate as the deed of suretyship, on account of absence of an underlying legal obligation (suretyship). In other words, if the obligation to which the mortgage bond is accessory, is unenforceable the security in respect of it is unenforceable too.³

[48] In regard to the plaintiff's alternative claim of enrichment, I find that the plaintiff has led no evidence in support of such claim and such claim stands to be dismissed. In addition, I find that there is no evidence in support of the alleged tacit suretyship agreement between the plaintiff and the third defendant. In any event, such agreement if existed, would have suffered the same fate as the suretyship executed by the second defendant, for non-compliance with the provisions of s7(2)(b) of *the Act*.

² Klerck N.O v Van Zyl and Maritz 1989 (4) SA 263 at 275 G-276H.

³ Albert v Papenfus 1964 (2) SA 713 E at 717 H.

[49] The court order dated 07 December 2016 states that the costs associated with the application for rescission of default judgment (which rescission was granted on 07 April 2016) stands over for determination in the main action. I have perused the pleadings and documents filed of record. In their application for rescission of default judgment the defendants averred that the combined summons was not served on them and was not timeously brought to their attention. They further argued that they intended at all material times to defend the action. From the record it appears, the application for rescission of default judgment was not opposed. I am of the opinion that the appropriate costs order in the circumstances is an order in terms of which costs in respect of the rescission application, are costs in the cause, and I would make an order to that effect.

[50] In respect to costs in the main action, I would apply the general rule that costs follow the event.

Conclusions

[51] In conclusion, I find that:

- (a) the deed of suretyship executed by the second defendant in favour of the plaintiff is invalid and unenforceable by reason of the provisions of s.7(2) (b) of the *Act*, and,
- (b) on the strength of the facts of this matter, the continuing covering mortgage bonds registered by the defendants in favour of the plaintiff as security for the abovementioned suretyship, are invalid and unenforceable by reason of absence of a legal obligation which such bonds secure.

[52] In the result, I make the following order:

1. The plaintiff's claim against the second and the third defendants is dismissed;
2. The plaintiff's alternative claim for enrichment, against the second and third defendants is dismissed;

3. The costs occasioned by the application for rescission of default judgment (which application was granted by this court on 07 December 2016) are hereby ordered to be costs in the cause;
4. The plaintiff is ordered to pay the costs of the second and third defendants, and such costs are to include costs of one instructing and one instructed legal practitioner;
5. The matter is removed from the roll and regarded finalised.

B Usiku
Judge

APPEARANCES:

PLAINTIFF:

Adv. G Narib

Instructed by Dr Weder, Kauta & Hoveka Inc.

Windhoek

1st and 2nd DEFENDANTS:

Adv. CE Van der Westhuizen

Instructed by Francois Erasmus and Partners

Windhoek