REPORTABLE

CASE NO.: SA 56/2019

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

STANDARD BANK NAMIBIA LTD **Appellant**

and

WILLEM JOHANNES GROENEWALD **First Respondent**

WILLEM JOHANNES GROENEWALD **Second Respondent**

CHRISTINA ELIZABETH GROENEWALD **Third Respondent**

MAROELA FARMING CC **Fourth Respondent**

Coram: DAMASEB DCJ, MAINGA JA and HOFF JA

Heard: **13 July 2021**

Delivered: **04 October 2021**

Summary: This appeal turns on a suretyship agreement signed by the deceased in life on 27 November 2013 but not his wife, third respondent to whom he was allegedly married to in community of property. At the heart of the dispute are the provisions of ss 7(1)(*h*) and 7(2)(*b*) of the Married Persons Equality Act 1 of 1996 (the Act) in terms

of which a spouse married in community of property shall not without the written consent of the other spouse, in respect of each separate performance of such act, bind himself or herself as surety. In light hereof, the question raised is whether the said suretyship was inchoate and unenforceable.

The first respondent had obtained credit facilities from Bank Windhoek in November 2006. The deceased and third respondent signed surety for the debts of the first respondent at Bank Windhoek. Bank Windhoek had registered bonds over the farms Pierre No 345 and Ryneveld No 367 ('the farms') as security for these debts.

On 22 July 2011, the first respondent and deceased concluded a written agreement in terms of which it was agreed that the first respondent would inherit the farms and would bear responsibility for servicing the mortgage bonds (in favour of Bank Windhoek) then registered over the farms and in exchange for the inheritance, the first respondent would pay certain amounts to his siblings.

On 15 August 2013, the deceased and third respondent executed a joint will which gave effect to the agreement between the first respondent and deceased. Between 2012 and 2013, a representative of the appellant received an application for credit facilities from the first respondent. The main purpose of the application was for the appellant to take over the credit facilities granted to the first respondent by Bank Windhoek. The third respondent was aware that the required deed of suretyship would be executed to enable the loans to be advanced to the first respondent as they had been privy to discussions relating to the extension of credit facilities to the first respondent. The deceased and third respondent submitted their joint will in support of the first respondent's application for credit facilities with the appellant. It was the intention of all parties (including the deceased and third respondent) that the farms would be hypothecated as security for the indebtedness of the first respondent to the appellant.

On or about 19 November 2013, the appellant concluded three loan agreements with the first respondent namely: a medium-term loan facility – limited to N$12 000 000, a business revolving credit loan agreement – limited to N$2 000 000; and an overdraft facility – limited to N$1 500 000. The loan amounts would be secured upon the deceased signing unlimited suretyship for all the obligations and indebtedness of first respondent to the appellant and the suretyship would be supported by the deceased registering it in favour of the appellant two separate first continuing coverage mortgage bonds over the farms. On 27 November 2013, the deceased executed an unlimited written deed of suretyship in favour of the appellant, in terms of which he bound himself as surety and co-principal debtor in *solidum* for payment of all money owed by the first respondent to the appellant.

The first respondent defaulted on his obligations under the loan agreements and on 3 March 2016, the appellant instituted action against the first to fourth respondents seeking *inter alia* payment in the aggregate amount of N$16 126 733.26 and declaring the mortgaged properties executable.

The deceased and third respondent relied on the defence as outlined in ss 7(1)(*h*) and 7(2)(*b*) of the Act, namely a spouse married in community of property shall not without the written consent of the other spouse, in respect of each separate performance of such act, bind himself or herself as surety.

The High Court dismissed the appellant's claims with costs, the court holding that the deed of suretyship is invalid and unenforceable in terms of s 7(2)(*b*) of the Act. It was further held that the two continuing covering mortgage bonds are invalid and unenforceable for the reason that the allegation which they secured was invalid.

The appellant now appeals against the judgment and orders made.

Ad Condonation

Held that the explanations for the failure to file the record on time and reinstatement of the appeal is not sufficient, but for the prospects of success on appeal, condonation is granted.

Ad the appeal

Held that the defence raised by the deceased and third respondent is not grounded in the law of suretyship but a special defence of invalidity of the suretyship in question, premised on ss 7(1)(*h*) and 7(2)(*b*) of the Act.

Held that the deceased and third respondent bore the onus to prove that they were protected by s 7 of the Act.

Held that on the facts the third respondent did give her consent and accordingly the suretyship signed by the deceased, and not the third respondent, is valid.

Held that the court *a quo* erred in upholding the respondents' defence for the reason that there was a blank space where third respondent should have signed.

Held that in South Africa s15(5) of the Matrimonial Property Act 88 of 1954 provides for such consent for the performance of the acts contemplated to be given separately in respect of each act and shall be attested by two competent witnesses. Whereas in Namibia there is no such provision. Consent can be in the form of a signature on the contract itself or on a separate document.

Held that, in the face of the unequivocal conduct of the third respondent and a consequence of s 8(1)*(a)* of the Act, the appellant did not and could not have known that her requisite consent had not been given and therefore it is deemed to have been given.

The appeal succeeds.

APPEAL JUDGMENT

MAINGA JA (DAMASEB DCJ and HOFF JA concurring):

Introduction

[1] At the hearing of this appeal, the court was informed that the second respondent had passed on. The court's most sincere condolences to the third respondent and their offspring. The court was further provided with the letter of executorship appointing the third respondent as the executrix of the deceased's estate. I shall henceforth whenever necessary refer to the second respondent as the deceased.

[2] This appeal turns on a suretyship agreement signed by the deceased in life on 27 November 2013 but not his wife, third respondent, to whom he was allegedly married to in community of property. At the heart of the dispute are the provisions of ss 7(1)(*h*) and 7(2)(*b*) of the Married Persons Equality Act 1 of 1996 (the Act) in terms of which a spouse married in community of property shall not without the written consent of the other spouse, in respect of each separate performance of such act, bind himself or herself as surety. In light hereof, the question raised is whether the said suretyship was inchoate and unenforceable.

[3] This appeal concerns the deceased and third respondent only. Default judgment having being granted in favour of the appellant in the court below against first and fourth respondents on 7 April 2016. First and fourth respondents

nevertheless remain cited in this appeal for reference purposes only as first respondent was the principal debtor.

Facts in this case

[4] Previously, the first respondent had obtained credit facilities from Bank Windhoek in November 2006. The deceased and third respondent signed surety for the debts of the first respondent to Bank Windhoek. Bank Windhoek had registered bonds over farms Pierre No 345 and Ryneveld No 367 (the farms) as security for these debts.

[5] On 22 July 2011, the first respondent and deceased concluded a written agreement in terms of which it was agreed that:

5.1 The first respondent would inherit the Pierre No 345 and Ryneveld No 367 (the farms);

5.2 The first respondent would bear responsibility for servicing the mortgage bonds (in favour of Bank Windhoek) then registered over the farms; and

5.3 In exchange for the inheritance, the first respondent would pay certain amounts to his siblings.

[6] On 15 August 2013, the deceased and third respondent executed a joint will which gave effect to the agreement between the first respondent and deceased. The joint will provided that:

> 'The first respondent's inheritance of the farms was subject to him paying the deceased and third respondents *"an amount equal to ten percent on two million three hundred and fifty thousand dollars" per annum*.'

[7] Between 2012 and 2013, Mr Botes of the appellant received an application for credit facilities from the first respondent. The main purpose of the application was for the appellant to take over the credit facilities granted to the first respondent by Bank Windhoek.

7.1 The third respondent was aware that the required deed of suretyship would be executed to enable the loans to be advanced to the first respondent as they had been privy to discussions relating to the extension of credit facilities to the first respondent.

7.2 The deceased and third respondent submitted their joint will in support of the first respondent's application for credit facilities with the appellant.

7.3 It was the intention of all parties (including the deceased and third respondent) that the farms would be hypothecated as security for the indebtedness of the first respondent to the appellant.

[8] On or about 19 November 2014, the appellant concluded three loan agreements with the first respondent namely:

> '27.1 The Medium-Term Loan Facility – limited to N$12 000 000 (the main purpose of which was to facilitate the takeover of the first respondent's indebtedness to Bank Windhoek).
>
> 27.2 The Business Revolving Credit Loan Agreement – limited to N$2 000 000; and
>
> 27.3 The Overdraft Facility – limited to N$ 1 500 000.'

[9] It is alleged that the first loan was lent and advanced to facilitate a take-over from Bank Windhoek and some funds for irrigation and feedlot development. Among other things the material express, alternatively implied, further alternatively tacit terms of the medium-term loan agreement was that the loan would be made available to the first respondent on condition that he obtained the required security as stipulated in clause 7[1] of the medium-term loan agreement to the appellant's satisfaction. It is

[1] The security required in the medium-term loan letter of offer of 11 November 2013 which offer was accepted by first respondent on 17 November is in this form:

'7. Security
7.1 Security Required
7.1.1 Unlimited Suretyship to be signed by Willem Johannes Groenewald, Identity Number 360116 0012 3 for all of the obligations and indebtedness of Willem Johannes Groenewald, Identity Number 700616 0010 5 to the Bank.
7.1.2 Unlimited Suretyship to be signed by Maroela Farming Close Corporation, Registration Number CC/97/1015 for all of the obligations and indebtedness of Willem Johannes Groenewald, Identity Number 700616 0010 5 to the Bank;
Supported By:
7.1.4 Willem Johannes Groenewald, Identity Number 360116 0012 3 is to register in favour of the Bank, a First Continuing Covering Mortgage Bond for an amount of NAD 5 000 000-00 (Namibia Dollars five million) plus an additional sum of NAD 1 250 000-00 (Namibian Dollars one million two hundred and fifty thousand) over Farm Pierre Number 345.
7.1.5 Willem Johannes Groenewald, Identity Number 360116 0012 3 is to register in favour of the Bank, a First Covering Mortgage Bond for an amount of NAD 5 000 000-00 (Namibia Dollars five million) plus an additional sum of NAD 1 250 000-00 (Namibia Dollars one million two hundred and fifty thousand) over Farm Ryneveld Number 367.'

further alleged that the loan amounts in claims 1 and 3 would be secured upon the deceased signing unlimited suretyship for all the obligations and indebtedness of first respondent to the appellant and that the suretyship would be supported by the deceased registering in favour of the appellant two separate first continuing coverage mortgage bonds each for the amounts of N$5 000 000 plus additional sums of N$1 250 000 over the farms.

[10] On or about 27 November 2013, the deceased executed an unlimited written deed of suretyship in favour of the appellant, in terms of which he bound himself as surety and co-principal debtor in *solidum* for payment of all money owed by the first respondent to the appellant.

The deceased and third respondent passed two continuing covering mortgage bonds, in favour of the appellant:

29.1 Bond No B 151/2014 – passed over Farm Ryneveld No 367; and

29.2 Bond No B 152/2014 – passed over Farm Pierre No 435.

[11] It is further alleged that on the same date, third respondent in person, orally alternatively tacitly bound herself jointly and severally to be liable for the due repayment of the above stated sums and interest thereon.

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[12] The appellant advanced the first respondent money under the loan agreements.

[13] The first respondent defaulted on his obligations under the loan agreements and on 3 March 2016, the appellant instituted action against the first to fourth respondents seeking *inter alia*: payment in the aggregate amount of N$16 126 733,26 and declaring the mortgaged properties executable.

[14] As at the date of issue of the summons, the first respondent (and the deceased by virtue of the suretyship) were indebted to the appellant in the aggregate amount of N$16 126 733, 26 comprising:

> ‘32.1. N$12 101 242, 02 under the Medium-Term Loan Facility;
>
> 32.2. N$2 250 490, 30 under the Business Revolving Credit Loan Agreement; and
>
> 32.2. N$1 775 000, 94 under the overdraft agreement.’

[15] Two continuing covering mortgage bonds dated 24 January 2014 were duly registered over the farms securing the aforesaid indebtedness. In terms of the said mortgage bonds, the deceased and third respondent acknowledged that they are indebted to the appellant for the amounts as in para 14 above. As a consequence, appellant is seeking an order declaring the two properties executable.

[16] I omitted the alternative enrichment claim as it is not persisted with.

[17] The deceased and third respondents' defences can be summarised as follows:

> '1. The appellant acted recklessly in extending the above credits to the first respondent, when it should have reasonably appeared to the appellant that first respondent would be unable to service such credit facilities.
>
> 2. They deny specifically that they, or any one of them, is or was a party to the alleged agreements.
> 3. The [deceased] and third respondent were at all material times, married to each other in community of property, which marital status the appellant was, at all relevant times, aware of.
>
> 4. In terms of ss 7(1)(*h*) and 7(2)(*b*) of the Act a spouse married in community of property shall not without the written consent of the other spouse, in respect of each separate performance of such act, bind himself or herself as surety.
>
> 5. The third respondent did not provide written consent for the [deceased] to bind himself as surety.
>
> 6. As a result the suretyship agreement was invalid for want of compliance with ss 7(1)(*h*) and 7(2)(*b*) of the Act.
>
> 7. [Deceased] and third respondent deny that the third respondent ever bound herself either orally or tacitly as surety.
>
> 8. They admit the registration of the continuing covering mortgage bonds on the two farms and deny indebtedness to the appellant in the amount alleged in appellant's case.'

High Court Proceedings

[18] During the High Court proceedings, counsel for the appellant, handed up an unlimited suretyship which the deceased and third respondent had both signed at Bank Windhoek as sureties for the first respondent's indebtedness at that bank which the appellant took over. Handed up was also copies of their identity documents and their marriage certificate. The handing up of the documents was not opposed, counsel for the respondents only questioned their relevance, an argument deferred to when submissions were to be made.

[19] Appellant called two further witnesses, Messrs Pierre Human and Andreas Petrus Botes. Mr Human testified that he was a manager, Business Solution and Recoveries with the appellant. That portfolio entailed consulting with clients whose accounts are in arrears and discuss alternative solutions and repayment terms. When he received the first respondent's account which was in arrears, he and Mr Botes travelled to first respondent's farm to discuss the account and find a solution. First respondent gave them a plan which was never complied with. A further meeting was held with the deceased and third respondent and the siblings of first respondent with the intention of bringing the account up to date. At that meeting he explained the consequences of the breach by the first respondent and the suretyship in respect of which the deceased and third respondent were sureties and co-principal debtors. The witness confirmed the outstanding balances as per the appellant and the then current balances at the time of the trial. In cross-examination, he reiterated why the deceased and third respondent were sued with the first respondent for the debts. When asked if

there was no suretyship would he still have registered the mortgage, his reply was yes. When asked whether he knew the marital status of the deceased and third respondent he said according to the declaration it is in community of property. The declaration of marital status was received as exhibit B. The declaration was made seven days before the deceased signed the suretyship on 27 November 2013.

[20] Mr Botes was with the appellant for six years before he left to work for Agribank. He received the business plan of the first respondent. After considering the plan, he met first respondent in Otjiwarongo. Among other things, the business plan stated that Willem Groenewald Group operated from three farms, namely, Ryneveld, Janning and Pierre and it included the purpose of obtaining funding. It also incorporated securities that would be provided by the deceased by sureties supported by bonds over the farms. The two farms were valued at N$13 729 716. In that business plan, first respondent indicated that he would open an account with appellant so that appellant could take over his account from Bank Windhoek. Since the farms were registered in the name of the deceased, first respondent and deceased provided an agreement dated 22 July 2011 in which they agreed that first respondent would inherit the farms with the mortgages thereon. That agreement played a crucial role in the structuring of the funding by appellant to the Willem Groenewald Group through the first respondent. Before the appellant took over the indebtedness of the first respondent from Bank Windhoek, the latter had bonds registered in its favour which had to be cancelled. As a result of the agreement that first respondent would inherit the two farms in question, deceased and third

respondent submitted their joint will dated 15 August 2013 in support of the first respondent's application. Mr Botes further said the deceased and third respondent were aware of the nature of the first respondent's application and security offered in support thereof.

[21] After the formalities were done and met, Mr Botes on 21 September 2013, completed the application for agricultural facilities on behalf of first respondent. The application sets out in great detail the factors that he considered and how the first respondent had met the same. It was approved. Upon the approval of the credit facilities he visited the first respondent at farm Ryneveld on 15 November 2013. The medium-term loan agreement provided for unlimited suretyship by the deceased supported by two bonds over the farms in question. Pursuant to the medium-term loan agreement appellant's attorneys forwarded powers of attorney to pass continuing covering mortgage bonds over the farms to appellant's Outjo branch where the deceased signed the documents and returned the same to the witness. Both powers of attorney were given by the deceased and third respondent. The deceased and third respondent also bound themselves *securitatim debiti* in respect of the Business Revolving Credit loan agreement.

[22] On the suretyship, Mr Botes testified that the deceased executed a deed of suretyship in favour of the appellant and that third respondent was aware that the suretyship agreement will be executed by her and deceased and she was a party to the negotiations. He elaborated on this point to say when he visited the first

respondent, he introduced him to his parents where it was discussed the reason for the business, the existing facilities would be taken over from Bank Windhoek and the bonds would be utilised as security and deceased and third respondent who were the owners of the properties would have to sign a suretyship to link the bonds to the facilities. At that moment they were also informed that the loans have been approved and that appellant would take over the existing facilities from Bank Windhoek and award additional facilities. According to the witness, in terms of the suretyship, deceased and third respondent bound themselves as surety and co-principal debtors in respect of the first respondent which included existing, future and contingent indebtedness, incurred by the first respondent solely, jointly or jointly and severally with any other person, money lent or advances and money overdrawn on any account.

[23] Once first respondent had defaulted on his payments, the witness confirms what Mr Human testified to. His addition on that score is that after the summons were issued, the second and third respondents together with first respondent approached him on two occasions with the aim of resolving the debt in this matter. At the first meeting, deceased and third respondent wanted to know the magnitude of first respondent's indebtedness. After acknowledging the first respondent's debt, they wanted to pay the portion relating to farm Ryneveld only where they resided. The appellant waited for the settlement of farm Ryneveld but nothing came of it.

[24] The appellant closed its case and so did the respondents without leading evidence.

[25] The trial court dismissed the appellant's claims with costs, the court holding that the deed of suretyship is invalid and unenforceable in terms of s 7(2)(*b*) of the Act. It was further held that the two continuing covering mortgage bonds are invalid and unenforceable for the reason that the allegation which they secured (the indebtedness of the deceased under a deed of suretyship) was invalid.

[26] The appeal lies against that judgment and orders made.

The submissions on appeal

[27] In a nutshell appellant's case is that, firstly the deceased and third respondent failed to discharge the onus that they bore in relation to their pleaded defence based upon s 7(1) of the Act, in that, (i) they led no evidence as to their marital status at the time the suretyship was executed as the marital status of the deceased and third respondent was in issue, specifically recorded as an issue to be resolved at trial in the pre-trial roll; and, (ii) there is no evidence that the third respondent did not provide written consent to the deceased providing the deed of suretyship. The trial court proceeded on the presumption that because the third respondent did not sign the consent block provided on the deed of suretyship itself that no written consent exists. However that conclusion does not follow from the third respondent's failure to sign the consent block.

[28] Secondly, the documentary evidence before the court below, properly considered, in fact established that the third respondent did consent to the deed of suretyship in that she caused various documents to be executed, each of which signified her consent to the deceased standing surety for the debts of the first respondent.

[29] The secondary argument is that if the third respondent had not consented to the execution of the suretyship, which the appellant disputes then the appellant did not know and could not reasonably have known that the suretyship was entered into without the requisite consent because the unequivocal conduct of the third respondent (causing mortgage bonds to be executed and her involvement in the pre-transaction discussion) caused the appellant to believe that she had given the requisite consent. Therefore consent is deemed to have been given under s 8(1)(*a*) of the Act.

[30] The appellant's third argument is, firstly each of the mortgage bonds contained an acknowledgement of debt (amounts owed specified) complied with an express undertaking to pay the acknowledged debt. The mortgage bonds thus served to create a new separate self-standing obligation to pay the appellant the acknowledged debt in the event the first respondent defaulted. The bonds are therefore valid even in the absence of the deed of suretyship. Secondly, the mortgage bonds served to secure money advanced to the first respondent.

[31] The gist of the argument on behalf of the deceased and third respondent is that, the deed of suretyship on which the appellant seeks to rely on is for the reason that the requisite spousal consent was simply not given as required by ss 7(1)(*h*) and 7(2)(*b*) of the Act.

The analysis of the evidence and the law

[32] The written deed of suretyship annexure 'G' to the summons is a comprehensive document comprising of five pages with 25 headings. Paragraph 25 headed 'Execution' makes provision for the surety's particulars and witnesses and provision for the consenting spouse and witnesses and the certificate of completeness which also makes provision for the particulars of the surety, consenting spouse and witnesses.

'25. Execution

This suretyship is signed by each Surety as follows:

25.1	As Witnesses		Surety No. 1:
	1. (Signed)		Signature(s) signed
	Occupation: Manager Assistant		Full Name: Willem Johannes Groenewald,
	Address:		IDENTITY NUMBER: 36011800123
	4the Floor Town Square		
	2. (Signed)		
	Occupation: Manager		
	Address:		Street Address of Surety
	4th Floor, Town Square		Farm Ryneveld No 367
			Outjo

	Date of Signature 27/11/2013		Place of Signature Windhoek

Consent of spouse of surety in community of property.

I, the undersigned, being the spouse married in community of property to the abovenamed Surety, do hereby consent to such Surety binding himself/herself as Surety under the foregoing suretyship.

	As Witnesses		
	1.		Signature
	Occupation:		Full Name
	Address:		
	2.		
	Occupation:		
	Address:		Street Address of Spouse
	Date of Signature		Place of Signature

CERTIFICATE OF COMPLETENESS

Each Surety hereby certifies by his signature appended below that when the aforegoing suretyship in favour of

STANDARD BANK NAMIBIA LIMITED

(Reg No. 78/01799)

was signed by him there were no blank spaces therein which still required to be completed and no deletions which still required to be made, that the names of the Debtors

WILLEM JOHANNES GROENEWALD, IDENTITY NUMBER: 700816 00105

had been duly inserted in clause 1.2, and that the said suretyship was in all respects complete and not subject to any conditions precedent to its coming into force.

As Witnesses:		Surety No 1
1. (Signed)		Signature: (Signed)
2. (Signed)		Full Name: WILLEM JOHANNES GROENEWALD,
		IDENTITY NUMBER: 360118 00123
As Witnesses:		Consenting Spouse:

1.		Signature:
2.		Full Name…'

[33] The deed of suretyship signed by the deceased is consistent with the terms and conditions of the medium-term loan letter of offer of 11 November 2013, accepted by the first respondent on 17 November 2013 and so is it consistent with the overdraft and other banking facilities of 16 June 2015, accepted on 3 November 2015 by the first respondent. In both instances, the deceased would have signed unlimited suretyship supported by deceased and third respondent registering in favour of the bank two first continuing covering mortgage bonds in specified amounts plus specified additional amounts over the farms.

[34] The terms which are peculiar to and essential for a contract of suretyship are the identities of the parties, the name of the principal debtor, the nature of the debt guaranteed and the extent of the guarantee.[2] In *Di Giulio v First National Bank of South Africa Ltd*, Van Zyl J put it thus: 'In any claim against a surety the plaintiff must, at the outset, prove the existence of a valid contract of suretyship. He must then prove that the source of indebtedness (*causa debiti*) in terms of such agreement is one in respect of which the defendant undertook to be liable. Finally he must prove that the said indebtedness is due and payable'.[3] In *Northern Cape Co-operative Livestock Agency Ltd v John Roderick and Co Ltd*, De Villiers J held that if the written

[2] *Lategan & another NNO v Boyes & another* 1980 (4) SA 191 (T) at 203F.
[3] 2002 (6) SA 281 (C) at 291D. See also Harms Amler's *Precedents of Pleadings* 5th ed (1998) at 381-382.

document contains all the essential elements of the contract of suretyship, namely the identity of the parties, the name of the principal debtor, the nature of the debt guaranteed and the extent of the guarantee, it is valid despite the omission of other material terms, and in a proper case such material terms, could be added by rectification.[4]

[35] Suretyship is accessory to a valid principal obligation. The authors Forsyth and Pretorius defines suretyship as an accessory contract by which a person (the surety) undertakes to the creditor of another (the principal debtor), primarily that the principal debtor, who remains bound, will perform his obligation to the creditor and secondarily, that if and so far as the principal debtor fails to do so, the surety will perform it or, failing that, indemnify the creditor.[5]

[36] On these well settled principles of suretyship there can be no doubt, on the facts of the case and annexure 'G' to the summons in particular, that the required terms of a valid written contract of suretyship were complied with. In fact, the facts are not in dispute, what is before us is purely legal and it is to that issue I turn my attention to.

[37] The defence raised by the deceased and third respondent is not grounded in the law of suretyship but a special defence of invalidity of the suretyship in question, premised on ss 7(1)(*h*) and 7(2)(*b*) of the Act. The relevant provisions are in this form:

[4] 1965 (2) SA 64 (O) at 69-71.
[5] Caney's *The Law of Suretyship*, 4th ed (1992) 26-27. See also *Corrons & another v Transvaal Government and Coull's Trustee* 1909 TS 605 at 612.

‘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 –

. . .

(h) bind himself or herself as surety;

. . .

(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) any such act which entails the registration, execution, or attestation of a deed or other document in a deed registry; or

(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) The consent required for the performance of any act contemplated in paragraphs (b) to (j) of subsection (1), except where it is required for the registration, execution, or attestation of a deed or other document in a deeds registry, may also be given by way of ratification within a reasonable time after the performance of the act concerned.

. . .

Consequences of act performed without required consent

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, in adjustment shall be effected in favour of the other spouse –

(i) upon division of the joint estate; or

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

Power of court to dispense with spouse's consent with regard to specific juristic act

10. If a spouse married in community of property withholds the consent required in terms of section 7 or 9 or if that consent cannot for any other reason be obtained, a court may on the application of the other spouse give that spouse leave to perform the act in question without the required consent if the court is satisfied, in the case where the consent is withheld, that such withholding is unreasonable or, in any other case, that there is good reason to dispense with the consent.

Power of court to suspend powers of spouse

11. A court may, on the application of a spouse, if it is satisfied that it is essential for the protection of the interest of that spouse in the joint estate, suspend for a definite or indefinite period any power that the other spouse may exercise in terms of this Part, either in general or in relation to a particular act as the court may specify in its order.'

[38] *Inter alios* the purpose of the Act is to abolish the marital power vested in the husband under the Roman Dutch Common Law, where a husband could willy-nilly dispose or squander the assets of the joint estate to the exclusion and consent of his wife. That status of our common law is repugnant and inconsistent with chapter 3 of our Constitution and had to be streamlined with the supreme law.

[39] Part I of the Act headed 'Abolition of Marital Power' abolishes the marital power of the husband including him being head of the family and that part provides for the effect of the abolishment. Part II provides for marriages in community of property. Section 5 provides for equal powers of spouses married in community of property. Section 6 provides for spouse's juristic acts generally not subject to other spouse's consent.

[40] Section 7(1) adumbrates acts requiring other spouse's consent including binding oneself as surety. Subsection 2 provides for the consent to be given either orally or in writing, but the consent required for the performance as in 7(2)(*a*) and (*b*) shall in respect of each separate performance of such act, be given in writing only.

[41] I pause here to say, the command in s 7(2)(*b*) replicates the South African Law Amendment Act 50 of 1956, s 6 thereof, which provides that 'no contract of suretyship entered into . . . shall be valid, unless the terms thereof are embodied in a written document signed by or on behalf of the surety . . .' and the General Law Amendment Act 68 of 1957, s 1(1) which provides that 'no contract of sale or cession in respect of land or any interest in land . . . shall be of any force or effect . . . unless it is reduced to writing and signed by the parties thereto or by their agents acting on their written authority.'

[42] The object of these provisions is essentially one having in view an object of public policy, namely the prevention of unnecessary lawsuits and of frauds and perjuries.[6]

[43] Section 8 is headed 'Consequences of act performed without required consent'. It provides for transactions entered into by a spouse married in community of property with another person without the consent required in s 7, or without leave by a competent court in s 10 or contrary to an order of court in terms of s 11. Such a transaction will nonetheless be valid and enforceable if the other person did not know and could not reasonably have known of the lack of consent. The consent under the circumstances is deemed to have been given.

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[6] *Wilken v Kohler* 1913 AD 135 at p142 and p149. See also *Northern Cape Co-operative Ltd v John Roderick & Co Ltd* 1965 (2) SA 64 (0) at 71A-H.

[44] Section 10 empowers a competent court, on application of a spouse if the consent required in terms of s 7 or 9 or if that consent for any reason cannot be obtained to give that other spouse to perform the act in question without the required consent if the court is satisfied that the consent is withheld unreasonably or in any other case, where there is good reason to dispense with the consent. While s 11 empowers a court to suspend powers of spouse for a definite or indefinite period, either in general or in relation to a particular act as the court may specify in its order, on application by the other spouse, if it is satisfied that it is essential for the protection of the interest of that spouse in the joint estate.

[45] The equivalent of s 7(1) of the Act, in South Africa is s 15(2) and (3) of the Matrimonial Property Act 88 of 1984 where it has been held that because it is framed in peremptory terms, a transaction listed under it, which is concluded without the requisite spousal consent is unlawful, and is void and unenforceable.[7] This appears to be the case in Namibia as well[8] and it is the approach the trial court adopted in this case.[9] The approach appears to emanate from what Innes CJ, in *Schierhout v Minister of Justice* called a 'Fundamental principle of our law', namely that 'a thing done contrary to the direct prohibition of the law is void and of no effect'.[10]

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[7] *Bopape & another v Moloto* 2000 (1) SA 383 (T) at 386-387A.

[8] *Behrens NO v The Home Doctor CC* (HC-MD-CIV-ACT-CON 2018/03150) [2020] NAHCMD 557 (3 December 2020) para 48.

[9] *Standard Bank Namibia Ltd v Groenewald* & others (I 633/2016) [2019] NAHCMD 326 (6 December 2019) Usiku J para 41 said:
'I am of the view that the prohibition enacted by s 7(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 in s 7(5) or s 8(1)(a). Should the creditor be unable to bring the challenged act within the scope of those exceptions, then the prohibited act should be a nullity and unenforceable.'

[10] *Schierhout v Minister of Justice* 1926 AD 99 at 109.

[46] The equivalent of s 8(1) of the Act in South Africa is s 15(9) of the Matrimonial Property Act, it has been held that the transaction performed with another person/third party without the requisite spousal consent will only be valid or consent can only be deemed to have been given if the third party did not know and could not reasonably have known of the lack of consent.[11] Section 15(9) of the Matrimonial Property Act has been further held to cast a duty of proof on the party seeking to rely on the deemed consent.[12] Reasonableness or 'cannot reasonably know' is determined by an objective standard of a reasonable man, which implies that the party seeking to rely on the deeming provisions is required to take reasonable enquiries whether in any circumstances, consent is required, and if so whether it has been obtained.[13] In *Marais v Maposa,*[14] above, Plasket JA states that the reasonableness and the objective standard of a reasonable man is supported by academic writers who held the view that the third party may not do nothing because then s 15 (9)*(a)* would be meaningless.[15] Plasket JA rubs it in, when he said, '. . . a duty is cast on a party seeking to rely on the deemed consent provision of s 15 (9)*(a)* to make the enquiries that a reasonable person would make in the circumstances as to whether the other contracting party is married, if so, in terms of which marriage regime, whether the consent of the non-contracting spouse is required and, if so,

[11] *Marais v Maposa* 2020 (5) SA 111 SCA at 117G.
[12] *Distillers Corp Ltd v Modise* 2001 (4) SA 1071 (O) para 4.
[13] *Ibid* para 5.
[14] Footnote 11.
[15] *Ibid* at 119A-F.

whether it has been given. Anything less than this duty of enquiry, carried out to the standard of the reasonable person, would render s 15(9)*(a)* a dead letter.'[16]

[47] However, in *Strydom v Engen Petroleum Ltd,*[17] Strydom who was married in community of property had executed an unlimited deed of suretyship in favour of Engen for the debts incurred to Engen by Soutpansberg Petroleum (Pty) Ltd, of which he was director. Soutpansberg was subsequently liquidated and Engen invoked the suretyship and sought to recover from Strydom. Strydom raised the defence that since his wife had not consented to the signing of the deed of suretyship, the deed was invalid by virtue of s 15(2)(*h*) of the Matrimonial Property Act.

[48] The High Court rejected Strydom's defence and granted Engen's application for judgment against Strydom based on the suretyship. On appeal, the argument was rejected again, the court holding that whether a deed of suretyship was executed in the ordinary course of business is a question of fact, to be assessed objectively with reference to what is expected of business people.[18] The court went on to say, since s 15(6) the equivalent of Namibia's s 7(5) was, in substance if not form, a proviso to the relevant parts of s 15(2) and (3), it was for the person who would rely on s 15(2)(*h*) to bring himself within its ambit by showing that he had not bound himself in the ordinary course of his business.[19]

[49] In para 13, the court further on said:

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[16] *Ibid* at 119G.
[17] 2013 (2) SA 187 (SCA).
[18] *Ibid* para 11.
[19] *Ibid* paras 13 and 14.

> '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 in order to bring themselves within the ambit of the section. That is because the section only operates in certain limited circumstances. If they wish to rely upon it they must bring themselves within the full range of operation.'

[50] On the issues, Strydom failed to explain, the court said:

> '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. 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.'[20]

[51] On the question whether Mrs Strydom had a direct and substantial interest in the subject matter of the litigation in the case and that she should have been joined as a party to the litigation, the court had this to say:

> '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 financial prejudice to her and undoubtedly a source of matrimonial discord.[21]'

[20] *Ibid* para 19 and 20.
[21] *Ibid* para 24.

[52] To sum up, in the *Strydom* matter the burden of proof is placed on the party invoking the South African s 15(2)(*h*), Namibia's s 7(1)(*h*).

[53] In *Di Giulio v First National Bank of South Africa Ltd*[22] above, which also involved a written suretyship in terms of which the appellant bound himself as surety and co-principal debtor in favour of the respondent for the due payment by the debtor, of all amounts owing from time to time, to the respondent, Van Zyl J said:

> '[28] It is trite that, if the surety should admit liability in terms of the suretyship agreement, the plaintiff would not be required to lead evidence in this regard. If the amount of the claim should likewise be admitted, no evidence of its composition or calculation would be required. If the surety should, however, deny liability on the basis that the principal debt was not due, the principal would have to prove that it was . . . . On the other hand, if the surety should raise a "special" defence such as illegality, fraud, lack of contractual capacity or lack of authority, he would be required to present evidence in support thereof. This is because the facts underlying such defence are regarded as falling beyond the ambit of the plaintiff's cause of action. See *C W H Schmidt and H Radenmeyer Bewysreg* (4th ed 2000) at 38-39) and the authorities cited there.'

[54] *Distillers Corporation Ltd v Modise,*[23] on s 15(9)*(a)* the equivalent of Namibia's s 8(1) which also involves a suretyship, the headnote reads as follows:

> 'The requirement, in s 15(9)(*a*), that a person with whom the spouse enters into a transaction "cannot reasonably know" that the transaction is being entered into

[22] Footnote 3.
[23] Footnote 12.

> contrary to the provisions of s 15(2) implies that the matter must be considered from the point of view of the reasonable man and that the conclusion at which the reasonable man would have arrived must be reached. Where someone who is married in community of property signs a deed of suretyship without the written consent of his spouse, after having read the document and without having been misled by the creditor about its imports, and the deed contains a provision in which the surety states that he is "legally competent to execute", a reasonable man in the position of the creditor will accept that the surety is aware of the implication of his statement (namely that he has the written consent of his spouse to bind himself as surety), and will accept it as the factually correct position. In such a case, therefore, it must be deemed in terms of s 15(9)(a) that the suretyship was entered into with the written consent of the surety's spouse (paras [5] at 1075H/I-I and [8] and [9] at 1077E/F-I, paraphrased).'[24]

[55] On the authorities above, it is undoubtedly clear that the interpretation of s 7(1) would attract unending debate and a difference of opinions.

[56] On the facts of this case, the question whether the suretyship signed by the deceased, and not the third respondent is invalid should be answered in the negative. In the circumstances of this case and as a consequence of s 7(1)(*h*) and 7(2)(*b*), the transaction was concluded with the necessary written spousal consent. The facts speak for themselves. The sole intention of deceased and third respondent was to assist first respondent to secure loan facilities. Not a shred of evidence exists in this case that when the deceased executed the suretyship, he was maladministering the joint estate without the consent of the third respondent. Section 7(1) is intended to protect spouses married in community of property from the maladministration of the joint estate by the one spouse in

[24] *Ibid*, para 28.

the absence of the other's consent. The evidence of Mr Botes was not disputed that third respondent was involved from the very beginning when first respondent applied for loan facilities at the appellant. In fact, previously at Bank Windhoek she signed the suretyship guaranteeing the indebtedness of the first respondent. When the same process was repeated at the appellant, third respondent knew exactly what was expected of her. The two complete powers of attorney granted to pass mortgage bonds on the two properties in question could not have been signed for any other purpose than to incorporate them into the deed of suretyship.

[57] Throughout the formation of contracts it is to be observed that not assent, but what the other party is justified as regarding as assent, is essential . . . . This rule, though frequently harsh in application, rests upon the fundamental principle of the security of business transactions, and the integrity of contracts demands that it be rigidly enforced by the courts.[25]

[58] The reasoning of Wallis JA in the *Strydom* case above, particularly where he said, it is not sufficient for a person, seeking to rely on s 15(2)(*h*) the equivalent of s 7(1) of the Act to say that they are married in community of property and that their spouse did not consent to the transaction in order to bring themselves within the ambit of the section commends itself to my mind. He holds that the reason is that the section only operates in certain limited cases. He goes on to say if they wish to rely upon it they must bring themselves within the full range of operation. In other words, if husband and wife wants to

[25] *Steenkamp v Webster* 1955 (1) SA 524 AD at 530B.

rely on s 7(1) they need to demonstrate that they are covered by that section. When the learned trial judge in this case, with greatest respect held that, for the reason that there was a blank space where third respondent should have signed, denoting consent to the contract and therefore s 7(1) found application, when the facts proved the contrary, he misdirected himself. Whether a joint estate has been maladministered by the one spouse is a question of fact.

[59] Before us was a hotly contested issue of who of the parties bore the onus of proof, the appellant contending that it was the respondents and the respondents contending that it was the appellant. Respondents *inter alia* relied on the *Home Doctor* case above. With greatest respect to the trial judge again that case was wrongly decided and should not be followed. In brief, that case turned on a settlement agreement signed by second and third defendants, the third defendant being the wife of the second defendant. The case appears to have been enrolled as a High Court Rule 108 enquiry but the court conflated the inquiry into s 7(1). Notwithstanding the third defendant having signed the settlement agreement, the court found that, that was not enough, but the court did not elaborate in what form the consent should have been. In South Africa s 15(5) provides that 'the consent required for the performance of the acts contemplated in paragraphs (a), (b), (f), (g) and (h) of subsection 2 shall be given separately in respect of each act and shall be attested by two competent witnesses.' Namibia has no such provision. Consent can be in one form by signature on the contract itself or on a separate document. The onus of proof in the *Home Doctor* matter was placed on the plaintiff.

[60] In this case, on its facts, the onus of proof was on the deceased and third respondent to prove the status of their marriage at the time the deceased signed the suretyship. Mr Botes testified that the suretyship agreement was sent to the nearest branch of the appellant where the respondents resided which was Outjo. The deceased signed the document and returned same to Windhoek. It is not known why the third respondent did not sign or whether the signature of the deceased was a double signature for himself and that of the third respondent. In fact the marital status of the deceased and third respondent was one of the issues of fact[26] to be resolved at the trial as per the pre-trial order by Prinsloo J on 21 June 2018.

[61] In *Stuurman v Mutual & Federal Insurance Company of Namibia Ltd,*[27] this court said:

> 'Parties engaged in litigation are bound by the agreements they enter into limiting or defining the scope of the issues to be decided by the tribunal before which they appear, to the extent that what they have agreed is clear or reasonably ascertainable. If any one of them want to resile from such agreement it would require the acquiescence of the other side, or the approval of the tribunal seized with the matter, on good cause shown.'

Therefore the marital status of the deceased and third respondent remained a live issue at the trial. More so, that even the readable marriage certificate purportedly produced at the hearing of this appeal, the provision with or without ante-nuptial contract remains blank. The words with or without are crucial to the certificate. 'With'

[26] Damaseb P T: Court - Managed Civil Procedure of High Court of Namibia, Law Procedure and Practice at p 202-8-031 states that phase 3 of the four places of model case management plan has the objective to ensure that all outstanding matters which may compromise the trial dates when granted are resolved and to clearly define what is genuinely in dispute between the parties.
[27] 2009 (1) NR 331 (SC) para 21.

denotes the marriage is out of community of property and without denotes in community of property. Without the said words one cannot say as to what is the status of the marriage.

[62] The suretyship was drawn with s 7 in mind when it made space for the consenting spouse. Deceased signed as the surety, but the space for the consenting spouse was returned blank. Why and how it was not signed is within the province of the deceased and third respondent and they bore the onus of proof that they were protected by s 7. More so that in clause 12, deceased renounced the benefits of excussions and division and all other benefits and legal exceptions that could or might be raised or pleaded in answer to any claim by the appellant. Clause 12.2 provides that the suretyship shall be fully enforceable against the surety regardless of any negligence or breach of contract on the part of the appellant or the first respondent.

[63] Counsel for the deceased and third respondent either jokingly or was serious when he said maybe third respondent was tired of first respondent's indebtedness. That is possible but it is speculation – that is evidence that should have been placed before court. The argument that appellant had the suretyship agreement with it all the time and that appellant knew the marital status of the deceased and third respondent, given what I have stated above on the pre-trial order the argument is meritless. In the face of unequivocal conduct of the third respondent and a consequence of s 8(1)*(a)* of the Act, the appellant did not and could not have known that her requisite consent had not been given and therefore it is deemed to have been given.

Condonation

[64] The explanations for the failure to file the record on time and reinstatement of the appeal, to convene a meeting within 20 days of noting an appeal for purposes of eliminating portions of the record that are not relevant for the determination of appeal and the failure to submit to the Registrar a jointly prepared report about the meeting within ten days of conclusion of that meeting, are not so attractive but for the prospects of success on appeal, condonation should be granted.

Costs

[65] I do not find any reason why costs should not follow the result.

Order

[66] The following order is made.

1. The appeal succeeds.

2. The order of the High Court dated 06 September 2019 is set aside and substituted with the following:

> 'The deceased or his estate or his executor and third respondent are ordered to pay appellant, jointly and severally, one paying the other to be absolved'.

Claim 1

1. Payment of the sum of N$12 101 242,02;
2. Payment of interest at the rate of 10,25% per annum on the amount N$12 101 242.02 calculated from 20 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 N$2 250 490,30 calculated from 20 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 N$1 775 000,94 calculated from 20 January 2016 to the date of payment;

3. Claim 1, 2 and 3 – the farms below are declared executable.

CERTAIN : Farm Ryneveld No. 367

REGISTRATION : Division “A”
KUNENE REGION

MEASURING : 3488, 7118 (Three Four Eight Comma Seven One One Eight) Hectares

HELD BY : Deed of Transfer No. T 1644/1982

SUBJECT : Farm Pierre No. 345

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. T 1650/1968

4. The deceased’s estate and/or executor and third respondent are ordered to pay the costs of the appellant, jointly and severally, one paying the other to be absolved on the basis of one instructing and two instructed counsel.

_____

MAINGA JA

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DAMASEB DCJ

_____
HOFF JA

APPEARANCES:

Appellant:	A R Bhana SC (with him L M Spiller & G Narib) Instructed by Dr Weder, Kauta & Hoveka Inc
Second and third Respondents:	R Heathcote SC (with him B de Jager) Instructed by Francois Erasmus & Partners