IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case No.: 2073/2019

In the matter between:

KEABETSWE SUZAN MOLOI Applicant

and

FIRSTRAND BANK LIMITED t/a FIRST NATIONAL BANK 1st Respondent

JOFANI DISTRIBUTORS CC 2nd Respondent

FANI PETROS MOLOI 3RD Respondent

CORAM: VAN RHYN, J

HEARD ON: 4 AUGUST 2023

DELIVERED ON: 8 AUGUST 2023

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[1] This is an application by Mrs. K S Moloi, (the "applicant") for leave to appeal against the judgment by Khooe, AJ, delivered on 17 April 2023. The application for leave to appeal is opposed by FirstRand Bank Limited t/a First National Bank, the first respondent.

[2] A directive was issued that the parties are to submit Heads of Argument in respect of the application for leave to appeal. Heads of Argument on behalf of

the applicant was filed on 31 July 2023 and Heads of Argument on behalf first respondent on 2 August 2023.

[3] The salient facts are as follows: During May 2019 the first respondent instituted action (as the plaintiff in the main action), against the second respondent, Jofani Distributors CC ("Jofani Distributors") as first defendant and Mr. F P Moloi as the second defendant. Mr. Moloi is cited as the third respondent. The first respondent's claim was based upon a written loan agreement and a written facility agreement concluded with Jofani Distributors and four (4) written deeds of suretyship, annexures PC5, PC6, PC7 and PC8, appended to the summons. The four (4) suretyship agreements are signed by Mr. Moloi.

[4] In terms of the aforesaid deeds of suretyship, Mr. Moloi bound himself in favour of Jofani Distributors as surety *in solidum* and as co-principal debtor, jointly and severally with Jofani Distributors, for due payment of the monies owed by Jofani Distributors to the first respondent.

[5] The first respondent applied for judgment by default against Jofani Distributors and Mr. Moloi subsequent to the failure by these respondents to enter appearances to defend the main action.

[6] It is common cause that the applicant was not cited as a party to the main action and that, as such the summons was not served upon her. Default judgment, in terms of the provisions of Rule 31(5), was granted against Jofani Distributors and Mr. Moloi jointly and severally, the one to pay the other to be absolved in the sum of R126 961.42 (claim 1) and in the amount of R1 264 366.55 (claim2) with interest and costs on 17 October 2019.

[7] On 15 September 2022 the applicant applied for an order rescinding the judgment by default against Mr. Moloi. It is furthermore common cause that the applicant is married in community of property to Mr. Moloi. It is against the refusal to rescind the default judgment that the applicant now seeks leave to appeal.

[8] The grounds for the application for leave to appeal are set out in the application for leave to appeal and can concisely be summarized as follows:

8.1. the court *a quo* lost sight of the accessory nature of the suretyship agreements concluded between the first respondent and Mr. Moloi and erred in finding that annexures PC7 and PC8 clearly state that the sureties were given by Mr. Moloi in the ordinary course of his trade and business with the result that consent of the applicant was not required;

8.2. The court *a quo* erred in finding that two of the suretyship agreements are valid even though they were signed by Mr. Moloi and not by both the applicant and Mr. Moloi;

8.3 The court *a quo* erred in finding that the applicant provided consent to Mr. Moloi to enter into the suretyship agreements without written proof of such consent;

8.4 The court *a quo* erred by not finding that annexures PC5 and PC 6 bear no relevance to the matter at hand;

8.5 The court *a quo* erred in not finding that, on the basis that Mr. Moloi and the applicant are married in community of property, the applicant should have been joined as a party in the main action;

8.6 The court *a quo* erred in finding that section 17(5) of the Matrimonial Property Act[1] (the "MPA") is applicable to the facts of this matter.

[9] In her application for rescission of the default judgment, the applicant alleged that default judgment was granted erroneously by the court on 17 October 2019. Applicant relied upon the provisions of Rule 42(1)(a) for her application for rescission. Mr. Phalatsi, appearing on behalf of the applicant, argued that on the basis that the applicant and Mr. Moloi are married in community of property,

[1] Act 88 of 1984.

the action should have been instituted against both spouses unless section 17(5) of the MPA is applicable.

[10] On behalf of the applicant it is argued that the 3 jurisdictional facts for Rule 42(1)(a) to find application have been established: namely the default judgment was "erroneously granted" as she was not cited as a party. Secondly, it was granted in her absence, and thirdly, the applicant is affected by the judgment for purposes of Rule 42(1)(a). Mr. Phalatsi contends that it is not necessary for the applicant to raise anything further apart from the above mentioned 3 jurisdictional facts. It is therefore not necessary for the applicant to indicate what her defence to the first respondent's claim is as same will be revealed during the trial. Taking into consideration the abolition of marital power and the grave consequences of the judgment against Mr. Moloi, the applicant now faces the possibility of losing her 50% ownership in the communal home without having the right to present her grievances to court.

[11] The loan agreement in respect of claim 1 was concluded on 5 April 2016 between the first respondent and Jofani Distributors. Mr. Moloi in his capacity as the sole member of Jofani Distributors acted on its behalf. On 18 June 2018 the first respondent and Jofani Distributors, again represented by Mr Moloi, entered into a written facility agreement which formed the basis of claim 2 in the main action.

[12] In commercial transactions it is common for one contracting party, such as a commercial bank, to require from the other party to provide personal suretyship as security for the performance of the obligations under the agreement. Whilst the person providing the suretyship often have no objection to signing the suretyship agreement in order to benefit from the underlying contract, it often occurs that in cases where the surety is married in community of property, opposition comes from the other spouse. Mr. Moloi did not defend the action instituted by the first respondent and was not a party in the application for rescission of the default judgment.

[13] The four (4) suretyship agreements appended to the main action bore the

signature of Mr. Moloi who bound himself as said. Two (2) of the suretyship agreements, annexure PC 5 and PC 6 furthermore were co-signed by the applicant as the spouse of the surety. Mr. Phalatsi however explained that PC5 and PC6 are not in respect of Jofani Distributors, but its predecessor as is evident from the registration number. In respect of annexure PC7, signed by Mr. Moloi on 5 April 2016 as surety, clause 37 reads as follows:

> "Marital status – if I/we am/are married in community of property, I/we confirm that I/we have obtained the required consent from my/our spouse to enter into this suretyship."

[14] In respect of PC8, signed by Mr Moloi on 14 April 2016, clause 37 provides as follows:

> "37 Marital Status – I/we confirm that this suretyship is given by me/us in the ordinary course of my/our profession, trade and that I/we am/are involved in the management/business of the debtor. I/we declare that if I/we am/are married in community of property the consent of my spouse is/are not required or the required consent has been given."

[15] The marital power of a husband was abolished by the MPA resulting that spouses married in community of property have the same powers regarding the disposal of assets of the joint estate, the contracting of debts which lie against the joint estate and the management of the joint estate. However, the law does not provide free reign to any spouse acting on his own and imposes limitations where the well-being of the joint estate is involved. Section 15(2)(h) of the MPA specifically provides that a person married in community of property may not, without the written consent of the other spouse bind him- or herself as surety.

[16] Section 15(6) of the act however creates an exception and allows such a spouse to sign a suretyship in the ordinary course of that spouse's business, without the necessity to obtain spousal consent. A spouse married in community of property can therefore be bound to a suretyship even though he/she was unaware of the dealings of his/her spouse or disagreed.

[17] In **Strydom v Engen Petroleum Limited**[2] the Supreme Court of Appeal dispelled any doubt on the interpretation of section 15(2)(h) of the MPA read with section 15(6) as to when a spouse will be bound to a suretyship. The facts in the **Strydom v Engen**- case are as follows: Mr. Strydom, who was a director of a company, signed an unlimited personal suretyship in favour of Engen for the debts of the company to Engen. The company was later liquidated. Engen obtained judgment against Mr. Strydom in the High Court based on the suretyship. Mr. Strydom appealed the judgment to the Supreme Court of Appeal on the basis that he was married in community of property and his wife had refused her consent to him signing the suretyship. The appeal was unsuccessful, the Supreme Court of Appeal concluding that Mr. Strydom was a director of the company and worked at the very core of the business. He was unable to show that the suretyship was not executed in the ordinary course of his business, trade or profession at the company and that section 15(6) did not apply. In other words, the suretyship was not invalid simply because his wife had not consented to it.

[18] Mr. Tsangarakis, counsel on behalf of the first respondent, furthermore relied on the judgment in **Zake v Nedcor Bank Ltd and Another**[3] pertaining to the purpose of section 17(5) of the Matrimonial Property Act in cases where the creditor who deals with spouses who, unbeknown to the creditor were married in community of property after a particular transaction was concluded. Mr. Phalatsi submitted that in the matter at hand the applicant and Mr. Moloi were married on 9 September 1994, a date prior to the conclusion of the loan agreement, the facility agreement and the suretyship agreements. Mr. Phalatsi therefore argued that as a result of the marriage in community of property the applicant should have been joined in the main action.

[19] However, with a few exceptions, all the liabilities of either spouse, whether incurred before or during the marriage and whatever the source of the liability become the joint liability of both spouses, that is, they fall into the community[4].

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[2] 2013 (2) SA 187(SCA).
[3] 1999 (3) SA 767 (SE).
[4] De Wet NO v Jurgens 1970 (3) SA 38 (a) at 46 and 47.

During the existence of the community, a creditor can recover his/her debts by levying execution on the assets of the joint estate. The applicant failed to set out any facts or evidence in her founding affidavit in the Rule 42(1)(a) application why section 17(5) of the MPA is not applicable to the facts of this matter.

[20] Section 17(5) of the MPA provides that:

> "Where a debt is recoverable from a joint estate, the spouses who incurred the debt or both spouses jointly may be sued therefor, and were a debt has been incurred for necessaries for the joint household, the spouses may be sued jointly or severally therefor."

This section is intended to protect creditors against spouses who try to avoid liability on the basis of arrangements between them of which creditors are unaware. It allows creditors to sue spouses jointly and severally and in their own name without joining the other spouse.[5]

[21] I am of the view that the court *a quo* adequately dealt with the issues raised by the applicant and the first respondent and came to the conclusion that the order, granted by Daffue J, was not granted erroneously. Two (2) of the suretyship agreements were signed by Mr Moloi (annexure PC7 and PC8) and clearly provides that the suretyship was given by Mr Moloi in the ordinary course of his trade, profession or business and that the consent of the applicant was therefore not required. I therefore agree with the finding by Khooe, AJ that the first respondent was entitled to issue summons against Jofani Distributors and Mr. Moloi only, notwithstanding the fact that Mr. Moloi is married in community of property to the applicant.

[22] The legislation dealing with the circumstances upon which leave to appeal may be granted is set out in section 17(1) of the Superior Courts Act 10 of 2013 which provides as follows:

> "Leave to appeal may <u>only</u> be given where the judge or judges concerned are of the opinion that-
>
> (a)(i) the appeal <u>would</u> have a reasonable prospect of success; or

[5] Zake v Nedcor Bank (supra).

> (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;
> [Emphasis added]

[23] In applications of this nature, the test which was applied previously, was whether there were reasonable prospects that another court "*may*" come to a different conclusion.[6] What emerges from section 17(1) is that the threshold to grant a party leave to appeal has been raised. It is now only granted in the circumstances set out and is deduced from the words *'only'* used in the said section.[7]

[24] I have considered the application for default judgment, the application in terms of the provisions of Rule 42(1)(a), the judgment of Khooe AJ, the application for leave to appeal and the submissions on behalf of the parties and I am of the view that the prospects of success on appeal are extremely remote and that no realistic chance of success exists.

[25] I therefore make the following order:

1. The application for leave to appeal is dismissed with costs.

VAN RHYN, J

[6] Commissioner of Inland Revenue v Tuck 1989 (4) SA 888 (T) at 890.
[7] The Mont Chevaux Trust v Tina Goosen & 18 Others 2014 JDR 2325 (LCC) at para [6].

On behalf of the Applicant: **MR. N W PHALATSI**
Instructed by: N W PHALATSI ATTORNEYS
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On behalf of the First Respondent: **ADV. S TSANGARAKIS**
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