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ARTICLE 1:

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CREDITORS BEWARE: LEGAL CHALLENGES ON SURETYSHIP AND MARRIAGES IN COMMUNITY OF PROPERTY

1. INTRODUCTION

One of the main concerns of creditors is to ensure that they have security against any amount they lend. Any such form of security should meet the legal requirements for it to be valid and enforceable. This article focuses on one such security in the form of suretyship. A contract of suretyship can be defined as an agreement where one person (the surety) undertakes to the creditor of another (principal debtor) that if the principal debtor fails to perform the


principal obligation, the surety will perform it or, failing that, indemnify the creditor.


This paper interrogates the legal challenges which may be encountered on suretyship where there is a marriage in community of property. This is done by discussing a recent Court of Appeal judgment in *National Development Bank v. Maje*¹. This case sheds light on at least two main aspects. First, that where there is a marriage in community of property, a surety needs

¹ CACGB-203-21: judgment rendered on 4th February 2022 (yet to be reported)


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the consent of the other spouse and where there is no such consent, the Deed of Suretyship is voidable. Second, that it is legally void for one to be a surety for their own debt. The next section discusses the aforesaid case both at High Court and at Court of Appeal. The paper then winds up with some observations and conclusions.

2. THE CASE: *NATIONAL DEVELOPMENT BANK V MAJE*

2.1 In the High Court

The Plaintiff in this case was the National Development Bank (Hereinafter interchangeably referred to as the Bank). The 1st Defendant was the ex-wife to Seabelo R. Maje, the 2nd Defendant. The 1st Defendant and the 2nd Defendant were married in community of property until 9th March 2016. In March 2012, during the subsistence of their marriage, the 1st Defendant obtained a loan from the Plaintiff. The 2nd Defendant bound himself, in writing, as a surety and co-principal


debtor. This means that he was to be jointly and severally liable with the 1st Defendant for any amount that would be due and owing by the 1st Defendant. However, the 1st Defendant was not requested to confirm the surety agreement and thus she did not consent to such agreement.


The terms of the written loan agreement included the following:

- That the Plaintiff would advance to the 1st Defendant the sum of P680 000.00 repayable over a period of 20 years at the rate of P8 056.39 per month with effect from 30th May 2012;
- That the amount would attract an interest at the rate of 12.50% per annum compounded monthly;
- That in the event of the 1st Defendant defaulting in payment of any instalment on due date, the whole loan amount outstanding at that date, together with interest,


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would immediately become due and payable.

Pursuant to the agreement, the Plaintiff advanced the sum of P680 000.00 to the 1st Defendant. However, in December 2016, the 1st Defendant defaulted in the payment of monthly premiums. As a result, the Plaintiff brought an action against the 1st Defendant and the 2nd jointly and severally, for the payment of the amount of P870 533.63; interest at the rate of 12.50% from the 1st of December to the date of full payment, among others.

In response, the 2nd Defendant filed a Special Plea to the effect that:

- The 2nd Defendant was married in community of property to the 1st Defendant at the time of the execution of the Deed of Suretyship.
- That the 1st Defendant has not signed a consent to the Deed of Suretyship as required by under the Abolition of Marital Power Act


(Cap 29:07) nor was she exempted from doing so by the provisions of the Abolition of Marital Power Act.


- The Deed of Surety is therefore invalid and should be set aside.
- The Deed of Surety was void as the 2nd Defendant could not bind himself as surety for a liability incurred by his wife which was to be paid from joint estate.

The High Court had ruled in favour of the 2nd Defendant. It concluded that there was no evidence that a consent was obtained from the 1st Defendant in terms of section 9 of the Abolition of Marital Power Act. As such, this Act was violated. This rendered the suretyship agreement voidable. Furthermore, the High Court had ruled that the 2nd Defendant and the 1st Defendant were co-sureties of the principal debt in respect of which they were co-debtors, and this made them surety of their own debt.


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Thus, this was held to be legally void and unenforceable.

2.2 The Court of Appeal

Aggrieved by the Decision of the High Court, the Bank appealed to the Court of Appeal. The grounds of appeal included the following:

- That the Court a quo erred and misdirected itself in holding that the Surety Guarantee/Deed of Suretyship executed by the Respondent was a nullity and/or unenforceable.
- That the Court a quo erred in concluding that since the Respondent was married in community of property, the suretyship contract was in effect the Respondent standing surety for his own debt.
- That the Court a quo erred and misdirected itself in failing to appreciate that the Surety Guarantee not only bound the Respondent as a

surety but also bound him as a co-principal debtor.

From the foregoing, the issues which arose for determination were :


- a) whether the Deed of Suretyship issued in contravention of in terms of section 9 of the Abolition of Marital Power Act is *void ab initio*, and
- b) whether in terms of the principles of the marriage in community of property, a party can execute suretyship agreement to secure indebtedness of the other.


With respect to the effect of the absence of the spousal consent to the Deed of Suretyship, the Court affirmed the decision of the High Court and reiterated that the Deed of Suretyship was not in conformity with the Abolition of marital Power Act, since the 1st Defendant had not given her consent to it. Thus, it was voidable.

The Court of Appeal also deliberated on whether, in terms of the principles of the


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marriage in community of property, a party can execute suretyship agreement to secure indebtedness of the other. It upheld the decision of the High Court that one cannot be a surety for his own debt. Since the Respondent was a co-principal debtor by virtue of being in a marriage in community of property. That the Deed of Suretyship was unenforceable. Resultantly, the appeal was dismissed with costs. The Court of Appeal upheld the decision of the High Court.

3. CONCLUSION

This paper has discussed some legal challenges which may be encountered with respect to suretyship where parties are married in community of property. Creditors should exercise due diligence in ensuring that where the parties are married in community of property and an instrument of security relied upon is a Deed of Suretyship, the spousal consent of the surety is a legal requirement, the absence of

which will render the suretyship voidable at the instance of the spouse who was supposed to give the consent. Most importantly, this case is the authority to the principle that one cannot be a surety to his own debt. Therefore, where the borrower(s) is/are married in community of property, he/she/they is/are co-debtors with the other spouse. Thus, they cannot be surety to their own debt. Creditors should take these into account in order to secure their financial interests.

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