IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

NEDBANK LIMITED ..... Appellant

and

MAGRIETA VAN ZYL..... Respondent

CORAM: Corbett CJ, Hefer, Nestadt, FH Grosskopf JJA, et Nicholas AJA

DATE OF HEARING: 1 November 1989

DATE OF JUDGMENT: 15 March 1990

J U D G M E N T

CORBETT CJ:

On 10 September 1980 the respondent signed a written contract of guarantee ("garansie") in terms of which she bound herself to the appellant, Nedbank Limited, as surety and co-principal debtor (with renunciation of the benefits of excussion and division) for the repayment on

demand of all moneys owed by Petrus Gideon Van Zyl ("Van Zyl") to the appellant on overdraft then or from time to time thereafter. At the time of the execution of this contract, which is more correctly to be described as a suretyship, the respondent was married to Van Zyl in community of property. In entering into the contract she was duly assisted by her husband. In February 1981 respondent and Van Zyl became estranged and they were divorced on 25 May 1982. In terms of a consent paper entered into by the parties and incorporated in the decree of divorce the assets of the joint estate were divided between the parties. It appears that during the subsistence of the marriage respondent was not possessed of any assets outside the joint estate.

During 1984 Van Zyl defaulted on his obligations to appellant and the latter endeavoured to recover from him the amount owing on overdraft which as at 23 October 1984

amounted to R15 213,61. He failed to pay and default judgment was taken against him. He did not satisfy the judgment and disappeared.

In March 1985 appellant instituted action against respondent in the Transvaal Provincial Division claiming payment of the aforesaid amount of R15 213,61, together with interest and costs. Appellant sought to hold respondent liable for this amount solely on the basis of the deed of suretyship signed by her on 10 September 1980. The matter came to trial before Roux J who held that the deed of suretyship was a nullity and dismissed appellant's claim with costs. With leave granted by the trial Judge, appellant now appeals against the whole of the judgment and order of the Court a quo.

One of the crucial issues which arises on appeal is whether a wife married in community of property can validly enter into a contract in terms of which she stands surety

for a monetary obligation undertaken by her husband. There are two conflicting decisions on this point. In Reichmans (Pty) Ltd v Ramdass 1985 (2) SA 111 (D) Friedman J held that such a deed of suretyship was valid; and in the unreported case of Volkskas Bpk v Van Heerden, decided on 20.5.85 in the Cape Provincial Division, Rose-Innes J held that it was not. In the present case Roux J preferred to follow the decision, and reasoning, in Volkskas Bpk v Van Heerden.

Fundamental to the decision in the latter case were the propositions that a person cannot stand surety for his own obligation; and that if he purports to do so the resulting transaction is a nullity. There is authority to support these propositions. The obligations of a surety are essentially accessory in nature, in the sense that they are grafted onto a principal obligation and without a principal obligation they can have no separate existence. The definition of a contract of suretyship

given in Caney, The Law of Suretyship, 3rd ed, p 27 reads as follows:

> "Suretyship is 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, he, the surety, will perform it or, failing that, indemnify the creditor."

This definition (as it appeared in the second edition of Caney) was cited with approval in Trust Bank of Africa Ltd v Frysch 1977 (3) SA 562 (A) at 584 F and in Sapirstein and Others v Anglo African Shipping Co (SA) Ltd 1978 (4) SA 1 (A), at 11 H. Of course, this is not to say that the principal obligation must be in existence at the time when the contract of suretyship is entered into. As appears from the two decisions just cited, a suretyship may be

contracted with reference to a principal obligation which is to come into existence in the future, in which event the obligation of the surety does not arise until the principal obligation has been contracted. In the meanwhile it is, as Van der Keessel (Praelectiones 3.3.24) puts it, "in pendenti". (See also Digest 5.1.35.)

One of the consequences of the accessory nature of a suretyship obligation is that it must relate to a principal obligation owed by another. This is reflected in Caney's definition and the principle may be traced back to Roman Law. Thus in Digest 46.1.21 one reads (I quote from the Watson translation) -

> "2. When I had advanced money to your slave, you manumitted him, and then I accepted the same surety [in respect of the debt]. If the surety accepted liability for the obligation which rested on you within a year [from the manumission], he [Julian] says that he is bound; but that if it was for

> [the slave's] natural obligation, it is rather the case that no transaction has been effected. For it cannot be admitted that a person becomes bound by going surety for himself. But he thought that if the manumitted slave became heir to his surety, the ground of the suretyship survives and that in any event, there would still be the natural obligation so that though the civil obligation no longer exist, what has been paid cannot be recovered. Nor does it conflict with this that if the principal debtor become the heir of his surety, the ancillary obligation is destroyed; for there cannot be a double civil obligation with the same person [over the same thing]. Conversely also, if the surety become heir to the manumitted slave, there remains the same obligation upon him, although his liability is natural and one cannot be surety for oneself." (My emphasis.)

The position under Roman Law where a surety became heir to the principal debtor, and vice versa, is dealt with in Digest 46.1.5 and it would seem that the resultant "merger"

("confusio") caused the obligation of suretyship to fall away. (See also Domat's Civil Law (Strahan trans., §1897.) Of course, as Caney remarks (op cit, p 174, n 105), under our modern system of administration of estates, where an heir is no longer a universal successor, this position would not arise. And it is of interest to note that modern Dutch law has departed from the Roman law in this regard (see Asser, 5de druk (1988), Bijzondere Overeenkomsten, deel iv, p 152).

The Roman-Dutch law of suretyship differed little from the Roman law (see Wessels, Law of Contract in South Africa, 2nd ed, par 3777). In his Koopmans Handboek (published in 1806) Van der Linden (at 1.14.10) defines suretyship ("borgtogt") as -

> "....een contract, waar bij iemand zig verbindt voor eenen schuldenaar, ten behoeven van den schuldeisscher, om hem geheel of gedeeltelijk te betaalen, het geen de

> schuldenaar hem schuldig is, zig alzoo bij zijne verbintenis voegende";

and the author explains that it follows from this definition that no suretyship can exist unless there is a valid principal obligation on the part of a principal debtor and

> "Dat de borgtocht te niet gaat, wanneer de beide qualiteiten van principaalen schuldenaar en borg zig in een en denzelfden persoon vereenigen, b.v. wanneer de één des anders erfgenaam wordt."

(See also J Voet, Ad Pandectas, 46.3.20; Huber, Heedensdaegse Rechtsgeleertheyt 3.41.3; Kersteman's Aanhangsel, vol 1, p 189.) Pothier, Traité des Obligations, par 383 put the position under Roman Law thus (I quote the Evans translation):

> "From the principle that the surety, according to our definition, is one who obliges himself for and accedes to the obligation of another, the Roman jurists

> deduced this consequence, that whenever the two qualities of principal debtor and surety become united in the same person, which happens when the surety becomes heir to the principal; or, vice versa, when the principal becomes heir of the surety, or when a third person becomes heir to both the one and the other; in all these cases the quality of principal destroys that of surety; as a surety is essentially one who is obliged for another, and a man cannot be a surety for himself; whence they concluded that in all these cases, the obligation as surety was extinguished, and that the principal obligation remained only."

Moreover, definitions of the contract of suretyship by writers on Roman-Dutch law emphasize that the surety undertakes under certain circumstances to discharge the obligation of another (the principal debtor): see eg Grotius, Inleydinghe, 3.3.12; Van Leeuwen, Het Rooms-Hollands-Recht 4.4.2 and Censura Forensis 1.4.17.3; Voet, op cit, 46.1.1; Huber, op cit, 3.26.2).

Modern South African writers also accept that under our law it is essential to the existence of a suretyship that there be a principal obligation in terms whereof someone other than the surety is the debtor; and that a person cannot stand as surety for his own debt (see De Wet & Yeats, Kontraktereg en Handelsreg, 4de ed. p 345; 26 LAWSA par 153; Caney, The Law of Suretyship, 3rd ed, pp 27-8, 174; Wessels, Law of Contract in South Africa, 2nd ed, paras 2624, 4368; Van Jaarsveld, Suid-Afrikaanse Handelsreg, 3de ed, p 760). It may be argued that the corollary to this would seem to be that a contract, intended by the parties to constitute a suretyship, in terms of which a person purports to stand surety for a principal obligation owed by himself, is a nullity (see 26 LAWSA par 153; cf Croxon's Garage (Pty) Ltd v Olivier 1971 (4) SA 85 (T), at 88 A-C). In Standard Bank of SA Ltd v Lombard and Another 1977 (2) SA 808 (W), at 813 F-H, and in the

Reichmans case, supra, at 114 E, it was accepted or assumed that a person cannot validly stand as surety for his own debt. In Litecor Voltex (Natal) (Pty) Ltd v Jason 1988 (2) SA 78 (D) Didcott J expressed doubts as to the correctness of a classification of invalidity, but went on to say (at p 81 B) -

> "To guarantee the payment of your own debt is a futile exercise, to say the least, neither underwriting nor reinforcing the obligation to pay it that rests on you in any event. Failing the basic test for a suretyship, it does not amount to such. Nor does it accomplish anything else. It is not worth, in short, the paper on which it is written."

It seems to me that whatever the precise terminology should be an undertaking in a contract whereby a person purports to stand as surety for his own debt is not a legally enforceable one.

In the present case the respondent bound herself

in terms of the contract as surety and co-principal debtor ("borg en medehoofskuldenaar"). It is clear, however, that this undertaking as co-principal debtor did not in any way change the purported nature of the contract, viz one of suretyship, the effect of such an undertaking merely being a renunciation of the benefits of excussion and division (see Neon and Cold Cathode Illuminations (Pty) Ltd v Ephron 1978 (1) SA 463 (A), at 471 D-E).

The next question is whether a contract whereby a woman married in community of property purports (with her husband's assistance) to stand surety for an obligation undertaken by her husband amounts to standing surety for one's own debt.

The legal position in regard to contractual debts incurred by husband or wife where they are married to one another in community of property was authoritatively stated by this Court in De Wet, NO v Jurgens, 1970 (3) SA 38 (A),

as follows (at p 47 D-F):

> "Dit blyk duidelik dat die man en die vrou se skulde gemeenskaplike skulde is wat uit die gemeenskaplike boedel betaalbaar is. Hulle is dus eintlik medeskuldenaars. Dit is wel waar dat die man gewoonweg verantwoordelik is vir die betaling van skulde, maar dit beteken nie dat net hy skuldenaar is nie. Betalings word van hom geëis omdat hy in beheer van die boedel is, en hy word in die Hof aangespreek omdat, behalwe in sekere uitsonderingsgevalle, slegs hy voor die Hof gedaag kan word. Wanneer hy skulde betaal, betaal hy dit uit die gemeenskaplike boedel, en wanneer hy 'n vonnisskuld nie betaal nie, word eksekusie teen die bates in die gemeenskaplike boedel gehef."

On the facts of this case it is not necessary to consider what the position is with regard to so-called "private debts" (see Lee & Honore, Family, Things and Succession, 2nd ed, paras 82-4).

If the principles enunciated in De Wet NO v Jurgens, supra, be applied in the present case, then it is clear that on 10 September 1980, when the suretyship contract was signed, the principal debt, viz. the amount owed or to be owed to appellant on overdraft, was the joint obligation of Van Zyl and respondent. Moreover, although the suretyship was entered into by respondent alone as surety (Van Zyl's signature thereof being merely to supplement respondent's limited contractual capacity: see Cross v Pienaar en 'n Ander 1978 (4) SA 943 (T), at 949 F-G), the suretyship obligation which she thus purported to incur would, if valid, likewise become a joint obligation owed by Van Zyl and herself. There was thus at the time of signature of the suretyship a complete identity of surety and principal debtor: the purported effect of the transaction was to make respondent and Van Zyl co-sureties of the overdraft obligation in respect of which they were

co-debtors. It was consequently a clear case of persons standing surety for their own debt and, in my view, in the light of the principles expounded above, the suretyship was unenforceable when entered into.

The position is, of course, complicated by the fact that at the time when appellant instituted action against respondent (in March 1985) respondent was no longer married to Van Zyl, their marriage having been dissolved by divorce on 25 May 1982. Although the evidence on the point is not clear, it seems probable that as at the date of divorce Van Zyl's current account with appellant was overdrawn.

Upon divorce the community of property and of debts subsisting between Van Zyl and respondent was terminated and respondent became endowed with full legal capacity. Each became entitled to half the joint estate, such as it was, and the assets thereof were divided by

agreement between them. Debts incurred as joint liabilities during the marriage and unpaid as at the dissolution of the marriage remained exigible from the former parties to the marriage. In Lee and Honoré (op cit, par 97) it is stated that such a debt may be enforced by the creditor concerned for the whole amount outstanding against the estate of the spouse who incurred it and for half the amount against the estate of the other spouse; and that the original debtor who has paid the whole amount has a regressus pro semisse against the other spouse because the debt was a joint one. As the learned author of this section (Prof A H van Wyk) indicates, however, the position is not altogether clear, particularly in the light of our case law. I do not find it necessary, however, in present circumstances to express any view as to the precise nature of the post-nuptial liability of the spouses for community debts. What is of significance is the fact that as at the date of dissolution of the marriage the amount owing to

appellant on overdraft remained a joint liability of the parties; and that thereafter all subsequent amounts advanced by appellant to Van Zyl on overdraft constituted his own separate liability.

I would again emphasize that at no time did appellant seek to recover the amount owed on overdraft (as at 23 October 1984) from respondent on the basis of her liability for the joint debts of the community (at the time of the dissolution); and that the present claim is based entirely on the contract of suretyship.

The questions which now arise are how, if at all, the termination of the marriage and the consequent dissolution of the community of property and debts between Van Zyl and the respondent affected the position; and whether under such changed circumstances respondent became liable on the suretyship for the outstanding amount of van Zyl's overdraft. The suretyship is in the widest possible

Zyl's overdraft. The suretyship is in the widest possible terms. The relevant portion reads:

> "Vir die verlening deur Nedbank Beperk (hierna 'die genoemde Bank') van sekere bankfasiliteite aan Petrus Gideon van Zyl....(hierna genoem die 'genoemde skuldenaar') garandeer en verbind ek.... die ondergetekende..... Magrieta van Zyl my... sowel gesamentlik as afsonderlik... as borg en medehoofskuldenaar..... vir die terugbetaling op aanvraag van enige geldsom of geldsomme wat die genoemde skuldenaar... nou of hierna van tyd tot tyd aan genoemde Bank.... skuldig mag wees.... hetsy die skuld voortspruit uit geld wat reeds voorgeskiet is of hierna voorgeskiet sal word...."

Accordingly it might be contended that as there is no limitation as to the duration and applicability of the surety's undertaking it covers overdraft obligations (to the appellant) incurred by Van Zyl after the divorce; and that qua such future obligations the suretyship was valid and

enforceable.

The chief obstacle in the path of this line of argument is that proof that the amount of R15 213,61 constituted a post-nuptial overdraft obligation is totally lacking. As I have indicated, it is probable that at the time of the divorce Van Zyl's current account was overdrawn, possibly in an amount at least equivalent to the amount of appellant's claim; but appellant made no attempt either in the pleadings or the evidence at the trial or in the course of argument before us to establish precisely what the overdraft amount was at the time of the divorce or to show that according to a correct process of appropriation or allocation of deposits (cf. Trust Bank of Africa Ltd v Senekal 1977 (2) SA 587 (W); Paget's Law of Banking, 9th ed, pp 118 ff) the debit balance existing at the time of divorce had been wholly liquidated by 23 October 1984, when the claim was computed. At the trial a bundle of documents,

marked "B", was handed in by agreement, but it is not clear what exactly was agreed to in regard to their admissibility or probative value. These documents included certified copies of Van Zyl's bank statements. Mr Bellingham, the bank official called to give evidence by the appellant, stated that certain of these documents came from a file under his control, but these did not include the bank statements. It is impossible to say whether or not these are computer printouts. Bellingham stated that at the time of the trial he was the sub-accountant ("onderrekenmeester") at the Uitenhage branch of appellant bank, where Van Zyl's current account was as from March 1981. He also said: "Ek was die bestuurdersklerk op die stadium", but is not clear what stage ("stadium") is referred to. Under cross-examination he said (referring to the bank statements): "Die state word deur ons hoofkantoor opgestel". In my view, the bank statements themselves cannot be used to prove

the drawings and deposits on Van Zyl's bank account (cf Narlis v South African Bank of Athens 1976 (2) SA 573 (A); Trust Bank of Africa Ltd v Senekal, supra, at 590 E - 591 B); and Bellingham himself did not purport to give any original evidence in this connection. Thus even if the claim could in law be based upon the validity of the suretyship in so far as it related to the post-nuptial obligations of Van Zyl to appellant bank it must fail for want of a proven factual foundation.

Finally, I must refer to the decision in the Reichmans case, supra. In that case Friedman J was confronted with a factual situation similar to the present one. The main differences were that (a) in that case the wife, who stood surety, owned a valuable piece of immovable property which she had acquired by way of inheritance and which did not form part of the joint estate, and (b) husband and wife were still married to one another at the time when

the creditor sued the wife (defendant) on the deed of suretyship. It was argued on behalf of the defendant that she was in effect standing surety for herself and that this was something which in law created a nullity.

Friedman J rejected this argument and gave judgment for the plaintiff. He assumed in favour of the defendant that one cannot stand surety for oneself (see p 114 E). His further reasoning may be summarized as follows:

(1) It does not follow from the fact that the joint estate may be liable for the payment of any debt incurred by the wife under the suretyship that she is standing surety for herself: her husband, not she, is the principal debtor.

(2) The rights and obligations of the wife under the deed of suretyship differ in certain respects from those of the principal debtor.

(3) The suretyship agreement could survive the dissolution of the marriage, upon which there would be a total separation of identity between surety and principal debtor.

(4) The joint estate is not the only source out of which the wife's indebtedness to the creditor can and need necessarily be met, eg where the wife has assets falling outside the community.

With respect, I am not able to agree with this reasoning. As to (1), it seems to me that it is incorrect to say that the husband is the principal debtor. Husband and wife are in truth joint debtors with regard to the principal debt, even though it may contractually have been incurred by him. As to (2), the rights and obligations under the suretyship are also those of both husband and wife, owed jointly. As I have indicated, the point made under (3) may, given the proper facts, be sound in the sense

that the suretyship is enforceable in respect of post-nuptial obligations, but I fail to see the relevance of this in a case where the marriage has not been dissolved or where the obligations are incurred stante matrimonio. And as to (4), the fact that the wife may have assets outside the community, which is not pertinent in the present case, does not seem to me to alter the basic identity between surety and principal debtor.

Friedman J also referred by way of analogy to the following remarks of Botha J in the Standard Bank case, supra, at p 813 F-H, (a case concerned with whether a partner could validly bind himself as a surety for the debts of the partnership) -

> "In the next place counsel for the defendant submitted that, since a partnership was not a legal persona separate from the individual partners, partners could not validly bind themselves as sureties for the

partnership, because they would in effect be standing in as sureties for themselves. I was not referred to any authority for the proposition that partners could not validly bind themselves individually as sureties for partnership debts. (Cf Caney on Suretyship, 2nd ed at p 48). In matters of practice and procedure, the law does to some extent recognise the existence of a partnership as an entity in itself, albeit not as an entity endowed with legal personality. Thus a creditor of the partnership is obliged during the subsistence of the partnership to sue all the partners together for payment of the partnership debts and execution must first be levied on partnership assets before the assets of individual partners may be attached in execution. I can see no reason in principle why partners should not bind themselves to a partnership creditor in such a way that each partner is individually liable in solidum to the creditor for payment of the whole of the partnership debts, even during the subsistence of the partnership. This, I conceive was plainly the object sought to be achieved by means of

> the documents in question in this case. I can see no reason why the documents should not be valid and operative as such, even if it is to be assumed that they do not qualify as suretyships stricto sensu, a matter on which I need not express any firm opinion."

And it is to be noted that in Du Toit en 'n Ander v Barclays Nasionale Bank Bpk 1985 (1) SA 563 (A), at p 575 F-G, this Court confirmed these views. I do not think that the partnership analogy is a valid one. Unlike a partnership, there is no basis for saying that the law, to any extent, recognises the relationship of marriage in community "as an entity in itself"; nor do the features of the law of partnership emphasized in this quotation from the judgment in the Standard Bank case find any parallel in marriage in community.

I accordingly agree with the conclusion reached by the Court a quo. The appeal is dismissed with costs.

M M CORBETT

HEFER JA)
NESTADT JA) CONCUR
F H GROSSKOPF JA)
NICHOLAS AJA)