

Surety by a spouse married in community of property - do I have to consent?

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Under the Roman Dutch common law, marriages were ordinarily in community of property and the husband was vested with the marital power. This caused the husband to deal with all the assets of the joint estate to the exclusion and without the consent of his wife. The marital power of a husband was abolished by the Matrimonial Property Act, No 88 of 1984 (Matrimonial Act).



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The effect of the Matrimonial Act meant that spouses, married in community of property, have the same powers regarding the disposal of the assets of the joint estate, the contracting of debts which lie against the joint estate and the management of the joint estate. However, the Matrimonial Act does not provide free reign and imposes limitations on the exercise of the powers of spouses such as that neither spouse may perform any juristic act with regard to the joint estate without the consent of the other.

Many debtors have used the limitations provided by the Matrimonial Act and in particular s15(2)(h) to their advantage: a defence to escape the enforceability of suretyships. S15(2)(h) of the Matrimonial Act reads as follows:

*“(2) Such a spouse shall not without the written consent of the other spouse –
(h) bind himself as surety.”*

Viewed alone, this section is straightforward but s15(6) of the Matrimonial Act sets out a proviso: *Should a suretyship be furnished in the ordinary course of a person’s business then such a suretyship is deemed valid even if spousal consent was not given.*

What then constitutes ordinary course of that spouse’s business?

In the case of *Ockie Strydom v Engen Petroleum Limited* [2012], the Supreme Court of Appeal (SCA) dispelled any doubt on the interpretation of s15(2)(h) read with s15(6) as to when a spouse will be bound to a suretyship even though he/she was unaware of the dealings of his/her spouse. In this case the defence was raised that the Appellant’s wife had refused to consent to his signing of the deed of suretyship and therefore the deed was invalid by virtue of the provisions of s15(2)(h).

The SCA held that the question that had to be decided was what constitutes acting in the ordinary course of one's profession, trade or business. To answer the question, the SCA stated that the determination of whether a person acted in the ordinary course of his/her business was a question of fact that must be judged objectively with reference to what was expected of a businessman/businesswoman. For example, signing a suretyship may not be in a surety's ordinary business if they are a mere salaried employee, having no commercial interest in the business' success or failure. However, a person who holds a number of non-executive directorships that are the principal source of their income may well, when executing a deed of suretyship for one of those companies, be acting in the ordinary course of their business.

The SCA with reference to the case of *Absa Bpk v De Goede & 'n ander 1997* (4) SA 66 (A) further stated that where a business is carried on through an incorporated vehicle such as a partnership or trust, the question to be answered is whether the surety's involvement in that business is his or her business and whether the execution of the suretyship was in the ordinary course of the surety's business, not the business of the company, close corporation, partnership or trust.

The SCA held that s15(2) does not apply if the act in question is performed in the ordinary course of the spouse's business, trade or profession. Therefore, it is not enough for a person seeking to rely on s15(2)(h) to say that they were married in community of property and that their spouse did not consent to the suretyship.

If you have not consented to a suretyship, it will be insufficient for you to state that your spouse did not inform you that he/she signed a suretyship. A court will dispel such a defence if the court finds that the suretyship was done in the ordinary course of your spouse's business, trade or profession. In such cases, no consent is required to sign as a surety, despite being married in community of property.

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