

BOTH HUSBAND AND WIFE MUST SIGN

Can a third party withdraw from a sale of immovable property where the other party had acted without the consent of his spouse with whom he was married in community of property? In the matter of *Govender and Another v Maitin and Another* 2008 (6) SA 64 (D), Mr Govender signed a purchase and sale agreement of immovable property without the written consent of his spouse. The seller made a counter-offer to sell the property, Mrs Govender took over from Mr Govender, signed the document and accepted the counter-offer.

The Govenders approached the High Court to enforce the agreement. The buyers relied on the provisions of the Matrimonial Property Act 88 of 1984 which provided that:

“when a spouse enters into a transaction with a person contrary to the provisions of subsection (2)... and – (a) that person does not know and cannot reasonably know that the transaction is being entered into contrary (to the provisions of this Act)... it is deemed that the transaction concerned has been entered into with the consent required...,”

The court held that it could not have been the intention of the lawmaker to provide a weapon to enable partners in a marriage in community of property to enforce transactions against third parties where any of such spouses contract contrary to the peremptory provisions of section 15 (2) with third parties who act in good faith and do not know and cannot reasonably know, that the transaction is being entered into contrary to those provisions, purely because the consent of the other spouse is deemed to exist.

Further, the court held that the conduct of the Govenders, that is, for Mr Govender to make an offer on a property without Mrs Govender’s written consent, and then for Mrs Govender to accept the counter-offer, constituted a violation of the provisions of s 2(1) of the Alienation of Land Act 68 of 1981.

The Namibian equivalent of the interpreted section is Section 7 of the Married Persons Equality Act no. 1 of 1996, the court concluded that the signature of both spouses is needed to make the agreement binding and valid. The defect could have been cured by a written consent from the spouse whose signature was lacking.