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A LOOPHOLE IN THE JOINT ADMINISTRATION OF ESTATES BY SPOUSES MARRIED IN COMMUNITY OF PROPERTY IN THE CONTEXT OF THE PURCHASE OF LAND

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1 Introduction

Marital power, the now defunct system giving a male spouse absolute decision-making power in relation to marriages in community of property, was abolished in 1993 by the General Law Fourth Amendment Act 132 of 1993.[1] Section 11 of the Matrimonial Property Act 88 of 1984 ("Matrimonial Property Act"), which repeals the common-law rule in terms of which a husband obtained marital power over the person and property of his wife, specifically codifies this abolition. The position is reiterated in section 14 of the Matrimonial Property Act, which confirms that a wife has the same powers concerning the joint estate as the husband. This brought the Matrimonial Property Act in line with the equality provisions in the Constitution of the Republic of South Africa, 1996 ("Constitution") by giving men and women equal powers in relation to the administration of their joint estates. Section 15 of the Matrimonial Property Act entrenches the right to joint administration by requiring written consent of the other spouse in transactions that would have a substantial impact on their share of the joint estate.[2] Most notably, section 15(2)(g) requires the consent of a spouse "to enter into a contract as defined in the Alienation of Land Act" which is generally understood as requiring the consent of both spouses when purchasing immovable property.

In 2008 and 2009 respectively, one judge sitting in the Durban and Coast Local Division, in the reported case of *Govender v Maitin* ("*Govender*")[3] and a full bench of the South Gauteng High Court ("SGHC"), Johannesburg (now called the Gauteng Local Division) in the unreported case of *Raymond Walljee v Kenneth Botto* ("*Walljee*")[4] pronounced on the validity of a contract for the

1 See also J Heaton & H Kruger *South African Family Law* 4 ed (2015) 70-71.

2 For example, in terms of section 15(2), written consent is required from the other spouse to alienate, mortgage or otherwise burden a joint property (15(2)*(a)*); to enter into any contract for the alienation, mortgaging or burdening of the joint property (15(2)*(b)*); to alienate, cede or pledge any shares, stocks, debentures, insurance policies or other investments (15(2)*(c)*); to alienate or pledge any jewelry, coins, stamps, paintings or other assets forming part of the joint estate (15(2)*(d)*); to withdraw money held in the name of the other spouse in any account in a banking institution (15(2)*(e)*); to enter as a consumer, into a credit agreement to which the provisions of the National Credit Act 34 of 2005 apply (15(2)*(f)*) and to enter into a contract as defined in the Alienation of Land Act (15(2)(g)).

3 2008 6 SA 64 (D).

4 GPJHC 07-08-2009 case no A5044/08 delivered by J Van Oosten, J Malan & J Mokgoathleng.

purchase of immovable property, which a purchaser married in community of property had entered into without the written consent of his spouse. The judgments (which are from different jurisdictions but have similar facts) reached different conclusions on the same issue of law and no further authority seems to exist on which judgment made the correct ruling or how a court faced with similar facts ought to decide such matters in future. The appeal decision in the case of *Walljee,*[5] reveals a flaw or loophole in the protection afforded by the system of joint administration of the joint estate for spouses married in community of property, and as such, will be the focus of this article. The decision in the case of *Govender*[6] is consistent with the court *a quo's* decision in *Walljee*[7] and will be discussed in that context. Whilst the latter case is unreported, it is available electronically and is of legal significance as there are presently no other reported judgments on this issue. For reasons which will follow below, the loophole renders the law on equal spousal power in the context of modern property purchases untenable. The flaw seems to be contained in the wording of the Matrimonial Property Act which requires the consent of a spouse to enter into "a contract as defined" in the Alienation of Land Act 68 of 1981 ("Alienation of Land Act"). However, the definition in that Act seems to be inconsistent with modern contracts for the purchase and sale of immovable property. The loophole, which has potentially devastating consequences for the non-consenting spouse, seems to allow one spouse to purchase immovable property without the consent of the other, as will be elaborated upon below.

2 The facts and the decision of the court *a quo* in the case of *Walljee*

The respondents, Mr Botto and his wife (hereinafter referred to as "the sellers"), sold immovable property to the first appellant, Mr Walljee (hereinafter referred to as "the purchaser"). As is standard in modern agreements for the purchase of immovable property, the full purchase price was payable in cash upon registration of transfer of the property into the name of the purchaser subject to the purchaser having secured a bond with a registered financial institution.

At the time that the agreement of sale was entered into, the purchaser was married in community of property. The purchaser's wife had not been party to the agreement of sale, nor had she given her written consent to the transaction in question. Unbeknownst to the sellers, the purchaser was in the process of persuading his wife to have their matrimonial property regime amended to one out of community of property and entered into the transaction in anticipation of his wife's acquiescence thereto. When the sellers became aware of the purchaser's marital status, they sought to resile from the agreement on the basis that the agreement between them and the purchaser was *void ab initio* for

5 GPJHC 07-08-2009 case no A5044/08 delivered by Van Oosten J, Malan J and Mokgoathleng J.
6 2008 6 SA 64 (D).
7 GPJHC 07-08-2009 case no A5044/08 delivered by Van Oosten J, Malan J and Mokgoathleng J.

lack of the purchaser's wife's consent. The sellers were seemingly motivated by the fact that the property had increased in value since the agreement had been entered into and they realised that they could sell it for a higher purchase price to someone else. The purchaser approached the SGHC requesting the court to enforce the agreement of sale between him and the sellers and to authorise the transfer of the property into his name.

The Court *a quo* dismissed the application to enforce the agreement of sale, relying heavily on the purpose of the Matrimonial Property Act, which was intended to provide for the joint administration of the joint estate for spouses married in community of property. In the court's view, the purpose of section 15 was to improve equality in decision-making in respect of the joint estate.[8] The court interpreted section 15 as having abolished unilateral marital power, especially in transactions involving the disposal or acquisition of land. In the circumstances, the court was satisfied that the lack of written consent by the purchaser's wife – at the time that the transaction was entered into –rendered the agreement between the purchaser and the sellers void and of no effect.[9]

A similar decision was reached in the case of *Govender*[10] where a purchaser had signed an offer to purchase property, which offer the seller initially rejected. The seller then made a counteroffer that was accepted and signed, but not by the purchaser's spouse. In both instances, the spouses signed separate offers to purchase without the consent of the other. Effectively, the husband was willing to purchase the property for far less than the wife, and at the time of signature there was no agreement between the spouses in this respect. In requesting the court to uphold the agreement, the purchasers sought to rely on section 15(9) of the Matrimonial Property Act, which states that:

> "When a spouse enters into a transaction with a person contrary to the provisions of subsection (2) … and –
> 1. that person does not know and cannot reasonably know that the transaction is being entered into contrary to those provisions …, it is deemed that the transaction concerned has been entered into with the consent required in terms of the said subsection (2) or (3), or while the power concerned of the spouse has not been suspended, as the case may be;
> 2. that spouse knows or ought reasonably to know that he will probably not obtain the consent required in terms of the said subsection (2) or (3), or that the power concerned has been suspended, as the case may be, and the joint estate suffers a loss as a result of that transaction, an adjustment shall be effected in favour of the other spouse upon the division of the joint estate."[11]

Interpreting the section and refusing to uphold the agreement of sale, Ntshangase J stated:

> "I cannot conceive the intention of the legislature as having been 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 *section 15(9)* provides that 'it is deemed that the transaction concerned has been entered into with the consent required in terms of *subsection (2)*…'"[12]

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8 Para 17 of the court *a quo's* judgment.
9 Para 17 of the court *a quo's* judgment.
10 2008 6 SA 64 (D).
11 Section 15(9) of the Matrimonial Property Act.
12 *Govender v Maitin* 2008 6 SA 64 (D) para 11.

What both the court *a quo* in *Walljee*[13] and Ntshangase J in *Govender*[14] failed to do, was to consider and to scrutinise the actual wording of section 15(2)(g) of the Matrimonial Property Act as read together with the Alienation of Land Act, opting rather for a substance-based approach to the issues.[15]

3 The appeal decision and the reasons for the decision in *Walljee*

On appeal, a full bench of the SGHC led by Van Oosten J was called upon to reconsider the validity of the agreement. The SGHC concerned itself with only one issue: whether the agreement before it was in fact an agreement as contemplated by section 15(2)(g) of the Matrimonial Property Act – as it is only in that instance where the purchaser's wife's consent would have been required. Section 15(2)(g) of the Matrimonial Property Act states that:

> "A spouse shall not without the written consent of the other spouse, as a purchaser [of immovable property] enter into a contract as defined in the Alienation of Land Act, No 68 of 1981."[16]

Accordingly, the question to which the SGHC confined itself was whether the purchaser had actually entered into a "contract" as defined in the Alienation of Land Act. The Alienation of Land Act defines "contract" as follows:

> "(a) [a contract] means a deed of alienation under which land is sold against payment by the purchaser to, or to any person on behalf of, the seller of an amount of money in more than two instalments over a period exceeding one year;
> (b) includes any agreement or agreements which together have the same import, whatever form the agreement or agreements may take."[17]

Since the agreement was for a cash sale subject to the acquisition of finance through a mortgage bond, it did not fit squarely into the definition of "contract" as defined since it would not be paid in more than two instalments over a period exceeding one year. Counsel for the sellers contended that the agreement was a "contract" as defined, if the contract of sale and subsequent bond agreement were considered together.[18] In other words, it was argued that a mortgage agreement which would ultimately be paid off in more than two instalments over a period exceeding one year could be interpreted as being tantamount to a "contract" as defined when sections 1(a) and (b*)* of the Alienation of Land Act were read together. Accordingly, that the contract was void for want of consent by the purchaser's spouse.

The Appeal Court rejected this argument and reasoned that full payment of the purchase price of an immovable property against transfer had always

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13 GPJHC 07-08-2009 case no A5044/08 delivered by Van Oosten J, Malan J and Mokgoathleng J.

14 2008 6 SA 64 (D).

15 In the case of *Gugu v Zongwana* 2014 1 All SA 203 (ECM) paras 11-12, the court a *quo* took a substance-based approach to the issue when they held that s 15(2) of the Matrimonial Property Act required the consent of both spouses when entering into a contract for the sale of immovable property but the appeal court overruled this decision because the spouses were divorced at the time that the agreement was entered into and thus the section did not technically apply as there was no longer a joint estate subsisting between them, and consent was required due to the co-ownership which remained when the court ordered an equal division of the joint estate during the divorce proceedings.

16 Section 15(9) of the Matrimonial Property Act.

17 Section 1(a), (b).

18 GPJHC 07-08-2009 case no A5044/08 para 3 delivered by Van Oosten J, Malan J and Mokgoathleng J.

been considered to be a cash transaction.[19] The court opined that the payment of a separate debt conferring real rights of security on a financial institution could not in any way be equated to the repayment of the purchase price in two or more instalments.[20] The Appeal Court thus rejected the sellers' contention that the agreement should be read in conjunction with the provisions of the mortgage agreement between the purchasers and their loan provider in order to fit the definition of "contract" as defined in the Alienation of Land Act. According to the court, the mortgage agreement constituted an independent obligation by the purchaser as security to the bank for the repayment of the loan granted to them. Accordingly, the agreement between the purchaser and the sellers was valid and not affected by the prohibition contemplated in section 15(2)(g) of the Matrimonial Property Act as the consent of the spouse was not required unless the transaction constituted a "contract" as defined in the Alienation of Land Act.[21]

4 Evaluation of the loophole and practical implications

The Court's application of the definition of "contract" in the Alienation of Land Act reveals a major loophole in the protection afforded by section 15 of the Matrimonial Property Act to the system of equal and joint administration of the joint estate. The loophole manifests itself when one considers that most modern property purchases (cash purchases financed through a bond) will not actually constitute a "contract" as defined in the Alienation of Land Act. The bulk of modern property transactions are essentially cash sales involving a third-party mortgagee (a bank or other financial institution) financing the transaction. Usually, in such transactions, the system of joint administration is maintained by the fact that the mortgagee (the bank or financial institution) will require the consent of both spouses married in community of property to sign the loan (bond) agreement. However, if we contemplate a strictly cash purchase of immovable property sans the policing effect of a mortgagee who will ensure that the other spouse is party to the transaction, a very serious impediment to the joint administration of assets and liabilities emerges. Say, for example, a spouse married in community of property failed to disclose their marital status and proceeded to acquire a loan in their own name, or, said spouse withdrew a large cash sum out of the joint estate to pursue personal property investments. The non-consenting spouse would be left with no redress and the spirit and purport of section 15 would be undermined because any cash sale, following the reasoning in *Walljee*,[22] would not qualify as a "contract" and, accordingly, no consent would be required from the non-consenting spouse to enter into the transaction. Whilst the value of the purchased property would still form part of the joint estate, the protection intended by section 15 in the context of joint decision-making powers would be entirely circumvented. This is particularly worrisome where the non-

[19] Para 3.
[20] Para 3.
[21] Para 3.
[22] GPJHC 07-08-2009 case no A5044/08 delivered by Van Oosten J, Malan J and Mokgoathleng J.

consensual investment made by the contracting spouse is a bad one, for instance, the contracting spouse contracted to pay more for the property than it is worth, or the property market subsequently fell, or the investment was simply not worthwhile and resulted in a loss.

The decision in *Walljee*[23] highlights an inherent flaw in the way that the legislature drafted section 15(2)(g) of the Matrimonial Property Act (or the definition of "contract" in the Alienation of Land Act). As already alluded to, since most property purchases are condition precedent upon the acquisition of a bond, in most instances where an errant spouse purchases immovable property without his or her spouse's consent, the effect of the lack of consent will be mitigated somewhat by sections 15(2)(a) (which requires consent to burden joint property) and (b) (which requires the other spouse to consent to enter into a mortgage agreement). If the non-contracting spouse refuses to co-sign the mortgage agreement, the purchase will fall through due to the suspensive condition. With regard to sections 15(2)(c) or (e), since the consent of the spouse will be required for the withdrawing of fixed investments or money from the bank account of the other spouse, relative protection is also maintained. However, in situations where the intention is to withdraw cash funds from the bank account in the name of the errant spouse (whose funds still form part of the joint estate but are within the direct control of the errant spouse) or where the funds to finance a purchase are withdrawn from a joint bank account, the non-consenting spouse will have no say in the matter. The more alarming concern is that on the reasoning in *Walljee*,[24] the seller in these transactions will have an actionable right to claim specific performance in respect of the property purchase from both spouses married in community of property notwithstanding the lack of consent by one of those spouses.

The culprit in this iniquitous result is section 15(2)(g) of the Matrimonial Property Act requiring consent of the other spouse to "enter into a contract as defined in the Alienation of Land Act, No 68 of 1981", which, in layman's terms, only requires consent from a spouse for the purchase of immovable property on instalment (in more than two instalments over a period exceeding one year). Since the definition of "contract" in the Alienation of Land Act ostensibly excludes any cash sale, it would appear that a spouse's consent is not necessary for a cash purchase, even when the transaction contemplates the purchase of an immovable asset with the funds of the joint estate or funds for which the joint estate will become liable when the contract is enforced by the seller.

[23] GPJHC 07-08-2009 case no A5044/08 delivered by Van Oosten J, Malan J and Mokgoathleng J.
[24] GPJHC 07-08-2009 case no A5044/08 delivered by Van Oosten J, Malan J and Mokgoathleng J.

5 Is there a remedy or a solution?

5 1 Existing legal framework for remedies in respect of the maladministration of joint estates

As a general proposition, the law provides a number of remedies for a spouse against the other in situations of maladministration of the joint estate.[25] For instance, an interdict is available to a spouse who foresees or has specific knowledge of the other spouse's intention to contract for the purchase of immovable property or to otherwise deal with joint assets without the requisite consent.[26] This is a peremptory remedy aimed at preventing the conduct complained of and by its nature, knowledge of the intended wrong-doing is a prerequisite. In matters pertaining to the purchase of land, the non-consenting spouse generally comes to know of the problem when it is already too late. The statutory right to the adjustment of the joint estate upon dissolution of the marriage is provided for in section 15(9)(b) of the Matrimonial Property Act. It provides that the party suffering the loss is entitled to claim a redistribution of, or an adjustment in their favour, of the balance of the joint estate when the marriage is dissolved.[27] Realistically, this remedy only finds applicability if a substantial part of the joint estate was not affected by the errant spouse's unilateral actions. In a situation where no money is left in the joint estate or where the available funds are purged by both parties now having to service a bond, the prejudiced spouse has no way of recovering the loss from the other spouse. The remedy also presupposes that the parties want to divorce, which is not always the case. If the parties do not wish to divorce, a spouse who is the victim of maladministration of the joint estate has a right in terms of section 20 of the Matrimonial Property Act to apply to court for the immediate division of the joint estate together with a request to change the spouses' matrimonial property regime to one out of community of property (if the court is satisfied that this would ensure effective protection of the prejudiced spouse).[28] Again, the remedy only finds concrete application in a situation where the entire estate has not been financially annihilated by the non-consensual conduct. Notably, with the exception of the interdict, all the above-mentioned remedies only provide protection *inter partes*. This means that the remedies are available by a spouse against the other and not against *bona fide* third parties (those contracting with the errant spouse) unless the third party could have reasonably been expected to know of the existence of the non-consenting spouse.[29] Furthermore, these remedies are primarily based on the intention of one spouse to defraud the other and to cause them prejudice.[30] Accordingly, they are not available if a spouse merely enters into an unwise transaction which has the effect of prejudicing the other.[31] Arguably, if one accepts the

[25] Heaton & Kruger *Family Law* 75-80.
[26] 79.
[27] 77-78.
[28] 78-79. See also s 20(2) of the Matrimonial Property Act.
[29] Heaton & Kruger *Family Law* 75-76.
[30] 79.
[31] 79.

reasoning of the appeal court in *Walljee*,[32] these remedies would in any event only be available in situations where section 15(2) required spousal consent and the transaction was pursued in the absence of such consent, but *not* in cases like *Walljee*[33] where it was held that the consent was not required in the first place.

5 2 Theft of trust money

In a situation where large sums of cash were withdrawn to finance a cash sale of immovable property without consent, the non-consenting spouse could opt to lay criminal charges for theft of trust money against the errant spouse. In principle, an owner of money cannot steal it. Since a spouse in community of property is the co-owner of an undivided share of the entire estate,[34] it is difficult to envisage a situation where a criminal charge of theft could be of assistance to the prejudiced spouse against the errant one. Our criminal law does however recognise theft of trust money as a criminal offence.[35] For instance, theft of trust money would occur in situations where A (in this case the prejudiced spouse) entrusts money (her half share of joint savings) to B (the errant spouse), for a specific purpose (retirement or a child's education fund, car allowance, etc.) but the money is used by B for a purpose other than what it was intended for.[36] An argument could be made that spouses with access to a joint bank account or savings are entrusted with each other's shares and interests therein and that removing the funds for a purpose not agreed to, constitutes theft of trust money. The problem with a criminal sanction in these circumstances is that the errant spouse may well be the breadwinner in the household – his or her incarceration would not have any beneficial impact on the prejudiced spouse and if only a fine were imposed, it would ultimately equate to a further reduction of what little was left in the joint estate, if anything.

5 3 Creative adjudication by the courts

It would appear that short of legislative amendments, the only viable solution would be to insist that courts abide by their obligation in section 39(2) of the Constitution to interpret legislation in a manner that promotes the spirit, purport and objects of the Bill of Rights. Whilst the court in *Govender*[37] did not draw on section 39(2) directly, Ntshangase J seemed to use his discretion to interpret legislation when he rightly contended that the legislature could not have intended section 15(9) to provide a weapon to spouses who contracted without complying with section 15(2) to enforce contracts against third

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32 GPJHC 07-08-2009 case no A5044/08 delivered by Van Oosten J, Malan J and Mokgoathleng J.
33 GPJHC 07-08-2009 case no A5044/08 delivered by Van Oosten J, Malan J and Mokgoathleng J.
34 Heaton & Kruger *Family Law* 115. See also *Estate Sayle v Commissioner for Inland Review* 1945 AD 388; *De Wet v Jurgens* 1970 3 SA 38 (A); *Du Plessis v Pienaar NO and Others* 2002 4 ALL SA 311 (SCA).
35 J Burchell *Principles of Criminal Law* 5 ed (2016) 707.
36 Burchell *Criminal Law* 709. See also *S v Boesak* 2000 1 SACR 633 (SCA) para 99.
37 2008 6 SA 64 (D).

parties.[38] Likewise, in *Walljee*,[39] it would be not be an unreasonable inference that the Matrimonial Property Act could not have intended to provide a loophole through which spouses married in community of property could purchase immovable property without each other's written consent.

In addition to the problematic wording in the Matrimonial Property Act, the definition of the word "contract" in the Alienation of Land Act remains contentious to the extent that it only recognises instalment sale transactions as contracts. This problem came under scrutiny in 2015 in the Constitutional Court case of *Sarrahwitz v Martiz* ("*Sarrahwitz*")[40] but in the context of the rights of purchasers upon a seller's insolvency. Whilst the facts are distinguishable, the judgment shows how flaws in legislative wording could be handled going forward. The purchaser in that case had paid R40 000 in cash to buy property from the seller. The transfer was not immediately possible due to arrear municipal charges and the municipality refused to issue a clearance certificate. The purchaser, who was already in occupation of the property, undertook to pay off the municipal debt over time. During this lapse in time, the seller was sequestrated and all his assets, including the property, which was still registered in his name, vested in a Trustee.[41] When the Trustee refused to uphold the agreement, the purchaser sought to rely on the protection afforded in section 22(1) of the Alienation of Land Act, which states that:

> "When the owner of land alienated under a contract becomes an insolvent, or a judgment creditor of the owner attaches such land by virtue of a writ of execution, that land shall, subject to the provisions of the Deeds Registries Act, be transferred to any person who purchased that land in terms of a contract or who is an intermediary in relation to that contract and who, in accordance with the provisions of subsection (2), makes arrangements for the payment of all costs in connection with the transfer …"[42]

Reliance on the above-mentioned section by the purchaser was refused by the Trustee. Seemingly, the Alienation of Land Act provides protection to a vulnerable purchaser who has paid the full purchase price and is entitled to receive transfer as against an insolvent seller, but again, the definition of the word "contract" in the Alienation of Land Act excludes cash sales and implies that only purchasers who bought property on instalment would be protected. The classification of different purchasers based on how they paid for the property is clearly contentious and it is the constitutionality of such classification that formed the broader basis of the enquiry in that case.

In those proceedings, the Minister of Trade and Industry argued that it must have been the purpose of the Alienation of Land Act to protect all vulnerable purchasers in the case of a seller's subsequent insolvency irrespective of the method of payment they used.[43] The Minister submitted that, on a proper interpretation of the Act informed by the normative values of the Constitution, a purchaser who made a once-off payment of the full purchase price should enjoy the same protection and benefit as a purchaser who bought a house via

38 Para 12.
39 GPJHC 07-08-2009 case no A5044/08 delivered by Van Oosten J, Malan J and Mokgoathleng J.
40 2015 4 SA 491 (CC)
41 Paras 5-8.
42 Section 22(1) of the Alienation of Land Act.
43 *Sarrahwitz v Martiz* 2015 4 SA 491 (CC) para 24.

instalment sale.[44] The remedy he proposed was the reading in of certain words, with retrospective effect into the affected sections.[45] He further considered it unnecessary to refer the Act back to Parliament to cure the defect that had been identified.[46] Whilst the majority of the court's focus in that case was on the constitutional validity of differentiating between classes of purchasers, ultimately, an order was made that:

> "The words 'including residential property paid for in full within one year of the contract, by a vulnerable purchaser' are to be read into the definition of 'contract' at the end of section 1(a) [of the Alienation of Land Act]".[47]

By analogy, it is clear that a functional or dynamic, as opposed to a formal or literal, approach to interpretation is required if we are to preserve the equal administration of joint estates envisaged by section 15 of the Matrimonial Property Act in future cases.

6 Conclusion

My opinion is that the loophole and implications thereof remain a serious undiagnosed cancer within our legal framework, which, if left untreated, has serious ramifications for the institution of the joint and equal administration of estates. The primary concern is that there is no reported case law which provides clear or unambiguous precedent on the issue. The judgment in *Govender*[48] is reported but does not touch on the problem with the definition of "contract" in the Alienation of Land Act or the reliance on that definition by the Matrimonial Property Act, opting rather to employ a (arguably correct) broader legislative intent approach to the issue of consent. Whilst that is commendable, the judgment is not strictly binding on other jurisdictions. The judgment in *Walljee,*[49] on the other hand, directly evidences the loophole and deals specifically with the definitional problem but is unreported and follows a formalistic and literal approach to both sets of legislation. This approach is unlikely to withstand constitutional scrutiny, if tested. While, the Constitutional Court in *Sarrahwitz*[50] gives us a glimpse into how such matters might be argued in future cases, legal uncertainty remains in how responsive individual judges would be when called upon to "read into" legislation or to "interpret" legislation in any way other than its literal meaning. In the meantime, spouses remain placated by the false sense of security created in section 15(2) of the Matrimonial Property Act regarding the joint administration of estates, when it actually does not exist in respect of purchases of immovable property other than on instalment.

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44 Para 24.
45 Para 25.
46 Para 25.
47 Para 78.
48 2008 6 SA 64 (D) para 24.
49 GPJHC 07-08-2009 case no A5044/08 delivered by Van Oosten J, Malan J and Mokgoathleng J.
50 2015 4 SA 491 (CC).

SUMMARY

The Matrimonial Property Act 88 of 1984 ensures equal spousal powers in relation to the administration of the joint estate. Section 15 of the Matrimonial Property Act entrenches the right to joint administration by requiring written consent of the other spouse in transactions that would have a substantial impact on their share of the joint estate. Most notably, section 15(2)(g) requires the consent of a spouse "to enter into a contract as defined in the Alienation of Land Act" which is generally understood as requiring the consent of both spouses when purchasing immovable property. The Alienation of Land Act 81 of 1988 defines "contract" as a "deed of alienation under which land is sold against payment by the purchaser to, or to any person on behalf of, the seller of an amount of money in more than two installments over a period exceeding one year". This wording effectively limits the requirement for spousal consent to installment sales which reveals a fatal flaw or loophole in the protection afforded by the system of joint administration of the joint estate for spouses married in community of property. Most modern property transactions are cash sales secured by mortgage and not installment sale transactions. With reference to reported and unreported cases, this article investigates the loophole and proposes a way in which the devastating effects of the flaw might be mitigated in future cases.

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