

SOUTH AFRICA / JUDGMENT

Walljee and Another v Botto and Another (A5044/08) [2009] ZAGPJHC 36 (7 August 2009) [2009] ZAGPJHC 36

COURT

South Gauteng High Court, Johannesburg

BEFORE

Van Oosten

CASE / FILE NUMBER

A5044/08

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IN THE SOUTH GAUTENG HIGH COURT

(JOHANNESBURG)

CASE NUMBER A5044/08

In the matter between

RAYMOND WALLJEE FIRST APPELLANT

CHARMAINE WALLJEE SECOND APPELLANT

and

KENNETH JOHN BOTTO FIRST RESPONDENT

CHARMANNE ISABEL BOTTO SECOND RESPONDENT

J U D G M E N T

VAN OOSTEN J:

- [1] At issue in this appeal is the validity of an agreement of sale of an immovable property (the agreement). The first appellant, who is married to the second appellant, purchased the property concerned from the respondents in terms of a written agreement of sale. Six months after its conclusion the respondents relying on the provisions of s 15(2)(g) of the Matrimonial Property Act 88 of 1984 (the Act) sought to resile from the agreement for want of the second appellant's consent to the transaction. The appellants in the court a quo launched an application in which they in essence sought to interdict the respondents from

alienating or disposing of the property and for transfer thereof in their name. The matter was argued before Mlonzi AJ who dismissed the application with costs. The appeal now serves before this Court with leave of the learned judge.

- [2] Although a number of issues were raised and dealt with by the judge a quo, it is in the view I take of the matter only necessary to determine one thereof which is the question whether the agreement is one contemplated by s 15 of the Act. The undisputed background facts relevant to this issue are briefly these. The appellants were married to each other in community of property on 7 September 2002. Subsequent to the conclusion of the marriage the appellants applied to this Court for an order to change the proprietary regime of their marriage in terms of s 21 of the Act. The application was successful and pursuant thereto a notarial postnuptial contract was duly registered on 22 August 2005. Prior to that on 1 April 2005 and while the appellants were thus still married in community of property the agreement was concluded. It is common cause that the agreement was concluded by the first appellant as purchaser without the written consent of the second appellant as contemplated in s 15 of the Act. In terms of the agreement the first appellant purchased from the respondents the immovable property more fully described as Stand 605 Bez Valley, 225 and 225a Eighth Avenue, Bez Valley, for “the purchase price of R358 500.00, payable in cash upon registration of transfer of the property into the name of the purchaser which amount shall be secured by a suitable guarantee from a registered financial institution within 15 days from date of grant of loan” within 10 days from the date of signature of the agreement. Merely to complete the history of the matter, I may mention that on 26 October 2005 the second appellant in writing ratified the agreement “in so far as is necessary in terms of s 15(4) and (5) of the Matrimonial Property Act”.
- [3] Section 15(1)(g) of the Act prohibits a spouse in a marriage in community of property without the written consent of the other spouse, to “as a purchaser enter into a contract as defined in the Alienation of Land Act, 1981 (Act No 68 of 1981) (the Alienation of Land Act), and to which the provisions of that Act apply”. “Contract” according to s 1 of the Alienation of Land Act

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