IN THE SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)

CASE NUMBER A5044/08

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO	
(2) OF INTEREST TO OTHER JUDGES: YES / NO	
(3) REVISED.	
.....	.....
DATE	SIGNATURE

In the matter between

RAYMOND WALLJEE	**FIRST APPELLANT**
CHARMAINE WALLJEE	**SECOND APPELLANT**

and

KENNETH JOHN BOTTO	**FIRST RESPONDENT**
CHARMANNE ISABEL BOTTO	**SECOND RESPONDNET**

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

> *(a) 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 installments 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;*

In the court *a quo* the argument on behalf of the appellants that the agreement was not a contact as contemplated in the Alienation of Land Act, received short shrift and was brushed aside by the judge as "mischievous". Having referred to sub sec (b) of the definition of "contract" in the Alienation of Land Act, the judge reasoned

> *The meaning to be assigned to the phrase "same import" include giving same significance. The most significant act in the agreement to alienate land is the agreement to alienate which stands as the ultimate outcome. Moreover payment on registration of transfer, and paying an amount of money in more than two installments over a period exceeding one year, have the same import, invariably the same significance namely exchange of land with money* (underlining in original).

With respect to the learned judge, I am unable to follow the logic of her reasoning. Full payment of the purchase price of an immovable property against transfer has always been held to be a cash transaction. It cannot in any way be equated to payment of more than two instalments over a period exceeding one year. The agreement is

unambiguous in its terms: it provides for a cash transaction and there is simply no provision for the payment of any instalments. In argument before us counsel for the respondents submitted that the agreement should be read in conjunction with the provisions of the mortgage agreement securing a loan entered into between the appellants and the grantor of the loan secured, Standard Bank. This, counsel concluded, resulted in two agreements having the same import as contemplated in s 1(b) of the Alienation of Land Act. There is no merit in the argument. The mortgage agreement constituted an independent obligation by the appellants as security to the bank for repayment of the loan granted by the bank (see *Gounder v Top Spec Investments (Pty) Ltd* 2008 (5) SA 151 (SCA)) and therefore did not constitute an "instalment" payable by "the purchaser" to "the seller" within the meaning thereof in the definition of "contract" in s 1 of the Alienation of Land Act. The second appellant moreover signed a written consent for her husband (the first appellant) to enter into the loan agreement, and in the same document acknowledged that the mortgage bond would secure the indebtedness arising from the loan. It follows that the agreement was not hit by the prohibition contemplated in s 15(1)(g) of the Act. The respondents' reliance on the section accordingly was misplaced. This conclusion renders it unnecessary to deal with the other issues raised on appeal.

[4] For these reasons the appeal must succeed.

[5] Finally, it is necessary to deal with the costs of the previous hearing of this appeal on 4 June 2009. On this occasion the first respondent appeared in person and informed us that his attorneys due to a lack of funds had withdrawn as the respondents' attorneys of record. He accordingly applied for a postponement in order to obtain legal representation. Although the appellants were ready to proceed, the indulgence sought was granted. There is no reason why the respondents should not be liable for the costs of the first hearing. The

appellants are successful in this appeal and entitled to the costs of the appeal which renders it unnecessary to make a separate order as to the costs of the first hearing.

[6] In the result the following order is made:

1. The appeal is upheld with costs.
2. The order of the court *a quo* is set aside and replaced by the following
    1. *The first and second respondents are interdicted from alienating or taking any steps aimed at alienating or disposing of the immovable property known as STAND 605 BEZVALLEY, 225 AND 225a – 8TH AVENUE, BEZVALLEY ("the property") except in terms of the agreement entered into between the first applicant and the respondents on 1 April 2005 ("the agreement").*
    2. *In the event of the first and second respondents failing to honour their obligations in terms of the agreement within 10 days of the date of this judgment the sheriff or his deputy are authorised and directed to sign all documents and to do all things necessary on behalf of the respondents to affect the sub-division and transfer of the property into the name of the first applicant.*
    3. *The first and second respondents are ordered to pay the costs of the application.*

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FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

I agree.

_____
FR MALAN
JUDGE OF THE HIGH COURT

I agree.

_____
RRD MOKGOATHLENG
JUDGE OF THE HIGH COURT

COUNSEL FOR THE APPELLANTS	***ADV FJ NALANA***
APPELLANT'S ATTORNEYS	***GARLICKE BOUSFIELD INC***
COUNSEL FOR THE RESPONDENTS	***ADV AI CAJEE***
RESPONDENTS' ATTORNEYS	***WITS LAW CLINIC***
DATE OF HEARING	***4 JUNE & 27 JULY 2009***
DATE OF JUDGMENT	***7 AUGUST 2009***