

Married in community of property: What you need to know about contracts and consent

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There are various matrimonial property systems governing marriages in South Africa but, looking at the proprietary consequences of marriages, a marriage is either "in community of property" or "out of community of property".



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Where an antenuptial contract was duly executed by the intended spouses *prior* to the conclusion of their marriage, and if the contract was registered in the deeds office within the period prescribed by law, the marriage would be considered out of community of property. In the absence of a duly registered antenuptial contract, the marriage will automatically be considered as one of in community of property. This article takes a closer look at the contractual capacity of spouses who are married in community of property to each other.

Subject to certain exceptions, Section 15 of the Matrimonial Property Act No. 88 of 1984 (the "Act") provides that spouses married in community of property can perform juristic acts regarding the joint estate without the other spouse's consent. However, Section 15(2) and 15(3) outline specific juristic acts that require the consent of the other spouse, and failure to obtain such consent may affect the joint estate in the future.

Required consent

One such exception pertains to dealings with immovable property. Section 15(2)(a) states that a spouse cannot alienate, mortgage, burden with a servitude, or confer any real right in immovable property forming part of the joint estate without the written consent of the other spouse.

Section 15(2)(b) of the Act specifically provides that a spouse is not permitted to enter into any contract for the alienation, mortgaging, burdening with a servitude or conferring any other real right in any immovable property forming part of the joint estate without the written consent of the other spouse. In essence, a spouse cannot sell immovable property without the other spouse's consent.

This now begs the question - what happens if an agreement of sale was concluded by a spouse who did not obtain the required consent of the other spouse? Does an innocent third party have cause against the joint estate? And what about the rights of the deceived spouse who had no knowledge of the sale?



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Protected interests

If a spouse enters into a transaction requiring the other spouse's consent but fails to obtain it, the law generally favours the innocent third party (see Section 15(9)(a) of the Act). The legal position contained in Section 15(9)(a) of the Act was confirmed in the recent case of *Vukeya v Ntshane and others [2022]* (SCA) where the Supreme Court of Appeal held that a non-consenting spouse is deemed to have consented to the sale of the immovable property if the third party was unaware and could not reasonably have known that the required consent was not obtained.

However, our law can also protect the interests of an innocent spouse in a case where immovable property was disposed of without the required consent.

For instance, upon dissolution of the marriage (either death or divorce), the court can make an adjustment in respect of the division of the joint estate in order for the innocent spouse to be compensated. Naturally, the joint estate must have suffered a loss in order for the court to order that the innocent spouse be compensated.

Furthermore, the Act recognises that there may be instances where a transaction that would normally require the consent of the other spouse may be entered into without the said consent being obtained. Section 16 of the Act provides that when a spouse withholds consent or when the consent for whatever reason cannot be obtained, the court may, on application by the other spouse, grant leave to enter into the transaction.

The court will, however, only allow it if it is satisfied that the consent is being withheld unreasonably or if there is a good reason to dispense with the consent.

When in doubt...

It is important for parties married in community of property to understand their contractual capacities when it comes to concluding certain transactions. Spouses are encouraged to seek legal advice if there is doubt as to whether the consent of the other spouse is required for the conclusion of a particular transaction.

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