REPORTABLE

CASE NO: SA 106/2022

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

MEGAMENO BOAS NAANDA	**Appellant**
and	
GERHARDUS CHRISTIAN FREDRIK	**First Respondent**
HILMA FREDRIK	**Second Respondent**

Coram:	SMUTS JA, HOFF JA and SCHIMMING-CHASE AJA
Heard:	**14 October 2024**
Delivered:	**1 November 2024**

Summary: This appeal concerns the scope and ambit of s 8(1)*(a)* of the Married Persons Equality Act 1 of 1996 (the Act). The appellant entered into a sale agreement with Mr G C Fredrik in respect of an immovable property, Erf 3944, Katutura Extension No. 2 (the property) in 2017. Mr Fredrik was married in community of property to Ms H Fredrik (the respondent in this matter) and the property was registered in both their names by virtue of their marital regime. The sale and transfer of the property was done without the knowledge and written consent of the respondent. When the respondent became aware of the sale and transfer, she refused to vacate the property. The

appellant instituted his action against the Fredriks confining his claim to their eviction. Only Ms Fredrik entered an appearance to defend and a counterclaim.

The court *a quo* found that the appellant had not brought himself within the protection afforded to a third party purchaser under s 8 of the Act where such a purchaser had no knowledge that a spouse did not consent to a sale. It further found that the appellant was under an obligation to enquire about the status of the person with whom he was contracting. Having made no enquiries, the appellant did not establish that he, as a reasonable person, could not have known that the transaction was entered into without the spouse's consent. The court dismissed the appellant's eviction claim and set aside the sale and transfer of the property.

On appeal, this Court must determine whether the appellant brought himself within the protection provided to third party purchasers of immovable property purchased without the consent of a spouse in a marriage in community of property (in terms of s 8 of the Act); and whether this Court can make an order for restitution in favour of the appellant raised for the first time on appeal.

Held that, the appellant having made no enquiries as a reasonable person would, the High Court correctly found that the appellant failed to discharge the burden upon him to establish that he could not reasonably have known that consent had not been given. The court below thus cannot be faulted in finding that the appellant had not established that consent could not be deemed for the purpose of s 8 of the Act and that the transaction was thus unenforceable.

Held that, it was open to the appellant to have made an alternative claim seeking restitution in the event of the court not finding in his favour on the issue of the validity of the transaction especially after it was squarely challenged in the plea and counterclaim. He elected not to do so at a time when he was legally represented. The question of restitution not having been raised in the course of judicial case management (JCM) or sought at the trial, the appellant's ground of appeal that the court below erred in this regard when restitution was never raised in any manner, is not tenable. The court held that it is unfair to the respondent to raise this issue on appeal for the first time.

Consequently, the appeal is dismissed with costs.

APPEAL JUDGMENT

SMUTS JA (HOFF JA and SCHIMMING-CHASE AJA concurring):

[1] This appeal concerns the scope and ambit of s 8(1)*(a)* of the Married Persons Equality Act 1 of 1996 (the Act) and whether the appellant brought himself within the protection provided to third party purchasers of immovable property purchased without the consent of a spouse in a marriage in community of property.

Background facts

[2] The background facts are these. On 21 August 2017, the appellant as purchaser entered into a sale agreement with Mr G C Fredrik as seller in respect of immovable property, namely Erf 3944, Katutura Extension No. 2 (the property). The deed of sale only designates Mr Fredrik as the seller although above his name the following was inscribed in handwriting ('Mr G C and Mrs H Fredrik') onto the cyclostyled sale agreement of the estate agents, Amazing Kingdom Properties CC represented by a certain Mr Cosmos. There was however only one party whose particulars are provided as seller and only one signatory designated as seller, namely Mr Fredrik. The purchase price was N$535 000.

[3] It is common cause that Mr and Ms Fredrik were at all material times married in community of property. They were married in 1991. Ms Fredrik inherited the right to the property from her father. On 13 March 2001 the property was transferred from the City of Windhoek to them and registered in both their names as being married in community of property. In 2013 the parties became estranged and reconciled in 2016 and became estranged again in 2018.

[4] Ms Fredrik did not sign the deed of sale. Nor did Ms Fredrik sign a power of attorney to pass transfer of the property to the appellant. Ms Fredrik also bore no knowledge of the sale and did not consent to it.

[5] The appellant paid the purchase price and took transfer of the property on 28 September 2017 after making an initial down payment to Mr Fredrik. The appellant testified that he orally agreed with Mr Fredrik that the Fredrik family could remain in occupation of the property until the end of December 2017 to avoid a disruption for the Fredriks' school going children at a rental of N$4000 per month which would be payable from the date of transfer until they vacated the property.

[6] After Ms Fredrik became aware of the sale and transfer, she refused to vacate the property. The appellant instituted action against Mr and Ms Fredrik as first and second defendants respectively for their eviction from the property.

The pleadings

[7] The appellant instituted his action against the Fredriks in October 2018, confining it to a claim for their eviction as registered owner of the property. Only Ms Fredrik entered an appearance to defend. Although summary judgment was granted against both Mr and Ms Fredrik, the latter succeeded in rescinding that judgment and was granted leave to defend.

[8] In her plea, Ms Fredrik denied that the appellant was the lawful owner of the property. This denial was based upon her marriage in community of property. It was pleaded that the property belonged to the joint estate and that she had at no stage gave her written consent for the sale and transfer of the property to the appellant. Ms

Fredrik also denied ratifying the sale and transfer and asserted that it was contrary to the provisions of the Act. Ms Fredrik also pointed out that the sale agreement was only signed by Mr Fredrik and denied authorising the estate agent or Mr Fredrik to sign the sale agreement. Ms Fredrik also pleaded that it (the sale) did not comply with the Formalities in respect of the Contracts of the Sale of Land Act 71 of 1969. Ms Fredrik also pleaded that she had received no proceeds from the sale and pleaded that the sale and transfer were nullities.

[9] Ms Fredrik simultaneously instituted a counterclaim, repeating the basis for contending that the sale and transfer were unlawful and void and sought a declaratory order to that effect as well as an order directing that transfer of the property be effected in her name consequent upon the declaratory relief being granted. An order was further sought that the Deputy Sheriff be authorised to take steps to cause the transfer in the event of the appellant failing to do so.

[10] The appellant replicated to the plea and pleaded to the counterclaim invoking s 8 of the Act. He pleaded that he did not know or reasonably know that the sale was entered into without her consent and that it should be deemed to have been entered into with the required consent.

<u>The trial</u>

[11] The matter thereafter proceeded to trial in July 2022.

[12] The appellant testified that he was approached by Mr Cosmos, offering the property for sale as belonging to both Mr and Ms Fredrik. The appellant testified that Ms Fredrik was present at his viewings of the house. He however only dealt with Mr

Fredrik and Mr Cosmos and agreed on a purchase price of N$500 000 excluding the transfer costs and agent's commission of N$35 000. Mr Cosmos prepared a sale agreement which the appellant and Mr Fredrik signed in the presence of Mr Cosmos. The appellant stated that it was handed to Mr Fredrik 'for Ms Fredrik to sign'.

[13] The appellant further testified that Mr Fredrik nominated conveyancers Isaaks and Associates to attend to the transfer of the property and also sought a part payment of the purchase price of N$200 000 in advance from the appellant. The latter paid that sum and paid the balance upon transfer. He testified that he agreed that the Fredrik family could stay on in the house until the end of 2017 at a rental of N$4000 per month.

[14] The appellant further testified that in early 2018, Mr Fredrik approached him with an offer to buy back the property. A deed of sale in the sum of N$900 000 was prepared by the appellant's lawyers but Mr Fredrik failed to sign it and effect that payment.

[15] The appellant thereafter approached Ms Fredrik, informing her that he had struggled to contact Mr Fredrik. Ms Fredrik refused to vacate the house.

[16] In cross-examination, the appellant stated that he sought the eviction of the Fredriks or the refund of the money he had paid as well as expenses incurred as a result of the sale. He further testified that he paid Mr Cosmos' agent's commission in the sum of N$35 000. That amount had been agreed between him and Mr Cosmos. He also stated that Mr Cosmos had drafted the sale agreement.

[17] When it was put to the appellant that Ms Fredrik was not involved at all in the discussions concerning the sale, the appellant stated that he did not know whether Mr Fredrik was married or not or whether he was in a relationship. He conceded that his agreement was at all times with Mr Fredrik and never with Ms Fredrik, including the subsequent arrangements on vacating the property and rental.

[18] The appellant accepted that he did not require Mr Cosmos to identify on whose behalf he was selling the property and that he did not ask Mr Fredrik if he was married or not.

[19] Ms Fredrik gave evidence and called her brother-in-law to testify concerning her confrontation with Mr Fredrik when she invited Mr Cosmos to a meeting at the house after finding out about the sale after the appellant had approached her in early 2018 to vacate the premises.

[20] Ms Fredrik confirmed that she had not signed the sale agreement or a power of attorney to pass the transfer of the property.

[21] Under cross-examination, Ms Fredrik stated that she had approached the Municipality after finding out that her husband had sold the property and opened a case of fraud against him. She also queried the conveyancer, Mr Boris Isaaks about the transfer and he undertook to have the house returned to her. Ms Fredrik stated that she no longer resided with Mr Fredrik and that she had not known of the sale or received any of its proceeds.

<u>The approach of the High Court</u>

[22] The High Court stressed that the fundamental requirement of s 7 of the Act made it clear that a spouse married in community of property is prohibited from alienating immovable property forming part of the joint estate without the consent of the other spouse.

[23] After examining the facts, the court concluded that the appellant had not brought himself within the protection afforded to a third party purchaser under s 8 of the Act where such a purchaser had no knowledge that a spouse did not consent to a sale.

[24] The court found that the appellant was under an obligation to enquire about the status of the person with whom he was contracting. The statement by Mr Fredrik to the appellant that he (Mr Fredrik) would secure Ms Fredrik's signature to the power of attorney as well as other transfer documents should have alerted the appellant to ascertain whether Mr Fredrik was married and whether consent was required for the transaction. Having made no enquiries, the appellant did not establish that he, as a reasonable person, could not have known that the transaction was entered into without the spouse's consent.

[25] The court below dismissed the appellant's eviction claim and set aside the sale and transfer of the property.

[26] In addressing the relief for the counterclaim, the court invoked s 80 of the Deed Registries Act 14 of 2013 which empowers the court to order the cancellation of a deed of transfer which would result in the property being held under the deed prior to its cancellation and proceeded to make an order to that effect.

Submissions on appeal

[27] The appellant framed the issue on appeal as concerning the correctness of the granting of the relief sought in the counterclaim without any order that Ms Fredrik repay the purchase price to the appellant.

[28] Appellant's counsel further contended that the appellant had brought himself within the protection provided by s 8 of the Act. It was argued that, having accepted that the appellant did not know that Mr Fredrik was married, the issue of consent would not have then arisen.

[29] Counsel further contended that after the sale agreement was signed and handed over to Mr Fredrik for Ms Fredrik to sign, (who had indicated that Ms Fredrik was busy at work and would sign at the legal practitioner's office), that the appellant was entitled to assume that Ms Fredrik's consent was given.

[30] It was further argued that the High Court erred in fashioning a remedy without directing restitution or a refund of the purchase price and that the result was a 'grave failure of justice', resulting in Mr Fredrik benefiting from his own unlawful conduct.

[31] Counsel for Ms Fredrik, Ms Shifotoka, in her well researched argument, supported the approach adopted by the court below with regard to the appellant's knowledge, arguing that he would need to show that he could not reasonably have known that Ms Fredrik's consent was required for the transaction. The appellant would

need to establish that he did not know the consent was lacking and could not reasonably have known that the consent was not given.

[32] Counsel relied upon the authority of this Court in *Standard Bank Namibia Ltd v Groenewald & others*[1] which held that the reasonableness on the part of the third party is to be determined by an objective standard of a reasonable person, requiring that party to make reasonable enquiries as to whether consent was required.[2] Counsel argued that the appellant bore the onus to place himself within the protection of s 8 but had failed to discharge that burden because he had failed to make any enquiries as to the marital status of Mr Fredrik before the conclusion of the transaction.

[33] Ms Shifotoka also pointed out that at no stage had the appellant raised the issue of restitution on the pleadings or in pre-trial proceedings and that the High Court was not requested to decide that question. Ms Shifotoka submitted that this Court would be disinclined to permit the appellant to raise this point for the first time on appeal as it was not covered by the pleadings and it would be unfair to Ms Fredrik as she had not received any monies from the appellant in respect of the purchase price.

[34] Ms Shifotoka conceded that the High Court's reliance upon s 80 of the Deed Registries Act 2015 was incorrect, as raised on behalf of the appellant, because the government notice putting that Act into operation had been set aside by the High Court on 7 June 2021. The equivalent provision in the Deeds Registries Act 47 of 1937 is s 6 which also empowers a court to cancel a registered deed. Counsel sought a variation or an amendment of the High Court's order to include reference to this provision.

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[1] *Standard Bank Namibia Ltd v Groenewald & others* 2021 (4) NR 968 (SC).
[2] Para 46.

<u>The statutory provisions</u>

[35] Section 2 of the Act sets out the fundamental purpose and principle embodied in the Act by abolishing the common law rule in terms of which a husband in a marriage exercised marital power over his wife, unless an antenuptial contract provided otherwise. In s 3, one of the effects of abolishing marital power was to remove the restrictions which marital power placed upon a wife's legal capacity to contract and litigate including registering immovable property in her name.

[36] In furtherance of this fundamental principle, s 6 provided that, subject to s 7 of the Act, spouses married in community of property 'may perform any juristic act with regard to the joint estate without the consent of the other spouse'.

[37] Section 7, to which s 6 is made subject, sets out a number of transactions which do not only require the consent of the non-contracting spouse, but expressly requires that the consent is to be in writing.

[38] Relevant for present purposes is s 7(1)*(a)* which provides:

> '7(1) Except in so far as permitted by subsection (4) and (5), and subject to sections 10 and 11, a spouse married in community of property shall not without the consent of the other spouse –
>
> (a) alienate, mortgage, burden with a servitude or confer any other real right in any immovable property forming part of the joint estate.'

Sections 10 and 11 and the sub-sections referred to are not relevant for present purposes.

[39] Section 7(2) expressly requires that the consent in s 7(1)*(a)* must be given in writing.

[40] Section 8 deals with the consequences of an act performed without the consent required under s 7. Pertinent to this matter is s 8(1)*(a)* which provides:

> '8(1) If a spouse married in community of property enters into a transaction with another person without the consent required by the provisions of section 7, or without leave granted by a competent court in terms of section 10 or contrary to an order of a court in terms of section 11, and –
>
> (a) that other person does not know and cannot reasonably know that the transaction is being entered into without such consent or leave or in contravention of that order, as the case may be, such transaction shall be deemed to have been entered into with the required consent or leave or while the power concerned of the spouse has not been suspended, as the case may be.'

[41] This Court in *Standard Bank* held that, subject to s 8(1)*(a)*, a contract requiring consent would be void and unenforceable in the absence of that consent,[3] following *Marais N.O. & another v Maposa & others.*[4]

[42] Section 8(1)*(a)* thus provides a degree of protection for a bona fide third party who contracts with a spouse where the required written consent is lacking by providing for 'deemed consent' to the transaction if that third party did not know or could not reasonably have known of the lack of consent.

[43] In order for the consent to be deemed and the transaction to be enforceable, a third party in the position of the appellant would be required to establish two things,

[3] Para 45.
[4] *Marais N.O. & another v Maposa & others* 2020 (5) SA 111 (SCA) para 26.

neatly summarised by Plasket JA in *Marais* with reference to similarly worded legislation in South Africa:[5]

> '[28] . . . (F)irst, that he or she did not know that consent was lacking; and secondly, that he or she could not reasonably have known that consent had not been given. In terms of the general principle that the party who asserts a particular state of affairs is generally required to prove it, the burden of bringing s 15(9)*(a)* into play rests on the party seeking to rely on the validity of the transaction.
>
> [29] The reference to reasonableness in the phrase "cannot reasonably know" imports an objective standard into the proof of this element: it must be established with reference to the standard of the reasonable person, in terms of what the reasonable person would do in the circumstances and the conclusion that the reasonable person would draw.
>
> [30] In other words, a duty is placed on the party seeking to rely on deemed consent to make reasonable enquiries . . . .'
>
> (Footnotes excluded)

[44] The approach set out by Plasket JA was followed by this Court in *Standard Bank*[6] and reflects the position in Namibia in respect of the similarly worded provision applicable here.

[45] It was thus incumbent upon the appellant when seeking to rely on the deemed consent provision in s 8(1)*(a)* to make enquiries which a reasonable person would make concerning whether Mr Fredrik was married at the time and, if so, whether his spouse's consent would be required. I agree with Plasket JA in *Marais* that 'anything less than this duty of enquiry, carried out to the standard of the reasonable person

[5] *Marais* para 28-30.
[6] Para 46.

would render (s 7) a dead letter'[7] and undermine the statutory purpose underpinning the enactment of the Act.

Did the appellant meet the requisites posited by s 8(1)*(a)*?

[46] The relevant facts relating to this key question can be shortly stated. In this matter, it is common cause that Ms Fredrik did not consent to the sale. The sale agreement referred to the seller as being Mr Fredrik but above the name of Mr Fredrik the following was inscribed in brackets 'Mr G C Fredrik and Mrs H Fredrik'. The appellant was required to establish that he did not know that Ms Fredrik's consent was lacking and that he could not reasonably have known that consent had not been given in order to bring himself with the ambit of the protection provided to third parties in s 8(1)*(a)*.

[47] The appellant was alerted to the fact the Mr Fredrik was married by virtue of what was stated with reference to the designation of the seller in the agreement. He also testified that Mr Fredrik was to take the agreement to Ms Fredrik for signature. There was thus a duty upon the appellant to make reasonable enquiries, especially after being so alerted. Yet he made no enquiries at all and stated that he did not see the need to do so. He admitted that he did not enquire at all concerning the marital status of Mr Fredrik. Reasonable enquiries to be made would extend to the marital regime and if consent was given. No enquiry at all was made.

[48] Having made no enquiries, the High Court correctly found that the appellant failed to discharge the burden upon him to establish that he could not reasonably have known that consent had not been given. The court below thus cannot be faulted in

[7] *Marais* para 32.

finding that the appellant had not established that consent could not be deemed for the purpose of s 8 of the Act and that the transaction was thus unenforceable.

[49] Quite how transfer could have proceeded on the basis of the sale without her written consent is not apparent but is outside the scope of this judgment.

The appellant's point on restitution

[50] One of the grounds of appeal raised by the appellant claims:

> 'The Court *a quo* erred in effectively granting a one-sided restitution in the circumstances where upon consideration of equity, public policy, and relevant legal principles, ordering a one-sided restitution would result in a failure of justice and an inequitable outcome particularly in view of the fact that the Appellant in fact paid the purchase price to the respondents.'

[51] This ground was also advanced in both written and oral argument. During oral argument, counsel for the appellant relied upon the approach set out in *Jajbhay v Cassim*[8] to do simple justice and prevent manifest injustice and inequity between the parties when finding that an agreement which was contrary to public policy was unenforceable. This approach has been consistently followed by this Court.[9] As was stressed in *Oberholzer v Loots & another*[10] in following *Ferrari,*[11] one of the considerations would be whether one of the parties was enriched at the expense of the other if relief to redress that were not to be granted. A court would also consider the relative degrees of turpitude of the respective parties. The underlying principle is that a court would not grant an order which would amount to indirectly enforcing an illegal

[8] *Jajbhay v Cassim* 1939 AD 537.
[9] *Ferrari v Ruch* 1994 NR 287 (SC); *Moolman & another v Jeandre Development* CC 2016 (2) NR 322 (SC).
[10] *Oberholzer v Loots & another* 2023 (4) NR 1047 (SC).
[11] Para 62.

agreement. The object of relaxing the *par delictum* rule is to discourage illegal or criminal conduct by refusing the aid of the court to delinquents involved in them.[12]

[52] When instituting his action against Mr and Ms Fredrik as first and second defendants, the appellant confined his claim to eviction. It was open to him to have made an alternative claim seeking restitution in the event of the court not finding in his favour on the issue of the validity of the transaction especially after it was squarely challenged in the plea and counterclaim. He elected not to do so at a time when he was legally represented. Even after the counterclaim was delivered, the appellant elected not to seek restitution and join Mr Fredrik to the further proceedings. Nor was the question of restitution raised in the course of judicial case management (JCM). Nor was any order of restitution sought at the trial. Quite how the court below erred in this regard when it was never raised in any manner, is by no means clear.

[53] This point is raised for the first time on appeal. The principles governing raising points for the first time on appeal referred to by Ms Shifotoka are cogently summarised by the Deputy Chief Justice in his work, *The Supreme Court of Namibia: Law, Procedure and Practice*:[13]

> 'As a general matter, the appeal court is disinclined to allow a party to raise a point for the first time on appeal because having chosen the battle-ground, a party should ordinarily not be allowed to move to a different terrain. However, the Court has a discretion whether or not to allow a litigant to raise a new point on appeal. In the exercise of its discretion, the appeal court will have regard to whether: the point is covered by the pleadings; there would be unfairness to the other party; the facts upon which it is based are disputed; and the other party would have conducted its case differently had the point been raised earlier in litigation.'

[12] *Moolman* para 79.
[13] P. T. Damaseb *The Supreme Court of Namibia: Law Procedure and Practice* (2021) at 43-44.

[54] This point was not raised in the pleadings and during JCM. Furthermore, Ms Fredrik's undisputed evidence was that she did not receive any proceeds of the purchase price of the sale agreement. Nor was she party to the agreement or participate in it at all, unlike the cases relied upon by the appellant. Her testimony in that regard is supported by the appellant's version in making an advance payment to Mr Fredrik of a portion of the purchase price with the remainder to be paid on transfer. It was not contested that Ms Fredrik did not engage with the conveyancer around the time of the transfer.

[55] As this point was not raised in the pleadings or later in JCM – or even at the trial – and given the distinguishing features of the cases relied upon, it is unfair to raise this issue on appeal for the first time. It is furthermore and in any event not apparent to me that any such order should be made on the facts before us to prevent manifest injustice and inequity.

Conclusion

[56] It follows that the appeal is to be dismissed. The order of the High Court is however to be corrected to reflect the applicable legislative provision, namely s 6 of the Deeds Registries Act 47 of 1937. As for costs, we were informed by Ms Shifotoka that Ms Fredrik is legally aided in these proceedings. In accordance with s 17 of the Legal Aid Act 29 of 1990 an award of costs in her favour will be payable to the Director: Legal Aid.

Order

[57] The following order is made:

1. The appeal is dismissed with costs, to include the costs of one instructing and one instructed counsel. Such costs are to be paid to the Director: Legal Aid.

2. Paragraph 6 of the High Court order is varied to read:

> 'The Registrar of Deeds is directed to cancel Deed of Transfer No. T 6463/2017.'

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SMUTS JA

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HOFF JA

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SCHIMMING-CHASE AJA

APPEARANCES

APPELLANT:	M Ntinda (with him K Gaeb) Instructed by Sisa Namandje & Co Inc.
RESPONDENTS:	E Shifotoka (with her Ms Gaes) Instructed by Uanivi-Gaes Inc.