The requirements and consequences of sections 17 (5) and 23 (5) of the Matrimonial Property Act 88 of 1984

A comparative scrutiny for the South African legal system

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Summary

This thesis is a comparative scrutiny of sections 17 (5) and 23 (5) of the Matrimonial Property Act 88 of 1984. The comparison centres on the legal situation in South Africa, Germany and Switzerland. References, however, will also be made to other countries such as England, Scotland, France, Belgium, Spain, Sweden, Austria and Poland.

Sections 17 (5) and 23 (5) of the Matrimonial Property Act 88 of 1984 provide that for legal transactions in respect of household necessaries both spouses are, respectively, jointly and severally liable [section 23 (5)] or may be sued jointly and severally [section 17 (5)]. As regards the question of liability for the debts arising from transactions in respect of household necessaries, the statutory provisions are relatively clear. However these statutory provisions give rise to many important questions other than the issue of liability such as the historical background, the *ratio legis* and the legal nature of sections 17 (5) and 23 (5) of the Matrimonial Property Act 88 of 1984, the requirements and the effects of sections 17 (5) and 23 (5) in respect of the contractual position of the spouses and the acquisition of ownership. Furthermore the question arises as to how the effects of sections 17 (5) and 23 (5) of the Matrimonial Property Act 88 of 1984 can be excluded. Unfortunately it would appear that the South African authorities have not yet grappled with many of these questions, in spite of the importance thereof. The author therefore attempts to submit his own answers.

Furthermore the legal situation in Germany and Switzerland is presented. No attempt is made to answer questions which arise in these countries, since the primary object of the present thesis is the legal situation in South Africa. The author thus merely describes the legal situation in Germany and Switzerland and concentrates on the majority opinion in these countries. Only where, from the South African point of view it appears to be necessary, a short criticism is submitted.

Finally the author compares the different legal systems, highlights weaknesses of the South African law and the advantages of the Swiss and German law in order to submit a proposal which could improve the current legal situation in South Africa.

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Contents

Introduction

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Sections 17 (5) and 23 (5) of the Matrimonial Property Act 88 of 1984 provide that for legal transactions in respect of household necessaries both spouses are, respectively, jointly and severally liable [section 23 (5)] or may be sued jointly and severally [section 17 (5)].

As regards the question of liability for the debts arising from transactions in respect of household necessaries, the statutory provisions are relatively clear. However, as will be illustrated below, these statutory provisions give rise to many important problems other than the issue of liability. Unfortunately it would appear that the South African authorities have not yet grappled with these other problems, in spite of the importance thereof. The author will therefore attempt to submit his own solutions to such problems.

The work is subdivided into three parts. The first part contains an analysis of the legal situation in South Africa and an attempt to find solutions [*de lege lata*] to the problems arising in this context.

The first chapter of the South African part deals with the historical background, the *ratio legis* and the legal nature of sections 17 (5) and 23 (5) of the Matrimonial Property Act of 1984. It will be pointed out that the wife's capacity to bind her husband's credit for household necessaries was derived from the common law and gave rise to many controversies regarding questions such as which of the spouses could be held liable for such transactions or whether the creditor could attach the private assets of the non-contracting spouse married in community of property.

Sections 17 (5) and 23 (5) of the Matrimonial Property Act 88 of 1984 put an end to many such controversies. Yet, it will be illustrated, in the case where spouses are separated from each other and such separation is not perceptible to the trader, these controversies are still relevant. In addition it will be pointed out that the capacity of one spouse to bind the other spouse's credit can no longer - as in former times - be regarded as an enhancement of legal capacity, but must rather be seen simply as a legal effect of the fact that the object of the legal transaction is a household necessary. This perception is decisive for the determination of the legal nature of the two sections under discussion. The author will attempt to illustrate that a clear determination of the legal nature of sections 17 (5) and 23 (5) of the Matrimonial Property Act 88 of 1984 is in fact not possible.

As regards the question of the *ratio legis* of sections 17 (5) and 23 (5) of the Matrimonial Property Act 88 of 1984, the present thesis will illustrate that South African authorities have grappled with this problem only in a very superficial way. Only one author deals with this question without, however, offering a satisfactory answer. The author will therefore attempt to develop his own suggestions in this regard.

The second chapter deals with the requirements for the capacity of one spouse to bind the other spouse's credit in respect of household necessaries, i.e. the existence of a valid and lawful marriage, the cohabitation of the spouses and that the fact that the object of the legal transaction must be a "household necessary".

Whereas the first requirement appears to be relatively clear, it will be illustrated that other requirements give rise to many important questions. It will be pointed out that one of the most controversial questions in this sphere of family law is as to the effect of the termination of the common household of husband and wife. Furthermore, it appears to be very controversial which criteria must be relied upon in order to assume the termination of the cohabitation. The author attempts to answer these questions by referring to accepted principles in Swiss, German and English law.

As regards the requirement of a "household necessary", the thesis will illustrate that the criteria relied upon by case law and literature in respect of the wife's common law capacity to bind the husband's credit cannot be regarded as sufficient in the application of sections 17 (5) and 23 (5) of the Matrimonial Property Act 88 of 1984.

Here too the author will attempt to submit his own solution to the problems raised in this regard.

The third chapter deals with the legal consequences of sections 17 (5) and 23 (5) of the Matrimonial Property Act 88 of 1984.
As pointed out above, with regard to the liability for debts arising from legal transactions in respect of household necessaries, the statutory provisions are relatively clear. However, problems may well arise as regards the question of the contractual position of the spouses, particularly that of the non-contracting spouse. Does he or she become a party to the contract, can he or she accept the performance and exercise all rights flowing from such a contract? It appears that the South African literature and jurisprudence have not yet dealt with these questions. Here again the author will suggest his own answers to these questions.
Another problem with which the South African literature and jurisprudence have not yet grappled is the question of whether sections 17 (5) and 23 (5) of the Matrimonial Property Act 88 of 1984 have any effect on the acquisition of ownership. It will be pointed out that in Germany this question is answered in the affirmative in respect of § 1357 BGB - a statutory provision which is to some extent similar to sections 17 (5) and 23 (5) of the Matrimonial Property Act 88 of 1984. In Germany spouses generally acquire co-ownership in respect of items which fall within the ambit of § 1357 BGB. It will, however, be illustrated that the German solution does not appear to be possible in South Africa. It will be pointed out that the reason for this conclusion lies mainly in the difference between the respective principles governing the South African and German law of representation.

The fourth chapter deals with the question of how the capacity of one spouse in this regard can be excluded by the other spouse. In contrast to the problems mentioned above, the legal situation in this regard appears to be clear.

The second part illustrates the legal situation in *Germany* and *Switzerland*. No attempt is made to answer questions which arise in these countries, since the primary object of the present thesis is the legal situation in South Africa. The author will thus merely describe the legal situation in Germany and Switzerland and concentrate on the

majority opinion in such countries. Only where, from the South African point of view, it appears to be necessary, will a short criticism be submitted.

Similarly to the South African part, the German and Swiss part is subdivided into four sections with the following topics: historical background, *ratio legis* and legal nature [part one]; requirements of the capacity to bind the other spouse's credit [part two]; effects of the legal transactions falling within the ambit of § 1357 BGB and Article 166 ZGB [part three]; and exclusion of the competence [part four]. For the sake of convenience the thesis will present those parts, which in Germany and Switzerland are regulated in a similar way, together in the same section, whereas those parts which are regulated in Germany and Switzerland in different ways, will be illustrated in different subsections.

The thesis will show that § 1357 BGB and Article 166 ZGB are to a large extent similar to each other, but that these statutory provisions differ from sections 17 (5) and 23 (5) of the Matrimonial Property Act 88 of 1984, particularly in the legal nature, the requirements and the effects as regards the contractual position of the non-contracting spouse.

It will be shown that § 1357 BGB and Article 166 ZGB are similar to the rules of representation in Germany and Switzerland respectively and therefore stipulate different requirements from those requirements implicit in sections 17 (5) and 23 (5) of the Matrimonial Property Act 88 of 1984. Whereas the wording of § 1357 BGB, which requires "legal transactions for the appropriate provision of the necessities of life", is regarded by German literature and jurisprudence as unclear and misleading, the Swiss law stipulates (with Article 166 ZGB) very clear requirements for the capacity of one spouse to bind the other spouse's credit. In terms of the Swiss statutory provision, the contracting spouse can bind the other spouse's credit if the object is a "continuous legal transaction", if the non-contracting spouse or a judge has authorised the contracting spouse to act, or if the legal transaction is necessary and the contracting spouse is not able to give his consent to the transaction.

As regards the question whether the non-contracting spouse can unilaterally revoke the other spouse's capacity to bind his or her credit, it will be shown that the Swiss and German legal situations are different. Whereas the German code permits such

unilateral withdrawal, the Swiss code favours a different solution which is apparently also the solution in South Africa.

In the third part the author will compare the different legal systems, highlight weaknesses of the South African law and the advantages of the Swiss and German law. Finally a proposal will be submitted which could improve the current legal situation in South Africa.

Chapter 1: General Explanations

I. Historical background and *ratio legis*

The current capacity of a spouse[1] to bind his spouse's credit has to be seen and understood in the context of the former legal situation For this reason a short historical introduction will be given in this section.

The South African Common Law provided that, unless the spouse had agreed otherwise in an antenuptial contract, the wife was subject to the marital power of the husband who administered the joint estate[2]. Without her spouse's consent she could not enter into a binding contract, alienate or encumber property, bind herself *quasi ex contractu*, for example, as a *negotiorum gestor* for a third party, or release a debtor from liability. She had no *locus standi in judicio* and had to be represented or assisted in a civil action by her husband. Without her husband's consent in writing, she could not be appointed as an *executrix* or an *administratrix* in a deceased estate[3] or as a *tutrix* or *curatrix* to a person under disability[4], as a trustee in an insolvent estate[5], or under a deed of trust[6], or as a director[7] of a company[8].

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1 In the following the male version will be used only. The author is aware of the incorrectness of this use. The reason is that otherwise the sentences lose clarity.

2 Hutchison, Van Heerden, Van der Merwe, Visser in: Wille's Principles of South African Law, 126.

3 Administration of Estates Act 66 of 1965, sections 17 and 20 - repealed by: Act 57 of 1988 section 26.

4 Administration of Estates Act 66 of 1965, section 85 read with section 17.

5 Insolvency Act 24 of 1936, section 55 (c).

6 Insolvency Act 24 of 1936, section 55 (c).

7 Company Act 61 of 1973, section 218 (1) (b).

8 On the whole question of the wife's limited legal capacity to perform juristic acts see: Grotius, 1.5.23; Van Leeuwen *RHR* 1.6.7; 2.7.8; Van der Linden 1.3.7; Voet 12.6.19; 23.2.42; Van der Keessel *Th* 96; Arntzensius 3.6.9; 3.8.48; *Magmoet v Registrar of Deeds (1897)* 5 *SC* 179; *Executors of Morkel v Heirs of Morkel* (1829) 1 Menz 177; *Janion v Watson § Co* (1885) 6 NLR 234; *Coetzee v Higgins* (1887) 5 EDC 352; *Du Preez v Cohen Bros* 1904 TS 157; *Van Geems v Fitt* (1910) 20 CTR 537; *Kent v Salmon* 1910 TPD 637; *Rautenbach v Groenewald* 1911 TPD 1148; *Meltzer* v *Kotzen* 1914 CPD 727; *Pretorius v Hack* 1925 TPD 643; *Brigg v Brown's Pharmacy* 1958 (4) SA 526 (O); *Rebier & CO v Algar* (1914) 35 NLR 420; *Reloomel v Ramsay* 1920 TPD 371, 375; *Bing & Lauer v Van den Heever* 1922 TPD 279, 281; *Excell v Douglas* 1924 CPD 472; *Gammon v McClure* 1925 CPD 137; *Smith v Philips* 1931 OPD 107; *Oelofse v Grundling* 1952 (1) SA 629 (SR); *Stern v Schattel* 1935 CPD 78; instructive: Hahlo, 191 and Hutchison, Van Heerden, Van der Merwe, Visser in: Wille's Principles of South African Law, 126-127.

Her legal status was similar[9] to the status of a minor[10].

One of several[11] exceptions to the rule that a wife who was subject to her husband's marital power could not enter into a binding contract or other legal transactions was her capacity to purchase household necessaries[12]. The Roman - Dutch writers stated the general principle that a wife, irrespective of whether she was married in or out of community of property had (1) contractual capacity to bind *herself* and (2) capacity to

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9 This comparison is only an analogy, because the differences between minority and marital power are obvious. Whereas a guardian has to administer the affairs of his ward in the ward's interest, the husband may exercise his powers as administrator of the joint estate and of his wife's separate property entirely in his own interests. Furthermore he is (unlike a guardian) not obliged to give security for nor to render an account for his administration, nor is he liable to his wife in damages for any loss caused by a non-fraudulent maladministration; see: Voet 23.2.63; Arntzensius 3.6.9; Van der Keessel *Th* 91; Van der Keessel *Praelectiones ad Gr* 1.5.21; Rodenburg 2.1.5 and see too: Hutchison, Van Heerden, Van der Merwe, Visser in: Wille's Principles of South African Law, 135.

10 Hutchison, Van Heerden, Van der Merwe, Visser in: Wille's Principles of South African Law, 131. For this reason the majority of the old writers regarded the marital power as a sort of guardianship over the person and the possessions of the wife, see: Barnard, Cronjé & Olivier, 213 n. 1.
The common law protected the wife in respect of certain movable and immovable property, see Barnard, Cronjé & Olivier, 213.

11 Further exceptions were: (1) unilateral contracts where only rights and no obligations accrue to the wife or to the joint estate. See: Voet 23.2.44; *Rautenbach v Groenewald* 1911 TPD 1148, 1150 (2); Contracts which are concluded by the wife with her husband's consent. See Voet 23.2.42; Van Leeuwen *CF* 1.1.7.7; Van der Keessel *Th* 96; Rodenburg 2.1.21; *Standard Bank of SA Ltd v Carson* 1917 CPD 17; *Mpushu v Mjolo* 1976 (3) SA 606 (E); *Rautenbach v Groenewald* 1911 TPD 1148 (3) Contracts which are concluded by the wife as a public trader (*publica mercatrix*). Arntzensius 3.6.33; Grotius 1.5.23; Van Leeuwen *RHR* 1.6.8, 2.7.8, 5.3.13; Van der Keessel *Praelectiones ad Gr* 1.5.23, 2.11.17, *Th* 95; Voet 23.2.44. *Tucker's Fresh Meat Supply (Pty) Ltd v Echakowitz* 1958 (1) SA 505 (A) *Smith & Walton* SA (Pty) *Ltd v Holt* 1961 (4) SA 157 (D); *Steyn v McDonald* 1965 (3) SA 693 (O). Since the wife needed the consent of her husband to become a public trader no. 3 may be regarded as a special case of no. 1.

12 Arntzensius 3.6.33; Grotius 1.5.23; Huber *Prael* 26.1.13; *Hedendaegse Rechstgleeelrdheyt* 1.10.15; Van der Keessel *Praelectiones ad Gr* 1.5.23; Rodenburg 2.1.20. Schorer *ad Gr* 1.5.23; Van Wesel *De Con Bon Soc* 2.3.37; *Grassmann v Hoffmann* (1885) 3 *SC* 282; *Janion v Watson & Co* (1885) 66 NLR 234; *Mason v Bernstein* (1897) 14 *SC* 504; *Du Preez v Cohen Bros* 1904 TS 157; *Somdaka v Caroll* 1912 EDL 85; *Hern & Co v De Beer* 1913 TPD 721; *Excell v Douglas* 1924 CPD 472; *Gammon v McClure* 1925 CPD 137; *Smith v Philips* 1931 OPD 107; *R v Jackson* 1931 TPD 352; *Bonthys v Preiss* 1933 OPD 59; *Stern v Schattel* 1935 CPD 78; *MacNaught v Caledonian Hotel* 1938 TPD 577; *Clarkson v Van Rensburg* 1951 (1) SA 595 (T); *Voortrekkerwinkels (Ko-operatief) Bpk v Pretorius* 1951 (1) SA 730 (T); *Oelofse v Grundling* 1952 (1) SA 338 (C); *Brigg v Brown's Pharmacy* 1958 (4) SA 526 (O); *Behr v Minister of Health* 1961 (1) SA 629 (R); *Clark & Co v Lynch* 1963 (1) SA 183 (N); *Whelan v Whelan* 1972 (4) SA 306 (W); *Stacey v Stacey* 1976 (4) SA 365 (W); *Bevan v Bevan* 1982 (2) SA 304 (W); Van Wyk, 195; Hutchison, Van Heerden, Van der Merwe, Visser in: Wille's Principles of South African Law, 137; Hahlo, 211; Van Wyk, in: Lee & Honoré § 67; Hall (1935) 52 *SALJ* 191; Lee (1938) 2 *THRHR* 89; Aquilius (1939) 3 *THRHR* 65, Aquilius (1953) 70 *SALJ* 350; De Vos (1951) 68 *SALJ* 424; Scholtens (1954) *Butt.SA.Law Rev.* 182; Pont (1967) 30 *THRHR* 366.

bind her *husband's credit* by such contracts. The purchase of household necessaries thus led to two consequences, which have to be distinguished: firstly the wife's contractual capacity was enhanced and secondly the husband was liable for such purchase. Thus a creditor had more security if he sold an item on credit, since he had a second debtor. Such second debtor enhanced the creditworthiness of the wife and encouraged the trader to contract with her.

Capacity and *liability* were therefore distinguished[13].

Two reasons for this exception can be given: on the one hand the wife had to be enabled to perform her traditional role as wife and mother by managing the household and looking after the children of the marriage[14]. For this reason, the wife's competence in *rebus domesticis* had to be seen and understood in the context of the husband's marital power, viz. as an exception to the wife's limited contractual capacity to perform jurstic acts[15].

On the other hand the principle stipulated a general and homogeneous liability of spouses for the purchase of household necessaries[16], probably irrespective of whether

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13 Van Wyk, 197.

14 *Union Government v Warneke* 1911 AD 657, 663, 666, 668; *Excell v Douglas* 1924 CPD 472, 476; *Gildenhuys v Transvaal Hindu Educational Council* 1938 WLD 260; *Plotkin v Western Assurance Company Ltd* 1955 (2) SA 385 (W), 389.

15 Thus most authorities discuss this issue under the title "cases where the wife's capacity is enhanced", see for example: Hutchison, Van Heerden, Van der Merwe, Visser in: Wille's Principles of South African Law, 132; Hahlo, 198. In cases where the marital power was excluded by antenuptial contract this consequence was without importance Grotius 1.5.24.

16 The effect of the wife's contract for household necessaries depended on the matrimonial property system applicable to the marriage.
If the spouses are married out of community of property, the contracting spouse is liable in full and the non-contracting spouse liable for half of a debt incurred in respect of household necessaries.
If the spouses are married in community of property, the *pro semisse* rule is irrelevant in respect of the liability of spouses towards the trader. The wife's contract binds the joint estate. It appears to be the majority viewpoint that any legal actions arising from such contract must be instituted against the husband as the administrator of the joint estate (see: Grotius 1.5.23; Voet 23.2.46 and Hutchison, Van Heerden, Van der Merwe, Visser in: Wille's Principles of South African Law, 137, n. 419). But see Van Wyk, in: Lee & Honoré § 72 who wants an exception to be made if the wife entered into a legal transaction in respect of household necessaries.
It is very controversial whether the creditor can during the existence of the marriage attach the *private assets* of the *non-contracting* spouse. The view that the creditor cannot attach the private assets of the non-contracting spouse during the existence of the marriage appears to be the majority opinion, see *Brink v Oliviera* (1852) 1 Searle 270; *Bosman v Richter* (1854) 2 Searle 78; *Barnett v Rudman* 1934 AD 203; *Van Wyk v Groch* 1968 (3) SA 240 (E); *Santam Versekeringsmaatskappy Bpk v Roux* 1978 (2) SA 856 (A); *Reichmans (Pty) Ltd v Ramdass* 1985 (2) SA 111 (D); Hutchison, Van Heerden, Van der Merwe, Visser in: Wille's Principles of South African Law, 124, 125; dissenting: Sonnekus (1986) *TSAR* 92, 97; *Badenhorst v Bekker* (1994) (2) SA 155 (N)

husband or wife was the contracting party. The contracting spouse should be liable for the full amount and the other spouse only *pro semisse*[17]. By this rule, spouses, who were married out of community of property, were regulated in a similar way to spouses married in community of property[18]. The reason for this regulation might be

where the court follows Van Wyk's viewpoint [see Van Wyk, in: Lee & Honoré § 84 and in: Power to dispose, 60 - 62]. In: *Badenhorst v Bekker* 1994 (2) SA 155 (N) the non-contracting spouse [the wife] had inherited certain assets from her father as her "free and exclusive property, free from debts and excluded from any community of property". The husband's estate was under sequestration at the time that the wife inherited these excluded (private) assets and the Natal Provincial Division held that these assets could be utilised to satisfy the claims against the (insolvent) joint estate (such claims apparently incurred by her husband). See too the comments on this case by Nagel & Borraine (1994) *De Jure* 457; Sonnekus (1994) *TSAR* 143. Van Wyk, in: Lee & Honoré § 84 and in: Power to dispose, 60 - 62 regards the view that the creditor cannot attach the assets of the non-contracting spouse during the existence of the marriage as irreconcilable with the rules concerning the liability after dissolution. Van Wyk points out that it is difficult to understand why a creditor should not have the right to attach the private assets *during* the existence of the community, whereas he can do so *after* the dissolution. Furthermore he points to the fact that the Insolvency Act 24 of 1936 does not take account of the possible existence of a private asset in marriages in community of property. See further Voet 23.4.50, 42.1.33; *De Wet NO v Jurgens 1970* (3) SA 38 (A); Hahlo, 165-166; Barnard, Cronjé & Olivier 242; J P Yeats *Die Algehele Huweliksgemeenskap van Goedere* (1943) 25. The dissenting opinions lead to the question whether or not the exclusion of assets from the joint estate has an effect as regards the rights of the *third* party creditor. If not, the effect of such provisions has to be regarded as purely *internal*, i.e. has only effect *inter partes* but not *inter omnes* in respect of the trader.

The *pro semisse* rule becomes relevant after the dissolution of the marriage. It is usually stated that the husband is always *liable* for the full amount and the wife is only liable *semisse*, even though she was the contracting party, see Hahlo, 207; Hutchison, Van Heerden, Van der Merwe, Visser in: Wille's Principles of South African Law, 137, n. 419. But there is strong common law authority that the *contracting* spouse should incur full liability and the other spouse only liability *pro semisse*. See: Schorer *ad Gr* 1.5.22; Van Leeuwen *CF* 1.4.23; Voet 23.2.52; *Johnston v Powell* (1909) 26 *SC* 35; *Hem & Co v De Beer* 1913 TPD 721, 725; *Reloomel v Ramsay* 1920 TPD 371; *Van Rensburg v Swersky Bros* 1923 TPD 255; *Clarkson v Van Rensburg* 1951 (1) SA 595 (T); Van Wyk, 199, n, 349. The reason is that the contracting spouse is regarded as the principal of the legal transaction [*qui ipse principaliter contraxit* (Voet 23.1.52.)]. If either spouse pays the debt in full after the dissolution of the marriage, he has a right of recourse for half the amount (*regressus pro semisse*) against the other, see: *Grassmann v Hoffmann* (1885) 3 *SC* 282, 284; *Copeland & Creed v Ditton* (1895) 9 EDC 123; *Schultz v Preller* (1895) 2 Off Rep 156; *Stevenson v Alberts* 1921 CPD 698, 700; *Maury (Edms) Bpk h/a Franelle Gordon Boutique v Erasmus* 1988 (2) SA 314 (O).

17 On the history and controversies surrounding the *pro semisse* rule see Van Wyk, 55-74.

18 Aquilius (1939) 3 *THRHR* 65, 76-84 criticised this rule as not reconcilable with the principle that spouses can completely exclude the external community of debt by antenuptial contract. Most authors agreed with the *pro semisse* rule. Van Wyk, 200 opines that in the age of mass marketing it would be unrealistic to expect that suppliers of household necessaries should first ascertain whether their clients are married in or out of community of property. Stratford, J., stated in *Hem & Co v De Beer* (1913) TPD 721, 726: "...where either spouse buys necessaries for the common household the vendor is entitled to hold each party liable for the half of the cost, on the assumption, I think, that because of the nature of the things bought it is a joint purchase". Lee (1938) *THRHR* 89, 96-97: thinks "that the rule was based upon the very reasonable principle that both spouses should be answerable to creditors for the joint establishment ".

seen as an attempt to protect suppliers of household necessaries, who cannot ascertain whether a couple is married in or out of community of property[19].

In 1953 the legal situation changed, with the promulgation of section 3 of the Matrimonial Affairs Act 37 of 1953.

Section 3 provided the following:

> *A husband and wife married out of community of property shall be liable jointly and severally for all debts incurred by either spouse in respect of necessaries for the joint household.*

It can be argued that the intention of the legislature with this statutory provision was to put an end to the controversies surrounding the content and the legal consequences of the *pro semisse* rule. The advantage of this enactment can thus be seen in the settlement of the controversies in the majority of the cases[20]. The disadvantage is that it disturbed the symmetry of the system because the South African law now provided different liability systems[21] for spouses married in community of property and spouses married out of community of property[22].

In 1984 the legal situation changed again, when the legislature took the first step towards abolishing the marital power, but only in respect of certain marriages. The last step was taken in 1993 when the remaining vestiges of the marital power were removed from South African law[23].

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19 Van Wyk, 201.

20 The *pro semisse* rule is still important only in one exceptional case where one of the spouses enters into a legal transaction at a time where there is no joint household and where the separation of the spouses is not perceptible to the supplier of household necessaries, see: ch. 2, III, 1, e.

21 Van Wyk, 219 and Scholtens (1954) *Butt.SA.Law Rev.* 190.

22 Section 3 of the Matrimonial Affairs Act must thus be regarded as a half-hearted enactment that created legal uncertainty, because it provided two different liability systems. Spouses married in community of property were liable according to the abovementioned liability system, whereas spouses married out of community of property were jointly and severally liable for the debts incurred by either of them for necessaries of the joint household. The results were difficult to reconcile with the matrimonial property system, since spouses married out of community of property had to face a "stricter" liability than spouses married in community of property. The *non-contracting* spouse in particular was affected. During the existence of the marriage in community of property the creditor could apparently not attach the spouse's private assets (see the discussion above) and, after the dissolution of the marriage in community of property, the non-contracting spouse was only liable for the half of the debt. The non-contracting spouse married out of community of property was on the contrary always jointly and severally liable.

23 The Matrimonial Property Act 88 of 1984 abolished the marital power in respect of marriages of whites, coloureds and Asians contracted after 1 November 1984. This meant the husband could only exercise marital power if he had married before this date. However, in terms of section 25 (2) of the Matrimonial Property Act 88 of 1984,

The Matrimonial Property Act contained two new provisions concerning the wife's ability to bind her husband's credit.

Before 1 December 1993, when section 29 of the General Law Fourth Amendment Act 132 of 1993 abolished the remnants of the marital power, section 17 (5) applied only to marriages in community of property of the *new* order. However at the present time section 17 (5) applies to all marriages in community of property.

The section provides as follows:

> *Where a debt is recoverable from a joint estate, the spouse who incurred the debt or both spouses jointly may be sued therefore, and where a debt has been incurred for the joint household, the spouses may be sued jointly and severally therefore.*

Section 23(5) provides as follows:

> *Spouses married out of community of property are jointly and severally liable to third parties for all debts incurred by either of them in respect of necessaries for the joint household.*

Two consequences have to be borne in mind. Firstly that the harmony of the liability system is re-established in that all spouses irrespective of whether they are married in or out of community of property are now jointly and severally liable for purchases of household necessaries. Secondly the joint and several liability in respect of purchases of household necessaries cannot any longer be seen in connection with the limited *legal capacity* of a wife to enter into a binding contract. Whereas in marriages in community of property of the old order, the object of the purchase pertained to an enhancement of the wife's legal capacity *and* to a modification of liability, in the present system only the latter aspect is affected. This again raises the question as to

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spouses who were married in community of property before 1 November 1994, could by notarial contract abolish the marital power. Initially the period during which the marital power could be thus abolished was only 2 years, but it was subsequently extended by an additional period of two years. In terms of section 25 (1) this Act did not apply to marriages in respect of which the matrimonial property system was governed by section 22 of the Black Administration Act 38 of 1927 (viz. marriages between black people). In 1988 the Marriage and Matrimonial Property Law Amendment Act 3 of 1988 abolished the marital power in respect of marriages between blacks entered into after 2 December 1988 [see also the transitional provisions contained in section 25 (3), as inserted by section 4 (c) of Act 3 of 1988]. Thus until 30 November 1993 the marital power still existed in some marriages between Asians, coloured and whites concluded before 1 November 1984 and in marriages between blacks concluded before 2 December 1988. Finally, with effect from 1 December 1993, section 29 of the General Law Fourth Amendment Act 132 of 1993 abolished these remnants of the marital power and replaced them with a system of concurrent administration of the joint estate in all marriages in community of property.

the reason for this "strict" liability[24]. As stated above enhancement of the wife's legal capacity is no longer necessary, as in marriages in community of property, she has the same capacity to act as her husband. Harmony in liability might be one explanation but this does not appear very convincing; surely it would have been equally possible to find another form of liability. The justifications[25] for the *pro semisse* rule cannot be raised in this context. They only explain why *both* spouses should be answerable to the creditor[26]. They do not answer the question why spouses should be jointly and *severally* liable. Literature on this question is very rare[27]. *Scholtens*[28] regarded the liability of spouses for household necessaries in terms of section 3 of the Matrimonial Property Act as being a result of "hasty and unpremeditated legislation" which intended to put the creditor in the most favourable position. *Scholten's* opinion can rely on *Sinclair*[29] who states that the legislation of 1984 in general protects third persons even in those cases where they do not need protection and thus subordinates the spouses' interests. The opinion of *Scholtens* appears to be even more convincing if we take another fact into account. It is not necessary for the spouse's capacity that the supplier of household necessaries *knows* that the contracting party is married. The other spouse is bound even when the contracting party represents himself as unmarried[30]. In these cases the seller of household necessaries has no reason to believe that there might be a second debtor. Nonetheless both spouses are answerable to him. The access to the assets of the second spouse seems to be a "godsend".

If the only purpose of section 17 (5) and section 23 (5) of the Matrimonial Property Act 88 of 1984 was really to *privilege* the supplier of household necessaries, there would be good reason to doubt whether these sections are reconcilable with the equality clause in section 8 (1) and section 8 (2) of the South African Constitution[31].

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24 The term "strict liablity" is used in an untechnical way.

25 *Lee* (1938) 2 *THRHR* 89, 96-97; *Hem & Co v De Beer* (1913) TPD 723, 726 and n. 18.

26 *Lee* (1938) 2 *THRHR* 89, 96-97; *Hem & Co v De Beer* (1913) TPD 723, 726 and n. 18.

27 Only Van Wyk, 201 and Scholtens (1954) *Butt.SA.Law Rev*, 182, 196 refer to this question. In the great standard textbooks of Hahlo, Hutchison, Van Heerden, Van der Merwe, Visser in: Wille's Principles of South African Law, Lee & Honoré and Boberg no word could be found on the reason for the co-liability.

28 Scholtens (1954) *Butt.SA.Law Rev*, 182, 196.

29 Sinclair, 21. She thinks that the legislature has in many cases gone too far by protecting *all* third parties who are *bona fide*. Sinclair does not refer to this specific question.

30 *Paquin Ltd v Beauclerk* (1906) AC 148; Hahlo, 207.

31 One could think too of Art. 18 Act 200 1993 of the African Charter on Human and Peoples' Rights that explicitly protects the family.

One could argue that married couples are discriminated against, because their liability is "stricter" than the liability of *un*married couples who live together in a common household[32]. If the couple is not married the creditor can only make one person liable [the contracting party]. If the couple is married, he can make also the non-contracting spouse liable. The debtor's position thus is better in the latter case, whereas the position of the non-contracting party is worse than his position before his marriage[33].

It must be noted that the author cannot share the interpretation that sections 17 (5) and 23 (5) of the Matrimonial Property Act 88 of 1984 seek to protect only the supplier. Such argument concentrates too much on the interests of the supplier and does not take the situation of the spouses sufficiently into account. If we consider the historical background of the capacity to bind the other spouse's credit we see that originally the competence of the wife to conclude contracts was enhanced to enable her to manage the joint household. But the *legal* enhancement of her competence would have been fruitless if the husband had not also been liable for debts thus incurred by his wife. Otherwise no creditor would have entered into the contract with a non-solvent partner. As pointed out above the first reason [enhancement of the legal capacity] has fallen away. The second reason [enhancement of the creditworthiness by giving a second debtor] still remains. The joint and several liability of the non-contracting spouse thus leads primarily to an enhancement of the *creditworthiness* of the contracting party[34]. For this reason he and not the trader must be regarded as the main addressee of sections 17 (5) and 23 (5) of the Matrimonial Property Act 88 of 1984. This conclusion leads to an interpretation, which is nowadays also favoured by Swiss[35] and German[36] authorities with regard to Art. 166 ZGB and § 1357 BGB. In

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32 See below.

33 See the discussion in: part 4, II, 1.

34 One could argue that if the creditor knows that the contracting spouse is married, he will more readily enter into the contract. The spouse can thus fulfil his duty to manage the household. If the creditor does not know that the contracting party is married but would conclude the contract anyway there actually would be no reason to encourage him by "giving" him a second debtor (see above). On the other hand the insolvent spouse will be reluctant to enter into the contract if only he were to be liable (especially if the spouses are married out of community of property). He could not fulfil his role as manager of the household either. In the absence of the liability of the other spouse the contracting spouse would have to act as the agent of the former which seems to be degrading and not reconcilable with the principle that spouses are equal partners.

35 Bericht der *Expertenkommission*, 1560; *Hegnauer* § 18.04; *Hausheer*/Reusser/Geiser Art. 166 no. 8 ZGB, *Berger*, 124; *Luzern*, Obergericht II, SJZ 1992, 169, 170.

36 Münchner Kommentar/*Wacke* § 1357 no. 2; Rolland/*Brudermüller* § 1357 no. 5; Soergel/*Lange* § 1357 no. 2; Palandt/*Diedrichsen* § 1357 no. 2; Erman/*Westermann* §

both countries the protection of the trader is regarded only as a *side effect* [it is spoken of a "Reflex"] of the enhanced creditworthiness of the non-solvent spouse and not as the *main* purpose[37].

It is therefore submitted that the primary purpose of the application of sections 17 (5) and 23 (5) of the Matrimonial Property Act 88 of 1984 is to enable the contracting party to fulfil his role as manager of the household[38] and not to protect the trader.

II. Legal nature

The phenomenon that juristic acts carried out by a contracting party have effects for a non-contracting third person is known in many forms to the South African legal system[39]. The law of representation is one example. But, in contrast to the law of representation, it is not necessary in the case of the spouse's competence to bind the other spouse's credit that the contracting spouse acts *in the name of* the other spouse[40]. The legal consequences arise without any reference to the co-liable non-

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1357 no. 4; *Leipold*, in: FS für *Gernhuber* 695, 702; *Lüke*, in: FS für *Bosch*, 629, 636; Staudinger/*Hübner* § 1357 no. 10; *BVerfGE* 81 1, 4 = FamRZ 1989 1273, 1275; *BGHZ* 94 1, 4 = *BGH* JZ 1985 680, 681.

37 Any other interpretation would violate essential principles of statutory interpretation, namely that statutory provisions are presumed not to sanction discrimination or inequality, that if more than one construction of a provision is logically possible, the more just and equitable construction is to be preferred, see: Du Plessis, The Interpretation of Statutes, 83; Du Plessis, 83; Davis, Chaskalson, De Waal in: Rights and Constutionalism, 126.

38 In terms of Art. 96 *OR* (Austrian Code of Obligations) only the spouse who is manager of the joint household *and* who has no own income is able to bind the other spouse's credit. On the one hand the advantage of this provision is that the supplier gets the "godsend" of a second debtor only in those cases where the contracting party needs the enhancement of creditworthiness. The disadvantages on the other hand are that the supplier cannot know whether the contracting spouse is the manager of the household and without income. For this reason Austrian authorities regard Art. 96 OR as a statute that has missed its purpose. See Rummel/*Pilcher* § 96 ABGB I no. 3, 5. See: *Rummel*, JBl 1976, 136, 137. *Kotziol*, JBl 1976, 169, 171.

39 See in general: De Wet, Du Plessis, in: Joubert Agency and Representation § 107, 108 and Silke, De Villiers & Macintosh, The Law of Agency in South Africa § 101; Kerr, *The Law of Agency in South Africa* (1991).

40 Grotius, 1.5.23; Van Leeuwen *RHR* 1.6.7, 2.7.8; Van der Linden 1.3.7; Voet 12.6.19, 23.2.42; Van der Keessel *Th* 96; Van der Linden 1.3.7; Amtzensius 3.6.9, 3.8.48; *Magmoet v Registrar of Deeds* (1887) 5 *SC* 179; *Executors of Morkel v Heirs of Morkel* (1829) 1 Menz 177; *Van Geems v Fitt* (1910) 20 CTR 537; *Kent v Salmon* 1910 TPD 637; *Rautenbach v Groenewald* 1911 TPD 1148; *Meltzer* v *Kotzen* 1914 CPD 727; *Pretorius v Hack* 1925 TPD 643; *Brigg v Brown's Pharmacy* 1958 (4) SA 526 (O); Hahlo, 191; Hutchison, Van Heerden, Van der Merwe, Visser in: Wille's Principles of South African Law, 135.

acting spouse[41]. It is sufficient for the liability of both spouses that the contracting party acts in his own name. The co-liability for his partner in respect of such legal transactions is a legal consequence of such transaction. Unlike in the law of representation the one spouse's capacity to bind the other spouse's credit does not *shift* the effects from the acting party to the non-contracting party. Sections 17 (5) and 23 (5) of the Matrimonial Property Act 88 of 1984 cause an *extension* of the relevant juristic act which gives rise to a combination of own- and third-party-liability. Since the co-liability of the other spouse is an automatic legal consequence [herein after referred to as an "*annex*"], only the contracting spouse is relevant for the existence of the contract. The effect for his spouse arises directly from the conclusion of the contract by the contracting spouse. That is why the contracting spouse must always have full capacity[42] to perform juristic acts.

To demonstrate the difference between shifting and expansion of the legal consequences, one example might be given.

In the law of representation it is not always necessary that the contracting party has full capacity to perform juristic acts. An exception is made if the person with limited capacity to perform juristic acts as the representative of a third person[43]. The juristic act has consequences only for the principal, and not for the representative. For the latter, the juristic act is "neutral"[44]. The contracting party can thus, in spite of his limited legal capacity, perform juristic acts and thereby bind the other person as principal. If, for instance, the contracting spouse is a declared prodigal, his legal capacity is comparable with that of a minor. Consequently he cannot bind himself without the assistance of a *curator bonis*. But he could act as an agent of the other spouse[45] and, by doing so bind the latter. In German law this principle is also applied to the capacity of the spouse to bind the other's credit[46]. The contracting party with

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41 See above.

42 See the wording of section 23 (5) of the Matrimonial Property Act: "...*incurred* by either of them".

43 *Dreyer v Sonop Bpk* 1951 (2) SA 392 (O). The decision is, to put it mildly, not very clear, but most authorities interpret it in the way pointed out above, see Van der Merwe, 177 n. 61; Joubert § 105.

44 Neutral because it has neither direct positive nor negative effects. Designation comes from the author.

45 *Dreyer v Sonop Bpk* 1951 (2) SA 392 (O); Van der Merwe, 177 n. 61. De Wet, Du Plessis, in: Joubert Agency and Representation § 105.

46 Soergel/*Lange* § 1357 no. 6; Münchner Kommentar/*Wacke* § 1357 no. 15; *Büdenberger*, FamRZ 1976 661, 669; Rolland/*Brudermüller* § 1357 no. 9; Erman/*Heckelmann* § 1357 no. 8; Reichsgerichtskommentar/*Roth-Stielow* § 1357 no. 14; *Käppler*, AcP 179 (1979) 245, 276.

limited legal competence thus binds the other spouse but not himself. The reason for this analogy has to be seen in the legal nature of § 1357 BGB. As will be pointed out below, § 1357 BGB is not regarded as a rule of representation. However, in contrast to sections 17 (5) and 23 (5) of the Matrimonial Property Act 88 of 1984, § 1357 BGB does not only stipulate the *legal consequences* of a contract entered into by either of the spouses. § 1357 BGB provides for the one spouse's *capacity* to bind the other spouse. Therefore similarities to the law of representation are noteworthy. That is the reason why German authorities apply principles of the law of representation to problems arising in the context of § 1357 BGB. In this case only the other non-contracting and "normal" spouse would be liable.

In South African law this solution is not possible. As pointed out above, the rules of the law of representation are in no way applicable to the legal transactions of spouses with regard to household necessaries. Such an application would not take into consideration the manifest differences of the law of representation [*shift* of legal consequences] and the automatic legal consequences of a spouse's juristic act in respect of household necessaries [*expansion* of the legal consequences][47].

In summary therefore it is submitted that sections 23 (5) and 17 (5) of the Matrimonial Property Act 88 of 1984 have a *sui generis* effect that is not comparable to any other consequence in the South African legal system. The founding of the contract depends merely on the contracting spouse[48].

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47 Therefore it is strictly speaking no longer correct to speak of the spouse's *capacity* to bind the other spouse's credit. The term capacity was used [as pointed out] because the object of the purchase enhanced the wife's legal capacity, which was genefally limited. In spite of this terminological incorrectness this expression will be continued to be used for the sake of convenience.

48 Another question is whether the further destiny of the contract depends also only on the contracting party, see: ch. 3, I.

Chapter 2: Requirements for the capacity to bind the other spouse

I. Valid and lawful marriage

The *legal* capacity to bind the other spouse's credit requires a valid marriage[49]. A marriage that is only void*able* remains in force and has all the normal legal consequences of a valid marriage until it is dissolved by a court order so that the parties to such a marriage can bind each other's credit[50].

II. Exception for a *bona fide* trader

If we speak of the protection of a *bona fide* third person who has good reason to believe that the unmarried couple is married, we have to distinguish between two possibilities.

The question arises whether an exception can be made in respect of the requirement of a valid and lawful marriage for the supplier, who in good faith has reason to believe that the couple was married [for example the contracting party speaks of his "spouse" or wears a wedding ring]. In this case one could apply the principle of good faith to the requirement of a valid marriage in terms of sections 17 (5) and 23 (5) of the Matrimonial Property Act. Thus the supplier would have two debtors who are jointly and severally liable. No authority could however be found for such an interpretation to be relied on. All South African[51] authorities simply point out that the competence

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49 *Du Preez v Cohen Bros* 1904 TS 157; *Reloomel v Ramsay* 1920 TPD 371, 386; *Stern v Schattel* 1935 CPD 78, 80; *Clarkson v Van Rensburg* 1951 (1) SA 595 (T) 598; *Chenille Industries v Vorster* 1953 (2) SA 691 (O) 698; *Behr v Minister of Health* 1961 (1) SA 629 (R) 629, 630; Hahlo, 103; Lee and Honoré § 48 (i); Barnard, Cronjé & Olivier, 207; Van Wyk, 196.

50 Hahlo, 108; Lee and Honoré § 48; Barnard, Cronjé & Olivier, 207. To the differences between void and voidable see Barnard, Cronjé & Olivier ch. 15 and 17.

51 *Du Preez v Cohen Bros* 1904 TS 157; *Reloomel v Ramsay* 1920 TPD 371, 386; *Stern v Schattel* 1935 CPD 78, 80; *Clarkson v Van Rensburg* 1951 (1) SA 595 (T) 598; *Chenille Industries v Vorster* 1953 (2) SA 691 (O) 698; *Behr v Minister v Health* 1961 (1) SA 629 (R) 629, 630; Hahlo, 202; Lee and Honoré § 48 (i); Barnard, Cronjé & Olivier, 207; Van Wyk, 196.

to bind the other spouse's credit is a legal incident of marriage and therefore requires a valid and existing union of man and wife[52].

The second possibility to bind the other party is on the basis of estoppel or implied agency. In *Thompson v Model Steam Laundry Ltd*[53] a divorced couple continued to live together. They were still "comporting themselves to all outward appearances as married people and the former wife performed the duties as a manageress." The court held that the ex-husband was liable on the basis of implied agency[54]. Estoppel was not considered, though it is submitted that this would also have been a good basis for holding the ex-husband liable[55]. The fact that the parties previously had been married was not of importance[56]. That finding allows the conclusion that a person who lives together with another person can similarly incur liability[57].

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52 Although the author agrees with that interpretation it does not seem to be very consequent if one regards, [as most South African authorities do, see ch. 2] sections 17 (5) and 23 (5) of the Matrimonial Property Act 88 of 1984 as statutes which protect the supplier of household necessaries. To be consistent with this viewpoint one surely should consider whether one should not decide the question whether a valid marriage exists from *the supplier's point of view.* The author agrees with this conclusion of the South African authorities because firstly sections 17 (5) and 23 (5) of Matrimonial Property Act 88 of 1984 are in his submission statutes which protect the supplier only as a side effect [reflex]. For this reason it is not necessary to concentrate on the supplier's point of view which one could do, if one follows the majority opinion. Secondly it would not be convincing to interpret the question whether there is a valid marriage from the supplier's perspective because it is in general not necessary that he knows that the contracting party is married [*Paquin Ltd v Beauclerk* (1906) AC 148; Hahlo, 207]. And thirdly, the marriage is the "*raison d'être*" for the capacity. The spouse has the capacity to bind the other spouse' credit not for his own sake but to fulfil his chosen *duty* as the manager of the household [see: ch. 1, 1]. Sections 17 (5) and 23 (5) of the Matrimonial Property Act 88 of 1984 therefore contribute to a common family life.

53 *Thompson v Model Steam Laundry Ltd* 1925 TPD 674.

54 *Thompson v Model Steam Laundry Ltd* 1925 TPD 674, 675.

55 Boberg, 299 n. 87.

56 Estoppel and implied authority require transactional *behaviour.* De Wet & Van Wyk, 113; De Wet, Du Plessis, in: Joubert Agency and Representation, § 136. The consent of the parties to the marriage implies no authority for one spouse to act on the other's behalf. The marriage creates no position of trust towards other persons. The capacity to bind the other spouse's credit is just a legal consequence of marriage and not a consequence of a legal transaction. For this reason the author agrees that the fact that the parties previously had been married was immaterial.

57 *Thompson v Model Steam Laundry Ltd* 1925 TPD 674; Hahlo, 202, 208; Boberg, 202; Van der Vyver & Joubert, 252; Hutchison, Van Heerden, Van der Merwe, Visser in: Wille's Principles of South African Law, 135.

III. Joint household

1) Effects of a cessation of cohabitation

One of the most controversial topics in family law is the effect of a cessation of cohabitation of husband and wife. Only on two points are the jurisprudence and the literature are unanimous.

Firstly, that in such cases liability cannot be based on section 17 (5) or section 23 (5) of the Matrimonial Property Act 88 of 1984, because both statutory provisions explicitly require a *joint* household[58].

Secondly that a spouse does not necessarily escape all liability merely because he no longer lives together with his partner[59]. Besides these aspects on which the literature is unanimous, the discussion centres on the question whether the non-contracting spouse is liable *ex contractu* for debts his partner has incurred when the couple no longer lives together. Since such liability cannot result from section 17 (5) or section 23 (5) of the Matrimonial Property Act 88 of 1984, the inquiry focuses on the question whether a separated spouse can rely on *common law* to bind the other spouse's credit for legal transactions in respect of household necessaries[60]. A positive answer is only conceivable if the common law, unlike sections 17 (5) and 23 (5) of the Matrimonial Property Act 88 of 1984, does not require a joint household in this regard.

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58 "...for the *joint* household".

59 *Janion v Watson & Co* (1885) 6 NLR 234; *Coetzee v Higgins* (1887) 5 EDC 352; *Rebier & Co v Algar* (1914) 35 NLR 420; *Reloomel v Ramsay* 1920 TPD 371, 375; *Excell v Douglas* 1924 CPD 472; *Gammon v McClure* 1925 CPD 137; *Smith v Philips* 1931 OPD 107; *Oelofse v Grundling* 1952 (1) SA 629 (SR); *Stern v Schattel* 1935 CPD 78; Lee and Honoré § 67 n. 4; Boberg, 202 n. 88; Hutchison, Van Heerden, Van der Merwe, Visser in: Wille's Principles of South African Law, 135.

60 The practical significance of this question is important. Since spouses are only jointly and severally liable if they live together, they will be liable *pro semisse*, that means that the contracting party is answerable for the full amount and the other for the half. See: Schorer *ad Gr* 1.5.22; Van Leeuwen *CF* 1.4.23; Voet 23.2.52; *Johnston v Powell* (1909) 26 *SC* 35; *Hem & Co v De Beer* 1913 TPD 721, 725; *Reloomel v Ramsay* 1920 TPD 371; *Van Rensburg v Swersky Bros* 1923 TPD 255; *Clarkson v Van Rensburg* 1951 (1) SA 595 (T). See as well the dissenting opinion in: *Grassmann v Hoffmann* (1885) 3 *SC* 282, 284; *Copeland & Creed v Ditton* (1895) 9 EDC 123; *Schultz v Preller* (1895) 2 Off Rep 156; *Stevenson v Alberts* 1921 CPD 698, 700; *Maury (Edms) Bpk h/a Franelle Gordon Boutique v Erasmus* 1988 (2) SA 314 (O).

a) The common law

The common law is not very clear[61]. There are only two authorities who explicitly demand a "common household" of husband and wife.

Neostadius[62] remarks:

Schulden in die gemeene *Huyshoudinge, ende totonderhoud van die gemaakt...* "

and van Leeuwen[63] writes:

"Si quid ad communem familiae sustentationem mulieri creditum fuerit...".

Other common law authorities, referring *explicitly* to a common household could not be found. Instead such authorities[64] refer to necessities of a "*household*" which does not necessarily mean that a *joint* household is required.

These uncertainties gave rise to the development of three different schools of thought.

b) Termination of the capacity

Some authorities[65] disallow any *contractual* liability if man and wife do not live together. They regard the existence of a joint household as the "raison d'être"[66] of the capacity of the spouse. The separation of the spouses thus leads automatically to a *termination*[67] of the capacity to bind the other spouse's credit[68]. The proponents of

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61 Van Wyk, 208. Van Wyk points to the possibility of interpreting the silence of the majority of the old authorities in several ways.

62 Neostadius 9 (d).

63 Van Leeuwen *CF* 1.1.7.7.

64 Amtzensius 3.6.33; Grotius 1.5.23; Voet 23.2.64 and 24.2.18; Huber *Prael* 26.1.13; *Heedendaegse Rechtsgeleerdheyt* 1.10.15; Van der Keessel *Praelectiones ad Gr* 1.5.23; Rodenburg 2.1.20; Schorer *ad Gr* 1.5.23; Van Wesel *De Con Bon Soc* 2.3.37

65 *Janion v Watson & Co* (1885) 6 NLR 234; *Wolhuter v Maddison* (1897) 7 CTR 246; *Bing & Lauer v Van den Heever* 1922 TPD 279; *Excell v Douglas* 1924 CPD 472; *Waverley Hotel Ltd v Harris* 1929 PH B 41; in *Rebier & Co v Algar* (1914) 35 NLR 420 the wife was responsible for separation; Hahlo, 210; Boberg, 204.

66 Boberg, 204.

67 Pay attention to the expression "termination" that has to be distinguished from the expression "suspension" which is used in this work, see: ch. 2, 4 (b).

68 Under the old law the question was raised whether a wife who was subject to the marital power of her husband, lost only the capacity to bind her husband's credit or whether she lost as well the capacity to bind herself; see the controversial opinions of: *Excell v Douglas* 1924 CPD 472; De Wet & Yeats, 61; Boberg, 203. Since the abolition of the marital power this question has lost any practical relevance. Not considered by the old authorities but more relevant today is the question whether the exclusion of marital power and of the community of property by antenuptial contract would have made any difference to the principles laid down (see above). The reason for this silence possibly has to be seen in the fact that a complete exclusion of the marital power was

this opinion argue that the reason why Roman-Dutch law authorities did not expressly state that a common household is necessary is because they took this requirement for granted. Such proponents favour instead a *quasi* contractual claim of the supplier of household necessaries against the non-contracting spouse[69]. The supplier has to rely on *negotiorum gestio* or unjust enrichment.

c) Capacity to bind is linked with the duty of support

The proponents of another opinion[70] suggest that the capacity of one spouse[71] to bind the other spouse's credit should be *unaffected* by the termination of the joint household, provided that the deserted and contracting party cannot be blamed[72] for the separation. If this is the case the acting spouse continues to be able to bind the other spouse's credit. This linking of the duty to maintain[73] the other spouse and of an obligation towards a third person would guarantee that one spouse cannot abolish the other spouse's capacity to bind the former for the purchase of household necessaries by leaving him without just cause[74].

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not lawful at that time. See Voet 23.4.20 and the analysis of the old authorities in *Excell v Douglas* 1924 CPD 472, 482.

69 *Negotiorum gestio* is preferred by: *Behr v Minister of Health* 1961 (1) SA 629 (SR); Hahlo, 204; Hahlo is misunderstood by Olivier, 120. Unjust enrichment is suggested by: *Oelofse v Grundling* 1952 (1) SA 338 (C); left open by: Boberg, 205.

70 *Grassmann v Hoffmann* (1885) 3 *SC* 282; *Excell v Douglas* 1924 CPD 472; *Voortrekkerwinkels (Ko-operatief) Bpk v Pretorius* 1951 (1) SA 730 (T) 735; *Perks v Jose et Antoinette* (1969) 1 PH A 17 (T).

71 Expressly they speak of the wife's capacity. The author uses instead the term "spouse".

72 Controversial is the question of what happens if the spouses separate from each other by mutual consent. Wessels, J, in *Reloomel v Ramsay* 1920 TPD 371 suggests that in this case the husband can escape liability. In *Grassmann v Hoffmann* 1885 3 *SC* 272, 282; *Excell v Douglas* 1924 CPD 472, 476 and *Behr v Minister of Health* 1961(1) SA 629 (R) the opposite opinion was expressed.

73 A wife having left her husband in misconduct or without cause was not able to claim maintenance from her husband, see: Voet 24.2.18; Van Leeuwen *CF* 1.1.15.19; *Bing and Lauer v Van den Heever* 1922 TPD 274; *Excell v Douglas* 1924 CPD 472, 477. This is however in the current legal situation no longer an absolute rule. Conduct is one of the factors to be considered by the court in respect of a maintenance.

74 This seems to be the case in the law of Scotland. See Fraser, 2.8.2: "The presumption in cases when husband and wife live separately is *prima facie* against her power to bind him; and unless the tradesman suing for his account can remove that presumption *by showing some justifiable cause for her living apart*, he will be defeated."

d) Capacity to bind is unaffected

The abovementioned opinions have been criticised by the majority of modern South African writers[75]. They argue that neither the first nor the second school of thought has equitable results and thus argue that the claims of third parties ought not to be dependent on the existence of a joint household.

As regards the first opinion the view is that relying on *negotiorum gestio* will in most cases be fruitless for the dealer, since, if he wanted to rely on *negotiorum gestio* he would have to fulfil two requirements.

Firstly, he would have to prove that the contracting spouse has a right of maintenance against the other spouse[76]. This is only the case if the separation of the spouses was due to the non-contracting spouse's misconduct and if the non-contracting spouse has not yet discharged his duty of support. According to this doctrine the supplier can fulfil this requirement only with great difficulty, because in most cases, he will not have any insight into the relationship of husband and wife.

Secondly, he would have to prove that he was acting with the intention of promoting the interest of the non-contracting spouse [*animus negotium aliendum gerendi*[77]]. It is obvious that this requirement, in the age of anonymous mass marketing, will only seldom be satisfied.

Generally the non-contracting spouse's liability will therefore be based on undue enrichment[78]. The supplier can recover only the amount of the non-contracting spouse's *enrichment*. Its extent depends on the question whether or not the non-contracting spouse has fulfilled his duty to support the contracting partner. If he has fulfilled his duty, the supplier cannot recover anything at all from the non-contracting spouse because the latter is not enriched. The supplier's chances to hold the other spouse liable will therefore depend on a factor he cannot influence.

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75 Van Wyk, 202; Van Wyk, in: Lee & Honoré § 67; Van der Vyver and Joubert, 550; De Wet and Yeats, 62; Hutchison, Van Heerden, Van der Merwe, Visser in: Wille's Principles of South African Law, 136; Barnard, Cronjé & Olivier, 194.

76 Otherwise the non-contracting spouse [*dominus*] has no benefit of the unauthorised act. This is an absolute requirement for *negotiorum gestio* and for unjust enrichment, see: Wessels § 3558; Pothier, Neg. Gest., section 180.

77 Pothier, Neg. Gest. section 189; Wessels § 3573.

78 Barnard, Cronjé & Olivier, 194.

As regards the second opinion it is argued that this doctrine confuses the obligation of spouses to maintain each other with the obligation towards *third* persons[79]. The questions of whether debts have to be discharged towards third persons on the one hand and of whether contributions have to be made by one spouse to the other on the other hand, have to be distinguished[80].

e) Statement

In order to decide which solution is tenable it seems to be necessary to investigate firstly the dogmatic framework offered by the Roman-Dutch law. Secondly a normative evaluation will be done to find an equitable solution within this framework.

aa) Dogmatic aspects

As pointed out above, the Roman-Dutch law is not very clear. But even if most authorities do not mention explicitly the requirement of a joint household, there are at least two authorities who may be relied on to buttress the doctrine demanding a common household whereas the proponents of the third opinion [capacity to bind is unaffected] cannot rely at all on *explicit* remarks of authorities to support their view. Another dogmatic indication might be seen in sections 17 (5) and 23 (5) of the Matrimonial Property Act. One reason for the enactment of these statutory provisions was to end the uncertainties surrounding the *pro semisse* rule and to achieve a uniform liability[81]. The renouncement of a joint household leads to different liability systems: if spouses live together both are jointly and severally liable, whereas if they live apart the non-contracting party is only liable *pro semisse*. The legislature's target i.e. to achieve a uniform liability, would be impeded thus *by law*[82]. An interpretation

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79 Van Wyk, 205 calls that *obligation* and *contribution*.

80 See too: *Excell v Douglas* 1924 CPD 472.

81 Van Wyk, 208.

82 It makes a difference whether an assumed rule impedes a target [here the harmony of liability] *in general* or whether this aim is obstructed only *exceptionally* when *higher ranking values* [here the protection of *bona fide* third persons (see below)] are given precedence. It is thus more than unlikely that the legislature proceeded from the assumption that the Roman-Dutch law contains a rule giving spouses the capacity to bind each other's credit even after separation. Otherwise the legislature could have tried to achieve a harmonious liability system by extending the application of sections 17 (5) and 23 (5) of the Matrimonial Property Act on spouses living separated from each other.

favouring a joint household as an absolute requirement would help to reduce these disharmonies.

Against the second opinion it might be argued that the proposition to link the internal obligation of spouses to maintain each other with the competence of one spouse to conclude contracts and thereby to bind the other spouse's credit, cannot rely on any Roman-Dutch law authority. It is perfectly possible that the external liability of the parties differs totally from their internal responsibility[83].

It is therefore submitted that the dogmatic situation rather favours the requirement of a common household in *every* case.

bb) Normative aspects

The author admits that the dogmatic analysis of the current law is not compelling. It provides no more than an *indication* that might be regarded as a starting point. The question that arises is whether the requirement of a joint household provides an equitable solution. If not, then one might have reason to deviate from the dogmatic indication and interpret the abovementioned Roman-Dutch law writers in another, more reasonable and convincing way. This is the method followed by the supporters of the third opinion [capacity to bind is unaffected]. Such proponents do not renounce the requirement of a joint household mainly for dogmatic but also for normative reasons in order to avoid inequitable results[84]. The other two opinions try to compensate for their sometimes inequitable conclusions by taking refuge in *quasi* contractual claims or by drawing dogmatically untenable links between obligations flowing from the conclusion of marriage and obligations resulting out of contract[85].

aaa) Criticism of the presented opinions

It is obvious that none of the abovementioned solutions gives rise to fully convincing results.

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83 De Bruijn, 279.

84 See especially Van Wyk, 207 who takes advantage of the uncertain legal situation by interpreting the Roman-Dutch law in a way that is most advantageous for the supplier. This analysis of Van Wyk's argumentation was approved by Prof. Van Wyk himself in an interview with the author on 21 April 1995.

85 See too Watermeyer, J, in: *Excell v Douglas* 1924 CPD 472, 477 where the learned Judge remarked on the inequitable consequences for the supplier of household necessaries. This realisation had however no influence on his conclusion.

As was pointed out by the proponents of the third opinion [capacity to bind is unaffected] the first and second opinions do not properly protect an *innocent*[86] outsider. To such an outsider it is not apparent whether or not a person has a right of contribution against a spouse whom he in most cases has never met[87]. His chances of making the non-contracting spouse answerable depends thus on the conduct of the spouses towards each other.

However in the case of a divorce or long-term separation the trader can refer[88] to the maintenance order[89] of the court[90] [in most instances there is one[91]]. In the majority of the cases the situation of evidence therefore does not seem to be as difficult as described by the third opinion [capacity to bind is unaffected].

A further objection which may be made to the third opinion [capacity to bind is unaffected] is that it protects the supplier of household necessaries even if he does not need any protection. That is the case if he *knows* that the spouses live separately *and* that the contracting spouse has no right of recourse against the other spouse[92].

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86 The third opinion [capacity to bind is unaffected] does not distinguish between an innocent and a non-innocent outsider. The distinction comes from the author. The reason for this differentiation will be explained below.

87 Van Zyl, J, in: *Excell v Douglas 1924* CPD 472, 477 approves this consequence without any objections: *"Under these circumstances the plaintiff should, if her intention had been to hold the defendant liable for his wife's purchases, have made inquiries before she supplied to Mrs. Excell. Thus if she (the trader) was ignorant of what the position between the defendant and his wife was she should not be allowed to take advantage of that ignorance seeing that she had only herself to blame for it".*

88 The trader, in terms of section 13 (b) of Supreme Court Act of 1959, can give third party notice. In this way he can refer to the court decision when he suits the non-contracting spouse and limit thus the risk of his own law suit against the co-liable party.

89 It is true that *divorce* terminates the reciprocal duty of support between spouses. But a court can in terms of section 7 (2) of the Divorce Act of 1979 order the payment of maintenance if an agreement in terms of section 7 (1) of the Divorce Act of 1979 is absent, see further: Hutchison, Van Heerden, Van der Merwe, Visser in: Hutchison, Van Heerden, Van der Merwe, Visser in: Wille's Principles of South African Law, 191.
If spouses live separately without obtaining a dissolution of the marriage, consequences are similar. The spouses' duty to support each other does not necessarily terminate if the joint household breaks up. This duty of support can be enforced by legal proceedings irrespective of whether the basis of the claim is an agreement between the spouses that one maintains the other or the legal duty of maintenance resulting out of marriage. The most efficient way is provided by the Maintenance Act of 1963. See further: Hahlo, 140 and 370.

90 This point is overlooked by Van Wyk, 207 who sees in a *quasi* contractual solution an unacceptable consequence for the trader who is not able to prove his demand.

91 If there should be no maintenance order the situation for the trader is more difficult.
But even in this exceptional situation his position in not worse than the position of any other creditor who tries to prove that a spouse has the right to maintenance against his partner.

92 One has to remember the reason for the common liability of spouses for the purchase of household necessaries. For the supplier it is often a *coincidence* which of the spouses purchases the article required by the joint household. He knows that if the wife

bbb) Own proposal

My own proposal refers partly to principles accepted in German and Swiss law. In both legal systems one does not speak of a cessation of the legal power but of a *suspension*[93]. It is submitted that for the South African system too, the competence of the spouse to bind the other spouse's credit should be regarded as *suspended* when spouses live separately *unless* the separation is not *perceptible* to a third person[94]. The competence revives when the spouses live together again.

The consequences of this proposal are as follows[95]:

If the supplier is *innocent,* he is protected. He has to prove neither an enrichment or an *animus negotium aliendum gerendi*. The onus is on the non-contracting spouse to *inform* the supplier or to get a court order against the other spouse[96].

If the supplier *knows* that the spouses do not live together there is, in the opinion of the author, no reason to protect him. The trader is aware of the fact that the other spouse does not profit *at all* from his performance. To give him, as most modern

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does not buy the household necessary then the husband might do so. To motivate him not to distinguish between the spouses and thus to enhance the creditworthiness of the non-earning manager of the household, the Roman-Dutch law writers prescribed a co-liability *pro semisse*, see: ch. 1.1. This idea of coincidence does not apply in case of separation because the spouses purchase *independently* for their own households. The situation today [after the abolition of the marital power] is rather comparable with divorce. If the non-earning party has a right to maintenance against the other, his creditworthiness is enhanced. If he has no such right he is [today (see supra)] in the same situation as unmarried or divorced persons.
If the supplier wants to contract nonetheless, he either has to obtain the other spouse's explicit consent or he has to accept that he enters into a contract with a person who might not be able to discharge his debts, see: *Excell v Douglas* 1924 CPD 472, 478.

93 Switzerland: *Hausheer*/Reusser/Geiser Art. 166 no. 30 ZGB; Art. 176 no. 12 ZGB; Petipierre/*Hausheer*/Guinard, 29.
Germany. Palandt/*Diedrichsen* § 1357 no. 10; Rolland/*Brudermüller* § 1357 no. 53; Münchner Kommentar/*Wacke* § 1357 no. 14; Soergel/*Lange* § 1357 no. 18.

94 As to the question of proof, see: ch. 2, III, 2.

95 Conceivable too seems to be to apply the criterion of perceptibility on sections 17 (5) and 23 (5) of the Matrimonial Property Act 88 of 1984. But such a solution cannot rely on any authority and was obviously not the intention of the modern legislature which had only an *existing* household in mind, see Van Wyk, 199; De Vos (1956) 73 *SALJ* 70. Apart from this the different liability of spouses who only seem to have a common household and those who really have one supports the interpretation of the *ratio legis* of sections 17 (5) and 23 (5) of the Matrimonial Property Act 88 of 1984. Only where a joint household really exists does a spouse need the co-liability of the partner in order to fulfil its role as manager of the household. For this reason the legislature stipulated such strict liability. Where a joint household does *not* exist, the co-liability protects *only* a supplier and is for this reason less advantageous.

96 See below.

writers propose, the right of recourse against the other spouse does not appear convincing. Why should the supplier expect to have a second debtor[97]?

An exception has to be made only if the non-contracting spouse *profits* from the performance of the supplier. That is the case if he has to maintain the other spouse. In this case different possibilities are conceivable.

The most common case probably is that the supplier does *not know and cannot know* whether the non-contracting spouse is obliged to maintain the other spouse and whether the first mentioned has already fulfilled this duty. An *animus negotium aliendum gerendi* will be absent. The trader has to rely on the *actio negotiorum gestorum contraria* that allows him to recover only the amount by which the other spouse has been enriched[98]. This is equitable because if he knows, as it is submitted, that the spouses live separately then there is no reason to treat him better, at the expense of the non-contracting spouse, than *any other negotiorum gestor*. The latter also has to prove[99] the enrichment of his *dominus*[100].

Another possibility is that the supplier contracts with the deserted party in spite of an interdiction of the non-contracting spouse. In this case he can demand the *impensas utiles et necessarias* provided that these expenses have produced an actual *profit* to the *dominus* [the non-contracting spouse][101]. It does not seem to be very convincing to give, as the third opinion [capacity to bind is unaffected] suggests, the trader, who was aware of the separation and of the fact that the other party did not want to be bound, a full right of recourse against the passive spouse irrespective of whether the latter is enriched or not.

Apart from these normative aspects the suggested requirement is supported by dogmatic reasoning. Firstly, it follows the indications pointed out above[102]. Secondly, because it is the only way *to take the trader's knowledge into account*, since it is not possible to say that the deserted spouse *keeps* his competences unless the trader

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97 See above: n. 92.

98 Pothier, Neg. Gest., section 189.

99 As to the question of how the supplier can prove the profit of the deserting party, see n. 90.

100 If there is no enrichment he acts at his own peril. Why should a *male fide* purchaser of household necessaries be treated differently?

101 Wessels § 3563, Pothier, Neg. Gest., section 182; *Colonial Govt. v Smith & Co* (1901) 18 *SC* 380.

102 See ch. 2, 3.

knows that the couple lives separately. Knowledge of a party is only relevant where the other party does *not* have the capacity to act, so that liability is sought to be based on estoppel or unjust enrichment.

One objection may be raised against the submission presented above. In the age of mass marketing a general trader normally does not know whether a spouse is still living together with his partner or not. In most cases this fact will entail the undesirable consequence that the non-contracting spouse will be liable for the contracts made by his partner even if the contracting spouse lives apart *due to his own fault*. This will lead to the contradictory result that the non-contracting spouse can still demand maintenance from the other spouse but cannot prevent himself being bound by the other's act[103]. On the other hand no objection can be raised if the contracting spouse lives apart *due to the other spouse's fault* and if the conflict of interest between the innocent trader, the *non-contracting "guilty"* spouse and the *"innocent" but contracting* spouse is solved at the expense of the "guilty" party.

To avoid the first consequence and to achieve the latter target the author suggests that the concept of German and Swiss law be followed. Both legal systems provide that the spouse's power to bind the other spouse is not terminated but suspended, if the joint household ceases to exist[104]. The difference between a terminated and a suspended competence is that the latter competence still exists, but just cannot be exercised. A terminated competence has no effect any more. In practice this means that a suspended competence can still be revoked by court order[105] provided that sufficient cause is shown[106]. The advantage for the applying spouse is that a court

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103 Even if contribution and obligation have to be distinguished, it seems to be convenient to avoid as far as possible disharmonies.

104 Germany: Palandt/*Diedrichsen* § 1357 no. 10; Rolland/*Brudermüller* § 1357 no. 53; Münchner Kommentar/*Wacke* § 1357 no. 14; Soergel/*Lange* § 1357 no. 18. Bay ObLG, FamRZ 1959, 504, 505.
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106 If one assumes a termination an innocently deserted spouse would be penalised by having less competence than a spouse who still lives together with his partner, because it is uncontroversial that the competence of a spouse, who still lives together with his partner, can be revoked with effect towards *innocent persons*. To the consequences of such terminological differentiation see below.

order also has effect vis à vis *innocent* persons[107]. *Misconduct* of a spouse which leads to the separation should be regarded as sufficient cause. Thus an *innocently* deserted spouse could revoke the other's competence whereas a "guilty" spouse *could not* do so[108]. The advantages of this approach over the other suggestions are, firstly, that an *innocent* trader who needs protection does not lose any of his privileges merely because of the separation[109]. Secondly, the "innocent" spouse *de facto* keeps his irrevocable right to bind the other's credit whereas he can withdraw the "guilty" spouse's competence by court order[110] [111].

2) Criteria to determine a cessation

Questions that arise are when is it tenable to speak of a common household and when can its dissolution be assumed. Whereas the first question in general causes no problems[112], the second one is not answered unanimously. The discussion deals mainly

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107 It is unanimously accepted that one of the cohabiting spouses can withdraw the other's competence by court order irrespective of whether a third person is *bona fide* or not. *Chenille Industries v Vorster* 1953 (2) SA 691 (O), 699; *Traub v Traub* 1955 (2) SA 671 (C), 673; De Wet & Yeats, 66; de Vos (1951) 68 *SALJ* 427; De Villiers & Macintosh *Law of agency in South Africa*, 70; Hahlo, 211; Bamard, Cronjé & Olivier, 195; see: ch. 4. Thus a deserted spouse and a still cohabiting spouse are treated in the same way. To prevent liability towards an innocent trader in *both* cases the non-contracting spouse has to get a court order.

108 The first opinion [termination of the capacity] does not consider the different situations of the innocent and guilty spouse. Furthermore it is submitted that it appears not convincing to put the onus of proof on a trader who normally cannot know that spouses live separately.

109 This advantage cannot be fulfilled by opinions no. 1 and 2. The onus to take action is placed on the spouse who seeks to be freed from liability and not on the trader who normally cannot know whether or not spouses live together.

110 The court order puts the trader in the same position as does a divorce decree.

111 A further question in this context is which legal consequences follow when the marriage is *dissolved before the debts in respect of household necessaries are discharged.* In *Excell v Douglas* 1924 CPD 472, 483 it was held that the *pro semisse* rule applied. The trader could sue the husband for the whole and the wife for the half. The author submits that this question is now answered by the legislature. Sections 17 (5) and 23 (5) of the Matrimonial Property Act speak of debts that are incurred *for* the joint household. "For" means that the spouse must conclude the contract to achieve an aim, here to satisfy the needs of the joint household. This means that it is sufficient if the contracting spouse concludes the contract *in order to* supply the joint household with necessaries. If he fulfils this requirement then it does not matter whether the joint household or the marriage is subsequently terminated. Both spouses are thus jointly and severally liable, irrespective of when their creditor sues them. Decisive only is the *intention* at the time of conclusion, see too Hahlo, 208 and Van Aswegen (1984) MB 140, 146. On the question whether section 17 (5) of the Matrimonial Property Act 88 of 1984 is applicable to *joint* debts incurred *stante matrimonio* but unpaid upon dissolution of the marriage and before the payment of the debts see: Hahlo, 183, 207, 382 and Hutchison, Van Heerden, Van der Merwe, Visser in: Hutchison, Van Heerden, Van der Merwe, Visser in: Wille's Principles of South African Law, 180 n. 904. Most authorities apply the rules of Roman-Dutch Law in this case.

112 See the definition in *Clark & Co v Lynch* 1963 (1) SA 185 (N), 186, where James, J, held: "*The household extends to all persons who are part of the organised family*

order also has effect vis à vis *innocent* persons[107]. *Misconduct* of a spouse which leads to the separation should be regarded as sufficient cause. Thus an *innocently* deserted spouse could revoke the other's competence whereas a "guilty" spouse *could not* do so[108]. The advantages of this approach over the other suggestions are, firstly, that an *innocent* trader who needs protection does not lose any of his privileges merely because of the separation[109]. Secondly, the "innocent" spouse *de facto* keeps his irrevocable right to bind the other's credit whereas he can withdraw the "guilty" spouse's competence by court order[110] [111].

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with the problem of whether it is sufficient that the spouses do not live together for a certain period of time [objective criterion][113] or whether one has to require in addition a subjective element indicating the intention to cease the cohabitation[114]. The practical relevance of these questions becomes clear when one thinks of borderline cases for example where one spouse travels around the world for a year or is imprisoned. Another example is where the spouses, though they do not wish to continue to live a "common life", still live under the same roof. If one applies only the criterion of physical (objective) separation one has to approve the dissolution in the first two cases[115], whereas one has to deny it in the last example. If one requires *in addition* to a local separation the *intention* of at least one spouse to cease the cohabitation one probably could not assume in any of the abovementioned cases a separation.

An indication might be seen in section 4 (2) (a) of the South African Divorce Act 70 of 1979 and in section 1 (2) (d) of the English Matrimonial Causes Act of 1973 that was a guideline for the enactment of the South African Divorce Act[116]. In the English act the concept of "living apart" is defined in almost the same words as are used in the South African Divorce Act[117]. The wording of section 4 (2) (a) of the Divorce Act, however, differs in an important respect from the definition of "living apart" in

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establishment centering round the man and his wife living together in a joint home". See too: *Excell v Douglas* 1924 CPD 472, 483, Barnard 203, n. 92; Hahlo, 203.

113 See Boberg, 206 n. 93 who renounces any subjective criterion. Boberg submits instead that "*the criterion should be whether, in all circumstances, it can reasonably be said that the wife made the contract in the course of managing the joint household shared by her husband and herself*". This certainly is a circular reasoning because one cannot answer the question whether a joint household *exists* by asking whether the spouse entered into the contract in the course of *managing* the same.

114 Hahlo, 209 demands a mutual consent of the spouses to give up the common home with the intention to put an end to life in common or that one spouse leaves the other with the intention of living henceforth permanently apart from the other. Hahlo, 209 n. 123, 124 relies on *Reloomel v Ramsay* 1920 TPD 371, 375; *Stern v Schattel* 1935 CPD 78, 80 and *Excell v Douglas* 1924 CPD 472, 477. None of these references is compelling. In *Stern v Schattel* Gardiner, J, demanded further evidence to approve the dissolution of the common household without putting in concrete terms what he meant. In *Reloomel v Ramsay* Dr. Ramsay was only temporarily absent. Judge Wessels held only that "*a wife is not living apart from her husband, in a legal sense, merely because the husband is temporarily absent. The temporary absence of a husband on a journey makes no difference to the status of the wife or to her rights to buy necessaries*". In *Excell v Douglas* Van Zyl, J, mentioned the subjective criterion but did not say that this was a necessary requirement in order to approve a dissolution of the common household. Cases thus do not give clear indications.

115 See the reasoning in *Reloomel v Ramsay* 1920 TPD 371, 375 [and n. 114] where Wessels, J, did not mention a subjective criterion.

116 Barnard, The New Divorce Law, 49.

117 The only difference must be seen in the length of the required period. Whereas section 1 (2) (d) of the English act requires a continuous period of two years section 4 (2) (a) of the South African Divorce Act requires one year. However this difference is for the present research of no relevance.

English law. In terms of section 4 (2) (a) of the Divorce Act, the spouses are required not to have lived together "*as husband and wife*." It is thus clear that it is not only physical separation which is required, but *in addition* the intention to terminate the *consortium*[118]. The English act which speaks only of 'living apart", does not refer to any reasons for the physical separation and it seems therefore that the motives are unimportant. Nonetheless English doctrine[119] and jurisprudence require as well an *animus deserendi*. In *Santos v Santos*[120], *Beken v Beken*[121], *Drew v Drew*[122] and *Townsend v Townsend*[123] it was held that a mental element is required.

If one takes into account the similar consequences of divorce and dissolution of the joint household in regard to the right to bind the other spouse's credit, it seems, on the one hand, to be appropriate to harmonise the requirements as far as possible. On the other hand the difference between the intention to terminate the *consortium* and to terminate the *common household* must be borne in mind. The common household is only one part of the *consortium*[124]. To require the intention to end the *consortium* would therefore go too far. It is proposed that the spouses must simply have the intention to terminate the common household. It is true that this requirement will in many cases lead to a difficult investigation of mental states[125]. It is submitted therefore that the mere separation should lead to a *prima facie* presumption that the spouses

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118 Barnard, The New Divorce Law, 49, 50.
119 Bromley, 190, 191.
120 *Santos v Santos* [1972] 2 All ER 246, 247.
121 *Beken v Beken* 1948 P 302 CA [in this case the parties were sent to different Japanese prison camps during the second World War].
122 *Drew v Drew* 1888 13 PD 97 [here the husband was held to have deserted although serving a sentence of penal servitude].
123 *Townsend v Townsend* 1873 LR 3 P&D 129 [The husband was in prison - the court here denied an *animus deserendi*].
124 Barnard, The New Divorce Law, 50.
125 See as well the criticism of Cretney, 155.

have given up their common household[126] and the onus should be on the other party to prove the opposite[127].

IV. Household necessaries

The determination of the meaning of the notion 'necessaries of the joint household" or alternatively 'household necessaries" is not unanimous. The controversy centres mainly around the question whether the notion should be determined *subjectively* or *objectively*. It is also unclear which criteria are to be used and what influences the latest enactments[128] concerning the legal capacity of a wife and her equal position to her husband, have for the capacity to bind the other spouse's credit.

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126 In English law whether the absence of one spouse is *voluntary* or not is decisive. Only if the latter is the case will English doctrine assume a *prima facie* separation, [see: Barnard, 152]. The author does not follow this suggestion because it leads to legal uncertainty. How would a third person know whether a separation was voluntary or not. This might be easy to answer in the case of imprisonment. But what about a professional journey one spouse has" to do or service in the army. How shall a shopkeeper know whether the young soldier has joined the army voluntarily or not. These questions, however one may want to answer them, point to an important fact that must not be forgotten. Questions arising in the context of the spouse's capacity to bind his partner must be answered having regard to the fact that third persons are involved. This is not the case in many other fields of family law, for example when spouses seek divorce.

127 The suggestion must be seen in context with the requirement that the separation must be perceptible to the third person. It leads to a two step investigation. Firstly one has to ask whether a joint household exists. In the case of a longer separation (the question of length must be decided from case to case; decisive here also is which of the spouses leaves the common household) such as a long term holiday or imprisonment, one has to answer this question in the negative, whereas one has to answer it affirmatively when the spouses still live under the same roof. Secondly to refute this presumption, either it must be shown by the trader that the separation was not an expression of the intention to dissolve the common household (case 1 and 2) or the spouses who still live under the same roof must prove that they do not live together as husband and wife any longer.
(1) If the trader *knows* that one spouse *lives apart* from the other he has *prima facie* no reason to believe that the other profits as well from the purchase (case 1 and 2) *unless* he *knows* that the spouses *want* to continue a common life - this he has to prove.
(2) If he does *not know* that the spouses have this *intention*, then there is no reason to protect him because he must in this case assume that the common liability is not recompensed by a common profit. He cannot expect to get the second debtor (see on this idea of recompense: *Excell v Douglas* 1924 CPD, 472, 476).
(3) If he, on the other hand, does *not know* at all that the spouses *live separately* he is protected because the other spouse is liable *pro semisse*.
This solution has the advantage that it harmonises with the results found above.

128 See for example: section 14 Matrimonial Property Act 88 of 1984, Domicile Act 3 of 1992, Guardianship Act 192 of 1993 and sections 29, 30 of the General Law Fourth Amendment Act 132 of 1993.

The courts have applied mainly two criteria in order to determine in general what can be understood as a household necessary, namely the criteria of function[129] and finance[130]. The wife could only bind her husband's credit if the contract fell within the scope of her *role as manager* of the household [functional aspect[131]] and if the object of the legal transaction was *reasonable*[132] with regard to the means of the concrete family [financial aspect[133]].

Both aspects must be seen in the light of the former understanding of the distribution of roles of husband and wife. Where typically the husband provided the family with support out of his income, the wife's primary duty was to perform her traditional role as wife and mother by managing the household[134]. The wife was subordinated to the husband who was the head of the family[135]. This disposition of roles restricted the wife's competence to legal transactions that did not fall into the reserved competence of the husband[136].

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129 Functional aspects were decisive in: *Laubscher v Leiserowitz Bros* 1940 (2) PH A52 (C), 53; *Whelan v Whelan* 1972 (4) SA 306 (B), 308.

130 Financial aspects are preponderantly mentioned, probably because they are easier to determine, see: *Schultz v Preller* 1895 2 Off Rep 156; *Mason v Bernstein* 1897 14 *SC* 504; *Du Preez v Cohen Bros* 1904 TS 157; *Menmuir v Hardy* 1904 ORC 56; *Somdaka v Carroll* 1912 EDL 85; *Reloomel v Ramsay* 1920 TPD 371, 373; *Bing & Lauer v Van den Heever* 1922 TPD 279, 282; *Stern v Schattel* 1935 CPD 78, 79. In *O'Brian v Keal* 1910 TPD 707 the court applied both the functional and financial criteria in order to deny that reading glasses were not household necessaries. The case must certainly be read very restrictively because the court's main motivation to deny the liability of both spouses obviously was to protect the wife who was caught unawares by a skilful and adroit optician.

131 See too: Hahlo, 203 who writes: "*In order to fall within the scope of her authority as manageress of the joint household the wife's contract must be incidental to the management of the household...*" and further down: "*By virtue of her authority as manageress of the household,...*"

132 *Reloomel v Ramsay* 1920 TPD 371, 372, where Wessels, J, held that "necessaries" does not only mean necessaries *of life* and held that even silk dresses can be regarded as objects leading to the co-liability of the other spouse. See further James, J, in *Clark & Co v Lynch* 1963 (1) SA 185 (N), 186 who held: "*The wife has the power to bind her husband in respect of all those matters reasonably incidental to that organised family establishment...*".

133 See Hahlo, 203 who continues (see n. 65): "*...and having regard to the means and circumstances of the family (justus modus)*".

134 *Union Government v Warneke* 1911 AD 657, 663, 666, 668; *Excell v Douglas* 1924 CPD 472, 476; *Gildenhuys v Transvaal Hindu Educational Council* 1938 WLD 260; *Van Vuuren v Van Vuuren* 1940 NPD 170, 181, 182; *Plotkin v Western Assurance Company Ltd* 1955 (2) SA 385 (W), 389.

135 Critical: Hutchison, Van Heerden, Van der Merwe, Visser in: Wille's Principles of South African Law, 111.

136 See *Laubscher v Leiserowitz Bros* 1940 (2) PH A52(C) where the court of appeal held: "*It is not the function of a wife to hire a house without her husband's permission for the common household. It is the function of the husband to provide a home for his and family.*[...]. *The wife neither had the capacity nor the duty or function as manager of the common household to hire this house.*"

The answer to the question whether a purchase is reasonable relies mainly on the principles developed for the duty of spouses to support each other[137]. For both the finance and functional aspects the main factors to be taken into account are the means of the spouses, their social standing, their style of living in the past and the customs of the place and society in which they live[138]. If there is a discrepancy between the spouses' style of living and their real means the first will be decisive. The concept is a relative one[139], and the authority extends only to those contracts of the spouses in the particular case[140].

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137 *Whelan v Whelan*, 1972 SA (4) 306 (E), 307. The comparison is only an analogy. The obligation to maintain cannot be *equated* with the authority to bind the other spouse's credit. The latter is in many cases wider and different from the duty of reciprocal support.

138 Hahlo, 203; *Reloomel v Ramsay* 1920 TPD 371, 376.

139 Voet 23.2.46; *O'Brian v Keal* 1910 TPD 707, 709; *Brudo v Chamberlain* 1912 TPD 131, 133; *Reloomel v Ramsay* 1920 TPD 371, 376; *Smith v Phillips* 1931 CPD 107, 110; *Stern v Schattel* 1935 CPD 78, 80, 81; *Voortrekkerwinkels (Ko-operatief) Bpk v Pretorius* 1951 (1) SA 730 (T), 734. See *Reloomel v Ramsay* 1920 TPD 371, 376 where Wessels, J, held: "*What will be regarded by the court as a necessary in the case of spouses who move in the best society of the place in which they live will not be regarded as a necessary in the case of a couple of humble origin and of narrow means*".

140 Hahlo, 204; *Reloomel v Ramsay* 1920 TPD, 371, 376. Highly controversial in this context is whether it is permissible for the non-contracting party to raise the objection that (1) the household is already sufficiently supplied with household necessaries or (2) the contracting partner was supplied with enough money by the non-contracting party. The latter question was answered in the affirmative in *Voortrekkerwinkels (Ko-operatief) Bpk v Pretorius* 1951 (1) SA 730 (T), 734 where Murray, J, allowed the husband to object that the objects of purchase were not necessary. The learned Judge argued: "*There appears to be some difference of judicial opinion as to the degree of the onus resting on the tradesman to show that what he supplied constituted necessaries. But I shall take the position most favourable to the tradesman* [...] *and assume that* [...] *the articles supplied were of the character and prima facie of the quantity reasonably required for the joint household, and such onus was satisfied by the appellant. But I do not think that this concludes the matter.* ... [I]t *is still open to the husband to show that in view of the amount of the articles already possessed by the household or its members, the articles were in fact not necessary.* [The wife had bought clothes although there was no real need.] And further: "*This may be an unfortunate result for a tradesman but he must take this risk when he relies on merely an implied authority to bind the husband...*" The second question was dismissed in *Reloomel v Ramsay* 1920 TPD, 371, 376 where Wessels, J, held: "*It is true that a husband can determine how he and his wife ought to live, but then he must take steps to see that in that outward appearance she conforms to the standard he wishes to set for the household.* [...]. *It is nowhere said, in any of the authorities* [...] *that the Court must take into account the fact that the husband has given his wife money to buy food and clothing. Our law looks at the subject not only from the point of view of the husband but also of the shopkeeper.*[...]. *How can a shopkeeper tell that a wife was given money to buy a dress but that she spent it in a race course?* [In this case the absent husband had given sufficient funds to his wife who in spite of his express interdiction pledged his credit in order to buy expensive silk clothes.] Both opinions can rely on common law authorities in so far as they refer to the trader's view as a *starting point*. But the question whether the non-contracting party can put forward a defence is neither expressly denied nor

approved by common law authorities. [See: Amtzensius *Institutions Juris Belgici* II, 263; Grotius 1.5.23; Rodenburg *Tractatus de iure coniugum*, 2.1.20; Van Wesel *Tractatus de Connubiali Bonorum Societate et Pactis Dotalibus* 2.3.39.] This fact leaves room for either interpretation. Two questions therefore have to be answered. (1) Do the cases stand in contradiction to each other or is there reason to draw a distinction between a household sufficiently supplied with money [*Reloomel v Ramsay* 1920 TPD 371, 376] and one sufficiently supplied with goods [*Voortrekkerwinkels (Ko-operatief) Bpk v Pretorius* 1951 (1) SA 730 (T), 734]? And (2) if a reason for a distinction cannot be found, would the non-contracting spouse have the right to raise a defence in every case [generalisation of the solution in: *Voortrekkerwinkels (Ko-operatief) Bpk v Pretorius*] or not all [generalisation of the solution in: *Reloomel v Ramsay*]?

(1): Judge Murray [*Voortrekkerwinkels (Ko-operatief) Bpk v Pretorius* 1951 (1) SA 730 (T), 734] apparently sees reason to differentiate between the case of a sufficient supply of money on the one hand and goods on the other. He can thus rely on Wessels, J, [*Reloomel v Ramsay* 1920 TPD, 371, 376, 378] who opined: "*No doubt if it can be shown that Mrs. Ramsay had an ample store of silk dresses and other dresses, that would be an element in deciding whether the purchase was or was not reasonable.*" [but see as well: De Vos (1951) *SALJ* 424 who disagrees with this interpretation of Wessels], Hahlo, 205 (Hahlo also wants to differentiate between the cases mentioned above) and De Vos (1962) *Acta Juridica*, 152, 153 who regards the distinction as unsound. See furthermore: Boberg, 206 n. 99 who refuses to consider the trader's knowledge. Boberg prefers an abstract approach to the question, whether or not an item is a household necessary. Boberg submits that the "character of household necessaries attaches to goods of a particular class because, viewed against the background of the spouses' means, status and life style, they are regarded as reasonable requirements of the common household".]

The author cannot agree with the differentiation of Judge Murray for the following reason: As pointed out above the determination of what is reasonable for a household shows parallels to the principles of maintenance. Here a spouse fulfils his duty of support by paying a certain amount of money instead of delivering the necessary goods by himself. Money must be therefore regarded as a substitute for all necessaries, it takes the place of everything [see too: De Vos (1962) *Acta Juridica* 152, 153]. This interpretation can rely on Rodenburg 2.1.20; Voet 23.2.46, *Du Preez v Cohen Bros* 1904 TS 157; Hahlo, 205 and De Wet and Du Plessis, in: Joubert Agency and Representation § 90, where it is held that a wife can *borrow money*. The money itself is no household necessary either, because one cannot satisfy with paper and coins the needs of the family. Only the value the money stands for can do so and only if this value is used in *another* legal transaction to purchase the actual necessaries. Money and necessaries therefore must be regarded as the same. It is for this reason that it should not matter whether there are enough goods in a household or whether there is enough money.

(2): The question whether the other spouse has a right of defence leads to the problem as to which factors a judge is allowed to consider. May he consider *all* relevant circumstances [*objective* test] or may he only consider those circumstances which were *known* or could reasonably be known to the trader [*subjective* test]. [The terminology comes from Yeats, *Die Algehele Huweliksgemeenskap van Goedere*, 47]. As pointed out above common law writers take the trader's point of view as a starting point which leaves room for interpretation in both directions. The question that arises is therefore which of the parties needs protection. Is it tenable to say that the trader acts at his own risk? If one assumes so, then, as Murray, J, suggested, the shopkeeper would be forced to make inquiries as to whether the household is already sufficiently supplied with goods. How should he do this? Should he ask awkward questions like how many clothes the purchasing spouse already has? What if the contracting spouse does not answer truthfully? At any rate it is impossible to say that this lie draws the other spouse into the contract. If this objective test is adopted the trader might well be reluctant to enter into the contract, because, from his point of view, the contracting spouse's capacity to bind the other spouse's credit is connected with too many incalculable risks. The consequence of this interpretation is legal uncertainty because a particular item may lose from one day to the other its quality as a household necessary [Boberg, 205, 206, n. 99]. This approach thus reduces sections 17 (5) and 23 (5) of the Matrimonial

Most cases were decided before the abolition of the marital power and referred therefore mainly to the competence of the *wife* to conclude contracts in order to fulfil *her role as manager* of the joint household[141]. As submitted above[142] the *main* purpose of sections 17 (5) and 23 (5) of the Matrimonial Property Act 88 of 1984 is to enable the spouse who is manager of the household to fulfil his duties. But it must be stressed that a spouse who does not feel responsible for the joint household at all and who follows a full-time profession also has the capacity to bind the other's credit. Contrary to the rules of the Roman-Dutch law the legislature has given up any distinction between husband and wife and their traditional function. The functional aspect is therefore irrelevant[143] for the legal effects. Husband and wife are now equal partners who can act independently of each other[144] and who do not adopt a specific role by law.

The conclusions to be drawn from the departure from the traditional understanding of the spouse's respective roles are not clear. Does this mean that the only relevant factor for the competence of husband and wife is the financial aspect[145]? Can a wealthy spouse bind the other's credit for the rent of a new dwelling[146], for a long-

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Property Act 88 of 1984 to instruments which neither motivate the shopkeeper to give credit nor enable the non-earning party to manage the household. This interpretation is therefore not reconcilable with the *ratio legis* of the capacity to bind the other spouse's credit.

The subjective point of view on the other hand protects the shopkeeper only when he needs protection, viz. in the case when the spouse's appearance makes him believe that the purchases are reasonable, and protects the non-contracting spouse if the shopkeeper knows that he is contracting with a spouse who buys goods which are not necessary for the household. Thus far the situation is comparable to the case where a spouse buys objects which never fulfil the requirements of household necessaries [for example shares or stock papers. (This point is overlooked by Boberg, 205, 206, n. 99)]. In both cases the shopkeeper cannot proceed from the assumption that the contracting party binds his spouse's credit.

Therefore it is submitted that it would be better to apply the subjective test and to consider only those circumstances which were obvious or ought reasonably to have been so to the trader.

141 The only exception that could be found was *Whelan v Whelan* 1972 (4) SA 306 (W), 308, see below.

142 See ch. 1, 1.

143 See on the contrary Art. 96 OR that gives only the manager of the household the competence to bind the other spouse's credit.

144 Only spouses married in community of property are in terms of section 15 of the Matrimonial Property Act 88 of 1984 obliged to respect further requirements.

145 See Barnard, Cronjé & Olivier, 194 (1994) who refer only to financial aspects.

146 The rent of a dwelling is probably one of the most necessary and reasonable legal transactions spouses can perform for a common household. The existence of a common dwelling is the primary requirement for a common household and thus for *consortium vitae*.

term family trip overseas or for the hire of a moving-company? In other words has every spouse the competence to bind the other's credit even for those legal transactions which concern *the common foundation of family life*? In the former legal system these questions were usually answered in the negative because the abovementioned transactions were seen to fall within the scope of the elevated position of the husband as head of the family, who determined, *inter alia*, the style in which the spouses lived and the place where they resided[147]. Assuming that the husband is no longer the head of the family[148] and that husband and wife are now equal partners one has to ask whether the competence of a spouse to bind his partner's credit now encompasses also those matters which belonged in former times to the competence reserved to the head of the family. If one follows the suggestion of Barnard, Cronjé & Olivier[149] who apply only financial criteria, this question has to be

147 See *Laubscher v Leiserowitz Bros* 1940 (2) PH A52 (C).

148 The present legal situation is not clear. It is true that sections 29 and 30 of the General Law Fourth Amendment Act 132 of 1993 tried to rid the South African legal system of some of its anachronisms by abolishing the marital power and by eliminating the position of the husband as head of the family. Whereas the first target was achieved it is possible to argue that the husband is, despite the hasty and unpremeditated legislation (the national elections took place only four months later) still head of the family. The husband's position as head of the family is a rule of common law that was given renewed expression in section 13 of the Matrimonial Property Act 88 of 1984. It could thus be argued that this section has only a declaratory effect in so far as it merely confirms the existing legal situation. Section 29 of the General Law Fourth Amendment Act 132 of 1993 therefore deleted a provision which was unnecessary. It is thus tenable to argue that neither the enactment nor the deletion of section 13 of the Matrimonial Property Act 88 of 1984 had any effect on the common law. This idea is buttressed by the fact that the other aspects of common law which were enumerated in section 13 of the Matrimonial Property Act 88 of 1984 (domicile and guardianship) were amended by express legislation [see: Domicile Act 3 of 1992 and the Guardianship Act 192 of 1993], see Sinclair, in: Rights and Constitutionalism, Family Rights, 545. But even if one follows this argumentation the result for the present research is the same. The reason is that sections 17 (5) and 23 (5) of the Matrimonial Property Act 88 of 1984 do not contain any distinction based on gender. Such sections therefore can only comprise the *common* intersection of the spouse's competence. This does not involve the competences of the head of the family. Such competence falls exclusively within the scope of the husband's competence and therefore cannot be regarded as a common competence in terms of sections 17 (5) and 23 (5) of the Matrimonial Property Act 88 of 1984.

149 Barnard, Cronjé & Olivier, 194. Cronjé is one of the few authors who published after the total abolition of the marital power [see further: Visser & Potgieter (1994) 95-99, 116, 129-130; Schäfer (looseleaf updates) B 59-B 62 and Cronjé and Heaton (2. ed. (1994) 311-328). All other authorities discuss the capacity to bind the other spouse's credit mainly in the context of the *enhancement* of the *wife's* limited capacity, see: Arntzensius 3.6.33; Grotius 1.5.23; Huber *Prael* 26.1.13; *Heedendaegse Rechtsgeleerdheyt* 1.10.15; Van der Keessel *Praelectiones ad Gr* 1.5.23; Rodenburg 2.1.20. Schorer *ad Gr* 1.5.23; Van Wesel *De Con Bon Soc* 2.3.37. *Grassmann v Hoffmann* (1885) (3) *SC* 282; *Janion v Watson & Co* (1885) 66 NLR 234; *Mason v Bernstein* (1897) 14 *SC* 504; *Du Preez v Cohen Bros* 1904 TS 157; *Somdaka v Caroll* 1912 EDL 85; *Hern & Co v De Beer* 1913 TPD 721; *Excell v Douglas* 1924 CPD 472; *Gammon v McClure* 1925 CPD 137; *Smith v Phillips* 1931 OPD 107; *R v Jackson* 1931

answered in the affirmative provided that the costs of the legal transactions are reasonable with regard to the financial possibilities of the particular family[150].

If one takes the following arguments into account the answer must be negative.

Firstly, as it has been submitted above, the reasons for the enactment of sections17 (5) and 23 (5) of the Matrimonial Property Act 88 of 1984 were (1) to enable the non-earning spouse to fulfil his role as manager of the joint household, (2) to obtain legal certainty by ending the controversies surrounding the *pro semisse* rule and (3) to re-establish a symmetrical liability of spouses for the purchase of household necessaries irrespective of whether they are married in or out of community of property. Sections 17 (5) and 23 (5) of the Matrimonial Property Act 88 of 1984 concentrate therefore mainly on the legal *consequences* and not on the *capacity* of the contracting spouse[151]. An interpretation which gives both spouses the competence to conclude contracts concerning those matters which were formerly within the competence of the head of the family would lead to an *extension of the capacity* to bind the other spouse's credit which was *not* intended by the legislature[152].

TPD 352; *Bonthys v Preiss* 1933 OPD 59; *Stern v Schattel* 1935 CPD 78; *MacNaught v Caledonian Hotel* 1938 TPD 577; *Clarkson v Van Rensburg* 1951 (1) SA 595 (T); *Voortrekkerwinkels (Ko-operatief) Bpk v Pretorius* 1951 (1) SA 730 (T); *Oelofse v Grundling* 1952 (1) SA 338 (C); *Brigg v Brown's Pharmacy* 1958 (4) SA 526 (O); *Behr v Minister of Health* 1961 (1) SA 629 (R); *Clark & Co v Lynch* 1963 (1) SA 183 (N); *Whelan v Whelan* 1972 (4) SA 306 (W); *Stacey v Stacey* 1976 (4) SA 365 (W); *Bevan v Bevan* 1982 (2) SA 304 (W); Van Wyk, 195; Hutchison, Van Heerden, Van der Merwe, Visser in: Wille's Principles of South African Law, 137; Hahlo, 211; Van Wyk, in: Lee & Honoré § 67; Hall (1935) 52 *SALJ* 191; Lee (1938) 2 *THRHR* 89; Aquilius (1939) 3 *THRHR* 65; De Vos (1951) 68 *SALJ* 424; Scholtens (1954) *Butt.SA.Law Rev.* 182; Pont (1967) 30 *THRHR* 366. Thus the majority of such authorities refer to the functional aspect. Cronjé neither mentions functional aspects nor does he make any effort to develop an alternative criterion of what has to be understood as a household necessary.

150 The partner of a millionaire could make the other spouse liable for the purchase of a modest weekend flat or for the rent of a new apartment even if the other partner does not want to spend his weekends somewhere else or does not want to change his place of residence.

151 Van Wyk, 209. The capacity of the spouses was regulated mainly by those statutes which abolish the marital power [see ch. 1, I] and stipulate limitations to the independent administration of the joint estate [see: section 15 Matrimonial Property Act 88 of 1984].

152 *Whelan v Whelan* 1972 (4) SA 306 (W), 308; Van Wyk, 209. The consequence of co-liability has [in the present legal system] nothing to do with the [*legal* (see ch.1, I)] capacity to enter into contracts. It is an effect that is a result of the mere fact that a household necessary is the object of a transaction. That means that the capacity of the contracting spouse to bind the other's credit only depends on the interpretation of the words household necessary. For this reason it is not fruitful to point to the undeniable fact that the wife's capacity to bind *herself* or the *joint estate* has been enhanced [see especially section 14 Matrimonial Property Act 88 of 1984, Domicile Act 3 of 1992, Guardianship Act 192 of 1993 and sections 29, 30 of the General Law Fourth Amendment Act 132 of 1993] and also that she only in certain exceptional cases is obliged to consult her husband [see section 15 Matrimonial Property Act 88 of 1984].

The second reason must be seen in the spouses' duties towards each other which are flowing from the *consortium vitae*. The *consortium vitae* includes *inter alia* companionship, love, services, affection, company, comfort, mutual services and sexual intercourse[153]. This enumeration is not exhaustive because "the word *consortium* is used as an umbrella word for all legal rights of one spouse to the other"[154]. Should one not assume that *consortium* also involves the duty of both spouses to consult each other before one of them enters into a contract that concerns not only *essential questions of common life but leads as well to a joint and several liability* of the non-contracting party? The answer is affirmative, because in the former legal system the competence of the wife was limited to those legal transactions which *did not* require her to *consult* her husband; in other words she did not have the competence to enter into those contracts which needed the permission of the head of the family[155]. If we assume, on the one hand, that the new legal system provides two equal heads of the family and, on the other hand that the legislature's intention was not to *extend* the capacity of the contracting party to bind the other spouse's credit[156], then there is room for only one conclusion: those legal transactions which in former times required the permission of the head of the family demand in the modern legal system a consultation[157] of both spouses. Since the capacity of the wife to bind her husband's credit involved only legal transactions which did not need permission we

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See also ch. 1, II where it is pointed out that sections 17 (5) and 23 (5) of the Matrimonial Property Act do not regulate legal capacity but legal consequences of a legal transaction in repect of household necessaries.
When the legislature enacted sections 17 (5) and 23 (5) of the Matrimonial Property Act 88 of 1984 the husband was the undeniable head of the family. Thus it is not arguable that the abolition of the elevated position of the husband as head of the family could have pertained to an extension of the legal transactions which fall under sections 17 (5) and 23 (5) of the Matrimonial Property Act. Otherwise one would confuse the question of liability for certain legal transactions with the legal capacity of the wife.

153 *Grobbelaar v Havenga* 1964 (3) SA 522 (N); Cronjé and Heaton 297-300; *Ainsbury v Ainsbury* 1929 AD 109; *Peter v Minister of Law and Order* 1990 (4) SA 6 (E). In *Ainsbury v Ainsbury* the court stated that apart from the rights enumerated above *various* other conjugal rights can emanate from marriage.

154 *Peter v Minister of Law and Order* 1990 (4) SA 6 (E).

155 This is the conclusion from the fact that the wife could enter unassisted [without consultation and express authority of her husband (Hahlo, 203, 204; Hutchison, Van Heerden, Van der Merwe, Visser in: Wille's Principles of South African Law, 134)] into the legal transaction.

156 To avoid misunderstandings it must be repeated again: the legislature did not regulate the capacity of the spouses at all. It was just intended to stipulate the legal consequences of a legal transaction that has household necessaries as objects.

157 One might as well call it a mutual permission.

come to the result that these transactions cannot fall into the capacity to bind the other spouse's credit[158].

It is therefore submitted[159] that the words household necessaries encompass all objects which are within the financial capacity of the family and which can be managed by either spouse without consultation of his partner because the objects in question do not concern essential questions of the spouses' common life[160].

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158 The question whether the principle of mutual consent can be applied in general to the relationship of husband and wife is in this context not relevant.

159 This solution can rely on: *Whelan v Whelan* 1972 (4) SA 306 (W), 308 where the learned Judge Steyn on the question whether the purchase of a motorcar by the husband could be regarded as a transaction of household necessaries held as follows: *"I find that within the context of section 3 of the Matrimonial Affairs Act the joint liability of husband and wife for the purchase of household necessaries does not extend beyond those necessaries which a wife would be entitled to purchase for the joint household without the consent of her husband. If such a restrictive interpretation were not given to the section, it would be possible to conceive nearly unlimited extensions".*

160 As it is submitted above, the trader's point of view is decisive. The answer to the question whether the requirements are fulfilled therefore depends on the facts of each individual case.

Chapter 3: Effects

With regard to the effects of juristic transactions, one has to distinguish between those which fall into the domain of the law of obligations, and those which belong in the sphere of the law of property. The following section will deal with the first-mentioned group.

I. Liability of spouses

The liability of spouses for the purchase of household necessities is regulated explicitly by the Matrimonial Property Act 88 of 1984. In terms of 23 (5) of this Act, both spouses are jointly and severally *liable* to the third party supplier and in terms of section 17 (5) of the Matrimonial Property Act 88 of 1984 both spouses may be *sued* jointly and severally for debts incurred in this regard. This means the legal transaction of household necessities creates a relationship in which each spouse is answerable to the common creditor for the full amount of the debt, as if each one were a sole debtor - *singuli solidum debent*. The common creditor can demand the whole debt from either of the spouses at his own choice[161]. The spouses are bound once only to the common creditor - *unum debent omnes*.
The legal situation thus seems to be clear. Difficulties may well arise however in determining the precise contractual position of the spouses.

II. The spouses' contractual position

The first question that has to be answered is whether both spouses become parties to a contract concluded by one of them for household necessaries. This is the case if the passive spouse is drawn into the juristic bond created by the other spouse and the supplier of household necessaries[162]. The question is not easy to answer because the situation is not clear. Section 17 (5) and 23 (5) of the Matrimonial Property Act 88 of 1984 speak only of "joint and several liability" or that the spouses may be sued jointly

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161 Wessels § 1514.
162 Van der Merwe, Contract, General Principles, 168.

and severally. However the point is of great importance if one thinks of the rights and obligations flowing from the contract. Can the non-contracting spouse also withhold his performance until the other party tenders his performance, exercise any claims like the *actio quanti minoris* or *actio redhibitoria*? Can he novate the whole debt by creating a new one or rescind the contract on the ground of breach of contract by the trader or on the ground of fraudulent or negligent misrepresentation?

Neither the jurisprudence nor the literature which the author has investigated deal with this question[163]. The investigated sources are restricted to the requirements of joint and several liability. They do not however explain what joint and several liability actually means for the position of the spouses within the contractual bond.
The author will try therefore to develop his own suggestion.
Several concepts seem to be pertinent. They will be discussed in the following paragraphs.

1) First thesis: Both spouses become parties to the contract

In German and Swiss law[164] both spouses become parties to the contract. Both spouses become „Gesamt*schuldner*"[165] (§ 421 BGB/Art. 144 Abs. 1 OR) and

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163 Only Van Wyk, 211 raises this subject. But Van Wyk restricts his research to the question of whether a wife, who is subject to the marital power of her husband, can exercise the rights flowing from *her* contract *in rebus domesticis*. Van Wyk does not deal with the question as to whether the husband can exercise these rights as well. Where the husband had the marital power, this question did not rise, because the husband by virtue of his power was entrusted with the administration of *all* assets of *both* spouses, no matter whether these assets were part of the joint assets of both spouses or whether they belonged to the private and separate asset of one of them. Grotius 1.5.22; 3.21.10; Voet 19.2.17; Van der Keessel *Th* 91; *Govender v Chetty* 1982 (3) SA 1078 (C); Hutchison, Van Heerden, Van der Merwe, Visser in: Wille's Principles of South African Law, 126. But the marital power could be excluded Grotius 1.5.22; 3.21.10; Voet 19.2.17; Van der Keessel *Th* 91; Hutchison, Van Heerden, Van der Merwe, Visser in: Wille's Principles of South African Law, 126. The legal situation then was comparable with the present-day one. The question whether the non-contracting spouse could exercise any of the rights flowing out of the contract, entered into by his partner, would be pertinent in such a situation, but was not considered by any South African authority. See too the commentaries to the Acts of 1953 and 1984: "South African Law Commission, Report pertaining to the matrimonial property law with special reference to the Matrimonial Affairs Act, 1953, the status of the married woman, and the law of succession in so far as it affects the spouses, 1982" and further the "Report of the women's legal disabilities commission, 1949". These sources do not give any further explanation on the position of the spouses.

164 See part. B, ch. 4 I, II and part C, ch. 4 I, II.

165 Münchner Kommentar/*Wacke* § 1357 no. 33; Soergel/*Lange* § 1357 no. 20; Erman/*Heckelmann* § 1357 no. 19; *Gernhuber* § 19 IV 7; *Büdenberger*, FamRZ 1976, 662, 667.

„Gesamt*gläubiger*"[166] (§ 428 BGB/Art. 150 OR) respectively „Mit*gläubiger*"[167] (§ 432 BGB/Art. 70 OR) and each spouse can therefore exercise all rights flowing from the contract. The reason for this consequence must be seen in the legal nature of § 1357 BGB and Art. 166 ZGB. In both countries the statutory provisions give the *competence* to bind the other spouse's credit[168]. In Germany and in Switzerland the contracting spouse is regarded as acting on behalf of the "association" family[169], which is comparable to the representation of a partnership by its partners. In both countries the contracting spouse thus acts as a kind of representative for the family[170].

As been pointed out above[171] the South African law follows another conception. Section 17 (5) and 23 (5) of the Matrimonial Property Act 88 of 1984 do not regulate the competence of the contracting spouse to bind the other spouse's credit. These statutory provisions regulate only the legal *consequences* of a contract in respect of household necessaries. Sections 17 (5) and 23 (5) of the Matrimonial Property Act 88 of 1984 therefore only regulate the co-liability of the non-contracting spouse. As submitted above these statutory provisions were intended to end the controversies surrounding the *pro semisse* rule[172], but not to regulate the capacity of one spouse to draw the other spouse into the contract[173]. It is thus noteworthy that it was not intended to make an exception to the principle[174] that only the contracting party

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166 Münchner Kommentar/*Wacke* § 1357 no. 36; Rolland/*Brudermüller* § 1357 no. 43; Soergel/*Lange* § 1357 no. 22; Reichsgerichtskommentar/*Roth-Stielow* § 1357 no. 13; Erman/*Heckelmann* § 1357 no. 19; Beitzke/*Lüderitz* § 12 IV, 3; *Mikat*, Rechtsprobleme, 47; *Käppler*, AcP 179 (1979) 245, 284; Staudinger/*Hübner* § 1357 no. 67; also: *Schwab* no. 157.

167 *Büdenberger*, FamRZ 1976, 662, 667; Palandt/*Diedrichsen* § 1357 no. 23; *Roth*, FamRZ 1979, 361, 362; *Binder*, 79.

168 See part B, ch. 1, II and part C, ch. 1, II.

169 In Germany the competence of the other spouse flows from a *mandate tacite*, in Switzerland the competence is regarded as a legal incident of marriage.

170 To the differences between § 1357 BGB and Art. 166 ZGB on the one hand and representation on the other hand, see below.

171 See ch. 1, 2.

172 Van Wyk, 209.

173 Van Wyk, 209.

174 The premise is that it is for each individual to decide whether, and on what basis, to assume contractual liability. This entails that the legal consequences of a contract are in principle restricted to those participating in it as principals. In other words, this means that the parties concluding a contract are not at liberty to infringe upon the sphere of an outsider by imposing legal consequences on him. Therefore a contract, which attempts to impose duties on one who is not party to it, is ineffective with regard to such a person. See: *Cullinan v Noordkaaplandse Aartappelkernmoerkwekers Koöperasie* Bpk 1972 (1) SA 761 (A); *Thal v Baltic Timber* Co 1935 CPD 110; *Barclays National Bank Ltd v H J de Vos Boerdery Ondernemings (Edms)* Bpk 1980 (4) SA 475 (A); *Starkey v McElliot* 1984 (4) SA 120 (D); Christie, 266. Section 17 (5) and section 23 (5) of the Matrimonial Property Act 88 of 1984 must therefore be regarded as exceptions to this general rule only as far as *liability* is concerned.

becomes party to the contract unless the contract was concluded through representation or in favour of a third party[175].
It is therefore submitted that only the contracting spouse becomes a party to the contract and not the non-contracting spouse as well.

The question that arises is what does it mean if a spouse is co-liable, but not a party to the contract. How must this position be understood and to which forms of liability known to the South African legal system is this comparable?
In order to answer this question several principles of co-liability which are known to the South African legal system will be enumerated in the following section. As it will be seen these principles are not mutually exclusive but all together they can help to determine the position of the other spouse.

2) Second thesis: The non contracting spouse as a pure object of liability

One concept could be found in the theory of the distinction between Schuld and Haftung[176]. According to this theory the essential elements of an obligation are, on the one hand, Schuld (or the duty to perform), and, on the other hand Haftung (a right or a power of the creditor to enforce the duty of the debtor). This means in other words that one person is physically bound and the other is legally bound to perform. The person who is bound legally bears "die Schuld" whereas the other person who is bound personally is the object of "die Haftung". The consequence of this is that the non-contracting spouse has to be regarded as "Haftungsobjekt" without being a "Schuldner," or in other words, he can be liable but is not the debtor of the obligation. This distinction relies on German law[177] and is also mentioned by South African authorities. Van Wyk[178] refers to it and Joubert[179] writes: "It is therefore to be accepted that the obligation does have these two aspects, namely Schuld and Haftung". However all other works on contract law made no reference to this concept

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175 Van der Merwe, Contract, General Principles, 168.
176 Larenz, § 2 IV who writes: *„Die Haftung ist zwar von der Schuld, dem Leistensollen begrifflich zu trennen, sie folgt ihr aber gleichsam wie ein Schatten nach."*
177 Larenz, § 2 IV; Zimmermann, The Law of Obligations, 5, n. 18.
178 Van Wyk, 68. The author tries to explain the principle that the non-contracting spouse, whose partner enters into a contract that does not concern household necessaries, is only liable with his common share of the joint estate but not with his private asset.
179 Joubert, General Principles of The Law of Contract, 7, 8.

nor any distinction between the question whether somebody is "co-liable" or "co-debtor". Instead the terms are used synonymously. But if one accepted this principle of "Schuld" and "Haftung", it can only help to understand the general concept which could be the dogmatic basis for sections 17 (5) and 23 (5) of the Matrimonial Property Act 88 of 1984. It cannot give detailed answers however to the questions relating to the rights of the non-contracting spouse. Other concepts therefore shall also have to be investigated.

3) Third thesis: Section 17 (5) and 23 (5) of the Matrimonial Property Act 88 of 1984 as a legal form of suretyship

Another possibility to explain the position of the non-contracting spouse seems to be the comparison with suretyship. There are similarities but also differences between the liability of a surety and that of a non-contracting spouse.

Like the liability of the surety, the liability of the other spouse is only *accessory*[180], because the original debt is that between the contracting spouse and the trader. If the contract in the relationship of trader/contracting spouse is void, the trader can hold neither the surety nor the non-contracting spouse liable. Furthermore both constructs have in common the fact that they lead to liability, without the liable person being party to the contract. Only the contracting spouse or the principal debtor is party to the contract.

The differences are however obvious. Suretyship is a contract[181], which requires a special form[182]. The surety is therefore a debtor in respect of an obligation [Schuld] he incurred with somebody else, whereas the other spouse does not enter into any legal transaction [Haftung]. Besides this difference, the surety is also not co-liable, because the surety has the benefit of excussion[183]. The surety can demand therefore that the

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180 Voet 46.1.10; Wessels § 3943; Lotz, in: Joubert Suretyship § 153; *Fitzgerald v Argus Printing and Publishing Co Ltd* (1907) (3) BAC 160; *Imperial Cold Storage and Supply Co Ltd v Julius Weil & Co* 1912 AD 747; *Television & Electrical Distributors v Coetzee* 1962 (1) SA 747 (T); *Croxon's Garage (Pty) Ltd v Olivier* 1971 (4) SA 85 (T); *Trust Bank of Africa Ltd v Frysch* 1977 (3) SA 562 (A), 584; *Inter Union Finance Ltd v Dunsterville* 1956 (4) SA 280 (D).

181 Hutchison, Van Heerden, Van der Merwe, Visser in: Wille's Principles of South African Law, 611.

182 See section 6 of the General Law Amendment Act 50 of 1956.

183 Voet 46.1.14; Grotius 3.3.27; Van Leeuwen *CF* 1.4.17.48;Wessels § 4068; *Hare v Croeser* (1828) 1 Menz 293; *Rogerson NO v Meyer & Berning* (1837) 2 Menz 38; *Lindley v Ward* 1911 CPD 21; *Gaba v Orda Trust and Investments* (Pty) Ltd 1954 (2) SA 129 (T); *African Guarantee and Indemnity Co Ltd v Thorpe* 1933 AD 330, 335;

principal shall first exhaust his legal remedies against the principal debtor for performance or payment, whereas the other spouse does not have this possibility[184]. Furthermore the surety has a right of recourse against the principal debtor for the full amount[185]. He may claim whatever sum he was *obliged* to pay to the creditor whereas the other spouse has in terms of section 23 (3) of the Matrimonial Property Act 88 of 1984 no right of recourse against his partner at all.

The differences between these forms of liability thus seem to be extensive. Comparisons therefore can be drawn only with caution.

4) Fourth thesis: The other spouse as a co-principal debtor

A person binding himself as a surety may in addition bind himself as a co-principal debtor. The undertaking of the obligation of surety and co-principal debtor operates as a renunciation of the benefit of excussion[186]. If the surety binds himself as a co-principal debtor, he is, as far as the creditor is concerned, a surety who has undertaken the obligation of a co-debtor; i.e. his obligations in the latter respect are co-equal in extent with those of the principal debtor and thus of the same scope and nature[187]; he is thus jointly and severally[188] liable with the principal debtor. But he does not undertake a separate independent liability as a second debtor; he is a surety[189]. His obligation is therefore accessory to the original debt and can be stipulated only by formal contract.

Turkstra v Massyn 1959 (1) SA 40 (T); *Taylor & Thorne v The Master* 1965 (1) SA 685 (N).

184 Hutchison, Van Heerden, Van der Merwe, Visser in: Wille's Principles of South African Law, 619.

185 Voet 46.1.28; Grotius 3.3.13; Lotz, in: Joubert Suretyship 26 § 166; Van Leeuwen *RHR* 4.4.13; *CF* 1.4.17.18; *Van der Vyver v De Wagner* (1861) 4 Searle 27; *Klopper v Van Straaten* (1894) 11 *SC* 94, 98.

186 Grotius 3.3.29; Van der Keessel, *Theses selecta juris* 503; Van Leeuwen *RHR* 4.49; Wessels § 4088; Forsyth, Pretorius, in: Caney, The Law of Suretyship in South Africa, 51.

187 Grotius 3.3.29; Van der Keessel 503; Van der Linden 4.4.7; *CF* 1.4.17.23.

188 *Klopper v Van Straaten* (1894) 11 *SC* 94; *Van der Byl v Munnik* (1845) 2 Menz 73; *In re Deneys* (1846) 3 Menz 309; *Union Government v Van der Merwe* 1921 TPD 318, 322; *Mahomed v Lockhat Brothers & Co Ltd* 1944 AD 230, 238; *Business Buying & Investment Co Ltd v Linaal* 1959 (3) SA 93 (T), 95; *Trans-Drakensberg Bank Ltd v The Master & others* 1962 (4) SA 417 (N) 422; *Neon and Cold Cathode Illuminations (Pty) Ltd v Ephron* 1978 (1) SA 463 (A), 472.

189 *Willens v Widow Schendeler* (1835) 2 Menz 20; *Van der Byl v Munnik* (1845) 2 Menz 73; *In re Deneys* (1846) 3 Menz 309; *Maasdorp v Graaff-Reinet Board of Executors* (1909) 3 Buch AC 482, 484; *Peimer v Finbro Furnisher* (Pty) Ltd 1936 AD 177; *Mahomed v Lockhat Brothers & Co Ltd* 1944 AD 230, 238; *Business Buying & Investment Co Ltd v Linaal* 1959 (3) SA 93 (T) 95; *Trans-Drakensberg Bank Ltd v The*

It is therefore noteworthy that suretyship and sections 17 (5) and 23 (5) of the Matrimonial Property Act 88 of 1984 differ in their requirements but not in their consequences as far as the relationship of trader / spouse / surety is concerned.
It is thus submitted that the position of the non-contracting spouse is similar and comparable to the position of a co-principal debtor. His rights and duties give a guiding principle qualifying the position of the non-contracting spouse[190].

5) Consequences

a) The contracting spouse

As seen above[191], only the contracting party is relevant for the existence of the contract. Like any other principal of a contract he can exercise all contractual rights flowing from it. The liability of the other spouse is a legal consequence of the stipulation of the contract and of any disposition made thereunder.

Therefore it is submitted that the contracting party can exercise *any* right flowing out of the contract provided that the legal transaction is in respect of household necessaries.

b) The position of the non-contracting spouse

One indication to start the inquiry to determine the contractual position of the spouses might be found in the systematical context of sections 17 (5) and 23 (5) of the Matrimonial Property Act 88 of 1984. On the one hand, one notices that section 17 (5) of the Matrimonial Property Act 88 of 1984 is placed in Chapter III dealing with marriages *in* community of property whereas section 23 (5) of the Matrimonial Property Act 88 of 1984 is placed in Chapter IV giving *general* provisions. Systematically both sections are thus regulated differently. On the other hand it is noteworthy that sections 17 (5) and 23 (5) of the Matrimonial Property Act 88 of

Master & others 1962 (4) SA 417 (N), 422; *Neon and Cold Cathode Illuminations (Pty) Ltd v Ephron* 1978 (1) SA 463 (A) 472.

190 Another question is the *further* destiny of the obligation. One will see that the legislature has found different solutions. In terms of section 17 (5) of the Matrimonial Property Act 88 of 1984 the contracting spouse's capacities are fully extended to the non-contracting party. However this phenomenon has no influence on the dogmatic explanation found above.

191 See ch. 1, .II.

1984 each have the same requirements. These sections refer respectively to a *debt* [that] *has been incurred for necessaries for the joint household* [section 17 (5)] and to *all debts incurred by either of them in respect of necessaries for the joint household* [23 (5)]. And both sub-sections provide for joint and several liability. It is not clear why the legislature did not include in section 23 of the Matrimonial Property Act 88 of 1984 also the requirements for spouses married in community of property, especially if it is borne in mind that this section deals with nothing other than household necessaries. Neither in the commentaries[192] nor in any South African[193] authority could explanations be found.

If one takes the historical background of sections 17 (5) and 23 (5) of the Matrimonial Property Act 88 of 1984 into account, it would appear that the legislature primarily wanted to regulate liability consequences for the purchase of household necessities. The intention was apparently to enhance the contracting spouse's creditworthiness by making his partner co-liable, thus to motivate the supplier to enter into the contract with a non-earning partner. Hence the trader's prospect of recovery does not depend on the identity of the spouse who purchases the household necessary[194]. The rights and obligations connected with co-liability were not regulated but were left to be resolved within the general principles of the marital property system applicable to the marriage in question. It is submitted therefore that it was for this reason that section 17 (5) of the Matrimonial Property Act 88 of 1984 was incorporated in Chapter III, dealing with marriages in community of property while section 23 (5) of the Matrimonial Property Act 88 of 1984 refers to the position of spouses married out of community of property.

aa) Spouses married in community of property

Section 14 of the Matrimonial Property Act 88 of 1984 provides that a wife in a marriage in community of property has the same powers with regard to the disposal of the assets of the joint estate, the contracting of debts which lie against the joint estate, and the management of the joint estate as those which a husband in such a marriage

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192 See: "South African Law Commission, Report pertaining to the matrimonial property law with special reference to the Matrimonial Affairs Act, 1953, the status of the married woman, and the law of succession in so far as it affects the spouses, 1982" and the "Report of the Women's Legal Disabilities Commission, 1949".

193 See above: n. 163.

194 See ch. 1, I.

had immediately prior to the commencement of the Matrimonial Property Act 88 of 1984. Section 15 (1) of the Matrimonial Property Act 88 of 1984 lays down that a spouse in a marriage in community of property may perform any juristic act with regard to the joint estate without the consent of the other spouse, save for those legal transactions which are enumerated in sections 15 (2), (3) and (7) of the Matrimonial Property Act 88 of 1984. With these provisions, the legislature adopted the principle of concurrent administration of the joint estate.

The contractual rights and duties therefore fall into the joint estate and can be administered by both spouses, no matter which of them originally entered into the contract.

bb) Spouses married out of community of property with exclusion of the community of profit and loss

If the spouses are married out of community of property each spouse keeps his separate estate[195]. The patrimonial system and general capacity of the spouses remains largely unaffected by the marriage. With the exception of sections 17 (5) and 23 (5) of the Matrimonial Property Act 88 of 1984, the spouses are not liable for each other's debts and neither spouse can exercise any of the other spouses' rights and remedies[196].

In order to determine the rights of one spouse with regard to a contract concluded by his partner in respect of household necessaries, reference must be made to the discussion above. The position of the non-contracting spouse who is married out of community of property is also comparable with a co-principal debtor. The co-principal debtor cannot exercise any of the contractual rights on his own, because he is not a party to the contract[197]. He may rely upon, however, and plead any defence *in rem* which the principal debtor *could* have raised successfully against the creditor[198], namely withholding of the performance until the other party tenders his performance, the *actio quanti minoris*, the *actio redhibitoria*, illegality, fraud, duress, payment, *res*

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195 Hutchison, Van Heerden, Van der Merwe, Visser in: Wille's Principles of South African Law, 154.

196 Hutchison, Van Heerden, Van der Merwe, Visser in: Wille's Principles of South African Law, 159.

197 Pothier § 380, 381; *Hastie v Dunstan* (1892) 9 *SC* 449; *Eaton Robins & Co v Nel* (1909) (2) 26 *SC* 624; *Worthington v Wilson* 1918 TPD 104; *Ideal Finance Corp v Coetzee* 1970 SA (3) I (A); *Linden Dupley (Pty) Ltd v Harrowsmith* 1978 (I) SA 371 (W).

198 Pothier § 380; *Ideal Finance Corp v Coetzee* 1970 (3) SA I (A); Lotz, in Joubert Suretyship § 162.

iudicata[199], set-off[200] and prescription. He cannot rely on those defences which are purely personal to the debtor (defence *in personam*) such as minority[201], insolvency[202] or liquidation[203]. The difference between defences *in rem* and defences *in personam* is that defences *in rem* arise from the invalidity, extinction or discharge of the principal obligation itself, while those *in personam* arise from a personal immunity of the principal debtor from liability for an otherwise valid and existing civil or natural obligation[204].

This leads to the conclusion that the non-contracting spouse cannot exercise any of the rights flowing from the contract in respect of household necessaries on his own, because he is not the principal of the contract. But he can rely upon and plead all rights the other spouse could exercise, provided that these rights are not of a purely personal nature.

6) Result

The spouses' contractual position and their ability to exercise rights flowing from such a contract is determined mainly by the marital property system, in which sections 17 (5) and 23 (5) of the Matrimonial Property Act 88 of 1984 are incorporated. This leads to different solutions, depending on whether the spouses are married in or out of community of property.

If spouses are married in community of property each spouse can exercise the rights flowing from the contract. If the spouses are married out of community of property the contracting spouse has the power to exercise any contractual right. The other spouse's position on the contrary is comparable with that of a surety who is co-principal debtor. He can rely on defences *in rem* but not on defences *in personam.*

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199 Pothier § 380; *Ideal Finance Corp v Coetzee* 1970 SA (3) I (A); Lotz, in: Joubert Suretyship § 162.
200 Lotz, in: Joubert Suretyship § 162.
201 Grotius 3.48.8; *Estate Van der Linth v Conradie* (1903) 20 *SC* 241, 246.
202 *Proksch v De Meester* 1969 (4) SA 567 (A).
203 *Jayber (Pty) Ltd v Miller* 1981 (2) SA 403 (W).
204 Lotz, in: Joubert Suretyship §162.

III. Acquisition of ownership

As regards the consequences of sections 17 (5) and 23 (5) of the Matrimonial Property Act 88 of 1984 on the acquisition of ownership [in the following referred to as "real" consequences], a distinction must be made between *direct* and *indirect* consequences.

Under direct consequences it must be understood that a statutory provision or a rule of the Roman-Dutch law prescribes the (original or derivative) acquisition of ownership. Typical examples of this are the unilateral occupation by a person of a *res nullius*[205], the mixing of liquids[206] or the mingling of solids[207]. It is clear that sections 17 (5) and 23 (5) of the Matrimonial Property Act 88 of 1984 do not have these consequences, because they only provide for joint and several *liability* for the debts, but not joint *ownership* of the object purchased.

The question is whether it can be assumed that sections 17 (5) and 23 (5) of the Matrimonial Property Act 88 of 1984 have *indirect* consequences on the acquisition of ownership. The German Supreme Court[208] [hereinafter referred to as BGH[209]] answers this question in the affirmative[210] with respect to § 1357 BGB[211]. The court also denies any direct consequences of § 1357 BGB on the real situation[212], but it

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205 Grotius 2.4.1; Van der Keessel *Paelectiones ad Gr* 2.4.1; Van der Linden *Koopmans Handboek* 1.2.1; Kleyn, Boraine in: Silberberg and Schoeman's, The Law of Property, 195; Van der Merwe, The Law of Things §§ 54, 62.

206 Voet 41.1.23; Grotius 2.8.9; Van der Merwe, The Law of Things § 147.

207 Kleyn, Boraine in: Silberberg and Schoeman's, The Law of Property, 220-222; Van der Merwe, The Law of Things § 147.

208 BGH, NJW 1991, 2283, 2284. See part. 2.

209 Bundesgerichtshof. It is Germany's highest court.

210 In the case of spouses married in community of property this question is not of great importance because any household necessary purchased falls into the joint estate of both spouses. They therefore become co-owners of the household necessary. See: Amtzensius 2.4.10; Voet 23.2.68; 41.41; *Van der Keessel Th* 216; *Rosenberg v Dry's Executors* 1911 AD 679, 688; *Union Government v Leak's Executors* 1918 AD 447, 457; *Estate Sayle v CIR* 1945 AD 388, 395; *Lock v Keers* 1945 TPD 113, 116; *Klerck v Registrar of Deeds* 1950 (1) SA 81 (A), 85; *Issels v Gold & Fitt* 1952 (2) SA 615 (SR), 616; *Hare v Hare' s Estate* 1961 (4) SA 42 (W), 44; *De Wet NO v Jurgens* 1970 (3) SA 38 (A); *Keyser v Keyser* 1979 (4) SA 12 (T); *Jacobs v United Building Society* 1981 SA 37 (W), 40; *Kinloch v Kinloch* 1982 (1) SA 679 (A) 697. However if the spouses are married *out* of community of property this question is decisive for the real situation. If one follows the German concept both spouses become co-owners of the purchased household necessaries.

211 The wording of § 1357 BGB is given in part 2 ch. 1.

212 This question was very controversial in German literature. Many proponents used to argue that § 1357 BGB has a direct effect on the real situation, see: OLG *Schleswig*, FamRZ 1989, 88; LG *Aachen*, NJW-RR 1987, 712, 713; LG *Münster*, NJW-RR 1989, 391; Palandt/*Bassenge* § 929 no. 4 (until 50. ed.); Palandt/*Diedrichsen* § 1357 no. 22 (until 50. ed.); Soergel/*Lange* § 1357 no. 23; *Henrich* § 8 II 3c (until 3. ed.); *Lüke*, AcP

interprets the *animus transferendi* of the spouse, who purchases household necessaries *in the light* [indirectly] of § 1357 BGB. The result of this interpretation is that spouses, irrespective of whether they are married in or out of community of property, become co-owners of the object purchased.

To understand this solution and to decide whether it could also be applicable in the South African legal system one has to examine the requirements of the passing of ownership in South Africa and in Germany.

It is noteworthy that the general concept is the same: both countries follow an abstract system of transfer[213]. This means that the *causa* for the delivery is totally abstracted from the passing of ownership[214]. It is immaterial whether the *causa* is void or voidable, because a clear distinction is drawn between the agreement giving rise to the transfer and the real agreement[215]. Furthermore, both in Germany and in South Africa, there are two key requirements for the passing of the ownership[216]. Firstly an objective element is required. The object of the transaction must be delivered or transfer thereof must be registered[217]. Secondly at the moment of the passing of ownership the transferor must have the intention of transferring the ownership [*animus transferendi domini*] and the transferee must have the intention of acquiring

178 (1978) 1, 20; Jayme, Jus 1986, 893; Rolland § 1357 no. 19 (1.ed.); *Thiele*, FamRZ 1958, 118.

213 South Africa: Kleyn, Boraine in: Silberberg and Schoeman's, The Law of Property, 78, 81-84, 110; Scholtens (1957) *SALJ* 282-284; Van der Merwe, in: Joubert Things § 167; Van der Merwe, The Law of Things § 13. For further details see: Van der Merwe, in: Joubert Things § 166-168.
Germany: Münchner Kommentar/*Säcker* § 903 no. 3; Palandt/*Bassenge* Einl. v § 854 no. 14; BGHZ 55, 153.
The authorities in both countries rely on Gaius 2.20.

214 Van der Merwe, The Law of Things § 13; Scholtens (1957) *SALJ* 282-284; Van der Merwe, in: Joubert Things § 167; Exceptions are known in both countries. See for South Africa: Van der Merwe, in: Joubert Things § 166-167 and for Germany Münchner Kommentar/*Säcker* § 903 no. 3 and Münchner Kommentar/*Säcker* § 929 no. 1; Palandt/*Bassenge* Einl. v § 854 no. 14.

215 Van der Merwe, The Law of Things § 13; Van der Merwe, in: Joubert Things § 165.

216 Apart from these the following requirements must be fulfilled: (1) The thing must be a *res commercio*, that is, capable of being held in private ownership. (2) The transferor and the transferee must be capable respectively of transferring and of acquiring ownership. See Van der Merwe, in: Joubert Things § 165 and Van der Merwe, The Law of Things § 13.

217 Van der Merwe, The Law of Things § 165; Van der Merwe, in: Joubert Things § 165; Kleyn, Boraine in: Silberberg and Schoeman's, The Law of Property 75-78.

ownership [*animus accipiendi domini*] [subjective element]. A real agreement is thus necessary[218].

If both spouses married out of community are to become co-owners the following requirements must be fulfilled:

Firstly the acting spouse must act in his own name. Secondly he must act also as the representative of his partner. This requires that he acts in the name of the other spouse [*nomine alterius*] and with his authority[219]. And thirdly it is necessary that both spouses must become co-possessors.

The last-mentioned requirement was accepted by the BGH[220], because spouses are regarded as co-possessors of those things which are used by both of them in common[221]. Household necessaries are such things[222]. An exception is made only for those items which are to be regarded as highly personal, such as the inherited necklace of the wife or personal letters of one of the spouses[223].

The second requirement is problematic, because in those cases where the spouse's capacity to bind the other's credit is relevant the contracting spouse acts without express authority of the other party and in his *own* name and not in the name of the other spouse [when the spouse acts with the authority of and expressly for the other spouse, both are liable and both become co-owners without any necessity of referring to section 23 (5) of the Matrimonial Property Act 88 of 1984[224]]. The questions that therefore arise are whether the contracting spouse can act on behalf of the other

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218 The mental element has found its expression in the Afrikaans term "saaklike ooreenkoms". Prior to the decision of *Air-Kel (Edms) Bpk h/a Merkel Motors v Bodenstein* 1980 (3) SA 917 (A) the concept of a real agreement was used mainly by academics, see: Voet 41.1.35; Huber *Heedendaegse Rechtsgeleerdheyt* 2.9.6; Van der Merwe, in: Joubert Things § 168; Van der Merwe, The Law of Things § 165; Kleyn, Boraine in: Silberberg and Schoeman's, The Law of Property, 77.

219 Voet 17.1.9; 17.2.13; Van der Keessel, *Theses selecta juris* 572; Van der Merwe, in: Joubert Things § 109.

220 BGH, NJW 1991, 2283, 2285.

221 Palandt/*Heinrichs* § 866 no. 3; BGH NJW, 1979, 976.

222 BGH, NJW 1991, 2283, 2285.

223 BGH NJW 1979, 976.

224 The analysis therefore is restricted to the situation where the trader has no reason to believe that the spouse acts in the name of his partner. Otherwise one has to deal with the question of when one can assume that an innocent third person has reason to believe that the contracting party acts on behalf of and as the representative of somebody else. This question falls into the domain of contract law and thus will not be investigated further, see De Wet, Du Plessis, in: Joubert Agency and Representation § 109.

spouse without *express* authority and whether he can do so without acting *in the name* of the other spouse[225].

The BGH[226] has answered both questions in the affirmative. The court assumes firstly that the contracting spouse acts with the *tacit* authority of the other. Since altruism is very rare, the BGH further assumes that somebody who is liable for the debt of an obligation in general also wants to profit from the counterperformance. Therefore the BGH holds that the non-contracting spouse generally tacitly *authorises* the other spouse to make him co-owner of those articles for which he is liable in terms of § 1357 BGB[227].

As pointed out however, the contracting spouse acts in general in his *own* name. Is it despite this possible to assume that he acts as a representative of the other spouse? The BGH answers this question in the affirmative, by referring to the principles of the "*dingliche Geschäft an den, den es angeht*" [real transacting to whom it may concern]. In the case of real transacting to whom it may concern the representative is not obliged to act in the name of the principal. It is sufficient if he acts in his own name[228]. Only the intention of the contracting party is decisive for the question as to who becomes owner, regardless of whether this intention was perceptible to the third person or not[229].

The reason for this is that the requirement that a person acts in the name of the principal is to *protect* the supplier[230]. The latter should know who is the other party to the contract or, in the case of the transfer of ownership, who becomes owner of the object purchased from him. But there are exceptions known. If the third person does not need any protection, there is no reason why the contracting party should be obliged to act in the name of the principal. A typical example where the representative is not obliged to act in the name of the principal is the daily mass marketing cash

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225 This is the classical contractual situation in which sections 17 (5) and 23 (5) of the Matrimonial Property Act 88 of 1984 are relevant.

226 BGH, NJW 1991, 2283, 2284 Nr. 2.

227 The authorisation is in German law a unilateral act, see Münchner Kommentar/Thiele § 167 no. 3; Palandt/Heinrichs § 167 no. 1 and Palandt/Heinrichs Übl. 11 v § 104.

228 Münchner Kommentar/*Thiele* § 164 no. 42-53; *Baur* § 51 VII; Soergel/*Schultze v Laselaux* before § 164 no. 39; RGZ 99, 208; 100, 190, 192; 109, 167, 169; 140, 223, 229; BGHZ 5, 279 = NJW 1952, 658; BGH, NJW 1955, 587, 590.

229 Palandt/*Heinrichs* § 164 no. 8; Münchner Kommentar/*Thiele* § 164 no. 42-53; *Baur* § 51 VII; Soergel/*Schultze* before § 164 no. 39; OLG Düss NJW 1992, 1707.

230 RGZ 99, 208; 100, 190, 192; 109, 167, 169; 140, 223, 229; BGHZ 5, 279 = NJW 1952, 658; BGH, NJW 1955, 587, 590; *Baur* § 51 VII; Soergel/*Schultze* before § 164 no. 39.

purchase[231]. Another example is when the supplier reserves ownership until the sum due is rendered[232]. In both cases it is immaterial to the supplier who becomes owner of the object purchased[233]. All the supplier has to do is to fulfil his obligation by his performance[234]. Whether he transfers the ownership to the contracting party, or to the non-contracting party, or to both of them, is immaterial to him. In terms of § 362 BGB[235] particularly §§ 362 II and 185 BGB[236] he will at any rate fulfil his obligation.

It is therefore noteworthy that in such cases it does not make any difference to the supplier whether only one or both spouses become owners of the household necessary.

Therefore in such cases it is only the intention of the contracting spouse which is decisive in determining the ownership of household necessaries[237].

By referring to these circumstances the BGH[238] interprets the intention of the contracting spouse and holds that in general such spouse *wants* the spouses to become co-owners. If he does not so desire, then he must express his opposite intention. With this interpretation the BGH modifies the general presumption that a person wants to become a single owner unless he expresses the opposite[239]. It must be noted, however,

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231 *Baur* § 51 VII; Soergel/*Schultze* before § 164 no. 39.

232 Palandt/*Heinrichs* § 164 no. 8; Münchner Kommentar/*Thiele* § 164 no. 44; *Baur* § 51 VII; Soergel/*Schultze* before § 164 no. 39; OLG Düss NJW 1992, 1707.

233 It must be pointed out again that this section deals with the real agreement and not with the contractual bond. The abovementioned principles are in general not applicable to contractual agreements. Here the situation is often different. If the purchase concerns an expensive object the purchaser often wants to know who the other contracting party is, whether he is liquid and reliable and so on. These points are not important in the case of the transfer of property. See on this difference: Münchner Kommentar/*Thiele* § 164 no. 42-53.

234 Palandt/*Heinrichs* § 164 no. 8; Münchner Kommentar/*Thiele* § 164 no. 44; *Baur* § 51 VII; Soergel/*Schultze* before § 164 no. 39.

235 § 362 BGB *(1) An obligation is extinguished if the performance due is effected in favour of the creditor.*
(2) If the performance is effected in favour of a third party for the purpose of fulfilment, the provisions of § 185 apply.

236 § 185 *(1) A disposition affecting any object which is made by a person without title, if made with the approval of the person entitled, is valid.*

237 It is not necessary that the intention is declared to the third person, because this would be normal representation. It is sufficient, if the intention is objectively manifest, for a person who knows all the circumstances of the transaction see: Münchner Kommentar/*Thiele* § 164 no. 42-53; *Baur* § 51 VII; Soergel/*Schultze* before § 164 no. 39. RGZ 99, 208; 100, 190, 192; 109, 167, 169; 140, 223, 229; BGHZ 5, 279 = NJW 1952, 658; BGH, NJW 1955, 587, 590.

238 BGH, NJW 1991, 2283, 2284 Nr. 2.

239 Münchner Kommentar/*Thiele* § 164 no. 14- 41.

that the BGH makes clear that this interpretation applies only to spouses purchasing household necessaries[240].

Three reasons can be mentioned for this interpretation of the contracting spouse's intention: firstly both spouses are liable for the debt. It therefore seems to be equitable for both spouses to *profit* from the counterperformance for which they are both answerable. The co-ownership seems to be the *correlative* of the co-liability.

Secondly the distinction between the assets of the spouses married out of community of property seems to be very theoretical as far as household necessaries are concerned. Spouses usually do not have the intention to distinguish between "mine" and "yours" as far as household necessaries are concerned. Household necessaries are often *bought* in common, *used* in common and *possessed* in common. Why should they not also be *owned* in common?

And thirdly reference can be made to the underlying *ratio legis* of the spouse's capacity to bind the other spouse's credit[241]. § 1357 BGB tries to extinguish *as far as possible* the different consequences which arise from the fact that either the husband or the wife or both spouses together have purchased the object. This idea is also applicable to the real situation [indirect application of § 1357 BGB]. Thus the purchased household necessaries fall into the co-ownership of both spouses.

§ 1357 BGB modifies the real consequences *indirectly* by giving an indication of how to interpret the *unrevealed* intention of the acting spouse.

1) Application of the Supreme Court's reasoning in the South African legal system

The question that rises from this discussion is whether these principles are also applicable in the South African legal system. An investigation of the abovementioned requirements leads to the following conclusion:

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240 BGH, NJW 1991, 2283, 2284 Nr. 2.

241 See ch. 1, I.

a) Objective element

In the South African legal system spouses are generally co-possessors of those things which are used by them in common[242]. The objective element is thus present.

b) Authorisation

An authorisation to act on somebody's behalf can be given tacitly[243]. The interest of the non-contracting party in becoming a co-owner is the same as in German law. Therefore it is possible to assume for the South African law, as the BGH has done with respect to the BGB, that the non-contracting spouse in general authorises the other spouse to make him a co-owner of those objects which the latter has purchased for the household and for which the authorising spouse is in terms of section 23 (5) of the Matrimonial Property Act 88 of 1984 co-liable[244].

c) The intention of the contracting party

It also appears to be possible to interpret the (unrevealed) intention of the contracting spouse in such a way that one can assume that both spouses become co-owners. The arguments relied upon by the German supreme court can be mentioned here as well.

d) The interest of the supplier

As under German law it is immaterial to the supplier in South Africa which of the spouses becomes owner of the household necessary. All he wants to do is to fulfil his obligation by rendering his performance to the creditor of the contract. The creditor is the contracting party only[245]. The seller must therefore render the performance only to the contracting party. However, the South African legal system recognises the possibility of performing to a person other than to the creditor, provided that such third person has the authority to receive the performance[246]. Such authority can be express but it can also be inferred from objective circumstances[247].

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242 *Rosenbuch v Rosenbuch* 1975 (1) SA 181 (W); *Oglodzinski v Oglodzinski 1976 (4) SA 273 (D);* Van der Merwe § 61.

243 De Wet, Du Plessis, in: Joubert Agency and Representation § 115.

244 The authorisation is a unilateral act, see: De Wet, Du Plessis, in: Joubert Agency and Representation § 115.

245 See ch. 3, I.

246 *Kambanis Buildings (Pty) Ltd v Gal* 1983 (2) SA 128 (A); Matador *Buildings (Pty) Ltd v Harman* 1971 (2) SA 21 (C); *Baker v Probert* 1985 (3) SA 429 (A) 439; *Viljoen v*

One can refer to the abovementioned criteria which were applied by the BGH in order to interpret the contracting spouse's intention. It is submitted that the other spouse in general has authority to receive the performance. The reasons for this suggestion are: Firstly, that the right to receive the performance seems to be the correlative of the liability of the other spouse. Secondly the fact that spouses generally regard household necessaries as "theirs" and not as "his" and "her" property, proves that it is immaterial to spouses which of them concludes the contract and which receives the performance. A distinction according to which of the spouses has entered into the *vinculum iuris* therefore seems to be artificial. Thirdly the *ratio legis* of section 23 (5) of the Matrimonial Property Act 88 of 1984 supports this interpretation. The statutory provision tries to eliminate the different consequences of the coincidence of which of the spouses was the contracting party. This phenomenon concerns not only the liability of spouses but also the question of which of them is authorised to receive the performance.

If this argument is accepted the supplier could fulfil his obligation by rendering performance to either of the spouses. It is immaterial to him which of the spouses becomes owner of the household necessary.

e) Acting on behalf of a third person

Is it possible to forgo the requirement that the representative acts also in the name of the other spouse? Is it tenable to assume that there is a real agreement between both spouses and the supplier although the one spouse acted only in his *own* name? This question can be answered in the affirmative only if principles comparable to the "Geschäft an den, den es angeht" exist in the South African legal system.

2) The real agreement

The real agreement is a contract [meeting of minds] that refers to a real transaction[248]. The only difference between a real agreement and a contract which stipulates an

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Trakman 1994 (3) SA 116 (A); *Minister van Justisie v Jaffer* 1995 (1) SA 273 (A); Christie, 487.

247 *Tank v Jacobs* 1881 1 SC 289; *Fields & Co v Marks & Co* 1897 12 EDC 13; *Roberts v Bryer Bros* 1931 OPD 197; *Bird v Summerville* 1961 (3) SA 194 (A); *Reed v Sager's Motors (Pvt) Ltd* 1970 (1) SA 521 (RA).

248 Van der Merwe, in: Joubert, Things § 168.

obligation [a so-called "obligatory or obligationary agreement[249]"] is the object of the legal transaction. Whereas in the first contract the content of the agreement is to alienate property, the content of the second agreement is to create a juristic bond between parties, giving rise to reciprocal or unilateral obligations and rights. Both agreements require legal capacity to act, both agreements are void in the case of *iustus error* and voidable in the case of fraud or misrepresentation[250].
It is therefore to be noted that, to some extent, the principles of contract law can be applied to the real "contract"[251] too.

If one tries to answer the question of when it is possible to forgo the requirement that the representative has to act in the principal's name, one thus has to investigate the general principles of contract law and decide from case to case whether these principles are reconcilable with the principles of property law.

3) The unnamed principal

In the law of representation it is possible for a person to contract with a third person without revealing the principal's name[252]. As in any other contract on behalf of a third person any right and obligation flowing from this contract is acquired by the principal of the transaction and not by the representative[253]. However this situation only exists if the representative and the other contracting party are aware of the fact that the contract is concluded on behalf of a third (unnamed) person. The one contracting party knows that "somebody else" and not the other contracting person is the principal of the contract. The only fact of which he is not aware is the *identity* of the principal. In order to assume co-ownership of spouses, the acting spouse therefore has to make clear that he does act (1) on his own behalf but also (2) on behalf of "somebody else". In this way therefore the non-contracting spouse becomes co-owner only if the other spouse has revealed to the third party his intention to act for a third person.

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249 *Johnson v Incorporated General Insurances Ltd* 1983 (1) SA 318 (A).
250 Kleyn, Boraine in: Silberberg and Schoeman's, The Law of Property, 78; Van der Merwe, in: Joubert, Things § 168.
251 Kleyn, Boraine in: Silberberg and Schoeman's, The Law of Property, 78.
252 *Bothomley v Siew & Co* 1902 9 HCG 207; *Fairbairn v Pepper* 1904 *SC* 154; *Edelson v Glenfields Estate (Pty) Ltd* 1955 (2) SA 527 (EDL); *Marais v Perks* 1963 (4) SA 802 (E).
253 *Bothomley v Siew & Co* 1902 9 HCG 207; *Fairbairn v Pepper* 1904 *SC* 154; *Edelson v Glenfields Estate (Pty) Ltd* 1955 (2) SA 527 (E); *Marais v Perks* 1963 (4) SA 802 (E).

This principle is thus not comparable with the "Geschäft an den, den es angeht". The contracting spouse cannot, on the one hand, act purely in his own name and, on the other hand, acquire co-ownership for his spouse.

4) The undisclosed principal

Contracting on behalf of an unidentified principal must be distinguished from contracting for an "undisclosed principal". As mentioned above, in the former situation, the acting party acts as a representative and in the name of "somebody else". In the latter situation the acting person does not contract at all on behalf of another person. He enters into the contract in his *own name*, but acts in the service of or on the instructions or (tacit) mandate of a third person; the third person may then emerge from his obscurity, announce himself as the "principal" and act as if the person who has contracted, has done so as his representative[254].

It is thus noteworthy that it is accepted in the modern[255] South African legal system that the effects of a legal transaction can concern an unrevealed third person.

It is submitted however that this principle cannot be relied on in order to reason that both spouses are co-owners. The reason is that this doctrine does not lead to the consequence that both spouses become parties to the *real agreement*. The essence of the doctrine is that the undisclosed principal can claim that he and not the acting person, with whom the other party has contracted, is party to the agreement. And on the other side the contracting party has the right to make either the acting party or

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254 The doctrine comes from English law and was adopted in *Lippert & Co v Desbats* 1869 Buch 189 where it was simply taken for granted that the doctrine existed in the South African legal system. Significantly no citation of any authorities can be found in this judgement. In *O'Leary and another v Habord* 1888 5 HCG 1 the court referred to Voet and Van der Keessel and admitted that these authorities say that only the actual contracting parties can be liable and entitled. However the court felt bound by *Lippert's* case although no authorities were mentioned there. After these two judgements the English doctrine has been followed consistently, see *Symon v Brecker* 1904 TS 745; *Crood v Adred* 1909 TS 150; *Judelson and Cohen v Botha and others* 1913 TPD 747; *Vertkouteren v Rubesa* 1917 TPD 274; *Zieve v Verster and Co* 1918 CPD 296; *Gadlela v Mountjoy* 1921 EDL 51; *Natal Trading and Milling Co v Inglis* 1925 AD 410; *Scholtz v Sieff* 1928 OPD 131; *Chappel v Gohl* 1928 CPD 47; *Don Shoe Co (Pty) Ltd v Goodman Bros.* 1931 OPD 26; *Spies v Hanford Ltd* 1940 TPD 1; *Hirsch v Rosen* 1944 WLD 24; *Van Staden v Prinsloo* 1947 (4) SA 842 (T); *Blaikie & Co Ltd v Lancashire 1951 (4) SA 571 (N); Cullinan v Noordkaaplandse Aartappelkernmoerkwekers* 1972 (1) SA 761 (A).

255 The courts have deviated from the old authorities. Such authorities regarded the unrevealed acting on behalf of a third person as a *res inter alios acta*, see: Van Leeuwen *CF* 1.4.3.6. and 7; Voet 14.3.6, 17.1.9; Schorer 36; Grotius 3.1.31; Van der Keessel *Theses selecta juris* 572.

alternatively the undisclosed principal answerable[256]. It might therefore be arguable that somebody other than the acting party becomes owner, even if the latter has acted in his own name, provided that all other requirements for the acquisition of property are met[257]. But it is not possible on this approach to assume that both spouses become co-owners if the acting spouse only acts in his own name.

5) Further exceptions

Further exceptions to the principle that a representative must act in the name of his principal are not known to the South African legal system.

6) Conclusion

The South African legal system does not know a principle that is comparable in its consequences with the "Geschäft an den, den es angeht". It is always necessary therefore to interpret the intention of the acting spouse from the supplier's point of view. Unless the contracting spouse declares expressly or tacitly his intention to act on behalf of his partner [*nomine alterius*], only the contracting spouse becomes owner of the purchased household necessary.

7) Result

Spouses married out of community of property thus do not become co-owners of household necessaries if the acting spouse acts in his own name. If this is so, section 23 (5) of the Matrimonial Property Act 88 of 1984 has no real consequences.

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256 *Vertkouteren v Rubesa 1917 TPD 274; Natal Trading and Milling Co. Ltd v Inglis* 1925 TPD 724; *Spies v Hanford Ltd* 1940 TPD 1; *Van Staden v Prinsloo* 1947 (4) SA 842 (T); *Blaikie & Co Ltd v Lancashire* 1951 (4) SA 571; Van der Merwe, in: Joubert, Things § 150 speaks of *ius variandi*.

257 The limited parameters of this work do not allow for investigation of this idea.

Chapter 4: Exclusion of the competence

The question whether a spouse can unilaterally revoke the other spouse's competence has been a fruitful source of dispute for many years and it would be a totally unnecessary repetition to consider all the points raised in that debate again. This work therefore will not enter into the controversies surrounding whether a spouse can deprive the other spouse of his competence without a court order or whether the court order is necessary in every case [258]. The accepted opinion today is that a spouse cannot unilaterally revoke the other spouse's capacity[259], because such capacity is (other than in English law) not based on a mandate from the other spouse. It is a legal incident of marriage[260]. The notification by the one spouse to the trader, that the former will not be held liable for the other spouse's debt has therefore no direct effect on the other spouse's capacity to bind the credit of the spouse giving such notice. The notification is only decisive when the court has to determine the scope of the capacity of one spouse to bind the other spouse's credit[261]. As has been pointed out, the court should view the matter from the dealer's point of view and take into consideration only the facts which were or which ought reasonably to have been obvious to the dealer. The publication of a notice of non-liability may thus be relevant as evidence of the trader's knowledge of the situation in question. The non-contracting spouse might therefore argue that the trader knew that the spouses no longer lived together or that the purchased item was not necessary for the household. A notification therefore can have indirect consequences for the capacity of one spouse to bind the other spouse's credit.

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258 See on this discussion: Yeats, 45-47; Van Heerden, in: Joubert, Marriage § 67 no.3.

259 Grotius 1.5.23; Voet 23.2.46; *Bing and Lauer v Van den Heever* 1922 TPD 279; *Chenille Industries v Vorster* 1953 (2) SA 691 (O); *Clark & Co v Lynch* 1963 (1) SA 183 (N); Cronjé and Heaton, 325; Van Wyk, 343; Lee and Honoré § 67; Barnard, Cronjé & Olivier, 195; Boberg, 200 n. 85; Hahlo, 210-212. The other point of view was held by: *Reloomel v Ramsay* 1920 TPD 371, 376, 380 (*obiter dicta*); *McNaught v Caledonian Hotel* 1938 TPD 577 (*obiter dicta*); *Behr v Minister of Health* 1961 (1) SA 629 (SR) (*obiter dicta*).

260 *Reloomel v Ramsay* 1920 TPD 371, 376, 380; *Bing and Lauer v Van den Heever* 1922 TPD 279; *McNaught v Caledonian Hotel* 1938 TPD 577; *Chenille Industries v Vorster* 1953 (2) SA 691 (O); *Behr v Minister of Health* 1961 (1) SA 629 (SR); *Clark & Co v Lynch* 1963 (1) SA 183 (N); Cronjé and Heaton, 325; Van Wyk, 197; Lee and Honoré § 67; Cronjé, 195; Boberg, 200 n. 85; Hahlo, 210-212; Hutchison, Van Heerden, Van der Merwe, Visser in: Wille's Principles of South African Law, 135.

261 Lee and Honoré § 67; Barnard, Cronjé & Olivier, 195; Boberg, 200 n. 85; Hahlo, 211; De Vos, 1951 *SALJ* 424, 427.

It is thus noteworthy that a spouse always needs a court order, if he wants to withdraw the other spouse's competence. Since the obtaining of a court order will take more time generally than a notice published or given unilaterally by the non-contracting spouse, there remains a risk that in the meantime he will be bound for unreasonable purchases of household necessaries. The disadvantage of this procedure thus is that the contracting spouse can in the time before the application to the court bind the other spouse's credit without restriction and take further advantage of his competence.

Part B Chapter 1: General explanation

I. Historical background and *ratio legis*

1) Of § 1357 BGB [Germany]

a) Historical background

In 1900, when the "Bürgerliches Gesetzbuch" [BGB] was enacted, the then § 1357 BGB provided for the "Schlüsselgewalt[262]" of the wife. The wording of the statutory provision was as follows:

§ 1357 BGB:

> *The wife is entitled, within the sphere of her domestic activity, to manage the husband's affairs for him and to represent him. Juristic acts which she enters into within such sphere of activity are deemed to be entered into in the husband's name, if it does not appear otherwise from the circumstances.*
> *The husband may limit or exclude the right of the wife. If the limitation or exclusion appears to be an abuse of the husband's right, it may be annulled by the Guardianship Court upon the application of the wife. As against third parties the limitation or exclusion is effective only in accordance with § 1435 BGB.*

Similar to the capacity to bind the husband's credit in the South African legal system, § 1357 BGB constituted an exception to the wife's limited legal capacity[263]. The wife acted on behalf of her husband as his agent[264]. Only the husband was liable for the

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262 The term "Schlüsselgewalt" is an historic expression. The key was the symbol for the power in *rebus domesticis*. "Receiving the key" meant to become a housewife, see: *Schlegelberger*, 196, 243; *Brauneder*, 1446-1450. Today the expression is incorrect, because it does not take into account that § 1357 BGB does not distinguish between husband and wife and that the wife does not need an authorisation to be able to act on her husband's and on her own behalf. For this reason German literature has tried to find alternative expressions, see: *Büdenberger* FamRZ 1976, 662, 663; Beitzke/*Lüderitz* § 12 V and *Lüke* AcP 1978, 18; Palandt/*Diedrichsen* § 1357 no. 3; *Gernhuber*, 130; Erman/*Heckelmann* § 1357 no. 2. However in spite of the terminological incorrectness most writers still use the term "Schlüsselgewalt" notwithstanding the change in the meaning thereof, see: Münchner Kommentar/*Wacke* § 1357 no. 7; *Mikat*, Rechtsprobleme, 8; Wacke, FamRZ NJW 1979, 2585, 2586; *Binder*, 13.

263 Beitzke/*Lüderitz* § 12 V; *Lüke* AcP 1978, 18; *Gernhuber*, 130; Erman/*Heckelmann* § 1357 no. 2; Münchner Kommentar/*Wacke* § 1357 no. 7; *Mikat*, Rechtsprobleme, 8; *Wacke*, FamRZ NJW 1979, 2585, 2586; *Binder*, 13; *Büdenberger* FamRZ 1976, 662, 663; Palandt/*Diedrichsen* § 1357 no. 3.

264 Rolland/*Brudermüller* § 1357 no. 3; Münchner Kommentar/*Wacke* § 1357 no. 7.

legal transactions entered into by his wife. One reason for this competence was to enable the wife to fulfil her role as manager of the household and mother [§ 1356 I BGB[265]]. The other reason was to protect the third party, who could make the husband directly answerable, without being obliged to attach the wife's claim for housekeeping money[266]. Since § 1357 BGB only gave the wife the competence to bind the other spouse's credit (and not vice versa), it was very controversial as to whether this statutory provision was reconcilable with the equality clause in Article 3 II GG [German Grundgesetz (constitution)]. The majority opinion[267] answered this question in the affirmative, arguing that the reason for the differentiation was not the difference in sex between husband and wife but their different *functions* in a marriage.

On 1 July 1958 the then § 1357 BGB was amended. The new statutory provision provided as follows:

§ 1357 BGB

> *(1) The wife is entitled to take care of matters within the sphere of her domestic activities, with effect for the husband. Legal transactions undertaken by her within such sphere of activity confer rights and obligations upon the husband unless the circumstances indicate a different conclusion; if the husband is insolvent the wife shall also be liable.*
> *(2) The husband may limit or exclude the authority of the wife to take care of matters with effect for him; if there is insufficient ground for such limitation or exclusion, the Guardianship Court may, upon petition by the wife, set it aside. Such limitation or exclusion is effective as against third parties only in accordance with the provisions of § 1412 BGB.*

Two aspects had therefore changed. Firstly, the wife no longer acted as the representative of her husband[268]. Secondly, the wife also could be made answerable to the third party. She lost, therefore, the privilege that she could not be held liable for the debts she had incurred. Her liability was, however, subsidiary to that of the husband. She had the benefit of excussion[269], which means that she only had to pay for the debts if her husband was incapable of doing so.

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265 As to § 1356 BGB see below.
266 Rolland/*Brudermüller* § 1357 no. 3; Münchner Kommentar/*Wacke* § 1357 no. 7.
267 Rolland/*Brudermüller* § 1357 no. 2; Erman/Heckelmann § 1357 no. 1; Münchner Kommentar/*Wacke* § 1357 no. 5 no. 5 (1. ed.).
268 Rolland/*Brudermüller* § 1357 no. 1; Münchner Kommentar/*Wacke* § 1357 no. 4.
269 Rolland/*Brudermüller* § 1357 no. 1; Münchner Kommentar/*Wacke* § 1357 no. 4.

The current § 1357 BGB was enacted on 1 July 1977. The statutory provision now provides as follows:

§ 1357 BGB

(1) Each spouse is entitled to enter with effect for the other spouse into legal transactions for the appropriate provision of the necessities of life. By such legal transactions both spouses become entitled and liable, unless the circumstances indicate a different conclusion.
(2) Each spouse may limit or exclude the right of the other spouse to enter into legal transactions with effect for him; if sufficient cause is not shown for the limitation or exclusion, it may be set aside by the Guardianship Court upon application of the other spouse. As against third parties the limitation or exclusion is effective only in accordance with the provisions of § 1412 BGB.
(3) Subparagraph 1 is not valid when the spouses live separately.

Several modifications are worthy of note. Firstly, § 1357 BGB now applies irrespective of which of the spouses has entered into the legal transaction[270]. The legislature reacted to the modification of § 1356 BGB by providing a neutral formulation. Whereas, in former times § 1356 BGB prescribed that the wife was the manageress of the household, nowadays § 1356 provides that the household may be managed by either of the spouses. It is the agreement of both spouses which is decisive for the determination of the role of manager of the household[271]. Secondly, both spouses are jointly and severally liable and both are entitled. The wife has thus lost the benefit of excussion[272]. The enhancement of her liability was the correlative of the established formal equality between man and woman[273]. And thirdly, § 1357 BGB no longer refers to the household. Instead, the statutory provision speaks of the needs of the family[274]. The functional element has thus been replaced by a person-orientated term[275].

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270 *Mikat*, 9-22; Palandt/*Diedrichsen* § 1357 no. 3; Rolland/*Brudermüller* § 1357 no. 3; Münchner Kommentar/*Wacke* § 1357 no. 5.

271 Palandt/*Diedrichsen* § 1356 no. 1; Rolland/*Brudermüller* § 1356 no. 1; Münchner Kommentar/*Wacke* § 1356 no. 1.

272 Rolland/*Brudermüller* § 1357 no. 5; Münchner Kommentar/*Wacke* § 1357 no. 4.

273 Rolland/*Brudermüller* § 1357 no. 5; Münchner Kommentar/*Wacke* § 1357 no. 4.

274 The consequences of this new wording will be presented in Chapter 2 and 3 in detail.

275 Rolland/*Brudermüller* § 1357 no. 5; Münchner Kommentar/*Wacke* § 1357 no. 4. Until the decision of the Bundesverfassungsgericht of 3.10.1989 the question as to whether § 1357 BGB was reconcilable with the Grundgesetz was a disputed one. It is true that, contrary to the previous § 1357 BGB, the current § 1357 BGB does not draw a distinction depending upon which of the spouses has entered into the legal transaction. However, § 1357 BGB could be regarded as discriminating against married couples. If so, this would be irreconcilable with Article 6 I GG, which explicitly protects the family. The potential discrimination is to be found in the fact that only husband and wife are jointly and severally liable whereas an unmarried couple living together is not. The Bundesverfassungsgericht shared the opinion that § 1357 BGB is a rule which is not

b) Ratio legis

One controversial aspect is the *ratio legis* of § 1357 BGB. Whereas the minority opinion[276] argues that § 1357 BGB protects only the supplier, the majority opinion[277] is to the effect that the protection of the supplier is only a side effect: § 1357 BGB primarily enhances the creditworthiness of the family and thus enables the non-earning party to fulfil his chosen role as manager of the household. He thereby can fulfil such role, purchase household necessaries and enter into contracts without having the financial means to do so. The existence of the second debtor motivates the trader to enter into a contract with a non-solvent partner.

2) Of Article 166 ZGB [Switzerland]

a) Historical background

The capacity of the spouses to bind each other's credit developed differently in Switzerland. Before the Schweizer Zivilgesetzbuch [ZGB] was codified in 1907 the wife's capacity to bind her husband's credit was regulated expressly in thirteen cantons[278]. In the other Swiss cantons such capacity was accepted on the basis of

unproblematic. However in a solomonic decision the court held that § 1357 BGB does not infringe the Grundgesetz. It pointed to the differences between married and unmarried couples, which allow different regulations [see for example § 1356 BGB: this statute obliges only spouses to maintain each other either by supplying money or by managing a household. § 1357 BGB thus enables one spouse to fulfil his legally imposed obligations. Unmarried couples are however not obliged to maintain each other. Another example is the privileges of married couples in terms of tax law. A man and a woman living in a concubinage do not have such privileges]. Furthermore the court highlighted the possibility of excluding the operation of § 1357 BGB in terms of §1357 III BGB. As one will see the non-contracting spouse can withdraw the other spouse's competence without a court order. He thus has a very efficient means to escape from liability [see ch. 4]. Finally the court argued that § 1357 BGB is a rule that enables each spouse to supply the family with those articles which are necessary for the joint household. This advantage was regarded as the justification for the joint and several liability of married couples.

276 Münchner Kommentar/*Wacke* § 1357 no. 1 (1. ed.); *Mikat*, in: FS für Beitzke, 307 ; *Käppler*, 246, 252; *Walter*, in: JZ 1981, 601, 605; *Gernhuber* § 19 IV 3; *Wacke*, in: FamRZ 1980, 13, 16; *Holzhauer*, in: JZ 1977, 729, 731; *Bosch*, in: NJW 1987, 2617, 2627.

277 Münchner Kommentar/*Wacke* § 1357 no. 2 (3. ed.); Rolland/*Brudermüller* § 1357 no. 5; Soergel/*Lange* § 1357 no. 2; Palandt/*Diedrichsen* § 1357 no. 2; Erman/*Westermann* § 1357 no. 4; *Leipold*, in FS für *Gernhuber* 695, 702; *Lüke*, in: FS für *Bosch*,629, 636; Staudinger/*Hübner* § 1357 no. 10; *BVerfGE* 81 1,4 = FamRZ 1989 1273, 1275; *BGHZ* 94 1,4 = *BGH* JZ 1985 680, 681; BVerfG, FamRZ 1989, 1273 = NJW 1990, 175 = Fur 1990, 101.

278 *Arbenz*, 46 - 49; see also: *Braunschweig*, 7.

common law [Gewohnheitsrecht][279]. The wife was entitled to enter into those legal transactions which were necessary to manage the household. She could do so without the permission of her husband who was head of the family. The wife was the representative of her husband in respect of such transactions. Only the husband was a party to such a contract concluded by his wife. It was controversial whether the wife's capacity flowed from a tacit mandate or had to be regarded as a legal consequence of marriage[280].

In 1907 the ZGB was enacted. The wife's capacity to bind her husband's credit found its expression in Article 163 ZGB[281]. This statutory provision followed the traditional concept of the male-female role. In terms of Article 162 ZGB the husband was head of the family whereas the wife was manageress of the household[282]. Due to these different positions the husband had the unlimited capacity to enter into legal transactions whereas the wife's capacity was limited to those transactions which were necessary to fulfil her role as manageress of the household [Article 163 ZGB][283]. The correlatives of these capacities were the different liability regulations. The husband was liable for all legal transactions entered into by himself or his wife, whereas his wife was only liable if the husband was not capable of paying his debts[284]. Her liability was - like in Germany - subsidiary[285].

The current Article 166 ZGB was enacted in 1988. During its parliamentary debates the legislature dealt with the question of whether to abandon completely the spouse's capacity to bind the other spouse's credit or to maintain it. The first alternative had been chosen in Great Britain, Spain and Belgium. The second alternative was preferred in Sweden, France, Austria, Poland and Germany.

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279 *Arbenz*, 46 - 49; *Braunschweig*, 7.
280 *Lenz*, 23; *Arbenz*, 53.
281 The wording of Article 163 ZGB was as follows:
(1) The wife has the care of the continuous needs of the household as alternate to the husband.
(2) The husband is to be held liable for her legal transactions except for such legal transactions which, as perceived by third persons, exceed the scope of her care.
282 Züricher Kommentar/Hasenböhler Article 166 ZGB no. 3
283 *Huber*, 155.
284 Züricher Kommentar/*Hasenböhler* Article 166 ZGB no. 4.
285 Züricher Kommentar/*Hasenböhler* Article 166 ZGB no. 4.

The legislature decided to maintain a spouse's capacity to bind the other spouse's credit because Article 163 ZGB - as it then was - was regarded as a statutory provision of great practical value[286]. However the previous Article 163 ZGB had to be modified, because it infringed the equality clause in Article 4 II of the Swiss Constitution[287], since it drew a difference between husband and wife, which was justified only by the different sexes of the concerned parties. Furthermore Article 163 ZGB was not reconcilable with the new concept of marriage according to which husband and wife determine on their own which of them becomes manager of the household and which of them maintains the family with money[288]. The modification of the role understanding made it necessary to formulate the wording of Article 166 ZGB[289] in a way which did not take the sex of the acting spouse into account. Thus both spouses became entitled to represent the "marital partnership "[290].

Another question with which the legislature had to deal was how to achieve equality of powers between husband and wife. Two possibilities were conceivable: on the one hand it would have been possible to extend to the wife the unlimited capacity of the husband to act on behalf of the "marital partnership"; on the other hand it was possible to place upon the husband's capacity the same limitations as those attaching to the wife's capacity to bind her husband's credit. The Swiss legislature preferred the second option. The reason is that it was intended to reduce liability risks as far as possible[291]. A comprehensive capacity to bind the other spouse's credit is not reconcilable with such a target. The legislature therefore preferred to define the capacity to bind the other spouse's credit narrowly. Thus each spouse can bind the other spouse's credit only for legal transactions which fulfil the requirements of Article 166 ZGB.

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286 *Botschaft* 215.21.
287 Berger, 23.
288 Begleitbericht der *Expertenkommision* zum Vorentworf für die Änderung des ZGB 1976, 14.
289 The wording of Article 166 ZGB is as follows:
(1) During the cohabitation each spouse represents the marital partnership in respect of the continuous needs of the family.
(2) In respect of other needs a spouse can represent the marital partnership only:
1. if he was authorised either by the other spouse or by a judge
2. if the matter is extremely urgent as regards the interest of the marital partnership and the other spouse cannot consent due to illness, absence or similar reasons.
290 To the meaning of this formulation see ch. 1, 2.
291 Bulletin, *Ständerrat*, 1981, 82.

During the parliamentary debates the possibility of giving only the manager of the household the capacity to bind the other spouse's credit was also discussed[292]. This solution was adopted in the Austrian ABGB [§ 96 ABGB]. It was rejected however by the Swiss legislature in response to negative criticism of the Austrian doctrine[293] in respect of § 96 AGBGB. Austrian literature regards § 96 AGBGB as a statutory provision which has "failed its purpose". Such criticism points to legal uncertainty[294]. The other party to the contract cannot tell whether or not a contracting spouse is the manager of the household or whether (where there have been past dealings with the trader) the distribution of roles has changed in the meantime[295]. He bears the risk for circumstances he can neither know nor influence. § 96 AGBGB thus cannot encourage the trader to enter into the contract with a non-solvent spouse. At the moment when the trader enters into the legal transaction he cannot be sure of having a second debtor.

b) Ratio legis

The interpretation of Article 166 ZGB's *ratio legis* corresponds with those opinions espoused by the German literature[296]. Swiss doctrine and jurisprudence[297] refer partly explicitly to German authorities. Like in Germany the Swiss doctrine regards Article 166 ZGB as a statutory provision which primarily enables a spouse to fulfil his role as manager of the household. Similarly to § 1357 BGB, Article 166 ZGB enhances the creditworthiness of the contracting spouse by giving him the possibility of binding the other spouse's credit. The trader has a second debtor and will therefore enter into the contract even if the *contracting* spouse is non-solvent. The other spouse as additional debtor, gives the trader the security he needs to give credit to a non-solvent person. It

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292 See: Protokoll der *Nationalrätlichen Kommission*, I, Votum 466 and 473.

293 See for Austria: Rummel/*Pilcher* § 96 ABGB I no. 3, 5 ; *Rummel*, JBl 1976, 136, 137.

294 Protokoll der *Nationalrätlichen Kommission*, I, Votum 466 and 473.

295 Züricher Kommentar/*Hasenböhler* Article 166 ZGB no. 5

296 Münchner Kommentar/*Wacke* § 1357 no. 2 (3. ed.); Rolland/*Brudermüller* § 1357 no. 5; Soergel/*Lange* § 1357 no. 2; Palandt/*Diedrichsen* § 1357 no. 2; Erman/*Westermann* § 1357 no. 4; *Leipold*, in FS für *Gernhuber* 695, 702; *Lüke*, in: FS für *Bosch*,629, 636; Staudinger/*Hübner* § 1357 no. 10; *BVerfGE* 81 1, 4 = FamRZ 1989, 1273, 1275; *BGHZ* 94 1, 4 = *BGH* JZ 1985, 680, 681.

297 Bericht der *Expertenkommission*, 1560; *Hegnauer* § 18.04; *Hausheer*/Reusser/Geiser Article 166 no. 8 ZGB; *Berger*, 124; *Luzern*, Obergericht II, SJZ 1992, 169, 170. It is in general noteworthy that German doctrine and jurisprudence have a great influence in Switzerland.

is obvious that the spouse's capacity to bind the other spouse's credit is very advantageous for the trader, since he can rely on a second - often more solvent - debtor. This advantage however is regarded as a *side effect,* as in Germany, and not as the main *ratio* of Article 166 ZGB[298]. It is regarded as the correlative of the fact that a non-solvent spouse can fulfil his role as manager of the joint household without being obliged to act in the name of his partner.

II. The legal nature of § 1357 BGB and Article 166 ZGB

The legal nature of § 1357 BGB and Article 166 ZGB is similar. It therefore shall be dealt with in the same section.

In both countries § 1357 BGB and Article 166 ZGB are regarded as statutory provisions which have a "*sui-generis* legal nature"[299]. The reason for this qualification must be seen in the fact that on the one hand, both statutory provisions are similar to the rules of representation[300]. As in the law of representation a third person's credit is bound by the act of another person. The contract concluded by one person has thus effects for another person who is not involved in the conclusion of the contract. On the other hand, the differences between the capacity to bind the other spouse's credit on the one hand, and § 1357 BGB and Article 166 ZGB on the other, are noteworthy. In both countries it is required in terms of § 164 BGB (for Germany) and in terms of Article 32 OR (for Switzerland) that, firstly, the representative act *with the authority of* the *principal* and secondly that the representative act *in the name* of the principal and not in his own name[301]. By comparison § 1357 BGB and Article 166 ZGB give each spouse a legal authority and do not require that the spouses act in each other's

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298 *Hegnauer* § 18.04; *Hausheer*/Reusser/Geiser Article 166 no. 8 ZGB; *Berger*, 124; *Luzern*, Obergericht II, SJZ 1992, 169, 170; unclear: Züricher Kommentar/*Hasenböhler* Article 166 ZGB no. 7.

299 For Germany: Münchner Kommentar/*Wacke* § 1357 no. 10 (3. ed.); Rolland/*Brudermüller* § 1357 no. 5; Soergel/*Lange* § 1357 no. 2; Palandt/*Diedrichsen* § 1357 no. 2; Erman/*Westermann* § 1357 no. 4; *Wacke*, FamRZ 1977, 505.
For Switzerland: *Braunschweig*, 13, 14; *Reusser*, Wirkung der Ehe im allgemeinen II, 34, 36, in: Das neue Eherecht; *Keller*, 70; *Arbenz*, 43, *Hausherr*/Reusser/Geiser Article 166 no. 5 ZGB.

300 For this reason some German authorities qualify § 1357 BGB as a rule of representation, see: AG *Lampertheim* NJW RR 1987, 1155; Palandt/*Heinrichs* Einf. vor § 164 no. 5; *Lüke* AcP 178, 1, 19; *Müller*, AcP 113, 115.

301 For Germany: Palandt/*Heinrichs* § 164 no. 1.
For Switzerland: *Stofer* Article 32 OR no. 3.

name[302]. Another difference between representation in terms of Article 32 OR and Article 166 ZGB is that the representative in general acts only on behalf of *somebody else*, which is not the case in terms of § 1357 BGB and Article 166 ZGB. In terms of these statutory provisions the spouse acts on his own *and* on his spouse's behalf[303]. As a consequence the non-acting spouse becomes liable and entitled although the acting spouse did not contract in the name of his partner. Furthermore in terms of § 1357 BGB and Article 166 ZGB both spouses may be held liable for the contractual debts whereas, in terms of § 164 BGB and Article 32 OR only the *represented* spouse is answerable for such debts[304]. Finally, in cases falling within the ambit of § 1357 BGB and Article 166 ZGB, the consequences for the other spouse do not depend upon the *intention* of the acting spouse but flow from statutory provisions[305]. Contrary to the position under Article 32 OR and § 164 BGB, the non-contracting spouse becomes automatically liable for the debts incurred by his partner in the circumstances set out by § 1357 BGB and Article 166 ZGB.

In spite of these differences between the rules of representation on the one hand and the capacity to bind the other spouse's credit on the other, German[306] and Swiss[307] authorities compare the capacity to bind the other spouse's credit with the rules governing representation in partnerships, where each partner can contract on his own behalf and on behalf of his partner. The phenomenon that one spouse becomes party to a contract concluded by the other spouse would therefore result from the fact that spouses are members of the "marital partnership" which is represented by the contracting spouse. The acting spouse is thus regarded as the "manager" of the

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302 For Germany: Münchner Kommentar/*Wacke* § 1357 no. 2 ; Rolland/*Brudermüller* § 1357 no. 5; Soergel/*Lange* § 1357 no. 2; Palandt/*Diedrichsen* § 1357 no. 2; Erman/*Westermann* § 1357 no. 4.
For Switzerland: Züricher Kommentar/*Hasenböhler* Article 166 no. 12 ZGB.

303 For Germany: Münchner Kommentar/*Wacke* § 1357 no. 2 ; Rolland/*Brudermüller* § 1357 no. 5; Soergel/*Lange* § 1357 no. 2; Palandt/*Diedrichsen* § 1357 no. 2; Erman/*Westermann* § 1357 no. 4.
For Switzerland: Züricher Kommentar/*Hasenböhler* Article 166 no. 12 ZGB.

304 Münchner Kommentar/*Wacke* § 1357 no. 2.

305 Rolland/*Brudermüller* § 1357 no. 5.

306 Beitzke-*Lüderitz*, 89; Erman/*Heckelmann* § 1357 no. 6; Palandt/*Diedrichsen* § 1357 no. 3; *Kaemmerer*, FamRZ 1968, 10; Münchner Kommentar/*Wacke* § 1357 no. 10; Soergel/*Lange* § 1357 no. 9; *Lüke*, AcP 178 (1978), 11, 19; *Käppler*, AcP 179 (1979), 245, 273; AG *Lampertheim*, NJW 1987, 1155.

307 Haushern/Reusser/Geiser Article 166 no. 5 ZGB; *Reusser*, Wirkungen der Ehe im allgemeinen, in: Das neue Eherecht, 34, 35.

"marital partnership"[308], the other spouse as the liable partner. The reason for this analogy must be seen, in Switzerland, in the wording of Article 166 ZGB. Article 166 ZGB speaks explicitly of "ehelicher *Gemeinschaft*" ("marital *partnership*"). Article 166 ZGB therefore indicates that in cases falling within its ambit the spouses have to be regarded as partners of the "marital partnership"[309]. In Germany such inference from the wording of § 1357 BGB cannot be made, because § 1357 BGB speaks only of the needs of the "family". However reference is made to the wording of Article 166 ZGB in order to maintain the viewpoint that § 1357 BGB is comparable with the rules governing representation in partnerships[310].

It must be pointed out that such explanation of the legal nature of § 1357 BGB and Article 166 ZGB is not entirely convincing. The difference between the rules governing the representation in partnerships and Article 166 ZGB is that in the former case the contracting partner has to act *in the name* of the *partnership*. The third person must be able to recognise that the partner wants to contract on behalf of the partnership. This is the case when the partner explicitly acts *in the name* of the partnership or when such intention was obvious to the third person, because it appears from the circumstances [e.g. the partner uses the letter-head of his firm]. In terms of § 1357 BGB and Article 166 ZGB, on the contrary, it is irrelevant in which name the spouse acts. Even if the other party cannot recognise that the person is married or that the spouse wants to act on behalf of his partner, the non-contracting spouse becomes

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308 It is even spoken of a "Prokura".

309 *Hausherr*/Reusser/Geiser Article 166 no. 5 ZGB; Züricher Kommentar/*Hasenböhler* Article 166 no. 12 ZGB.

310 Münchner Kommentar/Wacke § 1357 no. 10 n. 29. The consequence of such an analogy is that many rules of the law of representation are applied by analogy. One example has already been pointed out (see part 1, ch. 1, 2). In Germany § 165 BGB is applied if a spouse with limited legal capacity contracts as the representative of a third person (in Germany marriage does not entail full legal capacity). § 165 BGB provides that a person with such capacity can act as a representative and thereby bind somebody else. The contract thus has effect only for the represented person with full capacity but not for the contracting person. A person with limited legal capacity is therefore able to act as representative. This rule is applied by analogy to § 1357 BGB. Contrary to sections 17 (5) and 23 (5) of the Matrimonial Property Act 88 of 1984 it is therefore possible that the contract between the contracting spouse and the trader could be invalid and that nonetheless the other spouse becomes party to the contract. It has already been pointed out (see: part 1, ch. 1, 2) that this solution is not conceivable in South Africa because sections 17 (5) and 23 (5) of the Matrimonial Property Act 88 of 1984 follow a strict concept of expansion of legal consequences. In terms of such statutes it is necessary that the contract between the contracting spouse and the trader be valid in order to have consequences for the other spouse.

party to the contract. It must therefore be borne in mind that this comparison is at best only an imperfect analogy.

Chapter 2: Requirements of § 1357 BGB and Article 166 ZGB

I. General requirements of § 1357 BGB and Article 166 ZGB

Both § 1357 BGB and Article 166 ZGB require an existing lawful marriage, the cohabitation of the spouses and that the purchased item is respectively a necessity of life (§ 1357 BGB) or a need of the family (Article 166 ZGB). In order to avoid repetition these requirements will be presented together.

1) Valid and lawful marriage

§ 1357 BGB and Article 166 ZGB require a valid and lawful marriage[311]. This requirement must also be met in respect of those legal transactions which are concluded in anticipation of the marriage, for example when prospective spouses purchase household necessaries in respect of their future marriage, they do not bind each other's credit as they would following the marriage. Parties to an engagement thus do not have the competence to bind each other's credit[312]. The moment when the contract is concluded is thus decisive and not the purpose of the legal transaction[313]. The subsequent marriage has no effect on the liability of the non-contracting party. Such marriage cannot be regarded as the "ratification" by the non-contracting spouse of the contract entered into by the other spouse prior to the marriage[314].

Where grounds of voidability exists the position is as follows:

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311 For Germany: Soergel/*Lange* § 1357 no. 4; Münchner Kommentar/*Wacke* § 1357 no. 13.
For Switzerland: *Wirthlin* ZGJV 129 (1993), 280, 281; *Hausheer*/Reusser/Geiser Article 166 no. 109 ZGB; Berner Kommentar/*Lemp* Article 163 no. 4 ZGB; *Arbenz*, 77; *Lenz*, 32; Züricher Kommentar/*Hasenböhler* Article 166 no. 19 ZGB.

312 See for Germany: Soergel/*Lange* § 1357 no. 4; Münchner Kommentar/*Wacke* § 1357 no.13.
See for Switzerland: *Hausheer*/Reusser/Geiser Article 166 no. 109 ZGB; Berner Kommentar/*Lemp* Article 163 no. 4 ZGB; *Arbenz*, 77; *Lenz*, 32; Züricher Kommentar/*Hasenböhler* Article 166 no. 19 ZGB.

313 For Germany: Erman/Heckel*mann* § 1357 no. 7.
For Switzerland: *Arbenz*, 77.

314 For Germany: Soergel/*Lange* § 1357 no. 4; Münchner Kommentar/*Wacke* § 1357 no. 13.

The German code contains in §§ 17-22 EheG a catalogue of "Nichtigkeitsgründen" for a marriage[315]. A similar regulation is to be found in terms of Article 120 ZGB for the Swiss legal system. Although both codes speak of "nichtig" (void) the circumstances enumerated in these statutory provisions do not actually entail a *void* marriage. The marriage is merely *voidable*. Until such time as the court has declared that the marriage is void, the marriage is regarded as valid. The judgement has effect *ex nunc*. The declaration has therefore no effect on the validity of the legal transactions in terms of § 1357 BGB and Article 166 ZGB. The non-contracting spouse is jointly and severally liable. The wording of §§ 17 - 22 EheG and Article 120 ZGB are therefore somewhat misleading in this regard[316]. A marriage is void only in the case of very severe infringements of marriage law, such as the "marriage" of two people of the same sex or when the couple does not marry in the presence of a registrar[317].

2) Protection of good faith as an exception

If spouses enter into a contract they bind, in terms of § 1357 BGB and Article 166 ZGB, the other spouse's credit, provided that the transaction falls within the ambit of such statutory provisions. It is not necessary that a spouse act in the name of his partner. The non-contracting spouse automatically becomes a party to the contract. On the contrary an unmarried person must always act *in the name* of his partner if the partner is to become a party to the contract. It is therefore necessary that the non-contracting party is *represented* by the acting person. The question that arises is whether an exception can be made where the contracting party acts only in his own name but the trader reasonalby believes that the contracting party is married, because

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315 See for instance § 17 EheG who declares a marriage "nichtig" if it has not been concluded in the required form in terms of § 13 EheG (each spouse must consent personally in the marriage, at the same time and in presence of a registrar). See furthermore § 18 EheG which provides that a marriage is void if one spouse did not have legal capacity at the moment of conclusion. See § 20 EheG which provides that the marriage is "nichtig" if the one spouse is already married. As has been pointed out, in spite of the wording, a marriage is only voidable in these cases.

316 See for the German code § 23 EheG which provides that nobody can refer to the "Nichtigkeit" of a marriage, unless the marriage has been declared as void by court order.

317 German and Swiss literature speak of a not-existing marriage (*matrimonium non existens*).
For Germany: Palandt/*Diedrichsen* vor § 16 EheG no 1; RGZ 133, 166, 168.
For Switzerland: Tuor/*Schnyder* § 21 Nr. 2; *Hegnauer* § 7.04; Züricher Kommentar/*Egger* Article 120 no. 2 ZGB.

either the contracting person or the non-contracting person gives him reason to believe that the contracting person is married (for instance the contracting person speaks of "his spouse", wears a wedding ring or was only recently divorced). In such a case the trader might give credit to the contracting "spouse", only because he believes in good faith that such person is married. The question that thus arises is whether a *bona fide* trader should be protected by applying the principle of good faith to the requirement of a valid marriage[318].

§ 1357 BGB and Article 166 ZGB would apply, although there is no valid marital relationship between "husband" and "wife". The other "spouse" thus would become a party to the contract irrespective of whether or not the contracting "spouse" acted on his behalf. Both "spouses" would be jointly and severally liable for the debt incurred[319].

It is clear that the behaviour of the contracting "spouse" only cannot be regarded as sufficient in order to apply the principle of good faith to the requirements of § 1357 BGB and Article 166 ZGB. Otherwise the principle of good faith would infringe the right of a *non-involved* (third) person. But is it possible to apply § 1357 BGB and Article 166 ZGB by analogy if the non-contracting "spouse" gives the trader reason to believe that the person is married?

In both countries this question is answered in the negative[320]. In Germany it is pointed out that § 1357 BGB is a constitutionally problematic statutory provision[321], which must therefore be interpreted in a restrictive way. An extended interpretation in respect of unmarried couples is thus not possible. Furthermore it is argued in Germany and in Switzerland that the effects of § 1357 BGB and Article 166 ZGB are to be regarded as a legal incident of marriage[322]. The existence of a marriage is

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318 This is propounded by a minority opinion in Germany and Switzerland.
For Germany: *Brinker*, 75.
For Switzerland: *Vogt*, Vertretung der ehelichen Gemeinschaft, in: Die eheähnliche Gemeinschaft im Schweizer Recht, 45, 48.

319 For Germany: *Brinker*, 75.
For Switzerland: *Vogt*, Vertretung der ehelichen Gemeinschaft, in: Die eheähnliche Gemeinschaft im Schweizer Recht, 45, 48.

320 For Germany: Rolland/*Brudermüller* § 1357 no. 10; *Dörr*, NJW 1989, 813; Palandt/*Diedrichsen* § 1357 no. 10: LG Tübingen, FamRZ 1984, 50.
For Switzerland: Züricher Kommentar/*Hasenböhler* Article 166 no. 22; 23 ZGB; *Hausheer*/Reusser/Geiser Article 166 no. 18 ZGB *Wirthlin* ZGJV 129 (1993), 280, 281; Berner Kommentar/*Lemp* Article 163 no. 4 ZGB; *Arbenz*, 77; *Lenz*, 32.

321 *Binder*, 23.

322 For Germany: Rolland/*Brudermüller* § 1357 no. 10; Palandt/*Diedrichsen* § 1357 no. 10.

therefore the "raison d' être" of the capacity and thus it is required in each case that there be an existing and valid marital relationship. Consequently in Switzerland and in Germany the trader bears the risk if he is in good faith in respect of the belief of the existence of a marriage.

3) Living together

§ 1357 BGB and Article 166 ZGB require that the spouses "live together". They live together if they have a common household[323]. The common household is the expression of the marital relationship[324]. Spouses are in terms of § 1353 BGB and Article 159 ZGB obliged to keep a common household[325].

a) Criteria to assume a cessation

The question arises when a cessation of the cohabitation can be approved.
The responses in Germany and Switzerland are different.

aa) The answers in Switzerland

In Switzerland two situations have to be distinguished:

aaa) The legal separation by court order

In terms of Article 146 II ZGB spouses become legally separated by court order when there is sufficient ground for a divorce but the spouses prefer to have a legal separation. Instead of divorcing the spouses the judge separates them. Such legal separation is regarded as sufficient to suspend the provisions of Article 166 ZGB[326].

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323 For Switzerland: Züricher Kommentar/*Hasenböhler* Article 166 no. 22, 23 ZGB.
Frank § 7.2 no. 10; *Hegnauer* § 18.05; Züricher Kommentar/*Hasenböhler* Article 166 no. 25 ZGB; *Hausheer*/Reusser/Geiser Article 166 no. 18 ZGB. Swiss literature does not mention the possibility that spouses live together without having a common household. For example actors who live together but without a permanent place of residence. In this case the legal situation in Switzerland is not clear. The German literature on the contrary refers to § 1567 BGB which provides clear criteria for the definition of cohabitation and separation, see below.

324 BGE 112 II 398, 49 II, 449.

325 For Switzerland: BGE 112 II 398, 49 II, 449; *Botschaft* 211.
For Germany: Palandt/*Diedrichsen* § 1353 no. 6; RGZ 53, 340.
§ 1353 BGB and Article 159 ZGB oblige the spouses to keep a *consortium vitae*, see for Germany Palandt/*Diedrichsen* § 1353 no. 1 and for Switzerland BGE 112 II 398.

326 *Bühler*/Spühler Article 147 and 148 no. 12 ZGB; *Hausheer*/Reusser/Geiser Article 166 no. 30 ZGB; Petipierre/*Hausheer*/Guinard, 29. The question of the consequences when spouses are legally but not actually separated is not discussed in Switzerland.

bbb) The de facto separation

In the case of a non-legal separation the question arises as to which requirements must be fulfilled in order to assume the termination of the cohabitation in terms of Article 166 ZGB.

The Swiss writers[327] who refer to this question do not give a clear answer, because they do not mention *any* requirements for a separation in terms of Article 166 ZGB. Their expositions are cryptic. While pointing out that cohabitation does not terminate with a mere physical separation, such writers however do not identify any further criteria which have to be fulfilled in this regard, i.e. subjective elements. The legal situation is therefore unclear.

Examples to be found in the Swiss literature of circumstances not giving rise to a termination of cohabitation are the interruption of the cohabitation of the spouses due to imprisonment or a long term holiday[328].

bb) The answers in Germany

The question as to when one can speak of a separation for the purposes of § 1357 III BGB is answered in two different ways by the German literature.

One opinion[329] proposes the application of the criteria set out in § 1567 BGB, which is a statutory provision which applies to divorce. It defines in which cases it is tenable to assume a separation in terms of § 1565 II BGB[330]. § 1567 BGB requires that (1) the spouses do not live together in a domestic community and (2) that at least one of them refuses to live in it, *because* (3) he no longer wishes to maintain the *consortium vitae*. Thus, both an *objective* and a *subjective* element, as also a *reason* underlying the subjective element, are necessary for the purposes of § 1567 BGB.

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327 Only Züricher Kommentar/*Hasenböhler* Article 166 no. 22, 23 ZGB; *Hausheer*/Reusser/Geiser Article 166 No. 18 ZGB deal with these problems. All other authorities remain silent.

328 Züricher Kommentar/*Hasenböhler* Article 166 no. 23 ZGB; *Hausheer*/Reusser/Geiser Article 166 No. 18 ZGB.

329 Bastian/*Roth-Stielow*/Schmeidbuch § 1357 no. 10; Münchner Kommentar/*Wacke* § 1357 no. 44; *Ambrock*, Bem. VI; *Gernhuber* § 19 IV 10; *Mikat*, Rechtsprobleme,38.

330 § 1565 II, 1 BGB provides that the spouses must have lived apart for one year in order to become divorced. § 1567 II, 2 BGB provides exceptions to such principle if the requirement of a one year separation is unreasonable.

Another opinion[331] refers to the previous § 48 EheG, which was the predecessor of § 1567 BGB. The requirements of § 48 EheG are met when the spouses do not live together in a domestic community and when one of them no longer wants to maintain such domestic community. § 48 EheG demands also an *objective* and a *subjective* element. In contrast to § 1567 BGB, § 48 EheG does not require any reason why one spouse seeks the separation[332]. It is sufficient that one spouse refuses to cohabit.

It is thus obvious that for neither of the statutory provisions, is the fact that the spouses live physically separated sufficient.

It is submitted that the second mentioned opinion (§ 48 EheG) is preferable, because contrary to § 1567 BGB and § 48 EheG, §1357 BGB is not a rule of divorce law[333]. Whereas in divorce law it is important to know the reason for the separation of husband and wife in order to determine whether the spouses are estranged, this requirement seems to be unnecessary in the case of § 1357 BGB.

If one thinks of the borderline cases which were mentioned in the above analysis of the South African situation[334], one comes to the following conclusion: if the spouses live apart because one of them is in prison, one cannot speak of a separation in terms of § 1357 III BGB, since the requirement that one of the spouses does not want to re-establish the domestic community is not met [subjective element]. One comes to the same result in the case where one spouse goes on a long trip around the world or joins the army. On the other hand, it is possible to speak of a separation when the spouses still live in the same dwelling, provided that they have stopped any activity which could be interpreted as the expression of a common household[335]. Therefore § 1357 III BGB may also apply in the case of spouses living under the same roof[836].

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331 Soergel/*Lange* § 1357 no. 18; Rolland/*Brudermüller* § 1357 no. 52; *Büdenberger*, in: FamRZ 1976, 662, 669; Palandt/*Diedrichsen* § 1357 no. 10.

332 Schwab, Ehescheidungsrecht, no. 116-119; Soergel/*Lange* § 1357 no. 18; Rolland/*Brudermüller* § 1357 no. 52; *Büdenberger*, in: FamRZ 1976, 662, 669; Palandt/*Diedrichsen* § 1357 no. 10.

333 Palandt/*Diedrichsen* § 1357 no. 1; Rolland/*Brudermüller* § 1357 no. 1; Münchner Kommentar/*Wacke* § 1357 no. 1; Soergel/*Lange* § 1357 no. 1.

334 See: ch. 2, III, 2.

335 For example if the spouses still have sexual intercourse or if they continue to use household necessaries in common. See furthermore: Münchner Kommentar/*Wolf* § 1567 no. 29.

b) Protection of good faith in respect of the existence of a common household

If spouses do not live together any longer the question arises whether a *bona fide* supplier who has reason to believe that the spouses still live together is protected[337]. The consequence of protection would be that such a trader could rely on § 1357 BGB and on Article 166 ZGB respectively to hold the non-contracting spouse liable.

aa) The German literature

In Germany it is accepted that this question is to be answered in the negative[338]. The mere fact of whether or not the spouses still live together is only relevant. An extended interpretation is thus not permissible.

The justification given for this opinion is that the cohabitation is regarded as the "raison d'être" for the capacity to bind the other spouse's credit[339]. Only if the spouses live together can the common liability be justified by the common profit[340]. Furthermore it is pointed to § 1357 III BGB. Such subparagraph expressly requires the cohabitation of the spouses. It is argued that such clear wording does not leave room for any extended interpretation[341].

bb) The Swiss literature

In Switzerland the majority of Swiss writers[342], referring to the previous Article 163 ZGB, answered the question whether or not a *bona fide* supplier should be protected,

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Those authors who prefer to refer to § 1567 BGB in order to determine the separation (see above) can rely directly on § 1567 I, 2 BGB which provides that spouses can be "separated" in the same dwelling.

336 Bastian/*Roth-Stielow*/Schmeidbuch § 1357 no. 10; Münchner Kommentar/*Wacke* § 1357 no. 45; *Gernhuber* § 19 IV 10; *Mikat*, Rechtsprobleme, 38 ff.; Palandt/*Diedrichsen* § 1357 no. 10; Rolland/*Brudermüller* § 1357 no. 53; Soergel/*Lange* § 1357 no. 18.

337 For example day in and day out for several years, the wife has purchased the provisions of life on credit in the same shop, which purchases have always been paid for by her husband at the end of each month. In the case of such a longstanding contractual relationship the trader may be caught unawares by the fact that the spouses have ceased to live together and thereby have lost their capacity to bind the other spouse's credit.

338 Palandt/*Diedrichsen* § 1357 no. 10; Rolland/*Brudermüller* § 1357 no. 53; *Gernhuber* § 19 IV 10; *Dörr*, NJW 1989, 813; LG-*Tübingen*, FamRZ 1984, 50; critical: Münchner Kommentar/*Wacke* § 1357 no. 45.

339 LG-*Tübingen*, FamRZ 1984, 50.

340 Rolland/*Brudermüller* § 1357 no. 53; *Gernhuber* § 19 IV 10; *Dörr*, NJW 1989, 813; LG-*Tübingen*, FamRZ 1984, 50; Münchner Kommentar/*Wacke* § 1357 no. 45.

341 *Binder*, 32.

342 Berner Kommentar/*Lemp* Article 163 no. 6, 23; *Braunschweig*, 25; *Brasset* SJK, 57 Karte 104, 2.

in the affirmative, whereas the prevailing opinion[343] in respect of Article 166 ZGB answers it in the negative[344].

The reason for the change of opinion is not clear. The uncertainty arises because Swiss literature does not discuss this problem in depth. The only justification for the former opinion is the argument that such protection is "equitable"[345]. The second point of view, however, emphasises the requirement implicit in Article 166 ZGB that both spouses should profit from the performance. This requirement is regarded as sufficient justification to deny any protection of the good faith of a third person in respect of the existence of a common household. It is argued that in the case of a separation this argument would no longer be valid.[346]. Both arguments are however applicable to both the previous Article 163 ZGB and to the current Article 166 ZGB. It is therefore unclear why in former times the majority of writers affirmed the protection of the good faith of a third person (and rejected the argument underpinning the second opinion), whereas the majority of modern authorities now deny this protection (and dismiss the argument which was in former times regarded as convincing). One reason for this development might be seen in the wording of Articles 163 and 166 ZGB respectively. Only the latter article speaks *explicitly* of cohabitation. One could therefore argue that only Article 163 ZGB left room for an extended interpretation of the requirement of cohabitation, whereas the wording of Article 166 ZGB is clear in this regard.

It is therefore noteworthy that the current Swiss and German doctrines deny any protection of good faith of third persons in respect of the existence of a joint household.

c) Effects of a cessation of cohabitation

As has already been pointed out above[347], German and Swiss law distinguish between the termination of the capacity to bind the other spouse's credit and the suspension of

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343 *Hegnauer* § 18.05; *Grossen*, 17; Petipierre/*Hausheer*/Guinard SJK, 1988, 9, Karte 10.45.9; *Wessner*, 92; *Frank* § 7.2 no. 10; *Reusser*, Die Wirkungen der Ehe im allgemeinen, in: Das neue Eherecht, 50; *Hausheer*/Reusser/Geiser Article 163 no. 33 ZGB; *Stettler*, 87 no. 175; dissenting: *Deschenauy/Steinauer*, 73.

344 The new wording of Article 166 ZGB does not give any reason for this change of opinion.

345 *Braunschweig*, 25.

346 Züricher Kommentar/*Hasenböhler* Article 166 no. 28 ZGB.

347 See part 1, ch. 2, III.

such capacity. The capacity terminates with the end of the marriage. The termination of the cohabitation of the spouses entails merely the suspension of each spouse's capacity to bind the other spouse's credit[348]. The capacity is reactivated with effect *ex nunc* when the spouses resume cohabitation[349]. Those legal transactions which have been entered into by one of the spouses during the period of separation cannot bind the other spouse[350]. Since the capacity still exists during the period of termination (albeit in a state of suspension), it remains possible to withdraw such capacity in terms of § 1357 II BGB[351].

d) Acting in one`s own name

If a legal transaction falls within the ambit of § 1357 BGB, Article 166 I ZGB or Article 166 II ZGB, the contracting spouse can bind the other spouse's credit by acting *in his own* name only. In contrast to the rules of representation in terms of § 164 BGB and Article 32 OR where a person must make clear that he is acting on behalf of somebody else[352], the contracting spouse is not obliged to act in the name of his partner[353]. Both spouses become jointly and severally liable in respect of a legal transaction which falls within the scope of the capacity to bind the other spouse's credit[354].

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348 Palandt/*Diedrichsen* § 1357 no. 10; Rolland/*Brudermüller* § 1357 no 53; Münchner Kommentar/*Wacke* § 1357 no 14; Soergel/*Lange* § 1357 no. 18. See too: ch. 2, III.

349 Palandt/*Diedrichsen* § 1357 no. 10; Rolland/*Brudermüller* § 1357 no. 53; *Gernhuber* § 19 IV 10; Münchner Kommentar/*Wacke* § 1357 no. 45.

350 Palandt/*Diedrichsen* § 1357 no.10; Rolland/*Brudermüller* § 1357 no.53; Münchner Kommentar/*Wacke* § 1357 no.14; Soergel/*Lange* § 1357 no.18.

351 Rolland/*Brudermüller* § 1357 no. 53.

352 § 164 BGB and Article 32 OR provide that a declaration of intention which a person makes *in the name* of a principal within the scope of his agency operates both in favour of and against the principal. § 164 II BGB provides explicitly that if the intention to act in the name of another is not apparent, the agent's absence of intention to act in his own name is not taken into consideration.

353 For Germany: Münchner Kommentar/*Wacke* § 1357 no. 10 (3. ed.); Rolland/*Brudermüller* § 1357 no. 5; Soergel/*Lange* § 1357 no. 2; Palandt/*Diedrichsen* § 1357 no. 2; Erman/*Westermann* § 1357 no. 4; *Wacke*, FamRZ 1977, 505.
For Switzerland: Züricher Kommentar/*Hasenböhler* Article 166 no. 37 ZGB; *Hausheer*/Reusser/Geiser Article 166 no. 67.

354 See ch. 4, I.

II. The special requirements of § 1357 BGB and Article 166 ZGB

1) Requirements of § 1357 BGB

§ 1357 BGB speaks of "legal transactions for the appropriate provision of the necessities of life". The following section will clarify these requirements.

a) Necessities of life

It is accepted in German literature and jurisprudence that the term "necessities of life" refers to the spouses' obligations of reciprocal maintenance[355]. The reason for this assumption has to be seen in the *ratio legis* of § 1357 BGB. In terms of § 1360 BGB spouses are mutually obliged to support the family adequately from their work and property. As a rule one spouse fulfils his obligation to contribute to the support of the family by managing the household. § 1357 BGB enables the non-earning spouse to fulfil his obligations of reciprocal maintenance in terms of § 1360 BGB, because § 1357 BGB enhances the creditworthiness of such spouse by giving the trader a second debtor[356]. § 1357 BGB and § 1360 BGB thus have to be read together.

Guidelines for the interpretation of § 1357 BGB can be found in §§ 1610 II BGB and 1360 a II[357] BGB. The term "necessities of life" is used to include all needs which fall under the obligation to maintain the other spouse[358]. Worth highlighting are household

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355 Rolland/*Brudermüller* § 1357 no. 15; *Mikat,* Rechtsprobleme, 29; *Henrich*, comment to BGH judgement v. 27.11.1991, in: JZ 1992 , 587, 588; *Schwab no.* 141; Münchner Kommentar/*Wacke* § 1357 no. 19; *Henrich.*, in: FamRZ 1987, 505, 522; *Käppler*, AcP 179 (1979), 245, 276; *Bartel*, 38; *Peter*, NJW 1993, 1949, 1950; *BVerfGE*, FamRZ 1989, 1273; BGHZ, 94, 1 ; OLG *Schleswig*, FamRZ 1994, 445. Critical: *Schwab*, in: FamRZ 1978, 289, 290. *Diedrichsen*, NJW 1977, 217, 221; *Diedrichsen*: *Lange*, in: FS für Kraft, 102; *Büdenberger*, in: FamRZ 1976, 662, 668; BGH, JZ 1992, 586; BGH, FamRZ 1985, 681 with comment by *Böhmer*, JR 1986, 24.

356 See ch. 1, 2.

357 § 1360 a BGB determines the extent of the obligation of the spouses' maintenance. § 1360 a BGB provides that the adequate financial support includes all that is required according to the circumstances of the spouses to meet the household expenses and to provide for the personal needs of the spouses and the necessities of life for those of their children who are entitled to support. § 1360 a II BGB is applicable for spouses only but refers to § 1613 II BGB. § 1613 II BGB refers to the obligation to maintain relatives. § 1613 II BGB provides that the obligation of maintenance might include exceptional, unusual and expensive necessities, provided that they do not go beyond the financial capacity of the paying person. See furthermore: Rolland/*Brudermüller* § 1357 no. 15; *Mikat,* Rechtsprobleme, 29; *Henrich*, comment to BGH judgement of 27.11.1991, in: JZ 1992, 587, 588; *Schwab no.* 141; Münchner Kommentar/*Wacke* § 1357 no. 19; *Henrich.*, in: FamRZ 1987, 505, 522; *Käppler*, AcP 179 (1979), 245, 276.

358 *BVerfGE*, FamRZ 1989, 1273; BGHZ, 94, 1 ff.; OLG *Schleswig*, FamRZ 1994, 445.

necessaries[359], debts for medical treatments[360], travel expenses, expenses for cultural, personal and political needs[361]. Even the cost of luxury articles might be included[362]. However the term does not encompass those expenses which fall into the professional sphere of one spouse[363].

b) The third person's point of view

Whether an item falls within the sphere of the "necessities of life " must be decided from *a third's party point of view*[364]. One has to investigate the spouse's standard of living. Spouses who live beyond their means and create in the minds of third parties the impression that they are wealthy, can thus be held liable for purchases they cannot in reality afford[365]. It is not necessary that the family really needs the purchased article[366]. It is relevant only that the concrete item is in general necesssary for a family living according to the relevant standard. The fact for example that a family is already sufficiently supplied with goods or that the purchasing party is provided with enough money by his spouse is irrelevant. In German law it would therefore not make any difference whether, in the circumstances existing in the *Reloomel v Ramsay*[367] case, Ms. Ramsay was already supplied with an ample store of silk dresses or with enough money to buy such dresses. The only requirement is that from the purchaser's point of view the spouse entered into the legal transaction *in order* to provide the family Ramsay with silk dresses[368]. Whether such transactions are objectively necessary is immaterial, because § 1357 BGB only speaks of legal transactions for the provision of

359 Rolland/*Brudermüller* § 1357 no. 15; Münchner Kommentar/*Wacke* § 1357 no. 19.

360 See especially: BGHZ, 94, 1 = BGH, FamRZ 1985, 681 with comment by *Böhmer*, JR 1986, 24; BGH, JZ 1992, 586; *Henrich*, comment to BGH judgement v. 27.11.1991, in: JZ 1992, 587, 588.

361 A comprehensive presentation of examples can be found in: Münchner Kommentar/*Wacke* § 1357 no. 21; Staudinger/*Hübner* § 1357 no. 17; *Bartel*, 40; Rolland/*Brudermüller* § 1357 no. 27; *Käppler*, AcP 179 (1979); *Gernhuber* § 19 IV 6; *Mikat*, FamRZ 1981, 1128, 1130; Soergel/*Lange* § 1357 no. 10.

362 Rolland/*Brudermüller* § 1357 no. 27.

363 Münchner Kommentar/*Wacke* § 1357 no. 21; Staudinger/*Hübner* § 1357 no. 17; Rolland/*Brudermüller* § 1357 no. 27; Soergel/*Lange* § 1357 no. 10.

364 Münchner Kommentar/*Wacke* § 1357 no. 21; Staudinger/*Hübner* § 1357 no. 17; Rolland/*Brudermüller* § 1357 no. 27; Soergel/*Lange* § 1357 no. 10.

365 Münchner Kommentar/*Wacke* § 1357 no. 21; Staudinger/*Hübner* § 1357 no. 17; Rolland/*Brudermüller* § 1357 no. 27; Soergel/*Lange* § 1357 no. 10.

366 Palandt/*Diedrichsen* § 1357 no. 12.

367 *Reloomel v Ramsay* 1920 TPD 371, 375. See part 1, ch. 2.

368 Palandt/*Diedrichsen* § 1357 no. 14; Rolland/*Brudermüller* § 1357 no. 16; *Holzhauer*, JZ 1985, 685; Münchner Kommentar/*Wacke* § 1357 no. 20; Soergel/*Lange* § 1357 no. 10, *Käppler*, AcP 179 (1979), 245, 283; *Gernhuber* § 19 IV 6 ;*Schwab* no. 141.

necessities of life. Sufficient therefore is the *intention*[369] to act on behalf for the family Ramsay[370].

The reason for this interpretation is the requirement of legal certainty[371]. Firstly the supplier cannot tell whether a family is already sufficiently supplied. The only aspect which is revealed to him is whether or not the concrete item is in principle necessary for a family living according to the relevant standard. Secondly the requirement that the family's necessities are actually met through the legal transaction entered into by one spouse would make the supplier bear the risk of the further destiny of the purchased item[372]. One example might be given: if Ms. A buys a toaster, Mr. A is co-liable for this purchase, because a toaster is an appropriate provision of the necessities of life. If one required in addition that the family must actually profit from the toaster (viz. that part of the family's necessities of life are actually met through the purchase of the toaster), the liability of Mr. A would depend on the question as to how Ms. A deals with the purchased item. If the toaster is destroyed on the way home or if Ms. A resells it to another person, the liability of Mr. A would have to be denied.

c) Appropriate provision of the necessities of life

The word "appropriate" does not refer to the necessities but to provision of the necessities[373]. One therefore has to ask whether the *way* in which the spouses provide for their necessities of life is appropriate[374]. In general, appropriate legal transactions

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369 AG, *Bochum*, FamRZ 1992, 435, 436.

370 BGH, JZ 1985, 680, 682; BGH, JZ 1992, 586; OLG *Köln*, FamRZ 1991, 434, 435; OLG *Schleswig*, FamRZ 1994, 444, 445; OLG *Düsseldorf* MDR 1989, 914; OLG *Frankfurt*, FamRZ 1983, 913; LG *Frankfurt*, NJW RR 1993, 1286; LG *Braunschweig*, FamRZ 1986, 61; LG *Bonn*, NJW 1983, 344, 345; Palandt/*Diedrichsen* § 1357 no. 14; Rolland/*Brudermüller* § 1357 no. 16; *Holzhauer*, JZ 1985, 685; Münchner Kommentar/*Wacke* § 1357 no. 20; Soergel/*Lange* § 1357 no. 10, *Käppler*, AcP 179 (1979), 245, 283; *Gernhuber* § 19 IV 6 ;*Schwab* no. 141.

371 Rolland/*Brudermüller* § 1357 no. 16.

372 Rolland/*Brudermüller* § 1357 no. 16; *Holzhauer*, JZ 1985, 685; Münchner Kommentar/*Wacke* § 1357 no. 20; Soergel/*Lange* § 1357 no. 10, *Käppler*, AcP 179 (1979), 245, 283.

373 Palandt/*Diedrichsen* § 1357 no. 14; Rolland/*Brudermüller* § 1357 no. 16; Münchner Kommentar/*Wacke* § 1357 no. 20; Soergel/*Lange* § 1357 no. 10, *Käppler*, AcP 179 (1979)245, 283; *Gernhuber* § 19 IV 6;*Schwab* no. 141; BGH, JZ 1985 680, 682; BGH, JZ 1992 586; OLG *Köln*, FamRZ 1991, 434, 435; OLG *Schleswig*, FamRZ 1994, 444, 445; OLG *Düsseldorf*, MDR 1989, 914; OLG *Frankfurt*, FamRZ 1983, 913; LG *Frankfurt*, NJW RR 1993, 1286; LG *Braunschweig*, FamRZ 1986, 61; LG *Bonn*, NJW 1983, 344, 345.

374 The legislature changed the wording of § 1357 BGB. The first draft of § 1357 BGB spoke of appropriate legal transactions; see *Bundestagsdrucksache* 7/4361. The legislature modified the wording to clarify § 1357 BGB. According to

are those which are carried out by one spouse without the necessity of consulting the other spouse[375], because only if such circumstances are present are spouses permitted to act on their own without their partner's consent given in advance. Within the sphere of § 1357 BGB, therefore, fall everyday legal transactions, such as the purchase of household necessaries. By exception § 1357 BGB encompasses legal transactions of high financial impact. This is the case if a spouse enters into a legal transaction "which cannot be postponed without difficulties"[376], because there is not time for a mutual consultation. The requirement that spouses should consult each other is in this case not necessary[377]. If a legal transaction cannot be postponed, (namely the operation of the common child or the repair of the roof of the common house), the *way* in which the spouse provided for the necessaries of life is appropriate. In this regard, too, the point of view of a third party is decisive in order to determine whether or not the provision of household necessaries was appropriate.

One therefore has to ask whether the circumstances of the legal transaction are such as to lead the third party to believe that the legal transaction could be concluded by the one spouse without consulting the other spouse or whether, on the contrary, the transaction is of a kind typically entered into with the knowledge and co-operation of both spouses.

d) Criticism

The wording of § 1357 BGB has been strongly criticised by German doctrine. The harshest criticism is that from *Diedrichsen*[378] who calls the wording of § 1357 BGB "pseudonormatic, pseudoempiric and meaningless". The BGH[379] has also conceded

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Palandt/*Diedrichsen* § 1357 no. 14 the legislature failed to realise such clarification, see also above.

375 Palandt/*Diedrichsen* § 1357 no. 14; Rolland/*Brudermüller* § 1357 no. 16; Münchner Kommentar/*Wacke* § 1357 no. 20; Soergel/*Lange* § 1357 no. 10, *Käppler*, AcP 179 (1979)245, 283; *Gernhuber* § 19 IV 6; *Schwab* no. 141; BGH, JZ 1985, 680, 682; BGH, JZ 1992 586; OLG *Köln*, FamRZ 1991, 434, 435; OLG *Schleswig*, FamRZ 1994, 444, 445; OLG *Düsseldorf*, MDR 1989, 914; OLG *Frankfurt*, FamRZ 1983, 913; LG *Frankfurt*, NJW RR 1993, 1286; LG *Braunschweig*, FamRZ 1986, 61; LG *Bonn*, NJW 1983, 344, 345.

376 See the parliamentary debates: *Bundestagsdrucksache* 7/650, 99; see too: Palandt/*Diedrichsen* § 1357 no. 14; Rolland/*Brudermüller* § 1357 no. 16; Münchner Kommentar/*Wacke* § 1357 no. 20; Soergel/*Lange* § 1357 no. 10, *Käppler*, AcP 179 (1979) 245, 283; *Gernhuber* § 19 IV 6; *Schwab* no. 141. Critical: *Binder*, 44; *Holzhauer*, JZ 1985, 685.

377 Münchner Kommentar/*Wacke* § 1357 no. 20; Rolland/*Brudermüller* § 1357 no. 16.

378 Palandt/*Diedrichsen* § 1357 no. 14.

379 BGH, JZ 1985 ,680, 682; BGH, JZ 1992 ,586.

that the intention of the legislature to restrict § 1357 BGB to those legal transactions which are normally carried out by one spouse alone and without consultation with the other spouse, does not find clear expression in the wording of § 1357 BGB.

e) Examples

aa) Legal transactions which fall under § 1357 BGB

The daily purchases of food[380], clothing[381], heating material[382], household contents insurances[383], literature[384], purchases for the education of the children[385], presents[386], medicine[387] and contraceptives[388] fall under § 1357 BGB.

bb) Legal transactions which do not fall under § 1357 BGB

§ 1357 BGB does not encompass professional transactions[389], even if both spouses run a business together [390]. Expenses for the education of the spouses[391], provisions for one's old age[392], the opening of an account[393], legal transactions for the formation of wealth[394] and the purchase of securities[395] and shares[396] are not legal transactions for the appropriate provision of the necessities of life of the family. Concluding or terminating the lease of a dwelling also does not fall under § 1357 BGB[397], because such legal transactions concern the essentials of the common life and therefore require consultation[398] between the spouses.

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380 OLG *Braunschweig*, OLGE 26, 212.
381 RGZ 61, 78; OLG *München* OLGE 26, 212.
382 LG *Koblenz*, WM 1990, 445.
383 AG *Eschwege* VersR 1959, 1038; *Gernhuber* § 19 IV.
384 LG *Itzehoe* SchlHA 1964, 215.
385 LG *Stuttgart* MDR 1967, 45 (*obiter dictum*).
386 LG *Itzehoe* FamRZ 1969, 90.
387 LG *München* FamRZ 1970, 314.
388 For the "pill": LG *München* FamRZ 1970, 314.
389 LG *Hannover* FamRZ 1984, 268; AG *Augsburg* FamRZ 1987, 819.
390 AG *Augsburg* FamRZ 1987, 819; dissenting: LG *Hannover* FamRZ 1984, 268.
391 Münchner Kommentar/*Wacke* § 1360 a no. 8 and § 1357 no. 24.
392 Reichsgerichtskommentar/*Roth-Stielow* § 1357 no. 29.
393 *Gernhuber* § 19 IV.
394 Palandt/ *Diedrichsen* § 1357 no. 17.
395 *Diedrichsen*, NJW 1977, 217, 221.
396 *Diedrichsen*, NJW 1977, 217, 221; Münchner Kommentar/*Wacke* § 1357 no. 24.
397 LG *Köln*, FamRZ 1990, 744 LS = WM 1990 142; Soergel/*Lange* § 1357 No.15; Reichsgerichtskommentar/*Roth*-Stielow § 1357 no. 26, Münchner Kommentar/*Wacke* § 1357 no. 24 ref. 93; dissenting: Erman/*Heckelmann*n § 1357 no. 13; *Mikat*, Rechtsprobleme, 75; *Weimar*, ZMR 1977, 225.
398 See: *Bundestagsdrucksache* 7/650, 99.

2) Requirements of Article 166 I ZGB

a) Needs of the family

Article 166 ZGB requires a "need of the family". Swiss doctrine and jurisprudence try to put this requirement in concrete terms by categorising the legal transactions in question[399]. Thus those legal transactions which pertain to the individual sphere of the spouses would not fall within the ambit of Article 166 ZGB, for example purchases of goods for professional reasons [such as tools or working-clothes][400]. These transactions do not concern the marital community. So, too, purchases in connection with the hobbies of a spouse are not needed by the family but only by the spouse concerned[401]. Thus legal transactions which have such purchases as subject matter do not fall within the ambit of Article 166 ZGB.

Similar legal transactions which fall into the "outlying areas" of family life are not encompassed by Article 166 ZGB[402]. Legal transactions which might be presented as examples are the purchase of items for children or parents of the spouses who do not live in the common household[403]. In this case not the common household of the spouses but another household profits from such transactions.

Swiss jurisprudence and literature approves a need of the family if legal transactions are in close relationship to the community of husband, wife and children. Standard examples are contracts in respect of food, housing, clothes, health care, etc[404].

b) The continuous needs of the family in terms of Article 166 ZGB

The principle of consent in a marriage demands co-operation in substantial matters[405] [Article 159 II ZGB[406]]. It would be irreconcilable with this principle if one of the spouses could, in important matters, act on the other spouse's behalf without the

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399 See: Züricher Kommentar/*Hasenböhler* Article 166 no. 30 ZGB; *Hausheer*/Reusser/Geiser Article 163 no. 36 ZGB; Berner Kommentar/*Lemp* Article 166 no. 8 ZGB; *Braunschweig*, 29.

400 *Botschaft*, Ziff. 215.21; *Hausheer*/Reusser/Geiser Article 166 no. 36, 37 ZGB.

401 *Hausheer*/Reusser/Geiser Article 166 no. 36, 37 ZGB.

402 Züricher Kommentar/*Hasenböhler* Article 166 no. 30 ZGB.

403 Züricher Kommentar/*Hasenböhler* Article 166 no. 30 ZGB.

404 See furthermore the examples in ch. 2, II, 1.

405 Züricher Kommentar/*Hasenböhler* Article 166 no. 37 ZGB.

406 In terms of Article 159 II ZGB the spouses are mutually obliged to live in conjugal community.

latter's agreement[407]. For this reason the Swiss legislature restricted the capacity in terms of Article 166 I ZGB to *continuous* needs. These are transactions which concern the "everyday life" of the family and which do not entail expensive[408] obligations. These "everyday-contracts" may be concluded by either spouse without the necessity of consulting the other spouse[409]. The reason for this stance is that Article 166 I ZGB is not intended to undermine the general principles of partnership and co-operation in a marriage. Systematically this intention found its expression in the differentiation between *"continuous"* and *"other"* needs. Only the latter group may encompass legal transactions of great financial impact[410]. Whether a legal transaction falls within the ambit of Article 166.I ZGB or Article 166 II ZGB - in other words whether or not an item is a "continuous" need or "another" (expensive) need - must be decided from the point of view of an objective third person[411]. One has to investigate the spouses' style of living. Spouses who live beyond their means and thus create in the minds of third parties the impression that they can afford a legal transaction can thus be held liable in terms of Article 166 I ZGB even if the concrete item is not a continuous need according to the real wealth of the family[412].

c) Examples for Article 166 I ZGB

If one enumerates examples from case law or from literature where a continuous need is denied or approved, it has always to be borne in mind that the financial means and the standard of living of the *concrete* family must be considered. The test therefore is whether the relevant family can afford the legal transaction and whether the article is an everyday item for *that* family[413]. However in making such determination the criterion is not so much the real circumstances, namely the real income of the earning party, but rather what the circumstances of the family are perceived to be by an objective third person in the position of the trader.

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407 Protokoll der *Expertenkommission*, 1365.
408 Protokoll der *Expertenkommission*, 1365.
409 Züricher Kommentar/*Hasenböhler* Article 166 no. 37 ZGB.
410 See below.
411 *Deschenaux/Steinauer* § 7 C III; *Reusser*, Die Wirkungen der Ehe im allgemeinen, in: Das neue Eherecht, 34, 40, Fn. 15; *Hegnauer* § 18.07; Petipierre/*Hausheer*/Guinard, Karte 104 10, 11; *Frank* § 7.2; Tuor/*Schnyder* § 23 VI; *Botschaft*, Ziff. 215.21; *Hausheer*/Reusser/Geiser Article 166 no. 38, 45-54 ZGB
412 Züricher Kommentar/*Hasenböhler* Article 166 no. 37 ZGB.
413 The purchase of a washing machine, for example, might be an everyday item for a wealthy person whereas for a working class person, such a purchase might be regarded as expensive and unusual.

aa) Examples where continuous needs have been approved

Article 166 I ZGB encompasses in general all typical purchases for the common household, such as the purchase of clothes, energy [oil, petrol, gas, electricity], household appliances, refrigerators, washing machines, cleaning materials[414], also the conclusion of contracts for repairs in the household, such as the hire of a plumber[415]. Each spouse can engage domestic servants or buy articles for the education of the children[416]. Legal transactions to satisfy cultural needs or to buy presents for friends of the spouses are continuous needs in terms of Article 166 I ZGB[417]. Medical treatment and the conclusion of a health insurance contract also fall under Article 166 I ZGB[418].

bb) Examples where a continuous need has been denied

Legal transactions with a great financial impact on the family do not fall under Article 166 I ZGB. Spouses may conclude such transactions only after they have consulted each other. Examples are the purchase of a house[419] or an apartment[420], expensive furniture, carpets, hi-fi equipment, cars or the conclusion of expensive insurance contracts[421]. Article 166 I ZGB encompasses neither expensive health treatments nor the engagement of a moving company[422]. But once again - if the spouses appear to be wealthy an elevated is used to determine whether or not an item is an "other need".

3) Requirements of Article 166 II ZGB

a) "Other needs"

Needs other than continuous needs do not fall within the ambit of Article 166 I ZGB but may be encompassed by Article 166 II ZGB. "Other needs" are those legal transactions which are necessary for the family but which entail high costs and which

414 *Hausheer*/Reusser/Geiser Article 166 no. 50.
415 *Hausheer*/Reusser/Geiser Article 166 no. 50; *Braunschweig*, 30; Züricher Kommentar/*Hasenböhler* Article 166 no.39 ZGB.
416 Berner Kommentar/*Bräm* Article 163 no. 50 ZGB.
417 *Arbenz*, 86.
418 *Hausheer*/Reusser/Geiser Article 166 no. 50.
419 *Hausheer*/Reusser/Geiser Article 166 no. 54; Berner Kommentar/*Lemp* Article 163 no. 7.
420 *Botschaft* 215.21.
421 Züricher Kommentar/*Hasenböhler* Article 166 no. 40 ZGB; *Hausheer*/Reusser/Geiser Article 166 no. 54; Berner Kommentar/*Lemp* Article 163 no. 8 ZGB.
422 BGE 112 II, 398; Protokoll der *Nationalrätlichen Kommision*, 473.

have to be regarded as extraordinary[423]. Examples of such "other needs" are the purchase of expensive household equipment, a car or expensive medical treatment[424]. As has already been pointed out[425], for the question whether or not a need falls within the sphere of Article 166 II ZGB, the point of view of an objective third person is decisive. Here, too, the standard of living of the spouses is relevant.

b) The authorisation in terms of Article 166 II, 1, 1 ZGB

The principle of partnership in a marriage requires co-operation for the purchase of "other needs". It is not acceptable that one spouse enters into expensive legal transactions and binds the other spouse's credit without the latter's consent[426]. The presumption contained in Article 166 I ZGB, viz. that the non-contracting spouse agrees to the legal transaction entered into by the other spouse, is thus not applicable[427] in the context of Article 166 II ZGB. Article 166 II, 1, 1 ZGB offers the spouses the opportunity to authorise each other and to act on each other's behalf. The non-contracting spouse becomes a party to the contract although the contracting spouse does not act in his name. The non-contracting spouse can thus be bound for legal transactions which have a great financial impact on the family. In contradiction to Article 166 I ZGB the non-contracting spouse does not need any protection under Article 166 II ZGB because his credit is bound for those legal transactions only to which he has explicitly agreed.

The authorisation is a unilateral act in terms of Article 32 OR[428]. A special form is not required, even if the intended legal transaction requires a special form[429]. The authorisation must be given either before or simultaneously with the legal transaction in question[430]. The addressee of such authorisation is in terms of Article 33 II OR the

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423 Züricher Kommentar/*Hasenböhler* Article 166 no. 55 c. ZGB; *Hausheer*/Reusser/Geiser Article 166 no. 35.

424 Protokoll der *Expertenkommission*, 1365; Züricher Kommentar/*Hasenböhler* Article 166 no. 55 c. ZGB; *Hausheer*/Reusser/Geiser Article 166 no. 35.

425 See ch. 3, II, 1.

426 Züricher Kommentar/*Hasenböhler* Article 166 no. 37 ZGB; Protokoll der *Expertenkommission*, 1365.

427 *Hausheer*/Reusser/Geiser Article 166 no. 53.

428 *Hausheer*/Reusser/Geiser Article 166 no. 67.

429 BGE 99 II, 159; 86 II, 33; 84 II, 157; Züricher Kommentar/*Hasenböhler* Article 166 no. 56 ZGB; *Hausheer*/Reusser/Geiser Article 166 no. 68.

430 Züricher Kommentar/*Hasenböhler* Article 166 no. 56 ZGB.

other spouse, not the other party to the contract[431]. The authorisation should refer to a specific legal transaction[432]. A general authorisation is possible but not desirable, because such authorisation undermines the principle that each significant transaction requires an explicit, special consent given in advance[433]. The authorisation must be in conformity with the general rules relating to authorisation in terms of Article 32 OR[434].

c) The authorisation by a judge in terms of Article 166 II, 1, 2 ZGB

In terms of Article 166 II, 1, 2 ZGB the spouse who wants to enter into a legal transaction concerning an "other need" may be authorised to do so by a judge[435]. Article 166 II, 1, 2 ZGB proceeds from the assumption that no spouse should be able to "sabotage" the marital life by refusing to give his consent for transactions which are necessary to maintain the common household and to make a common life possible[436]. The authorisation in terms of Article 166 II, 1, 2 ZGB has three requirements. Firstly the legal transaction must be extraordinary and not a continuous matter[437]. Secondly the legal transaction must be necessary in order to keep up a common family life[438]. And thirdly the non-contracting spouse must refuse his consent unreasonably[439]. Examples for Article 166 II, 1, 2 ZGB are that the non-contracting spouse refuses to give his consent for the repair of the roof of the family house[440] or for a necessary operation[441].

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431 Züricher Kommentar/*Hasenböhler* Article 166 no. 56 ZGB; *Hausheer*/Reusser/Geiser Article 166 no. 71. Article 33 II OR provides for the granting of power of attorney. In terms of such statute a power of attorney is conferred by declaration on the person who is given the power of attorney not on the third party with whom the matter delegated is to be transacted.

432 Protokoll der *Nationalrätlichen Kommission*, 478.

433 Protokoll der *Nationalrätlichen Kommission*, 478. Without any objections against a general authorisation: *Hausheer*/Reusser/Geiser Article 166 no. 70.

434 Züricher Kommentar/*Hasenböhler* Article 166 no. 37 ZGB; Protokoll der *Expertenkommission*, 1365; *Hausheer*/Reusser/Geiser Article 166 no. 53. To the granting of power of attorney see above.

435 *Botschaft* 215.21.

436 *Deschenaux/Steinauer*, 79.

437 *Deschenaux/Steinauer*, 79; Züricher Kommentar/*Hasenböhler* Article 166 no. 57 ZGB; *Hausheer*/Reusser/Geiser Article 166 no. 73.

438 See examples below. *Deschenaux/Steinauer*, 79; Züricher Kommentar/*Hasenböhler* Article 166 no. 57 ZGB; *Hausheer*/Reusser/Geiser Article 166 no. 73.

439 *Deschenaux/Steinauer*, 79; Züricher Kommentar/*Hasenböhler* Article 166 no. 57 ZGB; *Hausheer*/Reusser/Geiser Article 166 no. 73.

440 *Botschaft* 215.12..

441 *Hausheer*/Reusser/Geiser Article 166 no. 73.

If one spouse enters into a legal transaction with the consent of a judge, the other spouse will be held liable against his intention[442]. It is obvious that this phenomenon can entail problems between husband and wife. For this reason parts of the Swiss literature prefer a very narrow interpretation. Such proponents demand furthermore that the contracting spouse prove that he cannot contract, unless his partner is also liable for the obligation[443]. Such requirement is fulfilled if the applying spouse can prove on the one hand that he is non-solvent and on the other hand present a trader who insists on the co-liability of the other non-contracting spouse.

d) The emergency-competence in terms of Article 166 II, 2 ZGB

If it is necessary and urgent that one spouse enters into a legal transaction, he may rely on the provisions of Article 166 II, 2 ZGB. Three requirements must be fulfilled[444]. Firstly the transaction must concern a matter of extraordinary importance, because the transaction in question will otherwise fall within the ambit of Article 166 I ZGB[445]. Secondly the matter must be extremely urgent. The requirement of "urgency" is interpreted to mean that it is imperative that one spouse acts immediately so that there is no time left to wait for the consent of the other non-contracting spouse[446]. And thirdly it is required that the other spouse is prevented from giving his consent[447], because he is either ill or absent. It is not sufficient that the non-contracting spouse refuses without good reason to consent to the legal transaction. This latter case must be subsumed under Article 166 II, 1, 2 ZGB[448]. The contracting spouse thus needs a court order to bind the other spouse's credit. The competence to act without the consent of the other spouse cannot last longer than the urgent situation. The capacity thus terminates as soon as the other spouse regains his ability to express his consent[449].

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442 Züricher Kommentar/*Hasenböhler* Article 166 no. 57 ZGB.

443 *Deschenaux/Steinauer*, 79; Züricher Kommentar/*Hasenböhler* Article 166 no. 57 ZGB; *Hausheer*/Reusser/Geiser Article 166 no. 75.

444 Züricher Kommentar/*Hasenböhler* Article 166 no. 58 ZGB.

445 Protokoll der *Expertenkommission*, 1567.

446 Hegnauer § 18.07; Züricher Kommentar/*Hasenböhler* Article 166 no. 57 ZGB; *Hausheer*/Reusser/Geiser Article 166 no. 78; Protokoll der *Expertenkommission*, 1567.

447 Hegnauer § 18.07; Züricher Kommentar/*Hasenböhler* Article 166 no. 57 ZGB; *Hausheer*/Reusser/Geiser Article 166 no. 78; Protokoll der *Expertenkommission*, 1567.

448 *Hausheer*/Reusser/Geiser Article 166 no. 78; Züricher Kommentar/*Hasenböhler* Article 166 no. 57 ZGB.

449 Protokoll der *Expertenkommission*, 1567.

One example of a situation falling under Article 166 II, 2 ZGB would be the conclusion of a lease in respect of the family apartment in order to prevent the family from becoming homeless[450], while the other spouse is too ill or too far away (on a long term holiday, in prison, etc.) in order to consent to the legal transaction. Another example is that the family cannot afford their home anymore. In this case Article 166 II, 1 ZGB gives one spouse the competence to give notice of termination of the lease[451] [452].

4) Difficult examples for § 1357 BGB and Article 166 ZGB

It is not clear in either country whether the credit agreement and the hire-purchase agreement respectively fall within the ambit of § 1357 BGB and Article 166 ZGB. Since the target of this work is not to discuss unresolved problems in Germany and Switzerland, the work will focus on the majority opinion of both countries.

a) Terminological clarification

The term "credit agreement" is used for the loan of money. Contrary to the hire-purchase agreement such loans are not granted for a specific purpose. It might therefore encompass overdraft facilities such as the loan of money by a bank or by a "loan shark".

The term "hire-purchase agreement" is used for such legal transactions where the purchase of an item is gradually paid off[453]. The provisions of the VerbrKG[454] and of Article 226 a ff. OR apply to hire-purchase agreements. Such statutory provisions protect the purchaser by providing that the contract must enumerate all details of the hire-purchase agreement (§ 2 VerbrKG/Article 226 a OR) and that the consumer has

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450 Protokoll der *Expertenkommission*, 1567.

451 *Hegnauer*, 18.13.

452 Whether the sale of the house which is owned by both spouses in common falls within the scope of Article 166 II ZGB is not clear. Literature and jurisprudence do not answer this question.

453 Typical examples are those household necessaries such as hi-fi equipment or a washing machine which are gradually paid off. In these cases the credit is granted by the trader. Another example is where the price of the object is paid by a bank which co-operates with the trader, i.e. a car dealer. In this case the credit is granted by the bank to the consumer whose debts in respect of the purchase of the car are paid by the bank.

454 The Verbraucherkreditgesetz is a consumer protection act which is comparable with the provisions of the Credit Agreements Act 75 of 1980.

the right to repudiate the contract (in terms of § 7 VerbrKG within seven days, in terms of Article 226 c OR within 4 days).

b) The credit agreement

In Germany and in Switzerland it is accepted by the majority opinion that the credit agreement does not fall within the ambit of § 1357 BGB or Article 166 ZGB[455].
In both countries some authors[456] argue that § 1357 BGB and Article 166 ZGB respectively require a *direct* provision of the necessities of the family. Required therefore is that a spouse enters into the concrete legal transaction and *thereby* meets the necessaries of life of the family, for example through the purchase of food and clothes. In the case of a loan the subject of the legal transaction is money, which is only a substitute for the needed object. Money [itself] cannot satisfy the needs of the family. It is necessary that another [second] legal transaction is undertaken in order to supply the family with the goods needed [the spouse has to enter into another contract and buy the necessaries].
Other writers[457] argue that - in the case where the money is advanced by a bank - the bank does *not need the protection* of § 1357 BGB. Due to its superior position a bank normally has the opportunity to make inquiries about the income of the spouse applying for credit. In addition a bank often has access to information about the balance of the account and normally requires proof of income. The bank will therefore know whether or not the contracting spouse is non-solvent. If the former should be

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455 For Germany: LG *Aachen*, FamRZ 1980, 996; LG *Braunschweig*, FamRZ 1986, 61; *Schmidt*, FamRZ 1991, 629, 631; Palandt/*Diedrichsen* § 1357 no. 13; *Schwab* no. 146; *Binder*, 42, 209, 231; LG *Aachen*, FamRZ 1980, 996; *Binder*, 42; Münchner Kommentar/*Wacke* § 1357 no. 28; Rolland/*Brudermüller* § 1357 no. 32; *Gernhuber* § 19 IV, 6; *Arndt*, 18.
For Switzerland: *Hausheer*/Reusser/Geiser Article 166 no. 41, 52 ZGB; Züricher Kommentar/*Hasenböhler* Article 166 no. 44 ZGB; Petipierre/*Hausheer*/Guinand, 9 B Nr.2; *Berger*, 96, *Stettler* no. 167; *Hegnauer* § 18.07; *Braunschweig*, 43; Berner Kommentar/*Lemp* Article 207 no. 79 ZGB; Berner Kommentar/*Lemp* Article 207 no. 85, 86 ZGB; Obergericht Zürich, in: B/ZüR 23 Nr. 173; BGE 49 II, 448, 454; BGE 47 II, 1, 5.

456 For Germany: *Binder*, 42; LG *Aachen*, FamRZ 1980, 996.
For Switzerland: BGE 49 II, 448, 454; *Braunschweig*, 43.The Bundesgericht (BG) had to deal with the question whether a loan of about 1500 FS falls within the ambit of the capacity to bind the other spouse's credit. The BG answered the question in the negative pointing to the fact the subject of a loan cannot satisfy the needs of the family. The BG did not mention more arguments.

457 For Germany: Münchner Kommentar/*Wacke* § 1357 no. 28; Rolland/*Brudermüller* § 1357 no. 32; *Gernhuber* § 19 IV, 6.
For Switzerland: Züricher Kommentar/*Hasenböhler* Article 166 no. 44 ZGB.

the case, the bank has the possibility to refuse the credit and to demand that the non-contracting spouse himself enters into the agreement.
In addition it is pointed out by some authors[458], that the question as to whether a legal transaction is an appropriate provision of the necessities of life has to be answered from the point of view of an objective third party in the position of the trader. Only if it appears to such a third party that the spouse enters into the legal transaction in order to provide the family with the necessities of life, does the legal transaction fall respectively within the scope of § 1357 BGB and Article 166 ZGB. The third party however cannot tell whether the spouses use the money advanced on credit for the behalf of the family or for their own affairs.

It is therefore noteworthy that the majority opinion in both countries does not unanimously subsume the credit agreement under § 1357 BGB and Article 166 ZGB respectively.

c) The hire-purchase transaction

It is unclear whether the hire-purchase agreement falls within the ambit of § 1357 BGB and Article 166 ZGB. The legal situations in Germany and in Switzerland differ. For this reason the work will present the Swiss and German situations separately.

aa) The situation in Germany

In Germany the doctrine is divided into two major schools of thought. Neither has yet been approved by the BGH. Both opinions thus will be presented in the following section.

aaa) The first opinion

One opinion[459] answers the question as to whether the capacity of the spouses to bind the other spouse's credit encompasses the hire-purchase agreement in the negative. It

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458 For Germany: *Schwab* no. 146; *Binder*, 42, 209, 231; LG *Aachen*, FamRZ 1980, 996; *Binder*, 42; Münchner Kommentar/*Wacke* § 1357 no. 28; Rolland/*Brudermüller* § 1357 no. 32.

459 *Witte-Wegmann*, NJW 1979, 749, 752; *Wacke*, NJW 1979, 2585, 2589; *Bosch*, FamRZ 1980, 739, 745; *Limbach*, JuS 1982, 117; *Klauss*/Ose 1988, Abschn. C; § 1 AbzG no. 35; Erman/*Heckelmannn* § 1357 no. 15; Münchner Kommentar/*Wacke* § 1357 no. 29; Reichsgerichtskommentar/*Keßler* Einl. AbzG no. 17; Reichsgerichtskommentar/*Roth-Stielow* § 1357 no. 31; Altemativkommentar/*Finger* § 1357 no. 12; LG *München*, NJW

is opined that the other party should contract with *both* spouses in order to get the second debtor. The reason for this exclusion of the hire-purchase agreement from the scope of § 1357 BGB is to protect the non-contracting spouse[460]. The VerbrKG protects the consumer by providing that the contract must enumerate all details of the hire-purchase agreement [§ 2 VerbrKG] and that the consumer must be informed about his right to repudiate the contract [§ 7 VerbrKG]. As will be pointed out below, in German law *each* spouse has the right to repudiate the contract[461]. A spouse can exercise this right only if he is informed about the requirements of repudiation[462]. If the hire-purchase agreement falls within the scope of § 1357 BGB the non-contracting spouse might be unaware of the fact that he is a party to the contract. It is thus possible that the non-contracting spouse could lose *his* right in terms of § 7 VerbrKG to repudiate the contract within one week without ever having known about it[463].

bbb) The second opinion

The other opinion[464] answers the question as to whether the hire-purchase agreement falls within the ambit of § 1357 BGB in the affirmative. The proponents of this opinion refer to §166 BGB[465]. § 166 BGB is a statutory provision of the law of representation and entails an imputation of the knowledge of the representative to the principal[466]. In terms of such statutory provision it is sufficient if the representative has knowledge about certain facts required by other statutory provisions. The principal in terms of § 166 BGB will be deemed to have such knowledge[467]. The non-contracting

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1961, 677; LG Duisburg, MDR 1962, 409; LG *Stuttgart*, FamRZ 1965, 567; LG *Stuttgart*; MDR 1967, 45; LG *Detmold*, NJW-RR-1989, 10; AG *Elmshorn*; NJW-RR 1979, 457; AG *Michelstadt*, NJW 1985, 205.

460 The VerbrKG is comparable with the Credit Agreements Act 75 of 1980.

461 Münchner Kommentar/*Wacke* § 1357 no. 36; Rolland/*Brudermüller* § 1357 no. 43; Soergel/*Lange* § 1357 no. 22; Reichsgerichtskommentar/*Roth-Stielow* § 1357 no. 13; Erman/*Heckelmann* § 1357 no. 19; Beitzke/*Lüderitz* § 12 IV, 3; *Mikat*, Rechtsprobleme, 47; *Käppler*, AcP 179 (1979), 245, 284; Staudinger/*Hübner* § 1357 no. 67; *Schwab* no. 157; *Büdenberger*, FamRZ 1976, 662, 667; Palandt/*Diedrichsen* § 1357 no. 23; *Roth*, FamRZ 1979, 361, 362; *Binder*, 79. See the details in ch. 3, I.

462 Erman/*Heckelmannn* § 1357 no. 15; Münchner Kommentar/*Wacke* § 1357 no. 29; Reichsgerichtskommentar/*Roth-Stielow* § 1357 no. 31; Alternativkommentar/*Finger* § 1357 no. 12.

463 Erman/*Klingsporn/Rebmann* § 7 VerbrKG no. 1.

464 Arndt, 138; *Binder*, 218; *Heinrichsmeier*, 23; *Mikat*, in: FS für Beitzke, 294; *Schwab*, no. 146; *Gernhuber* § 19 IV 6, 7; *Schmidt*, FamRZ 1991, 629, 639; *Käppler* AcP (179) 1979, 245, 279; Rolland/*Brudermüller* § 1357 no. 93; Rolland § 1357 no. 15a; *Lüke* AcP 178 (1978), 1, 21; LG *Kiel* SchlHA 1956, 17; LG Berlin, NJW 1975, 351.

465 *Heinrichsmeier*, 23.

466 Palandt/*Heinrichs* § 166 no. 3.

467 If for instance the representative is *male fide* whereas the principal is *bona fide*, the principal is treated as if he were *male fide*. A *bona fide* acquisition of ownership in

spouse will thus be treated as if he had known about the requirements of his right to repudiate the contract in terms of the VerbrKG.

In addition reference is made to the importance of the VerbrKG, which is applicable to nearly every transaction on credit[468]. The exclusion of the hire-purchase agreement would undermine § 1357 BGB, because § 1357 BGB was enacted to enhance the creditworthiness of the acting spouse[469]. An interpretation excluding the hire-purchase agreement would therefore make § 1357 BGB inapplicable in many cases.

ccc) Criticism

As pointed out above the target of this work is *not to solve* the controversy. However an inconsistency in the second opinion which appears to be, from the South African point of view, of importance, will be pointed out.

§ 166 BGB is a rule of representation. It relies on the idea that a person who has authorised somebody else shall not only profit from the fact that this person is acting on his behalf, but shall also take the negative aspects into account[470]. The reason is that the principal but not the representative has a direct advantage from the legal transaction entered into by the representative[471]. The representative acts only on behalf of the principal.

The situation of spouses binding each other's credit in terms of § 1357 BGB is different. Firstly, § 1357 BGB is not a rule of representation but a rule *sui-generis*[472]. Secondly, the non-contracting spouse does not authorise the contracting spouse[473]. And thirdly, the contracting spouse does not act on behalf of the non-contracting spouse only but on behalf of the family[474]. In contrast to a representative, the

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terms of § 932 BGB would therefore not be possible if the representative is *male fide* - irrespective of whether the principal is *bona fide* [in terms of § 932 BGB it is possible to acquire ownership provided that the acquiring person (who actually is the principal and not the representative) is *bona fide* and if he is in possesion of the object]. See Palandt/*Heinrichs* § 166 no. 3.

468 In 1989 the sum of consumer-credits falling under the VerbrKG went up to 233 billion DM, see.: Statistische Beihefte zu den Monatsberichten der Deutschen Bundesbank; statistically each German is indebted by 3757 DM in respect of consumer credits, see: *Korczak*, 48.

469 *Heinrichsmeier*, 23; *Schmidt*, FamRZ 1991, 629, 639; Rolland/*Brudermüller* § 1357 no. 93.

470 Palandt/*Heinrichs* § 166 no. 6-9.

471 Palandt/*Heinrichs* § 166 no. 6.

472 See ch. 1, III.

473 See ch. 1, III.

474 See ch. 1, II.

contracting spouse does not fulfil somebody else's obligation but his own, because he must, in terms of § 1360 BGB, support the family from his work and property. If however both spouses profit from the legal transaction [the contracting spouse fulfils his obligation in terms of § 1360 BGB, the non-contracting spouse's necessities of life are satisfied], the idea of § 166 BGB cannot apply in this context. An imputation of knowledge from the contracting spouse to the non-contracting spouse is therefore not possible.

The *Verbraucher*kreditgesetz on the one hand protects the "Verbraucher" (consumer). It provides that the consumer should be informed about the details of the contract such as the annual interest rates and the sum total of the credit. He should know how to exercise his rights flowing from the contract or which are provided by the VerbrKG. § 1357 BGB, on the other hand, provides that both spouses have the same rights flowing from any legal transaction in respect of the necessities of life entered into by one of the spouses. If the provisions of the VerbrKG are only to be fulfilled in respect of the contracting spouse, the non-contracting spouse does not have the same legal position and therefore not the same rights as the contracting spouse. Such consequence is not reconcilable with the abovementioned *ratio legis* of § 1357 BGB.
The arguments of the first opinion thus appear to be more convincing.

bb) The situation in Switzerland

The Swiss position relating to the hire-purchase agreement is different to the legal situation in Germany but similar to the situation in South Africa. A spouse who lives with his partner in a common household in terms of Article 226 b OR needs the explicit permission of his partner in order to enter into a hire-purchase agreement which gives rise to an obligation of more than 1000 SF[475] [476]. If the other spouse does not express his written consent vis à vis the third person, the contracting spouse lacks the necessary *legal competence* in order to bind *himself*[477]. The marriage thus leads to

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475 In contrast to section 15 (2) (f) of the Matrimonial Property Act 88 of 1984 which applies only to spouses married in community of property, Article 226 b OR applies to all spouses.
476 On the exact calculation of the sum: *Stofer* Article 226 b OR Anm. 3.
477 *Stofer* Article 226 b Anm. 31; OR/*Giger* Article 226 b no. 3 a. E.

a legal status of the spouses in respect of hire-purchase agreements relating to a sum of at least 1000 SF which is comparable with the status of a minor[478]. Without the consent of the other spouse one spouse is not capable of entering into such a contract. It is not necessary that such consent is written in the document of the hire-purchase agreement. It is sufficient if such consent is expressed in a separate document. In addition it is not required that the document enumerates all details required by Article 226 a OR in respect of the hire-purchase agreement. The document expressing the spouse's consent must encompass the essential elements of the contract, namely the object of the hire-purchase agreement and the price[479].

It is therefore noteworthy that a spouse can neither enter into a hire-purchase agreement nor bind the other spouse's credit if that the obligation in question relates to a sum of at least 1000 SF.

So far the legal situation in Switzerland seems to be clear. However problems may well arise when the contracting spouse enters into a hire-purchase agreement relating to a sum of less than 1000 SF. It is true that Article 226 b OR does not apply. The spouse's legal capacity therefore remains unaffected. He thus has the capacity to enter into the hire-purchase agreement and to bind himself. However, similar to Germany, the question may well arise as to whether the requirements in terms of Article 226 a OR must be fulfilled in respect of both spouses or in respect of the contracting spouse only. As will be pointed out below[480], in Switzerland too each spouse can exercise any right flowing from the legal transaction in respect of "continuous needs" or "other needs" of the family. Like in Germany the non-contracting spouse thus risks losing his rights flowing from such a legal transaction without ever having known about such right.

Article 226 a OR requires a signature in the *contracting* party's own hand and that the *contracting* party be fully informed of his rights. The explicit wording of this statutory provision thus relates only to the contracting party. However it seems to be possible -

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478 *Stofer* Article 226 b Anm. 3; OR/*Giger* Article 226 b no. 1. See as well Article 220 III French civil code. Article 220 III CC also requires the consent of the other spouse. Unlike the Swiss article, the French statute does not entail a limitation of the *legal capacity* of the spouse. Article 220 III CC has no effect on the ability of the spouse to bind himself. It only prevents the acting spouse being able to bind *his partner*.

479 *Stofer* Article 226 b Anm. 3; OR/*Giger* Article 226 b no. 1.

480 See ch. 4, II.

as propounded by German doctrine in respect of § 1357 BGB - to apply such statutory provision by analogy to a non-contracting party if such party has all rights flowing from the transaction. In spite of the importance of this problem, Swiss literature does not deal at all with this question[481].

[481] See for example: *Hausheer*/Reusser/Geiser Article 166 no. 53 and no. 69 , Züricher Kommentar/*Hasenböhler* Article 166 no. 45 ZGB; *Stofer* Article 226 b Anm. 3. As pointed out above the target of this work is not to develop an own solution for the Swiss legal system. The author therefore will not try to resolve this problem.

Chapter 3: Effects of § 1357 BGB and Article 166 ZGB

I. Liability of spouses

1. The Gesamtschulderschaft

Spouses are *"Gesamtschuldne"r* in terms of § 421 BGB and *"Solidarschuldner"* in terms of Article 144 OR respectively for the debts incurred by either of them for legal transactions concerning household necessaries[482]. This means that they are jointly and severally liable for such debts. Similarly, in the South African legal system, a legal transaction of household necessities creates a relationship in which each spouse is answerable to the common creditor for the full amount of the debt - *singuli solidum debent*. The common creditor can demand the whole debt from either of the spouses at his own choice. The spouses are bound once only to the common creditor - *unum debent omnes*[483].

2. § 425 BGB and Article 146 ZGB

§ 425 BGB and Article 146 ZGB provide that each obligation of each debtor must be regarded separately. Each debtor is responsible for his own actions only but not for the actions of his partner. In terms of such statutory provisions "Gesamt-"and "Solidarschuldner" are not to be seen as one person but as two different objects of liability. If, for example, one debtor is in default, only this debtor has to pay the compensation for any damage arising from such default, and not the other debtor[484]. If the performance becomes impossible because of a circumstance for which one debtor

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482 For Germany: Münchner Kommentar/*Wacke* § 1357 no. 33; Soergel/*Lange* § 1357 no. 20; Erman/*Heckelmann* § 1357 no. 19; *Gernhuber* § 19 IV 7; *Büdenberger*, FamRZ 1976, 662, 667.
OR/*Schnyder* Article 146 no. 1 ZGB; Guhl/Merz/*Koller* § 6 V, 2 a; *von Tuhr/Escher*, 307; *Gauch/Schluep* no. 3850.

483 Münchner Kommentar/*Selb* § 421 no. 1; Larenz § 37 I; Münchner Kommentar/*Wacke* § 1357 no. 33; Soergel/*Lange* § 1357 no. 20; Erman/*Heckelmann* § 1357 no. 19; *Gernhuber* § 19 IV 7; *Büdenberger*, FamRZ 1976, 662, 667; BGHZ 49, 61.

484 Münchner Kommentar/Selb § 425 no. 1.

is responsible, only such debtor is answerable for compensation, but not the other debtor[485].

§ 425 BGB and Article 166 ZGB provide thus for different liabilities of Gesamt-and Solidarschuldner respectively.

The question that arises is whether such statutory provisions are applicable if spouses enter into a legal transaction and bind thereby the other spouse's credit in terms of § 1357 BGB and Article 166 ZGB respectively.

According to the Swiss[486] and German[487] doctrine, this question has to be answered in the negative. The literature in both countries wants an exception to the abovementioned principle to be made if the non-contracting spouse becomes a party to the contract in terms of § 1357 BGB or Article 166 ZGB. The arguments put forward in support of this view are as follows: firstly, in both countries attention is drawn to the close relationship of spouses. Such closeness should entail parallel and homogeneous liability. Secondly, the spouses are regarded as the representatives of the "marital partnership". They are liable for the debts of such partnership. If one of the spouses is responsible for the impossibility of the performance or if one spouse is in default, the *partnership* is to be held liable for the conduct of the spouse. Since the marital partnership is not a legal person, each spouse - as "partner" of such partnership and party to the contract - becomes liable for the debts of the partnership. Spouses are always regarded as a single entity, and it is accordingly not possible that the obligation of each spouse is not identical. § 425 BGB and Article 146 ZGB in terms of which the debtors are regarded as two different persons are thus not applicable.

The obligations of husband and wife therefore do not differ.

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485 Münchner Kommentar/Selb § 425 no. 8.

486 OR/*Schnyder* Article 146 no. 1 ZGB; Guhl/Merz/*Koller* § 6 V, 2 a; *von Tuhr/Escher*, 307; *Gauch/Schluep* no. 3850.

487 *Schwab* no. 157, 161; Münchner Kommentar/*Wacke* § 1357 no. 33, 34; Rolland/*Brudermüller* § 1357 no. 47; Soergel/*Lange* § 1357 no. 20, 21.

II. The spouses' contractual position

1) The systematical context of § 1357 BGB and Article 166 ZGB

§ 1357 BGB and Article 166 ZGB are placed in the general part of the section about the family in the BGB and ZGB. § 1357 BGB and Article 166 ZGB are thus applicable to all marriages, irrespective of whether the spouses are married in or out of community of property. Contrary to the South African legal system it is therefore not possible in either Germany or Switzerland for the contractual position of the spouses to vary according to the matrimonial property system under which the spouses are living[488]. Different regulations for spouses married in community and spouses married out of community of property are thus impossible.

2) The spouses as parties to the contract

In the German and Swiss legal systems both spouses become party to the contract[489]. The contracting spouse acts on the non-contracting spouse's behalf and draws him into the contract which he has concluded with the trader.

The legal situation thus seems to be clear. Difficulties may well arise, however, in determining the *precise* contractual position of the spouses. Two questions have to be answered: firstly, are spouses *Gesamtgläubiger* or *Mitgläubiger*? Secondly, which of the spouses can exercise the rights flowing from the contract?

3) The "*Gesamt*"- and "*Mitgläubigerschaft*"

In both countries two forms of co-debtorship are known. Co-debtors can either be "*Gesamtgläubiger*" in terms of § 428 BGB and Article 70 OR respectively or "*Mitgläubiger*" in terms of § 432 BGB and Article 150 OR respectively[490]. The

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488 Rolland/*Brudermüller* § 1357 no. 1-7.

489 For Germany: Münchner Kommentar/*Wacke* § 1357 no. 36; Rolland/*Brudermüller* § 1357 no. 43; Soergel/*Lange* § 1357 no. 22; Reichsgerichtskommentar/*Roth-Stielow* § 1357 no. 13; Erman/*Heckelmann* § 1357 no. 19; Beitzke/*Lüderitz* § 12 IV, 3; *Mikat*, Rechtsprobleme, 47; *Käppler*, AcP 179 (1979), 245, 284; Staudinger/*Hübner* § 1357 no. 67; *Schwab* no. 157; *Büdenberger*, FamRZ 1976, 662, 667; Palandt/*Diedrichsen* § 1357 no. 23; *Roth*, FamRZ 1979, 361, 362; *Binder*, 79; *Bartel*, 118.
For Switzerland: *Hegnauer*, no. 18.03; *Hausheer/*Reusser/Geiser Article 166 no. 13 ZGB.

490 The terminology "Gesamtgläubiger" and "Mitgläubiger" relies on the BGB but can be used also for the ZGB.

difference between § 428 BGB and 70 OR on the one hand and § 432 BGB and 150 OR on the other, is that in the latter case, the debtor is to render his performance to *both* creditors[491]. The performance to only one spouse [i.e. the contracting party] is not sufficient[492]. Thus the supplier of household necessaries would not fulfil his obligation if he renders his performance to one of the spouses only[493]. Instead he must find the other spouse and render his performance to him as well[494].

4) The secondary rights

The question of which spouse may exercise secondary rights arising from the contract, is pertinent here, as it was in relation to the South African system. Examples for secondary rights are the cancellation of the contract or claims like the *actio quanti minoris* or *redhibitoria*. One therefore has to ask which of the spouses can rescind the contract on the ground of breach of contract by the trader or on the grounds of fraudulent or negligent misrepresentation?

5) The concept of spouses as partners of the marital partnership

It has been pointed out above that the majority opinion in Germany and Switzerland regards the spouses as partners of the "marital partnership"[495]. It is therefore argued that each spouse must be able to accept the performance in terms of § 428 BGB and 70 OR without assistance of the other spouse and exercise alone all rights flowing from the contract. To support the view that the spouses are to be qualified as "*Gesamtgläubiger*", it is further pointed to the position of the trader. The qualification of the spouses as "*Mitgläubiger*" in terms of § 432 BGB and 150 OR

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491 For Germany: *Hadding*, in: FS für E. Wolf, 107, 110; *Larenz*, Schuldrecht AT § 36 I b.
For Switzerland: Tuor/*Schnyder* § 5 III; Berner Kommentar/*Weber* Article 70 no. 13 OR; Berner Kommentar/*Becker* Article 70 no. 2 OR; *von Tuhr/Escher*, S. 325; Züricher Kommentar/Oser/Schönenberger Article 70 no. 2 ZGB.

492 For Germany: *Larenz*, Schuldrecht AT § 36 I b.
For Switzerland: Berner Kommentar/*Weber* Article 70 no. 13 OR; Berner Kommentar/*Becker* Article 70 no. 2 OR; *von Tuhr/Escher*, S. 325; Züricher Kommentar/Oser/Schönenberger Article 70 no. 2 ZGB.

493 For Germany: Münchner Kommentar/*Heinrichs* § 362 no. 11.

494 For Germany: This solution is submitted by *Roth*, FamRZ 1979, 361.

495 For Germany: Münchner Kommentar/*Wacke* § 1357 no. 10 (3. ed.); Rolland/*Brudermüller* § 1357 no. 5; Soergel/*Lange* § 1357 no. 2; Palandt/*Diedrichsen* § 1357 no. 2; Erman/*Westermann* § 1357 no. 4; *Wacke*, FamRZ 1977, 505.
For Switzerland: *Braunschweig*, S. 13, 14; *Reusser*, Wirkung der Ehe im allgemeinen II, S. 34, 36, in: Das neue Eherecht; *Keller*, S. 70; *Arbenz*, S. 43, *Hausherr*/Reusser/Geiser Article 166 no. 5 ZGB.

would put the supplier of household necessaries in a disadvantageous position[496]. Since the trader in most cases does not know whether or not the other party is married, the application of § 1357 BGB would therefore prejudice his contractual position. The trader would be obliged to find out whether or not the other party to the contract is married, and if so, whether such party has the permission to act on his spouse's behalf as his agent in order to receive the performance [§ 164 BGB and 32 OR].

In order to support the view that each spouse is entitled to exercise the rights flowing from the contract, reference to the co-liability of the spouses is made. It is argued that the correlative of co-liability is the entitlement to exercise all rights flowing from the contract[497]. In addition it is pointed out that the solution which gives each spouse the rights flowing from the contract has practical advantages for the spouses[498]. If the spouses want to exercise the *actio quanti minoris* or *redhibitoria*, or to rescind the contract on the ground of breach of contract by the trader or on the grounds of fraudulent or negligent misrepresentation, they have to to comply with the prescriptionsrules for such rights. The possibility for each spouse to exercise such rights independently of each other reduces the risk of the rights prescribing.

6) Result

In Germany and in Switzerland each spouse is entitled to accept the performance, exercise any contractual right flowing from the contract, withhold the performance, cancel the contract, or exercise claims such as the *actio quanti minoris* or *redhibitoria* independently.

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496 This argument is only raised in Germany: Münchner Kommentar/*Wacke* § 1357 no. 36; Rolland/*Brudermüller* § 1357 no. 43; Soergel/*Lange* § 1357 no. 22; Reichsgerichtskommentar /*Roth-Stielow* § 1357 no. 13; Erman/*Heckelmann* § 1357 no. 19; Beitzke/*Lüderitz* § 12 IV, 3; *Mikat*, Rechtsprobleme, 47; *Käppler*, AcP 179 (1979), 245, 284; Staudinger/*Hübner* § 1357 no. 67; *Schwab* no. 157; *Gernhuber* § 19 IV.

497 For Germany: *Mikat*, Rechtsprobleme, 47; *Käppler*, AcP 179 (1979), 245, 284; *Gernhuber* § 19 IV. This aspect is controversial in Germany. According to the minority opinion only those rights which do not affect the contractual bond can be exercised by each spouse without the assistance of the other spouse [i.e. the warning of the creditor in terms of § 284 BGB. In terms of § 284 BGB the debtor is in default, (1) if the obligation is due, (2) if the debtor does not perform (3) the creditor has given the debtor a warning], see: *Roth*, FamRZ 1979, 361.

498 For Germany: *Wacke*, FamRZ 1977, 505.

IV. Acquisition of ownership

The effects of § 1357 BGB and Article 166 ZGB on the acquisiton of ownership was a controversial issue in both countries. The discussion centred on the question of whether § 1357 BGB and Article 166 ZGB/163 ZGB had *direct* or only *indirect* consequences for the acquisition of ownership. To understand this discussion it is necessary to explain the acquisition of ownership in Germany and Switzerland.

1) The concept of acquiring ownership in Germany and in Switzerland

Germany and Switzerland have the same concept of acquiring ownership. Both countries follow an abstract system of transfer[499]. For the transfer of ownership of a movable thing it is necessary that the owner of the thing deliver it to the acquirer and that both agree that the ownership is being transferred[500]. An objective element is thus required. The object of the transaction must be delivered. Furthermore a subjective element is also required. At the moment of passing of ownership, the transferor must have the intention of transferring ownership and the transferee must have the intention of acquiring ownership. In both countries a real agreement is thus necessary[501].

2) Direct effect of § 1357 BGB and Article 166 ZGB on the real situation

According to some authors in Germany[502] and in Switzerland[503] § 1357 BGB and the previous Article 163 ZGB should have a *direct* effect on the acquisition of ownership. For such proponents it is sufficient if the abovementioned requirements for the acquisition of ownership are met by the *contracting* spouse only. The non-contracting spouse acquires co-ownership automatically in terms of § 1357 BGB and Article 163 ZGB[504] respectively. He thus acquires ownership *ex lege* [and not in terms of § 929

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499 For Germany: Palandt/*Thomas* Einl. 16 vor § 854.
For Switzerland: Tuor/*Schnyder* § 93 II a.

500 For Germany: Palandt/Bassenge § 929 no. 2.
For Switzerland: Tuor/*Schnyder* § 93 II a.

501 See too the explanation in part 1, ch. 3, IV.

502 OLG *Schleswig*, FamRZ 1989, 88; LG *Aachen*, NJW-RR 1987, 712, 713; LG *Münster*, NJW-RR 1989, 391; Soergel/*Lange* § 1357 no. 23; Rolland § 1357 no. 19 (1.ed.); *Schwab* no. 162.

503 These authors refer only to the previous Article 163 ZGB: *Arbenz*, 100; Berner Kommentar/*Lemp* Article 163 no. 24 ZGB; *Zimmerli*, 57; *Braunschweig*, 47.

504 Modern authorities unanimously deny any direct effect of Article 166 ZGB.

BGB and Article 714 ZGB[505]]. The reason put forward by the proponents of this opinion is firstly the wording of § 1357 BGB which speaks of "*berechtigt*". It is argued that "*berechtigt*" means "entitled" in respect of contract *and* property law. Secondly, the result of co-ownership is regarded as equitable, because co-ownership is seen as the correlative of the co-debtorship of the spouses.

3) Indirect effect of § 1357 BGB and Article 166 ZGB

It has already been pointed out[506] that the BGH[507] and the majority opinion[508] in the German literature do not agree with this concept. They answer the question as to whether § 1357 BGB has any *direct* influence on the acquisition of ownership in the negative. The same answer is given by the majority opinion in Switzerland in respect of Article 166 ZGB. Today in both countries it appears to be accepted that the non-contracting spouse must fulfil all requirements in terms of § 929 BGB and Article 714 ZGB for the acquisition of ownership [objective and subjective elements] in order to become owner of the object purchased. Neither § 1357 BGB nor Article 166 ZGB provide therefore for an *ex lege* acquisition of ownership.

In both countries it is argued that an *ex lege* acquisition of ownership by the non-contracting spouse is irreconcilable with the provisions of the matrimonial property law. Such provisions provide for the *separation* of all assets of the spouses if the spouses are married out of community of property [in Germany: § 1363 II BGB in respect of the "*Zugewinngemeinschaft*"; in Switzerland: Article 198 ZGB in respect of the "*Errungenschaftsbeteiligung*"]. If the spouses live in community of property [in Germany and in Switzerland: "*Gütergemeinschaft*"] §§ 1416 I, 1419 BGB and Article 222 ZGB provide that the property of both spouses falls into the joint estate. It is therefore noteworthy that the BGB and ZGB provide that either all assets are

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505 § 929 BGB and Article 714 ZGB are the provisions which provide for the abovementioned requirements [(1) delivery of the thing to the acquirer and (2) real agreement]

506 See part 1, ch. 3, IV.

507 BGH, NJW 1992, 2283, 2284.

508 Münchner Kommentar/*Wacke* § 1357 no. 37; Erman/*Heckelmann* § 1357 no. 20; Jauernig/*Schlechtriem* § 1357 Anm. 3c; Alternativkommentar/*Finger* § 1357 no. 21; Palandt/*Diedrichsen* § 1357 no. 22 (51. ed.); Palandt/*Bassenge* § 929 no. 4 (51. ed.); *Henrich* § 7 IIc, (4. ed.); *Käppler*, AcP 179 (1979), 245, 257; *Wacke*, NJW 1979, 2585, 2591; *Walter*, JZ 1981, 601, 604; Brötel, Jura 1992, 470, 473; *Kick*, Anm. zu BGH-Urteil vom 13.3.1991, in: JZ 1992, 219; *Lüke*, Anm. zu BGH-Urteil vom 13.3.1991, in: JR 1992, 287; *Mikat*, Rechtsprobleme, 50; *Gernhuber* § 19 IV 9; *Eichenhofer*, JZ 1988, 329; *Leipold*, in: FS für *Gernhuber*, 695, 696. See the investigation for the South African legal system in: part 1, ch. 3. IV.

separated or that all assets fall into the *joint estate*. The acquisition of *co-ownership by law* thus creates a new property system for all things which fall within the ambit of § 1357 BGB and Article 166 ZGB. § 1357 BGB and Article 166 ZGB would thereby undermine the principle that the assets of the spouses are either separated [§ 1363 II BGB and Article 198 ZGB] or fall into the joint estate of the spouses [§§ 1416 I, 1419 BGB and Article 222 ZGB]. § 1357 BGB and Article 166 ZGB would have to be regarded as legal exceptions to the matrimonial property system.

4) Ownership in terms of § 929 BGB and Article 714 ZGB

If the non-contracting spouse is to become owner he must fulfil the requirements of § 929 BGB and Article 714 ZGB. It is necessary that he enter into a real agreement with the owner who must deliver the thing to the acquirer [if the non-contracting spouse is to become co-owner the trader must deliver to both spouses; if the non-contracting spouse is to become sole owner, the trader must deliver to him only]. Since the non-contracting spouse in general is absent and not involved in the conclusion of the contract, it appears that only the contracting spouse becomes sole owner of the purchased item, because the requirements of § 929 BGB and Article 714 BGB are met only by him.

It is however possible that the contracting spouse acts as the *representative* of the non-contracting party. If so, then the non-contracting party may in terms of § 164 BGB and Article 32 OR acquire ownership

Representation requires that the contracting spouse acts, from the trader's point of view, *in the name* of the other spouse and with his authority[509].

It has already been pointed out[510] that it appears to be reasonable to assume that, on the one hand, the non-contracting spouse in general authorises the other spouse to act on his behalf, but, on the other hand that the contracting spouse generally acts *in his own name* but not in the name of his partner. From the trader's point of view, the contracting spouse thus acts only on his own behalf and not on behalf of his partner.

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509 In terms of § 164 BGB and Art. 32 OR a declaration of the intention which a person makes in the name of the principal within the scope of his agency operates directly both in favour of and against the principal. It makes no difference whether the declaration is made expressly in the name of the principal, or if the circumstances indicate that it was to be made in his name.

510 See part 1, ch. 3, III.

The non-contracting spouse would therefore not acquire ownership. The contracting spouse would become *sole* owner.

a) Sole ownership in Switzerland

This solution is propounded by Swiss literature[511]. According to such proponents the contracting party acquires *sole* ownership unless it was obvious for the trader that the contracting spouse acted not only on his own behalf but also on behalf of his partner[512]. It is therefore notable that in Switzerland the contracting spouse must always act *in the name* of the other spouse, if the latter is to acquire ownership. In the age of mass-marketing, however, the contracting spouse typically acts in his *own* name. Hence the non-contracting spouse does not acquire ownership in respect of the objects purchased.

b) Co-ownership in Germany

As pointed out above[513], in Germany it is not necessary in each case that the representative act in the name of his principal. The requirement that the representative act in the name of his principal is to protect the trader[514]. He then knows with whom he has contracted and who acquires ownership of the object purchased. It has been pointed out[515] that the BGH[516] and the majority opinion in the German literature[517] forgoes this requirement if the contract [*causa*] falls within the ambit of § 1357 BGB by applying the principle of the "*Geschäft an den, den es angeht.*" The reason is that it is immaterial to the trader whether he transfers ownership to the contracting spouse or to the non-contracting spouse, or to both of them, because in terms of § 362 II

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511 *Berger*, 109-13; *Frank* § 7 no. 27-38; Züricher Kommentar/*Hasenböhler* Article 166 no. 75 - 83 ZGB

512 If for example one of the spouses purchases items which are typically used by the other spouse [the husband buys woman's clothes or toiletries such as lip-stick, make-up and sanitary towels].

513 See part 1, ch. 3, III.

514 See part 1, ch. 3, III.

515 See part 1, ch. 3, III.

516 BGH, NJW 1991, 2283, 2284.

517 Münchner Kommentar/*Wacke* § 1357 Rz. 37; Erman/*Heckelmann* § 1357 Rz. 20; Jauernig/*Schlechtriem* § 1357 Anm. 3c; Alternativkommentar/*Finger* § 1357 Rz. 21; Palandt/*Diedrichsen* § 1357 Rz. 22 (51. ed.); Palandt/*Bassenge* § 929 Rz. 4 (51. ed); *Henrich* § 7 IIc, (4. ed); *Käppler*, AcP 179 (1979), S. 245, 257; *Wacke*, NJW 1979, 2585, 2591; *Walter*, JZ 1981, S. 601, 604; *Brötel*, Jura 1992, S. 470, 473.

BGB and § 185 BGB[518] he will fulfil his obligation. It thus does not make any difference to the trader which of the spouses acquires ownership of the purchased item. It is therefore regarded as sufficient if the acting spouse has the *intention* to act on his spouse's behalf.

Furthermore it has been pointed out[519] that the BGH holds that the contracting spouse in general has the (unrevealed) intention to acquire ownership on behalf of both spouses unless he expresses his opposite intention. The reason for this interpretation is that co-ownership of the objects purchased is regarded as correlative of the co-liabilty and that spouses in general do not have the intention to distinguish between "mine" and "yours" as far as household necessaries are concerned.

The result of this reasoning is that the non-contracting spouse acquires co-ownership in terms of § 929 BGB and not in terms of § 1357 BGB. He thus acquires co-ownership not *by law* but by legal *transaction*[520].

c) Result

Neither § 1357 BGB nor Article 166 ZGB have a direct effect on the acquisition of ownership. The non-contracting spouse acquires ownership in terms of § 929 BGB and Article 714 ZGB respectively. In Switzerland it is necessary that the contracting spouses act *in the name* of his spouse, otherwise the acting spouse becomes sole owner. In Germany by contrast, the non-contracting spouse becomes co-owner in terms of § 929 BGB unless the contracting spouse expresses his opposite intention.

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518 § 362 BGB *(1) An obligation is extinguished if the performance due is effected in favour of the creditor.*
(2) If the performance is effected in favour of a third party for the purpose of fulfilment, the provisions of § 185 apply.
§ 185 *(1) A disposition affecting any object which is made by a person without title, if made with the approval of the person entitled, is valid.*

519 See part 1, ch. 3, III.

520 This difference is decisive, because only the acquisition of co-ownership *by law* [in terms of § 1357 BGB and Article 166 ZGB] would have to be regarded as a legal exception to the provisions governing the matrimonial property law.

Chapter 4: Exclusion of § 1357 BGB and Article 166 ZGB

In both legal systems the effects of a legal transaction which falls within the ambit of § 1357 BGB and Article 166 ZGB can be excluded. The exclusion of the effects of § 1357 BGB and Article 166 ZGB can be achieved either by the contracting or by the non-contracting spouse, but never by third persons[521].

I. Exclusion by the acting spouse

The acting spouse can exclude the legal consequence of co-entitlement and co-liability by making it clear to the trader that only he and not the other spouse is to be a party to the contract[522]. He must make sure that the other party entertains no doubt as to the fact that only one spouse is answerable and entitled. In general he therefore has to inform the supplier *expressly* of his intention to limit the consequences of the purchase to himself personally[523].

II. Exclusion by the non-contracting spouse

Thus the legal situation in both Switzerland and Germany is very much the same. However, as regards the question how the non-contracting spouse can withdraw the contracting spouse's capacity to bind his credit, the ZGB and the BGB stipulate different requirements. Such requirements will be presented in different sections for each country.

1) The exclusion of the competence in Germany

In Germany it is necessary to be distinguish between the withdrawal of the competence and the effects of such withdrawal on *third* persons. It is possible that on

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521 *Binder*, 135.

522 For Germany: Rolland/*Brudermüller* § 1357 no. 50; *Büdenberger*, FamRZ 1976, 662, 667; *Käppler*, AcP 179 (1979), 179, 245, 279.
For Switzerland: *Hausheer*/Reusser/Geiser Article 166 no. 15, 67, 88 ZGB; Züricher Kommentar/*Hasenböhler* Article 166 no. 66 ZGB.

523 For Germany: Rolland/*Brudermüller* § 1357 no. 50; *Büdenberger*, FamRZ 1976, 662, 667; *Käppler*, AcP 179 (1979), 179, 245, 279.
For Switzerland: *Hausheer*/Reusser/Geiser Article 166 no. 15, 67, 88 ZGB; Züricher Kommentar/*Hasenböhler* Article 166 no. 66 ZGB.

the one hand, the non-contracting spouse can withdraw the other spouse's capacity to bind his credit, and that on the other, this withdrawal has no effect on third persons.

a) The withdrawal of the capacity

Each spouse can withdraw the contracting spouse's capacity to bind the other spouse's credit[524]. The withdrawal of the other spouse's capacity is a unilateral, informal declaration of intention[525]. The addressee of this declaration is either the contracting spouse or the trader. The withdrawal of the capacity is thus regulated in the same way as the expiration of the power of attorney in terms of §§ 164 BGB, 168 BGB[526]. The spouse can deprive the other spouse of his capacity without a court order[527].

b) The effect on third persons

The withdrawal has effect on third parties only when it has been registered in terms of § 1412 BGB or when the third party gets to know about the withdrawal[528]. The registrar does not control whether a reason for such withdrawal is given, because such reason is not needed[529]. Whether or not the affected spouse knows about the withdrawal imposed by his partner, is irrelevant[530].

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524 . See: § 1357 II BGB which provides as follows:
Each spouse may limit or exclude the right of the other spouse to enter into legal transactions with effect for him.

525 Palandt/*Diedrichsen* § 1357 no. 10; Rolland/*Brudermüller* § 1357 no. 54; Münchner Kommentar/*Wacke* § 1357 no. 40; Soergel/*Lange* § 1357 no.18; OLG *Hamm* FamRZ 1958, 465; Staudinger/*Hübner* § 1357 no. 48.

526 See § 168, 1 BGB:
The expiration of the power of attorney depends on the legal situation upon which its creation is based.
§ 168, 1 BGB must be read together with § 167 I BGB
A power of attorney is conferred by declaration on the person who is given the power [here: the contracting spouse], *or on the third party with whom the matter delegated is to be transacted* [here the trader].

527 Palandt/*Diedrichsen* § 1357 no. 10; Rolland/*Brudermüller* § 1357 no. 54; Münchner Kommentar/*Wacke* § 1357 no. 40; Soergel/*Lange* § 1357 no. 18; Staudinger/*Hübner* § 1357 no. 48.

528 § 1412 BGB provides that if the spouses excluded or modified the statutory matrimonial regime, they may not invoke this to affect the validity of a legal transaction made between them and a third party unless the marriage contract was registered in the Register of Marital Property of the competent District Court or was known to the third party at the time of carrying out the transaction.

529 Palandt/*Diedrichsen* § 1357 no. 10; Rolland/*Brudermüller* § 1357 no. 54; Münchner Kommentar/*Wacke* § 1357 no. 39; Soergel/*Lange* § 1357 no. 18; Staudinger/*Hübner* § 1357 no. 48.

529 Münchner Kommentar/*Wacke* § 1357 no. 40.

530 Rolland/*Brudermüller* § 1357 no. 54.

The capacity to withdraw the other spouse's competence is not modifiable. Thus each spouse always has the right to withdraw the other spouse's capacity[531]. An agreement between the spouses that one or both of them cannot exercise this right has no effect. The agreement is void as soon as one of the spouses exercises the rights flowing from § 1357 II BGB[532].

c) Countermeasures of the affected spouse

The affected spouse can go to court and apply for the repeal of the measure [§ 1357 II, 1, 2 BGB]. The measure must be repealed if there was not sufficient reason for the withdrawal [§ 1357 II, 2, 2 BGB][533]. Sufficient reason is given if one spouse is incapable of or unwilling to fulfil his obligation flowing from § 1353 BGB[534] [535]. Whether or not the spouse can be blamed for his inability is irrelevant[536]. Examples of sufficient reason for the withdrawal accepted by case law and literature are the inability to handle money[537], wastefulness[538] or the attempt of one spouse to enrich himself during a marital crisis in a "surprise attack" by entering into legal transaction only he profit from[539]. The court must respect the principle of proportionality[540]. If the total withdrawal of the competences flowing from § 1357 BGB appears to be unnecessary, the court may grant the application of the spouse in part, namely by maintaining the withdrawal for certain legal transactions only[541].

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531 Rolland/*Brudermüller* § 1357 no. 23.

532 *Binder*, 131.

533 Palandt/*Diedrichsen* § 1357 no. 10; Rolland/*Brudermüller* § 1357 no. 54; Münchner Kommentar/*Wacke* § 1357 no. 43; Soergel/*Lange* § 1357 no. 18; OLG *Hamm* FamRZ 1958, 465; Staudinger/*Hübner* § 1357 no. 48.

534 Palandt/*Diedrichsen* § 1357 no. 10; Rolland/*Brudermüller* § 1357 no. 54; Münchner Kommentar/*Wacke* § 1357 no. 43; Soergel/*Lange* § 1357 no. 18; OLG *Hamm* FamRZ 1958, 465. Staudinger/*Hübner* § 1357 no. 48; *Gernhuber* § 19 IV 11, ref. 58.

535 In terms of § 1353 BGB the spouses are mutually obliged to live in conjugal community.

536 Rolland/*Brudermüller* § 1357 no. 54; Münchner Kommentar/*Wacke* § 1357 no.43.

537 OLG *Hamm*, FamRZ 1958, 465; Rolland/*Brudermüller* § 1357 no. 54; Palandt/*Diedrichsen* § 1357 no.10.

538 *Bay*ObIG, FamRZ 1959, 505.

539 Münch- Komm/*Wacke* § 1357 no. 42.

540 Münch- Komm/*Wacke* § 1357 no. 42.

541 Münchner Kommentar/*Wacke* § 1357 no. 42. Courts usually do not take advantage of this possibility, because a partial withdrawal of the "Schlüsselgewalt" appears to be impractical.

2) The exclusion of the competence in Switzerland

Similar to the German law, the Swiss legal system distinguishes between the withdrawal of the capacity to bind the other spouse's credit and the publication of such withdrawal.

a) The withdrawal of the capacity

In terms of Article 174 ZGB[542] the non-contracting spouse can exclude the other spouse's competence to act on his behalf[543]. Contrary to the German legal system and similar to the legal situation in South Africa, a spouse requires a court order to exclude the other spouse's competence[544]. The judge only withdraws the other spouse's competence if certain circumstances are present: the affected spouse must have exceeded his competences or he must be "incapable" of exercising his capacity to act on behalf of the family[545].

The contracting spouse will be regarded as incapable to exercise his capacity flowing from Article 166 ZGB if he cannot exercise this capacity in an appropriate way[546], i.e. he purchases items which are not required by the family [for example he buys so many clothes that there is no money left for the purchase of food]. The reasons underlying the spouse's "incapability" are irrelevant[547]. Further examples in case law and the literature are wastefulness and the inability to handle money[548].

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542 Article 174 ZGB (1) *If one spouse exceeds his capacity in respect of the representation of the marital partnership or if he is incapable of making use of such capacity the judge can limit or exclude such right upon application of the other spouse.*
(2) The applying spouse shall inform the third person only by personal notice.
(3) As against bona fide third parties the exclusion is effective only if it has been published upon order by a judge.

543 *Hausheer*/Reusser/Geiser Article 174 no. 18 ZGB; Berner Kommentar/*Lemp* Article 164 no. 8 ZGB.

544 *Hausheer*/Reusser/Geiser Article 174 no. 13 ZGB; BGE 95 II, 68, 71.

545 *Hausheer*/Reusser/Geiser Article 174 no. 18 ZGB; Berner Kommentar/*Lemp* Article 164 no. 8 ZGB.

546 *Hausheer*/Reusser/Geiser Article 166 no. 14 ZGB.

547 They might be of a physical or mental nature. BGE 95 II, 68, 71; *Hausheer*/Reusser/Geiser Article 166 no. 14 ZGB.

548 Obergericht *Basel*, BJN 1960 no. 1; Obergericht *Zürich*, ZR 78 no.. 125 and ZR 82 no. 22 *Hausheer*/Reusser/Geiser Article 166 no. 14 ZGB.

b) Publication of the exclusion

Article 174 ZGB provides for two different kinds of publication of the exclusion of the competences of a spouse: firstly, the personal notification by one spouse to the trader [Article 174 II ZGB], secondly, the publication by the judge [Article 174 III ZGB].

The personal notification destroys the good faith of the addressee trader[549]. He thereby becomes *male fide*.

Only the publication by a judge has effect vis à vis a trader who is not personally informed about the withdrawal of the spouse's capacity to bind the other spouse's credit[550]. The exclusion of the competence does however not limit the legal capacity of the affected spouse. He can act on his own behalf, but not on the behalf of his partner in terms of Article 166 ZGB[551].

It is unclear in which order of precedence Article 174 II ZGB and Article 174 III ZGB stand to each other. The question therefore arises as to when the judge is to publish the withdrawal of the spouse's competence and when he is to order the personal notification? Article 174 ZGB does not give any indication. In terms of the commentary on Article 174 ZGB[552] the judge must order the publication when it is "necessary" which must be understood as an *ultima ratio* principle[553]. The publication of the decree is to be ordered only if personal notification of the trader appears to be impossible or ineffective[554]. The intention is apparently to protect the affected spouse as far as possible from the compromising effects of the exclusion. A private and personal notification serves this purpose much more effectively than an official publication.

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549 *Hausheer*/Reusser/Geiser Article 174 no. 18 ZGB; Berner Kommentar/*Lemp* Article 164 no. 8 ZGB.

550 *Hausheer*/Reusser/Geiser Article 174 no. 23 ZGB; Berner Kommentar/*Lemp* Article 164 no. 9 ZGB.

551 *Hausheer*/Reusser/Geiser Article 174 no. 18 ZGB; Berner Kommentar/*Lemp* Article 164 no. 8 ZGB.

552 Botschaft 215.21.

553 *Berger*, 141; *Hausheer*/Reusser/Geiser Article 166 no. 20 ZGB; *Frank* § 7.2 no. 24, 25 ZGB.

554 *Hausheer*/Reusser/Geiser Article 166 no. 20 ZGB:

A publication in a newspaper is not allowed[555]. This form of publication is inappropriate and leads to the exposure of the affected spouse[556].

c) Countermeasures

In terms of Article 179 ZGB the affected spouse can apply for the repeal of the exclusion of his capacity in terms of Article 166 ZGB. The judge will grant this application if the spouse can prove that he will in future respect the limitations of his capacity or that he has regained the capacity to act on behalf of the family[557]. Examples in jurisprudence and literature for the repeal of the exclusion of a spouse's capacity are that the spouse has overcome his alcoholism or has recovered from a physical or mental disability.

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555 *Berger*, 141; *Hausheer*/Reusser/Geiser Article 166 no. 20 ZGB; *Frank* § 7.2 no. 24, 25 ZGB.

556 The publication in a newspaper is a ground for a divorce in terms of Article 138 I, 3 ZGB; see: *Hegnauer* § 9.22.

557 Obergericht *Basel*, BJN 1960 no. 1; Obergericht *Zürich*, ZR 78 no. 125 and ZR 82 no. 22; *Hegnauer* § 21.10 ZGB.

Part 3: Conclusion

This thesis has thus far concentrated on a presentation and an analysis of the legal situation concerning the capacity of spouses to bind each other's credit for legal transactions in respect of household necessaries in the three selected countries.
The South African legal situation has been central to the discussion. Within this context the author has attempted to propose certain solutions for the *current* legal situation [proposals *de lege lata*]. In doing so, the author has made extensive reference to discussions, debates and controversies arising from the legal situation in Germany, Switzerland and England. These legal systems have proved to be of great value, *inter alia*, by identifying problems with which the South African jurisprudence and literature has yet not dealt.

I. Aim of this section

This section will traverse once again the submitted proposals and solutions. This section will proceed from the author's interpretation in respect of sections 17 (5) and 23 (5) of the Matrimonial Property Act 88 of 1984, assuming that such interpretation is the "correct" reflection of the current legal situation. This conclusion will compare the South African legal situation, on the one hand, and the German and Swiss legal situations, on the other. By doing so, the advantageous and disadvantageous aspects of each legal system will be highlighted. The following section will thus again refer to the questions and problems already highlighted and discussed in this thesis, albeit with another objective.

1) *Ratio legis*

It has been pointed out that South African authorities have not yet provided an adequate or satisfactory answer to the question of the *ratio legis* of sections 17 (5) and 23 (5) of the Matrimonial Property Act, in spite of the importance thereof. Only one authority has dealt with this question, by arguing that the *ratio* of such statutory provisions is to protect the supplier. It has been pointed out by the author that this explanation cannot be regarded as convincing. German and Swiss literature offers a better explanation of the *ratio legis* of the capacity of one spouse to bind the other

spouse's credit. Such writers point out that the creditworthiness of the contracting spouse is enhanced by § 1357 BGB and Article 166 ZGB and that such enhancement of the creditworthiness enables the contracting spouse to fulfil his role as manager of the household. Such explanation appears to be preferable, because it takes into account the fact that the non-earning or non-solvent spouse who is manager of the household *needs* the capacity to bind the other spouse's credit in order to fulfil his duties of supporting the family through his work and property. This proposal appears to be transferable to the South African legal system. For this reason the author has submitted that the *ratio legis* of sections 17 (5) and 23 (5) of the Matrimonial Property Act should be interpreted in the same way as that propounded by the German and Swiss commentators in respect of § 1357 BGB and Article 166 ZGB.

2) Legal nature

This thesis revealed that the legal nature of § 1357 BGB, Article 166 ZGB and sections 17 (5) and 23 (5) of the Matrimonial Property Act is unclear. In particular it has been submitted that the principles governing the law of representation which also have, similarly to § 1357 BGB, Article 166 ZGB and sections 17 (5) and 23 (5) of the Matrimonial Property Act effects in respect of third parties, cannot be referred to in this regard. Thus in all three countries the relevant statutory provisions have to be qualified as provisions "*sui generis*". Yet the differences between sections 17 (5) and 23 (5) of the Matrimonial Property Act on the one hand and § 1357 BGB and Article 166 ZGB on the other, are obvious. Whereas the German and Swiss statutes show similarities to the rules of representation for partnerships, this comparison cannot be made in respect of the South African provisions. In terms of § 1357 BGB and Article 166 ZGB, both spouses become parties to the contract and can exercise all rights flowing from it. In the South African legal system however, only the contracting spouse is relevant for the conclusion of the contract and its further destiny. The rights of the non-contracting spouse derive from the position of the contracting spouse. To illustrate the differences between sections 17 (5) and 23 (5) of the Matrimonial Property Act 88 of 1984 on the one hand and § 1357 BGB and Article 166 ZGB on the other, the example of a contracting spouse with limited legal capacity was given. It appears to be possible only in Germany and Switzerland to apply the rule according to which a representative can have limited legal capacity by way of analogy. As a result, only the non-contracting spouse becomes a party to the contract, and not the

contracting spouse. In South Africa, however, such a solution is impossible, because in terms of sections 17 (5) and 23 (5) of the Matrimonial Property Act 88 of 1984 only the contracting spouse becomes a party to the contract, but not the other spouse.

The fact that the legal nature of § 1357 BGB and Article 166 ZGB on the one hand and of sections 17 (5) and 23 (5) of the Matrimonial Property Act on the other, is different, has a great impact on the effects of transactions falling within the ambit of such statutory provisions.

3) Requirements

a) Valid and lawful marriage

All the statutory provisions under discussion require a valid and lawful marriage. It would appear that this requirement is satisfied even if the marriage is voidable. Until such time as a voidable marriage has been annulled by court order, the spouses in all three countries can bind the other 's credit for legal transactions in respect of household necessaries.

b) Exception in respect of a bona fide trader

It would furthermore appear that, as regards the requirement of a valid and lawful marriage, none of the investigated legal systems protects a trader, who is *bona fide* in respect of the existence of a marriage. In each country the doctrine requires the existence of a marriage and refuses an extended interpretation of the "spouse's" capacity in relation to unmarried couples.

c) Living together

Each of the investigated legal systems requires that the spouses live together, making the legal situation in all countries relatively clear. However, problems may well arise as regards the question of the effect of the termination of the cohabitation and the requirements thereof.

aa) The termination of the cohabitation in Germany and Switzerland

aaa) The consequences of the termination of the cohabitation

In Germany and Switzerland it appears to be clear that the termination of the cohabitation suspends the capacity of the spouses to bind each other's credit.

Two aspects thereof are worth highlighting. Firstly, following such termination of cohabitation, the one spouse can no longer bind the other spouse's credit, irrespective of whether or not a third person is in good faith in respect of the cohabitation. The argument put forward to support this point of view is the wording of § 1357 BGB and Article 166 ZGB. Both statutory provisions *explicitly* require the cohabitation of the spouses [§ 1357 III BGB: "Subparagraph 1 is not valid when the spouses live *separatetly*"; Article 166 I ZGB: "*During the cohabitation* each spouse represents the marital partnership ..."]. Thus it appears that there is no room for an extended interpretation in respect of a *bona fide* trader.

Secondly, the capacity of the spouses is not terminated, but is merely suspended when the spouses cease to live together. The advantages of this conclusion are mainly practical ones. So for example, this conclusion appears to permit each spouse to withdraw the other spouse's competence during the separation.

bbb) The criteria for the termination of the cohabitation

As to the question of the circumstances required to constitute a termination of the cohabitation, this thesis has illustrated that only the German literature offers a satisfactory answer by referring to § 48 EheG. The statements of the Swiss doctrine in this regard appeared to be very cryptic and unclear.

cc) The termination of the cohabitation in South Africa

aaa) The consequences of the termination

As regards the legal situation in South Africa, this thesis has referred partly to principles underlying the German, Swiss and English law.

In respect of the question of the consequences of the termination of the joint household, this thesis has pointed to the uncertainties surrounding the South African common law and the controversies in the literature and case law resulting from such uncertainties. In contrast to the clear statutory provisions in Germany and Switzerland

it has been argued that the South African legal system offers room for a more flexible and equitable solution. The analysis of the dogmatic framework of the common law favours the point of view that cohabitation is - like in Germany and Switzerland - required in each case. The normative evaluation of the legal situation, however, requires an exception to be made in the case where the separation of the spouses is not perceptible to the trader. If the latter requirement is not met, the contracting spouse can (despite the separation) continue to bind the non-contracting spouse's credit.

In order to harmonise the spouses' [internal] obligation to maintain each other by means of their work and property with their [external] obligation to pay for their debts for transactions in respect of household necessaries, it has been submitted that the South African law should adopt the German and Swiss solution, namely that the separation of the spouses *suspends* the capacity but does not terminate it. Thus an "innocent" spouse, who is not responsible for the separation can, on the one hand, continue to bind the other spouse's credit (provided that the trader is in good faith) and can, on the other, withdraw the "guilty" spouse's capacity to bind his credit, because the latter left him without good reason.

bbb) The criteria for the termination of the cohabitation

As regards the question of the requirements for termination of the cohabitation this thesis has referred to as the principles underlying the English and South African divorce law, according to which a subjective [*animus deserendi*] and an objective element is required to constitute the separation of the spouses. Contrary to the rules underlying the divorce law, it is not necessary that the spouses must have the intention to terminate the *consortium vitae*. It is sufficient if the spouses have the intention to terminate the common household. In order to avoid difficult investigations of the spouses' mental states, the author has submitted that the separation should lead to a *prima facie presumption* that the spouses have given up their common household and that the onus should be on the trader to prove the opposite.

dd) Result

The submitted solution of the author for the South African legal system shows similarities but also differences to the legal systems in Germany and Switzerland. It

appears that in all three countries the mere physical separation is not sufficient. Furthermore the termination of the common household entails a suspension but not a termination of the capacity to bind the other spouse's credit in all countries. Contrary to the legal situation in Germany and Switzerland, the separation of the spouses does not suspend in each case the capacity of the spouses to bind the other spouse's credit. The author has submitted that an exception be made in the case of a non-perceptible separation. The legal situation in South Africa appears therefore to be more flexible and equitable than the situation in Germany and Switzerland.

d) The objects falling within the ambit of the capacity to bind the other spouse's credit

With regard to the question of which objects fall within the ambit of the capacity to bind the other spouse's credit, all three legal systems show great differences in their terminology. Sections 17 (5) and 23 (5) of the Matrimonial Property Act 88 of 1984 speak of "*household necessaries*", § 1357 BGB speaks of *"legal transactions which are necessary for the appropriate provision of the necessities of life*" and Article 166 ZGB enumerates four possibilities. An object of a legal transaction falls within the ambit of Article 166 ZGB firstly, when it is to be regarded as a "*continuous need of the family*", secondly and thirdly, when either the *other spouse or a judge has authorised the contracting spouse* to enter into a legal transaction in respect of a certain object and fourthly, when the transaction is necessary and *the other non-contracting spouse is not able to consent* into such transaction.

aa) Household necessaries

As to the question of how to define the words "household necessary", the author has submitted an own solution. It has been pointed out that such words were, in former times, interpreted in the light of the traditional understanding of the role of husband and wife. Whereas the husband maintained the family from his work, the wife fulfilled her obligation of maintenance by managing the household. This *functional* element, however, cannot be referred to anymore because the legislature has jettisoned the typical understanding of the roles of husband and wife. The role as manager of the household, the solvency and the gender of the contracting spouses does not affect his

capacity to bind the other spouse's credit for legal transactions in respect of household necessaries. His function in the family is thus irrelevant.

The other criterion the South African jurisprudence referred to was the element of *finance*. The judges refused to classify an object of a legal transaction as a "household necessary" when the object of the legal transaction was not reasonable with regard to the means of the concrete family. The main factors to be taken into account when considering the reasonableness of an object are the spouses' social standing, their style of living and the customs of the place and society in which they live. If there is a discrepancy between the spouses' style of living and their real means, the former will be decisive. Spouses who live beyond their means and create in the minds of third parties the impression that they are wealthy, can thus be held liable for purchases they cannot in reality afford.

bb) The third person's point of view

It is not necessary that the family should really need the purchased article. It is relevant only that, from the *trader's point of view*, the concrete item is in general necesssary for a family living according to the relevant standard. The fact, for example, that a family is already sufficiently supplied with goods or that the purchasing party is provided with enough money by his spouse is irrelevant.

cc) The criterion of consultation

This thesis has shown furthermore that the criterion of function is to be replaced by the criterion of consultation. The reason for such interference is to be seen in two factors: firstly, that in former times the wife's capacity encompassed only legal transactions which *did not require the consultation or permission of her husband* and secondly, that it was not intended to extend the capacity of the contracting spouse to bind the other spouse's credit. Thus only transactions which do not require a [in the present legal system: mutual] consultation fall within the ambit of sections 17 (5) and 23 (5) of the Matrimonial Property Act 88 of 1984.

dd) "Appropriate provisions of the necessities of life" and "continuous needs"

Similar criteria are used in Switzerland and Germany in order to determine what is to be understood by "*appropriate provisions of the necessities of life*" and of "*continuous needs*" respectively.

It is pointed out that the only transactions which fall within the ambit of § 1357 BGB and Article 166 I ZGB are those which are reasonable in respect of the spouses' social standing, their style of living and the customs of the place and society in which they live. If there is a discrepancy between the spouses' style of living and the spouses' real means, the style of living only will be relevant in both countries. If the spouses live beyond their means and create in the minds of third parties the impression that they are wealthy, they can be held liable for purchases they cannot in reality afford.

Furthermore, like in South Africa, the capacity of the spouses in terms § 1357 BGB and Article 166 I ZGB encompasses only legal transactions which can be entered into without a *consultation* of the spouse.

It is therefore obvious that the criterion of consultation is decisive in all three legal systems.

ee) Legal transactions of a great impact

It has been pointed out that, in contrast to the South African system, the capacity of the spouses in terms of § 1357 BGB and Article 166 ZGB might encompass legal transactions of great impact on the family life. Such legal transactions fall within the ambit of § 1357 BGB if a consultation is not necessary. In terms of Article 166 ZGB "other needs" fall within the scope of the capacity to bind the other spouse's credit if the legal transaction is authorised by the other spouse or a judge, or if the situation requires the spouse to act although he cannot consult his partner.

ff) Examples

The work has presented several examples from literature and case law. In all three legal systems the capacity of the spouses encompasses debts for medical treatments, travel expenses, expenses for cultural, personal and political needs. The statute with the widest ambit is Article 166 ZGB, since this statute includes "other needs", i.e. very expensive and exceptional needs of the family, provided that the requirements of Article 166 II ZGB are met.

In addition this thesis has focused on the question of whether the credit agreement and the hire-purchase agreement fall within the ambit of § 1357 BGB and Article 166 ZGB respectively. Whereas this question has yet not been discussed in the South African literature and jurisprudence[558], it appears to be the majority opinion in Germany and Switzerland that neither of these contracts falls within the scope of the capacity to bind the other spouses' credit.

As regards the credit agreement it is argued in particular that the object of the legal transaction cannot satisfy the needs of the family and that it is impossible for the trader to tell, whether the money advanced on credit is used for the family or for the private purposes of the contracting spouse.

As regards the hire-purchase agreement this thesis pointed to Article 226 b OR, according to which the contracting spouse does not have the legal capacity to enter into a credit agreement. Furthermore, in both countries the non-contracting spouse also becomes a party to the contract and can thus exercise all rights flowing from such a contract. If the hire-purchase agreement falls within the ambit of Article 166 ZGB and § 1357 BGB, it is possible that the non-contracting spouse could lose his rights without ever having known about such rights.

gg) Result

The differences between the objects falling within the scope of sections 17 (5) and 23 (5) of the Matrimonial Property Act 88 of 1984 on the one hand and § 1357 BGB and Article 166 ZGB on the other, reflect the different concepts of the South African, German and Swiss statutes. Sections 17 (5) and 23 (5) of the Matrimonial Property Act 88 of 1984 enable the spouses to enter into legal transactions in respect of household necessaries. § 1357 BGB and in particular Article 166 ZGB regard the spouses as partners of the marital partnership. Thus they do not only empower the spouses to purchase household necessaries [as sections 17 (5) and 23 (5) of the Matrimonial Property Act 88 of 1984 do] but go beyond this ambit [see in particular: Article 166 II ZGB] by permitting the spouses to enter into all ["*other*"] legal transactions which concern the common family life.

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[558] See: Rodenburg 2.1.20; Voet 23.2.46; *Du Preez v Cohen Bros* 1904 TS 157; Hahlo, 205 and De Wet and Du Plessis, in: Joubert, Agency and Representation § 90 which approve the question of whether the credit agreement falls within the ambit of the capacity to bind the other spouse's credit without any discussion.

4) Effects

a) Liability of the spouses

In all three legal systems the spouses are jointly and severally liable for the debts incurred by either of them in respect of household necessaries. This means the legal transaction in respect of household necessities creates a relationship in which each spouse is answerable to the common creditor for the full amount of the debt - *singuli solidum debent*. The common creditor can demand the whole debt from either of the spouses at his own choice. The spouses are bound once only to the common creditor - *unum debent omnes*.

Furthermore it has been pointed out that in Germany and Switzerland the spouses are to be regarded as the representatives of the "partnership" family. Thus they are always to be seen as a single entity, and it is accordingly not possible that the obligation of each spouse is not identical. Therefore they are always liable not only for the debts in respect of the legal transaction they entered into, but also for the compensation one of them is to pay.

b) The spouses' contractual position

It has been pointed out that § 1357 BGB and Article 166 ZGB apply to spouses married in community of property and spouses married out of community of property, because both statutes are placed in the general part on family law of the BGB and ZGB. It is thus obvious that different regulations, in respect of the matrimonial property systems, are not possible. In terms of these statutes both spouses become parties to the contract. Each spouse can accept the performance or exercise the rights arising from the contract, such as the cancellation of the contract or claims like the *actio quanti minoris* or *actio redhibitoria* or the recission of the contract on the ground of breach of contract by the trader or on the grounds of fraudulent or negligent misrepresentation.

In contrast to Germany and Switzerland, in South Africa different regulations govern the capacity to bind the other spouse's credit in terms of sections 17 (5) and 23 (5) of

the Matrimonial Property Act 88 of 1984, depending upon the relevant matrimonial property system.

If spouses are married in community of property, each of them can exercise all rights flowing from the contract. The reason is that the rights flowing from the contract fall into the joint estate. Since each spouse can administer the joint estate in terms of section 15 (1) of the Matrimonial Property Act 88 of 1984, each of the spouses can exercise all rights flowing from the contract as if each of them were a party to the contract [which in fact they are not in the South African system].

If spouses are married out of community of property, the situation of the non-contracting spouse is comparable with that of a surety who is co-principal debtor. He is not a party to the contract but he may rely upon and plead any defence *in rem* which the principal debtor *could* have raised successfully against the creditor, namely withholding of the performance until the other party tenders his performance, the *actio quanti minoris*, the *actio redhibitoria*, illegality, fraud, duress, payment, *res iudicata*, set-off and prescription. He cannot rely on those defences which are purely personal to the debtor (defences *in personam*) such as minority, insolvency or liquidation.

c) Acquisition of ownership

This thesis has illustrated that none of sections 17 (5) and 23 (5) of the Matrimonial Property Act 88 of 1984, § 1357 BGB nor Article 166 ZGB have any *direct* effect on the acquisition of ownership. The non-contracting spouse acquires only ownership if he enters into a real agreement with the trader and if the owner of the thing delivers the thing to the acquirer.

In all three countries it is however possible that the contracting spouse acts as the *representative* of the non-contracting spouse. If so, the represented (non-contracting) spouse might acquire ownership. It has been pointed out that representation requires that the contracting spouse act in the name of the non-contracting spouse [principal]. In the age of mass marketing such requirement is usually not satisfied. From the trader's point of view the acting spouse acts in his *own* name and not in the name of his partner [whom the trader in most cases never meets]. Thus the requirement that the contracting spouse is to act in the name of the non-contracting spouse is not met.

The latter cannot acquire ownership. This consequence is the conclusion for the South African and Swiss legal systems.

In contrast to Switzerland and South Africa, in Germany an exception to the rule that the representative is to act in the name of the principal is accepted. If it is immaterial to the trader in which name a person acts, the person "whom it may concern" becomes party to the (real) agreement, provided that the acting spouse has the (unrevealed) intention to act on behalf of his partner. This thesis has illustrated that in the case where the contractual obligation falls within the ambit of § 1357 BGB such circumstances are met. The contracting spouse acquires co-ownership on his own and on his spouse's behalf without having to act in the non-contracting spouse's name ["*Geschäft an den, den es angeht*"]. In the German legal system the contracting spouse thus acquires - in contrast to Switzerland and South Africa - co-ownership in respect of household necessaries.

5) Exclusion of the capacity

a) The procedure

As regards the question of how the non-contracting spouse can withdraw the contracting spouse's capacity, the three legal systems provide for different solutions.

The German law offers the most favourable solution for the non-contracting spouse, since he can withdraw the other spouse's capacity without a court order. The withdrawal is regulated in the same way as the expiration of the power of attorney. The onus is on the affected spouse to go to court and apply for a repeal of the withdrawal.

The withdrawal takes effect with regard to third parties only when it has been registered in the Register of Marital Property of the competent District Court or when the third party gets to know about the withdrawal.

Less favourable is the South African system. According to this legal system, the non-contracting spouse requires a judicial decree in order to exclude the other spouse's competence. The judge only withdraws the other spouse's capacity if sufficient reason for such withdrawal is given. The publication of the decree takes effect as regards *bona fide* persons.

The Swiss system is similar to the South African situation. The non-contracting spouse needs a court order to exclude the other spouse's capacity. As in South Africa the non-contracting spouse must prove that sufficient reason for the withdrawal is given. The effects with regard to third persons are, however, differently regulated. The Swiss law provides *two* possibilities: firstly, the publication of the court order by a judge and secondly, the personal notification of the trader by the spouse. The judge publishes the withdrawal only when it appears to be necessary to protect the non-contracting spouse. Otherwise he will order that the non-contracting spouse is to personally notify the trader.

b) The reason for the withdrawal

Similarly answered in all three countries is the question as to when the non-contracting spouse has reason to withdraw the other spouse's capacity. Examples mentioned are that the non-contracting spouse is unable or not willing to bind the other spouse's credit in an appropriate way.

II. Proposal

If one intends to *improve* sections 17 (5) and 23 (5) of the Matrimonial Property Act 88 of 1984 one important factor must be borne in mind. The legislature chose a certain concept of liability in relation to sections 17 (5) and 23 (5) of the Matrimonial Property Act 88 of 1984. It was intended to make the non-contracting spouse co-liable only for legal transactions in respect of household necessaries. It was not intended to give each spouse the position of partners in a partnership as was done in Germany and Switzerland. Sections 17 (5) and 23 (5) of the Matrimonial Property Act 88 of 1984 do not provide for capacity to bind the family or the other spouse but provide *legal consequences* which result from the fact that household necessaries are the object of the transaction. The target of this thesis is not to replace this concept which was chosen in South Africa, with the solution which is preferred in Germany and Switzerland. The author feels, on the contrary, bound to the South African concept. He thus only tries to submit suggestions as how to improve the South

African concept according to which the object of the legal transaction has consequences as regards a third person.

If one revisits the differences between sections 17 (5) and 23 (5) of the Matrimonial Property Act 88 of 1984 on the one hand and § 1357 BGB and Article 166 ZGB on the other, one has to highlight the following aspects: firstly, that it not necessary in each case in South Africa, that the spouses live together, whereas in Germany and Switzerland cohabitation is always required; secondly, that the spouses can act on each other's behalf like partners of a partnership; and thirdly that the rules governing the exclusion of the competence are very different.

1) The cessation of the cohabitation

It has already been pointed out that the South African solution in respect of the cessation of the cohabitation appears to be more flexible and equitable than the German and Swiss solution. § 1357 BGB and Article 166 ZGB thus cannot give any incentive for an improvement of the current situation in South Africa.

2) The concept of the representation of a partnership

As regards the position of the spouses being similar to partners in a partnership, it has already been pointed out that such legal concept was not intended by the South African legislature and thus it shall not be further considered. Yet, one important consequence of such a concept is to be highlighted. In terms of § 1357 BGB and Article 166 ZGB each spouse can accept the performance and exercise all rights flowing from the contract, whereas in South Africa only a spouse married in community of property has such rights. The spouse living out of community can however only rely upon and plead any defence *in rem* which the other spouse could have raised. Such consequence is difficult to reconcile with the *ratio legis* of sections 17 (5) and 23 (5) of the Matrimonial Property Act 88 of 1984 and is unsatisfactory, because it entails disharmony between the positions of spouses married in community of property and those married out of community of property. It is true that the positions of spouses married in and out of community of property are in general regulated in different ways. But an exception must be made in respect of legal

transactions concerning household necessaries. The reason for such an exception has already been mentioned above. Irrespective of the applicable matrimonial property regime, both spouses profit from the performance. Thus they should both be liable. If the liability consequences for spouses married in and out of community of property are regulated in the same way, the entitlement - the correlative of liability - should be regulated in the same way too.

Another argument which can be put forward in support of a harmonious regulation is legal certainty which appears to have been one of the reasons for enacting section 17 (5) of the Matrimonial Property Act 88 of 1984 because a trader is not necessarily able to tell whether the spouses are married in or out of community of property. The same argument can be relied on in respect of the entitlement of spouses. If the non-contracting spouse purports to exercise his rights flowing from the contract, the trader does not necessarily know whether or not that spouse has such a right (in that he is married in community of property to the contracting spouse).

A harmonious regulation seems therefore preferable.

Harmony in respect of the spouses' entitlement could be achieved in two possible ways which are both accepted in the present South African legal system.

Firstly, one could extend to marriages in community of property the present legal situation in respect of spouses married out of community of property, namely that only the contracting spouses have all the rights flowing from the contract.

Secondly, the legal situation in respect of spouses married in community of property, according to which each of the spouses can exercise the rights flowing from the contract could be applied to all marriages.

The latter solution, which is accepted in Germany and in Switzerland, appears also to be preferable for the South African legal situation. The reason is that the entitlement of the non-contracting spouse is the *correlative* of his liability. He is not only a "Haftungsobjekt", but can also influence the further destiny of the obligation for which he is liable.

It is therefore submitted that each spouse should have every right flowing from the contract.

3) Exclusion of the capacity

a) The procedure

The German law on the one hand and the Swiss and South African law on the other, offer different possibilities of how to withdraw the contracting spouse's capacity. Whereas the German law privileges the non-contracting spouse, the South African and Swiss law put the contracting spouse in a more favourable position. Both systems have their advantages and disadvantages.

The advantage of the German system is that the contracting spouse *immediately* loses his capacity with the unilateral declaration by the non-contracting spouse and thus cannot continue to bind the other spouse's credit, whereas in Switzerland and South Africa he can still bind his partner's credit in the time between the application to the court and the actual withdrawal by decree. The disadvantage of the South African and Swiss systems is that the non-contracting spouse cannot prevent liability for legal transactions entered into by his spouse before the publication of the decree.

The disadvantage of the German system is that the contracting spouse might lose his capacity to bind the other spouse's credit without there being sufficient reason for such a loss. The right to withdraw the other spouse's capacity might therefore easily be abused.

The solution favoured in Germany is conceivable for the South African system too. The Deeds Registries Act 47 of 1937 is similar to the Registrer of Marital Property[559]. It would therefore be possible to amend the Deeds Registries Act 47 of 1937 to provide for publication of the withdrawal of the capacity of the non-contracting spouse. Like in the German system the non-contracting spouse would therefore (1) withdraw his spouse's capacity by a unilateral act and (2) publish it in the Deeds Registry. However an important aspect needs to be mentioned. Germany is a first world country. (Nearly) every trader has the possibility to inform himself and look into the Register of Marital Property. High standards of technical equipment [phones, connected computers, minitel, fax-machines] allow German traders to have access to

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559 See for instance sections 3 (1) (k), 86 - 88 which provide that if the spouses excluded or modified the statutory matrimonial regime, they may not invoke this to affect the validity of a legal transaction made between them and a third party unless the marriage contract was registered in the Registry of Deeds.

the Register of Marital Property. If they do not take advantage of such opportunity they must face the possibility that the contracting spouse has not the capacity to bind his partner's capacity. In South Africa the situation is different. It is true that a lot of traders are, like in any western country, perfectly equipped in order to inform themselves about the capacity of the contracting spouse to bind the other spouse's credit. Yet, it must be pointed out, that many traders in the poorer regions [Eastern Cape (Transkei), North-West Province] of this country do not have such facilities. In most cases traders will be caught unawares by the withdrawal of the capacity. In contrast to Germany, in South Africa therefore, it is not arguable in respect of many traders that they have to face the consequences if they do not take advantage of the opportunity to look in the Deeds Registry.

Considering these differences between Germany and South Africa, it appears to be better to limit the right of withdrawal to cases where it is approved by court decree that sufficient reason for such withdrawal is given. Such a solution has two advantages. Firstly, the trader who is *bona fide* becomes caught unawares by the withdrawal only in those cases where sufficient reason for such withdrawal was really given. Secondly the non-contracting spouse cannot abuse such right.

As to the question whether one should adopt the Swiss system according to which the judge is to publish the withdrawal only in cases where it seems to be " necessary", one must point to the following aspect. It is true that such notification protects the contracting spouse from the compromising effects of the exclusion. This thesis however has shown that the question of when it is possible to speak of a "necessity" to publish the withdrawal is very difficult to answer. How shall the judge know whether it is sufficient that the non-contracting spouse gives personal notification. Such might be the case if the spouses live in a small village in the Berner Oberland. For South Africa and its developing system of mass-marketing, such notification, however, seems to be in most cases insufficient.

The current South African system thus seems to be the most advantageous.

b) The reason

The wording of Article 166 ZGB appears to be relatively clear as regards the question of when the capacity might be withdrawn by the non-contracting spouse. It is thus submitted to adopt such wording for the South African legal system.

4) Proposition

Section 17 (5) of the Matrimonial Property Act 88 of 1984 should be abolished. Section 23 (5) the Matrimonial Property Act 88 of 1984 should be amended.

Section 23 (5):

(1) Spouses are jointly and severally liable for all debts incurred by either of them in respect of necessaries for the joint household. Either spouse can exercise any right flowing from such legal transactions.
(2) If one spouse exceeds his capacity to bind the other spouse's credit or if he is incapable of making use of such capacity the judge can limit or exclude such right upon application of the other spouse. As against bona fide third parties the exclusion is effective only if it has been published upon order by a judge.

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