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2017/2018



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OUR SERVICE

STBB | SMITH TABATA BUCHANAN BOYES is a firm of business-minded lawyers which was established in 1900. At present the firm consists of approximately 90 professionals practising from 11 offices throughout South Africa.

By understanding our clients' needs and objectives, we strive to deliver cost-effective legal solutions to their business and personal matters. A vital aspect of the professional service we provide, is a commitment to developing close working relationships with our clients. This commitment enables us to consistently succeed on their behalf.

CONGRATULATIONS ON YOUR PROPOSED MARRIAGE!

A marriage is a unique parcel made up of, on the one hand, considerations and undertakings private and intimate to two persons and, on the other, certain legislated consequences that automatically apply to the persons' patrimonial relationship.

Married persons are often, at least initially, unaware of the effect of these somewhat contradictory elements that exist within their marriage relationship. But as time passes and spouses becoming involved in businesses, investments and other opportunities, the legal side of the relationship plays a very significant role, undoubtedly also should the spouses divorce.

1. WHY AN ANTENUPTIAL AGREEMENT?

For the reasons mentioned above, and as a start to honouring your union and showing consideration for your future life together, spouses-to-be are well advised to invest in a custom-drafted antenuptial contract to avoid unnecessary uncertainty or conflict in future.

An antenuptial contract gives parties the opportunity to (amongst other things):

- protect and secure a spouse's individual assets (including those intended for heirs) from the other spouse's creditors;
- protect a spouse from becoming jointly liable for the debt of the other spouse;
- determine that an inheritance received by a spouse during the marriage will remain in that spouse's individual estate; and
- outline rights and obligations in the event of divorce and death.



Many couples are uncomfortable to contemplate the possibility that their intended marriage may be subject to financial strain or come to an end; it is however in the best interest of both parties to do so, in order to ensure a degree of certainty in making financial decisions and planning their future with confidence.

2. ONCE UPON A TIME...

Antenuptial contracts have a long history in our law and many of the circumstances that these agreements were intended to deal with in the past, no longer exist today. They were initially used as a measure to protect the daughters of wealthy families from exploitation by their spouses, due to past legislation assuming a union in community of property. They implied something about the social status of the parties: the agreements gave the partners independence, was perceived to be relevant only where the intended spouses had some financial worth of their own, and therefore traditionally had some snob appeal. Later, in the post World War II society, more often than not they simply guaranteed the poverty of a non income-earning spouse.

3. THE MODERN MARRIAGE

In the 'old days,' a young couple would breeze into their lawyer's office, hand in hand, sign a contract as a formality and without much discussion, and go off (still hand in hand) to get married.

It is, however, becoming increasingly common for each partner to get independent legal advice from his or her own lawyer before entering into an antenuptial agreement. Today, although they still walk into and leave the lawyer's office hand in hand, they frequently depart with more on their minds, and they may even want a second or third consultation before they conclude the agreement. It is nowadays accepted as prudent to be knowledgeable of the legal implications of marriage before tying the knot.

4. MARRIAGES AND ANTENUPTIAL CONTRACTS: OPTIONS

If the parties are domiciled (in the legal sense of the word) in South Africa, the proprietary consequences of the marriage (i.e. what happens to your assets) will be governed by the prescripts of South African law. A person's domicile is determined with reference to the country where the husband was permanently domiciled at the time of entering into the marriage.

South African law presents the marriage partners (whether same-sex or opposite sex) with three major options:



- Marriage in community of property;
- Marriage out of community of property without the accrual system;
- Marriage out of community of property with the accrual system.

Note that:

- Having made your choice and entering into marriage under one or the other of the above systems, it is costly to change to another system, but not impossible.
- An antenuptial contract is not an estate planning tool. Rather, it constitutes a document reflecting spouses' choice as to how they want to arrange their assets and finances during the existence of the marriage. It also constitutes a notification to third parties as to the marital regime the parties chose so that third parties can adapt dealings with them accordingly. For example, consent may be required from both spouses in certain instances in marriages in community of property, whilst it may not be required where the parties are married under a different regime.

4.1 MARRIAGE IN COMMUNITY OF PROPERTY

This is a union between equal partners. You have joint and equal say over your assets and all your property – movable and immovable, including bank accounts, and everything which you brought into the marriage or acquired during the marriage – automatically falls in your joint estate. There are certain exceptions though, such as inheritances, which may be specifically excluded.

If you want to sell property, pass a bond over it, or buy goods on a credit sale, you need the signature and consent of your spouse.



Think of the marriage as a pool: when you get married in community of property, everything goes into the pool. If you own two chairs before the marriage, and your intended spouse owns two chairs, the result of a marriage in community of property will be that you now each own four half chairs – not two chairs each!

A marriage in community of property is the system that will apply by default, i.e. a civil marriage is automatically a marriage in community of property if the parties do not enter into an antenuptial contract before their marriage.

This type of marriage is an excellent system for younger people who start out both working for employers and earning salaries, or who expect to do so for the rest of their working lives. It requires them to work together in decision-making within the marriage, and leaves them with the expectation that they will benefit equally from the fruits of the marriage, and knowledge that they are responsible for a joint fate both during and after the marriage.

This system also gives security to a spouse who may expect to stop working at some stage – for example, to have children – but who needs to know that she will be supported and will benefit from the joint effort of both spouses over the years.

Older people who are thinking of marriage, persons entering into a second marriage and people who already have children from previous partners would be better served by one of the options discussed below.



4.2 MARRIAGE OUT OF COMMUNITY OF PROPERTY WITHOUT THE ACCRUAL SYSTEM

If persons enter into a marriage out of community of property, their estates remain separate throughout the marriage. There are two variations of this, being a marriage out of community of property with accrual, and one without accrual.

A practical example of a marriage out of community of property, which excludes the accrual, will be the following: A and B marry out of community of property. A owned a property before the marriage. The property will remain part of A's estate's and A can deal with the property as he/she pleases. The same applies if A acquired the property during the existence of the marriage.

This contract is often understood as "What's his is his, and what's mine is mine", which is almost correct. It is however closer to the truth to explain it as "you keep what you brought into the marriage, and you keep what you earn during the marriage".

More importantly however, is that the marriage partners have contractual independence. They don't need each other's signatures on contracts; they own property and can deal with that property independently and without consulting or co-operating with each other. They can dispose of their property by way of sale, donation or bequeath it in their will – without prior reference to the other party.

The system is most useful where one of the partners has a high-risk, high-income lifestyle: the assets of the other partner are protected from negative consequences of that lifestyle. The partners may even decide that certain assets should be protected from risk by being transferred into the name of the other partner.

The concern with this system is that it does not automatically assure a financially weaker partner of any share in the proprietary benefits of the marriage and this can become more serious the longer the marriage continues. Normally, partners to this type of marriage would take care of these issues by way of their wills, which would be regularly updated, and by way of other agreements between them regarding the share and control of assets in the marriage. For example, they may decide that notwithstanding the marriage out of community of property, they will own certain assets (like the matrimonial home) jointly. The important thing here is not to allow the financial and other patrimonial aspects of your marriage to run 'on autopilot' indefinitely. It requires management and consistent attention.

This system is most suitable, as mentioned above, in cases where partners need greater independence, or enter into the marriage already having children, or are older and may have plans to bequeath parts of their estates to other people on their deaths.

The process to follow if you want to conclude a marriage out of community of property excluding the accrual system, is explained on page 16 of this brochure



4.3 MARRIAGE OUT OF COMMUNITY OF PROPERTY WITH THE ACCRUAL SYSTEM

This type of antenuptial contract was created to rectify some of the injustices of the old style contract: it takes into account the fact that the partners may start out in life fairly equal in wealth, but at some stage one of them stops working (say, to have children), while the other keeps growing his or her estate by earning an income. Under a marriage out of community excluding the accrual system, one partner can be left much richer than the other, and the poorer partner is pretty much at the mercy of the richer partner.

A practical example of including the accrual system would be the following: A and B married out of community of property and included the accrual system in their antenuptial contract. The property that A owned before his marriage (unless it was specifically excluded from the accrual) will remain A's own asset. But on dissolution of the marriage (on divorce or death), the increase in value of the property will be part of A's accrual and will be included when an assessment is made to equalize the accrual between A and B's estates. If A acquired the property during the marriage, the same principle applies: the value of A's estate is then increased by the value of the property and this forms part of the accrual which is shared between the spouses. Effectively, half the difference in value between their separate estates accrues to the smaller estate when the marriage ends.

This is a modern option, only having come into existence in South Africa in 1984. The prospective partners sign an antenuptial contract and the contract provides that when the marriage comes to an end, a calculation will be done to make sure each party shares equally in the joint accrual.

The contract does not operate any differently from the marriage out of community excluding the accrual during the existence of the marriage. The difference lies only in what happens when the marriage ends.

This option requires each of the prospective partners to take an inventory of their estates as at the date of entering into the marriage. The value of this inventory is called your commencement value. At the end of the marriage, each partner (or the partner's executor) takes an inventory and values that inventory again. This is called the final value. The commencement value is then adjusted to allow for inflation according to the consumer price index, and the adjusted commencement value is deducted from the final value.

The result (which is hopefully a positive figure) is then compared with the result of the same calculation in the other partner's estate. The lesser result is then subtracted from the greater result, the difference is divided by half, and that half is then transferred ("paid") from the greater estate to the lesser estate. That figure is, in fact, the accrual.

These are the basic principles, but it can be more complicated. Parties can, for example, exclude certain assets from the accrual by naming them specifically when they sign the contract. These assets may be things which they own at that stage, or which they expect to acquire afterwards.

In addition, there are certain classes of assets, which by law is automatically excluded from the accrual calculation, namely inheritances and money awarded as personal injury damages. The first class (inheritances) speaks for itself. As for the second class, think of it like this: it's your pain, so it's your money.





5. GAY MARRIAGE

The Civil Union Act came into effect in November 2006. It was a ground-breaking piece of legislation in that it granted same sex married couples the same rights, protection and status as those enjoyed by heterosexual couples in a civil marriage. South Africa, at the time, thereby became the fifth country in the world, and the first in Africa, to legalize same sex marriage.

Civil unions are modelled parallel to other civil marriages and the legal consequences flowing from the union are equivalent to those flowing from heterosexual marriages: just as heterosexual couples would be married either in community of property or out of community of property (with or without accrual), the same options are available to same sex spouses that enter into a civil union in terms of the Civil Union Act.

6. MUSLIM CIVIL MARRIAGE

Earlier this year, one hundred Muslim Imams were registered as marriage officers under section 3 of the Marriage Act. Muslims entering into a religious marriage ceremony (the Nikah) in front of one such Imam may now elect to simultaneously register their civil marriage in community of property, and the system as explained in paragraph 4.1 applies. Alternatively, to marry out of community of property on the same day as the religious ceremony, an antenuptial contract has to be signed by the couple prior to the date of marriage, and the same consequences will then apply to that marriage as described in paragraph 4.2 and 4.3 above, depending on the system chosen by the spouses.



7. FORMALITIES

■ IN COMMUNITY OF PROPERTY

You don't need to do anything other than see a marriage officer in order to get married in community of property. You will have to make an appointment for this purpose, and he or she will take you through the formalities of the marriage ceremony.

■ OUT OF COMMUNITY OF PROPERTY

If you choose a marriage out of community with accrual, or out of community without accrual, the following is important:

- The antenuptial contract has to be prepared by and signed in front of a specially qualified person designated as a notary public before the date of marriage.
- It must then be registered at a South African deeds registry within three months, and the notary will in due course prove to you that he has registered the contract by giving you the original with the deeds registry details endorsed on it.
- This is absolutely crucial as the contract is a public document, and any member of the public can go and view a copy of your contract at the deeds registry. That is what proves that you have the right to conduct your financial affairs independently.
- The contract must be signed BEFORE you get married. If parties omit to sign beforehand, you will have to bring an application in the High Court to change the matrimonial system. This is an expensive application and can be avoided by arranging the necessary timeously.

8. IS THERE SUCH A THING AS A COMMON LAW MARRIAGE?

No, South African law does not recognise the concept of a "common law marriage". This means that no amount of time spent living with another person will convert that cohabitation relationship into a marriage. Many people are nonetheless under the mistaken belief that such "common law marriages" are legally recognised and that legal rights and duties automatically flow from the relationship. Although our Courts have, in specific instances, recognised that certain reciprocal duties flow from such relationships, it is not a given. Partners in such relationships are urged to conclude a 'domestic partnership agreement' (as explained below in paragraph 9), to safeguard their investment in the relationship.

9. DOMESTIC PARTNERSHIP AGREEMENT AND LIVING TOGETHER

It is nowadays common to enter into a permanent relationship with another person (whether of the same or opposite sex) with the intention of living together as married persons, without ever getting married. There is currently limited legal protection afforded to partners in such relationships. As such, were the relationship to break down or end as a result of death, a party may face dire consequences due to the fact that there was no prior agreement with regard to assets, maintenance and the like.

The only way to ensure that both parties are protected if the relationship breaks down, is for them to enter

into an agreement in which they regulate their affairs – often referred to as a 'domestic partnership agreement'. This agreement will record the expectations that each partner may have with regard to his/her financial contribution to the joint household and assets acquired individually or jointly, and is an opportunity to iron out concerns that may otherwise arise in future.

Remember that such an agreement is only enforceable between the parties thereto and is not binding on third parties, as in the case of civil marriages. For example, partner A and B have been living together for 10 years. A has a bigger salary than B and as a result, often paid for larger acquisitions such as the dishwashers, TV, couch,

Persian carpet, and the like. The understanding between them was, at all times, that these assets belong to them jointly. When A is declared insolvent, however, his creditors (as third parties and outsiders to the agreement between A and B) may claim all A's assets to cover his (A's) outstanding debts. However, in case of the parties breaking up and having concluded a domestic partnership agreement, B will be able to claim her share in the assets from A.

If no agreement was entered into, B will be left with little more than that which he/she had when the relationship started, or that which B acquired during the duration thereof in his/her own name. No automatic claim or share in that which was 'jointly' acquired, exists.





10. A BILL FOR LIFE PARTNERS

The situation described in paragraphs 8 and 9 is evidently not satisfactory for persons in such relationships and our legislature has commenced finalising the Domestic Partnership Bill, to address the issues and hardship caused as a result.

The Bill aims to regulate the position of persons who live together outside of a legally valid marriage or civil union. However, it was promulgated in 2008 already and little has happened since. It is therefore uncertain, as at date of this brochure, if and when it will be enacted into law. If the day comes, it will bring significant change in the lives of partners in domestic partnerships.

11. WILLS

While on the subject of marriage, it is essential that the spouses-to-be should give attention to the subject of their wills. Unlike the antenuptial contract, a will is an important estate planning tool. It has flexibility, which the antenuptial contract does not have, and it complements the antenuptial contract in the legal preparations for the marriage. People often discuss the will at the same time as the antenuptial contract and sign both documents in a single sitting. This is recommended as part of a good management policy for the marriage.

Planning your wedding is an exciting time for you and your partner. You have a list of "essentials" – the venue, the dress, the caterers, the rings ... Make sure an essential is on your list: a consultation with an attorney to help you to make one of the most important decisions you will ever make - correctly and confidently.

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