



DUAL MARRIAGES AND THE ANTENUPTIAL CONTRACT

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INTRODUCTION

The Recognition of Customary Marriages Act 120 of 1998 (“The Act”) commenced on 15 November 2000. Despite the Act having formed part of South African law for a substantial time, there is still uncertainty in respect of some of the legal consequences of the Act.

In practice, it often happens that the notary is called upon to register an antenuptial contract for a couple planning on entering a civil marriage (a marriage contracted under the Marriage Act, 25 of 1961). Upon further questioning of the clients, it then transpires that a valid customary marriage already exists between the parties.

Can parties who are legally married to each other in terms of Customary Law, enter a valid Antenuptial Contract after the Customary Marriage has been concluded, but before entering into a Civil marriage with no intervention by the Courts?

THE DUAL MARRIAGE

Customary law means the customs and usages traditionally observed among the indigenous African peoples of South Africa and which forms part of their culture. A customary marriage is a union concluded in accordance with customary law and is recognised as a valid marriage in terms of the Act.

In terms of Section 7(2) of the Act a marriage concluded in terms of customary law, is a marriage in community of property unless such consequences are specifically excluded by the spouses in an antenuptial contract.

In terms of Section 10 of the Act a man and a woman, married in terms of customary law where neither of them is a spouse in a customary marriage with any other person, are allowed to also conclude a marriage with each other under the Marriage Act 25 of 1961. This marriage, the colloquially called “dual marriage”, is a marriage in community of property unless such consequences are specifically excluded in an antenuptial contract.

Clients often assume that they may conclude an antenuptial contract after their customary marriage has been concluded, but before they enter the civil marriage. They assume that if their customary marriage has not been registered at Home Affairs, the marriage is not legally binding. This is incorrect, as Section 4(8) of the Act confirms that failure to register the customary marriage does not affect the validity of that marriage.

At first glance, it will seem as if the parties have a valid antenuptial contract and civil marriage. Under closer scrutiny, however, the contrary may prove to be the true in respect of the antenuptial contract.

WHAT DO THE COURTS SAY?

On 4 December 2023 the Pretoria High Court had to determine whether Section 10(2) of the Act is unconstitutional if it allows parties to change their matrimonial property system without any judicial oversight, as opposed to civil marriages where judicial oversight is a requirement for any post-nuptial changes to the matrimonial property system. This may be detrimental to creditors and to the party with a weaker footing to negotiate the terms of the new matrimonial property regime. (See: [Another constitutional challenge in family law](#))

The Court reserved judgement.¹

CONCLUSION

As the customary marriage is a legally recognised marriage, and as the civil marriage cannot dissolve the customary marriage, the legal consequences and in particular the matrimonial property system of the original customary marriage should also not be dissolved.

Pending the outcome of the abovementioned judgement, parties should take care to protect themselves. If the parties wish to be married out of community of property, the antenuptial contract must be concluded before the customary marriage is entered into.

Should the parties wish to change their matrimonial system after the fact, they should follow the process as set out in section 21 of the Matrimonial Property Act 88 of 1984, read together with Section 10 of the Act and apply to Court for an order to change the matrimonial property system and to authorise them to enter into a postnuptial agreement on such conditions as the court may think fit.

Failure to follow the correct procedure could result in a misrepresentation of the matrimonial property regime and parties may not enjoy the protection of the marriage out of community that they planned for in case of death, divorce or third party creditors.

¹ Article will be updated once judgement is passed.



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It is therefore of the utmost importance that clients arrange for a consultation and for them to be completely open with their attorney to receive accurate legal advice.

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