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MARITAL STATUS IN SOUTH AFRICA

The following legislation regulates the marital status of persons in South Africa:

1. Matrimonial Property Act 88 of 1984
2. Recognition of Customary Marriages Act 120 of 1998
3. Marriage Act 25 of 1961
4. Black Administration Act 38 of 1927
5. Deeds Registry Act 47 of 1947

I. **Matrimonial Property Act 88 of 1984**

(commencement: 1 November 1984)

Marriages in terms of this act will be referred to as "civil marriages". This act makes provision for three types of marriages:

- a. Married in community of property;
- b. Married out of community of property without the accrual system;
- c. Married out of community of property with the application of the accrual system.

In terms of this act parties will be automatically married in community of property, unless the parties had an antenuptial contract executed in the presence of a notary before they married and this agreement had been registered in the Deeds Office within three months after the notary executed the antenuptial agreement.

The parties can, in terms of Section 21, apply to the High Court to have their marital regime changed.

Thus to prove the marital status one would need the following:

- a. Married in community of property;
(Only the *marriage certificate* issued by the department of Home Affairs)
- b. Married out of community of property;
(The *marriage certificate* issued by the department of home affairs and the *registered antenuptial contract*)

II **Regulation of Indigenous Marriages**

Black Administration Act 38 of 1927

The position before 2 December 1988:

Black marriages were regulated by the Black Administration Act 38 of 1927. Section 14 stated that marriages, where no customary marriage subsisted, were considered out of community of property. But the parties could declare their marriage to be in community of property in the presence of a

magistrate within one month after the celebration of their marriage. It is important to note that this section did not regulate customary marriages.

Ex Parte Minister of Native Affairs in re Molefe v. Molefe 1946 AD 315: confirmed that where the parties were married out of community of property. The Court also stated that if no antenuptial agreement had been concluded, the common law and not customary law, thus the same as "civil" marriages, governs the proprietary rights.

The position after 2 December 1988:

This position changed with the Marriage and Matrimonial Property law amendment Act 3 of 1988, which commenced on 2 December 1988. This act stated that the parties will be married in community of property, unless the parties concluded an antenuptial agreement.

Recognition of Customary Marriages Act 120 of 1998

(commencement: 15 November 2000)

Marriages in terms of this act will be referred to as "customary marriages".

This basis of this act is to formalise marriages concluded in terms of customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples.

The act, therefore, states that a marriage, which is a valid marriage at customary law and existing before 15 November 2000, is for all purposes recognised as a marriage. This includes the situation where a person is a spouse in more than one customary marriage entered into before 15 November 2000.

Marriages concluded after 15 November 2000 must comply with Section 3 of the Act to be recognised as a marriage. It is still possible for a person to enter into more than one customary marriage after 15 November 2000.

Capacity of spouses

Spouses have equal status and capacity in a customary marriage has, on the basis of equality with her husband and subject to the matrimonial property system governing the marriage, full status and capacity, including the capacity to acquire assets and to dispose of them, to enter into contracts and to litigate, in addition to any rights and powers that they might have at customary law.

The act distinguishes between the following situations:

- a. Customary marriages concluded before 15 November 2000; and
- b. Marriages concluded after 15 November 2000.

Proof of the marital status

A certificate of registration of a customary marriage issued under the act or any other law providing for the registration of customary marriages constitutes prima facie proof of the existence of the customary marriage and of the particulars contained in the certificate. However, failure to register a customary marriage does not affect the validity of that marriage.

The registration certificate from the department of Home Affairs and if applicable the antenuptial contract would serve as proof of the marital status.

Customary marriages before 15 November 2000:

The spouses of a customary marriage have a duty to ensure that their marriage is registered.

A customary marriage entered into before the commencement of this Act, and which is not registered in terms of any other law, must be registered within a period of 12 months after 15 November 2000 or within such longer period as the Minister may prescribe.

Proprietary consequences of customary marriages and contractual capacity of spouses entered into before the commencement of this Act continues to be governed by customary law. But spouses have equal status and capacity in a customary marriage. Spouses will, therefore, be able to sell or purchase property in their own name.

Change of matrimonial system

Spouses in a customary marriage entered into before the commencement of this Act may apply to a court jointly for leave to change the matrimonial property system, which applies to their marriage or marriages and the court may, if satisfied that-

- (i) there are sound reasons for the proposed change;
- (ii) sufficient written notice of the proposed change has been given to all creditors of the spouses for amounts exceeding R500 or such amount as may be determined by the Minister of Justice by notice in the Gazette; and
- (iii) no other person will be prejudiced by the proposed change,

order that the matrimonial property system applicable to such marriage or marriages will no longer apply and authorise the parties to such marriage or marriages to enter into a written contract in terms of which the future matrimonial property system of their marriage or marriages will be regulated on conditions determined by the court.

In the case of a husband who is a spouse in more than one customary marriage, all persons having a sufficient interest in the matter, and in particular the applicant's existing spouse or spouses, must be joined in the proceedings.

The parties will be described as follows for conveyancing purposes:

Full Names

Identity number

Married which matrimonial property system is governed by customary law in terms of the Recognition of Customary Marriages Act. (120 of 1998)

*Note that in terms of the Constitutional case of E Gumede (born Shange) v the President of the Republic of South Africa (8 December 2008) our Constitutional court ruled that the distinction drawn between customary marriages concluded before and after 15 November 2000 was discriminatory against African women insofar as their matrimonial property rights are concerned and as such declared "entered into after the commencement of the Act" inconsistent with the Constitution and therefore invalid.

Marriages concluded in terms of this act, thus after 15 November 2000.

Marriages entered into after the commencement of this Act, must be registered within a period of three months after the conclusion of the marriage or within such longer period as the Minister may prescribe.

Proprietary consequences of customary marriages and contractual capacity of spouses entered into after the commencement of this Act in which a spouse is not a partner in any other existing customary marriage, is a marriage in community of property and of profit and loss between the spouses, unless such consequences are specifically excluded by the spouses in an *antenuptial*

contract which regulates the matrimonial property system of their marriage. Chapter III and sections 18, 19, 20 and 24 of Chapter IV of the Matrimonial Property Act, 1984 (Act 88 of 1984), apply in respect of any customary marriage which is in community of property.

The parties will be either be described as:

Full Names

Identity number

And

Full Names

Identity number

Married in community of property

Or

Full Names

Identity number

Married out of community of property

A husband in a customary marriage who wishes to enter into a further customary marriage with another woman after the commencement of this Act must make an application to the High Court to approve a written contract which will regulate the future matrimonial property system of his marriages.

If a court grants the application, the registrar or clerk of the court, as the case may be, must furnish each spouse with an order of the court including a certified copy of such contract and must cause such order and a certified copy of such contract to be sent to each registrar of deeds of the area in which the court is situated.

When the Court considers the application for a further marriage

(a) the court must-

- (i) in the case of a marriage which is in community of property or which is subject to the accrual system-
 - (aa) terminate the matrimonial property system which is applicable to the marriage; and
 - (bb) effect a division of the matrimonial property;
- (ii) ensure an equitable distribution of the property; and
- (iii) take into account all the relevant circumstances of the family groups which would be affected if the application is granted;

(b) the court may-

- (i) allow further amendments to the terms of the contract;
- (ii) grant the order subject to any condition it may deem just; or
- (iii) refuse the application if in its opinion the interests of any of the parties involved would not be sufficiently safeguarded by means of the proposed contract.

All persons having a sufficient interest in the matter, and in particular the applicant's existing or spouses and his prospective spouse, must be joined in the proceedings.

The parties will then be described as:

Full name

Identity number

Married which matrimonial property system is governed by customary law in terms of the Recognition of Customary Marriages Act. (120 of 1998)

Change of the Matrimonial System

Spouses in a customary marriage entered into after the commencement of this Act may apply to a court jointly for leave to change the matrimonial property system which applies to their marriage. Section 21 of the Matrimonial Property Act, 1984 (Act 88 of 1984) is applicable to a customary marriage entered into after the commencement of this Act in which the husband does not have more than one spouse.

Marriage Act, 1961 (Act 25 of 1961) and Recognition of Customary Marriages Act 120 of 1998

The Marriage Act, 1961 is the act that regulates "civil" marriages.

A man and a woman between whom a customary marriage subsists are competent to contract a marriage with each other under the Marriage Act, 1961, but only if neither of them is a spouse in a subsisting customary marriage with any other person.

Despite the above no spouse of a marriage entered into under the Marriage Act, 1961, is, during the subsistence of such marriage, competent to enter into any other marriage.

When a marriage is concluded as under the Marriage Act the marriage is in community of property and of profit and loss unless such consequences are specifically excluded in an antenuptial contract which regulates the matrimonial property system of their marriage. Chapter III and sections 18, 19, 20 and 24 of Chapter IV of the Matrimonial Property Act, 1984 (Act 88 of 1984), apply in respect to these marriages.

No spouse in a customary marriage shall be competent to enter into a marriage under the Marriage Act, 1961 (Act 25 of 1961), during the subsistence of such customary marriage, unless the spouses are married only to each in terms of a subsisting customary marriage.

III Religious Marriages

Religious marriages are currently not recognised in South African law. In light thereof this is in conflict with our Constitution and consequently the position is in the process of revision.

In the meantime, Muslim, Islam, Hindu, etc. religious marriages are not legal marriages and the parties are seen as unmarried.

The parties can, therefore, be described as

Full names

Identity number

Unmarried OR Married according to Muslim/Islamic/Hindu rites

They have no option but to plead their cases with the courts and the judiciary. This results in widespread oppression and gender discrimination in areas such as divorce, the duties of support, parental rights and responsibilities and inheritance.

On 30 April 2014 over 100 Imams were officially appointed as marriage officers in terms of the Marriage Act. Their accreditation in terms of the Marriage Act now enables Muslim marriages to be legally recognised, enabling Imams to officiate over marriage unions.

Thus, a Muslim marriage will only be valid where the marriage is solemnized by a marriage officer duly registered as such in terms of the Marriage Act. The Proprietary consequences of a Muslim marriage will now be the same as a civil union in terms of the Marriage Act. In addition it should be noted that such a marriage officer may not marry any person who is already a party in another (muslim) marriage, even where that marriage is not registered as intended in the amendments as

yet.

A class action case has been instituted calling for the South African Government to give recognition to Muslim personal law, including Muslim marriages. There are several matters that are pending at a number of courts across the country. This is testament to the fact that Muslim women are struggling to assert their rights because their Muslim marriages and the consequences arising therefrom are not legally recognised.

IV Foreign Marriages

The Deeds Registry Act 47 of 1947 states how conveyancers should attend to foreign marriages. Section 17 states:

"Registration of immovable property in name of married persons

- (2) Every deed executed or attested by a registrar, or attested by a notary public and required to be registered in a deeds registry, and made by or on behalf of or in favour of any person, shall-
 - (d) where the marriage concerned is governed by the law of any other country, state that the marriage is governed by the law of that country.
- (6) A person married in terms of a marriage the legal consequences of which are governed by the law of any other country, shall be assisted by his or her spouse in executing any deed or other document required or permitted to be registered in any deeds registry or required or permitted to be produced in connection with any such deed or document, unless the assistance of the spouse is in terms of this Act or on other grounds deemed by the registrar to be unnecessary."

When is the legal consequence of a marriage governed by the laws of another country?

The appellate division has settled this issue in 1950 in FRANKEL'S ESTATE & ANOTHER v THE MASTER & ANOTHER (1950 (1) SA 220 (A)). The Court stated:

".., [According to] South African law, the property rights of spouses are governed, in the absence of express contract [notarial agreement], by the law of the country in which the husband is domiciled at the time of the marriage."

Thus the legal consequences will be governed by another country if the husband at the time of his marriage was not domiciled in South Africa.

How is the husband's domicilium established?

In order to answer this question, one must consider two aspects. The first is whether the husband was physically present in the foreign country. The second aspect is whether the husband intended to settle permanently in the foreign country. In other words, was his intention that the foreign country was his permanent home.

For example: Mr A, a citizen of Botswana, lived in South Africa since 1970 and saw South Africa as his permanent home. He decided to study in the United Kingdom with the intention to return to South Africa after his studies. During 2002 Mr A went to the United Kingdom and married Ms B. Ms B is a citizen of France but lived in the United Kingdom (her domicilium country). The Marriage ceremony took place in the Netherlands. The parties did not execute an antenuptual agreement.

The Husband is domicile in South Africa as he never intended the United Kingdom to be his domicilium (permanent home). The legal consequences of the marriage will be governed by the country where the husband was domiciled at the time of his marriage, thus the South African law. In terms of South African law you are married in community of property if no antenuptual agreement has been executed. The parties are, therefore, married IN community of property.

BUT if Mr A lived in Botswana and he saw Botswana as his permanent home, then the legal consequences of the marriage will be governed by the laws of Botswana and his wife would need to assist him in executing documents intended for use in the Deeds Office.

How will the parties be described in documents intended of registration in the Deeds Office?
A transferor or mortgagor (The power of attorney – special and general powers)

FULL NAMES

DATE OF BIRTH / SOUTH AFRICAN IDENTITY NUMBER:

Married, which marriage is governed by the laws of xxxxxx and assisted herein by his wife/husband xxxxxx insofar as needs be

A transferee:

FULL NAMES

DATE OF BIRTH / SOUTH AFRICAN IDENTITY NUMBER :

Married, which marriage is governed by the laws of xxxxxx

Is it possible that the spouse does not assist when signing as seller or mortgagor?

The short answer to this question is YES.

The Deeds Registry Act, section 17(6) states: "unless the assistance of the spouse is in terms of this Act or on other grounds deemed by the registrar to be unnecessary".

This provides the Registrar with discretion to allow a party to execute documents without the assistance of the spouse. CRC 5/1994 paragraph 4.6 confirms this discretion.

The Johannesburg Deeds Office: It seems that the Registrar will on providing of full reasons/facts on an *ad hoc* basis exercise his discretion. The attorney must also provide a written indemnity to the deeds office wherein the attorney indemnifies the Deeds Office against civil claims if the spouse's assistance was required for the performance of any act in that Deeds Office.

The Pretoria Deeds Office: The Registrar will only exercise his discretion on providing full reasons/facts and an analysis (or legal opinion) of the marital system of the foreign country. This opinion must specifically refer to the fact that the spouse's marital powers are excluded and that the marital system is equivalent to being married out of community of property.

ALTHOUGH, the possibility exists to do away with the assistance as is required it should be reserved only in exceptional cases. The procedure is actively discouraged and can only be considered after having been approved by one of the conveyancers who will have due regard to the four points mentioned below and having received approval from all parties to the transaction. The reasons why this procedure should be discouraged are:

1. The Registrar takes a very conservative approach and will not easily exercise his discretion.
2. The application to the Registrar will cause long delays in the transfer process.
3. The legal opinion will result in additional costs (about R5000).
4. The attorneys will be exposed to the risk of civil claims.

V Civil Unions in terms of the Civil Union Act

The Civil Union Act, which came into operation on 1 December 2006, regulates the solemnisation and registration of civil unions by way of either a marriage or a civil partnership and provide for the legal consequences thereof.

The Civil Union is a voluntary union of two persons who are both 18 years of age or older which is solemnized and registered by way of either a marriage or a civil partnership in accordance with the procedures prescribed in this Act to the exclusion while it lasts of all others.

Therefore where the Marriage Act afforded heterosexual partners legal recognition of their relationship, the Civil Unions Act affords homosexual partners the same rights, status and benefits in line with the provisions in our Constitution that provides in section 9 (1) for equality before the law, and in section 9(3) prohibits unfair discrimination, and in section 15(1) provides for the right to freedom of conscience religion belief and opinion.

Therefore, partners intending to enter into a civil union or marriage in terms of the Civil Union Act, need to consider the proprietary consequences of their union which will be in community of property by default unless they enter into an Antenuptial Contract prior to their union, which Antenuptial Contract must be registered within 3 months from date of it's execution.

If the partners therefore entered into and registered an Antenuptial Contract within the prescribed period of time, their union/marriage will be out of community of property.

Conveyancing attorneys who attend to conveyancing work for clients, have to verify the status and legal capacity of the parties to act and therefore they will call on their clients to provide them with supporting documents substantiating their legal consequences of their union or marriage.

When describing parties joined by civil union, and reference is made to the civil union instead of marriage, the description will be as follows:

- 1) If no antenuptial contract has been registered

ABC
Identity Number

and

XYZ
Identity Number
partners in a civil partnership in community of property registered in terms of the Civil Union Act number 17 of 2006

- 2) If an antenuptial contract has been registered

ABC
Identity Number
partner in a civil partnership out of community of property registered in terms of the Civil Union Act number 17 of 2006

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