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## **VALIDITY OF UNREGISTERED ANTENUPTIAL AGREEMENTS**

Section 86 of the Deeds Registries Act 47 of 1937 (the Act) provides inter alia that an antenuptial contract must be registered, failing which it shall be of no force or effect as against any person who is not a party thereto (see ex parte Weight and Weight 1906 TS 709 and Fisher v Fisher 1911 WLD71. The application of the section is discussed in S v S [2015] 3 All SA 85 (KZD).

In the said case the parties, before entering into marriage, gave their attorney an instruction and power of attorney, also signing a draft antenuptial contract, to execute an antenuptial contract and have it registered in terms of the Act. It was the intention of the parties to enter into a marriage out of community of property, with no community of profit and loss, but subject to the accrual system. When the parties divorced more than twenty years later, they discovered that the antenuptial contract had not been registered. As a result the plaintiff, Mrs S, contended that the marriage was in community of property, while the defendant husband took the view that as per the intention of the parties the marriage was out of community of property.

The High Court held that the marriage was, as per the intention of the parties, out of community of property, but of no force or effect as against any person who was not a party thereto. The antenuptial contract would, however, be valid and binding as between the parties. The reason being because the unregistered antenuptial contract reflected the common intention of the parties at the time the contract was entered into. This had the effect that an informal antenuptial contract existed between the parties.

From a conveyancing perspective, the parties, however, will be described as being married in community of property. Remember that the deeds office is there to publicise to the world the status of parties with regards to their marital status and ownership of immovable property, so that third parties can be aware of their status when dealing with them, and therefore the true position as it will affect the world needs to be revealed and when an ANC was not registered in the Deeds Office the world cannot view parties as married out but only as married in community of property

In the said scenario where deeds are erroneously registered, describing the parties as married out of community of property, such deeds must be rectified in terms of section 4(1)(b) of the Act to reflect the parties as being married in community of property. In the court application, in terms of section 20 or 21 the Matrimonial Property Act 88 of 1984, it must be resolved whether the property will vest in one or both the parties, which will result in the titles having to be endorsed in terms of Section 45bis(1)(b), alternatively 45bis(1A)(b) of the Act.

It is thus imperative that when consulting with clients one must ensure that their antenuptial contract was entered into prior to their marriage, and not merely rely on viva voce evidence or an affidavit in this regard.

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