

Understanding South Africa's Marital Regimes: A Guide to Antenuptial Contracts

By **Pierre van der Merwe** (Partner),
Lauren Squier (Senior Associate) and
Juliette Vermeulen (Candidate Attorney)

27 May 2024

INTRODUCTION

Getting married can be one of the most exciting, busiest, and frustrating times of your life. In addition to planning for the wedding, one must not forget to consider the legal aspects thereof – before solemnization of the marriage – particularly in relation to the matrimonial regime applicable and the negotiation, execution and registration of an antenuptial contract (“ANC”) where applicable. This article will explore the three options available to couples relating to the various matrimonial property regimes in terms of the Matrimonial Property Act 88 of 1984 (“the Act”).

In South Africa, there are three matrimonial property regimes that couples may choose from, namely:

1. In community of property (“ICOP”)
2. Out of community of property, without the accrual system;
3. Out of community of property, with the accrual system.

1. In Community of Property

If you do not enter into an ANC prior to your marriage, your marital regime is automatically recorded as being ICOP. This means that, legally, the spouses will be regarded as having one estate – with joint assets and joint liabilities. What this means is that if you elect to get married in ICOP, you share the risk, with your spouse, of insolvency but you also benefit equally from any windfalls in fortune from one another.

If either you or your spouse currently bear, or are likely to bear in future, any financial risk in relation to a business enterprise, it is generally recommended that you get married out of community of property.

2. Out of Community of Property without the Accrual System

Under this regime, the law regards both spouses as completely separate individuals – each with their own estate of assets and liabilities.

Spouses do not share in each other's profits and losses. If one spouse is declared insolvent, the other will not as a consequence be declared insolvent.

Two Individuals may elect to get married out of community of property, with or without the application of the accrual system. We will deal with the accrual system and the application thereof, below.

In our experience, couples who have already accrued estates of significant value and are well established in their careers elect to be married out of COP without the application of the accrual system. Similarly, if both spouses have equal or relatively equal income earning capacity, then getting married without accrual may be considered a fair way to regulate the relationship between the spouses.

3. Out of Community of Property with the Accrual System

Where one spouse contributes more time than money to the marriage, or it is contemplated that during the marriage this will be the case, then it may be worthwhile to consider getting married out of community of property with accrual.

‘Accrual’ refers to a financial calculation of the value of the spouses’ estates upon commencement and the termination of the marriage by either death or divorce. The result of the calculation renders an amount of money (which will be payable by the spouse whose estate has grown the most during the marriage) to the spouse whose estate has grown the least during the marriage. If the spouses’ estates have grown by the same amount during the marriage, the accrual calculation will render a value of zero and no payment will be made by either spouse to the other.

The actual accrual calculation is determined by calculating the monetary value of how much each of the spouse's estates have grown during the marriage. One therefore subtracts the net worth of each spouse at the beginning of the marriage, from the net worth of each spouse at the end of the marriage.

The effect of the accrual calculation is to equalise the growth of the respective estates. It does not equalise the amount of money that the two spouses take away from the marriage.

This is a 'popular' option as selected by couples because it is widely regarded as being the most economically and commercially fair option for historical reasons (wherein one of the spouses remained at home to care for the children full-time).

GENERAL PROVISIONS

Spouses are generally free to include any provision or modification in their ANC (as long as it is not contra bonos mores or against nature, reason, morality, public policy or prohibited by any law and does not conflict with the essential consequences of marriage or is not calculated to lead to separation, dissolution of the marriage by divorce or to take over the powers of the court).

Examples of these types of clauses which cannot be included in an ANC are as follows:

1. An undertaking by a spouse to adopt or convert to the religion or faith of the other spouse.
2. A clause stating that the marital disputes will be referred to arbitration.
3. A clause recreating or retaining the husband's marital power.
4. A clause stating that the parties will not live together after their marriage.
5. A clause permitting the parties to commit adultery.
6. A clause stating that the wife shall stop working and become a housewife on a permanent basis from the birth of their first child.
7. A clause stating that one spouse shall not have the power to bind the other spouse for household necessities.
8. A clause stating that neither spouse shall have the right to ask an order of forfeiture to share in the accrual of the other's estate on divorce.

Some of the more popular modifications to ANC's include the following: that the accrual system only be applicable on condition that the marriage has "lasted" for a certain time period, or when a child has been born of the marriage, and a clause to the effect that the accrual system shall not operate on termination of the marriage if either party's estate is insolvent – which clause is not detrimental to creditors. The ANC may also include a provision that the spouses will share in the accrual in a different percentage as the prescribed 50/50 and they may include a clause wherein they agree on the manner in which the accrual claim shall be payable upon dissolution of the marriage. It is important to note that inheritances, legacies and donations from third parties (including donations between spouses) are not

are not taken into account and are automatically excluded when calculating the accrual of a spouse's estate unless the parties agree to include same in the contract.

THE EXCLUSION OF PARTICULAR ASSETS

Movable and immovable assets may be excluded insofar as a spouse wishes, as long as the asset is owned by the spouse at the time of execution of the ANC or will be owned prior to the conclusion of the marriage. The asset must be described in an objectively identifiable manner in the ANC. When a particular asset is excluded from the accrual of a spouse, such asset will not be taken into account when calculating the accrual of that spouse. By way of example, parties may exclude assets in the following circumstances:

1. Where a spouse has promised a particular property to a third party;
2. A share in a family business and whether income derived therefrom should be excluded;
3. Shares held in a share incentive scheme by an employer of one of the spouses, or held by a spouse in their personal capacity;
4. Where a spouse has speculative property, which may generate significant capital profits (ownership of immovable property, policies and annuities etc.)
5. Where a spouse has an interest in a family trust and the capital therefrom may be distributed to them as a beneficiary of the trust. Often spouses wish to exclude
6. Unfortunately, as the law currently stands, the clauses containing the exclusions of future assets may be deemed to be unenforceable.

COMMENCEMENT VALUES

The commencement value of spouses refers to the net value of each spouse's estate prior to the solemnization of the marriage. Where a spouse's liabilities exceed their assets, their commencement value will be recorded as nil.

It must be borne in mind that the ANC, by virtue of it being registered in the Deeds Registry, is a public document.

Therefore, spouses who do not wish to disclose their commencement values in a publicly accessible document may declare their commencement values in a separate document referred to as a section 6(1) statement, which statement is not registered in the Deeds Registry, but is retained in the Notary's protocol. This statement must be made before the marriage is entered into or within 6 months after the conclusion of the marriage.

CONCLUSION

Whilst ANC's may be daunting, it is advisable to have these discussions with your spouse in advance of the intended marriage. HBGSchindlers Attorneys, Notaries and Conveyancers are well versed in consulting, negotiating, drafting, executing and attending to the registration of your ANC. As such, we are pleased to assist you and your partner in preparing an ANC on your behalf.

Kindly contact the authors of this article on 011 568 8500 for more information.

Please note: this article is for general public information and use. It is not to be considered or construed as legal advice.

Each matter must be dealt with on a case by case basis and you should consult an attorney before taking any action contemplated herein.



Pierre van der Merwe
(Partner)



Lauren Squier
(Senior Associate)



Juliette Vermeulen
(Candidate Attorney)