

# Real Estate Law

## ALERT

26 SEPTEMBER 2023



INCORPORATING  
**KIETI LAW LLP, KENYA**

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In terms of the Matrimonial Property Act 88 of 1984 (Matrimonial Property Act), all marriages and civil unions entered into between parties are at present automatically deemed as being in community of property. In terms of this matrimonial property regime, the parties' assets are pooled together to form one joint (communal) estate. The parties therefore become the owners of an undivided one-half share in and to each other's respective estate, which is inclusive of all their assets and liabilities (debts).

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## Antenuptial contracts: I do/I don't

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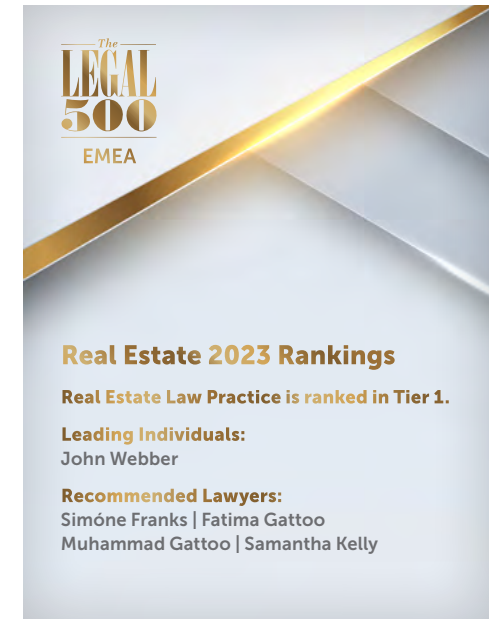
For example, Thabisa and Clinton get married in community of property. Prior to the commencement of their marriage, Thabisa owns assets to the value of R2 million with no debt. Clinton owns immovable property to the value of R1 million, but he owes R600,000 to the bank on his mortgage bond, and thus the net value of his estate at the commencement of the marriage is R400,000. On the date of conclusion of their marriage, their estates are joined to become one joint estate. Thabisa and Clinton therefore, from the date of their marriage, each own a one-half share in their joint estate, being R1,2 million each (R3 million total asset value less R600,000 debt). The joint estate from the date of conclusion of their marriage is liable for all their debts prior to and during the subsistence of their marriage. Therefore, Thabisa and Clinton are jointly liable by operation of law for the repayment of Clinton's mortgage loan to the bank.

Some disadvantages of marriages in community of property are that:

- should one spouse be declared insolvent, the whole joint estate would be dissolved to settle the debts owing in terms of the insolvency; and
- any inheritances, damages awarded or donations received from third parties, will form part of the joint estate.

### Proposed changes

The Matrimonial Property Act is almost 40 years old, and since it was enacted, South Africa has undergone significant social changes. To keep up with and to take into account these changes, in June 2023 the South African Law Reform Commission drafted and released for comment a discussion paper, titled 160 Project 100E, Review of Aspects of Matrimonial Property Law, which sets out and discusses various proposals for legislation around



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matrimonial property distribution and non-discrimination based on sex, gender, religion, marital status, etc. In terms of its paper, the South African Law Reform Commission has proposed, among other things, changing the default matrimonial property regime from in community of property to out of community of property with the application of the accrual system being deemed the default system to be applied.

The proposal for the default matrimonial property system, for monogamous marriages, is as follows, and will be discussed further should a proposed amendment bill to the Matrimonial Property Act be published and circulated for consideration and approval:

*"For all monogamous marriages without an antenuptial contract:*

- Introduce accrual as the default regime.
- If there is no antenuptial contract entered into, then the commencement value is deemed to be zero.

- Customary family property is excluded from the accrual calculation.
- *Religious marriage contracts are considered to include accrual unless it is explicitly excluded."*

The Matrimonial Property Act currently makes provision for marriages or civil unions to be out of community property. Out of community of property is where the parties' respective estates remain separate throughout their marriage or union as opposed to pooling their estates to form one joint (communal) estate. For marriages and civil unions to be out of community property, the parties will need to enter into and execute a valid antenuptial contract.

### **Antenuptial contracts**

What is an antenuptial contract (ANC) and how do I conclude one? An antenuptial contract is a contract entered into by parties who wish and intend for their marriage or union to be out of community of property. These types of contracts set out the rights, duties, proprietary and legal

consequences as well as the financial arrangements in respect of the parties' respective estates (assets), as agreed to by them, in the event that their marriage or civil union is dissolved by death or divorce. In simpler words, parties will enter into an antenuptial contract so that they may continue to have ownership of their own estates (to protect their assets and financial position), as opposed to pooling their estates to form one joint (communal) estate. Parties can include any provisions that they want to in their antenuptial contract, as long as the provisions are not against the law, against public policy, immoral, etc.

For an antenuptial contract to be valid and enforceable between the parties and third parties (i.e. their creditors) in South Africa, it must be:

1. Signed by the parties in the presence of two witnesses as well as a Notary Public before the marriage or civil union takes place.

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- It does not matter if the contract was signed one month or one hour before the marriage or civil union takes place, it must just be signed before the conclusion of the marriage or civil union. Therefore, if the contract is signed on the day of the conclusion of the marriage or civil union, the exact time of the signature by the parties must be stated on the contract.
- **Parties who are entering into a customary marriage with the intention of entering into a civil marriage at a later date with an antenuptial contract, are often under the impression that they only need enter into and execute their antenuptial contract prior to the conclusion of their civil marriage. This is, however, not the case. The parties will need to enter into and execute their antenuptial contract prior to the conclusion of**

**their customary marriage for their marriage to be out of community of property and their antenuptial contract to be valid. Should the antenuptial contract be concluded after the conclusion of their customary marriage but prior to the conclusion of their civil marriage, they will be deemed to be married in community of property.**

2. Attested by the Notary Public (signed in a special manner by the Notary together with the Notary's seal as per section 87 of the Deeds Registries Act 47 of 1937 (Deeds Registries Act).
3. Registered in any Deeds Office within South Africa (in line with section 87 of the Deeds Registries Act):
  - If the antenuptial contract was signed in South Africa, it needs to be registered within 90 days of the date of attestation by the Notary.

- If the antenuptial contract was concluded outside of the South Africa by the parties, it needs to be registered within six months of the date of signature by the parties. A contract entered into outside of South Africa must be attested by a Notary or alternatively be entered into in accordance with the law of the place of its execution (signature by the parties).

If the antenuptial contract is not registered within the prescribed period or is entered into by the parties after conclusion of the marriage or civil union, the contract will not be recognised in law and will not be enforceable against third parties. The parties will therefore be deemed as being married in community of property. However, section 21 of the Matrimonial Property Act and section 88 read together with sections 86 and 87 of the Deeds Registries Act, provide



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for the registration of post-nuptial contracts (execution of antenuptial contracts after the date that the marriage or civil union have been concluded). These sections state the requirements for the registration of post-nuptial contracts:

- Section 21(1) of the Matrimonial Property Act:

*"A husband and wife, whether married before or after the commencement of this act, may jointly apply to a court for leave to change the matrimonial property system, including the marital power, which applies to their marriage, and the court may, if satisfied that:*

- (a) there are sound reasons for the proposed change;
- (b) sufficient notice of the proposed change has been given to all the creditors of the spouses; and

(c) no other person will be prejudiced by the proposed change, *order that such matrimonial property system shall no longer apply to their marriage and authorise them to enter into a notarial contract by which their future matrimonial property system is regulated on such conditions as the court may think fit."*

- Section 88 of the Deeds Registries Act:

*"Notwithstanding the provisions of sections 86 and 87 the court may, subject to such conditions as it may deem desirable, authorise post-nuptial execution of a notarial contract having the effect of an antenuptial contract, if the terms thereof were agreed upon between the intended spouses before the marriage, and may order the registration, within a specified period, of any contract so executed."*

### Types of antenuptial contracts

For marriages to be out of community of property, the Matrimonial Property Act makes provisions for two types of antenuptial contracts to be entered into:

#### 1. Out of community of property with the inclusion of the accrual system.

This allows for the sharing of assets and liabilities accumulated during the course of the marriage or civil union. In terms of this matrimonial property regime, parties will have their own assets and liabilities, however at the dissolution of the marriage or civil union, the party whose estate shows no growth or has a smaller growth compared to the other party, will be entitled to claim half of the difference between the growths of both estates.

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- For example, at the commencement of their marriage, both Thabisa's and Clinton's estates were nil, during their course of their marriage Thabisa's estate grew to R5 million and Clinton's to R3 million at the dissolution of the marriage Thabisa has the larger accrual and Clinton will therefore have a claim against Thabisa's estate for half of the difference in the accrual: R5 million - R3 million = R2 million. Clinton's accrual claim will be half of the difference of R2 million, being R1 million.
- The advantages of marriages out of community with the application of the accrual system are as follows:
  - Each party may deal with their respective estate as they wish.
  - Sharing of growth of the assets in the estate.
  - In the case of insolvency of one party, the assets of the solvent party are protected. One would, however, need to be cognisant of section 21 of the Insolvency Act 24 of 1936 (Insolvency Act).

### 2. Out of community of property with the exclusion of the accrual system.

This allows for each spouse to retain full control and contractual capacity of their own estate, which includes all assets and liabilities acquired before and during the marriage by the parties. There is no pooling of estates and everything that belonged to either party prior to the marriage or civil union and is acquired by either party during the marriage, will remain their exclusive property and liability.

- The advantage of marriages out of community is as follows:
  - In the case of insolvency of a party, the assets of the solvent party are protected. One would, however, need to be cognisant of section 21 of the Insolvency Act.
- The disadvantage of marriages out of community is that:
  - The party who generated little financial growth but invested emotional and functional support (i.e. being a stay-at-home parent) would not benefit should the marriage or civil union be dissolved.

### Conclusion

Section 21(1) of the Insolvency Act says that:

*"The additional effect of the sequestration of the separate estate of one of two spouses who are not living apart under a judicial order of separation shall be to vest in the Master, until a trustee has been appointed, and, upon the appointment of a trustee, to vest in him all the property (including property or the proceeds thereof which are in the hands of a sheriff or a messenger under a writ of attachment) of the spouse whose estate has not been sequestrated (hereinafter referred to as the solvent spouse) as if it were property of the sequestrated estate, and to empower the Master or trustee to deal with such property accordingly, but subject to the following provisions of this section."*

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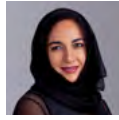
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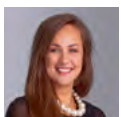
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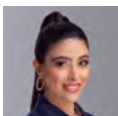
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**BBBEE STATUS:** LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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