

## LAW MATTERS



## MARRIED AND WANTING TO CHANGE YOUR MARITAL REGIME? THIS IS HOW

SPONSORED COLUMN

NICHOLAS CURA

IN TERMS of our South African Law, if you do not properly execute an antenuptial contract prior to marriage, then you are automatically deemed to be married in Community of Property (“INCOP”) which is South Africa’s “default” marital regime.

Implications of being married INCOP? This means that you and your spouse have a joint estate and hand in hand with that are also subject to community of profit and loss which means you are responsible for each other’s debts and obligations. This is a serious and potentially negative consequence for you should you or your spouse be running your own business or for any other reason need to protect assets from attachment by creditors. It often happens that parties only become aware of these consequences after the conclusion of their marriage.

By law you are not allowed to execute an antenuptial contract after marriage, however, Section 21(1) of the Matrimonial Property Act No.88 of 1984 (“the Act”) provides that a married couple may jointly apply to the High Court to amend their existing marital regime by the registration of a Postnuptial Contract. If the Court is satisfied with the application the Court will authorise the parties to sign a Notarial Contract- excluding community of property and community of profit and loss and either with or without the application of the accrual system- and which after registration of the Contract, will then regulate the consequences of their marriage.

In order to succeed with the application to Court the Act requires that:

- ◆ sound reasons must exist for the proposed change;
- ◆ sufficient notice of the proposed change must be given to all the creditors of the spouses. This must be done by way of registered post;
- ◆ sufficient notice of the proposed change must be given to the Registrar of Deeds;
- ◆ notice of the proposed change must be published in the Government Gazette and two local newspapers at least two weeks prior to the date on which the Application will be heard by the Court;
- ◆ no other person will be prejudiced by the proposed change;
- ◆ the Application must contain information about both spouses assets and liabilities in order to assist the Court in determining whether or not sound reasons exists for the proposed change and whether or not any person may be prejudiced by the proposed change.

**COSTS**

The costs of drafting the Postnuptial Contract should be the same as the costs of drafting an Antenuptial Contract however since the process also involves an Application to the High Court, legal fees and the costs of publishing the required notices in two local newspapers and the Government Gazette, as well as serving the application on the Registrar of Deeds will also be incurred. In appropriate circumstances however the benefits will invariably far outweigh the costs involved.

---

*Nicholas Cura is an Associate at Cox Yeats practising in the Property Services Law Team, with a keen interest in litigation, family law and property law. He can be contacted on 031 536 8500 or via email: [ncura@coxyeats.co.za](mailto:ncura@coxyeats.co.za)*

COX | YEATS  
attorneys