



Antenuptial Contracts

The default matrimonial property law regime in South Africa is a marriage in community of property. This ensures that should the parties to the marriage enter into no agreement prior to signing the marriage register, the parties will be perceived to be married in community of property and share one joint estate including all the assets and liabilities of each party. To prevent this automatic consequence in our law, one needs to sign an Antenuptial Contract before signing the marriage register.

The Antenuptial Contract (“ANC”) provides the parties with the opportunity to dictate their own terms, and just about anything can be conveyed through this type of contract. The object of the contract is to allow the parties to change some, or all of the financial consequences of their marriage. The ANC’s validity is dependent on it being duly prepared by a Notary Public and thereafter being signed by both parties and two witnesses in the presence of the Notary Public. The signed ANC should then be registered at the Deeds Registries Office within 3 months thereafter.

The ANC will generally take one of two forms;

- 1) An ANC that excludes community of property, community of profit and loss, and the accrual system; or
- 2) An ANC that excludes community of property, community of profit and loss, but includes the accrual system

In the first system each spouse keeps a separate estate which holds all their assets and liabilities held prior to the marriage as well as any assets or liabilities that are acquired during the marriage.

The second system ensures that the accumulated wealth of the marriage is evenly distributed between the parties. The accrual system implements its own formula to ensure that upon termination of the marriage, the party who has the smallest accrual in their assets when compared to that of the other spouse, will have a claim against the other spouse for an amount which is equal to one half of the difference between the accruals of the respective estates.

The accrual amount is determined by taking the asset value of each party at the beginning of the marriage and deducting it from the asset value at the end of the marriage. What is important to note is that this claim only becomes available upon dissolution of the marriage. All previous assets and liabilities prior to the marriage remain in the individual estates of each party (unless agreed otherwise) and this allows the spouses to enter into the marriage in a mutual place whilst still sharing in the increased value of their assets that accumulate during the marriage.

It should also be noted that certain assets are excluded from the accrual for the benefit of the parties, such as donations or inheritance. The system allows the financially weaker spouse to share in the wealth which, without their contribution, would not have been possible. The system further encourages joint success whilst still protecting what is rightfully yours. It is important to ensure that both parties fully understand the various options available, and make informed, mutually beneficial decisions accordingly.

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