

Planning before a customary marriage now essential

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Anybody planning to enter into a customary marriage should get expert advice on the choice of the suitable matrimonial property regime for the marriage, i.e. whether it should be in community of property, or out of community of property, with or without inclusion of the accrual system.

Many couples choose to have both a customary marriage ceremony and then wish to enter into a civil marriage as well after the customary wedding. It is very important to note that couples now need to enter into an ante-nuptial contract before the customary wedding if they do not want their marriage to be in community of property.

This has become essential due to a recent judgement of the Constitutional Court in which certain provisions of the Recognition of Customary Marriages Act, 1998, had to be interpreted by the court.

Under this act customary marriages are recognised as marriages on par with a civil marriage under the provisions of the Marriage Act, 1961. Customary marriages are also automatically in community of property unless the spouses have entered into an ante-nuptial contract before the wedding, which contract have been registered in the Deeds Office within three months after the signing of the contract.

In a valid ante-nuptial contract the would-be spouses can arrange that the marriage will be out of community of property and of profit and loss, and can choose whether the accrual system will be applicable to such out of community of property marriage.

If the contract does not exclude the accrual system, it is automatically included. This means that, upon death of one or both spouses, or upon divorce, the spouse who had the smaller growth in wealth during the marriage will have a claim of half the difference between the increases in wealth of the two spouses. This is a claim against the other spouse or the deceased estate of the other spouses, depending on the circumstances.

A marriage in community of property means that the spouses will be joint owners of a joint estate, each owning an undivided half share of all property, investments, etc.

After a marriage the matrimonial property regime of a marriage can only be changed, e.g. from in community of property to out of community of property, by applying to the High Court for permission to enter into a post-nuptial contract.

The court case

In the court case (*VVC v JRM and Others* (CCT202/24) [2026] ZACC 2) the two spouses entered into a customary marriage in 2011, without concluding an ante-nuptial contract. As a result, their customary marriage was in community of property. They then entered into a civil marriage in 2021, before which they signed an ante-nuptial contract providing that the marriage will be out of community of property with inclusion of the accrual system.

In 2022 the marriage ended in divorce and the question arose whether the ante-nuptial contract was valid and, if so, whether section 10(2) of the Recognition of Customary Marriages Act providing for this was unconstitutional. The Gauteng High Court (Pretoria) ruled the contract invalid, but also held that the section was unconstitutional.

In a majority judgement the Constitutional Court ruled that the contract was invalid, because section 10(2) does not give spouses in a customary marriage the right to conclude a new ante-nuptial contract entered into before the later civil marriage, but refers to an ante-nuptial contract entered into before the customary marriage.

This means that spouses who enter into a customary marriage, and then later into a civil marriage, can only enter into a valid ante-nuptial contract before the customary marriage. If they did not, their customary marriage is in community of property and so will the civil marriage be unless they apply to court for permission to conclude a valid post-nuptial contract under the provisions of section 21 of the Matrimonial Property Act, 1984.