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Quo vadis? Antenuptial contracts, aftermath of the constitutional judgments and other court cases

This article addresses the critical question of 'quo vadis?' (where are we going?) regarding antenuptial contracts (ANC) in the light of recent constitutional judgments, other court cases and their aftermath.

The key point is this: An ANC remains the only legal instrument that allows a couple to choose their matrimonial property system. The court's power to intervene in certain circumstances does not erase the contract's numerous and significant benefits, nor does it make the alternative, marriage in community of property, any more advantageous.

Firstly, this article explains to couples – whether planning a civil marriage, civil union, customary, or religious marriage – when to sign an ANC to be married out of community of property. Secondly, it will discuss the effectiveness and benefits of the ANC considering recent court rulings.

Part 1: When to enter an antenuptial contract

South African law currently recognises three types of marriages: Civil marriages, civil unions and customary marriages. The Marriage Acts are the Marriage Act 25 of 1961, Civil Union Act 17 of 2006, and the Recognition of Customary Marriages Act 120 of 1998 respectively. The proprietary consequences of the marriage – how assets and liabilities are managed – are governed by the Matrimonial Property Act 88 of 1984.

To be married out of community of property, a couple must sign an ANC before their civil marriage, civil union and customary marriage. This contract can be –

- out of community property with the accrual system; or
- out of community of property without the accrual system.

Without accrual, each spouse retains their own assets and is liable for his or her own debt during and after the marriage. With accrual, while assets and debt remain separate during the marriage, on dissolution (by divorce or death), the spouse whose estate showed less growth has a claim against the other of the difference in accrual.

For civil marriages and civil unions

The couple must sign the ANC before the marriage ceremony conducted by a marriage officer.

For customary marriages

The ANC must be signed before the customary marriage is concluded. The landmark case of *VVC v JRM and Others 2026 (3) BCLR 234 (CC)* made this unequivocal.

Key points on customary marriage dates and the VVC judgment

- A customary marriage is valid from the date customary law requirements are fulfilled (e.g. agreement, lobola, handover), not from its later registration date.
- The Constitutional Court ruled that an ANC is invalid if signed after the customary marriage has been concluded, even if signed before a subsequent civil ceremony.
- A civil marriage after a customary marriage is a continuation of the same union, not a new one.
- Therefore, to be out of community of property, the ANC must precede the customary rites.
- Since customary marriage is by default in community of property (unless an ANC was signed before the customary marriage began), that property regime remains in place throughout the subsequent civil marriage.
- To change the matrimonial property regime once a customary marriage exists, spouses must follow s 21 of the Matrimonial Property Act. This requires a High Court application, to ensure the change does not prejudice creditors or the economically vulnerable spouse.
- The court clarified that s 10(2) of the Recognition of Customary Marriages Act does not allow couples to retroactively introduce an ANC during the marriage. It only confirms that a civil marriage continues under the existing property regime unless it was lawfully altered via court order.

- Couples must sign their ANC before lobola negotiations are finalised or any customary celebrations occur to ensure they are married out of community of property.
- This ruling may invalidate thousands of existing ANCs that were signed after a customary marriage but before a civil marriage.

For Muslim marriages (Nikah)

As a Nikah alone is not legally recognised, an ANC is not required before it. However, if the couple later enters a civil marriage (under the Marriage Acts) they must sign the ANC before the civil ceremony to be out of community of property.

For Hindu and Jewish marriages

Hindu and Jewish marriages are not automatically recognised as legal marriages unless registered under the Marriage Acts. Without registration, these ceremonies are often deemed 'putative marriages' and lack full legal protection for a spouse regarding divorce, inheritance and property.

The same principle applies as for Muslim marriages. An ANC is to be signed before any subsequent civil marriage to be out of community of property.

Part 2: The effectiveness and benefits of ANC after recent court rulings

Recent judgments have affirmed the courts' power to redistribute assets on divorce even where an ANC without accrual exists. This does not render ANC worthless, but clarifies the powers of the courts.

The landmark ruling: *EB v ER NO and Others and a Similar Matter 2024 (2) SA 1 (CC)* –

- Previously, s 7(3) of the Divorce Act only allowed asset distribution for couples married out of community of property (without accrual) before 1 November 1984.
- The court found this date restriction unconstitutional. It held that judicial

discretion to order a 'just and equitable' redistribution exists for all such marriages, regardless of date.

- To prevent unfairness where one spouse made significant non-financial contributions (e.g. homemaking, child rearing) but would be left with nothing under a 'without accrual' ANC.

So, what are the benefits and ongoing effectiveness of an ANC?

Despite the court's redistribution power, an ANC remains highly effective and beneficial:

- It establishes your chosen default regime. Timing is paramount: Without an ANC, which precedes a civil marriage, civil union and customary marriage, the marriage is in community of property. The VVC case underscores that a properly timed ANC (before the civil marriage, civil union and customary marriage) is essential to secure an out of community property regime. It remains fully effective if correctly executed.
- Formal safeguards: ANCs are drafted by legal professionals and executed before a notary public, ensuring (ideally with independent legal advice) that the parties understand and voluntarily agree to the terms.
- Contractual freedom and judicial consideration: A couple can tailor the ANC (e.g. excluding specific assets, set accrual shares) to suit their circumstances. Even in a 'without accrual' scenario, the ANC is not ignored. A court must

consider it as a key factor, respecting the principle of *pacta sunt servanda* (agreements must be kept). Courts intervene only where enforcing the strict terms would lead to a manifestly unconscionable result, not merely because one party is less wealthy. A properly drafted ANC, entered into with independent legal advice, carries immense weight.

- Protection from insolvency: It shields one spouse's assets from the other's creditors if a spouse becomes insolvent.
- Financial autonomy: It allows each spouse to manage their own estate, invest and contract without requiring the other's consent-preserving individual financial independence.
- Estate planning certainty: It provides clarity for estate planning, allowing individuals to bequeath their separate assets according to their wishes.
- The accrual system provides built-in fairness and predictability: If the possibility of court redistribution under a 'without accrual' contract is a concern, the solution is simple: Choose an ANC with the accrual system. This system is specifically designed by law to ensure a fair sharing of wealth built up during the marriage. Courts are very reluctant to intervene with a redistribution where a fair accrual system is in place, as the contractual mechanism itself achieves equity.
- Alignment with religious principles: For Muslim, Hindu and Jewish couples, an ANC allows them to align the civil proprietary consequences of their marriage with their religious teachings.

Finally, an ANC provides certainty, structure and a strong starting point for any court's deliberation. Other laws (like forfeiture of benefits) also override private agreements: Section 7(3) is one such mechanism for achieving equity.

Conclusion and advice

I urge couples to seek independent legal advice before marriage to make this crucial financial decision. Changing the matrimonial property system later requires a costly and onerous High Court application.

Looking ahead

New legislation (the Marriage Bill and amendments to the Matrimonial Property Act) is in the pipeline, aiming to consolidate marriage laws. A note of caution: Provisions for the retrospective recognition of religious and polygamous marriages could lead to disputes over unintended proprietary consequences.

Disclaimer: This article is for general information purposes only and does not constitute legal advice. Individuals should consult a qualified legal professional for advice on their specific circumstances. The author is not responsible for any actions taken based on the information.

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