

PERSONALISED LEGAL ASSISTANCE

Professional legal and property consulting

SONNENBERG & ASSOCIATES PROPERTY AND LEGAL ADVICE NEWSLETTER # 13

1. Legal Quotes

"There is nothing more expensive than a bad lawyer." [Mike Gowen]

"Law is the second oldest profession" [unknown]

"Where law ends, tyranny begins." [William Pitt]

2. Legal short

What's the difference between an attorney and God? God doesn't think he's an attorney.

3. Fact of the day

Nigeria is Africa's largest champagne consumer. In 2010, Nigeria, Africa's leading economic power, consumed around 593 000 bottles of bubbly, compared to South Africa's 340 000. Nigeria also puts away more Guinness every year than Ireland, with demand trailing only that of Great Britain.

4. Inspiring quotes

"The harder I work, the luckier I get." [Gary Player]

"The mind is like a parachute; it doesn't work if it isn't open." [Frank Zappa]

"Believe you can, and you're half way there." [Theodore Roosevelt]

5. South African quote

"Our government is the potent, the omnipresent teacher. For good or for ill, it teaches by example.... If the government becomes the law breaker, it breeds contempt for the law; it invites every man to become a law unto himself..." [US Supreme Court justice Louis D Brandeis]. **Thuli Madonsela, our Public Protector, opened her report on President Jacob Zuma's Nkandla upgrades, "Secure in Comfort," with this quote.**

6. Getting married in South Africa

A wise person once told me that the key to a successful marriage was a full stomach and empty balls.

I think perhaps, without trying to be flippant or clever, the key is "certainty." This certainty may be the fact you have no doubt that you've chosen the right person, emotional or financial security, trust, respect, or any number of things.

One thing that I believe in very strongly is that this certainty is aided tremendously if the prospective spouses execute an antenuptial contract.

This newsletter will hopefully explain why I say this.

The antenuptial contract is a written agreement between two people intending to marry which sets out the terms of how the finances and assets of both parties are to be dealt with on termination of the marriage (by death or divorce).

No-one wants to consider the termination of the marriage when the wedding hasn't even taken place, but with one out of every two marriages ending in divorce these days, it is critical that the prospective spouses get certainty as to their assets and potential future earnings.

What can be more frightening than learning on the break-up of your marriage that you are in fact married in community of property (either because you failed to register an antenuptial contract timeously or at all), you have young children and your spouse insists that the matrimonial home be sold and half the proceeds go to him/her?

Let us briefly examine marriage in South Africa. There are **three types of unions: civil marriage, civil unions** (both same-sex partners and opposite sex partners where the partners have the same rights, responsibilities and legal consequences as marriages in terms of the Civil Union Act 17/2006) **and customary marriage**. A customary marriage entered into after 1988 continues to be governed by customary law and is in essence a marriage in community of property.

The first two unions follow suit: ***in the absence of the registered antenuptial contract ("ANC"), you are married in community of property.***

There are three different types of marriage contracts in South Africa:

1. Marriages in community of property

There is one joint estate and the spouses on termination of the marriage share 50/50.

Advantages:

- Spouses share everything equally on dissolution

Disadvantages:

- You share in your spouse's debt: if one spouse falls into debt or is sequestered, creditors have claim over all the assets in the estate (both yours and your spouse's);
- If one spouse has a business that becomes insolvent, your home and all assets can be attached by creditors and sold in execution;
- There is no contractual or financial freedom: for certain transactions you require the written consent of both spouses;
- On the death of one spouse, the estate of the deceased and the surviving spouse will be wound up (it is a joint estate). The surviving spouse will struggle to get access to money as a result for the time it takes to wind up the estate.

2. Marriages out of community of property

2.1 Where the accrual is specifically excluded

This is where the spouses retain their own assets both prior and during the marriage.

Advantages:

- Absolute protection from creditors (you are not responsible for your spouse's debt whether before or during the marriage);
- Complete financial and contractual freedom.

Disadvantages:

- On dissolution you are not automatically entitled to your spouse's assets or a portion thereof (you can still benefit in terms of a will or intestate succession).

2.2 Where the accrual is included (most people considered this to be the fairest system of marriage)

This is where both spouses state the value of their assets going into the marriage ("the commencement value"). The accrual is the difference between the commencement value and the termination value (when the marriage is dissolved by death or divorce). The spouse whose estate has grown the least during the marriage is entitled to half the difference between the respective accruals.

Advantages:

- Absolute protection from creditors (you are not responsible for your spouse's debt whether before or during the marriage);
- Complete financial and contractual freedom;
- On dissolution both spouses share in the wealth accumulated during the marriage;
- On death of one of the spouses, if the surviving spouse is owed money in terms of the accrual (i.e the surviving spouse's estate has accrued less than that of the deceased), the surviving spouse is entitled to be immediately paid out the amounts owing in respect of the accrual by the executor.

Formalities of entering into an antenuptial contract

The ANC is prepared and signed by the spouses before the marriage in front of a notary public and must be registered at the deeds office in the area in which you reside within three (3) months of signature.

You can check whether your ANC has been registered by getting your attorney to do a deeds office search on your name. Under the contracts section, you should see an "H" symbol: this

means you are married by ANC. The search doesn't indicate whether you have excluded the accrual or not; it merely is an indication that an ANC has been registered.

It is possible to register an ANC post-nuptially, but this will necessitate a High Court application where you have to show good cause why you didn't execute an ANC before your marriage or why you failed to register it timeously. This is not a straight-forward application as your creditors may oppose the application and it may be a costly exercise.

General notes on antenuptial contracts

Your ANC can be tailored to your specific situation. I have drafted ANC's in the past where the husband agreed to forfeit a portion of his estate to his wife in the case of his infidelity! Remember that your ANC is a contract between you and your spouse: you can include any clauses in the contract agreed on between the two of you.

All assets that either spouse has brought into the marriage, remain the exclusive property of the owner (except where the owner donates the asset to his/her spouse in terms of the antenuptial contract, or donates it to his/her spouse during the marriage). Similarly, if such an asset is sold during the marriage, the monetary value of the sold asset remains that of the owner exclusively. (This is the legal situation: practically spouses can have joint bank accounts).

All inheritances, legacies or donations between spouses are also left out in the calculation of accrual.

Until the marriage is terminated by death or divorce, the accrual system has no effect whatsoever. Only when the marriage is terminated, will an accounting exercise be done to determine what is owed to either spouse in terms of the accrual system.

An important point to mention is that even if you get married overseas, if you are domiciled in South Africa (i.e. you consider South Africa to be your permanent home), the proprietary consequences of your marriage (what happens to your assets), will be governed by South African law. If you plan to marry overseas, make sure you sign your antenuptial contract before you get onto the plane.

All newsletters can be obtained on our website: www.sonnenberg.co.za. You can also sign up to receive future newsletters on the site. Please let us know of legal or property topics you wish us to address in future newsletters.



FRITZ SONNENBERG | LEGAL CONSULTANT

Mobile: 083 251 5451 | Email: Fritz@sonnenberg.co.za | Skype: fritzsonnenberg



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