

## MATRIMONIAL REGIMES IN SOUTH AFRICA

In South Africa, there are three different laws in terms of which persons may be married:

- The Marriage Act, 1961 which allows for a civil marriages.
- The Civil Union Act, 2006 which allows a civil marriage or a civil partnership between two people, regardless of gender.
- The Recognition of Customary Marriages Act 1998 which allows for the registration of African customary marriages.

Each of these unions will have consequences on the person and the property of the spouses. We will today briefly explain marriages governed by all three of the Acts.

### Civil Marriages:

- Only licensed marriage officers solemnise civil marriages and can register the marriage (wedding register) and issue a marriage certificate.
- Either at the offices of the DHA or by religious marriage officers at chapels or religious buildings.
- The state grants you legal recognition by issuing a marriage certificate.
- Marriages are formalised in accordance with marriage laws of the state, and is irrespective of religious or cultural affiliation.
- Minors require the consent of a parent, a guardian or a Commissioner of Welfare before entering into a marriage.
- In addition to the above consent, boys under 18 years and girls under 16 years of age require the consent of the Minister of Home Affairs.
- Parties can choose to prior to marriage enter into an Antenuptual Contract, which will determine whether they are married in community of property or out of community of property.
- If married in community = both parties have to sign the Sale Agreement and the property will be registered into both parties names 50/50.
- If married out of community of property = parties need to specify if the property will be registered in both of their names, or only one of them. If both, the parties must also further indicate whether they will own the property 50/50, or in a different percentage.

### Civil Unions:

Definition in Act: "civil union" means the voluntary union of two persons who are both 18 years of age or older, which is solemnised and registered by way of either a marriage or a civil partnership, in accordance with the procedures prescribed in this Act, to the exclusion, while it lasts, of all others.

The legal consequences of a civil partnership are identical to those of a marriage under the Marriage Act, except for such changes as are required by the context. Any reference to marriage in any law, including the common law, is deemed to include civil partnership in terms of the Civil Union Act; similarly, any reference to husband, wife or spouse in any law is deemed to include a civil partner. The law of divorce for civil partnerships is the same as that for marriage.

- Parties can enter into either a civil marriage or a civil partnership.
- The parties can be of the same sex or of different sexes.
- A certificate of registration must be issued by an authorised marriage officer, which indicates whether the civil union is a marriage or a civil partnership.
- Government officials (primarily magistrates and Home Affairs civil servants) who are appointed as marriage officers under the Marriage Act are also automatically appointed to solemnise civil partnerships.
- Religious marriage officers may not solemnise civil partnerships.
- A person may only be a spouse or partner in one marriage or civil partnership at any given time.
- A person in a civil union may not conclude a marriage under the Marriage Act or the Customary Marriages Act and vice versa.
- Civil unions may be terminated through death of a spouse or partner or divorce.
- A civil union will be in community of property, unless the parties have executed an antenuptial contract prior to their civil union, ie exactly the same as above.

### Customary marriages:

- The spouses of a customary marriage have a duty to ensure that their marriage is registered Customary marriages entered into after the commencement of this Act must be registered within a period of 3 months after the conclusion of the marriage.
- Customary marriages entered into before the Act must be registered within 12 months of the commencement of the Act.
- Failure to register a customary marriage does not affect the validity of that marriage - can apply to a Court.
- The act recognises polygamy - a husband who has registered his marriage under the Act is permitted to register additional marriages under the Act, provided he adheres to the regulations under the Act regarding his property. The husband has to get an order from a competent court that will regulate his future matrimonial property system.
- No spouse in a customary marriage however shall be allowed to enter into a marriage under the Marriage Act, 1961 during the subsistence of such customary marriage.
- Prospective spouses must be above the age of 18, if younger the consent of both parents, or if he or she has no parents, his or her legal guardian must consent to the marriage.
- Prospective spouses must both consent to be married to each other under Customary law.
- The marriage must be negotiated and entered into or celebrated in accordance with customary law.
- A customary marriage entered into after the commencement of this Act in which a spouse is not a partner in any other existing customary marriage, is a marriage in community of property and of profit and loss between the spouses, unless such consequences are specifically excluded by the spouses in an antenuptial contract which regulates the matrimonial property system of their marriage.
- Spouses in a customary marriage entered into before the commencement of this Act may apply to a court jointly for leave to change the matrimonial property system which applies to their marriage.

### Muslim marriages:

Does South Africa recognise (Nikah) Muslim marriage? The short and concise answer is, NO.

However, by registering a marriage in terms of the marriages act 25 of 1961, spouses can obtain recognition and regulate the proprietary consequences of their marriage.

In April 2014 over 100 Imams (Muslim clerics) were officially appointed as marriage officers in terms of the Marriage Act. All Imams had to complete a three-day-course during which they learned about the Marriage Act and wrote an exam. Their accreditation in terms of the Marriage Act now enables Muslim marriages to be legally recognised, enabling Imams to officiate over marriage unions. Thus, a Muslim marriage will only be valid where the marriage is solemnised by a marriage officer duly registered as such in terms of the Marriage Act.

The Proprietary consequences of a Muslim marriage will now be the same as a civil union in terms of the Marriage Act. In other words such a marriage will be in community of property, unless the spouses has entered into an antenuptial contract whereby excluding the community of property regime with or without the inclusion of the accrual system.

In addition it should be noted that such a marriage officer may not marry any person who is already a party in another (muslim) marriage, even where that marriage is not registered as intended in the amendments as yet.

Christelle Pansegrouw  
Director  
Van der Merwe & Robertson Attorneys Incorporated