

## **The Cart Before the Horse: Why an ANC Can't Outrun a Customary Marriage**

The Constitutional Court, in *VVC v JRM and Others [2026] ZACC 2*, has provided much-needed clarity on the issues of executing an antenuptial contract during the subsistence of a valid customary marriage, as well as the effect of concluding a civil marriage subsequent to a customary marriage.

The facts in this case concerned spouses who entered into a customary marriage on the 5th of August 2011, in community of property. On the 19th of February 2019 the spouses concluded an antenuptial contract. The antenuptial contract provided that their subsequent civil marriage, which was entered into on the 10th of June 2021, would be out of community of property, and subject to the accrual system.

When a decree of divorce was sought in May 2022, the key legal contention rested upon the validity and enforceability of the antenuptial contract concluded by the spouses. The one spouse argued that the antenuptial contract was invalid to the extent that it allowed for a change in the marital regime applicable to their marriage without the required judicial oversight mandated by Section 21 of the Matrimonial Property Act. It was further contended that enforcing the antenuptial contract constituted an arbitrary deprivation of property in violation of Section 25 of the Constitution in that it split a joint estate thereby extinguishing their claims to certain property in the joint estate.

In its judgment, the Constitutional Court effectively declared that all antenuptial contracts concluded after the spouses have entered into a customary marriage are invalid (with the proviso of when the customary marriage was concluded to be a distinguishable fact). This conclusion stands irrespective of the spouses' intentions when executing the antenuptial contract. As the Court stated, the spouses' intentions cannot be favored over the statutory regime applicable.

With specific reference to customary marriages, the default application of an in-community-of-property matrimonial regime may be departed from only by either (i) executing an antenuptial contract prior to entering into a customary marriage, or (ii) complying with the provisions of Section 21 of the Matrimonial Property Act after a valid customary marriage has been concluded.



In its reasoning, the Constitutional Court emphasized that there can exist only one continuous marriage between spouses. The subsequent conclusion of a civil marriage following a customary marriage neither creates a new marriage nor dissolves the existing one. The customary marriage is merely subsumed into the civil with the marital property regime still intact. The sole consequence of entering into a civil marriage is the change in the marriage system governing the marriage, from customary law to the common law.

It is important to understand the concepts of a 'marriage system' and a 'matrimonial property regime', along with their effects on your marriage, as this often becomes the source of confusion.

Where spouses remain married in community of property, the joint estate remains exposed to the claims of creditors, with each spouse bearing joint and several liability for debts incurred by the other. This includes the risk of execution against the joint estate, irrespective of which spouse incurred the obligation. The judgment therefore serves as a timely reminder of the inherent vulnerability of a joint estate in circumstances where spouses may have intended, but failed, to validly regulate their matrimonial property affairs.

Spouses who, in light of this judgment, have come to learn that they are married in community of property and wish to mitigate the ongoing risk to their joint estate should consider approaching the High Court in terms of Section 21 of the Matrimonial Property Act for leave to change their matrimonial property regime. Such an application, if granted, allows spouses to regulate their affairs going forward and limit future exposure to creditors, although it does not affect existing obligations.

Clients are encouraged to contact us should they have any questions concerning the impact of this judgment on existing marriages.

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