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Marriage & *Property*

A guide to matrimonial property regimes and
antenuptial contracts in South Africa.

PORT ELIZABETH

JEFFREYS BAY

EAST LONDON

Before you say “I do”

Marriage changes more than your name. It determines who owns what, who is liable for whose debts, and how your assets will be divided if the marriage ends through divorce or death. South African law offers three matrimonial property regimes, and the one that applies to you depends on whether you sign an antenuptial contract (ANC) before the wedding and what it says.

	In community	Without accrual	With accrual
Antenuptial contract	Not required	Required	Required
Estates during the marriage	One joint estate	Separate	Separate
Consent for major transactions	Required	Not required	Not required
Liable for spouse’s debts	Yes	No*	No*
When the marriage ends	Joint estate divided equally	Each keeps own estate	Growth shared equally

*Except for household necessities, for which both spouses may be liable.

In community of property

The default position

If you marry without signing an antenuptial contract, you are automatically married in community of property. You and your spouse form a single joint estate: almost everything each of you owns before the marriage, and everything either of you acquires during it, belongs to both of you in equal shares, regardless of who paid for it or in whose name it is registered.

You will need each other's written consent for major transactions, such as selling or bonding immovable property, entering into credit agreements or standing surety for someone else's debt. Each of you may be held liable for debts the other incurs on behalf of the joint estate, even debts you did not know about, and if either of you becomes insolvent, the joint estate, and therefore both of you, is affected.

When the marriage ends, whether by divorce or death, the joint estate is divided equally between the spouses, regardless of what each of you contributed to it.

IN SHORT

Simplicity and a full financial partnership, but shared exposure to each other's debts and financial decisions.

Out of community of property, without accrual

Complete separation

This regime requires an antenuptial contract, signed before a notary before the wedding, that expressly excludes the accrual system. You and your spouse keep entirely separate estates, both during the marriage and when it ends. What each of you brings into the marriage, and what each of you earns or acquires afterwards, remains your own, and each of you may deal with your own assets without the other's consent.

On divorce or death there is no sharing of growth: each spouse simply keeps what is in his or her own name.

This regime often suits spouses who run a business, have significant existing assets or wish to protect family wealth. Its drawback is that a spouse who earns less, or who steps back from a career to raise children or to support the other's business, may leave the marriage with little to show for the family's financial growth.

IN SHORT

The greatest independence and asset protection, but no sharing in what you build together.

Out of community of property, with accrual

The middle ground

This regime also requires an antenuptial contract. If you marry out of community of property and do not expressly exclude the accrual system, it applies automatically.

During the marriage your estates are separate: each of you controls your own assets and is not liable for the other's separate debts. When the marriage ends, the growth in each estate is calculated and compared, and the spouse whose estate grew by less has a claim for half of the difference. In effect, you share equally in the wealth built during the marriage while keeping what each of you brought into it.

Each of you should record in the ANC the net value of your estate on the wedding date, known as your commencement value. Inheritances, legacies, donations from third parties and damages for non-patrimonial loss are excluded by law, and you may exclude other assets, such as a family business or a property, by listing them in the ANC.

TIMING MATTERS

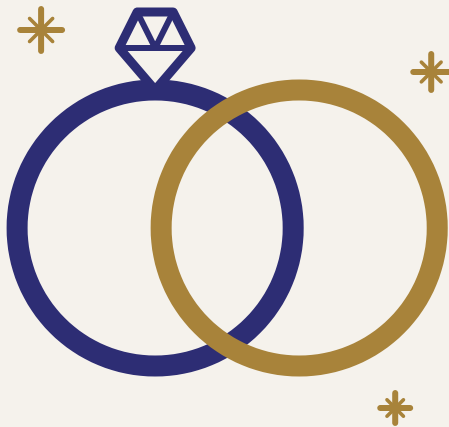
The ANC must be signed before a notary before the wedding and registered in the Deeds Office within three months of signature. Changing your regime after the wedding requires a High Court application, so it is best to decide now.

1

Is only the growth in each estate shared?

Yes. Under the Matrimonial Property Act 88 of 1984, the net value of each estate at the start of the marriage is recorded as its commencement value. When the marriage ends, the growth in each estate is compared, and the spouse with the smaller growth may claim half of the difference.

Commencement values are first adjusted for inflation using the Consumer Price Index (CPI), so only real growth is shared. Each estate is assessed as a whole, so a loss on one asset reduces the growth on another.

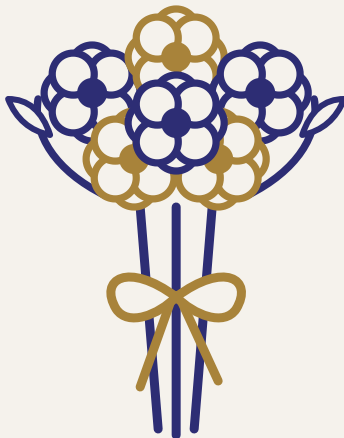


2

How is the commencement value recorded, including where there is a bond?

It is the net value of your estate: all your assets less all your liabilities, including any outstanding bond. It is best declared in the ANC itself, although a separate statement within six months of the marriage is also permitted. If your liabilities exceed your assets, the value is nil.

If nothing is declared, the value is treated as nil, so everything you own when the marriage ends, including what you brought into it, may be counted as growth. Support each figure with investment and bank statements, a property valuation and a bond statement, all dated close to signature.



3

How is growth calculated on a bonded house?

Growth is measured on the equity, being the market value of the property less the outstanding bond, and not on the full value of the property. For example:

	Value	Bond	Equity
At marriage	R5 500 000	R4 300 000	R1 200 000
Two years later	R6 000 000	R2 800 000	R3 200 000

If CPI rose by 10%, the opening equity is escalated to R1 320 000, leaving accrual of R1 880 000 on this asset. Capital repayments and market growth both count, and because repayments are usually made from income earned during the marriage, much of that equity will be shared.

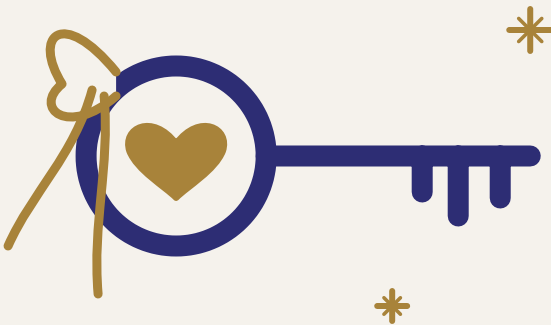


4

Does the bond remain the borrower's debt if the growth is shared?

Yes. The bond remains the debt of the registered borrower alone, and the other spouse becomes neither a co-owner nor a co-debtor. The accrual is only a calculation made when the marriage ends, at which point the bond is deducted from the owner's estate.

A property can be excluded in the ANC, in which case the ANC should also exclude its bond, state whether a replacement property is excluded and deal with bond repayments made from earnings during the marriage. A common middle ground excludes only the equity held on the wedding date.



5

What if one spouse's savings help to pay the other's bond?

Such a payment is generally treated as a donation between spouses, which section 5(2) of the Act excludes from both spouses' accrual, so it will usually not be recovered through the accrual claim. Contributions towards a shared home may also be regarded as part of the spouses' duty to support each other. If a contribution must be recoverable, record it in writing as a loan when it is made, or include a contributions clause in the ANC.



6

Is either spouse protected against the other's debts or insolvency?

Partly. Because your estates are separate, one spouse's creditors cannot claim the other's assets, except for household necessities. If one spouse is sequestrated, however, section 21 of the Insolvency Act 24 of 1936 vests the solvent spouse's property in the trustee as well, and the solvent spouse must prove ownership to have it released, so keep good records of what you own and how you paid for it.

The accrual claim itself cannot be transferred or attached during the marriage, and a court may order an immediate division of the accrual if one spouse's conduct seriously prejudices the other's claim. We also recommend a clause providing that a spouse who is sequestrated or insolvent when the marriage ends is not entitled to an accrual claim, which keeps family assets out of reach of that spouse's creditors.



7

How is death treated compared with divorce?

The accrual applies in both cases. On death, it is calculated before the will is given effect, and the claim lies either by the survivor against the deceased estate or by the estate against the survivor. A court may allow payment to be deferred, on security, where immediate payment would cause undue hardship.

On divorce, a court may also order under section 9 of the Divorce Act 70 of 1979 that a spouse forfeit the accrual benefit, wholly or partly, if that spouse would otherwise be unduly benefited, having regard to the length of the marriage, the reasons for its breakdown and any substantial misconduct. Examples include a marriage of eighteen months in which one spouse's business grew by millions while the other contributed little and caused the breakdown, or serious abuse, destructive substance abuse, or the hiding or squandering of assets.

Ordinary breakdown is not enough, and no one is penalised for earning less or for running the home. Forfeiture affects only a share of the other spouse's growth, never a spouse's own assets, and has no equivalent on death.

8

Are inheritances kept separate from the growth? Can this be specified?

Yes. Section 5(1) of the Act excludes inheritances, legacies and donations from third parties, and assets acquired with them, unless the ANC provides otherwise. Other assets can be excluded by listing them in the ANC, which should also state expressly that income from, and growth in, excluded assets are excluded, as the law on this point is not settled.

9

Does a will override an antenuptial contract?

No. The accrual claim is a debt of the deceased estate and is paid before any heir inherits, so a will cannot be used to defeat it. You should both make or update your wills once the ANC has been signed, so that the two documents work together.



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Which clauses help where our assets are held in two countries and currencies?

The Act is silent on foreign currency, so your ANC should deal with it. We recommend that it record each commencement value in Rand, together with the exchange rate, its source and the date used; attach a schedule of foreign assets with their values in the foreign currency; state how those assets will be valued and converted when the marriage ends; and exclude any foreign assets you wish to keep separate.

Exchange rates need particular care. Commencement values are escalated by South African CPI, but a weaker Rand can make a foreign asset appear to grow when it has not grown at all. You may therefore agree to disregard growth caused only by exchange-rate movements, or to measure foreign assets in their own currency.



PREPARED IN-HOUSE

Your antenuptial contract is drafted and executed by our admitted Notaries Public, under the personal supervision of founding directors Morne and Tania Schaefer.

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What if one of us is a foreign national, such as a British citizen?

The key concept is domicile, the place where you live with the intention of remaining permanently, which is not the same as citizenship. South African courts determine the matrimonial property regime by the domicile at the time of the marriage, traditionally that of the husband (*Ex parte Spinazze* 1985 (3) SA 650 (A)). If the husband is domiciled abroad, foreign law could govern your property, and English law, for example, has no accrual system. As spouses may choose the governing law, your ANC should record your domiciles and your choice of South African law.



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If we later move abroad, will our ANC still protect us?

Under South African law, yes. Your regime does not change when you emigrate, and it can only be changed by order of the High Court. A foreign court hearing a divorce will, however, apply its own law.

In England and Wales a nuptial agreement is not automatically binding, although since *Radmacher v Granatino* [2010] UKSC 42 the courts will generally uphold one entered into freely and with a full understanding of its effect, unless that would be unfair. Full financial disclosure, independent advice and signing well before the wedding (English practice is at least 28 days) all strengthen your position, and if a move is likely you should ask a local lawyer about a supporting agreement under that country's law.





— NEXT STEPS

Preparing your antenuptial contract

When we meet, we will ask you to confirm your chosen regime, your commencement values with supporting documents, any assets to be excluded, which of the clauses discussed you wish to include, your domiciles and your wedding date, so that signing can be arranged well in advance. We also draft wills to work alongside your contract.

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