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CUSTOMARY MARRIAGES AND ANTENUPTIAL CONTRACTS

A marriage in South Africa is either in community of property, out of community of property without accrual or out of community of property with accrual. For a marriage out of community of property (with or without accrual), the parties must sign an antenuptial contract drafted and executed by a notary public.

The above is applicable to all marriages in South Africa with no exception to customary marriages. This was clearly illustrated in the recent matter of JRM v VVC. In this matter the parties entered into a customary marriage in 2011 without concluding an antenuptial contract, rendering the marital regime in community of property. The parties then decided to register a civil marriage which is permitted pursuant to section 10 of the Recognition of Customary Marriages Act. The parties concluded an antenuptial contract in 2019 and registered the civil marriage in 2021. During their divorce proceedings in 2022 the court had to decide on the validity of the antenuptial contract and consequently determine the marital regime of the civil marriage.

The court took various case law, the complexity of customary marriages and section 7(2) of the Recognition of Customary Marriages Act into account and concluded that the assets that the parties wanted to regulate under the antenuptial contract, already fell into the parties' joint estate under the customary marriage in community of property. The Presiding Officer noted that parties who wish to change their marital regime should apply to the Court and follow the procedure of section 21 of the Matrimonial Property Act.

It is therefore clear that should parties wish to be married out of community of property, they must conclude an antenuptial contract before the customary marriage takes place. Should this not be done, the customary marriage and the subsequent civil marriage is in community of property and the section 21 route will have to be followed for the marriage to be deemed out of community of property.