

# Postnuptial agreements - possible, but not simple

By [Loryn Liberty](#)

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This important decision is sometimes overlooked or deemed unnecessary in the hopes of "happily ever after". In reality, however, this decision is one of the most important that they will make, not because they should prepare for separation, but because their marital regime will be the mechanism that will be used to deal with their finances going forward.



Image source: Getty Images

There are three types of marital regimes in South Africa: a marriage in community of property, out of community of property and out of community of property with the inclusion of the accrual system. The default position in South African law is a marriage in community of property.

For couples to enter into marriages out of community of property with or without the inclusion of the accrual system, they must enter into an antenuptial contract (ANC) signed in the presence of a Notary Public and two witnesses, before the marriage ceremony is concluded. The ANC must also be registered with the Registrar of Deeds not less than three months after the ceremony.



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But how does a couple change their marital regime if they have not entered into an ANC and realise that they should have; or perhaps they intended to enter into an ANC but did not have the chance to do so before the day of their ceremony; or they were simply ignorant of the law?

Unfortunately, married couples cannot simply enter into a post-nuptial agreement to rectify the situation. The only way to validly change your marital regime in South Africa is to launch a High Court application in terms of the Matrimonial Property Act, in which the following the requirements must be satisfied:

- The application must be brought jointly by both spouses;
- It must disclose where the parties are resident, which must be within the Court's jurisdiction;
- Sound reasons which are fully motivated for the change must be set out;
- A copy of the couple's proposed post-nuptial contract, prepared by a Notary Public, must be annexed to the application;
- Parties must explain why no other person will be prejudiced by the proposed change;
- Parties must provide sufficient notice of the application to all creditors, the Registrar of Deeds and the South African Revenue Service at least two weeks before the hearing of the application;
- Notice of the application must also be published in the Government Gazette as well as in two local newspapers in the area where the parties reside;
- Parties must provide full particulars of their financial position, including a detailed list of all assets and their value, as well as the full amount of each liability;
- Parties must include declaratory statements as to whether either of them has been sequestrated in the past - if so, when, and in what circumstances; and
- Details of any pending litigation in which a creditor is seeking to recover payment of an alleged debt.



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To avoid this very onerous and expensive exercise, couples must ensure that they seek legal advice and consider the consequences of all three marital regimes before they are married. Failing which, they may find themselves in the uncomfortable situation of having to consult an attorney and approach the Court to ensure that their financial position is protected.

## ABOUT THE AUTHOR

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