YOUR MARITAL REGIME AND OWNERSHIP OF IMMOVABLE PROPERTY

Matrimonial Property Act 88 of 1984

In our experience, when couples are on the brink of celebrating the 'big day', they are confident that they understand the legal consequences of entering into a marriage. Learning subsequently that a whole array of provisions contained in the Matrimonial Property Act are automatically applicable and may limit, amongst other things, their capacity to enter into agreements, might come as a surprise.

Read here to find out more. occurred.

DISCUSSION

YOUR MARITAL REGIME AND IMMOVABLE PROPERTY OWNERSHIP

When you are buying or selling immovable property, it is important to appreciate how your marital regime (in other words, is it a marriage in or out of community of property?), impacts on your ownership rights in respect of the property.

In South Africa, the default matrimonial property regime is in community of property. A marriage of this nature entails that the two spouses share one, single joint estate. Any assets acquired before or during the marriage shall form part of this joint estate. Consequently, immovable property purchased before or after a marriage in community of property, will automatically fall within the single, joint estate (unless ownership thereof was excluded in terms of the provision of a will or deed of donation) and on termination of the marriage by death or divorce, each spouse has a right to 50% of the joint estate.

Since a joint estate is established, a person who is married in community of property may generally not, without the consent of the other spouse, enter into a sale agreement to purchase or sell immovable property (certain exceptions do exist) or obtain mortgage financing. It is thus imperative that both spouses are parties to transactions for the sale, purchase or mortgaging of immovable property.
In contrast to the above, when spouses enter into an antenuptial agreement prior to their marriage and ensure that same is registered in the deeds office, they will be considered to be married out community of property. This means that their individual estates remain separate, whether or not they are married subject to the accrual system or not.

Spouses are therefore free to enter into transactions for the alienation or purchasing of immovable property in their own names, without the consent of the other spouse.

Because the intricacies of the law that apply to marriages, whether in or out of community of property, are often unexplored at the time of entering into the marriage, spouses often request, belatedly, whether a change of their matrimonial property regime can be effected. For example, this request may arise when a spouse wants to open a business but does not want the joint estate to be at risk should the business fail.

The Matrimonial Property Act 88 of 1984 permits spouses to change their existing matrimonial system. It is achieved by approaching a High Court with an application made by both spouses setting out the reasons for the request to

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change their regime and details regarding notification to creditors, amongst other things, and by entering into a notarially executed post-nuptial agreement.

The High Court will authorise the spouses to amend their matrimonial property regime if it is satisfied that there are good reasons to do so and that notice has been given to the spouses' creditors and further, that no third party will be prejudiced by such an amendment.

For assistance, contact Shirné Grobler at Shirneg@stbb.co.za

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