When did we get married?

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More often than not couples who first get married in terms of customary law also, once the customs and usages of their tradition are observed, get married under civil law.

There is legal uncertainty as to when, exactly, customary marriages are concluded. This legal uncertainty perhaps explains why most couples who first get married in terms of customary law and later in terms of civil law, are unsure exactly when they need to execute their ante-nuptial contracts.

There is a rebuttable presumption that all marriages in South Africa are in community of property, and the presumption is rebutted should a valid ante-nuptial contract be executed before date of marriage. The date of civil marriages is at the exact point that certain prescribed formalities have been observed in terms of the Marriages Act 25 of 1961.

In terms of civil law, ante-nuptial contracts must be entered into before the marriage takes place. The legal uncertainty in terms of the Recognition of Customary Marriages Act 120 of 1998, as to the exact date when customary marriages are concluded, makes it difficult for notaries to determine the exact point at which to execute ante-nuptial contracts. The need for legal certainty in this regard has never been fully observed, perhaps because couples who first get married in terms of customary law work on the assumption that they need to conclude ante-nuptial contracts only before the date of their civil marriages and not the date, whichever date that may be, of their customary marriages.

The two glaring legal issues with regard to first getting married in terms of customary law and then later in terms of civil law are that:

- the date of marriage in terms of customary law is not readily determinable; and
- those couples who wish to get married out of community of property work on the assumption that an ante-nuptial contract needs to be entered into only before the date of the civil marriage and not the date of the customary marriage.

The first legal issue is encapsulated in the matter of *Mabena v Letsoala* 1998 (2) SA 1068. In this matter, the court ruled that in order for there to be a valid customary

marriage there must be an agreement between the two families, *lobola* negotiations, and handing over/incorporation of the bride into the groom's family home. Consequently the date of a customary marriage may be when:

- the two families agree; or
- the date when *lobola* negotiations are concluded; and/or
- paid in full; or
- the date when the bride is handed over to the groom's family home.

Experts of customary law have come to the conclusion that a customary marriage comes into being on the date of the handing over or incorporation of the bride into the home of the groom's family, which is usually done in the form of a ceremony. In the *Maloba v Dube* [2008] ZAGPPHC matter, however, the court inferred from the facts of the case that if parties live together then the bride was handed over, thus giving the impression that a ceremony need not take place for there to be a handover.

Other legal experts believe that payment of *lobola* determines the date of a customary marriage. However, in the matter of *EXN v SRD* (2011/3726) [2016] ZAGPPHC the court accepted evidence of one of the parties, who led evidence to the effect that *lobola* negotiations only form part of a process of marriage. In the matter of *Mkabe v Minister of Home Affairs and Others* (2014/84704) [2016] ZAGPPHC 460, the court held that customary law has evolved over the years in such a way that payment of *lobola* in full cannot be an essential requirement for a customary marriage. Suitable arrangements are usually made for payment of *lobola* and, if the other requirements of a customary marriage have been met, it may be said that a valid customary marriage is entered into. That may be the case, but as to when the actual date of the marriage is for purposes of entering into an ante-nuptial contract is yet to be decided.

The second legal issue, which ties in with the first one, is encapsulated as follows: section 2(2) of the Recognition of Customary Marriages Act 120 of 1998 provides that customary marriages are for all purposes recognised as marriages. The proprietary consequences of any such marriages are exactly the same as that of marriages entered into in terms of the Marriages Act 25 of 1961. Section 7(2) of the Recognition of Customary Marriages Act 120 of 1998 provides that a customary marriage is marriage in community of property, unless a valid ante-nuptial contract is executed before date of marriage. When that date is must be determined by the notary concerned and, as previously observed this is not an easy task.

Section 10(1) of the Recognition of Customary Marriages Act provides that couples married in terms of that Act may also get married in terms of the Marriages Act. The couple has the option to first get married in terms of customary law and then later in terms of civil law. This is common practice but it becomes an issue when the couple does not know the date of their customary marriage, or that the ante-nuptial contract needs to be entered into before the date of their

customary marriage.

The general perception seems to be that once a couple is married in terms of customary law, and then wants to get married in terms of civil law, an ante-nuptial contract would need to be entered into before the date of the civil marriage for that marriage to be considered marriage out of community of property. But in the Recognition of Customary Marriages Act, customary marriages are, for all purposes, legally recognised as marriages, and in South Africa all marriages are in community of property unless a valid ante-nuptial contract was executed by a notary before the date of marriage.

While the exact date of a customary marriage in South Africa is difficult to determine, the legal position is that a marriage exists and if no ante-nuptial contract was entered into before the marriage, it will be in community of property. The unintended consequence, for a couple who wanted their marriage to be out of community of property, is that the ante-nuptial contract entered into after the customary marriage, but before the civil marriage, will be binding only to the couple concerned and not third parties.

In term of section 87 the Deeds Registries Act 47 of 1937 an ante-nuptial contract executed in South Africa shall be attested by a notary public and shall be registered in the Deeds Office within three months after the date of its execution. In instances where an ante-nuptial contract was entered into and registered in the Deeds Office after the customary marriage but before the civil marriage, to third parties the couple would be *de facto* married out of community of property. This is because the date of marriage recorded in the marriage certificate would be after the date of execution of the ante-nuptial contract. However, when one elects to examine the facts further, it would be found that, *de jure*, the marriage is in fact in community of property because an ante-nuptial contract would be executed after the date of the customary marriage.

Conveyancers and notaries who deal with the marital status of parties need to be extra vigilant, particularly in matters where the Deeds Office is concerned. In terms of section 17(2)(a) of the Deeds Registries Act, every deed or any other document lodged in the Deeds Office shall state the full name and marital status of the person concerned. In instances where conveyancers or notaries know that any party to the matter observes the customs and usages traditionally observed among the indigenous African people of South Africa, they need to go to great lengths to establish the true legal position that will affect the party concerned.

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