MARITAL PROPERTY REGIMES
AND THE
NATIVE ADMINISTRATION PROCLAMATION

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INTRODUCTION

This memorandum has been drafted to explain the bizarre and racially-based marital system that still exists in Namibia. Namibian law still contains several old statutes which date from the years of the apartheid regime, despite the fact that Namibia has been independent for 11 years. The result is that different laws on marital property apply to different people depending on their race and place of residence.

In April 2001 the Legal Assistance Centre conducted a workshop at Oshakati for magistrates and marriage officers on marital property regimes, inheritance and the Married Persons Equality Act. At this workshop it emerged that there was some confusion about the laws on martial property which apply in the North of Namibia. The Legal Assistance Centre was asked by the workshop participants to follow up this issue.

This memo has been drafted to explain the current legal situation and its implications in the North of Namibia.

OVERVIEW OF THE CURRENT LEGAL POSITION IN NAMIBIA

In general, civil marriages in Namibia are automatically **IN community of property**, unless the couple makes an ante-nuptial agreement which specifies a different marital property regime. (An antenuptial contract is a formal written agreement concluded before the marriage and filed in the Deeds Registry.) This rule comes from the Roman-Dutch common law which Namibia inherited at independence.

However, the Native Administration Proclamation 15 of 1928, which is still in force, makes a different rule for all civil marriages between "natives" north of the old "Police Zone" which take place on or after 1 August 1950. These marriages are automatically **OUT OF community of property**, unless a declaration establishing another property regime was made to the marriage officer before the marriage took place.

THE NATIVE ADMINISTRATION PROCLAMATION 15 OF 1928

According to section 17(6) of the Native Administration Proclamation:

> A marriage between Natives, contracted after the commencement of this Proclamation, shall not produce the legal consequences of marriage in community of property between the spouses: Provided that in the case of a marriage contracted otherwise than during the subsistence of a customary union between the husband and any woman other than the wife it shall be competent for the intending spouses at any time **within one month previous to the celebration of such marriage to declare jointly before any magistrate, native commissioner or marriage officer (who is hereby authorized to attest such declaration) that it is their intention and desire that community of property and of profit and loss shall result from their marriage,** and thereupon such community shall result from their marriage.

This provision applies to all black people north of the so-called red line (outside the colonial "Police Zone"). [1]

The proclamation is still in force. It has not been amended or repealed, although th government is reportedly in the process of preparing a new Marriage Act which is expected to apply a single set of legal rules to all persons in Namibia. The Native Administration Proclamation is clearly a violation of the Namibian Constitution's

[1] See Proclamation 67 of 1954 (Application of Certain Provisions in Chapter IV of Proclamation 15 of 1928 to the Area Outside the Police Zone). The Police Zone is defined in the First Schedule to the Prohibited Areas Proclamation 26 of 1928.

prohibition on discrimination on the basis of race. But in terms of Article 144(1) of our Constitution, all laws in force at the date of independence remain in place until repealed or amended by an Act of Parliament or declared unconstitutional by a competent court. [2] There is a pending case in which a client represented by the Legal Assistance Centre seeks to declare the statute unconstitutional. [3] Judgement has yet to be given in another case in which this proclamation was challenged on constitutional grounds. [4] At present, however, the Native Administration Proclamation remains in place.

THE CURRENT PROBLEM IN THE NORTH

According to various sources in the north of the country a disturbing trend has begun whereby marriage officers are being trained according to a South African book on marriage. Although the information in the book is correct, the marriage officers are not being instructed to follow the correct procedure. The declaration which is supposed to be signed according to section 17(6) of the Native Administration Proclamation to obtain a marriage IN community of property is no longer being printed, and marriage officers are

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[2] See the case of *Myburgh v. Commercial Bank of Namibia,* Unreported, Sup Ct Case No. SA 2/2000 (8 December 2000), for an interpretation of this article. In this case, the court per Strydom CJ, quoted Mohamed J in the case of *Government of the Republic of Namibia v Cultura 2000* (1993 NR 328): "Article 140(1) deals with laws which were in force immediately before the date of independence and which had therefore been enacted by or under the authority of the previous South African Administration exercising power within Namibia. Such laws are open to challenge on the grounds that they are unconstitutional in terms of the new constitution. Until such a challenge is successfully made or until they are repealed by an Act of Parliament, they remain in force." (my emphasis).

This statement was confirmed by the court in *Myburgh* as the correct interpretation of Article 140(1) of the Constitution. The court however made a distinction between statute law and the common law, ruling that the Constitution sets up "different schemes" for statute law and common law which are in conflict with its provisions. According to the court, statute law in force at Independence remains in force until amended, repealed or declared unconstitutional, while common law in conflict with the Constitution is rendered automatically invalid (to the extent it conflicts with the Constitution) by Article 66(1).

[3] This case is *Tiopolina Ashikoto v Kwanyama Traditional Authority, and 9 Others*.

[4] This case was handled by Shikongo Law Chambers, and is called *Mofuka v Mofuka*. It involves a marriage covered by the Native Administration Proclamation, in which the parties married out of community of property in terms of the said proclamation. During the subsistence of the marriage, the parties accumulated a substantial amount of property, which was registered in the husband's name. At the dissolution of the marriage, the wife was excluded from sharing in the property as a result of the fact that the marriage was out of community of property, and she has now challenged the validity of the proclamation. As mentioned above, judgement in this case has not yet been given.

being told that they need only record the marriage on the marriage certificate as being IN community of property.

It is unlikely that a notation by the marriage officer on the marriage certificate will be interpreted by the courts as the joint declaration required by the Native Administration Proclamation. Thus, the current confusion will cause problems and confusion about the applicable marital property regime in the long term. Unless the forthcoming Marriage Act makes provision for marriages where the property regime has been dealt with incorrectly, the situation could be disastrous for those couples who are under the impression that their marriages are IN community of property, when in fact they are governed by the old 1928 statute and are OUT OF community of property. Couples may learn of this problem only at the time of divorce, or when on of the spouses dies, which could lead to considerable hardship and unfairness.

CHANGING A MARITAL PROPERTY REGIME AFTER THE MARRIAGE

If couples in the North of Namibia are wrongly informed by the marriage officer that they do not need to make a declaration in terms of the Native Administration Proclamation to obtain the marital property regime of INs community of property, can they correct this problem after the marriage takes place?

The general common law rule on marital property regimes is as follows: "Community once excluded cannot be introduced, and once introduced cannot be excluded, nor can an ante-nuptial contract be varied by a post nuptial agreement between the spouses, even if confirmed by the death of one of them." [5]

This rule was followed in the leading South African case of *Edelstein v Edelstein* where Van Den Heever JA said the following: "Our law is clear: once a particular proprietary matrimonial regime is established at the marriage it may not … be altered except by an

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[5] *The South African Law of Husband and Wife*; 4th edition; HR Hahlo at 305, quoting *Union Government v Larkan* 1916 AD 212 at 214.

order of court in certain circumstances." In this case, the circumstances were that the was a minor when she entered into the antenuptial contract, and she did not have the consent of her father to enter into the antenuptial contract. As a result, the court declared that the antenuptial contract was void. [6]

Changing a matrimonial property regime under the Deeds Registries Act

It is possible in limited circumstances to change a marital property regime by means of a postnuptial agreement -- an agreement after the marriage takes place. This is authorised by section 88 of the Deeds Registries Act 47 of 1937, a South African statute inherited at independence which is still in force in Namibia. The relevant portion of this section reads as follows:

> "… the court may, subject to such conditions as it may deem desirable, authorise postnuptial execution of a notarial contract having the effect of an antenuptial contract, if the terms thereof were agreed upon between the intended spouses before the marriage, and may order the registration, within a specified period, of any contract so executed."

There are three requirements that have to be met before the court will allow such registration and execution of a postnuptial contract. These requirements are:

1. The parties must have agreed on the terms of the contract before the marriage.
2. They must show good reason why they failed to execute the contract in the prescribed manner before the marriage.
3. The change must be requested within a reasonable time after the marriage takes place. [7]

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[6] 1952 (3) SA 1 (AD) at15H.

[7] HR Hahlo, The South African Law of Husband and Wife, 4th Edition, 1975 at 267. It should however be kept in mind that the law does not permit postnuptial contracts apart from the above, in terms of the Deeds Registries Act.

Section 88 does not in itself permit postnuptial contracts, but merely authorises the court to execute and register an antenuptial contract after marriage if the listed requirements are met. According to Broome J in the case of *Winwood* [8], "The only contract which the court has power to authorise to be postnuptially executed is one the terms of which were agreed upon between the intended spouses before the marriage." The question of whether or not the parties have actually agreed to the terms of the antenuptial contract is a factual determination.

It seems that most of the applications brought under section 88 are based on the fact that the parties were mistaken as to the proprietary consequences of their marriage. This usually occurs in circumstances where the parties are foreigners who get married in South Africa, and are under some mistaken belief that their marital property regime will be out of community due to the fact that this would be the case in their country of origin.

First requirement: Agreement on the terms of the contract before the marriage.
Regarding the question of mistake, one could ask, whether parties who marry in the mistaken belief that their marriage is out of community of property or that they can exclude community after the marriage, have tacitly entered into an antenuptial agreement. [9]

The courts have dealt with this question in different ways. The Cape Province, as well as the Orange Free State, have interpreted the requirement of an antenuptial agreement strictly. The courts here have held that one cannot imply a contract to exclude community based on the fact that the parties thought that they were being married out of community of property. According to the courts, the mere fact that the spouses did not consider an antenuptial contract shows that they did not have the intention to make one. In *Ex parte Orford*, [10]

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8 *Ex Parte Winwood* 1946 NPD 279 at 287.

9 Hahlo *supra* at 267.

10 1920 CPD 367 at 371.

Juta JP said the following:

> "Where the parties think that they are being married out of community by virtue of some law other than the law of South Africa, it seems to me obvious that no such contract was made between the intending spouses. I do not see how consistently with the principles of our law, the court can allow an agreement to be executed after marriage which it is obvious was never entered into before marriage because the parties thought or believed that there was no need for it, but where they would have entered into one if they had known it was necessary."

The courts in the Transvaal have been somewhat undecided on the matter. In the case of *Pollard* [11], the parties thought that they were being married according to English law. The court held that where there is no proof that the applicants had discussed an antenuptial contract before their marriage, the court could not grant an application in terms of section 88 of the Deeds Registries Act. However, in *Ex parte Wells*[12] and *Ex parte Erskine*[13] the parties had agreed beforehand to exclude community but thought that they could complete a formal contract after the marriage, and the courts in these case granted the application for registration of a postnuptial contract.

The question was further considered by the full bench of the Transvaal Provincial Division in the case of *Ex parte Morris*.[14]. In this case, Mason J said "I am not prepared to subscribe to the doctrine that a mere intention of parties to get married under antenuptial contract is sufficient by itself to found an application of this nature…Vague intentions are not sufficient."[15]

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11 *Pollard v Registrar of Deeds* 1903 TS 353.

12 1905 TS 54.

13 1910 TPD 644.

14 1918 TPD 53.

15 At 55.

In *Ex parte Raine* [16] the court per De Villiers JP granted an application where the marriage had been solemnised in England, and the parties were under the impression that the husband had acquired an English domicile, and that the marriage would accordingly be out of community of property.

The stricter principles laid down in *Morris* [17] were reaffirmed in the cases of *Ex parte Wessels*[18] and *Ex parte Podlas.* [19] In the latter case De Wet J said "There is nothing before me in the present case to show that the parties ever discussed the question of keeping their property separate… I agree with the remarks by Mason J in *Pollard v Registrar of Deeds*, that these applications are only justified on the ground that there was an express or implied agreement before the marriage …it is not the function of the court to provide facilities for registering what is in fact nothing but a postnuptial contract." [20]

However, since *Ex parte Podlas* there have been a number of other Transvaal cases in which the court took a much more lenient approach. In the case of *Ex parte d'Angelo*[21] for example, the court granted an application to enter into an antenuptial contract postnuptially, even though there were no allegations that the parties had prior to their marriage made a specific agreement to be married out of community of property. The applicants did however allege that they believed that they were married out of community of property, and the court thought that this was sufficient to grant the application.

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16 1919 WLD 111.

17 1928 TPD 53.

18 1927 WLD 179.

19 1935 WLD 14. In this case, foreigners coming from a country where the matrimonial property regime is one of out of community of property were married in South Africa and were under the impression that South Africa also had the same law.

20 Per De Wet J at 21 and 22.

21 1938 WLD 266.

In *Ex parte Witz* [22] both parties were born in England and were subsequently married in Johannesburg. The court granted an application for the postnuptial registration of an antenuptial contract as the husband, although domiciled in Johannesburg, was under the false impression that English law applied.

It has been said that "*Ex parte Witz* represents the high-water mark of judicial leniency in the Transvaal." [23] The courts subsequently appear to have returned to a somewhat stricter approach, as can be seen by the case of *Ex parte Said* [24] where the court refused to grant an application for the postnuptial registration of an antenuptial contract. A similar approach was taken in the cases of *Ex parte Jacobs* [25], *In re Hertzel*[26] and in *Ex parte Dantowitz* [27] , in which Murray J said "Assumption and intention not communicated by the one party to the other so as to form the basis of an agreement upon the matter are not sufficient effectively to exclude the common law consequences of the husband's domicile."

As can be seen from the above, the Transvaal courts have moved closer to the stricter approach of the courts in the Cape, whilst the courts in the Orange Free State and Cape have taken an approach similar to the more lenient Transvaal decisions on occasion. In various Cape decisions, the court held that where intending spouses actually discussed their matrimonial regime, and decided on out of community, this was sufficient and constituted the necessary agreement even though the spouses did not speak about an

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22 1941 WLD 74.

23 Hahlo *supra* at 270.

24 1943 WLD 223 In this case, the spouses thought that their marriage was governed by the law of Lithuania.

25 1946 WLD 26.

26 1946 WLD 55.

27 1946 WLD 415.

antenuptial contract because they did not think it necessary. This was confirmed in the *Jacobson* case [28], as described by Hahlo:

> In that case the Cape Provincial Division held that all s88 required was an antenuptial agreement between the spouses which was binding in the sense that, had the ordinary law of contract applied, either party could have enforced it against the other. Such an agreement could not be inferred from the mere fact that the parties thought they were being married out of community by virtue of some law other than the law of South Africa, but where the parties had before their marriage discussed their marital status and agreed that they desired each to retain the ownership and control of his or her own property, and had failed to execute a formal contract because they were under the impression that their marriage would be governed by English law, or some other legal system, which would give effect to that desire, there was the necessary antenuptial agreement.[29]

The following quotation from the case of *Ex parte Hersch* [30] provides a useful summary of the position in South Africa:

> …Evidence is required of the station in life of the parties, economical and educational, and their standard of intelligence at the time of the alleged contract, evidence of their financial position both at the time of making the alleged agreement and at the time of moving the court, and all matters which might affect the mind of the court in deciding whether, on all the facts, it is satisfied that it is reasonable that the applicants should have made their agreement as and when alleged. The court is entitled to information as to what statements on this matter were made by the parties to the marriage officer at the time of the marriage ceremony, and to an explanation as to why such statements (if that be the case) did not disclose the antenuptial agreement. Any delay in making the application

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28 1949 (4) SA 360(C)

29 Hahlo supra at 271

30 1946 TPD 548 at 554-5.

must be explained – the absence of any explanation throws some doubt on the genuineness of the parties' allegation of a definite agreement.

Second requirement: Good reason for failure to execute antenuptial contract

The second requirement in terms of section 88 of the Deeds Registries Act is that the parties must show good reason why they failed to execute the antenuptial contract in the correct manner before the marriage. The courts when interpreting this section have taken each case individually, and looked at the surrounding circumstances in each case.

In the case of *Ex parte Van der Merwe* [31] the applicants were both 'educated' persons and the court felt that their ignorance in executing and registering an antenuptial contract was inexcusable, and could not be condoned. In *Ex parte Van Rensburg*[32] on the other hand, the court granted an order in terms of section 88 as the parties were ignorant and illiterate.

Third requirement: Reasonable time period.

The final requirement of section 88 is that the parties must bring the application to court with reasonable promptitude. According to Hahlo [33], even where the period of time between the date of marriage and the actual application may be long, this in itself is no bar to granting the necessary relief under section 88. [34] However, there must not be an unnecessary delay between the date when the parties became aware of the mistake or the true legal position, and the actual court application.

Once an order is granted in terms of section 88 the new matrimonial regime is binding upon third parties, as if it existed since the date of marriage.

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31 1938 OPD 62.

32 1947(4) SA 435 (C).

33 Hahlo *supra*.

34 Hahlo *supra*. In the following cases the time difference was as follows: *Ex parte Karbe* 1939 WLD 351 (25 years); *Ex parte Goode* 1939 WLD 367 (36 years); *Ex parte Roche* 1947 (3) SA 687 (N) (27 years).

Application of section 88 in Namibia

There are no reported Namibian cases dealing with section 88 of the Deeds Registries Act. However, it is submitted that this provision, leniently interpreted, could apply to cases where parties to marriages concluded in the North of Namibia believe themselves to have been married in community of property, but did not sign a declaration as required in terms of the Native Administration Proclamation because they were not informed of this necessity by the marriage officer.

One question which might arise is whether or not the declaration which is required in terms of the Native Administration Proclamation is in fact a type of antenuptial contract. An antenuptial contract is "an agreement between intending spouses as to the terms and conditions by which their marriage is to be governed." [35] Using this definition it is therefore possible to deduce that a declaration in terms of section 17 of the Native Administration Proclamation is analogous to an antenuptial contract, as it is a formally-recorded written agreement between the spouses laying down the terms of the marriage as being one of in community of property.

By implication therefore, as long as all the requirements as laid down in section 88 of the Deeds Registries Act are met, one could potentially approach the court for an order in terms of section 88 of the Act for a postnuptial change of the marital property.

The drawback of this approach is that is requires an order of the High Court, which would be an expensive and inconvenient undertaking for the couples in question.[36]

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[35] Hahlo *supra* at 259.

[36] The Deeds Registries Act defines 'court' or 'the court' in section 102 as "the provincial or local division of the Supreme Court having jurisdiction or any judge thereof". In Namibia this court has been replaced by the High Court.

POSSIBLE RELIEF FROM ADMINISTRATIVE LAW

There may be possible relief from an administrative point of view. A couple who failed to make the required declaration despite their intent to be married in community of property might be able to rely on the fact that the marriage officer has breached a statutory duty – albeit accidentally.

The first question which arises is whether administrative law would apply to marriage officers. A marriage officer includes "any magistrate or special justice of the peace, as well as any minister of religion of, or any person holding a responsible position in, any religious denomination or organisation, so long as he is such a minister or occupies such position", provided that such persons have been designated as marriage officers by means of written authorisation from the Minister (or an officer in the public service delegated by the Minister to perform this task). [37] Rules and procedures for solemnising marriages is set forth in the *Marriages Act 25 of 1961*, and marriage officers who do not follow the requirements of the Act have committed a criminal offence. [38]

While marriage officers who are magistrates or public servants would clearly be public authorities, what about the larger number of marriage officers who are religious officials?

The following have been suggested as examples of criteria for distinguishing public authorities from private ones:

- whether the institution in question is established by statute
- whether it falls under the control of a recognised public authority
- whether it is staffed or funded from public resources
- whether it provides a public service
- whether it is endowed with coercive powers over members of the public. [39]

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[37] *Marriage Act 25 of 1961*, sections 2-4.

[38] *Marriage Act 25 of 1961*, sections 35.

[39] L Baxter, *Administrative Law,* 1984 at 100, citing Professor Wiechers.

In one South African case, for example, the court found that the Johannesburg Stock Exchange was a public authority because, although not a statutory body, it was nevertheless under a statutory duty to act in the public interest. [40] Commentators point out that even private bodies with no statutory regulation whatsoever, such as disciplinary tribunals of churches, are subject to the common law rules similar to the requirements of administrative law in cases where they exercise power over individuals. It has also been noted that cases involving the exercise of authority by public and private institutions have been cited interchangeably by the courts. [41]

There has not been a case in which the principles of administrative law have been applied to a marriage officer, as is being considered here. However it is possible in theory that a marriage officer performing the statutory duty of solemnising marriages would be a public authority for that purpose, and that a couple who have been misinformed by a marriage officer about the procedure for changing a martial property regime before the marriage could invoke administrative law as a last resort.

According to Baxter, "Where a public authority is vested with a statutory duty which it neglects or refuses to perform, the individual who would benefit by its performance may have two options." [42]

One option is for the aggrieved individual to obtain an order from a court directing the public authority to perform its duty. This can be done where the situation can be remedied, or where further harm can be avoided by such an order. In principle, the court has the power "of correcting an illegality committed by [a] public officer, so long as it is capable of correction, if the rights of an individual are infringed by such illegality". [43] Therefore, it appears that a court could theoretically order the matrimonial regime to

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40 *Dawnlaan Beleggings (Edms) Bpk v Johannesburg Stock Exchange* 1983 93) SA 344 (W).

41 Baxter *supra* at 101.

42 Baxter *supra* at 614.

43 *Moll v Civil Commissioner of Paarl* (1897) 14 SC 463, 467-8.

amended after the fact so as to reflect the intention of the spouses at the time that they entered into the marriage. It appears that an application for such an order could be brought in a Magistrate's Court or in the High Court. [44]

Alternately, the court could order the public authority to pay damages. This is probably not a very appropriate remedy in respect of marital property regimes, but the question of damages would have to be tackled on a case-to-case basis, depending on the circumstances. A case claiming damages could be brought in a Magistrate's Court or in the High Court, depending on the amount being claimed in damages.[45]

Neither of these approaches are ideally suited to remedy the problem, and would be usefu only as a last resort.

THE SOUTH AFRICAN POSITION AND ITS POTENTIAL USE IN NAMIBIA

The position for black people in South Africa was similar to that in Namibia, until the enactment of the *Marriage and Matrimonial Property Law Amendment Act, Act No 3 of 1988* which came into operation on 2 December 1988. Before that date, marriages between blacks were deemed to be out of community of property, unless both spouses signed a declaration in front of a magistrate, commissioner or marriage officer. This

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[44] This would be by way of a so-called mandatory order, which has been viewed as the appropriate remedy in the case of public bodies which have refused to exercise their discretion. This action can be brought in the magistrate's court but only under certain circumstances. A mandatory order is a form of interdict, and so all the requisites of an interdict must be met, before such an order will be granted. Section 30 of the Magistrates Court Act says that the court can grant interdicts against persons and things. According to Jones and Buckle, (*The Civil Practice of the Magistrates' Court in South Africa*; 9th Edition Volume 1; 1996) whether a Magistrates Court can grant a mandatory order depends upon the meaning that is given to s46(2)(c) of the Act, which restricts a Magistrates Court from ordering specific performance. In *Francis v Roberts* (1973(1) SA 507 (RA)) the then Rhodesian equivalent of the section was applied to a mandatory interdict. According to LAWSA XI at 294, all courts possess jurisdiction to grant interdicts, and the High Court has inherent jurisdiction whilst the Magistrate's Court is so empowered by s30. In the case of *Matjila v Moore*, (1948 3 SA 1001 (T) at 1008) the court granted a perpetual interdict in the Magistrate's court. In the case of *Jordan and Another v Penmill Investments CC and Another*, (1991 (2) SA 430) the court granted a mandatory order in the Magistrate's Court, saying that the Magistrate's Court has jurisdiction. Therefore it would seem that the Magistrate's Court does have the jurisdiction to hear an application for a mandatory interdict.

[45] Magistrates Courts currently have jurisdiction to an amount of N$25 000.

declaration had to be signed within one month prior to the marriage, and had to indicate the intended spouses' wish to marry in community of property and of profit and loss.[46]

The situation was changed by the enactment of Act 3 of 1988, which had the effect of bringing black civil marriages into line with all other civil marriages. A civil marriage entered into between blacks after Act 3 of 1988 came into operation is, like all other civil marriages, governed by the Matrimonial Property Act.[47] The Matrimonial Property Act provides that the default system for all marriages is "in community of property", and marriages which are out of community of property automatically apply the accrual system unless there is an express agreement between the parties not to do so.

This changeover was accomplished by way of allowing black people who were already married a "grace period" of two years in which to register changes to their matrimonial property regime. Blacks who married before the commencement of Act 3 of 1988 could change their matrimonial regime by executing and registering a notarial contract to that effect in a deeds registry within two years after the commencement of the Act.[48] This method was introduced by the South African government in order to help black people to avoid the expense of going through a court proceeding as a result of a past discriminatory law which had affected them. It was unnecessary for such couples to approach a court for the relief required, as the act provided a method of changing one's matrimonial property regime easily and directly. The period given for recording the change by way of a notarial deed ended on 2 December 1990, and now any person who would like to change their matrimonial regime has to do so by way of formal application to court.

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46 Barnard, DSP Cronje, and Olivier, *The South African Law of Persons and Family Law*, 3rd Edition, 1994, at 203.

47 Act 88 of 1984, which came into operation on 1 November 1984 provided that chapters II and III of this Act did not apply to marriages in respect of which the matrimonial system was governed by section 22 of the Black Administration Act 38 of 1927. It was only in 1988 that Act 3 of 1988 came into effect and brought all civil marriages under the same system. So a black civil marriage entered into after Act 3 of 1988 came into effect will also be governed by the Matrimonial Property Act.

48 Cronje *et al* at 204.

According to section 21(2) of the Matrimonial Property Act, any husband and wife, irrespective of when they were married, may apply jointly sto court for leave to change the matrimonial property regime. [49] The couple has to lay down the proposed new system in a notarial contract, which has to be approved by the court. The court will only approve this new contract if the couple can show sound reasons for requesting the change. Notice must be given to all creditors of the spouses and to any other person who could be prejudiced in some way by the new matrimonial regime. The relevant section of the Act reads as follows:

> *(1) A husband and wife, whether married before or after the commencement of this Act, may jointly apply to a Court for leave to change the matrimonial property system, including the marital power, which applies to their marriage, and the Court may, if satisfied that:*
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> *(a) there are sound reasons for the proposed change;*
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> *(b) sufficient notice of the proposed change has been given to all the creditors of the spouses; and*
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> *(c) no other person will be prejudiced by the proposed change*
>
> *order that such matrimonial property system shall no longer apply to their marriage and authorize them to enter into a notarial contract by which their future matrimonial property system is regulated on such conditions as the Court may think fit.*

In the case of *Ex Parte Lourens* [50] the court was faced with five similar applications in terms of section 21(1) of the Matrimonial Property Act [51]. Regarding sound reasons, the court per Marais J said the following: "Sound reasons cannot be defined exhaustively and

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49 JC Bekker, *Family Law: An Introduction*, 1990 at 60.

50 *Ex Parte Lourens and Four Other Similar Cases* 1986 (2) SA 291(C).

51 In all of the applications before the court, there was some kind of defect in the application, in that the correct procedure was not followed For example in one of the applications, notice was not given to the Registrar of Deeds, and in another notice was not given to two newspapers and the government gazette as required.

in advance. However, care must be taken to motivate fully the proposed change in the existing matrimonial property system."[52]

In deciding what sound reasons are, the court has looked at the facts and surrounding circumstances in each case. In the case of *Ex Parte Engelbrecht* [53] the court held that "sound reasons" means facts which are convincing, valid and anchored to reality. Evidence as to the parties' intention and agreement concerning the matrimonial property regime reached before their marriage is relevant and admissible. According to the court, not to admit such evidence would amount to preventing a party from furnishing sound reasons to the court as to why the matrimonial property regime should be altered. [54]

In the case of *Ex Parte Kros* [55] the court found that the reasons advanced by the parties were sufficient to allow a change of the matrimonial property regime. In this case, the reason advanced by the applicants was that they had been ignorant about the consequences of marriage in community of property when they entered into marriage. It was only after the conclusion of the marriage that the parties realized that marriage out of community of property better suited their needs. In the case of *Ex Parte Oosthuizen* [56] however, the court held that it does not have the authority to alter a marital regime retrospectively.

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52 At 293H.

53 1986 (2) SA 158 (NC).

54 In this particular case, the spouses were married in community to property, and made an application to have their marriage changed to one excluding community of property, and the marital power. Before the marriage, the parties had agreed to marry out of community of property, but did not conclude an antenuptial contract to that effect, as they thought that they only had to inform the marriage officer of their intention. The parties produced evidence to show that the wife was being hampered by her limited contractual capacity in the administration of the assets bequeathed to her and her children by her deceased husband, and both applicants had kept and administered their assets separately. The court granted the request to change the matrimonial regime under these circumstances.

55 1986 1 SA 642 (NC).

56 1990 4 SA 15 (E).

As can be seen by the above case law, the court in most instances seems to grant changes to a matrimonial property regime quite easily. It is significant to note that sound reasons in South Africa can include a substantial change in the financial position of the spouses, as was the case in *Kros*. [57]

It would be possible for Namibia to follow the South African example and provide a legislative "out" for those parties who are married according to the Native Administration Proclamation and would like to change their marital regime, and also for all other parties to a civil marriage who want to alter their property regime. For those parties married under the Native Administration Proclamation, a grace period of two or three years could be given, during which couples could alter their matrimonial property regime, by way of simply registering a notarial deed. This would avoid the costly procedure of going to court.

SUMMARY AND RECOMMENDATIONS

The purpose of this memorandum, was to alert all relevant parties to the problems that could and will exist in the future as a result of the continued existence of the Native Administrative Proclamation. Having canvassed the legal possibilities, we offer the following recommendations:

(1) **The Native Administration Proclamation, which is clearly unconstitutional and already being challenged in several court cases, should be repealed as quickly as possible.**

(2) **All marriage officers in the north should be directed to require black couples who want their marriages to be in community of property to sign the**

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[57] *Ex Parte Kros, supra*. The court here quotes Hahlo, *supra,* and says that a sound reason would be for example where one of the spouses starts a business. In the event of liquidation of the company, especially if it were a sole proprietorship, the spouses' joint assets would be at stake.

declaration which is required by the Native Administration Proclamation so long as this discriminatory law remains in force.

(3) **Namibia should enact, as a matter of urgency, a legal provision modelled on that of South Africa which would give black couples affected by the discriminatory Native Administration Proclamation a simple procedure for changing their marital property regimes, at least for a given time period.** This is necessary because the other possible legal remedies for couples who have been misinformed about which marital property regime applies to them, or about the procedure for changing their regime, are not really appropriate or sufficient for the situation at hand. A provision enacted to provide a more suitable remedy would have to be widely publicised in order to be effective.

(4) **Namibia should also adopt a provision modelled on that in South Africa which would provide all married couples with an opportunity to make a joint application to a court to change their marital property regime if they can show sound reasons for doing so**. This is necessary because many couples of all races throughout the country are not well-informed about the various marital property regimes and their implications. Such a provision should state straightforwardly that misunderstanding of the property regimes or the procedure for changing them would suffice to support a request for an alteration. The new law should of course provide due protection for the rights and interests of third parties, such as creditors, who have had financial dealings with the couple in question.