

## **APARTHEID LAWS ON MARRIAGE: SORTING OUT THE PROBLEM**

*Leigh-Anne Agnew and Dianne Hubbard of the Legal Assistance Centre discuss the Native Administration Proclamation and its impact on marital property regimes.*

As impossible as it sounds, more than 11 years after independence there is still a law in force called the “Native Administration Proclamation”. And, far from being just a dead letter on the statute books, this law provides rules for marriages between black couples north of the old “Police Zone” – which means that it is still having a practical impact on scores of Namibian citizens. It is undoubtedly unconstitutional to apply different rules to marriages based on race and location. The offending Proclamation is currently being challenged in at least two court cases, and its days are undoubtedly numbered. But what will happen to couples who married while it was still in force? Past unfairness will have to be unravelled.

The picture is complicated by some current confusion. During April 2001, the Legal Assistance Centre held a workshop in Oshakati, for marriage officers and magistrates on marital property regimes, inheritance and the Married Persons Equality Act. At this workshop it emerged that some marriage officers in the north of Namibia were unsure about which procedures to follow. The Legal Assistance Centre was asked by the workshop participants to follow up on this issue, and this article summarises our findings on the relevant legal situation.

### **THE CURRENT LEGAL POSITION IN NAMIBIA**

In general, civil marriages in Namibia are automatically IN community of property, which means that both spouses share everything equally. However spouses can also marry OUT of community of property, which means that their individual assets remain separate. In general in Namibia, a couple who want to marry OUT of community of property must enter into a formal antenuptial contract. An antenuptial contract is a special, written agreement which is concluded before the marriage, and which is registered at the Deeds Registry.

The situation is different for civil marriages between black people north of the old Police Zone. (The Police Zone is the area south of an imaginary line drawn through Namibia to separate the area which was the focus of white settlement during the colonial era from the northern regions which were viewed by the colonists primarily as labour reserves.)

The 1928 Native Administration Proclamation says that all black people who enter into a civil marriage north of the Police Zone will automatically be married OUT of community of property, and not automatically IN community of property like everyone else. If a black couple in the North wants to be married IN community of property, they have to sign a document called a declaration before the marriage officer one month or less before the wedding takes place. This declaration will show the couple's intention to marry IN community of property. If the couple do not sign this declaration, they will automatically be married OUT of community of property. So, in other words, the position for black couples in the north is virtually the opposite of the situation which applies to everyone else when it comes to marital property regimes.

Offensive as it is, until the Native Administration Proclamation is repealed by Parliament or declared unconstitutional by the courts it remains in force. The present confusion arises from the fact that some marriage officers in the north have stopped using the required declarations, and the Ministry of Home Affairs has reportedly even stopped printing them. Some marriage officers are instead simply making a notation of "in community of property" on the marriage certificate itself -- which may not constitute the 'declaration' required by the law.

The reason this may create problems for couples in future is that a couple cannot easily change their marital property regimes after the marriage has taken place. There is a provision in the Deeds Registries Act which allows the registration of a postnuptial contract after the marriage takes place. But a couple who wants to do this must make application to the High Court, and must show good reasons for registering the contract after the marriage.

It is also possible in theory that a couple suffering from mistaken instructions by a marriage officer could bring a case in a magistrate's court or in the High Court citing principles of administrative law, and asking either that the marriage officer be ordered to

rectify the mistake or that the marriage officer pay any damages resulting from the error. But neither of these remedies is well-suited to the problem at hand, and once again a court case would be required.

If the Native Administration Proclamation is declared unconstitutional, it would cease to apply to future marriages. But this would not in itself help couples who have a marital property regime which is not the one they wanted, or a system which is different from what they actually thought they had.

So what to do? The Legal Assistance Centre suggests that the Native Administration Proclamation should be repealed as quickly as possible. In its place, Parliament should enact a legal provision which would give black couples affected by the discriminatory Proclamation a simple procedure for changing their marital property regimes, at least for a given time period. This approach has been successfully used in South Africa to rectify similar discrimination against black couples there.

At the same time, Parliament should also enact a provision 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 approach has also been successfully applied in South Africa. It would be useful in Namibia since many couples at the time of their marriage, regardless of whether they were inside or outside of the old Police Zone, were not well-informed about the various marital property regimes and their implications. Mechanisms to protect the interests of third parties, such as creditors, could be put in place to ensure that no couple tries to change their property regime as a way to wiggle out of their responsibilities. But no couples should be stuck for life with a marital property system which they did not intend or understand.

In the meantime, 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 declaration which is required by the Native Administration Proclamation so long as this discriminatory law remains in force. And marriage officers everywhere should be equipped to give brides and grooms a simple and clear explanation of the different property regimes and their consequences, to help all couples make informed choices about their future. These steps will help to minimise the need for future changes to marital property regimes, and hopefully encourage more “happily ever afters”.