

# Can my husband and I change our marital regime?

By Whyona Sithapersad (Director)

Although in South Africa our Constitution allows us the freedom of testation, matrimonial property regimes place legitimate limitations on such rights.

## Change may be advantageous

Life and the future it holds are almost impossible to predict with certainty. Unforeseen events or change in circumstances usually result in substantial alteration of our future plans. This is a phenomenon which occurs in all spheres of life, from business, politics to private.

While we enter into marriage with the best intentions at heart, due to the unpredictable nature of life and what the future holds, circumstances may change. A change in circumstances may force a change in the matrimonial property system. Such a change does not necessarily mean we love each other less, but it could be a means of protecting each other and the marriage relationship.

An example would be when one of the spouses who is married in community of property decides to venture into business or take up a riskier business venture. In such circumstances, if the spouse's business fails or leads that spouse to debt, the creditors of that spouse may be entitled to claim from the joint estate which as one can imagine would be very disadvantageous to the other spouse who may lose everything! This is just only one of the many reasons it may be essential or desirable for spouses to change their marital regime.

## The law in South Africa

In South Africa marital regimes are governed by the Matrimonial Property Act, 88 of 1984. The act allows for spouses to change their marital regime. The Act sets out requirements which have to be met before the court can authorize the change of the marital regime.

The Act requires spouses to jointly apply to the court for the change of the matrimonial property system. The application must amongst others, satisfy the court of the following:

That there are sound reasons for the proposed change;

Sufficient notice of the proposed change has been given to all of the spouses' creditors; and



**J Leslie Smith & Company Inc.**

ATTORNEYS, CONVEYANCERS AND NOTARIES PUBLIC

The application must contain sufficient information about the parties' assets and liabilities

That no other person will be prejudiced by the proposed change

Where the spouses own immovable property, notice to Registrar of Deeds in terms of Section 97(1) of the Deeds Registries Act No. 34 of 1947, may be required.

If satisfied, the court will order that such marital regime no longer applies and authorise the spouses to enter into a contract which will regulate their future marital regime in which they can be married with or without an Antenuptial contract.

This allows spouses to share in any benefit whilst having the protection from each other's creditors.

Should you require any assistance, please contact Whyona Sithapersad at J Leslie Smith and Co Inc on 033 845 9700.



**J Leslie Smith & Company Inc.**

**ATTORNEYS, CONVEYANCERS AND NOTARIES PUBLIC**