

FAMILY

Your marriage has fallen apart - so what now?



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Even though it may feel as if your world is falling apart, in truth it's not; if you look around you, three out of five people that you can see have gone through, or will go through, the same situation.

The bottom line is that all marriages will one day come to an end, either by death or by divorce. If it is divorce, here are some things to consider.

Children

When there are minor children involved (children under the age of 18), there are certain factors that come into play.

Mediation:

The courts, specifically the High Court, being the upper guardian of all minor children, have taken a dim view of parents who take to litigation without attempting some form of alternate dispute resolution, usually mediation.

Mediation in the context of divorce litigation is not to "patch things up" in an attempt to restore a normal marriage relationship between the parties, but rather an attempt to settle issues via a consultative process, as opposed to an adversarial, litigious one.

Issues include spousal maintenance, maintenance for the children, who will be the custodial parent of the children, contact, care and access to the children by the non-custodial parent, how the assets in the estate will be divided, and to what extent the antenuptial contract, if there is one, will be deviated from (if at all).

The reason for this is that our courts, and specifically our divorce law, are adversarial and combative in nature, and whenever there are children involved, the yardstick employed by the Constitution and the Children's Act is that of the "best interests of the child".

In short, for parents to be involved in adversarial litigation is accepted as not being in children's best interests, as when "elephants do battle, it is the grass that gets trampled".

Maintenance for the children:

In terms of the Maintenance Act, parents have a common-law and statutory duty to support their children in terms of their reasonable living, education, food, clothing, medical care and accommodation needs.

Maintenance for children is broadly divided into three main areas: the cash component, the educational costs and the medical costs.

- **The cash component:** The cash component is the monthly amount of cash that the non-custodial parent pays to the custodial parent (the parent that the children live with) for daily consumables, such as their portion of the bond/rent, food, electricity, fuel, food and clothes. A rule of thumb is that each parent should contribute 50% of such costs, but in terms of the Maintenance Act, "parents' respective shares of such obligations are apportioned between them according to their respective means", ie the parent who earns more will pay more.

- **The educational costs:** These costs are subdivided into academic costs (being the school or university fees), stationery costs (which these days can include an iPad), school uniforms, extramural activities, extramural equipment, and school and sports tours. A good attorney should be able to divide these up equitably between the parents, based on their respective incomes.



- **The medical costs:** These are divided into the medical aid contribution and into costs not covered by medical aid, and is usually split between the parents.

There are some common misconceptions regarding maintenance, the first being that a parent's obligation to pay maintenance ceases when the minor child reaches the age of majority. This is not so; a parent's obligation to maintain a child's reasonable needs ceases when the child does not reasonably require maintenance any more. Thus, a child who is over the age of majority, but is still diligently studying, does require maintenance.

The second misconception is that access to children and maintenance are interlinked, in that if a person (usually the father), for whatever reason, fails to meet his maintenance obligations, the opposing parent (usually the mother) now has the right to refuse him access.

This is not so, and although the father is probably in contempt of an order of court regarding the payment of maintenance, the mother now is also falling foul of the law. When a father cannot pay maintenance (due to a lack of means or for another reason), he cannot be refused access to his children; conversely, the children cannot be denied their right to see their father.

The converse is also true; even if a parent wants nothing to do with the children, they still have a statutory and a common-law duty to pay maintenance for their children.

The division of the above responsibility is based on what the parents are earning at the time, not how much money they had in the past, as fortunes do change and can do so rapidly. Also, maintenance orders given by the court can be altered based on changed circumstances.

Spousal maintenance

Spouses have a common-law duty to support each other, but that duty comes to an end upon divorce.

This, however, is not the end of it,

as in terms of the Divorce Act, the court can order that one spouse pay maintenance to another spouse, either for a period of time, known as rehabilitative maintenance, to allow the beneficiary to re-enter the labour market, or permanent/lifelong maintenance, being until death or remarriage of the beneficiary spouse.

The factors that the court considers are the existing and prospective means of the respective parties, their respective earning capacities, the duration of the marriage, the standard of living of the parties prior to divorce, their conduct insofar as it may be relevant to the breakdown of the marriage, and any other relevant factor. In respect of the last two factors, misconduct can be considered by the courts.

The courts have moved away from permanent maintenance (largely due to women claiming their rightful place in the labour market), and more towards rehabilitative maintenance and a "clean break" between couples. However, if a person is unable to enter the job market due to old age or ill health, and the marriage was of a long duration, the chances for lifelong maintenance are far greater.

Divorce in general

All marriages, whether civil, same-sex or customary-union, are subject to some form of marital regime (that is how the assets are treated, usually upon divorce).

The three regimes are in community of property (the default position in South Africa if you were married without an antenuptial contract), out of community of property (what is mine is mine and what is yours is yours) and out of community of property with the accrual system (a hybrid "of sorts" between the two). Unless a settlement agreement is reached between the parties that determines how the assets should be divided upon divorce, the antenuptial contract and marital regime that it stipulates will be

strictly applied by the courts.

There has been a groundswell of dissatisfaction about this and our courts' limited discretion to vary antenuptial contracts, in the interests of justice and equity, and for our matrimonial property system and divorce law to become more progressive in this regard. The courts are slowly starting to get on board, but the Appeal Court is somewhat lagging behind.

One of the main grounds of criticism is that the normal rules of contract, most notably *pacta servanda sunt* (agreements must be

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kept), should not be strictly implemented when it comes to antenuptial contracts, for the sake of fairness, equity and justice.

It has been noted that the present system of rigid enforcement of antenuptial contracts offers fertile ground for substantive gender discrimination and injustice.

It is hoped that, in the near future, there will be groundbreaking development in our law, via judgments delivered by our courts, that will bring our matrimonial law in line with the Constitution and the Promotion of Equality and Prevention of Unfair Discrimination Act.

Refund of lobola

A claim for the refund of lobola, paid under our customary law,

has never been tested in our legal system. The Recognition of Customary Marriages Act, 120 of 1998, and case law can give an insight into a probable legal position, though.

In a civil marriage, the man would likely first ask the lady's father for her hand in marriage, and then propose to her with a wedding ring. We follow Roman Dutch law and, in terms of this, if the parties get divorced, the man cannot claim back the engagement or wedding ring.

The agreement to pay lobola underpins the customary marriage in our customary law, and plays a similar role to that of a wedding ring in civil marriages. However, the lack of a wedding ring does not invalidate a marriage.

There is a school of thought that there is a case to be made for the reclamation of the funds, especially if the marriage broke down due to the misconduct of the wife, such as in an instance of her infidelity. It remains to be decided by the court and will no doubt be in the future.

Legal costs

Settlement is always cheaper than litigation, and better for all involved, especially children.

Even when litigation is necessary, a good attorney will settle the issues that can be settled and proceed to litigation on the issues that cannot, thus limiting the time spent in court, and wasted costs for clients.

In the past, divorces were the domain of the High Courts, which involved legal fees for attorneys and advocates, and prohibitive costs.

The Regional Courts (Magistrate's Courts) now have concurrent jurisdiction, and many divorces are being brought there in less time, thus costing far less.

Unless there are complex issues of law involving vast quantities of money, a competent divorce attorney can bring the matter to trial and argue it himself far more quickly, for far less than previously.

A spouse who was the home-maker and who does not have the necessary funds to bring a matter to trial can apply to court for a contribution to costs and interim maintenance from her spouse (High Court Rule 43 and Regional Court Rule 58). However, it is noted that such an award is a contribution and not the entire cost of the proceedings.

Caution should be taken in selecting an attorney who specialises in this field (divorce and matrimonial law), as these areas have become highly specialised, and the negative results can be lifelong, and economically and emotionally crushing.

In short, should you become involved in divorce litigation, have a specialist divorce and matrimonial lawyer who can cover all of the above bases, attend to your divorce, settle what can be settled, and fight on your behalf regarding what cannot. And whatever else, know that you are not alone, and that with the proper legal assistance, there is light at the end of the tunnel (and it's not an oncoming train).

Always remember, ignorance of your lawyer (and their competence or not) is no excuse.

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