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WHEN LOVE IS NOT ENOUGH: A COMPARATIVE APPRAISAL OF THE LEGAL FRAMEWORK FOR THE VALIDITY AND ENFORCEMENT OF PRENUPTIAL AGREEMENTS IN NIGERIA AND SOUTH AFRICA

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When Love is not enough: A Comparative Appraisal of The Legal Framework for The Validity and Enforcement of Prenuptial Agreements in Nigeria and South Africa

Abstract

Marriage is a contract between two consenting people that is expected to last their lifetime without expectation of separation. Modern life challenges have made it imperative that couple safeguard assets brought into the marriage and acquired during the pendency of the marriage. This has given rise to married couples entering into prenuptial agreement that stipulates the distribution of assets if there is a breakdown of marriage. This study, using a desk-based doctrinal methodology gives a comparative analysis of the legal framework of prenuptial agreements in Nigeria and South Africa. The study found that in Nigeria, there is no legal framework for prenuptial agreements while South Africa has an established legal framework for prenuptial agreements. It concluded that prenuptial agreements are not to be used as a premonition that a marriage will end but to safeguard assets, prevent confusion and acrimony when separation occurs or marriage ends. It recommends that the Nigerian Matrimonial Causes Act should be amended in line with the South African Matrimonial Property Act which makes prenuptial agreement an essential part of the marriage contract.

Keywords: *Matrimonial Causes Act, Matrimonial Property Act, Nigerian prenuptial legal framework, Prenuptial agreement, Nigeria and South Africa*

1. Introduction

Marriage is the oldest institution created by God. According to Christian belief, it started in the Garden of Eden between the first man and woman, Adam and Eve.¹ All other faiths agree that the Creator instituted marriage. In the beginning, marriage was to be for the lifetime of the parties without expectation of separation in any manner. Therefore, assets were jointly acquired and owned belonged to the couple and their offspring after their demise. When married couples realize that marriage could lead to separation, there arose a need to protect assets brought into the marriage or personally or jointly acquired during the pendency of the marriage. This gave rise to the pre-emptive arrangement between the couple to protect marital assets through writing prenuptial agreements.

¹ The Holy Bible, Genesis 2:24. Islam also states that Allah created marriage as ‘the lawful union of a man and woman based on mutual consent’, Ahmed Bello, Dogarawa, ‘Marriage and Divorce in Islam’, Lecture presented at the NTA/FRCN Ramadan Annual Lecture Series 1430 (2009), <<https://mpira.ub.uni-muenchen.de/23194/>>accessed 27 May 2023.

This paper is a comparative study of the legal framework of prenuptial agreements in Nigeria and South Africa. Both South Africa and Nigeria have a diverse multi-ethnic demography. The two countries have a shared colonial heritage under British rule. Though Nigeria gained independence much earlier than South Africa,² South Africa's legal framework on prenuptial agreement is better advanced than that of Nigeria. Using doctrinal desk-based methodology, this paper begins with an introduction, followed by the historical background of prenuptial agreements in ancient and modern times. It is followed by a discussion of the contractual bases of prenuptial agreement, legal framework for prenuptial agreements in Nigeria, contractual features of prenuptial agreements under Nigeria's Matrimonial Causes Act, as well as the legal framework for prenuptial agreements in South Africa. The paper highlights the similarities and differences between the laws in Nigeria and South Africa. It analyses the shortcomings of the South African legal framework and nevertheless conclude that Nigeria can incorporate and improve on aspects of the South Africa's law. It thereby recommends an amendment to Nigeria's Matrimonial Causes Act to incorporate provisions for prenuptial agreements within that law.

1.1 *Historical Background of Prenuptial Agreements*

Prenuptial agreements are not a recent concept although modern trends have led to its popularity and development. Prenuptial agreements can be traced to ancient times in different cultures.³ Egypt has one of the first recorded prenuptial agreements that are more than 2,000 years old.⁴ During ancient times, prenuptial agreements were either in writing or verbal and it specified the assets each partner was to bring to the union. It was also utilized to set out the 'bride's dowry' (i.e., the value the intending husband was going pay the bride's parents for marrying her). The bride and groom's parents negotiated the agreement without the involvement of the intending spouses. No legal practitioners that served the interest of

²Nigeria gained her independence on 1st October 1960 South African History Online 'Nigeria gained independence from the United Kingdom' <https://www.sahistory.org.za/dated-event/nigeria-gained-independence-united-kingdom> accessed 5 July 2023, South Africa gained independence from Great Britain on 31 May 2010, National Archives, The White House <https://clintonwhitehouse4.archives.gov/Africa/south.html#:~:text=Independence%3A%20The%20Union%20of%20South,the%20Commonwealth%20in%20May%201994> accessed 5 July 2023.

³ Friedman Joshua, 'The History of Prenuptial Agreements' (Brodie Friedman Marital and Family Law Attorneys, 2022) <<https://brodiefriedman.com/history-prenups>> accessed 18 March 2023.

⁴Ashuramir, 'Legal Documents: How to Identify Prenuptial Agreements' (2019) 32 (2/4) JH441–49 <https://www.jstor.org/stable/48684892> accessed 22 March 2023.

individual partner were involved as well.⁵ This practice was common until early 20th century.⁶ This is in contrast with the modern-day norm, where intending spouses prepared the agreement themselves. This is one of the notable developments prenuptial witnessed.

Prenuptial agreement was not present in the Egyptian culture alone; the Hebrew culture also has more than 2,000 years of historical background of marriage contracts. The Hebrew made use of the marriage contract called *the Ketubah*, which connotes ‘it is written’ and it was part of the earliest statutory provisions to grant women economic independence in.⁷ The *Ketubah* is an artistically designed traditional legal document printed in a creative manner, designed and artfully placed in the spouses’ house, which contained details of financial matters.⁸ The *Ketubah* is thought to have been the very first written ‘instance’ that guaranteed a woman woman’s right to inherit her husband’s assets in the event of his passing.

Throughout Europe, prenuptial agreements have their roots in dowries. The prenuptial agreement as we know it now was first popularised by the Royal family. In the middle of the fourteenth century, Edward IV and Eleanor Butler agreed to sign a prenuptial agreement.⁹ In the middle of the seventeenth century, Elizabeth Oglethorpe asked General James Edward Oglethorpe to sign a prenuptial agreement to enable Elizabeth Oglethorpe have property rights.¹⁰

In France, traditional prenuptial contracts were inspired by the dowry, which initially appeared in the 19th-century.¹¹ In the United States, in 1848, the Married Women’s Property Act (MWPA) was passed to ensure that women who were married would partake of their husband’s assets. Prior to that time, married women could end up with no asset in their

⁵Schulefand B. Keith, ‘The Long and Strange History of Prenuptial Agreements’ (2018) KBS<<https://www.schulefandlawoffice.com/blog/2018/03/the-long-and-strange-history-of-prenuptial-agreements/>> accessed 18 March 2023.

⁶Schulefand B. Keith, ‘The Long and Strange History of Prenuptial Agreements’ (2018) KBS<<https://www.schulefandlawoffice.com/blog/2018/03/the-long-and-strange-history-of-prenuptial-agreements/>> accessed 18 March 2023.

⁷Greniman, Deborah, ‘The Origins of the Ketubah: Deferred Payment or Cash up Front?’ (2001) 4JJWSGI 84–118 <<https://www.jstor.org/stable/40326536>> accessed 22 March 2023.

⁸Greniman, Deborah, ‘The Origins of the Ketubah: Deferred Payment or Cash up Front?’ (2001) 4JJWSGI 84–118 <<https://www.jstor.org/stable/40326536>> accessed 22 March 2023.

⁹Lily White, ‘Edward IV, Dame Eleanor and the Phantom Web of Impediments’ *Ricardian Loons*, 2020) <<https://ricardianloons.wordpress.com/2020/07/28/edward-iv-dame-eleanor-and-the-phantom-web-of-impediments/>> accessed 22 March 2023.

¹⁰Williamson J. Franklin, ‘American History I: Colonial Period to Civil War (Gordon State College)’ (*Galileo Open Learning Materials*, 2019) <<https://oer.galileo.usg.edu/cgi/viewcontent.cgi?article=1004&context=history-textbooks>> accessed 22 March 2023.

¹¹Fremaux Nicola and Leturcq, ‘Marriage, prenuptial agreements and wealth in France (1855 - 2010)’ (2016) JEL <<https://epc2016.eaps.nl/papers/160215>> accessed 22 March 2023.

possession if their husband passed even if children were involved.¹² Although the MWPA gave women the right to acquire their husband's belongings in alignment to his will, it did not give pre-emptive protection offered by the present-day prenuptial agreement.¹³ In 1983, the Uniform Premarital Agreement Act (UPAA) was then drawn up as part of a response to the demands by large number of people getting married and who had the intention of pursuing a career.¹⁴

Prenuptial agreement continued to develop through the 19th century to the 20th century. Now in the 21st century, prenuptial agreements are more diversified than they have ever been.¹⁵ While it was only drawn initially to protect the interests of women to assure them of some property rights if their husband passed on, a prenuptial agreement now serve to establish equitable division of assets premised on the agreement of both partners and to protect the best interests of both spouses.¹⁶ Due to the increase in the rate of divorce, many intending spouses now consider prenuptial agreements as an insurance, which they hope not to use, but do not want to be without.¹⁷

According to Australian Research Network on Law and Ageing¹⁸ people now use agreement more often, but the failure accompanied with the use of the agreement is also increasing. The failure of prenuptial agreements is equal to the inability to fulfil the purpose of making it. A prenuptial agreement caters for any issue that may arise in a marriage relationship. It is to make an arrangement that has binding force on parties and which could be enforceable by the courts. Family agreements can cover decisions such as marriage property settlement, rights to

¹² Rodgers Julia, 'A Brief History: Prenuptial Agreements' (2019) <<https://helloprenup.com/prenuptial-agreements/history-prenuptial-agreements/#>> accessed 18 March 2023.

¹³ Rodgers Julia, 'A Brief History: Prenuptial Agreements' (2019) <<https://helloprenup.com/prenuptial-agreements/history-prenuptial-agreements/#>> accessed 18 March 2023.

¹⁴ Weaver Jeffrey, 'When did Prenups become so popular' (2022) <<https://prenuppros.com/post/why-are-prenups-popular>> accessed 18 March 2023.

¹⁵ Young Lauren, 'The Power of the Prenup' (*Reuters*, 2012) <<https://www.reuters.com/article/us-moneypack-weddings-prenup-idUSBRE8540SY20120605>> accessed 22 March 2023.

¹⁶ Rodgers Julia 'A Brief History: Prenuptial Agreements' (2019) <<https://helloprenup.com/prenuptial-agreements/history-prenuptial-agreements/#>> accessed 18 March 2023.

¹⁷ Reisman J. Seymour, 'Prenuptial Agreements in History' *The New York Times* (22 April 1990) <<https://www.nytimes.com/1990/04/22/nyregion/I-prenuptial-agreements-in-history-636790.html>> accessed 18 March 2023.

¹⁸ Submission 90; Justice Connect Submission 182. In: 'Challenges Posed by Family Agreements' (2016) Australian Law Reform Commission <<https://www.alrc.gov.au/publication/elder-abuse-dp-83/8-family-agreements/challenges-posed-by-family-agreements/>> accessed 23 October 2022.

adjudicate on medical needs and in some cases determine the place of a child to a non-biological parent.¹⁹

Laws governing prenuptial agreements vary from one jurisdiction to the other. In Nigeria, all cultures negotiate marriage contracts on behalf of the intending couple. Each ethnic group in Nigeria had an established understanding of what was to accrue to both spouses, in case of a separation. This agreement is usually not in writing, but often witnessed by representative from both sides of the family. In modern times however, as is the trend in other parts of the world, intending couples who chooses to have a prenuptial agreement, will both decide on their own without the intervention of either parent. In most cases, prenuptial agreements are being drafted by legal practitioners acting on behalf of both parties jointly or individually;²⁰ since there is no specific legal framework to guide parties and their lawyers.

1.2 Deficiencies of Prenuptial Agreements

Some of the drawbacks of prenuptial agreements has been the issue of enforcement where there is no legal framework, as is the case in Nigeria. Other socio-cultural and religious issues have affected its acceptability, especially with the varying schools of thoughts and belief systems.²¹ Some hold the view that their religion does not support prenuptial agreement while some believe that it is an anticipation of evil. For example, some people are of the opinion that prenuptial agreements stem from lack of trust or anticipation of separation or divorce or even death. In addition, parties to a family agreement tend not to realize that there is no family agreement that is guaranteed for all jurisdictions. What this means is that a family agreement would only become legally recognized and enforceable based on the law of each jurisdiction.²²

¹⁹ Swift M. Katherine, 'Parenting Agreement, The Potential Power of Contract and the Limits of Family law' (2006-2007)34 ULR 913
<<https://heinonline.org/HOL/LandingPage?handle=hein.journals/flsulr34&div=35&id=&page=>> accessed 13 October 2022.

²⁰Babayomi A. Olutumbi, 'Understanding Prenuptial Agreements: The Nigerian Perspective'(2022) SSRN<https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID4200469_code2201713.pdf?abstractid=4200469&mirid=1> accessed 13 March 2023.

²¹Shelby B. Scott *et al*, 'Reasons for Divorce and Recollections of Premarital Intervention: Implications for Improving Relationship Education' (2014) NHI<<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4012696>> accessed 22 March 2023.

²²Napley Kingsley, 'The Challenges with Family Agreements for International Couples' (*Kingsley Napley LLP*, 2016) <<https://www.kingsleynapley.co.uk/insights/blogs/family-law-blog/the-challenges-with-family-law-agreements-for-international-couples>>accessed 23 October 2022.

In countries where legal framework exists, it should be noted that prenuptial agreements cannot be used to waive the right to maintenance or custody of children.²³ The constant evolution of the marital institution is promoting and encouraging the use of prenuptial agreement.²⁴ Prenuptial agreement is one of the persuasive materials a court can consider when looking into issuing settlement orders.²⁵ However, a court will only uphold the content of a prenuptial agreement if it complies with the provisions of the law and the principle of fairness in each circumstance. Where the court considers a prenuptial agreement to be unfair, unconscionable or in conflict with legal standards, the content of the agreement will become unenforceable and the agreement will be set aside.²⁶ Therefore, it is crucial to speak with a lawyer when creating a prenuptial agreement.

2. Prenuptial Agreement as a Contract

An agreement is an arrangement amongst two or more people concerning a mutual objective.²⁷ The fulfilment of an agreement depends on the parties' free will. In other words, an agreement can be defined as an arrangement between two or more people about something with a common goal in mind. Agreements are less formal arrangements with no intent to become legally binding.²⁸ However, if there is an intention for it to become binding, it must meet the requirements of a valid contract.²⁹ This means that for any agreement to become legally binding and enforceable, it must have the necessary features of a contract. Not all agreements are contracts (i.e., the parties may not intend for it to become legally binding on them),³⁰ but all contracts qualify as an agreement.³¹

²³Boros Nicole, 'Enforceable Provisions for a Prenuptial Agreement' (Boros Law Firm APC, 2016)<<https://borosfamilylaw.com/enforceable-provisions-prenuptial-agreement/>> accessed 22 March 2023.

²⁴Barlow, Anne and Smithson Janet, 'Is modern marriage a bargain? Exploring Perceptions of Pre-Nuptial Agreements in England and Wales' (2012) 24 CFLQ<https://www.researchgate.net/publication/233540527_Is_modern_marriage_a_bargain_Exploring_Perceptions_of_Pre-Nuptial_Agreements_in_England_and_Wales> accessed 22 March 2023.

²⁵Fairbair Catherine, 'Prenuptial Agreements' (2017) Briefing Paper, House of Common Lords Library <<http://researchbriefings.files.parliament.uk/documents/SN03752/SN03752.pdf>> accessed 22 March 2023.

²⁶Fairbair Catherine 'Prenuptial Agreements' (2017) Briefing Paper, House of Common Lords Library <<http://researchbriefings.files.parliament.uk/documents/SN03752/SN03752.pdf>> accessed 22 March 2023.

²⁷Yonjan Kumar Yam, 'An Analysis on Major Elements of a Valid Contract Under Muluki Civil Code, 2074' (2019) SSRN<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3437233> accessed 22 March 2023.

²⁸Zaremba Yuri, 'Agreement v Contract: What's the Difference?' (AXDRAFT, 2021)<<https://www.jdsupra.com/legalnews/agreement-vs-contract-what-s-the-9387283/>>accessed 15 October 2022.

²⁹'Intention to Create Legal Relations' (Lawteacher.net, 2021)<<https://www.lawteacher.net/free-law-essays/contract-law/intention-to-create-legal-relations.php?vref=1>>accessed 15 October 2022.

³⁰'Agreement vs contract: what's the difference? Definition and Examples' Juro Knowledge Team <<https://juro.com/learn/agreement-vs-contract>> accessed 15 October 2022.

³¹Solan Lawrence, 'Contract as Agreement' (Brooklyn Law School, 2007) <<https://core.ac.uk/download/pdf/228596499.pdf>> accessed 15 October 2022.

An agreement is an arrangement between two or more parties to do or not to do a particular thing.³² The terms agreement and contracts are often used interchangeably but they are not the same. According to the Black's Law Dictionary,³³ a contract is 'an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law'. Where there is a valid agreement, parties to the agreement must be held accountable to act in compliance with the prescribed rules and regulations guiding the agreement.³⁴ What does it mean for an agreement to be enforceable? According to LH Tribe, enforceable means 'capable of being enforced especially as legal or valid.'³⁵ From the definition, 'enforceable' means ability to be binding or recognized as binding under the law.

It is important that a prenuptial agreement be in writing with the intention to become legally binding on both parties creating a legal relationship and attracting legal consequences. In the case of *Orient Bank (Nig.) Plc v Bilante International Ltd*,³⁶ the court held that for a contract to be valid, 'there must be mutuality of purpose and intention.' The law recognises the need for the satisfaction of reasonable and well-founded expectations created by promises and agreements. The legal relations created by the contractual nature of a prenuptial agreement, enables the partners to enforce the content of the agreement or to obtain a remedy for non-compliance.³⁷

2.1 Contractual Features of Prenuptial Agreement

For the general presumption of the unenforceability of a family agreement to be rebutted, such agreement must contain the following elements:³⁸

- i. The parties to the agreement must give complete disclosure of the subject matter of the agreement.³⁹
- ii. The agreement should be in writing. Although, oral agreements can be upheld by the court but it may be difficult to establish the terms of the agreement. An agreement that

³²Yonjan Kumar Yam, 'An Analysis on Major Elements of a Valid Contract Under Muluki Civil Code, 2074' (2019) SSRN<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3437233> accessed 15 October 2022.

³³ Sixth Centennial Edition (1981- 1991) 389-390

³⁴Enemchukwu v Okoye and Anor. [2016] NGCA 105

³⁵ Tribe H. Lawrence, 'Structural Due Process' Rec. 269 (1975) 10(2) HCRCLR<<https://heinonline.org/HOL/LandingPage?handle=hein.journals/hcrcl10&div=16&id=&page=>> accessed 15 October 2022.

³⁶ (1997) 8 NWLR (Pt. 515) 37

³⁷ Sagay I.E., *Nigerian Law of Contract* (2nd edn, Spectrum Books Limited 2009) 2

³⁸ Boyd John-Paul, 'Family Law' (2021) <<http://www.jpboyd.com/>> accessed 18 October 2022.

³⁹ Kara Cook 'Family Law Property Settlements are Not as Simple as Drafting an Agreement' (2021) Colin Daley Quinn Solicitors<<https://www.cdq.com.au/family-law-property-settlements-are-not-as-simple-as-drafting-an-agreement>> accessed 18 October 2022.

is oral will only be enforced after the determination of the terms and conditions of the agreement by the Court. Family agreements should be written to adequately fulfil the purpose of making it.⁴⁰

- iii. The parties must possess the capacity to make a legally binding agreement. The parties cannot be under any kind of legal disability e.g. insanity.⁴¹
- iv. The agreement must be voluntarily accented to by all the parties involved without pressure or coercion.⁴²
- v. The agreement has to be properly executed by the parties in the presence of at least one witness who is not a party to the agreement.⁴³
- vi. The agreement must not be obtained by fraud, compulsion, or disproportionate influence.
- vii. The agreement must not be contrary to public policy.

3. Purpose of a Prenuptial Agreement

A prenuptial agreement is typically used to safeguard individual possession or income, and to make sure assets are divided in accordance to their desires.⁴⁴ However, they are not always enforceable, as courts may invalidate certain provisions that are considered unfair or against public policy. A prenuptial agreement can cover variety of topics, including but not limited to:⁴⁵

- a. **Property rights:** It specifies how assets and property will be distributed amongst the two partners in case of a separation or divorce. The rights and obligations of each party in any of the property of either or both of them whenever and wherever acquired. The right to buy, sell, use, transfer, exchange, abandon, lease, consume, expand, assign, create a security interest in, mortgage, encumber, dispose of, or

⁴⁰Iwamoto Izumi, 'The Role of Family Management in Japan' (1999) 35KU 25-31 <<https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.507.8498&rep=rep1&type=pdf>> accessed 18 October 2022.

⁴¹ Stim Richard, 'Who Lacks the Capacity to Contract' (*Nolo*, 2022)<<https://www.nolo.com/legal-encyclopedia/lack-capacity-to-contract-32647.html>>accessed 18 October 2022.

⁴²Bilawala Marylou, 'Family Agreement' (*WadiaGhandy&Co. Associates*, 2017) livemint<<https://www.nolo.com/legal-encyclopedia/lack-capacity-to-contract-32647.html>> accessed 18 October 2022.

⁴³Ryznar Margaret, 'Prenuptial Agreement': Marriage and Divorce in America: Issues, Trends, and Controversies' (2019) JLH<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3446218> accessed 20 January 2023.

⁴⁴Clarfeld Rob, 'Does a Prenuptial Agreement Protect Assets?' (*Citizens Bank*)<<https://www.citizensbank.com/learning/protecting-assets-with-a-prenuptial-agreement.aspx>> accessed 22 March 2023.

⁴⁵Spector Nicole, 'Prenuptial agreements: What is a prenop and should I get one?' *NBC Universal* (12 April 2019)<<https://www.nbcnews.com/better/amp/ncna993616>> accessed 22 March 2023.

otherwise manage and control property. The disposal of property upon separation, marital dissolution, death, or the occurrence or non-occurrence of any other event.

- b. **Alimony:** It can specify whether or not one party will receive spouse maintenance in the event of a divorce.
- c. **Debts:** It can specify who will be responsible for any debts incurred during the marriage.
- d. **Inheritance:** It can clarify how inheritances are to be divided if one of the parties dies. Including, the making of a will, trust or other arrangement to carry out the provisions of the agreement.
- e. **Business interests:** It can outline what will happen to any business interests owned by either party in the event of a divorce or separation.
- f. It can make reference to ownership rights in and disposition of the death benefit from a life insurance policy.
- g. Right to retirement savings plans and account and choice of law governing the construction of the agreement can be covered by a prenuptial agreement.

Indebtedness, assets distribution, cost of living, presents, divorce and separation, entitlements of partners to estate in the case of death, child support and personal matters are all concepts that can be featured in a prenuptial agreement.⁴⁶

4. Legal Framework for Prenuptial Agreement in Nigeria

There are different forms of family agreement all across the world catering for different issues. However, the validity and enforcement of these agreements depends on the legal regime available in each jurisdiction. The fundamental laws regulating marriage in Nigeria are Marriage Act (MA)⁴⁷ and Matrimonial Causes Act (MCA).⁴⁸ The MA is a federal law that governs the contract, celebration of statutory marriage and states the primary conditions for a valid marriage. The MCA regulates and considers issues arising from marriages celebrated under the Act, which includes divorce, separation, custody and maintenance, while the Matrimonial Causes Rule is the procedural law for the MCA that states the procedures for determining a marriage including divorce, separation, custody and maintenance. In addition, the relevant customs of the intending spouses govern customary marriage rites in Nigeria.

⁴⁶ Asia E. Elvis, 'Practical and Legal Reasons for Pre-nuptial Agreement in Nigeria' *Academia*<https://www.academia.edu/39976807/PRACTICAL_AND_LEGAL_REASONS_FOR_PRENUPTIAL_AGREEMENT_IN_NIGERIA> accessed 13 March 2023.

⁴⁷CAP. M6, LFN, 2004.

⁴⁸CAP M7LFN 2004.

‘Family agreements are presumed not to give rise to legal relations unless there is clear evidence to the contrary’.⁴⁹ However, where there is undoubtable intent to become legally binding, the assumption is rebutted.⁵⁰ In *Merritt v Merritt*⁵¹ an agreement for separation amongst partners who had drifted apart was held enforceable by the court. While the laws governing family, agreement vary from jurisdiction to jurisdiction, certain contents in the agreement or circumstance may render such agreements out rightly unenforceable some of which are, fraud, duress or non-disclosure.⁵²

4.1. Matrimonial Causes Act (MCA)

Prenuptial and postnuptial agreements are not so popular in Nigeria.⁵³ Family agreement as a whole is still a growing concept in Nigeria as not much provision is made for it in the law. **Section 72(2) of the Matrimonial Causes Act**⁵⁴ expresses the right of partners to have prenuptial and postnuptial agreements. However, the validity and enforceability of the agreement is left to the discretion of the court. There is nothing hindering parties from entering into family agreements under the law in Nigeria.⁵⁵ However, the law is quiet as to the procedure or requirements and the enforcement of this contract and only give discretion to the Court as to same. There are few documented cases on prenuptial agreements in Nigeria because they are not commonly used. In the case of *Oghoyone v Oghoyone*,⁵⁶ the Appellate Court only appeared to give a nod to the validity of prenuptial and post nuptial agreements when it stated that the court of first instance was in alignment, when it held that the Respondent had equal right in an asset which belonged to both partners because reference was made to it in their prenuptial agreement.

⁴⁹ Laurence Koffman and Elizabeth Macdonald, *The law of contract* (Oxford University Press, 2010) 98 <https://books.google.com.ng/books?hl=en&lr=&id=3WycAQAAQBAJ&oi=fnd&pg=PP2&dq=Koffman,+Macdonald,+p.+98&ots=rCYMfUXsub&sig=ucFwA4eeJS5Y_vkEdzMjmS6VLHI&redir_esc=y#v=onepage&q=Koffman%2C%20Macdonald%2C%20p.%2098&f=false> accessed 15 October 2022.

⁵⁰ *Merritt v Merritt* [1970] 2 All ER 760, [1970] 1 WLR 1211.

⁵¹ [1970] 2 All ER 760, [1970] 1 WLR 1211.

⁵² Reynar Margaret and Stepien-Sporek Anna, ‘To have and to hold, for Richer or Richer: premarital agreements in the comparative context’ (2009) 13 (27) CLR <<https://digitalcommons.chapman.edu/cgi/viewcontent.cgi?article=1200&context=chapman-law-review>> accessed 16 October 2022.

⁵³ EfeEtomi and Elvis Asia, ‘Family law in Nigeria: overview’ (*FRALaw*) <[https://uk.practicallaw.thomsonreuters.com/6-613-4665?transitionType=Default&contextData=\(sc.Default\)&firstPage=true#co_anchor_a486919](https://uk.practicallaw.thomsonreuters.com/6-613-4665?transitionType=Default&contextData=(sc.Default)&firstPage=true#co_anchor_a486919)> accessed 15 October 2022.

⁵⁴ CAP M7LFN 2004.

⁵⁵ ‘Are Pre-nuptial Agreements Valid Under Nigerian Law?’ (2021) <<https://lawpadi.com/are-pre-nuptial-agreements-valid-under-nigerian-law/>> accessed 18 October 2022.

⁵⁶ (2010) 3NWLR (1182) 564.

The idea of a prenuptial agreement is still struggling to gain ground in Nigeria.⁵⁷ This is due to the belief that marriage was (and still mainly is) viewed as an institution initiated by God and based on love and that any effort to indicate otherwise by executing a prenuptial was strange and not welcomed socially and culturally. Prior to this time, divorce was uncommon due to deeply ingrained custom and religious beliefs that bonded spouses to their marriage even in the face of dysfunctional and hazardous circumstances.⁵⁸ Today, these elements have lessened; the light of civilization has beamed on the ideas and approach of people towards marriage. It is no longer uncommon to find persons requesting the annulment of marriages that have just been a few months or a few years old in Nigerian courts, with implausible allegations of marital problems.

Compared to some other countries where property rights are defined clearly in state or national laws, the legal framework in Nigeria is inexplicit, leaving room for a lot of discretion, the exercise of which are impacted by gender stereotypes. In accordance with Section 72 of the MCA, the courts may divide assets or distribute funds necessary for the advantage of both partners and the children of the marriage. However, there is no legal provision defining the basis and limits of the court's power to act. The Court is required to take into consideration what is right and equitable under the specific circumstances of each case.⁵⁹

When using this broad autonomy, the courts in Nigeria have developed pivotal criteria which were developed in line with the clamouring for the recognition of women's right in property distribution. This was based on each partners' effort to the marriage property. In previous years, regardless of the age of the marriage, if one partner was discovered not to have made any tangible contribution, he or she will leave with nothing. In recent years, the anticipated impact has encompassed not just financial contributions to the acquisition of the assets but overall commitment to living as man and woman. This has been judicially recognized in a plethora of cases such as *Kafi v Kafi* and *Akinbuwa v Akinbuwa*.⁶⁰ This is a benefit to women who may be homemakers in the marriage. The idea behind this is that, once a property has

⁵⁷UniniChioma, 'Pre Nuptial Agreement And Its Controversies' (2021) TNL<<https://thenigerialawyer.com/pre-nuptial-agreement-and-its-controversies/>> accessed 18 March 2023

⁵⁸UniniChioma, 'Pre Nuptial Agreement And Its Controversies' (2021) TNL<<https://thenigerialawyer.com/pre-nuptial-agreement-and-its-controversies/>> accessed 18 March 2023

⁵⁹EfeEtomi and Elvis Asia, 'Family law in Nigeria: overview' (*FRA Law*)<[https://uk.practicallaw.thomsonreuters.com/6-613-4665?transitionType=Default&contextData=\(sc.Default\)&firstPage=true#co_anchor_a486919](https://uk.practicallaw.thomsonreuters.com/6-613-4665?transitionType=Default&contextData=(sc.Default)&firstPage=true#co_anchor_a486919)>accessed 15 October 2022.

⁶⁰*Kafi v Kafi* (1986) 3NWLR 27; *Akinbuwa v Akinbuwa* (1998) 7 NWLR (559) 661.

been acquired or purchased during the course of a marriage, the parties have a right of ownership in the asset and it is up to the court to decide the measure of each party's interest.

In the exercise of this discretion, the court may consider factors like, duration of the marriage, interest of the children of the marriage⁶¹ and custody. This practice aligns with what is practiced in the United Kingdom. Unfortunately, without proof of contribution, the court would not provide any sort of privilege. This court's approach has led to unfair treatment in some circumstances. This has caused some parties who have properties outside of the country to prefer filing a petition outside Nigeria for the distribution of assets or apply for ancillary reliefs after proceeding in Nigeria.⁶² A prenuptial agreement will assist in resolving the ambiguity in the law in Nigeria on the distribution of marital assets in the case of divorce or separation.

5. Legal Framework for Prenuptial Agreement in South Africa

Upon getting married in South Africa, spouses are automatically regulated by a matrimonial property framework called 'community of property system' which includes their premarital property except they choose to opt out by executing a prenuptial agreement.⁶³ The use of a prenuptial agreement in South Africa is intricately linked with the matrimonial property regime. Hence, there are two matrimonial property regimes in South Africa, namely, the community of property and the accrual system (also referred to as the out of community of property).⁶⁴ These regimes are regulated by the Matrimonial Property Act (MPA).⁶⁵ The main purpose of prenuptial agreement in jurisdictions like South Africa is to vary the effect of some statutory standards on matrimonial possessions; the main focus of prenuptial agreement in South Africa is the matrimonial property regime.

5.1.The Matrimonial Property Act (MPA)

The Matrimonial Property Act, which took effect from 1 November 1984, eliminated the matrimonial power imbalance in all marriages contracted after the establishment of the Act. A regime of equality and concurrent administration of the joint estate of spouses who got married under the community of property system was created. The Act introduced a statutory

⁶¹Odusote v. Odusote (2012) 3NWLR (1288) 478.

⁶²Agbaje v Akinnoye-Agbaje (2010) UKSC 13.

⁶³ Morley Jeremy 'Prenuptial Agreement in South Africa' (*Lawlytics*) <<https://www.international-divorce.com/prenuptial-agreements-south-africa>> accessed 18 May 2023

⁶⁴ Robinson JA 'Matrimonial Property Regimes and Damages: The Far Reaches of the South African Constitution' (2007) 1(3) PER, ISSN 1727-3781 <<https://www.ajol.info/index.php/pelj/article/view/43401/26938>> 19 May 2013.

⁶⁵ 88 of 1984

alternative to a complete separation of power (marriage out of community of property) by introducing the accrual system. However, until the enactment of the Marriages and Matrimonial Property Law Amendment Act, the operational system of the Matrimonial Property Act was of no effect to black person marriages. The MPA remedied the potential disadvantage of economic inequality in marriages out of community property system. This allowed for judicial discretion concerning the reallocation of assets where marriages have been concluded with complete separation of property before the commencement date of the MPA.

5.2.Community of Property

A marriage contracted between two individuals, where community of property is not expressly excluded in a marriage contract, will be considered as a marriage ‘in community of property’ according to South African common law and the MPA.

The community of property system serves as the default regime for matrimonial property system in South Africa. This system implies the joint ownership of assets and liabilities, including those acquired before marriage.⁶⁶ All assets and liabilities acquired individually and jointly by the parties in the course of the marriage will also form a part of their joint estate.⁶⁷ The partners in a community of property system are equal and joint owners of all assets and liabilities notwithstanding which party acquired the liability or asset. Creditor of third parties may bring claim against the parties jointly and severally as joint owners of the assets and co-debtors of the liabilities of the joint estate. Upon dissolution of the marriage or in the event of death, each party to the marriage is entitled to a half share of the joint estate.

The generally accepted explanation of this system was given by the Appellate division in *Estate Sayle v CIR*, when it stated that

spouses own the assets of the joint estate in equal undivided shares which means that no asset can physically be divided and no rights pertaining to the joint estate can accrue exclusively to one of the spouses- during the subsistence of the marriage the shares of the spouses are indissolubly tied up.⁶⁸

The exception available for a party seeking to exclude the strict adherence to the conditions of an equal division of the joint estate is if he/she makes a claim, in relation to Section 9 of

⁶⁶ Section 14, Matrimonial Property Act, 1984

⁶⁷ Section 17(5), Matrimonial Property Act 88 of 1984

⁶⁸ (1945) AD 388

the Divorce Act, for the other party to forfeit his or her patrimonial benefit to all the assets of the joint estate (total forfeiture claim), part thereof or specific assets of the joint estate (a partial forfeiture claim). The basis for the principle of forfeiture is that a partner should not benefit financially from a marriage that he or she caused to fail. The factors that would be considered by the court for a forfeiture claim are: duration of the marriage,⁶⁹ situation surrounding the breakdown of the marriage and any outstanding misconduct by either of the parties.⁷⁰

Under the community of property system, a prenuptial agreement is not required. However, if the couple choose to execute a properly designed and notarized agreement, that states that they prefer to opt out of the community property system, they will be seen to have chosen the accrual system,⁷¹ which could either be, out of community property without accrual or out of community property with accrual; the accrual system introduces the use of a prenuptial agreement. A prenuptial agreement signed between intending spouses and registered at the 'Deeds Office' will serve as *prima facie* evidence that the parties are not married under the community of property system.⁷²

5.3.Out of Community without Accrual

Before the enactment of the MPA, two systems of matrimonial property system were present in South Africa namely community of property and out of community of property. These systems were retained after the enactment of the MPA. However, the Act introduced the accrual system. The accrual system is a method of distribution of assets acquired during the subsistence of the marriage. The accrual system which is also referred to as 'out of property system' is of two forms, namely: the 'out of community with accrual' and the 'out of community without accrual'. When partners to a marriage choose the out of community of property system without accrual, they will execute a prenuptial agreement before the marriage. Under this system, the parties must expressly decide to leave out the application of the community of property system in the prenuptial agreement.

The out of community property without accrual is like getting married but remaining single with regards to financial status. The intending spouses must expressly exclude the operation of the accrual system in their prenuptial agreement, otherwise, the accrual system would be

⁶⁹*Matyilia v Matyilia* (1987) 3 SA 230 (W) 235-236

⁷⁰*Singh v Singh* (1983) 1 SA 781 (C)

⁷¹ Section 2, Matrimonial Property Act, 1984

⁷²*Odendaal v Odendaal* (2002) All SA 94 (W)

deemed applicable.⁷³ Each partner remains the individual owner of his/her assets before, during and after the marriage; any substantial boost in the assets or liabilities by one partner in the course of the marriage is not divided by the other partner in the event of death or divorce.⁷⁴ Neither of the partners will have an automatic right to share in the other partner's estate in the event of divorce or death. In this system, financial equality is absent. However, this position has been addressed by the High Court of Pretoria on the 11th of May, 2022.⁷⁵ What this implies is that parties who got married under the out of community of property without accrual are by this new position enabled to request for asset redistribution in the court, notwithstanding the provisions of an executed prenuptial agreement.

The purpose of this is to address the inequity, which existed in the patriarchal community in South Africa, where the husband was the main breadwinner and the economically secure party in a marriage with better opportunity to build an estate as was seen in the case of *Jordaan v Jordaan*.⁷⁶

5.4.Out of Community with Accrual

The out of community property with accrual system is the most prevalent and is established on equitable treatment and run as a partnership. This system shares resemblance with the out of community property without accrual system as the spouses under both systems retain ownership of their assets. However, under the out of community property with accrual system, spouses can create a system of financial responsibility which can help prevent disputes about finances during marriage. The out of community property with accrual system gives room for flexibility with regards to how assets are distributed. This system takes into consideration the worth of each spouses' assets at the time of divorce or death instead of just assets owned during marriage;⁷⁷ this stands as an advantage over the out of community property without accrual system.

The MPA,⁷⁸ states precisely the formula to calculate the distribution of the accrual between the partners. If the application of the accrual system is not expressly excluded in the prenuptial agreement, it will automatically be applied to parties in out of community of

⁷³Section 2. Matrimonial Property Act

⁷⁴ 'Antenuptial Contract in South Africa' (*Simon Dippenaar & Associates*, 20 August 2018) accessed 19 May 2023.

⁷⁵ Constitution of the Republic of South Africa, 1996

⁷⁶*Jordaan v Jordaan*(2001) 3 SA 288

⁷⁷ 'Protecting Yours Assets with an Antenuptial Agreement in South Africa' (*Martin Vermaak*) <<https://martinvermaak.co.za/services/protecting-your-assets-with-an-antenuptial-agreement-in-south-africa/>> accessed 19 May 2023

⁷⁸ Section 4, Matrimonial Property Act, 88 of 1984

property system. The accrual system has a visible effect on the partners in the event of death or divorce.

5.5. Conditions for the Validity of Prenuptial Agreement in South Africa

Generally, prenuptial agreements are recognised and enforceable in South Africa. In line with this status of enforceability of prenuptial agreements in South Africa, certain conditions have been set out in the MPA that must be followed by intending spouses seeking to draw-up a valid prenuptial agreement. These conditions are discussed below.

- i. A prenuptial agreement must not contain anything illegal, immoral or against good morals. The agreement must be written, signed by both parties with date.
- ii. A prenuptial agreement must be executed before marriage takes place between the spouses.⁷⁹ In compliance with the law, a prenuptial agreement must be acceptable and fair to both parties.⁸⁰
- iii. A prenuptial agreement must be attested to by a notary and registered at the Deeds Office. Where parties contract a prenuptial agreement but did not register it at the Deeds Office, this agreement may be binding between the parties but not have a binding effect on parties or creditors.⁸¹
- iv. Before agreeing to the terms of the agreement, each party is required to have obtained independent legal counsel from different lawyers. This is done to ensure that everyone is aware of the terms of the agreement as well as the corresponding legal obligations.
- v. Each party must make full disclosure of financial status to the other party before executing the agreement. This is to avoid unpleasant shocks later by ensuring that everyone is aware of what they are agreeing to.⁸²
- vi. A prenuptial agreement should be equal to all parties at the time of execution. This implies that either of the parties cannot be unjustly treated or prejudiced. The agreement may be annulled by the court if it determines that the agreement is unfair.
- vii. Parties who are equally seeking to modify the conditions of their prenuptial agreement may do so by filing a joint application at the High Court based on the provisions of the Matrimonial Property Act.⁸³

⁷⁹ Section 86, Deeds Registries Act of 1937

⁸⁰ Kotze Dirk 'requirements for a prenuptial agreement in South Africa' (*Dirk Kotze Attorneys*, 14 September 2022) <<https://www.linkedin.com/pulse/requirements-prenuptial-agreement-south-africa->> accessed 19 May 2023

⁸¹ Section 89, Deeds Registries Act 47 of 1937.

⁸² Section 6(1), Matrimonial Property Act, 1984.

⁸³ Section 21, Matrimonial Property Act

- viii. The High Court may permit the postnuptial signing of a contract that has the same effect as a prenuptial agreement under specific conditions. However, the parties must present good reasons for failure to execute the contract before they were married.
- ix. A prenuptial agreement that was executed outside of South Africa by a husband who is domiciled in South Africa must be registered in South Africa to take effect against third parties. Where the husband is not a South African domiciliary, registration is not required for the agreement to be recognised under the law in South Africa.⁸⁴

5.6. Shortcomings of the Legal Framework for Prenuptial Agreement in South Africa

The South African matrimonial system is mainly governed by means of statutory law. However, these statutes do not contain all the rules and certain rules are still regulated by the common law. It is difficult to state which one of the existing matrimonial property system would be the most suitable for indigent persons. This is because some individuals have little material resources, and most times commit themselves blindly to the proprietary effect of their prenuptial agreement.

Some scholars argue that the matrimonial property systems in South Africa are limited and parties are restricted only to the two systems available. The researchers deviate from this perspective and are of the opinion that the matrimonial property systems available in South Africa is sufficient and should be improved consistently in light of evolutionary changes in marriage and societal dynamics.

One of the challenges of the community of property system is that it does not give either of the parties' protection to their individual asset as it calls for joint administration and management of estate. Where either of the partners are said to be insolvent, it will influence the joint estate of the partners. Also, there is no specialised family court division of the superior courts. The High Courts possess general jurisdiction over civil and criminal matters, including divorce and family related matters. The lower courts have designated divorce courts, maintenance courts and children's courts.⁸⁵

⁸⁴ Amanda Catto 'Family law in South Africa: Overview' Thomson Reuters Practical Law 1 October 2020 <[https://content.next.westlaw.com/practical-law/document/I63cd7e63e68b11e398db809b4f043e0/Family-law-in-South-Africa-Overview?viewType=FullText&transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://content.next.westlaw.com/practical-law/document/I63cd7e63e68b11e398db809b4f043e0/Family-law-in-South-Africa-Overview?viewType=FullText&transitionType=Default&contextData=(sc.Default)&firstPage=true)> accessed 19 May 2023.

⁸⁵ Ende Van Isabel 'South Africa: How Does The Children's Court Work in South Africa' Barnard Inc. 19 April 2023 <<https://www.mondaq.com/southafrica/family-law/1305730/how-does-the-childrens-court-work-in-south-africa>> accessed 26 May 2023

6. The Legal Framework for Prenuptial Agreement in South Africa and Nigeria: Similarities and Differences

Like Nigeria, South Africa is a cosmopolitan country, rich with diverse ethnic, cultural, traditional and religious heritages and groups. The South African matrimonial system affords intending spouses with two options which enables them choose the preferable system peculiar to their circumstance. Intending spouses in South Africa can choose which matrimonial property system will apply to their marriage before they enter into marriage. This explicit provision obtainable in South Africa is not the case in Nigeria. Intending spouses planning a marriage in Nigeria do not have a variety of options to explore as to which matrimonial system best suits their marriage.

South Africa stands as one of the countries that have developed its matrimonial property system in Africa. The Nigerian matrimonial systems are a clone of old traditional practices that view women as chattels and undeserving of partaking in the property of their spouses, upon dissolution of marriage.⁸⁶ The South African matrimonial regime, which regulates the validity of a prenuptial agreement generally, seems to be broader in scope and more definite than of Nigeria. Parties seeking to get married in South Africa seem to have more freedom with regards to the choice of law to regulate the choice of a prenuptial agreement, compared to what is obtainable in Nigeria.

7. Conclusion

The perspective of today's world about the institution of marriage is changing rapidly. The presence of a prenuptial agreement does not imply that a marriage will come to an end, it simply means that in case of such occurrence, there will be less confusion, less hatred, less intense arguments and less ambiguity in the process. It is like the concept of insurance. Insurance provides a financial safeguard from any mishap. The concept of prenuptial agreement rests on this same principle. Prenuptial agreements provide some semblance of an amicable relationship between the partners post separation. This is of benefit to the mental health of the parties within the failed marriage and the children that formed part of the marriage. Partners planning to get married in Nigeria should be informed through the counselling stage as well as at the marriage ceremony itself about the use of prenuptial agreement especially at the statutory registries. The Matrimonial Causes Act must also be amended to conform with current marital trends and challenges in the dynamic and changing Nigerian society as the South Africans have done.

⁸⁶ Adebayo Festus 'The Smart Alec called Achraf Hakimi' *Nigerian Tribune* (16 April 2023)