

The following scenario is fictional but typical of the situations which we deal with on a daily basis. The names which are used do not relate to actual persons or cases.

Mr and Mrs Tabata are married in community of property.

Mr Tabata has stood surety for the debts of a company of which he is a director and shareholder.

The company is placed in liquidation and the creditor which holds the suretyship (often a bank) claims payment from Mr Tabata.

Mr Tabata cannot afford to pay and the major asset which they have, is their home.

Mr and Mrs Tabata consult with us. What is to be done?

One of the possibilities which they raise is to convert their marriage to a marriage which is out of community of property, by way of a postnuptial contract.

In general, a marriage which is in community of property can be converted to a marriage which is out of community of property. This involves an application to the high court, advertising in newspapers, permission being obtained to register the postnuptial contract, and its registration at the Deeds office.

The process can take a number of months, and is fairly expensive, with one of the biggest expenses being the costs of advertising in newspapers.

Sadly however, and even if Mr and Mrs Tabata were to bring such an application, it won't assist them for the following simple reasons:-

1. It does not affect the rights of existing creditors;
2. It only operates forward in time, and not backwards in time.

Any reader of this article who is married in community of property, and could one day be faced with claims based on suretyships, would be well advised therefore to consider the bringing of such an application i.e. an application for permission to register a postnuptial contract. Furthermore, if there is immovable property which is jointly owned, it is possible for the entire property to be thereafter transferred into the name of the spouse who has not furnished a personal suretyship, and who is therefore not likely to be in the "firing line". There are limitations and restrictions on this principle but, if two years pass after such a transfer has taken place, it can as a general rule be stated that the property is safe from the creditors of the transferring spouse.

Let's turn back to Mr and Mrs Tabata. The property is worth – say – R1 million and the bond is R500 000,00 i.e. there is equity in the property of R500 000,00. The bank's claim is R1 million and because the company has been liquidated, Mr Tabata is unemployed.

There are not many options, and Mr and Mrs Tabata have their backs to the wall. They might wish to consider the following:-

1. A voluntary sale of the property, so that it achieves its maximum market value, the payment of the nett proceeds to the bank, and then an offer of settlement to pay the balance.
2. If Mr Tabata has a family member or friend who could assist him with a loan, the bank may well accept a reasonable amount in settlement of its claims, and leave the property alone.
3. As an aside, if Mr Tabata were to borrow money from a family member or friend, care has to be taken that the person making the loan does not fall foul of the National Credit Act i.e. the lender would have to register under that Act. But that is a separate topic of discussion.
4. Mr Tabata could arrange for a so called "friendly sequestration" or surrender his estate himself. In either of these eventualities, he would be declared insolvent, not be able to be a director of a company, and would be prohibited from incurring credit. He would however be able to be employed, and generate income. Any "surplus" assets would however have to be dealt with as part of Mr Tabata's insolvent estate i.e. they would be surrendered to his trustee, and sold.

What will the effect be on Mrs Tabata? As a spouse married in community of property, and unless she can prove that she has separate title to any assets, “her” assets are part of the joint estate and will also be sold by the trustee.

The position would be entirely different if Mr and Mrs Tabata were married out of community of property, assuming of course that Mrs Tabata has not also furnished a suretyship. Then, she has independent title to any assets which are in her name, and although there are procedures to be followed, the sequestration of Mr Tabata will not result in her losing her own assets and/or investments.

Are there any lessons to be learned, in these difficult times?

The first would be if either party have business careers and could one day potentially face sequestration, to either marry out of community of property or to register a postnuptial contract at the earliest possible opportunity.

Secondly, and assuming that there is immovable property, this should be put in the name of the spouse who will not be in the “firing line”. By way of example, if Mr Tabata is a businessman and Mrs Tabata is a teacher, then the property should be in her name. Thereby, the matrimonial home can be secured.

Thirdly and lastly, and when faced with banks demanding security, the spouse in the position of Mrs Tabata should, if at all possible, not furnish a suretyship and not furnish security to the bank or any other creditor.

We deal with situations such as a foregoing on a daily basis, and are well equipped to advise on the implications of liquidations, sequestrations, as well as the registering of prenuptial and postnuptial contracts.

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