



## The impact of Divorce on Family Owned Businesses

André Diederichs: interview with Madeleine Britz, Senior Legal Advisor Old Mutual Life Assurance Company (SA) Limited

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FAMILY BUSINESS CHALLENGES

***According to Stand for Your Marriage the lowest divorce rate in the world is in India with 1.1%. The highest divorce rate in the world is in Sweden with 54.9%. The divorce rate in South Africa for all marriage now stands at 50% while second and third marriages face a divorce rate of approximately 60%***

Says Madeleine Britz: "Given the percentage marriages that end in divorce, the odds are pretty good that a divorce will affect a significant amount of family owned businesses.

### **Different marital regimes:**

- Marriage in community of property is the automatic marital regime in South Africa (i.e. no written contract is necessary to marry in this way).
- Marriages out of community of property with an ante-nuptial contract.
- Marriages out of community of property with the accrual system.

Continues Britz: "While there is no magic bullet to avoid all problems that can come with divorce, there are some precautions that can be taken to avoid common problems.

1. **Pre-nuptial agreements.** The most effective way of dealing with the negative consequences of a divorce is to deal with the issue before it happens. Having a strong ante-nuptial agreement setting out the rules and regulations of the marriage signed by the business owner and spouse before marriage is the best protection later on.
2. **Inter Vivos Trust:** The shares/ interest are held by a trust not in the personal name of the business owner. The trust deed must contain a clause providing that all benefits accruing to a beneficiary in terms of the trust deed shall for all purposes be excluded from any community of property or community of profit and loss.
3. **Buy-and-Sell Agreements /Shareholder's Agreements:** A buy-and-sell agreement/Shareholder's Agreement protects a business and its continuance from the sale, transfer or

ownership of its shares to anyone outside or no longer involved in the business. It gives the shareholders /business owners the rights to buy back the shares of a shareholder, withdrawing spouse, partner or heir at a predetermined price. In the unfortunate event of divorce it can protect a business from a division of assets. A buy-and-sell is triggered by specified circumstances, like death, disability or retirement.

Concludes Britz: "Family business owners should consider the impact of a divorce involving one of the business owners when they do their business succession planning. Without a plan, the entire business could collapse if and when the business owners can no longer effectively work together or manage the business."

**Considering the best options/solutions when it comes to divorce, will help protect the business and ensure the needs and concerns of the owners are reflected in all legal documents.**

