

Trusts & Estates Law



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South Africa

A new constitutional view of
cross-border marriages



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A new constitutional view of cross-border marriages

For many years, South African private international law has applied the common law rule of *lex domicilli matrimonii* to determine the proprietary consequences of marriages between parties across the world. Under this rule, the proprietary consequences of a marriage were determined exclusively by the law of husband's domicile at the time of the marriage.

In a landmark ruling, delivered on 23 June, in *N.P v Minister of Justice and Constitutional Development and Others* (2468/2024) [2026] ZAWCHC 343 (23 June 2026), the Western Cape High Court not only declared the rule inconsistent with the Constitution of South Africa but also found that the common law rule lacked a rational basis; unfairly discriminated against women and same-sex couples on the basis of sex, gender and sexual orientation; and ultimately ruled that the common law rule must be reconsidered.

The facts

The applicant was born in Bogota Colombia and educated and domiciled in England. She married her husband (a South African national, living in Zimbabwe with ties to multiple jurisdictions) in England in the 1990s. After some years of travel for work, the couple eventually settled in South Africa, where they lived together until 2023, when their marriage irretrievably broke down.

When the applicant instituted divorce proceedings, she was advised that the *lex domicilli matrimonii* rule would be applicable and that the proprietary consequences of the marriage, and in turn the divorce, would be governed by the domicile of her husband at the time when the marriage was concluded, which she believed was England.

The dispute took a turn when her husband defended the action and instead alleged that the proprietary consequences of the marriage were actually governed by the laws of Zimbabwe, which he considered to be his domicile at the time of the marriage. This distinction was significant because the applicable matrimonial property regime of Zimbabwe materially affected the division of assets by favouring the husband.



Rather than asking the court to determine which country's laws were applicable to their marriage, the applicant instead challenged the constitutionality of the common law rule on the basis that the application of the rule would unjustifiably discriminate against her based on sex and gender.

She argued that the rule was rooted in a patriarchal and archaic assumption that recognised the husband's domicile as the decisive factor, thereby treating husbands and wives unequally by affording husbands a procedural, symbolic, and substantive advantage over their wives.

She further contended that the rule discriminated against spouses in same-sex marriages because it assumed that every marriage has a husband whose domicile determines the applicable law and in so doing violated section 9 of the Constitution.

The court's findings

In a landmark ruling penned by TJ Golden AJ, the court ruled in favour of the applicant. It held that the *lex domicilii matrimonii* rule was inconsistent with the Constitution of because it unfairly discriminated on the grounds of gender and sexual orientation, two grounds listed in section 9(3).

The court found that the rule reflected an outdated conception of marriage in which the husband occupied the dominant legal position and that a wife was subordinate to her husband, a rule which perpetuated gender inequality and is inconsistent with the contemporary role of a wife in a marriage.

It found further that, by making the husband's domicile the sole determining factor, the rule was incapable of recognising or operating fairly in marriages that do not conform to the traditional husband-wife model. Accordingly, the court found that the rule was inconsistent with the Constitution and, accordingly, invalid.

However, rather than declaring the rule invalid without replacement, the court exercised the Constitutional powers afforded to it under section 8(3) and section 172 of the Constitution to develop the common law. It concluded that South African private international law should adopt a gender-neutral approach that determines the applicable law according to the jurisdiction with the **closest connection** to the marriage and accordingly developed it such that the proprietary consequences of a marriage would be determined as follows:

The parties will agree before or at the time of the marriage, the country whose legal system shall apply, save that there should be evidence of a substantial link or connection between the choice of the applicable law and one or both of the spouse.

Failing that, the law of the country of the common domicile of the spouses shall apply;

or

the law of the country of common habitual residence of the spouses at the time of their marriage.

The court held that this flexible approach not only reflects modern Constitutional values but allows courts to consider all relevant circumstances, including the spouses' shared residence, nationality, intentions and other connecting factors, instead of relying exclusively on the domicile of one spouse.





Significance of the judgment

The judgment is significant for two main reasons. Firstly, it marks a significant departure from the outdated common law rule by replacing it with a gender-neutral and constitutional rule which paves a fairer future for women and same-sex marriages.

Secondly, it has a significant impact, not only from a divorce perspective, but from a deceased estate perspective too. Going forward, the proprietary consequences of a union will no longer solely be determined by the domicile of the husband, at the time of the union. Instead, practitioners, executors and the Master's office must now apply the court's gender-neutral hierarchy. This shift could significantly change the classification and distribution of assets; the existence of accrual claims; maintenance claims and the proprietary rights of surviving spouses in the deceased estate context.

In an increasingly globalised world where marriages between individuals with ties to numerous jurisdictions are becoming more common, the High Court's adoption of a flexible, connection-based approach ensures that the law remains responsive to the realities of modern relationships. The judgment, despite still being subject to approval by the Constitutional Court, represents more than the demise of an outdated conflict-of-laws rule; it signals a Constitutional shift towards a more equitable and inclusive approach to cross-border marriages in South Africa.

While this approach has notable merits, it may also create ambiguity within the wider international law framework, with its practical effects likely to emerge only through future judicial application.

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