

Domicile - The Effect on Immovable Property Sales

By **Marius van Rensburg** (Partner)

15 October 2024

INTRODUCTION

When dealing with the sale and transfer of immovable property it is important to establish how the parties are married and which country's laws apply to the marriage as this has a direct impact on their contractual capacity.

Their marital regime determines whether they are able to contract alone (if married in accordance with South African law out of community of property having entered into an antenuptial contract) alternatively whether they can only contract together with their spouse (if married in accordance with South African law in community of property) or alternatively whether they need to be assisted by their spouse (if married in accordance with the laws of a foreign country).

DOMICILE

In order to answer the above question it is important to establish the "domicile" of the husband inasmuch as it is the domicile of the husband at the time that the marriage was concluded that determines which country's laws apply to the marriage between the parties.

In other words, the laws of the country in which the husband was domiciled at the time the marriage was concluded will apply to that marriage. The domicile of the wife is not taken into account as in our law the wife follows the domicile of the husband.

Whilst it is possible for a husband to acquire a new domicile, the domicile of the husband at the date of marriage will still be applicable.

Domicile may be defined as the country that the husband treats as his permanent home, or lives in and has a substantial connection with. The husband's permanent home is one to which he returns or intends to return. The determination of a domicile requires an examination of the facts and the husband's intention.

THE DOMICILE ACT NO 3 OF 1992

This act provides that every person over the age of 18

years and who has the ability to make a rational choice may acquire a domicile of choice (there are exceptions in the Act.)

The act further provides that a domicile of choice is acquired when two elements are present, the first being when he is lawfully present at a particular place and the second when he has the intention to settle there for an indefinite period. Domicile is determined by looking at the fact and intention on a "balance of probabilities."

EXAMPLE

Mr. H is a citizen of South Africa. He meets Mrs. W, an American citizen. Mr. H takes up a 6 month contract in London to gain experience in his chosen profession. Whilst in London they marry and receive a British marriage certificate. Inasmuch as Mr. H never intended London to be his permanent home, the law of South Africa will govern the marriage. In other words Mr. H's domicile remained South Africa. In this instance, as an antenuptial contract was not entered into prior to the marriage, they will be deemed to be married in community of property.

If however Mr. H's intention was never to return to South Africa, he would then have chosen London as his domicile and the laws of the United Kingdom would apply to the marriage.

CONCLUSION

Determining domicile can be a complex decision of law and fact. Legal advice should be sought when in doubt.



Marius van Rensburg
(Partner)