

Lex Domicilii Matrimonii : The Status Quo No More

By **Celeste Hornby** (Partner),
and **Khanyisile Thobane** (Candidate Attorney)

24 July 2026

INTRODUCTION

For decades, South African private international law determined the proprietary consequences of a marriage by reference to the husband's domicile at the time of marriage, through the common law rule known as *lex domicilii matrimonii*. Although once treated as a settled rule, it increasingly came into conflict with South Africa's constitutional commitment to equality, dignity and non-discrimination.

This article examines the court's declaration in *N.P v Minister of Justice and Constitutional Development and Others* (2468/2024) [2026] ZAWCHC 343 (23 June 2026), that the rule was unconstitutional and its adoption of a gender-neutral framework for determining the law governing spouses' property regime.

BRIEF BACKGROUND

The applicant sought an order declaring the common law rule of *lex domicilii matrimonii* unconstitutional and invalid. This long-standing rule provided that the proprietary consequences of a marriage, being the legal rules governing spouses' property, were determined by the husband's domicile at the time of the marriage. The applicant argued that the rule discriminated against women, failed to accommodate same-sex marriages and lacked any rational connection to a legitimate governmental purpose.

The applicant asserted that, although the Domicile Act of 1992 had abolished a wife's "domicile of dependence", the *lex domicilii matrimonii* rule had survived and continued to privilege the husband's domicile over the wife's. The court held that the rule violated section 9 of the Constitution, as it constituted unfair discrimination on the grounds of sex, gender and sexual orientation and agreed that the rule was founded on outdated, patriarchal assumptions of female dependency and subordination.

THE NEW LEGAL FRAMEWORK

Upon declaring the old rule invalid, the court developed the common law to introduce a gender-neutral, tiered

system for determining the proprietary consequences of a marriage.

The new rule follows this order of priority:

1. **Party Agreement:** Spouses may designate the applicable legal system by agreement, provided there is a substantial link or connection between that law and at least one spouse.
2. **Common Domicile:** In the absence of an agreement, the law of the spouses' common domicile at the time of marriage applies.
3. **Common Habitual Residence:** Failing a common domicile, the law of the country of their common habitual residence applies.
4. **Common Nationality:** Failing habitual residence, the law of their common nationality applies.
5. **Closest Connection:** Failing all preceding factors, the law of the country to which the spouses are jointly and most closely connected applies.

SIGNIFICANCE AND EFFECT OF THE DECISION

The judgment removes one of the last remaining common law rules that formally prioritised the legal status of a husband over that of a wife, thereby promoting substantive equality. The previous rule was unworkable in the context of same-sex unions because it depended on identifying a "husband". The new tiered framework is gender-neutral and applies to all marriages.

While the court ordered that the development of the common law apply retrospectively to all existing marriages, it established four specific exceptions, or "carve-outs", to ensure that the remedy remains just and equitable and to prevent administrative uncertainty.

The exceptions to retrospective application are as follows:

- **Antenuptial Contracts (Two-Year Grace Period):** Where spouses expressly chose a law to govern their proprietary regime in an antenuptial contract, the new rule will not apply for two years from the date of the court order. This period allows parties to amend their contracts to comply with the new

requirement that there be a substantial link or connection between the spouses and their chosen legal system.

- **Substantial Prejudice:** Where spouses did not choose a law to govern their marriage, the new rule applies immediately, unless it can be shown that its application would result in substantial prejudice. This exception is intended for circumstances in which parties were aware of the old rule, regulated their affairs accordingly, and would suffer a detrimental legal outcome if the new tiered framework were applied.
- **Completed Steps and Transactions:** The ruling does not affect any positive steps, decisions, or transactions already taken or performed in accordance with the former “husband’s domicile” rule. This exception protects the validity of past actions and the interests of bona fide third parties who may have relied on the previous legal framework.
- **Previously Dissolved Marriages:** The development does not apply to marriages dissolved by death or divorce before the date of the order, being 23 June 2026. This exception ensures that estates already wound up or finalised are not reopened, thereby maintaining legal certainty in respect of completed processes.

The court emphasised that these limitations were necessary to balance the need for immediate and effective relief for the applicant and similarly situated persons against the potential for undesirable consequences and administrative difficulties.

CONCLUSION

The decision marks an important development in South African private international law and constitutional jurisprudence. By declaring the *lex domicilii matrimonii* rule unconstitutional, the court removed a discriminatory common law principle that privileged the husband’s domicile and failed to reflect the equal legal status of spouses in modern South African law.

The new gender-neutral framework provides a more principled and practical method for determining the proprietary consequences of marriage. It recognises party autonomy while ensuring that, where spouses have not made an election, the applicable law is determined by objective connecting factors such as common domicile, habitual residence, nationality and closest connection.



Celeste Hornby
(Partner)



Khanyisile Thobane
(Candidate Attorney)