

IMPORTANT DEVELOPMENT: DETERMINATION OF MARITAL REGIMES IN WESTERN CAPE

South Africa, and in particular the Western Cape, is a popular destination for foreign property investors. This has led to many issues surrounding the determination of the Marital Regime of foreign buyers and the risks to the Deeds Office, Conveyancers and the Banks related to particularly the registration of the transfer of properties and Mortgage Bonds to secure loans for the acquisition thereof. The risk especially lies with Conveyancers that has to pay the proceeds of such sales to the parties that owned the properties so transferred. It is therefore no surprise that a judgement that developed the law regarding the determination of these marital regimes has been handed down in the Western Cape Division of the High Court on 23 June 2026 by Judge AJ Golden, which of course now has to be followed in the Western Cape in such determinations.

Domicilium is defined as the place where you live and work with the intention of permanently returning to. In the past, the *Domicilium* of the husband was followed to determine the laws of the country that governed the Marital Regime of a husband and wife. It was not determined by the country where the marriage took place or where they lived together at the time. For explanation purposes, if this country was South Africa or a country with similar laws, such a marriage would be regarded as in community of property unless an Antenuptial Contract was correctly entered into before the date of the marriage and registered in the Deeds Office within 3 months thereof. If however it was a country like for instance the United Kingdom, the marriage would be regarded as out of community of property in terms of its laws. This was particularly important in the past when a Conveyancer could research the laws of the country that was alleged to be the *Domicilium* of the husband at the time of the marriage by for instance obtaining an opinion from its Embassy. The Conveyancer could then certify to the Deeds Office that a particular country's marital regime is regarded as in or out of community of property to determine the spousal assistance required by the Deeds Office to register a transfer or a Mortgage Bond.

This practice put both the Deeds Office and Conveyancers at risk as the consent of a spouse was not needed to register a bond or to transfer a property and make payment of the proceeds to such spouses where it seemed as if the marriage was governed by a marital regime that was regarded as out of community of property. In doing so the Deeds Office and Conveyancers rely on the information provided by the spouse wanting to transfer a property or register a Mortgage Bond. As a result, the Deeds Office issued a Circular in terms of which it regarded all foreign marriages as similar to a marriage in community of property in terms of South African law, thereby requiring spousal assistance or consent to register a Mortgage Bond or transfer a property, regardless of the actual laws of the country that determined the marital regime. However, this mechanism purely related to the procedures to be followed and consents to be obtained when registering bonds and transfer, although the contractual arrangement between husband and wife remained the same.

Following the *Domicilium* of the husband, can for obvious reasons be seen as discriminatory based on gender and therefore be regarded as an infringement of a human right contained in the Bill of Rights. As such, this is unconstitutional. That is exactly the reason for the judgement that has been handed down in the matter of *N.P. v Minister of Justice and Constitutional Development and others*. One would assume that the matter will not be left there and that the law will in due course be further developed or confirmed by the Constitutional Court in which case the entire country will be bound by such judgement.

It was aptly ordered that:

1. That the common law rule of *lex domicilii matrimonii* in terms of which the proprietary consequences of a marriage are determined by the husband's domicile at the time of the marriage, is inconsistent with the Constitution and invalid.
2. The common law is developed so that the law that determines the proprietary consequences of a marriage is determined as follows:
 - 2.1 the parties designate by agreement 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 spouses, failing which, the provisions below shall apply;
 - 2.2 in the absence of agreement between the spouses or where there is no substantial link or connection with the designated legal system, the law of the country of the common domicile of the spouses at the time of the marriage shall apply;
 - 2.3 in the absence of agreement or in the absence of a common domicile, the law of the country of common habitual residence of the spouses at the time of their marriage;
 - 2.4 in the absence of any of the previous factors, the law of the country of common nationality of the spouses at the time of the marriage;
 - 2.5 in the absence of any of the previous factors, the law of the country to which the spouses are jointly and most closely connected at the time of the marriage.
3. The development of the common law set out in paragraph (2) above, shall apply retrospectively to all existing marriages, save that:
 - 3.1 where the spouses have chosen a law to govern the proprietary consequences of their marriage in an antenuptial contract, the development shall not apply for 2 (two) years from the date of the order to enable the parties to amend their antenuptial contract to align with the new rule;
 - 3.2 where the spouses have not chosen a law to govern the proprietary consequences of their marriage, the development shall apply unless it will result in substantial prejudice;
 - 3.3 the development shall not affect any positive steps and/or decisions and/or transactions already taken or performed in accordance with the law of the husband's domicile as it relates to any existing marriage; and
 - 3.4 the development shall not apply to marriages that were dissolved by death or divorce prior to the date of this order.

This judgement will of course have an influence on the conclusion of contracts for the acquisition and disposal of property and the rules related to consents required by spouses for a valid agreement to come into existence as well as the signature of sureties and consents required by the Banks as lending requirements. As such, we will keep you advised of further developments.

<i>Going Beyond</i> The DVH group is a national group of attorney practices with offices situated in the Western Cape, Gauteng, and Kwa Zulu Natal. www.dvh.law.za or scan the QR to contact us.	
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