The Demise of the Lex Domicilii Matrimonii in South African Private International Law

by Sibusiso Mabaso, Lecturer in Private International Law, University of South Africa

For many years, South African private international law relied on the *lex domicilii matrimonii* as connecting factor to determine the legal system applicable to the proprietary consequences of a marriage. The *lex domicilii matrimonii* is interpreted as the husband's domicile at the time of entering into the marriage. This rule was firmly entrenched in South African law since it was formally adopted in ***Frankel's Estate v The Master & Another*** **1950(1) SA 220 (A)** and reinforced in subsequent decisions, the latest being ***LE v LA 2024*** **(5) SA 539 (GJ)**. Despite the courts' reliance on this rule, it became increasingly evident that it is not compatible with South Africa's Constitutional commitment to equality, dignity and non-discrimination **(Constitution of the Republic of South Africa, 1996)**. The Westen Cape High Court has finally addressed this discriminatory connecting factor in a judgment delivered on 24 June 2026 in ***Pringle v Minister of Justice and Constitutional Development and Others*** **(2468 / 2024) [2026] ZAWCHC 343**.

The challenge to the *lex domicilii matrimonii* emerged from a divorce dispute between *Nina Pringle* (applicant) and *Ian Norman Pringle* (third respondent), both of whom, at the time of their marriage, were domiciled outside South Africa. The marriage between the parties also took place outside South Africa, therefore South African private international law rules came into play in the case. The applicant challenged the application of the *lex domicilii matrimonii* rule on the basis that it automatically preferred the husband's domicile at the time of the marriage, which has the result that the rule discriminates against women and fails to accommodate same-sex marriages.

The applicant argued that the *lex domicilii matrimonii* is inconsistent with the Constitution in that it discriminated between spouses on the on grounds of sex, gender and sexual orientation. Historically, the rule developed from patriarchal

assumptions that the husband was the head of the family and that the wife's identity followed his (*para 60* of the case). Although such assumptions show the legacy of earlier legal systems, they have long since been rejected by South African constitutional jurisprudence. What is also interesting is that, while the wife's domicile of dependence was abolished through the **Domicile Act 3 of 1992**, the *lex domicilii matrimonii* continued to determine the proprietary consequences of marriage according to the husband's domicile. The applicant therefore challenged validity of the *lex domicilii matrimonii*, that this rule no longer serves any legitimate purpose within a constitutional democracy founded on equality and human dignity (*para 3.1 of the Pringle case*).

The court concurred with the applicant's argument. It held that the *lex domicilii matrimonii* rule unfairly discriminates based on sex, gender and sexual orientation, which renders the rule inconsistent with the Constitution (*paras 70 & 72*). The court acknowledged that there exists no rational justification to continue employing the husband's domicile when South African law has already abolished the idea that a married woman's legal identity is dependent upon her husband (*para 64*). The court further acknowledged that the rule failed to accommodate same-sex marriages (*para 67*). In arriving at this conclusion, the court recognised that the common law must evolve to reflect the values enshrined in the Constitution, specifically where private international law rules perpetuate historical inequalities.

The court's declaration that the rule is unconstitutional and invalid in terms of s 172(1)(a) of the Constitution, means that it had to pronounce a just and equitable replacement (s 172(1)(b)) that will determine the legal system applicable to the proprietary consequences of marriages with an international element. In this vein, the court used its powers to develop the common-law by drawing inspiration from international instruments such as the **1978 Hague Convention on the Law Applicable to Matrimonial Property Regimes and the European Union's Matrimonial Property Regulation 2016/1103** (*paras 85 – 93*). The court developed a new hierarchical applicable law framework. The new rule prioritises party autonomy by enabling spouses to choose the legal system that will govern the proprietary consequences of their marriage, this is subject to the chosen system having a substantial link to either or both spouses (*para 2.1. of the order*). Should there be no choice made by the spouses or their choice has no substantial connection to them, the applicable law is determined successively by the parties'

common domicile, common habitual residence, common nationality and finally, the legal system with the closest connection to the spouses (*para 2.5 of the order*). The court also considered the South African Law Reform Commission's (SALRC) ***Project 100E, Review of Aspects of Matrimonial Property Law,* Discussion Paper 160**, that considered the constitutionality of the *lex domicilii matrimonii* and any suitable replacement. The court departed from the SALRC Discussion Paper 160 in respect of the choice of the applicable law. The court pronounced that there should be a substantial connection between the parties and the designated legal system (*para 95*).

The new common-law rule developed by the court has retrospective effect; subject to certain exceptions. Firstly, where spouses concluded an antenuptial contract choosing the law governing the proprietary consequences of their marriage, the new rule will not apply for two years from the date of the order, allowing the parties time to amend their contract if necessary (*para 3.1 of the order*). Secondly, in the absence of a choice of law by the parties, the new rule shall not apply if it would lead to substantial prejudice (*para 3.2 of the order*). Thirdly, the order will not disturb vested rights or invalidate transactions and decisions already taken under the previous *lex domicilii matrimonii* rule (*para 3.3 of the order*). Finally, the new rule will not apply to marriages already dissolved by death or divorce before the date of the order (*para 3.4 of the order*).

The court's declaration of invalidity and replacement of the *lex domicilii matrimonii* rule marks a significant development in South African private international law. Unlike the previous rule, which by default preferred the husband's domicile, the new framework recognises the equal status of spouses while advancing legal certainty and flexibility in international marriages. The court's adoption of connecting factors internationally applied and recognised as best practice, advances harmonisation between South African private international law and other jurisdictions. It also promotes predictability for parties involved in cross-border relationships.

The judgement is widely welcomed, given the fact that many experts in the field have long criticised and called for the rule to be replaced. The courts did not wait for legislative intervention to align the South African law with internationally accepted principles. This indicates that the courts are prepared to ensure that common-law rules align with the constitution. Some aspects still need to be explored, namely the practical application of the concept of "closest connection"

and the extent to which courts will interpret the requirement of a "substantial connection" when spouses exercise their right to choose a legal system. Another aspect that would need to be explored is the court's order that the new common-law rule shall not apply to existing marriages if it would lead to substantial prejudice. The meaning of substantial prejudice will require interpretation from our courts. These issues will undoubtedly be addressed through future scholarship and litigation.

Nevertheless, *Pringle* marks the demise of the *lex domicilii matrimonii* which was rooted in outdated patriarchal assumptions and confirms that South African private international law must develop in line with the Constitution.