IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

REPORTABLE

Case No.: **2468/2024**

In the matter between:

N[…] P[…] (BORN O[…]) Applicant

and

MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT First Respondent

MINISTER OF HOME AFFAIRS Second Respondent

I[…] N[…] P[…] Third Respondent

Coram: TJ Golden, AJ

Date of Hearing: 7 November 2025

Date of Judgment: 23 June 2026

Summary: 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 declared

inconsistent with the Constitution and invalid; development of the common law to introduce a new rule to govern the proprietary consequences of the marriage; costs order against the State; no difference in principle between awarding costs in relation to an unconstitutional provision in a statute and an unconstitutional common law rule.

ORDER

1. It is declared 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; or

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; or

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; or

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.

4. The First and Second Respondents shall pay the Applicant's cost jointly and severally on Scale C.

JUDGMENT

GOLDEN, AJ:

Introduction

1. This is an application to declare unconstitutional and invalid the common law *lex domicilii matrimonii* rule ("the *domicilii matrimonii* rule" or "the Rule") where the proprietary consequences of a marriage are governed by

the law of the husband's domicile at the time of marriage.

2. Other than her own direct interest in the relief sought, the applicant also brings this application in the public interest in terms of Section 38(d) of the Constitution.

3. The applicant alleges that the Rule violates the right to equality in Section 9 of the Constitution and is inconsistent with the spirit, purport and objects of the Bill of Rights. She alleges that the Rule violates Section 9 in two ways:

   3.1 Contrary to Section 9(1) of the Constitution, it bears no rational connection to any legitimate government purpose. A wife's domicile of dependence was abolished by the Domicile Act, 3 of 1992, yet the *lex domicilii matrimonii* rule preserves the subordinate and unequal position of a woman in a relationship. The law is also irrational because it fails to regulate same-sex marriages.

   3.2 Contrary to Section 9(3), it constitutes unfair discrimination on the basis of sex, gender and sexual orientation. In heterosexual marriages, it privileges the husband's domicile over the wife's affording him a procedural, symbolic and substantive advantage. The Rule discriminates against same-sex partners

because, while providing a rule for the resolution of opposite-sex marriages, it fails to provide a rule for determining which law governs the proprietary consequences of same-sex marriages.

4. She has also brought a conditional, alternative challenge to the Matrimonial Property Act, 88 of 1984 ("the MPA") in the event that the Court determines it is necessary or appropriate to challenge the Act for failing to regulate the choice of law of the proprietary consequences of a marriage constitutionally.

5. She seeks no primary substantive relief against either of the Ministers and has cited them because they are jointly responsible for the laws that regulate marriage and divorce in South Africa, including the Marriage Act, 25 of 1961, the Civil Union Act, 17 of 2006, the Recognition of Customary Marriages Act, 120 of 1998, the Divorce Act, 70 of 1979 ("the Divorce Act"), and the MPA. She asserts that the application was necessary because of the failure of the Ministers to introduce amendments to replace the unconstitutional rule, and therefore seeks costs against them, jointly and severally, whether or not they oppose the application.

6. The Minister of Justice and Constitutional Development ("the Minister"), the first respondent, has filed an answering affidavit but has indicated her intention to abide the Court's decision in relation to the declaration of invalidity. The parameters of her involvement in the application are,

according to the affidavit filed on her behalf, the following:

6.1 She abides the order of the Court in respect of the claim for a declaration that the common law rule is invalid.

6.2 She seeks to place her views before the Court about the appropriateness of the applicant's proposed development of the common law and its wider consequences.

6.3 Her opposition to the application has been necessitated by (a) the applicant's conditional, alternative challenge to the MPA, and (b) the costs order sought against her.

7. I deal more fully with the Minister's position and involvement in the application later in the judgment.

8. The Minister of Home Affairs, the second respondent, has filed a notice of non-opposition.

9. The applicant's husband, the third respondent, has filed an answering affidavit limited to the factual averments which the applicant has made in relation to the marriage. He otherwise does not oppose the substantive relief sought in the application.

10. The applicant and the third respondent are currently engaged in divorce proceedings. In the divorce action, the third respondent seeks to rely on the Rule to contend that the proprietary consequences of the marriage are

governed by the laws of Zimbabwe, where he asserts he was domiciled at the time of the marriage. The applicant, however, contends that the proprietary consequences of their marriage are governed by the laws of England and Wales because: (a) both she and the third respondent were domiciled in England at the time of their marriage; and (b) the proposed reform of the common law she seeks in this application would have that effect.

11. She asserts that the determination of which law governs the proprietary consequences of the marriage will make a significant difference to the divorce.

12. The applicant has attached to her founding affidavit an expert legal opinion authored by Professor Elsabe Schoeman, Professor Marlene Wethmar-Lemmer and Elisa Rinaldie titled *Academic Opinion on the Private International Law Rule for Proprietary Consequences of Marriage: Lex Domicilii Matrimonii, being the Law of the Matrimonial Domicile at the Time of Marriage, referring to the Domicile of the Husband at the Time of the Marriage*, on the common law rule of the *lex domicilii matrimonii*, the constitutional challenges to the rule, global perspectives and the proposed development of the rule, in support of her application. [1]

[1] In *L.E v L.A* (1884/2018) [2024] ZAGPJHC 104; 2025 (5) SA 539 (GJ) (9 February 2024), the applicant also sought to place an expert legal opinion before the Court but which she sought to do irregularly in her replying affidavit which the Court in terms of Rule 36(9) disallowed not only in terms of the procedure followed but also for the reason that the proprietary consequences of the marriage, whether in terms of Turkish or Romanian law,

13. The applicant's marriage is testimony to the hidden complexities which marriages with international elements (often referred to as "international marriages")[2] have and where the spouses to the marriage are often not aware of the associated implications and legal consequences of the law which governs their marriage until they are confronted with divorce.

14. Unsurprisingly, the applicant was not aware of any private international law rule that determined the proprietary consequences of the marriage until the issue was raised by her attorney in early 2023. According to the third respondent, they had received legal advice previously in South Africa that Hong Kong was their domicile because they had been living permanently in Hong Kong at the time of their marriage.

15. The facts of this case also reveal the uncertainty associated with the regulation of international marriages in South Africa.

16. Judicial pronouncement on the common law *lex domicilii matrimonii* is, needless to state, long overdue.

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was for the court in the divorce action to determine. However, the Schoeman et al expert legal opinion does not advance an argument for the application of a specific foreign law, but the focus of the opinion is rather more broadly directed at the constitutionality of the *lex domicilii matrimonii* rule and the development of the rule. There is nothing in the expert legal opinion which is inconsistent with the relevant authorities and international law principles which are referred to in the judgment. As a matter of general legal principle, expert opinions are required to be of assistance to the Court although a Court is not bound to adopt the reasoning and conclusions set out in the opinion. Notwithstanding this principle, the opinion was helpful to the Court.

[2] An international marriage or foreign marriage is commonly defined as a marriage where one or both spouses have different nationalities and/or citizenship.

The Applicant's Marriage and Divorce Proceedings

17. I summarise broadly only the most salient facts pertaining to the marriage. I do not make any findings in relation to the disputed allegations as they are for determination by the trial court who will determine the divorce action with the benefit of oral evidence.

18. The applicant was born in Bogota, Colombia. She was educated in England from the age of 11 and as an adult had established her home in England. At the time of her marriage to the third respondent, she considered herself domiciled in England.

19. The third respondent was born in South Africa and relocated to Zimbabwe in 1970. He has been a Zimbabwean citizen since 1981.

20. According to the applicant, although she and the third respondent were temporarily living in Hong Kong at the time of their marriage, they were domiciled in England at the time and always intended to return to the UK. According to the third respondent the applicant was already in Hong Kong in 1996 and had a job there. He denies that his secondment to Hong Kong was temporary as it was an open-ended contract. He still considered Zimbabwe to be his home, and at the time, he had no intention of returning to the UK and sold his house in the UK when he moved to Hong Kong in 1995.

21. The applicant alleges that both she and the third respondent were British citizens at the time of their marriage.

22. The third respondent's UK citizenship was approved two days prior to their marriage. He entered the United Kingdom in 1992 on a Zimbabwean passport and secured a five-year ancestry visa under the British Nationality Act, 1981. He had subsequently obtained British citizenship by way of naturalisation after his marriage to the applicant. His UK citizenship was approved in 1997 when he became a dual citizen of Zimbabwe and the UK. He denies that he was domiciled in the UK at the time of the marriage.

23. The applicant alleges that the third respondent's career was UK based at the time of their engagement. The third respondent denies this.

24. The applicant returned to the UK in April 1998 and was pregnant with their only child, whom they wanted to be born in the UK. After their son's birth, she returned to Hong Kong at the end of July 1998. They enrolled their son at a school in England shortly after he was born as, according to the applicant, they always intended to return to England as soon as the third respondent's tenure in Hong Kong ended. The third respondent denies that it was a joint decision that their son be enrolled in a school in the UK and points out that the school where the applicant had

enrolled their son was a boarding school for boys aged 13 to 18 for secondary education, and was no way indicative of where they intended to reside after their son's birth.

25. They returned to the UK toward the end of 1998 where they bought property close to where the third respondent worked at the time.

26. They moved to South Africa in June 2000 when the third respondent worked for BP Southern Africa. The applicant alleges that the third respondent had secured temporary work permits for South Africa. According to the third respondent, they required a temporary residence permit which was essential for him to work for BP in South Africa, and that the temporary residence permit had no bearing on his domicile at the time. They sold their property in the UK in December 2000 because South Africa was intended to be their permanent home, and they had bought property in Cape Town.

27. The third respondent was unexpectedly transferred back to the UK in August 2001 on a three-year contract. When this occurred, they sold their home in Rondebosch and bought land in Cape Town to build their dream permanent home in South Africa, which home was developed and completed in 2004. They rented a home from 2001 to 2004 while he was stationed in the UK as, according to the third respondent, they had no intention of remaining in the UK post-retirement.

28. The third respondent retired in 2004 and moved back to South Africa. During their time in South Africa, they bought and sold several properties over the years, including the house where he currently resides.

29. They purchased property jointly in Portugal in 2019, where the applicant currently resides.

30. The third respondent accepts that previous legal advice which they had received that their domicile at the time of the marriage was Hong Kong was incorrect. When he obtained further legal advice, it became clear to him at the time of his marriage, that Zimbabwe, then considered to be his home and the place where he was most closely connected, was his domicile. At the time, he felt that he would ultimately return to Zimbabwe.

31. The marriage had subsequently irretrievably broken down, and the applicant instituted a divorce action in this Court on 19 April 2023.

32. When the applicant instituted the divorce action, she was advised that in terms of the *lex domicilii matrimonii* rule, the proprietary consequences of their marriage were governed by the law where the third respondent was domiciled at the time of the marriage, which she believed was the UK. According to her, she was also domiciled in the UK at the time of the marriage. Thus, the proprietary relief that she seeks in the divorce is therefore based on the laws of England and Wales.

33. The third respondent has defended the divorce action where he contends that due to the Rule, the patrimonial consequences of the marriage are determined by the laws of Zimbabwe, as he contends that he was domiciled in Zimbabwe at the time of the marriage.

34. Whilst the applicant alleges that the third respondent seeks to rely on the laws of Zimbabwe which have provisions that favour him versus the laws of England and Wales, she does not ask the Court to make any finding regarding the law that is applicable to the proprietary consequences of the marriage, correctly so, as it is an issue pending before the Court that will determine the divorce action. But on the current South African law, the proprietary consequences of their marriage would be governed by Zimbabwean law because that would have been the third respondent's domicile. She asserts that whatever the practical outcome of her case, it would discriminate against her for the proprietary consequences of their marriage will be determined by the application of an outdated, gender discriminatory rule.

35. Although it is not for this Court to engage the merits of the applicant's case, the international elements which underpin the marriage only but confirms that the time has come for this Court to pronounce on the validity of the rule which has been the prevailing legal position for at least three decades.

36. It is desirable that there is legal certainty about the applicable marital

property regime during the marriage, and for which a choice must be made either before the marriage or at the start of the marriage.

The *Lex Domicilii Matrimonii* Common Law Rule

37. Although a South African court can grant a divorce in respect of a marriage which is not governed by South African law if one or both spouses are domiciled or ordinarily resident in the area of the court's jurisdiction at the time when summons is issued, different rules apply in determining the proprietary consequences of non-South African marriages.

38. Section 7(9) of the Divorce Act provides that:

> '*When a court grants a decree of divorce in respect of a marriage, the patrimonial consequences of which are according to the rules of the South African private international law governed by the law of a foreign state, the court shall have the same power as a competent court of the foreign state concerned would have had at that time to order that assets be transferred from one spouse to the other spouse.*'

39. Under the common law in South Africa, the proprietary consequences of a marriage are determined according to private international law, by the husband's domicile at the time of the marriage known as the *lex domicilii*

matrimonii rule.[3] The Rule applies immediately when the marriage is concluded. Once the matrimonial domicile is adopted, it cannot be changed during the subsistence of the marriage.[4]

40. The Rule is inflexible and provides for no exceptional circumstances that may be considered in its application.[5]

41. The Rule was formally adopted in *Frankel's Estate* in 1950.[6] The Appellate Division (as it then was), had justified the Rule as the wife had always assumed the domicile of her husband upon marriage. The Rule was confirmed by the AD in *Sperling*[7].

42. The Domicile Act 3 of 1992 ('the Domicile Act') which has abolished the wife's dependent domicile and gives her the right to acquire a separate domicile independent of her spouse, has not disturbed this rule.[8] The *South African Law Commission Project 60, Domicile Report, March 1990* ("SALC Report on Domicile") recognised that although the MPA, which

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3 *Sperling v Sperling* 1975 (3) SA 707 (A) at 716F-H.
4 *L.E v L.A* 2024 (5) SA 539 (GJ) at para [42] and the authorities cited thereunder.
5 CF Forsyth, *Private International Law (The Modern Roman Dutch Law Including The Jurisdiction of the High Court)* 5th Edition at p297
6 *Frankel's Estate & Another v The Master & Another* 1950 (1) SA 220 (A).
7 *Sperling v Sperling* 1975 (3) SA 707 (A) at 716F-G.
8 See *Esterhuizen v Esterhuizen* where the Court held that the MPA was intended to deal with local marriages concluded in circumstances where the domicile of the husband was in South Africa; C.F Forsyth, *Private International Law (The Modern Roman-Dutch Law Including The Jurisdiction Of The High Courts)* 5th Edition, p 295, FN 115 and p296; *L.E v L.A* supra at paras [44] and [45]; SALRC Report of the South African Law Commission on Project 60 (Domicile) (March 1990) at S.6.7; see also E Kahn, Appendix on the 'Conflict of Laws' to MM Corbett, G Hofmeyr and E Kahn *The Law of Succession in South Africa* 2nd Ed (Khan (*Succession*)) at 613.

has as its object the granting of equal status to husband and wife, has abolished the husband's marital power, the law of domicile remains unchanged in section 11 of the Act.[9]

43. The Rule was confirmed more recently in *L.E v L.A*, albeit reluctantly, by Bezuidenhout AJ in 2024 where an order was sought for the immediate division of the joint estate in terms of section 20 of the MPA.[10] Here the parties were married in Romania. The husband opposed the application and asserted that the parties' proprietary rights were governed by either Turkish or Romanian law on the basis that he and his wife were domiciled either in Turkey or Romania at the time of the marriage.

44. One can no longer assume that prospective spouses who wish to conclude a marriage share a domicile, residence or nationality. The international experience is that more persons of different countries and nationalities marry and often move away from their place of birth or country of citizenship.

45. As the author, *Forsyth,* has recognised, it is a commonplace social fact of modern life that husbands and wives frequently have permanent homes separate from each other and that children increasingly live apart from

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9 *South African Law Commission Project 60, Domicile Report, March 1990* at para *2.32, p15*

10 (1884/2018) [2024] ZAGPJHC 104; 2024 (5) SA 539 (GJ) (9 February 2024) at para [40].

their parents. In such circumstances, assigning to wives the domiciles of their husbands (and to children the domiciles of their father) may lead to excessive artificiality and assigning to those persons domiciles hardly in accord with their factual

positions. It was therefore unsurprising, that the Domicile Act has abolished the domicile of dependence.[11]

46. As Lord Denning in the English Court of Appeals held in *In Re P. (GE) (An Infant)*[12]*:*

> '*The tests of domicile are far too unsatisfactory. In order to find out a person's domicile you have to apply a lot of archaic rules. They ought to have been done away with a long time ago but they still survive, particularly the rule that the wife takes the domicile of her husband and the rule that a child takes the domicile of its father.*'[13]

The Constitutional Validity of the *Lex Domicilii Matrimonii* Rule

47. As counsel for the applicant contended, the *lex domicilii matrimonii* rule is not simply a matter of procedure. The substantive content of the Rule provides that the proprietary consequences of a marriage is determined by the husband's domicile.

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[11] Forsyth, p 160.
[12] [1965] Ch 568 (CA) at 583
[13] Forsyth, p 160, FN 170; E Kahn, "*The South African Law of Domicile of Natural Persons, Cape Town*", Juta & Co 1972 (also published in 1971 *Acta Juridica* 1) at 72-3.

48. However, dependent domicile was abolished by Section 1 of the Domicile Act but the *lex domicilii matrimonii* rule survived this amendment and remains in force.

49. The applicant contends that the Rule is discriminatory and violates section 9 of the Constitution.

50. As the Constitutional Court held in *Prinsloo v Van der Linde and Another*, the right to equality requires that all laws that distinguish between people have a "*rational relationship between the differentiation in question and the governmental purpose which is proffered to validate it. In the absence of some rational relationship, the differentiation would infringe section 8.*"[14]

51. In *Hugo*[15], Goldstone J held that:

'*At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups*.'[16]

52. The right to equality is enshrined in section 9 of the Constitution.

53. Section 9 provides that:

(1) Everyone is equal before the law and has the right to equal protection

[14] [1997] ZACC 5; 1997 (3) SA 1012 (CC) at para [26].
[15] *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC) (18 April 1997)
[16] *Ibid* at para [41]

and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

54. Section 9(2) envisages substantive equality.[17]

55. Differentiation lies at the heart of equality jurisprudence and the section 9 rights.[18]

56. I must determine as part of my analysis whether the *lex domicilii matrimonii* rule differentiates between people or categories of people, and if so, whether the differentiation serves a legitimate government purpose. If it fails this test, it violates the right to equality in section 9(1) of the

[17] *Ibid* para [48]; *Jordaan and Others v Minister of Home Affairs and Another* (CCT 296/24) 2025 (6) SA 323 (CC) at para [30]
[18] *Prinsloo* supra at para [23], although Prinsloo dealt with the equality clause in section 8 of the Interim Constitution.

Constitution.[19] Where the discrimination is on a listed ground in section 9(3), it is presumed that the discrimination is unfair unless it is established that the discrimination is fair.[20]

57. The Rule clearly differentiates between men and women as spouses in a marriage. It differentiates on the basis of sex and gender, two listed grounds in section 9(3) of the Constitution.

58. My analysis of the constitutionality of the *lex domicilii matrimonii* rule would not be complete without acknowledging the underlying assumptions and stereotypes which has underpinned the Rule.

59. The Constitutional Court in *Jordaan* has acknowledged that gender discrimination and patriarchy is well-established in our society and worldwide.[21] Theron J recognised that the steadfast progression of women's rights in South Africa has allowed for significant advancement of gender equality and the self determination of women, however there are still many practices and laws that continue to perpetuate harmful stereotypes regarding the role and autonomy of women.[22]

60. The Rule is predicated on the outdated assumption that the wife cannot acquire, or is not capable of acquiring, a domicile separate to that of her

[19] *Hugo* supra at para [31]
[20] *Ibid* para [32]; Jordaan at para [30]
[21] *Jordaan* at paras [21] and [22].
[22] *Ibid* para [29]

husband. The notion of dependency and the wife adopting the dependent domicile of her husband is also completely inconsistent with the lived reality of contemporary marriages where wives are financially independent, where they share equally in the financial contribution to the marriage and household, and where they often are also the main breadwinner. The underlying assumption of dependency is patently outdated and demonstrably inconsistent with the contemporary role of a wife in a marriage. The Rule is also irrational for this reason.

61. The Rule is underpinned by the patriarchal norm that women are subordinate to their husbands. It perpetuates gender inequality and the subordinate stereotypical role of the wife in a marriage.

62. The Rule also operates in a time where the concept of the international marriage is becoming more commonplace, but where the Rule is inconsistent with contemporary international private law.

63. Notably, the Minister's affidavit expressly states that there "*are strong indications that the Rule is inconsistent with the Constitution and ought to be declared invalid*", recognised in the SALRC Discussion Paper 160, Project 100E: Review of Aspects of Matrimonial Law ("the Discussion Paper") upon which the Minister relies. The Discussion Paper acknowledges with reference to Issue Paper 41 that "*even in opposite sex marriages, the invariable choice of the husband's domicile as the applicable legal system discriminates on the bases of sex and gender by*

conferring a benefit – familiarity with the applicable legal rules, or at least, ease of ascertaining what the applicable matrimonial property system would be on husbands – but not wives. There appears to be no justifiable reason for the different treatment of husbands and wives other than the need to designate one legal system which will govern the proprietary consequences of the marriage."[23]

64. It is difficult to conceive of any underlying factors which would justify this differentiation between a husband and wife in a marriage. There can be no rational reason to prefer a husband's domicile over that of the wife. I assume that this must have been recognised when the wife's dependent domicile was abolished by Section 1 of the Domicile Act.

65. The Rule clearly constitutes an arbitrary differentiation which violates Section 9(1) of the Constitution.

66. The Rule also only regulates opposite-sex marriages. It does not recognise same-sex marriages or unions.

67. The Rule cannot determine which law applies in same-sex marriages. It will be very difficult, if not impossible, to determine in a same-sex marriage who the "husband" is for purposes of determining the domicile.[24]

68. The Rule therefore differentiates:

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[23] SALRC, Discussion Paper, para 3.5, p 31; Issue Paper 41 at 9.
[24] SALRC Discussion Paper; the Schoeman *et al* expert legal opinion at para 2.3.

68.1 On the grounds of sex and gender because it prefers the husband's domicile to that of the wife.

68.2 On the basis of sexual orientation because it does not provide a remedy for the choice of law for same-sex marriages.

69. Because the Rule differentiates on three listed grounds set out in Section 9(3), these differentiations constitute discrimination and are presumed to be unfair. Although none of the respondent parties have contended that the discrimination is fair, I am still required to satisfy myself that it constitutes unfair discrimination.[25]

70. In the absence of any justification contemplated in Section 36(1) of the Constitution, I accept and conclude that the Rule unfairly discriminates on the basis of sex, gender and sexual orientation.[26] It is difficult to conceive of any countervailing interests or rights that could legitimately justify the differentiation.

71. Notably, the SALRC Discussion Paper also acknowledges that the Rule cannot be applied to same-sex civil unions and unfairly discriminates

[25] *Jordaan* at para [42]; *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Another* [1998] ZACC 15 ('the Sodomy case"); 1999 (1) SA 6 (CC) at para 18.
[26] *Van der Merwe v Road Accident Fund* [2006] ZACC 4; 2006 (4) SA 230 (CC) at paras [62] and [63].

against same-sex civil union partners.[27]

72. The *lex domicilii matrimonii* rule directly violates the right to equality in section 9(1) of the Constitution and is therefore unconstitutional and invalid.

73. The Rule is also patently unconstitutional because it is inconsistent with the spirit, purport and objects of the Bill of Rights.

74. Given the finding that the Rule is unconstitutional and invalid, I do not deem it necessary to deal with the applicant's conditional alternative challenge to the MPA.

The Just and Equitable Remedy and the Development of the Common Law

75. Given the finding that the *lex domicilii matrimonii* common law rule is unconstitutional and invalid under section 172(1)(a) of the Constitution, I am required in terms of section 172(1)(b) to remedy this unconstitutionality and may make any order that is just and equitable, including an order limiting the retrospective effect of the declaration of invalidity.[28] The question which arises, whether, having made such a declaration, the court should develop the common law as part of the just and equitable relief so as to remedy the constitutionally offensive Rule.[29]

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[27] SALRC Discussion Paper at para 3.4, pp30 and 31.
[28] Section 172 (1)(b)(i); *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*
(CCT10/99) [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) (2 December 1999) at para [24].

[29] [2005] ZACC 19; 2006 (1) SA 524 (CC) at para [120].

76. Section 172(1)(a) also applies to declarations that the common law is invalid.[30] Sachs J in *Minister of Home Affairs and Another v Fourie and Another*[31] held, in relation to a just and equitable remedy, that the challenges to the common law definition of marriage and challenge to the Marriage Act fell to be considered together to enable the court to develop a less attenuated remedy that was available to the SCA, and that the challenge now meant that the question of whether and how to develop the common law need no longer be answered narrowly as an independent and abstract matter separately from how to respond to the defects of the Marriage Act. He held:

> '*[120] It is clear that, just as the Marriage Act denies equal protection and subjects same-sex couples to unfair discrimination by excluding them from its ambit, so and to the same extent does the common-law definition of marriage fall short of constitutional requirements. It is necessary, therefore, to make a declaration to the effect that the common-law definition of marriage is inconsistent with the Constitution and invalid to the extent that it fails to provide to same-sex couples the status and benefits coupled with responsibilities which it accords to heterosexual couples. The question then arises whether, having made such declaration, the Court itself should develop the common law so as to remedy the consequences of the common-law's under-inclusive character.*'[32]

77. The Court in the *Sodomy* case where it dealt with the constitutional invalidity of a common law criminal offence, held that "*there is no valid reason why the constitutional principles underlying the above approach*

[30] *Ibid* at paras [118] – [120].
[31] [2005] ZACC 19; 2006 (1) SA 524 (CC).
[32] *Ibid*, at para [120].

should not, suitably adapted, also apply to the instant case where, on a direct application of the Bill of Rights, we have found the very core of the offence to be constitutionally invalid."[33]

78. Where the common law deviates from the spirit, purport and objects of the Bill of Rights, the Courts have an obligation to develop the common law by removing the deviation.[34]

79. Thus, if a common law provision is inconsistent with the Constitution, and when appropriately challenged, it will be declared invalid and struck down.[35]

80. The Constitution provides for the development of the common law in the following circumstances:

80.1 In terms of Section 8(3)(a), when applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court, in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right and may develop rules of the common law to limit the right, provided that the limitation is in accordance with Section 36(1).

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[33] *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* **1998 (12) BCLR 1517** (CC); **1999 (1) SA 6** (CC) at [69] ('the Sodomy case"); *Fourie* op cit at para [121].

[34] *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) at para [33].

[35] *Fourie* op cit at para [121]; The Courts have developed the common law in cases such as *K v Minister of Safety and Security* [2005] ZACC 8; 2005 (6) SA 419 (CC), *F v Minister of Safety and Security* [2011] ZACC 37; 2012 (1) SA 536 (CC); *Masiya v Director of Public Prosecutions, Pretoria and Another (Centre for Applied Legal Studies, Amici Curiae)* 2007 (5) SA 30 (CC) and *Women's Legal Centre Trust v President of the Republic of South Africa and Others* 2022(50 SA 323 (CC)

80.2 In terms of Section 39(2), when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

80.3 In terms of Section 173, the Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.[36]

81. The approach to the development of the common law has been set out by the Constitutional Court in *Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum Ltd and Another*:

> '*[38] Before a Court proceeds to develop the common-law, it must (a) determine exactly what the common-law position is; (b) then consider the underlying reasons for it; and (c) enquire whether the rule offends the spirit, purport and object of the Bill of Rights and thus requires development. Furthermore, it must (d) consider precisely how the common-law could be amended; and (e) take into account the wider consequences of the proposed change on that area of the law.*' [37]

82. The applicant and the Minister both accept that a declaration of invalidity is not sufficient and that it must be replaced to regulate the choice of law

[36] See the Constitutional's Court's approach to the development of the common law in *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) at paras [33] and [34].
[37] 2016 (1) SA 621 (CC) at para [38]; *MEC for Health and Social Development, Gauteng v DZ obo WZ* 2018 (1) SA 335 (CC) at paras [31] – [32].

although they disagree on the ambit of the new rule. The applicant asserts that the SALRC has already endorsed a five-step proposal that fairly regulates which law should apply, and that this Court can and should develop the common law and adopt this position, with minor variation.

83. On the question as to how the common law should be amended and formulated, the Minister proposes "*slight revisions*" and asserts that there are no substantive differences between the applicant's proposed wording and her proposal.

84. Support for the introduction of a new rule is found in two international instruments, namely, the Convention on the Law Applicable to Matrimonial Property Regimes (1978 Hague Convention) ("the Convention")[38] and the European Union's Council Regulation 2016/1103 ("the EU Regulation")[39].

85. I commence my analysis with consideration of the relevant provisions of the Convention.

86. The Convention permits spouses to decide which jurisdiction's laws will apply to their property. They may select the laws of any state of which one of the spouses is a national at the time of selection, the laws of any state in which one of the spouses has his/her habitual residence at the time of selection, or the law of the first state in which one of the spouses

[38] Convention on the Law Applicable to Matrimonial Property Regimes (1978 Hague Convention), The Hague Conference on Private International Law. https://www.hcch.net/en/instruments/conventions/full-text

[39] https://eur-lex.europa.eu/eli/reg/2016/1103/oj/eng. Accessed on 8 June 2026.

establishes a new habitual residence after the marriage.[40] If no such selection is made, the laws of the first state in which the couple had their habitual residence after marriage govern the property.[41]

87. Although South Africa is not a signatory to the Convention, this court is not precluded from having regard to its provisions or the provisions of the EU Regulation.

88. Section 39(1)(b) of the Constitution mandates courts to consider international law when interpreting the Bill of Rights.[42] Section 233 of the Constitution provides that when interpreting any legislation every court must prefer any reasonable interpretation which is consistent with international law.[43] This includes international conventions as a source of international law, even though it has not been ratified domestically. Having regard to international conventions and regulations would promote harmonisation, one of the recognised objectives of private international law, and will introduce legal certainty in a world of rapidly growing international marriages,

89. Article 3 of the Convention provides as follows:

Article 3

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[40] Article 2.
[41] *Ibid*, Article 3.
[42] There is an obligation to consider international law but courts are not obliged to apply it. See *S v Williams* 1995 (3) SA 632 (CC) at para [23] and *Jordaan* supra at para [64].
[43] See also *Mahlangu and Another v Minister of Labour and Others* (CCT306/19) [2020] ZACC 24; (2021) 42 ILJ 269 (CC); 2021 (2) SA 54 (CC) (19 November 2020) at para [41]

The matrimonial property regime is governed by the internal law designated by the spouses before marriage.

The spouses may designate only one of the following laws-

(1) the law of any State of which either spouse is a national at the time of designation;

(2) the law of the State in which either spouse has his habitual residence at the time of designation;

(3) the law of the first State where one of the spouses establishes a new habitual residence after marriage.

The law thus designated applies to the whole of their property.

Nonetheless, the spouses, whether or not they have designated a law under the previous paragraphs, may designate with respect to all or some of the immovables the law of the place where these immovables are situated. They may also provide that any immovables which may subsequently be acquired shall be governed by the law of the place where such immovables are situated.

Article 4

If the spouses, before marriage, have not designated the applicable law, their matrimonial property regime is governed by the internal law of the State in which both spouses establish their first habitual residence after marriage.

Nonetheless, in the following cases, the matrimonial property regime is governed by the internal law of the State of the common nationality of the spouses-

(1) where the declaration provided for in Article 5 has been made by the State and its application to the spouses is not excluded by the provisions of the second paragraph of that article;

(2) where that State is not a Party to the Convention and according to the rules of private international law of that State, its internal law is applicable, and the spouses establish their first habitual after marriage-

(a) in a State which has made the declaration provided for in Article 5, or

(b) in a State which is not a Party to the Convention and whose rules of private international law also provide for the application of the law

of their nationality; or

(c) where the spouses do not establish their first habitual residence after marriage in the same State.

If the spouses do not have their habitual residence in the same State, nor have a common nationality, their matrimonial property regime is governed by the internal law of the State with which, taking all circumstances into account, it is most closely connected.

90. The relevant provisions of the EU Regulation are Articles 22 and 26.

91. Article 22 of the EU Regulation 2016 provides as follows:

Article 22

Choice of the applicable law

(1) The spouses or future spouses may agree to designate, or to change, the law applicable to their matrimonial property regime, provided that that law is one of the following:

(a) the law of the State where the spouses or future spouses, or one of them, is habitually resident at the time the agreement is concluded; or

(b) the law of a State of nationality of either spouse or future spouse at the time the agreement is concluded.

(2) Unless the spouses agree otherwise, a change of the law applicable to the matrimonial property regime made during the marriage shall have prospective effect only.

(3) Any retroactive change of the applicable law under paragraph (2) shall not adversely affect the rights of third parties deriving from that law.

Article 26

Applicable law in the absence of choice by the parties

(1) In the absence of a choice-of-law agreement pursuant to Article 22, the law applicable to the matrimonial property regime shall be the law of the State:

(a) of the spouses' first common habitual residence after the conclusion

of the marriage; or, failing that

(b) of the spouses' common nationality at the time of the conclusion of the marriage; or, failing that

(c) with which the spouses jointly have the closest connection

at the time of the conclusion of the marriage, taking into account all the circumstances.

(2) If the spouses have more than one common nationality at the time of the conclusion of the marriage, only points (a) and (c) of paragraph (1) shall apply.

(3) By way of exception and upon application by either spouse, the judicial authority having jurisdiction to rule on matters of the matrimonial property regime may decide that the law of a State other than the State whose law is applicable pursuant to point (a) of paragraph (1) shall govern the matrimonial property regime if the applicant demonstrates that:

(a) the spouses had their last common habitual residence in that other State for a significantly longer period of time than in the State designated pursuant to point (a) of paragraph (1);

and

(b) both spouses had relied on the law of that other State in arranging or planning their property relations.

The law of that other State shall apply as from the conclusion of the marriage, unless one spouse disagrees. In the latter case, the law of that other State shall have effect as from the establishment of the last common habitual residence in that other State.

The application of the law of the other State shall not adversely affect the rights of third parties deriving from the law applicable pursuant to point (a) of paragraph (1).

This paragraph shall not apply when the spouses have concluded a matrimonial property agreement before the establishment of their last common habitual residence in that other State.

92. Both the Convention and the EU Regulation provide the spouses with a choice of law which would regulate the proprietary consequences of the marriage, but the choice is a limited one and confined to a connecting factor such as nationality or habitual residence.

93. In the absence of a choice of law by the spouses, both instruments provide for a tiered set of factors that will determine the applicable law which should govern the proprietary consequences of the marriage. But the most significant factor is that the governing regime in both instruments are gender neutral (refers to "spouses") and do not differentiate on the basis of sex, gender and sexual orientation.

94. The SALRC's Discussion Paper[44] proposes that the spouses in the first instance at any time before or at the time of the marriage, may agree that *any* legal system shall apply to the proprietary consequences of their marriage, irrespective of their domicile, nationality or habitual residence at the time of the marriage.[45] This is undesirable and also inconsistent with international law principles.

95. It is undesirable, in my view, to allow spouses to agree that *any* legal system may apply to the proprietary consequences of their marriage

[44] Albeit that it recommends an amendment of the Divorce Act
[45] SALRC Discussion Paper, para 3.34, p41

irrespective of their domicile, nationality or habitual residence. There must be a substantial connection between the parties and the designated legal system. This serves to provide certainty to both spouses as to what the law is, and the implications and consequences of the chosen or applicable legal system. This knowledge and awareness are facilitated by a governing law which is both familiar and accessible to both parties. A legal system entirely disconnected from the parties and/or their marriage would subvert this purpose mindful that the wife has traditionally adopted the subordinate role of the less powerful and more financially under-resourced spouse, and where the husband was likely to have made the choice of the applicable legal system or influenced this choice.

96. Thus, in the order that I shall make, the formulation of the new rule will make provision for the spouses to agree on the applicable legal system which will govern the proprietary consequences of their marriage provided there is a substantial link or close connection between the spouses and choice of legal system.

The Retrospective Application of the New Rule

97. It is settled law that the default position, in relation to declarations of legislative invalidity, is that the new law is retrospective in its operation.[46] A change to the common law is no different.[47] However, courts can in terms of section 172(1)(b)(i) make any order that is just and equitable

[46] *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC) at para 65
[47] Ibid para [65]

including an order limiting the retrospective effect of the declaration of invalidity. A departure from the default position is dependent on the facts of the case and the consequential effects of the introduction of the new law or, in the present case, the new rule.

98. An important consideration in the debate on retrospectivity is that an applicant must derive the full benefit of the new rule and should not be subjected to an ongoing constitutionally offensive law or rule. This manifestly engages the issue of a just and equitable remedy to which the applicant, and similarly placed persons, is entitled. Thus, an order regulating the consequences of retrospective invalidity should be carefully considered and any departure from the default position should be done only when it is necessary to do so.

99. The applicant and the Minister agree that there should be some limitation on retrospectivity but are not in agreement on the scope of the limitation. The Minister agrees that an unqualified retrospective order could have undesirable consequences.

100. The applicant proposes default retrospectivity with two "carve-outs":

100.1 If spouses have chosen a law in an antenuptial contract, but that choice is inconsistent with the development because there is no substantial link to that country. In those circumstances, the applicant proposes that the development will not take effect for two

years. This carve-out is necessary if the Court decides not to limit the spouses' choice of law.

100.2 If applying the development would cause substantial injustice, that will generally only be the case where the parties were aware of the rule, regulated their affairs accordingly, and the development would result in a different law applying. In those cases, either spouse could argue that the development should not apply to their situation.

101. Although the Minister asserts that she abides the order of the Court in respect of retrospectivity, she provides her views on the "*wider consequences of the proposed development of the common law and a possible alternative for the court's consideration*", according to her, to assist the Court in its determination. She is guided by SALRC's preliminary proposals on the retrospective application of the proposed rule (although in her answering affidavit she refers to the proposed statutory amendment considered by the SALRC). She asserts that what is required is an order of constitutional invalidity fashioned in such a way as to limit the retrospective effect so as to reduce administrative difficulties and to protect the position of *bona fide* third parties as best possible, on the one hand, while granting effective relief to the applicant and similarly situated persons, on the other.

102. The heads of argument filed on her behalf contends that there is no substantive opposition to the retrospective effect of the development of the common law contended for.[48]

103. The Minister submits, consonant with the SALRC's Discussion Paper, that the interests of justice may be served by an order directing that retrospectivity be provided for in the following manner:

103.1 The order will have no effect on the validity of any exercise of power, duty, function, procedure, process, provision or any other act performed in accordance with the law of the husband's domicile in respect of an existing marriage (this is similar to the position envisaged in the applicant's prayer 3.3).

103.2 The order will have no effect on marriages that were dissolved by death or divorce before or on the date of the order (as envisaged in the applicant's prayer 3.4).

103.3 Spouses in existing marriages are afforded two years from the date of the order to enter into an agreement or amend an existing

[48] The Minister's HOA, para 16.

antenuptial contract in respect of the single matrimonial property system which will apply.

103.4 The development will operate retrospectively in the case of same-sex marriages which were concluded before the date of the order, or where it can be shown that substantial injustice will result absent such retrospective application.

104. The applicant and the Minister agree that retrospectivity must be limited to protect the validity of steps which have already occurred and must not allow the reopening of estates that have already been wound up as a result of death or divorce.[49]

105. I have difficulty with the third and fourth aspects of the Minister's proposal.

106. The Minister proposes that spouses in existing marriages are afforded two years from the date of the order to enter into an agreement or amend an existing antenuptial contract in respect of the matrimonial property system which will apply. But this would mean that spouses in the applicant's position would continue to be governed by an unconstitutional common law where the third respondent's domicile would regulate the marriage for a period of two years.

107. The effect of this proposal would mean that the applicant, and similarly

[49] See *EB v ER and Others*; *KG v Minister of Home Affairs and Others* 2024 (2) SA 1 (CC). See *Women's Legal Centre Trust* where similar provisions were considered and applied to limit the effects of retrospectivity.

placed persons, would not have obtained effective relief that will regulate the divorce. The formulation and the effect of the proposal would not provide any practical assistance to the applicant in the determination of the proprietary consequences of her marriage given that, realistically, she and the third respondent are unlikely to agree on a matrimonial property regime. Whilst they may have had a harmonious relationship at some stage during their marriage, it would be unrealistic to expect them (and parties similarly placed) to resolve this issue, according to the Minister's proposal, when they are in the middle of divorce proceedings and in a position of conflict.

108. The second difficulty relates to the proposal that the development will operate retrospectively in the case of same-sex marriages which were concluded before the date of the order.

109. The Minister provides no explanation or rationale that the development should operate retrospectively in the case of same-sex marriages concluded before the date of the order, but why the development cannot, or should not, operate retrospectively in respect also of opposite-sex marriages. It is difficult to understand the cogency of the Minister's proposal.

110. She relies on Option 3 in the Discussion Paper which proposes that the new rule apply prospectively but that spouses in existing marriages be given a window period of two years within which they can opt into the

new rule by way of a formal written agreement, but that in the case of same-sex marriages, which were concluded before the operation of the adoption of the legislation, the new rules operate retrospectively.

111. I was unable to discern a rationale for this proposal in the Discussion Paper.

112. The Minister's proposal is also irreconcilable with her own position and that of the SALRC that the Rule is discriminatory in respect of husbands and wives and that it is unworkable in relation to same-sex marriages.

113. Her position is also irreconcilable with her own heads of argument which acknowledges that in order to address the shortcomings of the common law rule, it is necessary to remove sex or gender as a determinative factor.[50]

114. The effect of the Minister's proposal is that extant same-sex marriages without an antenuptial contract will be regulated by a constitutional law, while extant opposite-sex marriages will be governed by an unconstitutional law unless they can prove applying it will cause them substantial injustice. Same-sex spouses with an antenuptial contract governing choice of law will also be discriminated against relative to their opposite-sex counterparts in that they will be denied the two-year opportunity to amend their antenuptial contract that will be granted to

[50] The Minister's HOA, para 13

opposite-sex spouses.

115. It is difficult to conceive of a rationale that could legitimately differentiate between same-sex and opposite-sex marriages in relation to the retrospective application of the rule – a rule which is necessary to remedy an unconstitutional common law position.

116. The Minister's proposed order is patently irrational, seeks to perpetuate the discriminatory effects of the common law position and creates a new form of discrimination whereby same-sex marriages are treated differently to opposite-sex marriages with no justifiable basis for this differentiation.

117. Any proposed retrospectivity regime must apply equally to *all* marriages and must provide just and equitable relief to *all* spouses.

118. On the Minister's proposed order, the applicant, and similarly situated spouses, will be denied an immediate and effective remedy.

119. The Constitutional Court has pronounced on the grant of effective relief in *Gory v Kolver N.O. and Others*[51] and *Gumede (born Shange) v President of the Republic of South Africa and Others.*[52]

120. In *Gumede* the effect was to immediately change the proprietary regime of all existing monogamous customary marriages, and in respect of the

[51] [2006] ZACC 20; 2007 (4) SA 97 (CC).
[52] [2008] ZACC; 2009 (3) SA 152 (CC)

Women's Legal Centre Trust[53], the Constitutional Court provided for an interim regime which would allow spouses in Muslim marriages to approach a court in terms of Section 7(3) of the Divorce Act for an equitable redistribution of assets. The interim regime effectively altered the proprietary consequences to allow for equitable redistribution. The point to be made is that the effect of the orders granted was to provide immediate and effective protection to the applicants.

121. The applicant cannot be expected to demonstrate why she will suffer substantial injustice in the absence of retrospective application. In addressing substantive equality, the Constitutional Court has held that past unfair discrimination frequently has ongoing negative consequences, the continuation of which if not halted immediately when the initial causes thereof are eliminated, and unless remedied, may continue for a substantial time and even indefinitely. In the reasoning of the Constitutional Court, "*Like justice, equality delayed is equality denied*".[54]

122. Effective relief means that the applicant, and similarly situated spouses, must obtain the benefit of the change in the common law position. This will be reflected in the order that I propose to make.

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[53] *Women's Legal Centre Trust v President of the Republic of South Africa and Others* [2022] ZACC 23; 2022 (5) SA 323 (CC).

[54] *National Coalition for Gay and Lesbian Equality v Minister of Justice* [1999] ZACC 15; 1999(1) SA 6 (CC) at para 60; *Jordaan* supra at para [48].

Costs

123. The applicant seeks her costs against both Ministers jointly and severally, alternatively, only against the Minister of Justice. She relies on *Magnificent Mile Trading 30 (Pty) Limited v Charmaine Celliers N.O. and Others*,[55] *Gory* and *Fourie* in support of her argument that she is entitled to costs.

124. Her primary reason for seeking costs is that she had to bring this application because of the State's failure to replace the unconstitutional rule, notwithstanding that it was not a direct challenge to existing legislation.

125. Counsel for the applicant argued that courts cannot develop the common law proactively and can only do so in response to litigation brought before them but that it is open to the Executive to amend the common law rule through legislation, and they did not have to wait for the SALRC to propose amendments. He contended that although the Minister has not opposed the declaration of invalidity of the common law rule, she has opposed the applicant's remedy and which denies her an effective remedy.

126. The fact that the Minister has abided the order in relation to the retrospective application of the new rule does not detract from the effect of her proposal, which stands in contrast to that which is sought by the

[55] [2019] ZACC 36; 2020 (4) SA 375 (CC) at para [65].

applicant. I am of the view that the Minister has effectively opposed the applicant's remedy.

127. The Minister opposes the order for costs and asserts that each party should bear their own costs of the application. Her reasons for this is: (i) that she abided the relief sought by the applicant in relation to the declaration of invalidity, (ii) this is not a case of inaction on the part of the Minister as it is common cause that the SALRC was investigating the common law rule and made recommendations in this regard in the Discussion Paper published in June 2023. She asserts that the applicant has failed to demonstrate any constitutional delinquency on her part, and there is no reason that she should be directed to pay the applicant's costs.

128. Although *Gory* dealt with a challenge to legislation, the principles set out by van Heerden AJ as to why the State had to pay the successful applicants' costs, apply equally to a position where the common law is unconstitutional.

129. There is no persuasive countervailing argument that the State was not responsible for allowing this discriminatory common law rule to remain in place.

130. As a matter of legal principle, I am not precluded from granting a costs

order in relation to a declaration of invalidity of the common law. But the grant of costs remains within the discretion of the Court.

131. Counsel for the Minister submitted that there are no exceptional circumstances that justify a costs order against the Minister and argued that the facts of the matter do not justify the extension of the principles that apply to successful challenges to legislation, to challenges to the common law and that different considerations apply. But the Minister does not explain what these different considerations are, and why they should also not apply to challenges to the common law. She has not put up any argument - of any force - to support her proposition that different considerations ought to apply in relation to the common law and costs orders.

132. The Ministers cannot be shielded by the SALRC process in the discharge of their constitutional duties. Notably, neither of the Ministers have initiated amendments to either the Divorce Act or the MPA.

133. But perhaps the most compelling reason for the grant of a costs order, in my view, is the intransigence on the part of the State to permit the unconstitutional rule to remain in place for three decades, notwithstanding that:

(i) the wife's dependent domicile was abolished more than thirty years ago pursuant to an amendment to the Domicile Act 1992;

(ii) our courts have acknowledged in a number of judgments that the *lex domicilii matrimonii* rule is discriminatory[56],

(iii) the SALC in the Project 60 Report on Domicile (pursuant to which the Domicile Act was amended) acknowledged – 30 years ago – that the wife follows the husband's domicile is not in step with legislation that has been adopted in South Africa during the past years and that notwithstanding the MPA which has as it object the granting of equal status to husband and wife, the law relating to domicile however remains unchanged[57]; and

(iv) the SALRC's Discussion Paper has acknowledged that the rule is discriminatory.

134. It took this application for the common law rule to be struck and for the law to change.

135. My view on the issue of costs would not be complete without reference to the Convention on the Elimination of All Forms of Discrimination against Women, New York, 18 December 1975 (CEDAW), ratified by South Africa on 15 December 1995.

136. Confirming South Africa's international law obligations in relation to CEDAW, Rogers J in *KG* held that in assessing the constitutional standard of fairness in Section 9 of the Constitution are this country's international

[56] More recently in *L.E v L.A* supra
[57] SALC, Report on Domicile, para 2.31 p15

law obligations and that the international instruments by which South Africa is bound militate against accepting as a factor, a form of discrimination which continues in the main to prejudice women.[58]

137. The Convention requires States Parties to take "*all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on the basis of equality with men.*"[59]

138. The Convention provides that States Parties shall:

138.1 take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;[60]

138.2 take all appropriate measures: (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;[61]

138.3 accord to women equality with men before the law and that States

[58] *KG* supra at [136]
[59] Article 3
[60] Article 2(f)
[61] Article 5

Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile;[62]

138.4 take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and, in particular, shall ensure on a basis of equality of men and women.[63]

139. Notwithstanding the adoption of the Constitution in 1996, the ratification of CEDAW more than 30 years ago and the abolishment of the wife's dependent domicile in the Domicile Act 1992, there has been no change in the law. Although I respect that the SALRC's process is a rigorous one and often serves as a platform for the promulgation of new laws, it should not be used to shield the Ministers from their obligation to take positive steps to amend an unconstitutional law and to do so expeditiously.

140. The Constitutional Court in *Jordaan* awarded costs against the Minister of Home Affairs for the reason that, but for the constitutionally offensive provisions, the applicants would not have had to bring the litigation to vindicate their constitutional rights.[64] Notably, a costs order was awarded notwithstanding that the Minister of Home Affairs and the Minister of Justice (cited respectively as the first and second respondents) abided the

[62] Article 15(1) and (2)
[63] Article 16(1)
[64] *Jordaan* supra at para [84]

order of the Court.

141. In the circumstances, both Ministers are ordered to pay the applicant's costs, jointly and severally.

The Order

142. In the result, I make the following order:

1. It is declared 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; or

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; or

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; or

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.

4. The First and Second Respondents shall pay the Applicant's costs jointly and severally on Scale C.

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TJ GOLDEN

Acting Judge of the Western Cape High Court

23 June 2026

For the Applicant:	Adv M Bishop, instructed by Catto Neethling Wiid Inc
For the First Respondent:	Adv T Sarkas instructed by the State Attorney, Cape Town
For the Third Respondent:	Ms M Simpson of Mandy Simpson Attorneys