



fn inc

Attorneys Notaries Conveyancers

1st Floor, 2 Albury Park, Albury Road, Dunkeld West, 2196. Docex 11 Hyde Park. t +27 11 560 7100 f +27 11 759 7960. Stellenbosch Office: t +27 82 287 3173

FOREIGNERS AND FOREIGN ENTITIES

As South Africa is nowadays part of the global village, we are dealing more and more with parties and entities, who are married or established in foreign countries.

FOREIGN MARRIAGES

The Deeds Registry Act 47 of 1947 states how conveyancers should attend to foreign marriages. Section 17 states:

“Registration of immovable property in name of married persons

- (2) Every deed executed or attested by a registrar, or attested by a notary public and required to be registered in a deeds registry, and made by or on behalf of or in favour of any person, shall-
 - (d) where the marriage concerned is governed by the law of any other country, state that the marriage is governed by the law of that country.
- (6) A person married in terms of a marriage the legal consequences of which are governed by the law of any other country, shall be assisted by his or her spouse in executing any deed or other document required or permitted to be registered in any deeds registry or required or permitted to be produced in connection with any such deed or document, unless the assistance of the spouse is in terms of this Act or on other grounds deemed by the registrar to be unnecessary."

When is the legal consequence of a marriage governed by the laws of another country?

The appellate division has settled this issue in 1950 in FRANKEL'S ESTATE & ANOTHER v THE MASTER & ANOTHER (1950 (1) SA 220 (A)). The Court stated:

".., [According to] South African law, the property rights of spouses are governed, in the absence of express contract [notarial agreement], by the law of the country in which the husband is domiciled at the time of the marriage."

Thus the legal consequences will be governed by another country if the husband at the time of his marriage was not domiciled in South Africa.

How is the husband's domicilium established?

In order to answer this question, one must consider two aspects. The first is whether the husband was physically present in the foreign country. The second aspect is whether the husband intended to settle permanently in the foreign country. In other words, was his intention that the foreign country was his permanent home.

For example: Mr A, a citizen of Botswana, lived in South Africa since 1970 and saw South Africa as his permanent home. He decided to study in the United Kingdom with the intension to return to South Africa after his studies. During 2002 Mr A went to the United Kingdom and married Ms B. Ms B is a citizen of France but lived in the United Kingdom (her domicilium country). The Marriage ceremony took place in the Netherlands. The parties did not execute an antenuptual agreement.

The Husband is domicile in South Africa as he never intended the United Kingdom to be his domicilium.(permanent home). The legal consequences of the marriage will be governed by the country where the husband was domiciled at the time of his marriage, thus the South African law. In terms of South African law you are married in community of property if no antenuptual agreement has been executed. The parties are, therefore, married IN community of property.

BUT if Mr A Lived in Botswana and he saw Botswana as his permanent home, then the legal consequences of the marriage will be governed by the laws of Botswana and his wife would need to assist him in executing documents intended for use in the Deeds Office.

How will the parties be described in documents intended of registration in the Deeds Office?

A transferor or mortgagor (The power of attorney – special and general powers)

FULL NAMES

DATE OF BIRTH / SOUTH AFRICAN IDENTITY NUMBER:

Married, which marriage is governed by the laws of xxxxxx and assisted herein by his wife/husband xxxxxx insofar as needs be

A purchaser:

FULL NAMES

DATE OF BIRTH / SOUTH AFRICAN IDENTITY NUMBER:

Married, which marriage is governed by the laws of xxxxxx

Is it possible that the spouse does not assist when signing as seller or mortgagor?

The short answer to this question is YES.

The Deeds Registry Act, section 17(6) states: "unless the assistance of the spouse is in terms of this Act or on other grounds deemed by the registrar to be unnecessary".

This provides the Registrar with discretion to allow a party to execute documents without the assistance of the spouse. CRC 5/1994 paragraph 4.6 confirms this discretion.

The Johannesburg Deeds Office: It seems that the Registrar will on providing of full reasons/facts on an *ad hoc* basis exercise his discretion. The attorney must also provide a written indemnity to the deeds office wherein the attorney indemnifies the Deeds Office against civil claims if the spouse's assistance was required for the performance of any act in that Deeds Office.

The Pretoria Deeds Office: The Registrar will only exercise his discretion on providing full reasons/facts and an analysis (or legal opinion) of the marital system of the foreign country. This opinion must specifically refer to the fact that the spouse's marital powers are excluded and that the marital system is equivalent to being married out of community of property.

ALTHOUGH, the possibility exists to do away with the assistance as is required it should be reserved only in exceptional cases. The procedure is actively discouraged and can only be considered after having been approved by one of the conveyancers who will have due regard to the four points mentioned below and having received approval from all parties to the transaction. The reasons why this procedure should be discouraged are:

1. The Registrar takes a very conservative approach and will not easily exercise his discretion.
2. The application to the Registrar will cause long delays in the transfer process.
3. The legal opinion will result in additional costs (about R3 000).
4. The attorneys will be exposed to the risk of civil claims.

ILLEGAL FOREIGNERS

The Immigration Act 13 of 2002 repealed the Alien Control Act *in toto*. Illegal foreigners, specifically with regards to conveyancing matters, are now dealt with by section 42 of the Immigration Act.

This section states:

- "(1) Subject to this Act, and save for necessary humanitarian assistance, no person, shall aid, abet, assist, enable or in any manner help-
- (a) an illegal foreigner; or
 - (b) a foreigner in respect of any matter, conduct or transaction which violates such foreigner's status, when applicable,
- including but not limited to-
- (ix) letting or selling or in any manner making available any immoveable property in the Republic to him or her."

Section 49(6) makes any transgression of this prohibition a criminal offence.

Section 49(6) states:

"(6) Anyone failing to comply with one of the duties or obligations set out under sections 42 to 46 of this Act shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding 18 months."

Section 42(2) states that it will not be a defence if one did not know the person was an illegal foreigner, if one ought reasonably to have known that the person was an illegal foreigner.

Section 42(2) states:

"(2) In any criminal proceedings arising out of this section, it is no defence to aver that the status of the foreigner concerned, or whether he or she was an illegal foreigner, was unknown to the accused if it is proved that the accused ought reasonably to have known the status of the foreigner, or whether he or she was an illegal foreigner. "

In terms of the Immigration Act an 'illegal foreigner' means a foreigner who is *in the Republic* in contravention of this Act and includes a prohibited person.

A 'prohibited person' means any person referred to in section 29 of the Act.

Section 29 states:

"The following foreigners do not qualify for a temporary or a permanent residence permit:

- (a) those infected with infectious diseases as prescribed from time to time;
- (b) anyone against whom a warrant is outstanding or a conviction has been secured in the Republic or a foreign country with which the Republic has regular diplomatic relations in respect of genocide, terrorism, murder, torture, drug trafficking, money laundering or kidnapping;
- (c) anyone previously deported and not rehabilitated by the Department in the prescribed manner;
- (d) a member of or adherent to an association or organisation advocating the practice of racial hatred or social violence; and
- (e) anyone who is or has been a member of or adherent to an organisation or association utilising crime or terrorism to pursue its ends."

It is, therefore, clear that one should have some working knowledge of the different ways a foreigner may enter South Africa.

Section 9 of the act states:

(1) Subject to this Act, no person shall enter the Republic at a place other than a port of entry.

(4) A foreigner may only enter the Republic-

- (a) by producing to an immigration officer his or her passport to be valid for no less than 30 days after the expiry of the intended stay, and
- (b) if issued with a valid temporary residence, as set out in this Act."

A valid temporary residence could be one of the following:

Temporary residence permits (upon admission, a foreigner may enter and sojourn in the Republic only if in possession of a temporary residence.)

Visitor's Permit (A visitor's permit may be issued by the Department in respect of a foreigner who-

- (a) holds a visa; or
- (b) is a citizen of a foreign state prescribed from time to time and provides the financial or other guarantees prescribed from time to time in respect of his or her departure)

Diplomatic permit

Study permit

(A study permit may be issued to a foreigner intending to study in the Republic for longer than three months)

Treaty permit

(A treaty permit may be issued to a foreigner conducting activities in the Republic in terms of an international agreement to which the Republic is a party.)

Business permit

(A business permit may be issued by the Department to a foreigner intending to establish, or invest in, a business in the Republic in which he or she may be employed, and to the members of such foreigner's immediate family)

Crew permit

(A crew permit may be issued to a foreigner who is a member of the crew of a ship)

Medical treatment permit

(A medical treatment permit may be issued to a foreigner intending to receive medical treatment in the Republic for longer than three months)

Relative's permit

(A relative's permit may be issued by the Department to a foreigner who is a member of the immediate family of a citizen or a resident, provided that such citizen or resident provides the prescribed financial assurance)

Work permit

(A quota work permit may be issued by the Department to a foreigner if the foreigner falls within a category determined by the Minister. A general work permit may be issued by the Department to a foreigner not falling within a category contemplated in above)

Retired person permit

(A retired person permit may be issued for a period exceeding three months to a foreigner who intends to retire in the Republic)

Corporate permit

(A corporate permit may be issued by the Department to a corporate applicant to employ foreigners who may conduct work for such corporate applicant)

Exchange permit

(An exchange permit may be issued by the Department to a foreigner participating in a programme of cultural, economic or social exchange, organised or administered by an organ of State, or a public higher education institution, in conjunction with an organ of a foreign state)

Asylum

(The Department may issue an asylum permit to an asylum seeker subject to the Refugees Act, 1998 (Act 130 of 1998), on any prescribed terms and conditions.)

Cross-border and transit passes

(The Department may issue a cross-border pass with the same effect as a multiple admission visitor's permit to a foreigner who is a citizen of a prescribed foreign country with which the Republic shares a border and who does not hold a passport but has received a prescribed identity document by the Department and is registered with the Department.)

Permanent residence

The holder of a permanent residence permit has all the rights, privileges, duties and obligations of a citizen, save for those rights, privileges, duties and obligations which a law or the Constitution explicitly ascribes to citizenship.

The conveyancer must, therefore, make sure that when he or she deals with

1. A non South African citizen, or
2. A person that does not hold a permanent resident permit

to obtain the following from the foreigner who is in South Africa

1. a valid passport;
2. proof of entry into South Africa;
3. proof of a valid temporary residence (Visitor's permit, Study permit, work permit, etc.); and
4. make sure that the foreigner is not a prohibited person in terms of section 29.

FOREIGN COMPANIES

A foreign or external company is a company registered in a country other than South Africa.

In terms of the Companies Act 61 of 1973 external company means a "company or *other association of persons*, incorporated outside the Republic, the memorandum of which was lodged with the Registrar under the repealed Act, or which, since the commencement of this Act, has established a place of business in the Republic and for purposes of this definition establishing a place of business shall include the acquisition of immovable property. A foreign country means any state, country, colony or territory other than the Republic."

Section 324 of the Companies Act states:

"Power of external company to own immovable property in Republic

- (1) Save as may be expressly provided in any other law, an external company of which the memorandum has been registered under section 322 shall have the same power to own immovable property in the Republic as if it were a company incorporated in the Republic.
- (2) As from a date three months after the commencement of this Act, no external company shall be capable of acquiring the ownership of immovable property in the Republic unless its memorandum has been or is deemed to be registered under section 322."

Section 322 again states:

"Registration of memorandum of external company

- (1) Every external company shall within twenty-one days after the establishment of a place of business in the Republic lodge with the Registrar [of Companies], in the prescribed manner [certain documents]"

Section 30 of the act should be taken into account when dealing with "*other association of persons*"

"Limitations on Partnerships and Associations for Gain

- (1) No company, association, syndicate or partnership consisting of more than twenty persons shall be permitted or formed in the Republic for the purpose of carrying on any business that has for its

object the acquisition of gain by the company, association, syndicate or partnership, or by the individual members thereof, unless it is registered as a company under this Act, or is formed in pursuance of some other law or was before the thirty-first day of May, 1962, formed in pursuance of Letters Patent or Royal Charter.

(2) The provisions of subsection (1) shall not apply with reference to the formation by persons qualified to carry on any organized professions which are designated by the Minister by notice in the Gazette, of any association, syndicate or partnership for the purpose of carrying on such professions and/or any combinations of such professions."

Section 31

"Unregistered associations carrying on business for gain not to be corporate bodies

No association of persons formed after the thirty-first day of December, 1939, for the purpose of carrying on any business that has for its object the acquisition of gain by the association or by the individual members thereof, shall be a body corporate, unless it is registered as a company under this Act or is formed in pursuance of some other law or was before the thirty-first day of May, 1962, formed in pursuance of Letters Patent or Royal Charter."

In terms of Regulation 18(1)(b) the name and registration number of a company must be stated. Therefore:

ABC (proprietary) Limited (Incorporated in STATE FOREIGN COUNTRY)
Registration number: 2003/00000/10

In terms of the Close Corporations Act 69 of 1984 more specifically section 2(2) and 2(4) states:

"Formation and juristic personality of close corporations

(2) A corporation formed in accordance with the provisions of this Act is on registration in terms of those provisions a juristic person and continues, subject to the provisions of this Act, to exist as a juristic person notwithstanding changes in its membership until it is in terms of this Act deregistered or dissolved.

(4) A corporation shall have the capacity and powers of a natural person of full capacity in so far as a juristic person is capable of having such capacity or of exercising such powers."

EXTERNAL RELATIONS (ss 53-55)

53 Pre-incorporation contracts

(1) Any contract in writing entered into by a person professing to act as an agent or a trustee for a corporation not yet formed, may after its incorporation be ratified or adopted by such corporation as if the corporation had been duly incorporated at the time when the contract was entered into.

(2) The ratification or adoption by a corporation referred to in subsection (1) shall be in the form of a consent in writing of all the members of the corporation, given within a time specified in the contract or, if no time is specified, within a reasonable time after incorporation."

54 Power of members to bind corporation

(1) Subject to the provisions of this section, any member of a corporation shall in relation to a person who is not a member and is dealing with a corporation, be an agent of the corporation

(2) Any act of a member shall bind a corporation whether or not such act is performed for the carrying on of the business of the corporation unless the member so acting has in fact no power to act for the corporation in the particular matter and the person with whom the member deals has, or ought reasonably to have, knowledge of the fact that the member has no such power.

TRUST PROPERTY CONTROL ACT 57 OF 1988

6. Authorisation of trustee and security

Any person whose appointment as trustee in terms of a trust instrument, section 7 or a court order comes into force after the commencement of this Act, shall act in that capacity only if authorised thereto in writing by the Master."

8 Foreign trustees

When a person who was appointed outside the Republic as trustee has to administer or dispose of trust property in the Republic, the provisions of this Act shall apply to such trustee in respect of such trust property and the Master may authorise such trustee under section 6 to act as trustee in respect of that property.