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## **FROM BANTU DIVORCE COURTS TO DIVORCE COURTS: A SUCCESSFUL EXERCISE IN LEGAL TRANSFORMATION**

### **1 Introduction**

In order to establish Family Courts in South Africa, the Department of Justice and Constitutional Development established a Family Court Task Team in 1997. During September 1998 a Family Court Pilot Project was launched by the Department of Justice and Constitutional Development to serve as test sites for possible nation-wide implementation (Chaskalson and De Jong Consulting "Family Courts in South Africa – Draft Interim Policy and Implementation Plan" released by the Department of Justice and Constitutional Development, 17 December 2002, 4 (hereinafter referred to as "Chaskalson *Family Courts*"). This project flowed from the "Justice Vision 2000" national strategy. (The "Justice Vision 2000" is a national strategy of the Department of Justice, released in December 1997.) The aim of the project was to make justice accessible to families in urban, rural and even isolated communities, by providing co-ordinated and integrated family services to all parties involved in family law disputes under one roof (Department of Justice Press Release "Family Court Centre Brings Justice to the People" 23 June 2000). The establishment of Family Courts was motivated by the following aims: to afford wide and specialized protection and help to the family as a fundamental unit in society, to bring about access to justice for all in family disputes, and to improve the quality and effectiveness of service delivery in this area (Chaskalson *Family Courts* 4).

With the formation of the Family Court Pilot Project, the vision of the project was defined as to establish a court structure which has its own identity, is accessible to the community, sensitive to the needs of the community, operating according to simple procedures, offering counselling and mediation support services and providing a quality service in a pleasant and user-friendly environment (Loots "Concept Document of the Department of Justice Outlining the Family Court Pilot Project" 6 Nov 1997). With its formation, it was envisaged that each Family Court Centre will have two components, the support service and the litigation component.

The family support service provides support to the family and encompasses alternative ways to resolve disputes without parties appearing in court, such as counseling and family group conferencing. The litigation component offers services ranging from maintenance, domestic violence, Children's Court, deceased estates, Family Advocate services, divorces and a help desk (Department of Justice Press Release 23 June 2000).

The Divorce Courts form an integral and important part of the Family Court Pilot Project. These courts were originally instituted in 1929 to

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entertain divorce actions between black people. These so-called Black Divorce Courts were established under section 10 of the Black Administration Act (38 of 1927) and the Black Administration Amendment Act (9 of 1929).

According to Kloppers and Coertze the reasons for the establishment of these courts were the following:

“With the establishment of the Bantu divorce courts it was hoped that facilities would be more readily available to serve the needs of a section of the community whose circumstances not infrequently debarred them access to the higher courts of the land. The simplification of proceedings was purposely designed to bring ready and inexpensive relief to litigants” (Klopper and Coertze *Bantu Divorce Courts* 2ed (1976) 1).

It is, however, clear that the jurisdiction of these courts was dependent upon the race of the litigants (compare in this regard Van der Vyver and Joubert *Persone en Familiereg* (1985) 314). This racial jurisdictional factor was removed with the introduction of the Divorce Courts Amendment Act (65 of 1997, which came into operation on 6 April 1998), which made these courts accessible to all population group (Van Heerden “Judicial Interference with the Parental Power: The Protection of Children” in Van Heerden, Cockrell and Keightley (general eds) *Boberg’s Law of Persons and the Family* 2ed (1999) 518; and also compare Kondile “Family Courts must Reflect New South Africa” 1994 *De Rebus* 878).

In a recent article, the Family Court Task Team chairperson calls for a strengthening of Family Courts in South Africa (Tladi “Strengthening the Family Courts in South Africa – Reforming the Malformed?” July 2004 *News & Views for Magistrates* 3). In addition the opinion is expressed that the Pilot Projects have inefficiencies such as fragmentation, insufficient protection of the family, non-specialized assistance, multi-forum appearances, as well as staffing and spatial needs (Tladi July 2004 *News & Views for Magistrates* 3). It is furthermore pointed out that despite these constraints some of the projects became creative and innovative.

In this article it is submitted that the Divorce Courts in particular have operated successfully as a part of the Family Court Project and, within five years of their creation, managed to handle the majority of divorce matters in South Africa, in an affordable, efficient and expedient manner (compare par 4 *infra*).

The main differences between the procedures employed in the Divorce Courts and those applicable in the High Court will be highlighted. The statistics pertaining to the processes issued and cases disposed of during the period since the “de-racialization” of these courts will be analyzed and discussed.

In conclusion some observations and recommendations regarding the role of the Divorce Courts as an integral part of the Family Court Pilot Project will be made.

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## 2 Status, divisions and jurisdiction of the Divorce Courts

Although not formally addressed in legislation, Divorce Courts enjoy the status of High Courts. Khumalo (*The Civil Practice and Procedure of all Black Courts in Southern Africa* 3ed (1984) 230) in this regard states that “(t)he address of the president and the assessors is your Honour and counsel have to be robed. The court has the status of a superior court”. (Also compare Olivier *Die Privaatreg van die Suid-Afrikaanse Bantoetaalsprekendes* 2ed (1981) fn 215 589. In terms of Rule 4.27 of the Uniform Rules of Conduct of the General Council of the Bar of South Africa, advocates should robe in “all other courts and tribunals of a status similar to the High Courts”.)

Section 166(e) of the Constitution Act (108 of 1996) makes provision for the establishment or recognition of any court of a status similar to either the High Courts or the Magistrates’ Courts. It is clear that the Divorce Courts cannot be similar in status to Magistrates’ Courts, as the matters justiciable by the Divorce Courts are specifically excluded by section 46(1) of the Magistrates’ Courts Act (32 of 1944). The fact that an order of divorce alters the legal status of a person, clearly indicates that the Divorce Courts are courts similar in status to High Courts (compare Hosten, Edwards, Bosman and Church *Introduction to South African Law and Legal Theory* 2ed (1995) fn 93 1175). A divorce court hearing a matter relating to a nullity of a marriage and relating to divorce between persons and deciding upon any question arising therefrom, has the same jurisdiction as any High Court in respect of such matter (s 1(a) of the Divorce Court Amendment Act 65 of 1997). In terms of section 1(b) of the same act, a division of the court shall consist of one or more presiding officers, one of whom shall be president of the division and such persons shall be deemed to be magistrates of a regional court as contemplated in the Magistrates’ Court Act (32 of 1944). It is advanced that the equation of presiding officers of these courts with regional court magistrates does not influence that status of the courts, but merely regulates the appointment and remuneration of the presiding officers and places them under the auspices of the Magistrates’ Commission.

At present there are three Divorce Courts: the Central Divorce Court with its seat in Johannesburg, the North-Eastern Divorce Court in Durban, and the Southern Divorce Court in King William’s Town. Each of the Divorce Courts has its own designated jurisdiction with various centra where circuit courts are held. Collectively the jurisdiction of the above three courts encompasses the entire Republic.

As part of the pilot project referred to above, additional permanent circuits, at places other than the seats of the above mentioned Divorce Courts, have been instituted at Lebowagomo, Port Elizabeth and Cape Town.

It has been held that the jurisdiction of these courts is limited to two types of matrimonial causes, specified in section 10(1) of the Black Administration Act, namely suits of nullity and divorce.

In addition to this jurisdiction, Divorce Courts have ancillary jurisdiction to decide any question arising from suits of nullity or divorce, such as questions

of custody of children, maintenance, and property rights (Bekker *Seymour's Customary Law in Southern Africa* 5ed (1989) 36). These courts therefore do not have jurisdiction to entertain any other claim not directly arising from the marriage, for example a claim for money lent and advanced by one spouse to another married out of community of property.

As a general rule it is desirable that different matrimonial actions involving the same parties should be disposed of at the same time. (Compare Kruger "Family Law Procedures" in Clarke *et al* (eds) *Schäfer Family Law Service* (1987) Service Issue 41 par F53. Hereinafter referred to as "Clarke Family Law Service".) Actions against third parties for damages for adultery, enticement and harbouring may be included in divorce actions (Clarke *Family Law Service* par D6). There are two conflicting judgments as to whether Divorce Courts may hear claims for damages against co-defendants. In *Mahase v Mahase and Koza* 1961 BAC 25, it was held that these courts do not have jurisdiction to hear such claims, whilst *Lutu v Lutu* (1955 NDC (C) 101) held that these courts may entertain such claims. It is advanced that the *Lutu* decision is indeed correct, as the claim for damages against the third party arises from and is closely connected to the divorce action, and substantially the same evidence will be used in both claims.

### **3 A comparison of procedures employed in the Divorce Courts and the High Courts**

Rules governing the operation of the Divorce Courts were published in the Government Gazette on 9 November 1998, and came into operation on 15 November 1998 (GG 19458 (hereinafter referred to as "the Divorce Court Rules"). The procedures followed in the Divorce Courts are mostly similar to the procedures followed in the High Court. Amongst others the following differences, however, exist:

- 3 1 *The summons*: In both forums the action is commenced with the issuing of a summons by the Registrar. In order to make Divorce Courts more accessible, a Registrar of the Divorce Court may delegate his or her authority to a clerk of the court or a registrar of a High Court (compare Rule 2(2) of the Divorce Court Rules). This has in fact been done at all the centres other than the seat of the courts where permanent circuit courts were introduced in terms of the pilot project, making it unnecessary to have the summons issued at the office of the Registrar itself. In the High Court a summons must bear a revenue stamp of R80,00, whilst in the Divorce Courts a stamp of R20,00 must be affixed (compare Rule 67(a)(i) of the High Court Rules and Annexure 1, Part III, item 1 of the Divorce Court Rules).
- 3 2 *Representation of parties*: In both forums a party may appear in person or be represented by a legal practitioner. (In the case of the Divorce Court the term "legal practitioner" includes an advocate or attorney, as well as a candidate attorney qualifying to appear in the Regional Court. Compare in this regard s 8(1) of the Attorneys Act 53 of 1979. In the High Court only certain attorneys have the right of appearance, whilst a candidate attorney does not have right of appearance.) In terms of the Divorce Court Rules (Rule 3(8)) a party who does not make use of the

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services of a legal practitioner, may request the registrar or clerk of the court for assistance with the preparation of any process of court or other document concerning the action.

The registrar or clerk of the court shall render such assistance or refer the party to a convenient legal aid centre. (In terms of s 1 of the Divorce Court Rules a legal aid centre means any centre which provides legal services free of charge to the public and includes centres operated by the Legal Aid Board. Law Clinics operated by universities could therefore play an important role in assisting indigent litigants in divorce proceedings.) The State and a registrar or clerk of the court is indemnified against a claim for damages or loss resulting from assistance given in good faith (Rule 3(8)(d) of the Divorce Court Rules). It is submitted that this rule places undue pressures on registrars and clerks of the court, as these officials are normally not legally trained. Should a wife for instance not include a prayer for maintenance for herself, seek a redistribution or forfeiture order, and no such order is made by the court, she cannot approach the court for such an order after granting of the final divorce order. The Divorce Court Rules (Rule 3(9)) furthermore afford the presiding officer the discretion to perform any act required to be done by the registrar, but specifically exclude the writing out of any affidavit, pleadings or process for any party or the taxing of any bill of costs. This provision is clearly in line with the adversarial nature of our law of procedure (compare Hosten *et al* 1130).

- 3 3 *Notice of appearance to defend:* In terms of Rule 18(1) a defendant has one month within which to enter an appearance to defend an action for divorce. In the High Court a considerably shorter period of ten days is applicable (compare Rule 19(1) of the High Court Rules). In terms of Rule 22 of the Divorce Court Rules, a defendant may deliver his notice of appearance to defend to the registrar or any clerk of the court and merely needs to nominate the full address where he will accept service of process in the action. In the High Court, an address within eight kilometers of the office of the registrar needs to be nominated (compare Rule 19(3) of the High Court Rules). The so-called correspondent address is therefore not used in the Divorce Courts. Another interesting aspect is that a defendant may waive the period for delivering a notice of appearance to defend, by giving written notice to the plaintiff and the registrar that he or she does not intend defending the action (Rule 29(6)(c) of the Divorce Court Rules). In the High Court no provision is made for a defendant to waive *dies* for entering and appearance to defend, and consequently this period must elapse before the matter may be enrolled (Rule 19(1) of the High Court Rules).
- 3 4 *Pre-trial procedures:* A mostly similar procedure for the discovery of documents in both forums exists, although the number of *dies* differs (compare Rule 35 of the High Court Rules and Rule 26 of the Divorce Court Rules). An important difference is the fact that a pre-trial conference and pre-trial discovery of documents are compulsory in the High Court (Rule 37(1) of the High Court Rules), whilst these procedures are discretionary in the Divorce Courts. In the Divorce Courts discovery will only take place if requested by a party to the action (Rule 26(1) of the

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Divorce Court Rules) and a pre-trial conference may take place *suo motu* by order of the court, or upon the written request of a party (Rule 28 of the Divorce Court Rules). It is suggested that a similar procedure for pre-trial conferences as contained in Rule 37 of the High Court Rules be introduced in the Divorce Court Rules, as many preliminary issues can be disposed of before the commencement of the trial.

- 3 5 *Costs*: In terms of the Divorce Act (s 10 of Act 70 of 1979) a court is not bound in a divorce action to make an order for costs in favour of the successful party, but the court may, having regard to the means of the parties and their conduct in so far as it may be relevant, make such order as it considers just, and the court may order that the costs be apportioned between the parties. The Divorce Court Rules (Rule 41(1)) go even further, and stipulate that a court may award such costs as may be just, provided that the court shall not order one party to pay another party's costs unless there is good reason to do so. The scale of fees to be taken by legal practitioners as between party and party, is limited to the lowest scale of fees (Scale of Table A of Annexure 2 to the Magistrates' Court Rules) applicable in the Magistrates' Courts (Rule 41(4) of the Divorce Court Rules). There is therefore a huge disparity between party and party costs recoverable from the other party if the costs are calculated in terms of the High Court tariff, as opposed to the Divorce Court tariff. The fees of the sheriff are also limited to those prescribed for sheriffs in the Magistrates' Court Rules (Rule 46 of the Divorce Court Rules).

The issue of the difference in tariffs between the two forums raises another pertinent issue. As a general rule, a litigant who institutes proceedings in the High Court where he or she could have proceeded in a less costly forum, will be mulcted in costs in so far as he or she will, if successful in the claim, be awarded costs only on the scale applicable in the forum he or she ought to have chosen (Cilliers *Law of Costs* 2ed (1984) 25).

Cilliers (25), however, points out that the High Court has in its discretion in many instances awarded High Court costs instead of costs on a lower scale. He warns that litigants should not adopt a reckless attitude in their choice of forum. In *Ntuli NO v Baloyi* (1962 1 SA 834 (D) 836) the court had been asked to award costs on the scale applicable in the then Native Commissioner's Court. The court held that the applicants, having chosen the High Court as their forum and in addition having failed to abide by the rules and practice of the High Court, should be mulcted for cost applicable to the forum which they had chosen (*Ntuli NO v Baloyi supra* 836).

In terms of the Divorce Act (s 1; and also compare s 10(1)(b) of the Black Administration Act 38 of 1927) both the High Court and the Divorce Courts have jurisdiction in respect of divorce actions. A plaintiff can accordingly choose to institute action in either forum. In *Mbele v Mbele* (1947 WLD 782 783) the applicant, a black woman, sought an order for a contribution towards costs of an action for divorce and an order for maintenance for herself *pendente lite*. The then Native Divorce Court had concurrent jurisdiction to hear suits of divorce and separation

between black people domiciled within their areas of jurisdiction. The court pointed out that a litigant is entitled to proceed in a court of his or her choice, should more than one forum have jurisdiction. The court however pointed out that an important question in this regard is whether, in the case where the Legislature has provided a tribunal which is admittedly less expensive, a litigant is entitled nonetheless to seek a remedy in a court which is open to the litigant and to burden the other party with higher costs.

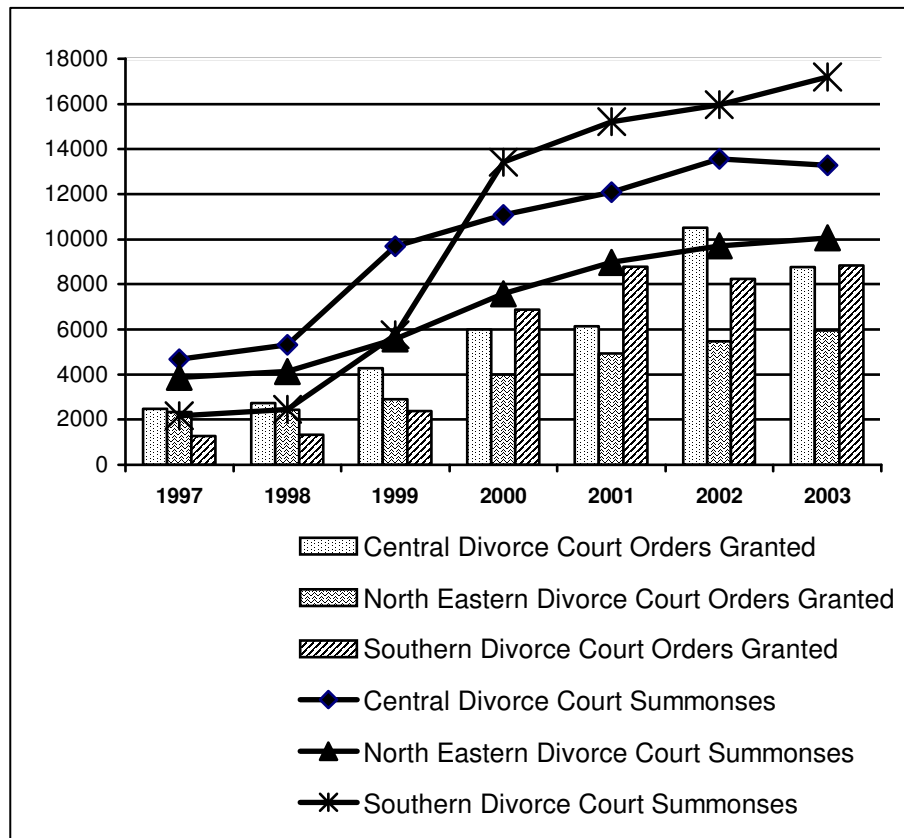
In this regard, the court stated that “the Supreme Courts have warned natives who are parties to divorce actions that in proceeding in the Supreme Court they run the risk that they will recover only the costs which would be incurred in the Native Divorce Court” (*Mbele v Mbele supra* 784). The court concluded by finding that “a native intending to sue another native for divorce or judicial separation, it will not, unless there is some special reason, award costs, whether by way of contribution ordered or in the application on a scale greater than that which would apply in the Native Divorce Court” (*Mbele v Mbele supra* 785). This judgment was followed and applied in *Mohapi v Mohapi* (1981 2 SA 818 (O) 820).

It has been pointed out above that the racial element has been removed from the jurisdictional requirements of the Divorce Court. It is submitted that the same argument, namely that a party to litigation should not be burdened with higher costs if a less expensive forum is available, as decided in *Mbele v Mbele (supra)*, should be applicable if a party chooses to institute a divorce action in the High Court instead of the Divorce Court. It is submitted that the High Court should award only costs on the scale applicable in the Divorce Court, if divorce proceedings are instituted in the High Court. In this way litigants will be encouraged to use the cheaper and specialized forum (compare in this regard similar views expressed Haffejee “The New Dispensation: Dissolution of Marriage by Divorce” 1994 *De Rebus* 779). Especially in the case of divorce, which normally has serious financial implications on the spouses and the children, costs should be restricted as far as possible.

#### **4 An evaluation of statistics pertaining to the Divorce Court**

In figure 1 the increasing number of summonses issued and final divorce orders granted by the Divorce Courts for the period 1997 to 2003 are depicted. (Statistics for the Divorce Courts were obtained from the Registrars at the three main Divorce Courts.) During the period 1997 to 2003, the total number of summonses issued increased from 10 740 to 40 540 and the number of final orders granted from 6 011 to 23 511.

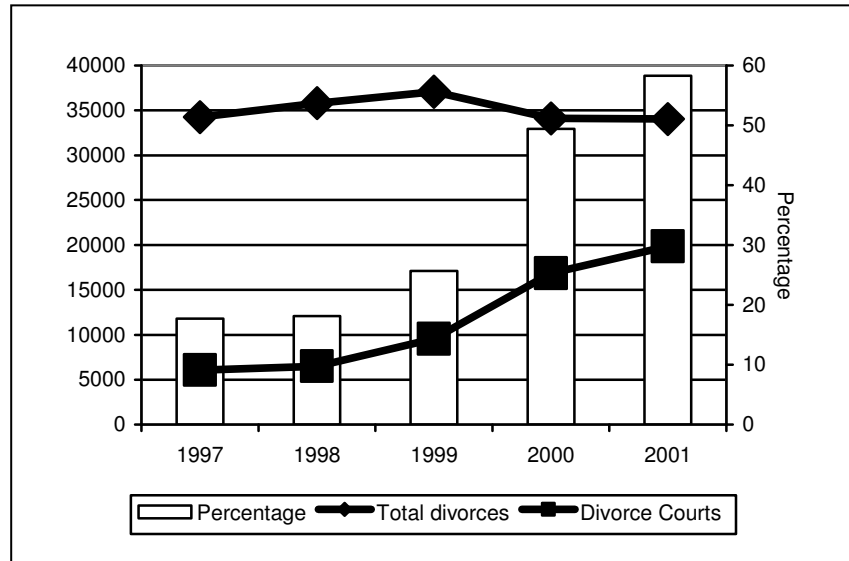
Fig 1



In figure 2 below the total number of divorce orders granted in the Divorce Courts, compared with the number of orders granted in the High Courts are indicated for the period 1997 to 2001. (Statistics for the total number of divorce orders granted were obtained from the webpage of Statistics South Africa [www.statssa.gov.za](http://www.statssa.gov.za). Only statistics up to 2001 are currently available.) Within 5 years of their “de-racialization” the Divorce Courts now entertain the majority of divorce cases, namely 58%.



Fig 2



## 5 Conclusion and recommendations

As indicated above, the Divorce Courts are an integral part of the Family Court Pilot Project. From the previous paragraph it is clear that the Divorce Courts have progressed to entertaining the majority of divorce cases in South Africa within five years of their formation. This is indeed a commendable achievement, in view of the fact that not all provinces have access to Family Court Pilot Project sites. These courts furthermore now serve the entire community and provide a cost effective service. The transformation of these courts from Bantu Divorce Courts to Divorce Courts was indeed a successful transformative step.

In paragraph one reference is made to the blueprint that was developed to provide a strategic framework for the Family Courts (compare par 1 above). The purpose of the blueprint was to address the inefficiencies and strengthen the existing Pilot Projects into a working model to be rolled out to other provinces.

Nine interim policy principles were identified for the Family Courts (Chaskalson 6). These principles are that the courts should:

- 1 Deal exclusively with comprehensive service delivery in maintenance, domestic violence, children's court and divorce matters;
- 2 Provide services in an integrated manner;
- 3 Provide users with relevant substantive rights education services;

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- 4 Provide users with substantive legal advice and assistance with form completion;
  - 5 Embrace the use of alternative dispute resolution services where appropriate, and build this service directly into workflows;
  - 6 Be staffed and supported by appropriately skilled staff who will receive specifically developed training in order to enable them to perform their functions;
  - 7 Operate in terms of their specific designated budget and move towards performance-based budgeting;
  - 8 Operate within clear management and reporting lines; and
  - 9 Be subject to on-going monitoring and evaluation that is uniform in nature.

It is submitted that these principles should be adhered to and be implemented as soon as possible. Appropriate funding for this purpose should be made available. In the interim it is suggested that law faculties of universities, situated within the areas of the pilot projects, should become more involved with the service delivery of the Divorce Courts. Senior students could, for instance, assist litigants with basic advice, the drafting of court documents and the completion of forms. In addition, students from other disciplines, such as social work and psychology, could assist with the implementation of alternative dispute resolution processes. Apart from delivering community service, students would gain valuable practical experience. Through this service immediate effect and implementation could be afforded to policy principles 3, 4, 5 and 6 listed above.

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