



LAWS OF LOVE:
THE TRANSVAAL NATIVE DIVORCE COURT AND THE
'URBAN AFRICAN', 1948

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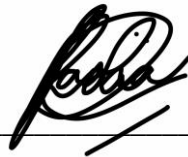
April 2018,
Johannesburg

DECLARATION

I hereby declare that this Dissertation to be my own, unaided work.

It is being submitted for the Degree of Master of Arts, History at the University of the
Witwatersrand, Johannesburg.

It has not been submitted before for any degree or examination at any other University.



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Introduction

*Divorce isn't a cure, it's a surgical operation, even if there are no children to consider.*¹

Marriage today is culturally accepted by many regions and communities globally to signify an expression of love and commitment between two people. Its successful continuation is cause for celebration, - a realisation of the 'happily ever after' narrative, and its end is something to mourn. There are ceremonies attached to the idea of courtship, and weddings – love letters, white dresses, and wedding rituals. Divorce is the separation of two people who promised to spend their lives loving each other. For many, it is a tragedy in some ways, full of pain, and loss. It can be considered the death of a relationship. However, these ideas and practices of romantic love, marriage, and divorce, are a privileging of western idealisations, and iconography. Colonisation and Christianity brought these notions of romantic love to many parts of Africa, which literature and the media helped to spread. This idea of love culminated in Christian marriages practices, which were considered by the church to be the foundation of a strong state.² The introduction of these ideas and practices had a profound impact on the formation of African notions of intimacy, love, commitment, identity, and society. As Jennifer Cole and Lynn Thomas explain:

While passionate attraction and attachment had long been a source of intergenerational tension in many parts of Africa, the elaboration of European colonial rule—and specifically the spread of Christianity, Islam, and school education during the twentieth century—infused such tensions with new political dynamics and cultural meanings. Certain intimate and emotional relations were depicted as 'civilized' 'modern,' and 'Western' and contrasted with others deemed 'primitive,' 'traditional,' and 'African.' The elaboration of ideologies of love was part of this process. Turning attention to the specifics of this process enables us to move away from vague and often obfuscating references to tradition and modernity and, instead, to examine how people have variously

¹ Rosamunde Pilcher, *Wild Mountain Thyme* (New York, NY: St. Martin's Paperbacks, 1996).

² Lynn M Thomas and Jennifer Cole, 'Thinking Through Love in Africa', in *Love in Africa*, eds, Jennifer Cole and Lynn M. Thomas (Chicago and London: The University of Chicago Press, 2009), 1–30; 'Bishop on Divorce and Birth Control', *Rand Daily Mail*, 19 September 1927.

deployed such categories to negotiate changing sensibilities and social processes, and to make political claims to inclusion.³

It is within this narrative of social and political transformation and its practical application in South Africa's legal spaces that this research project is located. This project examines the social and political contexts which surround the establishment of the Native Divorce Court in the Transvaal, set up in 1948, under the directive of the 1929 Native Administration Amendment Act.⁴ This thesis argues that within the space of the Native Divorce Court urban African men and women were able to articulate new forms of thinking around marriage and divorce by breaking with traditional ideologies and social structures. In this sense, urban African identities were very much the product of modernity. The project seeks to understand why the Native Divorce Court was established, what its purpose and functions were, and how it related to the social and political context of an urbanising African population. In contrast to its counterparts in the Orange Free State and Natal, which were established in 1929 after the passing of the Native Administration Amendment Act in that year, the Transvaal Division originally existed as part of the Transvaal and Natal Division, with both provinces being presided over by a single Native Divorce Court. It was only in 1948 that the Transvaal Central Division of the Native Divorce Court was established as a separate division⁵, and this research tries to explain why. Moreover, it attempts to analyse how the Native Divorce Court developed in relation to, and impacted on, emerging urban African identities and understandings of marriage and divorce by urbanised Africans in the first half of the twentieth century. Thereafter, it examines urban African identities, and the Native Divorce Court, within the framework of the modernisation project of the segregationist state in order to interrogate how urban African notions of marriage and love were affected by colonial economies, black urbanisation, and labour migration – including, notably, by African women. It does this through a close reading of legal proceedings and case files from the records of Native Divorce Court housed in the National Archives in Pretoria, as well as relevant and corroborating newspaper reports. The analysis of this documentary evidence relies heavily on secondary bodies of scholarship which focus on African identities and gender, migration and urbanisation,

³ Cole and Thomas, *Thinking through Love in Africa*, 16.

⁴ See Appendix two for details of section 10 the 1929 Native Administration Amendment Act, which establishes the Native Divorce Court.

⁵ Martin Chanock, *The Making of South African Legal Culture 1902-1936: Fear, Favour and Prejudice* (Cambridge: Cambridge University Press, 2004), 333–36.

marriage, and legal histories, which will be discussed more extensively in the historicisation, literature review, and methodology sections of this chapter.

Society, Economy, Politics, and Everyday Life

Before the discovery of diamonds in the Orange River region in 1867, the majority of Africans still lived in communities independent of British colonial or Afrikaner republic rule, and maintained control of their land and labour power. By the turn of the century, with the 1910 unification of South Africa, ‘African chiefdom, a British colony, and Afrikaner republic had been swept aside; south of the Limpopo, all had been meshed into a single capitalist state dominated by whites.’⁶ The discovery of diamonds, and later gold, and the South African War had seen power shift from the Afrikaner republics to the British. The consequential re-ordering of the colonies and republics into a single South African Union excluded Africans from political representation. By the end of the 1940s, South Africa had been further transformed. Chiefdoms had lost most of their political autonomy, and their economy had been tied to the capitalist economy through the migrant labour system which provided cheap labour to the mines, industries, and white farms. The series of political engagements between the British and Afrikaners who vied for power, formed alliances, and influenced political systems of segregation and apartheid began after the formation of the Union, and continued to unfold over the decades. The 1940s saw a reconstituted Afrikaner nationalism that culminated in the establishment of the apartheid government in 1948.

The rapidly industrialising colonial and post-colonial economies of the late nineteenth and early twentieth centuries had a profound impact on the nature and development of South Africa’s working class. The collection of essays edited by Shula Marks and Richard Rathbone, *Industrialisation and Social Change in South Africa*, centres this development of the African working class within the industrial mining projects which were emerging, particularly in the Witwatersrand and Kimberly, at the turn of the century. This resulted in a high demand for labour which changed African migration patterns, as more and more African men began to move into developing cities and mining compounds for work.⁷ As Peter Delius points out in his work on Sekhukhuneland, and the politics of rural and urban

⁶ Shula Marks and Richard Rathbone, ‘Introduction’, in *Industrialisation and Social Change in South Africa: African Class Formation, Culture, and Consciousness, 1870-1930*, eds, Shula Marks and Richard Rathbone (London and New York: Longman, 1982), 1.

⁷ Shula Marks and Richard Rathbone, eds, *Industrialisation and Social Change in South Africa*.

spaces, *A Lion amongst the Cattle*, for first-generation migrant men, work in the cities was seen as ‘a means of maintaining a primarily rural way of life’ – a way to acquire wealth and prestige before returning to the rural areas they considered their homes.⁸

In the Witwatersrand, particularly by 1913, extensive gold and mineral mining ‘bestrode the economic world’⁹ and the Transvaal had shifted from an agricultural to an industrial economy which ‘spawned a series of urban sponges – mining compounds and towns,’ the most notable of which was Johannesburg - the pulsing heart of this new South Africa.¹⁰ By the late nineteenth into the early twentieth century, hundreds of thousands of people from every ethnic, racial, social, political and geographical grouping lived and worked in and around the city. The racial and gendered makeup and division of labour also heavily influenced the architecture of Johannesburg and its surrounding urban and industrial sprawl. While the wealthy, landowners, and tenants comprised the residents of the city, the working class migrant labourers, both male and female, were given more temporary accommodation, with white workers living in boarding houses within the city limits, and African male migrants mostly accommodated in single men hostels and mining compounds, which were often on the mines that dotted the Witwatersrand area.¹¹ However, as urbanisation in South Africa had developed rapidly due to the industrialisation of mining and manufacturing, and the increased dependence of these industries on the ‘urbanised or detribalised natives,’¹² it became necessary for the stabilisation of colonial authority to

insulate and immunise [the urban industrial experience] as a potential cancer. Migrant labour was never just a source of cheap labour; it was at the same time semiservile and controlled. Every effort was made to turn urban hostels in which migrants lived into enclaves shut off socially and physically from surrounding townships.¹³

⁸ Peter Delius, *A Lion amongst the Cattle: Reconstruction and Resistance in the Northern Transvaal*, Heinemann Social History of Africa Series (Portsmouth, NH : Johannesburg : Oxford: Heinemann ; Ravan Press ; J. Currey, 1996), 23.

⁹ Charles van Onselen, *New Babylon, New Nineveh: Everyday Life on the Witwatersrand 1886-1914* (Johannesburg and Cape Town: Jonathan Ball Publishers, 2001), 1.

¹⁰ *Ibid.*, 1-2.

¹¹ *Ibid.*, 6, 31.

¹² Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton, N. J: Princeton University Press, 1996), 6. The ‘urbanised native’ is discussed further below.

¹³ *Ibid.*, 220.

The gendered relations of African men and women in urban areas, and the reserves, that emerged in this period will be discussed in the later sections of this chapter, and more comprehensively in Chapter Two of this study.

In *The Politics of Race, Class, and Nationalism in Twentieth Century South Africa*, Shula Marks and Stanley Trapido consider how migrant identities were formed as a result of ‘transformations of the economy... [and] shifts in the nature of ideologies.’¹⁴ They argue that

the successive moves of the South African economy from the dominance of the merchant capital to mineral exploitation, secondary industrialisation and monopolisation, although regionally varied and uneven, have profoundly affected not only the experience of daily life but also the ways in which men and women have understood their world and their highly differentiated place in it.¹⁵

This idea that the lived experiences of Africans in urban areas differed from those of their rural counterparts is echoed in Marks’ and Rathbone’s *Industrialisation and Social Change in South Africa*, where they argue that practices and institutions in which town culture was embodied - such as mothers’ unions, literary societies, dance halls and cricket clubs’ - greatly shaped urban life and in turn contributed to the formation of new identities. This is important for understanding how urban African identities differentiated from rural ones.¹⁶

Framing this discussion of African urban identities are Peter Delius’s *A Lion amongst the Cattle*¹⁷ and Van Onselen’s *New Babylon, New Nineveh*,¹⁸ which situate the formation of the urban African in the shifting frameworks of migration, the urban-rural divide, and the rapid urbanisation of the Witwatersrand. *New Babylon, New Nineveh* is ‘an extended and thematically linked exercise in historical materialism’ set at the turn of the century’s industrial revolution which overtook the Witwatersrand’.¹⁹ It attempts to contextualise the experiences of people within the shifting economic, political and social landscape of an

¹⁴ Shula Marks and Stanley Trapido, ‘The Politics of Race, Class and Nationalism’, in *The Politics of Race, Class and Nationalism in Twentieth Century South Africa*, ed. Shula Marks and Stanley Trapido (London and New York: Longman, 1987), 2.

¹⁵ *Ibid.*

¹⁶ Marks and Rathbone, ‘Introduction’, 9.

¹⁷ Delius, *A Lion amongst the Cattle*.

¹⁸ Van Onselen, *New Babylon, New Nineveh*.

¹⁹ *Ibid.*, xviii.

increasingly westernised capitalistic Rand. The complex changes in the state and the economy, along with the burgeoning mining and industrial classes, and the connections between race, ethnicity, gender, and sexuality reveal an understanding of how the 'New African' (the petty urban African bourgeoisie) and settler identities of the early twentieth century South Africa influenced social difference.²⁰ This contextualisation is particularly important for the discussion presented in Chapters Two and Three, which focus on issues of gender identities and relations, Christianity, and migration, because it is within the changing socio-political and economic developments of the late nineteenth and early twentieth century period that urban African identities begin to emerge.

Delius's work forms part of a body of scholarship which emerged in the 1980s that attempted a new kind of historical writing which reconstructed the narratives of the reserves from 'rural idylls' or having a 'supporting, suffering role' in South African history to one which reflected the reality of the political and social economies of the time. The links between alcoholism and spousal abuse, for example, has been a long established causal effect/relationship and a possible consideration for understanding the dynamics of sexual violence during this period. Extending this examination of alcohol in relation to African urbanisation is Phil Bonner's 'Desirable or Undesirable Sotho Women? Liquor, Prostitution and the Migration of Sotho women to the Rand, 1920-1945', which looks at how alcohol played a role in the migration of African women to urban areas, and subsequently how the state responded to this.²¹ This is significant for this project because, as Chapters Two and Three will show, there was a clear link between the production and consumption of alcohol, African female independence in urban areas, and violence by African men.²² Bonner's essay also highlights the role of African women in the urbanisation of the second quarter of the twentieth century. Developing this idea, and tying it to state attempts to control African women's productive and reproductive capacities is Karen

²⁰ *Ibid.*

²¹ Philip Bonner, 'Desirable or Undesirable Sotho Women? Liquor, Prostitution and the Migration of Sotho Women to the Rand, 1920-1945', *African Studies Institute - Seminar Papers*, African Studies Seminar Series, May 1988.

²² Alan Gregor Cobley, 'Liquor and Leadership: Temperance, Drunkenness and the African Petty Bourgeoisie in South Africa', *South African Historical Journal* 31, no. 1 (1994): 128-48; Deborah James, 'Urban Life and the Struggle for Autonomous Culture in Some Transvaal Communities', *African Studies* 51, no. 1 (1992): 1-7.

Jochelson's 'Women, Migrancy and Morality: A Problem of Perspective'²³ and Thomas McClendon's 'Tradition and Domestic Struggle in the Courtroom: Customary Law and the Control of Women in Segregation-Era Natal.'²⁴ This is significant for this study because of the relationship between gender, migration, and the law, and highlights the impact of African women migrants and urban African women on the modernising project. Attempts by the state and traditional authorities to control African women are discussed in Chapter Two.

Urban African Identities

South Africa's transition from a colonial satellite into a semi-independent Union consolidated the influence of the white minority on the state and the economy. It also influenced how this minority conceptualised their identities in relation to emerging African identities as well as each other. The increasing dependence of the reserves on the capitalist economy, and the continued engagement of the African population with urban spaces solidified an enduring African presence within the cities, which themselves had begun to be seen as permanent things. The 'urban African identity' developed as a result of this continued urbanisation and failing reserve economies.

It was as part of a rejection of non-whiteness and aspiration to the white or more specifically the urban identity that the first petty African bourgeoisie emerged in the early decades of the twentieth century. This was an identity that was tied very closely to the notion of the urban or working class African. Mahmood Mamdani, in his work *Citizen and Subject*, writes that

The African colonial experience came to be crystallised in the nature of the state forged through that encounter. Organised differently in rural areas from urban ones, that state was Janus faced, bifurcated. It contained a duality: two forms of power under a single hegemonic authority. Urban power spoke the language of civil society and civil rights, rural power of community and culture. Civil power claimed to protect rights, customary power pledged to enforce tradition. The former was organised on the principle of differentiation to check the concentration of power, the latter around the principle of fusion to ensure a unitary authority. To grasp the

²³ Karen Jochelson, 'Women, Migrancy and Morality: A Problem of Perspective', *Journal of Southern African Studies* 21, no. 2 (1995): 323–32.

²⁴ Thomas V McClendon, 'Tradition and Domestic Struggle in the Courtroom: Customary Law and the Control of Women in Segregation-Era Natal', *The International Journal of African Historical Studies* 28, no. 3 (1995): 527–61.

relationship between the two, civil power and customary power, freedom and tradition – we need to consider them separately while keeping in mind that each signified one face of the same bifurcated state.²⁵

This bifurcation was reflected in the ways in which urban Africans interacted with both the rural and the urban space, socially, politically, and economically. These *abalungu abamnyama* or ‘white black persons’ [were] westernised, educated (*izifuniswa*), Christian, and affluent Africans²⁶, were what Charles van Onselen calls the ‘New African’ and Deborah Posel and David Goodhew call the ‘urban African’²⁷, whose identity was tied closely to engaging in urban spaces, customs, practices, and law. Urban Africans were those Africans who lived in and around large urban areas, in mining compounds and townships rather than in the rural or homeland areas ‘reserved’ for them under the 1913 Native Land Act.

However, this urban identity was not just tied to race, despite that being its most important determinant in South Africa. It also existed as a ‘socially constructed phenomenon subject to a multitude of influences’ such as class, status, morality, respectability, religious piety, and wealth.²⁸ In moving between the traditional markers of rural African identity, such as initiation and polygamy, and urban markers of identity such as Christianity and respectability, urban African men and women experienced identity formation in cities differently depending on the social, political, and legal spaces in which they found themselves.

Some of the most significant texts this project uses in framing and contextualising this study’s discussion of the development of urban African identities in relation to the state

²⁵ Mahmood Mamdani, *Citizen and Subject*, 18.

²⁶ Meredith J. Green, Christopher C. Sonn, and Jabulane Matsebula, ‘Reviewing Whiteness: Theory, Research, and Possibilities’, *South African Journal of Psychology* 37, no. 3 (2007): 395.

²⁷ Van Onselen, *New Babylon, New Nineveh*, 4; David Goodhew, ‘Working Class Respectability: The Example of the Western Areas of Johannesburg, 1930-55’, *Journal of African History*, no. 41 (2000): 241–66; D. Posel, ‘Marriage at the Drop of a Hat: Housing and Partnership in South Africa’s Urban African Townships, 1920s-1960s’, *History Workshop Journal* 61, no. 1 (1 January 2006): 57–76.

²⁸ Meghan Healy-Clancy, ed., ‘ASR Forum: The Politics of Marriage in South Africa’, *African Studies Review* 57, no. 2 (2014): 1–92; Posel, ‘Marriage at the Drop of a Hat’; Goodhew, ‘Working Class Respectability: The Example of the Western Areas of Johannesburg, 1930-55’; Meredith J. Green, Christopher C. Sonn, and Jabulane Matsebula, ‘Reviewing Whiteness: Theory, Research, and Possibilities’, *South African Journal of Psychology* 37, no. 3 (2007): 389–419, 242–43; Lynn M Thomas, ‘The Modern Girl and Racial Respectability in 1930s South Africa’, *The Journal of African History* 47, no. 3 (2006): 461–90.

include Mamdani's *Define and Rule*,²⁹ and *Citizen and Subject*.³⁰ These texts examine the formation of the 'Native' within the colonial narrative, looking particularly at colonial conceptions of the colonised subject. Mamdani's works look at how the settler and the indigene were produced and reproduced in tandem by discussing the colonising project through defining and understanding the actors of the empire. Mamdani's *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* critiques this aspiration to whiteness, arguing that the 'de-Africanis[ation of] the African [would] turn him either into a beast of the field or into a pseudo-European' whose institutions (which this project argues includes institutions of marriage and divorce) were 'force[d]' into an alien European mould.³¹ This institutional colonialism was seen in the practice of 'institutional homogenisation. Natives may be territorially separated from whites, but native institutions were slowly but surely giving way to an alien institutional mould.'³² 'The emphasis on differentiation [that is foundational to segregation] meant the forging of specifically 'native' institutions through which to rule subjects.'³³ This is evidenced by Chapters Four and Five of the 1927 Native Administration Act, and Section 10 of the 1929 Native Administration Act,³⁴ which set up institutions such as the Native Commissioners' and Native Divorce Courts which legislated Africans as 'potential Europeans' through the promotion of white values such as Christian marriage while maintaining a segregationist attitude.³⁵

Notions of Love, Ideas of Marriage

Christianity has had a profound impact on how Africans have perceived and practiced love and marriage in the twentieth century. Beyond that however, there has been limited development in how Africans have engaged with intimacy outside of sexual relations. *Love in Africa*, edited by Jennifer Cole and Lynn Thomas, attempts to centre the narrative of

²⁹ Mahmood Mamdani, *Define and Rule: Native as Political Identity* (London, England: Harvard University Press, 2012).

³⁰ Mahmood Mamdani, *Citizen and Subject*.

³¹ *Ibid.*, 5.

³² *Ibid.*, 5–6.

³³ *Ibid.*, 7.

³⁴ Chapter four of the 1927 Native Administration Act sets up the Native Commissioners courts, and is intended to regulate judicial procedure as it relates to Africans. Chapter five, which specifically looks at marriage and succession can be found in Appendix 1. S10 of the 1929 Native Administration Amendment Act, which establishes the Native Divorce Court, is laid out in Appendix 2.

³⁵ Mahmood Mamdani, *Citizen and Subject*, 5.

African intimacy in the emotional rather than the sexual, and in doing so give new dimensions to the examination of how men and women have ‘imagined and negotiated love... in sexual, predominantly heterosexual, relationships in colonial and postcolonial Africa.’³⁶ Cole and Thomas endeavour to do this by challenging old-fashioned scholarship which equated African intimacy with sex and by arguing for the anthropological consideration that love is the product of diverse historical processes and intersections which acknowledge the ‘shifting kinship practices, gender ideologies, and political economies [which] shape intimate attachments.’³⁷ Understanding these practices is important for understanding how Africans created and navigated domestic and intimate spaces such as marriage, and how shifts in these practices could lead to separation or divorce.

Particularly significant to the understanding of marriage and divorce in twentieth-century South Africa is the *African Studies Review Special Edition: The Politics of Marriage in South Africa* which looks at the ‘mutually constitutive relationships between domestic transformations and political and economic change... constituting categories of difference, even while creating new forms of community.’³⁸ Particularly notable articles for this study are Megan Healy-Clancy’s ‘The Politics of New African Marriage in Segregationist South Africa’³⁹ and Natasha Erlank’s ‘The White Wedding: Affect and Economy in South Africa in the Early Twentieth Century’⁴⁰ which examine the relationship between Christian marriages, mission education, notions of ‘respectability’ and gender relations among urban Africans. Deborah Posel’s ‘Marriage at the Drop of a Hat: Housing and Partnership in South Africa’s Urban African Townships, 1920s–1960s’⁴¹ and Victor Muzvidziwa’s ‘An Alternative to Patriarchal Marriage: Mapoto Unions’⁴² look at how marriage developed and changed with the advent of modernisation, through the filter of marriages of convenience,

³⁶ Jennifer Cole and Lynn M. Thomas, eds, *Love in Africa* (Chicago and London: The University of Chicago Press, 2009), 1.

³⁷ *Ibid.*, 4.

³⁸ Meghan Healy-Clancy, ‘Introduction’, *African Studies Review* 57, no. 02 (September 2014): 2.

³⁹ Meghan Healy-Clancy, ‘The Politics of New African Marriage in Segregationist South Africa’, *African Studies Review* 57, no. 02 (September 2014): 7–28.

⁴⁰ Natasha Erlank, ‘The White Wedding: Affect and Economy in South Africa in the Early Twentieth Century’, *African Studies Review* 57, no. 2 (September 2014): 29–50.

⁴¹ Posel, ‘Marriage at the Drop of a Hat’.

⁴² Victor Muzvidziwa, ‘An Alternative to Patriarchal Marriage: Mapoto Unions’, *Nordic Journal of African Studies* 11, no. 1 (2002): 138–55.

which this project argues were made easier by the increased accessibility of divorce under the Native Divorce Court.

Jack Simons' *African Women: Their Legal Status in South Africa*, published in 1968, positions African women within South Africa's rapidly industrialising twentieth century.⁴³ It examines both customary and common law through the filters of patriarchy, race, polygyny, traditional attitudes and the state's modernisation project to locate and understand how the twentieth century held specific challenges for African women in social and domestic spaces, and provides both frameworks and historicised legal perspectives for situating the women in this project within a historical and legal space. *Women and Gender in Southern Africa*, the seminal collection of essays edited by Cheryl Walker, situates gender within the legal and social histories of twentieth-century South Africa, engaging with the specific intersections of settler and indigenous gender relations to understand how the development of urban African identities, and its influences on Christianity, urbanisation, migration, and modernity, occurred.⁴⁴ 'The Modern Girl and Racial Respectability in 1930s South Africa'⁴⁵ by Lynn Thomas looks at the impact of the modernity project on the development of urban African women. Looking at notions of Christianity, 'respectability,' and education, this work, in conjunction with Healy-Clancy's *A World of Their Own: A History South African Women's Education*,⁴⁶ situates African women in urban spaces. These authors, beyond speaking to the themes of love, patriarchy, and gender which this study examines, also serve to historicise and contextualise much of the analysis of case law in this project. It is by building on their work that this project is able to develop a critical framework for the cases presented, and situate itself within both legal and social scholarship.

White Laws, African Lives

This project attempts to contribute to the body of historical and legal scholarship which examines the ways in which African urban identities developed, in the context of and as a

⁴³ Harold Jack Simons, *African Women: Their Legal Status in South Africa* (University of Michigan: Northwestern University Press, 1968).

⁴⁴ Cheryl Walker, ed., *Women and Gender in Southern Africa to 1945* (Cape Town, London: David Philip, James Currey, 1990).

⁴⁵ Thomas, 'The Modern Girl and Racial Respectability in 1930s South Africa'.

⁴⁶ Meghan Healy-Clancy, *A World of Their Own: A History South African Women's Education* (Pietermaritzburg: University of KwaZulu Natal Press, 2013).

reaction to the developing legal system that emerged to govern and regulate the socio-political changes wrought by capitalist development after the establishment of the Union in 1910. Because of this, there were many new and amended laws which were designed to govern a changing population dynamic, control access to urban and ‘white’ spaces, regulate African migration and life in the reserves, preserve white hegemony and fulfil the needs of the capitalist economy. Mamdani writes that

Between the rights-bearing colons and the subject peasantry was a third group: urban-based natives, mainly middle- and working-class persons, who were exempt from the lash of customary law but not from modern, racially discriminatory civil legislation. Neither subject to custom nor exalted as rights-bearing citizens, they languished in a juridical limbo.⁴⁷

Urban Africans had neither the legal status of citizen nor subject, and as a result, became judicially ‘in-between,’ existing in a ‘bifurcated’⁴⁸ legal state, and an uncertain legal status as neither subject nor citizen.

Very significant is Martin Chanock’s *The Making of South African Legal Culture 1902-1936: Fear, Favour and Prejudice*,⁴⁹ which also survey the procedures and practices of the court, and the development of South Africa’s legal system. These works also consider the way the law related to conjugal rights. These authors form the core readings of the civil law aspect of this project and have been instrumental in developing my understanding of the practices and procedures of the Native Divorce Court. Thomas W Bennet’s *Customary Law in South Africa*⁵⁰ examines the nature and evolution of customary law leading up to the 1996 democratic Constitution, framing it in the court system as well as in the everyday lives of African communities. Bennet also collaborated with Nicola Peart, a professor of law at the University of Cape Town, to produce *A Sourcebook of African Customary Law for South Africa*,⁵¹ which discusses the primary sources of customary law in relation to individual African communities. In addition to these are Posel’s ‘State, Power and Gender: Conflict over the Registration of African Customary Marriage in South Africa c. 1910–

⁴⁷ Mahmood Mamdani, *Citizen and Subject*, 19.

⁴⁸ *Ibid.*, 7.

⁴⁹ Chanock, *The Making of South African Legal Culture 1902-1936*.

⁵⁰ TW Bennett, *Customary Law in South Africa* (Lansdowne: Juta and Company Ltd, 2004); TW Bennett and NS Peart, *A Sourcebook of African Customary Law for South Africa*, 1st ed. (Cape Town, Johannesburg: Juta and Co. Limited, 1991). Thomas W Bennett is a professor of law at the University of Cape Town and has written extensively on customary law.

⁵¹ Bennett and Peart, *A Sourcebook of African Customary Law for South Africa*.

1970'⁵² and 'Traditions of Power and the Power of Tradition: The State and African Customary Marriage in South Africa'⁵³ which also serve to engender discussions of customary marriage, and contribute to the understanding of why African women left the reserves and joined the migrant labour force.

Valuable older but problematic scholarship produced in the twentieth century South African context, with all of the political and racial agendas that production implies, but which still offers valuable technical and judicial understandings of the Native Divorce Court and the codification of customary law includes legal historian Julius Lewin's *Law, Power and Race Relations in South Africa*,⁵⁴ *The Conflict between Native and Common Law in South Africa*,⁵⁵ *The Legal Status of African women*,⁵⁶ and *The Role of the Courts in Race Relations*⁵⁷. His *An Outline of Native Law*⁵⁸ is the basic guideline to the Native Divorce Court which helped this study to position itself within South Africa's legal system. *Bantu Divorce Courts*⁵⁹, by TF Coertze, the first president of, and HP Kloppers, the Registrar of, the Johannesburg Central Division Native Divorce Court from its inception in 1948, examines the decisions of the court, the laws of marriage and divorce, and the general practice and policy of the Native Divorce Court. This seminal work is supplemented by *Urban Native Law*,⁶⁰ the *Law and Practice of Divorce and Matrimonial Causes*.⁶¹ *Seymour's Customary Law in South Africa*,⁶² written by JC Bekker, Seymour's son, focuses

⁵² Deborah Posel, 'State, Power and Gender: Conflict over the Registration of African Customary Marriage in South Africa c. 1910–1970', *Journal of Historical Sociology* 8, no. 3 (1995): 223–56.

⁵³ Deborah Posel. 'Traditions of power and the power of tradition: the state and African customary marriage in South Africa.' (1994). <http://wiredspace.wits.ac.za/bitstream/handle/10539/8037/HWS-340.pdf?sequence=1>.

⁵⁴ Julius Lewin, 'Power, Law and Race Relations in South Africa', *The Political Quarterly*, December 1959, 389–99.

⁵⁵ Julius Lewin, 'The Conflict between Native and Common Law in South Africa', *The South African Law Journal*, November 1941.

⁵⁶ Julius Lewin, 'The Legal Status of African Women - the Preliminary Report of an Institute Sub-Committee', *Race Relations Journal (SA Institute of Race Relations)* xxvi, no. 4 (1959): 152–58.

⁵⁷ Julius Lewin, 'The Role of the Courts in Race Relations', *The Cape Times*, 4 December 1964.

⁵⁸ Julius Lewin, *An Outline of Native Law*, 3rd ed. (Johannesburg: S.A. Institute of Race Relations, 1960).

⁵⁹ H P Kloppers and T F Coertze, *Bantu Divorce Courts*, 2nd Edition (Cape Town, Johannesburg, Wynburg: Juta and Company Ltd, 1976). A full list of specimen forms used by the native divorce court can be found in the annexure of this work on pages 63-54, and subsequently, has not been included in the appendix here.

⁶⁰ Gordon Davis, L Melunsky, and F B du Randt, *Urban Native Law* (Port Elizabeth, South Africa: Grotius Publications, 1959).

⁶¹ D Tolstoy, *The Law and Practice of Divorce and Matrimonial Causes, Including Proceedings in Magistrates Courts*, 5th ed. (London: Sweet and Maxwell, 1963).

⁶² J C Bekker, *Seymour's Customary Law in Southern Africa*, 5th ed. (Cape Town, Johannesburg: Juta and Co. Limited, 1989).

on his father's experiences with the use and production of customary law in the twentieth century as an attorney at law who practised in the early 1900s. It is a seminal work on customary law and the recording thereof in the twentieth century⁶³ and is valuable for understanding how customary law was conceptualised by the state. These are supplemented by Lewin's *Some Problems Involved in the Recognition of African Native Law*,⁶⁴ and *The Recording of Native Law and Custom*.⁶⁵ When reading older scholarship, it is important to remain aware of the attitudes and ideologies being perpetuated in the political space of the time. It is for this reason that most of these works are used in Chapter One, and are valued in this project primarily for their technical and judicial knowledge.

Examining how and why the Native Divorce Courts were established, within the scope of this project, requires an understanding of the difference between what Rosemary Hunter calls *legal history* and *legal history*, with the emphasis falling on quite different areas. The first focuses mostly on 'legal documents', and the second on the 'legal dimensions of historical problems.'⁶⁶ As this project, in a sense, exists between *legal history* and *legal history*, it is important to consider both the legal and social aspects of it. In drawing from both legal documents and the historical context of the law, this project situates itself in the in-between space that exists amid social and legal histories, looking at legal records within the framework of period-specific social, political, and racial discourses.

Why

There has been a shift in the last fifty years in the historiography on African gender relations and intimacies from a focus on sexuality and sexual behaviour in African communities to one which examines 'love' as a romantic, individualistic experience in modernising African communities. In the nineteenth and twentieth centuries, and especially under the rise of Christianity, the idea of the 'nuclear family' became the conduit for understanding urbanisation, economic development, labour patterns, and population growth in African

⁶³ SM Seymour, *Bantu Law in South Africa*, 3rd ed. (Wynburg: Juta and Co. Limited, 1970).

⁶⁴ Julius Lewin, 'Some Problems Involved in the Recognition of African Native Law', *Journal of Comparative Legislation and International Law* 24, no. 2 (November 1942).

⁶⁵ Julius Lewin, 'The Recording of Native Law and Custom', *Journal of the Royal African Society*, October 1938.

⁶⁶ Rosemary Hunter, Australian legal histories in context, *Law and History Review* 21(3), 2003 in Marelize Grobler, 'Towards a Legal History of White Women in the Transvaal, 1877-1899' (Unpublished, University of Pretoria, 2009), ii, <http://repository.up.ac.za/bitstream/handle/2263/27046/dissertation.pdf?sequence=1&isAllowed=y>.

communities, under the modernisation project.⁶⁷ Much of this scholarship looks at the shift from a ‘communal, kin-based ethos to an individualist one,’⁶⁸ and narratives surrounding this typically juxtaposed pre-colonial African’s emphasis on the interests of the family and community against the ‘autonomous experience’ or ‘stepping stone to marriage’⁶⁹ nature of romantic love, which brought to the forefront an emphasis on customary marriages in colonial and postcolonial writings. According to Cole and Thomas, ‘Love became a subject of analysis because modernization theory proposed that nuclear families based on strong bonds between couples rather than kin groups were foundational to the creation of industrial society.’⁷⁰

The legislative development in the Transvaal contributed significantly to the development of South African law as a whole, and this project is an opportunity to further explore the relationship between the law and gender formation in a historical context. This study seeks to investigate what archives can tell us about the historical construction of colonialism and colonial legislature, the codification of customary law, gender roles and the control of women’s sexuality, the social values and norms of the time and how urban African identities, manifested in the domestic spaces of love, marriage, and divorce, and how these narratives informed and were informed by the Native Divorce Court.

What this project attempts to do is situate itself within the space between the social historian’s ambition to interrogate the African experience of Christian or common-law marriage within urban spaces and how it differed from traditional marriage practices, and the legal historians’ desire to plot and understand the legislative and government processes which underpin state development. Understanding how and why urban Africans adopted western ideologies and practices, how legal bifurcation impacted on the development of African identities, and how the legislative processes developed to govern them is a considerable task. Coupling that with developing an understanding of how these themes intersected with the period-specific discourses of race, culture, class, and sexuality over the Union period of South African history as necessary to fully develop this scholarship is significantly more comprehensive a task than this project allows for. For this reason, this

⁶⁷ Cole and Thomas, *Thinking through Love in Africa*, 10.

⁶⁸ *Ibid.*, 10.

⁶⁹ *Ibid.*, 12.

⁷⁰ *Ibid.*

dissertation narrows its focus to the Transvaal Central Division Court in 1948, which is the year when this court was established. Saul Dubow's and Alan Jeeves' seminal anthology on the 1940s is, as a result, of considerable importance to this research. *South Africa's 1940s: Worlds of Possibilities* examines the social, political, and economic considerations of the transitional period of the 1940s, situating this epoch in a time of change that culminated in the 1948 election of the National Party.⁷¹ It is within this context of rapid change that urban African identities established themselves, and it is through an interrogation of this period that a more nuanced understanding of these identities, in relation to the legal, social, political, and economic developments, emerges. The 1940s saw an increase in urbanisation, as well as the stratification of the urban space and capitalist economy, the dwindling of reserve economies and authorities, the migration of African women to urban areas, and the establishment of what seemed to be a permanent urban African presence. This influx of Africans 'into cities and towns overwhelmed the already meagre array of state and municipal services and encouraged the emergence of new political and cultural associations.'⁷² This led to an increase in political engagement from both African men and women, with the emergence of the Youth League of the African National Congress (ANC) in 1944, and the inclusion of African women into ANC ranks from 1943.⁷³ Dubow and Jeeves further write:

A youthful and volatile city-based population expressed its hopes and aspirations in new musical and literary forms, as well as through participation in independent churches and in self-help groups. The newly confident and assertive generation of urban-based intellectuals now pressed for inclusion in South African society as a right rather than as a privilege.⁷⁴

While this was occurring, Afrikaner nationalism was experiencing its own resurgence, with the National Party rising to political prominence.⁷⁵ In white and African communities in urban spaces, political organisation and mobilisation were developing more rapidly, until the election of the National Party and the apartheid regime in 1948. The legislative impact of apartheid was not felt in the Native Divorce court until the 1950s and 1960s, when new

⁷¹ Saul Dubow and Alan Jeeves, eds, *South Africa's 1940s: Worlds of Possibilities* (Cape Town: Double Story Books, 2005).

⁷² *Ibid.*, 2.

⁷³ Dubow and Jeeves, 3.

⁷⁴ *Ibid.*, 4.

⁷⁵ *Ibid.*, 5-6.

legislation such as the Matrimonial Affairs Act 37 of 1953 was established, and so the apartheid period remains largely outside of the scope of this project.

When interrogating how urban African identities in South Africa developed in both legal and social spaces, the work by Jason Hickel on domesticity and social engineering in colonial South Africa provides an excellent starting point, as it examines the relationship between customary and colonial law and their application in ‘remaking the African family.’⁷⁶ Hickel draws links between the urban townships created by colonial administrators and the eventual politicisation of the anti-apartheid movements, theorising that the ‘specific forms of social organization that characterised township society’⁷⁷ are what allowed for black consciousness ideologies to form. Beyond the application of laws, colonial or customary, Hickel also looks at the role of the colonial administration in the breakdown of traditional African families (as a result of labour migration and urbanisation) and in re-making these families ‘according to European expectations of domesticity.’⁷⁸ From this work, it is easy to see that the urban/rural divide, the relationship between customary and colonial law, and white notions of domesticity and marriage, particularly as they were informed by Christianity and the Native Divorce Court, had a significant impact on the position of the urban African in the domestic space. By looking at legal records it is the aim of this project to better understand exactly how these factors and others worked to shape the African urban identity and urban African notions of marriage and divorce.

Despite the fact that the legislative development in the Transvaal has contributed significantly to the development of South African law as a whole, the scholarship around the Central Division of the Native Divorce Court has been comparatively underdeveloped. As a result, this dissertation centres itself on the development and records of the Transvaal Central Division of the Native Divorce Court and provides a contribution to the study of the impact of the law on the everyday and African matrimony in urban areas. It also speaks to the relationship between the law and urban African identities in a historical context.

⁷⁶ Jason Hickel, ‘Social Engineering and Revolutionary Consciousness: Domestic Transformations in Colonial South Africa’, *History and Anthropology* 23, no. 2 (2012): 301.

⁷⁷ *Ibid.*, 302.

⁷⁸ *Ibid.*

Methodology

This research is based on archival documents, particularly legal records found in the Transvaal depot of the National Archives in Pretoria, which contains the public records of the former Transvaal province, its predecessors, magistrates and local authorities. The records from the Central Black Appeal and Native Divorce Court (SEJ), on which the dissertation relies heavily, include court transcripts, court missives, proclamations, public records, and discussions between court workers, lawyers, government officials, and other members of the legal profession in the Native Commissioners and Native Divorce Courts. This material is supplemented by legislative and legal discussions published in Government Gazettes, as well as newspaper articles from the *Rand Daily Mail*.

As this project is centred on divorce (and marriage), my primary source of information are the case files which contain documents pertaining divorce hearings held before the Transvaal Central Division of the Native Divorce Court. Each case contains a hearing for either divorce proceedings or the restitution of conjugal rights. Most of these cases come from the Johannesburg court, but some of them were tried in satellite courts such as Kroonstad. The documents within these cases include but are not limited to court records, magistrates' records, letters, pay slips, warrants, and case summaries which are found in 'part files', or incomplete case files which do not contain transcripts of court proceedings. As mentioned throughout the rest of the thesis, and particularly in Chapter Four, there are a number of limitations which have been placed on this thesis in regards to how cases have been analysed, as well as which cases could be presented here. Primary among these are the formulaic nature of the court records, the poor archival record keeping which has resulted in a number of case files being incomplete, and the issue of court shorthand which rendered a large number of documents illegible. For this reason, despite being a comparatively small number, the cases highlighted here are among the most comprehensive in the archive, and contain the most nuanced, detailed, complex, and complete view of the inner workings of the Native Divorce Court, and are representative of the larger body of court proceedings which were examined in the course of this project. Beyond the records themselves, however, this project is further constrained by the limitations of the Masters' framework, and as such, this thesis can be considered an exploratory study focusing on the inception of the Transvaal Central Division of the Native Divorce Court in 1948. Further scholarship is necessary to fully understand the inner workings of the court.

Because the primary source files for this thesis are taken from Union-era archives, the source materials reflect the language of the time. When the terminology ‘Native’ or ‘Bantu’ is used, it is because it has been taken from archival materials, and referenced accordingly. All instances of my own reference to the African population or individuals thereof will use ‘African’ or ‘black.’ The short form of Acts will be used throughout this project. Most commonly, the Native Administration Act 38 of 1927 will be referred to as the 1927 Native Administration Act. The Native Administration Amendment Act 9 of 1929 will be referred to as the Native Administration Amendment Act or the 1929 Native Administration Amendment Act. Unless otherwise specified, all instances of the phrase Native Divorce Court (except in Chapter One) will refer specifically to the Native Divorce Court Central Division’s Johannesburg Court. The Native Divorce Court Central Division may also be referred to as the Central Divorce Court, or the Transvaal Central Division Court.

Reading the Archive

As most historians will attest to, the experience of archival research is a taxing one. It is often important to approach research in these spaces with an understanding that records are often incomplete, illegible, or occasionally incorrect. In the course of attempting to discern the process by which the Native Divorce Court came into being, I came across many promising documents that stopped mid-file, which made the process of tracing when, how, and why Johannesburg’s Central Divorce Court came into being quite challenging. In addition, many of the case files themselves simply contain a summons, a verdict, and an order for either the restitution of conjugal rights or a decree of divorce.⁷⁹ Typically, the records this project has looked at contain very little information beyond this, other than a marriage certificate and court ruling. Occasionally there are also shorthand notes available, written by the court stenographer detailing the testimonies and processes of the case, but these are usually unreadable, which is frustrating as these records often contain the only substantive information in many cases.

There are several things to consider when it comes to archival research. Beyond the fragility of the documents themselves, several of which were almost illegible and in poor

⁷⁹ An example of a Summons document can be seen in Appendix 4, an Order for the Restitution of conjugal rights in Appendix 8, and a decree of divorce in Appendix 9.

condition,⁸⁰ there are missing documents, haphazardly organised files and the ever-present enemy of healthy sinuses: dust. Beyond what will blacken your fingers and make you forget what fresh air feels like, there is what Carolyn Steedman calls ‘Archival Fever’ (borrowing from Derrida) - the environmental hazards of days spent in archives where the hours of your day and the days of years long dead blend together and are breathed in by your mind and your lungs simultaneously until, jerked back to the present, your reorientation feels like the hangover after a student’s night out – and takes just as long to recover from. The experience in the archive she captures perfectly:

You sit all day long, reading in the particular manner of the trade, to save time and money and in the sure knowledge that out of the thousand lines of handwriting you decipher, you will use perhaps one or two. You scarcely move... mainly because you want to finish, and not have to come back, because the PRO is so far away, so difficult to get to. That is the immediate ambition that excites you: to leave; though there exists, of course, the wider passions, of finding it, and writing the article or book, writing history.⁸¹

That is not, of course, to say that the only challenges of the archives exist in the physical realm. Steedman also writes that

Dust is the immutable, obdurate set of beliefs about the material world, past and present, inherited from the nineteenth century, with which modern history-writing attempts to grapple; Dust is also the narrative principle of that writing; and Dust is the joke.⁸²

Students of the archive today have to be conscious of the colonial nature of archival records – which is particularly relevant to my research as this project will be looking at the records of the segregationist state. Colonial archives and state archives, beyond being products of state machineries, ‘bolstered the production of those states’ through ‘systems of accountability’ and ‘paper trails’ which included ‘weekly reports to superiors, summaries of reports of reports, [and] recommendations based on reports’⁸³ - which are used to

⁸⁰ In cases of quoted sections containing illegibility, due to poor handwriting, or faded words written in pencil, word or sentence fragments which are unreadable have been indicated. In selecting cases, this study attempts to make this as infrequent as occurrence as possible.

⁸¹ Carolyn Steedman, *Dust: The Archival and Cultural History* (New Brunswick, New Jersey: Rutgers University Press, 2002), 18–19.

⁸² *Ibid.*, xi.

⁸³ Ann Laura Stoler, ‘Colonial Archives and the Arts of Governance: On the Content in the Form’, in *Refiguring the Archive* (Cape Town: David Philip Publishers, 2002), 90.

supplement the casework. There must always be the Foucauldian understanding that the ‘archive is not simply institution, but rather the law of what can be said, the system of statements, or rules of practice, that give shape to what can and cannot be said’ and that ‘archives are often both documents of exclusion and monuments to particular configurations of power.’⁸⁴ The challenges of the archives extend beyond mental and physical exertion to their metaphysical representations, their controversies, pitfalls, and potential political agendas. Many of the documents in the files examined in this project are evidence of what Steedman calls ‘enforced narratives’⁸⁵ or narratives recorded, and in many cases, written, by court stenographers or legal professionals who are more concerned with a ‘Petition, a Narrative of Information, containing an Account of his or her Service – ‘with whom, when, where, how long, in what quality.’⁸⁶ These narratives became a product of the state, rather than the individual, in the action of their recording. Subsequently, the ideologies of the scribes of the state and the law permeated the narratives they recorded, and so the *dust* continues to speak, often over the voices of the Africans who approached the court.

Because of this, it is often necessary to read against the grain and interrogate the biases and colonial values which would have influenced the language used in records. In recognising that archival documents often portray Africans as ‘objects of colonial discipline,’⁸⁷ and that archives themselves are systems which preserve and exclude materials in order to propagate specific power relations,⁸⁸ this project is better positioned to write them as ‘subaltern subjects and agents of practice’⁸⁹ who navigated cultural representations of power to make their own choices where possible. It is also important to consider the problem of language, translation, and interpretation when considering colonial archival sources which deal with African subjects, and to read within an understanding that inaccuracies and biases could and did distort archival records. Additionally, Stoler’s emphasis on the archive as a ‘site of the imaginary’⁹⁰ is an important theme within this

⁸⁴ Carolyn Hamilton, Verne Harris, and Graeme Reid, ‘Introduction’, in *Refiguring the Archive*, ed. Carolyn Hamilton et al. (Dordrecht: Springer Netherlands, 2002), 8.

⁸⁵ Steedman, *Dust*, 48.

⁸⁶ Or, in the case of the SEJ files examined in this project, the Summons, Particulars of Claim, and Judgement Sought.

⁸⁷ Stoler, ‘Colonial Archives and the Arts of Governance’, 99.

⁸⁸ Hamilton, Harris, and Reid, ‘Introduction’, 8.

⁸⁹ Stoler, ‘Colonial Archives and the Arts of Governance’, 99.

⁹⁰ *Ibid.*, 89.

thesis, as many of the arguments offered here are based on inference and speculation, due largely to the limited records available. Because of this, the narrative nature of this thesis becomes more significant. This will be discussed more in Chapter Four.

Extending concerns over the interrogation of bias and reading against the grain is the consideration of what Premesh Lalu calls speaking to the ‘nationalist narratives’⁹¹ which repurpose historical subjects for the ideation of propagandist ideologies, and the ‘narrative impasse’⁹² which can result. In this scenario, the possibility for interpretation or the development of ‘alternative history’ is removed. In this space, ‘colonial sources are useful in describing everything around the event except the event itself.’⁹³ I have found this, in a sense, to be true in my own experience with the colonial sources which make up this project. There are many case files I have examined which concern themselves with the bureaucracy of divorce litigation and jurisdiction, but which contain little to no detail about the proceedings themselves. These records are ‘associated with legal administration, with the beginning of things (government, police, magistracy), and with the rule system of the law’⁹⁴ rather than an account of trial and testimony. These records served to enforce state authority and removed black subjects from their own narratives. Though, in this case, it was less due to any sense of nationalism or the promotion or preservation thereof, and more the outcome of what can be seen largely as bureaucratic inefficiency and indifference, as will be further discussed below. Lalu suggests a postcolonial reading of history, wherein the evaluation of the archive in terms of “‘objectivity” and “bias””⁹⁵ limits the interpretation of colonial records. While

the colonial archive is usually read in relation to its exclusions, its function in the process of subject constitution, its process of objectification, in other words, reveals the techniques of colonial governmentality interlaced with the grammar of domination. The colonial archive thereby combines and orders dispatches, cartographic representations, information and intelligence reports, commissions of inquiry and the orders of language in a very specific way to keep the subject in its place.⁹⁶

⁹¹ Premesh Lalu, *The Deaths of Hintsa: Postapartheid South Africa and the Shape of Recurring Pasts* (Cape Town: HSRC Press, 2009), 33.

⁹² *Ibid.*, 36.

⁹³ *Ibid.*, 37.

⁹⁴ Steedman, *Dust*, 67.

⁹⁵ Lalu, *The Deaths of Hintsa*, 37.

⁹⁶ *Ibid.*, 38.

This idea of ‘the grammar of domination’ is particularly useful when looking at court files, as the formulaic nature of those records speaks to the systems of domination practised by colonial and white authorities, even as those same records removed or reduced African experiences in favour of espousing ‘colonial and later apartheid biases.’⁹⁷

Reading the Record

In the late 1970s, legal anthropologist Sally Falk Moore began to call for the inclusion of historical perspective and social processes in the study of legal anthropology. Her work on the Chagga people in Tanzania emphasises that ‘Chagga ‘customary’ law, regarded by Europeans as immutable tradition, was, in fact, the product of the historical interaction between the Chagga people and their colonial rulers.’⁹⁸ This idea of studying the law through a historical and anthropological context became more popular in the 1980s, new scholarly analysis revealed the ‘value of legal records and questions for the study of changes in political economy and everyday life.’⁹⁹

This understanding of the relationship between law and cultural order as ‘mutually defining’ is reflected on in the edited collection titled *Law in Colonial Africa*.¹⁰⁰ Here, historians discuss the different ways of reading the law: culturally through ‘discourse about laws and legal systems’; interactionally, or through processes of engagement, ‘asking how individuals and groups use laws and legal processes for their own ends’; and institutionally, focusing on the ‘economic and political processes and [which] treats actors as representatives of economic interests and laws as manifestations of ideological positions.’¹⁰¹ In particular, Martin Chanock’s ‘Paradigm, Policies, and Property: a Review of the Customary Law of land Tenure’¹⁰², and David William Cohen’s ‘A Case for the

⁹⁷ Hamilton, Harris, and Reid, ‘Introduction’, 9.

⁹⁸ David William Cohen, ‘A Case for the Basoga’: Lloyd Fallers and the Construction of an African Legal System’, in *Law in Colonial Africa*, ed. Richard L. Roberts and Kristin Mann (London: Heinemann Educational Books, 1991), 7.

⁹⁹ *Ibid.*, 7.

¹⁰⁰ Richard L. Roberts and Kristin Mann, eds, *Law in Colonial Africa* (London: Heinemann Educational Books, 1991).

¹⁰¹ Richard L. Roberts and Kristin Mann, ‘Law in Colonial Africa’, in *Law in Colonial Africa*, eds, Richard L. Roberts and Kristin Mann (London: Heinemann Educational Books, 1991), 8.

¹⁰² Martin Chanock, ‘Paradigm, Policies, and Property: A Review of the Customary Law of Land Tenure’, in *Law in Colonial Africa*, ed. Richard L. Roberts and Kristin Mann (London: Heinemann Educational Books, 1991), 61–84.

Basoga': Lloyd Fallers and the Construction of an African Legal System'¹⁰³ present an understanding of how Africans and Europeans in colonial Africa used the law to compete for resources, labour, power, and authority. This was done by invoking

symbols, rules, and ideas in support of particular positions. ... Institutional, class, and ideological forces... in turn shaped the distribution of resources, labour, power and authority in society and the content and character of local law and culture.¹⁰⁴

These interpretations are important for explaining why, for example, the 1927 Native Administration Act designed common law marriages for Africans to be automatically out of community of property, at the behest of African men, in order to control the movement and limit the independence of African women. In *Gender and Generations Apart: Labour Tenants and Customary Law in Segregation-era South Africa, 1920s to 1940s*, Thomas McClendon highlights the importance of the preservation of African patriarchal structures to the stability of the segregationist state.¹⁰⁵ African marriages enacted this patriarchy by reducing women's access to their husband's financial support after divorce, under s22(6) of the 1927 Native Administration Act¹⁰⁶. While this relationship between gender and the state is discussed more comprehensively in Chapters Two and Three, it is important to note that the deliberate reduction of African experiences in legal records, particularly for women, is one way that the state preserved its power and enacted its prejudices. Another way these prejudices were enacted was through the use of English in court, with parties either being expected to give testimony and file documents in English, or utilise the services of those who could, through attorneys who employed, perhaps unconsciously, the 'grammar of domination' in filing for and representing their clients, and court translators and interpreters. This will be discussed further in Chapter Four.

In his paper 'The Judge and the Historian', Carlo Ginzburg, an Italian historian, seeks to understand the relationship between archival records and reality through an analysis of a number of historical texts. He considers 'a sound historical construction ... impossible' 'without a thorough analysis of its inherent distortions (the codes according to which it had

¹⁰³ David William Cohen, 'A Case for the Basoga', 239-254.

¹⁰⁴ Roberts and Mann, 'Law in Colonial Africa', 8.

¹⁰⁵ Thomas V McClendon, *Gender and Generations Apart: Labour Tenants and Customary Law in Segregation-Era South Africa, 1920s to 1940s* (Portsmouth, NH; Oxford; Cape Town: Heinemann, James Currey Ltd., David Philip Publishers (Pty) Ltd., 2002).

¹⁰⁶ See Appendix 1 for details.

been constructed and/or it must be perceived).¹⁰⁷ As a result, ‘a specific interpretive framework is needed, which must be related ... to the specific code according to which the evidence has been distorted.’¹⁰⁸ This understanding further emphasises the ideas in Roberts and Mann’s *Law in Colonial Africa* that a historically contextualised reading of legal sources offers a more nuanced understanding of how the law entangled with the everyday lives of people.¹⁰⁹ In *Gender and Generations Apart*, McClendon offers a counterpoint for consideration: ‘litigants sometimes lie, rules of evidence often exclude, and translators and transcribers may trammel the truth.’¹¹⁰ Readings of these records must take this possibility, even likelihood, of distortion into account when considering legal materials. Natasha Erlank highlights the ‘need to read records across and according to both their contexts and the context of their production.’¹¹¹ In order to apply these frameworks to the cases analysed in this project, it is important to properly contextualise and periodise these cases within the racial and social paradigms of the twentieth century in South Africa, by using the authors discussed in the first half of this chapter, as well as case files and other archival materials as necessary.

It is important then, if it is accepted that the law is produced by the ideology of those in power, when considering the historical contexts of legal records, to remember the biases, prejudices, and agendas that are then built into legal systems and language. Lalu’s postcolonial readings of ‘bias’ and the ‘grammar of domination’ are significant when examining the language of the law. It is also necessary to consider that ‘the archive is made from selected and consciously chosen documentation from the past’ and also that ‘though the bundles may be mountainous, there isn’t in fact, very much there.’¹¹² Multiple copies of a single document have filled a divorce case file that says nothing of the lives that were meant to be recorded there. In the file, there is often no testimony and often no marriage certificate, but there are two copies of the Summons and two more of the Particulars of Claim.¹¹³ What was relevant to the court was what was necessary for the administration of

¹⁰⁷ Carlo Ginzburg, ‘Checking the Evidence: The Judge and the Historian’, *Critical Inquiry* 18, no. 1 (1991): 84.

¹⁰⁸ *Ibid.*, 84.

¹⁰⁹ Roberts and Mann, *Law in Colonial Africa*, 1991.

¹¹⁰ McClendon, *Gender and Generations Apart*, 26.

¹¹¹ Natasha Erlank, ‘Well Coming Straight to Business, Immediate Marriage Is Absolutely Impossible’: Seduction Christian-Style in the Eastern Cape, c.1930’ (Unpublished paper, 25 October 2005), 5.

¹¹² Steedman, *Dust*, 68.

¹¹³ These documents will be explained more in chapter one, and a sample of a summons is in Appendix Four.

ideologically driven law, which, in the colonial, segregation, and apartheid eras, meant the continued separation of white and African populations. The African voice and narrative, and the recording thereof, was only necessary when it could be used to further the objectives of the white state.

There is an interesting sense of indefatigable voyeurism that is present in the examination of any kind of personal narrative work that involves performed narratives. While this project is based in legal records, it is also an attempt to develop an understanding of the personal motivations of the men and women who appeared before the Native Divorce Court, as well as the legal attitudes of those who legislated and enforced its tenets. Subsequently, much of the case law examined is a study of the personal testimonies of people whose marriages, and in some cases, the foundation of their lives, were changing in significant ways.

Despite this focus on the personal, however, when reading records, it is important to be cognisant of the performative nature of court proceedings, and the ways in which urban African men and women took on specific and gendered roles within the confines of common law. As a result, it is necessary to consider that the ‘performativity’ of gender, as a ‘coercive and productive reiteration of norms,’ is very much present in this project, and echoes the use of the metaphor of the theatre to promote the idea that ‘sexuality and gender were ‘dialogic performances, dramatic roles, scripted dramas, displays, and accomplishments.’¹¹⁴ The formulaic nature of legal documents and language, and the surgical theatre of divorce – precise and clean, like an operation, are ideas which thread through this work. But divorce is also in many ways a theatre of performance, and specifically of performed and scripted stage play, wherein African men and women took on the roles of specific personas, following rules which ‘created an artificially constrained storytelling ritual in the courtroom.’¹¹⁵ As a result, this dissertation is an engagement with the challenges and considerations discussed throughout this chapter. Through the interrogation of the political and legislative frameworks of the Native Divorce Court, this study attempts to understand the experiences of urban Africans in 1940s South Africa.

¹¹⁴ Janice M. Irvine, ‘“The Sociologist as Voyeur”: Social Theory and Sexuality Research, 1910–1978’, *Qualitative Sociology* 26, no. 4 (2003): 445.

¹¹⁵ McClendon, *Gender and Generations Apart*, 27.

Chapter Outline

Chapter One, 'The Theatre of Divorce', traces the history of the Native Divorce Court and plots its evolution from its establishment in 1929 to the opening of the third arm in the Transvaal province in 1948. It examines the records and discussions of the court and attempts to answer the questions of what the Native Divorce Court was, how it functioned, and why the Transvaal division was established so much later than its counterparts in the Orange Free State and Natal. The Native Divorce Court is viewed as the stage upon which divorce was acted out by urban Africans and court officials, and the chapter examines the procedures laid down for the function of this court, which in many ways operated like a surgery, clinical and formulaic. This dual meaning of 'theatre' is reflected in the themes of legal precision and performed narrative which permeates much of this project.

Chapter Two, 'Why the Binds of Marriage Should not be Dissolved', looks at the relationship between the state's modernisation project, Christianity, migration, urbanisation, and the socio-political context of the early twentieth century, particularly in the 1940s, and the impact of these on the development of urban African identities. It more closely examines how Africans conceptualised and practised love and marriage in urban spaces, and how Africans positioned themselves between the cities and the reserves. It also examines cases of malicious desertion and considers how gender both affected and was shaped by the urban space, with a particular focus on women. It also introduces ideas of how the urban African population was able to use the court to their benefit and advantage.

Chapter Three, titled 'What Makes a Man, What Makes a Marriage', is an analysis of cases pertaining to domestic violence and conjugal rights. This chapter presents an examination of African masculinities and the socio-political contexts in which they developed, including mining compounds, urban respectability, and racial patriarchy. It also looks more specifically at the idea of the African urban masculinities as a result of labour migration and the urban-rural divide.

The final chapter, 'The Native Divorce Court and the urban African: Testimony, Agency, Voice and Record', looks at the relationship between the Native Divorce Court and the law, framing it within a discussion of how the state perceived and attempted to manage the African urban population. It also examines in detail the inefficiencies of the Native Divorce

Court system, as well as some of the technical details of the documents found in case files, and interrogates the idea of representation and African agency within this system of law.

The Conclusion offers a synthesis of the major arguments offered in this work and presents future avenues of exploration in this scholarship.

Appendices One to Three contain excerpts from the 1927 Native Administration Act, the 1929 Native Administration Amendment Act, and the Matrimonial Causes Act Jurisdiction Act 22 of 1939 and provide a reference point for sections of these Acts which are relevant to the establishment and running of the Native Divorce Court. Appendices Appendices Four through Six contain samples of the summons, particulars of claim, and marriage certificates which are found in each case, and are presented here as a point of consideration of the kind of information available in cases, as well as the language used, and some of the technical aspects of case proceedings. Appendix Seven provides a breakdown of the kinds of costs encountered by urban Africans who employed lawyers to assist in their cases.

Chapter One

The Theatre of Divorce

The Establishment of the Native Divorce Court, 1929-1948

This chapter presents an overview of South Africa's legal history, specifically in relation to the passing of the Native Administration Act 38 of 1927 and the Native Administration Amendment Act 9 of 1929, under which the Native Divorce Court was established. The relevant sections of these Acts, as they relate to African common law marriage and the Native Divorce Court are reproduced in Appendix One and Two. This chapter then provides an overview of some of the debates which surrounded the creation and necessity of this court, before looking at its daily functions from its inception in 1929 to the establishment of the Transvaal Central Division Court in 1948. The primary sources for this study are drawn from the case files and court documents housed in the Pretoria National Archives, which contains correspondence and discussions between the members of the Commissioners, Appeals and Native Divorce Courts.

What this chapter, and more broadly this thesis, attempts to do is establish a relationship between the Native Divorce Court and the way urban Africans conceptualised and practiced common law marriages. The aim of the chapter is to explain what the Native Divorce Court was and how it operated, in order to better understand how it contributed to the development of the urban African identity and reflected the attitudes of the state and legislature during the twentieth century. One of the primary concerns of this chapter is determining why the Transvaal Central Division of the Native Divorce Court was established later than the other divisions of this court.

The Union of South Africa

Prior to the 1910 unification, South Africa was divided into four different territories and colonies under British or Afrikaner rule. In each of these territories, a Superior Court was established during the course of the nineteenth century by different sets of legislation.

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The 1827 Charter of Justice set up the Cape Supreme Court in the Cape Colony, the High Court of Griqualand West was established by Act 12 of 1880, and the Eastern Districts Court was established by Act 21 of 1864. The Orange River High Court was established by Ordinance No. 4 of 1902 after British occupation. After Natal became a colony, a separate Supreme Court was established by Law 10 of 1857, and Natal was governed by its own set of laws. In the colony of the Transvaal, then known as the South African Republic, Britain's occupation saw Proclamation 14 of 1902 establish the Transvaal Supreme Court and the Witwatersrand Local Division.¹

In 1910, the Union of South Africa was formed under the South Africa Act of 1909, uniting the separate British colonies and the former Afrikaner sovereign republics into one country, which became a white dominion within the British Commonwealth until the establishment of the Republic of South Africa in 1961. The South Africa Act also established a single overarching Supreme Court, which absorbed all other Supreme Courts in the country under its jurisdiction. This Act re-structured other existing High and Criminal courts into provincial arms of the National Supreme Court. The South Africa Act also brought into existence the Appellate Division appeal courts, whose duties and jurisdictions were outlined by the Appellate Division Further Jurisdiction Act 1 of 1911. The Act remained in effect until it was repealed by the Supreme Court Act 59 of 1959. The mix of English and Dutch colonists, other European settlers, indigenous Africans, as well as the mix of migrant and indentured Indian, Chinese and Malay populations into the newly created South African Union required the establishment of new laws, or the amendment and re-structuring of laws and ordinances. For this reason, the procedures or modes of operation of existing courts were amended, and new courts were established. Due to Dutch colonialism, legal practices and jurisprudence that emerged in the twentieth century were an amalgam of Roman Dutch law and English legal customs and values. As a result, many of the laws from this period and into the Union years reflected English legal customs and values.

¹ Statutes of the Republic of South Africa Classified and Annotated from 1910, 'Courts,' 14 Preliminary Note.

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The law and its origins

From its inception in 1910, the Union of South Africa's colonial and segregationist authorities, and rapidly developing capitalist economy, necessitated the modification and restructuring of the law in order to effectively rule the state. This was in large part due to the number of sources from which South Africa's legal system was drawn and the way the law itself was codified and understood by legal scholars and practitioners. In order to understand how colonial powers conceptualised and understood political and subsequently legal identities, it becomes important to note that, under colonial and segregationist modes of thought, 'the emphasis on differentiation meant the forging of specifically "native" institutions through which to rule subjects.'²

This distinction between African/indigenous and settler/coloniser populations already existed under colonial rule, and the unification continued in this tradition. Under white domination, both pre-and post-formation of the Union, an entirely separate body of law was established to govern the African population.

Common law was derived from the rules and customs brought by colonisers from the seventeenth century onward. Dutch settlers in the Cape brought with them Roman practices which had been accepted in Holland. This system of law became known as Roman-Dutch and was later strengthened by complementary English practices which came with British colonialism in the nineteenth century. This combination of English and Roman-Dutch law became known as 'European' or 'common' law and was applied throughout the South African colonies in the aftermath of the South African War and later Union. This body of law will be referred to as common law throughout this work. While common law applied to Indian, Coloured, and African communities, it also reflected the segregationist attitudes of this era. As historians and scholars like Mamdani argue, Africans, and particularly urban Africans, existed under common law and were simultaneously separate from it, as they were subject to common laws but with their own 'native courts'. The existence of civil customary and indigenous customary law, which applied only to African communities, as well as the application of the Native Administration Act, highlights common law and customary law distinctions for Africans. All race groups in the Union were subject to common law, but Africans were also subject

² Mamdani, *Citizen and Subject*, 7.

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to specific legislation that did not apply to other racial groups, such as the Native Administration Act, and to customary law. Understanding this simultaneous subjection to and displacement from common law becomes important when identifying how the law contributed to the construction of urban African identities.

The codification of customary law

Under the theory of nativism, according to Sir Henry Maine, a legal member of the viceroy's cabinet in India, colonial authorities believed that

if the settler was modern, the native was not; if history defined the settler, geography defined the native; if legislation and sanction defined modern political society, habitual observance defined that of the native. If continuous progress was the mark of settler civilization, culture was best thought of as part of nature, fixed and unchanging.³

This form of colonialism, which took root in India, was often transplanted to the colonised spaces of Africa, resulting in distortions in how colonial authorities conceptualised and subsequently codified customary law in Africa. From this emerged

a mode of rule undergirded by a set of institutions—a racialized and tribalized historiography, a bifurcation between civil and customary law, and an accompanying census that classified and enumerated the native population into so many 'natural' groups. Transplanted to African colonies in the early twentieth century, the 'customary' administrative authority classified the population in each unit ('tribal homeland') into natives and migrants, except this time both were ethnicized rather than racialized, with customary law privileging the ethnic native while discriminating against the ethnic migrant. Excluded from the racialized domain of rights, a theory of history framed the agency of the native, set into motion by the colonial legal system, and targeted by its administrative practice.⁴

In Natal, under Theophilus Shepstone's Locations Commission of 1848, there was a move by colonial authorities to institute 'schools and industrial training, freehold tenure for progressive individuals, and the appointment of superintendents who would apply as much of the tribal law as was compatible with the principles of European law.'⁵ They believed that the 'improvement' of African society would happen through the upliftment

³ Mahmood Mamdani, *Define and Rule*, 6.

⁴ *Ibid.*, 7.

⁵ Simons, *African Women*, 18.

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of black women, and subsequently, in an attempt to curb and eventually end the practice of polygamy and *lobolo*, restructured ‘tribal marriage and divorce [...] so as to give them a much greater significance than under traditional law.’⁶ In reality however, the codification of customary law was designed to legitimate those traditional authorities who supported colonial rule.⁷ As a complete restructuring proved fiscally impossible, authorities made the decision to ‘sanction tribal law and rule through the chiefs.’ Over the next fifty years, traditional authorities worked for colonial rulers in order to influence customary law development in order to gain and preserve as much of their own power as possible, while colonial rulers sought to gain control over African communities. According to the address delivered in 1929 at the first session of the Native Appeal Court Transvaal and Natal Division by ET Stubbs, president of the Native Appeals Court at the time, customary law in South Africa was

evolved by custom, and its expounders are the old men who have learnt it by precedent and the experience of age, and this definition would no doubt make a more immediate appeal to Native administrators the majority of whom have graduated in the hard school of experience. [...] Neither does it embrace all the juristic practices of the natives. There still remains a large body of unwritten and uncodified law behind it. It is, however, a moot point whether in the process of codification which after all is the product of a foreign mentality and environment, native law may not be the poorer in ethical, moral and logical quality.⁸

In his address, Stubbs effectively expounded the belief that colonial modes of law were superior to those developed by customary courts, while simultaneously acknowledging the validity of those customs, so long as they did not supersede colonial authority in any way. It is also from these quotes that we can see the frequent use of the terms ‘tribe’ and ‘tribal group’ in the colonial lexicon. As argued by Moore in her study of the Chagga people in Tanzania, much of what colonial authorities understood as ‘immutable tradition’ was the result of historical interactions between African communities and those colonisers.⁹ That is to say that codified customary law was not always accurate, and only

⁶ *Ibid.*, 18–19.

⁷ Jeff Guy, *Theophilus Shepstone and the Forging of Natal* (South Africa: University of KwaZulu Natal Press, 2013).

⁸ P Van Biljon, *Decisions of the Native Appeal and Divorce Court (Transvaal and Natal Division) 1929*, vol. 1 (Cape Town, Johannesburg: Juta and Co. Ltd, 1930). President Stubbs is quoting Dundas, a legal scholar, in his definition of customary law.

⁹ Richard L. Roberts and Kristin Mann, eds., *Law in Colonial Africa*, 7.

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those customs accepted by colonial sensibilities were enforced. This understanding of African political formations also disregarded the self-identification and internal distinctions of African groups, and subsequently, ‘tribal’ distinctions did not reflect the nuances of similarity and disparity between African communities, or the realities of their lives in precolonial periods. Neither did these colonial laws reflect the distinctions between rural and urban African identities. ‘The first codification of customary law in Natal, for instance, listed “subjection of the female sex to the male” as a basic principle’ in a way that did not consider women’s agricultural power, nor their own agency and authority in pre-colonial societies.’¹⁰ Terence Ranger’s study on the ‘invention of tradition’ highlighted that ‘African rulers and elites shaped the content of tradition in alliance with colonial officials in order to reassert control over women and youth, and cement their positions of authority through, among others, a strategy of divide and rule. In the process, the powers of chiefs expanded and the concept of tradition hardened.’¹¹ Codified customary law was, in many ways, ‘an invention of the colonial era’¹² designed as a control mechanism to keep the African population in check, and was imbued with deeply racist and patriarchal attitudes which were used well into the apartheid era.

Because neither codified customary law nor common law fully represented the interests of the African population, it can be argued that the Native Divorce Court was one more way in which African communities were bifurcated into separate i.e. rural and urban identity groups by white authorities. Other significant ways this bifurcation occurred was through the establishment of the reserves, land and labour tenancy and migration policies which discouraged permanent residency in cities for African labourers through the practice of ‘territorial segregation’¹³ and the ‘six-month system’ of labour employment in the cities and farms.¹⁴ When examining issues of jurisdiction, domicile, the courts, and African urban identity formation, as well as the difficulty that came from maintaining urban areas, this classification of African communities into urban and rural became significant as Africans in different spaces were subject to different sets of laws,

¹⁰ McClendon, *Gender and Generations Apart*; Guy, *Theophilus Shepstone and the Forging of Natal*.

¹¹ McClendon, *Gender and Generations Apart*, 8.

¹² *Ibid.*, 8, 48.

¹³ Transvaal Local Government Commission, ‘Native Urban Areas Act,’ Pub. L. No. 21 of 1923, s1-10.

¹⁴ Mahmood Mamdani, *Citizen and Subject*, 6.

¹⁴ McClendon, *Gender and Generations Apart*, 48.

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particularly in cases of marriage and other customary practices. Customary laws were officially codified by the Union's Native Administration Act 38 of 1927. Chapter four of the Act in particular, sets up the legal framework under which Africans would be governed and appointed courts and commissioners to handle the legislative process. This Act drew from various sets of customary law that had existed under the colonial courts and administrations, 'created courts under the auspices of white Native Commissioners to hear litigation among Africans, and authorised the courts to follow customary law.'¹⁵

Native Courts, Commissioners and Administration Acts

Essentially, the 1927 Native Administration Act and 1929 Amendment Act brought the African judicial structure into the jurisdiction of the 'lower' courts i.e. the chiefs', native courts and commissioners' courts under the control of the Department of Native Affairs, which ran concurrently with the magistrates' courts. It was within this judicial structure that the Native Divorce Court was established. The Native Commissioners' Courts, which were established under chapters one and four of the 1927 Native Administration Act, would preside over all 'civil causes and matters between Native and Native only.'¹⁶ The Act goes on to specify that the Native Commissioners' Courts would have no jurisdiction in cases of mental capacity, perpetual silence, namptissement, wills and testaments, inheritance, and divorce. All other litigation between Africans was dealt with by these commissioners, including, for example, issues of violence, tax collection, and work passes. These Native Commissioners were the point of contact between the African population and the state. In his novel, *The Native Commissioner*, a fictionalised version of his fathers' life as a Bantu and then a Native Commissioner, Shaun Johnson describes the role of the Commissioners in a scene discussing the development of an American lead mine:

Railway tracks were being laid from Walvis Bay, fortune hunters and work-seekers were streaming in. the problems associated with the creation of an instant oasis in the desert were in large part the new Commissioner's problems. Among other things, housing had to be built for the thousands of labourers who had materialised in the town. George relished these responsibilities. The young and well liked Native Commissioner, doubling, as always, as Magistrate, was elected Chairman of the Village Management Board. He was also Receiver of

¹⁵ McClendon, *Gender and Generations Apart*, 18.

¹⁶ 'Native Administration Act', Pub. L. No. 38 (1927). Chapter 4 s10(1).

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Revenue, District Accountant, Marriage Officer, Immigration Officer, and Representative of the Customs and Excise Department. He was Presiding Officer at mining inquiries, which became frequent. The census declared that Tsumeb was a town of two and a half thousand Europeans, and five thousand Natives, and George was its king.¹⁷

In the novel, a letter from Johnson's father, who detailed himself a '1st Grade Native Commissioner' who was 'in the employ of the Union Native Affairs department' as a 'Native Labour Officer to the gold mines on the Reef' and as a 'liaison between the Native mineworkers and the Government on one hand and the Mine Managements on the other' as well as an 'ex officio member of the Native Labour Advisory Committee [...]'.¹⁸ These excerpts from the novel suggest that there were very few duties that did not fall under the auspices of the Native Commissioners. They served as a primary point of contact between the white government and the indigenous African population, and the Native Commissioner Courts provided legal services for Africans in a variety of different disputes, using the common law courts to facilitate these services.

As mentioned earlier, one of the major reasons why common law courts for Africans were established under the Union, particularly through chapters four and five of the 1927 Native Administration Act, was the influx of Africans into urban areas.¹⁹ Another significant reason for this Act was the need of colonial authorities to control and access African labour in the reserves.²⁰ The Act was also informed by the colonial attitude, discussed by General Smuts in his 1929 Rhodes Memorial Lectures at Oxford about the 'native question', that it was necessary to provide Africans with the 'authority' that they, as 'children' needed to advance beyond their 'barbarism'.²¹ The development of the migrant labour system began with the Glen Grey Act of 1894, which started to push Africans into wage labour, and was firmly established under the Native Land Act of 1913. This Land Act forced Africans to live in specifically designated areas, away from urban centres, and limited their access to land and land ownership. Chapter three of the 1927 Native Administration Act informed the regulation of the reserves, through land

¹⁷ Shaun Johnson, *The Native Commissioner* (South Africa: Penguin Books, 2006), 66.

¹⁸ *Ibid.*, 73.

¹⁹ Transvaal Local Government Commission, 'Native Urban Areas Act,' Pub. L. No. 21 of 1923, s1-10.

²⁰ McClendon, *Gender and Generations Apart*, 134–35.

²¹ Mamdani, *Citizen and Subject*, 4–5. The passage referenced is taken from the 1929 Oxford Rhodes Memorial Lectures delivered by Smuts.

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tenure. As Delius notes, the reserves were often portrayed by colonial officials and in colonial narratives as ‘rural idylls’ where Africans lived a ‘relaxed lifestyle’ that preserved and maintained their agricultural practices and culture while still allowing them to access work in the cities ‘to earn money to buy particularly alluring goods.’²² In actual fact however, the ‘limited amounts of arable land, combined with a capricious climate and remoteness from major markets, ensured that agriculture played a diminishing role in providing food or cash income for the villages,’²³ while taxes on Africans who failed to find wage employment for lengths of time were also imposed.

Over time, migrant labour became one of the primary income sources for life in the reserves. This system fed the insatiable need of the mining industry and white farmers for cheap labour. For young men and women, migrant labour also became a way for them to remove themselves from patriarchal and gerontocratic societies. However, despite the need for African labour, colonial officials remained concerned over the influx of Africans into urban and ‘white’ areas. These anxieties fed the desire to enforce and maintain segregation. A number of legislative control mechanisms were instituted, including pass laws to control the movement of Africans. The 1936 Native Trust and Land Act increased the mass of land designated for the reserves, while also placing all of the land in those reserves in the South African Native Trust.²⁴ This limited Africans’ access to land even further, increasing their need to engage in migrant labour, as they could no longer survive outside the capitalist economy or through subsistence farming.

The 1927 Native Administration Act ‘recognise[d] and enforce[d] Native law and custom in civil cases between Africans, provided that the custom [was] not contrary to “public policy and natural justice”.’²⁵ However, in cases where whites, Coloureds or Indians were also involved, common law was applied.²⁶ It is important to note that the Native Administration Act did not legislate criminal activities for Africans, and its scope was limited to significant aspects of African life such as marriage, *lobolo*, divorce, children, inheritance, and chieftaincy successions.

²² Delius, *A Lion amongst the Cattle*, 3.

²³ *Ibid.*

²⁴ *Ibid.*, 54–55.

²⁵ Native Administration Act 38 of 1927.

²⁶ Julius Lewin, *An Outline of Native Law*, 2–3.

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For the purposes of this thesis, customary law can be understood using three different frameworks, according to Bennett and Peart's *Sourcebook*: the official legislature applied in courts and that which informs governmental procedures; the law as understood by legal academia and scholarship; and the normal application of law as lived by people.²⁷

Important to this understanding is Stubbs address, wherein he stated that

It will thus be appreciated that by the system of judicature here outlined, embodying simple and convenient forms of procedure, stripped, as far as possible, of legal niceties and technicalities, designed to meet the needs of the situation [which is] to bring the legal machine within easy reach of, and accessible to, the highest as well as to the lowest member of the Native community.²⁸

This sentiment highlights the patronising, racist, and paternalistic nature of the state and legislative customary law, by implying that Africans were incapable of complex thought. The courts and legal system instituted by the 1927 Native Administration Act were meant to make accessible and affordable a legal recourse for civil disputes. The Act came with several qualifiers over the legitimacy and merit of African customary laws, understanding and validating them in a typically benevolent racist and paternalistic fashion:

Native law is [...] in many respects, despite the modifying influences and mutilating effects, over a century or more, of colonial legislation, as pure, rational, and logical a system of law as any of our systems of contemporary jurisprudence of Western civilisation. [...] Like the Roman-Dutch law and English common law, it is customary and obviously, it is unwritten. It is every whit as valuable, as fixed and as rational a system (so far as the law of persons is concerned), as Roman-Dutch law.²⁹

The attitudes displayed by this Act and the understanding of African laws, customs and communities were specifically crafted to fit in with notions of separation and exclusion of Africans from the people of 'European' origin. The Act was part of a comprehensive exclusionary system of administration, an 'authoritative discourse'³⁰ imposed on Africans, ostensibly to avoid their exposure to a result which, 'to the Native mind', would

²⁷ TW Bennett and NS Peart, *A Sourcebook of African Customary Law for South Africa*, 1st ed. (Cape Town, Johannesburg: Juta and Co. Limited, 1991), vii.

²⁸ Biljon, *Decisions of the Native Appeal and Divorce Court*, 1:7–8.

²⁹ *Ibid.*, 1:6.

³⁰ Martin Chanock, *The Making of South African Legal Culture 1902-1936*, 34.

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be ‘both startling and unjust’³¹ while simultaneously elevating their legal and socio-political stagnation beyond the ‘frozen past’ that colonial authorities imagined customary legal practices to be.³² Despite the vested interest of Africans who would have been subject to it in the codification of customary law, and subsequently customary law’s acknowledgement by colonial authorities, their contributions to its development remained limited, except in instances where African elders could uphold colonial authority through the control of migrant labour and the control of women’s labour.³³ This Act empowered patriarchies³⁴ – colonial and African – to place African women at ‘the bottom of the social structure,’ making them ‘inaudible to state, polity and law,’³⁵ in ways which removed women from the authority they had in pre-colonial society. The creation of a separate legal body for the African population was subsequently justified through the ‘cultural uniqueness of the African people’³⁶ in a country where ‘culture is a political and social resource’³⁷ which could be used by colonial authorities to control or pacify what they saw as a recalcitrant population. While many traditional authority figures were strengthened as a result of the Act and supported its establishment, there remained a mixed reaction among Africans. The continuation of labour migrancy and the gradual proletarianisation of Africans fuelled the politicisation of the African working class.³⁸ The economic independence gained by men and women who worked in the cities and on the mines and farms also ‘loosened the economic bonds which held chief and subject together.’³⁹

After the passing of the 1927 Native Administration Act, questions which arose because of uncodified or new customary laws were dealt with by African assessors or expert

³¹ *Shibi v Sithole and Others*, 2005 (1) SA 580 (CC), referencing Whitfield *South African Native Law* 2, 314.

³² Chanock, *The Making of South African Legal Culture 1902-1936*, 34.

³³ *Ibid*, 34.

³⁴ Jeff Guy, ‘An Accommodation of Patriarchs: Theophilus Shepstone and the Foundations of the System of Native Administration in Natal’, Unpublished paper. Colloquium on Masculinities in Southern Africa, University of Natal, Durban, 1997

³⁵ Martin Chanock, ‘Writing South African Legal History: A Prospectus’, *The Journal of African History* 30, no. 2 (1989): 26.

³⁶ Bennett and Peart, *A Sourcebook of African Customary Law for South Africa*, vi.

³⁷ *Ibid*, vii.

³⁸ William Beinart, *Twentieth Century South Africa* (Cape Town, Oxford: Oxford University Press, 1994), 14–15.

³⁹ *Ibid*, 30.

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witnesses, often traditional leaders or advisors, who were called by the courts to give testimony or guidance.⁴⁰ This confusion often also resulted from European misinterpretations –either through ignorance or disinterest – of the customs and practices of African communities. This practice persisted until it was altered by the Schedule to Act 34 of 1986 to abolish the use of expert witnesses,⁴¹ as well as ‘law agents’ –individuals, usually African, ‘who ‘provided legal services’ in ‘lower level courts,’ particularly in rural areas where access to attorneys was often difficult and expensive.⁴²

In order for a custom to be considered legally valid, it had to show a definite certainty in its application; reasonableness; accordance with public policy and natural justice; and a conclusive nature.⁴³ Ultimately, for a customary law to be considered legally valid, it had to conform to European standards of validity, which undermined the original assertions that African customary law was as valuable or equal to colonial jurisprudence. Despite this implication, there were a number of Native Commissioners who were sympathetic to customary law. Johnson recounts an incident taking place in 1957 in his novel, where his father came across a case of assault wherein three men stood accused of attacking, without provocation, three other men. It became evident during testimony in the Native Commissioner’s Court, however, that the three men who had committed the assault had been provoked:

Sikutuni and party has dangerous weapons. I am the leader of the faction of my age group in this district, and I am due to be circumcised this year. By carrying dangerous weapons in my presence, Sikutuni and his group were purposely issuing a challenge to my leadership, and that of my group. They are denying this here in this court of yours, but they are lying and you do not know enough to know it [...] I am a leader and a leader’s duty is to keep the peace. Sometimes he has to make war to do so. This is our way.⁴⁴

⁴⁰ J C Bekker, *Seymour’s Customary Law in Southern Africa*, 5th ed. (Cape Town, Johannesburg: Juta and Co. Limited, 1989), 11. as outlined in s19 of the 1927 Native Administration Act: ‘19(1) In any case in which a native appeal court or native commissioner’s court deems it desirable, it shall be at liberty to call to its assistance, in an advisory capacity, such native assessors as the court may deem necessary. (2) The opinion of such assessors shall be recorded, and form part of the record.’

⁴¹ Special Courts for Blacks Abolition Act 34 of 1986 3 Schedule A1, which repealed s9, 10, 13, 14, 15, 16, 17, 18, 19 and 21 of the 1927 Native Administration Act.

⁴² Liz Thornberry, ‘African law agents and the development of black politics.’ Paper presented at the 26th SAHS Conference, Wits University, June 2017, 4.

⁴³ Bekker, *Seymour’s Customary Law in Southern Africa*, 11.

⁴⁴ *Ibid*, *The Native Commissioner*, 89.

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The Defendant's testimony ended with the question 'what has it to do with you, Sir?'⁴⁵ The Commissioner, George Johnson, was persuaded by this argument – that he was an outsider imposing external rules on customary practices, the living character of which had not been recognised by the codification – and 'handed down the lightest sentence he could in terms of the law.'⁴⁶

Challenges to the Native Divorce Court

The major concerns in African divorce cases, as established by the reports on the Appeal and Divorce Court to 1939 taken from the Secretary of Native Affairs (1880 - 1975) (NTS) Report on the Appeals and Divorce Court, tended to be the custody of children, and desertion by men. A major problem in the early 1940s, according to Braadvedt, was the lack of Native Divorce Courts in the Transvaal, with only one centre in Pretoria severely limiting access to legal facilities. The distance and costs involved made it prohibitive for many Africans to attend court, 'especially of women who have good grounds for asking for a divorce.'⁴⁷ In addition, accessing the Supreme Court for these facilities cost over £20.00, a sum most Africans could not afford. As a result, the Native Divorce Court, where a divorce cost between £2 and £10, was much more accessible. This concern became increasingly evident in the 1930s and 1940s – that there were too many cases in the Transvaal and too few courts to hear them, and often too far away to access easily.

The Orange Free State Division and Natal and Transvaal Division of the Native Divorce Court ran for several years before an increasing workload made it difficult to continue with only the resources of two courts. It was becoming increasingly evident that a third court was needed to ease demand. By the early 1940s, reports from the Natal and Transvaal Native Divorce Court indicated that between the Transvaal and Natal, the court was presiding over more than a thousand cases a year. For example, according to a Report the Appeal and Divorce Court dated 1943, the Native Divorce Court litigated 1339 cases per year between the two provinces, and in 1944, a total of 1552 cases were looked at – of which over 850 came from the Transvaal. A breakdown of the number of days the court

⁴⁵ Ibid, 89.

⁴⁶ Ibid, 90.

⁴⁷ TAB, Secretary of Native Affairs (1880 - 1975) (NTS) 9372 12/384. 'Report on Appeal and Divorce Court to 1939.'

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sat indicates that due to weekends (104 days), public holidays (11 days), and travel between the four districts of the court (24 days), additional time in Pretoria (12 days) and Natal (12 days), the court recesses in December (10 days), and an additional eight days for preparation in appeals cases, there were typically only 184 days a year in which to look at cases.⁴⁸ This is possibly one reason why the case files are so short. The report continued with the claim that the number of hours in court ‘cannot be given. On some days the Native Divorce Court has sat from 10 am to 4 pm – on some days right up to 5.30pm while on other days the roll has been disposed of by 1 pm.’ As a result, there were ‘many hours of night work at home perusing records in appeal cases and writing judgements,’ which were not reflected in the records.⁴⁹ According to an explanatory memorandum found in the Secretary of Native Affairs files which outlined the reasons for the creation of a new court in the Transvaal Province, the ‘ever-increasing volume of work’ necessitated the formation of a third court.⁵⁰

The demands on the Natal and Transvaal Native Divorce Court were not exceptional as well. An article in the *Rand Daily Mail* in 1946 urged attorneys to encourage Africans to ‘bear in mind the desirability of instituting actions of a matrimonial nature on behalf of natives in the Native Divorce Court’ where ‘proceedings were considerably cheaper’ rather than in the Rand Division of the Supreme Court where Africans had been litigating divorce cases before the establishment of the Native Divorce Court.⁵¹ The difficulties in jurisdiction which resulted in the case cited in the article being brought before the Supreme Court were arguably symptomatic of the larger issues facing the Native Divorce Court and by extension the Supreme Court: that there were simply not enough courts to handle the number of matrimonial actions among urban Africans. There is also a larger implication here which speaks to the assertion that the Native Divorce Court was one more manifestation of segregationist era authorities using jurisdictions and migration to not only control the movement of Africans, but also to impose identity divisions on African communities. Even given the slow nature of bureaucracy, it was almost twenty years before the need for a new court was acknowledged, despite the continuous call by

⁴⁸ TAB, NTS 9372 16/384 ‘Report on Appeal and Divorce Court to 1939’.

⁴⁹ TAB, NTS 9372 16/384. ‘Report on Appeal and Divorce Court to 1939’.

⁵⁰ TAB, Secretary of Native Affairs (1880 - 1975) NTS 9228 132/367. ‘Establishment of Native Divorce Court of the Witwatersrand and Western Areas.’

⁵¹ ‘Natives Urged to Use Own Court’, *Rand Daily Mail*, 4 January 1946, 5.

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the workers in the Natal and Transvaal Native Divorce Court for the establishment of a third Native Divorce Court to ease their workload. This delay could have been due to the strong opposition to the establishment of the Native Divorce Court from even before the courts were established in 1929.

A letter from the Magistrate in Harrismith, R. Colson, to the Secretary for Justice, A.E.M. Jansen, dated 20 February 1928, outlined several concerns over the establishment of a Native Divorce Court. In essence, Coulson objected to the number of procedural changes that would have to be made to set up the new court, as well as the strain on already meagre resources and manpower in magisterial courts who would become overwhelmed with the addition of new work. He also raised concerns over the potential burden for senior and experienced clerks because of the additional work, and worried establishing this new court would encourage Africans to become increasingly litigious, or use the courts as a recourse to seek justice, particularly if they were allowed more affordable legal representation. In addition, it would become difficult to enforce jurisdiction for Africans who lived outside large population centres.⁵² Essentially, Coulson felt it would be an unnecessary and expensive endeavour that would result in increased work for clerks and Magistrates, and encourage Africans to use the court frivolously, benefitting no one and wasting the state's money. Coulson offered numerous criticism of the proposed 1929 Native Administration Amendment Act and regulations, which would establish the Native Divorce Court, and argued that the Native Appeal Court could be expanded to offer litigious services to Africans who sought them specifically rather than establish a new set of courts for the purpose.

Over the next ten years, Coulson objected to the expansion of the Native Divorce Court while Braadvedt continued to raise concerns over the lack of regulation of customary unions in the Transvaal as well as the lack of a codified Native law comparable to the Natal Code and suggested that a similar judicial collection be consolidated in the Transvaal. This, Braadvedt argued, would be of particular benefit to the children of customary unions whose legitimacy was in question under civil law, and to the courts in regulating Africans who moved between customary and civil law.⁵³ Other suggestions he

⁵² TAB, Secretary of Justice (1899 - 1966) (JUS) 973, 1/209/27. 'Native Commissioners Courts.'

⁵³ TAB, NTS 9372 12/384. 'Report on Appeal and Divorce Court to 1939.'

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proffered included an observation on the steadily rising number of cases dealt with each year, a need to make provisions for African women in the Union who married Africans from then Rhodesia, Nyasaland and Portuguese East Africa to obtain a divorce in the Native Divorce Courts, and a concern over the effect of customary unions on civil court cases. He elaborated by explaining that African men often entered into marriage contracts despite having already entered into a customary union. It was then common practice that ‘he remembers his first love and brings her back, and his new wife promptly sues him for divorce on the ground of adultery.’⁵⁴ These examples can be viewed as evidence of how the migrant labour system and the reserves contributed to the breakdown of African domestic life. Braadvedt went on to say ‘much unhappiness results in some cases from the provisions of the Act,’⁵⁵ a statement which highlighted not only the need to constantly refine the legislature to suit the needs of the Africans who used it. This ‘bifurcation’ of the law dislocated Africans, particularly urban Africans, from a sense of community, and the stability, such as was available, which community provided, and also served to delegitimise both customary and common law marriages.

Later in the same report, Braadvedt brought up the issue of the application of customary versus common law again in relation to inheritance, property, *lobolo*, and the difficulties in interpreting the law, particularly in the Appeals Court. For example, under the Native Administration of 1927, a child born of a customary union was illegitimate as a customary union was not considered a legal marriage. Because of this lack of clarity in legislature and regulations, issues of child maintenance and inheritance, for example, were then difficult to determine. Braadvedt further suggested that the Transvaal should adopt the Natal practice of registering customary unions, and not allow their dissolution except by the order of a court. He went on to argue that this practice had helped stabilise and improve the quality of life of Africans in Natal as compared to other provinces, attributing the positive impact to the improvement of African women’s ‘status and self-respect.’ He considered the easy dissolution of customary unions to be a ‘debasement’ of women and a ‘retarding factor’ in the progress of African development.⁵⁶ While this chapter does not focus on customary unions, it is impossible not to consider their impact when looking at the development of urban African identities, marriage, divorce, and the

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

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impact of migration on both customary and urban African unions. It is certainly true that migration played a significant role in the formation and instability of relationships in African communities, and the disparities in how customary unions and civil marriages were formed, regulated, and dissolved arguably contributed to the creation of more fluid, and less traditional, domestic lives in urban African communities and families. This will be discussed in greater detail in Chapter Two.

Coulson's answer to Braadvedt's concern over the application of customary law came in as a suggestion about the establishment of training centres focused on the education of officials in the 'scientific study of South African Native Ethnology' in order to better navigate and legislate African law and custom.⁵⁷ This teaching body could then also have served as a consulting body, and build a body of 'authoritative information, which would be of infinite value in the administration on native matters.'⁵⁸ He cited the usefulness of the large body of information available on common law and compared its efficacy to the dearth of comparable information about African law and custom. He argued for the creation of a teaching body aimed at educating officials about their African constituents, highlighting that Colson believed his objections to the establishment of a Native Divorce Court to not be motivated by any particularly pejorative racial bias, but rather coming from a bureaucratic concern for the practicality and costs of establishing a new court system. While that is not to say that racial superiority played no part in his reasoning, it did not appear to form the major part of his objections, as he also advocated for the increased education of officials in order to better understand and serve African communities. Instead, he motivated his objections using concerns over the belief that costs of establishing and operating new courts, including salaries, allowances, and pensions for the staff, building hiring, maintenance of buildings and furniture, stationary supplies and other such miscellaneous costs would greatly exceed the revenue brought in through court fees. He believed that by expanding the scope of existing courts, that Africans would be equally well served, with less burden to the state. He was also concerned about the 'flood' of cases establishing a specific court would bring and how the subsequent costs would far outweigh any revenue generation.⁵⁹

⁵⁷ TAB, JUS 973, 1/209/27. 'Native Commissioners Courts.'

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

The objection to the establishment of a Native Divorce Court on the grounds of costs continued to be a point of concern for Couslon for the next two decades, despite its establishment under the 1929 Native Administration Amendment Act. These conflicting concerns help explain why it took two decades for the pleas by the magistrates in the two existing divorce courts to be answered. These objections were also very much a reflection of the colonial and union era attitudes of authorities to spend as little money as possible on mitigating the impact of their legislation on Africans. As in the reserves, authorities in the Native Divorce Court waited until the demands on the existing courts became unmanageable before attempting to establish a third court.

The Establishment of the Native Divorce Court, Central Division

The Native Administration of 1927 established the courts and commissioners that dealt with African marriage and divorce under common/Christian law.⁶⁰ Chapter Five of this Act also outlines all the rules and regulations surrounding marriage and succession. The Act differentiated between common law and customary marriages, and the legislation that applied to each. A ‘customary union’ was defined as a ‘marriage according to native law and custom’⁶¹ and a ‘partner’ was a spouse from that union.⁶² This was later amended by the Native Administration Amendment Act to state that ‘customary union means the association of a man and a woman in a conjugal relationship according to Native law and custom, where neither the man nor the woman is party to a subsisting marriage.’⁶³ A marriage or civil union, typically conducted by a registered minister or pastor under Christian rights, was defined as ‘the union of one man with one woman to the exclusion, while it lasts, of all others.’⁶⁴ One of the major distinctions between a customary and civil union was the issue of polygamy, a practice held by Europeans to be ‘inconsistent with the general principles of civilisation recognised in the civilised world’ as it allowed a man to marry a second and third wife during the ‘subsistence of the first union.’⁶⁵

⁶⁰ S10(1)(e) of the 1927 Native Administration Act.

⁶¹ *Ibid*, s35.

⁶² *Ibid*.

⁶³ Native Administration Amendment Act 9 of 1929.

⁶⁴ *Ibid*.

⁶⁵ Biljon, *Decisions of the Native Appeal and Divorce Court (Transvaal and Natal Division) 1929*, 1:22–23.

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A marriage in a common law court was known simply as a marriage, and could only take place under 'common' or European law. These marriages were presided over by Magistrates, Native Commissioners, or recognised religious ministers, and after officiation, a marriage certificate was issued. Typically, the marriages were conducted according to Christian rites, but the 1927 Native Administration Act did not specify Christianity as a requirement for a common law marriage. In the Transvaal, an additional enabling certificate was required to prove there was nothing prohibiting the marriage (such as a customary law partner).⁶⁶ Marriages under these circumstances could also only be dissolved by an official court order, usually in the Native Divorce Court, which was presided over by the President of the Native Appeals Court. Alternatively, a divorce could be granted by the Supreme Court. Divorce was generally granted on one or more of four grounds: desertion, adultery, insanity, or one partner's imprisonment for a period longer than five years.⁶⁷

The Native Divorce Court was established in South Africa under Section 10 of the 1929 Native Administration Amendment Act to

be empowered and have jurisdiction to hear and determine suits of nullity, divorce and separation between natives domiciled within their respective areas of jurisdiction in respect of marriages and to decide any questions arising out of any such marriage which is not cognisable by a Native Commissioner's Court established under Section 10 of the principal Act.⁶⁸

The Act goes on to qualify that the Native Divorce Courts would share jurisdiction with the Native Appeal Courts established under Section 13 of the Native Administration Act of 1927. Each Native Divorce Court would have presiding over it the president of the Native Appeals Court, up until such time as an official president could be instated. This president would have the authority to call upon up to two magistrates to 'sit and act with him as assessors in an advisory capacity on questions of fact.'⁶⁹ In addition, the stipulations of section 13 of the 1927 Native Administration Act as they applied to the

⁶⁶ While polygamy has been mentioned a few times in this chapter, it does not form a significant point of discussion in this thesis, and will be looked at briefly in relation to the construction of the urban African identity in Chapter Two.

⁶⁷ Lewin, *An Outline of Native Law*, 6.

⁶⁸ Native Administration Amendment Act 9 of 1929.

⁶⁹ Native Administration Act 38 of 1927.

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operation of the Native Appeals Court would also apply to the Native Divorce Court. Each Native Divorce Court fell under the jurisdiction of the provincial or local divisions of the Supreme Court, and all appeals were prosecuted by magistrates' judgements in civil matters.⁷⁰

It is important to note when understanding the conceptualisation of the Native Divorce Court that it was very clearly a civil court, and as such did not exercise jurisdiction in instances where customary law would apply or influence the ruling, such as inheritance and the division of assets after divorce. It was primarily a court for urban Africans, and one of the reasons it was established was because the influx of Africans into urban and municipal centres, and the increased rate of common law marriage and divorce that came with it required government provision.⁷¹ The relationship between the development of urban African identities and the Native Divorce Court will be discussed in greater detail in Chapter Two. Under The Native Administration Amendment Act 9 of 1929, two Native Divorce Courts were established: one serving Natal and the Transvaal, and one for the Orange Free State, which had jurisdiction in the areas of the Natal and Transvaal Native Appeal Court, and the Cape of Good Hope and the Orange Free State Native Appeal Court respectively.⁷² These courts were established and operated in districts with high African populations in recognised African areas where customary laws were not in operation.⁷³ The Natal and Transvaal Court held sessions in Pietermaritzburg, Vryheid, Pretoria, Eshowe, and Durban, while the Orange Free State held sessions in Queenstown, Port Elizabeth, Cape Town, Butterworth, Port St Johns, Kokstad, and Umtata.⁷⁴

In 1948, the same year that the National Party took power and started implementing apartheid, the Governor-General of the Union of South Africa, Nicolaas Jacobus de Wet, issued a Proclamation establishing a third Native Divorce Court in the jurisdiction of the Native Appeal Court, Central Division, whose headquarters were located in Johannesburg

⁷⁰ Native Administration Amendment Act 9 of 1929

⁷¹ Transvaal Local Government Commission, 'Native Urban Areas Act,' Pub. L. No. 21 of 1923, s1-10.

⁷² (TAB), Decisions of the Executive Council (1910 - 1985) (URU) 1929 3540/3575. Unie Van Suid-Afrika. Uitvoerende Raad. Minute Nrs. 3540-3575. Band Nr. 1092/1.

⁷³ TAB, NTS 9228 132/367. 'Establishment of Native Divorce Court of the Witwatersrand and Western Areas.'

⁷⁴ H P Kloppers and T F Coertze, *Bantu Divorce Courts*, 8.

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– under section 10 of the 1929 Native Administration Amendment Act.⁷⁵ This subsequently altered the jurisdiction of the already existing Natal and Transvaal Court and the Orange Free State Court to ‘coincide with the areas of jurisdiction of the Native Appeal Court, North-Eastern Division, and the Native Appeal Court, Southern Division, respectively.’⁷⁶ In addition, any open cases would proceed in their original courts, unless it became necessary to transfer cases to the newly established Central Division court for reasons of jurisdiction.⁷⁷ It was also requested by the then Secretary for Native Affairs, HHM Smuts, that the records of previous cases which now fell under the jurisdiction of the Central Division Court be transferred there ‘as soon as possible.’⁷⁸ However, no record of these transfers is available, and the current number of cases available for this period indicates that while some cases were transferred, particularly those after 1946, there are large numbers of cases which were not transferred and are thus not available in the national archives.

The major satellite courts of the Native Divorce Court Central Division were located in Kimberly, Kroonstad, Johannesburg and Mafikeng. By 1949, this had been expanded to include a Bloemfontein location. The majority of the cases examined for this thesis occurred in the Johannesburg New Magistrate’s Court, also known as Court 7, on Fox Street, and took place in 1948, the first year of the court's inception. The dates for each session of 1948 were published in the Government Notices, also called the Government Gazette, by the Department of Native Affairs under its Secretary RW Kirk, in both English and Afrikaans.

The Regulations of the Native Divorce Court

The rules for the Native Divorce Court were published in the Government Notices in November 1929 by the Secretary for Native Affairs at the time, JF Herbst. However, from 1 October 1934, those rules were withdrawn, and a new set was established. It is this

⁷⁵ Signed by the South African Governor-General, G. Brand van Zyl on 10 April 1948 at Cape Town, to take effect from 1 May, 1948, under the command of the Governor-General-in-Council, Jan H. Hofmeyer.

⁷⁶ TAB, NTS 9228 132/367. ‘Establishment of Native Divorce Court of the Witwatersrand and Western Areas.’

⁷⁷ NTS 9228 132/367. ‘Establishment of Native Divorce Court of the Witwatersrand and Western Areas.’

⁷⁸ TAB, NTS 9228 134/367. ‘Central Native Divorce Court – Sessions.’

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second set of rules which were applied to the Central Division court. Some of the major differences in the two documents are as follows:

In the 1934 version, section 6 (which previously only allowed for witnesses to give testimonies *viva voce* or in person and verbally) now allowed for witnesses who were unable to testify verbally to give evidence in other ways, on a discretionary basis.⁷⁹

Part of section 9 of the 1929 version was also removed. This section had stated that it was the duty of the Registrar to issue processes⁸⁰ in matrimonial cases. One of the most common type of processes were summons, which contained the details of the court date, which was calculated at a minimum of fourteen days from the date on the summons, as well as an additional day for every ten miles which needed to be travelled between the place of service of the summons and the court, but which in no case was to be more than thirty days. In the cases this study examined from the year 1948, the court appearances were usually dated several months after the initial summons was given, with the defendants allowed up to ten days after receiving the summons to respond either in person or in writing to ‘confess or deny the claim of the Plaintiff’ and ‘make any demand or claim in reconvention’⁸¹ which needed to be filed with the court. These claims were laid out in the summons. The summons was also delivered to the defendant by a Messenger of the Court rather than the Registrar, who issued and signed the documents, as outlined in the replacement section 12 of the 1934 rules.

The duties of the Messenger of the Court were also more clearly outlined, with several sections focusing on their duties and obligations in serving summons, e.g. that they had the right to elicit help from local authorities in cases where parties were resistant to being served. These rules also went on to outline that a copy of the summons and other processes were to be delivered to the person or their authorised agent, to the person’s place of residence or work, and to the person’s *domicilium citandi* or place for all legal processes and notices, should they have chosen one. Several of the cases examined in

⁷⁹ Rules for the 1934 proclamation are taken from TAB, URU 3262/3350, 1950. ‘Unie van Suid-Afrika. Uitvoerende Raad. Minute Nrs. 3235-3350 (1950). Band Nr. 2815’ and the rules for the 1929 proclamation from the TAB, URU 3540/3575, 1929. ‘Unie van Suid-Afrika. Uitvoerende Raad. Minute Nrs. 3540-3575. Band Nr. 1092/1.’

⁸⁰ Processes were defined in the 1934 rules as ‘any summons, subpoena, warrant, notice of application or the like.’

⁸¹ Found in the ‘Particulars of Claim’ section of all TAB, SEJ case files containing ‘summons’ documents.

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chapters Two and Three had elected as their *domicilium citandi* their lawyers' offices. Interestingly, the new rules also allowed a Messenger, having exhausted all other avenues for pursuing the person, to attach the process to the door of work or home premises.⁸² However, the court could consider this an invalid service. The rules do not say what would happen then, but it is not unreasonable to assume that another attempt to serve the summons to the person would be made. This also speaks to the transitory nature of African urban life during the segregation period. Influx control measures and migrant labour made permanent residency difficult, which negatively impacted on African domestic life, contributing to its breakdown.

Additional sections in the 1934 rules made court proceedings accessible to the public, under the supervision of the Registrar. There is also an additional section in the 1934 rules which looked at the jurisdiction of the different courts and stated that when serving a summons outside a particular jurisdiction, the endorsement of the Native Commissioner under whose jurisdiction the case fell was needed in order to enforce the summons. However, cases were required to be heard within their respective jurisdictions. Other than these changes, the rules largely remained the same, detailing cost and billing procedures, and laying out the particulars of specific rulings like restitution of conjugal rights orders. A typical divorce cost between £2 and £10. Over the years, further additions and changes were made, but there was no formal proclamation of a new set of rules for the Native Divorce Court until the early 1950s, under the new apartheid regime.

A fairly significant piece of legislature that was included in the revised rules under the advice of JN Braadvedt, President of the Native Appeals Court, was the Matrimonial Causes Jurisdiction Act 22 of 1939.⁸³ This was significant as it allowed courts to 'try an action for divorce or for restitution of conjugal rights or for judicial separation' if that action was brought forward by a woman.⁸⁴ Women previously did not have the right to make such a petition before the courts, and the significance of this development will be explored more fully in Chapter Two. In a 1940 report on the Native Appeal and Native Divorce Courts (Natal and Transvaal Provinces), Braadvedt made several suggestions,

⁸² In the case of *Betty Mdakane vs Jan Mdakane*, Jan was served his summons via his employer, and Betty chose her lawyer's office as her *domicilium citandi*.

⁸³ The details of which can be found in appendix 3.

⁸⁴ Matrimonial Causes Jurisdiction Act 22 of 1939, Section 2.

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one of which being that the Matrimonial Causes Jurisdiction Act 22 of 1939 should apply to the Native Divorce Court to allow African women to sue their husbands.

The day to day workings of the Native Divorce Court

This section examines the grounds for divorce, as well as the general procedure for examining cases. More specific consideration of the processes and practices of the Divorce Court has already been done by other authors, who were discussed in the introductory chapter. This section intends to familiarise the reader with the general legal processes and types of cases dealt with in this court. To that end, it will provide a brief overview of the divorce process and court proceedings, a discussion of various laws including the Matrimonial Causes Jurisdiction Act 22 of 1939, as well as an outline of the case files selected for this study in order to facilitate a more comprehensive understanding of what kinds of documents are contained in each file, the types of cases examined, and the language used by litigants and the court.

Each case was instituted on one or more of the four grounds for divorce already mentioned above: desertion, adultery, insanity, or imprisonment for a period longer than five years. Proceedings could also be instituted for an order of restitution of conjugal rights, and after the 1939 Matrimonial Causes Jurisdiction Act, women were importantly allowed to institute proceedings just as men were. Previously, women were not able to institute claims against their husbands. Women were further granted the right to sue for the restitution of conjugal rights even if their husbands were no longer domiciled in South Africa. They were also allowed to institute claims against their husbands for alimony or contributions towards the cost of the petitions. This was significant, as it allowed women the freedom to leave their husbands, or hold them accountable for desertion. This was particularly important as African women did not enjoy many rights under customary law. In particular, women had the same legal capacities as children, and were expected to remain under the care of their fathers, husbands, or brothers (or another male relative), who managed their property for them. However, while the Matrimonial Causes Act made no distinction on the grounds of race, African women were only allowed to institute claims under this Act two years after it was established. This role of women will be discussed in greater detail in Chapter Two, as it ties into the development of the urban African identity.

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According to the 1929 Native Administration Amendment Act, matrimonial proceedings were limited to three types of cases: suits of nullity, divorce, and separation, as well as any questions arising from each of these cases. For a case to be brought before the Native Divorce Court, several requirements needed to be met. These requirements were laid out in Act 38 as well as the Rules of the Native Divorce Court as follows: both parties must be African, court jurisdiction was based on domicile, and there must have been a valid marriage subsisting between the parties.

The definition of African according to section 35 of the Native Administration Act included ‘any person who is a member of any aboriginal race or tribe of Africa: Provided that any person residing in an area proclaimed under section six (1) under the same conditions as an [African] shall be regarded as an [African] for the purposes of this Act.’⁸⁵

Domicile was determined not just by where parties resided, but also by where they were registered for taxes. According to Secretary for Justice AEM Jansen, ‘domicile is a question of fact, compounded of residence and *animus manendi*’ (intention to remain) and basing matrimonial causes upon it ‘adopts a principle which is practically universal throughout the civilised world.’⁸⁶

Marriage was understood under the 1927 Native Administration to mean the union of one man and one woman who were married under the common law, typically using Christian rites, and who had no pre-existing customary unions. Proof of marriage was provided through a marriage certificate which also detailed the particulars of the marriage: whether it was in or out of community of property, the existence of ante-nuptial contracts, etc. Unless stated otherwise, marriages were automatically considered out of property.

The grounds for divorce were understood to mean the following:

- Desertion occurred when one partner left the other and refused to return or receive them. This was usually, but not always, stated to be ‘malicious desertion.’
- Adultery was understood as extra-marital affairs which included sexual intercourse and for which proof of infidelity could be produced. This proof was

⁸⁵ S35 of the Native Administration Act 38 of 1927.

⁸⁶ TAB, JUS 973, 1/209/27. ‘Native Commissioners Courts.’

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usually in the form of witnesses or admittance to guilt by the Defendant. However, the partner who committed adultery could not typically institute proceedings in this case.

- If mental illness as defined under the Mental Disorders Act 38 of 1916 could be proved, a partner could sue for divorce.
- If a party was declared to be a habitual criminal under s344 of the Criminal Procedure and Evidence Act, 1917, and had been imprisoned for five or more years, the other party could obtain a divorce (even when her husband was in prison).⁸⁷

It was typical for Native Commissioner's Courts to also determine issues of the custody of children should it be necessary, as well as any issues of property, at the same time as the decree of divorce was granted. Under common law, fathers were the legal guardians of their children and their property until they turned twenty-one, and even when the mother was given custody (as was practised in the case of very young children), fathers remained legal guardians and were usually granted visitation rights. In the case of children born out of wedlock, the mother was considered the natural guardian and was given custody. However, the issue of custody of children did not fall under the jurisdiction of the Native Divorce Court, and so none of the case files presented here examine this issue in any significant detail. In cases that did attempt to institute such a claim, it was typically men who attempted to file for custody of children, rather than women.

A decree of restitution of conjugal rights was the 'remedy available to enforce the return of a spouse who has withdrawn from cohabitation.'⁸⁸ The decree ordered the defendant to return to their spouse within a specific time period, stipulated in the order, and file a certificate of compliance. This was typically the first step in a desertion case and was intended to preserve a marriage. Despite the assumed meaning of 'conjugal,' the decree had no authority to enforce sexual intercourse, only cohabitation. Non-compliance with the decree typically meant that divorce would be granted should the original plaintiff continue to pursue a case. It also meant a case for alimony or property settlement could be initiated, as the defendant did not automatically become guilty of desertion even if that desertion was grounds for the original action. It is for these reasons that desertion cases

⁸⁷ Divorce Laws Amendment Ordinance 18 of 1935, Lewin, *An Outline of Native Law*, 12–13.

⁸⁸ Gordon Davis, L Melunsky, and F B du Randt, *Urban Native Law* (Port Elizabeth, South Africa: Grotius Publications, 1959), 94.

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typically included a claim of ‘an order for restitution of conjugal rights, or failing that a decree of divorce on the grounds of malicious desertion.’⁸⁹ Cases involving the restitution of conjugal rights will be further examined in detail in Chapter Three, but in summation, it was largely desired by the state that marriages remain intact. If a restitution order could incentivise one party to return, then the suit for divorce would be dropped. However, in the majority of cases, the defendant ignored the order to return and a divorce was eventually granted.

Each of the cases presented in this thesis was instituted by the plaintiff and started with a summons containing the sex, occupation and addresses of the plaintiff(s) and defendant(s), as well as the date on which both parties were expected to appear before the Native Divorce Court. The parties were allowed to represent themselves or to employ attorneys. This freedom of representation was a key reason why the Court was established in the first place, and failure to appear on the specific date without a reason often resulted in the judge ruling in favour of the party who was present, usually the plaintiff, as was the issue in many of the case files examined for this research project. The summons was then met with an appearance to defend the ruling which outlined the defendants’ response to the plaintiff. This usually contained the defendant’s intention to accept or reject the claims laid out in the summons.⁹⁰

Conclusion

This chapter has outlined the establishment of the Native Divorce Court within the context of the history of South Africa’s legal development. It has also examined the regulations and internal debates surrounding the creation of this court, and has provided an overview of the kinds of cases that were presented before this court. Lastly, it has tried to explain why the Transvaal division of the Native Divorce Court was established so much later than its counterparts i.e. the high demand for divorces among Africans.

From the debates concerning the development of the Native Divorce Court, we can begin to see the paternalistic and racist ways in which the segregationist state conceptualised and dealt with African constituents. Where great concern was made over the need to

⁸⁹ Found in the ‘Particulars of Claim’ section of all TAB, SEJ case files pertaining to ‘malicious desertion.’

⁹⁰ Kloppers and Coertze, *Bantu Divorce Courts*, 13–16.

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establish a cheaper and more easily accessible court, but which was ill-equipped to handle the magnitude of cases it had to deal with. Attempts to fix this issue only occurred after decades of protest over the increasing workload, as discussed above.⁹¹ The establishment of the Native Divorce Court also highlighted the ideology of the superiority of European based common laws over African customary law, and that the codification thereof was often inaccurate or problematic.⁹² The inclusion of African women into Matrimonial Act 22 only occurred in 1941 after the Matrimonial Act was passed, despite there being no mention in the legislature of racial distinction.

Chapter Two will explore and expand on some of the themes discussed here, including the reserves, migration, women, Christianity, and the development of the urban African identity, particularly as it relates to marriage, divorce, and the Native Divorce Court. The cases in the following chapters have been selected because they contain more substantive information than the usual trend, in which case files often contain minimal information, and in chapter two in particular, there will be a focus on cases of desertion.

⁹¹ 'Natives Urged to Use Own Court'. *Rand Daily Mail*, 4 January 1946, 5.

⁹² Some of the authors discussed in this chapter which deal with this issue more extensively include Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism*; SM Seymour, *Bantu Law in South Africa*, 3rd ed. (Wynburg: Juta and Co. Limited, 1970); Bennett and Peart, *A Sourcebook of African Customary Law for South Africa*; Delius, *A Lion Amongst the Cattle*.

Chapter Two

‘Why the binds of marriage should not be dissolved’¹

The Native Divorce Court and the Urban African: Gender, Christianity, and Migration

Natasha Erlank writes that ‘in the first half of the twentieth century, Christianity also fostered the emergence of new narratives about the modern family and domesticity by mission-educated African men, and significantly, women linking the private and public culture of African nationalism.’² Christianity fundamentally altered the idea of marriage in urban African communities, shifting it from a communal to an individual conception, and as this chapter argues these changes in marriage practices were assisted by the establishment of the Native Divorce Court, and the developing urban African identities of this period. This will be done using the cases of *Betty Mdakane vs Jan Mdakane*³, and *Joseph Moeketsi vs Esther Moeketsi*⁴ to examine how legislative and social control was enacted upon and challenged by urban African women, using both the 1939 Matrimonial Causes Act and notions of modernity and respectability. The chapter will then discuss the development of marriages of convenience, in order to understand how and why urban Africans began to conceptualise common law marriage for their own benefit. This will be done through an examination of prominent social and political structures within the first half of the twentieth century, including access to land and housing, economic stability, Christianity and respectability, labour migration, and access to the productive and reproductive capacities of spouses, in order to argue that the Native Divorce Court was one way in which marriages of convenience were more easily negotiated.

¹ TAB, SEJ V1 69/2/1948. Divorce. Betty Mdakane (born Radebe) vs Jan Mdakane.

² Natasha Erlank, ‘Gender and masculinity in South African nationalist discourse, 1912-1950,’ *Feminist Studies*, 29 no. 3 (2003), 653-671.

³ TAB, SEJ V1 69/2/1948. Betty Mdakane vs Jan Mdakane.

⁴ TAB, SEJ V1 79/2/48. Summons struck from rolls. Joseph Moeketsi vs Esther Moeketsi (born Hladi).

Marriage, the crumbling institution

The following quotes are taken from the *Rand Daily Mail*, and present the views of colonial society in the 1920s over what many people during that period saw as a problematic increase in the number of divorces. While the articles themselves are either non-specific or focus on white divorce rates, these attitudes also speak to concerns over easy access to divorce facilities, and the importance of marriage in Christian homes, and the impact of urbanisation on divorce rates, which all apply to urban African marriages as well. In 1927, an article in the *Rand Daily Mail* quoted an anonymous old woman who had been overheard lamenting

that the old forms of courtship had died out [...] when young couples rambled the countryside together, building up plans for the future, and thrashing out their problems with a sincerity of purpose and a straightforwardness that the young lovers of this generation can never hope to understand. [...] They took their marriage vows, and they stood by them. Today, young people court to the accompaniment of a jazz band. Everything is done with a bang, and a tremendous amount of fuss, show and noise, but there is no sentiment behind it and little serious thought. Why, therefore, should anyone marvel at the increase of divorce?⁵

It is very likely that the focus of this article is young white people, as divorce under the 1929 Native Administration Act had not yet been established, and it is easy to dismiss this article as evidence of the older generation complaining about the deteriorating morals of the younger, as it is wont to do. Despite this, there is an indication in this article of the trends of marriages, and what society saw as the larger moral decay that came with easy access to marriage and divorce. It is also reflective of the way the younger, particularly the urbanised, generation, thought of marriage and divorce. This older woman attributed the high rate of divorce to urbanisation, as people did not ‘court’ with serious intent as in the ‘countryside.’⁶

The church, represented by the Bishop of Johannesburg, the Right Reverend Dr ABK Karney of the Anglican Church of South Africa and the Church of England, ‘deplored the forces which were disintegrating family life, and pleaded for the restoration of religion to

⁵ ‘Too Many Jazz Marriages’, *Rand Daily Mail*, 26 September 1927.

⁶ *Ibid.*

the house' in another *Rand Daily Mail* article in 1927.⁷ According to the Bishop, 'the church cannot recognise re-marriage after divorce,' emphasising that a 'sound family life' was necessary for a strong state. According to St. Marks Gospel, the church considered re-marriage after divorce to be adultery and a sin against God. He continued by saying that

it was a hard task of the bishops and clergy to take a stiff line in that matter. Again and again, one was tempted to give way. It was no love of narrow orthodoxy, no delight in petty tyranny that kept the Church strict, but rather the fear that in re-marriage after divorce lay one of the greatest dangers to family life on which the hope of the nation rested.⁸

According to the clergy, the state, and the older generations, there was a pandemic of divorce that threatened the fabric of both white and African society.

According to yet another article from 1929, Justice Thanam moved to revise the divorce laws in the Union, citing the 'prevalence of collusions in applications for divorce' in Durban.⁹ It is not clear if he was talking about Africans or white divorce here, or both. By 1929, the Native Divorce Court had been established, and the Natal and Transvaal Division had a satellite in Durban. According to him, there were fourteen divorce cases per day in Durban, a number he found unacceptable. 'The facility with which divorce is now granted in South Africa really means divorce by consent. [...] There is every reason to suppose it is a mere matter of arrangement between the spouses to get a divorce.'¹⁰ These remarks by Justice Thanam are indicative of the state's concern over the increase in divorces occurring during this period. Despite the uncertainty of which section of society he is referring to, African or white, if his concerns are read in conjunction with the concerns of Coulson in the last chapter, there seems to have been a rising concern among state officials over the number of divorces that were occurring, among both white and black South Africans. Justice Thanam's comments echo the debates over the establishment of the Divorce Court discussed in the previous chapter, over the concern

⁷ 'Bishop on Divorce and Birth Control', *Rand Daily Mail*, 19 September 1927.

⁸ *Ibid.*

⁹ 'Easy Divorce Deplored', *Rand Daily Mail*, 12 March 1929.

¹⁰ *Ibid.*

that the establishment of the Native Divorce Court would encourage Africans to use it frivolously.¹¹

This section has served to provide a background of the attitudes and discourses among the state, Church, and white that were emerging during the period being examined in this chapter, and more broadly this thesis. The next sections are more specifically oriented to the factors which contributed to the development of urban African identities.

The Reserves and migrant identity

As a result of the 1913 and 1936 Land Acts, Africans were limited to land ownership in reserve areas of South Africa. These reserves were placed under the control of chiefs. However, these reserves were not able to sustain the agrarian economy of pre-colonial African society. This, coupled with the pull of the capitalist economy, which required cheap black labour, meant more and more African men from the reserves began to seek work in the mining and farming sectors. The next thirty years saw the reserves being slowly drawn into the capitalist economy through the migrant labour system that had become vital to the continued survival of reserve life. This migrant system involved African men finding work in urban or industrialising areas for several months at a time. This system was developed by colonial and later Union authorities to control the influx of African migrants into urban areas and discourage their permanent residency in those areas. Simultaneously, however, white authorities, mine owners, factories, and white farmers wanted access to the productive labour of Africans in the reserves, and so instituted a series of taxes which forced them into the capitalist labour market, through the migrant labour system.

As time passed, more and more men joined the migrant labour force and, as a result of their increased wealth and politicisation, began to challenge traditional authority figures. Traditional authorities and subsequently stability in the reserves was also challenged by an increasingly interventionist state, who, through legislative acts like the 1927 Native Administration Act and the 1936 Native Trust and Land Act, began to erode traditional authority structures in the countryside. By the 1930s and 1940s, migrant labour in particular impacted on the authority of traditional leaders, with young men and women

¹¹ See TAB, JUS 973, 1/209/27. 'Native Commissioners Courts.'

viewing the city as a modern space wherein they could gain financial independence and subsequently break away from the authority of their male elders in the reserves.¹² In particular, ‘cleavages of religion, gender, generation, and between chiefs and commoners,’¹³ which, in large part were the result of migration, shaped life in the reserves and life for urban Africans.

By the mid-twentieth century, the reserves had become a political hotbed of resistance, fuelled in large part by politicised migrant workers organisations. The Department of Native Affairs also began to ‘check’ the power of chiefs, leading to weaker authority in the face of migrant rebellion.¹⁴ The African National Congress, in particular, began to rise to prominence through its adoption of more radical ideologies, the inclusion of women, and the establishment of a youth league. This political renewal was in part fuelled by the migration of large numbers of Africans, including women, to urban spaces. This migration also formed the basis for the much of the political, economic and social systems which were established during this time, as industrialisation (mining and factory work, as well as commercial farming on white-owned farms) replaced subsistence agriculture as the dominant stream of income for African communities in both rural and urban spaces. Yet, for many men, working in the city was still seen as a way of ‘maintaining a primarily rural way of life.’¹⁵

African men perceived urban areas in different ways. While some men - particularly the younger, rebellious, and politically conscientised - viewed migration as an opportunity and cities as places they could settle in and establish themselves, other men viewed them as ‘a necessary evil which had to be undertaken not only in order to pay taxes but also to secure the resources to marry, build a homestead, accumulate cattle and ultimately allow for rural retirement.’¹⁶

Towns were regarded and described as *makgoweng* (the place of the whites) or *lešokeng* (a wilderness). Part of what defined them as such was the absence of core institutions like initiation and chieftainship and

¹² Delius, *A Lion amongst the Cattle*, 25.

¹³ *Ibid.*, 4.

¹⁴ *Ibid.*, 16.

¹⁵ *Ibid.*, 21-23.

¹⁶ *Ibid.*, 23.

what many migrants saw as the corrosion of appropriate relationships of gender and generation among urban Africans. Some men stayed away for decades without remitting money or returning, while others abandoned their families and never came home. But these acts merely strengthened the majority view that towns were deeply immoral places. Most migrants saw the chiefs and especially the *kgošikgolo* as key symbols and guarantors of a rurally centred moral order.¹⁷

This distinction between Christian and traditional Africans in the reserves was also compounded by the resentment of some Africans over the role of missionaries in colonisation, and the comparative prosperity of the educated Christian African elite who occupied teaching, civil, church, and administrative positions.¹⁸ This often led to conflicts between these African groups, on religious and social grounds. Initiation was one particular way in which Christian youth felt excluded from their more traditional peers. Girls were also

warned against the dangers and temptations of *makgoweng* and were told that locations, and especially urban women, were dangerous, disease-ridden and degrading. And they had the example of Christian youth – who it was believed simply abandoned their rural responsibilities – held up to them as an example of truly delinquent behaviour.¹⁹

For the African population, it can then be seen, urban areas became a space of contestation between the traditional and the modern, each group viewing the city as the marker against which they defined themselves. Rural Africans saw urban areas as a place of danger, to be used when necessary but never embraced, while urban Africans viewed it as a place of economic opportunity and social and political advancement.

‘The Urban African’

Meghan Healy-Clancy, in her article on ‘The Politics of New African Marriage in Segregationist South Africa’, writes:

The term ‘New African’ began appearing in the press at least as far back as 1928 to refer to an individual with a Christian mission education, cosmopolitan interests, and a sense of racial consciousness. This racial consciousness united people categorized as ‘native’ or ‘Bantu’ from

¹⁷ *Ibid.*, 23.

¹⁸ *Ibid.*, 25–26.

¹⁹ *Ibid.*, 30.

across the Union of South Africa as *Africans*: these Africans claimed ties to other Africans across the continent and in the diaspora, at the same time as they made specific rights claims on the basis of their belonging in the Union of South Africa.²⁰

William Beinart, in his work *Twentieth Century South Africa*, encapsulates the New African identity as the creation of a new class of Africans which emerged as the result of ‘colonial and settler intrusion.’²¹ He writes:

Those Africans called by traditionalists ‘dressed’, ‘pierced’, or *kholwa* developed their own sets of ideas about the colonial state and their rights within it. They hoped their loyalty to local magistrates and the ethos of an inclusive British Empire might protect them from the machinations of land-hungry settlers. They provided the levies for colonial wars, loyal headsmen to displace recalcitrant chiefs as well as mission-educated ministers, teachers, and agricultural demonstrators who became the models and ideologues for a new African identity.²²

From the two quotes above, and the discussion in the introductory chapter of this work, it is clear that the urban African identity was multi-faceted, written at turns as the adoption of whiteness in an attempt to gain favour or access to privilege²³, and as the politically liberated intellect of ‘racial modernity’ who rejected the chieftaincy identity in favour of Pan-African emancipation.²⁴ Essentially, the urban African, also known as a ‘New African’ or the ‘African petty bourgeoisie’ in the scholarship, was comprised of a politically conscientised, Christian, educated, urban working class who differentiated themselves from their rural counterparts. In many ways, these urban Africans sought to emulate a kind of whiteness, or at least to access predominantly white spaces and privileges, including access to land, urban housing, social status, and employment, even as they became more politicised to the injustices of what that whiteness represented. One of the major ways this ‘African petty bourgeoisie’ set itself apart was in the ways it accessed and navigated legal spaces. This chapter suggests that the Native Divorce Court was one such legal space navigated, and in some instances manipulated for advantage, by urban Africans. Influencing this navigation and manipulation were several considerations:

²⁰ Meghan Healy-Clancy, ‘The Politics of New African Marriage in Segregationist South Africa’: 9.

²¹ William Beinart, *Twentieth Century South Africa*, 23.

²² *Ibid.*, 23–24.

²³ Beinart, *Twentieth Century South Africa*; Kincheloe and Steinberg, ‘Addressing the Crisis of Whiteness: Reconfiguring White Identity in a Pedagogy of Whiteness’.9.

²⁴ Healy-Clancy, ‘The Politics of New African Marriage in Segregationist South Africa’, 9–10.

migration, Christianity, the urban-rural divide, and gender. Tied closely into this identity were notions of respectability and modernity. This will be discussed further on in this chapter, in the sections on the urban African woman.

Urban African Respectability

The competing ideologies that influenced and contributed to the development of urban African identities in the first half of the twentieth century established a set of expectations for these Africans: to become part of the 'African elite', Africans had to adopt a Christian education and morality, and exhibit a desire to enter the 'petty African bourgeoisie', or '*amarespectable*' as it was also known, that existed in towns and cities. As Healy-Clancy argues, for women, this meant a 'respectable' identity premised on

the virtues of impeccable self-fashioning and unimpeachable manners where respectability was a public, racial discourse that hinged significantly upon private, familial conduct – reflecting the contradictions that had long structured *kholwa* domestic life.²⁵

This domestic life is important for understanding how urban Africans approached and engaged with the Native Divorce Court. '*Kholwa* home life was centrally premised on maintaining respectability, within mission communities located ambiguously in a racially exclusive state.'²⁶ This idea of respectability that was part of the *kholwa* home life, as Goodhew writes, stressed the importance of

economic independence, orderliness, cleanliness and fidelity in sexual relations. This is often, though not always, linked to religion. Belief in education as a beneficial force is strongly present. Respectability could also be defined negatively: as implying hostility to alcohol (or at least excessive consumption of alcohol), gambling, sexual unions outside monogamy, and a lack of religious devotion.²⁷

²⁵ Meghan Healy-Clancy, *A World of Their Own*, 91.

²⁶ *Ibid.*, 91.

²⁷ Goodhew, 'Working Class Respectability,' 241.

While it would appear that this idea of respectability was specific and exacting, it was in fact quite flexible, and was largely ‘defined against other people [and] those deemed “unrespectable” [or] by its conflicts with the state.’²⁸ Goodhew continues by highlighting

A 1980s study of Nairobi’s prostitutes showed that ‘it is possible to argue that prostitute/householders were the respectable women; they were certainly the richest.’ Respectability was far from being the preserve of the middle and upper classes. One of the recurring themes of studies of the British and African working class was their tenacious attachment to respectable norms. Respectability could divide society – and in particular the working class – but it was equally true to say that respectability could be a radicalizing force.²⁹

The different interpretations of respectability meant that urban Africans could draw from it the identity they chose. This was particularly important for women in the cities, who struggled to find formal employment in trade and industry. Most ended up in one of in three areas of the economy: laundry work, domestic work, and liquor production, the last of which could be considered to have violated the tenets of *kholwa* respectability.³⁰ According to Goodhew,

the ANC's Dr A. B. Xuma, who lived in Sophiatown, spoke of the ‘many’ women he knew who combined stable marriages with liquor production. Other Africans noted how brewing was an effective means of accumulating wealth and could be perfectly compatible with respectable norms.³¹

The ‘African elite’ was, in essence, a ‘hybrid middle-class figure’ whose ‘bifurcated’ nature simultaneously mediated and militated against state power.³² This ‘elite’ emerged in large part due to the ideology of ‘the moral, social, and educational development of the race’ espoused and practised by missionary schools in South Africa.³³ The 1940s saw these mission schools called ‘school[s] for homemakers, where Christian nurses, teachers and wives for Africa came of age.’³⁴ It was in these mission schools that urban African

²⁸ *Ibid.*, 242.

²⁹ *Ibid.*, 242.

³⁰ *Ibid.*, 245.

³¹ *Ibid.*, 245.

³² Healy-Clancy, *A World of Their Own*, 88-91.

³³ *Ibid.*, 88.

³⁴ *Ibid.*, 90.

women were educated and trained. This identity was, as a result, often closely tied into their religious beliefs. Healy-Clancy writes:

members of this class were identified by reference to the bases of their social position: their Christianity (*amakholwa* – believers), education (*izifundiswa* – learned ones) or legal status (*izemtiti* – those exempted from Native law). Some traditionalists called them *amabuka* – traitors. But in both isiZulu and isiXhosa, they were more often known as *amarespectable*. Their critics applied that moniker sardonically, revealing elite snobbery towards the majority who were neither Christian, school educated nor exempted. [...] The term *amarespectable* also reveals the gendered stakes of their position in a state premised on racialized public exclusions and transracial Christian domestic values. In the first half of the twentieth century, debates over the bounds of women's respectability flourished in the press and on the streets: although these debates were male-dominated, women participated as individuals, and as members of all-female political, religious and social service groups.³⁵

African women also had to maintain the respectability which they became representative of.³⁶ For example,

middle-class Baptist women reworked dominant norms of 'temperance, industriousness, thrift, refined manners, and Victorian sexual morals' to 'counter racist images and structures' that cast black women as immoral and unkempt, and to condemn aspects of black working-class life.³⁷

This relationship between African women and *kholwa* life will be discussed further in later sections of this chapter. However, it is important to consider that the uncertain nature of life in the cities and developing township areas, along with limited class mobility, meant that Africans often had to adopt a fluid respectable identity and ideology in order to minimise hardship and navigate the white hegemony they lived in.

Christianity and the amaRespectable

Christianity, under the Methodists, Anglican, and Lutherans particularly, had established itself among its African constituents, with many literate members becoming teachers, or in the case of men, pastors. By the twentieth century, due in large part to the role of

³⁵ *Ibid.*, 90–91.

³⁶ Lynn M Thomas, 'The Modern Girl and Racial Respectability in 1930s South Africa', 467.

³⁷ *Ibid.*, 467.

independent churches in the Transvaal, Christianity had become more widespread and 'request[s] came for native teachers and preachers. Headmen pleaded with the church: if you will give us a teacher, we will fetch him in a wagon, build a house and a church and we will support him.'³⁸ However, despite this acceptance by Africans,

the greatest obstacle to the acceptance of the gospel was polygamy. Mr Weavind once said 'when you preach, the natives said you always talk about our having too many wives, we are too old to alter, look to the little ones for they will listen.'³⁹

This resistance to monogamy was one of the major divides between rural and urban Africans, with those adopting Christianity understanding that marriages under the court system were monogamous, though in some cases neither accepting nor practising it. While a number of the cases I have examined are missing marriage certificates, or do not provide information on church affiliation, those that do reveal that many of the litigants in these files, in fact, belonged to the Methodist denomination, with the largest number coming from the African Methodist Episcopal (AME) Church.

Discussing in more detail this idea of urban African identities, notions of respectability, and the impact of migration on the domestic space is the case of Betty Mdakane vs Jan Mdakane.

Betty Mdakane vs Jan Mdakane

In June 1948, Betty Mdakane brought a petition against her husband Jan before the Native Divorce Court, Central Division in Johannesburg. In it, she prayed for an order for the Restitution of Conjugal Rights on the grounds of malicious desertion, or, failing that, a decree of divorce; forfeiture of the benefits of the marriage; division of the joint estate; and alternative relief.⁴⁰

The facts of the case laid out in the Particulars of claim are as follows:

³⁸ MW Leleki, 'The Methodist Church and Society in Transvaal (1948-1976) Unpublished paper' (University of Pretoria, 2003), 17.

³⁹ *Ibid.*, 17. Mr Weavind is one of the people whom Leleki interviewed for his study. He was a Methodist missionary in the late 1800s who helped to start one of the first trial missions for the Methodists in the Transvaal in 1873.

⁴⁰ TAB, SEJ V1 69/2/1948. Betty Mdakane vs Jan Mdakane.

Betty, the Plaintiff, and Jan, the Defendant, were married in Heidelberg on 21 November 1933 in community of property and had two children. Betty was a domestic worker and had been living fifteen kilometres away from Heidelberg, in the Nigel Plots in Nigel, Transvaal, for over a year before she instituted claims in June 1948. Jan was a railway labourer who lived at the Railway Native Quarters in Heidelberg, Transvaal. He had been born in Frankfort, in the Orange Free State in 1909, but had lived in the Transvaal since 1928. Betty and Jan had lived together at the Balfour Location in the Transvaal until November 1947, when Jan ‘drove [Betty] away from his house and despite demand refuse[d] and/or neglect[ed] to take her back.’⁴¹ Jan, who was self-represented in the case, was ordered at the hearing on 24 September 1948 to ‘return or receive the Plaintiff [Betty, who was living in Nigel at the time] on or before 24 October 1948, failing which to show cause, if any, to this court on 11 November sitting at Johannesburg why the binds of marriage now subsisting between the Defendant and the Plaintiff shall not be dissolved, with costs.’⁴² On 27 October, Betty filed an Affidavit of Non-Return in Benoni which stated that Jan had ‘not complied’ with the court order. As a result, at the second hearing on 11 November, a decree of divorce was granted with costs. There is no indication that Jan was present at these proceedings.⁴³

This is one of the first cases in the Central Division court that this project examines wherein a woman used the Matrimonial Causes Act to institute claims against her husband. That she was able to do so is significant, speaking to her agency and ability to hold her husband legally accountable for his actions. There are very few legible facts in this case, so it is not clear why Jan ‘drove Betty away’. There are several pages of illegible shorthand, which likely contain a transcript of the case, but there is no longhand version of these notes in the file. The lack of accessible detail in the court records have made it necessary to read intentions into many of actions taken recorded. This issue, which was mentioned in the introduction, will be discussed more comprehensively in Chapter Four. It can be assumed that Jan grew dissatisfied with Betty in some way or for some reason, and ‘drove [her] away from his house’⁴⁴ which, coupled with his failure to

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ *Ibid.*

return to her/accept her back and his failure to appear at the second hearing, is indicative of the fact that he no longer wished to remain married to her or that the marriage was no longer viable due to their living in different areas.

Jan, however, did not file for a divorce himself. Why he did not is unclear, as there all the notes on the case are in shorthand, but there are three possibilities. The first is that he did not want to take on the additional expense of a hearing; the second is that he did not wish to divide their shared assets; or, lastly, that he viewed common law marriage as a fleeting experience. It is also likely that it would have been an embarrassment, as an important aspect of urban African *kholwa* life was the ability to maintain a successful, monogamous marriage.⁴⁵ It is unlikely, however, that he considered his common-law marriage as anything but legitimate, due to the fact that he and Betty married in community of property, which required additional legal procedures after the marriage.⁴⁶ This practice of community of property marriages will be discussed more comprehensively in the next chapter, as the reasoning behind it ties into the discussion on race and patriarchy in Chapter Three. It is not clear from this case that he paid the court costs for the second hearing, but even assuming he did and the records of the costs and payments are not in the case file, it would have cost him significantly less to bear these costs than having to miss work and travel to Johannesburg from Heidelberg a second time.

Jan's desertion of Betty is interesting for a number of reasons. Firstly, it speaks to the impact of the migrant labour system on the domestic lives of Africans in this period, which contributed directly the breakdown of marriages and family life. That both parties married in community of property and had been married for fourteen years before Jan 'drove'⁴⁷ Betty away is indicative of their commitment to each other, and makes the possibility that the marriage was one of convenience unlikely. Secondly, this case speaks to how urban African men and women experienced common law marriages differently. Before the passing of the Matrimonial Act ten years earlier, Betty would have had no legal recourse against Jan, despite the pressures on her as part of the *amarespectable* to

⁴⁵ Goodhew, 'Working Class Respectability'; Healy-Clancy, *A World of Their Own*.

⁴⁶ Under the Native Administration Act 38 of 1927, section 22(6) 'A marriage between Natives, contracted after the commencement of this Act, shall not produce the legal consequences of a marriage in community of property'. See Appendix one for more details.

⁴⁷ TAB, SEJ V1 69/2/1948. Betty Mdakane vs Jan Mdakane.

maintain a successful marriage.⁴⁸ This access to legal recourse had previously only been held by men. According to the Christian and racially conscious doctrines of the time, African women needed to establish a successful, monogamous marriage. While *amarespectable* men were also expected to keep monogamous marriages, they did not experience the same social pressures as women, and as a result, Jan was less motivated to obtain a divorce or remain in his marriage. Healy-Clancy explains:

Within this paradigm, women bore social authority as exemplary nurturers – not only sustaining their families through their productive and reproductive labours [...] using their homes to model new forms of sociality and racial pride.⁴⁹

African men were not confined to this domestic social space, nor were they expected to nurture their families the way women were. For women, essentially, there was a deep sense of expectation to create and maintain successful domestic spaces based on both the Christian and urban modern ideals. This social pressure also goes some way towards explaining why women were willing to return to or take back their husbands as ordered by the court, despite the domestic violence they were often subjected to. Cases which involved domestic violence will be discussed in the next chapter. Thirdly, this case is also evidence of the level of agency by urban Africans, including women, in legal engagement with the Native Divorce Court. Jan's failure to comply with the edicts of the restitution order and to appear before the court at the second hearing suggests he was aware he would be able to obtain a divorce without incurring additional expenses. This is indicative of a degree of potential manipulation of the loopholes of the court structure that was likely unintentional on the part of the legislators who drafted its rules and language. This will be explored further in Chapter Four.

Gendered Migrant – the Urban African Woman

High levels of male migrancy in the early decades of the twentieth century resulted in chiefs and community elders in the reserves being reluctant to allow women to become migrants,⁵⁰ due to the loss of labour productivity and control of their sexuality that this would result in. As Thomas McClendon explains, the 'gender division of labour put most

⁴⁸ Healy-Clancy, *A World of Their Own*; Goodhew, 'Working Class Respectability'.

⁴⁹ Healy-Clancy, *A World of Their Own: A History South African Women's Education*, 7.

⁵⁰ Delius, *A Lion amongst the Cattle*, 23.

of the burden of agricultural production on women while limiting their opportunities for independence.⁵¹ Despite this attempt by chiefs to control the agricultural capacities and subsequently the movement of African women into the cities, ‘the impact of political fragmentation, high bridewealth, economic depression, and Christianity’,⁵² along with increased opportunities for education and financial and social independence, made the city increasingly appealing for women. The war years, in particular, meant that many African men would not be working in the cities or sending money back to the reserves, which would have required women to enter the migrant labour force in order to sustain their families.

Mission schools ‘which provided nearly all African schooling before apartheid – prepared girls to run homes, schools and clinics.’⁵³ This led to an increase in women’s class mobility and for many women, became an opportunity to break away from the patriarchal structures of rural life in the reserves. This education, coupled with the economic opportunities in the city, led to an increase in female migrants to urban areas, particularly from the 1940s onward.⁵⁴ In her work *Women Migrants and Marriage*, Eleanor Preston-Whyte, highlights some of the reasons for female migration in South Africa in the 1940s and 1950s: wage employment and informal earning opportunities, particularly in domestic service which offered income and accommodation, the avoidance of arranged marriages, the appeal of Christianity and western individualism, lack of financial support from male family members, unsuccessful traditional marriages, pre-marital pregnancy, the need to support family, following husbands or male partners, or simply a sense of curiosity or adventurous desire to see the city.⁵⁵

Despite this increased female migration, however, urban areas remained predominantly male even into the 1950s. According to Jack Simons, for every thousand African men in urban areas in the Transvaal aged fifteen and up, there were 314 African women in 1936

⁵¹ Thomas V McClendon, *Gender and Generations Apart*, 12.

⁵² Delius, *A Lion Amongst the Cattle*, 23.

⁵³ *Ibid.*, 4.

⁵⁴ Philip Bonner, ‘Desirable or Undesirable Sotho Women? Liquor, Prostitution and the Migration of Sotho Women to the Rand, 1920-1945’, 11.

⁵⁵ Eleanor Preston-Whyte, ‘Women Migrants and Marriage’, in *Essays on African Marriage in Southern Africa*, ed. Eileen Jensen Krige and John L Comaroff (Cape Town, Johannesburg: Juta and Company Ltd, 1981), 158–62.

and 432 in 1951.⁵⁶ In the reserves, however, the numbers are quite different with 1127 women in 1936 and 1032 in 1951 for every thousand African men. From this, it is clear that in the 1930s and 1940s, female migration into the cities began to increase.⁵⁷ By 1951, there were 130 430 African men in the Witwatersrand (excluding Johannesburg) to 116 659 women and 295 681 African men in Johannesburg to 196 137 women.⁵⁸ From these numbers, it is clear that while the city and migration became more attractive to African women in the 1940s and 1950s, patriarchal and traditional authority, duty to and responsibility for the family unit within the reserves, and pass laws prevented African women from moving to the cities unless it became absolutely necessary. There were also fears in rural society over the *makgoweng*, the tensions between rural and urban Africans, and of becoming what Lynn Thomas deemed the ‘modern girl’⁵⁹ and having to engage in prostitution⁶⁰ or other ‘degrading’⁶¹ work. Despite the promise of employment offered by the city and the low numbers of female migrants, African women still struggled to find employment in many instances. A large number of these women were forced into prostitution or illegal beer brewing as a result, leading to conflicts with local authorities who had outlawed all non-state sanctioned beer production in an attempt to not only monopolise the market but also limit the influx of single female migrants into the city.⁶²

Both racial and patriarchal limitations on African women existed in urban areas. While urban African women enjoyed a certain amount of independence, due to their economic bargaining power, this independence was not entirely different to the agency of women in the reserves whose reproductive and productive capacities gave them security and prominence in rural communities. In both rural and urban areas and pre-colonial and colonial times, social pressures meant that women were still ‘generally subordinate’ to men.⁶³ In rural areas, African women were expected to cede to their husbands and chiefs, restricting themselves to reproductive and productive domesticity, and were prevented

⁵⁶ Simons, *African Women*, 73.

⁵⁷ *Ibid.*, 73.

⁵⁸ *Ibid.*, 73.

⁵⁹ Thomas, ‘The Modern Girl and Racial Respectability in 1930s South Africa’. This is discussed more below.

⁶⁰ Bonner, ‘Desirable or Undesirable Sotho Women?’, 12.

⁶¹ Delius, *A Lion amongst the Cattle*, 30.

⁶² Bonner, ‘Desirable or Undesirable Sotho Women?’, 3–6.

⁶³ McClendon, *Gender and Generations Apart*, 14.

from engaging in the cattle economy which was how wealth was accumulated in rural society.⁶⁴ In urban areas, women were placed under enormous pressure from the *amarespectable* to be the foundation and paragon of the urban African population⁶⁵ and were still largely prohibited from ‘white’ or ‘male’ dominated public spaces of economy, politics, and religion. Instead, they were expected to maintain households, raise children, and engage in social spaces of racial upliftment through ‘teaching, nursing, and social work.’⁶⁶ While these acts tended to be seen by Africans as ‘acts of empowerment, officials saw them as fonts of self-help that enabled [white authorities’] neglect of black social welfare.’⁶⁷

Despite these exploitative and patriarchal attitudes by the state and men, African women continued to organise themselves for the betterment of their communities.⁶⁸ Particularly prominent in this regard were the ‘uniformed prayer associations or *manyanos*’⁶⁹ and ‘*kopanos*’⁷⁰ which enjoyed high participation from married African women.⁷¹ These groups acted as a ‘conduit’ for the dissemination of the ideas and practices of modernity into urban African communities - for example, taking responsibility for the upliftment of young African women⁷², even as they resisted their relegation to the role of wife and mother.⁷³

However, this independence and challenge to both colonial and male forms of authority was constrained by those mission schools. The family model espoused by the missions to their African female converts spoke of an evangelical, and distinctly urban, kind of domesticity: the ‘male breadwinner, dependent housekeeping wife and mother, [and]

⁶⁴ *Ibid.*, 14–15.

⁶⁵ Healy-Clancy, *A World of Their Own: A History South African Women’s Education*, 87–89.

⁶⁶ *Ibid.*, 88.

⁶⁷ *Ibid.*, 88.

⁶⁸ *Ibid.*, 4.

⁶⁹ Deborah Gaitskell, “‘Wailing for Purity’: Prayer Unions, African Mothers and Adolescent Daughters 1912–1940”, in *Industrialisation and Social Change in South Africa: African Class Formation, Culture, and Consciousness, 1870–1930*, eds, Shula Marks and Richard Rathbone (London and New York: Longman, 1982), 338.

⁷⁰ Marc Epprecht, ‘Domesticity and Piety in Colonial Lesotho: The Private Politics of Basotho Women’s Pious Associations’, *Journal of Southern African Studies* 19, no. 2 (June 1993): 204.

⁷¹ Gaitskell, “‘Wailing for Purity’”, 338.

⁷² Gaitskell, “‘Wailing for Purity’”.

⁷³ *Ibid.*, 206.

dependent school going children.⁷⁴ Marriage, for many African women in common-law unions, became a full-time occupation, wherein women involved themselves in domestic housekeeping and childrearing pursuits. In many of the cases that this thesis examines, women were housewives, with no discernible income outside of their husbands.⁷⁵ Despite improvements in their education and economic mobility, women, particularly those in urban areas, remained subject to the forces of racialised patriarchy which colonialism and apartheid anchored on. ‘Religious and educational ideology confirmed the importance of women’s domestic influence in the spheres of family spirituality and child nurture.’⁷⁶ Essentially, urban African women’s social and religious expectations and duties to remain wives and mothers who served Christianity created a space wherein they were simultaneously more empowered than they had ever been, and less.

Tied closely into this identity were notions of respectability and modernity. Lynn Thomas’s ‘modern girl’ is an excellent example of the dichotomy of the urban African – on one hand, she was seen as embracing whiteness and on the other as a modernising force for Africans.⁷⁷ According to this definition, ‘girl’ denotes the ‘working-class and middle-class unmarried young women who seemingly occupied ‘a provisional free space.’⁷⁸ It is to this dual social identity of urban African women that this thesis applies Mamdani’s theory of ‘bifurcation.’⁷⁹ It is particularly significant that this ‘bifurcation’ is read onto the body of the urban African woman, as she, as this chapter and the rest of this work will discuss, is often a space of contestation and control for the state, traditional authorities, and patriarchy. On one hand, the urban African woman is the paragon of Christian domestic virtue, meant to be responsible for the upliftment of her race and the stability of her family and the larger community, as the domestic foundation of the

⁷⁴ Deborah Gaitskell, ‘Housewives, Maids or Mothers’, 241.

⁷⁵ Examples of these cases include TAB, SEJ 68/1/1948. Restitution of Conjugal Rights. Adam Lesibo vs Maria Lesibo (born Rakhale), TAB, SEJ 12/1/1948. Divorce. Esau Tiisetso Kaibe v Alice Kaibe (born Mohale), TAB, SEJ 12/5/1948. Restitution of Conjugal Rights. Lucia Moshoele (born Mokhogi) vs Isaac Moshoele, and TAB, SEJ 14/1/1948. Restitution of Conjugal Rights. Augustine Tau vs Bellina Tau (born Leshoro). In each of these cases, the wife’s employment was listed as ‘Nil’ or ‘Housewife’.

⁷⁶ Gaitskell, “‘Wailing for Purity’”, 339.

⁷⁷ Thomas, ‘The Modern Girl and Racial Respectability in 1930s South Africa’.

⁷⁸ *Ibid.*, 463.

⁷⁹ Mahmood Mamdani, *Citizen and Subject*, 18.

amarespectable and the *kholwa* elite.⁸⁰ On the other, she was a product of the *makgoweng*, and carried all implications of promiscuity, disease, and degradation that came with life in the city.⁸¹ She, in her pursuit of modernity, challenged traditional authority, flouted notions of respectability, and disrespected her elders and husband.⁸²

In South Africa, some viewed African young women's schooling, professional careers or cosmopolitan appearances as contributing to 'racial uplift' [*sic*]. Others accused the African modern girl of 'prostituting' her sex and race by imitating white, coloured or Indian women, and by avoiding marriage, dressing provocatively or engaging in extra-marital and inter-racial sex.⁸³

The next case examines the bifurcation of the urban African woman, who was at once the 'modern girl' who enjoyed sexual autonomy and a level of independence, and the wife subject to the patriarchal and hegemonic control of her reproductive capacities.

Joseph Moeketsi vs Esther Moeketsi

In June 1948, Joseph Moeketsi brought a petition against his wife Esther before the Native Divorce Court, Central Division satellite court in Germiston, for a judgement of an 'order for the restitution of conjugal rights, failing which a degree of divorce on the grounds of malicious desertion; forfeiture of benefits arising from the marriage, costs of the suit, and alternative relief.'⁸⁴

Joseph Moeketsi's claims were as follows:

Joseph (the Plaintiff) and Esther (the Defendant) were married in community of property in Pretoria on 18 March 1928. Joseph was born in Vereeniging and remained domiciled in that area. He and Esther lived together in Germiston. According to his testimony in the Particulars of Claim,

the parties are staying together in one house [in Germiston], but that since the beginning of 1946, defendant started to quarrel with Plaintiff

⁸⁰ Healy-Clancy, *A World of Their Own*; Goodhew, 'Working Class Respectability'; McClendon, *Gender and Generations Apart*.

⁸¹ Delius, *A Lion amongst the Cattle*, 30.

⁸² McClendon, *Gender and Generations Apart*, 169–70.

⁸³ Thomas, 'The Modern Girl and Racial Respectability in 1930s South Africa', 464.

⁸⁴ TAB, SEJ V1 79/2/48. Joseph Moeketsi vs Esther Moeketsi.

and refuses Plaintiff Conjugal Rights. Defendant stays and sleeps in one room and Plaintiff in another room. Defendant said in the presence of witnesses that she does not want a husband and that she does not regard Plaintiff as such.⁸⁵

At the hearing on 23 September 1948, which both parties attended, Esther denied desertion or the refusal of conjugal rights. Joseph handed in his marriage certificate as evidence, and each side then closed their cases. The summons was dismissed with costs by the Court's President Wronsky, and the case was struck from the rolls. There is no explanation given for why this is. There is testimony from neither party offered, and there is no marriage certificate in the file.⁸⁶ As a result, it is not known whether Esther or Joseph were employed, or where. It is also unclear how old both parties were, although they had been married for twenty years. What is known from the particulars of claim is that the parties were married in community of property, so, as in the case of *Betty Mdakane vs Jan Mdakane*, it is unlikely that this was a marriage of convenience.

The most significant aspect of this case is the assumption on behalf of Joseph over what 'restitution of conjugal rights' meant. It is clear from the case that Joseph believed conjugal rights to mean sexual intercourse. However, the court's position was that an order for the restitution of conjugal rights was intended to preserve a marriage, and was an alternative to judicial separation or divorce. The court did not 'enforce sexual intercourse, but only cohabitation and restitution of conjugal rights [could not] be ordered where the respondent refuses sexual intercourse but continues to cohabit with the petitioner.'⁸⁷ It was preferable for the state and the church, who viewed divorce as a sign of a destabilised and morally weakened society,⁸⁸ that African couples stayed together, as it created a more stable workforce, and prevented the insubordination of urban African women who provided the moral foundation of the urban African community.⁸⁹ This position is why the *Moeketsi* case, where both parties were already living together, was dismissed, and the witnesses Joseph mentioned were not brought in. The case also shows

⁸⁵ TAB, SEJ V1 79/2/48. *Joseph Moeketsi vs Esther Moeketsi*.

⁸⁶ TAB, SEJ V1 79/2/48. *Joseph Moeketsi vs Esther Moeketsi*.

⁸⁷ D Tolstoy, *The Law and Practice of Divorce and Matrimonial Causes, Including Proceedings in Magistrates Courts*, 94.

⁸⁸ 'Easy Divorce Deplored'. *Rand Daily Mail*, 12 March 1929; 'Bishop on Divorce and Birth Control', *Rand Daily Mail*, 19 September 1927; 'Too Many Jazz Marriages', *Rand Daily Mail*, 26 September 1927.

⁸⁹ Healy-Clancy, *A World of Their Own*, 88.

a sense of entitlement on Joseph's part to sexual intercourse with Esther, which was no doubt exacerbated by his belief that his entitlement was legitimised by what he believed the court's 'restitution of conjugal rights' order would do. This reflects the dislocation between how urban African men understood and attempted to use the restitution of conjugal rights versus how and why the state enforced it, and highlights the need of both to control the reproductive capacities of urban African women.⁹⁰

The lack of marriage certificate in this case, as well as the lack of testimony, is telling of the ways in which the courts processed divorce cases. Cases tend to be deeply formulaic, and almost brusque in their summative nature. This idea will be explored further in Chapter Four, which looks at the relationship between the state and the Divorce Court. From this case, it can be seen that while it was expected that black Christian women should have respectable, successful marriages, women like Esther rejected this notion. Unfortunately, this case is very short, so there is limited data available from which to draw conclusions. However, according to her husband, she declared that she 'did not want a husband'- something that was not supported by either Christian or African ideals, but does speak to the independence of what Thomas calls the 'modern girl.'⁹¹ Esther would only have been able to refuse her husband as she did if she had economic independence.

The use of the law to attempt to force a woman to engage in sexual intimacy speaks of the entitlement of both the state and men over African women's productive and reproductive capacities.⁹² The belief that the courts could order a woman to engage in sexual intercourse with a man indicates a strong sense of patriarchal entitlement to women's bodies, which is reflected in the high levels of normalised domestic violence in both customary unions and common law marriages, the latter of which will be discussed in the next chapter. This entitlement was exacerbated by the normalisation of racialized hyper-masculinity and increased aggression that came with life in urban spaces and on the mines of the Rand.

⁹⁰ McClendon, *Gender and Generations Apart*, 171–76.

⁹¹ Thomas, 'The Modern Girl and Racial Respectability in 1930s South Africa'.

⁹² McClendon, *Gender and Generations Apart*, 194–195.

Urban Africans and marriages of convenience

One of the most significant issues that this project deals is the issue of marriages of convenience, or marriages for practical and economic gain rather than love, and how they simultaneously empowered and exploited urban African women in particular. This study also makes the argument that the relative ease of obtaining a divorce in the Native Divorce Court made it easier to practice marriages of convenience. However, as marriages of convenience were not supported by the state, and there is no indication of these in the case files, it is necessary to read intention behind the actions of the cases themselves. An analysis of these kinds of marriages also highlights important points about the impact of urbanisation, access to land, and migration on how urban Africans formulated new ways of thinking about marriage and commitment as husbands and wives. The transience of migrant labour, fluid nature of life in urban areas, and the vices and temptations of the city made it difficult for urban Africans to maintain long term commitments to the idea of the sanctity of marriage.

The ‘*maputo*’ or ‘pots’ unions which are described in Michael F. C. Bourdillon’s *The Shona Peoples* as ‘a convenient sharing of cooking arrangements’,⁹³ came about as the result of migrant labour practices impacting on domestic situations in urban areas in Zimbabwe, which had weakened traditional institutions such as marriage. These marriages are defined by Blair Allen Rutherford in her book *Working on the Margins* as

a less formal structure which permitted men to have somewhat stable cooking and sexual relations without the concerns of the formalized bridewealth transactions and which allowed women who would have had difficulty getting married (because they were divorcees or already had children) to have the security of a home and maintenance.⁹⁴

Muzvidziwa situates these unions from the perspective of women, explaining them as ‘a loosely structured relation with a man which allows the woman to retain control of her life in terms of decision making.’⁹⁵ For many women in Zimbabwe, these marriages,

⁹³ M. F. C. Bourdillon, *The Shona Peoples: An Ethnography of the Contemporary Shona, with Special Reference to Their Religion*, Rev. ed., 2nd rev. ed, Shona Heritage Series, v. 1 (Gweru [Zimbabwe]: Mambo Press, 1982), 319.

⁹⁴ Blair A. Rutherford, *Working on the Margins: Black Workers, White Farmers in Postcolonial Zimbabwe, Postcolonial Encounters* (Avondale, Harare, Zimbabwe: London, UK; New York, NY, USA: New York, NY: Weaver Press; Zed Books; St Martin’s Press, 2001), 177.

⁹⁵ Victor Muzvidziwa, ‘An Alternative to Patriarchal Marriage’: 139.

which were cohabitations, were necessary for their survival within the urban space.⁹⁶ These ‘income generating strategies’ involved navigating ‘intricate relationships’ wherein domestic and reproductive services were necessary to enable women to remain in the city.⁹⁷ These *maputo* unions were similar to the ‘*vat en sit*’ marriages practised by Sotho women on the Rand in the 1930s, which were an ‘improvised marriage arrangement’ ‘whereby the informal production of the [slum] yards and the income from formal employment were harnessed together to provide for working class needs.’⁹⁸ This idea of marriages of convenience was also carried out in other practices, such as the Hats. ‘The Hats was one mode of so-called “house marriages” (marriages of convenience, transacted in order to secure a house, with little or no emotional foundation at the outset)’⁹⁹ which became popular in the 1950s and 1960s, as a result of stricter controls over land access under the apartheid government. As Deborah Posel explains, they were called ‘Hats’ marriages because

African men and women in search of state housing would assemble at the office of a Native Commissioner. While the women waited outside, the men were instructed to remove their hats, and leave the room. The hats were lined up on a table, and the women filed in. Each one selected a hat, and was married, there and then, to its owner.¹⁰⁰

It is possible that some of the marriages examined in this study from the 1940s, particularly those which lasted only a few months or years, were marriages of convenience. However, it is not a guarantee that those marriages that failed quickly were exclusively housing marriages, as while ‘some collapsed as rapidly as they had been manufactured [...] many others endured for longer periods of time.’¹⁰¹ The practice of the Hats, *vat en sit*, *maputo* and other forms of housing marriage became increasingly common as time went on, and ‘by the late 1960s, many state officials regarded marriage for the sake of housing as one of the most common motives for, and forms of, matrimony in urban African communities in South Africa.’¹⁰² For many African women, these

⁹⁶ *Ibid.*, 139.

⁹⁷ *Ibid.*, 139.

⁹⁸ Bonner, ‘Desirable or Undesirable Sotho Women?’, 9.

⁹⁹ D. Posel, ‘Marriage at the Drop of a Hat’, 58.

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

marriages provided stability and access to urban housing in exchange for domestic and reproductive services. These kinds of marriages were very necessary for the survival of Africans, particularly women, within the urban context.

Marriages of convenience were only possible due to the legal framework which existed at the time, which allowed Africans to marry and divorce under common rather than customary law; and the adoption of the respectable urban identity by Africans who wanted access urban spaces. It also highlighted a fluid understanding of marriage, which on one hand can be considered entrepreneurial, or mercenary, and on the other as an indictment of the social, political, and economic situation of the time which led to a housing crisis, the need to share wage packets, and the focus on presenting a respectable identity. As Posel notes:

The Hats exhibited a logic of partnership which increasingly informed the production of domesticity within urban African communities. Marriage, from this point of view, was a primarily instrumental undertaking, the ticket to a life in the city (particularly for women), at a time when state regulations restricted urban housing to married couples. Emotionally, marriage was considered ‘a lottery’, as likely to succeed as it was to fail; therefore, the route into marriage had relatively little bearing on its potential durability. Yet culturally, marriage – of this or any other variety – remained a necessary condition of social and moral respectability (particularly for women).¹⁰³

It is unlikely that Hats marriages were occurring in the 1920s, as Posel indicates they only became popular in the 1950s, due to increases in female migration and attempts by the apartheid government to more stringently control where and how African movement occurred.¹⁰⁴ This, of course, does not mean that other kinds of convenience marriages were not occurring in the earlier decades of the twentieth century.

The passing of the 1923 Natives (Urban Areas) Act, the increase in female migration and the subsequent increase in the number of Africans attempting to establish permanent residency in the city. As this African urbanisation increased, so did common law marriages, including marriages of convenience. Unfortunately, during a period when the law allowed for marriage at the ‘drop of a hat’ or the cost of a shilling, and the question

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

of 'genuine' in marriage becomes difficult to answer. Similarly, divorce, once the Native Divorce Courts had been established under the 1929 Native Administration Amendment Act, was relatively easy to obtain. It was simply a matter of instating a claim, appearing before the court on the date of the hearing, and obtaining a verdict. The most difficult parts – travelling to and accessing the courts - were made easier after the establishment of the Central Division Court in 1948, which opened several new satellite courts. This, coupled with its inexpensive cost, and the fact that Africans could represent themselves, meant that marriages which started as a convenience could also be ended as one.

As divorce became more easily accessible, after the Native Divorce Courts were established, people chose to end difficult marriages, rather than endure the hardships that came with them despite the 'threat to a sound State' that the Church believed their choices represented. Because of this, the underlying dynamics of marriage had begun to change, as there was a shift in focus from 'sincerity of purpose' to a certain practicality. As Posel indicates, many Africans got married and divorced for more practical reasons.

Conclusion

The first half of this chapter looked at the development of the urban African identity in the first half of the twentieth century and presented an overview of some of the influences which contributed to that identity's formation. It then argued that the Native Divorce Court was a space which allowed urban African women to challenge the patriarchal forces which sought to control their sexual and reproductive capacities, while simultaneously enforcing those oppressive structures, using the cases of *Betty Betty Mdakane vs Jan Mdakane*, and *Joseph Moeketsi vs Esther Moeketsi*. The chapter then discussed how urban Africans, as a result of influences of Christianity, migration, and urbanisation began to formulate a new kind of marriage, that of convenience, which was more easily facilitated through the use of the Native Divorce Court. While this chapter mainly focused on urban African women, Chapter Three will look at the development of urban African masculinities within the context of urbanisation and migrant labour to the mines, and presents an overview of how violent masculinities developed during the first half of the twentieth century. It will then examine cases of domestic violence, and continue to examine the relationship between the restitution of conjugal rights, entitlement and violence in the domestic space.

Chapter Three

Patriarchy, Domestic Violence, Conjugal Rights, and Constructions of Masculinity in the Transvaal

Chapter Two examined the relationship between the socio-political forces of the 1930s and 1940s in South Africa, specifically Christianity, labour migration and gender, to develop an understanding of the urban African. Particularly, the cases in that chapter provided an overview of the gendered dynamics of the Native Divorce Court, with a particular focus on attempts by the court and African men to control women's reproductive capacities, and attempts by women under the Matrimonial Causes Act to hold their husbands accountable for desertion. This chapter begins by discussing patriarchal and violent masculinities – which the state, through the Native Divorce Court, condoned if not endorsed, and to which women responded ambivalently – in relation to migration, marriage, and black urbanisation. It argues that the Native Divorce Court, while allowing women a space to exercise their agency, simultaneously situated itself alongside the patriarchal order, domestic violence, and the control of and entitlement to women's bodies as enacted by African men over their wives. Furthermore, this chapter looks at conjugal rights, continuing with an analysis of the case of *Joseph Moeketsi vs Esther Moeketsi*, as well as how masculinity and patriarchy informed paternity and custody, and antenuptial contracts in common law African marriages.

Masculinities, patriarchies and violent identities

There is a large body of scholarship which has examined the relationship between men, masculinity, and male sexuality and violence in South Africa. Many of these studies have emerged due to the impact of HIV/AIDS on African communities, and a number of them cite a link between masculinities and violence.¹ Graeme Reid and Liz Walker present an

¹ Rachel Jewkes et al., 'Rape Perpetration by Young, Rural South African Men: Prevalence, Patterns and Risk Factors', *Social Science & Medicine* 63, no. 11 (December 2006): 2949–61; Robert Morrell, Rachel Jewkes, and Graham Lindegger, 'Hegemonic Masculinity/Masculinities in South Africa: Culture, Power, and Gender Politics', *Men and Masculinities* 15, no. 1 (April 2012): 11–30, 1; Rachel Jewkes and Naema

overview of South Africa's sexual histories, examining the Foucauldian theory that 'sexuality was fundamentally constitutive of the social order'.² They situate discussions around gender and masculinity into two categories: the first of these categories looks at 'deviant' or 'sexually aberrant' practices of homosexuality as the result of 'rural migrant workers' fears of "townswomen", resistance to urbanisation and [...] "homeboy networks" of patronage.³ This project speaks to this body of literature, particularly in how it looks at the impact of urbanisation, mining, labour migration, and the sexually liberated 'townswoman' impressions perpetrated by rural African communities, colonial authorities and, to some extent as the result of the tensions between rural and urban Africans, and urban Africans themselves.⁴ The second category of sexuality studies looks at how desire and intimacy shape male sexuality. Beyond this, there are also considerations of the 'historically specific ways in which masculine subjectivities are co-constructed and mediated by a range of salient subjectivities built around class, race, ethnicity.'⁵ This, as well as issues of identity, community, political subjectivities, and the rising class of independent women, need to be reflected in discussions of how urban African men navigated the changing landscape of twentieth-century South Africa. These discussions need to be framed within the intertwining urban economic and domestic spaces, as well as period-specific discourses of gender, class, and race.

Carrie Paetcher defines hegemonic masculinity as one which 'confers considerable power vis-à-vis women, not just on the hegemonically masculine but on all men, while at the same time standing as an ideal type against which various ways of 'doing man' can be

Abrahams, 'The Epidemiology of Rape and Sexual Coercion in South Africa: An Overview', *Social Science & Medicine* 55, no. 7 (October 2002): 1231–44; Keith Breckenridge, 'The Allure of Violence: Men, Race and Masculinity on the South African Goldmines, 1900-1950', *Journal of Southern African Studies*, Special Issue on Masculinities in Southern Africa, 24, no. 4 (December 1998): 669–93; Radhika Chopra, Chaitali Dasgupta, and Mandeep K. Janeja, 'Understanding Masculinities', *Economic and Political Weekly* 35, no. 19 (6 May 2000): 1607–9; Peter Delius and Clive Glaser, 'Sexual Socialisation in South Africa: A Historical Perspective', *African Studies* 61, no. 1 (July 2002): 27–54; Clive Glaser, 'The Mark of Zorro: Sexuality and Gender Relations in the Tsotsi Subculture on the Witwatersrand', *African Studies* 51, no. 1 (January 1992): 47–68; Clive Glaser, 'Managing the Sexuality of Urban Youth: Johannesburg, 1920s-1960s', *International Journal of African Historical Studies* 38, no. 2 (2005): 301–27.

² Graeme Reid and Liz Walker, 'Sex Then and Now: Exploring South Africa's Sexual Histories', *South African Historical Journal* 50, no. 1 (January 2004): 79.

³ *Ibid.*, 76–77.

⁴ For more on this, see chapter two of this project as well as Peter Delius, *A Lion amongst the Cattle*; Meghan Healy-Clancy, *A World of Their Own*; Lynn M Thomas, 'The Modern Girl and Racial Respectability in 1930s South Africa', 461–90.

⁵ Tamara Shefer, Garth Stevens, and Lindsay Clowes, 'Men in Africa: Masculinities, Materiality and Meaning', *Journal of Psychology in Africa* 20, no. 4 (2010): 511.

constructed and performed.’⁶ On the other hand, the subordinated masculinity is one which ‘the various masculinities have reverted to being ‘how men are empirically found to behave’ but are then classified according to the closeness of their relationship to a particular hegemonic masculinity.’⁷ What this means, in regards to this project, is that urban African men performed patriarchy in regards to their wives, subordinating them and using that subordination to establish their own hegemonically masculine dominance within domestic and intimate spaces, in customary ‘partnerships’ as well as in Christian marriages, even as these men were subordinated to hegemonic white authorities. This patriarchy was also seen in the intergenerational relationships of African male youth, elders and traditional authorities in the reserves, through violent engagements with white labourers who lived in mining compounds⁸, and through political resistance and obedience to white authority and the state. African masculinities were seen as hyper-aggressive, and hypersexualised in regards to white women. This hegemonic masculinity and patriarchy which was performed by African men manifested in spousal abuse and sexual entitlement, as discussed in the cases below, and increased aggression and the rise of gangsterism and violence in urban spaces. This gangsterism also speaks to how urban African men associated violence with sexual conduct and manifested domestic authority through aggressive and often abusive behaviour with spouses.⁹

The urban African man in the first half of the twentieth century was the product of a number of different influences. In particular, he was the product of a ‘subaltern gender’ and a ‘powerless masculinity,’¹⁰ marginalised and oppressed by hierarchies of whiteness and wealth. This ‘powerless masculinity’ has also been attributed, in colonial and pre-colonial times, to ecological and agricultural systems of ‘drought, changes in forest ecology, and the loss of land [and] changes in land ownership’¹¹ which negatively impacted how men situated themselves within patriarchal structures. During times of ecological and agricultural upheaval, men would lose wealth, prosperity and status. In colonial times, this was truer of the reserves, and urban Africans, particularly first-generation migrants such as

⁶ Carrie Paechter, ‘Masculine Femininities/Feminine Masculinities: Power, Identities and Gender’, *Gender and Education* 18, no. 3 (2006): 5.

⁷ *Ibid.*, 57–58.

⁸ Breckenridge, ‘The Allure of Violence’.

⁹ Clive Glaser, ‘Managing the Sexuality of Urban Youth’.

¹⁰ Radhika Chopra, Chaitali Dasgupta, and Mandeep K. Janeja, ‘Understanding Masculinities’, 1607.

¹¹ *Ibid.*, 1607.

the BaPedi, who maintained strong ties with reserve communities, suffered a decrease in their wealth as their migrant labour earnings failed to sufficiently support their families. Similarly, the ‘loss of access to women’ for these migrant labourers resulted in a ‘weakening’ masculinity, and a rise in homosexual behaviour, as well as a concurrent rise in the ‘hyper-masculine’, typically manifested as aggression or ‘machismo’¹² or domestic violence. The ‘culture and the material conditions they worked and lived in’ had ‘combined to engender a notably “macho” stoicism.’¹³ That is, these typically young African men were expected, by their peers, particularly in the first half of the twentieth century, to engage in hyper-masculine behaviours – taking risks, aggression, sexual promiscuity, drinking, and violence – in order to gain acceptance and even prestige among their peers.¹⁴ This hyper-masculinity was particularly prevalent in mining compounds and among African youth. Their relationships with women were typified by aggression – either sexual or physical violence was normalised in relationships. The independence women claimed in urban areas served only to heighten male aggression, as men ‘frequently attempted to re-assert their masculine authority and prerogatives, both by appeals to a generally sympathetic colonial state and, increasingly, with brute force.’¹⁵ These prerogatives included conjugal rights, and attempts to re-establish control were often centred on the Native Divorce Court. These attempts were based in turn on appeals to Christian colonial conceptions of domestic ideologies of the ‘obedient wife’, and what Gaitskell calls the ‘ideal home’ (or the home where the wife was the embodiment of ‘domestic virtues’¹⁶) and what Epprecht called the ‘good Marian mothers’, who would ‘demonstrate a combination of traditional domestic virtues and progressive mothercraft.’¹⁷

The urban African man also existed in a state of what Mrinalini Sinha calls ‘masculine anxieties’ as he positions his construction of himself within ‘a relationship to men of other communities.’¹⁸ In this case these communities and anxieties included white men, men of other ethnicities, other members of the African bourgeoisie, his own financial and class

¹² *Ibid.*, 1607–8.

¹³ Marc Epprecht, ‘Domesticity and Piety in Colonial Lesotho’, 202–3.

¹⁴ Breckenridge, ‘The Allure of Violence’.

¹⁵ Epprecht, ‘Domesticity and Piety in Colonial Lesotho’, 203.

¹⁶ Deborah Gaitskell, ‘Housewives, Maids or Mothers’, 9–10.

¹⁷ Epprecht, ‘Domesticity and Piety in Colonial Lesotho’, 220.

¹⁸ Mrinalini Sinha, ‘Giving Masculinity a History: Some Contributions from the Historiography of Colonial India’, *Gender and History* 11, no. 3 (November 1999): 449–50.

independence, rural African masculinities, the patriarchs and headsmen of his community, as well as his positionality against coloniality, and African and white women. This placed the urban African man in simultaneously ‘hegemonic’¹⁹ and ‘subordinated’²⁰ positions of masculinity within intersected power relations of race, class, and gender. The following cases examine the intertwining themes of patriarchy, masculinity, domestic violence, adultery, and male entitlement, and situate these themes within the legal spaces of the Native Divorce Court. These cases are evidence of the ways in which the law and traditional belief systems converged in the Native Divorce court, which perpetuated the patriarchal oppression of urban African women and shaped urban African masculinities.

Josiah Rasemetse vs Emily Rasemetse

In May 1948, Josias Rasemetse instituted a claim against his wife, Emily, seeking a decree of divorce on the grounds of adultery, custody of the minor children of the marriage, and forfeiture of the benefits of the marriage in community of property. Failing that, he also instituted an alternative claim for the restitution of conjugal rights.²¹

The Particulars of Claim laid out the specific circumstances of the case as follows:

The couple were married in community of property at Heidelberg, a town in the Transvaal south-east of Johannesburg, in 1938. At the time of the suit, Josiah was employed by a building contractor in nearby Brakpan, but was a registered taxpayer in Vereeniging, which was in the jurisdiction of the Native Divorce Court Central Division. Emily lived in Brakpan. The marriage produced two children, Lydia, aged seven, and Raheba, aged four. Josiah accused Emily of committing adultery in 1945 with a man called Johannes Maseko, from whom he claimed Emily had a child born in 1946. Because of this, Josiah prayed, or petitioned, for divorce on the grounds of adultery. He further claimed that in 1945, Emily ‘wrongfully and maliciously deserted [him] from the marital home at Germiston and despite demand [she] neglect[ed] or refuse[d] to return to him.’ As a result, he requested the court grant an order for the restitution of conjugal rights or a decree of divorce.²²

¹⁹ Carrie Paechter, ‘Masculine Femininities/Feminine Masculinities: Power, Identities and Gender’, 57.

²⁰ *Ibid.*, 58.

²¹ TAB, SEJ V1 79/2/48. Divorce. Josiah Rasemetse v Emily Rasemetse (born Molala).

²² *Ibid.*

At the hearing, where Josiah was represented by his attorney, Mr S. Judes, and Emily was self-represented, Mr Judes requested that the Summons and Particulars of Claim be amended from ‘married in community of property’ to ‘married out of property’, to reflect the marriage certificate. Emily had no objection.²³ This amendment was requested fairly frequently and suggests the possibility of either bureaucratic inefficiency or a lack of knowledge on the part of urban Africans, who assumed their marriages would be in community of property, as common law marriages among white people automatically were. This issue will be discussed in more detail below.

Josiah’s testimony, after confirming the other details of the particulars of claim, was as follows:

For eight years subsequent to marriage we lived in Germiston. In or about 1945 while we were in bed I asked my wife to have [sexual intercourse] with me. She got up and ran to her people. She has been away from me since then and has married someone else. She has been living with Johannes Maseko. She has had two children by this man. I ask the court for a decree of divorce on the grounds of adultery or alternatively restitution of conjugal rights, costs of suit, or alternative relief. [...] I want my wife back. I love her. I have two children by my wife, aged seven and four years.²⁴

This testimony makes Josiah appear extremely sympathetic to the reader. When reading his testimony, it is hard not to feel sympathy for him, as his wife, who had borne him two children, and who then went to live with another man, with whom she had another two children, abandoned him. However, this apparent desertion by his wife is immediately undercut by her testimony. Here, again, there are no questions from the court.

Plaintiff continually assaulted me. He drove me away. Why does he ask for my return? I still love the Plaintiff. He is my husband. I am prepared to return to him.²⁵ [...] I complained to the Native Affairs Department at Brakpan about the assault. We were living at Germiston then. I have three living children and one dead. Four in all. Plaintiff is father of all my children. The youngest child is ten months old. I left Plaintiff in 1946 and went to live in Brakpan.²⁶

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ *Ibid.*

The court issued a restitution of conjugal rights order on Emily, instructing her to ‘return to or receive’ Josiah ‘on or before 19 June 1948, failing which to show cause on 13 September why a decree of divorce should be granted against her with costs and with an order of forfeiture of the benefits arising from the marriage.’²⁷

This mention of spousal violence in the midst of a divorce hearing was not dwelt on or expanded in any way and becomes all the more startling for the proclamations of love, desire for reconciliation, and pleadings for his wife’s return on the part of the plaintiff, Josiah Rasemetse. It becomes even more remarkable to read that while it was the abuse that prompted her to leave, Emily’s testimony indicates that she considered the abuse representative of the fact that he was no longer satisfied with her, or wanted her to leave, proclaiming that he ‘drove her away.’²⁸ This is further emphasised by her apparent confusion or anger over why he would ask her to return to him, which is then immediately followed by a declaration of her reciprocal love and willingness to do so. The commonality lies not just in an acceptance of violence as a normal state, but also in it being a signal of a husband’s dissatisfaction with his wife and loss of desire for her, rather than what we understand gender and spousal abuse to be. It is not the act of being assaulted, but rather the dissatisfaction displayed by her husband, which is a failing on the part of an urban African wife charged with maintaining her home, that results in her leaving or being ‘driven’ away. This idea of violent men or men who love violently is not a new one, nor is the relationship between this violence and patriarchy. ‘Rape, like domestic violence, is both a manifestation of male dominance over women and an assertion of that position,’²⁹ and was normalised both by the state and African patriarchies.

Why she didn’t leave

One of the narratives of this thesis, discussed in Chapter Two, has been that for the urban woman, the city offered an opportunity to break away from traditional authority, through employment and financial independence, as well as through ‘marriages of convenience’. It has also been argued that women used these courts ‘to seek freedom from oppressive marriages through the vehicle of divorce, as well as using to the forum provided by the

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ Rachel Jewkes and Naeema Abrahams, ‘The Epidemiology of Rape and Sexual Coercion in South Africa.’

courts to provide their own versions of labour tenant histories, and their own perspectives on conflicts of gender and generation.³⁰ This presentation of urbanisation as empowering is undercut by a number of elements of the gendered and racialised make-up of urban areas in the mid-twentieth century. Liz Thornberry, in her study *Sex, Violence, and Family in South Africa's Eastern Cape*, writes that 'Marriage ... was a circumstance in which some residents of the Eastern Cape sanctioned coercion and even violence.'³¹ Courts, due in part to the pluralism that bifurcated South Africa's legal system, often 'naturalised violence within a broad range of "family" relationships.'³² This normalisation of violence in marriages and the subsequent normalisation of domestic violence by the courts left African women with little to no recourse to engage with issues of violence. As a result, while urban African women could and did have recourse against their husbands for some issues such as the restoration of conjugal rights, because of the court's position on assault in African marriages, these women had little to no legal protection or rights in those cases, particularly in urban areas where they had fewer family or community members to defend them.³³ Thornberry's study highlights that within African communities women's consent to marriage was equal to consent to all sexual relations with their husbands, and also that their consent was not needed for marriage in many instances. Another dimension of this interpretation is present in the case of Emily Rasemetse. She, like the women in other cases that are presented in this project, often expressed a willingness to return to her husband, despite the violence she experienced. As troubling as that is in and of itself, it also speaks to the coercive elements of sexual relationships and marriages within some communities.

Racism and patriarchy intersected in ways which, when coupled with a lack of economic opportunities in urban areas for women³⁴, meant that a number of women entered into marriages like the Hats and *maputo* unions for access to housing, protection from other men, or financial security. This coercion, born of necessity and from patriarchy, fuelled cultural understanding that 'if a man paid *ilobolo* for his wife it meant that he owned her...

³⁰ McClendon, *Gender and Generations Apart*, 170.

³¹ Elizabeth Thornberry, 'Sex, Violence, and Family in South Africa's Eastern Cape', in *Domestic Violence and the Law in Colonial and Postcolonial Africa*, ed. Emily S. Burrill, Richard L. Roberts, and Elizabeth Thornberry, New African History Series (Athens, Ohio: Ohio University Press, 2010), 129.

³² *Ibid.*, 132.

³³ *Ibid.*, 117.

³⁴ David Goodhew, 'Working Class Respectability', 245.

it meant she has to have sex whenever he wanted it.³⁵ Even when she did not want it, women still believed that a married woman could not refuse her husband sex, which reflected ‘a position of dependence within the relationship and fear of abandonment or loss of economic support.’³⁶ In this, we can see Emily’s willingness to return to her husband, and her ‘acceptance’ of his assault, despite her employment as a domestic worker and subsequent economic independence, as was listed on the marriage certificate. This view of the African women’s subordination to, and acceptance of, her husband and domestic violence is echoed by the court’s ruling, which contains no mention of the assault whatsoever in its final ruling. As Thornberry argues, in the eyes of the court, a certain level of violence was to be expected in African marriages, and it was beyond the scope of the common law to deal with instances of domestic abuse.³⁷ Despite this though, Emily refused to comply with the court order, and at the second hearing, which she attended (unusually since the defendant rarely appeared at the second hearing after failing to comply with the ruling of first), a divorce order was granted with costs. This case is also one of the very few that mention ‘love’, and in doing so, links that love to violence. This mingling of love and assault indicates a normalisation of violence in marriages – typically enacted by men on the bodies of their wives - that is a common trend in the cases presented in this chapter, and discussed by the authors quoted here. However, that link between love and violence speaks more to the silences of Africans within the Divorce Court, and as a result, is discussed more fully in Chapter Four.

Beyond the themes of domestic violence and love which this case offers, there are also questions of community of property, custody of children, and adultery. The discrepancy between Emily’s testimony and Josiah’s accusations are not addressed, but the court dismissed Josiah’s accusations of adultery on the grounds of insufficient evidence, due to his having no witnesses. This requirement of witnesses for adultery is discussed later in this chapter. The next case offers additional testimony of domestic violence and insights into the kinds of claims that could be filed in the Native Divorce Court, as well as the costs that were involved.

³⁵ Jewkes and Abrahams, ‘The Epidemiology of Rape and Sexual Coercion in South Africa’, 1239.

³⁶ *Ibid.*, 1239.

³⁷ Thornberry, ‘Sex, Violence, and Family in South Africa’s Eastern Cape’.

Johannes Mahlangu vs Martha Mahlangu

In this case, Johannes filed a petition against his wife, Martha, in June 1948, wherein he sought an order for the restitution of conjugal rights, or a decree of divorce should that fail, custody of the minor children, and forfeiture of the benefits of the marriage.³⁸

In his particulars of claim, he stated that he was born in the Transvaal, and was registered for tax purposes in Vereeniging, where he was domiciled. He and Martha had been married out of community of property in Belfour, Heidelberg, in March 1945. There were two children from the marriage, Ben, who was two years old, and Amos, who was six months old. Ben was in Johannes' custody, while Amos was with Martha. Johannes accused Martha of maliciously deserting him in February 1948.³⁹

Upon receiving the summons, Martha's lawyer, Mr Malan, filed a Notice of Appearance to Defend, declaring her intention to appear before the court to the Registrar, HP Kloppers, and to Johannes' lawyer, Mr Malte. She then filed a counterclaim, or claim in reconvention as it is called, and entered a plea in July 1948. In the plea, she denied his accusation that she maliciously deserted him, which had been submitted on 21 September 1948, on the day of the hearing, stated that he had maliciously deserted her instead.⁴⁰

At the hearing on 21 September 1948, Johannes' testimony was as follows. There were no questions from the Magistrate recorded.

[She] asked to go to church but deserted. [I] went to [the] Native Commissioners Court in Vereeniging. Twice before she deserted. [...] She disappeared. Tried to get her back. Saw [her] people. Mother in law would not let her go. I want her back. [...] I want her back. [...] I never assaulted her. I was not before [the] Meyerton Advisory Board. I live on [a] farm [in] Kolfontien. My home. [Martha's] parents [live] at Meyerton. Saw them. [Martha] refused to return. Many times I asked why. She would not say. [Her] parents would not help.⁴¹

Martha's response is as follows:

³⁸ TAB, SEJ V1 79/1/48. Restitution of Conjugal Rights. Johannes Mahlangu vs Martha Mahlangu (born Mosoeu).

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

[Johannes] assaulted me since we married. First reported to my parents and he went to the Native Commissioners Court. Native Commissioners Court warned him each time not to ill [treat] me. [I] went back on each occasion. Last time [the] Native Commissioners Court said our parents should talk [the] matter over. He did not bring his. [I] went before [the] Meyerton Board but he did not come. I don't want a divorce. I want to return to my husband. [He] chokes me, He hits me with his fists. [I] have been treated by Dr Rionite at Vereeniging. [My husband] kicked me in my bladder. [I] did not tell [the] Doctor I had been assaulted. My ma paid [the] Doctor... I was sick. [He] said he did not want me anymore. [He] kicked me in the bladder. Just told [the] Doctor I was sick. [My husband] first complained to the Native Commissioners Court that I had deserted him. The Native Commissioners Court warned him. I was ordered to go back. [He] assaults me every weekend. No reason. No quarrels. Says he doesn't want me. [...] Plaintiff has never never [*repetition theirs*] been to my people.⁴²

Below this testimony is a note that Johannes paid £30 and four cattle in *ilobolo* for Martha, which is 'still with [her] people' as well as testimony from Josaphine, Martha's mother.⁴³ There are no recorded questions from the Magistrate.

[Johannes has] never been home. She made reports. Took her to Kraal [in Meyerton]. I went with her to [the] Native Commissioners Court twice. [...] I was present. [Martha was] ordered to return, and [the] Native Commissioners Court warned [Johannes] against assaults. [He was] warned many times by [the] Native Commissioners Court. I sent her back. Last time, [Johannes was] told to bring [his] parents. He has not brought them. [I] went to [the] Doctor with [Martha]. [We] could see she was assaulted. [...]. [Martha] has been home three times. She did not stay home long. [Johannes] ran to [the] Native Commissioners Court.⁴⁴

As Martha had filed a claim in reconvention against Johannes, she became the new Plaintiff, and the court ruled in her favour, granting her request for a restitution order. Johannes was ordered to pay seven pounds and twelve shillings to cover the costs of the case.⁴⁵ A note by Acting Judge Wronsky states

Plaintiff in reconvention (defendant) does not desire a divorce, the application for a restitution order against Defendant in reconvention

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ A breakdown of the costs of this case is provided in Appendix 7 as it contains the general costs of not only the court fees but also the serves rendered by lawyers.

(Plaintiff) is refused. The Plaintiff, Johannes Mahlangu, is ordered to pay the costs of this action.⁴⁶

Unfortunately, due to the state of the records, some parts of the testimonies have been rendered illegible, due to faded and cursive handwriting, thus omitting some information which can only be inferred. However, what is clear from these records is that Johannes was clearly abusive to Martha, and the state was largely disinvested in punishing him for it. Other than warnings, there is no indication that other actions were taken against him by the authorities. Domestic violence only became criminally punishable very late into the twentieth century. In addition, Martha, when attempting to seek assistance, was continually ordered to return to him. Essentially, despite the marriage being subject to common law, as far as the state was concerned, domestic violence in, and to a certain extent outside of, African marriages was a purely domestic issue, to be dealt with by the couple, and their parents. This echoes Thornberry's assertions that the state normalised domestic violence in African marriages, as discussed above.⁴⁷ However, it is also clear that the court took Martha's wish to return to her husband, rather than be granted a divorce, into account. This desire is reflected throughout the testimony in her constant cycle of leaving and returning. Johannes' testimony also contradicts elements of Martha's. He claimed that he had never assaulted her, despite the testimony of both her mother and herself. He also claimed that he wanted her back, while Martha's testimony implied that he beat her regularly because he 'doesn't want me.'⁴⁸ This could potentially speak to the idea that for many African men who had adopted and internalised colonial and urbanised interpretations of customary marriage practices, there was an implied understanding of the ownership of a woman for whom *ilobolo* had been paid, and that violence was one way of enacting that ownership.⁴⁹ Other ways common law marriages enacted ownership included the patrilocal move of a wife from her father's to her husband's house, taking on her husband's surname, and marriage vows which declared a woman a man's wife, thereby altering her status in relation to him.

There are a number of problematic elements in the records of this case. Chief among them is that there is no marriage certificate in this case, which makes it difficult to determine if

⁴⁶ TAB, SEJ V1 79/1/48. Johannes Mahlangu vs Martha Mahlangu.

⁴⁷ Thornberry, 'Sex, Violence, and Family in South Africa's Eastern Cape'.

⁴⁸ TAB, SEJ V1 79/1/48. Johannes Mahlangu vs Martha Mahlangu.

⁴⁹ Jewkes and Abrahams, 'The Epidemiology of Rape and Sexual Coercion in South Africa'.

Martha had an income, as well as her age, and other particulars of information about both parties. As a result, it is very possible that she was financially reliant on her husband, and subsequently could not leave him in the long term, adding an element of duress to her actions. Even her family support structure made it clear that she needed to return to her husband, with her mother testifying that she told her to ‘go back’ to Johannes.⁵⁰ Because of this, and the court’s refusal to intervene on her behalf, it is likely that her testimony that she loved her husband and wanted to return to him was influenced by economic vulnerability and familial pressures. It is also unlikely that her attempts to leave were intended to be permanent, as soon after each time she left, she returned to Johannes – according to her mother’s testimony she never stayed at their kraal in Meyerton for very long.⁵¹

There is another concept brought up in Thornberry’s work which could bear on our understanding of the gendered and colonial dynamics of this case. She highlights that in the minds of Xhosa men in the colonial and post-colonial period she examined, their acts of sexual assault were not considered assault, but rather an intention to lay claim to a woman for marriage.⁵² This was in large part due to the colonial framing of *ilobolo* as a transaction wherein men paid a ‘brideprice’ for their wives. It is very possible that this belief was perpetuated in common law marriages that practised *ilobolo*, where men did not see their assaults as assault, but as an assertion of ownership. Many of the testimonies by husbands accused of assault insist they did not commit assault, and many of the women in these cases believed that the assault was an indication of their husband’s dissatisfaction with her. There is a strong indication in this case, as well as the Rasemetse case above, that domestic violence was normalised, but still understood as something to be hidden, as Martha hid it from her doctor.⁵³ Domestic violence was seen as an indicator of dissatisfaction on the part of the husband. In this sense, it came to reflect as failure on the part of the wife: the idea that ‘he beats me, therefore he does not want me’, which is mirrored in the Rasemetse case where Josiah ‘drove’ Emily away, is indicative of a level of spousal loyalty and obedience to patriarchal norms, according to which women often accept abuse as a sign of masculine dissatisfaction, and desertion as a sign of disinterest.⁵⁴ In the Rasemetse case, his violence

⁵⁰ TAB, SEJ V1 79/1/48. Johannes Mahlangu vs Martha Mahlangu.

⁵¹ *Ibid.*

⁵² Thornberry, ‘Sex, Violence, and Family in South Africa’s Eastern Cape’.

⁵³ TAB, SEJ V1 79/1/48. Johannes Mahlangu vs Martha Mahlangu.

⁵⁴ TAB, SEJ V1 79/2/48. Josiah Rasemetse v Emily Rasemetse.

was interpreted as disapproval, and it is this, rather than the assault, which prompted Emily to return to her parents' home. Emily was not alone in this willingness to accept spousal abuse, as is seen in the Mahlangu case, as well the case below.

Beyond the issue of the acceptance of violence, or at least the lack of expressed resistance by women, and its dismissal by male perpetrators, there are also issues of discrepancies within testimony and the illegibility of records, which will be discussed more in Chapter Four, and issues of conjugal rights and custody, which will be discussed below.

Moses Kutoane vs Maria Kutoane

One of the cases wherein 'adultery' was cited as the reason for divorce was that of Moses Kutoane vs Maria Kutoane. In this case, there was no petition for a restitution of conjugal rights order by Moses. However, Moses did file for custody of the minor children of the marriage. This was later struck from the petition. In his Particulars of Claim, dated 3 August 1948, Moses stated that he and his wife had been married in community of property in 1938 and that they had one eight-year-old girl together. She was in her mother's custody. In his claim, Moses stated that 'during or about December 1942, [Maria] deserted [him] and since then she has been living with another man in adultery.' At the hearing on 29 November 1948 in the Kroonstad division of the Central Native Divorce Court, Maria agreed that they had had a child together, and been married in community of property, despite their marriage certificate stating 'community of property excluded in terms of s22(6) of Act 38 of 1927.'⁵⁵ Maria also denied any claims of desertion, claiming that she had been 'driven away' and that she was not with another man. However, she did not oppose the divorce. According to Moses's testimony, he 'found her living with a man at Heilbron, Gladwin Mohauwe. She refused to return to [him] saying he was married. Found her with Gladwin again in 1945 at Vereeniging.' He also did not know where his child was – Maria had left her with her parents. While the court could not deliberate on the issue of custody, a divorce decree was issued on 22 November 1948, and ordered that Maria 'forfeit the benefits arising from the marriage.'⁵⁶ Two things are of note here, one being that Moses wanted full and legal custody of his daughter and that while both parties claim to have been

⁵⁵ See Appendix 1 for more details.

⁵⁶ TAB, SEJ V1 71/2/48. Divorce. Moses Kutoane vs Maria Kutoane (born Moepadira).

married in community of property, their marriage certificate contradicted this. Section 22(6) of the 1927 Native Administration Act states:

A marriage between Natives contracted after the commencement of this Act, shall not produce the legal consequences of marriage in community of property between the spouses.⁵⁷

From this, we can see that the default state of marriage among urban Africans was out of community of property, unlike in white marriages which were in community of property by default. This default state remained until it was repealed by the Marriage and Matrimonial Property Law Amendment Act no. 3 of 1988. For Africans to share their wealth with each other in marriage would require a special declaration. For this reason, it was incredibly rare for marriage certificates to reflect any such inclusion under this Act, and on the rare occasion when it was reflected in the particulars of claim in divorce cases, it was usually not reflected in the marriage certificate. However, when mentioned, it is also a useful indicator of whether or not a marriage was ‘fake’ or not, as was discussed in Chapter Two in the section on marriages of convenience. It is reasonably safe to assume that marriages where resources and wealth were shared were not intended to be marriages of convenience. This does not mean to imply that every marriage that was out of community of property was one of convenience, but rather than when analysing cases for marriages of convenience, this is a useful criterion.

The Native Divorce Court and Children

Typically, under civil or common law, the father was granted custody of legitimate minor children, and ‘the Supreme Court was ... reluctant to deprive him of guardianship.’ However, courts were

free to award the mother of a child its custody, while recognising that the father retained certain powers in his continuing capacity as guardian. For example, the father’s consent would still be required if the child wished to get married while under the age of 21. Such consent might be necessary for some other important purposes, too; such as decisions about education or domicile. ... Neither the Matrimonial Affairs Act nor the Children’s Act makes any special reference to Africans or to Native

⁵⁷ Section 22(6) of Native Administration Act 38 of 1927. See Appendix one for more details.

customs and both these statutes apply to Africans in legal theory, though too seldom in administrative practice.⁵⁸

From this, it is evident that nothing stopped the courts from granting mothers custody of their children, though this did not preclude the father's authority over the child. As noted earlier, the Native Divorce Court did not handle matters of minor children, and typically, these custody cases were handled by the Native Commissioners' Courts when legal intervention became necessary. For this reason, there is no indication in the divorce files over the fate of children. However, under customary law 'a divorced woman, or widow might be allowed to take her young children with her on leaving her husband's home, but they always continued to "belong" to him or to his heir.'⁵⁹ In the Transvaal, largely due to President Braatvedt's attempts to protect the interests of African women and children, Native Commissioners were not permitted to make a decision about the custody of children unless the mother was present – which was not the case in other provinces. In addition, the Commissioners were required to make a considered decision over the welfare of children, rather than automatically grant custody to the father. That is not to say that women were given full rights to sue for custody, being considered legal minors with limited legal capacity themselves under customary law.⁶⁰

Due to it not being the jurisdiction of the Native Divorce Court to rule on custody, there are comparatively few cases that mention children specifically, and those which do frequently have the petition struck from the file – possibly because Africans and their lawyers were aware that it was not an issue which could be contested before the Native Divorce Court. Yet, in several divorce hearings, the fate of children of the marriage become an issue of contention. In cases of malicious desertion, it was usually a situation where one spouse resided with the children, and the other wanted custody of them. In cases of adultery, it was usually a question of paternity, with the husband being unsure if the children were his. Cases of a divorce on the grounds of adultery were not particularly common in 1948 in the Transvaal. Cases where adultery was an issue of contention were typically filed on the grounds of 'malicious desertion' rather than the adultery specifically. The cases themselves

⁵⁸ Julius Lewin, 'The Legal Status of African Women - the Preliminary Report of an Institute Sub-Committee', 153–54. The Acts mentioned here refer to the Matrimonial Affairs Act 37 of 1953 and the Children's Act 31 of 1937.

⁵⁹ Simons, *African Women*, 211.

⁶⁰ *Ibid.*, 214.

do not make it clear why this was so, as adultery was considered as legitimate grounds for a divorce order as malicious desertion.

Some Notes on Urban African Courts, Adultery and Custody

A number of the cases citing adultery as the reason for the petition of a divorce order in this study had this application denied on the grounds of lack of evidence. This section attempts to explain what the criteria for a successful divorce on the grounds of adultery were. In addition, while the Native Divorce Court did not deal specifically with custody, a number of cases examined in this study attempt to ask for custody in their original claims. As a result, this section tries to shed light on some of the ideologies which governed how cases of adultery were examined by the court, as well as the processes which would have influenced how the Native Commissioners' Courts would have ruled in custody cases. According to a statement delivered by Judge Marsburg of the Native Appeals and Divorce Court, during the case of George Kgongoane vs Wilhelmina Kgongoane,

When you accuse a person of adultery there must be proof of it. When you have nothing more to say than you have said today about adultery, then you must realise that your case is very slender. You see there must be witnesses to give evidence about her conduct with other men because there is a very strong rule of law that all children born to a married woman belong to the husband if the marriage still subsists.⁶¹

It is likely that this was a colonial interpretation of customary law practices wherein 'the duty of supporting a woman and her children rested on the head of their household.'⁶² In traditional communities, this was usually because children were 'assets' whose productive capacities could benefit the household.⁶³ The head of the household was usually the woman's husband, but if she divorced, that became her father or male guardian. The common law, while granting women the autonomous right to claim custody of the child, still reflected, or attempted to reflect through colonial interpretations, traditional African beliefs about the 'patrilineal, polygynous family system' in precolonial communities.⁶⁴ These practices regarding the children of adultery did not adequately reflect the 'exchange

⁶¹ TAB, SEJ 12/4/48. Divorce. George Kgongoane vs Wilhelmina Kgongoane (born Sono).

⁶² Simons, *African Women*, 211.

⁶³ *Ibid.*

⁶⁴ *Ibid.*

economy, aggressive industrialisation labour migration, and growing individualism which so marked urban African identities.⁶⁵

Conjugal Rights

A number of the cases presented in this and the previous chapter contain petitions for an order for the restitution of conjugal rights. As the introduction and first chapter outlined, a restitution of conjugal rights order was the ‘remedy available to enforce the return of a spouse who has withdrawn from cohabitation.’⁶⁶ It did not force recipients to engage in sexual relations with their partners, and was intended to curb what the state saw as a lamentably high divorce rate among urban Africans. The case of *Joseph Moeketsi vs Esther Moeketsi*, which was discussed in the last chapter, is particularly significant for understanding how urban Africans, particularly men, conceptualised the idea of a conjugal rights order, their rights as husbands to conjugal relations, and the court’s role in enforcing their access to those relations.⁶⁷ While it is true that the 1939 Matrimonial Causes Act gave women the right to sue for conjugal rights, none of the cases examined for this study indicate that African women felt specifically entitled to sexual relations. However, this was the result of many factors, and the subject of a dissertation on its own. The case of *Betty Mdakane vs Jan Mdakane*, wherein Betty instituted an order for the restitution for conjugal rights due to her husband’s ‘malicious desertion’⁶⁸, when juxtaposed against Esther refusing to have marital relations with Joseph, is a clear indication of the ways men and women conceptualised and utilised conjugal rights orders. The discussion above speaks to the internalised colonial conceptions and patriarchal entitlement to their wives that urban African men experienced in the mid-twentieth century. The cases discussed in this chapter are also an indication that while women could sue for the restitution of conjugal rights, it was a petition made mostly by African men, which further emphasises the patriarchal control of and entitlement to women’s sexuality that African men practised in their marriages.

⁶⁵ *Ibid.*

⁶⁶ D Tolstoy, *The Law and Practice of Divorce and Matrimonial Causes, Including Proceedings in Magistrates Courts*, 94.

⁶⁷ TAB, SEJ V1 79/2/48. *Joseph Moeketsi vs Esther Moeketsi*.

⁶⁸ TAB, SEJ V1 69/2/1948. *Betty Mdakane vs Jan Mdakane*.

Michael Mashigo vs Asnate Mashigo

In this case, Michael originally opened the case in the Natal and Transvaal Native Divorce Court, but as the Central Division Court had just been established, the case was transferred there, due to both parties residing in Witbank. In this case, Michael laid two claims against Asnate. In the first, wherein he filed for a decree of divorce on the grounds of adultery, he stated that they married in community of property in Witbank on 1 February 1934, and that

during the period 1934 to 1947, the exact dates being to [Michael] unknown, [Asnate] committed adultery with a person or persons to [Michael] unknown, as a result of which adultery [Asnate] gave birth to four children, of which [Michael] is not the father. The first of these children was born in Pretoria in the year 1943, and the other three were born in Witbank, the last during the year 1947.⁶⁹

In his alternative claim, at the Central Division Court, Michael reiterated the basic information of his first claim, but further stated that Asnate had ‘wrongfully, unlawfully and maliciously deserted’ him and that she had ‘since that date persisted in such desertion.’⁷⁰ In this alternative claim, he wished to file for a restitution of conjugal rights order or, failing that, a decree of divorce on the grounds of malicious desertion. In both claims, he also filed for Asnate’s forfeiture of the benefits arising from the marriage as well as alternative relief. His reason for filing two claims against his wife was so that he had a higher chance of either getting a divorce order or having his wife return to him. It is clear though that he wanted the divorce more, as he filed two claims for it.

This is quite a detailed case, despite its eventual outcome, giving testimony from both parties as well as a transcription of the shorthand notes by the court stenographer, A. Liting, given in the case. It also, unusually, gives voice to Judge Marsberg, the judge who presided over the Native Appeals and the Native Divorce Courts. In addition to this, the case highlights the importance of jurisdiction, which was heavily enforced to combat the issue of labour migration. The summons outlining Michael’s case was originally issued on 11 February and directed Asnate to the Old Barclays Bank Assurance Buildings in Church Square, Pretoria, for the hearing on 25 May 1948. These summons were unable to be served, according to a note in the file dated 13 April, because Asnate’s stand could not be located among the 1500 stands in Witbank. As a result, the summons was allegedly

⁶⁹ TAB, SEJ V1 71/1/48. Divorce. Michael Mashigo vs Asnate Mashigo.

⁷⁰ *Ibid.*

returned to the court in Pretoria. As a result of non-service by the parties, on 25 May 1945, the case was struck from the rolls. In addition, the Pretoria court did not have jurisdiction as the parties were domiciled in Witbank. As a result, Registrar H.P. Kloppers moved that the matter be started ‘afresh’ on 24 August 1948. M. Levy, Michael’s lawyer, disagreed on 31 August 1948 and instead requested that a new date be added to the original summons. A newly corrected summons was sent from H.P. Kloppers to M. Levy on 2 September 1948 along with a copy of the marriage certificate, which is not in the case file. The corrected summons was handed to Asnate on 7 September 1948 and instructed her to appear before the Johannesburg court on 11 November 1948. However, the ‘Return of Service’ document that certified the delivery of the summons is labelled ‘divorce’ rather than ‘summons’ and calls the defendant (labelled Asnate) ‘him’. The delivery is signed by J. Rooym, the messenger of the court in Witbank. Interestingly, the first attempt at a summons which failed was labelled correctly.⁷¹

The case, which took place on 11 November 1948 before President Marsberg in Johannesburg, deals with the details of the summons and contains a full transcript of the case. It began with Levy, as Michael’s representative, stating that he relied on the original claim of adultery. President Marsberg and Asnate had an exchange wherein she denied her adultery and opposed the divorce. She then confirmed the particulars of claim: that they were both African, that Michael was registered in Witbank where he was born, and that they were married in community of property in 1934. She then denied that she had any affairs and claimed the children were Michael’s. She also claimed to have had three children, and not four. The first was born in Pretoria, and the other two, both of whom had been born in Witbank, had died. She claimed Michael was the father of all three of them. Upon further questioning, she stated that she has one child that was not Michael’s, and admitted to having committed adultery. She indicated that the child (a 2-month-old baby) was in the court, and admitted that the baby’s existence confirmed her adultery, and that she now had four children, and that she did not oppose the divorce. At this point, President Marsburg began to show frustration, saying ‘you have told me three things in three minutes – what do you really want?’ To which Asnate replied, ‘[Michael] does not want me, but I am prepared to return to his side.’ in his testimony, Michael revealed that he had been born, was employed, and paid taxes in Middelburg, rather than Witbank. Upon checking his tax

⁷¹ *Ibid.*

number, it was verified that Michael was, in fact, a taxpayer in Middelburg. According to Mr Levy, the summons were in error over the issue of where Michael was a taxpayer. The court subsequently ruled that it had no jurisdiction over the case and consequently dismissed the summons.⁷² There is no record in this case of what happened after, but it is likely that the case was moved to the Natal Native Divorce Court where jurisdiction of Middelburg was at that time.

While this last case does not indicate any instances of domestic abuse, Asnate did state that she was ‘driven away’ by her husband who she believed no longer wanted her.⁷³ It is possible that this was because he cut off marital relations with her, as her testimony indicated he did after her last pregnancy. Many of the cases examined in this study where the women left have the women claiming that their husbands ‘drove’ them away, or led them to believe they were no longer wanted, which was usually done through domestic violence. This speaks to the limited agency women had during this time. Despite employment offering a number of African women economic independence, as was discussed in the last chapter, the reality for many African women in urban areas was that they remained economically vulnerable, and were often coerced into difficult relationships. Christian and traditional beliefs also led them to be submissive to the whims of their husbands and to embrace patriarchal practices. This case also points to the inefficiency and errors of day to day bureaucracy, the problem of translation and transcription, as well as the importance of jurisdiction of the courts. There are many elements of the testimonies in this case which are contradictory, or lack consistency, particularly in Asnate’s testimony, and it is possible that this was due to errors in the translation or transcription processes. These inconsistencies are also indicative of the problems that come with oral sources, and issues of memory and false testimony. Chapter Four looks at the ways in which urban Africans were able to navigate the Native Divorce Court for their own advantage, and one of the ways could have been achieved was through false testimony. It is possible that Asnate was attempting to lie to gain favour with Judge Marsburg, but was not able to sustain this, as is evidenced by his increasing irritation with her contradictory answers to his questions.⁷⁴

⁷² *Ibid.*

⁷³ *Ibid.*

⁷⁴ *Ibid.*

As this case had originally been filed around the same time as the central division of the Native Divorce Court had been established, it is reasonable to assume that there had been some confusion over what cities and towns fell under the jurisdiction for the central and Natal courts. It is, therefore, possible that this is why this case had its issue of jurisdiction mistaken twice, first in the Pretoria court and later in the Johannesburg court. That Asnate lived in Witbank at the time of the summons being delivered is also a possible reason for the confusion. However, the discrepancy over Michael's residence is less certain, as he and his representative signed the affidavit stating that he was a resident of Witbank. There are also a number of technical errors in this case file, with documents being misdirected, lost, or mislabelled. This inefficiency is not in and of itself proof that the Native Divorce Court was poorly run, as bureaucratic inefficiency is the mark of government offices, but it is an indicator of the larger attitudes of the state towards its African constituents at the time: indifference, low prioritisation, or racism. This idea will be expanded on more in the next chapter.

Conclusion

This chapter has argued that the Native Divorce Court was complicit in the patriarchal oppression of African women, as a result of the lack of state intervention into cases of domestic violence, and the lack of recourse available to women who were victims of assault by their husbands. The link between domestic violence and the control of women's bodies has also been highlighted in the cases presented here. Other themes which have been considered include issues of coercion, conjugal rights, the patriarchal attitudes of the court and African men – and women, and the role of the Native Divorce Court in enabling hegemonic masculinity over African women.

The next chapter will look at issues of voice, agency, and representation of the urban African in the court. Using testimonies and records, this chapter will examine how and why Africans presented themselves before the Native Divorce Court, and how they navigated the courts to their advantage even as their voices were silenced by that court. The use of lawyers, the issues of transcription and translation, and the challenges of writing narratives out of legal archives will be analysed. In reading between testimonies and silences of these records, the chapter will attempt to situate and understand the relationship between the Native Divorce Court and urban Africans.

Chapter Four

The Native Divorce Court and the urban African: testimony, agency, voice and record

Previous chapters in this study have examined how and why the Native Divorce Court was established, and how the development of this court impacted on the construction of urban African identities in the Transvaal in the mid-twentieth century. It has done this by examining why and how common law unions and divorces were shaped by gender, Christianity, urbanisation, and labour migration. These records also highlight the role of the court and legal procedure in ‘disrupting or reinforcing patterns of domestic violence.’¹ This legal position was a reflection of the cessions of the common law to customary law practices, with common law courts not presiding over issues that they considered too ‘domestic,’ and the jurisdiction of traditional authorities.²

This chapter looks at the ways in which Africans were represented in the Native Divorce Court in order to understand what their testimonies and silences can tell us about how they navigated the law in this period. It will also focus more closely on questions of language, representation, narration, and translation. The Introduction and Chapter One attempted to frame the Native Divorce Court as a ‘theatre’ – both as a stage drop for performed narratives, and as an operating room wherein the surgical cleaving of a marriage occurred. This will be discussed through the examination of case files that deal with the processes and costs of litigation, debates surrounding testimony, transcription, translation, representation and agency, and a discussion of how love was conceptualised and discussed in the Native Divorce Court.

¹ Emily S. Burrill, Richard L. Roberts, and Elizabeth Thornberry, eds., ‘Introduction: Domestic Violence and the Law in Africa’, in *Domestic Violence and the Law in Colonial and Postcolonial Africa*, New African History Series (Athens, Ohio: Ohio University Press, 2010), 19.

² Elizabeth Thornberry, ‘Sex, Violence, and Family in South Africa’s Eastern Cape’, 119.

The state and the court

The idea of the court as a surgical theatre speaks to the totally formulaic and calculated nature of court proceedings. The cases I have examined are almost rigid in their unfolding and rarely deviate into personal testimony of any kind. While this makes it difficult to build the kind of narratives which social historians seek to construct, these kinds of ‘surgically precise’ cases offer several insights into how the state and Africans viewed and used the Native Divorce Court. What this chapter attempts to highlight are the ways in which litigants and their lawyers navigated the Native Divorce Court in order to ‘advance their individual interests’³ either through the manipulation of legal processes or through the adoption of specific narratives and roles.

While there are extensive sets of rules laid out for the procedures in the Native Divorce Court, these often appear to not have been followed, as several steps of paperwork were either not filed or missing.⁴ Cases were often missing marriage certificates, or any kind of missive or communication between lawyers, litigants, or court officials. One of the most judicially comprehensive case examined in this study is that of Petrus Sekano vs Angelinah Sekano.

Petrus Sekano vs Angelinah Sekano

There are several interesting elements presented here. In this case, Petrus made a claim against Angelinah stating that ‘on or about the first day of October 1942’ she ‘maliciously deserted’ him by failing to join him after he moved to Vredefort in the Orange Free State due to finding employment there. The two had previously been living together and working in Johannesburg, after their marriage in Bloemfontein on 11 April 1942.⁵ The particulars of claim, which were signed in Johannesburg on 21 June 1948 were laid out as follows:

1. The Parties hereto are Natives as defined by Act No. 38 of 1927.
2. The husband was born at Vredefort in the Province of the Orange Free State and is still domiciled in that province.
3. They were married in community of property at Bloemfontein in the District of Bloemfontein on the 11th day of April 1942.

³ Richard L. Roberts and Kristin Mann, ‘Law in Colonial Africa’, in *Law in Colonial Africa*, 7.

⁴ H P Kloppers and T F Coertze, *Bantu Divorce Courts*; Gordon Davis, L Melunsky, and F B du Randt, *Urban Native Law*.

⁵ TAB. SEJ V1 71/1/1948. Divorce. Petrus Sekano vs Angelinah Sekano (born Serame).

4. On or about the 1st day of October 1942 the Defendant maliciously deserted the Plaintiff in the following circumstances.

The Plaintiff, who, up to that time had been working in Johannesburg, moved to Vredefort in the Orange Free State and found employment there. Despite requests from the Plaintiff the Defendant refused to join the Plaintiff at Vredefort and has on diverse occasions since then refused to return to the Plaintiff.

Wherefore Plaintiff prays for judgement as follows:-

1. Restitution of Conjugal Rights failing which a Decree of Divorce on the grounds of malicious desertion.
2. Forfeiture of the benefits arising from the marriage.
3. Alternative Relief.⁶

This claim highlights the significance of jurisdiction and the impact of labour migration on court proceedings. Despite currently living in the Orange Free State, which had its own Native Divorce Court, the fact that Petrus was registered as a taxpayer in the Transvaal, and Angelinah lived there, meant that the case was held in the Central Division of the Native Divorce Court. Their marriage appeared to have begun to disintegrate five years before they were able to get a divorce. A note from the Deputy Messenger of the Court, whose name is not given, is in the file and indicates that the summons was delivered to her on 25 June 1948. In addition, and this is where the case is unusual, there is a notice of 'Appearance to Defend' from Angelinah stating her intent to appear and defend herself, dated 23 August. Angelinah also entered her plea and counterclaims on 23 August, admitting to claims 1, 2, and 3 but denying 'each and every allegation in paragraph 4 [...] and more particularly denies that she deserted the Plaintiff on the 1st day of October 1942 as alleged or at all. Therefore the Defendant prays that the Plaintiff's summons may be dismissed with cost.' Her counterclaims were as follows:

1. The Defendant (now the Plaintiff in reconvention), repeats paragraphs 1, 2, and 3 of the Plaintiff's (now Defendant in reconvention) Summons.

2. In or about the 1st day of October, 1942, and at Johannesburg, the Plaintiff (now Defendant in reconvention), wrongfully, unlawfully, and maliciously deserted the Defendant (now Plaintiff in reconvention), and has since failed, refused and/or neglected to return to or restore Conjugal rights to the Defendant (now Plaintiff in reconvention).

Wherefore Defendant (now Plaintiff in reconvention) prays that it may please the above Honourable Court to grant an order for:-

- a. Restitution of Conjugal Rights and failing which a decree of divorce on the grounds of malicious desertion;
- b. Division of the joint estate;

⁶ *Ibid.*

- c. Costs of suit;
- d. Other or alternative relief.

Petrus was served this counter summons on 2 October 1948 by a lawyer in Rustenburg, Samuel Miller. The fact that Angelinah was employed may explain how she was able to pay for a lawyer, although there is no mention in the file of what her employment was. Her petition further claimed that she was ‘not in possession of any funds or other capital assets whatsoever to institute her counterclaim, as she only derive[d] adequate funds from her employment to maintain herself.’⁷ There is a claim in the petition which asks that the court to order Petrus to pay Angelinah’s attorney £10.00 as a ‘as a contribution towards the costs for instituting the Counterclaims’ she made.⁸ According to Appendix Seven, which provides a breakdown of the costs of lawyers in a case that also involved filing counterclaims, the cost in that case was seven pounds, twelve shillings and ten pence. There is no clear explanation for why Angelinah’s lawyer cost over two pounds more than that. It is thus possible that Angelinah and/or her lawyer were attempting to profit from any additional funds over and above the normal court fees, though this is by no means certain, and it is possible that this case simply cost more to litigate as a result of the additional steps of counterclaiming and petitions. Another possibility, however, is that there was an element of exploitation in the way white lawyers (all the law firms examined in these cases were white) charged their African clients. This potential for exploitation was mitigated by the fact that Africans could represent themselves in the Native Divorce Court, but may have facilitated higher prices for those Africans who did contract with a lawyer. However, it must be noted that the missing or incomplete records in most of these cases make many of the claims presented here, and throughout this thesis, speculative as best, a limitation which has already been discussed in Chapter One. There is unfortunately limited literature on the issue of white layers representing African litigants in African courts, so this project cannot comment extensively on the issue. Thornberry’s work on ‘Law Agents’ does indicate the existence of African litigators, but these agents were generally frowned upon by the courts who saw them as ‘unethical’ and there is no mention in her paper of whether African attorneys worked in the Transvaal Native Divorce Court.⁹

⁷ *Ibid.*

⁸ *Ibid.*

⁹ Liz Thornberry, ‘African law agents and the development of black politics.’ Paper presented at the 26th SAHS Conference, Wits University, June 2017, 7.

The case includes a notice, dated 4 September 1948, which was submitted to the Registrar, HP Kloppers, from S. Miller which sought to correct the claim of desertion occurring 'on or about the first day of October' to 'during October 1946, the exact date being to the defendant (now Plaintiff in reconvention) unknown.' A copy was received by Petrus's lawyer, L. Trevor, on 8 September. On 3 September, Angelinah filed a 'Notice of Application for Contribution' with the Registrar and Petrus's lawyers, requesting that the Court make a contribution to the costs of the Applicant (Angelinah) in terms of the attached petition, which was discussed above.¹⁰ This notice was not signed as received by Petrus's lawyers, but it is unclear as to whether this was due to poor bookkeeping or a failure to receive. Angelinah gave testimony that during October 1946 in Johannesburg, after Petrus took part in a strike at a laundry in Bertrams where he was employed, he deserted her and she did not know where he was until she received his summons. There is also a follow-up request from H.P. Kloppers to S. Miller requesting information on Angelinah's earnings. Miller's response was a request to keep the question for the court where she could testify under oath, as that was when he would see her.¹¹

On 28 September, Petrus's lawyer, Angelinah and her lawyer, S. Miller, appeared before the court. Petrus was not present. Trevor stated that Petrus's original claim was withdrawn, as was the claim for contribution. In regards to the claim in reconvention: Miller provided the marriage certificate, and by the consent amendment of the summons, submitted a second marriage certificate. It was ruled that there was no evidence for Petrus and his case was closed. An Order for the Restitution of Conjugal Rights was granted to Angelinah, ordering Petrus to return to her in Johannesburg on or before 28 October 1948. On 30 October 1948, Angelinah filed an Affidavit of Non-Return, stating that while Petrus was served the Order for Restitution of Rights on 2 October, he failed to comply with it. As a result, upon the motion of S. Miller, a Decree of Divorce was granted by President B. Wronsky on 18 November 1948. The ruling, which was indicated on the case file by a stamp, had 'with costs' struck out. The following statement: 'It is ordered that the Defendant forfeit the benefits arising from the marriage' and 'division of the joint estate is ordered in terms of the prayer' was also struck out.¹²

¹⁰ According to Rule 27 of the Native Divorce Court - Rules (G.N. No 2888, 9 November 1951), which are laid out in *Urban Native Law*, a female applicant may apply for a court order instructing the other party in a suit to contribute towards the costs she incurs during the suit, either as a plaintiff or defendant.

¹¹ TAB. SEJ V1 71/1/1948. Petrus Sekano vs Angelinah Sekano.

¹² *Ibid.*

In spite of the establishment of the Central Division Court in 1948, the Native Divorce Court remained difficult to access. Easier access to the courts would have made it more likely that Petrus would have filed against his wife much earlier. However, inconsistencies in his testimony and her correction of them suggests that Petrus had either a very poor sense of time, or he was exaggerating his claims in order to attempt to gain the sympathy and favour of the court. This case also highlights the many procedural steps that were required before a judgement could be passed. While legal sources¹³ state that these steps were required procedures, the files, claims, and affidavits found in the Sekano case were not found in other cases, even when those cases followed the same legal processes of desertion, filing of claims, hearing, judgement, non-compliance, and subsequently judgement. The only document that has been relatively consistently present in all cases' folders – but not every case where it was applicable – is an Affidavit of Non-Return, which was used to indicate that the Defendant had not returned to the Plaintiff as ordered by the court through an Order for the Restitution of Conjugal Rights.

From the other claims in this case, several things can be elucidated. It seems that the court did not grant forfeiture benefits of the division of the joint estate as requested by both parties of the other. Instead, Angelinah and Petrus would have needed to divide the estate and share the proceeds between them. It was not a function of the Native Divorce Court to oversee this process of division, only to make a general ruling. According to Kloppers and Coertze:

the proper course to follow by the parties is to appoint a liquidator should it be necessary to arrange the forfeiture or division; and should there be no agreement on this, the aggrieved party could invoke proceedings in the Bantu Affairs Commissioner's Court which has concurrent jurisdiction in terms of s10(1) of Act 38 of 1927.¹⁴

¹³ See Davis, Melunsky, and Randt, *Urban Native Law*; Kloppers and Coertze, *Bantu Divorce Courts*.

¹⁴ Kloppers and Coertze, *Bantu Divorce Courts*, 53. S10 (1) of Act 38 reads: 'The Governor-General may, by proclamation in the *Gazette*, constitute courts of native commissioners for the hearing of all civil causes and matters between Native and Native.' This same clause stipulated that Native Commissioner Courts 'have no jurisdiction matters in which [...] (e) a decree of divorce or separation in respect of a marriage contracted according to civil or Christian rights is sought.' However, as the divorce court did not consider the liquidation of a joint estate to be within its jurisdiction, the native commissioners' court was able to adjudicate these proceedings if it became necessary.

‘Costs of the suit’ were typically not awarded until after they had been calculated and taxed by the registrar. These costs could range from £2 to £10.¹⁵ There is no indication of who the costs were awarded to, nor what they were, and it is possible that both parties were expected to pay, as ‘with costs’ was struck from the ruling, and as discussed earlier, neither party had been granted their request for the other party’s forfeiture of benefits. ‘Alternative or other relief’ which is usually listed in every claim was inserted as a formality.¹⁶

The Sekano case was a fairly litigated case where both parties, and/or their legal representatives, were present at all proceedings. This is unusual because typically, when one party desired a divorce and the other a restored marriage, the party seeking the divorce would simply not attend the second hearing after failing to comply with the verdict of the first, as was the practice in several of the cases noted in this thesis, and which was also common practice in the other cases found in the archive.

Petrus’s move to the Orange Free State for employment reasons is indicative of the impact of the migrant labour system on the breakdown of African families, due to parties being forced into a transient lifestyle inconsistent with maintaining stable relationships. Colonial authorities used marriages as one way to control or facilitate the control of African productive capacities, and for much of the twentieth century used migrant labour, mining compounds, and land access in urban areas to keep the presence of Africans in cities temporary or minimal.¹⁷

It is possible that this was a marriage of convenience, but as the parties had been married in community of property, it does seem unlikely that this was true. Being married in community of property was also not an absolute indicator that a marriage was legitimate. It is more likely that Angelinah was simply unwilling to leave her work and family support structure to follow Petrus. Angelinah also stated in her petition that it was as

¹⁵ An interesting case that of Johannes Mahlangu vs Martha Mahlangu (TAB. SEJ 79/1/1948), has a breakdown of the costs of the case, which amounted to seven pounds, twelve shillings and ten pence. This is unusual, as cases that give an indication of costs tend to give just a figure. For example, in the case of TAB, SEJ 1/3/1948. Restitution of Conjugal Rights. Jacob Stamper vs Evelyn Stamper, there was a single indication that Jacob needed to pay 2 pounds and ten pence towards Evelyn’s costs.

¹⁶ Kloppers and Coertze, *Bantu Divorce Courts*, 51.

¹⁷ Thomas V McClendon, *Gender and Generations Apart*; D. Posel, ‘Marriage at the Drop of a Hat’; Peter Delius, *A Lion amongst the Cattle*.

result of his participation in a strike that Petrus had to leave the Transvaal, and find work in the Orange Free State, where he was born, and would have to return if he became unemployed, due to the pass laws. It was also, presumably, where his family support structure existed. It can then be inferred that she may have disagreed with his participation in that strike, and as a result wished to sever their relationship. Despite the amount of detail this case offers, there are still a number of things that are not known, or which need to be assumed. There is also the issue that, despite the relative detail of the claims, and petitions, neither Petrus nor Angelinah were given the opportunity to speak, except through their lawyers. This idea of the African voice in courts will be discussed more in the next section.

White power, African voices

Colonial records are often dry, dusty, and imperial, and in legal records, it becomes important to read between the lines, while simultaneously attempting not to read too much into what case files are actually saying. Archival records are, as Stoler says, ‘sites of the imaginary and institutions that fashioned histories as they concealed, revealed and reproduced the power of the state.’¹⁸ Limited as colonial archives are, they do highlight the common practice of writing Africans through the filters and expressions of coloniality, or colonial ideology and understanding. However, while the formulaic nature of colonial records needs to be considered, there is also a significance in the lack of emotion expressed in those files which have recorded testimony. Cases of infidelity, abuse, abandonment, even occasionally the mention of having lost a child, some of which have been discussed in this and earlier chapters – are deeply painful things to endure – and they are mentioned with a seemingly indifferent tone.

While the filter of colonial writings and the indifference of colonial officials accounts for at least some of this obfuscation of African suffering, there are two other reasons for this limitation of African expression in the courts which bear merit for consideration. The first is that Africans understood that there was no space for the expression of their pain in colonial settings and that what pain or suffering they expressed would have to be modulated to suit the courts they utilised. Secondly, there may have been a cultural reluctance about the expression of pain. While it is known that Africans have long

¹⁸ Ann Laura Stoler, ‘Colonial Archives and the Arts of Governance: On the Content in the Form’, in *Refiguring the Archive*, 89–90.

struggled to have their physical pain acknowledged by medical officials, due in part to their own reluctance to express the truth and magnitude of this pain (coupled with a long history of colonial assumptions that Africans did not feel pain¹⁹), a similar reservation is found in the way they express emotional suffering.²⁰ In their study on the cultural language of pain, Nico Nortjé and Réne Albertyn looked at people from the South African Sotho and Nguni cultures to determine more effective ways of pain management and treatment. In their study, they determined that the expression of pain, either emotional or physical, is largely discouraged by these cultures. Tied into tradition and folklore is the understanding that one should always hide emotional pain, and for men in both the Nguni and Sotho groups, ‘expressing pain in any manner is strictly taboo as it is indicative of being weak,’ an understanding which was also largely reflective of masculinity in general. Women are allowed, and even encouraged, to express pain, however, as it will ensure they receive help, while men are ‘supposed to toughen up and take whatever comes.’ This, the study found, was true in both urban and rural areas.²¹

Simon Mokoena vs Alina Mokoena

An interesting case which highlights issues of labour migration, jurisdiction and legal procedure, and the relationship between testimony and agency is that of Simon Mokoena vs Alina Mokoena. Simon was born in Basutoland and moved to the Orange Free State when he was seven years old. He continued to live there, working as a preacher and a bricklayer and was registered as a taxpayer in Bethlehem. He and Alina married in Bethlehem in 1940, in community of property, and had one child. According to Simon, in 1942 Alina,

wrongfully, maliciously and without case deserted [him], taking the child with her and eloping with some other man to [him or to some place] unknown. Although [he] has spent a great deal of money and travelled far and wide in his endeavours to find [her], he neither saw her nor heard from her since.²²

¹⁹ For more on this, see Kelly M. Hoffman et al., ‘Racial Bias in Pain Assessment and Treatment Recommendations, and False Beliefs about Biological Differences between Blacks and Whites’, *Proceedings of the National Academy of Sciences* 113, no. 16 (19 April 2016): 4296–4301; Rachel Dudley, ‘Toward an Understanding of the ‘Medical Plantation’ as a Cultural Location of Disability’, *Disability Studies Quarterly* 32, no. 4 (2012).

²⁰ Nico Nortjé and René Albertyn, ‘The Cultural Language of Pain: A South African Study’, *South African Family Practice* 57, no. 1 (2 January 2015): 24–27.

²¹ *Ibid.*, 25–26.

²² TAB. SEJ 10/1/1948. Divorce. Simon Mokoena vs Alina Mokoena (born Maseko).

Subsequently, he sought either an order for the restitution of conjugal rights or a decree of divorce on the grounds of malicious desertion, forfeiture of benefits, or alternative relief. Simon continued, in his petition, by claiming that Alina's father, Mangesi Maseko, and her mother, whose name is not given, did not know where she was, despite his asking them weekly. He specified that he had looked for her in Bethlehem, Kroonstad, Johannesburg, and Durban but had been unsuccessful. He had also enlisted the assistance of the various ministers of chapters of the Presbyterian Church of South Africa around the country to no avail. Because of this, in May 1948, he requested that the court grant him an order allowing him to sue her by Edictal Citation for Restitution of Conjugal Rights. He also requested that the court assist him in the process of serving the citation. This citation, which today is used to facilitate divorces when parties live in separate countries, allowed parties to sue spouses whose whereabouts were unknown at the time. A summons was issued to Alina on 28 May 1948, instructing her to appear before the Kroonstad court on 6 August 1948 to respond to Simon's claims.

There is a letter from Simon's attorney, Heyman Gersohn, dated 29 May 1948 querying the delay in proceedings, and requesting that a more typical timeframe be adopted, as cases did not typically have a three month waiting period between the institution of summons and the first hearing. A responding note from the Registrar, H.P. Kloppers, stated 'it is regretted that this Honourable Court cannot adopt the procedure as outlined in your letter.'²³ Typical divorce cases had a time frame of two to four months from the date of the Plaintiff's filing a suit to the issuing of a decree of divorce or a restitution order. While this may seem quick, there were several reasons for it, namely that the Native Divorce Court went through large numbers of cases, and often had poorly trained or inexperienced, or insufficient clerks and magistrates to preside over cases, as was discussed in chapter one. In addition to this, the comparatively low cost of the court, when compared to the Supreme Court which was used by Africans to litigate divorce proceedings before the establishment of the Native Divorce Court in 1929,²⁴ meant that usually, the best court administrators were not assigned to that court, leading to inefficiencies. Usually, cases where non-compliance was an issue extended their duration, as parties were usually given a month to comply. For example, the case of Jacob Stamper vs Evelyn Stamper was initiated by Jacob on 13 December 1948, and a restitution order

²³ TAB. SEJ 10/1/1948. Simon Mokoena vs Alina Mokoena.

²⁴ 'Natives Urged to Use Own Divorce Court', *Rand Daily Mail*, 4 January 1946.

was ordered on 14 February 1949, with Evelyn being given until 14 March 1949 to comply, ‘failing which to show cause on [...] 15 June 1949 why a decree of divorce should not be granted.’²⁵ This case, which is typical of the time, gives an indication of the timeline of these proceedings. From this, we can see that the timeline of the Mokoena case is unusually long, with a three-month gap between the issuing of the summons and the date of the hearing. There is no reason given for the delay, but a reasonable assumption can be made that it was because of Alina’s whereabouts being unknown, and the suit being filed under an Edictal Citation, which added steps to the process, subsequently delaying proceedings. It is interesting to note that despite the three-month delay, Alina was given the normal ten days from the date on the summons to ‘confess or deny the claim of the Plaintiff, and [...] make any demand or claim in reconvention’ that she may have had.²⁶

The hearing, which occurred on 6 August 1948, saw Alina in default and Simon’s lawyer applying for leave from the court to sue by edictal citation. Simon wished to have the summons published in the African newspaper *Umtutuli wa Bantu*, in English and in Sesotho, and to send a cutting from the newspaper to Alina’s father, Mangesi Maseko, by registered post. This application was granted by the court, and the hearing was rescheduled for 25 November 1948. The notice was published on 19 September 1948, and a copy was subsequently delivered to Mr Maseko. It was ordered at the hearing on 25 November 1948 that an order for the restitution of conjugal rights would be granted, and Alina (who continued to be in default) was ordered to return to Simon on or before 28 February 1949, failing which to ‘show cause on [...] 7 April 1949 why a decree of divorce should not be granted against her and with an order of forfeiture of the benefits arising from the marriage.’ It was also ruled that the restitution order ‘be published in *Umtutuli wa Bantu* in English and Sesotho and a copy served by registered post on Mangesi Maseko,’ Alina’s father. The notice was published on 15 January 1949, and a copy was subsequently served. On 8 March 1949, Simon filed an affidavit of non-return. The hearing on 7 April 1949 saw the newspaper article and copy thereof which was again sent to Mr Maseko, the affidavit of non-return, and the restitution order presented as evidence by Simon’s lawyer, H. Gersohn. As a result, a decree of divorce was ordered, with Alina forfeiting the benefits of the marriage.

²⁵ TAB. SEJ 1/3/1948. Jacob Stamper vs Evelyn Stamper.

²⁶ TAB. SEJ 10/1/1948. Simon Mokoena vs Alina Mokoena.

This is a remarkably long case, lasting eleven months from Simon's first filing to the final decree of divorce. Throughout this entire case, however, we are only given a small glimpse into Simon's personal reasoning, and there is no mention of his emotional state. He did not give testimony, and his voice is only present in the confines of the heavily formulaic Particulars of Claim. This case is not unique in that aspect, but it does indicate that the rigid nature of the court system, as well as the inclusion of a lawyer to speak and act on his behalf, removed Simon from his narrative and his agency. Alina remains a total mystery – her family, or rather her father, featured as the recipient of Simon's filed actions, but not really as an actor with any agency or voice of his own. In the case of Alina's mother, there is no name given, and she is mentioned once, as 'his wife,'²⁷ referring to Mangesi Maseko, and never again. Every interaction by Simon, lawyers, or members of the court, was with Alina's father. This is significant for several reasons, as it speaks to the structure of the family dynamics and their patriarchal nature among both urban and rural African communities. It also highlights the nature of legal records, the dispassionate and impersonal nature of which did not allow for the expression of African voices or their emotions.²⁸ That lawyers were white is also significant, speaking to the idea that even in spaces demarcated for African legal processes, colonial voices and language was the most prominent, colouring both testimony and record, and subsequently subsuming African narratives into colonial discourses. This practice reflected other colonial processes which repurposed African communities and distorted them for colonial imperatives.

Legally, African women were the charges of their fathers, or other male relatives, until marriage, after which they became the charge of their husbands. This was true for Africans under both customary and civil law, and is an issue which was discussed more comprehensively in Chapters Two and Three in the sections on gender and children. This is reflected in Mangesi Maseko's encounters with both Simon and the law, and the way he is represented in the testimony and his wife is not. When questioned by Simon and in his testimony, Maseko is presented as the dominant figure in his home, with his wife not speaking nor even being named. Legal correspondence meant for his daughter Alina was

²⁷ TAB. SEJ 10/1/1948. Simon Mokoena vs Alina Mokoena.

²⁸ For more on this, see Peter Delius, *A Lion Amongst the Cattle: Reconstruction and Resistance in the Northern Transvaal*, Heinemann Social History of Africa Series; Julius Lewin, 'The Legal Status of African Women - the Preliminary Report of an Institute Sub-Committee':152–58.

sent specifically to him, who, while voiceless, was at least present in the record. We also never see mention of Alina, save through Simon's brief detailing of her desertion. We never learn her side of the story, only that she left and no one knew where she was. The narrative, such as there is one, is entirely Simon's. There was also only a single mention of there being one child produced from the marriage, and nothing in the case file details any kind of attempt or intention on Simon's part to obtain custody or take responsibility for the child.

One of the notable things in the cases analysed in this thesis is the limited African voice and the general lack of an expression of African emotion. In this case, there is quite an extensive testimony by Simon, laying out his testimony, but his is the only African voice that is present. Of the other African actors in this case there is no voice present. There is also a lack of expression of emotion in Simon's testimony. The reason for this is two-fold: the formulaic nature of the law, with scripted language, and Simon who, in employing a lawyer to represent him in the case, removed himself even further from any potential personal expression. In addition, historically Africans have been allowed very little space to express any kind of voice or emotion in archival records. This reluctance to express emotional pain, or lack of space to do so within the cases themselves that indicate almost no emotional range on the part of African men in testimony, coupled with pressures of having to perform this expression in the face of white hegemony, is likely another reason why there is very little emotional range expressed in these files. Due to the breakup of families caused by the migrant labour system, and the difficulties of preserving the safety of family members as a result of the violence and hardships of life in rural and urban areas, African families often went long periods without contact, as evidenced by Alina Makoena.²⁹ Because of this, pain became normalised – something to be endured or to be resigned to rather than performed or expressed. African life in the Transvaal during this period was, after all, difficult, tumultuous, uncertain, and often brief.

Lost in Translation

When looking at colonial court cases which feature African litigants, it is important to be cognisant of the ways in which colonial authorities represented them. There are issues of

²⁹ TAB. SEJ 10/1/1948. Simon Mokoena vs Alina Mokoena.

language, translation, and transcription to consider. The introductory chapter has spoken briefly about the issue of archival materials being transcribed in inscrutable short hand or illegible script. The records are also old, and faded, which makes their examination difficult. Beyond this practical consideration however, there is also the issue of the language itself. A number of cases make mention of an interpreter, W. Ngcana, who translated for the court during the hearings.³⁰ There is no information on him given in any of the cases, nor is the issue of the languages spoken by the litigants ever brought up. Court documents themselves were in either English or, occasionally, Afrikaans. Prinisha Badassy writes,

Language after all was ‘the perfect instrument of the empire,’ since it was this aspect that served as the ideal conduit between the colonizers and the colonized. Language, translation and interpretation have always been, as Douglas Robinson states, ‘an indispensable channel of imperial conquest and occupation’³¹

As a result, ‘the problematics of translation and interpretation have become a highly contested site of struggles over representation and truth.’³² Translation, due to the inadequacies of court translators (and transcribers could and did lead to a distortion of language and meaning)³³ and the use of lawyers, particularly white lawyers who employed the formulas of legal language and subsumed African voices within the court, meant that often the records did not reflect the entire reality of a situation. For these reasons, court records need to be read as ‘representative reality’³⁴ that often distorts, obscures, or even misrepresents urban African lives.

White laws, African love

There have been very few instances of love mentioned in the case files of this court. Chapter Three contains the only instances of ‘love’ mentioned in this thesis. The Introduction has spoken about the idea of love as expressed by Africans, and this chapter

³⁰ For instance, the cases of *Betty Mdakane vs Jan Mdakane*, TAB, SEJ V1 69/2/1948; and *Petrus Sekano vs Angelinah Sekano*, TAB, SEJ V1 71/1/1948 both make mention of the interpreter.

³¹ Prinisha Badassy, “‘...And My Blood Became Hot!’ Crimes of Passion, Crimes of Reason: An Analysis of the Crimes against Masters and Mistresses by Their Indian Domestic Servants, Natal 1880-1920’ (University of KwaZulu-Natal, 2005), 86.

³² *Ibid*, 10.

³³ Prinisha Badassy, ‘A Severed Umbilicus: Infanticide and the Concealment of Birth in Natal, 1860-1935’ (University of KwaZulu-Natal, 2011), 28.

³⁴ Badassy, ...*And my blood became hot*, 27.

has looked at the limitations on the expression of African emotion in the courts. If considering the two simultaneously, it is likely that the lack of expression of this idea of love is also partly due to the constraints of the court, or the transcriber.

The migrant labour systems shaped the ways love was conceptualised by urban Africans. Traditional marriages were predicated on resources and *ilobolo*, and involved the joining of families rather than just a man and a woman. New forms of income meant that young men were no longer reliant on their fathers for the money or cattle they needed to marry, giving them greater independence, and as a result, ‘a woman now depended on a young man’s ability to work and not his father’s capacity to provide *ilobolo*.’³⁵ In this way, the migrant labour systems had an impact on both common law marriages and customary ones. Common law marriages were changed by the addition of traditional marriage practices like *ilobolo* and the development of ‘marriages of convenience’ which were discussed in Chapter Two. The spread of Christianity, in particular, had a profound impact on how urban Africans perceived and practiced love. In its idealised form, marriage based on romantic love meant men and women lived and slept together, placing their spouses before their families, and shared intimacy and emotional connections.³⁶ As studies have shown, however, often common law marriages were instituted for convenience, or access to housing, or economic necessity.³⁷ For women, marriage represented an opportunity to enter the urban space, and break away from traditional authorities, rather than being primarily linked to romantic notions of marital love. The argument can be made that love and materiality or practicality became intertwined in the urban space, with love and marriage becoming commodified.³⁸ Erlank writes, in her assessment of divorce in the 1930s, that

the start of the court case marked the end of a relationship which symbolised the disjunctures that existed between young Africans’ aspirations around romantic love and the cold, hard fact of identities and relationships laid down in a community which had only partially moved

³⁵ Mark Hunter, *Love in the Time of AIDS: Inequality, Gender, and Rights in South Africa* (Bloomington: Indiana University Press, 2010), 42.

³⁶ *Ibid*, 46.

³⁷ For more on this see Posel, ‘Marriage at the Drop of a Hat’; Victor Muzvidziwa, ‘An Alternative to Patriarchal Marriage’; Meghan Healy-Clancy, ‘The Politics of New African Marriage in Segregationist South Africa’: 7–28.

³⁸ Hunter, *Love in the Time of AIDS*, 178.

away from more pre-colonial ideas about women's fertility and women's worth in marriage.³⁹

It is difficult, in the cases examined in this thesis, to determine if love ended so absolutely, due to the limited testimony and lack of personal correspondence in the case files. But, because the overwhelming majority of cases do not speak to love, or ended in reunited couples, it is a safe presumption that love ceased when the marriages did, at least in some cases. In others, as seen in Chapter Three, love may have endured.⁴⁰ From the commodification of love and marriages of convenience, to the twinning of love and violent masculinities attempting to control women's sexuality, to Christianity and the rise of 'romantic love', to the 'death' of love that came when divorces were initiated, it is clear from these cases and the other scholarship discussed here and in the introductory chapter that for the urban African, love was a complicated affair.

Willie Sitole vs Sannie Sitole

In the case of Willie Sitole vs Sannie Sitole, Willie, on 11 August 1948, laid a petition against his wife seeking either '(a) a decree of divorce on the grounds of adultery, or alternatively, (b) restitution of conjugal rights, and in default thereof, divorce on the grounds of malicious desertion.'⁴¹ He claimed that she left him and their home in Johannesburg in April of 1947 and that in April 1948 she committed adultery with one Daniel Kumalo. The summons was issued to Sannie on 16 August 1948. They were married in 1944 when he was 27 and she was 24, and they had no children. At the hearing on 28 September 1948 in the Johannesburg court, both parties appeared in person, with Willie represented by an attorney, Mr Basner of Basner and Jaffe Attorneys, and Sannie represented by herself. When considering the testimony of both parties, and the legal space in relation to African voices, this case is another example of how the limitations on African expression in white court systems were exacerbated by the utilisation of lawyers. The testimony of Willie supplied by his lawyer reads:

³⁹ Natasha Erlank, 'Well Coming Straight to Business, Immediate Marriage Is Absolutely Impossible': Seduction Christian-Style in the Eastern Cape, c.1930' (History and African Studies Seminar, History Department, University of Kwa-Zulu Natal, 25 October 2005), 2.

⁴⁰ TAB, SEJ V1 79/2/48. Josiah Rasemetse v Emily Rasemetse.

⁴¹ TAB. SEJ, 23/2/1948. Divorce. Willie Sitole vs Sannie Sitole (born Mkonza).

Defendant left April 1947. Said she loved Daniel Khumalo. April 1948: Found her with Daniel in her room at the place of employment. In [unreadable single word]. I was alone. They were in bed.⁴²

It is unclear what Sannie's employment was, as she is listed as 'housewife' on the marriage certificate, and her testimony does not indicate any specific employment. However, the suggestion that she has a 'room at [her] place of employment suggests she was probably a domestic worker. Sannie's exposition is much longer, and while still restrained, it displays more of herself than Willie's was able to. She also denied the desertion and the accusation of adultery.

[Willie's] trouble is that I can't bear children. Told him to take me to a doctor. Native Commissioner told him to take me to my people. Plaintiff gave me permission to work. He worked there. Plaintiff is living with a woman. I pay rent for a house at Orlando...

[Willie] lives at Orange Grove. My brother's child is in my house. It is my house at Orlando [...]. I am in love with Plaintiff. I don't know Daniel. I don't have men in my room. I work in a flat. We are two girls in that room. I go to [Willie's] place of employment nearly every day. I ask him to come back. I want him to come back to Orlando. He is *not* [emphasis in the original] there. I go to Orlando nearly every day. He works close to my place of employment. I told [Willie] I loved Daniel Kumalo. I want him as my husband. Have had no children. We were both before Native Commissioners' Court. Native Commissioner's Court told him to take me to a Doctor.

From these two testimonies, it becomes clear that while the stage of the Native Divorce Court, and the act of transcription place limitations on the range of emotional expression allowed to African who spoke in it, the addition of legal representation placed further limits on that range. While Sannie's testimony does change midway, there is much more expression in her testimony than in Willie's.⁴³ Juxtaposing his testimony against Josiah's claims of love⁴⁴, for example, Willie's testimony very much concerns itself with only the facts of the case. Sannie's testimony also highlights the potential unreliability of court testimony as a historical source. There is always some element of confusion when considering how to interpret seemingly contradictory statements, as is evidenced by the uncertainty of some of the interpretations offered throughout this case analysis. Interpretations for the change of heart displayed by Sannie in her testimony vary from her

⁴² TAB, SEJ, 23/2/1948. Willie Sitole vs Sannie Sitole.

⁴³ Nortjé and Albertyn, 'The Cultural Language of Pain'.

⁴⁴ TAB, SEJ V1 79/2/48. Josiah Rasemetse v Emily Rasemetse.

simply moving on from Willie after numerous attempts to reconcile with him, to an attempt to hurt him, or make him jealous, as according to her he was by that point ‘living with a woman’. This confusion arises because it is unclear who the ‘him’ she desires is – Daniel or Willie, as she stated in her testimony that she loved her husband and wanted him back and that she did not know who Daniel was, before later saying that she loved Daniel and wanted to marry him. There is a great deal of confusion in the record of this testimony, which is possibly the result of errors in translation and transcription. An alternative interpretation, however, is that after she and her husband went to the Native Commissioner’s Court and was told to take her to her family, he took that to mean that he should set her aside and find another woman, and she, subsequently found and began a relationship with Daniel. This explanation would fit almost all the facts of her testimony, except that it was Willie who brought the original suit forward. Based on the information provided, it is difficult to say which of these scenarios is true, which is one of the fundamental problems of this court due to the lack of personal detail in the testimonies. It is also one of the major issues that came with difficulties in translation and poor transcription – that sometimes, information was taken down incorrectly or meaning was obscured or altered.

Other issues which this case speaks to include the patriarchal nature of common law marriages. That Sannie had to ask Willie for permission to work is indicative of the fact that women were expected to be subjugated to their husbands, as their legal property. This issue was discussed in more detail in chapters Two and Three, which also looked at the significance of common law in simultaneously empowering and subjugating African women. Sannie’s independence, which came largely from her employment, also allowed her to challenge and/or lie to her husband and find another man. Under white rule, urban Africans existed in a space that was simultaneously more agentising and more exploitative than in the rural areas. Urban areas offered employment and subsequently financial independence from traditional authority, even as colonial attitudes distorted traditional values and practices, and the state used the migrant labour system to exploit African migrant labour.

Conclusion

This chapter has argued that the testimonies of urban Africans as recorded in the case files presented here are often inaccurate or difficult to understand because of the problem

of translating and transcribing court proceedings. The procedures of the court and litigation have also been examined here. The cases here have also shown how Africans were expected to present themselves within specific ways in order to navigate the court system. Because of this, and the white lawyers who were often contracted to represent them in court, there is a limited sense of the African voice or emotional expression within the court itself, and what is there is hidden beneath the formulaic language of the court, the presence of lawyers, and the inaccuracies of testimony, translation, and transcription. For all that the Native Divorce Court was designed to litigate divorce cases between Africans, there is very little presence of African narratives within the records themselves.

Conclusion

This thesis has discussed the Native Divorce Court, tracking its development from its establishment under the 1927 Native Administration Act to the extension of the Transvaal Central Division arm of the court in 1948. The Native Divorce Court litigated common law divorces amongst urban Africans. Some of the debates which were taking place at the time of its inception have also been discussed. From its inception, it faced criticism from sections of the state who saw it as a drain on resources of the court, and the religious commentators which advocated for the sanctity of marriage, and saw divorce as a threat to the moral strength of the country. This thesis has located the establishment of this court within the history of South Africa's legal system by examining the bifurcated status of urban Africans who were not fully subject to either common or customary law.

Secondly, this thesis has also attempted to position the Native Divorce Court within the context of African urban identity formation, as well as state and legislative conceptions of Africans. It has done this by shifting between the parallel discourses of legal and socio-political histories in twentieth-century South Africa. This study has argued that the ways in which urban Africans thought about marriage and divorce were profoundly shaped by their engagement with the Native Divorce Court. The chapters in this thesis have used cases from the Native Divorce Court as a lens through which to analyse urban African identity formation, the impact of Christianity, urbanisation, and the migrant labour system. Urban Africans began to challenge traditional marriage practices as a response to the rapidly changing socio-political context of the early twentieth century which affected both the countryside and urban areas. The passing of the 1927 Native Administration Act, the 1929 Native Administration Amendment Act, and the 1939 Matrimonial Causes Act, which introduced common law marriage, divorce, and allowed women to institute divorce proceedings respectively, transformed how urban Africans engaged with both public and intimate spaces. Limited access to housing in the cities, the labour migration system, and influx control measures meant that Africans found it difficult to establish permanent residency in urban areas. As access to housing in the cities was predicated on marriage,

urban Africans were forced to develop new strategic ways of thinking about marriage and divorce.

Urban Africans in the segregation era married for different reasons – for love, for convenience, for access to urban housing, amenities and social services in cities, and many of them divorced for the same reasons. At its core, urbanisation and migration played an important role in how and why Africans conceptualised and accessed the Native Divorce Court. Employing the Native Divorce Court was one way Africans in urban centres situated themselves within the project of modernity. Common law marriages and divorces were as much a part of this new modern African as was their embrace of Christianity or their rejection or modulation of African customs and practices in favour of those of common law.

This transformation was not entirely the result of the Native Divorce Court, nor the Native Administration Acts which facilitated it. Rather, it was within the context of a rapidly urbanising South Africa, mass labour migration, state concerns over the influx of Africans into urban areas and segregation, that a transitory attitude was developed by urban Africans. This attitude, developed on the mines and in the cities by first generation migrants, was carried into, and exacerbated by, unstable urban living and working conditions at the time, and the marriages of convenience which were made easier by the Native Divorce Court.

Marriage and divorce in urban areas became a reflection of the transitory attitudes of urban Africans which also shaped the ways they navigated and employed the Native Divorce Court. From failing to appear in court in order to obtain a divorce, to empowering women to negotiate their husbands' return, to attempting to use a restitution of conjugal rights order to enforce marital rights, the Divorce Court was the theatre for a number of negotiations between African men and women in urban areas. In particular, after the passing of the 1939 Matrimonial Causes Act, women were allowed to litigate in the first instance, essentially allowing them legal recourse against their husbands. This was significant because customary law at this time regarded women as legal minors under the custody of their fathers, husbands, or male relatives. By interrogating the case files and records from this court, this thesis has attempted to understand how and why the

court operated as it did, as well as how African voices were represented or controlled within the space of the Native Divorce Court.

The introductory chapter provided a historiographical discussion of the major themes in this thesis: Christianity, gender, labour migration, urbanisation and urban identities, the segregationist state, and notions of love and commitment. It reviewed the historical and legal scholarship on segregation-era South Africa, as well as the debates surrounding reading archival materials as a background for analysing the Native Divorce Court and urban African identities.

Chapter One discussed the establishment of the Native Divorce Court, and examined the debates which surrounded its inception, necessity and expansion. Furthermore, it outlined the daily functions of the court. This chapter argued that the Native Divorce Court affected and was affected by how urban Africans thought about and engaged with the ideas of marriage and divorce, before concluding that while parts of the judiciary and legal fraternity objected to its inception, the Native Divorce Court contributed to how urban Africans navigated common law marriages, and urban African women, in particular, were able to assert their agency within it.

Chapter Two discussed how the urban African identity developed in the context of the social, political, economic, and legislative frameworks of the early twentieth century. Urbanisation, labour migration, Christianity, the reserves, gender, the Native Administration Acts and the Matrimonial Causes Act all contributed to how urban Africans challenge traditional authorities and customs. This chapter argued that for women, after the significant passing of the 1939 Matrimonial Causes Act, the Native Divorce Court became a space wherein they could uphold agency, using the cases of *Betty Mdakane vs Jan Mdakane* and *Joseph Moeketsi vs Esther Moeketsi*. It concluded that while the Native Divorce Court afforded women a degree of agency, it simultaneously functioned as a space for the enforcement of patriarchal control.

Chapter Three discussed the relationship between urban African masculinities, marriage, and domestic violence. It argued that urban African men used the Native Divorce Court to enact entitlement and control over the reproductive capacities of their wives. It did this by using the cases of *Josiah Rasemetse vs Emily Rasemetse* and *Johannes Mahlangu vs*

Martha Mahlangu, which dealt with domestic violence and conjugal rights, and *Michael Mashigo vs Asnate Mashigo*, which dealt with adultery on the part of the wife. It concluded by establishing that the moral economies facilitated by both white and traditional authorities normalised male violence against their wives. This left African women with little room outside of divorce to seek respite from their violent husbands, and reinforced the acceptance and normalisation of domestic violence in urban African marriages. Despite this, as the case files highlighted, domestic violence was not considered grounds for divorce, and women who attempted to leave would have had to desert their husbands in an attempt to make them file for divorce.

The final chapter of this thesis discussed how the stage of the Native Divorce Court created a platform where urban Africans simultaneously asserted their agency and where their voices were marginalised or silenced. It argued that the processes of recording testimony and archiving files distorted or usurped African voices and narratives. Using the cases of *Petrus Sekano vs Angelinah Sekano*, *Simon Mokoena vs Alina Mokoena*, and *Willie Sitole vs Sannie Sitole* this chapter concluded that urban Africans were able to some extent navigate and manipulate the Native Divorce Court, while still being subject to and subjugated by it.

The Native Divorce Court is not the most significant legislative or social development of segregationist South Africa, but it played a role in the development of urban African attitudes in domestic and legal spaces. While this thesis has approached urban African marriages and divorce from the perspective of court records and divorce proceedings, it is important to note that this work deals with cases wherein there was incredible emotional range – love, betrayal, broken hearts, and lives torn apart – that have been hidden beneath a hasty ruling by a bored or busy judge and the strokes of scribbled shorthand of a clerk with too much paperwork – which is never seen and can only be imagined. The emphasis on bureaucratic and legislative efficiency in the records is telling of the priorities of the courts of the time. The lives and stories that were played out in this court did not happen on a theatre of stages and dramas but rather a theatre of operations and surgeries: efficient, mechanical, and drawing as little blood as possible.

Appendix

Appendix 1

Relevant sections of the Native Administration Act 38 of 1927:

Chapter 1: Administration

S2(4) Every native commissioner and every assistant native commissioner in the Transvaal Province shall, within the area for which he is appointed, have the power to solemnize marriages under Law No. 3 of 1897 (Transvaal).

Chapter 4: Judicial Organisation and Procedure

S10(1) The Governor-General may, by proclamation in the *Gazette*, constitute courts of native commissioners for the hearing of all civil causes and matters between Native and Native only: Provided that a native commissioner's court shall have no jurisdiction in matters in which -

- (a) the status of a person in respect of mental capacity is sought to be affected;
- (b) is sought a decree of perpetual silence;
- (c) *namptissement* is sought;
- (d) the validity or interpretation of a will or other testamentary document is in question; or
- (e) a decree of divorce or separation in respect of a marriage contracted according to civil or Christian rites is sought.

Chapter 5: Marriage and Succession

S22(1) No male Native shall during the subsistence of any customary union between him and any woman, contract a marriage with any other woman unless he has first declared upon oath, before the magistrate or native commissioner of the district in which he is domiciled, the name of every such first-mentioned woman; the name of every child of any such customary union; the nature and amount of the movable property (if any) allotted by him to each such woman or house under native custom; and such other information relating to any such union as the said official may require.

S22(3) No minister of the Christian religion authorized under any law to solemnize marriages, nor any marriage officer, shall solemnize the marriage of any Native male person unless he has first taken from such a person a declaration as to whether there is subsisting at the time any customary union between such person and any woman other than the woman to whom he is to be married and, in the event of any such union subsisting, unless there is produced to him by such person a certificate under the hand of a magistrate or native commissioner that the provisions of this section hereinbefore set out have been duly complied with.

S22(5) Any Native male person who during the subsistence of any customary union between him and any woman contracts a marriage with any other woman without having previously made a declaration referred to in subsection (1) or subsection (3) shall be guilty of an offence and shall, upon be liable to a fine not exceeding fifty pounds or, in default of payment, to imprisonment for a period not exceeding six months; and any Native male person who knowingly makes any false statement in any such declaration shall be guilty of an offence and punishable in the same manner as if he had committed the crime of perjury.

S22(6) A marriage between Natives, contracted after the commencement of this Act, shall not produce the legal consequences of marriage in community of property between the spouses: provided that in the case of a marriage contracted otherwise than during the subsistence of a customary union between the husband and any woman other than the wife it shall be competent for the intending spouses at any time within one month previous to the celebration of such marriage to declare jointly before any magistrate, native commissioner or marriage officer (who is hereby authorized to attest such declaration) it is their intention and desire that community of property and of profit and loss shall result from their marriage, and thereupon such community shall result from their marriage except as regards any land in a location held under quitrent tenure such land shall be excluded from such community.

S22(7) No marriage contracted after the commencement of Act during the subsistence of any customary union between the husband and any woman other than the wife shall in any way affect the material rights of any partner of such union or any issue thereof, and the widow of any such marriage and any issue thereof shall have no greater rights in respect of the estate of the deceased spouse than she or they would have had if the said marriage had been a customary union.

Chapter 8: General

S35 In this Act, and any proclamation, rule or regulation made thereunder, unless inconsistent with the context -

‘customary union ‘ means a marriage according to native law and custom;

‘house’ means the family and property, rights and status, which commence with, attach to, and arise out of, the customary union of each native woman;

‘location’ means and includes-

(a) any area set apart or reserved for communal occupation by Natives;

(b) any area {other than a municipal location) set apart or reserved and made available for native occupation under a separate title, together with any commonage included therein;

(c) land acquired by Natives for tribal occupation;

(d) any area proclaimed by the Governor-General as a location for the purposes of this Act;

‘Minister’ means the Minister of Native Affairs, or any other Minister of State acting in his stead;

‘Native’ shall include any person who is a member of any aboriginal race or tribe of Africa: Provided that any person residing in an area proclaimed under section six (1) under the same conditions as a Native shall be regarded as a Native for the purposes of this Act;

‘partner’ means any spouse of a customary union;

‘pass area’ means an area defined by proclamation within which all Natives may be required to hold and carry passes.

Appendix 2

Relevant sections of the Native Administration Amendment Act 9 of 1929

Provision for Establishment of Native Divorce Courts

S10(1) Notwithstanding anything in any other law contained, the Governor-General may by proclamation in the Gazette establish Native Divorce Courts which shall be empowered and have jurisdiction to hear and determine suits of nullity, divorce and separation between natives domiciled within their respective areas of jurisdiction in respect of marriage and to decide any question arising out of any such marriage which is not cognisable by a native commissioner's court established under section ten of the principal Act.

S10(2) The area of jurisdiction of any court established under subsection (1) shall coincide with that of a native appeal court established under section thirteen of the principal Act.

S10(3) Every such court shall be a court of law and shall consist of the person for the time being acting as president of the native appeal court exercising jurisdiction in the same area. The president may in his discretion summon to his assistance two persons holding the office of the magistrate to sit and act with him as assessors in an advisory capacity on questions of fact.

S10(4) The provisions of subsections (5) and (6) of section thirteen and subsection (1) of section sixteen shall *mutatis mutandis* apply in respect of Native Divorce Courts established under this section.

Appendix 3

Relevant sections of the Matrimonial Causes Act Jurisdiction Act 22 of 1939

Jurisdiction

S1(5) For the purposes of this Act a divorce action shall be deemed to be instituted on the date on which the summons is issued or the notice of motion is filed or the notice is delivered in terms of the rules of court, as the case may be.

Preliminary orders

S2 Any provincial or local division of the Supreme Court of South Africa which in terms of section one has or would have jurisdiction to try an action for divorce or for restitution of conjugal rights or for judicial separation shall have jurisdiction to hear an application made by the wife for leave to sue her husband in *forma pauperis* or for an interdict pending the action or for an order compelling him to pay alimony *pendente lite* or to make a contribution towards the costs of the action.

Claims in reconvention

S4 Any provincial or local division of the Supreme Court of South Africa which in terms of section one has jurisdiction to try an action instituted by a wife shall have jurisdiction to try any claim in reconvention made by the husband for divorce or for restitution of conjugal rights or for judicial separation, and the provisions of sections two, three and five shall, *mutatis mutandis*, apply to any such claim in reconvention.

Orders as to property rights of spouses and custody, guardianship and maintenance of children

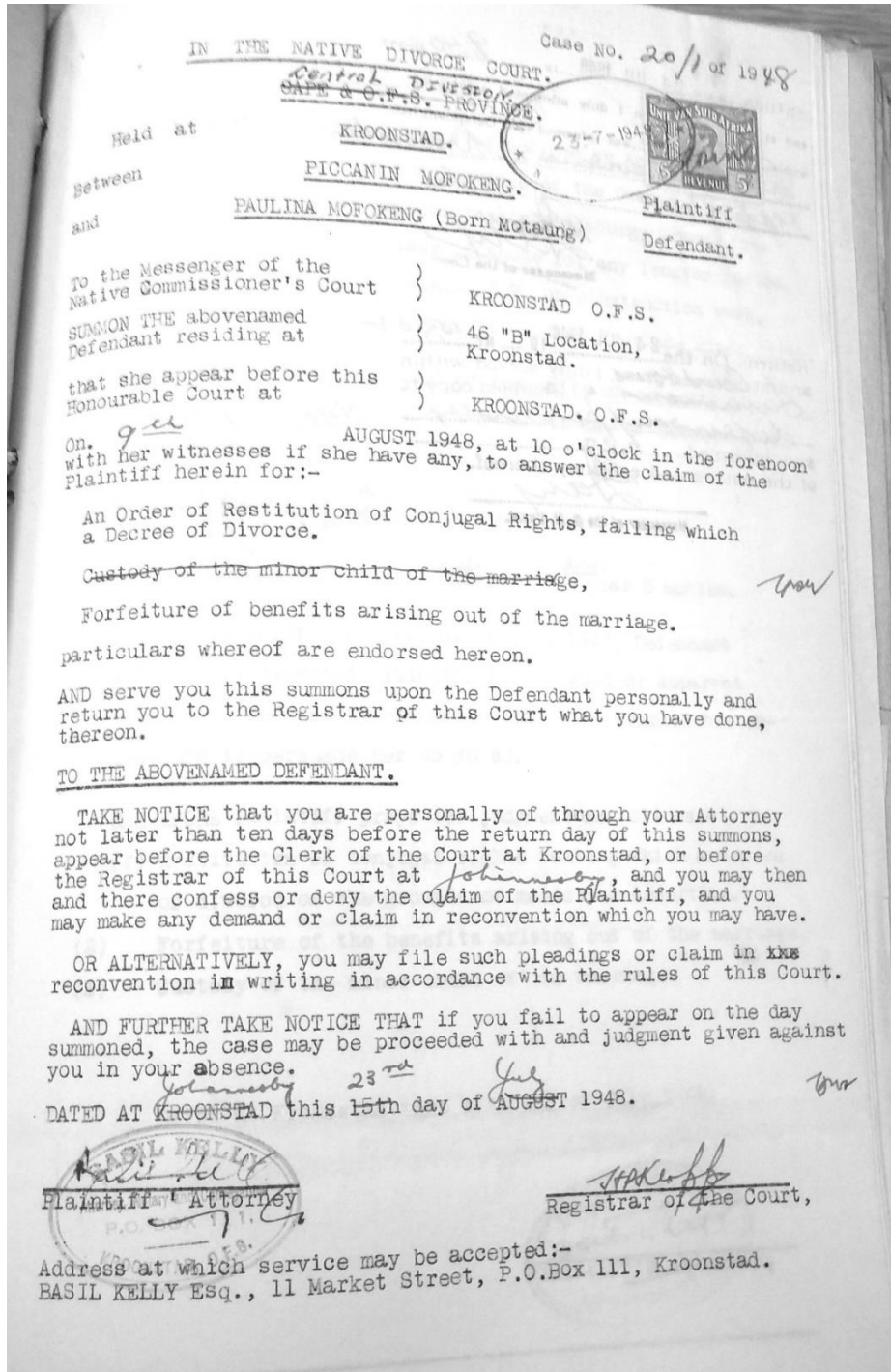
S5 Any division of the Supreme Court of South Africa which tries any action or claim in reconvention for divorce or for restitution of conjugal rights or for judicial separation by virtue of the jurisdiction conferred upon it by section one or four shall have jurisdiction to make an order determining the mutual property rights of the husband and wife or concerning the custody, guardianship and maintenance of any minor child born of the marriage subsisting between them; and any such division which has tried any such action or claim in reconvention by virtue of the jurisdiction so conferred upon it shall have jurisdiction at any time thereafter to amend any order made by it concerning the custody, guardianship or maintenance of any such child.

Law and practice applicable in actions or claims in reconvention for divorce or restitution of conjugal rights dealt with under this Act

S6 Whenever any division of the Supreme Court of South Africa deals with any action or claim in reconvention for divorce or for restitution of conjugal rights by virtue of the jurisdiction conferred upon it by section one or four or determines the mutual property rights of the husband and wife by virtue of the jurisdiction conferred upon it by section five, it shall do so in accordance with the practice and the law in accordance with which the division within whose area of jurisdiction the defendant in convention or the plaintiff in reconvention is or was domiciled or is resident, as the case may be would have dealt with it.

Appendix 4

Sample Summons Form¹



¹ TAB, SEJ, V1 20/1/1948. Restitution of Conjugal Rights. Piccanin Mofokeng vs Paulina Mofokeng (born Motaung).

The 'Summons' form gives the address of the Defendant, the specific date and location of the hearing, the court division that oversaw the case, and lists the prayers of the Plaintiff, in this case Piccanin. It also gives the Defendant, here Paulina, notice that she has ten days in which to confirm or deny charges, or file a claim in reconvention.

Appendix 5**Sample Particulars of Claim Form²**

PARTICULARS OF CLAIM.


1. The parties hereto are Natives as defined by Act No.38 of 1927
2. The husband was born in the Province of the Orange Free State and is Registered for general tax in Ficksburg, Orange Free State. He has no fixed place of abode for any lengthy period as he is employed on the S.A.R. & H. on construction work, but he has lived in the Orange Free State Province since birth.
3. The parties were married out of community of property at Kroonstad, Orange Free State on the 6th day of October, 1945, which marriage still subsists.
4. There is one minor child of the Marriage:-

Name.	Sex.	Age.
William Molefe Mofokeng.	Male.	1 year 8 months.
5. That on or about the 15th day of June 1947, Defendant maliciously deserted Plaintiff for no good or apparent reason and refuses to return to Plaintiff despite his endeavours to persuade her to do so.

WHEREFORE Plaintiff prays for judgment as follows:-

- (1) Restitution of conjugal rights failing which a decree of divorce on the grounds of malicious desertion.
- (2) Forfeiture of the benefits arising out of the marriage.
- (3) Custody of the minor child of the marriage.

Dated at Kroonstad this 17th day of July, 1948.



Messenger's return of service:-

The 'Particulars of Claim' document certifies that both parties are Africans as defined by the 1927 Native Administration Act, which is a requirement for using the Native Divorce Court. It then gives the birth, employment and location of the Plaintiff to the claim, which in this case is Piccanin. The details of the marriage, children, and primary complaint i.e. 'malicious desertion' are also highlighted. The specific prayers of the Plaintiff are then listed.

² TAB, SEJ, V1 20/1/1948. Piccanin Mofokeng vs Paulina Mofokeng.

Appendix 6

Sample Marriage Certificate³

B.M.D. 3

DUPLICATE ORIGINAL MARRIAGE REGISTER.

No. 359 / 1948 Marriage Solemnized at St. Mary's Orlando District Johnannesburg Province Transvaal

Husband Native
Wife Native

(1) Date of Marriage.	(2) Full names of Persons Married.	(3) Age.	(4) Country of Birth, Province, Place.	(5) Personal Status.	(6) Occupation.	(7) Residence at time of Marriage.	(8) Banns or Special Marriage License.	(9) Consent by Whom given.	(10) With or without Antenuptial Contract.	(11) REMARKS.
<u>27th</u> <u>June</u> <u>1948</u>	<u>Isaac Moshoele</u>	<u>27</u>	<u>Transvaal</u>	<u>Bachelor</u>	<u>Labourer</u>	<u>160 Orlando</u> <u>St. Louis</u>				<u>Declaration under section 22 (3) of Act No 38 of 1927 in community of property and for profit and loss excluded in terms of Section 22(6) of Act 38 of 1927.</u>
	<u>Lucia Mokhozi</u>	<u>19</u>	<u>Transvaal</u>	<u>Spinster</u>	<u>Housewife</u>	<u>Pretoria</u>				

This Marriage was solemnized by me on this Twenty Seventh day of June 1948 at St. Mary's Orlando Marriage Office.

in the presence of the undersigned witnesses: Isaac Moshoele
Jannie Mokhozi & his wife

Church of the Province
Denomination or Magistrate's Office.

This Marriage was contracted by us Isaac Moshoele
Lucia Mokhozi

(Copies from the Original Marriage Register of St. Mary's Church by J. J. J. J. on the 2/10/48)

For use in Head Office only:— Index Card checked _____
Card received for filing _____

Form checked _____
Indexed _____
[R.T.O.]

A marriage certificate contained the following information when filled in totally: the details of when and where the marriage occurred, who officiated and under what church denomination, who the witnesses were, how old the parties were, where they lived, and what they were employed as. It also detailed the parties' marital status, any special considerations to the marriage such as who gave consent, and whether it was in or out of community of property. Usually it was not, and parties who wished to contract their marriage in community of property were obliged to go to the Native Commissioners' Courts to do so.



³ TAB, SEJ, 12/5/1948. Restitution of Conjugal Rights. Lucia Moshoele (born Mokhogi) vs Isaac Moshoele.

Appendix 7***Breakdown of court and lawyer fees as taken from the case of Johannes Mahlangu vs Martha Mahlangu⁴***

IN THE NATIVE COMMISSIONERS' COURT FOR THE DISTRICT OF VILJOENSDRIFT
HELD AT VILJOENSDRIFT

CASE NO. 48/28/49

BETWEEN

<u>JOHANNES MHLANGU</u>			PLAINTIFF
AND			
<u>MARTHA MHLANGU</u>			DEFENDANT

BILL OF COSTS DUE TO STEYN, NOLTE & WILD, DEFENDANT'S ATTORNEYS AS
BETWEEN PARTY AND PARTY

1. Instructions to the Defendant.....	5	–	
2. Perusing Summons.....	2	6	
3. Appearance.....	5	–	
4. Pleas.....	15	–	
5. Taking proof of witnesses:			
a. Witness Mokolopo.....	5/–		
b. " Msisi.....	5/–		
	10/–		
6. Preparing for trial.....	1	–	–
7. Attending Court on 5/3/49.....	1	10	–
8. " " " 13/5/49.....	1	10	–
9. " " " 21/7/49.....	1	10	–
10. Travelling Expenses:			
2 (a) Defendant from Meyerton to Johannesburg by rail on above 3 occasions at 3/9d per return ticket.....		11	3
(b) Witness Mokolopo.....		3	9

⁴ TAB, SEJ, 79/1/1948. Johannes Mahlangu vs Martha Mahlangu

(c) " Msisi.....						3	9
11. Witness Fees							
(a) Witness Mokolopo.....	2/6						
(b) " Msisi.....	<u>2/6</u>						
	5/-					5	-
12. Letters (3)				15	-		
TOTALS.....		8	2	6	1	3	9
13. Taxed off.....							
14. Add disbursements.....							
15. Bill of cost.....				5	-		
16. Notice.....				3	-		
17. Taxation fees.....							
18. 25% Allowance.....							
19. Stamps on bill of cost.....							

TAXED and ALLOWED at [blank] pounds [blank] shillings
[blank] pence on the [blank] day of March, 1952.

BY ME,

TAXING MASTER.

NOTICE OF TAXATION.

BE PLEASED TO TAKE NOTICE that the above bill will be submitted for taxation on the 7th day of March, 1952, at 9.30, in the forenoon.

DATED at VEREENIGING on the 5th day of March, 1952.

F.G.J. WILD [SIGNATURE]
PLAINTIFF'S ATTORNEY,

c/o Steyn, Nolte & Wilde,
Dickinson's Buldings,
Voortrekker Street,
VEREENIGING.

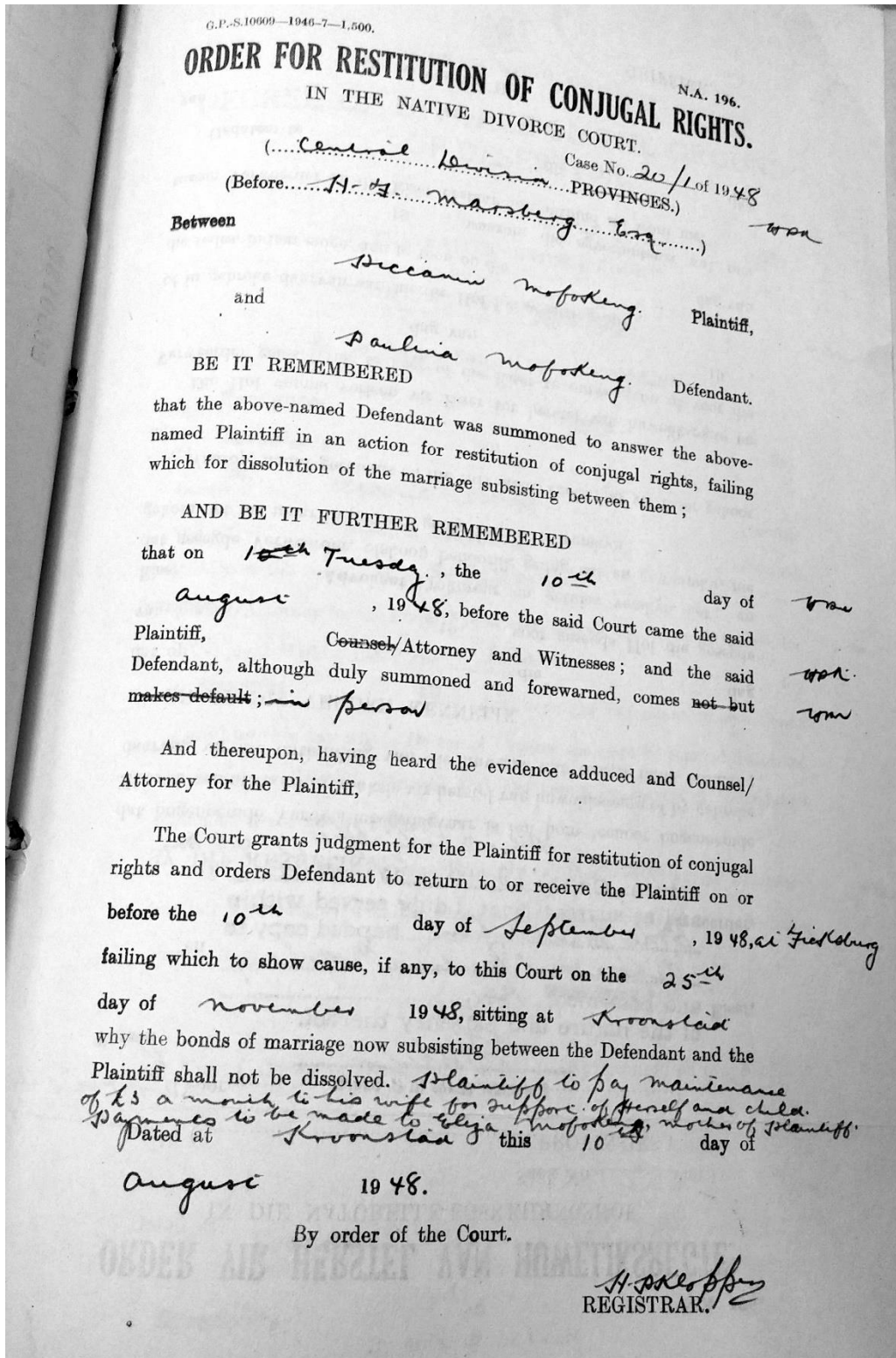
To: The Registrar,
The Native Divorce Court,
Magistrate's Court,
JOHANNESBURG.

AND TO: Helman and Michel
Defendant's Attorney,
P.O. Box 3592
JOHANNESBURG

The above details the costs of the case of Johannes Mahlangu vs Martha Mahlangu. There are no figures indicated in the total cost, but from the figures given, it would seem that Johannes (the Defendant in reconvention) would have had to pay just over £8.10. This appendix provides a breakdown of the kinds of costs and services offered by attorneys during this period.

Appendix 8

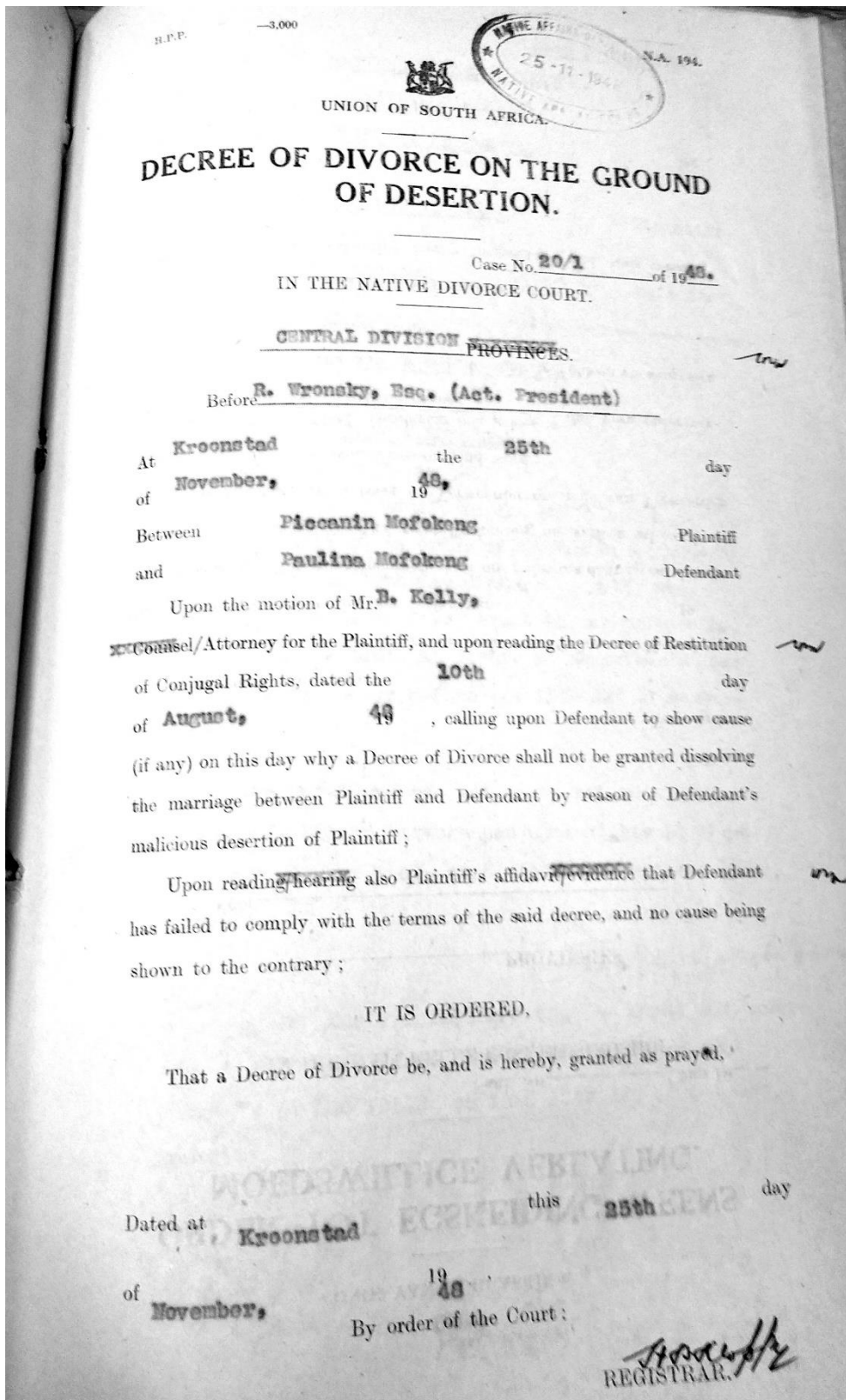
Sample Order for the Restitution of Conjugal Rights⁵



⁵ TAB, SEJ, V1 20/1/1948. Piccanin Mofokeng vs Paulina Mofokeng.

Appendix 9

Sample Decree of Divorce on the grounds of Desertion⁶



⁶ TAB, SEJ, V1 20/1/1948. Piccanin Mofokeng vs Paulina Mofokeng.

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TAB, SEJ 14/1/1948. Restitution of Conjugal Rights. Augustine Tau vs Bellina Tau (born Leshoro).

TAB, SEJ 68/1/1948. Restitution of Conjugal Rights. Adam Lesibo vs Maria Lesibo (born Rakhale).

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