OBSERVATIONS ON THE USE OF OFFICIAL LANGUAGES FOR THE RECORDING OF COURT PROCEEDINGS

1 *Introduction*

Language has an official as well as a non-official use in South African courts (and the courts of other jurisdictions). Languages are the media for oral and written (by affidavit) testimony of witnesses, accused and litigants in both civil suits and criminal cases as well as for arguing the merits of cases before judgment is delivered. This refers to non-official use. Secondly, language is used in an official capacity in court proceedings, namely for the recording of court proceedings and for the delivering of judgments by presiding officers (judges and magistrates). These aspects are discussed in further detail in par 2 *infra*.

The focus of this note is on the latter, more particularly on the implications of the language provisions of the Constitution of the Republic of South Africa, 1996, for the use of the official languages for the recording of court proceedings in South African courts and for the safekeeping of court records by the state. The official use of languages to record court proceedings, on the one hand, and the unofficial use of languages by accused, litigants and witnesses, on the other, have implications for each other. The use of different languages for recording court proceedings has direct implications for various individual rights of accused, witnesses and parties involved in criminal cases and civil litigation. However, those rights that relate to the unofficial use of language in court proceedings are not discussed here.

The note begins with an explanation of what is meant by the official and unofficial use of languages during litigation. Thereafter the focus turns to the official use of the languages of record in court. The relevant constitutional provisions dealing with the official languages set out in section 6 of the con-

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stitution are discussed. This is followed by a discussion and critique of the high court judgments in which the question of the official use of the official languages have been dealt with.

2 *The various uses of language in court*

2.1 Non-official use

When language is used in its non-official capacity it gives effect to the individual rights of litigants, accused and witnesses. That bears on their right of access to the courts. At least two constitutional rights, namely sections 34 and 35(3), immediately spring to mind in this regard. Section 34 of the constitution provides that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum. Since section 35(3) specifically deals with the rights of an accused, the right provided for in section 34 seems to be applicable to all litigation except in the criminal courts. Section 35(3)(k) provides that every accused person has a right to a fair trial, which includes the right to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted into that language.

Four aspects of the unofficial use of language in litigation may be distinguished: oral evidence in criminal trials; oral evidence in civil trials; written evidence in motion proceedings in the civil courts; and arguing cases before judgment is delivered.

The position in relation to the above aspects has been and still is essentially as set out below:

2.1.1. In criminal trials and civil trials there has never been a restriction on the language that may be used for adducing oral evidence. Accused and witnesses in criminal matters have always had the right to testify in the languages they understand best – mostly their mother tongues, regardless of whether that language was official or unofficial and no matter whether or not the language was a local South African language. The exercising of the right of accused and witnesses to testify in their mother tongues has all along been made possible by the department of justice, which has over the decades employed full-time interpreters for translation of testimony given by witnesses and accused who were speakers of the country's African languages into either of the official languages for court proceedings (English and Afrikaans). In criminal cases, free interpreting services have also been made available by the department of justice to accused and witnesses who were speakers of languages not indigenous to South Africa. Viewed against this background the right provided for in section 35(3)(k) therefore confirms and reinforces a right that has all along been recognised and strictly exercised in our courts.

2.1.2. The position regarding oral evidence in civil matters was basically the same save for the fact that the parties who called witnesses to testify in a language other than English or Afrikaans had to provide interpreting services at their own expense.

2.1.3. As for written evidence, there has never been an official restriction on the use of languages for testimony in this form. Written testimony is particularly

important in civil litigation, specifically in motions proceedings that are largely decided on the basis of affidavits. In principle any language could therefore be used for an affidavit. If a language other than the official language of record was used for an affidavit, it would have had to be translated into the language of record in the same way as oral evidence was translated. In practice, however, it (virtually) never happened that affidavits were in a language other than the language of record used by the court. Parties simply opted to draft affidavits in either of the two official languages of record. This remains the position.

2.1.4. There is likewise no restriction on which language a legal representative (or a litigant / accused who appears in person) may use to argue the merits of a case or to make submissions to the court.

2.1.4.1 Most accused in our criminal courts, particularly the lower courts, are undefended and conduct their defence in person. The free interpreting services provided by the department of justice to accused persons is therefore made available and utilised by accused in the same way as it is used for evidence. This again has been a long-standing practice in South African courts (Ferreira *Strafproses in die Laer Howe* (1967) 38).

2.1.4.2 Litigants in civil matters who conduct their cases in person and who are not sufficiently conversant in either of the languages of record are entitled to address the court through an interpreter in any of these languages on the same basis as they may testify through an interpreter. However, as indicated in § 1.1.2, litigants have to provide interpreting services at their own expense.

2.1.4.3 The legal position of legal representatives in civil matters in relation to the use of language for submissions (arguments) is the same as that of unrepresented litigants. However, it very rarely if ever happened that attorneys and advocates exercised this right. Legal counsel are usually conversant in both or at least one (English) of the official languages of record, being the language(s) in which they have done their legal studies. They therefore always make their submissions in either of these languages. This is also done for tactical reasons. Presenting argument, particularly on questions of legal principle, is obviously less effective if not self-defeating if it is done through an interpreter, particularly given that interpreters are not legally qualified.

2.2 Official use – language of record

All cases – from the beginning to the end – heard in South African courts are formally recorded. There is therefore a full record of all cases in their entirety. An outline, not purporting to give a full picture of what is included in the minutes, but at least highlighting the most important elements thereof, is briefly given.

In criminal trials the minutes comprise the charge / indictment, the plea, all evidence of all witnesses in all stages thereof, including main, cross, re-examination as well as the court's examination, submissions and arguments by counsel (or non-represented accused), and the judgment (and sentence in the event of a conviction) handed down by the court. The minutes also include documentary evidence, real evidence (more particularly the court's description of real evidence and exhibits formally read into the case record by the court) and evidence forthcoming from inspections *in loco*.

In civil trials the minutes comprise the pre-trial and the trial stage. The minutes of the pre-trial stage contains all pleadings, which are obviously in writing, affidavits and attachments thereto and the minutes of pre-trial hearings. The minutes of the trial stage includes all evidence, again in all its phases, submissions, and the court's judgment.

The case record comprises the proceedings in the court *a quo*, the review court (if any) and, in the event of appeals, also the proceedings in all successive courts of appeal. Currently, proceedings are recorded either electronically or mechanically. Previously, records of court proceedings were hand-written.

In the process of a trial, given South Africa's multilingual society, several languages may be, and are in fact, often used. This is true particularly for oral evidence. The result of this – very common in our courts – is that the presiding judge or magistrate often does not understand the accused and (some of the) witnesses. This requires the testimony to be interpreted into a language that the presiding officer understands. This has led to the interpreting practices that have all along been in operation in South African courts, reference to which is made in § 2.1. A set of related questions arises in this context.

Over several decades now, only English and Afrikaans have been used as languages of record. With regard to the languages used for formal recording purposes there are therefore only either English or Afrikaans trials in South African courts. Judgments are delivered only in these two languages. All evidence (or other evidential material) submissions, etc that might be presented which are not in these two languages are interpreted into whichever of the two languages is used as the language of record in the trial concerned.

The above arrangement is based on legislative provisions and concomitant practices. In the first place, as far as the lower courts are concerned, section 6 of the Magistrates' Courts Act 32 of 1944 provides that English and Afrikaans are the languages for the official recording of court proceedings in the lower courts. This provision does not have a counterpart in legislation that regulates the functioning of the high courts such as the Supreme Court Act 59 of 1959, but there is a long standing practice substantively to the same effect in the high courts. The practical operation of this arrangement was facilitated by the fact that the vast majority of presiding officers were sufficiently proficient in both of these languages. This resulted from the fact that English and Afrikaans enjoyed equal official status and were treated equally in terms of successive constitutional arrangements. The African languages did not enjoy official status as languages of record but these and all other languages could be used by accused, litigants and witnesses in the manner described in § 2.1.

Which one of the two languages of record to use in criminal matters was determined by basically these factors.

(i) If the accused was a mother-tongue speaker of either of the two languages of record, the case would be recorded in the language of the accused. The preference of the magistrate or judge ordinarily did not play a substantive role in exercising a choice between English and Afrikaans. In line with this, judge presidents of the high courts also assigned cases in accordance with the relative language proficiency of the judges of the court concerned. Afrikaans cases, *ie* cases where the accused was Afrikaans-speaking, were not assigned to judges with a poor mastery of Afrikaans but to judges who were proficient in Afrikaans. In principle the same applied in English cases (where the accused was English-speaking).

(ii) If the accused was a mother-tongue speaker of an African language the language of record was to a greater or lesser extent determined by the preferences and language proficiency of the presiding judge or magistrate. If the magistrate was English-speaking and less fluent in Afrikaans, the proceedings would ordinarily have been in English, while the presence of Afrikaans-speaking presiding officers usually meant that the proceedings were recorded in Afrikaans. The linguistic trends in the area in which courts were situated also exerted an influence in this regard, however. Criminal cases in the Eastern Cape and KwaZulu-Natal, where English (aside from the African languages concerned) has always been dominant, were therefore conducted in English rather than Afrikaans regardless of the personal preferences of the presiding officer. The same held true for Afrikaans in, for example, the Free State and various other provinces.

In civil matters the language of record to be used was to a large extent determined by the official language that the parties preferred to use in their pleadings. In the high courts judges president also followed the practice of assigning cases in accordance to the relative proficiency of the judges of the court. Cases in which the pleadings were in Afrikaans were therefore ordinarily assigned to judges who were proficient in Afrikaans instead of to judges with a poor mastery of Afrikaans. In principle the same applied to English cases but this did not occur often, as all Afrikaans presiding officers were usually sufficiently proficient in English to conduct the trial in either of the two languages of record. This corresponded with a similar practice in criminal cases.

The above practices, which were followed prior to the entering into force of the Constitution of the Republic of South Africa of 1993 in 1994, are in fact still followed except for the fact that the position of Afrikaans as a language of record has weakened considerably. (According to rule 14(4)(a) of the Rules of the Constitutional Court (promulgated under Government Notice R 1677 in *GG* 25726 of 31-10-2003) argument may be addressed to the court in any official language and the party concerned shall not be responsible for the provision of an interpreter. The rules do not deal with the languages(s) of record used in the court.)

3 *Relevant constitutional provisions on the official languages*

There are no constitutional provisions that specifically deal with the languages for the recording of court proceedings. However, the description in § 2 shows that when official languages are used for the recording of court proceedings, they are used in their official capacity. The constitutional provisions relevant to the official recording of court proceedings are therefore the provisions dealing with the official languages and not those bearing on language-related individual rights. (Constitutional provisions bearing on language rights include section 9(3), which prohibits discrimination on the basis of language (among other things); section 29(2), which provides for the right to receive education in the official language(s) of choice in public educational institutions where this is reasonably practicable; section 30, which provides among other things that everyone has the right to use the language of his/her choice and that persons belonging to linguistic communities may not be denied the right, with other members of that community, to use their language and to form, join and maintain linguistic associations and other organs of civil society; and section

35(3)(k), which provides that every accused has the right to a fair trial including the right to be tried in a language that the accused understands or to have the proceedings interpreted into that language.)

Section 6 of the constitution deals with the official languages. Subsections 6(1), (2) and (4) are important for the present discussion and are quoted below. Subsections 6(3) and (5) fall outside the scope of the discussion. Section 6(3) imposes certain obligations on the various spheres of government in relation to the use of the official languages. The provision is applicable to the legislatures and the executives in all three governmental spheres but not the courts. Section 6(5) deals with the Pan South African Language Board (Pansalb) and is also not directly relevant in the present context.

Subsections 6(1), (2) and (4) read:

> "(1) The official languages of the Republic are Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu.
> (2) Recognising the historically diminished use and status of the indigenous languages of our people, the state must take practical and positive measures to elevate the status and advance the use of these languages.
> (4) The national government and provincial governments, by legislative and other measures, must regulate and monitor their use of official languages. Without detracting from the provisions of subsection (2), all official languages must enjoy parity of esteem and must be treated equitably."

Four important aspects in these provisions call for closer examination.

3.1 Official status of a language

The meaning and consequence of the phrase *official language* are not defined and the detailed consequences of official language status must therefore, as is the case in most other similar jurisdictions, be spelt out in legislation that specifically deals with the practical implementation of official language status. However, in spite of the lack of clarity, it rather speaks for itself that an official language is to be understood as the language(s) used for conducting the business of government in the legislature, executive and the judiciary (Currie "Official languages and language rights" in Woolman *et al Constitutional Law of South Africa* (2006) 65-5). The language provisions of the constitution seem to be clear and specific enough to prevent official languages status to degenerate into a practically insignificant symbolism. The official language provisions, strengthened by the provisions relating to language rights that have been mentioned, clearly indicate that the official languages in South Africa are all but rhetorical since obligations of both a general as well as a specific nature are imposed upon government. The following obligations are relevant in the present context.

3.2 The state must take corrective action

Section 6(2) imposes the duty on the state to take practical and positive measures to elevate the status and advance the use of the indigenous languages that previously suffered from diminished use and status.

All the official languages except English are indigenous to South Africa. Unlike the other indigenous languages Afrikaans has not suffered from a diminished status or use, at least not in the decades immediately preceding

the constitutional transition in 1994 and at least not in the public sector. Section 6(2) therefore applies to the nine official African languages. Section 6(2) must, however, be interpreted in a manner that coheres with section 6(4), the relevant passage of which reads: "Without detracting from the provisions of subsection (2), all official languages must enjoy parity of esteem and must be treated equitably."

The clear implication of this is that the corrective measures instituted in terms of section 6(2) must not have the effect that the official languages do not enjoy parity of esteem and are not treated equitably.

Section 6(2) distinguishes itself from the rest of section 6 by imposing duties in the broadest possible terms not only on the various spheres of government or on organs of state but on *the state* as such. The clearly intended consequence of this constitutional obligation is that it applies to all three branches of state authority: legislative, executive and judicial. The official use of language(s) is obviously equally indispensable for the functioning of all three branches of state authority. It therefore goes without saying that this obligation is applicable to the legislature(s), executive(s), the courts and all other state institutions such as the judicial services commission, the magistrates commission, institutions created in terms of chapter 9 of the constitution and all organs of state (organs outside the private sphere and civil society).

Section 6(2) is expansive in relation to the languages to which it applies and is clearly meant to uplift these languages. It encourages the wider use of these languages than has hitherto been the case, and it decrees that their status should be elevated above their present position. These expansive and elevative goals can obviously not be achieved if certain sectors of the state are excluded from the ambit of its application. That would be glaringly inconsistent with the very objective of the provision. Expansion of use and elevation of status are closely related and interdependant since more use will usually imply a higher status, while a higher status will generally generate a wider use. The two aspects have a different emphasis, however. Expansion has implications on a horizontal level. It means that the languages must be used in places where they have not been used before or they must be used more in places where previously their use was limited. Elevation has implications on a vertical level as well. It means that the languages must be utilised for higher, learned, more public and reputable functions instead of being restricted to the private, menial and domestic zone. They must therefore be used as languages of education up the highest level, science, public administration and communication, political and judicial decision making etc. To exclude the use of these languages in any of these spheres, for example for passing legislation or for delivering judicial judgment and recording court proceedings, would suppress their status and inhibit their use. In that this would run directly counter to section 6(2), it would obviously be unconstitutional.

3.3 Parity of esteem and equitable treatment

Section 6 of the constitution is the first provision in the constitutional history of South Africa that has done away with the injunction that the official languages must be treated equally. In line with a longstanding practice included in successive constitutions since the adoption the South Africa Act in 1909, section 89(2) of the 1983 constitution (Republic of South Africa Constitution Act 110 of 1983) for example provided:

> "All records, journals and proceedings of parliament shall be kept in both the official languages and all bills, laws and notices of general public importance or interest issued by the government of the Republic shall be kept in both the official languages."

Section 3 of the 1993 constitution (Constitution of the Republic of South Africa 200 of 1993) conferred official status on the nine African languages in addition to English and Afrikaans. Section 3(2) of the 1993 constitution, however, provided for a non-diminution clause that sought to guarantee that the position of Afrikaans and English would not be weakened in the new dispensation. In terms thereof the rights relating to language and the status of languages existing at the commencement of that constitution were not to be diminished. Unlike its predecessor three years before, the present constitution does not have a non-diminution clause. This means that the erstwhile formal constitutional guarantee that the rights relating to language and status of English and Afrikaans that existed at the commencement of that constitution had not to be diminished, has now fallen by the way. Under the present constitution the diminished use of English and/or Afrikaans would therefore not necessarily be constitutionally assailable. Moreover, the equal use of the official languages is not constitutionally required. What is required, though, is that all the official languages must enjoy parity of esteem and be treated equitably. Although the constitution tacitly permits the diminished use of either Afrikaans or English or both, this may not amount to disparity of the status of these two languages (or for any of the other languages), or to a situation where they are treated inequitably. It is important to note in this regard that the corrective measures provision (s 6(2)) must be read with the parity of esteem provision (included in s 6(4)). This is obvious from section 6(4) itself, which provides that the corrective measures to the benefit of the African languages undertaken in terms subsection (2) must not have the effect that any of the official languages does not enjoy parity of esteem and is not treated equitably. The interpretation of the present *parity of esteem* and *equitable treatment* requirements is much more intricate than the rather clear-cut and easily measurable but now defunct equal treatment requirement of previous constitutions. Currie sums up the meaning of this requirement by stating that, while parity of esteem does not ensure equal treatment of the eleven official languages, it at least obliges the state to take all eleven languages seriously (65-7). Parity of esteem and equitable treatment of the official languages should in addition also as a minimum mean that:

(i) The use any one of the official languages as a so-called anchor language is prohibited. The use of a specific language as an anchor language means the consistent use of only one language whilst the others are used only rotationally or randomly. This would clearly create a negative disparity of esteem of the randomly or rotationally used languages in favour of the anchor language (Rautenbach and Malherbe *Staatsreg* (2004) 106).

(ii) No measures should be taken or practices followed that lead to the official languages competing for official use. That would obviously be inequitable. It would be particularly inequitable if such competition results from the using of one language as an anchor language, as described above. The fact that eleven languages instead of the previous two enjoy official status does not and should not mean a reduction of the status of either of the previous two. (See *In re Constitution of the RSA, 1996* 1996 10 BCLR 1053 (CC) 1327C-D.)

(iii) No practices should be followed that would lead to situations where the speakers of one of the official languages are forced or manipulated to use another official language in the place of the one they prefer. That would be inequitable to the language, and such practices would in time mean that such a language cannot be used and would also be unfair to the speakers of the non-used language.

(iv) Official policy and practices must create conditions that facilitate and promote the maximum use of all the official languages. Policies and practices that clearly promote and facilitate the increased use of one or some official languages and intentionally or arbitrarily discourage or diminish the use of others would be blatantly offensive to the injunction that the languages must be treated with parity of esteem and equitably. Again, it would also be unfair to the speakers of the languages suffering from such policies and practices.

(v) The patterns of the official use of the official language may change. The constitution allows for that. Moreover the constitution also tacitly permits that either one or both of the former two official languages – English and Afrikaans – may be used less than before. Yet the constitution does not allow arbitrary diminishment of use of these languages. It does not give a *carte blanche* to lesser use. The use of the official languages, including their possible lesser use, must still meet the requirement that the languages must enjoy parity of esteem and be treated equitably.

3.4 Impact on constitutional rights

The policies and practices in relation to the official languages must also carefully account for language-related constitutional rights in the bill of rights. As mentioned in § 1, there is a close interaction between the official languages of record (and official languages in general) and the exercise of constitutional rights in terms of the bill of rights. Policies and practices in relation to the official use of languages cannot be dealt with in isolation from these rights and any such policy or practice that infringes a constitutional right is obviously constitutionally impermissible.

4 *Judicial pronouncements on the languages of record*

Under white minority rule in the years prior to 1994 there were very few (if any) judges and magistrates who were mother-tongue speakers of the African languages. Black magistrates and judges did however occupy positions as presiding officers in the courts of the self-governing territories set aside for the various black ethnic communities in terms of the segregation policy.

Shortly after the new political dispensation was formally introduced by the interim constitution in 1994, the question arose whether all eleven official languages should also be used as official languages for the recording of court proceedings. The official status of the eleven languages obviously suggests that they should, otherwise their official status itself is undermined. It is important also to take into account the fact that it is also now progressively more practicable to do so. One of the effects of the new political dispensation is that an increasing number of black members of the legal profession are now appointed as magistrates and judges. Consequently scenarios present themselves in ever greater number in which all participants in a criminal case – the accused,

witnesses, prosecutor, defence attorney / counsel (if the accused is legally represented) and the presiding officer – are speakers of the same official African language. The same is true for civil cases. In such cases there is no need for translation of evidence. An important reason why this kind of scenario often and increasingly occurs is that specific African languages are concentrated in specific areas within South Africa. In such cases all relevant legal and practical considerations dictate that the African language in question should be used as the official language for recording the proceedings and to deliver judgment. Some of these considerations are mentioned here.

Firstly, without the unnecessary time-consuming translation of evidence, trials can be concluded more speedily, thus promoting more optimal enforcement of the right to a speedy trial, which is itself an element of the right to a fair trial (s 35(3)(d) of the constitution).

Secondly, it presents the most optimal way of giving effect to the accused's right in terms of section 35(3)(k) to be tried in a language that the accused understands or, if that is not practicable, to have the proceedings interpreted into that language. The mother tongue of the accused is usually also the language that he or she understands best. Moreover, it should be highlighted that section 35(3)(k) gives preference to criminal trials being conducted directly (untranslated) in the language that the accused understands while citing translation only as an alternative when it is not practicable that proceedings take place in the language the accused understands. (See the remarks made by Hlophe "Official languages and the courts" 2000 *SALJ* 690 695.)

Thirdly, it avoids the misunderstanding and the resultant risk of miscarriages of justice that do in fact occur if testimony is interpreted. When presiding officers and prosecutors in criminal cases speak different languages than, and do not understand, the mother tongue(s) of the accused and witnesses (whose testimony is translated to them from the languages of the accused / witnesses) serious misunderstanding and ensuing injustice may occur without the presiding officer even noticing it. Since these injustices are not noticed, they are also not remediable. No legal system can tolerate this, let alone follow a practice that allows and even facilitates the occurrence of these injustices.

Fourthly, it promotes more effective cross-examination, the sharpness of which is often lost when questions are translated, thus hampering the effective testing of evidence and once again the fairness of trials as such.

Fifthly, it also presents an excellent opportunity to elevate the status and advance the use of the official African languages as section 6(2) instructs the state, including the courts, to do.

Thus far the question of the languages of record, *ie* the official use of the languages in court, has been discussed in three cases.

Mthethwa v De Bruin NO (1998 3 BCLR 336 (N)) sprang from a criminal case that was heard in the regional court in Vryheid in KwaZulu-Natal. It was remarked in the case that 98 per cent of the criminal cases heard in that court involved accused and witnesses who were mother-tongue speakers of isiZulu and that the position was in all likelihood the same in the rest of the province. The mother tongue of the accused was also isiZulu and he applied for the case to be heard in isiZulu. The application was based on section 35(3)(k) of the constitution. The application was turned down purely on practical grounds and the proceedings were recorded in English, which the accused admitted to understand. (The ruling did not bear on the right of the accused to testify in

isiZulu.) The practical grounds pertained to the fact that there were simply not enough prosecutors, magistrates and judges to enable proceedings to be conducted in isiZulu. At the time of the trial there were 37 regional court magistrates in the province of whom only four were home language speakers of isiZulu, while the home language of thirty-three was either Afrikaans or English. Of the 256 prosecutors who were at that time employed in KwaZulu-Natal, the home language of 81 was isiZulu. The rest were again either Afrikaans or English with little or no knowledge of isiZulu. Of the 41 state advocates attached to the office of the director of public prosecutions in the province, only six were isiZulu-speaking. The court also mentioned that of the 22 judges of the high court in the province at that time only one was isiZulu-speaking. Since appeals and reviews from the magistrate's court must be heard by at least two judges, no review or appeal would therefore be possible. Against the backdrop of these circumstances as they obtained at that time in the province of KwaZulu-Natal, it was therefore simply not possible for court proceedings to be conducted in any language other than English or Afrikaans.

The court did not take into account that an increasing number of black people – mostly mother-tongue speakers of the African languages – are appointed as prosecutors, magistrates, judges and state advocates and that it would therefore become increasingly more practicable to conduct court proceedings in isiZulu and the other African languages alongside English and Afrikaans. The court might not really be susceptible for criticism for failing to do so as it is not incumbent on courts to decide or speculate – even convincingly – on what the future situation might look like. It had to resolve matters on the basis of the facts before it. The ruling in the *Mthethwa* case was nevertheless strongly criticised by Hlophe, who blamed the court for relying on the legacy of apartheid (in terms of which black people who were speakers of the African languages were largely barred from legal appointments).

As indicated, the court's ruling was purely based on practical grounds – the staff profile that obtained at that time in the KwaZulu-Natal province. The court did not take a stance on the basis of principle or on the basis of some sentiment against the official African languages being used as languages of record in court. Had the staff composition been different and had there been sufficient isiZulu-speaking prosecutors, magistrates, state advocates and judges in the province and at the court where the case originated from, the ruling would in all likelihood have been different.

In *S v Matomela* (1998 1 BCLR 339 (CK)) the factual situation was entirely different. In this matter there was no shortage in African-language speakers of the language concerned in that case (isiXhosa). The exact opposite obtained, as all the persons involved in the case were in fact mother-tongue speakers of isiXhosa. *Matomela*, like *Mthethwa*, was also a criminal matter. It originated in the Mdantsane magistrate's court in the Eastern Cape. The accused was found guilty and convicted for failing to comply with a maintenance order. All the participants in the case including the presiding magistrate and the prosecutor were mother-tongue speakers of isiXhosa, something which is certainly very common in litigation in the courts of this area in which the vast majority of inhabitants are mother-tongue speakers of isiXhosa. In the normal course of events, in accordance with established practice inherited from the area before 1994, the language of record would have been English (or Afrikaans). Re-

sponding to a query from the review court the senior magistrate of the Mdantsane district explained that on the day the matter came before the court there was a shortage of interpreters. The matter would of necessity have had to be postponed because of this. This would have caused the complainant in the matter further hardship (341B-C). (A postponement in circumstances where the trial could continue would also fly in the face of the accused's right to a speedy trial.) It was therefore ruled that the case proceed in isiXhosa. In this way the matter was speedily concluded to the benefit of everyone involved. The senior magistrate also based the decision to finalise the matter in isiXhosa on sections 6(1), (2) and (4) of the constitution. On automatic review the high court held that justice was done in the case and confirmed the conviction and the sentence. The review court also said that the reasons given by the senior magistrate for conducting the trial in isiXhosa were fair and reasonable (341G). Notwithstanding the smooth and speedy conclusion of the matter in isiXhosa the review court then added that instances like the present case would occur more frequently in future and that the problems arising from this would increase (341H). It is not clear what the problems were that the court had in mind, as in this case there was no problem at all. Apparently the court was concerned about the possibility of too much time-consuming translation being required in scenarios where review judges do not understand the (African) language that is used in the magistrate's court or where parties, witnesses and officers of court speak different languages and do not understand each other.

There is no way out of the need to interpret or to translate in scenarios like this. This is a reality of a multilingual society like ours in South Africa. Translation and interpretation can therefore not be entirely avoided. However, much can be done to avoid unnecessary translation on condition that legal professional staff, and, more particularly, presiding officers and officers of court are utilised in accordance with the linguistic profile and preferences of the communities where they are appointed.

The solution that the court in this case suggested, namely that English should be the sole language for the official recording of court proceedings, is therefore no practical solution at all. The court said that all official languages should enjoy parity of esteem and be treated equitably, but for practical reasons and for the better administration of justice there should be one official language, namely a language understood by all court officials regardless of their mother tongue (342G-H).

What the court did not mention is that this *solution* would avoid some translation but would generate the need for interpretation and translation that would otherwise have been unnecessary. Moreover, it is not acceptable, as the court in fact did, to pay mere lip-service to the requirement that the official languages should enjoy parity of esteem and be treated equitably but then to strip this constitutional injunction of its practical application and thus to reduce it to empty rhetoric and meaningless symbolism. This also disavows the injunction of section 6(2) that the state must advance the use and elevate the status of the official African languages.

The scenario in this case does not point towards the need to have English as the sole official language for court proceedings, but to the exact opposite. The language scenario in the case in fact demonstrates how the other official languages can be used for this purpose without incurring any problems as regards

the smooth and speedy conclusion of cases. It does not show that it would be impractical to have isiXhosa (or other official languages) as official court languages, but, as the proceedings in the case in question itself vividly demonstrate, precisely the opposite, namely how practicable it can be and in fact already is.

The language setting in *S v Damoyi* (2004 2 SA 564 (C)) was similar to that in the *Matomela* case. Everyone involved in the matter, including the prosecutor and the magistrate, was isiXhosa-speaking and there was no interpreter available to translate between English and isiXhosa. The magistrate did not want to grant a further postponement and ruled that the proceedings would continue in isiXhosa without an interpreter. The proceedings did indeed continue and were recorded in isiXhosa. The accused was accordingly convicted as charged.

As in *Matomela* the case went on automatic review and again as in *Matomela* the high court was satisfied that the proceedings in this matter were in accordance with justice. However, in a covering letter addressed to the review judge, the magistrate explained that a problem was experienced in having transcribed the portion of the record in which the evidence was recorded in isiXhosa. This resulted in a delay in the transcription of the record and hence also a delay in submitting the record for review. This apparently was the trigger for a fairly long discussion on the suitability of the use of official languages for court proceedings, which led the judge to conclude that English should be the sole language for recording court proceedings. This conclusion is subject to the same criticism as that of *Matomela*. However, the argumentation in this judgment was particularly strange. In a singular display of weird reasoning the judge said:

> "After all, English already is a language used in international commerce and international transactions are concluded exclusively in the English language. Although some stakeholders would take it with a pinch of salt, sanity would tip the scale in favour of English as the language of record in court proceedings, particularly in view of its predominance in international politics, commerce and industry" (569H-I).

Both of the most basic principles of the law of evidence and the injunctions of the constitution evidently escaped the court's mind.

Firstly, without any evidentiary support the court simply declared that English was the language of international commerce and that international transactions are concluded exclusively in English. No evidence was adduced to support this sweeping proclamation and if the court wanted to take judicial cognizance of this, it should have explained why it regarded the *fact* that English is the exclusive language in which international transactions are concluded so trite that no evidence was required to prove it. This the court also failed to do. Rather curiously, the court therefore made a factual *finding* in the absence of any evidential material.

Secondly, even if it is true that international transactions are concluded exclusively in English – which quite obviously is not so – the question arises what the relevance of this would be for deciding in which languages to record court proceedings in a South African criminal court. The court also stated that English should be the language for court proceedings particularly in view of its predominance in international politics, commerce and industry. The same question arises: what is the relevance of the predominance of English in international politics, commerce and industry for deciding in which languages court

proceedings in a local South African court should be recorded? The answer is obvious. It has no relevance at all. Unless the court record has covered up something there was clearly no international politics, commerce or industry involved in the *Damoyi* case. Neither was Damoyi somehow involved in an international transaction. The point is that the court's perceived language of international commerce or international politics has no relevance at all for the language in which an isiXhosa-speaking magistrate should be hearing a case of an isiXhosa-speaking thief, burglar, robber, knife-stabber, housebreaker, rapist or reckless driver in a poor suburb on the outskirts of Cape Town. Neither does it have any relevance for the overwhelming majority of cases heard in our courts. Yet this was the false reasoning on display in the *Damoyi* case.

Thirdly, the quoted dictum also reveals an idiosyncratic conception of the logic of official languages. The court seemed to be oblivious of the obvious fact that the official language(s) of a state ordinarily co-define and reflect something of the distinctive linguistic conditions within the national make-up of the state in question. This is precisely not, or at most only minimally, determined by the external linguistic landscape. If the major linguistic trends in international politics and commerce were determinative of the national linguistic policy, the official languages of all states would have been one or more of the following: English, French, Spanish, Mandarin, Russian and Arabic (the working languages of the United Nations). In terms of this twisted logic the perceived language(s) of international politics and commerce instead of the domestic linguistic profile of each state should henceforth decide official language status. This is not only plainly ridiculous; it is also a rash affront to the principle and details of the constitution's official language provisions, which are firmly anchored in the domestic linguistic landscape. The court has shown no trace of any commitment to the constitutional injunction for the elevation of the status and advancement of the use of the indigenous official languages, nor any sign of awareness that all official languages must enjoy parity of esteem and be treated equitably.

5 *Conclusion*

Section 6 of the constitution assigns official status to eleven languages, which are the mother tongues of the vast majority of the South African citizenry. By enjoining the state to take practical and positive measures to elevate the status and advance the use of the official African languages, section 6 seeks to ensure that official status shall not degenerate into empty symbolism, but shall be afforded more substantive content as time progresses. The state, including the courts, shares this responsibility. The injunction that all the official languages must enjoy parity of esteem and be treated equitably posits a general principle of fair treatment of the official languages and by implication also of their speakers. As a bare minimum this provision prohibits arbitrary reduction of the use of any of the official languages in all spheres and sectors of state activity. It also rejects any form of official monolingualism or domination of any one (or more) of the official languages. The courts as the supreme guardians of the constitution again have a special responsibility in this regard.

Unfortunately the dicta in the latter two judgments referred to demonstrate the regrettable trend of the judicial flouting of these clear constitutional provisions on the skimpiest of grounds – thus reneging on the courts' responsibility

to uphold the constitution. The *Damoyi* judgment in particular represents an unprecedented nadir in rash disregard for the constitution, looking more like a judicial squabble with the constitution than a serious effort to give effect to it. It shows no interest in promoting the use of the African official languages even in circumstances where that is practicable. Apart from this, some of these judicial pronouncements also amount to a plea for the abolition of Afrikaans as a language of record and thus of the little official multilingualism in the courts that we do have.

Constitutional injunctions cannot be flouted on the basis that it would be difficult to give effect to them. There are many constitutional obligations, including constitutional rights, which are in fact very difficult to uphold. Yet it is inconceivable to argue that these rights and obligations must be forsaken because their practical implementation appears to be difficult. When it comes to the use of our official languages for the official recording of court proceedings as one of the ways to promote the use of the official African languages and as a way to give content to the principle of parity of esteem and equitable treatment of the official languages, the excuse that there are difficulties with implementation cannot be made. The difficulties that might arise can easily be obviated. The opposite holds true, namely that now more than ever before it is more feasible and practicable to use all the official languages for recording purposes. There are now many more black legal practitioners – mother-tongue speakers of the African languages – than ever before. A considerable number of black African language-speakers are also now being elevated to the bench. The staff composition of South African courts in terms of proficiency in the official languages is presently diverse as never before.

This makes it possible to easily give effect to the injunctions of the constitution in terms of section 6, to use all the official languages for recording of court proceedings and also to give effect to the right of the accused to be tried in a language that he/she understands in the most optimal way. All that is needed is that the institutions responsible for the utilisation of staff in the legal sector – the judicial services commission, the magistrates commission, the director of public prosecutions and the department of justice – employ judges, magistrates, state advocates, prosecutors, etc in a manner that responds to the needs and that is compatible with the language profile and preferences of the communities where they are appointed.

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