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Speaking in Confused Tongues: Constructing Babelian Towers in Constitutional Times

Mabowa Thomas Mokoena*
University of South Africa
mokoemt@unisa.ac.za

Abstract

The South African Constitution recognizes the use of 11 official languages within "provincial" and "national" government on the basis of "parity of esteem". However, it does not specifically refer to the recognition and use of language in tribunals. Any perceived attribution is couched in generic terms that are open to interpretation, as evidenced in the cases of *Matomela, Damoyi* and *Pienaar*. The employment of a single language policy in court proceedings, as advocated in *Matomela* and *Damoyi* is probably the most sensible, pragmatic and plausible language policy imaginable. Such a position would be desirable to ensure speedier and simpler proceedings. However, it would, as argued in *Pienaar*, not only accord primacy and prominence to a single language, but would operate contrary to the spirit of plurality, multilingualism and inclusivity, which forms the bedrock of the current constitutional dispensation. Meanwhile, the dominance of English and (to a lesser extent) Afrikaans continues almost unabated, despite the principles of inclusivity championed by the Constitution.

INTRODUCTION

Historically, South African legislation has recognized only two official languages at any given time. At the inception of the Union of South Africa in 1910, English and Dutch were recognized as the "official languages of the Union".[1] Afrikaans was subsequently accorded retroactive recognition.[2] This development signalled the recognition of Afrikaans alongside Dutch, in that "wheresoever else that word [Dutch] occur[red] in the … Act, [it was] … declared to include Afrikaans".[3] It is, however, not entirely clear whether they (Afrikaans and Dutch) were regarded as the same language, and / or whether the subsequent recognition of Afrikaans implied the recognition and existence of three official languages.[4] Later developments explicitly recognized English and Afrikaans as the undisputed official languages of the

* B Iuris, LLB, LLM, LLD. Senior lecturer, College of Law, University of South Africa.
1 South Africa Act 1909, art 137.
2 Official languages of the Union Act 1925, art 2.
3 Id, art 1.
4 Afrikaans is widely considered to be a Dutch dialect. See *R v West London Youth Court, Ex Parte N* [2000] 1 All ER 823 at 826; *Ex Parte Marx Et Uxor* (1) 1936 CPD 483.

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republic.[5] These were regarded as "languages of record" in all official discourse.[6] Under these circumstances, Afrikaans and English functioned as equal partners, which essentially implied that "most" official documents were produced and served in both languages.[7] Recent political developments have altered the status quo somewhat, with the introduction of a new language policy arrangement.

In essence, the advent of constitutionalism ushered in an endoglossic dispensation, which recognizes, in addition to the two perennial official languages, nine other official languages,[8] all of which "must enjoy parity of esteem and be treated equitably".[9] Hence, South Africa's Constitution (the Constitution)[10] recognizes 11 official languages.[11] The provision explicitly, and by implication, excludes Sign, Khoi, Nama and San languages. Hence, these languages are recognized only insofar as they must be "promoted" and conditions "created" for their "development and use".[12] The promotion and development of languages in this regard is not only restricted to those mentioned above, but also applies in respect of the official languages.[13] In addition, the Constitution aims to "promote and ensure respect for" "commonly used" languages[14] and those that are "used for religious purposes".[15] In the case of religious language, the provision only seems to apply to languages used for religious purposes within the borders of the Republic of South Africa.[16]

National and provincial governments may use any particular language for the purposes of government, so far as is (reasonably) practicable.[17] The recently promulgated Use of Official Languages Act[18] presumably aims to regulate and monitor the national government's use of official languages for government purposes. However, it appears to be restricted to the regulation of official languages within bureaucratic operations, with no specific reference to courts and other tribunals.

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5 Republic of South Africa Constitution Act 1961, art 108(1).

6 *Marais v Mdowen* 1919 OPD 34 at 35; *S v Opperman* (1969) 3 All SA 237 T.

7 H Strydom and L Pretorius "On the directives concerning language in the new South African Constitution" in K Deprez and T Du Plessis (eds) *Studies in Language Policy in South Africa: Multiligualism and Government* (2000, Van Schaik) 105.

8 *Chweu v Pretoria Technical College* [1994] 8 BLLR 52 (IC) (*Chweu*) at 56; *S v Damoyi* [2003] JOL 12306 (C) (*Damoyi*), para 8; *S v Matomela* 1998 (3) BCLR 339 (Ck) (*Matomela*) at 342.

9 *Matomela*, ibid.

10 Constitution of the Republic of South Africa 1996.

11 Id, sec 6(1). The 11 languages are Afrikaans, English, isiNdebele, Sepedi, Sesotho, Setswana, siSwati, Tshivenda, isiXhosa, Xitsonga and isiZulu.

12 Id, sec 6(5)(a).

13 Id, sec 6(5)(b)(i).

14 Id, sec 6(5)(a)(i).

15 Id, sec 5(b)(ii).

16 Id, sec 5(b)(ii).

17 Id, sec 6(3)(a).

18 Act 12 of 2012, sec 2.

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The Constitution also regulates and recognizes the use of language in different spheres of cultural endeavour,[19] which, the author submits, is similar to religious usage. The essence here is that the Constitution guarantees to every person the right to choose and use the language of his or her choice[20] in every interactive endeavour. The exercise of the right to use one's language of choice must be applied within the accepted bounds of limitation and may not, therefore, violate any provision of the Bill of Rights.[21] In this instance as well, there are no constitutional provisions governing the use of language in court, save for the equal recognition of all official languages.[22]

The recognition of official languages in general, and of language use in particular, must always be viewed in the context of the spirit of plurality and multiculturalism, which is rooted in the current constitutional dispensation. This vision essentially ensconces the enjoyment of a plethora of "cultural" rights by a miscellaneous collective.[23] The delineation of language into the sphere of cultural rights probably results from the legislative framers' perception of the question of language as objectively inseparable from the broader questions of socio-cultural policy.[24] Thus, the issue of language rights is embodied within the Constitution, in what may aptly be referred to as the "cultural clause".[25] The Constitution also includes, inter alia, the right to use one's language of choice.[26] The recognition of language in this context essentially raises the acknowledgement of plurality to the level of "ethnic" diversity,[27] hence the characterization of language as the "quintessential symbol of ethnicity".[28] Pluralism in this sense entails the integration of a single, yet multifarious, entity into a new socio-political structure, which is required to respect and tolerate inherent differences accordingly.

In the South African context, historical necessity and, to a certain extent pragmatism, require that the issue of language use in general be approached with the utmost care and circumspection. These must be measured against due considerations of practicality and practicability, in order to attain, at best, fairness of use.

However, as will be seen below, the choice of language, especially in the official sense, is not necessarily a simple exercise.[29] Furthermore, while

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19 The Constitution, secs 30 and 31(1)(a).
20 Id, sec 30.
21 Ibid.
22 *Matomela*, above at note 8 at 342.
23 The Constitution, sec 31.
24 M Kalantzis, B Cope and D Slade *Minority Languages and Dominant Culture: Issues of Education, Assessment and Social Equity* (1989, Falmer Press) at 3.
25 The Constitution, sec 31.
26 Id, sec 30.
27 Kalantzis et al *Minority Languages*, above at note 24 at 2.
28 M Adejunmobi *Vernacular Palaver: Imaginations of the Local and Non-Native Languages in West Africa* (2004, Multilingual Matters) at 2.
29 L Wei "Dimensions of bilingualism" in L Wei (ed) *The Bilingualism Reader* (2000, Psychology Press) 3 at 12.

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pragmatism is indubitably an important, sometimes crucial, consideration in the choice of language, it is not always the most decisive, nor the best instrument of decision-making in this regard.[30] To this extent, it may be objectively surmised that official language policy regarding official discourse remains, even in the post-apartheid constitutional dispensation, relatively unreformed.

THE USE OF LANGUAGE IN THE COURTS

Under the Constitution, South African courts function in terms of national legislation.[31] This implies that the rules and procedures applicable in court must be provided for by national legislation.[32] National legislation governing court practice in both the high and lower courts regulates the use of language in the courts, albeit only to a limited extent. The Uniform Rules of the High Court (Uniform Rules) provide that, "[w]here evidence in any proceedings is given in any language with which the court or a party or his representative is not sufficiently conversant, such evidence shall be interpreted by a competent interpreter".[33]

Under the Magistrates' Courts Act:

> "If, in a criminal case, evidence is given in a language with which the accused is not in the opinion of the court sufficiently conversant, a competent interpreter shall be called by the court in order to translate such evidence into a language with which the accused professes or appears to the court to be sufficiently conversant, irrespective of whether the language in which the evidence is given, is one of the official languages or whether the representative of the accused is conversant with the language used in the evidence or not."[34]

In addition, this act accommodates the use of "either of the languages" during court proceedings.[35] The provision is still couched in terms of the original position, which recognized the existence of only two official languages. The author submits, however, that such implication and connotation is easily overcome by a teleological mode of interpretation, which essentially entails a more extensive approach. The latter fundamentally takes into account in its assessment all other surrounding legislation and circumstances. To this extent the provision must be read to include all the official languages of the day.[36]

The provisions of the Magistrates' Courts Act apparently apply specifically to court proceedings only, whereas the Uniform Rules refer to tribunal

30 Ibid.
31 Ibid.
32 The Constitution, sec 171.
33 Uniform Rules of the High Court 1965, rule 61(1).
34 Magistrates' Courts Act 32 of 1944, sec 6(2).
35 Id, sec 6(1).
36 DE Van Loggerenberg *The Civil Practice of the Magistrates' Courts in South Africa: Vol I* (10th ed, 2012, Juta) sec 6.

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proceedings in general.[37] In the case of criminal proceedings, the Constitution recognizes the right of an accused person to be "tried in a language which he understands".[38]

The use of language, even in ordinary discourse, is often a source of controversy and rancour, particularly when viewed from a historical context that is characterized by deep political, social and cultural fissures, as is the case in point. The harmonization of language policy is, therefore, a crucial element in the bridging of the resultant schisms.

The emotional sensitivities that underlie the use, and by extension choice, of language, as well as the consequences of an unclear language policy were outlined succinctly in *Matemane v Magistrate, Alberton* (*Matemane*), a pre-constitutional judgment, where Heher J stated that, "[t]he power, if it exists, to direct the choice of language used in the courts touches sensitive chords. Unless there is clarity as to the rights and duties of litigants, of accused persons, legal practitioners (including prosecutors) and judicial officers, the image of the judicial process in the public perception can only suffer harm".[39]

The preamble of the Constitution expresses in broad terms the aspiration to provide an inclusive milieu in which a populace that is "united in … diversity" hopes to "heal the divisions of the past". To this extent, a "recogni[tion of] the injustices of our past" substantially envisages transition towards an approach to language policy that is acutely cognisant of past practices, and is informed by the desire to advance to a more egalitarian arrangement. This is the most obvious pointer yet of language's pivotal position in the construction of a pluralistic framework, which intrinsically yearns for inclusivity against the backdrop of a fractured edifice.

The Constitution's vision of harmonizing language may be viewed from two perspectives. It is characterized, on the one hand, as an attempt to "to unify and homogenise life, yet also to throw together and tolerate diversity".[40] On the other hand, the question of language use cannot be separated from aspects of politics, power, domination and ideology.[41] These are crucial, if not decisive, determinants, which in some respects touch on broader questions of socio-cultural policy.[42]

It may be argued in this respect that the Constitution's explicit recognition of cultural diversity[43] serves as a bulwark against linguistic or cultural

37 Therefore, the court's submission in *Chweu*, above at note 8 at 53, that the Constitution does not make explicit provision for the use of languages in labour tribunals, is incorrect in the context of the Constitution of the Republic of South Africa Act 200 of 1993 (Interim Constitution), under which the case was decided.

38 The Constitution, sec 35(3)(k).

39 1991 (4) SA 613 (W) at 619.

40 Kalantzis et al *Minority Languages*, above at note 24 at 10.

41 Id at 8. F Ndhlovu *The Politics of Language and Nation Building in Zimbabwe* (2009, Peter Lang) at 35.

42 Kalantzis et al, id at 3.

43 The Constitution, sec 31.

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domination, whether perceived or otherwise. Hence, at a political level language is recognized as a "formal statement of equality".[44]

In the same vein, while the Constitution expresses the recognition of language in terms of equity and parity of esteem, the mantra per se is not as clear and compelling as the principle of equality itself.[45] In other words, it merely implies a non-binding obligation on the part of the state to treat all languages equally.[46]

The concept of plurality in modern society is not as easily explained as it is currently expressed in constitutional creed. Although it represents, in principle, the ideal of parity, it does not always necessarily represent "a diversity of equals"[47] in the greater scheme of things. Competing for primacy of place, especially in official discourse, is almost always inevitable in a multilingual environment that aims to harmonize and unify disparate sociocultural aspirations.

We approaches the issue of parity by using the concepts of complementarity, displacement and equivalence: "[l]inguistic equivalence refers to a situation where one language is claimed to be on par with another. Linguistic displacement refers to a competitive situation where the presence of one language is seen to lead to the elimination of another. Finally, linguistic complementarity is where various languages are treated as serving different and non-overlapping functions so that there is no competition between them".[48]

Hence, cognisance has to be taken of the notion that, where a language is retained under competitive conditions, the potential for the maintenance of ethnocentric attitudes and objectives cannot be discounted.[49] Here, the author submits, lies the Constitution's Achilles' Heel, when addressing the question of language use in general and the equality of language use in particular.

The endoglossic language policy adopted in South Africa somehow supinely exhibits all of Wee's delineations. However, while linguistic parity is an undisputed article of faith that is arduously championed by the Constitution, it is only fair and pragmatic to accept that the mere assertion of equivalence may not always equate to parallelism, nor is it sufficient to achieve equity.[50] Thus, raising the status of a language is not necessarily analogous to its advancement.[51]

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44 Kalantzis et al *Minority Languages*, above at note 24 at 10.
45 Strydom and Pretorius "On the directives", above at note 7 at 106.
46 Ibid.
47 Kalantzis et al *Minority Languages*, above at note 24 at 8.
48 L Wee "Prescribing pastoral and pragmatic orientations: Challenges for language policy" in C Percy and MC Davidson (eds) *The Languages of Nation: Attitudes and Norms* (2012, Multilingual Matters) 63 at 68.
49 JO Hertzler *A Sociology of Language* (1965, Random House) at 251.
50 Strydom and Pretorius "On the directives", above at note 7 at 106.
51 Id at 108.

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The question of linguistic displacement is, however, more potent and real in the present context and circumstances. Giving equal recognition to previously disadvantaged languages has inadvertently ensured that native South African languages,[52] which were perennially and automatically imbued with a quality of "essentialised-inferiority",[53] continue to struggle for recognition and survival, despite express textual affirmation in the Constitution.

While Afrikaans is subjectively viewed in some quarters as an "instrument of apartheid and oppression",[54] the English language somehow escapes any pejorative labelling, despite its own controversial history as a vehicle for the hegemonic and acculturation purposes of successive English governments during the colonial era.[55] Instead, it inexplicably assumes a liberatory and somewhat virtuous aura, no less because of its wide use among anti-apartheid activists.[56] Consequently, the acceptance and use of English is almost unassailable as the "political" language of choice.[57] This has prompted rumblings about the "de facto hegemony of English" at the expense of the other official languages.[58]

Needless to say, these suppositions are not entirely far-fetched. The implementation of a single language policy, which would enthrone English as the primary medium for official discourse, would carry two potentially negative and unpalatable consequences. At a subjective and specific level, it would signal the diminution of Afrikaans from its pedestal as an official language, which hitherto had enjoyed pride of place alongside English. More generally, confirmation of all the other official languages as facilitatory tools of official communication would become a fait accompli. This, of course, is premised on supposedly pragmatic considerations, which portray the English language as a benevolently universal, and therefore accessible, vehicle of communication accepted by all.

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52 For the purposes of this discussion, the author decided to adopt the term "native South African language". This differentiates "native" languages as traditionally spoken by black Africans, from Afrikaans. The latter is arguably native to South Africa, despite its Dutch origins. The author submits that the descriptions in this article are not necessarily technically accurate; they are, at best, an artificial description of aspects that are not meant for the present discussion.

53 D Kapoor and E Shizha (ed) *Indigenous Knowledge and Learning in Asia / Pacific and Africa: Perspectives on Development, Education, and Culture* (2010, Palgrave Macmillan) at 5.

54 NE Nxumalo "The status and role of minority African languages in South Africa's new and democratic language policy" (unpublished doctoral thesis, University of Limpopo, 2000) at 122. It is a somewhat unfortunate characterization when it is considered that the opposition was intrinsically "political" rather than "cultural". The absence of "ill-feeling" against Afrikaans (at 122) and its use and infusion into the wider matrix of South African languages is further testimony to its importance in the discourse of language policy.

55 Id at 86–98.

56 Strydom and Pretorius "On the directives", above at note 7 at 108.

57 Ibid.

58 Id at 104.

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The essence of the content of the Constitution and ancillary legislation strongly implies the retention of the contingent of official languages for different functions and purposes. While the functions of traditionally marginalized languages are, to a large extent, recognized merely at a "cultural" level, English (and Afrikaans, to a lesser extent, until relatively recently) is preponderantly utilized for intellectual and technical purposes. Hence, its acceptance, status and recognition as the indisputable symbol of intellectual authority.

The practice (of elevating English) is fundamentally premised on the lack of standardization of indigenous languages, coupled with the absence from these languages of expressive technical vocabulary.[59] These are perennial arguments that apparently define the internal contradictions of the previously marginalized native languages and ultimately serve as a convenient alibi for their non-advancement.

However, South Africa is not unique in this regard. In many parts of the world, English enjoys association with prestige and economic power.[60] In some instances English, although not an official language, serves as an "inter-ethnic lingua franca", which has pragmatic rather than cultural value.[61] Such endowments are not lost in the South African context and apply, the author submits, with equal measure.

In the recent past the use and recognition of only two official languages presented minimal challenges in practice in the context of tribunal proceedings. National legislation, as already noted, provided for the accommodation of native South African languages in the context of tribunal proceedings, with the aid and facilitation of translation Thus, in the vast majority of cases, it was (and still is) native languages (namely, Sepedi, Sesotho, Setswana, isi-Swati, Tshivenda, Xitsonga, isi-Ndebele, isi-Xhosa and isi-Zulu) that required translation into either English or Afrikaans in court settings. Thus, native South African languages provided, in the instance of tribunals, only a facilitatory role, which neither overlapped nor competed with the principal languages of record, either for supremacy or parity. This situation has remained virtually the same, despite their current official status, which catapulted these languages from relative obscurity onto a supposedly level playing field.

Given practical and pragmatic considerations, the use of a single official language is most desirable.[62] In most instances it is undoubtedly the most practical option.[63] The application of a single language policy is particularly satisfactory in circumstances where all the participants in a hearing are proficient in the language of record. The most apparent and obvious advantage in

59 J Nhlapo *Bantu Babel: Will the Bantu Languages Live?* (1944, African Bookman) at 5.
60 L Wee "Prescribing pastoral", above at note 48 at 69.
61 Id at 73.
62 *Damoyi*, above at note 8, para 11; *Matomela*, above at note 8 at 342.
63 Ibid.

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this regard is the symmetrical and uninterrupted relaying of information between participants in the legal proceeding.

While the logic of a single language policy is only too self-evident, its utilitarian logic cannot be regarded as the only solution to uninterrupted tribunal discourse. Ordinarily, the previous dual language policy sometimes delivered unhindered procedural interaction, which in turn resulted in the speedy resolution of disputes. However, the arrangement was not without its own flaws, spawned by unexpected technical glitches.[64]

The question of language use in official discourse underwent limited, yet decisive, metamorphosis from the advent of South Africa's Interim Constitution[65] to the present day. An evaluation of the provisions that relate to language, more specifically its use in general and official discourse, reveals a perilous struggle to arrive at a lasting, workable and generally acceptable solution. In the final analysis, it is important to discuss the Interim Constitution, in order to provide context to the supposed lacunae in the Constitution itself.

A BRIEF EXEGESIS OF THE DEVELOPMENT OF LANGUAGE POLICY IN THE CONSTITUTIONAL ERA

The Interim Constitution contained important provisions regarding the use of language, which, the author submits, did not necessarily crystallize into the provisions of the final Constitution. This state of affairs left intractable lacunae in the final dispensation, which, in some instances, entrenched rather than resolved the schisms that existed in official language use and discourse.

On the question of the practical use of languages, the Interim Constitution was more direct and expansive. Accordingly, a person had the right, not only to "use", but also to be "addressed" in the "language of his or [her] choice" at the national[66] and provincial[67] level of government.[68] This arrangement was, however, restricted to the 11 recognized official languages.[69]

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64 In *Geidel v Bosman* 1963 (4) SA 253 (T) the charges had been drawn and put to the accused in English, his first language. He pleaded in the same language. The evidence of the two state witnesses was presented in Afrikaans, whereupon they were cross-examined by the accused's attorney in the same language. The attorney then applied for the discharge of the accused and the case was postponed. All the proceedings up until then were conducted in Afrikaans. On resumption, the prosecutor opposed the application for discharge. He stated that he would argue in English for the benefit of the accused. Thereafter all argument, including the attorney's reply, was in English. The accused was subsequently convicted of the charges. The appeal court rejected his contention on review, that he had been unable to follow the evidence of the state witnesses, as he had not understood Afrikaans.

65 Constitution of the Republic of South Africa Act 200 of 1993.

66 Id, sec 3(3).

67 Id, sec 3(6).

68 Id, sec 3.

69 Ibid.

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The reason for this provision being abandoned in the final dispensation is somewhat self-evident. Its transfer into a court setting would essentially entail, by one interpretation, the right to have evidence translated into one's own language and, by another, the right to demand proceedings themselves in one's own language. While the argument on the latter point might sound fractious and impractical for the most part, a closer assessment of the court's analysis in *S v Pienaar* (*Pienaar*)[70] reveals an argument in favour of that approach.

The absence of a level playing-field is discernible from the couching of the provision that relates specifically to the use of language in court. Under the constitutional Bill of Rights: "[e]very 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 in that language".[71]

The wording and implications in the corresponding interim provision are similar, save for the phrase "failing this, to have the proceedings interpreted to him or her",[72] in place of the words "if that is not practicable, to have the proceedings interpreted in that language" in the new provision. The author submits that this implies divergent connotations to the provision as a whole. While the two provisions appear, at first sight, to denote the same purpose, meaning and consequence, this is not necessarily the case.

The interim provision had vastly more expansive allusions, which fundamentally implied wider application of the provision. The Constitutional Assembly's apparent intention in this regard, as implied by the provision, appears unequivocally to have been for the provision to be activated upon the "failure" to try the accused in the language most accessible to him or her. Consequently, the proceedings would have had to be conducted in any other language, just as long as they could be translated for the accused. The provision had a further significant implication. The translation had to be in a language that the accused understood fully, and not only partially.[73]

Crucially, however, while the interim provision centred on the "interpretation of the proceedings", the final provision is essentially premised on the "interpretation of the language" of choice of the defendant. This crucial difference came starkly to the fore in *Mthethwa v De Bruin*,[74] where the court, in interpreting section 35(3)(k) of the Constitution, concluded that the provision

70 2000 (7) BCLR 800 (NC).

71 The Constitution, sec 35(3)(k) (emphasis added).

72 The Interim Constitution, sec 25(3)(i).

73 *S v Ngubane* 1995 (1) BCLR 121 (T) at 122.

74 1998 (3) BCLR 336 (N). In this case the defendant, when arraigned in the regional court, requested that the trial be conducted in isi-Zulu, which is one of the official languages under sec 6(1) of the Constitution. The regional magistrate directed the trial to proceed in either English or Afrikaans. The defendant approached the High Court seeking a review and reversal of the magistrate's order to refuse the trial to be conducted in isi-Zulu as unlawful and unconstitutional. It also transpired that the defendant, a teacher by profession, "understood English", and yet preferred the use of isi-Zulu as

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does not accord an accused person the right to have their trial conducted in a language of his or her choice.[75] The import of the provision merely confers the right to be tried in a language that he or she understands.[76] The court maintained, in this regard, that the unfairness of any discrimination complained against regarding the choice of language had to be judged on the basis of practical considerations,[77] being the feasibility or otherwise of conducting the trial in the language envisaged. The position regarding the translation of proceedings is apparently further supported by the Magistrates' Courts Act, which envisages the recording of evidence in the official language that was used.[78] Thus the proceedings would have to be conducted in the accused's language of choice. In other words, the court would have had to be conversant with the language preferred by the accused. The author submits that, at an elementary and simplistic level, the policy envisaged by section 35(3)(k) essentially implies the prerogative to be able to follow proceedings in a language "preferred" by the litigant. For practical and pragmatic reasons, the preferred language is often the litigant's or witness's first language.[79] Thus, in the context of the current Constitution, which guarantees the parity of status of the official recognized languages, it is somewhat anomalous to require a party to establish the veracity of their claim to be unable to use one or other language instead of the one that is "generally used or preferred".[80]

"Interpretation of the proceedings" would, therefore entail translation from a language not understood by the court and the accused into the language of record, as it were. The author submits that the analysis in *Pienaar*[81] on this aspect accords with this line of reasoning. According to this approach, the

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contd
the language of record. According to the defendant's contention, the interpreter would only be employed in the case of non-isi-Zulu speaking witnesses.

75 Id at 338.

76 Ibid.

77 Id at 337.

78 Magistrates' Courts Act, sec 6(1).

79 *Mthethwa v De Bruin*, above at note 74; *Marais v Mdowen*, above at note 6.

80 In *Marais v Mdowen*, id, the defendants admitted service of the summons, but contended that they had not understood its contents, as it was drawn up in only one of the official languages, namely English. It is surmised, in the absence of any indication to the contrary, that the defendants were apparently of an Afrikaans-speaking background. The court held that the veracity of any claim of the inability to understand an official language had first to be determined on the basis of an inquiry by the court before any ruling could be made on the re-opening of the case. The onus lay with the defendants to prove that they could not understand English. They would have to undergo cross-examination on that point.

81 Above at note 70. The case in point was a criminal review. From the facts, it appeared that an Afrikaans-speaking accused, who desired to exercise the right to have legal representation, was duly provided, at state expense, with an attorney from the Legal Aid Board. The attorney spoke English, but could not speak any Afrikaans. At the commencement of the trial the attorney sought and was granted leave to withdraw as the accused's legal representative, because of the language barrier. The accused then

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most rational course of action is to proceed in a language that is not only practicable in the circumstances, but also suitable for all the participants involved in the process. When taken to its logical conclusion, this exegesis renders the courts' submissions in *Matomela* and *Damoyi* moot and ineffectual.

What also seems to be a linguistic discrepancy in section 35(3)(k) is the phrase, "interpreted *in* that language" (emphasis added). While the most sensible implication of this is for one language to be translated *into* another, the phraseology seems to suggest a different meaning altogether. Interpretation "in" the language in question somehow implies confusion regarding the language to which reference is being made. The wording somewhat creates the unseemly and improbable implication of translation *into* the same language that is being referred to in the first place.

The author submits in this regard that the connotation that is conveyed by the wording seems more in harmony with the Constitutional Assembly's apparent intention in the Interim Constitution, namely to have the proceedings, rather than the language, translated. However, the intention of the provision can only make sense if it implies translation "into" a language other than the one referred to in the first place.

The interim provisions also provided for the prohibition of the use of language for the purpose of exploitation, domination and division.[82] In addition, the provision relating to languages left no doubt as to the promotion of multilingualism. To this extent, the aspiration for this was expressly catered for.[83] Clearly, these provisions were aimed at fostering sensitivity, respect and appreciation among all persons and their respective languages of choice.[84] Hence, the author submits in the context of section 3(9)(c) of the Interim Constitution that the elevation of one or more language at the expense of others implicitly insinuates the prevention of "domination" of one language by another. Consequently, the inclusion of an equivalent provision in the Constitution itself would have made it almost impossible to avoid such a conclusion. Hence, the promotion of a single language policy that advocates the

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indicated that he would dispense with the attorney's services and conduct his own defence. The matter proceeded and the accused was convicted and sentenced. The court held, in the final analysis that, in the circumstances of the case, the predominance of Afrikaans in the Northern Cape had, in effect, necessitated the "practicability" of conducting the trial in Afrikaans. The accused's right to a fair trial essentially included the right to be tried in Afrikaans. Thus, the accused had not received the fair trial to which he was entitled. The right to a fair trial also included the right to be provided with representation by a legal practitioner who could communicate with the accused in the accused's own language of choice, either directly or through the medium of an interpreter. The magistrate's failure to explain these rights properly to the accused therefore constituted a denial of the accused's right to legal representation. The result was the denial of a fair trial, and the conviction and sentence were set aside.

82 The Interim Constitution, sec 3(9)(c).

83 Id, sec 3(9)(d).

84 *Chweu*, above at note 8 at 57.

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elevation of one language above the rest, is arguably rendered unworkable under such arrangement.

Lastly, both the interim[85] and final[86] provisions essentially recognized the phenomenon of regional differentiation in the application of language policy. The author submits that this approach is, in essence, a double-edged sword, which fosters the spirit of plurality and multilingualism, while at the same time entrenching a divisive provincialism, based on language and (to an extent) exclusionary ethno-centricity.

While the rationale behind the delineation is somewhat understandable, given the spread of usage that was spawned by exclusionary segregation, the policy nonetheless inadvertently perpetuates separatist exclusion, which had come to characterize grand apartheid at its zenith.

THE RIGHT TO USE ONE'S LANGUAGE OF CHOICE: COURTS AT THE CROSS-ROADS

The cases of *Matomela*, *Pienaar* and *Damoyi* represent a peculiar situation in which the question of language use in court fell to be considered.[87] The author submits that most of the findings of the courts in these cases raised further questions, rather than providing much-needed solutions to the most pressing issues surrounding language usage in the courts.

In *Matomela*, the court observed and lamented the absence of national legislation, as mandated by section 171 of the Constitution, which governs the use of language in court.[88] According to the court, this unsatisfactory state of affairs necessitated the implementation of legislation that would foster the translation of court proceedings, subject to the Constitution.[89]

In its analysis of the legislative landscape, the court glaringly omitted any mention of the Magistrates' Courts Act and the Uniform Rules as current and applicable national legislation regulating the use of language in court proceedings. In the past, the legislation in question had patently been meant to facilitate the flow of information in court proceedings, and in tribunals in

85 Interim Constitution, sec 3(4).

86 The Constitution, sec 6(3)(a).

87 The facts in *Matomela* and *Damoyi* are strikingly similar. In both instances, the proceedings had been conducted and recorded in isi-Xhosa, the mother tongue of the presiding officer and all the parties involved in the case. It appeared that no interpreter was available on the day of the trial. Rather than postpone the matter, a decision was taken to conduct the trial in isi-Xhosa. The trial courts in both cases had considered this course to be justified by circumstances of necessity. Furthermore, it was argued that the action had, in any event, been in accordance with the spirit of the provisions of sections 6 and 35(3)(k) of the Constitution. In both cases, the court on review considered the reasons given for adopting the course of conducting the proceedings in isi-Xhosa to be cogent, and the convictions and sentences were confirmed.

88 Above at note 8 at 342.

89 Ibid.

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general, in circumstances where litigation could be impeded by a lack of proficiency in either of the two recognized official languages at the time.

In the past, the facilitation implied that the language of record in any court proceedings would be either English or Afrikaans, regardless of the language spoken by any of the parties involved in the proceedings. Subsequently, the use, in procedural discourse, of one of the two official languages, even by presiding officers who were fluent in a native South African language, became a normalized and standard practice. Consequently, communication, even with fellow native language speakers in the language of record, became the norm, even in circumstances where all the parties could, and indeed would have been able to, communicate in the same native language.[90]

The promulgation of the provisions of the Uniform Rules and the Magistrates' Courts Act probably did not envisage the current status quo, where over-arching inclusivity is the source of the current conundrum. In principle and in practice, the legislation served essentially as a facilitatory tool to the existing procedural edifice of the time. It was, to a large extent, tailored to deal with potential procedural log-jams that could be occasioned by the (inadequate) flow of information resulting from misconceptions of language between participants. Probably the most potent and obvious criticism of the legislation concerned its role in the relegation and entrenchment of native South African languages to third class status, as informed by the socio-cultural-political order of the day. However, its efficacy as the guarantor, at the very least, of a modicum of procedural fairness to every witness can hardly be underestimated.[91]

To this extent, the author submits that the existing legislation still serves the same purpose as in the pre-constitutional era. Therefore, in the absence of any other prevailing legislation, the Uniform Rules and the Magistrates' Courts Act provide the most viable guide to the approach to language use within the ambit of the Constitution.

In principle, the current constitutional provisions regarding the use and recognition of languages are fundamentally broad. Consequently, they are open to various interpretational perspectives, which are inadvertently calculated to serve, in some instances, narrow and insular interests. Thus, the author submits that relevant provisions of the Uniform Rules and the Magistrates' Courts Act remain, in essence, the only legislative point of departure from

90 In *S v Moloi* [2006] JOL 16617 (O), para 32, the court held that, in practice, the use of an interpreter is superfluous where the magistrate is fluent in the language of the accused. In this case, the magistrate had employed the services of an interpreter when he could easily have dispensed with them. In the circumstances, the use of translation was attributed to practical matters, probably relating to the fact that the standard forms used were only available in English or Afrikaans, the official languages at the time.

91 There is, of course, something to be said about the standardization and contextualization of the received message, as well as power relations relating to the hierarchical status of languages and the relaying of messages. That, however, does not fall within the purview of this article.

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which to regulate the use of language in the courts. To this end, the relevant constitutional provisions that relate to language use may be advanced by a teleological mode of interpretation, which would, in essence, require an extensive approach. Such an approach would, in effect, make sense of the provisions of the Magistrates' Courts Act and Uniform Rules within the current constitutional dispensation.

Inconsistency and ambiguity are also to be found in the court's interpretation of section 35(3)(k) in *Matomela*. While on the one hand conceding the undisputed status of isi-Xhosa as an official language worthy of consideration and recognition, the court considers it implicitly undesirable for cases to be conducted in this language in future.[92] This argument is proffered despite the unavoidable events and circumstances that had culminated in the resultant consequences.

The same sentiment was expressed in *Damoyi*,[93] where the court concluded that section 6 of the Magistrates' Courts Act had been superseded by section 6 of the Constitution. Accordingly, reliance on the provisions of section 6 of the Magistrates' Courts Act (which supported the premise that the accused had a right to be tried in the Afrikaans language in this instance) did not conform with the provisions of section 6 of the Constitution.[94] In *Matomela*, the court also seemed oblivious to the fact that the trial court had not experienced any practical or logistical problems (other than, of course the obvious lack of a qualified interpreter) during the trial proceedings, which could have rendered the continuation of the trial virtually impossible.[95] This, the author further submits, would have been in keeping with the letter and the spirit of the Constitution, which is essentially based on promoting diversity and polylingualism. Instead, the court took into consideration potential post facto hypothetical challenges that are bound to arise from the monolingual use of a native South African language in an entire court proceeding.[96] To this end the court pointed out the "enormous costs" that could be incurred from the translation of evidence in cases that are presented for appeal and review after being heard originally in a language other than English.[97] Such eventuality is further characterized by the court as "inconvenient and time-consuming".[98]

In its summing up, the court considered that the situation would have been rendered "untenable" if the accused's legal representative had not been proficient in isi-Xhosa.[99] Accordingly, this conundrum is likely to be further amplified where a case comes before an appellate or review court, where the

92 Above at note 8 at 342.
93 Above at note 8, para 17.
94 Ibid.
95 Above at note 8 at 342.
96 Ibid.
97 Ibid.
98 Ibid.
99 Id at 341.

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language proficiency is other than the native South African language used in the original proceedings.[100] In essence, the court's conclusion in this regard ignored the provision of the Magistrates' Courts Act requiring the proceedings to be "recorded in the language so used".[101]

The author submits that this factor alone should have been adequate to alert and inform the court as to the viability, feasibility and desirability of conducting proceedings in any other official language, whenever the circumstances allowed, or even dictated. The court, however, held the view that challenges regarding the use of language in court could only be addressed by the adoption of a single language of record, "which can be understood by all court officials irrespective of mother tongue".[102]

Notably, the court proffered the point of a single language policy without necessarily committing itself to a recommendation on the language of choice to be adopted in the circumstances. However, implicit in the court's reasoning is the suggestion of the use of a common language of record other than any of the native South African languages. The subtle and subliminal undercurrent of the argument in favour a single language "understood by all" obfuscates the court's intention, which, the author submits, is the entrenchment of (at the very least) English, as the official language of record.

In the same vein, the use and understanding of a single language for communication in court was not always possible, even in the context of the original dual official language policy. This is obviated by the fact that, while potentially attractive, the understanding of a particular language by a sizable population of speakers does not necessarily equate to proficiency. This principle was articulated by Heher AJ in *Matemane*:

> "If a legal practitioner has any doubt about his competence in the use of one of the official languages, he owes a duty to his client to conduct the case in that official language in which he is the more competent. This also applies to a prosecutor, who has a responsibility to the state and the court to present his case as clearly and effectively as he is able. A party, including for this purpose an accused person, or a witness, has the right to use a language of his choice whether it be an official language or not."[103]

While this statement was made against the background of the use of language by a legal representative in the context of the previous dual official language arrangement, the author submits that it purveys the same message in the context of the general use of language in court. The potency of the comments is accentuated by the backdrop of the current constitutional milieu, in which

100 Id at 342.
101 Magistrates' Courts Act, sec 6(1).
102 *Matomela*, above at note 8 at 342.
103 Above at note 39 at 619.

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language rights are not only confined to legislative enactment, but have also acquired basic constitutional protection.

Basically, all native language speaking law practitioners in South Africa generally undergo their legal studies, and indeed legal training, in the English language. This is despite the fact that most of them are to some extent pluri-lingual.[104] On the other hand, Afrikaans is still firmly entrenched as a language of record and is still the preferred medium of record of some witnesses and practitioners.[105] In the same vein, whereas under the pre-constitutional dispensation presiding officers were "presumed to know the two official languages of the country",[106] the same cannot realistically be expected in the present context.

The court in *Damoyi* agreed in principle with the position in *Matomela* on the desirability of a single language policy for the courts. However, in this instance, the court was more candid in its anointment of English as the preferred official language of choice, best suited to relieve the stalemate. Its use in "international transactions" and "predominance in international politics, commerce and industry" naturally marked, fortified and consecrated English as the premium medium of discourse for South African courts.[107]

In *Pienaar* the preferred use of former official languages was contextualized as falling within the realm of "purely practical considerations", despite the legislators' obvious desire to promote the use of native South African languages.[108] The exclusive use of Afrikaans and English was justified as a temporary measure that, through evolution, would probably see the two

104 On the African continent, language use for persons of indigenous origin follows an almost identical pattern. The author submits that this reflects, to a large extent, the South African landscape. H Batibo *Language Decline and Death in Africa: Causes, Consequences and Challenges* (2005, Multilingual Matters) enunciates (at 17) a so called triglossic structure model that sketches the language vista: "Usually, at the top we find an ex-colonial language (English, French or Portuguese) holding official status and used as the language of higher education (in some cases the entire educational system), science and technology and official government business. Such a language tends to monopolize all the secondary or high-level domains and is therefore the most prestigious. Then at the middle level we find a major indigenous language serving as a lingua franca. Such a language would normally be demographically dominant and socio-economically prestigious. Last, at the lowest level we find a minority language, which normally has few speakers and is socio-economically marginalised." However, this situation does not necessarily reflect the status quo in South Africa. Nevertheless, there are sufficient similarities, with a few divergences. First, pluri-lingualism in this context denotes, in some instances, the "knowledge" and "use" of at least three indigenous languages. Secondly, the use of Afrikaans (the status of Afrikaans as a language "indigenous" to Africa is somewhat debatable) is not only confined to non-indigenous language speakers, but is used and spoken, as a former official language, by indigenous language speakers as well.

105 *Pienaar*, above note 70, para 14.

106 *Ex parte Paraskevopoulos* 1947 (1) SA 229 (O) at 231.

107 Above at note 8, para 18.

108 Above at note 70, para 28.

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languages being "supplemented" by the use of native languages.[109] This would hopefully culminate in the "equitable" use of all official languages, irrespective of regional affiliation.[110] Nevertheless, reasons justifying the retention of a dual language policy were explained as follows: the first factor to be considered is the tedious and long-winded nature of translated evidence,[111] the inevitable consequence of which is the lengthening of court proceedings.[112] The latter has potentially prohibitive cost implications, including seriously negative consequences for the general infrastructure of the courts, and the speedy and timeous finalization of cases.[113] Secondly, the court attacked the quality of translated evidence as unreliable and generally "second-best".[114] Accordingly, the quality control of such evidence is only feasible in circumstances where the court is conversant with the language from which the evidence is being translated.[115]

It is, however, worth noting at this point that, while communicative efficiency is desirable, it is not by any means the only decisive factor in the debate surrounding the efficacy of employing interpretation: "[t]he overriding consideration in cases where an accused does not speak or understand the language used by the court is to ensure that injustice is not done, even where this causes inconvenience or takes up additional time".[116] In addition, "[p]ractical considerations cannot be put on the same level as the constitutional commitment to the promotion of language equity diversity and development. Therefore, no body of state may approach section 6 with the sole motive of finding loopholes in it, simply to justify its lack of commitment to multilingualism".[117]

The view of the court in *Pienaar*, especially on the question of the quality of evidence that is assessed by courts, implies the subliminal and uncomfortable suggestion that the quality of evidence that is generally assessed by courts in the majority of cases where translation is relied upon to relay information, tends to be of dubious quality. Consequently, such evidence is inadequate at best, and unreliable at worst. Fundamentally, the acceptance of such evidence has the unpalatable potential to produce iniquitous and unjust results and consequences. This is evidently worrisome, especially considering that adjudication in South African courts generally takes place over translated evidence.

The court's argument in this regard is further rationalized by the phenomenon of the steady increase in native language speaking presiding officers on the bench, whose home languages are invariably one or other of the official

109 Ibid.
110 Ibid.
111 Id, para 18. See also *Matomela*, above at note 8 at 340 and *Damoyi*, above at note 8, para 1, in this regard.
112 *Pienaar*, above at note 70, para 18.
113 Ibid.
114 Id, para 20.
115 Ibid.
116 *Tran v The Queen* [1995] 23 CRR 2 (d) 32 at 45.
117 Strydom and Pretorius "On the directives", above at note 7 at 114.

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(native South African) languages.[118] This development is positive, according to the court, because of its potential for diversifying the adjudication process.[119] In other words, the fact that more and more presiding officers are conversant with, or are native speakers of, the newly inserted official languages is likely to accelerate the use of these languages in court. However, *Matomela* and *Damoyi* prove that such a notion is most unfavourable, presumably among the interpreters whose direct interests and proficiency the practice is supposed to serve.

Inevitably, the necessary condition for the ability to discern, and consequently assess and where necessary correct, inconsistencies in the translation of the interpreted language, lies principally in the ability to understand the source language accurately.[120]

However, the knowledge of a native South African language by a presiding officer who is native to the country cannot be generally presumed. Neither is knowledge of the language of one's original ethnic group to be assumed from obvious features of identification, such as name or geographical origin. Thus, it is not uncommon for a person belonging to a specific ethnic group not to be conversant in the language of his or her supposed origins.[121] Hence, the problem for the presiding officer cannot necessarily be remedied by incisive knowledge and understanding of the language in question, but by means of other quality control measures that are relatively independent of the presiding officer.[122]

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118 *Pienaar*, above at note 70, para 34. See also *Matomela*, above at note 8 at 342.

119 *Pienaar*, ibid.

120 *Ex v Makubesi* 1952 (2) SA 75 (T) at 78. The proper understanding of a language can be a somewhat testing endeavour, which requires circumspection in approach, as evidenced in *S v Mpopo* 1978 (2) SA 424 (A), where the presiding officer in the trial court believed that he had the measure of the language in question, such that he was qualified to draw certain decisive conclusions regarding a witness's evidence. The following findings were made on the demeanour of the accused in the course of the court's initial judgment, where the appellant was convicted of murder: "His evidence in the witness-box and his demeanour have been completely unsatisfactory. One of my assessors is a fluent Xhosa linguist, I myself understand the language sufficiently to follow the evidence and to form some impression of his demeanour and we are both satisfied that his demeanour was that of a lying witness." However, upon being alerted to a glaring discrepancy in his perceived understanding of the source language, he commented as follows in his judgment when granting leave to appeal: "After the trial the Attorney-General drew my attention in Chambers to the fact that the references to being a Xhosa linguist, the assessor being a fluent Xhosa linguist and my understanding the language were inappropriate as the accused had given his evidence in Sotho. I confirmed this with the interpreter as I was somewhat puzzled because during the trial when the accused gave evidence, I had found myself able to follow the gist of his evidence. It may well be that this is due to the fact that the accused comes from the district which borders on an area occupied by the Hlubi tribe who are Xhosa-speaking and to some extent the Hlubi influence may have crept in. Be that as it may, I was under the impression that he had spoken Xhosa and I was apparently wrong in that impression, in so far as demeanour was judged by his use of language."

121 Nxumalo "The status and role", above at note 54 at 110.

122 GJ Steele "Court interpreters in Canadian criminal law" (1991–92) 34 *Criminal Law*

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These aspects regarding the desirability and feasibility of a single language policy are, admittedly, not entirely without merit. However, the submission regarding the prolonged nature of court proceedings, the quality of the relayed information and the attendant expense, while reasonable, conveniently ignores the prevailing state of affairs in the courts, in particular that evidence in the majority of criminal cases in South African courts, is still translated into the language of record, which is usually Afrikaans or English. This is despite the recurrent debates on language use and policy in the courts. The principle applies equally to accused persons and to witnesses, as well as to all other participants in the proceedings.

The same principle applies to the submission that translation for review or appeal purposes, in the case where the entire case was heard in a native language, will be rendered almost unworkable. In principle there appears on the face of it to be no impediment to the notion of the translation of transcripts from one language to another. In any case, the Uniform Rules[123] provide for translation from one language to another. Thus, a possible solution to the quandary might be to expand and adapt the current provisions to include the translation of transcripts from the lower to the higher courts for the purposes of appeal and review.

The inconvenience, delay and additional expense that accompany the translation of proceedings when cases are referred for review and appeal, is cited as a factor that ostensibly vitiates against holding an entire court proceeding in a native language.[124] This would ordinarily be the case where a presiding officer on the subsequent appeal or review tribunal is not proficient in the native language.[125] The argument, though viable on the face of it, is not supported by any empirical evidence and data, which suggests that the translation of transcripts would be impossible, or even unworkable. Instead, the court makes unsubstantiated assumptions and findings that problems are likely to occur in this regard. On the other hand, while expense and time are quantifiable considerations that should merit consideration in the general compendium of truth-seeking, they should not be allowed to determine the overall administration of justice in individual cases.

This principle was elucidated by the Supreme Court of Canada in *Tran v The Queen* as follows: "[t]he overriding consideration in cases where the accused

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contd
Quarterly 218 at 243 proposes the use of three "controls" to improve the quality of translation: (i) concurrent controls, whereby two interpreters are used at the same time in order to spot discrepancies, and then to offer suggestions for correction; the "best" translation is then adopted for record purposes; (ii) post-hearing controls, in terms of which the record of the translation is reviewed and verified by another interpreter; and (iii) pre-hearing controls, which entail retention of a one-interpreter scheme, but with improvements to the interpreter's objective qualifications.

123 Rule 60.

124 *Matomela*, above at note 8 at 340.

125 Ibid.

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does not speak or understand the language spoken by the court is to ensure that injustice is not done, even where this causes inconvenience or takes up additional time".[126]

Generally, the symmetrical flow of information in proceedings where more than one language is required for communication is a tedious and time-consuming exercise.[127] This factor is obviated by the premise that the compilation of evidence is, by its very nature, usually an onerous exercise both logistically and economically. Depending on the nature, length and other variables of the individual case, the conduct of a trial may occasionally exert unbearable and immeasurable strain on the resources at the disposal of the authorities. However, the discharge of evidence cannot be dispensed with on the mere supposition of structural inadequacies, whether factual or otherwise. Instead, deficiencies of this nature can best be addressed by the implementation of other practical measures.[128] In the final analysis, the recording of evidence in this fashion is meant to ensure, despite structural deficits, that justice is not only done, but is also seen to be done.

The author submits, in this regard, that the legislature can easily solve the problem in the long term by investing more resources in the training of interpreters and translators. This exercise, while initially seeming to be expensive, ambitious and overtly simplistic, can only serve to enhance the constitutional imperatives of equality, plurality and multilingualism. Otherwise, the much-vaunted "parity of esteem" of official languages remains but a hollow promise, unlikely ever to be fulfilled.

On the other hand, the submission in *Pienaar* on the need for "practical considerations" in the approach to language policy in the courts, in the light of prevailing circumstances, is not entirely devoid of merit. However, the professed pragmatic approach would, in the final analysis, simply imply further entrenchment of the original official languages, if the issue is not tackled with courage, fortitude and determination.

In *Matomela*, constitutional language rights were unabatedly interpreted independent of any other existing language policy. The court further implied a lacuna in the law, with which the legislature is not cognisant, and that essentially nullifies the operation of sections 6(1) and 35(3)(k) of the Constitution unless a single language policy is adopted for the courts.[129] The argument is emphasized further by the assertion that, "[t]he Constitution as it presently stands entitles people of the same language group to conduct the whole case in their language only providing it is one of the official languages".[130]

126 Above at note 116 at 45.
127 The situation becomes more perilous and complicated where more than two languages are involved.
128 Steele "Court interpreters", above at note 122.
129 *Matomela*, above at note 8 at 341.
130 Ibid.

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This line of reasoning, while inherently fallacious, also ignores the existence, purport and aims of ancillary legislation on the use of languages during court proceedings. In other words, the supposed loop-hole in the Constitution is necessarily supplemented by the provisions of the Uniform Rules and the Magistrates' Courts Act which, the author submits, encompass most, if not all, of the contingent circumstances that might arise. Therefore, even in the factual circumstances of *Matomela* and *Damoyi*, a witness who is not conversant in isi-Xhosa, but is only proficient in English or any of the other official (or unofficial) languages, would still be accommodated under these provisions.

Even in the context of the original dual language policy, it had clearly never been the legislators' intention to allow the presentation of evidence only in a single language. Multilingualism being a fact of life, and socio-culturally a reality even then, obviously dictated an accommodation of sorts for the marginalized languages. Such an approach would not only be unreasonable in the vast majority of cases, but also impractical. The author therefore submits that a proper consideration of these provisions by the court would in fact have demonstrated consonance and convergence with the Constitution in this regard.

Under normal circumstances, the advantages of a single language policy are inexorably self-evident. In this context, however, a well-balanced and less pragmatic approach is not only required, but also demanded. Such a policy is bound to lead to conceptions (or misconceptions, depending on the perspective) that threaten the underlying constitutional democratic ethos, which is supposed to serve as a foundation for all law-making. A single language policy in the South African context cannot escape the general imputation of an "undemocratic" pursuit, which denies and undermines the country's multilinguistic demographics and pluralistic diversity.[131] The practice also possesses the inherent potential (inadvertently) to exclude rather than include other groups, which in itself implicitly carries a "destructive and disempowering effect".[132]

The cases of *Damoyi* and *Matomela* presented an exceedingly golden and unparalleled opportunity to demonstrate and test the constitutional canon of the "parity of esteem" regarding the status and use of official languages. The choice (express in the former and implicit in the latter) of English within a single language set-up, on the basis of its "international" pedigree and flavour, while apparently "pragmatic", essentially represents a colossal step backwards in the recognition of language rights, and multiculturalism in general. The irrelevance of English's pragmatism is obviated by the prevailing circumstances in the two cases, which dictated and necessitated the use of a local (official) language. Hence, the characterization in *Pienaar* by Buys J's of

131 *Chweu*, above at note 8 at 57.
132 Ibid.

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the court's arguments in this regard as "colonial and elitist" is apposite in the circumstances.[133]

The cosmopolitan nature, influence and reach of the English language can neither be ignored nor wished away. Its immersion into the fabric of South African society, politics and culture is, without doubt, firmly embedded. However, the use of English in court proceedings must, wherever applicable, be dictated not only by considerations of practicality, practicability and probity, but also considerations of constitutional imperative. In a nutshell, an overly simplistic approach to the conundrum must be avoided at all times.

The court in *Pienaar* on one hand ostensibly adopted a centrist approach, which espouses the virtues of multiculturalism and inclusivity in relation to language use, while on the other subtly advocated a *sub rosa* [clandestine] arrangement that, for "practical purposes", entrenches the old order of a dual official language policy. This is despite the court's condemnation of the apparent advancement of English at the expense of the other official languages.[134]

To this end, the court in *Pienaar* substantially argues in defence of the use of languages, ostensibly on the basis of provincialism.[135] In other words, the extent of the use of a language must be almost entirely dependent on the prevalence of its use within a particular region.[136] Hence, the preponderant use of Afrikaans in the Northern Cape as the dominant medium of discourse in everyday life weighed heavily in favour of its use in court proceedings.[137] In its re-iteration of this point, the court criticised the appointment of English speaking presiding officers and Legal Aid Board legal personnel to a province (the Northern Cape) that, according to the court, is predominantly Afrikaans-speaking.[138] This practice may potentially lead to prolonged proceedings because of the need to translate from Afrikaans to English and vice-versa.[139] It is, however, worth noting that the court's assertions in this regard are not necessarily averse to the constitutional dictates in relation to the regional delineation of language use.[140] The argument, while purportedly plausible, is not without inherent contradictions. The provincial use of language in the fashion suggested by the court must, if at all agreeable, be premised on the existence of quantifiable statistics (and, by its own admission, the court's quantitative analysis was necessarily "not a scientific sample").[141]

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133 *Pienaar*, above at note 70, para 34.
134 Id, para 26.
135 Id, paras 14–15.
136 Ibid.
137 Ibid.
138 Id, para 16.
139 Ibid.
140 The Constitution, sec 6(3).
141 *Pienaar*, above at note 70, para 14. The court estimated the percentile use of language in the Northern Cape to be: Afrikaans 72%, Setswana 14.8%, isi-Xhosa 8.8%, English 1.4% and others 0.6%. The court was also quick to stress the "unimportance" of these figures,

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In its crudest form, the submission regarding the provincial use of languages somewhat harks back to the bantustanization of South African society, in a manner never envisaged by the framers of the Constitution. The latter's upholding of the regionalization of language use at provincial and national government level,[142] while ostensibly intended as a pragmatic tool that tacitly acknowledges the reality of pre-constitutional regionalism, unwittingly serves as a double-edged sword that may yet prove cumbersome in both operation and interpretation. In the same vein, the supposedly practical approach, which envisages the continued use of language according to pre-constitutional borders, intrinsically bodes ominously ill for the promotion of cross-cultural awareness, understanding and cohesion, which, the author submits, are sorely lacking in many respects of South African society.

The court's advancement of a practical approach in *Pienaar* essentially spells dire consequences for the envisaged equal treatment of the other nine official languages. At its most benign, the court's suggestion to refrain from the "impractical" use of 11 official languages in favour of the current languages of record, sounds reasonable. The rationality of the stance is made more palatable by the submission that such an arrangement would merely be part an evolutionary phase, which would in time achieve a semblance of equality of use across the board. At its worst, the recommendation proposes the unpleasant maintenance of the status quo. In the same vein, the apparent rejection of the predominance of English in favour of inclusivity belies the equivocal intention to maintain the threatened parity of esteem between English and Afrikaans, while continuing to denigrate the previously maligned official languages.

The court in *Pienaar* agrees with the notion expressed in *Matomela* that the translation of transcripts from one language to another would be a prohibitively costly exercise that must be avoided wherever possible.[143] In this regard, the author submits that a broad approach, which seeks to advance the previously disadvantaged languages as far as possible, is more satisfactory at this stage. To this end, a somewhat more comprehensive option, encompassing the translation of evidence, is proposed as the most feasible approach to foster inclusivity. With this approach, encouragement should be given, wherever practicable, for court proceedings to be conducted exclusively in previously marginalised languages. In addition, the necessary material resources should be employed to ensure the proficient translation of the proceedings into the required source language. It is submitted that such an approach conforms with the constitutional injunction that grants parity of esteem to all 11 official languages.

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contd
at the expense of the general "tendency" of use. These observations are based arbitrarily on the court's "experience of the past 13 years in this Division."

142 The Constitution, sec 6(3) and (4).

143 *Pienaar*, above at note 70, para 18.

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Furthermore, the concern expressed in *Pienaar* regarding the projected prohibitive expense of translation from any of the previously maligned languages, and its potential to delay proceedings unduly, is not entirely without merit. However, the argument is as misplaced as it is unhelpful. Other than the obvious absence of reliable feasibility studies supporting the supposition regarding the expected cost of translation, the argument essentially ignores the importance of the advancement of justice, regardless of time constraints and expense, as expressed in *Tran v The Queen*.[144] The hypothesis advanced in *Pienaar* sounds more unreasonable and short-sighted when considered against the history and background of the pre-constitutional approach to court proceedings in South Africa. Invariably, court proceedings during this period were characterised by exclusion, not only in procedural but also in substantive terms; exclusion by means of language was, by far, the most pivotal and conspicuous aspect of the unequal criminal justice system. To this extent, a litigant who was not proficient in any of the languages of record was, to a certain degree, always an outsider to the legal system that determined his or her judicial fate. Thus, the conduct of proceedings under a more familiar linguistic environment (other, of course, than proceedings that are facilitated through translation) would serve to advance the course of justice and inclusivity for all participants in the criminal justice system. Consequently, the translation of the proceedings is but an additional mechanism to advance inclusivity, one that, to some extent, also balances the scales of communication.

The virulent criticism in *Pienaar* of the quality of translated evidence seems to contradict its suggestion of a more inclusive approach. The court appears to imply[145] that the process of translation should, in general, be dispensed with, in order to accommodate speedier and more proficient proceedings. This argument is justified on the basis of an (admittedly unscientific) demographic census that simply concludes that a certain percentage of language speakers are situated in a particular geographic location. Hence, court proceedings within such an area can be conducted without recourse to the use of translation.[146] The implication of the court's argument, if pursued to its logical conclusion, is that the use, on a daily basis, of translation from a native South African language (which occurs in the overwhelming majority of cases, on a daily basis) is a tedious, expensive and impractical exercise that must be, at best, only tolerated and, at worst, abandoned.

144 Above at note 116.

145 *Pienaar*, above at note 70, paras 18–19.

146 The court (at para 19) concluded at the time that approximately 72% of the cases in the Northern Cape High Court Division were conducted in Afrikaans and a mere 1.4% in English. According to the court's calculations, 10–12% of the remaining cases required the use of interpreters. Therefore, the court concluded, these cases could be conducted in Setswana, because at least one of the judges within the division was Setswana-speaking. Needless to say, the court had not assessed whether *all* the litigants falling within this 10–12% of cases would be *exclusively* Setswana-speaking.

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In the final analysis, the court purportedly only argues against translating evidence when it would entail clarifying the meaning from Afrikaans (particularly in the Northern Cape) to any other language (including, the author submits, English). In that sense the Afrikaans language would, like the native South African languages, be reduced to a mere instrument of facilitation, thereby replacing its former status as a dominant language of discourse alongside English. The cases of *Matomela* and *Damoyi* on the one hand, and *Pienaar* on the other, may be interpreted as two sides of a coin. The former espouse the virtues of constitutionalism at the risk of undoing the edifice of pluralism, whereas the latter embraces pluralism only in so far as it serves to advance a narrow version of constitutionalism. In either instance, the court adroitly skirts around a socio-political mine-field reserved only for the bravest.

CONCLUSION

The elevation to official status of languages that were hitherto confined to the periphery is axiomatically aimed at the advancement of a more comprehensive and pluralistic national agenda. However, the recognition of these languages in the context of court procedure and other interactive settings, seems to have occurred only at a textual level.

Constitutional recognition, albeit commendable, remains an essentially non-binding vehicle for these languages, calculated only to ensure recognition at a "cultural" and largely facilitatory level. Consequently, the language clause has degenerated into an instrument of "making people feel good about their cultures and languages, by officially viewing them as nice pieces of the national mosaic".[147] Hence, the entrenchment of the native language as a conduit and mere cultural curiosity is all but confirmed. The removal of structural inequalities, which permeate the very essence of language policy and remain essentially intact,[148] must receive maximum effort and attention from all concerned, if the language conundrum is to be successfully negotiated.

The legislative framers apparently purposefully avoided express constitutional imperative in the use of language in court. Instead, the supreme law is merely confined to generalized and open-ended provisions, which are susceptible to even broader interpretation. The onerous duty of translation in this regard has, by implication, been abrogated to the courts as the final operational frontier. The courts (at least as far as the analysed cases are concerned) for their part, betray hints of ideological embeddedness, concerned mainly with quick-fix and simplistic formulae that fail to confront the fundamental issue. It is, therefore, imperative for the legislature to implement legislation that provides impetus to the constitutional imperative requiring all the official languages to be treated on an equal par.

147 Kalantzis et al *Minority Languages*, above at note 24 at 13.
148 Ibid.

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