Observatoire international des droits linguistiques

Revue de droit linguistique

UNIVERSITÉ DE MONCTON
CAMPUS DE MONCTON
Faculté de droit

droitslinguistiques.ca

(2016) 3 RDL 20

CONSIDERING AN APPROPRIATE LANGUAGE POLICY FOR JUDICIAL PROCEEDINGS IN SOUTH AFRICA

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ABSTRACT

This article considers the most appropriate policy for language use, more in particular the use of the official languages in South African courts. The point of the departure is that the courts are in the service of the public, and not the other way around. Hence the arrangements regarding the use of languages have to be such that they best account for the particular needs of all South Africa's communities. In addition such arrangements have to give effect to the rights of everyone appearing in the courts as parties, witnesses and accused persons; effectively promote the smooth administration of justice and protect and advance the indigenous languages.

Against this backdrop the constitutional provisions pertinent to the present matter, namely sections 6(2), section 35(3)(k) in relation to criminal matters, and section 34 pertaining to civil litigation, are analysed. Relevant legislative provisions are also referred to and case law discussed. This leads to the conclusion that the use of English as the only language of record would severely obstruct effective access to justice. Such obstruction would be to the detriment mostly of indigent people who lack the means to overcome the language barrier between themselves and an English-speaking court by acquiring legal representation (in criminal cases) and of legal representation and interpreting services (in civil cases).

Conversely, the increased use of the indigenous official languages as languages of record is bound to promote effective and equal access to justice for all members of society. The transformation of the judiciary which has the effect of an increasing number of first language speakers of the indigenous African languages being appointed to the bench and elsewhere in the legal sector, facilitates the increased use of these languages. Various proposals are made on how the official languages may be used within various linguistic settings in the courts.

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INTRODUCTION

In this article the use of languages, more in particular the use of the official languages, in South African courts is being examined in an attempt to determine what policies would be the most appropriate to satisfy the needs of the members of all language groups in so far as they may be involved in the administration of justice. It is argued that the most appropriate policies would be those that best account for and optimally affords protection to the following interests:

- the rights of people appearing in court (in whatever capacity, either as parties, witnesses or accused persons);
- the promotion of smooth and effective administration of justice; and
- the protection and promotion of the indigenous languages of the country.

The discussion covers both the official and the unofficial use of language in court. The official use of language refers to the language of record, that is, the language in which the proceedings of the court are recorded and preserved. This should be distinguished from the non-official use of language, that is, the language used by witnesses in oral testimony. The latter is often different from the language of record, and in many instances it must be translated into the language of record.[1]

The policies concerned must be aimed at resolving the serious problem resulting from the fact that English is increasingly becoming the sole language of record, a phenomenon which does not only have a detrimental effect on all the other official languages but, and this is even more appalling, also on ordinary people who are not fully conversant with the English language and in seeking access to South African courts must rely on interpreters or, to the best of their ability, avail themselves of the English language. This is to a large extent due to human resources policies pursued in South Africa. These policies, which are also applied in the justice sector, are propelled by the drive to achieve racial representivity in all parts of the country in disregard of the linguistic demographics and needs of South Africa's language communities.[2] The increasing use of English in South African courts at the expense of all non-English speaking accused, litigants and witnesses – representing more than 90 percent of the South African population –

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1 For a comprehensive explanation of the concept and ambit of language of record see K. Malan, "Observations on the use of the official languages for the recording of court proceedings" (2009) Journal of South African Law - Tydskrif vir die Suid-Afrikaanse Reg (TSAR) 141 at 143-45 [Malan, "Observations on the use of the official languages…"].

2 K. Malan, "Observations on representivity, democracy and homogenization" (2010) Journal of South African Law - Tydskrif vir die Suid-Afrikaanse Reg (TSAR) 427-449.

and to the detriment of all other South African languages, should be a serious concern bearing in mind the interests referred to in the first paragraph which should be protected. However, the policies concerned are applied in total disregard of the rights of individuals who are seeking access to justice; they operate to the detriment of one of the most precious indigenous cultural assets in South Africa, namely the indigenous languages; and they impair the fair, smooth and effective administration of justice.

In assessing the proposed policies, I start off by outlining what should be the fundamental premise upon which these policies should be based. This introduction fits into the second part which is a discussion of the constitutional provisions which are of particular importance to language use in the administration of justice. Reference is also made to the judicial pronouncements on the use of the official languages in court. I also reflect on the legislative provisions relating to language use in judicial proceedings. The last part of the discussion deals with the practical policy proposals on the use of the official languages in both criminal and civil courts.

I – FUNDAMENTAL PREMISE

The fundamental premise underpinning a sound language policy for the judiciary is that courts are there for the people, not the people for the courts.[3] Courts should be organised in such a way that they best respond to the distinctive needs of the communities of the country concerned, in the present case to the variant needs of all South African communities. In consequence, any language policy for South African courts should be an indigenous South African one. This implies a policy which meets the needs of the South African citizenry and the various South African communities in the best possible way. It should also embrace the indigenous cultural assets of the country concerned – in this case, the indigenous languages of South Africa. Language policy in the courts must account for the fact that the average person's confrontation with the criminal justice system is a rather frightening experience. For most people the courtroom is an unfamiliar and intimidating place. They enter the courtroom with little or no knowledge of their rights and how to behave. The daunting courtroom situation is exacerbated when accused persons and witnesses either do not understand the language used by the

[3] See in this regard the apt remarks made by the court in *S v Pienaar* 2000 2 SACR 143 (NC) para 9 150F-G [*S v Pienaar*].

court at all or have but a limited knowledge thereof.[4] Moreover, in many cases accused and witnesses in South Africa are poorly educated and in most cases they do not have legal representation.[5]

These realities obviously informed the language provisions in the Constitution, more particularly the constitutional injunction that the state must enhance the status and promote the use of the indigenous languages as discussed in II-A below. Whilst acknowledging the importance of the leading international languages of our time, such as English, French, Mandarin and Spanish, in international, political and economic relations, domestic public policies, including policies pertaining to the language use in court proceedings, should in the first place be dictated by the distinctive demands and interests of the country in question, comprising in the present case, the full range of all South African communities. South Africa has a large number of languages and cultural communities. As will be indicated in the next section essentially the languages of all the permanent communities in South Africa enjoy a constitutional recognition.

A policy responding to the distinctive needs of South African communities is destined to give optimal effect to the second important premise of such policy, namely that it has to be genuinely democratic. By this I mean that the members of all communities in the country must enjoy maximum and equal access to the courts. No one, irrespective of her/his background, may, in pursuance or defence of a case be cowed by anything that could pose an awkward and unfamiliar situation in court. Democratic accessibility in this context means unhindered and easy access to the courts which should be available to every person who needs to state her/his case. The courts must be organised accordingly. Policies on language in courts must be tailored to meet the needs of the members of all communities, thus constituting a people-sensitive justice system. The courts must not be exclusively elitist institutions and, more in particular, not primarily institutions for

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4 A. Mazrui, "Globalism and some linguistic dimensions of human rights in Africa" in P.T. Zeleza and P.J. McMonnaughay, *Human rights, the rule of law, and development in Africa*, University of Pennsylvania Press, 2004, 52 at 66.

5 D. Cote, *The right to language use in South African criminal courts*, Minor LLM dissertation (2005) University of Cape Town, online: <http://uctscholar.uct.ac.za/PDF/1411_CoteD_2005.pdf> accessed on 21 April 2014 3 [Cote, *The right to language use…*]; J.M. Hlophe, "Receiving justice in your own language" (2004) Advocate 45 [Hlophe, "Receiving justice in your own language"]; C. Matthias and N. Zaal, "Hearing only a faint echo? Interpreters and children in court South African" (2002) South African Journal on Human Rights 350-71 explain how the use of languages in court that people do not understand assume even more serious proportions in the case of child witnesses. This situation is severely worsened as a result of the fact that the vast majority of accused appear in person and is not legally represented.

lawyers. Lawyers are the servants – the officials – of the court and those they represent; they are not an elitist class enjoying preferential treatment within the justice system. Democratic accessibility also implies that cases must be decided cheaply, speedily and in a manner best understood by the parties, witnesses and accused.

Applied to the question of language use in South African courts, this fundamental premise entails two closely linked dictates. The first pertains to the way in which the South African languages as such should be dealt with in policies regarding language use in courts. The second dictate pertains to the rights of the speakers of these languages when they appear in court, more in particular, it must be determined which policies are best suited to protect and promote the language rights of persons who appear in South African courts, such persons being accused persons in criminal proceedings, parties in civil proceedings and witnesses in either criminal or civil litigation. The South African Constitution addresses both concerns – the languages as such as well as the rights of the people concerned. The first concern – regarding languages as such – is addressed by section 6(2), read with the parity of esteem provision in section 6(4), all forming part of the official language clause. The second concern – regarding the rights of those who appear in the courts – are addressed by section 34 and section 35(3)(k). Legislative provisions – rule 61 of the *Uniform Rules of the High Court*, section 6 of the *Magistrates Court Act*, section 5(2) of the *Small Claims Court Act* and rules 14 and 25 of the *Rules of the Constitutional Court* – are also relevant to the present question and are therefore also referred to. Relevant case law will also be discussed. Some of the legislative provisions are dated in that they do not account for the constitutional provisions on the official languages. Others, especially those dealing with the translation of evidence, necessary as they are, still fail to account for the problems that accompany the translation of evidence and are also arguably at variance with the best interpretation of the mentioned constitutional provisions. These constitutional provisions are now discussed.

II – CONSTITUTIONAL AND LEGISLATIVE PROVISIONS

The South African state came into existence in 1910 when the four then British of the Transvaal, the Free State, the Cape colony and the Natal colony formed the Union of South Africa. The constitutional dispensation was race-based and made provision for the white minority rule. Two official languages were provided for namely English and Dutch (which was later on replaced with Afrikaans.) Afrikaans is largely an offspring of Dutch. The largest segment of mother tongue is the so-called coloured people, living mainly in the Western and Northern Cape

provinces (See annexure A) and well as the (white) Afrikaners who are spread over the country. There are nine indigenous African languages, spoken mainly by the various African ethnic groups and accounting for approximately eighty percent of the national population (See Annexure B). All these languages are concentrated in specific areas in South Africa (See annexure A). None of these languages enjoyed official status under the constitutional arrangement of 1910. Under the policy of territorial separatism pursued specifically by the National Party since 1948 most of these languages received official status in the bantustans that were created in terms of this policy.[6] White minority rule came to an end in 1994 when the interim constitution[7] entered into force. This constitution was soon to be replaced by the present (1996) South African constitution[8] which took effect in 1997. The constitutional transition also brought about major changes in the official languages dispensation. All the African languages now have official status together with English and Afrikaans. Hence, section 6(1) of the Constitution now provides that South Africa has eleven official languages namely Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu. In spite of this the position of English has substantively strengthened over the past two decades to such an extent that South Africa is now viewed as an English speaking country[9] specifically when it comes to the official use of the languages by the various branches of state power. In the present discussion the focus is specifically on one of the branches namely within the judiciary sector.

A – Section 6(2) read with section 6(4) and languages for the recording of judicial proceedings

Section 6(2) calls for specific attention in the present context. The other provisions of section 6, dealing with language use in the national, provincial and municipal spheres of government, and the self-regulatory and monitoring measures, as well as the Pan South African Language Board, are not pertinent to the present discussion.

Having declared eleven languages as South Africa's official languages in section 6(1), the Constitution provides in section 6(2) as follows:

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6 The official language dispensations provided for in successive South African constitutions are discussed in detail in K. Malan, "The discretionary nature of the official language clause of the Constitution" (2011) 26:2 *Southern African Public Law* 381-407 [Malan, "The discretionary nature of the official language clause…"].

7 Constitution of the Republic of South Africa 200 of 1993.

8 Constitution of the Republic of South Africa, 1996.

9 R.W. Johnson, *South Africa's brave new world: The beloved country since the end of apartheid* (London: Allen Lane, 2009) at 370.

> 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.

Section 6(2) must be read in conjunction with the last part of section 6(4) which reads:

> Without detracting from the provisions of subsection (2), all official languages must enjoy parity of esteem and must be treated equitably.

In discussing section 6(2) below the following three aspects will be elucidated. First, the obligations incurred by the courts in terms of this section; secondly, the languages envisaged by section 6(2); thirdly, the action to be taken, specifically by the courts and by organs of state responsible for the administration of justice, to give effect to section 6(2). This third aspect will be dealt with in conjunction with section 6(4).

1) Who bears obligations?

According to section 6(2) the obligations to take practical and positive measures to elevate the status and advance the use of the languages mentioned in the subsection, rests upon the "state". Section 6(2) is markedly wider than the rest of section 6, which places obligations on the national, provincial and local government (section 6(3)) and on the national and provincial governments (section 6(4)). The notion, "state" should therefore include all bodies that fall within the definition of organ of state as envisaged in section 239 of the Constitution but should also, as argued in the next paragraph, include other bodies not mentioned in that definition.

Section 239 includes in its definition, not only departments of state or administrations in the national, provincial or local sphere of government, but also any other functionary or institution, exercising a power or performing a function in terms of the Constitution or a provincial constitution, or exercising a public power or performing a public function in terms of any legislation.[10] This includes

[10] Section 239 of the Constitution defines an organ of state as follows:
(a) any department of state or administration in the national, provincial or local sphere of government; or
(b) any other functionary or institution-
(i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
(ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer.

bodies such as those provided for in Chapter 9 of the Constitution, namely the Public Protector, the South African Human Rights Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Commission for Gender Equality, the Auditor-General, and the Independent Electoral Commission. Public education facilities such as public schools also fall within the definition of organs of state. Though courts are excluded from the definition of organ of state, they are indispensable segments of the state exercising their own distinctive form of governmental power, namely judicial power alongside the exercising of legislative and executive power by the legislative and the executive, respectively. For that reason the judiciary, including all the courts, being a *conditio sine qua non* for the state, is obviously a segment of the state as envisaged by section 6(2) and therefore obligated to execute the constitutional duties imposed by that section.[11] For that very reason the courts, like all other state institutions, must pay heed to section 6(2) by elevating the status and advancing the use of the indigenous languages identified in that provision through affirmative, practical and positive measures that would overcome the consequences of their erstwhile diminished use and status. The courts, like all other state institutions, must show that they are in fact taking steps to give effect to this provision. Any neglect to do so would be unconstitutional. Moreover, by the same token, the policies pursued regarding the use of languages in the courts, including policies regarding the use of the official languages as languages of record, cannot be viewed as essentially a political issue[12] since these policies must account for and give effect to the dictates of this peremptory constitutional provision.

a) Which languages are to benefit from the measures of section 6(2)?

It is instructive that section 6(2) does not refer to official languages but to indigenous languages, more in particular those that suffered historically from diminished use and status. This category of languages might therefore also include the Khoi, Nama and San languages, which, although being the mother-tongues of certain indigenous communities, are not official languages.[13]

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[11] The argumentation in *S v Pienaar*, *supra* note 3 at para 30 (156F-G) renders support for this construction of the meaning of “state.”

[12] This is the erroneous view that Mr Justice Chaskalson, at the time the president of the Constitutional Court, expressed in an interview in March (2001) *De Rebus* 12.

[13] These languages in the words of section 6(2) are also “indigenous languages of our people” that “historically suffered from diminished use and status” as envisaged by section 6(2) and they are by name referred to in section 6(5), as languages which the PANSALB has to promote.

The two official languages not earmarked for the benefit envisaged by section 6(2) are English and Afrikaans. English is excluded arguably for two reasons: First, because it is not an indigenous language,[14] and secondly, because it has not "suffered historically from diminished use and status." Moreover, it commands tremendous power as the dominant language of trade and industry in South Africa, and has been one of the official languages since the establishment of the Union of South Africa in 1910. Afrikaans is indigenous to South Africa.[15] However, it was an official language since 1925[16] and has been dealt with on a par with English in all official matters,[17] and has also made considerable headway in the field of education.[18] After the present (1996) Constitution took effect Afrikaans, in contrast to English, has substantively deteriorated in a number of key areas, including as a means of communication in the public service, for drafting national legislation, for recording court proceedings and for educational purposes, thus causing the use of Afrikaans to be diminished and its status depreciated.[19]

b) What should the measures in terms of section 6(2) entail?

Section 6(2) is couched in mandatory terms in that the state *must* take measures referred to in the subsection. However, the substance of the measures is not spelt out. This affords the institutions bound by the provision a wide discretion to determine what these measures should be, thus underscoring the general discretionary nature of the official language clause.[20] This constitutional provision implies promotional or encouragement measures in relation to the languages

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[14] However, see K. Malan, "n Oorweging van die sosiopolitieke kragte wat inwerk op die betekenis en toepassing van die diskresionêre taalklousule van die Suid-Afrikaanse grondwet" (2012) LitNet Akademies 55 at 75, online: <http://www.litnet.co.za/Article/n-oorweging-van-die-sosiopolitieke-kragte-wat-inwerk-op-die-betekenis-en-toepassing-van-di> (accessed on 21 January 2015) and the sources quoted there.

[15] Although Afrikaans is very similar to Dutch it is at least indigenous in the sense that it has developed its own distinctive character in South Africa.

[16] Afrikaans enjoyed official status alongside English in place of Dutch since 1925 in terms of section 1 of the *Official Languages of the Union Act* 8 of 1925.

[17] This was in terms of consecutive constitutional provisions since the inception of the Union of South Africa, namely section 137 of the *South African Act* of 1909; section 108 of the 1961 constitution, and section 89 of the 1983 Constitution.

[18] See in this regard for example J.S. Steyn, *Ons gaan 'n taal maak: Afrikaans sedert die Patriotjare*, 2014 who discusses various aspects of this.

[19] As discussed in K. Malan, "Observations and suggestions on the use of the official languages in national legislation" (2008) *Southern African Public Law/Publiekreg* 59-76; Malan, "Observations on the use of the official languages…", *supra* note 1; K. Malan, "Die Grondwet, onderwysowerhede en die pad vorentoe vir Afrikaanse skole" (2010) Tydskrif vir Geesteswetenskappe Journal of Human Sciences 261-283.

[20] Malan, "The discretionary nature of the official language clause…", *supra* note 6.

identified in the subsection. The measures envisaged by section 6(2) do not necessarily enjoin the state to use these languages for official purposes, more in particular in this context, for the recoding of court proceedings. They also do not create any rights for members of any particular linguistic community.

However, viewed from a socio-linguistic point of view, the dual obligation to elevate the status and advance the use of a language seems to have been carefully considered. Status and use are intertwined and mutually reinforcing. If the status of a language rises, its use is bound to rise as well; and if its status diminishes, its use can be expected to diminish as well. Measures elevating the status and increasing the use of a language should obviously also entail the modernisation and expansion of the lexicon of the language, concerned.[21] Such development could promote the utilisation of a language for higher functions such as those pertaining to government, education and economic engagement. Once the use of a language expands beyond the domestic and private spheres, a general improvement of the expressive ability of that language is inevitable and its enhanced status will, in all likelihood, render its mother-tongue users less reluctant to adopt a new language.

Experience has shown that when economic or other benefits are at stake, communication between people will more often than not be conducted in a language of higher status at the expense of another language of lower status, even though the home language of one or more (and sometimes even all) the parties concerned happens to be a language of lower status and therefore of less social attraction.[22] The use of the languages referred to in section 6(2) would clearly be a measure that would contribute towards the use of such languages and the enhancement of their status as contemplated by this provision.

Over the past two decades, since the advent of South-Africa's constitutional transition, it has become increasingly feasible to introduce the recording of court proceedings in any of the indigenous African languages. Numerous black people have in the past two decades been appointed as judges (presiding in the superior courts), magistrates (presiding in the lower courts), state advocates, state attorneys, state prosecutors, etc.[23] Their mother-tongues are almost without

[21] J.S. Steyn, *Tuiste in eie taal* Kaapstad: Tafelberg, 1980 at 34-36.

[22] *Ibid* at 18-21.

[23] In October 2013, according to statistics obtained from the Magistrate's Commission of South Africa per Mr Michael Nieuwoudt (and on file with the author), 43 percent of all magistrates were African (and 60 percent were black African, Indian and Coloured); According to statistics obtained from the Judicial Service Commission of South Africa (and on file with the author), on 31 December 2013 108 of the total of 243 judges of the superior courts were African and therefore in all likelihood mother-tongue speakers of one or more of the African

exception one of the African languages, or they are at least fluent in one or more of these languages. These are the very languages earmarked in section 6(2) in terms of which the opportunity is afforded to use these languages for official purposes and therefore also in South African courts. However, despite the vast changes in the staff profile in the justice sector this opportunity has not as yet been seized. It would be difficult, if not impossible, to justify the continued failure to do so. As the discussion in II-B and II-C below will show, the constitutional right to fairness in criminal and civil trials dictates the use of these languages as languages of record.

What should be the fate of the other official languages (English and Afrikaans) as far as their use in judicial proceedings is concerned? More in particular, how should section 6(2) be read in relation to its possible impact on the use of those two languages? In order to answer this question it is at the outset important to realise that section 6(2) has to be read in conformity with the last part of section 6(4) which provides as follows:

> Without detracting from the provisions of subsection (2), all official languages must enjoy parity of esteem and must be treated equitably.

Hence, the corrective measures envisaged in terms of section 6(2), peremptory as they may be, may not be interpreted and applied in a way that would detract from parity of esteem of any of the other official languages, and would lead to any of them not being treated equitably. This accords with a statement of the Constitutional Court in the first certification judgment, namely that the introduction of eleven official languages in place of the erstwhile two should and does not mean a reduction of the status of any of the previous two.[24] It is submitted that within the context of the use of the official languages as languages of record, the implications should be those set out below.

First, the languages already used as languages of record should be retained for that purpose, especially in those cases where all involved are speakers of the same language. A staff policy should be pursued to maximise the number of cases where such result could be achieved. In that way a language that already enjoys optimal use and esteem, because of its high-function use as a language of record, would retain that status. A policy pursued to give effect to section 6(2) in terms of which the indigenous African languages are employed as languages of record in

languages. The total number of black judges including persons of African, Indian and Coloured origin on that date was 154 and the total number of white judges 89.

[24] *In re Constitution of the RSA, 1996* 10 BCLR 1053 (CC) at para 212 1327C-D.

circumstances where the use and status of any of the other two official languages (English or Afrikaans) are infringed upon would be unjustifiable if it amounts to a violation of the principle of parity of esteem in conflict with section 6(4).

Secondly, if only one language, more in particular English, is selected for the recording in circumstances where any of the others – those envisaged in section 6(2) as well as Afrikaans – may be used, it will also be incompatible with both section 6(2) and section 6(4). It would amount to a disregard of section 6(2) owing to a failure to utilise an opportunity to enhance the status and advance the use of the indigenous African language. As far as Afrikaans is phased out to allow only for English to be used, it would, in disregard of section 6(4), amount to inequitable treatment of Afrikaans and placing it, together with the indigenous African languages, in a position of disparity compared to English.

I now turn to discussing section 35(3)(k) which relates to language use in the criminal courts. Attention will then be focussed on language use in the civil courts with reference, amongst other things, to section 34. As the discussion will show, the rights provided for in section 35(3)(k) and 34 are also closely bound up with the use of the languages as languages of record.

B – Section 35(3)(k) and language use in criminal proceedings

Section 35(3)(k) provides as follows:

> Every accused person has a right to a fair trial, which includes the right-
> […]
> (k) 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.

Section 6(2) of the *Magistrates Courts Act*[25] which deals with the translation of evidence in criminal proceedings is also pertinent in the present context. It provides as follows:

> 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

[25] *Magistrates Court Act*, 32 of 1944.

> 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 of whether the representative of the accused is conversant with the language used in the evidence or not.

These interpreters are provided at the expense of the state. The same approach is followed in criminal proceedings in the High Court.

Section 35(3)(k) does not provide for a language right as such. The more correct interpretation is that it provides for an essential ingredient, alongside a number of other elements outlined in section 35(3), of the right to a fair trial.[26] It is a communication right which is an essential prerequisite for a trial to be fair. It is a fundamental aspect of the right to a fair trial because various other elements of that right, most notably the right to testify and to challenge evidence, are dependent on it. Section 35(3)(k) requires an accused to be placed in a position to understand and to participate in the proceedings in which her/his interests are profoundly at stake, in the most effective way possible. This requirement is necessary to ensure that the purpose of the present constitutional right, namely to achieve fairness in criminal trials, be optimally achieved. As regards the question of language, a generous interpretation (instead of a restrictive approach, which courts have to pursue in relation to constitutional rights[27]) dictates that the accused should be placed in a position to understand and participate in the most effective way possible and obviously not in a way that restricts the accused person's understanding of and hampers her/his participation in the proceedings. That would quite obviously dictate that the accused should preferably be tried in a language she/he understands, but more specifically in a language that he or she understands best, which ordinarily would be her/his mother-tongue and not a language that she/he is not fully acquainted with.[28] Concerns about equality, particularly with regard to equal and effective access to the courts, are also pertinent to the language issue in the present context. It would be untenable to have a policy of language use in court which promotes and facilitates access to

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[26] V. Cardi, "Regional minority language use before judicial authorities: Provisions and facts" (2007) *JEMIE* (Published by the European Centre for minority issues) 4. This was also the interpretation of the Supreme Court of Canada in *Societé des Acadiens du Nouveau-Brunswick v Association of parents for Fairness in Education*, [1986] 1 SCR 549. It may also be termed a communication right as N. Steytler, *Constitutional criminal procedure*, 1998 at 361 calls it [Steytler, *Constitutional criminal procedure*].

[27] Courts must interpret constitutional rights in such a way that it ensures for individuals the full measure of its protection. See in this regard *S v Makwanyane* 1995 6 BCLR 665 (CC) at para 9-10, specifically at para 10 667A. See also *S v Zuma* 1995 4 BCLR 401 (CC) at paras 13-15.

[28] There is judicial support for this view in *S v Pienaar*, *supra* note 3 at para 19 (153A-B).

one group but obstructs similar access to another group. The discussion will show that a policy in terms of which only English is recognised as the language of record in court is (unwittingly) premised on inequality. It provides smooth access to justice in criminal and civil matters to first language English speakers but denies or severely obstructs similar access to members of all other language communities.

1) The preferred scenario

Dealing with the language aspect of the right to a fair trial, section 35(3)(k) envisages two scenarios – here referred to as the preferred scenario and the alternative scenario, respectively. The first one is the scenario in which the language of the accused, in the words of the Constitution, is, "the language which the accused person understands", is the same as the language of the court, that is, the language of record. In this scenario there would be no need for interpreting the proceedings to the accused. The charge would be put to him or her in the language that he or she understands; her/his rights would be explained in the same language, whenever such explanation might be necessary in the course of the proceedings. That would also be the language in which the court's judgment is passed and (in the event of a conviction) sentence is imposed. It would not be necessary to interpret what the accused has to say – her/his plea (explanation), testimony, cross-examination and address to the court – since the accused and the court would use the same language. If a witness is not acquainted with the language shared by the court and the accused, the communication between the accused and the court, on the one hand, and such witness, on the other hand, will have to be interpreted.

The second or alternative scenario presents itself where the language of record is not understood by the accused, thus necessitating reliable interpreting of the communication between the accused and the bench in order to comply with all requirements inherent in the accused person's right to a fair trial.

In view of the unequivocal wording of section 35(3)(k) the Constitution clearly prefers the first scenario. Only if it is not practicable to conduct the trial in a language with which the accused is acquainted, should the alternative of interpreting be resorted to, and then only when the test for practicability has been met. Thus, Hlophe convincingly argued that "(if) it had been foreseen that considerations of practicality would forever stand in the way of realisation of the

right to have the trial conducted in the language one understands, then the section would have been couched in a different manner.[29]

In order to give effect to the preferred scenario of section 35(3)(k), thus to ensure that a trial is conducted in the language the accused understands (best), the relevant organs of state are duty-bound to respond to the language preferences of the accused. They have to pursue policies that would make it practicable to give effect to the first scenario of section 35(3)(k). Hence, any policy that would obstruct the practicability of a trial to be conducted in the language of the accused, would be incompatible with section 35(3)(k) and thus unconstitutional. Introducing English as the sole language of record would precisely be such an obstructionist policy because instead of making it possible for trials to be conducted in the language of the accused, such policy would be preventing it being in conflict with what section 35(3)(k) envisages. Cote is therefore perfectly correct when he states:

> In effect, adopting a policy of one sole language would prevent the majority of accused from having a trial in a language that they understand, which would appear not to be the intention of section 35(3)(k).[30]

The alternative, namely to have the proceedings interpreted in the language the accused person understands, would be permissible only in exceptional cases. Those would be the instances where notwithstanding policies tailored to enable trials to be conducted in the language the accused persons understand, there would be instances where the preferred scenario would not be feasible, thus calling for the alternative scenario to be pursued. Section 35(3)(k) requires two parallel policies. It places a duty upon all organs of state that participate in the administration of justice, including the Judicial Service Commission, the Magistrate's Commission and the prosecuting authorities, to deploy legal professional staff – judges, magistrates, state advocates, state prosecutors, public defenders, etc. – in such a way that the preferred scenario of section 35(3)(k) can find maximum application. Secondly, as Hlophe correctly emphasised, the African indigenous languages must be fully developed[31] in order to enable them to be as fully useful as languages of record as Afrikaans and English. Not to do so, would be unconstitutional.

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29 J.M. Hlophe, "Official languages and the courts" (2000) South African Law Journal 695 [Hlophe, "Official languages and the courts"].

30 Cote, *The right to language use…*, *supra* note 5 at 52.

31 Hlophe, "Official languages and the courts", *supra* note 29.

The preferred language of witnesses (alongside that of the accused) in a criminal trial is also relevant in the present context. The witnesses' preference must also be heeded. If the preferred language is the same as that of the court, the witness may obviously testify in that language and if such language is not the same as that of the court and the accused, the testimony of the witness concerned must be reliably interpreted. Moreover, if the language in which a witness testifies is not the same as that of the accused, the right to a fair trial requires testimony to be reliably interpreted to the accused, and that the questions of an accused person who is leading or cross-examining a witness must be reliably interpreted to witnesses, thus ensuring due compliance with an integral element of the right to a fair trial, namely the right to adduce and challenge evidence.[32] Compliance with this right implies that a witness must be enabled to testify in her/his preferred language, and that if the language of the court (the language of record) and the language of the accused are not the same, the testimony must be reliably interpreted to the court (the presiding officer) and the accused.

Section 35(3)(k) accounts for the fact that in South Africa, being a multilingual country, it will never be possible to dispense altogether with oral interpreting of testimony since the participants in courts proceedings are often speakers of different languages. From section 35(3)(k) it is clear, however, that the Constitution prefers the language of the accused and that of the court to be the same. There is a number of pressing legal (and practical) considerations that show that interpretation must be avoided as far as possible and that the preferential scenario of section 35(3)(k) must be pursued.

First, it must be emphasised that interpreting of evidence is always a risky matter which could, and in fact often does lead to unfairness and even outright wrong court decisions to the detriment of accused persons, complainants, witnesses and the integrity and repute of the justice system as such. Incorrectly interpreted evidence is an ever-present risk. Even a small error could lead to huge misunderstandings and even to wrong verdicts. Such errors could cause reliable and credible witnesses to be unjustifiably regarded as unreliable and not credible and could thus lead to a guilty accused being acquitted or an innocent one being convicted.

The questionable quality of interpreting was prominently on display in the widely televised (paralympic athlete) Oscar Pistorius murder trial in April 2014.[33]

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[32] Currently in terms of section 35(3)(k) of the Constitution and previously acknowledged at common law and duly applied in South Africa's criminal courts.

[33] Reported in among others: "Oscar trial: interpreter under fire" March 4 2014, online: <http://www.iol.co.za/news/crime-courts/oscar-trial-interpreter-under-fire-1.1655689>

However, this was no odd exception because there are always difficulties inherent in interpreting (or translating) court proceedings from one language into another. Apart from the risk of wrong interpretation of evidence on factual events, it should also be kept in mind that legal concepts are often closely linked to a particular language and are therefore very difficult to translate into another.

Moreover, a well-known description of a concept in one language may be absent in another. In consequence, it is inevitable that translation will cause a loss of and change in meaning.[34] Hlophe related telling examples of incorrect interpreting between isiZulu and English (the language of record in the cases he discussed) with serious potential implications for the fairness of trials.[35] A thorough empirical study by Nico Steytler brought to light the serious flaws, almost of systemic proportions, which are regularly occurring in the conduct of court interpreters. Apart from flaws of this nature, the ever-present risk of distortions inherent in interpreting of whatever nature must also be borne in mind. The said flaws stem mainly from the autonomous nature of the role of court interpreters whose duties are, by their very nature, regularly performed beyond the control of the presiding officer. The presiding officer, very often unfamiliar with the language in which the accused and witnesses communicate, would almost always be unaware of mistakes and even abuses on the part of the interpreter and is therefore excluded from exercising control. Steytler reported that interpreters often assumed partial roles in conducting their duties. In consequence, they are often not only a conduit of oral information but rather a redefined team player in court proceedings assuming the role of court orderly, lawyer, magistrate and prosecutor, entirely free from the control of the court.[36] Steytler observed as follows with reference to the results of the research he conducted:

> The evidence suggests that the interpreters were actors in their own right, far removed from being a mere conduit pipe as their legal mandate would have it. The development of an own persona was, furthermore, facilitated by the large measure of autonomy their position enjoyed. The very nature of the interpreters' position as

(accessed on 17 April 2014); "Oscar trial lost in translation?" March 14 2014, online: <http://www.iol.co.za/news/crime-courts/oscar-trial-lost-in-translation-1.1661259> (accessed on 17 April 2014); "Anger over Pistorius trial interpreters" 14 Mar 2014 | Sapa-AFP, online: <http://www.sowetanlive.co.za/news/2014/03/14/anger-over-pistorius-trial-interpreters> (accessed 17 April 2014).

34 B. Grossfield, "Literature, language and the law" (1987) De Jure 217 at 223-25.

35 Hlophe, "Receiving justice in your own language", *supra* note 5 at 45-46.

36 N. Steytler, "Implementing language rights in court: the role of the court interpreter" (1993) SAJHR 208-219.

> having sole access to two different language worlds, created that autonomy.[37]

With regard to the accuracy of their interpreting, court interpreters fall outside the immediate control of the court personnel who are not conversant with the language which the interpreter is interpreting into the language of record, used by the court.[38] Based on his research, Steytler observes that interpreters do not act neutrally within the sphere of autonomy they enjoy. The role of the interpreter as an official of court is often compromised by her/his position as member of a team whose daily task is the expeditious processing and disposal of the cases on the court role. Moreover, many interpreters are allocated to a specific court for fairly long periods during which they often develop close relations with the prosecutor in that court. In consequence, as the research results show, interpreters often do not maintain their positions as independent court officials in accordance with the demands of their office. Instead, they tend to forsake their independence and become an integral and subservient part of the state machinery.[39] According to Steytler -

> this inevitably compromised their impartiality and the resultant bias was evident in what they chose to translate and the manner in which they did it…The result was that the undefended accused, not conversant with the official languages, could not cross the language barrier effectively, and were routinely denied a fair trial.[40]

The very structures that are supposed to ensure a fair trial – in this case the system of interpreting between witnesses and the accused, on the one hand, and the court, on the other hand – are defeating the objective of a fair trial. The problem could in part be obviated if an accused has legal representation. However, the extent of the problem is exacerbated by the fact that the vast majority of accused in South Africa are undefended.

The grave risks involved in court interpreting and the malfunctioning of this service, of which there seems to be ample proof, underscore the need to limit the use of interpreters whenever possible. To that end staff in the justice system must be utilised and court roles organised in such a way that the language of record and

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37 *Ibid* at 219.
38 *Ibid*.
39 *Ibid* at 220.
40 *Ibid*. See also R. Moeketsi, *Discourse in a multilingual and a multicultural court room: A court interpreter's guide*, 1999 at 158.

the preferred language of communication of accused and witnesses must as far as possible be the same, thus ensuring trials to be conducted in the language of the accused (and witnesses). The proposals made in part III are aimed at achieving that objective.

The second consideration relates to the fact that interpreting tends to diminish the witnesses' personal involvement in the court proceedings. When the evidence of a witness or an accused is interpreted they tend to speak, often whispering, to the interpreter instead of addressing the court itself.[41] They are to some extent excluded from the court proceedings and instead of the witnesses being the focal point of the evidence the interpreter is taking centre stage.[42]

The third consideration pertains to cross-examination, which is a crucial instrument for pursuing the truth, but its effectiveness is suppressed when evidence is to be interpreted.[43] This negative impact on the effectiveness of cross-examination is obviously also restricting the right to challenge evidence, which is an important ingredient of the right to a fair trial.

Fourthly, interpreters are occasionally unavailable or they are not sufficiently competent to ensure reliable interpretation of evidence. In the result, the witness is obliged to testify in the language of record, which in present-day South Africa would in practice mean English. This is a risky practice. The witnesses might be subjected to undue pressure for not being allowed to testify in their mother-tongue. Although witnesses might consider themselves adequately conversant with English, they often do not have a sufficient command of English to hold their own under strenuous cross-examination in the unfamiliar, if not awkward, court atmosphere. For this reason an otherwise reliable witness could be found unreliable and not credible – once again something that can be prevented if the witness is allowed to testify in her/his mother-tongue.

Fifthly, the translation of oral evidence causes proceedings to drag on much longer, which then leads to postponements and hence to poor access to justice to the detriment of all those seeking such access.

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41 *Ibid* at 158.

42 See in this regard the discussion by F. Viljoen, "Look who is talking, in the courtroom too" (1992) SALJ 67-69; Steytler, *Constitutional criminal procedure*, *supra* note 26 at 361.

43 In *S v Mpopo* 1978 2 SA 424 (A) the Appellate Division (the predecessor of the Supreme Court of Appeal) observed as follows in this regard at 426H: "It is true that the interpretation procedure is not altogether satisfactory in that it often puts the cross-examiner at a disadvantage and does not enable the court to obtain such direct clear-cut impression of the demeanour of the witness as it may gain when no interpreter is employed."

Sixthly, using one language – English – as the sole language of record is causing patent absurdities, apart from being risky, time-consuming and detrimental to the parties involved. Consider the following scenario, exemplifying a common occurrence in practise: a criminal trial where all roll players – the magistrate, prosecutor, accused, witnesses and legal representative of the accused (if there is one) speak the same mother tongue, say isiZulu, but the oral proceedings – testimony, examination, arguments and judgment – must be translated into English. In scenarios of this nature all relevant considerations – the interests of the accused, the complainant and the witnesses, the imperative that trials should be fair and be concluded without unnecessary delay, as well as considerations of economy, and in particular considerations of practicality – dictate that such a trial should be conducted in isiZulu. A similar absurd situation would present itself when everyone involved in a trial is, for example, Afrikaans-speaking, but the magistrate is not sufficiently conversant with Afrikaans. In such case the matter should be disposed of quickly, fairly and effectively in Afrikaans, and all the risks that are involved in interpreting would be avoided. However, when the judicial officer, owing to an inappropriate assignment to try a particular case, is not sufficiently acquainted with the language spoken by the accused and/or a witness, the proceedings must be interpreted.

The discussion above clearly shows that the policy of allowing only English as the languages of record in the courts could easily result in systemic inequality. Such policy will pose no problem for first language English speaking accused and witnesses (the "English speaking group"). On the contrary, they are the group who benefit most from this policy unlike the mother-tongue speakers of all the other official languages (the "other languages groups"). Trials involving members of the English-speaking group are free from any risks of misunderstanding or unfairness which other languages groups cannot escape. The former group will also never have to suffer any annoyance resulting from time-consuming and money-wasting interpreting procedures which members of all other languages groups must endure. Lastly, the English speaking group, unlike the other languages groups, will never be required to testify in English and/or listen to the interpreting of the proceedings into English even where all those involved in the trial – the magistrate, prosecutor, accused, witnesses (and the attorney/counsel for the accused) share the same "other language" as their mother-tongue. However, the unnecessary interpreting process must be followed with all the unnecessary risks attendant to interpreting in general.

2) Which language?

According to the clear wording of the preferred scenario of section 35(3)(k), an accused person is entitled to be tried in a language that he or she "understands", not the language he or she has the best command of or the language which is her/his home language (mother-tongue). However, it is submitted that this provision should in fact be interpreted to mean the language the accused person understands best, which would ordinarily be her/his mother-tongue. There are sound considerations in support of this view.

Most people in South Africa have at least some understanding of at least one language other than their mother-tongue. Some people have more than one home language in which they are equally proficient. However, most people have one language – their home language or mother-tongue – of which their command is distinctively better than their command of any other language, including what might be described as their second language. Many South Africans speak English as a second or third language in which their proficiency may vary from good to fairly poor. Yet, even those who have a poor command of English might somehow be said to "understand" - the word used in section 35(3)(k) - English.

In the normal course of events, the mother-tongue is the language of spontaneous expression, the language which the speakers would freely choose to use as their preferred language. This is the language in which they can communicate with the least difficulty and forethought, in which they will make the least mistakes, the language that will serve them best in expressing their inner feelings and in which they will be fending for their interests; it is also the language they will use spontaneously when in a state of anxiety and stress; in short, this is the language which serves them best. Precisely for that reason the mother-tongue is the most appropriate language for an accused to state her/his case and to testify. It is also the most appropriate language for putting the charge against an accused, for requiring him or her to respond to the charge, for explaining to the accused her/his rights and to challenge the case of the prosecution through cross-examination. In short, the language of which the accused has the best command – ordinarily the home language – and not merely the language he or she understands – no matter how poorly – is the language which will serve the accused best in exercising his rights in court, that is, in responding in the best possible way to the demands of a fair trial.

In consequence of the multilingual realities in a country like South Africa it will often not be possible for trials to be conducted in the language the accused (and witnesses) understand best. In these scenarios translation is inevitable. Provisions

such as section 6(2) of the *Magistrates Court Act* and rule 61 of the *Uniform Rules of the High Court* are necessary.[44] That, however, does not mean that translation is the preferred scenario. Taking into account the risks that translation poses for the fairness of trials and the administration of justice, as discussed above, translation remains undesirable and should be resorted to only when it proves to be impossible or clearly unfeasible not to have a trial conducted in the language the accused (and witnesses) understand best. It is the last way out. Relevant policies should therefore not encourage it, but should endeavour to avoid it.

On close analysis, the fairness or otherwise of a trial is a matter of degree, depending, amongst other things, on the proficiency of the accused in the language used by the court. Precisely for that reason the language the accused understands best – ordinarily her/his home language – should preferably also be the official language of the court, that is, the language of record. That would ensure the best conditions for optimally achieving fairness in criminal trials and ultimately, to achieving justice. In consequence, the appropriate interpretation of the wording in section 35(3)(k), namely that the accused has the right "to be tried in a language that the accused person understands", should be that the accused has the right to be tried in a language that she/he understands best, that is, the language of which the accused has the best command, which ordinarily would be the home language.

3) Judicial pronouncements on language use in criminal courts

I now proceed to briefly refer to the case law that touched on the issue of the use of the official languages specifically in criminal proceedings. *S v Pienaar*[45] was a case that emanated from a magistrate court in the mainly Afrikaans speaking Northern Cape. In this case an Afrikaans-speaking accused and the English-speaking public defender provided by the state could not understand each other, causing the latter to withdraw when the trial commenced in the magistrate's court. The trial proceeded with the accused conducting his defence in person. Eventually the accused was convicted. On review the High Court rejected the magistrate's statement that the accused was satisfied to proceed without legal representation, held that the accused's right to legal representation was infringed and the trial was consequently not fair. The conviction and sentence were set aside. The Court criticised the justice department for its language insensitive policy that failed to take heed of the need to provide legal representatives able to communicate with and therefore properly represent accused in criminal trials. The Court also

44 *Supra* note 25.
45 *Supra* note 3.

afforded the opportunity to analyse the language related right in the criminal justice system in general as well as the official language provisions of section 6 of the Constitution. The following aspects in the Court's argumentation are of specific importance for the present discussion. It highlighted that the downsides of interpreting namely that it protracts trials, are therefore less cost effective, and moreover, could lead to serious misunderstandings to the detriment of the rights of those involved in criminal trails and to the integrity of the administration of justice.[46] The Court also expressed itself in favour of the increased use of the African languages as official languages of record in court, something that would be increasingly possible as more speakers of the African languages are appointed officers of courts as judges, magistrates, etc.[47]

Another was that of *Mthethwa v De Bruin NO*.[48] It originated from a criminal case that was heard in a regional court in KwaZulu-Natal in which an application based on section 35(3)(k) by an isiZulu speaking accused to have the case heard in isiZulu was turned down on practical grounds. (The ruling did not bear on the right of the accused to testify in isiZulu.) The practical grounds pertained to the fact that at the time there were simply not enough prosecutors, magistrates and judges to enable proceedings to be conducted in isiZulu.[49] 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 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 the ruling would in all likelihood have been different.

In two other cases namely *S v Matomela*[50] and *S v Damoyi*[51] the views expressed by the courts leave much to desire.[52] In these cases the court took the view that

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46 *Ibid* 152F-I (paras 17, 18); 153C-H (paras 20-22).
47 *Ibid* 153B (para 9). Some of the other views expressed by the court in this case are reflected elsewhere in this discussion.
48 1998 3 BCLR 336 (N).
49 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; 256 prosecutors of whom 81 were isiZulu; 41 state advocates of whom only six were isiZulu-speaking and of the 22 judges of the high court in the province only one was isiZulu-speaking at that time.
50 1998 1 BCLR 339 (CK).
51 2004 2 SA 564 (C).

English should be the sole language of record. This was done in spite of the fact that the relevant constitutional provisions were not scrutinised. Moreover the circumstances in both cases pointed to the direct opposite namely that it was entirely feasible to use official languages other than English as language for the recoding of court proceedings.

In *S v Matomela* all the participants in the case including the presiding magistrate and the prosecutor were mother-tongue speakers of isiXhosa. The case originated in the Mdantsane magistrate's court in the Eastern Cape. On the day of the case there was a shortage of interpreters. Instead of postponing the case, it was conducted in isiXhosa. Even though the review court had no problem with the use of isiXhosa in the present case, it nevertheless added that instances like this would occur more frequently in future and that would cause an increasing number of language problems.[53] 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 are used in the magistrate's court or where parties, witnesses and officers of court speak different languages and do not understand each other. The "solution" for the problem suggested by the court was that English should be the sole language for the official recording of court proceedings. The court stated that all official languages should enjoy parity of esteem and be treated equitably, but for practical reasons there should be one language, namely English which is the one language understood by all court officials regardless of their mother tongue.[54]

The language setting in *S v Damoyi* was similar to that in *Matomela*. Once again 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 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. The court nevertheless engaged in a fairly long discussion on the suitability of the use of official languages for court proceedings, and stated in conclusion that English should be the sole language for recording court proceedings. This conclusion is subject to the same criticism as that of

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[52] These two cases as well as the judgement in *Mthethwa* were critiqued in Malan, "Observations on the use of the official languages…", *supra* note 1.

[53] *S v Matomela* at 341G-H.

[54] At 342G-H.

Matomela.[55] However, the argumentation in this judgment was particularly idiosyncratic. The judge stated:

> 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.[56]

Both the basic principles of the law of evidence and the injunctions of the Constitution seemed to have escaped the court's mind. First, without any evidentiary support the court simply declared that English was the language of international commerce and politics 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, language use in international trade and politics is obviously completely irrelevant for deciding in which languages to record court proceedings in a South African criminal court in which no participant is English speaking. Thirdly, the quoted statement also reveals an idiosyncratic conception of the logic of the choice 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 internal linguistic profile of the state in question. This is precisely not, or at most only minimally, determined by the external linguistic landscape.[57]

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55 Malan, "Observations on the use of the official languages…", *supra* note 1.

56 *S v Damoyi* 569H-I.

57 The two *Lourens* judgments (*Lourens v President van die Republiek van Suid-Afrika & andere* 2013 (1) SA 499 (GNP) and *Lourens v Speaker of the National Assembly and Others* 2015 (1) SA 618 (EqC) are not discussed here as they relate to the use of the official languages in national legislation, which falls outside the scope of the present discussion.

C – Section 34 of the Constitution, relevant legislative provisions and language use in civil proceedings

The use of language in matters other than criminal cases, that is, in ordinary civil litigation, children's court, family court, labour court and labour conciliation and arbitration, administrative tribunals, small claims courts, etc., is as crucial as it is in criminal matters. In this part of the discussion the emphasis is on civil proceedings but it equally applies to the other matters mentioned above.

I start off to relay legislative provisions pertaining to language use in civil matters and then deal with section 34 of the Constitution.

Rule 61 of the *Uniform Rules of the High Court* which applies to all High Courts requires that interpretation services be provided in circumstances as set out in the rule as well as who will be responsible for the costs of such interpreting services. The rule reads as follows:

> (1) Where 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, sworn to interpret faithfully and to the best of his ability in the languages concerned.
>
> (2) Before any person is employed as an interpreter the court may, if in its opinion it is expedient to do so, or if any party on reasonable grounds so desires, satisfy itself as to the competence and integrity of such person after hearing evidence or otherwise.
>
> (3) Where the services of an interpreter are employed in any proceedings, the costs (if any) of interpretation shall, unless the court otherwise orders, be costs in the cause: Provided that where the interpretation of evidence given in one of the official languages of the Republic is required by the representative of a party, such costs shall be at such party's expense.

There is no similar provision relating to civil matters in the Magistrates Court. The practice is similar, however, as that set out in rule 61 of the *Uniform Rules of the High Court*, quoted above.

Section 5(2) of the *Small Claims Court Act*[58] provides that if evidence is given in a language with which one of the parties is in the opinion of the court not sufficiently conversant, a competent interpreter may be called by the court to interpret that evidence into a language with which that party appears to be sufficiently conversant, irrespective of whether the language in which the evidence is given is Afrikaans or English.[59]

There is no provision in the Constitution that expressly deals with the use of language in civil proceedings. However, like section 35(3) which provides for the fairness of criminal trials, section 34 also provides for fairness in these (non-criminal) matters even though it does not spell out the ingredients of fairness in the same detail as is done in section 35(3). Under the heading, "Access to courts", section 34 provides as follows:

> 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.

It stands to reason that if litigants and witnesses cannot communicate with the adjudicators in the kind of disputes envisaged in section 34, the court, tribunal or forum they seek to engage would be as inaccessible and fairness in the hearing as unachievable as it would be in criminal trials. If a litigant (or witness) does not understand the language used in the court or tribunal where a hearing is conducted, or, owing to language constraints, is unable to present a case, such hearing would fall way short of a fair hearing. Language is therefore as an essential matter in civil litigation as it is in the criminal court. By the same token, policy followed in relation to the official use of language and the accompanying need for interpreting evidence is as crucial in disputes of a civil nature as it is in criminal cases.

Access to justice and fairness of trials stand to be promoted as much in civil trials as in criminal trials if all the official languages are used as languages of record. Conversely, the use of a single language as language of record will obstruct access and lead to fairness in trials being compromised in the same way as discussed in II-B above. However, in some respects the extent of prejudice for litigants in civil matters, resulting from the use of only one language of record,

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58 *Small Claims Court Act*, 61 of 1984.

59 Section 6 of the *Magistrates Court Act* and section 5 of the *Small Claim Court Act* are both dated in that they still refer to pre 1994 situation when Afrikaans and English were the only two official languages.

will exceed the prejudice caused by such one-language policy in criminal matters, the reason being that, in contrast to the position in criminal cases, the state does not provide free interpreter services in civil litigation. While the communication barrier in the criminal court between the language of the accused and witnesses on the one hand and the language of record, on the other, can in part be overcome by interpreting with all its attendant shortcomings, it remains entirely insurmountable in civil matters because litigants cannot bear the heavy financial burden, either to hire interpreters or lawyers. In consequence, they are denied access to justice altogether.

Assume the following scenario: The sole language of record is English. Two isiXhosa-speaking litigants join issue in a civil action. Their witnesses are also home-language speakers of isiXhosa. In order for the case to be adjudicated in English, they have during the pre-trial stage, to exchange their pleadings, affidavits and all other process in English. During the trial itself their testimony and that of their witnesses as well as their arguments will also have to be in English because the language of record is English. Hence, in spite of the fact that their language and the language of everyone else involved in the matter is isiXhosa, everyone in the case will be forced to do everything associated with the adjudication of the case in English, regardless of how difficult, embarrassing and time consuming that might be for these isiXhosa speakers. Considering the difficulties which this situation imposes upon them, they might be forced – the choice of the word, "forced" is intentional because this is clearly not a truly voluntary decision – to employ lawyers to conduct the case on their behalf in English. For this service they will, however, have to pay. This will not be the end of their woes because they will still have to testify, either with difficulty in English, or once again compelled to obtain, and pay for, interpreting services with all the problems inherent in interpreting as described in II-B-1 . The more affluent litigant may be able to do all this, but what about poor and average income people who seek access to justice?[60] They are hit the hardest by the English-only policy. Not being able to pay for any of the necessary services and unable to conduct the trial in English, they might simply abandon their cases or decide right from the outset not to pursue their cases at all. In this way, the English-only policy

[60] According to information obtained from the deputy information officer of the department of justice, Ms MM Raswiswi as per letter dated 22 August 2014 (on file with author) the department of justice does not have any policy relating to the provision of (state-aided) interpreting services in civil cases. It depends on each individual court. According to the deputy information officer of the Department of Justice the Gauteng Division of the High Court does not provide such services in civil cases.

completely denies these people any access to the court and excludes them from the justice system altogether.[61]

The structural inequality of the English-only policy, once again, as in criminal cases, looms large. Such policy causes no problem for the first language English speaker litigants or witnesses. In fact, the policy suits them perfectly. They need not worry about hiring interpreters and paying for them because they can testify in English. They need not worry about interpreting of evidence fraught with its concomitant risks. If they want to do so, they can pursue their cases in person. The speakers of all the other languages are denied all this. They are in a detrimentally unequal situation compared with the first language English speakers. Their access to justice is either thoroughly hampered or completely excluded. The affluent among this large majority of inhabitants who are treated unequally by the English-only policy might try to avoid serious prejudice by hiring lawyers and interpreters. That avenue is not open to the less fortunate. The English-only policy excludes them without any redress at all. There is obviously no way in which this can be countenanced in terms of fundamental precepts of democracy.

The proclivity towards English-only practices is in fact applied in total disregard of the right of everyone to equality before the law, the right to equal protection and benefit of the law and the right of full and equal enjoyment of all rights and freedoms as envisaged in section 9(1) and (2) of the Constitution.

D – Proceedings in the Constitutional Court

For the sake of completeness the two provisions in the Constitutional Court Rules[62] deal with language use. Rule 13(4) deals with the language in which argument is conducted. It reads:

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[61] Legal aid ameliorates this problem only to a limited extent as such aid is available only to people who, in terms of a means test applied in accordance with the guide lines of the Law Society of South Africa are indigent and fall below a low income and asset bracket. In terms of this means test applied by the Law Clinic of the University of Pretoria legal in accordance with the guide lines of the Law Society is considered only if an applicant has a monthly gross income of less than R7000 or immovable property with a net value of less than R350 000. I am indebted to Mr Frikkie Grobler, an attorney at the Law Clinic of the University of Pretoria, who kindly furnished me with this information on February 23, 2015.

[62] Promulgated under Government Notice R1675 in Government Gazette 25726 of 31 October 2003.

> (a) 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.
>
> (b) Should a person wish to address the Court in an official language other than the language in which such person's written argument is couched, such person shall, at least seven days prior to the hearing of the matter in question, give written notice to the Registrar of his or her intention to use another official language and shall indicate what that language is.

Rule 25 deals with documents lodged with the Registrar that contain material in an official language which is not understood by all the judges. It provides as follow:

> Where any record or other document lodged with the Registrar contains material written in an official language that is not understood by all the judges, the Registrar shall have the portions of such record or document concerned translated by a sworn translator of the High Court into a language or languages that will be understood by such judges, and shall supply the parties with a copy of such translations.

III – POLICY OPTIONS

I proceed now to deal with a number of proposals that address these problems and that would to my mind go a long way towards ensuring equal and effective access to justice for everyone.

From the explanation of the fundamental premise (in I above) and the discussion of the constitutional provisions pertaining to language use in South African courts (in I above), it should be clear, in the first place, that that there is no basis for proposing English as the sole language for court proceedings. Such policy would be unconstitutional and would limit the right to a fair trial in accordance with section 35(3)(k), of the speakers of official African languages and to have criminal trials conducted in the language which the accused understands without the need for an interpreter.[63] The repugnant proportions of such policy are even more pronounced given the fact that it would only benefit a small percentage of

[63] Cote, *The right to language use…*, *supra* note 5 at 52.

English first langue speakers, in contrast with the large majority of speakers of the African languages who stand to be disadvantaged by such policy.

As explained in II-C, the English-only policy would have the same kind of detrimental effect in civil litigation, benefitting a small percentage of English speakers while obstructing all others from access to justice. Moreover, it would flout an excellent opportunity to elevate the status and advance the use of the indigenous African languages in pursuance of section 6(2) of the Constitution.

It is therefore proposed that all official languages be used as languages for the recording of court proceedings, taking into account the language demographics and preferences of the people living in the area served by the relevant court.[64] Before 1994 and in the first years after the beginning of the constitutional transition that would not have been possible owing to insufficient numbers of black legal professionals in the justice system who were home-language speakers of the African languages. The situation has now changed fundamentally. A large percentage of legal professional staff in the public sector of the justice system is now home language speakers of official African languages. In consequence, the speakers of all the languages can now be served in their home languages. This has greatly enhanced the feasibility of having a justice system which is maximally accessible to every inhabitant of South Africa and which would at the same time overcome all problems created by the policy of having only one language (English) as the sole language of record, as explained above. An insistence that English should be the sole language of record is based upon the wrong and outdated premise, namely that there is no suitable black legal professional staff members available who are home language speakers of one of the African languages, thus leaving no option but to settle for an English-only policy. Insisting on such policy amounts to reliance on a remnant of apartheid policies in terms of which black legal professional staff members were not appointed in the courts outside the erstwhile "homelands" for the various African ethnic groups. This has now changed completely and for that reason it can no longer serve as an excuse for not introducing all official languages as languages of record in the courts.[65]

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[64] The proposals made here are in line with that of Cote, *ibid*, at 53 and that of the Vereniging van Regslui vir Afrikaans (Association of Lawyers for Afrikaans) in this field which is available at www.vra.co.za and reflects the sentiments of Hlophe, "Official languages and the courts", *supra* note 29 at 690-96 and Hlophe, "Receiving justice in your own language", *supra* note 5 at 42-47.

[65] This was the basis of Hlophe's criticism (*supra* note 5) 694 of the judgment in *Mthetwa v De Bruin* 1998 3 BCLR 336 (N).

In practical terms the platform for the introduction of the African languages, with the retention of English and Afrikaans, should be a human resource policy tailored to respond to the variant linguistic demographics and to the needs of the speakers of the various languages of the country. This should be obvious because language related rights, including those applying within the context of the functioning of courts, which are enforceable against the state are without substance if the state, through its organs, cannot communicate in the language of the persons entitled to the rights.[66] In consequence, appointments, transfers and promotions of officials within the justice system (as elsewhere in the public sector) should be done with due consideration of the language demographics and preferences in the area where the deployment of an official is considered. How this could be achieved in practice will now be discussed.

A – Areas with a very high concentration of mother-tongue speakers of a specific language[67]

Legal professional staff, deployed in areas with a high concentration of mother-tongue speakers of a specific language must be fully in command of that language and thus be able to render services in that language without the need for interpreting. In an area such as the Eastern Cape the vast majority of prosecutors, magistrates, state advocates, state attorneys as well as judges will therefore have to be fully conversant in isiXhosa which is by far the dominant language in that area. This will enable cases involving isiXhosa speakers – the vast majority of the people in that province – to be conducted in isiXhosa as the language of record. It will also allow appeals to be conducted in isiXhosa. The same applies for most of the other languages in particular areas, for example, isiZulu in Kwazulu-Natal and Afrikaans in the Northern Cape.

B – Areas populated by a notable percentage of speakers of more than one language

Many regions are populated by a large number of mother-tongue speakers of more than one language, for example Afrikaans, isiXhosa and English in the Western Cape; Sesotho and Afrikaans in the Free State; Afrikaans, isiZulu, Setswana and Sepedi in Tshwane metropolitan area, etc. Once again the language demographics in these areas should be a decisive consideration for the deployment of legal

[66] On close analysis language is a meta-entitlement, ie, a basic prerequisite for the enforcement of all other rights. See in this regard the argumentation in K. Malan, “An analysis of the legally protectable interests pertaining to language” (2014) Journal of South African Law - Tydskrif vir die Suid-Afrikaanse Reg (TSAR) 66 at 66-69.

[67] Please see the maps included in Annexure A when these proposals are read.

professional staff. In the Tshwane metropolitan area there should, for example, be a notable percentage of mother-tongue speakers of the four mentioned languages employed as judges, magistrates, prosecutors, state advocates and state attorneys, thus allowing cases to be adjudicated in the language of the accused or litigants concerned. It would, however, be highly inappropriate to employ someone who can speak only English in this area. The same should apply for all other areas.

C – Policy within particular offices and at particular benches (1)

At a particular high court or magistrate`s court, court roles should be organised in a manner that respond to the needs of the public and the specific parties involved in a case. Trials should be assigned to judges and magistrates according to their language proficiency in order to ensure that judges and magistrates (and other court staff) are capable to conduct cases in the language of the accused in a particular criminal case, or of the parties in a civil trial. Such policies should be widely publicised in order to optimise access to justice for all members of the public.

If mother-tongue speakers of Sesotho join issue in a civil suit in the high court in the Free State – most definitely something that would regularly occur in that province given the large percentage of Sesotho speakers in the area – or, if an accused and all witnesses in a criminal trial in the magistrate’s court in Welkom in the Free State is Sesotho-speaking – once again, something that is certainly a common occurrence – the case should preferably be assigned to a judge/magistrate with a proper mastery of Sesotho in order to conduct the trial in that language. The same applies, for example, to the vast amount of cases involving only Afrikaans-speaking people in Pretoria, George, Bellville and Mitchell’s Plain, or for speakers of Sepedi in Polokwane, etc. These cases should certainly be heard by presiding officers in the language of the parties concerned.

D – Policy within particular offices and at particular benches (2)

There will always be many cases in which witnesses, accused and litigants speak different languages. Interpreting services will then have to be provided as it has been done in South African courtrooms for many decades if not centuries. Competent interpreters will therefore always be necessary to ensure administration of justice of a high standard. To that end further development of the interpreting and translation professions are essential. However, the risks and other possible disadvantages associated with any interpreting of evidence, as pointed out in part II-B above, will remain as will the importance of the proposals presently made.

E – Translation (preferable to interpreting)

It is common knowledge that numerous black people who are speakers of the indigenous African languages have over the past two decades, since the beginning of the constitutional transition, been appointed to the bench – both in the high and the lower courts. The same goes for other legal professional staff such as state advocates, prosecutors and state attorneys. This has important implications for cases originating from the lower courts and going on appeal or review[68] to the high courts. If a case is heard and judgment is delivered through the medium of one of the official African languages in the magistrate's court and such judgment is on appeal or review in the high court, it should now be possible for the proceedings in the high court to be conducted in the same official African language that was used in the magistrate's court. There would also be no need for the translation of the proceedings into English (or Afrikaans) in order to enable the high court to deal with the matter as was the position before the constitutional transition when there were no (or very few) judges conversant with any of the indigenous African languages.

It must be conceded that there will always be a small percentage of review and appeal cases that will require translation when there are no available judges acquainted with the African language in which the case was heard in the magistrate's court. The record of these cases can be translated to enable the high court to adjudicate the appeal or review. This would be a much better option than to adjudicate on the recorded testimony as interpreted in the magistrate's court. Translation is much less exposed than interpreting to the risks of rendering an incorrect version of court proceedings. Translation is done free from the pressures of immediacy and the consequent risk of mistakes which is something that interpreting is always fraught with. The translator has time to consider and to seek advice, an option which is not open to the interpreter. Translation will therefore always be more reliable than simultaneous interpreting, no matter how skilled the interpreter may be.

F – What about reporting?

It is trite that reported judgments of the superior courts constitute an important source of law. Hence, these judgments must be accessible to everybody, and

[68] Automatic review in terms of section 302 of the *Criminal Procedure Act* 51 of 1977 is the more important category in the present context since cases that go on automatic review from the magistrate's court to the high court, that is, cases in which sentences that exceed a defined minimum as described in the said section is imposed constitute the largest category of criminal cases heard in the magistrate's court that call for the attention of the High Court.

specifically to all members of the legal profession. It is therefore submitted that all reported judgments, must be in English because it is the one language understood by everyone in the legal profession in South Africa (apart from possibly also being available in any of the other official languages in which such reported judgment was initially delivered). This submission does not militate against the arguments advanced above for the increased use of all official languages as languages of record. Reported cases account for a very small percentage of all high court judgments.[69] An insistence upon an English-only approach, in so far as the recording of court proceedings is concerned, can hardly be justified merely to facilitate the reporting of a very small percentage of high court judgments. Judgments not delivered in English that need to be reported can be translated. Once again, as noted in the previous paragraph, that is much preferable to interpreting.

CONCLUSION

The currently evolving racial and linguistic profile of the South African judiciary and magistracy increases the feasibility of implementing the above proposals. So does the racial and linguistic profile of the prosecutorial profession in both the higher and lower courts and of the staff of the state attorney. The point is that many black people have been appointed as judges, magistrates, prosecutors and state advocates. They are mostly mother-tongue speakers of one of the official African languages (apart from almost always also being conversant with one or more of the other African languages). There are also many legal professionals in the public sector – black and white – who are sufficiently conversant with Afrikaans. These developments should be assessed in conjunction with the considerable progress which has been made to establish not only racial (and gender) representivity, but also linguistic diversity in the legal sector. The eventual transformation is engendering a judicial system that is politically much more legitimate than before.

The challenge, however, is to make the best possible use of this transformation, specifically also from a linguistic point of view. In other words: how should this transformation be utilised to the benefit of the South African public? The opportunity offered by this diversity should be seized to provide legal services in the courts to the public of South Africa in their own languages. The fruits of the policy of racial transformation in the legal sector (and elsewhere) should serve as

[69] My attempt to obtain exact information from the relevant authorities has thus far been unsuccessful.

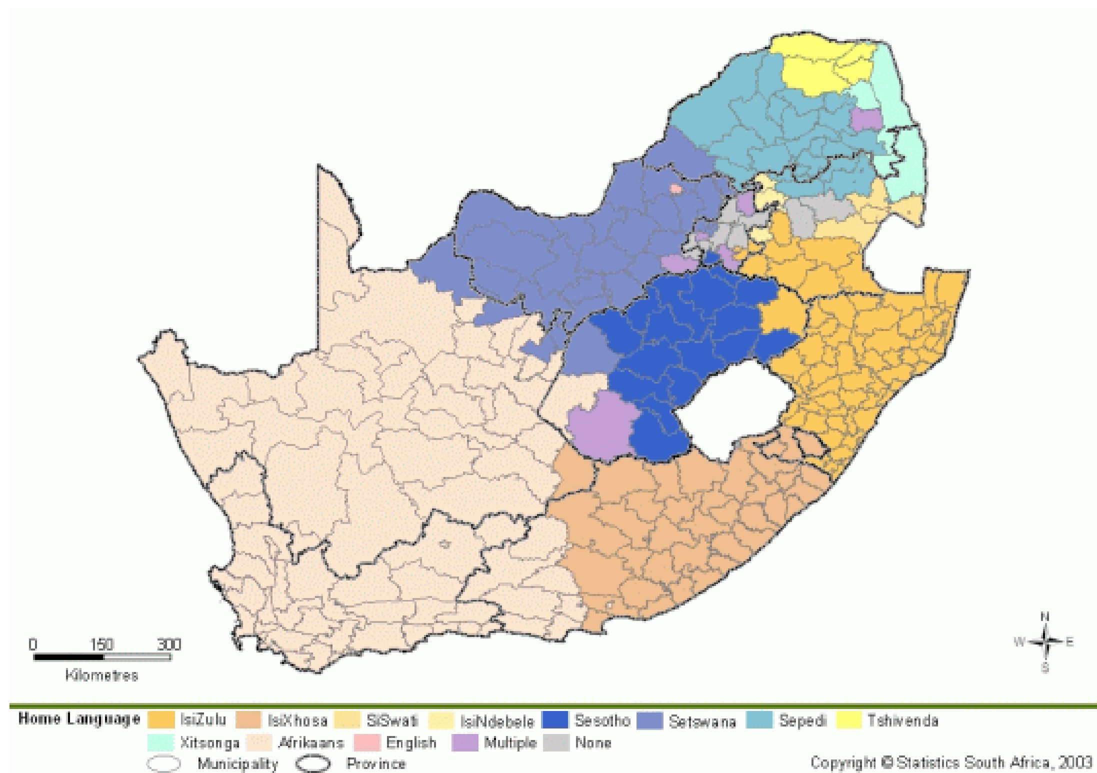
motivation to introduce the said legal services. The proposals above will go a long way towards giving practical effect to such introduction.

ANNEXURES

Annexure A: Languages maps, showing the geographical spread of the speakers of South African languages

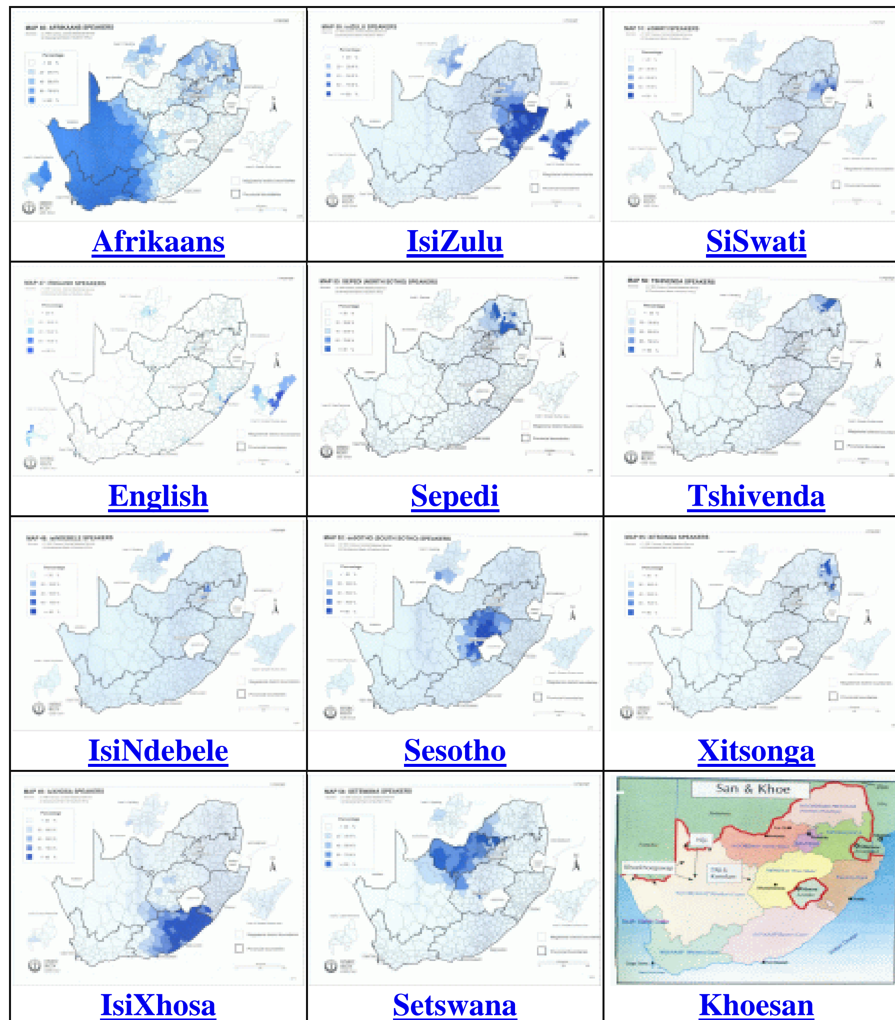
Annexure A.1

The language distribution map below shows the dominant languages per municipality in South Africa as gathered with the national census in 2001.



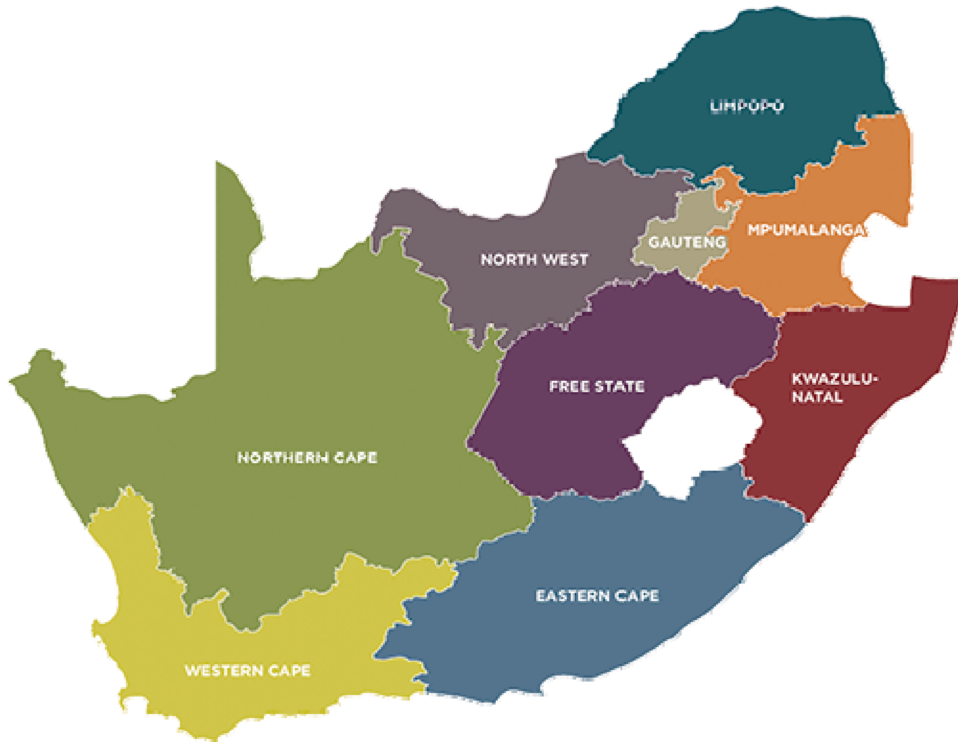
Annexure A.2

Specific language maps showing the spread of each official South African language (as well as the Khoesan languages, which are the languages of the indigenous inhabitants of South Africa.



Source: http://www.salanguages.com/languagemaps/ accessed on 10 April 2016

Annexure A.3 South Africa's provinces



Source: http://www.localgovernment.co.za/ accessed on 10 April 2016

Annexure B: Figures of the mother tongue speakers of the official languages

SOUTH AFRICAN LANGUAGES 2011		
Language	**Number of speakers***	**% of total**
Afrikaans	6 855 082	13.5%
English	4 892 623	9.6%
isiNdebele	1 090 223	2.1%
isiXhosa	8 154 258	16%
isiZulu	11 587 374	22.7%
Sepedi	4 618 576	9.1%
Sesotho	3 849 563	7.6%
Setswana	4 067 248	8%
Sign language	234 655	0.5%
SiSwati	1 297 046	2.5%
Tshivenda	1 209 388	2.4%
Xitsonga	2 277 148	4.5%
Other	828 258	1.6%
TOTAL	50 961 443**	100%

** Spoken as a home language*
*** Unspecified and not applicable are excluded*
Source: Census 2011

Source: http://www.southafrica.info/about/people/language.htm#afrikaans accessed 10 April 2016