REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

High Court Review No: 24441

Mag Crt Case No: A210/02

Review Case No: 44/02

In the matter between
THE STATE

and

MACEBO DAMOYI Accused

REVIEW JUDGMENT: DELIVERED 26 NOVEMBER 2003

YEKISO, J:

[1] The issue of use of official languages in Court proceedings which, despite a period of nine years having elapsed since the advent of the democratic order, has not as yet been resolved, is capable of and has the potential of costly

implications in the administration of justice. If parity of the eleven official languages were to be adhered to in court proceedings it could result in a considerable strain in resources which, in turn, could impact negatively on the quality of service delivery and efficiency in the administration of justice.

[2] The concerns raised in the preceding paragraph are evident in this matter which came before me by way of an automatic review in terms of section 302(1)(i) of the Criminal Procedure Act, 51 of 1977. The matter relates to criminal proceedings which were held in the Magistrate's Court, Bishop Lavis, within the magisterial district of Goodwood, Western Cape.

[3] At some point in the course of the proceedings in the matter which is the subject of this review, there was no interpreter available to interpret the proceedings from either English or Afrikaans language to IsiXhosa, resulting in postponement of the matter till the following court day. The following day there still was no interpreter available. On this occasion the Magistrate was averse in having the proceedings further postponed particularly in view of the fact that the Magistrate, the State Prosecutor and the Accused were all Xhosa speaking. The Magistrate then resolved that the proceedings would continue without an interpreter. The proceedings did indeed continue and were recorded in isiXhosa. After evidence had been led the court was satisfied that the guilt of the accused was proved beyond reasonable doubt. The accused was accordingly convicted as charged. The State proved previous convictions and after addressing the court in mitigation, the accused was sentenced to three (3) years imprisonment.

[4] I am satisfied that the proceedings in this matter are in accordance with justice. However, in a covering letter addressed to the review Judge, the Magistrate explains that tremendous problems were experienced in having the

portion of the record in which the evidence was recorded in isiXhosa transcribed, resulting in a delay in the transcription of the record, hence the delay in submitting the record for review. It is clear on the record that the matter had already been postponed due to the unavailability of an interpreter. In deciding that the matter proceed without the services of an interpreter, the Magistrate was of the view that a further postponement, due to the unavailability of an interpreter, would compromise the accused's right to a speedy trial particularly when all the parties concerned, that is the Magistrate, the Prosecutor and the accused were proficient in isiXhosa, the latter being one of the eleven official languages and also one of the three official languages in terms of section 5(3) of the Constitution of the Province of the Western Cape.

[5] When the matter came before me, I addressed a letter to the Director of Public Prosecutions to ascertain what the policy is within the Justice Department as regards the use of any one of the official languages in criminal proceedings, both in the High Court and the Lower Courts, and also to advise of the capacity

within the office of the Director of Public Prosecutions as regards the use of any one of the official languages, other than English or Afrikaans, in criminal proceedings, both in the High Court and the Lower Courts.

[6] The response from the Office of the Director of Public Prosecutions is that there is no policy within the Justice Department as regards use of any official language other than English or Afrikaans, that an audit in proficiency in official languages within the Directorate indicates that of the 262 prosecutors in the Lower Courts in the Western Cape, only 62 are African and proficient in an indigenous language and that only three advocates out of a total of 36 in the office of the Director of Public Prosecutions are able to speak one or more indigenous languages.

[7] Section 35(3)(k) of the Constitution of the Republic of South Africa, Act No 108 of 1996, provides as follows:-

"Every accused person has a right to a fair trial, which includes the right to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language."

[8] In turn, section 6(1), (2) and (4) of the Constitution reads as follows:-

"(1) The official languages of the Republic are Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu.

(2) Recognizing 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 of use of these languages.

(4) The national government and provincial governments, by legislative and other measures, must regulate and monitor their use of official languages. Without detracting from the provisions of subsection (2), all official languages must enjoy parity of esteem and must be treated equitably." (the underlinings are obviously mine)

It is quite evident that in terms of section 6(2) and (4) of the Constitution, both the National and the Provincial governments have a constitutional duty to realize the objective envisaged in the aforementioned subsections, not only as regards the affairs of either the National and Provincial governments but also as regards the conduct of court proceedings. Whether both the National and the Provincial governments have a political will to do so, remains to be seen.

[9] The question of parity of official languages for purposes of court proceedings has had occasion to be considered in other jurisdictions. In *S v Matomela 1998(2) All SA 1* (CK) the court dealt with an automatic review of a sentence on a conviction for failure to comply with a maintenance order.

[10] The evidence in the proceedings was recorded in isiXhosa due to the shortage or unavailability of interpreters. In this matter the Magistrate, the Prosecutor and the accused were all proficient in isiXhosa hence the conduct of the proceedings in isiXhosa. What is of significance in *S v Matomela* (supra) is the part of the judgment which discusses the problem of the language of the proceedings to be used in South African courts. Tshabalala, J (as he then was) had directed a query to the presiding magistrate in the following terms: *"Why was the evidence, conviction and sentence in Xhosa language? Is this in terms of an instruction from the Department of Justice? Full reasons are required.* " The senior magistrate responded that the recording of the proceedings in isiXhosa was not as a result of an instruction from the Department of Justice, but was occasioned by the following factors, namely:
There was a shortage of interpreters, and postponement until the shortage was overcome would have caused the complainant further hardships.

It was ascertained that the parties were all Xhosa speaking, including the presiding officer. The senior magistrate also did not want the presiding officer to act as an interpreter.

[11] learned judge accepted the reasons as fair and reasonable in the circumstances. He remarks as follows at p4 e-f:

"In my judgments the best solution is to have one official language for courts… All official languages must enjoy parity of esteem and be treated equitably but for practical reasons and for better administration of justice one official language of record will resolve the problem. Such a language should be one which can be understood by all court officials irrespective of mother tongue."

[12] In *S v Pienaar 2000(2) SACR 143*, the accused was convicted of dealing in dagga in the magistrate's court, Kimberley, Northern Cape, and was sentenced to a fine of R 3000 or two (2) years' imprisonment. Before the commencement of trial the accused had asked that his legal representative, who was English-speaking and not proficient in the Afrikaans language, to withdraw for the reason that they could not communicate effectively. She accordingly withdrew and the trial proceeded with the accused undefended. The reviewing judge enquired from the magistrate whether she had asked the accused if he knew that he was entitled to a legal representative with whom he could communicate or that he was entitled to an interpreter through whom he could communicate with his legal representative. The magistrate responded that she could have gone further and informed the accused that there was a possibility that he could get another legal representative or an interpreter. However, she was of the view that the accused had not been prejudiced even though the trial had proceeded without the accused having had legal representation.

[13] The review judge was not persuaded that the accused had made an informed and considered decision in agreeing that the matter proceed without the services of a legal representative. Further, in the view of the review judge, the accused had a right to legal representation provided by the State, but the judge also had to decide whether the accused had the right that the State provide him with a legal representative with whom he could communicate in Afrikaans or by means of an interpreter.

[14] The Court observed that although Afrikaans was the most commonly spoken language in the Northern Cape and was used in 72% of cases in courts in comparison with 1.4% of cases in English, it was the stated policy of the Department of Justice to introduce English as a language of record in the courts. English-speaking presiding officers and public defenders had been appointed, but the use of interpreters to cope with the problem would result in phenomenal cost and would have inequality implications. The Court was of the view that the promotion of English at the expense of other official languages was in conflict with the constitutional directive as envisaged in section 6(4) of the Constitution.

[15] The Court further referred to section 6 of the Magistrate's Court Act, 32 of 1944 in support of the view that the accused had a right to be tried in the Afrikaans language.

[16] Section 6 of Act 32 of 1944 reads thus:-

"(1) Either of the official languages may be used at any stage of the proceedings in any court and the evidence shall be recorded in the language so used."

In my view the provisions of section 6 of the Magistrate's Court Act were superceded by the provisions of section 6 of the Constitution so that reliance on section 6 of the Magistrate's Court Act in support of the view that the accused had a right to be tried in the Afrikaans language, in my view, is not in conformity with the provisions of section 6 of the Constitution.

[17] The application of section 35(3)(k) of the Constitution was further considered in *Mthethwa v De Bruin NO & Another 1998(3) BCLR 336(N)*. In this case the applicant, who had been charged in the Regional Court, understood English but had demanded that his trial be conducted in isiZulu. The regional magistrate before whom he appeared, as well as the legal representative who represented him, were not Zulu-speaking. The Court pointed out that section 35(3)(k) of the Constitution does not confer on an accused person a right to have a trial conducted in the language of his/her choice, but that it merely confers a

right to be tried in a language that he/she understands, or if that is not practicable, to have the proceedings interpreted into such a language. In my view this is the correct interpretation of the provisions of section 35(3) of the Constitution but falls short of addressing the issue of parity of the use of languages in court proceedings.

[18] What clearly emerges from the few decisions in which the issue of parity of languages was considered is the divergence in views concerning the use of official languages in court proceedings. The burning issue still is which of the eleven of the official languages should be used as the language of record in court proceedings. The solution to problems such as the one raised in this matter could be the introduction of one language of record in court proceedings. I am of the opinion that the recommendation by Tshabalala, J in *S v Matomela* (supra) is the route to follow, and, in my view, such a course would not only be economical but would be in the best interest of justice. After all English already is a language used in international commerce and international transactions are exclusively concluded 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.

[19] I thus do not share the view by Malan JJ :*Die gebruik van Afrikaans vir die notulering van hofverrigtinge gemeet aan die demokratiese standaarde: Tydskrif vir Regswetenskap / Journal for Judicial Science* p36 Vol 28 No 1 June 2003 that the approach as suggested in the preceding paragraph is incongruent with the democratic values enshrined in the Constitution.

[20] I have already made a determination that the proceedings in the instance of this matter are in accordance with justice. It is to be hoped that the issue of a language of record in court proceedings will be resolved sooner rather than later. Having said that the conviction and sentence is confirmed.

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N J Yekiso, J