IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG

REPUBLIC OF SOUTH AFRICA

Review No: DR224/14

Reportable

In the matter of -

THE STATE

versus

PHATHUMUZI THANDAZANI DAMANI

REVIEW JUDGMENT

Delivered on 9 December 2014

NDLOVU J

[1] The position whether any of the 11 official languages may be used at any stage of the criminal proceedings, at the instance of an accused or at the discretion of the court concerned; or whether a language of record should be prescribed for court proceedings, hitherto remains uncertain. In this matter, which served before me as an automatic review in terms of section 302(1) of the Criminal Procedure Act[1], this question has once again arisen.

[2] This case emanates from the Magistrate's Court, Mahlabathini, in northern KwaZulu-Natal. The entire proceedings in the matter were conducted in isiZulu, including the judgment and sentence. Only the charge sheet form (J15) and the review case covering form (J4) were completed in English. The accused was convicted of assault with intent to do grievous bodily and sentenced to undergo 12

[1] Act 51 of 1977.

months' imprisonment, which was wholly suspended for 5 years on certain conditions.

[3] I addressed certain review queries to the learned presiding Magistrate which, to the extent relevant, read as follows:

> "1. As an accused does not have a right to have his/her trial conducted in a language of his/her choice (*Mthethwa v De Bruin NO and Another* 1998(3) BCLR 336 (N)), was it the choice of the presiding magistrate to have the entire proceedings conducted in IsiZulu in this case? If so, did the magistrate consider the logistical problems that could or would potentially arise when the matter was brought to the High Court for review? (See: *S v Matomela* 1998(3) BCLR 339 (Ck); *S v Damoyi* 2004 (2) SA 564 (C). In any event, was there no interpreter available to assist with the translation duties in court? ...
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> 4. As the accused was sentenced on 30 April 2014, why did it take nearly 3 months for the matter to be submitted to the Registrar, on 27 July 2014?"

[4] In his reply the Magistrate indicated that it was his own choice that he conducted the proceedings in isiZulu. On the issue of late submission of the record for review, he sought to explain that the record was sent for transcription on 30 April 2014 (the date of sentence) and received back from the transcribers on 24 June 2014. He went on to say that (after 24 June 2014) the clerk of the court *"must have misfiled the case record"* in error, for it to be submitted to the Registrar only on 27 July 2014.

[5] The Magistrate further stated, in his reply, that in taking the decision to conduct the proceedings in isiZulu he had taken into account the following:

- That the Mahlabathini district comprised mostly rural areas and *"99.9 per cent of accused are Zulu speaking".*

- That, in the present case, the presiding magistrate, the prosecutor, the complainant and the accused (who was not legally represented) were all Zulu-speaking.
- That the Constitution called for recognition of the equality of all 11 official languages.

[6] In the meantime I have sought and obtained input from the Director of Public Prosecutions, KwaZulu-Natal, Advocate M Noko (the DPP); the Chief Magistrate of Pietermaritzburg, Ms ME Monyemore (in her official capacity as the administrative regional cluster head for the magisterial district of Mahlabathini)[2] and the Acting Chief Magistrate of Durban, Mr EB Ngubane. I am profoundly indebted to their helpful contribution.

[7] A magistrate's court is established under, and governed by, the provisions of the Magistrates' Courts Act[3]. Section 6(1) of that Act provides, *inter alia*, as follows:

> "6. **Medium to be employed in proceedings –**
>
> (i) 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."

[8] Obviously, section 6(1) of the Magistrates' Courts Act, above, must be read with section 6(1) of the Constitution[4] which provides that *"[t]he official languages of the Republic are Sepedi, Sesotho, Setswana, Siswati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu".* Taken literally, therefore, any of the 11 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".* This was a drastic, but

[2] This arrangement is presumably in terms of section 12(1)(c) of the Magistrates' Courts Act.
[3] Act 32 of 1944, as amended by section 7 of Act 40 of 1952.
[4] The Constitution of the Republic of South Africa Act 108 of 1996.

necessary, departure from the pre-1996 Constitution era where, in terms of the repealed Republic of South Africa Constitution Act, only English and Afrikaans were the official languages of record.[5]

[9] It is common knowledge that, during the pre-1996 period aforesaid, the indigenous languages of the people of this country did not receive proper recognition, in comparison to English and Afrikaans. Hence the Constitution put in place appropriate provisions to redress that discriminatory imbalance. In this regard, section 6 of the Constitution further provides, *inter alia*, as follows:

> "(2) Recognising the historically diminished use and status of the indigenous languages of our people, the state must take practical and positive measures to elevate the status and advance of the use of these languages.
>
> (3) (a) The national Government and provincial Governments may use any particular official languages for the purposes of Government, taking into account usage, practicality, expense, regional circumstances and the balance of the needs and preferences of the population as a whole or in the province concerned; but the national Government and each provincial Government must use at least two official languages …
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> (4) …. Without detracting from the provisions of sub-section (2), all official languages must enjoy parity of esteem and must be treated equitably." (Emphasis added)

[10] As to the question of language to be used during criminal proceedings, the Constitution stipulates that *"[e]very accused person has a right to a fair trial, which includes the right to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language."*[6] It is clear, however, that this provision does not extend to, or confer upon, an accused person a right to be tried in a language of his or her own choice. Indeed, this position was reiterated by this Court (*per* Howard JP, with Mthiyane J concurring) in *Mthethwa v De Bruin NO and Another*[7]. The provision simply means that an accused is entitled to

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[5] Section 108(1) of Act 32 of 1961.
[6] Section 35(3)(k) of the Constitution.
[7] *Mthethwa v De Bruin NO and Another* 1998(3) SA BCLR 336 (N) at 338.

understand the language used during the proceedings either directly or through an interpreter. In other words, it seems to me, the language used need not be the mother tongue of the accused concerned; but it must the language which the accused understands.

[11] Some 16 years ago, this issue was visited by the Court in *S v Matomela*[8]. In that case the the Court (per Tshabalala J, as he then was, with Pickard JP concurring) remarked as follows:

> "The constitutional provisions … referred to above [i.e. section 6(1) read with 6(2) and (4) of the Constitution] are binding unless there was one official language for the courts. In order to arrive at such a situation national legislation would have to be passed for that purpose. I anticipate that instances like the present case will occur more frequently in the future and the problems arising therefrom will become greater and greater. This is necessarily so when one considers that more and more judges and magistrates whose mother tongue is one of the official indigenous languages are finding their way on to the benches of South African courts. The same applies to the increase in the number of prosecutors and practitioners from indigenous language groups. The Constitution as it presently stands entitles people of the same language group to conduct the whole case in their language only providing it is one of the official languages. This is a matter that I consider should receive the urgent attention of the national legislature before injustices occur as a result of the present situation."

[12] Indeed, it would be a constitutional ideal to cherish the day we saw every court in the country operating in the language predominantly used in the area or region where the court is situated. As indicated already that, from a theoretical perspective, any of the 11 official languages may be used at any stage of the court proceedings and the evidence be recorded in the language so used. However, it seems to me, from empirical perspective, that the realisation and implementation of this constitutional ideal has, thus far, proved elusive or impracticable. As briefly outlined hereafter, a lack of proper planning appears to have been the catalyst for failure in this regard.

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[8] 1998 (3) BCLR 339 (Ck)

[13] At any rate, it should be borne in mind that the Constitution envisages, as cited above, that any process aimed at realising and implementing the constitutional imperative of promoting the use of indigenous languages in court proceedings should be embarked upon *"taking into account usage, practicality, expense, regional circumstances and the balance of the needs and preferences of the population as a whole or in the province concerned"*[9]. On the potential problems pertaining to logistics and expense the Court *(per* Yekiso J), in *S v Damoyi,*[10] observed thus:

> "If parity of the 11 official languages were to be adhered to in court proceedings it could result in a considerable strain on resources, which could, in turn, impact negatively on the quality of service delivery and efficiency in the administration of justice".

[14] Pursuant to the objectives outlined in section 6 of the Constitution, the Legislature promulgated the Use of Official Languages Act[11], section 4 of which provides, *inter alia*, that *"[e]very national department ... must adopt a language policy regarding its use of official languages*[12] [and which] *must comply with the provisions of section 6(3) of the Constitution*[13]*."* In terms of section 7(5) of the Public Service Act[14] the President of the Republic of South Africa, by proclamation in the Government Gazette[15], amended Schedule 1 to the said Act and inserted the 'Office of the Chief Justice' and 'Secretary-General: Office of the Chief Justice', respectively in Columns 1 and 2, thereby establishing the 'Office of the Chief Justice' on a status akin to a national department.

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[9] Section 6(3)(a) of the Constitution, above.
[10] 2004(2) SA 564 (C) at 566.
[11] Act 12 of 2012.
[12] Section 4(1) of Act 12 of 2012
[13] Section 4(2)(a) Act 12 of 2012.
[14] Promulgated under Proclamation R103 of 1994.
[15] Government Gazette No. 33500 dated 3 September 2010.

[15] According to section 8(3)(b) of the Superior Courts Act[16]:

> "The Chief Justice may, subject to subsection (5), issue written protocols or directives, or give guidance or advice, to Judicial Officers –
>
> (a) …
> (b) regarding any matter affecting the dignity, accessibility, effectiveness, efficiency or functioning of the courts."

Subsection (5) provides that any protocol or directive referred to in subsection (3) above –

> (a) may only be issued by the Chief Justice if it enjoys the majority support of the heads of those courts on which it would be applicable; and
> (b) must be published in the Gazette."

[16] In her memorandum the DPP pointed out that during October/November 2008 the national government *"embarked on a campaign through pilot projects to promote the use of indigenous languages in the country's courts"* – the so-called indigenous language courts. To this end, the pilot projects in the province of KwaZulu-Natal, in particular, were established in the districts of Msinga, Impendle, Nongoma and Hlabisa. Notably, the district of Mahlabathini (from which this case emanates) was not designated as one of the pilot project sites.

[17] It would appear that the said pilot project projects have thus far not been successful. The challenges experienced included the following:

- Difficulty experienced by a presiding magistrate, prosecutor, defence attorney in articulating legal terminology in isiZulu, including quotation from statutes and legal precedents.
- Translation into isiZulu of court annexures, roneo forms and statements in police dockets.

[16] Act 10 of 2013.

- Difficulty for the transcribers in preparing court records for review or appeal purposes, hence undue delay caused in this regard.
- Different isiZulu dialects occasionally posed problems to court officials and litigants, despite all of them being, otherwise, Zulu-speaking.

[18] Hence, in or about 2011 the operation of 'indigenous language courts' in KwaZulu-Natal floundered due to what was reported to be a lack of proper planning on the logistics and practicalities concomitant with the implementation. There was a 3 year lull on the matter since 2011, until about June 2014 when a body or association of all chief magistrates in the country, known as the Chief Magistrates Forum issued a 'preliminary report on indigenous language courts'. In terms of this report, on 21 April 2014 the Director: District Courts Efficiency, Mr Mahomed Dawood, informed all regional cluster heads that the Director-General of the Department of Justice and Constitutional Development had directed that the indigenous language courts should be resuscitated in all provinces. Consequently, two meetings of the sub-committee of the Chief Magistrates Forum, known as the Subcommittee: Legislation on Indigenous Language Courts (the subcommittee) were held during September 2014 with a view to discussing the matter, identifying problem areas and making the necessary recommendations.

[19] After due deliberation, the subcommittee issued a report on 19 September 2014 (which was furnished to me by the Chief Magistrate, Pietermaritzburg), in terms of which it was recommended to the Chief Magistrates Forum, as follows:

> 19.1 That Executive Committee of the Chief Magistrates Forum must seek the guidance of the Chief Justice on the Language Policy as regards the Magistrates Courts.

19.2 That the Executive Committee of the Chief Magistrates Forum must establish, through the Office of the Chief Justice, as to whether the Department of Justice and Constitutional Development has ensured that there are proper structures to adequately and timeously transcribe and translate proceedings recorded in any of the nine indigenous languages into English.

19.3 That the Chief Magistrates Forum in the meantime to do an audit of indigenous languages predominantly in use within Administrative Regions, in order to assist the National Department responsible for language policy in determining the most used languages within specific clusters and/or sub-clusters, for purposes of service level agreements with service providers of translation services.

19.4 That the Chief Magistrates Forum must support the use of indigenous languages in any courtroom for any proceedings, as long as it is practical to do so.

19.5 That the Chief Magistrates Forum must inform Mr Dawood that the Forum would not, for reasons specified in the report, support the idea 41of 'indigenous language courts', but that it would take practical steps and positive measures to elevate the status and advance the use of languages with historically diminished use and status in all the courts of the Republic of South Africa.

[20] Given the constitutional imperative in this regard, the use of any of the 11 official languages in courts is no doubt a constitutionally noble idea and the measure would go a long way towards realising and facilitating the people's right of access to courts and to justice. Therefore, all attempts and efforts that are aimed at elevating,

promoting and advancing the status and the use of indigenous languages in courts, particularly the lower courts at this stage, are to be welcomed and encouraged. Having said so, however, this process should be embarked upon in an orderly and less disruptive manner, so as to ensure that the finalisation of cases is not unduly delayed. To my knowledge, at the moment there seems to be no proper structures in place that could adequately and timeously attend to the transcription of court records from the nine indigenous languages, for purposes of appeals or reviews. It follows, therefore, that undue delays in finalising those cases would most certainly occur. Such outcomes would have dire and prejudicial consequences to the accused concerned – unfortunately being the people whom the proposed measure or system is otherwise intended to benefit. In the present case, for instance, it took some 2 months for the record to be transcribed. The reasons for the delay proffered by the Magistrate are, in my view, not convincing.

[21] It seems to me, accordingly, that a proper planning in this regard would necessarily have to include provision for adequate logistical support at all places that are certain or likely to be affected, in order to ensure that quality service delivery was not compromised.

[22] In terms of section 12(1)(c) of the Magistrates' Courts Act, *"a magistrate shall be subject to the administrative control of the head of the administrative region in which his or her district is situate."* Therefore, given the fact that a decision by any Magistrate, at his or her discretion, to conduct court proceedings in any of the nine indigenous official languages, is likely to have administrative and/or budgetary implications on the part of the Government or the Office of the Chief Justice, it is not, in my view, a salutary and desirable thing for any Magistrate to do at this stage, until such time that the issue of language policy during court proceedings in the lower

courts is officially resolved and determined upon by a competent authority. As to the position in the superior courts, it seems to me there are even more complications at that level and, therefore, it will be a matter for debate on another day.

[23] Otherwise, having read and considered the merits of the present review case, the proceedings are certified to be in accordance with justice.

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NDLOVU J

_____ I agree.

NKOSI J