

SOUTH AFRICA / JUDGMENT

Oosthuizen and Another v S (Appeal) (CA&R 248/2021 ; CA&R 45/2023) [2024] ZAECKMKHC 101; 2024 (2) SACR 600 (ECMk) (19 September 2024)

[2024] ZAECKMKHC 101

COURT

Eastern Cape High Court, Makhanda

BEFORE

B R Tokota, N Mullins

CASE / FILE NUMBER

CA&R 248/2021 ; CA&R 45/2023

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FLYNOTES:

CRIMINAL – Appeal –
Language of court record –
Concerns regarding records of
court proceedings which were partly in English and partly in
Afrikaans – Heads of court’s
committee on court
language policy recommend that English be court language of record
– Interpreter should have been
used and court record
translated in English – Order directing magistrates to
ensure that portions of each record in
Afrikaans are translated
into English – Magistrates Court Act 32 of 1944, s 6(2) –
Constitution, s 35(3)(k).
IN
THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE
DIVISION, MAKHANDA)
REPORTABLE
Case No: CA&R
248/2021
CA & R 45/2023

In the matter between: M
OOSTHUIZEN
Appellant
A
VAN
STRATEN
Appellant
and
THE
STATE
Respondent

JUDGMENT

Tokota J

Introduction:

- [1] The two appellants stood trial in the Magistrates' Courts facing different criminal charges before different Magistrates. The first mentioned appellant (Mr Oosthuizen) was charged in the Regional Court Division of Gqeberha. The second mentioned appellant (Mr Van Straten) was charged in the Magistrate's Court for the district of Joubertina. On the date of the hearing of their appeals we made the following order: (a) Both matters are struck from the roll;
- (b) The respective Magistrates are directed to ensure that portions of each record recorded in Afrikaans are translated into English;
- (c) The matters may not be re-enrolled until such time as the directive in (b) above has been complied with. What follows are the reasons for the order we made. Henceforth I will refer to the appellants by their names.
- [2] Mr Van Straten stood trial in the Magistrate's Court for the district of Joubertina on charges of contravening the provisions of s.17(a) of the Domestic Violence Act 116 of 1998 (violating the protection court order) Count 1; Assault GBH count 2; possession of a dangerous weapon in contravention of s.3(2) of Act 15 of 2013 count 3; failure to report the loss of a firearm in c/s.120 of Act 60 of 2000 count 4. He was convicted on counts 1 to 3 and acquitted on count 4. He was sentenced to undergo 5 years' imprisonment, all counts having been taken together as one for sentence purposes. With leave of that Court the appeal is against convictions only.
- [3] Mr Oosthuizen stood trial in Regional Court Gqeberha charged with fourteen counts of fraud, one count of contravening s.86(1) of The Electronic Communications and Transactions Act 25 of 2002 (the Act) and 13 counts of forgery. He was convicted on fourteen counts of fraud and one count of contravening s. 86(1) of the Act. On fraud conviction, he was sentenced to 5 years' imprisonment wholly suspended conditionally for a period of five years. He was fined R3000 or to undergo twelve months' imprisonment on the count of

contravening the provisions of the Act. With leave of the Magistrate the appeal is against convictions only.

- [4] The court records in both matters is partly in English and partly in Afrikaans. In the matter of Mr Oosthuizen 90% of the record is in Afrikaans and in the matter of Mr van Straten about 20% of the record is in Afrikaans. Furthermore, the record in my possession in respect of Mr van Straten is incomplete having 19 pages of the evidence of Mr van Straten missing. Prior to the hearing date my secretary drew this to the attention of the appellant's attorneys who promised to furnish me with a complete record, but this was not done.
- [5] At the hearing of these matters we raised our concerns about the records of the court proceedings which were partly in English and partly in Afrikaans in both matters. This point was also correctly raised at the commencement of the proceedings in the Magistrate's Court Joubertina by the defence lawyer. Mr Landman, who represented Mr van Straten, brought it to the attention of the Magistrate that he had 'heard that everything must now be done in English, we can go as far [as] we can in English.' The response to this by the Magistrate was, 'No no, one cannot just go on in English and take away his right to speak Afrikaans. If he wants to speak Afrikaans, he can speak Afrikaans.'
- [6] The Magistrate missed the point. He knows full well that he has a duty to get an interpreter to interpret the language spoken by the accused or witness as the record should be in English. I do not understand Mr Landman to have meant to deprive his client of the right to speak Afrikaans. Indeed, Mr van Straten was entitled to speak Afrikaans as long as the same would have been interpreted into English for record purposes. This is what happens when a person speaks in IsiXhosa or isiZulu. The same would apply to any one of the other official languages.
- [7] I must point out from the outset that it is not the intention of this judgment to convey the impression that witnesses, including accused persons, may not give evidence in Court in the language of their own choice. Far from it. Section 30 of the Constitution of the Republic of South Africa, Act 1996 (the Constitution) provides that

'Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights. Section 31(1) provides that '[p]ersons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community-

- (a) to enjoy their culture, practise their religion and use their language;'

Consequently, everyone involved in Court proceedings including the accused person is free to choose to give evidence in the language of his/her own choice.

- [8] Section 6(2) of the Magistrates Court Act 32 of 1944 makes provision for the Magistrate to use the services of an interpreter at State expense in criminal cases where the witness wishes to give evidence in a language other than the Court language. Section 35(3)(k) of the Constitution provides that 'Every accused person has a right to a fair trial, which includes

the right to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language'. I am not aware of any provision for the provision of an interpreter at State expense by the Magistrate in respect of civil litigation but in my opinion there is no valid reason why the same principle should not apply. Since these matters are concerned with criminal proceedings I will confine myself to criminal proceedings.

Language Historical

background.

- [9] The language issue is a sensitive matter especially if one has regard to the provisions of the Constitution which provides that 'all official languages must enjoy parity of esteem and must be treated equitably'.^[1] The heterogeneity of the population in South Africa is of such a nature that it is imperative that for practical reasons there must be uniformity in the use of Court language.
- [10] After the arrival of the colonists in this country in the seventeenth centuries there were three official languages, at least in Courts, namely English, Dutch, (which later subsided into Afrikaans) and Latin. In 1652 when Jan van Riebeeck occupied the Cape of Good Hope for the Dutch East India Company, Roman Dutch Law was introduced in South Africa.
- [11] Each language group has got its own jargon which has an impact on different cultures. There is a story that a certain counsel in the Supreme Court of Appeal, during the debate of the argument, was asked a question in Afrikaans and because of the race of the judge who put the question he responded in English anticipating that the judge would understand it better. The judge then asked if he misunderstood the question and thereafter he rephrased his answer in Afrikaans. This may sound as a joke but it illustrates the problem of the language usage and perceptions attendant thereto.
- [12] After the rise of Afrikaner nationalism, Afrikaans became an important legal language. In the then South West Africa, Afrikaans was generally spoken and understood by everyone and English was used by a smaller group of persons, primarily as a second or third language. Upon gaining independence Afrikaans was then perceived as the language of the vanquished conqueror. Consequently, it was replaced with English as the only official language.
- [13] In the South African context Afrikaans gained its momentum primarily because common law was derived from Roman Dutch law and its closeness to Dutch. After the Anglo-Boer war the official language policy was English. After the Union of South Africa was established on 31 May 1910 an Act of the Westminster Parliament had a language provision in terms whereof the official languages of the country were to be English and Dutch, each with an equal standing. After 1925 Afrikaans replaced Dutch completely.

- [14] During 1950s many judgments were written in the language easily understood by the loser. In the Universities in order to acquire an LLB degree one had to pass English, Afrikaans and Latin 1. So was the case for admission as an advocate. This remained the situation until 1976 when the Homeland Governments like Transkei adopted their own policies after gaining independence. However, the attainment of self-government and independence paid lip service to their own indigenous languages in Courts. English enjoyed preference and was the “unofficial” official language to be used in Courts. Indigenous languages could not be used for various reasons one of which is that the indigenous languages do not have the technical design of the legal system. Indigenous languages were not used as medium of instruction in the University.
- [15] With the advent of the constitutional era since 1994 the Latin requirement for advocates was abolished. In 1995 the abolition of all language requirements for advocates followed. Universities now have a free hand in determining their degree requirements and it is no longer a requirement that these languages should form part of the syllabus.
- [16] The battle for Afrikaans language to be retained as the medium of instruction in schools is demonstrated by a long line of cases some of which are quoted hereunder.[2] It is needless to say, as counsel, I was also involved in some of them representing the Government.

Heads of Courts Resolution on Court language.

- [17] In February 2003 the Heads of Courts established a Committee to prepare and report on the use of various official languages in Courts and make recommendations in connection therewith. The Committee recommended that:

‘... for reasons of practicality, English should be regarded as the language of record for all courts. This should not deny the litigant,

witness or legal practitioner the right, where practicable, to address the court in the language of his or her choice. In instances

where a language other than English is used during court proceedings, it must be translated contemporaneously into English. Where

contemporaneous translation is not available, the court record, or portions of the court record in a language other than English, must be translated into English.’ In March 2017 the Heads of Courts accepted the recommendations and decided that English be the language of record at the Superior Courts and should be implemented in the absence of a policy decision from the Executive in this regard. There is no policy decision from the Executive regarding official language to be used in Courts.

Judicial precedence:

- [18] In *Mathebula v S*[3] the full Bench of Mpumalanga held that 'Court language of record is English and it should be adhered to uniformly.' It held further that '[w]here the trial is conducted in any language other than the court language of record, the presiding officer has a duty to see to it that the record that is submitted to the High Court is translated into English. I agree.
- [19] In *S v Feni*[4] the Court held that in criminal cases Magistrates are obliged to use the services of an interpreter in the event the accused does not understand the Court language and failure to do so constitutes an irregularity vitiating the proceedings. It said '[t]he real issue, however, is whether this Court should set aside the proceedings by virtue of an irregularity or defect in the procedure. Sec. 6 (2) of Act 32 of 1944 provides that if in a criminal case evidence is given in a language with which the accused is not, in the opinion of the court, sufficiently conversant, a competent interpreter shall be called by the court in order to translate such evidence into a language with which the accused professes or appears to the court to be sufficiently conversant. The failure to do so would clearly be a gross irregularity vitiating the proceedings.' Although one may think that this case did not deal directly with the point in issue here, it caters for the fact that the appellant was Afrikaans speaking and that in those circumstances an interpreter should be provided. In any event in the absence of a judgment directly in point in this division the Magistrate should follow the decisions of the High Court of other divisions.[5]
- [20] In *Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another*[6] delivering a unanimous judgment Brand AJ said
- 'The doctrine of precedent not only binds lower courts but also binds courts of final jurisdiction to their own decisions. These courts can depart from a previous decision of their own only when satisfied that that decision is clearly wrong. Stare decisis is therefore not simply a matter of respect for courts of higher authority. It is a manifestation of the rule of law itself, which in turn is a founding value of our Constitution. To deviate from this rule is to invite legal chaos.'
- [21] The doctrine of judicial precedence is to the effect that lower courts are bound by the decisions of the High Courts. In the absence of any decision within his/her Division the Magistrates in these matters should have followed the Full Bench decision of Mpumalanga whose ratio is directly in point. In any event, in my view, the decision of the Heads of Courts relating to the Court language was also binding on the Magistrates. The *Feni*[7] decision also informs the Magistrate what to do in the event accused is not familiar with the Court language.

Discussion:

- [22] The Heads of Court's Committee on Court language policy established in 2003 saw it fit to recommend that English be the Court language of record. This was adopted as a resolution by the Heads of Court under the auspices of the Chief Justice in March 2017. Therefore, in my view, in light of the authority of Heads of Courts, including the Chief Justice, to manage and give guidance in the running of Courts in the Republic, the resolution is binding on

Courts and should be treated as such in the absence of the language policy from the Executive. Heads of Courts have the power to issue directives in order to manage the functioning of Courts under their jurisdictions[8] including Magistrates' Courts. Magistrates are therefore obliged to implement such directives or guidelines.

- [23] According to Baxter[9], directives belong to a 'body of rules which are of great practical importance' and which constitute 'instructions issued without clear statutory authority to guide the conduct of officials in the exercise of their powers'. There is a High Court decision pursuant to the directive which held that it is imperative that lower Courts should conduct their trials in English.[10]
- [24] In my view, the situation will be out of control if a Venda or Xhosa speaking person were to be allowed to insist that the proceedings be recorded in Venda or Xhosa simply because the presiding Magistrate happens to understand the language. I mention here Venda as one of the languages solely because it is regarded as one of the most difficult languages in South Africa. The record of the proceedings is not meant for Venda speaking judges but judges consisting of different races. The directive is in line with the common language spoken by the majority of persons in South Africa. It is not enough for the judicial officer to write the judgment in English. The judgment is based on the evidence led in Court and the appeal Court should be able to scrutinize the judgment and ensure that the findings are consistent with the evidence that was led.
- [25] It is perhaps expedient at this stage to mention that there was a faint argument by Mr Daubermann, appearing for Mr Oosthuizen, that if such a directive has not been published it is not valid. The argument loses sight of the fact that even if such directive has not been published it amounts to an administrative order which will be valid until set aside by a Court of law.[11]

In *Smith v East Elloe Rural District Council* [1956] UKHL 2; [1956] AC 736 (HL) at 769 - 70 ([1956] 1 All ER 855 at 871H; [1956] 2 WLR 888): it was stated:

'An [administrative] order . . . is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead.

Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders.'[12]

- [26] We were advised during the court hearing that one of these cases came before this court in February 2024 and a request was made for the translation of the record into English. The translation did not find its way to us. Mr Daubermann contended that it is the duty of the clerk of the court to submit the record to the High Court in terms of the rules. That may well be so but in terms of Rule 49A (4) of the Uniform Rules of Court the 'ultimate responsibility for ensuring that all copies of the record on appeal and all the necessary exhibits are in all respects properly before the court shall rest on the appellant or his or her attorney...'

[27] Mr Daubermann also raised a point of expenditure in translating the record into English suggesting that this court should make a ruling as to who should bear those costs. I cannot make such an order. Rule 49A provides that in an appeal to the full court, the registrar shall, subject to the provisions of section 316(5)(b) of the Criminal Procedure Act[13], prepare three additional copies of the case record or parts thereof, as the case may be, and shall furnish the State with the number it requires and, on payment of the prescribed fee, shall furnish the appellant with the number he or she requires.

[28] Mr Daubermann submitted that notwithstanding the fact that the record is in Afrikaans if we had read the papers we should hear the matter. In my view to hear these matters, even though there is resolution by the Heads of Courts, would have been tantamount to undermining that resolution. The point here is not about the use of the Afrikaans language by the parties involved but it is the principle which must be applied to all cases. In all those cases where the witnesses give evidence in IsiXhosa (which is the predominate language in the Eastern Cape Province) an interpreter is used and the court record is in English. There should be no exceptions in this regard.

[29] It for these reasons that we made the order mentioned in paragraph 1 above.

B R TOKOTA

JUDGE OF THE HIGH COURT

I AGREE

N MULLINS

ACTING JUDGE OF THE HIGH COURT

Appearances:

For Appellant/Mr Oosthuizen:

Mr P Daubermann

Instructed by Peter Daubermann

Attorneys

For Respondent:

K Cooney

Instructed by DPP

For Appellant/Mr van Straten:

A Thysse

Instructed by Smith Tabata Inc.

For Respondent

H Obermeyer

Date of Hearing:

4 September 2024.

This judgment was handed down electronically by circulation to the parties' representatives by email, and is to be released to SAFLII. The time and date for hand-down is deemed to be 9h30 on 19 September 2024.

[1] Section 6(4) of the Constitution.

[2] University of the FS v AfriForum 2017

(4) SA 283 (SCA) ([2017] ZASCA 32) Minister of Education, Western Cape, and Others v Governing Body, Mikro Primary School, and Another 2006

(1) SA 1 (SCA) ([2005] 3 All SA 436; 2005 (10) BCLR 973); Hoërskool Ermelo and Another v Head, Department of Education, Mpumalanga, and Others 2009

(3) SA 422 (SCA): Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another 2010

(2) SA 415 (CC) (2010 (3) BCLR 177; [2009] ZACC 32).

[2] University of the FS v AfriForum 2017

(4) SA 283 (SCA) ([2017] ZASCA 32)

Minister of Education, Western Cape, and Others v Governing Body, Mikro Primary School, and Another 2006

(1) SA 1 (SCA) ([2005] 3 All SA 436; 2005 (10) BCLR 973); Hoërskool Ermelo and Another v Head, Department of Education, Mpumalanga, and Others 2009

(3) SA 422 (SCA):

Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another 2010

(2) SA 415 (CC) (2010 (3) BCLR 177; [2009] ZACC 32).

[3] (A31/2017)

[2019] ZAMPMHC 1; 2020 (1) SACR 534 (ML) (22 July 2019)

[4] 2016

(2) SACR 581 (ECB) at 457I

[5][5] The South African Legal System and its Background; Hahlo and Khan p.257

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- [6] 2011 (4) SA42 (CC) (2011
(2) BCLR 121; [2010] ZACC 19) Para 28.
- [7] 2016
(2) SACR 581 (ECB) at 457I
- [8] Section 8 of the Superior Court Act 10 of 2013
- [9] Baxter Administrative Law 3 ed (Juta & Co Ltd, Cape Town 1991) at 200.
- [10] Mathebula Para.18 above footnote 3.
- [11] Baxter op cit. p.355
- [12] Oudekraal Estates (Pty) Ltd v City of Cape Town and Others 2004
- (6) SA 222 (SCA) ([2004] 3 All SA 1; [2004] ZASCA 48): MEC for Health, Eastern Cape, and Another v Kirland Investments (Pty) Ltd t/a Eye and Laser Institute 2014
- (3) SA 219 (SCA) ([2013] ZASCA 58): MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute 2014
- (3) SA 481 (CC) (2014 (5) BCLR 547; [2014] ZACC 6):
- [13] Act 51 of 1977
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