

# Linguistic Rights Litigation

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## Introduction

Martel (1999) sees litigation as one of the most important instruments of language activism. This article focuses on the role of litigation in obtaining linguistic rights with particular reference to the South African context. The article begins with a discussion of the importance of litigation in general. It will be shown that linguistically, Constitutions contain general principles about linguistic rights rather than specific detail. It is the task of courts to give content to the principles in the light of cases before them. Lessons are drawn from the United States of America, showing the development and interpretation of the First Amendment that guarantees freedom of speech. The same principle holds for linguistic rights litigation. The role of linguistic rights litigation in Canada is also sketched. While court decisions have done much to promote the Canadians' language rights, in South Africa, linguistic rights litigation is an under-utilised instrument of language rights activism. In the period 1994 to 2001, only eight cases of linguistic rights litigation occurred. In 2002 and 2004, only one case each was lodged in these years. These two cases are detailed to some extent in this article. Finally, certain conclusions are drawn and recommendations made about linguistic rights litigation in South Africa.

## Linguistic Rights as a Basic Human Right

The concept *human right* originated during the Enlightenment of the eighteenth century among philosophers such as Locke, Rousseau, Voltaire and Montesquieu. The strong emphasis that has been attached to human rights since the latter half of the previous century, was a reaction to the

totalitarian Nazi dictatorship in Germany. Already in June 1945, with the signing of the *Charter of the United Nations*, universal respect for human rights and the application of the principles of equality and non-discrimination was upheld. Barely three years later, in December 1948, the United Nations (UN) adopted the *Universal Declaration of Human Rights*. Section 2(2) states that every human being shall be entitled, without discrimination, 'and, in particular, without discrimination based on language', to fundamental rights and freedoms (Braën 1987: 5).

Particularly after the fall of the Union of Soviet Socialist Republics (USSR) in 1989-1991, and the concomitant ethnic conflicts, especially in central, eastern and south-eastern Europe, the international debate concerning the status of ethnolinguistic minorities (now defined not only in terms of numbers, but also in terms of strength) has increasingly associated the protection of the linguistic rights of the minority groups with fundamental human rights. Thus, the concept of linguistic human rights began to circulate among renowned sociolinguists and became an important subject of research (e.g. Skutnabb-Kangas *et al.* 1995; Paulston 1997; Kontra *et al.* 1999; Skutnabb-Kangas 2000; Skutnabb-Kangas 2002). Those who advocate that the free choice of any minority language should be regarded as a basic human right, proceed from the premise that language is essential to life, and that language 'plays a critical role in defining individual identity, culture and community membership' (Coulombe 1993:140).

The term *language rights* (also known as *linguistic rights*) is a hybrid concept which makes a distinction between individual rights and group rights. Individual rights include the right to non-interference in an individual's private domain of linguistic activity, and non-discrimination against his or her language. This right can be justified on the grounds of the individual's humanity, a right that was upheld in 1966 in a UN manifesto, the *International Convention for Civil and Political Rights*. Section 26 stipulates that civil and political rights are guaranteed, without discrimination on the grounds of language. Section 27 confirms that the right of linguistic minorities to use their own language amongst themselves shall not be denied to them (Coulombe 1993:142). South Africa was a co-signatory of the Treaty (Scholtz 2002:297). As Braën (1987:6) points out, the negative formulation of the stipulation places no positive obligation on the government to protect minority groups.

Another distinction that has been drawn in respect of linguistic rights, e.g. by the UN sub-commission for the prevention of discrimination and the protection of minorities (cf. Martinez Cobo 1987) is the one between the original inhabitants of a country and immigrant minorities. An increasing number of original inhabitants do not wish to be classified as 'minorities' and are demanding recognition as 'peoples and even as nations' (Hamel 1997:6). Numerous problematic questions have cropped up as a result of such a way of thinking: Who were the first people in a region? Can continuity be claimed after 500, 300, 100 years of colonisation?

Two recent international manifestos that recognise the right of original inhabitants are the *Convention 169*, issued by the International Labour Organisation in 1989, and the *Draft Universal Declaration of Indigenous Rights*. Section 3, 28 of *Convention 169* acknowledges the right of indigenous children to receive education in their own language, and to acquire the national language. The *Draft Universal Declaration* is even more explicit, and acknowledges fundamental human rights for indigenous nations, to enable them to develop and promote their own languages, and to use them for administrative, judicial, cultural and other purposes (Hamel 1997:6). Scholtz (2002:297) refers to further international documents that describe minority rights and minority language rights.

In order to do justice to the concept *linguistic human right*, a state must have a language policy at its disposal and must ensure that specific linguistic rights are legally regulated. Language legislation must eliminate discrimination based on language, enable the minority to conserve its linguistic characteristics, and allow it to remain in peaceful interaction with the majority. Individually, members of the minority group must have the opportunity of dealing on an equal basis with the majority, as well as possessing appropriate means to conserve their linguistic specificity (Braën 1987:8).

In South Africa the Final Constitution (Act no. 108 of 1996) was approved by the Constitutional Assembly on 8 May 1996. Language-related matters are addressed in section 6 of the Constitution. Recognition of the eleven official main languages is maintained. It has already been argued (e.g. Capotorti 1979:76, as referred to by Du Plessis & Pretorius 2000:508 and Currie 1998: 37-5), that the choice of (an) official language(s) may primarily be a political decision, a symbolic choice without legal content. The fact is,

however, that the awarding of official language status to different languages confirms the multicultural nature of the state. Recognition of the multicultural nature of the state should therefore cause the government to be sensitive to any form of preferential treatment of any language (or languages).

Complaints against the disregard of the linguistic rights of certain minority groups are constantly aired. Complaints of this kind are one type of language activism. Another instrument to bring about change is that of linguistic rights litigation (Martel 1999:47). Before linguistic rights litigation as an instrument of change is discussed, the importance of litigation in general will be discussed.

### **Importance of Litigation**

Litigation (word derived from the Latin *lis, litis*: lawsuit) is to take a claim or dispute to a court of law in order to force a judgement. In general, constitutions state broad principles rather than specific details. It is the task of courts to give substance to a principle on a case-by-case basis, handing down interpretations. Over time these interpretations build up a body of precedents that form the case law on the subject. Future legal advice and arguments is based on the constitutional clauses as interpreted in those cases. The advantage of constitutions stating broad principles rather than specific detail is that a constitution is flexible to adjust to changing circumstances over time, and is not fixed to a limited vision of a particular time.

The American Constitution's First Amendment (1791) guarantees freedom of speech. Freedom of speech, however, is a relative concept. Nobody is free to commit blackmail or perjury, and a government can not be prohibited from making laws to punish such acts. The evolution of interpretations of the American First Amendment illustrates how the principle (free speech) was applied over time in fresh ways to challenges unforeseen by its creators.

Already in 1798 the American Congress passed a Sedition Act that made criticism of the federal government a crime. During the First World War it passed an Espionage Act what made it a crime to criticise the government and the armed forces. Many people were imprisoned under both laws. Even a monthly journal, *The Masses*, was closed because of its

opposition to the war. It was only after the First World War that the American Supreme Court incrementally widened its interpretation of the First Amendment. Reference to only two cases will be made.

In an early case under the Espionage Act, the defendants had equated conscription with slavery. Judge Holmes concluded that, while comments could be made in peacetime that would not be tolerated in a time of war, the test should be whether the words used were of such a nature as to create 'a clear and present danger' (Sparks 2003:74) to the safety of the state. These words became a litmus test in American case law on freedom of speech. In a later judgement Holmes elaborated on the phrase:

I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purpose of the law that an immediate check is required to save the country (Sparks 2003:74).

The second case to be referred to is that of Commissioner Sullivan, police commander in Montgomery, Alabama. He sued *The New York Times* for libel in 1961. The local jury awarded him \$1 000 000 because the newspaper had published an advertisement critical of the city's brutal response to civil rights protests. The case was referred to the US Supreme Court. The judgement laid down a new set of rules to prevent critics of official conduct to be silenced. It declared that sovereignty was vested in the people, and not the government. Critical comment need not even be true, because to obtain proof of the truth, would inhibit would-be critics. Judge Brennan declared erroneous statement is 'inevitable' if the freedom of expression is to have the 'breathing space' that it needs (cf. Sparks 2003:75). The only exception was if an official could prove that a false statement had been made with 'actual malice'.

In spite of the aforementioned discussion, there are conflicting opinions concerning the question of whether law is an effective instrument of activism. Legal systems are often criticised for their inadequacies and their inability to achieve justice for individuals and groups. The Justice system contains loopholes, as are portrayed, for example, in detective stories. The complaint was raised that the effect of the Canadian *Charter of*

*Rights and Freedoms* actually was to strengthen the already great inequalities in Canada. This was the case because the Charter has weighed in on the side of power, and undermined popular movement (Martel 1999:51). Therefore, law is, according to some, 'a blunt instrument for effecting change' (Martel 1999:52), and less efficient than, for example, economic power and political mobilisation.

### **Language Rights Litigation as an Instrument of Change**

Courts have the same function, viz., to give substance to a broad principle as stated by a constitution, if the right to use a certain language is threatened, or not recognised. In such a case the matter had to be tested in court. Language rights as a legitimate field of legal study, and as another pillar in the civil rights world, together with the traditional areas of education, housing and voting rights, does not generally exist, at least not in the USA. (Del Valle 2003:4). As a matter of fact, civil rights law in America was, in a significant sense, born in 1954 with the school desegregation decision, *Brown v Board of Education* (Del Valle 2003:4).

*Brown v Board of Education* struck down racially enforced school segregation. In the 1940s and 1950s civil rights organizations had brought a series of cases designed to show that separate facilities did not meet the 'separate but equal' criterion. In May 1954 chief justice Earl Warren in his finding stressed the right of a child to good education which must be made available to all on equal terms, and he concluded that the doctrine of 'separate but equal' has no place.

It is a fact that language rights law will become of increasing importance, as language minorities each day increase in number in nearly all countries worldwide. The combined effects of improved transport and the political and economic displacement of populations have produced linguistic diversity and fragmentation. Except for the right to education, which is usually referred to, linguistic diversity also poses a problem for a just hearing in court (Storey 1998). Crime is an inevitable part of the human condition, and communication is an essential part of criminal investigation or prosecution. The result of linguistic dialectal and cultural miscommunication is misunderstandings, obstacles, even in some cases impenetrable barriers.

More litigation on language rights matters will result in more decisions, and only in this way an established and more coherent body of language rights law can be attained. Del Valle (2003) has written extensively on legal matters regarding language rights in the US. He discusses topics such as language rights in the workplace, language rights in litigation as well as commerce and language minorities. One case that he refers to and which is worth consideration here is the Arizona State Constitution which required that all civil servants had to use English only (also cf. Kibbee 1998:7). Spanish-speaking workers wondered if they could be arrested for speaking Spanish on the job. Would a bilingual police officer be subject to dismissal for speaking Spanish with a Spanish monolingual? The law was therefore immediately challenged.

A growing importance is accorded especially to international statutes and constitutional measures and also for matters relating to language. In 1992 the constitutions of 120 sovereign states, i.e., 75% of the states then recognised by the United Nations, contained one or more linguistic measures pertaining to language matters like language status, usage in courts and public administration, education, and rights for linguistic minorities:

Consequently, the law, and particularly litigation and rights activism, are prominently effecting a legalization and judiciarization of the political sphere around the world (Martel 1999:53-54).

In the next two sections linguistic rights litigation as an instrument of change is discussed with respect to Canada and South Africa.

### **Linguistic Rights Litigation in Canada**

In 1774, the British Parliament passed the Quebec Act by means of which, amongst other provisions, linguistic rights (the language French) and religious rights were guaranteed to French Canada. The *British North America Act* (1867), whereby Canada gained its independence, entrenched the guarantees of 1774 for Quebec with its French-speaking majority. Canada is a federation comprised of ten provinces (Quebec, and nine others with English-speaking majorities), where the federal and provincial

governments have equal status. Since language is not mentioned in the articles of the *Constitutional Law* of 1867, the federal and provincial governments jointly enact legislation concerning language-related matters. In contrast to Belgium, where the two main languages, Flemish and French, both have an approximately equal number of speakers, French is a minority language in Canada (spoken by only 26% of the population) in relation to English. In North America, French is the mother tongue of a mere 2% of the population, and the language is under pressure to assimilate:

In spite of the rights obtained by the people of Quebec the fear of cultural erosion persisted throughout Canada's first century. The strong economic influence of the Anglos in the province, their 'we-re-no-minority!' attitude, reinforced by location and situation, and a steadfast resistance to learn and to use French entrenched the fears of the francophones (Cartwright 1988:238).

A series of legislation was promulgated after 1867, all of which was aimed at resolving the linguistic rights of both language groups satisfactorily. In the process the autonomy the communities originally possessed gradually diminished as the provinces got more authority, including authority over the question of the language of instruction. The presiding ideology at this stage was one of homogenism, i.e., an ideology that believes in a single identity marker for nation-building:

[a] view of society in which differences are seen as dangerous and centrifugal and in which the 'best' society is suggested to be one without intergroup differences, [therefore] the ideal model of society is monolingual, mono-ethnic, monoreligious, mono-ideological (Blommaert & Verschueren 1998:194).

This ideology of homogenism raised questions about the right of French as a language of instruction and English as the only language of instruction was justified at the time. Three court cases between 1870 and 1917 confirmed the dominant ideology. At this stage litigation bore little fruit for the Francophone minorities. Between 1910 and 1920 the political theorists, Kymlicka & Patten (2003), challenged the ideology of homogenism. In their



opinion, homogenism was counterproductive, and as a result, they almost invariably stimulated 'a defensive nationalist response from the national minority' (Kymlicka & Patten 2003:13).

French linguistic activism surfaced and pressure groups were formed. The result was that most provinces adopted a more open attitude to their Francophone communities and gradually modified some of their legislation so as to reinforce instruction in French. A new ideology, the duality ideology developed in opposition to the ideology of homogenism. This ideology was inclusive of both the English and French linguistic groups. The federation was viewed as a negotiated pact between the two founding nations of Canada, and the role that Francophone minorities were to play in the new nation was realised (Martel 1999:61).

For decades the two opposing ideologies clashed and the English-majority provinces refuted the duality (compact) ideology. According to Martel (1999:61), three factors were responsible for the ultimate domination of the duality ideology. These were: i) an increased mobility which led both main groups to acquire a greater knowledge of one another; ii) a world-wide recognition of pluralism, and iii) the nationalist movement in Quebec, which forced the rest of Canada to alter its strategies towards Francophones.

The institutionalisation of minority rights was not such an easy task as the above summary may suggest. Recognition of minority rights in education was preceded on the one hand by long and difficult negotiations, and on the other hand, by mobilisation of the community. Actions carried out included door-to-door canvassing, telephone campaigns, surveys, use of the media, publication of brochures, political lobbying, as well as the distribution of Christmas cards (Martel 1999:67).

The duality hypothesis underpinned the well known *Canadian Charter of Rights and Freedoms* of 1982, and specifically section 23, which was described in 1990 by the Canadian Supreme Court as 'a linchpin in this nation's commitment to the values of bilingualism and biculturalism' (as quoted in *Annual Report* 2002:13). The use of language in law is not always clear and can sometimes be ambiguous. Section 23 also contains instances of polysemy thus resulting in different interpretations. Martel (1999:58) refers to polysemy in the definition of terms as well as polysemy in the area of implementation. It is precisely cases of polysemy which lead to litigation in order to clarify meaning. That was also the case regarding section 23. The

attitude of provinces with Anglophone majorities towards section 23 was somewhat negative. Faced with inaction and even refusal, Francophone minorities went to court. Between 1982 and 1997 twenty decisions were handed down in cases related to section 23. Financial support was given by the federal government, 'attempting to fulfil the role of guardian of the Charter' (Martel 1999:63).

In the process to obtain more (linguistic) rights, litigation is *inter alia*, in comparison with lobbying, community solidarity actions, research and media interventions, an important instrument for advocating change, in effect 'a final strategy and a sword of Damocles in negotiations with the state' (Martel 1999:65). The important role that litigation has played in the obtaining of language rights in Canada will be illustrated in the next paragraph by a brief summary of one case in particular.

One type of right conferred by section 23 on Canadian citizens with French or English as their mother tongue and who are residing in a minority situation, is that primary and secondary schooling in the minority language be provided through public funds, subject to the proviso of 'sufficient numbers' (Martel 1999:57). In Ontario, education through the medium of French was severely restricted after the third grade of elementary school (Cartwright 1996:244). Since the wording in section 23 did not accord with Ontario's *Education Act* of 1980 the Provincial Court of Appeal in 1984 declared the act in conflict and provided guidelines to correct this. Subsequently, legislation was revised to stipulate that the minimum number required to receive minority-language instruction would be 'one', thereby paving the way for French-language instruction in Ontario (Cartwright 1996:244).

The positive judgements of the litigation processes resulted in a new sense of confidence among the Francophones (Paquette 1998:325). They discarded the label *minority group*, and called themselves 'Canadian Francophone and Acadian Communities'. This revised identity is reflective of the rejection of the power structures which underpin the concept *minority*.

Language actions by the Francophone minority group in Canada demonstrated that litigation can be an essential tool towards the institutionalisation and legitimisation of the linguistic rights of a minority group. The law and the judiciary can construct the ideologies that guide community perceptions and decisions. This process is not necessarily uni-

directional. The law does not always construct ideologies in a community. The development of the duality ideology in Canada illustrates that an ideology can underpin legislation as is the case with section 23. It may be arguably said that process is, in fact, symbiotic.

On the value of litigation on linguistic rights issues, the Commissioner of Official Languages of Canada observed: 'Court decisions have done much to promote Canadians' language rights' (*Annual Report* 2002:36). The Commissioner also pointed out that litigation can also have unfortunate negative effects, stating that sometimes it can create an adversarial atmosphere that may damage relationships between governments and official language minority groups (*Annual Report* 2002:37).

Unfortunately, however, in the face of the indifference displayed by their governments, language minority communities often have no choice but to turn to the courts to ensure that their rights are respected. This constant need to reaffirm their constitutional rights undermines their confidence in the government, and as a result, 'democracy is weakened' (*Annual Report* 2002:37). The solution is the granting of equal language rights which will guarantee the maintenance and development of the official languages.

### **Linguistic Rights Litigation in South Africa**

The 1993 Constitution (Act no. 200 of 1993), confirmed in the 1996-Constitution (Act no. 108 of 1996), brought a most significant development to the South African legal system, viz. the principle of constitutional supremacy (Malherbe 1998: 86). According to this the constitution became the supreme law, in contrast to the previous system in which the political system was dominated by parliamentary sovereignty. The power to test parliamentary legislation against the provisions of the constitution was conferred on the courts.

A significant consequence of the constitutional supremacy, and pointed out by Malherbe (1998: 87),

is that the positivist outlook of our courts in the past has been replaced by a normative approach. In the past parliament was supreme [,][...] and all the courts were called upon to do was to apply [...] the law as laid down by parliament. Now the duty of the courts is to ask: What does the constitution say and how do we give

effect to the norms and values of the constitution, even when interpreting and applying other laws of parliament?

In these circumstances linguistic rights litigation became even more important. As was previously the case in Canada, the perception exists among certain groups that the present South African government, *de facto*, supports the ideology of homogenism. Although the language clause, in section 6, recognises eleven official languages, the evolving pattern of official language policy in South Africa reveals a trend towards English, thus in effect towards official monolingualism (Du Plessis & Pretorius 2000: 506), as is the case of English-dominated countries in general (Herriman & Burnaby 1996).

As is demonstrated by Du Plessis & Pretorius (2000), section 6 contains an inherent ambiguity. It is composed of three distinct parts, viz. an official language declaration (6(1)), normative guidelines for language policy (6(2) and 6(4)), and a number of practical considerations (or factors) to be considered in the choice of language(s) for official use (6(3)(a) and (b)). Interpretation of section 6 is thus dependent on which part is stressed:

Those stressing the practical considerations will approach official multilingualism as a directive ultimately requiring only a symbolic gesture. On the other hand, those more committed to the promotion of multilingualism tend to emphasise the importance of the official language declaration and the normative guidelines of parity of esteem and equitable treatment of official languages (Du Plessis & Pretorius 2000: 508).

How a clause is open for different interpretations is evident from the next two cases, both which have a bearing on the choice of a language in a court case. In *State v Matomela 1998 3BCLR 339 (CK)*, the case deals on the court procedures, which was in Xhosa because all those concerned could speak the language, and it was argued it was in accordance with the spirit of sections 6 and 35(3)(k). The revision court upheld the conviction and sentence, and stated that the Constitution allows people who speak the same language, provided it is one of the official languages, to conduct a case in their language.

In *Mthetwa v De Bruin NO 1998 3BCLR 336 (N)*, however, it was stated that the accused, in terms of section 35(3)(k), had not the right to demand that the court procedure had to be in isiZulu, but that he had a right on interpreting facilities.

In comparison with Canada, linguistic rights litigation in South Africa is an under-utilised form of linguistic activism. As was noted in the previous section, twenty rulings concerning section 23 were given in Canada between 1982 and 1997. For the period 1999-2000, the Commissioner of Official Languages was involved in fifteen litigations, five for the period 2000-2001, and four for the period 2001-2002 (*Annual Report 2000: 101; 2001: 121; 2002: 37*). For the period 1994-2001, only eight cases occurred in South Africa, an average of one per year (Du Plessis 2004: 171), and also one case in 2002.

Strictly speaking, only five of the nine cases are instances of linguistic rights litigation, it is where an alleged injured party litigate. Of these five cases, three were litigation on a specific language, viz language rights for English (*Chweu & Others v Pretoria Technical College (1994) 15 ILJ 892 (IC)*), for Zulu (*Mthetwa v De Bruin NO and Another 1998 3B CLR 336 (N)*) (already discussed), and Afrikaans (*Primary School Middelburg v Head of Department: Mpumalanga Department of Education (2002 4ALL SA 745 (T))* (to be discussed later in detail).

In *Chweu & Others* the applicant requested the court to order the respondent to prepare his defence in the language of the applicant's choice (English), or to translate it from Afrikaans into English. The Industrial Court refused to grant the order and gave the applicant an opportunity to prepare his answer for submission. By way of motivation, the Industrial Court found that a respondent is not obliged to use the language of the applicant's choice in the preparation of court documents. The respondent is entitled to use the language of his choice. Also, no obligation rests with the respondent to provide a translation of documents into the language of the applicant's choice. The task of, and the costs related to, the translation of court documents into the language of a party's choice rest with that party.

The other two cases, *In re: The School Education Bill of 1995 (Gauteng) 1996 4BCLR 537 (CC)*, and *Louw v Transitional Local Council of Greater Germiston 1997 8BCLR 1062 (W)*, did not refer to a specific language, but discuss fundamental language questions. In the first mentioned

the Speaker of the Gauteng Legislature requested that a dispute concerning the constitutionality of certain provisions of the *School Education Act of 1995* (Gauteng) regarding the provision and control of education be resolved. The request was submitted after a petition by various members of the provincial legislature. The petitioners alleged, *inter alia*, that the disputed provisions restricted the right of persons to be admitted to schools that utilise language testing as an admission mechanism. (The petition also dealt with provisions relating to the religious education policy of schools.) The Constitutional Court found that the disputed provisions of the concerned provincial act were not unconstitutional. By way of motivation, it was found that the challenge of finding a balance between corrective actions concerning the systemic inequality of the past, on the one hand, and protection against legally enforced assimilation, on the other, is not a constitutional matter, but that it must be resolved through democratic processes.

In *Louw v Transitional Local Council* the application was turned down, with costs. The applicant requested a court order from the High Court (Witwatersrand Local Division) to set aside a decision of the Transitional Council of the Greater Germiston, in terms of which English was declared to be the written and spoken language of the concerned council; and requested the Court to declare the mentioned decision to be in conflict with the fundamental rights contained in Chapter 3 (the so-called language clause) of the 1993 Constitution.

In motivating the finding, it was found that the applicant was not able to prove the existence of a language right in this context; and it was also found that the concerned resolution should not be regarded as legislation or official policy or practice.

The other four cases were introduced by the state against individuals for alleged unlawful deeds concerning language matters, and could be characterized as negative linguistic litigation with the aim to suppress linguistic rights (Du Plessis 2004: 171). In one case the litigation was against a Xhosa speaker (*State v Matomela* (already discussed)), and in three instances against Afrikaans speaking citizens. In *State v De Villiers, A612/98, 10 March 1999*, the accused was on trial in the magistrate's court in Virginia on a charge of the violation of a specific Road Traffic Regulation that had been promulgated on 26 April 1990, in terms of which the FS acronym was proclaimed to be the official registration mark for the Free

State province. The accused had applied the Afrikaans acronym, VS, as a registration mark to one of the vehicles in his possession. The accused was acquitted because the State was unable to prove its case against the accused beyond reasonable doubt. In motivation, it was contended that the concerned court was unable to establish an awareness of unlawfulness on the part of the accused, on the basis of the evidence. The finding did, in fact, confirm that VS number plates, as such, remained unlawful.

In the second case where Afrikaans was concerned, *State v Van Wyk, RCK89/99, 15 June 1999*, the accused was on trial in the Regional Court for the Northern Cape Division, and was charged with the violation of a provision contained in the *Civil Aviation Offences Act* (Act 10 of 1972), owing to his refusal to fasten his seat belt on landing in Kimberley, during a flight of SA Express. His defence argument was that the safety announcement had only been made in English, and that his insistence on an announcement in Afrikaans had been refused.

In this instance the accused was sentenced to five years of imprisonment, suspended for five years. In motivation, it was contended that the accused had acted unlawfully by insisting on the use of his language, and thereby creating a hazard on the concerned flight. He had used an incorrect method, as well as the wrong forum, in order to insist on his language rights.

The last instance of negative linguistic litigation to be discussed, *State v Pienaar, Review Case 77/2000, 18 May 2000*, was a review case by the High Court of the Northern Cape Division in respect of a criminal case in which an Afrikaans-speaking person had conducted his own defence and had been found guilty after he had requested that his English legal representative should withdraw, since she was unable to speak Afrikaans.

The conviction and sentence were set aside. In motivation, it was contended that the accused had been deprived of a fair hearing, owing to the fact that an English legal representative had been assigned to him, which boiled down to a violation of his right to a fair hearing, since he was unable to communicate with her. He had been entitled to a hearing in Afrikaans.

Because of the importance of matters concerning primary and secondary education, specifically the medium of instruction, the case *Primary School Middelburg v Head of Department: Mpumalanga Department of Education* will be discussed in more detail.

In *Laerskool Middelburg v Departementshoof: Mpumalanga*

*Departement van Onderwys (2002) 4 ALL SA 745 (T) (Primary School Middelburg v Head of Department: Mpumalanga Department of Education (2002) 4 ALL SA 745 (T))*, in the Transvaal Provincial Division, an application was made by the Middelburg Primary School to set aside a decision by the Mpumalanga Department of Education to declare the school a dual-medium institution.

Until the end of 2001 the Middelburg Primary School was an exclusively Afrikaans-medium institution. In November 2001, a member of the Mpumalanga Department of Education instructed the school to admit in January 2002 twenty learners who wished to be enrolled at the school, and which were to be taught in English. In January 2002, after the school's power to admit learners was withdrawn, eight learners were admitted to the school, to be taught in English. The school refused to be a dual-medium school and began with a lawsuit.

In his judgement (in Afrikaans and in this contribution translated), Judge Bertelsmann rejected the application of the school to set aside the decision of the Mpumalanga Department of Education to declare the school a dual-medium school. In his judgement he stressed section 28(2) of the Constitution, Act no. 108 of 1996, which stated:

A child's best interest is of paramount importance in every matter concerning the child.

The Judge was even of opinion that this section established a fundamental right.

If the learners were shown away, the best interests of them would be affected. These interests included e.g. the fact that the concerned school is the best school in Middelburg, academically as well as his sport and cultural activities. Forced removal could have a negative impact on the learners, because they could feel rejected, and also because close friendships with classmates had been formed. Furthermore, the school is the nearest school to their homes.

However, the judgement must not be interpreted as a blueprint that all future applications would receive the same judgement. The Judge stressed it that, if the application served before him on the day that the 'contentious decision' was taken, 'I would not have hesitated to put aside the



decision. Now, ten months later, this path could not be followed without damaging the minors’.

Judge Bertelsmann also questioned with biting critique the *bona fides* of the respondents, and ordered them to pay all the costs:

The respondents disregarded all the standing administrative directions which, *inter alia*, are there as protection of language and cultural interests which are of importance to many. They opposed the present application with might and main, although they *ab initio* must have known that their administrative behaviour was wrong. The attitude of the respondents disregarded the applicants’ rights and the views. The respondents had no respect for the applicants’ devotedness to their language and culture, and also ignored the interests of the individual learners, who became involved in the process by the actions of the respondents) (p 756 (2002) 4ALL SA 745 (T).

Also elsewhere in his sentence, Judge Bertelsmann refers to the ideological drivenness of the respondents:

The attitude of the respondents suggest that they principally decided to do away with Afrikaans-medium schools in Mpumalanga, in spite of the provisions of section 29(2) of the Constitution and of the National Language Policy. Apparently the behaviour was not only motivated by the demands of practical necessity, but in greater degree, by the principle that these schools must be transformed. I stressed this point repeatedly with Mr. Dreyer SC: Ultimately, it was common knowledge that this was the approach of the respondents) (p 754 of (2002) 4 ALL SA 745 (T).

Ironically, the repeated attempts - and probably future attempts if this application succeeds - was one of the reasons why the application was rejected:

There is a further consideration which compel me to reject the application. It is clear that the first and second respondents since

1996, with evidently disregard for administrative stipulations, try to change the first applicant to a dual-medium school. Mr. Dreyer admitted that most probably the first and second respondents will continue with their efforts if this application will succeed. It is in nobody's interest to expose the applicants and the learners to the process) (p 756 of (2002) 4 ALL SAL 745 (T).

The sentence was reported in *Beeld* on 13 November 2002. The chairman of the school's governing body, Mr. Meiring, commented: 'n Streep is deur Afrikaanse enkelmediumskole getrek' [A line is drawn through Afrikaans-medium schools].

Also the Pan South African Language Board (panSALB), was disappointed, because the sentence clipped the wings of the Department of Education's policy to promote multilingualism (*Citizen* 14 November 2002). The spokesperson of the Democratic Alliance, Sandra Botha, also deplored the judgement because English was promoted at the expense of Afrikaans (*Citizen* 14 November 2002).

A second, nearly similar case was settled. On the last day of the academic year, 13 December 2001, the Gauteng Department of Education declared the High School F.H. Odendaal (FHO) to be a dual-medium school with the re-opening on 16 January 2002. It was a one-sided declaration without any predetermined assessment of the needs, without motivations, negotiations and/or spirit of partnership (thanks to the chairman of the governing body of FHO, Mr. Louis Smuts, who supplied the correspondence relating to the matter). Thirty-two learners were moved to the school to begin a grade eight class. All the learners were approximately 20 to 25 km from the school, and passed three other schools where vacancies exist. They were transported by bus at a cost of R200 per child. In the same period, two other Afrikaans-medium schools accepted the declaration to become dual-medium institutions in the same area. Therefore there would be three Afrikaans-medium schools, with one grade eight class with English learners in each.

An urgent application to put aside the decision served before Judge Van der Westhuizen. Rights and powers entrenched in the Constitution and regulated in various acts, like as the School Act, were discussed:

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1. The right of present learners and parents to exercise the language of their choice in instruction, without interference from outside;
2. The rights, powers and competence of governing bodies to decide on matters like finances and language policy;
3. The right of a school community to uphold an existing ethos, culture and discipline in a school in their area;
4. The right of teachers to teach unrestrained in the language of their training and conditions of appointment; and
5. The right of the English-speaking learners to receive instruction as near as possible to their homes, in the language of their choice.

The legal representatives of the Department agreed on most of the arguments, and asked the court to adjourn so that they could negotiate for a settlement. The settlement was made an order of court with the following contents:

1. The declaration by the Department of Education for the FHO to be a dual-medium school is set aside;
2. The Department of Education pay all court and legal costs;
3. FHO undertakes to house the present group of English-speaking learners to the end of the 2002 school year; and
4. The Department of Education undertakes to move these learners to an English-medium school.

An important implication of the putting aside by Judge Bertelsmann of the initial one-sided declaration by the Gauteng Department of Education was highlighted in an editorial in *Beeld*, 6 May 2002, namely that a governing body can appeal to the Constitution if a department of education wants to force, or already has forced, certain decisions.

In an interview with Judge Arthur Chaskalson, Chief Justice of the Constitutional Court (*Rapport* 4 April 2004), Judge Chaskalson admits that language is a complex and difficult issue, and that principles relating to language should be tested as directive for future judgments. He finds it odd that relatively few such cases have appeared before the Constitutional Court. According to Chaskalson (translated from Afrikaans)

It is disempowering to express yourself in a language other than your mother tongue. If you are prevented from taking part in certain aspects of society because of language, it is disempowerment.

### **Role of PanSALB to Initiate Litigation**

In the previous sections the importance of litigation was shown. In general, Constitutions contain broad principles rather than detail on certain concepts. This holds true for section 6, the official language clause, of the Constitution. Because, as was shown, section 6 is open for different interpretations, it is imperative for the courts to give content to the principle of linguistic rights.

It is in this respect that panSALB can play a more important role. Section 11 of the panSALB Act, Act no. 59 of 1995, deals with procedures and mediation, conciliation or negotiation by the Board. Subsections 4 and 5 read as follows:

(4) The Board shall on its own initiative or on receipt of a written complaint investigate the alleged violation of any language right, language policy or language practice.

(5)(a) The Board shall, after an investigation of the alleged violation in terms of subsection (4), and if it is of the view that there is substance in the allegation, by mediation or conciliation or negotiation, endeavour –

(i) to resolve and settle any dispute; or

(ii) to rectify any act or omission,

arising from or constituting a contravention or infringement of legislation or alleged contravention or infringement of legislation, language policy or language practice, or a violation of or threat, or alleged violation of or threat to any language right.

(b) If any endeavour in terms of paragraph (a) fails and provided that the Board is of the view that there are good reasons to address the matter further, the Board shall assist the complainant or other persons adversely affected to secure redress by –

- (i) referral of the matter, with a recommendation, to the organ of state against which the complaint was lodged;
- (ii) recommending that the organ of state against which the complaint was lodged provide the complainant with financial or other assistance with a view to redressing any damage;
- (iii) providing, in its sole discretion, the complainant with financial or other assistance to redress any damage; or
- (iv) making arrangements for or providing the complainant with financial or other assistance to enable him or her to obtain relief from any other organ of state or a court of law.

It is important to note that subsection 4 makes provision that panSALB on its own can investigate a matter of violation of linguistic rights, and that it is not necessary to wait for complaints from outside bodies or persons. Of importance is also subsection (5)(b)(iv), which opens the possibility of financial or other assistance to enable complainants of violations of linguistic rights to carry on with their efforts.

As a result of the fact that panSALB has, up to 2004, not tested its legal enforcement power, his decisions and proposals are in many cases ignored by violators. During 2002, of a total of 82 language rights complaints, a mere 5% (4) were successfully settled (Lubbe *et al.* 2004: 49-60). A member of the panSALB Board, prof. Hennie Strydom, thus stated, in evidence before a Select Committee of Parliament dealing with legislative proposals of members and provinces, that the cause of panSALB is 'fruitless' without legal enforcement mechanisms (*Beeld* 20 September 2002).

At last panSALB took the Compensation Commissioner of the Department of Labour to court. In 2002 of the 82 complaints lodged with panSALB 28 were directed at the Compensation Commissioner (Lubbe *et al.* 2004: 56).

On 15 June 2004 in *The Pan South African Language Board v The Compensation Commissioner (1<sup>st</sup> respondent), the Minister of Labour (2<sup>nd</sup> respondent), the Director-General of the Dept. of Labour (3<sup>rd</sup> respondent (Transvaal Provincial Division) case number 5830/04* Judge Hartzenberg ordered,

1. That the decision and/or conduct of the First Respondent of adopting English as the only official language in which to communicate is reviewed and set aside as having no valid force and effect in law.
2. That the Respondents' decision and/or conduct of adopting English as the only official language in which to communicate is declared unlawful and/or unconstitutional.
3. That the process of dispatching the W.A(s) 8(a) and W.A(s)(E) Assessment forms exclusively in English, if such process is still on and/or proceeding be halted pending the finalisation of the matter.
4. That the Respondents are directed to implement within 60 days of this order the Applicant's decision published as Board Notices 40 of 2000 and 97 of 2002 in Government Gazettes Number 21175 of 19 May 2000 and Number 24121 of 29 November 2002 to the effect that:
  - 4.1 the Respondents must keep on hand forms in all official languages to be made available on request;
  - 4.2 the Respondents must indicate on these forms that forms are available in other official languages;
  - 4.3 the Respondents must train personnel to enable them to serve the public in official languages other than English;
  - 4.4 the Respondents must align language policy and practice with the constitutional requirements in consultation with the Board;
  - 4.5 the Respondents draft a proper language policy that would adequately serve the needs of the speech communities that they serve and submit the said language policy to the Applicant for scrutiny.
5. That the First, Second and Third Respondents be ordered to pay the costs of this application, jointly and severally, the one paying the other to be absolved.

It is foreseen that this decision will force state departments to give, in

practice, more recognition to all official languages and the importance of litigation has once more be shown.

## Conclusion

Litigation can be an effective form of activism for obtaining linguistic rights, and it provides a guarantee for their maintenance. In the South African situation it must be, if necessary, utilised to a greater extent. In the words of Martel (1999: 65), 'litigation remained a final strategy and a sword of Damocles in negotiations with the state'.

Litigation is an expensive process, and the implication of the costs is a stumbling block which inhibits the decision to litigate, in spite of the merits of a case. If sufficient cases of litigation, however, do not take place, content can not be given to the principle, in this case the principle of linguistic rights, with the result that uncertainty on the linguistic rights of language users, and the powers of the authority, will continue.

In this regard the Canadian attitude is an inspirational example. In spite of the fact that French in North America is the mother tongue of only 2% of the population, and the pressure to assimilate is huge, the linguistic rights of the minority group in Canada is recognised after a series of litigation processes. Financial support for all the litigation processes was supplied by the Federal government. The words of the Canadian Commissioner of Official Languages are relevant to South African users' attempts in obtaining linguistic rights: 'Court decisions have done much to promote Canadians' language rights' (*Annual Report* 2002: 36).

But in spite of the effectiveness of litigation it would still be the best if it would not be necessary to litigate, and in this respect the responsibility lies at the government not to alienate the speakers of minority languages by failing to respect their language rights. A government would benefit more by ensuring that every citizen's constitutional language rights are upheld, and to avoid conflicts by seeking to solve problems before they escalate. Respecting all speakers' language rights is just an important challenge for the South African government as e.g. combating poverty, job creation or fighting Aids.

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