LANGUAGE RIGHTS IN THE CONSTITUTION: THE UNBORN LANGUAGE LEGISLATION OF SUBSECTION 6(4) AND THE CONSEQUENCES OF THE DELAYED BIRTH

1. INTRODUCTION

The legal framework within which the South African multilingual language dispensation needs to find its feet, has been broadly dealt with in section 6 of the Constitution, Act 108 of 1996. The question of whether it is a multilingual phantom and whether the language skeletons of bygone days will continue to haunt us will be viewed in terms of the constitutional and other legislative measures. An essential added value and vision of the Constitution is multilingualism as the cornerstone for a democratic state.

2. GENERAL REMARKS

2.1 Firstly, it is essential not to make the general mistake of overlooking the fact that the section on language forms part of the founding sections of the Constitution. This section is consequently not subject to the limitations imposed by section 36 of the Constitution concerning the fundamental rights - which are relative, and not absolute, rights. The content of section 6 is the setting down of the social contract between the various language speakers of the Republic. It is important to note that the Government as such, at any level, was not party to this social contract. It was drafted by a constitutional assembly, comprising elected national representatives,

and it was in that capacity that the section on language was constructed in the Constitution. Consequently, the social contract between the citizenry and the Government of the day can therefore be enforced.

2.2 Section 6 thus creates a constitutional framework for the State within which state organs from every sphere are required to act, and affords no option to implement arbitrary unconstitutional policies beyond this framework. This is thus the agreed framework within which action may be taken.

2.3 The content of section 6 is a legal framework, which places an obligation on the various spheres of the state namely the executive, legislative and judicial authorities, to heed and give effect to the practical application of this language dispensation. The rights and lawful expectations of the people and various language communities (various language speakers) is that the State respect the social contract that this language regulation has effectuated. Indeed, it is the State's duty to observe the source document, namely the Constitution, upon which the State is founded. Should the Government of the day differ from it, mechanisms have been built into the Constitution to lawfully amend the social contract. If the Constitution is amended by omission and/or by another practice without formal amendment, disrespect for the law and the Constitution is the result. This can give rise to anarchy and undermines the principle of constitutionality and the rule of law. Here the wisdom of the famous Judge Brandeis comes to mind: [2]

"In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously….. Government is the potent, omnipresent teacher. For good or for ill, it teaches the whole people by its example…..If the government becomes a lawbreaker, it breeds contempt for the law, it invites every man to become a law unto himself; it invites anarchy,"

The principle of constitutionalism, which essentially places a heavier burden of respecting and observing a Constitutional provision on those subject to the Constitution, is currently negated by the current government's implementation of its policy of promoting English. This can be described in George Orwell's terms: all eleven languages are equal, but one, being English, is more equal than the others.

2.4 The virus contained in section 6 of the Constitution is the fact that the eleven official languages are not developed to the same higher level of functionality. An appropriate analogy is to place boxers who are boxers in various divisions of mass, into a single mass division. Granted, in the formulation of subsection 6(2) and the qualifying provisions of subsection 6(3) and subsection 6(4), read together with the obligation of the PANSALB, as reflected in subsection 6(5), it is acknowledged that they are not equally developed. The lightweight boxers therefore have constitutional support - stated otherwise, have received an undertaking of support - not to be knocked out. The context of the section on language is thus essential and is conveniently ignored.

2.5 The further hermeneutic principle on interpreting the law - that the Constitution be interpreted in its entirety - is also important, and must be taken into consideration when interpreting the section on language.

3. SECTION 6(1) AND THE NOTION OF OFFICIALISM

3.1 In terms of section 6(1) of the Constitution official status is accorded to eleven languages.

By definition an official language is a language of a country selected by the State for use in its official activities. In this regard I refer to the finding of the United Nations Human Rights Committee in *JGA Diergaart et al./Government of Namibia*[3] *in which commissioners*[4] *in their minority judgement put it that the choice of an official language is a prerogative of the State and that it is not within the power of the Human Rights Committee to dictate what official language a State should adopt.* They then continue to observe as follows:

> *" Once a State party has adopted any particular language or languages as its official language or languages, it would be legitimate for the State party to prohibit the use of any other language for official purposes and if the State party does so, its action cannot be branded being in violation of article 19, paragraph 2."*[5]

The argument to the contrary follows logically that when a State has selected an official language, the executive authority can neither directly nor indirectly forbid

and/or neglect the use thereof, whether by legislation or by own practice. This undermines the principle of the rule of law.

3.2 I submit that conferring official status upon a language in a constitutional state would be meaningless unless the consequence of granting such a status indicates that the State's use thereof as an official communication medium is constantly confirmed. This requires the language or languages in question to be employed in the central spheres of the state's official activities, namely in the legislative, executive and judicial spheres. Since this approach does not mean that all the official languages must be used in every conceivable instance of communication between government and citizens, it is essential that a language policy should spell out the quintessential aspects of the government's activities in the said three spheres, and to this end a National Language Act is required.

3.3 In the final Constitutional Court Certification Decision delivered on 11 October 1996 it was stated in paragraph 212 that all the eleven official languages are by implication equal. I quote the relevant section here:

> *"...A separate objection goes to the status of Afrikaans in the NT (New Text). That objection did not allege the violation of any particular CP (Constitutional Principle). Rather it was that NT6 must be given content by reading it alongside IC (Interim Constitution) 3(2), (5) and (9), which, inter alia, require that the status of Afrikaans as an official language should not be diminished. It appears to be the contention that the status of*

*Afrikaans is diluted under NT, relative to the IC. But NT6, like the rest of that document, must be tested against the CPs, and not against the IC. *(105) In any event, the NT does not reduce the status of Afrikaans relative to the IC: Afrikaans is accorded official status in terms of NT 6(1). Affording other languages the same status does not diminish that of Afrikaans."*.[6]

Any allegation that the Constitution of 1996 can be interpreted in the light of the Interim Constitution of 1993 is confirmed by this decision to be unfounded. With respect, the Constitutional Court expressed an opinion here without the obviously essential testimony of language sociologists and experts on language law, which is is a field of specialisation, and, with respect, necessitated expert testimony. The practical implication of a State with limited powers and serious developmental needs - as set out in the Reconstruction and Development Plan (RDP), encumbered with the duty of according eleven official languages the status of national official language, read together with the obvious failure of nine African languages to satisfy all or any of the so-called higher functions of an official language - was, with respect, on account of the lack of the expertise of the Constitutional Court, ill considered. In my opinion it was an incorrect finding by the Constitutional Court, but we are now bound to it, and the damage could be limited by means of a National Language Act. The unequivocal granting of official status to eleven languages in Section 6 is consequently irreconcilable with an interpretation that excludes the use by the state of one or more preferential languages and reduces the rest to minority languages.

4. THE STATE'S OBLIGATIONS IN RESPECT OF PREVIOUSLY MARGINALISED LANGUAGES

In accordance with subsection 6(2) the State is obliged to promote the status and use of the indigenous languages, in the context of the historical curtailment of their use and status, by means of practical and substantial measures. The use of the term 'State', which goes undefined in the Constitution, includes all levels of government and all three spheres of the State, while subsection 6(4) deals only with the national and provincial governments. The most serious language omission in South Africa is the State's scandalous neglect of its duty in terms of subsection 6(2) of the Constitution referred to above. The PANSALB should approach the High Court for a mandamus in order to compel the State to honour this constitutional obligation. Such a mandamus could be held over until 15 March 2012 to determine the extent to which the national government will honour this obligation to the benefit of the State.

5. SUBSECTION 6(3)(a)

The provisions of subsection 6(3)(a) and subsection 6(3)(b) of the Constitution are not dealt with in detail here. It warrants mentioning here that the national and provincial governments ***must*** use a minimum - and not a maximum - of two official languages for purposes of government. This principle is subject to the qualifying considerations of the, “usage, practicality, expense, regional circumstances and the balance of the needs and

preferences of the population as a whole or in the province concerned". A minimum requirement for municipalities is not prescribed in subsection 6(3)(b), but they are obliged to take the language usage and preferences of their residents into consideration. In my opinion this use of official languages by all three spheres of government should be defined in a more specific format in national and provincial legislation.

6. SECTION 6(4)

6.1 The introductory sentence of subsection 6(4) reads as follows, with my underlining:

> *'The national government and provincial governments, by legislative and other measures, must regulate and monitor their use of official languages.'*

It is thus important here to note the 'must', that it is a provision enforceable on the national and provincial governments to establish legislative and other measures in order not only to regulate, but also to monitor, their use of the official languages. What then happened in practice is that a protracted consultation process for establishing an umbrella act, known as the South African Languages Bill, dated 4 April 2003, took place. Owing to the lack of political will on the part of the Government of the day, it then began to gather dust.

On 25 July 2007, under the leadership of former president, Mr T. Mbeki, the cabinet took the following decision:

> "*The Minister of Arts and Culture must consult further with the Minister of Justice and Constitutional Development with a view to exploring alternative non-legislative ways of dealing with the matter and to assess the intended and unintended consequences of the various options. The Bill should not be forwarded to Parliament as a Bill and it will have to be removed from the Portfolio Committee of Arts and Culture programme as a Bill*."

The constitutional obligation to regulate and monitor their use of the official languages by means of legislative measures was therefore deemed unimportant by the executive powers. The *de facto* negation of this obligation was formalised as a resolution by this decision. The cost considerations for implementing the draft language act as a possible motivation for failing to promulgate said act was dismissed as immaterial in a report issued by Emzantsi Associates. The said organisation is an independent entity that undertook the costing for the implementation on the instruction of the Department of Arts and Culture. The cost of implementation would have amounted to only 0,18% of the budget[7]. The language policy would also have been phased in over a number of years. The national government nevertheless has no right to negate this constitutional provision - even on the grounds of affordability. This principle that budgetary considerations do not serve as an excuse was already clarified as follows by the Constitutional Court in the matter: *Minister of Health v Treatment Action Campaign*[8]*, and I underline the relevant aspects. It also clearly states the role of the court in enforcing constitutional provisions:*

' . . . *Even simple declaratory orders against government or organs of state can affect their policy and may well have budgetary implications. Government is constitutionally bound to give effect to such orders whether or not they affect its policy and has to find the resources to do so.*"

It is important to note that this case dealt with a relative right in the Charter of Fundamental Human Rights. It is my contention that the founding provisions, under which section 6 falls, is set in proverbial stone - subject to its own limiting subprovisions in subsection 6(3)(a), the second sentence in subsection 6(4) and, of course, the provision to amend the Constitution.

The respondents' chief argument in the opposing statement in the case *Lourens/President of the RSA et al.*[9] was the problem of capacity: was an alleged capacity problem, which was put forward as the reason that it had not yet been possible to promulgate a National Language Act.

The principle of constitutionality was essentially ignored here. The government thus amended, or attempted to amend, the rights of the people as contained in the Constitution, which the Government may not do without lawfully amending the Constitution. The postponement and/or omission of an obligation amounts to a failure to fulfil an obligation.

6.2 The answer to the question: *When should the national and provincial governments have fulfilled their respective legislative obligations concerning*

language in terms of subsection 6(4)?- is to be found in the Constitution. The unwillingness of the national and the majority of the provincial governance to comply with the constitutional obligation in terms of subsection 6(4) could possibly be found in the exclusion of a deadline date[10] in item 21 of schedule 6. Item 21 requires that legislation, which is required by the Constitution, must be enacted within a reasonable period. In addition, section 237 requires all constitutional obligations to be met diligently and without delay**.** 'Reasonable period' is a relative concept and, among others, was set at 18 months by the Constitutional Court in the particular case concerning *Minster of Justice/Ntuli*[11]. Venter submitted that the enactment of language legislation later than 1998 could be deemed unreasonable in terms of item 21 of schedule 6[12].

6.3 The nature of a constitution is illustrated in subsection 6(4), as in other sections, for example subsection 9(4), as well as in sections 32 and 33 of the Constitution, namely that it introduces the embryo provision with the prospect of more specific legislative measures that have no place in the constitution. Other amplifying legislative measures necessitate the principle of the agreement of the people, as contained in the Constitution, to be interpreted in greater detail. Of course, such amplifying legislation may not conflict with Constitution, but it is anticipated that, barring the Constitution, times will change and legislation will therefore be more easily adjusted. A special relationship exists between the Constitution and this type of legislation, and holds consequences in the interpretation and application of both. Furthermore, the provisions of a subordinate legislative Act, naturally

similarly to other legislation, must be interpreted in such a manner that concrete content be provided concerning the spirit, scope and purpose of the Charter of Rights, and specifically concerning the spirit, scope and purpose of this specific legislative provision. No provisions in such legislation may, however, also be permitted to minimise the scope of the protection provided to that legislative section or to infringe upon any other legislative right. Du Plessis pertinently states that subordinate constitutional legislation holds a weighty status and establishes a special role in achieving vital constitutional objectives. According to him it is an indispensable ally of the Constitution. It must be borne in mind that a litigant who relies on an alleged violation of a constitutional right in respect of which a subordinate act has more extensive effect, cannot circumvent the subordinate Act by attempting to rely directly on the constitutional right provided in the Constitution[14].

6.4 Applied to the failure of the executive authority to finalise the legislative measures, as provided in subsection 6(4) of the Constitution, it caused the constitutional dispensation in the RSA, with particular reference to the multilingual language dispensation provided therein, to fail. The question is whether there is any manner in which the existing vacuum, by which the failure to promulgate the subordinate constitutional language legislation in terms of subsection 6(4) within a reasonable period, was created, can be corrected. The envisaged language legislation in respect of the use of the official languages by the national and provincial governments is thus restricted only by the delayed

birth of the prescribed legislation. In natural life the delayed birth of a child necessarily has consequences for both the mother and the child. Either the mother or the child may die or both may suffer permanent damage and/or be disabled.

The vacuum caused by the failure of the national and provincial governments to legally regulate the use of the official languages has caused the heavyweight boxer, English, to begin to drive the others from the ring. The only other boxer, Afrikaans, which is able to take a stand against English, has been and is being suppressed. Notwithstanding a constitutional state dispensation, the mistakes of 1822[15] and 1976[16] are being repeated by *de facto* language imperialism. In a constitutional state citizens have the right to turn to the courts to counter the non-observance of the Constitution.

6.5 In the matter: *Lourens/President of the RSA, et al.,* the Honourable Justice Ben du Plessis issued the following order on 16 March 2010 against the Minster who represented the executive authority at the time[17]:

1. "Dit word verklaar dat die nasionale regering in versuim is om ingevolge artikel 6(4) van die Grondwet van die Republiek van Suid-Afrika, 1996 deur wetgewende en ander maatreëls die nasionale regering se gebruik van amptelike tale te reël en te monitor. ['*It is declared that, in terms of section 6(4) of the Constitution of the Republic of South Africa, 1996, the national government failed to regulate and monitor the national*

government's use of the official languages by means of legislative and other measures.' – Own translation.]

2. *Die nasionale Minister van Kuns en Kultuur, Wetenskap en Tegnologie, in haar hoedanigheid as die verantwoordelike lid van die uitvoerende gesag, word gelas om die gemelde verpligting binne twee jaar vanaf datum van hierdie bevel na te kom of toe te sien dat dit nagekom word."* ['*The national Minister of Arts and Culture, Science and Technology, in her capacity as the responsible member of the executive authority, is ordered to fulfil the said obligation, or to ensure that it be fulfilled, within two years from the date of this order.'* – Own translation.]

As a result, the cabinet decision of 25 July 2007 was declared to be *ultra vires* and subsection 6(4) must be complied with before 15 March 2012. The court did not wish to compel the executive authority to comply with legislative measures by having to draft an umbrella act or a multiplicity of legislative provisions. I was present in court when the Honourable Justice Ben du Plessis, in my opinion, justifiably remarked that he was unable to see how it could not be achieved meaningfully other than in a single Act, however he refrained from being prescriptive, since the courts do not easily interfere with the executive authority.

It is extremely important that the national government realises that all the legislative measures, that is not only the Act, but also the regulations in terms thereof, be finalised before 15 March 2012 in order not to to be found in contempt of this court order. The fact that a deadline date was set for the national

government by this court order, does not relinquish the national government from the charge that they are guilty of breach of the constitution. Rectifying the breach of the constitution necessitates**,** on the grounds of the principle of constitutionality solely an urgent approach, which is currently clearly absent.

Apart from legislative measures, this order also correctly states that *other* measures should also be established in order to regulate and monitor the use of the official languages by the national government. In my opinion by 15 March 2012 a proper language policy should exist in each department, together with a functioning language policy committee tasked with the regulation and monitoring thereof.

Owing to the fact that the national government will have taken from 4 February 1997 until 15 March 2012 to accomplish and/or establish the aforementioned - a period of approximately 15 years- and should it not have been effected by 15 March 2012, any non-compliance should be met with a strict order of contempt. The vacuum created by this deliberate omission to my mind requires additional corrective legislation as envisaged in section 9(2) of the Constitution. I am aware of the fact that this provision was aimed at providing for the empowerment of the previously disadvantaged persons who were financially and politically prejudiced by apartheid. However, this subsection's embryo provision for legislative measures for affirmative action has no time constraint. Any discriminatory practice, also a discriminatory practice in terms of language, should be rectified

by legislative measures. To my mind, the consequences of the delayed birth of the South African Language Act can be rectified only by provisions in that Act or in further legislation that accords parity of esteem to the official languages and eliminate the unfair treatment of the past and present.

6.6 The qualifying provision of subsection 6(4) reads as follows:

6.6.1 *'Without detracting from the provisions of subsection (2), all official languages must enjoy parity of esteem and must be treated equitably.'* Professor Koos Malan previously addressed this aspect and its subjective character and the scope for a discretionary approach, and I agree with this approach in principle.

6.6.2 The term *''[W]ithout detracting from the provisions of subsection (2), . . .'* sheds an interesting light on this qualifying provision. The term *''[W]ithout detracting from the provisions of subsection (2), . . .'* in my opinion implies that in the compliance process the State, other than in the case of Afrikaans and English, which do not fall under subsection 6(2), would therefore have to do more to promote the esteem and fair treatment of the indigenous languages. The justification for this 'do more' is contained in this phrase. A complaint that Afrikaans and English are being unfairly discriminated against in favour of the indigenous languages in order to establish parity of esteem and equitable treatment, could be countered thus. The use of only English thus has no justification on the basis of this argument.

6.6.3 The phrase "*must enjoy parity of esteem and must be treated equitably.'* has a corrective against subjectivity in the anti-discriminatory provision in subsection 9(3) of the Constitution, which prohibits unfair language-based discrimination by the State. When the unfair development of the various official languages in respect of the so-called higher function is taken into consideration, the qualifying reference to subsection 6(2) in subsection 6(4) is understandable. However, it does not permit the elevation of a heavyweight boxer - English - to a non-existent legal provision on language of 'language of record'. A heavyweight boxing champion is generally held in higher esteem than a paperweight one. Should an official language be elevated above the others there is no parity of esteem - only inequality of esteem and therefore unfair treatment and consequently unfair language discrimination. Esteem goes hand in hand with status.

6.7 It is interesting to note here that Parliament in its published policy on the preparation and publication of legislation considered itself to form part of the national government, as referred to in subsection 6(3)(a).[18] Naturally Parliament cannot consider itself selectively to form part of the national government for purposes of the use of the official languages, especially concerning the minimum requirement of two official languages, as required in subsection 6(3)(a) and then not wish to subject itself to subsection 6(4). What I mean is namely that Parliament's use of the official languages should also be contained in a South African Languages Act. Currently the old bill makes no provision for this and it could be a potential lacuna in the interpretation of Parliament's view of section 6.

However, my viewpoint is that, owing to the official nature thereof, Parliament should treat all official languages equally and should publish laws in all the official languages, since Parliament does not form part of the national government as such. A practical arrangement, concerning how and when the legislation should be adopted and published, should be written into the proposed South African Languages Act.

6.8 Such an arrangement will close the escape route for those subjective and anarchistic monsters that currently have a free rein and that were created by the lack of the specific judicial prescripts in a legislative structure – a structure that was envisaged in the embryo clause 6(4) of the Constitution.

Then officialdom will know the language framework within which they should move, and citizens will also be able to enforce their better-defined rights. The proverbial muscles will embrace all of officialdom's pseudo-legislation or policy documents with extensive details to give daily guidance to their unambiguous guidance in the application of the Constitution's multilingual language model.

6.9 Finally, the question may be raised whether the constitutional requirement of legal language measures will set false or true rights for the citizens. A false right is an empty right or indeed a paper right, as opposed to a true right that is rich in content and can be enjoyed by citizens. The answer lies partly with the executive authority, which was previously loath to establish the legal structure, whether it

will budget for the finances to allow for the effective implementation of the legally established structure in a proposed SA Language Act.

7. UNFAIR LANGUAGE DISCRIMINATION

7.1 In addition to section 6 it is important to remember the corrective to any notion of unfair discrimination based on language, as contained in subsection 9(3). Here language as forbidden discriminatory territory, together with other often occurring forms of discrimination, such as race, religion, etc., is specifically called by name. In terms of subsection 9(5) it is suspected that unfair discrimination occurs when a discriminatory practice is indicated, and it is then necessary for the discriminating party to prove that the discriminating practice was not unfair. In terms of subsection 9(4) this prohibition also applies to individuals and legal entities. Subsection 8(2), read together with subsection 9(4) of the Constitution, renders this right not to be discriminated against also applicable between natural persons and legal entities.

7.2 In subsection 9(4) an obligation is created to prevent and prohibit discriminatory practices by means of legislation. This was the embryo provision for the Promotion of Equality and the Prevention of Unfair Discrimination Act[19]. On 4 February 1997 the Constitution came into effect, and in terms of item 23 of schedule 6 thereof, a specific cut-off date, being three years after its commencement, was set for its enactment. It is interesting that this Act is a child

of its times in the sense that, owing to the context of time and era in which it was drafted, it is disabled, since it does not devote much attention to language discrimination. It concentrates more on the other grounds, except that language is referred to in the definitions and falls under the general provisions. In terms of this Act an Equality Court system is established as an enforcement mechanism.

7.3 In terms of subsection 20(5)(a) of the Equality Act, the Equality Court is authorised to refer a complaint for settlement to the Pan-South African Language Board. What must be borne in mind immediately here is that the PANSALB has jurisdiction only in respect of state organs. Consequently it will not be possible to refer a complaint to the PANSALB if it does not involve a state organ. In such a case the Equality Court will have to make a finding.

7.4 Owing to the language imperialist conduct of the Afrikaans-dominated government of 1976 and the emotional use of Afrikaans as a symbol of disposing of a politically suppressive system, the political prejudice is deeply entrenched in the subconscious of the transformed judiciary. Any attempt to promote language rights is regarded to be a camouflaged attempt at reviving Afrikaans and a previously advantaged dispensation. This approach finds its origin also in the language policy of the current government, the ANC party, which preceded the Constitution, namely that English had to be accepted as the official language. The multilingual model, as contained in section 6, was thus a political compromise,

that is, it is the result of the negotiated social contract. Trained, expert and language-sensitive judges is thus a requirement.

7.5 In my opinion the Equality Review Committee, established in terms of section 32 of the Equality Act, must also add unfair language discrimination practices as an additional paragraph to the Illustrative List of Unfair Practices in certain sectors in terms of subsection 29(5) of the Equality Act. The disregard of the language rights of language communities and institutions, as well as (the disregard) by communities and institutions is limited not only to unfair language discrimination, and the SA Language Act will have to make provision for such instances. Such legislation and the Equality Act could thus be employed in a complementary manner.

8. WHAT IS THE POSITION OF THE PAN-SOUTH AFRICAN LANGUAGE BOARD INSTITUTED IN TERMS OF SUBSECTION 6(5) OF THE CONSTITUTION?

In the matter: *Lourens/President of the RSA et al*. the respondents advanced the argument against the application that the national government should promulgate legislative measures in accordance with subsection 6(4) that the adoption of the Pan-South African Language Board Act[20] (the PANSALB Act) effectuated the compliance of subsection 6(4). This argument was duly rejected by the court. The PANSALB has no part in the

obligation of the national and provincial governments to regulate and monitor their own use of the official languages by means of legislative and other measures.

To my mind the Pan-South African Language Board would be overstepping its authority should it act in a capacity other than its fundamental objective as set out in subsection 6(5) of the Constitution. It must promote the development and use and create the circumstances for the development and use of the official languages, as well as of the Koi, Nama, San and sign languages. Moreover, it must also ensure respect for and enhance a list of other languages.

The Alliance Act of subsection 6(5) of the Constitution to afford the PANSALB the ligaments and muscle is the aforementioned PANSALB Act. It is thus a constitutionally-allied Act that found its origin in the Interim Constitution and, in my opinion, the Act necessitates the refinement of the amendments to the section on language in the final Constitution of 1996, since this Act came into existence prior to 10 December 1996. However, I shall not go into the details of this aspect.

In accordance with subsection 8(1)(a) of the PANSALB Act, the PANSALB must make recommendations on the proposed language legislation, and I am unaware of whether the Department of Arts and Culture is mindful of this provision. Compliance with this obligation could give rise to a further delay in formulating the language legislation.

The PANSALB also failed in its obligation in terms of subsection 8(1)(j)(i), which reads as follows:

> *'monitor the observance of the constitutional provisions regarding the use of language;'*

The PANSALB should actually have taken the State to court on the issue of compliance with the legislation in terms of subsection 6(4). As stated in subsection 3(d), the PANSALB's objective of promoting knowledge of and respect for the provisions and principles of the Constitution, which directly or indirectly have a bearing on language matters, is confirmed by its total failure to fulfil its obligations when the South African language bill was shelved. In this regard, in terms of subsection 8(5) of the PANSALB Act, the PANSALB could, in any sphere of government, have initiated, investigated and made recommendations to any legislature (thus also to parliament) or government body concerning *the provisions of the Constitution* that directly or indirectly deal with language.

The procedure for dealing with omissions and/or conduct that violates language by way of negotiation, reconciliation and/or mediation is to be found in section 11 of the Act. Amidst published decisions in terms of subsection 11(7) of the PANSALB to which no effect has been/is given, section 11 is a toothless provision. The PANSALB's limited budget further limits its ability to play a significant role. My conclusion is thus that the initial perception that the PANSALB should play a prominent role in establishing a multilingual dispensation while having the powers of enforcement is a misguided one. The prevailing occurrence of language discrimination also confirms this omission. After

the legislation in terms of subsection 6(4) has been adopted, the PANSALB will be able to perform its function as watchdog more effectively.

9. WHAT SHOULD AN UMBRELLA LANGUAGE ACT CONTAIN?

9.1 Ownership of the challenge, which multilingualism presents and as provided in section 6 of the Constitution, must be taken in respect of the road ahead. The obligation of adding ligaments and ultimately flesh to the language skeleton will have to be met. By 'ligaments' I mean a proper judicial structure, in accordance with the meaning contemplated in subsection 6(4), which is contained in a general language Act. The proverbial muscle will have to be contained in notably practical measures such as, for example, language policy documents. Reference is made especially to enforcement mechanisms and the practical application of these, and not to the *corpus* of such an Act.

9.2 Within the framework of the general language Act, each national government department should, by way of the legislation, receive specific obligations within the context of the multilingual constitutional model. Here the embedded limitations of subsection 6(3)(a) *supra* can be taken into consideration, and I believe that the practicalities of all eleven languages can be dealt with by employing the language demographics of a region or district as departure point in the legislation.

9.3 A practical point of departure to the proposed legislation should therefore be language demographics of a specific region. Measures that geographically preserve languages in order to maintain the language demographics of a particular region should also be incorporated in the legislation. Migration tendencies undermine the language rights of language communities. French serves as an example. In certain parts of Canada English is a threat to French and French, in turn, is a threat to Flemish in Belgium. The migration of IsiXhosa speakers from the Eastern Cape to the Western Cape has, due to their preference for English, for example caused the SAPS to adopt English as its language of communication. This should not be the case, and the appointment policy of the SAPS there should also take the linguistic competence of the inhabitants of the specific region into consideration.

9.4 A national census is being held in 2011, and in such a census the language demographics of South Africa could be used for language planning purposes. The said census of 2011 must be credible, and the method of determining the statistics must uphold scientific standards. The outcomes of the census on language demographics can be reliable only if the survey includes this aspect as a pertinent focus point.

9.5 In order to be able to render an effective service to citizens, as contemplated in section 195 of the Constitution, the national and provincial governments will have to take the demographics of a region into account concerning the appointment

policy of officials. Those language-proficient persons who are able to speak a number of official languages will therefore benefit from such an appointment policy, by being capable of rendering services to all those who come to reside in an area. It will not be possible for race to be the only consideration for representivity, upon which the current policy is based.

9.6 Owing to the national implementation of policy in terms of such legislation, the national government departments will also have to have all forms available in all eleven languages within a reasonable period, alternatively within a prescribed period plan. The minimum requirement that the national government must use at least 2 (two) official languages, must not negate the fact that the national government must serve the entire country, because then the limiting factors also come into play, and these foregoing limitations thus affect the use of a specific official language in a specific language demographic region. In its application the national government, for example, will have to use English and Tshivenda in the northern region of Limpopo Province, while it will have to use Afrikaans and Setswana in the Northern Cape.

9.7 The right to enforcement in courts has become a luxury and for the ordinary citizen it is not a true right. Enforcement is an exception to the rule and must not be the rule. A page will have to be taken from the book of the consumer industry, which reflects the current legal tendencies. Enforcement should thus be easy, quick and effective - and naturally, affordable - for the citizenry in order to be able enjoy it as a true right. Direct damages and costs orders against bureaucrats, who infringe upon citizens' rights and constitutional rights and lay claims upon them, will likely have the most immediate and effective impact in preventing arbitrary applications and abuses. In the matter: *Jacob Coetzee/The National Commissioner of Police, et al.*[21] Acting Judge R du Plessis ordered that the individual public servants had to pay the plaintiff's costs from own funds on a special scale and that, should they fail to do so, only then the National Commissioner or the Minister of Police. I therefore submit that, in the enforcement of language rights, the most effective measures for enforcing respect for language rights will be the direct orders against members of the executive authority.

9.8 The fact that the National Languages Act will apparently be tabled in Parliament in the second semester of 2011 and that its effect on the language rights of the language communities will become known only in the medium term, will ultimately determine whether a language community will be able to claim

constitutional damages from the State, due to the breach of the languages clause in the Constitution.

9.9 The stipulation of subsection 6(4) is not restricted to regulation only, but also to monitoring. For this reason the need for a monitoring functionary or committee is essential in any prescribed legislation.[22] The effectiveness thereof will also depend upon its easy and affordable accessibility. It is interesting that the State went to great pains to establish a consumer protection dispensation, with consumers enjoying affordable enforcement[23], but it does not consider and implement a similar dispensation, despite the fact that the Constitution demands a multilingual dispensation.

9.10 A language ombudsman[24] ought to be appointed to resolve language complaints within a limited period, as contained in the legislation. Alternatively, complaints should be automatically referred to the language tribunal. The latter could serve as a sifting institution in order to eliminate language rights violations, perpetrated especially as a result of language rights ignorance, and thereby promote language harmony. A 'private language ombudsman' for Afrikaans under the auspices of the ALB could be instituted as an auxiliary service. A helpline for Afrikaans could form part of the office that refers language complaints to specific organisations where such complaints are the focus. Such a language ombudsman could liaise with the official languages ombudsman and assist language speakers to direct their complaints along the correct channels.

9.11 In terms of the new Consumer Protection Act consumers' complaints can be referred to a consumers' tribunal. In my opinion the new South African Languages Act must make provision for affordable, that is easy access and expert courts/tribunals, in order to protect and enforce language rights. Only one such tribunal/court needs to be instituted. The establishment of an extensive, country-wide tribunal system or language court system in order to enforce compliance with language legislation is not cost-effective. The solution lies in extending the powers of the Equality Court, which is already being established across the entire country and which relies on the lower and higher courts, with additional training. The crux is expert presiding officers who have a knowledge of language rights, and the ordinary courts lack this expertise. I seriously question the ability of the presiding judge concerning his expertise on language rights matters. The Equality Court presiding judges first have to undergo special training in terms of section 16(2) of Act 4 of 2000 before being permitted to act as such and, to my knowledge, language rights training does not form part of their curriculum. It is thus a real lack in the current system. A judge or magistrate who is unable to or does not wish to deal with a complaint in terms of the Equality Court, may then, in terms of an amendment to section 20(5)(a), refer it to the language court or language tribunal, instead of referring it to the PANSALB. This will require an amendment to section 20(5)(a) of the Equality Act, and such court's authority will have to be set forth in the umbrella legislation. Such a court will also hear non-discriminatory language rights disputes as the Equality Court has only anti-

discriminatory jurisdiction. Alternatively, provision can be made in the enforcement division that courts, which act as equality courts, receive extended powers in respect of language rights enforcement measures so as not to deal only with unfair language discrimination cases.

10. CHARTER OF LANGUAGE RIGHTS

Since the proposed South African Language Act makes provision only for the patent compliance with subsection 6(4) of the Constitution and currently also makes no provision, for example, for a charter of language rights, which has been authorised in terms of section 234 of the Constitution, I am of the opinion that the various language communities should collaborate collectively to establish a charter of language rights. A request could then be submitted to obtain legislative sanction for it in terms of section 234 of the Constitution.

11. CONCLUSION

What if the SA Language Act does not become promulgated or is presented in a diluted form, that it will in any event be a legally restrained constitutional baby? This is a question that the various language communities could begin to debate. Five constitutions were adopted in the previous century, and we can accept that the current constitution will not have a shelf life of one hundred years. Various forces, powers and claims from communities and individuals will exert pressure

on it, and language communities must evaluate tendencies proactively and creatively, plan and implement protective action.

However, during the existence of a constitutional dispensation only legal and constitutionally acceptable protest measures must be used. Legal protest refers to various court applications in order to obtain or enforce rights. In my opinion as a jurist the increasing language discrimination practices of the government, following the exhaustion of local remedies, in future could force, especially the Afrikaans language community, to turn to the United Nations' Human Rights Committee.

Without being language imperialistic - and we are only too familiar with the sensitivity concerning this - the Afrikaans language community, which possesses a huge intellectual capacity at various levels of linguistic development, could play a leading role in allowing the treasure trove of other official and unofficial languages of South Africa to be mined and developed. In this way the plural diversity proposed in section 31 of the Constitution can be promoted.

Without effective enforcement measures the multilingual language dispensation of South Africa is merely a pipe dream and a subject of debate at conferences. Furthermore it will undermine the constitutional state and respect for the Constitution.

The current language anarchy can thus only be prevented by a considered South African Language Act for the national government and for each individual province, as the

Western Cape and Limpopo already have, for Parliament and the courts, with a Charter of Language Rights that will impact on the private sector as well. Amidst the language anarchy, the English wave is rushing in and is overwhelming and impoverishing South Africa. Without a language Act and, ultimately, without legal breakwaters, that is, enforceable legislation, only Anglo-Africans will remain in South Africa. An enforced legal caesarean in order to enforce the Language Act was thus a necessity, and the continued legal siege of the executive authority will probably be necessary in the foreseeable future in order to enforce language rights.

FOOTNOTES

1. See section 239 of Act 108 of 1996.
2. Mohamed and Another v President of the RSA & Others 2001 (3) SA 893(CC) op [68].
3. Human Rights Committee Communication No. 760/1997 (Views adopted on 20 July 2000, sixty-ninth session) (Applicant won the case against the Namibian government.).
4. PN Bhagwati, Lord Colville and Maxwell Yalden on p. 154.
5. Paragraph 6 on p. 154; 19.2 of the UN International Convention on Civilian and Political Rights.
6. *Ex parte* Chairperson of the Constitutional Assembly 1996 (4) SA 744 (CC).
7. Emzantsi Associates: 'Costing the Draft Language Policy and Plan for South Africa', p 46.

8. 2002 (5) SA 72 (CC).

9. NGPD Case Number: 49804/2009 of 16 March 2010.

10. See items 1 and 4 of Schedule 6.

11. 1997 3 SA 772 (CC) (par 39).

12. See F Venter: 'The Protection of Cultural, linguistic and religious rights: the framework provided by the Constitution of the Republic of South Africa.' (SA Public Law 1996, Vol. 13 No 2, 1998; pp.438 – 459).

13. LM Du Plessis: Paper read at the 'First Konrad Adenauer Foundation and Faculty of Law (North-West University) Human Rights Indaba on The role of Local Government and the Lower Courts in realising Socio-economic Rights in North-West, Northern Cape and Free State Provinces' held at the Feather Hill Spa, Potchefstroom on 29 October 2010, p 7.

14. MEC for Education: KwaZulu-Natal and Others v Pillay and Others 2008 (2) BCLR 99 (CC); 2008 (1) SA 474 (CC). Cf. also South African National Defence Union v Minister of Defence and Others 2007 (8) BCLR 863 (CC); 2007 (5) SA 400 (CC) par 51.

15. The memory of the anti-Afrikaans group is very short. The group has forgotten Proclamation 17 of 1822 that became effective on 5 July 1822 in the Dutch-speaking Cape, which instituted English as the only language for law and government. So, too, the Cape Education Act of 1865 which enforced only English in schools.

16. The Soweto uprising as a result of the institution of Afrikaans as language medium for certain school subjects.

17. Supra n9.

18. Language Policy for Parliament, amended 1 August 2003.

19. Act 4 of 2000 as amended by Act 52 of 2002, which came into effect on 15 January 2003.

20. Act 59 of 1995 as amended by Act 10 of 1999.

21. Unreported judgement of Justice Roelof du Plessis in the NGPD delivered on 11 October 2010 under case number: 70261/2009.

22. A provincial language committee, instituted in terms of Section 8(8)(a) of the PANSALB Act, does not have effective powers without further legislative enforcement rights.

23. Section 69 of the Consumer Protection Act, Act 68 of 2008.

24. See VN Webb (ed.), 'Afrikaans na Apartheid'