

Media statement
(no embargo)
21 November 2017

BACKGROUND

The Western Cape Division of the High Court of South Africa recently found in favour of Stellenbosch University (SU) in an application in which Gelyke Kanse and eight other applicants ('the applicants') challenged the process SU followed for the revision of the Language Policy and the 2016 Language Policy itself. Some of the most significant premises of SU's 2016 Language Policy are that language should promote access to SU and also support the academic and career success of students and staff. In the judgement, Judge Daniel Dlodlo said the following about the Policy: *"If one assesses the 2016 Policy holistically, one finds or comes to the realisation that it is proportional to the goals it seeks to achieve. I can think of no better and carefully crafted policy."* SU has since been informed that the applicants have filed an application for leave to appeal the judgement.

'Stellenbosch University's multiple purposes best served by 2016 Language Policy'

"I conclude that Stellenbosch University (SU) appears to have decided that its multiple purposes of preventing exclusion, promoting multilingualism, ensuring integration, and fostering Afrikaans are best served by the 2016 Language Policy it adopted. It clearly considered multiple factors and weighed them all."

This was the view expressed by the Western Cape Division of the High Court of South Africa in the recent judgement (links to the sections of the Court judgement below) handed down in the matter between Gelyke Kanse and eight other applicants (including the President of the Convocation of the University), and Stellenbosch University.

The applicants sought orders reviewing and setting aside the decisions of SU's Senate and Council taken on 9 and 22 June 2016 respectively, to adopt the 2016 Language Policy in terms of section 27 (2) of the Higher Education Act 101 of 1997, and the policy itself, while directing SU to implement its previous Language Policy (adopted in 2014). The applicants contended that it was of vital importance that the Afrikaans offering should not be reduced and that it should remain a primary language of instruction at SU.

Court dismisses main application

The Court dismissed the applicants' main application and application for leave to admit a further affidavit, and to lead oral evidence thereon, with costs. SU also successfully brought, with cost orders in its favour, two striking out applications to strike out unnecessary, irrelevant and hearsay evidence in the applicants' founding affidavits and replying affidavits. SU tendered to pay the costs occasioned by the fact that SU delivered its answering papers out of time. The Court ordered SU to pay these costs in accordance with the tender.

In short, the Court found that the 2016 Language Policy complies with the Language Policy for Higher Education. In the words of Judge Daniel Dlodlo, that the "applicants have not persuaded this Court that the SU 2016 Policy is in any way unconstitutional", the Court also found in favour of SU that the Policy is constitutionally compliant.

With regard to various allegations by the applicants that the revision of the Language Policy in 2016, was tainted by, among others, the pre-determining of the process and outcomes, bias, undue influence, ulterior motives, failure to consider all information and succumbing to political pressure and threats of violence, the Court found that there was no evidence of improper conduct.

Challenging the 2016 Language Policy

The applicants challenged the 2016 Language Policy itself on the grounds that it is inconsistent with ¹section 29 (2) and ²section 9(2) of the Constitution; that it is contrary to the right of access to higher education in ¹section 29 (1) of the Constitution; that it constitutes unfair discrimination against Afrikaans speakers and white and Coloured students; and that it is inconsistent with the ³Language Policy for Higher Education (LPHE).

Challenging the revision process and procedure

The applicants further alleged that the 2016 Policy was the result of ‘unlawful dictation’, ‘bias’ and ‘improper purposes’ by the University’s management, who created the ‘pretence of consultation, and failed to consider relevant information’. It was against the background of these allegations that the applicants also challenged the process followed by SU that led to the adoption of the 2016 Language Policy.

According to the applicants, SU acted procedurally irrationally; SU Management determined the process (even to the SU Council) under the pretence of consultation, whereas there was no real consultation; SU adopted the policy for improper purposes, namely to regularise SU’s deviations from the 2014 Policy and averting political pressure and the prospect or threats of violence; and SU furthermore failed to consider all relevant information.

Language Policy is compliant with Constitution and Language Policy for Higher Education

The Court confirmed that the 2016 Language Policy expressively states that its purpose is to “to give effect to section 29(2)” of the ²Constitution in relation to language usage in SU’s academic, administrative, professional and social contexts, as well as 29 (1) related to access to higher education”. This would require an increase in equitable access to SU for all students and staff, and pedagogically sound teaching and learning. Since its campuses are in the Western Cape, the institution is committed to multilingualism by using the province’s three official languages, namely Afrikaans, English and isiXhosa.

In adhering to the two constitutional principles of a ‘commitment to diversity’, and to ‘eradicating the legacy of South Africa’s racial past (including unequal access to public education)’, the Court held that SU had to create a balance between: a) the rights of Afrikaans-speaking students to their language and culture; b) the promotion of multilingualism; and c) the rights of primarily African people who are not conversant in Afrikaans, to access to education at SU.

The reasonableness standard built into the Constitution (Section 29) imposes a context-sensitive understanding of each claim for education in a language of choice. In response to claims by the applicants that the 2016 Language Policy constitutes unfair discrimination against Afrikaans-speaking white and Coloured students, the Court held that the rights of Afrikaans speakers ‘must be analysed with full acknowledgement of the historical context of State support for Afrikaans, disregard for other indigenous languages, and racial exclusion from education”. The commitment to equality, to redress and to equal access to further education remain fundamental parts of the Constitution’s mission.

“When weighing the competing interests of Afrikaans-speakers and Africans with no or inadequate Afrikaans proficiency, it is important to bear in mind that the Constitution aims at achieving an equality of opportunities not inequality or equivalence of burdens. It calls for equality of the vineyard, not the graveyard.”

‘I find it difficult to accept that the Policy intends to reduce Afrikaans’

The Court further found it to be “doubtful that there will be any reduction in the Afrikaans offering compared to what was offered under the 2014 Policy”, and that the 2016 Policy may even increase Afrikaans tuition through more parallel-medium lectures and more educational interpreting. “I find it difficult to accept that the Policy intends to reduce Afrikaans,” Judge Dlodlo said.

“Whether or not there is any reduction in the Afrikaans offering is a question of implementation and is not a necessary consequence of the impugned Policy. The truth is that the implementation of the Policy is not before us. If one assesses the 2016 Policy holistically, one finds or comes to the realisation that it is proportional to the goals it seeks to achieve. I can think of no better and carefully crafted policy. I am of the view that SU has indeed advanced an ‘appropriate justification’ for any possible reduction in Afrikaans tuition that flows inevitably from the Policy,” Judge J Dlodlo said.

Court finds allegations of improper conduct unfounded

In response to the various allegations by the applicants, which was summarised and described by the Court as “unlawful dictation”, “creating the pretence of consultation”, “improper purposes”, “failure to consider relevant information” and “bias”, the following findings were made:

- The allegations that management prescribed to Council what the Policy should be, were without substance. The SU Statute makes it clear that Council is the ultimate decision-making body of SU and that management is subordinate to Council.
- Council did not question the design of the language revision process because it was clearly considered and transparent. Both Council and Senate are multi-member decision-making bodies and together they represent a range of different interested parties.
- It was appropriate for the SU management to initiate and determine the process, because it had the capacity to assess changing circumstances and the impact of the 2014 Language Policy;
- The members of the Working Group that led the revision process were suitably qualified and experienced, and that most were from outside the SU administration;
- The Working Group considered most relevant documents and information, including the applicable legal principles contained in the Constitution, the Higher Education Act, the Language Policy for Higher Education, as well as the relevant demographic information, a well-supported survey of student preferences and the cost of full parallel-medium education.
- The Working Group considered input from students and other stakeholders, and that they responded by preparing amended drafts for input from faculties, Senate, the Institutional Forum, Council and the executive Committees of Senate and Council. The fourth version of the Policy was approved after long and intense debate, and comprehensive input from legal counsel. The fact that the comments of those in favour of an increase in the Afrikaans offering or equal offerings for Afrikaans and English were not accepted does not mean that they were not considered.

- There was no evidence that a ‘radical minority’ prescribed to the SU management what the Language Policy should be. The only relevance of the widespread disruptions on campuses in 2015 and 2016 to the Language Policy was that it created an urgency to resolve the issue.
- As to the alleged improper purposes of regularising the earlier deviations from the 2014 Language Policy, and to avert political pressure and the threat of violence, the Court found that was “unfair and devoid of merit”. By the second term of 2016 the mentioned deviations had been brought to an end, months before the 2016 policy was accepted. From SU’s answering papers it was “abundantly clear that the risk of violence did not influence the content of the 2016 Policy”.
- In response to SU’s contention that all the relevant information was considered and presented to Senate and Council, Judge Dlodlo said: “I do not for a moment doubt this assertion.”
- SU considered the results of its own survey that showed strong support for the retention of Afrikaans as primary medium of instruction. While this showed support for Afrikaans, the results also showed significantly more support for dual-medium teaching and English-only teaching.
- There was no basis for the argument that SU acted with an ulterior motive. The fact that Management had a view about a language policy it wished Council to adopt simply does not found a case for bias against Afrikaans tuition. Management was entitled to form and publicly state its view. The Court found that “the applicants do not appear to rely on extrinsic evidence of bias. Their argument is that bias is the only possible explanation for the decision. There is no basis on the papers to draw a conclusion of bias”.

Why change the 2014 Policy?

The Court carefully considered the reasons for changing the 2014 Language Policy, as well as the motivations for and content of the 2016 Policy.

SU’s intention with the 2014 Language Policy and Plan was to make it easier for English-speaking students to obtain an education at SU. In 2015 and 2016, it became clear that the Policy excluded students – mostly African students – who were not proficient in Afrikaans. These students could not fully understand the Afrikaans (A option) or dual-medium (T option) lectures; they felt stigmatised by real-time interpretation (into English only) and felt excluded from campus-life, for example residence meetings and events. By contrast, nearly all Afrikaans-speaking students were sufficiently proficient in English to understand academic content.

The Court described the 2014 Policy as a ‘brave attempt to move away from SU’s past and to recognise the equal status of English and Afrikaans’. In its answering papers, SU explained that the 2014 Policy had to be adapted because of the changing demographics of its student body and the increasing demand for English. The Policy’s intent to make SU equally accessible to all had the unintended consequence of excluding African students from full and equitable access, as is indicated by the following first-year statistics:

- 82,7% of Afrikaans-speaking students were white; 17% were Coloured;
- 62% of Coloured students were English speaking;
- 63% of first-year students who did not have Afrikaans as a grade 12 subject, were African;
- 61% of all the African first-year students did not have Afrikaans on a grade 12 level.

Consequently, SU decided to adopt a new language policy, which would result in 100% of the learning content offered at least in English. At the same time SU would manage the Afrikaans offering to maintain access for students who choose to study in Afrikaans and to develop Afrikaans as language of instruction where reasonably practicable. [Note to journalist: for more information on the implementation of the 2016 Language Policy please refer to the extract from *Matieland* below]

The 2016 Language Policy

The 2016 Policy expressly states its purpose as a) to give effect to Section 29 (2) – language in education; Section 29 (1) (b) – access to higher education, in conjunction with Section 9 (equality and the prohibition against direct and indirect unfair discrimination) of the Constitution.

In the judgement, held: “Looking squarely at the 2016 Policy one gathers that it does not reduce the Afrikaans offering. The Policy is to maintain and, if possible, increase the Afrikaans offering subject to demand and resources.” The applicants contended that the 2016 Policy would cause the ‘virtual exclusion’ of Afrikaans.

“It is doubtful there will be any reductions in the Afrikaans offering compared to the offering in the 2014 Policy. It will depend on how faculties implement the policy. If the reduction does become a reality, it cannot be described as an intent of the policy. It clearly will be a direct consequence of the nature of student demand and the limits of SU’s resources. I find it difficult to accept that the policy intends to reduce Afrikaans. In my understanding, the Policy is crafted and/or designed to retain the extent of Afrikaans tuition under the 2014 Policy and to offer as much Afrikaans tuition as SU is reasonably able to do, considering what is reasonably practicable.”

The Court also expressed the view that SU is not responsible for the fate of Afrikaans throughout South Africa, but only stretched to the boundaries of the University itself. The decision by other universities to reduce or end its Afrikaans offering did not determine the legality of SU’s decision to amend its policy.

“The deeper issues related to ‘majoritarian hegemony’ must be dealt through an attack on the State Policy, as expressed in the LPHE. SU’s Policy complies with the LPHE. The applicants’ real complaint appears to be the cumulative effect of those decisions by multiple universities that negatively impact Afrikaans-speakers. As the SCA held, the target then is the State’s language policy, not SU’s policy. The applicants have in my view, not persuaded this Court that the SU 2016 policy is in any way unconstitutional,” Judge Dlodlo said. He later also added that the 2016 Policy was carefully calibrated to achieve the balanced approach endorsed in the LPHE.

The Court found that the contents of the 2016 Language Policy shows:

- SU was well aware that speakers of various SA languages use English to communicate with one another.
- SU was aware of significant academic, business and international value of English.
- SU was aware of the need to advance the academic potential of Afrikaans and proceeded from the assumption that it was reasonably practicable to deliver Afrikaans tuition.
- SU knew that almost all Afrikaans-speaking students were sufficiently proficient in English to study in English, and it was a key factor when adapting the 2016 policy. SU did consider the need for smooth transition to a university environment in which there would be more teaching in English than Afrikaans.

The Court found that the reality was that Afrikaans students would suffer less harm being required to learn in English, than English students would incur if they had to learn Afrikaans. "If SU did not take this into account, the institution would have acted irrationally. "

The Court concluded that the 2016 Policy was fair in that:

- SU accepts that access to tuition in the language of one's choice has a connection to human dignity. SU still offers tuition in Afrikaans and accordingly any conceivable impairment of dignity is minimal. Importantly, the majority of Afrikaans speakers are able to learn in English.
- It weighs in favour of fairness that those who are disadvantaged by the Policy are primarily white Afrikaans speakers who occupy an historic and current position of privilege.
- It requires the maximum Afrikaans offering within SU's resources.
- It ensures equitable access to SU and promotes diversity by creating an attractive and accommodating space for all students, regardless of race.

"I conclude that SU appears to have decided that its multiple purposes of preventing exclusion, promoting multilingualism, ensuring integration, and fostering Afrikaans are best served by the 2016 Policy it adapted. It clearly considered multiple factors and weighed them all. This Court is commanded by the law not to second-guess that extremely difficult process, unless the outcome is obviously irrational," Judge Dlodlo said.

/-----/

¹ Section 29 of the Constitution

Section 29 (1): Everyone has the right -

- a) To a basic education, including adult basic education; and
- b) To further education, which the State, through reasonable measures, must make progressively available and accessible.

Section 29 (2):

Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the State must consider all reasonable educational alternatives, including single medium institutions, taking into account-

- (a) equity
- (b) practicability; and
- (c) the need to redress the results of past racially discriminatory laws and practices.

² Section 9 (2) of the Constitution

Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

³ Language Policy for Higher Education (LPHE)

The LPHE seeks to balance, on the one hand, the needs to transform higher education, and in particular to prevent institutions' languages of instruction from impeding access and success by people who are not fully proficient in English and Afrikaans on the other hand, the development of multilingualism in those institutions' day-to-day functioning and core activities, including the development of indigenous African and other languages as scientific and academic languages. It also seeks to assure the long-term maintenance and growth of Afrikaans as a language of science and scholarship in the higher education system.

COURT JUDGEMENT

Judgement in the Western Cape Division of the High Court of South Africa in the matter between Gelyke Kanse and eight other applicants, and Stellenbosch University.

Section 1 <http://www.sun.ac.za/english/Documents/Hofbevel%201.pdf>

Section 2 <http://www.sun.ac.za/english/Documents/Hofuitspraak%20deel%202.pdf>

Section 3 <http://www.sun.ac.za/english/Documents/Hofuitspraak%20deel%203.pdf>

Section 4 <http://www.sun.ac.za/english/Documents/Hofuitspraak%20deel%204.pdf>

Section 5 <http://www.sun.ac.za/english/Documents/Hofuitspraak%20deel%205.pdf>

BACKGROUND INFORMATION ON THE SU LANGUAGE POLICY

In the 2016 edition of Stellenbosch University's annual magazine Matieland Prof Arnold Schoonwinkel, Vice-Rector: Learning and Teaching, talks frankly about language and the erroneous assumption that this policy means the end of Afrikaans as language of instruction at SU. Below an extract from that article:

How the 2016 Language Policy is implemented in practice

In undergraduate modules, Afrikaans and English serve as the languages of learning and teaching. Where reasonably practicable and pedagogically sound, separate Afrikaans and English lectures will be presented for large groups, although tutorials and practical sessions will again involve students from both language groups.

In lectures using both Afrikaans and English (dual medium lectures), all information will be conveyed in at least English, supplemented with a summary or emphasis of facts also in Afrikaans. Questions are answered in the language of the question. Simultaneous interpreting will be available during each lecture in first-year modules. In further years of study, interpreting will be provided at a faculty's request.

Single-medium undergraduate lectures are allowed only where justified by the nature of the subject matter, where the lecturer is proficient to teach in one language only, or where all students in a class group unanimously vote for one language by ballot paper. For at least the first year simultaneous interpreting into the 'other' language will be available.

Students are supported further in both Afrikaans and English, via consultations in office hours, routine tutorials and practical sessions, information and communication facilitated learning (audio and video recordings) and the service offering of the Language Centre.

All compulsory reading material will be made available in English, and will be provided in Afrikaans also (excluding published material). SU's module frameworks and study guides still are available in

both languages. In undergraduate modules, test and exam papers as well as other assessments are set in both Afrikaans and English, and students may complete all assessments and written work in either Afrikaans or English. The multilingual model also supports Afrikaans students who in the first study year have not yet mastered English at an academic level. By their final year they will be able to hold their own nationally and internationally.

For students with Afrikaans as preferred language Afrikaans will be applied amply and practically in all three language modes. Although all information will be conveyed also in English, Afrikaans is not pushed to the background. Our point of departure is knowledge transfer in more than one language, focused on the needs of our students.

Issued by:

Corporate Communication Division
Stellenbosch University
Enquiries: Martin Viljoen