.CONSTITUTIONAL COURT OF SOUTH AFRICA

Gelyke Kanse and Others v Chairperson of the Senate, Chairperson of the Council and the University of Stellenbosch

CCT 311/17

Date of Hearing: 8 August 2019
Date of Judgment: 10 October 2019

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On Thursday, 10 October 2019 at 10h00, the Constitutional Court handed down judgment in an application for leave to appeal directly to it against the judgment and order of the High Court of South Africa, Western Cape Division, Cape Town (High Court). This application concerned the decisions of the Senate and Council of the University of Stellenbosch (University) to adopt a new language policy for the University (2016 Policy). The 2016 Policy was adopted under the Higher Education Act and the National Language Policy for Higher Education (LPHE).

The 2016 Policy creates three language specifications: parallel medium, dual medium and single medium. Its effect is to adopt a preference for English in certain circumstances so as to advance the University's goals of equal access, multilingualism and integration while also maintaining and preserving Afrikaans, subject to demand and within the University's available resources. The University contended that the 2016 Policy, in contrast to the 2014 Policy that preceded it, does not exclude black and English-speaking students from full and equitable access to the University. While the Afrikaans language provision under the 2014 Policy could be preserved by fully parallel medium tuition, the cost would total about R640 million in infrastructure (including additional classrooms), plus about R78 million per year thereafter, in additional teaching and other personnel costs. This would entail a 20% increase in fees, an additional R8100 on top of the approximately R40 000 per year students on average pay now.

Gelyke Kanse is a voluntary association originally formed to oppose the 2016 Policy but which now has broader goals in seeking to promote Afrikaans mother-tongue education and the acceptance of mother-tongue education as indispensable to community development. Along with individual applicants, including black, brown and white students affected by the 2016 Policy, Gelyke Kanse approached the High Court seeking an order reviewing and setting aside the 2016 Policy and reinstating the 2014 Policy.

The High Court dismissed the application. It held that the University's obligations under section 29(2) of the Bill of Rights are limited to providing Afrikaans education where reasonably practicable and through reasonable educational alternatives. In determining whether providing education in an official language of choice is "reasonably practicable", the State must take into account what is fair, feasible and satisfies the need to remedy the results of past discriminatory laws and practices. Further, assessing what is reasonably practicable requires consideration both of resource constraints and logistics (the factual criterion), and of equity, redress and non-racialism (the constitutional criterion).

The High Court found that the 2014 Policy was not equitable as it denied black students not conversant in Afrikaans full access to the University. It also held that the LPHE, which promised extension of Afrikaans tertiary education, was important as a guiding document but it was not binding. The University adequately justified departing from the LPHE. In any event, the 2016 Policy was found to be consistent with the LPHE, which focuses on ensuring equitable access.

The applicants approached the Constitutional Court for direct leave to appeal. They asked the Court to set aside the 2016 Policy on grounds that it violates section 29(2), and also contravenes other constitutional provisions, including section 6(2), section 6(4), the equality clause and other provisions of the Bill of Rights.

In a unanimous judgment penned by Cameron J, the Court dismissed the appeal. The Court found that the 2016 Policy was constitutionally justified. "Reasonably practicable" in section 29(2) involves both a factual and normative (constitutional) element. The constitutional criterion of reasonable practicability is to be judged objectively, and requires an approach founded in evidence.

In this case, the University's judgment on the cost of preserving Afrikaans tuition at the level in the 2014 Policy satisfies both the factual and normative elements in section 29(2). The University showed that, near-universally, brown and white-Afrikaans-speaking first-year entrants to the University are able to be taught in English. Though most entrants are able to receive tuition in Afrikaans, a significant minority cannot. The 2014 Policy created an exclusionary hurdle for specifically black students. The University also showed that classes conducted in Afrikaans, with interpreting from Afrikaans into English, made black students not conversant in Afrikaans feel marginalised, excluded and stigmatised.

This Court found that the University's process in adopting the 2016 Policy was thorough, exhaustive, inclusive and properly deliberative. The University's determinative motivation for introducing the new Policy was to facilitate equitable access to its campus, its teaching

and learning opportunities by black students not conversant in Afrikaans. The University's decision-making structures, with a scrupulous eye on racial equity, access and inclusiveness, judged that a downward adjustment of Afrikaans, without by any means eliminating it, was warranted. The University also determined that the cost of avoiding down-adjustment of Afrikaans was too high. This evidence established that continuing with the 2014 Policy was not "reasonably practicable".

The Court noted that the flood-tide of English predominance risks jeopardising South Africa's entire indigenous linguistic heritage. This is because the march of history both in South Africa and globally seems relentlessly hostile to minority languages, including Afrikaans, which is the mother-tongue of some seven million on a planet inhabited by seven billion people. But this could not be made the University's burden.

A separate concurrence by the Chief Justice (with Cameron J concurring) agreed that it was neither reasonably practicable nor equitable to maintain the position as it was before the 2016 Policy came into being. Additionally, the understanding and application of reasonable practicability and the need for equitable access to education, stood to be guided by this Court's articulation of these principles in *AfriForum v Free State University*. The separate concurrence also emphasized the need to develop all indigenous languages including the spoken languages of the First Nation people.

The concurrence also appeals to corporate citizens' spirit of generosity to help preserve Afrikaans, and develop other indigenous languages, as essential tools for knowledge impartation and comprehension, by deploying resources to the establishment of private learning institutions envisaged by section 29(3) of the Constitution.

In a separate concurring judgment, Froneman J (with Cameron J concurring) agreed with the reasoning and outcome of the first judgment. The concurring judgment draws out the implications of the entrenchment of English's dominance as a medium of instruction for the diminished use and protection of minority indigenous languages.