THE CONSTITUTIONAL COURT AND GELYKE KANSE: WHAT HAPPENED?
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On October 10, 2019, the Constitutional Court (CC) ruled in the case in which Gelyke Kanse (GK) asked that the 2016 Language Policy of the University of Stellenbosch (SU) be set aside because it is unconstitutional. GK's application was essentially an appeal against the Western Cape High Court's earlier ruling, and a request to bypass the Supreme Court of Appeal (SCA) and approach the Constitutional Court directly. This was allowed.

The overall verdict - with which all 10 judges agreed - was written by Judge Edwin Cameron (who was recently appointed new Chancellor of the SU). There are also two additional rulings, one by Chief Justice Mogoeng Mogoeng and the other by Judge Johan Froneman, which provide additional perspectives.

In our constitutional order, it is possible that one may differ from the decisions of the courts and also the Constitutional Court without being charged with contempt of court. The condition is that it is done in fairness and with respect. These are the starting points of this article.

The principle of "appropriate justification"
A key element of the Constitutional Court's judgment is that of "appropriate justification". This comes from the well-known Constitutional Court ruling on Ermelo High School's language policy in 2009. In it, Judge Albie Sachs said that where a learner already enjoys the benefit of education in the language of choice, the state has a negative duty not to take away this right or to reduce it without "appropriate justification".

The Constitutional Court accepted the SU management's motivation that the 2014 Policy, where Afrikaans and English enjoyed equal status, should change. The reasons were that the black students of SU, who cannot understand Afrikaans at all, felt "stigmatised, marginalised and excluded" by that equal treatment. It results from separate lectures in the same subject (some in Afrikaans, others in English), and simultaneous interpretation in lectures presented in Afrikaans. It also flowed from the common language of Afrikaans on campus. Stellenbosch University argues that equal treatment of Afrikaans is no longer sustainable if it makes students feel that way and that it must therefore be scaled down. The Constitutional Court accepted this and went even further by saying that SU's opinion that the 2016 Policy does not reduce Afrikaans education, but merely repositions it, is not true. The 2016 Policy effectively gives priority to English to promote SU's goals of "equal access, multilingualism and integration". That being said, how the preference for one language can promote multilingualism, only the respected judges will know! The use of Afrikaans at SU is now subject to available resources - and it is too expensive for SU to do this in a reasonably practicable way. In doing so, the Constitutional Court explains, the SU provided "appropriate justification" for the scaling down of Afrikaans at SU.

How did it happen that the Constitutional Court - which had the oath declarations and other statements in Afrikaans translated at its own expense - came to this conclusion? There were mainly three issues that GK faced in the court case and judgment.

The application of the policy was out of bounds

Because GK brought the first application to the Western Cape High Court before the start of the implementation of the 2016 Policy, the Constitutional Court decided that they were not allowed to use the Policy in the case. As a result, much of GK's good testimony from students and staff from which the negative implications for Afrikaans were already evident was not taken into account by the Constitutional Court. As Judge Cameron states in his ruling (based on SU's assurance) that all first-year classes will still be offered in Afrikaans, GK's evidence could not be used to prove it false - despite that many of the oaths declared by students have proven that this is not true. The irony is that GK may have brought their case too soon, before the implications of the Policy were clear and that they would probably not easily be allowed to bring a "new" case later on the negative consequences of applying the Policy. And this is the situation despite the fact that the Constitutional Court itself provided the negative consequences for Afrikaans and even (in Chief Justice Mogoeng and Judge Froneman's additional rulings) made sympathetic noises about it.

The interpretation of "reasonably practicable"

The second problem was the Constitutional Court's reluctance and unwillingness to correct the legal errors of their verdict in AfriForum's Kovsies case. Even Judge Froneman, who was very positive about Afrikaans as a teaching language in his minority judgment, affirms that the Constitutional Court is bound by the Kovsie judgment, even though the facts in the GK case were quite different. The biggest mistake the Constitutional Court made in the Kovsie case was to interpret the qualification for the right to be taught in a language of choice, namely "reasonably practicable", normatively and to link it to the equality and redress in the second part of section 29(2). It is stated that in order to make the right to education in the language of one's choice a reality, the State must consider all reasonable educational alternatives (including single-medium institutions), but also equality, practicality and the need to correct past discriminatory laws and practices. Any first year language student will know that "reasonably practicable" can only indicate that the qualification has to do with the practical feasibility of a case, such as it should not be unaffordably expensive or unenforceable.

Apart from the fact that it is linguistically nonsensical to interpret it in this way, the intention of the "legislature" (in this regard CODESA and later the Constitutional Assembly) must also be taken into account. Both Cyril Ramaphosa and Roelf Meyer will testify that the intention in the first sentence of section 29(2) has always been that the right to a language of choice must pass the test of practical feasibility. The second part of the sentence, where the possibilities of realising the law (further), first bring forth equality, restitution and (again) practicality. In the authoritative *Bill of Rights Handbook* (2013), Currie and De Waal also state this precisely as a matter of practical and reasonable application. And the Constitutional Court's ruling even quotes them. Respectfully, our esteemed courts have failed the language test here. And GK and Afrikaans are the victims of it.

The Constitutional Court did, however, reasonably test the cost aspect, and on the basis of SU's (untested) financial calculations, the Constitutional Court concluded that equal retention of Afrikaans in addition to English at SU would be too costly to do in a reasonably practicable way. But the Constitutional Court goes further and also brings in the fact that so many (black) students cannot understand and/or speak Afrikaans, as a further element to make the "reasonably practicable" impossible. And the fact that they feel "stigmatised", marginalised and excluded by simultaneous interpreting in classes are, according to the Constitutional Court, further reasons that retaining Afrikaans is not reasonably practicable - despite the fact that simultaneous interpreting is international practice at the UN and the EU. Obviously, these reasons that the SU presents and that are accepted by the Constitutional Court are not objective - and are rooted in students' "lived reality" according to the ideology of #FeesMustFall.

The lack of a systemic analysis

The third problem faced by GK is that in a case like this, the Constitutional Court does not look at the "bigger picture" of Afrikaans teaching. The Court assesses the set of facts on the table and applies the legal principles. For although all three judges who wrote the verdicts acknowledged that Afrikaans as a language of instruction is under pressure and may even disappear through the 2016 Language Policy, they did not take this fact into account in their judgment. And for that they can be criticised. Judge Cameron goes so far as to say that the scaling down of Afrikaans in favour of English for equality, access and participation, weighed on a sliding scale of what is lost in terms of language and gained in terms of social justice, is constitutionally justifiable. And here's the crux: when it comes to language, the individual's constitutional rights in the Constitutional Court's interpretation do not weigh as heavily as social justice. And Afrikaans and minority language rights are the victims.

Towards the end of his verdict, Judge Cameron makes some additional comments. He acknowledges that the fate of indigenous languages (including Afrikaans) requires serious consideration. To declare SU's 2016 policy as in line with section 29(2) comes at a cost, which "our judgement must acknowledge". But then the judge does an about turn: this problem is not the Constitutional Court's. The hegemony of English is part of the "march of history" and is hostile to all minority languages worldwide, including Afrikaans. This march of history and the fact that only one university still uses Afrikaans as a language of instruction is also not SU's problem. And equally, he concludes: "Yet we should not miss the cost that the diminution of Afrikaans at the University not only entails for Gelyke Kanse and its adherents, but for our world, and for ourselves."

With reference to one of GK's arguments, namely that Afrikaans as an indigenous and official language in terms of section 6(4) must enjoy "parity of esteem" and should be "treated fairly" (and that it does not happen at SU), Judge Cameron states in the brief that the Western Cape High Court did not go into it. But that element, in conjunction with section 6(2) on the promotion of indigenous languages "may require consideration". This is the closest that the Constitutional Court comes to a systemic analysis.

Chief Justice Mogoeng affirms that Afrikaans is an African language and that the fact that it was abused in the past does not affect the language's "African DNA". Then he makes the astonishing point that, because the State does not have the money now to help Afrikaans and other indigenous languages in terms of section 6, the corporate sector must please do so!

Judge Froneman goes further and approaches the case systemically. He starts with a strong statement about the Constitutional Court's acceptance that the 2016 Policy is in line with section 9(2).

> *One does not need international studies, of which there are many, to realise that this state of affairs entrenches English as the dominant language not only in tertiary education, but also, as we will see, from primary through secondary school to university. Opinions may differ on whether this is a good or bad thing, but it seems strange for this Court, the ultimate protector of minority language rights under the Constitution, to give its blessing to this result.*

He further shows how the hegemony of English has extremely detrimental consequences for young coloured and black South Africans, while white English speakers (with their own inheritance of colonialism) come off scot-free. He concludes with the belief that the constitutional empowerment for every South African to be proud of his/her language does not call for the destruction of other languages. Making South Africa truly multilingual will require everyone to work together. It is not "reasonably impractical".

At least Judge Froneman's ruling acknowledges the systemic crisis of Afrikaans and other indigenous languages. But that did not change the verdict.

Don't shoot the messenger ...
One cannot help but judge that the Constitutional Court's ruling is not fair, especially since it did not take the full picture into consideration. But it is important to keep in mind that the institution that brought the Afrikaans language community to this point is not the Constitutional Court, but SU, and the Afrikaans business leaders, parents and students who prefer English as their language of instruction. They must bear at least part of the blame.

What is clear (and deserves further analysis) is that Afrikaans in public institutions has been dealt a serious blow, if not a death blow. After the Constitutional Court's ruling, section 29(2) no longer has any value for the Afrikaans language community. They will now have to call on section 29(3) and build private Afrikaans institutions. This is - ironically - good news for Soltech (Solidarity's technical college), Akademia (Solidarity's university) and the MOS Initiative (a private company recently established to build and manage Afrikaans inclusive schools).

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