AFRIFORUM v UNISA: THE RIGHT TO EDUCATION IN THE LANGUAGE OF CHOICE
By Adv Jacques du Preez

The Supreme Court of Appeal (SCA) recently handed down a well-reasoned judgment that underscores a critical number of core principles insofar as language rights and education are concerned in South Africa.

The South African Constitution is very clear on language rights in public educational institutions - including universities and schools. Section 29(2) provides that *'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.'

The above is also reinforced by other provisions pertaining to language rights in the Bill of Rights, for example, the right to use the language of one's choice (Section 30) and that persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community, to enjoy and use their language (Section 31(1)(a)).

In the matter of *AfriForum NPC v UNISA*[1] the Court had to balance the above constitutional provisions with that of language policy at the University of South Africa (UNISA). UNISA is the sole distance institution of higher learning in South Africa and has, through the years of its existence as a correspondence university, offered a wide variety of graduate courses, in English and Afrikaans, to a vast number of local and international students.

In this matter the Court had to decide whether UNISA's decision to replace its *dual-medium* language policy with an *English-only* policy was constitutional. Furthermore, the Court was grasped with the issue of whether the policy infringed the principles of legality and lawfulness and whether the university failed to establish that it was not reasonably practicable to continue offering tuition in Afrikaans under section 29(2) of the Constitution.

The language policy sought to be replaced was approved by UNISA's Council in 2006. In 2010, the Council approved the revision of the language policy. According to UNISA, the need for the revision arose from a natural attrition of the demand for Afrikaans, the move for parity between Afrikaans and other African languages as support, rather than as language of learning, and the inclination of students wanting to study in English. Accordingly, in 2012 it introduced the 'Guidelines for the Discontinuation of Afrikaans in Certain Modules'. In 2014, a draft language policy and its implementation plan, which provided for an English-only language of learning and tuition (LOLT), was formulated. The new language policy was ultimately adopted by the Council of UNISA on 28 April 2016.

AfriForum took issue with the decision of the university and challenged it in the Gauteng Division of the High Court. Its attack was threefold, and it sought an order, *inter alia*, that UNISA suspend the

[1] http://www1.saflii.org/za/cases/ZASCA/2020/79.html

implementation of the new language policy adopted by the Council of the University of South Africa and:

1. That the resolutions of the Council and the Senate of the University of South Africa to approve a new language policy be reviewed and set aside;

2. That the new language policy adopted by UNISA be set aside as being unconstitutional and unlawful; and

3. That the new language policy be set aside as a whole; alternatively, be set aside insofar and to the extent that Afrikaans has been removed as language of learning and tuition at the University of South Africa.

In the High Court UNISA denied that its decisions were irrational, contending that it did not 'remove', 'abolish', 'eradicate' or 'abandon' or 'do away with' Afrikaans tuition, as AfriForum claimed. Instead, UNISA said, 'the new language policy favoured the use of English as the language of learning and tuition at the university, whilst placing Afrikaans on the same footing as the other official languages in the Republic, with tuition in Afrikaans and the other official languages being offered where there is capacity, with learner support, in the student's language, and with the intent that the development and place of Afrikaans as well as the other official languages should be promoted'.

On the principle contention that the new language policy was unconstitutional, Judge Keightley accepted that UNISA changed its language policy and resolved to offer tuition 'only in English due to the lack of demand and lack of capacity for Afrikaans tuition'. In her view, language parity and the need to treat students equitably when it came to mother tongue tuition were 'critical drivers' in UNISA's adoption of the new language policy. She found that on the evidence it was not reasonably practicable for UNISA, which is committed to redressing the imbalances that exist in languages, to offer tuition in Afrikaans while not offering tuition in the remaining official languages as the LOLT, as 'the cost associated with developing all the languages to that level at this stage would be prohibitive'. She further held that 'both locally and internationally, English was the accepted and preferred medium for communication, academia and business and that the adoption of English as the sole LOLT under the new policy was a 'matter of simple practicality'.

In sum, (as the judge put it) 'it was plain that the removal of Afrikaans was justified on the basis of considerations of equity, practicability and the need to redress the results of past racially discriminatory laws and practices, as required under section 29(2) and in accordance with the principles laid down by the Constitutional Court'. The court concluded that the new language policy did not violate section 29(2) and AfriForum's application was subsequently dismissed.

On appeal one of the principle issues, and really the crux of the matter, was whether UNISA's new language policy contravened section 29(2) of the Constitution. UNISA contended that that the new language policy constituted an attempt at a reasonable measure to make education progressively available and accessible to all, on an equitable basis, taking into account the practicability of a single medium English tuition, the dwindling demand for Afrikaans tuition, the responsibility not to continue entrenching historical privileges accorded to Afrikaans which were no longer justified by student numbers, and the alternative of unqualified multi-medium tuition not yet being reasonably feasible owing to constrained resources.

The SCA did not agree with UNISA and found that its new language policy did contravene section 29(2) of the Constitution.

The Court made it clear that section 29(2) entails an enforceable right against the State to provide education in the language of choice where this is 'reasonably practicable'. It also referred to the Constitutional Court which had described the constitutional test of 'reasonable practicability' in determining whether the right in section 29(2) may be invoked in the matter of *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another*.

In that matter the Constitutional Court said:

'The reasonableness standard built into section 29(2)(a) imposes a context-sensitive understanding of each claim for education in a language of choice. An important consideration will always be whether the State has taken reasonable and positive measures to make the right to basic education increasingly available and accessible to everyone in a language of choice. It must follow that when a learner already enjoys the benefit of being taught in an official language of choice the State bears the negative duty not to take away or diminish the right without appropriate justification.'

The SCA ruled that in light of the fact that UNISA students could elect to be taught in Afrikaans in respect of some modules when the new language policy was adopted, UNISA bore the *negative obligation* of establishing appropriate justification for taking away their right to receive tuition in the language of their choice. In doing so, it must show that it was not 'reasonably practicable' to sustain the dual English/Afrikaans tuition. The enquiry into whether section 29(2) has been complied to therefore is objective. The Court further referred to its own judgment in the matter of *University of the Free State v AfriForum* that *this* requirement contains both factual and legal elements - the latter, the legal standard of reasonableness, to be tested against constitutional norms which include equity, redress, desegregation and non-racialism, and the former entails practicability, which is concerned with resource constraints and the feasibility of adopting a particular language policy.

The SCA also noted with concern remarks by UNISA's SLC chairperson, Prof Moche, when she stated that the considerations prescribed by section 29(2) 'would arguably be relevant to the State when it is required to fulfil its responsibility … to ensure the effective access to and implementation of the right concerned, but are not relevant to UNISA when it determines its language policy'. This was so, she went on, because 'as opposed to the State, UNISA is not liable to ensure the effective access to, and implementation of the right concerned'. The SCA took a very stern view of this and rebuked her for it by finding that such views do not conform with the meaning which the Constitutional Court ascribed to section 29(2) and the ambit of its application. In *AfriForum and another v University of the Free State*, the Constitutional Court stated unequivocally that 'section 29 of the Constitution applies in its totality to the education sector' and that 'no sound legal basis exists for the isolation of parts of section 29(2) in seeking to understand the totality of the requirement of 'reasonable practicability' as its different parts are mutually reinforcing.

The SCA concluded that UNISA failed to establish on the evidence that the practicability test or the considerations of reasonableness - equity, inclusivity and access of other students - would be offended by the retention of Afrikaans as one of UNISA's LOLTs. To have found otherwise would have meant that the mere exercise of one's right to be taught in their mother tongue would be rendered unconstitutional where it has not been shown that non-Afrikaans students would be deprived of learning and other educational opportunities by the retention of Afrikaans as a LOLT, or that maintaining it as a LOLT was unaffordable, or would result in unlawful racial discrimination in an

institution of learning with a proclaimed, ambitious vision to promote multilingualism by developing all the official languages - including the San languages.

The Court considered UNISA's case stripped to its core: That it was not reasonably practicable to continue Afrikaans tuition for a minority of its students because the other indigenous official languages were not as developed as academic and science languages as Afrikaans was, and that it would be redeveloped later, alongside the other indigenous languages to bring them all on par.

The Court questioned how UNISA's noble and self-admittedly progressive goal to develop all South Africa's indigenous languages to become LOLT's, to benefit its students and sustain this precious and threatened national resource, will be advanced, and what useful purpose will be served by knocking down a fully developed and functional language of learning and tuition to 'develop the other official languages to its standard', when there is apparently no sound reason to do so other than dwindling interest in the language, and avoiding offering mother tongue tuition to a portion of students? The Court found that UNISA had failed to discharge the burden that it was not detracting from the rights contained in section 29(2) of the Constitution without appropriate justification.

The judgment is to be welcomed as it makes it clear that taking away a constitutional language right that was already being enjoyed, in such circumstances, could not satisfy the rationality test and could not be justified. Aside from other crucial points insofar as language rights are concerned in terms of section 29(2) the judgment also strongly reinforces the concept that section 29 of the Constitution applies in its totality to the education sector and that there is no sound legal basis for the isolation (and by implication, application) of parts of section 29(2).