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THE FUTURE OF MOTHER TONGUE EDUCATION*

By Ms Christine Botha: Legal Officer, Centre for Constitutional Rights

Is it realistic in South Africa's multicultural society to expect to receive mother tongue education at a public educational institution? If one only focuses on section 29(2) of the Constitution, the answer should be legally determinable in any factual context. Section 29(2) of the Constitution (section 29(2) right) was crafted to ensure a balancing of rights, by guaranteeing everyone the right to education in the language of their choice at a public education institution, provided the same is "reasonably practicable". The State is furthermore obliged to consider "all reasonable educational alternatives" to give effect to this right, taking into account the listed factors of "equity, practicability and the need to redress the results of past discriminatory laws and practices".

Therefore a constitutionally-framed balancing test exists in terms of which any language request can be tested against. However, how does one test section 29(2) in the context where an ideological factor such as a "commitment to transformation" - which is difficult to test - plays a dominant role? A case in point is the recent Supreme Court of Appeal (SCA) judgment of the *University of the Free State v Afriforum and Another* (SCA judgment). The SCA judgment questions the future of section 29(2) and whether mother tongue instruction at public educational institutions, as many experts believe, will boil down to political arm wrestling.

The SCA judgment upheld the University of the Free State's (UFS) decision to replace the dual Afrikaans-English language policy with English as the primary language of instruction (UFS decision). This was after the Free State High Court (High Court) set the UFS decision aside as an unlawful administrative action in terms of the *Promotion of Administrative Justice Act* of 2000 (PAJA). The High Court found that the UFS decision to abandon Afrikaans failed to take all relevant considerations into account, such as Afrikaans students' section 29(2) right and the Minister's Higher Education Language Policy (Higher Education Policy).

The Centre for Constitutional Rights (CFCR) will critically analyse the SCA judgment in a series of articles, considering the diverse findings of the SCA on key issues and the fact that leave to appeal to the Constitutional Court has been sought. This article will briefly set out the legal context against which the UFS's language battle played out and the main contentious points requiring legal certainty from the Constitutional Court.

The Constitution recognises all 11 official South African languages and section 6 specifically stipulates the State's obligation to elevate the status of indigenous languages which were historically diminished. The Minister of Higher Education also adopted the Higher Education Policy in terms of the *Higher Education Act* of 1997 (the Act), which stipulates the need for development of South African languages as mediums of instruction "alongside English and Afrikaans". Furthermore, it emphasises the retention of Afrikaans as a "medium of academic expression". All higher education institutions were to develop their own language policy, subject to the Higher Education Policy.

In 2003 the UFS, in line with the Higher Education Policy, adopted a dual-medium language policy, which also promotes the development of Sesotho. However, the implementation of the dual-medium language policy was found by the UFS to allegedly lead to racial friction as changes in student demographics in effect led to smaller Afrikaans classes. This created the perception that Afrikaans students were receiving better education. The single-medium policy was accordingly adopted in 2016 to ensure "transformation" and "the constitutional injunction of integration". However, bizarrely, certain faculties such as Theology and Education appear not to be in need of "transformation" and will continue with the dual-medium policy, "given the niche market demand" for Afrikaans graduates.

The High Court approached the UFS decision as 'administrative action', reviewable in terms of the rigorous framework of PAJA. Therefore the High Court could interrogate the weight given to the considerations taken into account by the UFS in abandoning Afrikaans as an option. This was the first crucial difference between the High Court and the SCA. The SCA found the UFS decision to be executive in nature, involving policy-formulation, associated with a wide discretionary power. The SCA therefore could only interfere if the UFS did not exercise its power rationally and as the UFS decision was the result of a procedurally fair process - there was no basis to intervene.

Secondly, the High Court, armed with more investigative powers under PAJA, compared the two language policies in light of Afrikaans students' section 29(2) right. The High Court first considered whether it is "reasonably practicable" to give effect to this right. The "reasonableness" aspect related to a question of the practicality of implementing a language policy considering resources and, for instance, availability of facilities in the specific factual scenario. As there were no resource constraints it was "reasonably practicable" according to the High Court to continue with Afrikaans. Then the High Court investigated all "reasonable educational alternatives", considering the listed criteria of equity, practicability and historical redress. On this analysis, the High Court found that the dual-medium language policy - which is not only "reasonably practicable" - also in effect gives better effect to these listed criteria. The SCA on the other hand did not approach section 29(2) as two distinctive parts and took a normative approach of what is "reasonable" in terms of the "reasonably practicable" qualifier. It held that it might be practical to implement the dual language policy but that it might not be "reasonable" as it as it offends constitutional norms such as "equity" and "desegregation". However, it is arguable that the SCA's approach to section 29(2) is misconstrued.

Lastly, the High Court found that the UFS was obliged to adhere to the Higher Education Language Policy on the basis of various sections of the Act, whereas the SCA held that the autonomy of Universities and non-prescriptive language of the Higher Education Policy indicated no legal obligation. This specific finding of the SCA not only questions the status of the Minister's Higher Education Policy but also the future enforceability of the Minister's policies.

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These diverse interpretations of the SCA require legal certainty by the Constitutional Court. Many South Africans might feel apathetic about the language battle and might perceive it as a battle for the retention of Afrikaans, however, due to the underdevelopment of indigenous languages, Afrikaans is the only other language which can compete with English at this stage. This overshadows the real threat to the future of a guaranteed constitutional right to receive education in one's mother tongue, which will greatly depend on the Constitutional Court's approach.

***The first article in a four-part series on the right to receive education in the official language or languages of choice in public educational institutions.**