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EQUITABLE V EQUAL; WHAT THIS MEANS FOR LANGUAGE RIGHTS: *LOURENS V SPEAKER OF THE NATIONAL ASSEMBLY*

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On 10 March 2016, the Supreme Court of Appeal (SCA) dismissed an appeal from the Equality Court by an Afrikaans-speaking lawyer who claimed that the failure on the part of Parliament and the Minister of Arts and Culture to publish legislation in all 11 official languages was tantamount to unfair discrimination. As an Afrikaans speaker, he felt disadvantaged because statutes are no longer published in that language. In light of the current public debate on the place and role of languages in tertiary institutes and in the civic society, the ruling lends greater understanding to the debate.

This challenge was first raised by the appellant in the Equality Court on his own behalf, as well as on behalf of all non-English speakers. Mr Lourens based his application on the *Promotion of Equality and Prevention of Unfair Discrimination Act* (PEPUDA). He requested that Parliament be given a reasonable period during which statues be translated and published in all 11 official languages. The challenge failed in that court and leave to appeal was only granted because the matter raised important constitutional questions of national significance and deserving of the SCA's consideration. The SCA agreed with the Equality Court in its finding that whilst the failure to publish all government legislation was indeed discrimination, it was, however, not unfair.

The Constitution, in section 6, recognises 11 official languages. This is due to the history of exclusion and undermining of indigenous languages which deferred to English and Afrikaans. Section 6(4) requires all languages to be treated *equitably*. It must be noted that equitable is not synonymous with equal. The court highlighted this difference and noted that

> *"Equity may therefore require that the languages that s6(2) [of the Constitution] terms 'historically diminished' in use and status receive particular attention from and support from the state. It might mean that historically undiminished languages (i.e. English and Afrikaans) are treated with relative inattention."*

In its remarks the Court noted that the Constitution in section 6(3)(a) provides for the use of "*at least two official languages*" by both national and provincial government. Furthermore, the *Joint Rules of Parliament* instruct that all Bills introduced in Parliament be in one official language and at the latest, three days prior to formal consideration in the National Assembly, translation in one other official language be provided to Parliament. The reason behind the predominant usage of English in Parliament is that it is the only official language understood by all Members of Parliament. In addition, the *Use of Official Languages Act* requires all government departments to identify a language policy through which three official languages are used in all communication based on factors such as locale and usage.

Notwithstanding the above, it must be noted that both Parliament and government departments have failed to meet their prescribed obligations. Parliament has not, since

1996, published all legislation in more than one official language. This is in clear contravention of the Constitution and the *Joint Rules.* The SCA found that Parliament must do more to advance the use of the official languages and meet the standards set in both the Constitution and the Rules.

In any event, it is also necessary to address the failure by most government departments to meet the deadline set in the *Use of Official Languages Act.* The deadline for the adoption of national language policies was 2 November 2014. However, as at the present moment, very few government departments, including the Department of Home Affairs, the Department of Public Works and the Department of Rural Development and Land Reform, have complied with the letter and spirit of the *Use of Official Languages Act*. This is troubling as language rights have been contentious following allegations of exclusion at university campuses. Government departments must lead by example in the transformation of our society.

Based on the above, it must be understood that conduct cannot be deemed unconstitutional if it is reasonable and does not clash with any clear provision of the Constitution. No court can order a Parliament (or any organ of state) to perform duties that would be impractical or unaffordable if they have no clear obligation to do so in terms of the Constitution or in law. The standard is reasonableness, justness and fairness of any government within the framework set by the Constitution and the law.

This matter is a strong reminder of the complexity created by the diversity and multiculturalism of modern day South Africa. This ruling provides clarity on the manner in which Parliament should deal with our official languages: however, it does not pronounce on how official languages should be dealt with elsewhere in the activities of the state at national, provincial and municipal levels, or in our education system.

However, section 6 goes much further than the usage of official languages in Parliament: it clearly requires government at all levels to provide services to, and communicate with, citizens in languages that they understand. Failure to do so might well affect the equality rights of citizens and the prohibition against unfair discrimination based on language. Neither should the SCA judgment be seen to contradict everyone's right, in terms of section 29(2) "*to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable*."