Centre for
CONSTITUTIONAL
RIGHTS

***AFRIFORUM AND ANOTHER V UNIVERSITY OF THE FREE STATE* - THE RIGHT TO BE TAUGHT IN AFRIKAANS INESCAPABLY LEADS TO RACIAL DISCRIMINATION**

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The Constitutional Court (the Court) delivered a crucial judgment in December 2017 on the constitutional right to receive education in the language of one's choice when it dismissed Afriforum's leave to appeal in the case between the *University of the Free State v Afriforum and Another* (SCA judgment).

The SCA judgment upheld the University of the Free State's decision to replace the dual Afrikaans-English language policy with English as the primary medium of instruction (UFS decision). Importantly, the UFS's decision was mainly taken due to racial friction caused by a perception that the Afrikaans students (majority of whom were white) were perceived to receive better education, as the Afrikaans classes were smaller.

This raises the question whether the Court's approach delivered an "objective and justifiable denial to the right"?

It is fair, before analysing the Court's findings, to criticise the fact that this matter, which raised a new and important constitutional issue, was only decided on written heads of arguments and on questions sent to the parties in the form of directives. No oral arguments were presented to the Court.

There were essentially three critical issues the Court had to determine. First, whether the UFS decision amounted to "administrative action" reviewable under the *Promotion of Administrative Justice Act* (PAJA). The SCA reviewed the UFS decision on the less rigorous doctrine of legality, as they held that it involved policy-formulation, which is executive in nature and excluded from PAJA.

Second, whether the UFS upheld section 29(2) of the Constitution that guarantees everyone the right to education in the language of their choice at a public education institution, provided same is "reasonably practicable". The State must consider all "reasonable educational alternatives" considering "equality, practicability and the need to redress the results of past discriminatory laws and practices". The SCA, held that the dual language policy might be practical regarding resources but it was not "reasonable" as it caused "segregation". Last, whether the UFS's language policy is "subject" to the Minister's Language Policy for Higher Education (the Minister's Policy) in terms of the *Higher Education* Act. The Minister's Policy recognises the equal status of Afrikaans and English as the primary languages of instruction at higher education institutions and promotes the academic development of all South African languages.

It is mainly the second issue that is at the core of this matter. Both parties essentially agreed in their answers to the directives that the executive or administrative nature of the UFS decision

should play no role in the interpretation section 29(2). However, for the majority of the Court's judges, it was important in considering granting leave to appeal. It was considered "fatal" for the "reasonable prospect of success of the appeal" as the review was mainly based on PAJA grounds. The majority held that the UFS decision amounted to policy-formulation, as the UFS Council does not ordinarily perform administrative duties. The legislative constraints to the Council's power in general were however not investigated by the majority. This could arguably have indicated a narrower sense of policy-formulation, which would be administrative in nature. Would this determination have made any difference to the outcome? The interpretation of a constitutional right should be an objective test and no deference should be tolerated. However, the majority, with respect, failed to factually test the UFS's decision, which leans towards judicial deference, a laxer form of review.

The UFS's language policy was also held by the majority to be "subject" to the Minister's Policy but since the Ministerial Policy was adopted circumstances have changed (general reference was made by the majority to racial incidents committed by white Afrikaans-speaking students). These changed circumstances accordingly made the dual policy inconsistent with constitutional norms. Therefore, the Ministerial Policy, according to the majority, required a new constitutionally-aligned policy. However, respectfully, no rational distinction was made between the option to study in a language and the conduct of some people speaking the same language - which was also pointed out by the minority of judges. The majority respectfully failed to objectively show how the option to study in Afrikaans is to blame for the racial conduct of some students and specifically how it rationally relates to the 'Reitz Four' hostel incident, as referred to in the footnote.

The majority's approach to the "reasonably practicable" qualifier in section 29(2), is difficult to criticise as a contextual purposive approach was taken. The meaning was considered against the overall right to education, which requires "reasonable measures" to be taken to make higher education "progressively available and accessible". The two parts of section 29(2) were not isolated and the majority held with reference to "reasonable educational alternatives" that "Whatever model is chosen must be informed by among others the constitutional obligation to make education accessible to all…". The majority agreed with the SCA that despite the dual medium policy being practical it was not "reasonable" as it "posed a threat to racial harmony".

At this point, the objectivity of the majority however becomes questionable. On considering what is "reasonable", reference was made to "scarce resources", "inequitable access" and "entrenching racial supremacy". Yet, this matter did not concern access to education, as non-white English students were not barred from studying at UFS nor did it concern the use of UFS resources. The UFS's standpoint has never been, according to the court papers, that it could not financially continue with the dual policy. Critically, the majority, with due respect, fails to investigate factually the perceived unequal quality of education and what has been done by the UFS to address this before taking such drastic measures. This view is simply endorsed

under “racial supremacy”. No factual evidence was referred to and at most there is only the UFS’s Language Committee’s report which held “...it does not, from the student point of view, guarantee equality of access to knowledge”.

AfriForum was also criticised for failing to suggest other “reasonable educational alternatives” but in all fairness this constitutional obligation neither rests on them nor did the Court’s directives request them to do so. This issue and the alleged racial discrimination should have been investigated, as pointed out in the minority judgment, on oral argument with factual evidence being presented.

It did not matter what approach the Court took to determine if it is “reasonably practicable” to provide Afrikaans classes. What matters is the failure to justify this denial objectively. This judgment provides little certainty for the future enforceability of this right for Afrikaans-speaking learners (or other minority languages) as the criteria, respectfully, are not objectively determinable.