CONSTITUTIONAL COURT OF SOUTH AFRICA

Chairperson of the Council of the University of South Africa and Others v AfriForum NPC

Case CCT 135/20

Date of Judgment: 22 September 2021

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On Wednesday, 22 September 2021 at 15h00, the Constitutional Court handed down judgment in an application for leave to appeal against the judgment and order of the Supreme Court of Appeal, which reviewed and set aside the University of South Africa's (UNISA) decision to adopt a revised language policy. The first applicant is the Chairperson of UNISA, the second applicant is the Chairperson of the Senate of UNISA and the third applicant is UNISA (collectively referred to as UNISA). The respondent is AfriForum NPC (AfriForum).

Acting in terms of section 27(2) of the Higher Education Act 101 of 1997, UNISA's Senate and Council took the decision to adopt a revised language policy on 30 March 2016 and 28 April 2016 respectively. The objective of this policy was to institute measures to enhance the status of indigenous African languages, while also phasing out Afrikaans and therefore removing the guarantee that courses be offered in both Afrikaans and English.

AfriForum launched an application to review and set aside the language policy on the basis of procedural irregularities and inconsistency with section 29(2) and to interdict the implementation of the policy pending this review at the High Court of South Africa, Gauteng Division, Pretoria (High Court). The High Court concluded that there was a prima facie violation of the section 29(2) right to receive an education in the language of one's choice, but very few students made use of the Afrikaans modules. It further held that the constitutional right to receive an education in the language of one's choice is qualified by the term "where that education is reasonably practicable". On rationality, the High Court held that the language policy was rationally connected to UNISA's powers in terms of section 27(2) of the High Language Act and the National Language Policy. The High Court noted that while the National Language Policy in general supports the retention of Afrikaans as a language of academia and science, this does not prohibit the adoption of policies

that remove Afrikaans. Finally, on legality, the High Court dismissed AfriForum's submissions that certain procedures provided for in the rules of the Senate had not been complied with and that these procedural irregularities rendered the decision invalid.

AfriForum approached the Supreme Court of Appeal (SCA). The SCA noted that when a learner already enjoys the benefit of being taught in an official language of their choice, the state has a negative duty not to diminish this right without appropriate justification. In order to justify the removal of the dual English/Afrikaans model of teaching and learning, UNISA had to show that it was not reasonably practicable to sustain it. They had not done so convincingly. Ultimately, the SCA concluded that UNISA had failed to establish that the adoption of its new policy in 2016 was conducted in a constitutionally compliant manner and did not detract from the section 29(2) right without justification. Accordingly, the SCA declared the adopted language policy unconstitutional and unlawful and set aside and ordered UNISA to reinstate modules that have been discontinued pursuant to the adoption of the language policy.

The Constitutional Court first dealt with the iniquitous portrayal of the Afrikaans and its true roots. The Court emphasised that it is a misconception that Afrikaans is only "the language of whites" and "the language of the oppressor". Today, Afrikaans is spoken predominantly by black people.

Then, the Constitutional Court clarified that this matter concerned a fundamental right in section 29(2) of the Constitution. Section 29(2) confers a right to receive education in the official language of one's choice at a public institution, subject only to the qualification that such education "is reasonably practicable". In this context, UNISA was constrained to justify the decision it took by demonstrating that it applied its mind to the considerations listed in section 29(2) and that it complied with the prescripts of that section. The Court held that UNISA singularly failed to adduce any evidence that it had regard to the considerations listed in section 29(2) at the time when the impugned decision was made. In respect of the justification of its decision and compliance with section 29(2), there was no evidence put up by UNISA that bears scrutiny. It was plain that neither the Senate, nor the Council, had regard to information relevant to any assessment of reasonable practicability. The evidence simply did not bear up UNISA's contentions on equity, on costs, on the dwindling demand for Afrikaans, or on demographics. The Court held that it was open to UNISA to put up this evidence in to justify the phasing out of Afrikaans in the future, but they could not justify the limitation of the section 29(2) right without clear and convincing evidence.

Consequently, the Court held that UNISA's decision in 2016 to adopt the new language policy, and discontinue Afrikaans as a language of learning and teaching, contravened section 29(2) of the Constitution, rendering that decision invalid. However, the Court also held that in this instance, UNISA as an organ of state must be afforded the deference to do the necessary feasibility investigations, take the decision it regards as most reasonably practicable and to implement the required changes. The order of invalidity was therefore suspended until the start of the 2023 academic year.