



**IN THE EQUALITY COURT
(HIGH COURT, CAPE TOWN)**

Case No EC08/12

In the matter between:

CORNELIUS JOHANNES ALEXANDER LOURENS

Applicant

And

SPEAKER OF THE NATIONAL ASSEMBLY

First Respondent

**CHAIR OF THE NATIONAL COUNCIL
OF PROVINCES**

Second Respondent

MINISTER OF ARTS AND CULTURE

Third Respondent

PAN SOUTH AFRICAN LANGUAGE BOARD

Fourth Respondent

Court: GRIESEL J

Heard: 18, 19 August 2014

Delivered: 17 September 2014

JUDGMENT

GRIESEL J:

Introduction

[1] In *Ex parte Gauteng Provincial Legislature: In re School Education Bill of 1995 (Gauteng)*,¹ Kriegler J observed:

‘Taal – en by name die behoud van Afrikaans – ontlok diepgewortelde emosie.’

[2] The present application is an illustration of this phenomenon. However, this matter cannot be decided on the basis of emotion, no matter how deep-rooted. The answer must, instead, be sought in the provisions of the Constitution of the Republic of South Africa, 1996 (‘the Constitution’), and the Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000 (‘the Equality Act’ or simply ‘the Act’).

[3] The applicant in this matter, an Afrikaans-speaking attorney from Brits in the North West Province, has launched proceedings in the Equality Court against the Speaker of the National Assembly (first respondent), the Chair of the National Council of Provinces (second respondent), the Minister of Arts and Culture (third respondent) and the Pan South African Language Board (fourth respondent). For convenience I shall refer to the first respondent as ‘the Speaker’, to the first and second respondents collectively as ‘Parliament’ and to the third respondent as ‘the Minister’.

[4] The applicant’s complaint is that national legislation promulgated by Parliament is not published in all eleven official languages, thereby undermining the official status of the official languages (other than English) and effectively elevating English to the status of ‘super official language’.

¹ 1996 (3) SA 165; 1996 (4) BCLR 537 (CC) para 39. See also *Lourens v President van die Republiek van Suid-Afrika & andere* 2013 (1) SA 499 (GNP) para 2 (‘*Lourens I*’).

[5] The relief originally claimed was formulated as follows:

- ‘1.1 Dat bevind word dat die Eerste en Tweede Respondent, alternatiewelik Derde Respondent, alternatiewelik Respondente gesamentlik en afsonderlik, onbillike taaldiskriminasie pleeg.
- 1.2 Dat die huidige praktyk van die Parlement van die Republiek van Suid-Afrika, soos vervat in Gesamentlike Reëls 220, 221 en 222, onbillike taaldiskriminasie daarstel, alternatiewelik toelaat dat onbillike taaldiskriminasie gepleeg word en in die hand werk.
- 1.3 Die nie-publisering van alle wetgewing, die amptelike status van die amptelike tale, soos vervat in sub-artikel 6(1) van die Grondwet ondermyn en onbillike taal diskriminasie daarstel, alternatiewelik daartoe aanleiding gee.
- 2. Alternatiewelik: die nie-publisering van wetgewing in sodanige aantal amptelike tale of in sodanige maksimum amptelike tale as waarin die wetgewing wat redelikerwys gepubliseer moes word, behoudens rasionele objektiewe gronde vir die keuse van publisering daarvan, onbillike taaldiskriminasie daarstel.
- 3. ’n Lasgewing dat Eerste en Tweede Respondent binne ’n redelike tyd, soos deur die Agbare Hof bepaal te word, van hoogstens 6 (ses) maande die Parlement se reglement ooreenkomstig die gees en letter van die Grondwet te bring deur wetgewing binne ’n bepaalde redelike tyd in al 11 (elf) amptelike tale te laat publiseer en dit te sertifiseer as korrek om in howe gebruik te kan word.
- 4. Alternatiewelik: om die Eerste, Tweede en Derde Respondent te verplig om wetgewing binne ’n redelik tyd, maar nie later as 12 (twaalf) maande na die bevel van hierdie Agbare Hof nie, wetgewing [sic] te finaliseer om die publisering van alle wetgewing van al die 11 (elf) amptelike tale of sodanige

maksimum amptelike tale as waarin die wetgewing redelikerwys gepubliseer moes word, behoudens rasonale objektiewe gronde vir die keuse van publiserings daarvan, kragtens Artikel 9(2) van die Grondwet te publiseer wat nie onbillik taaldiskrimineerend van aard mag wees nie en wat die objektiewe rasonale gronde, waaronder dié soos vermeld in sub-artikel 6(3)(a) van die Grondwet moes uitspel.

5. Koste van die saak aan die Applikant; en verdere en/of alternatiewe regshulp om enige bevel, wat die Agbare Hof ingevolge Artikel 21 van Wet 4 van 2000 in die omstandighede mag goed vind, te gelas.’

[6] During argument before me, the relief was narrowed down considerably on behalf of the applicant, without abandoning any of the relief originally claimed. In essence, what the applicant is seeking is an order finding ‘dat die Eerste, Tweede en Derde respondente onbillike taaldiskriminasie pleeg deur te versuim om alle Nasionale wetgewing in al die amptelike tale van die Republiek van Suid-Afrika amptelik te publiseer’.

[7] In considering the applicant’s contentions, I shall first briefly discuss the historical background pertaining to the constitutional protection of language rights under previous regimes. Thereafter, the relevant provisions of the Constitution will be referred to, followed by the Parliamentary process in promulgating national legislation, before considering the allegations of unfair discrimination against the background of the Equality Act and the respondents’ answers thereto.

Historical background

[8] The applicant's claims herein must be viewed in their historical context, although it is not necessary for purposes of this judgment to give a comprehensive overview of the position.² Suffice it to point out that, as a result of the compromise agreement reached at the National Convention of 1909, s 137 of the South Africa Act, 1909, was adopted, which provided that –

‘both the English and Dutch languages shall be official languages of the Union, and shall be treated on a footing of equality, and possess and enjoy equal freedom, rights and privileges; all records, journals, and proceedings of Parliament shall be kept in both languages, and all Bills, Acts and notices of general public importance or interest issued by the Government of the Union shall be in both languages’.

[9] The same dispensation was maintained when South Africa became a Republic in 1961³ and in 1983, when the new ‘Tri-cameral’ Constitution was introduced.⁴

[10] The language provisions of the Interim Constitution of 1993 were a bold attempt to end the linguistic discrimination practised by previous governments by giving official recognition to nine indigenous languages, in addition to the two pre-existing official languages. Those provisions eventually formed the basis for s 6 of the final Constitution.

² See in this regard, *inter alia*, Hahlo & Kahn *The Union of South Africa – the Development of its Laws and Constitution* (1960) at p 125; Cheadle Davis & Haysom *South African Constitutional Law – The Bill of Rights* (Issue 1) para 25.2.2; Woolman & others (eds) *Constitutional Law of South Africa* [2nd ed, Original Service: 12-05] para 65.1; Julien Hofman ‘Official Languages for a new South Africa: Art 5 of the ANC’s Draft Bill of Rights’ 1991 *Stell LR* 328; *In re School Education Bill of 1995 (Gauteng)*, *supra*, n 1 paras 46-49, especially fn 11 (per Sachs J).

³ Republic of South Africa Constitution Act, 32 of 1961, s 119.

⁴ Republic of South Africa Constitution Act, 110 of 1983, s 99(2).

Section 6 of the Constitution

[11] Section 6 is the cornerstone of the Constitution's approach to language rights.⁵ Section 6(1) provides that the official languages of the Republic are Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu.⁶ Thus, it entrenches all eleven languages as 'official languages' without according pre-eminence to any of them and without defining what is meant by 'official' language or describing what consequences (if any) flow from such designation.⁷

[12] Sub-sections 6(2), (3)(a) and (4) provide:

- '(2) Recognising the historically diminished use and status of the indigenous languages of our people, the state must take practical and positive measures to elevate the status and advance the use of these languages.
- (3)(a) The national government and provincial governments may use any particular official languages for the purposes of government, taking into account usage, practicality, expense, regional circumstances and the balance of the needs and preferences of the population as a whole or in the province concerned; but the national government and each provincial government must use at least two official languages.
- (4) The national government and provincial governments, by legislative and other measures, must regulate and monitor their use of official languages. Without detracting from the provisions of subsection (2), all official languages must enjoy parity of esteem and must be treated equitably.'

⁵ Cheadle Davis & Haysom *op cit* para 25.2.4.

⁶ According to the 2011 census, isiZulu is the mother tongue of 22.7% of South Africa's population, followed by isiXhosa at 16%, Afrikaans at 13.5%, English at 9.6%, Sepedi at 9.1%, Setswana at 8% and Sesotho at 7.6%. The remaining official languages are spoken at home by less than 5% of the population each. See <http://www.southafrica.info/about/people/language.htm> (accessed 14 September 2014).

⁷ Cheadle Davis & Haysom *op cit*, para 25.2.4.

Parliamentary process

[13] The Parliamentary process for the adoption of legislation is regulated by the provisions of ss 75 and 76 of the Constitution. In a nutshell, they provide that when the National Assembly passes a Bill, it must be referred to the National Council of Provinces. The Council, in turn, must pass the Bill; or pass the Bill subject to amendments proposed by it; or reject the Bill. If the Council passes the Bill without proposing amendments, the Bill must be submitted to the President for assent. A Bill assented to and signed by the President becomes an Act of Parliament, must be published promptly, and takes effect when published or on a date determined in terms of the Act.⁸

[14] The process preceding the adoption of a Bill is regulated by the Joint Rules of Parliament, more particularly rules 220, 221 and 222:

‘220. Language requirement for Bills

- (1) A Bill introduced in either the Assembly or the Council must be in one of the official languages. The Bill in the language in which it is introduced will be the official text for purposes of parliamentary proceedings.
- (2) The official text of the bill must be translated into at least one of the other official languages and the translation must be received by Parliament at least three days before the formal consideration of the bill by the House in which it was introduced.
- (3) The cover page of a Bill must specify which language version is —
 - (a) the official text; and
 - (b) an official translation.

⁸ Section 81.

- (4) In parliamentary proceedings only the official text of a bill is considered, but the Secretary must ensure that all amendments to the official text are reflected in the official translation or translations before the official text is sent to the President for assent.

221. Referral of Bills to President for assent

When the official text of the Bill is sent to the President for assent it must be accompanied by the official translation or translations.

222. Subsequent amendments

- (1) If an Act passed after the adoption of joint rule 220 is amended, the official text of the amendment Bill amending that Act may be in any of the official languages.
- (2) If the official text of the Bill is not in the same language as the signed text of the Act that is being amended, then one of the official translations of the Bill must be in the language of the signed text.’

Equality Act

[15] The fact that the present application has been brought in terms of the Equality Act has certain consequences. As pointed out by the Constitutional Court in *MEC for Education, KZN v Pillay*:⁹

‘[C]laims brought under the Equality Act must be considered within the four corners of that Act. This court has held in the context of both administrative and labour law that a litigant cannot circumvent legislation enacted to give effect to a constitutional right by attempting to rely directly on the constitutional right. To do so would be to “fail to recognise the important task conferred upon the legislature by the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights”. The same principle applies to the Equality Act. Absent a direct challenge to the Act,

⁹ 2008 (1) SA 474 (CC) para 40 (footnotes omitted).

courts must assume that the Equality Act is consistent with the Constitution and claims must be decided within its margins.’

[16] Consistent with this approach, it is accordingly to the provisions of the Equality Act, and not to s 9 of the Constitution, that one must turn in order to evaluate the applicant’s claim. As mentioned earlier, the applicant has sought to bring himself within the four corners of the Equality Act by claiming that he is being unfairly discriminated against on the basis of language.

[17] In this regard, the Equality Act defines ‘discrimination’ as –

‘any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly -

- (a) imposes burdens, obligations or disadvantage on; or
 - (b) withholds benefits, opportunities or advantages from,
- any person on one or more of the *prohibited grounds*.’¹⁰ [emphasis added]

[18] ‘Prohibited grounds’, in turn, are defined so as to include, *inter alia*, ‘language.’¹¹

[19] Section 6 of the Act contains the wide, over-arching prohibition against discrimination: ‘Neither the State nor any person may unfairly discriminate against any person.’

[20] Section 13, dealing with ‘Burden of Proof’ provides:

- ‘(1) If the complainant makes out a *prima facie* case of discrimination -
 - (a) the respondent must prove, on the facts before the court, that the discrimination did not take place as alleged; or

¹⁰ Sec 1(viii).

¹¹ Sec 1(xxii).

- (b) the respondent must prove that the conduct is not based on one or more of the prohibited grounds.
- (2) If the discrimination did take place –
 - (a) on a ground in paragraph (a) of the definition of ‘prohibited grounds’, then it is unfair, unless the respondent proves that the discrimination is fair.’

[21] Section 14(2) provides:

- ‘(2) In determining whether the respondent has proved that the discrimination is fair, the following must be taken into account:
 - (a) the context;
 - (b) the factors referred to in subsection (3);
 - (c) whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned.
- (3) The factors referred to in subsection 2(b) include the following:
 - (a) whether the discrimination impairs or is likely to impair human dignity;
 - (b) the impact or likely impact of the discrimination on the complainant;
 - (c) the position of the complainant in society and whether he or she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns of disadvantage;
 - (d) the nature and extent of the discrimination;
 - (e) whether the discrimination is systemic in nature;
 - (f) whether the discrimination has a legitimate purpose;
 - (g) whether and to what extent the discrimination achieves its purpose;
 - (h) whether there are less restrictive and less disadvantageous means to achieve the purpose;

- (i) whether and to what extent the Respondent has taken such steps as being reasonable in the circumstances to -
 - (i) address the disadvantage which arises from or is related to one or more of the prohibited grounds; or
 - (ii) accommodate diversity.’

Parliament’s defence

[22] Parliament’s position, as articulated by the Speaker in his answering affidavit, is that while it supports, as a matter of principle, the objective of ensuring that all legislation, including pre-existing legislation, is translated into each of the official languages, there is no constitutional or legislative obligation on it to translate legislation into all official languages. That obligation, if there is one, arises subsequent to the conclusion of the parliamentary process of enacting legislation. Legislation only becomes such when the President assents to and signs a Bill that has been submitted to him *after* approval by Parliament. By that point, Parliament’s legislative functions in terms of the Constitution have come to an end.

[23] A similar argument to the one raised by the applicant herein was dealt with and rejected by the North Gauteng High Court in *Lourens 1*,¹² in which the present applicant, *inter alia*, sought an order directing Parliament to cause all legislation to be published in all official languages. In rejecting the applicant’s contentions in that regard, Du Plessis J held as follows:

‘In bede 3 vra die applikant ’n bevel wat die parlement gelas om “alle wetgewing in alle amptelike tale te laat publiseer”. Die bevel word terugwerkend tot 1996 gevra.

...

¹² *Supra*, n 1, at paras 16–20.

Die getuienis voor die hof toon dat die parlementêre reëls vereis dat wetsontwerpe in twee amptelike tale voorberei word. Een van die wetsontwerpe moet in Engels wees. [*Comment: This requirement does not appear in the Joint Rules.*] As die parlement die wetsontwerp goedkeur, word dit vir bekragtiging en ondertekening aan die President voorgelê. Die wetgewende proses word dan afgesluit ingevolge artikel 81 van die Grondwet wat bepaal:

‘’n Wetsontwerp wat deur die President bekragtig en onderteken is, word ’n Wet van die Parlement, moet onverwyld gepubliseer word, en tree in werking by die publikasie daarvan of op ’n datum ingevolge die Wet bepaal.’

Uit sowel art 81 as 82 is dit duidelik dat slegs een wetsontwerp, en nie meerdere vertalings daarvan nie, aan die President voorgelê word. Artikel 82 bepaal:

‘Die ondertekende eksemplaar van ’n Parlements wet is afdoende bewys van die bepalings van daardie Wet en moet na die publikasie daarvan vir veilige bewaring aan die Konstitusionele Hof toevertrou word.’

Die applikant voer nie aan dat wetsontwerpe in al 11 tale vertaal moet word nie. Wat hy in bed 3 vra is dat die parlement gelas moet word om die getekende eksemplaar van elke wet in alle amptelike tale te vertaal. Ek aanvaar in die guns van die applikant dat landswette in al die amptelike tale vertaal moet word. Die vraag is egter of die applikant korrek is dat die parlement die plig het om dit te doen.

Ek het daarop gewys dat die wetgewende proses afgesluit word met een eksemplaar van die wet. Dit is daardie eksemplaar wat, as die applikant korrek is, vertaal moet word in die ander 10 amptelike tale. Mnr Pelser [*counsel for the applicant*] kon my nie op ’n grondwetlike bepaling of ’n ander regsreël wys wat die vertaalverpligting op die Parlement lê nie. Trouens, in die lig daarvan dat die wetgewende proses afgesluit word wanneer die President die wetsontwerp wat voorgelê word bekragtig en onderteken, dui daarop dat die parlement se werk dan afgehandel is en dat die verpligting om die getekende wet te vertaal eerder op die uitvoerende gesag rus.’

[24] The applicant suggests that this statement of law is *obiter*. I disagree. The applicant sought relief against Parliament in that case, as it does here, to the effect that Parliament was obliged to translate all legislation into all of the official languages. That relief was rejected. The question as to Parliament's translation duty is therefore *res judicata*. The fact that the present matter is brought in the Equality Court, as suggested by the applicant, does not detract from the fact that the same legal principles have to be applied in order to decide whether or not Parliament has a duty to translate national legislation. I in any event respectfully agree with the approach and reasoning adopted by the learned judge in that case.

[25] A second line of attack adopted by the applicant was his contention that Parliament's present practice, as encapsulated in Joint Rules 220, 221 and 222, constitutes unfair language discrimination. Parliament's defence to this complaint will be considered in the next section.

Unfair discrimination

[26] The discrimination on which the applicant relies, is the fact that the eleven official languages are not treated equally in as much as all national legislation is not published in all official languages. This argument raises interesting questions as to the meaning of 'official language' and the consequences that flow from such status. It also raises the question as to the meaning of 'discrimination', as defined in s 1(viii), more particularly the question whether the non-publication of national legislation in all official languages does in fact amount to discrimination.

[27] In the view that I take of the matter, it is not necessary for present purposes to give a final answer to these questions. Instead, I shall assume, without deciding, in favour of the applicant that the non-publication of national legislation in all official languages does indeed amount to

‘discrimination’ on a ‘prohibited ground’, as contemplated by s 13(2)(a) of the Equality Act. This raises the more fundamental question as to whether the respondents have discharged the onus of proving that such discrimination is fair.

[28] The applicant’s argument proceeds from the premise that, because there are eleven official languages, all those languages must always and for all purposes be treated equally. However, this is not what the Constitution provides. If equal treatment of all official languages for all purposes were intended, one would have expected to find a clear provision to that effect, similar in content to the emphatic and unambiguous provisions of s 137 of the South Africa Act, 1909, quoted above. Instead, s 6(4) of the Constitution simply provides that ‘all official languages must enjoy parity of esteem and must be treated *equitably*’ (my emphasis).

[29] Furthermore, the Constitution does not require the simultaneous and equal use of *all* eleven languages for all purposes. On the contrary, the Constitution permits the use by the national government and provincial governments of *any* particular official languages ‘for the purposes of government’, provided that they ‘must use at least two official languages’.¹³ Leaving aside for the moment the question whether legislation forms part of the ‘purposes of government’, the fact is that the Constitution expressly permits the use of only two official languages for certain purposes, thereby sanctioning (by necessary implication) ‘discrimination’ against the other nine official languages. This raises the question, to which the applicant has been unable to furnish a persuasive answer, as to why the position should be different when it comes to national legislation. The inevitable conclusion is that, to the extent that the

¹³ Section 6(3)(a).

practice of publishing national legislation in only two official languages may be discriminatory, such discrimination is fair.

[30] With regard to applicant's attack against the Joint Rules of Parliament (para 1.2 of the notice of motion), the Speaker has provided a comprehensive explanation as to why English is used as the predominant language in which Parliament conducts its business, particularly its legislative function:

'English is the *de facto* language in which Parliament conducts its business, and in particular exercises its legislative function. The reason for this is twofold:

- All parliamentarians understand English and can converse and participate in the work of Parliament, in that language. This is not the case with any of the other official languages. Given the above facts, it would be impractical, if not impossible, to use any other language to the same, or even similar, extent.
- The language in which a Bill is introduced dictates the language in which it will be processed in Parliament. Bills are invariably introduced in English as the official text (for presumably the same reasons as set out immediately above), and eventually enacted in the same language, with one of the other official languages as the official translation. . . . [T]he vast majority of Bills are introduced by individual government departments, and it is these departments under the auspices of their respective Ministers which choose both the language of the Bill as also the language of the official translation.'

[31] The Speaker accordingly submitted that, if it were to be found that the predominant use of English in the legislative process provided for in Joint Rules 220, 221 and 222 constitutes discrimination for purposes of the Equality Act, then Parliament has discharged the burden of proof imposed upon it by s 13(2)(a) of the Equality Act, read with the provisions of s 14(2) and s 14(3) thereof, of proving that such discrimination is fair. I agree with this submission.

Conclusion

[32] To summarise:

(a) There is no constitutional or statutory duty on any of the respondents to publish all national legislation in all official languages, nor to translate all national legislation into all official languages. Where such a duty is imposed, it is done so expressly, eg in s 31(2)(b) of the Equality Act.¹⁴

(b) To the extent that publication of legislation in only two official languages may be discriminatory, such discrimination is fair as contemplated by s 13(2)(b)(ii) of the Equality Act.

(c) To the extent that the Joint Rules of Parliament, permitting the use of only two official languages, may be discriminatory, such discrimination is fair as contemplated by s 13(2)(b)(ii) of the Equality Act.

[33] It follows that the application cannot succeed. None of the respondents sought an order for costs against the applicant. In the result, the application is DISMISSED. No order is made as to costs.

B M GRIESEL
Judge of the High Court
and the Equality Court

¹⁴ ‘(2) For purposes of giving full effect to this Act and making the Act as accessible as possible –

(a) . . .

(b) the Minister must make the Act available in all official languages in the prescribed manner within a period of two years after the commencement of this Act.’