Mind the gap: Bridging the cultural divide and broadening pathways to education

Following the Fees Must Fall and Open Stellenbosch movements, the Senate and Council of Stellenbosch University revisited the University's language policy and adopted a revised language policy in 2016, which shifted the status quo by providing for 100% English tuition and not including a similar regime for Afrikaans tuition, as was previously the case.

Section 29(2) of the Constitution confers on everyone the right to receive education in the official language(s) of their choice in public educational institutions, where that education is reasonably practicable. In order to ensure the effective implementation of this right, the State is required to consider all reasonable educational alternatives, including single medium institutions, taking into account equity, practicability and the need to redress the results of past racial discriminatory laws and practices.

English speaking students enrolled at Stellenbosch University prior to 2016 would only have been able to attend some classes in English, with the remaining classes being offered in Afrikaans (with the assistance of an interpreter), while Afrikaans speaking students were able to attend all classes in Afrikaans. Following the Fees Must Fall and Open Stellenbosch movements, the Senate and Council of Stellenbosch University revisited the University's language policy and adopted a revised language policy in 2016, which shifted the status quo by providing for 100% English tuition and not including a similar regime for Afrikaans tuition, as was previously the case.

The 2016 language policy was promptly challenged in 2017 in the Western Cape High Court by Gelyke Kanse, an organisation established to promote and preserve Afrikaans mother-tongue education in South Africa. *The High Court in Kanse v The President of the Convocation of the Stellenbosch University 2017* JDR 1687 held that the previous 2014 language policy fell foul of the "reasonably practicable" criterion set out in section 29(2) of the Constitution, while, by contrast, the 2016 language policy conformed with section 29(2).

The decision of the Western Cape High Court was then taken on appeal to the Constitutional Court, on the basis that it violates section 29(2) of the Constitution and contravenes the rights enshrined in sections 6(2), 6(4) of the Constitution and the right to equality, amongst others.

Evidence lead in argument showed that, near-universally, English and Afrikaans-speaking first-year entrants to the University were able to speak and understand English whilst only a minority of students could speak and understand Afrikaans. Kanse argued that the State has a duty to undertake positive measures, in terms of section 6(2) of the Constitution, to elevate the status of indigenous languages and cannot diminish existing language rights without proper justification. Kanse further argued that to ameliorate the exclusionary impact of Afrikaans, the University must up its parallel medium by offering a fully parallel tuition in both English and Afrikaans, thereby preventing any marginalisation, exclusion or stigmas. However, the University determined by careful study that changing to a fully parallel medium tuition would entail a 20% increase in fees, a solution that the court agreed, is not reasonably practicable. The University further argued that the 2016 language policy was specifically adopted to give effect to "equity, redress and practicability" (in terms of section 29(2) of the Constitution) by broadening access to African students.

Mind the gap: Bridging the cultural divide and broadening pathways to education...*continued*

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The Constitutional Court's judgment was handed down in the context of the many historical and current institutional privileges that white Afrikaans-speaking students continue to enjoy in South Africa. The Constitutional Court held that the primacy of Afrikaans under the 2014 language policy created an exclusionary hurdle for African and English-speaking students studying at Stellenbosch. Separate classes in English and Afrikaans or single classes conducted in Afrikaans (with the aid of an interpreter) made African students, who were not conversant in Afrikaans, feel marginalised, excluded and stigmatised. Ultimately, the court concluded that the exclusion of non-Afrikaans speakers from full participation in tuition and other institutional benefits is a legitimate basis for upgrading to English, while continuing to offer significant tuition in Afrikaans, even while sacrificing the previous primacy of Afrikaans.

Kanse, and those who share the same views as Kanse, might consider this judgment as the end of Afrikaans culture at Stellenbosch. Kanse attempted to create a theme in argument that the identity of the Afrikaans population is defined by its language and that the 2016 Language Policy will diminish the identity of the Afrikaans people. But identity is a multifaceted concept that consists of a variety of expressions, speakers and histories and protection of identity in a constitutional democracy must happen in the context of all our communities and an overall balancing of rights. It is in this spirit that the debate on the medium of instruction at universities such as Stellenbosch has to be conducted.

Zanele Ngakane and Dylan Bouchier

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The power of exemptions

Having received the advice that what was being supplied was adequate to meet its needs, our client concluded the lease.

A client of ours recently approached us with the following problem.

Our client is a food manufacturer. It wished to hire factory premises having adequate electricity supply (notwithstanding Eskom power cuts), to operate its machinery. Prior to the conclusion of a lease it sought and obtained advice from the landlord, via the letting agent, as to the power supply available at the premises. Having received the advice that what was being supplied was adequate to meet its needs, our client concluded the lease. However, the requirement for electricity supply was not written into the lease agreement.

When it sought to occupy the premises, our client found that the power supply capability had been significantly overstated. Since it could not operate its factory at the premises, our client advised the landlord that the lease would have be terminated on grounds of this misrepresentation. The landlord took the contrary view: since the lease agreement contained the usual clause that pre-contractual warranties or representations not incorporated into the lease agreement itself were not binding on the parties.

Historically courts have taken the position that parties are bound by the clear wording of contracts, and that contracting parties should ensure that whatever they wish to be recorded as part of their contract is incorporated in the contracted document itself.

However, this dogmatic approach has been softened over the years.

The Supreme Court of Appeal was recently presented with a similar factual situation to determine. In *Spenmac v Tatrim CC* (216/2013) [2014] ZASCA 48 (1 April2014) the Court had to decide if an agreement for the sale of property should be set aside on the basis that it was concluded in the mistaken belief that the sale included a right of veto in respect of subdivision. This mistake had been induced, it was common cause, by the seller's innocent misrepresentation of this material fact prior to the conclusion of the written agreement.

The written agreement contained an exemption clause to the effect that the sale was concluded "*voetstoots*", and that no representations or warranties outside the agreement of sale itself would be binding on the parties. The agreement further recorded that the purchaser had fully acquainted itself with the property it was buying.

Relying on earlier authorities, the court confirmed that where a misrepresentation, even an innocent one, results in a fundamental mistake, a contract is *void ab initio* i.e. it can be set aside as though it did not come into existence.

The court therefore found that a party, who concludes an agreement under a justifiable misapprehension as to material facts caused by the other party's representations, is entitled to resile from the contract. Such misapprehension leads to a lack of consensus between the contracting parties, and such lack of consensus taints consent to the whole contract, including any exemption clause. In such cases the exemption clause will not prevent cancellation.

The learnings from this case are as follows:

1. To avoid getting into a fight in the first place, it is desirable that all material terms of a contract, especially as regards the quality of goods, be incorporated in the contract if at all possible;

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The power of exemptions...*continued*

There is no doubt that this approach is equitable since it ensures that contracts are based on true agreement.

2. Parties who make misrepresentations as to material facts, even if such misrepresentations are made innocently, cannot hide behind exemption clauses to escape the consequences of such misrepresentation. This places a practical responsibility on contracting parties to ensure that they do not make such misrepresentations, failing which they run the risk of a contract being set aside in due course.

There is no doubt that this approach is equitable since it ensures that contracts are based on true agreement. It also ensures that contracting parties cannot rely on exemption clauses to escape from careless and misleading pre-contractual conduct.

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Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 1 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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