THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case No: 20827/2014

In the matter between:

CORNELIUS JOHANNES ALEXANDER LOURENS **APPELLANT**

and

THE SPEAKER OF THE NATIONAL ASSEMBLY

OF PARLIAMENT OF THE REPUBLIC OF SOUTH

AFRICA **FIRST RESPONDENT**

THE CHAIRPERSON OF THE NATIONAL

COUNCIL OF PROVINCES OF PARLIAMENT

OF THE REPUBLIC OF SOUTH AFRICA **SECOND RESPONDENT**

THE MINISTER OF ARTS AND CULTURE **THIRD RESPONDENT**

THE PAN SOUTH AFRICAN LANGUAGE BOARD **FOURTH RESPONDENT**

Neutral Citation: *Lourens v Speaker of the National Assembly of Parliament* (20827/2014) [2016] ZASCA 11 (10 March 2016)

Coram: Lewis, Ponnan and Seriti JJA and Fourie and Plasket AJJA

Heard: 18 February 2016

Delivered: 10 March 2016

Summary: The Rules and practice of Parliament and its failure, and that of the Minister of Arts and Culture, to publish all statutes in all official languages does not constitute unfair discrimination in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

ORDER

On appeal from: The Equality Court, Western Cape, Cape Town (Griesel J sitting as court of first instance): judgment reported *sub nom Lourens v Speaker of the National Assembly & others* 2015 (1) SA 618 (EqC).

The appeal is dismissed.

JUDGMENT

Lewis JA (Ponnan and Seriti JJA and Fourie and Plasket AJJA concurring)

[1] The appellant, Mr C J A Lourens, practises as an attorney in Brits, North West Province. He is Afrikaans-speaking. He believes that the current practice of Parliament in relation to the language used for legislation, and the rules of Parliament in this regard, amount to unfair discrimination against him in that Bills are introduced into Parliament invariably in English, are published in English, and that the official text that is sent to the President for signature is also, invariably, in English only. This, he contends, unfairly discriminates against all non-English speaking people in the country. The 11 official languages of the country are set out as such in s 6 of the Constitution, and the failure to translate all Acts of Parliament into those languages, contends Mr Lourens, amounts to unfair language discrimination in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Equality Act).

[2] Accordingly, he brought proceedings in the Equality Court, sitting in the Western Cape, claiming various orders, some in the alternative, against the Speaker of the National Assembly and the Chairperson of the National Council of Provinces (collectively referred to as Parliament) and the Minister of Arts and Culture. He cited the Pan South African Language Board as a respondent but sought no relief as

against it. (The Board does not feature in the appeal and so I shall not refer to it as one of the respondents.)

[3] I shall not refer to all the orders sought at first instance. It appears from the judgment of Griesel J, sitting as the Equality Court, that the order that Mr Lourens pursued before him was a declaration that the respondents are guilty of conduct that amounts to unfair language discrimination in that they fail to publish all national legislation in all the official languages of the Republic of South Africa.

[4] The Equality Court dismissed the application but granted leave to appeal to this court, not because an appeal would enjoy reasonable prospects of success, but because the issues raised are 'important constitutional questions of national importance' which deserve the attention of this court. This, Griesel J said, was a compelling reason why the appeal should be heard in terms of s 17(1)*(a)*(ii) of the Superior Courts Act 10 of 2013.

[5] Mr Lourens argued on appeal that this court should not only find and declare that the respondents unfairly discriminate against him and other non-English speakers, but that we should also issue an order requiring Parliament and the Minister to take steps to comply with their obligation to publish all national legislation in all 11 official languages within a reasonable period.

Language provisions in previous dispensations and under the Constitution

[6] As the Constitutional Court said in *In Re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) [1996] ZACC 26 para 209: 'Language is a sensitive issue in South Africa.' Prior to the interim Constitution taking effect, there were two official languages in the country, Afrikaans and English. The importance of the official status of language is reflected in the enactment, when the Union of South Africa was created, of the South Africa Act of 1909, which provided in s 137:

'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.'

[7] When the Union became a Republic in 1961, s 108 of the Republic of South Africa Constitution Act 32 of 1961 provided:

'Equality of official languages

(1) English and Afrikaans shall be the official languages of the Republic, and shall be treated on a footing of equality, and possess and enjoy equal freedom, rights and privileges.

(2) All records, journals and proceedings of Parliament shall be kept in both the official languages, and all Bills, Acts and notices of general public importance or interest issued by the Government of the Republic shall be in both the official languages.'

The latter provision was repeated in s 89 of the Republic of South Africa Constitution Act 110 of 1983.

[8] The final text of s 6 of the 1996 Constitution stands in stark contrast. It accords 11 languages official status, recognizes the historically diminished status of indigenous languages, acknowledges the importance of several others and exhorts the development of all. The full text of s 6 reads:

'6 Languages

(1) The official languages of the Republic are Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu.

(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* [my emphasis].

(b) Municipalities must take into account the language usage and preferences of their residents.

(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* [my emphasis].

(5) A Pan South African Language Board established by national legislation must-

(a) promote, and create conditions for, the development and use of-
(i) all official languages;
(ii) the Khoi, Nama and San languages; and
(iii) sign language ; and
(b) promote and ensure respect for-
(i) all languages commonly used by communities in South Africa, including German, Greek, Gujarati, Hindi, Portuguese, Tamil, Telegu and Urdu; and
(ii) Arabic, Hebrew, Sanskrit and other languages used for religious purposes in South Africa.'

[9] In the first *Certification* judgment (above) the court considered challenges to the exclusion of certain languages from the status of being official from s 6. The court said (para 210) that it was the responsibility of the Constitutional Assembly to determine the grant of official status to languages, and that Constitutional Principle XI – 'The diversity of language and culture shall be acknowledged and protected, and conditions for their promotion shall be encouraged' – required the Constitution only to protect diversity of languages and not the status of any particular one. Section 6, said the court, was directed at fostering linguistic diversity and was compliant with the principle that formed part of the basis of the social pact that resulted in the Constitution.

[10] The court said also (para 212) that an objection to s 6 on the ground that it resulted in the diminution of status of the Afrikaans language, because it was only one of 11 official languages, could not be sustained. It was accorded the same status as all the languages regarded as official.

[11] The section does indeed encourage protection of many languages and accords 11 the status of being official. At the heart of Mr Lourens' contention is the question of what is meant by 'official'. One must accord it some meaning, he argues, and the only one that is consistent with fair language treatment is that all conduct of government, including Acts of Parliament, must be in all 11 languages. That would accord with the language provisions in the earlier constitutions.

[12] But, as I have said, that is not what s 6 provides for: on the contrary it expressly allows government at national and provincial level to act in a minimum of two of the official languages: s 6(3). Thus, one must accept that the Constitutional Assembly intended that not all official languages have to be employed in the process of government. The text of s 6 says so expressly.

[13] How then can conduct that is constitutionally compliant amount to discrimination, let alone unfair discrimination? Before turning to s 9 of the Constitution that deals with equality, and to the provisions of the Equality Act, it is useful to set out the provisions of the Constitution that govern the processes of Parliament and the enactment of statutes, and then the joint rules of Parliament that deal with its use of language.

Constitutional provisions regulating Parliament and the passage of legislation

[14] Chapter 4 of the Constitution regulates the way in which Parliament is constituted, and its obligations. Section 42 sets out the composition of Parliament; s 42(3) provides that the National Assembly is elected to represent the people and ensure democratic government under the Constitution by providing a national forum for 'public consideration of issues, by passing legislation and by scrutinizing and overseeing executive action'. The National Council of Provinces participates in those processes, and considers issues affecting the provinces: s 42(4).

[15] Section 43 provides that the legislative authority of the national sphere of government is vested in Parliament. Section 44 confers various legislative powers on Parliament, and s 44(4) provides that, when exercising its legislative authority, Parliament is bound only by the Constitution and must act in accordance with, and within the limits of, the Constitution.

[16] Section 75 of the Constitution regulates the way in which a bill passed in the National Assembly must be referred to the National Council of Provinces and s 76 regulates the processes to be adopted by the Council. Section 81 provides that a Bill becomes law only when assented to and signed by the President. The President bears the obligation to publish the Act promptly and determine when it takes effect,

unless the Act stipulates when it will come into force. (The President's role in the process of making legislation is discussed fully in *Minister of Environmental Affairs & another v Aquarius Platinum (SA) (Pty) Ltd & others* [2016 ZACC] 4, paras 6, 10, 15, 33 and 34).) Section 81 is silent on any obligation imposed on the President to see to the publication of Acts in any official language other than the one in which the Bill is introduced in Parliament. The signed copy of an Act is conclusive evidence of its provisions and after publication must be entrusted to the Constitutional Court for safekeeping (s 82). It is thus not Parliament's duty to publish legislation, let alone translate it. And once a Bill has been sent to the President, and he assents and signs it, Parliament's obligations in respect of it come to an end.

The language provisions in the joint rules of Parliament

[17] The joint rules of Parliament reflect the Constitutional requirements. They are as follow:

220 Language requirements 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 [my emphasis].

(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 formal consideration of the bill by the House in which it was introduced [my emphasis].

(3) The cover page of a Bill must specify which language version is –

(a) the official text; and

(b) an official translation.

(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.'

Parliamentary practice

[18] It appears that of late Parliament has been in breach of its own rules and of s 6(3) of the Constitution. A report admitted into evidence by an expert witness, Mr K Pauw, adduced by Mr Lourens, shows that many of the Acts of Parliament passed since 1996 have been published in only one language – English. Similarly, amendments to Acts, even those the signed version of which was in Afrikaans, have been amended in English only.

[19] The language of Parliament is, on the whole, English. In his answering affidavit in the Equality Court application, the erstwhile Speaker of the National Assembly, Mr M Sisulu, explained that English is the only language that all members of Parliament understand. The language in which a Bill is introduced in Parliament determines the way in which it is processed. Invariably, Bills are introduced in English since that is the language which all members understand. Although the rules provide that a text in another language must also be provided before formal consideration of a Bill, that seldom occurs. The Speaker maintained that members may nonetheless speak in any of the official languages and also sign language. Interpreting services are provided.

[20] The importance of the right to use the official language of one's choice is emphasized by the principle that any member of the National Assembly may introduce a Bill. That principle was affirmed by the Constitutional Court in *Oriani-Ambrosini v Sisulu, Speaker of the National Assembly* 2012 (6) SA 588 (CC) [2012] ZACC 27, especially para 46.

[21] Parliament, the Speaker acknowledged, should do more to advance the use of official languages other than English, but was constrained by resources and time limits. The evidence of another expert, adduced by the Minister, Professor E Meintjes, advised that there are simply not enough trained translaters to do what Mr

Lourens requires. Universities in the country do not produce sufficient graduates in translating to do the work that would be required by Parliament. A fortiori, there would not be sufficient translators for the provincial legislatures, and the municipalities that would have the same obligations imposed on them, if Mr Lourens' contentions are correct. But since there is no legal requirement that this be done, the practical difficulties, which seem insurmountable, need not be addressed.

[22] As indicated at the outset, Mr Lourens limited the relief he claimed in the Equality Court to an order that the failure to translate legislation into all official languages amounts to unfair discrimination. On appeal he argued that the court should also make an order that Parliament comply with the obligation he contends for within a reasonable period. I shall deal briefly with the equality challenge, and then with the structural order that he seeks, which Griesel J held was res judicata.

The equality challenge

[23] Section 9 of the Constitution is the fundamental provision from which to start. It reads:

'Equality

(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.'

[24] The provisions of the Equality Act give effect to the fundamental right to equality protected by the Constitution. It is for Mr Lourens, as complainant, to make

out a prima facie case of discrimination on the ground of language. Discrimination is defined in the Act 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'. The definition of prohibited grounds of discrimination includes language discrimination (subsection 1(a)).

[25] Section 13(1) of the Equality Act places the burden of proving language discrimination on the complainant. It reads:

'(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

(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;

. . . .'

[26] I need not decide whether the conduct of Parliament and the Minister, in so far as it was constitutionally compliant, amounts to discrimination. The parties did not argue that it was not discriminatory: indeed counsel for Parliament said that he would be hard-pressed to argue that Mr Lourens and others in his position were not placed at a disadvantage. Assuming (as the Equality Court did) that the practice of passing Bills in Parliament in English only is discriminatory as against the speakers of other official languages, Parliament and the Minister argued that it was not unfair.

[27] Section 14 of the Equality Act sets out the tests for fairness.

'Determination of fairness or unfairness

(1) It is not unfair discrimination to take measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination or the members of such groups or categories of persons.

(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;
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.'

[28] Griesel J in the Equality Court found that the practice of Parliament in using English as the language for the passing of bills was not unfair. The Constitution itself requires only that all official languages be treated equitably and accorded parity of esteem. As Iain Currie states in *Constitutional Law of South Africa* ed Woolman et al (2 ed original service 12-05):

'"Equitable" treatment is clearly not the same as "equal" treatment. Equitable treatment is treatment that is just and fair in the circumstances. Those circumstances include a history of official denigration and neglect of indigenous languages. Equity may therefore require that the languages that s 6(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 (ie, English and Afrikaans) are treated with relative inattention.'

Currie points out that there is no hard and fast requirement that the national or provincial government use more than two languages for the purpose of government.

[29] Mr Lourens did submit that Parliament did not constitute government. But he was hard-pressed to explain this submission given the very terms of the Constitution dealing with the vesting of the legislative arm of government in Parliament: ss 42 and 43 of the Constitution. As for the use, in s 6(4) of the Constitution of the words 'parity of esteem', Currie (ibid) says that the phrase 'probably has little legal significance'. Parity, he states, is 'possible only where there is a legal prescription that the official languages are treated equally'. There is not. On the contrary – the Constitution itself requires that acts of government, including the passing of Acts of Parliament, be conducted in only two of the official languages. Thus the Constitution itself would be guilty of unfair discrimination on Mr Lourens' argument, which is plainly absurd.

[30] So too, the Use of Official Languages Act 12 of 2012, enacted in order to provide for the regulation and monitoring of the official languages by national government, does not require that government acts be in all 11 official languages. Section 2, which sets out the objects of the Act, provides in s 2*(b)* that one object is to 'promote parity of esteem and equitable treatment of official languages of the Republic'. Section 4 requires that every national department (national government comprising departments and national entities) must adopt a language policy and identify three official languages that it will use for government purposes. It accordingly goes further than does the Constitution. But the Act does not require the use of all official languages. That statute would also amount to unfair discrimination against the eight other language speakers on Mr Lourens' argument. Again, the conclusion would be absurd.

[31] I must thus conclude that in so far as Parliament and the National Government do not pass Bills, and enact them, in all official languages, they are not guilty of unfair discrimination.

An order that Parliament translate all statutes within a reasonable time period

[32] Mr Lourens asked that this court grant an order compelling Parliament to translate all statutes into all official languages within a reasonable period. That would, of course, be what Parliament and government should aspire to do. But it is

obviously not open to any court to compel parties to perform any obligations which they do not have. This court has no power to grant the order sought. In any event, it would be the duty of government, and not Parliament, to translate statutes, as has already been held by Du Plessis J in *Lourens v President van die Republiek van Suid-Afrika en andere* 2013 (1) SA 499 (GNP). Griesel J held, in the Equality Court, that the order sought was res judicata. It did not matter that Mr Lourens made a claim under the Equality Act: the same legal principles have to be applied in order to determine whether Parliament has a duty to translate national legislation. I agree with that finding.

Section 31(2)(b) of the Equality Act

[33] Tellingly, the Equality Act itself requires that the Minister 'must make the Act available in all official languages within a period of two years after the commencement of this Act'. Had it been Parliament's duty, or the Minister's duty, to translate all Acts into the other ten official languages this provision would be superfluous, and a court does not lightly regard provisions of statutes as purposeless.

Parliament's oversight function

[34] Section 42(3) of the Constitution imposes on the National Assembly the duty to scrutinize and oversee executive action. Mr Lourens argues on appeal that even if it is not Parliament's duty to translate all statutes into the other official languages, it is required to ensure that the Executive performs its duties. Parliament argues that this issue was not traversed before the Equality Court and was not raised by Mr Lourens in his papers. Mr Lourens has filed numerous pages showing that it was indeed raised by his counsel before that court. In my view that is of no consequence. The point is bad anyway. The Minister does not have the obligation to perform the function that Mr Lourens suggests he does. It is true that the National Government may now have the duty, by virtue of s 4 of the Use of Official Languages Act, to ensure publication of statutes in three official languages. The duty is not imposed directly, but the requirement that each national department adopt a language policy that identifies the three official languages that it will use, perhaps implies that. Even if there is such a duty it would not satisfy Mr Lourens.

[35] As I have said, Parliament has failed to comply with its own rules relating to language and has not given effect yet to s 4 of the Use of Official Languages Act. That should be remedied. But Mr Lourens' appeal must fail. The respondents, rightly so, do not ask for the costs of the appeal.

The appeal is dismissed.

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C H Lewis

Judge of Appeal

APPEARANCES

Appellant:	C J A Lourens
Instructed by:	Lourens Attorneys, Brits c/o Heyns & Partners, Cape Town Symington & De Kok, Bloemfontein
For First and Second Respondents:	I Jamie SC (with him A Coetzee)
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Instructed by:	Cheadle Thompson & Haysom Inc, Braamfontein Webber Attorneys, Bloemfontein