



EMPLOYMENT

Can language proficiency policies be used to exclude individuals who lack the required language skills from employment?

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Our Constitution recognises 12 official languages and commits to promoting their development and use. Viewed through the lens of language, the Constitution reflects South Africa's aspirations and unwavering commitment to fostering an inclusive society that embraces our diverse, multicultural, and multiethnic heritage—a land that truly belongs to all who live in it. These aspirations are not the sole responsibility of specific sectors or groups within society. Rather, they call on each of us to play our part, however small, in advancing inclusivity and unity.

That being said, are e-hailing services allowed to develop a business model centred around a language of choice? Specifically, is it permissible for an e-hailing service to require its drivers – whether employees or independent contractors – to be proficient in Afrikaans? The short answer is: it depends on the nature of the job.

There has been much debate on whether language proficiency may be used as a requirement for the employment of drivers with the new e-hailing service, Wanatu, which currently operates in Centurion and Pretoria. According to its website, one of Wanatu's goals is to offer "*Werkgeleenthede in Afrikaans*", which translates to "*Jobs in Afrikaans*".

Although the norm for most e-hailing platforms in South Africa is to appoint drivers as independent contractors, we understand, from media reports, that Wanatu employs drivers on the platform.

Depending on the nature of the appointment, whether the drivers are employed or contract with Wanatu as independent contractors, two scenarios emerge. The language proficiency requirement will either trigger the Employment Equity Act 55 of 1998 (EEA) or the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA), both of which give effect to Section 9, the equality clause of the Constitution.

First, where drivers are employed, the EEA will apply. Section 6(1) of the EEA prohibits direct or indirect discrimination on the basis of language. If Wanatu requires their drivers to speak Afrikaans as a precondition for employment, then such a recruitment/employment practice would be in offence of the equality clause and the EEA. The exclusion of drivers based on language could constitute unfair discrimination. The onus would then shift to Wanatu to demonstrate, on a balance of probabilities, that discriminating on the basis of language in their recruitment/employment practises is rational and not unfair, or is otherwise justifiable.

In cases where employers have used language proficiency as a requirement for employment, courts have found that the differentiation on the basis of language proficiency was justifiable if the requirement was inherently part of the job. (refer to *Stojce v University of KZN-Natal and Another* (delivered on 07 September 2006) and *De Bruyn v Metorex Proprietary Limited* (delivered on 21 July 2021))

To establish inherency, Wanatu will have to show that employing Afrikaans-speaking drivers is rationally connected to the performance of the job. It should also be borne in mind that a legitimate commercial rationale is not sufficient to escape the clutches of the EEA. This is especially important given that according to media reports, Wanatu does cater to non-Afrikaans speaking users – the app has an English translation button. The accommodation of a multilinguistic and multicultural market undermines the argument that Afrikaans proficiency is indispensable to the job.

Second, where Wanatu's drivers are appointed as independent contractors, the EEA would not apply. However, Wanatu's language proficiency practices would still be subject to constitutional scrutiny and could be challenged under the PEPUDA.

Similar to the EEA, section 6 of the PEPUDA prohibits unfair discrimination based on language. Notably, PEPUDA provides a non-exhaustive, illustrative list of practices to help determine whether a particular act or practice constitutes unfair discrimination. Of relevance to Wanatu, item 9(c) identifies the unfair limitation of access to contractual opportunities for supplying goods and services as a potential act of unfair discrimination.

At first glance, it seems Wanatu is differentiating on the basis of language. Depending on how it implements the language proficiency practice, the differentiation may have racial implications. This may arise if it is shown that Wanatu, whether intentionally or unintentionally, employs or contracts with a disproportionate number of drivers who are white and that employment or appointment is disproportionate to the racial demographics of Afrikaans speakers.

For example, where Wanatu disproportionately contracts with drivers in a manner that is inconsistent with the racial demographics of Afrikaans speakers, Wanatu would be in offence of sections 7(b), (c) and (e) of PEPUDA. These provisions prohibit engaging in activities that promote racial exclusivity, implementing practices or rules that exclude a particular race group under seemingly legitimate practices, and the denial of access to opportunities including access to services or contractual opportunities.

Indeed, the use and, thereby preservation, of all languages, is commendable as it fosters a sense of a communally shared identity among its speakers. However, this must be carefully balanced against the rights of others to use their own languages while protecting the human dignity, and equality of all. This delicate balance permeates all areas of our lives and, particularly, finds significance in the workplace. It is a true testament to the reality that we do not exist as islands or micro-communities isolated from the broader South African community, but live among others, interconnected in our communities and social spheres. Therefore, our laws do not offer absolute protection to any person's right to use a language of their choice. How we choose to use our languages matters, if we are to live harmoniously, with the utmost respect for the next person.



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