CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 101/17

In the matter between:

AFRIFORUM First Applicant

SOLIDARITY Second Applicant

and

UNIVERSITY OF THE FREE STATE Respondent

Neutral citation: *AfriForum and Another v University of the Free State* [2017] ZACC 48

Coram: Mogoeng CJ, Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Mojapelo AJ, Pretorius AJ and Zondo J

Judgments: Mogoeng CJ (majority): [1] to [81]
Froneman J (dissenting): [82] to [135]

Decided on: 29 December 2017

Summary: Section 29 of the Constitution - Higher Education Act — Ministerial language policy — Promotion of Administrative Justice Act

Administrative action — Legality review — Reasonable practicability — Legal standing

ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Free State Division, Bloemfontein):

1. Leave to appeal is refused.
2. There will be no order as to costs.

JUDGMENT

MOGOENG CJ (Nkabinde ADCJ, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Mojapelo AJ and Zondo J concurring):

Essential context

[1] Whenever we seek to resolve disputes that have the potential to divide our people along racial lines or exacerbate pre-existing divisions, a proper context would always be essential. This is such a case. It raises a real but unarticulated question whether Afrikaans has been "downgraded" from the status of a major medium of instruction for genuine and constitutionally sound reasons or in the furtherance of some historical and insensitive score-settling agenda. And the following remarks made by this Court in relation to language as a medium of instruction are some of the indispensable ingredients for the necessary context:

> "[45] Apartheid has left us with many scars. The worst of these must be the vast discrepancy in access to public and private resources. The cardinal fault line of our past oppression ran along race, class and gender. It authorised a hierarchy of privilege and disadvantage. Unequal access to opportunity prevailed in every domain. Access to private or public education was no exception. While much

> remedial work has been done since the advent of constitutional democracy, sadly deep social disparities and resultant social inequity are still with us.
>
> [46] It is so that white public schools were hugely better resourced than black schools. They were lavishly treated by the apartheid government. It is also true that they served and were shored up by relatively affluent white communities. On the other hand, formerly black public schools have been and by and large remain scantily resourced. They were deliberately funded stingily by the apartheid government. Also, they served in the main and were supported by relatively deprived black communities. That is why perhaps the most abiding and debilitating legacy of our past is an unequal distribution of skills and competencies acquired through education.
>
> [47] In an unconcealed design, the Constitution ardently demands that this social unevenness be addressed by a radical transformation of society as a whole and of public education in particular."[1]

[2] These truths and the demand for "radical transformation" apply with equal force to those of our universities where Afrikaans was the sole medium of instruction. They were exceedingly well-resourced for the exclusive or primary benefit of white Afrikaner students. And their inseparable and almost destiny-defining mandate was to develop the Afrikaans language very well. As a result, it now effortlessly and admirably fits President Mandela's poetic description of it as a language of "scholarship and science".[2] Sadly, all African universities and languages were deliberately starved of resources and capacities critical for a similar developmental agenda. Alive to this inequity and deliberate prejudice, it was deemed prudent to have this sobering reminder annexed to the ministerial language policy framework, that is central to this application, so as to give it the vital context which could easily elude many, and deflate the transformation project of its critical zest and legitimacy:

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[1] *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* [2009] ZACC 32; 2010 (2) SA 415 (CC); 2010 (3) BCLR 177 (CC) (*Ermelo*) (per Moseneke DCJ) at paras 45-7.

[2] Mandela "Address by President Nelson Mandela on the occasion of his acceptance of an honorary doctorate of the University of Stellenbosch" (25 October 1996), available at http://www.mandela.gov.za/mandela_speeches/1996/961025_stellenbosch.htm.

> "The level of development attained by the Afrikaans language is in demonstrable ways connected to aspects of history of colonial-settler domination and particularly in its latter phases to the dominant position of a sector of the Afrikaans-speaking communities in the apartheid order. Afrikaans became the language most closely associated with the formalisation and execution of apartheid. To a great proportion of South Africans it probably calls up first and foremost associations of discrimination, oppression and systematic humiliation of others.
>
> These associations understandably often affect the approaches people take to the role and future of Afrikaans. That history of association with racism and racially based practices is often one that Afrikaans-speaking communities will have to confront and deal with. That is part of the challenge of healing, reconciliation and reparation our society will continue to face for a considerable time to come."[3]

[3] Issues around language policy are as emotive as the language itself. This would be especially so where plans are afoot to effect changes that would water down the role or usage of language, particularly Afrikaans. For, Afrikaans has for many years been associated with dominion or power. Those whose mother tongue it is once ruled this country. And everything official had to also be in Afrikaans. It was a compulsory subject for all African learners and all law students. In at least five of our universities,[4] Afrikaans was the only medium of instruction for decades. To get to the point where Afrikaans now appears to be driven to virtual extinction, as a university medium of instruction, was always going to give rise to disaffection, controversy or a suspicion that a less than innocent agenda was being pursued.

[4] Extremely difficult, sensitive and potentially divisive as the language issue in general, and Afrikaans in particular, was and is bound to be for many years to come, the historical role of Afrikaans inescapably has to be confronted whenever possibilities of its use or disuse as a language of instruction are explored. After all, we

[3] Professor Jakes Gerwel was asked by the then Minister of Higher Education to lead a committee that would give advice on the use and future of Afrikaans as a medium of instruction. The report is available at http://www.dhet.gov.za/Management%20Support/Gerwel%E2%80%99s%20Language%20Policy%20Framework%20for%20Higher%20Education%20in%20South%20Africa.pdf.

[4] University of Pretoria, Stellenbosch University, University of the Free State, Randse Afrikaanse Universiteit and Potchefstroomse Universiteit vir Christelike Hoër Onderwys.

come from a racially divided past to which Afrikaans was inextricably linked. It bears emphasis that, though not necessarily articulated, a suspicion that Afrikaans was being unreasonably singled out for marginalisation for ignoble historical reasons, is always likely to lurk in the background. The use of Afrikaans is thus one of the most likely areas of fierce disputation. "That is part of the challenge of healing, reconciliation, and reparation that our society will continue to face for a considerable time to come".[5] It is a difficult transformational issue that requires a meticulous and detached handling by all true defenders and ambassadors of our constitutional vision.

[5] We all must consciously guard against the possibility of a subliminal and yet effectively prejudicial disposition towards Afrikaans setting in, owing only to its past record as a virtual synonym to "racism and racially based practices".[6] That said, the introduction of a language policy is a matter of such monumental importance that it once triggered what arguably turned out to be the most tragic, yet inspiring and proud moment in the history of our struggle for freedom from apartheid – a crime against humanity. In the 1970s and 1980s black learners rose against government's imposition of Afrikaans as the sole medium of instruction in flagrant disregard for the most vociferous opposition from students, teachers, parents and progressive leaders of all races. Afrikaans was being used as an instrument of control, exploitation and systematic humiliation. And this is what the ministerial language policy seeks to sensitise universities about right on its first page:

> "The use of language policy as an instrument of control, oppression and exploitation was one of the factors that triggered the two great political struggles that defined South Africa in the twentieth century – the struggle of the Afrikaners against British imperialism and the struggle of the black community against white rule. Indeed it was the attempt by the apartheid state to impose Afrikaans as a medium of instruction in black schools that gave rise to the mass struggles of the late 1970s and 1980s."[7]

[5] Gerwel above n 3.

[6] Id.

[7] Language Policy for Higher Education, November 2002 (Ministerial Policy).

[6] Multitudes of virtually unarmed students were detained, maimed and killed by the State law enforcement machinery. Then, it was a government led by predominantly Afrikaans-speaking people who sought to thrust their mother tongue upon others in the furtherance of sectional and self-serving white supremacist policies.

[7] Now, unlike then, united in their diversity, the University community has overwhelmingly decided in favour of English as the sole medium of instruction. Afrikaans is being phased out as a medium of instruction to advance a constitutionally-inspired transformational agenda. The aim is to deracialise classes, foster unity and reconciliation and to defuse observable racial tensions, but certainly not to impose any of the home languages of those in government on Afrikaners or others. And this is sought to be realised progressively, and with due regard to sensitivities attendant to the policy-shift.

[8] This then brings into sharp focus the critical need for judicial officers to always bring an impartial mind to bear on issues, and never to be emotionally entangled in matters presented for their determination. For, as this Court once cautioned, it would be most regrettable for them to make or appear to be making common cause with litigants:

> "Judicial officers must be very careful not to get sentimentally connected to any of the issues being reviewed. No overt or subtle sympathetic or emotional alignments are to stealthily or unconsciously find their way into their approach to the issues, however much the parties might seek to appeal to their emotions. To be caught up in that web, as a judicial officer, amounts to a dismal failure in the execution of one's constitutional duties and the worst betrayal of the obligation to do the right thing, in line with the affirmation or oath of office."[8]

[8] *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration* [2016] ZACC 38; 2017 (1) SA 549 (CC); 2017 (2) BCLR 241 (CC) at para 13.

[9] All of the above said, it falls to be determined whether it was reasonably practicable for the University of the Free State (University) to retain Afrikaans as the second major medium of instruction. The meaning of "reasonably practicable",[9] factors that ought to inform its determination and whether the University language policy was developed with due deference to that of the Minister, are some of the issues central to the decision of this Court.

Parties

[10] The first applicant is AfriForum. It is a non-governmental organisation involved in the protection and advancement of civil rights. In this case it seeks to promote the interests of students who seek to be taught in Afrikaans or the interests of parents who would like to have their children so instructed. That includes members of the organisation and their children.

[11] Solidarity, the second applicant, is a registered trade union. It acts in its own interest and now it says also in the interest of those of its members who are allegedly affected by the significant scaling down of Afrikaans as a medium of instruction. Its members are said to have an interest in the new language policy since they would be required to implement it.

[12] The University is the respondent. It is its policy-decision on the medium of instruction that is being challenged.

Background

[13] Exercising his powers in terms of section 3 of the Higher Education Act,[10] the then Minister of Education Professor Kadar Asmal developed a language policy framework for higher education institutions. That policy begins by recognising the use of language as a potential instrument of discrimination and oppression and sets out

[9] See section 29(2) of the Constitution.

[10] 101 of 1997.

constitutional provisions and values that ought to inform its proper understanding and application. It then ends by underscoring the need for multilingualism, expressing support for the retention and development of Afrikaans as a medium of instruction. This is however on condition that the use of Afrikaans does not unjustly deprive others of access to higher education and wittingly or unwittingly become an instrument for the furtherance of racial or narrow cultural discrimination.[11] Annexed to it is a report on the language policy framework generated by an Advisory Committee that was appointed by the Minister of Education and chaired by Professor Jakes Gerwel.

[14] The policy framework posits as its end goal "a transformed higher education system, which is the creation of higher education institutions whose identity and cultural orientation is neither black nor white, English or Afrikaans-speaking but unabashedly and unashamedly South African."[12] It also requires that historically Afrikaans medium institutions "submit plans . . . indicating strategies and time frames they intend putting in place to ensure that language of instruction does not impede access, especially in high costs programmes with limited student places such as health sciences and engineering."[13]

[15] It was with this understanding that in 2003, the University formalised its bilingual policy that had been proactively introduced in 1993. Two years into its implementation the then Rector, Professor Fourie, acknowledged that the policy had had the undesirable consequence of having separate lecture rooms for white and black students. This trend was regularly reported on. It persisted until concerns were raised by staff members and students that the dual-medium policy had given rise not only to racially segregated lecture rooms but also racial tensions.

[11] See above n 2. This captures the essence of what former President Mandela said of the University of Stellenbosch on 25 October 1996 on the occasion of the acceptance of an honorary doctorate.

[12] See above n 7 at Clause 15.4.3 of the Ministerial Policy.

[13] See above n 7 at Clause 15.4.5 of the Ministerial Policy.

[16] Of even greater moment are the observations captured by Professor Lange, the Vice-Rector (Academic) of the University. She characterised the worrisome and persistent challenge of racial segregation as "untenable on a post-apartheid campus". Professor Lange goes on to say:

> "It is inherently impossible to avoid racial division when language is maintained and where statistics show that one of the two language streams comprises white and the other black students. While this is at times described by different individuals as an 'ethical' or 'redress' issue, it is equally a matter of what is reasonably practicable. The fact of the matter is that the 'reasonably practicable' criterion is far exceeded. It is absolutely impossible to provide language of choice without indirectly discriminating on the basis of race."

[17] A report that was commissioned by the University authorities to look into the appropriateness of the continued use of Afrikaans as a medium of instruction highlighted its entrenchment of racial division among students and virtual subversion of racial integration. As a result, the University Management recommended a language policy shift. After open and admittedly extensive consultations with interested parties, including AfriForum, Solidarity and language experts, the final report was presented to the University Council for approval. The major finding was:

> "The consensus finding of the review committee is that the currently parallel medium language policy does not work. It divides students, largely by race, and therefore works against the integration commitments of the university; it does not, from the student point of view, guarantee equality of access to knowledge in the two different language class groups; it has not kept up with the dramatic changes in the racial and language demography of the university in recent years; and the continuation in Afrikaans is a declining language of preference among students who see themselves as living, learning and labouring in a global world where English competence provides more access and mobility than any other South African language."

[18] The use of Afrikaans reportedly worked against equal access to knowledge. Racial discrimination and the need for redress are the paramount concerns raised by the University within the context of reasonable practicability. And Afrikaans has

itself fallen into relative disuse since many Afrikaner students allegedly prefer English because they "see themselves as living, learning and labouring in a global world where English competence provides more access and mobility than any other South African language." Observable incidents and daily experience backed up by empirical research evidently caused the University to think and respond differently to Afrikaans as a medium of education.

[19] And the key policy positions taken by the Council are—

> "1. that English becomes the primary medium of instruction in undergraduate education and, as largely exists already, in postgraduate education.
>
> 2. that the [University] embeds and enables a language-rich environment committed to multilingualism with particular attention to Afrikaans, Sesotho, isiZulu and other languages represented on the three campuses.
>
> 3. that an expanded tutorial system is available to especially first-year students in Afrikaans, Sesotho, isiZulu and other languages to facilitate the transition to English instruction.
>
> 4. that in particular professional programmes, such as Education, the parallel-medium policy continues given the well-defined Afrikaans market that still makes such language-specific graduate preparation relevant at the moment.
>
> 5. that the language of administration be English.
>
> 6. that the English-medium language policy be implemented with flexibility and understanding rather than as a rigid rule regardless of the circumstances."

[20] The new language policy is intended to be implemented progressively over a period of about five years. Although English will be the only primary medium of instruction, Afrikaans still has an important role to play. It is to be used in the expanded tutorial system, and as a medium of instruction to cater for certain professional programmes like Education and Theology because there is a market-demand for them. This is consistent with the last point of the policy which provides:

> "the English-medium language policy [is to] be implemented with flexibility and understanding rather than as a rigid rule regardless of the circumstances."

[21] AfriForum and Solidarity are however unhappy with the policy. Some of their objections are that proper research was not conducted, and that most white and some black Afrikaans-speaking students prefer to be taught in Afrikaans. In essence, they see no justification for the language policy-shift. As a result, they approached the Free State High Court, Bloemfontein (High Court), to review and set aside the adoption of the policy by Council. The Full Court of the High Court ruled in their favour. Displeased with this outcome, the University successfully appealed to the Supreme Court of Appeal. AfriForum and Solidarity were aggrieved by this outcome. They now seek leave from this Court to appeal against the Supreme Court of Appeal (SCA) decision.

Issues

[22] The issues to be determined are:

(a) standing;

(b) leave to appeal, in particular whether the determination of a language policy by the University constitutes administrative action in terms of the provisions of the Promotion of Administrative Justice Act[14] (PAJA), alternatively, whether the doctrine of legality is implicated;

(c) whether the University acted inconsistently with its obligations in terms of section 29(2) of the Constitution in adopting a policy that phases out Afrikaans as a co-equal medium of instruction with English; and

(d) whether the University determined and adopted the new language policy "subject to" the ministerial language policy framework as required by section 27(2) of the Higher Education Act.

[14] 3 of 2000.

Standing

[23] Section 38 of the Constitution provides for standing in these terms:

> "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are—
>
> (a) anyone acting in their own interest;
>
> (b) anyone acting on behalf of another person who cannot act in their own name;
>
> (c) anyone acting as a member of, or in the interest of, a group or class of persons;
>
> (d) anyone acting in the public interest; and
>
> (e) an association acting in the interest of its members."

[24] Our constitutional provisions on standing could properly be characterised as an open invitation and encouragement to natural and corporate citizens to vigilantly guard against and resist violations of the Constitution, by testing compliance with fundamental rights. These provisions are self-evidently designed to ease, smoothen and in a way fuel insistence on the fulfilment of constitutional obligations and the rigorous observance of rights, in view of our shameful past. The language is more inviting, progressive and understandably permissive. Additionally, fundamental rights do not necessarily have to be infringed on before litigation is initiated. It is enough that they be threatened. Resource constraints or any other cause of the inability to litigate personally or as a group does not necessarily amount to an unliftable embargo on the litigation vessel. It is permissible for others to litigate on behalf of those enmeshed in any situation of incapacitation or disadvantage. This approach to standing is consistent with the constitutional mandate our higher courts have to uphold the supreme law of the land and "ensure that constitutional rights enjoy the full measure of protection to which they are entitled".[15]

[15] *Ferreira v Levin N.O.*; *Vryenhoek v Powell N.O.* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at para 165; see also sections 2, 167, 168 and 172 of the Constitution.

[25] So understood, this Court unsurprisingly crafted the *Biowatch*[16] principle to avoid an inadvertent subversion of this almost open-ended licence to litigate, by the inexorable chilling effect that cost orders ordinarily have or could have on the enthusiasm to embark on constitutional litigation. This applies especially to those who are not exceedingly well-resourced. In sum, legal steps geared at vindicating constitutional rights are encouraged as opposed to being deliberately or inadvertently constrained. For, a young constitutional democracy like ours, needs as much constitutional litigation as possible, as a platform for the divination of hidden meanings of unclear yet crucial constitutional clauses and concepts, for the development of its jurisprudence. A proper reflection on the need to litigate, and if so, on which matters, is likely to stand litigants and the court system in good stead.

[26] The University agrees that AfriForum has standing. But this is obviously not binding on this Court. It must therefore still satisfy itself that AfriForum does have standing. AfriForum litigates to vindicate its own rights and those of its members and their children. It seeks to act in the interest of the Afrikaans-speaking people and to assert the right to have the children of their members instructed in Afrikaans in every educational programme offered by the University, very much in line with one of its stated objectives, as a civil rights organisation. That is public interest litigation for which section 38 of the Constitution provides.

[27] The same does not necessarily hold for Solidarity. It is a trade union whose obvious mandate is to advance the interests of its members in the labour sphere. As correctly observed by the SCA, its members do not have the right to be instructed in Afrikaans. That right is available to students and possibly their parents to assert, none of whom was said to be their members. Neither Solidarity nor its members have any legal or material interest in the matter to support their assumed legal standing.[17]

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[16] *Biowatch Trust v Registrar Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).

[17] See *University of the Free State v AfriForum* [2017] ZASCA 32; 2017 (4) SA 283 (SCA) (SCA judgment) at para 42.

[28] And Solidarity does not claim to act in the public or any other constitutionally-recognised interest but its own. Its belated attempt to explain its standing hurdle away on the basis that its members would be required to implement the policy and therefore have an interest, is not helpful. Assuming that this explanation would ordinarily have sustained standing, it should have been set out in those terms in the founding affidavit filed in the High Court, to afford even the SCA the opportunity to consider it.

[29] The generosity or liberality of our standing provisions does not mean that standing is there for the taking. On the contrary, closer scrutiny is always called for, especially when standing is not apparent from the nature of the party, its interest in or relationship with the issues and the explanation offered to support standing. And courts ought to be circumspect in affording standing to similarly-positioned parties where the grounds for standing are weak. They must first be satisfied that factors relevant to determining whether a person is genuinely acting in the interest of a group, that has legal interest in the matter, have been shown to exist. Solidarity has failed to explain its interest and that of its members to meet the standing requirements.

Leave to appeal

[30] Leave to appeal depends on whether the University's language policy determination constitutes an administrative action, alternatively, on whether the decision to adopt the new policy is inconsistent with the Constitution or the law.

[31] To conclude that the University's determination of a language policy in terms of its section 27(2) powers constitutes an administrative action in terms of PAJA, certain requirements would have to be satisfied. They are that the decision (a) be of an administrative nature; (b) by an organ of State or a natural or juristic person; (c) exercising public power or performing a public function; (d) be in terms of any legislation or empowering provision; (e) that adversely affects rights; (f) that has a

direct external legal effect; and (g) that does not fall under any of the listed exclusions.[18]

[32] It is now settled that those decisions that relate to the award of tenders adversely affect the rights of those who lost out and that they have a direct external legal effect even before the winning party takes advantage of or executes the contract.[19] Understandably so, because it would be quite artificial to adopt an approach that insists on the right to challenge that decision on PAJA grounds being exercisable only when implementation takes place. Why would an affected party have to wait until full-blown harm has been done while that could be circumvented? Properly contextualised, why would a threat to a fundamental right be adequate to trigger litigation but not for all other rights?[20] For this reason I accept, that the University's language policy adversely affects the rights of those desiring to have Afrikaans as a medium of instruction available to them or their children and that it has a direct external legal effect. The pre-existing right of Afrikaans-speaking students to be taught in their own language is not remotely threatened but would cease to be effectively accessible upon the implementation of the impugned University language policy.

[33] It is also to be accepted that the practical effect of a challenge to the adoption of the language policy is that it is not to be implemented. Whatever ground is held out prominently for the setting aside of the policy, its implementation is certainly sought to be arrested thereby. Inelegantly framed though the challenge is, it really does boil down to one thing, and that is the policy is invalid because it was adopted despite its inconsistency with the provisions of section 29(2) of the Constitution and the ministerial policy framework.

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[18] See section 1 of PAJA.

[19] The Supreme Court of Appeal decided in *Umfolozi Transport (Edms) Bpk v Minister van Vervoer* [1997] ZASCA 8; [1997] 2 All SA 548 (SCA) that the award of a state tender amounted to administrative action. See also *Aurecon South Africa (Pty) Limited v Cape Town City* [2015] ZASCA 209; 2016 (2) SA 199 (SCA) at paras 14-6.

[20] See section 38 of the Constitution.

[34] That said, the challenge also relates to whether a statutory policy-making responsibility is, without more, administrative in nature. A decision or action that is administrative in nature is one that relates to the implementation or execution of a statutory function or policy that has already been fleshed out particularly in relation to what needs to be done. It is fundamentally about carrying out what the executive authority or the key decision-makers of an institution or entity have already pronounced upon definitively. A decision or action that is administrative in nature is therefore operational, for it is about carrying out what has already been prescribed often in some detail.

[35] The University Council and Senate did not purport to implement a ministerially predetermined language policy. They sought to develop a policy in line with the ministerial policy framework so that the University Management could, in turn, put it into operation. Council, even when it acts with the concurrence of Senate, does not ordinarily function in the realm of performing duties that are administrative in nature. It takes policy decisions. Here, it is enjoined by section 27(2) of the Act to make a policy that would then be executed by Management. Additional to the legal reality that Council does not exist to make decisions of an administrative nature, policy determination is, by its very nature, executive rather than administrative. And there is nothing about the kind of decision Council took in this regard that gives it a character that is even remotely administrative. The PAJA requirement for review that a decision must be of an administrative nature, has thus not been satisfied. And that alone is fatal to a review application that is primarily grounded on PAJA as outlined above.

[36] Two further possibilities were belatedly resorted to. One is that even if the University's decision is ordinarily executive in nature, it is still such as to qualify as administrative action. The other is that PAJA would still apply because policy-making is not the kind of executive action excluded from the PAJA scope of application. The other grounds strike one more as an afterthought and are even

difficult to understand. Since parties are correctly agreed that legality provides a clear basis for review here, it is indeed the only option AfriForum has in the circumstances.

[37] It is therefore on the alternative ground of legality that this application for leave to appeal is to be considered. The source of the University's power to determine the language policy is section 27(2) of the Act which in turn owes its origin to section 29(2) of the Constitution. It follows that the University was exercising public power when it took the impugned policy decision and that policy is reviewable under the doctrine of legality. For, the University may neither exercise any power inconsistently with the Constitution nor perform any function or take decisions other than those it is legally authorised to make.[21] If it took a decision that it lacked the power to take or that is unlawful – either by reason of its inconsistency with the Constitution, applicable legislation or ministerial policy – then that decision could be reviewed and set aside.

[38] The question whether an official language that has been developed to convey complex scientific and technical concepts, that has been a medium of instruction for many decades and could lose its status as a medium of instruction is a constitutional matter, must be answered affirmatively. And the history and sensitivity of language as a medium of instruction, Afrikaans in particular, do ordinarily raise a point of law of general public importance. Sadly, there simply are no reasonable prospects of success.

[39] Both grounds of review are so devoid of merit that the grant of leave to appeal would be an injudicious deployment of the scarce and already over-stretched judicial resources. It is thus not in the interests of justice to grant leave to appeal. This will become apparent from an analysis of the two key issues raised; namely (i) whether the University acted consistently with the provisions of section 29(2) of the Constitution;

[21] See *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at para 49 and *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* [1998] ZACC 17; 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) at para 56.

and (ii) whether, in adopting its new language policy, the University paid any or adequate attention to the ministerial policy framework on the language of instruction.

[40] What must be said upfront is that issues that have arisen for determination under the headings "Reasonable practicability" and "Inconsistency with ministerial policy" are so interrelated that repetition is at times difficult to avoid. Section 29(2) and the ministerial policy apply to both, thus adding to the inevitability of some repetition however hard one might try to avoid it. An iteration or omission of a discussion of an important aspect of the case under any of these topics must be understood in this context.

Reasonable practicability

[41] Much turns on the correct meaning of the words "reasonably practicable" in section 29(2) which provides:

> "Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account—
>
> (a) equity;
> (b) practicability; and
> (c) the need to redress the results of past racially discriminatory laws and practices."

[42] Every South African has the constitutional right to be taught in a preferred official language in our public institutions of learning. But access to that right is not unqualified. The overarching condition is that the fulfilment of the promise of education in a language of choice must be reasonably practicable. And what reasonable practicability means and entails lies at the heart of this application. The disputation relates to whether all factors set out in section 29(2) are to inform

"reasonable practicability" or only some, and if only some which, and where in the subsection we are to find a pointer to or the necessity for, their carving out. To answer this question correctly requires that we employ canons of constitutional interpretation.

[43] Some of those key interpretive aides that have by now become trite are the textual or ordinary grammatical meaning, context, purpose and consistency with the Constitution. Context comes into operation where the ordinary grammatical meaning is not particularly helpful or conclusive. And contextual interpretation requires that regard be had to the setting of the word or provision to be interpreted with particular reference to all the words, phrases or expressions around the word or words sought to be interpreted. This exercise might even require that consideration be given to other subsections, sections or the chapter in which the key word, provision or expression to be interpreted is located.[22] The meanings and themes emerging from that reflection would then reveal the overall thrust that cannot justifiably be veered away from.

[44] Similarly, where it is necessary to resort to a purposive interpretation, the purpose of a provision might not always be readily apparent from the words or expressions sought to be understood. When that is so, it is from the totality of the words, expressions, sections, if necessary the Chapter or much more that the purpose does at times have to be sought or made out. The values or norms foundational to our constitutional democracy may at times have to be taken into account in construing any provision. For, no meaning inconsistent with the Constitution ought to prevail. None of the above should be understood to mean that the process of interpretation is a regimented or compartmentalised exercise. In practice, they tend to kick into operation effortlessly because of their interconnectedness.

[22] *Cool Ideas 1186 CC v Hubbard* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) at para 28. See also *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd* [2013] ZACC 48; 2014 (5) SA 138 (CC); 2014 (3) BCLR 265 (CC) at paras 84-6 and *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12; 2007 (6) SA 199 (CC); 2007 (10) BCLR 1027 (CC) at para 5; *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* [2013] ZASCA 76; 2013 (5) SA 1 (SCA) at para 24 and *KPMG Chartered Accountants (SA) v Securefin Ltd* [2009] ZASCA 7; 2009 (4) SA 399 (SCA) at para 39.

[45] More importantly policy, like all legal instruments, is better understood when no aspects of it are sought to be interpreted in isolation from and inconsistently with some of its equally relevant and important aspects, particularly when that approach yields absurdities. And policy cannot exist in defiance of pertinent and explicitly incorporated constitutional values and modifiers. Its own provisions, context, purpose and the Constitution are inextricably connected and crucial components of the interpretive process. No sound legal basis exists for the isolation of parts of section 29(2) in seeking to understand the totality of the requirement of "reasonable practicability." As was stated in *Ermelo*, different parts of this subsection are mutually reinforcing.[23]

[46] It would be unreasonable to slavishly hold on to a language policy that has proved to be the practical antithesis of fairness, feasibility, inclusivity and the remedial action necessary to shake racism and its tendencies out of their comfort zone.[24] Section 29 of the Constitution applies in its totality to the educational sector. It is fundamentally about the right to education that we all have, the need for "reasonable measures" to be taken to make education "progressively available and accessible", and the impermissibility of racial discrimination, intended or otherwise, in all our educational institutions.[25] It is with the benefit of this perspective, that reasonable practicability must now be given meaning.

[47] After the words "where that education is reasonably practicable" in section 29(2) follow factors to be considered in an endeavour to give effect to "the right to receive education in the official language or languages of their choice". This subsection insists on "all reasonable educational alternatives" being explored. To avoid lip service to this fundamental right, concrete albeit broad options are alluded to

[23] *Ermelo* above n 1 at para 52.

[24] See id at para 53.

[25] Section 29(1)-(3) of the Constitution.

for "effective access" to it or its possible practical enjoyment. One stated possibility is the creation of new or the retention of some or all single medium institutions. The latter could for example have been done at all the pre-existing Afrikaans-speaking educational institutions.

[48] Whatever model is chosen must be informed by among others the constitutional obligation to make education accessible to all so as to free the potential of all our people. Also, our constitutional values ought to be central to every transformative or important measure we seek to implement. That is why section 29(2) requires "(a) equity; (b) practicability; and (c) the need to redress the results of past racially discriminatory laws and practices," to feature prominently in exploring the possibility of offering education in an official language of choice. They relate to equality, responsiveness and non-racialism. And all reasonable educational alternatives must be investigated within this context and with this purpose high on the list of instructive factors. The determination of this issue was contextualised by Moseneke DCJ in *Ermelo* in this manner:

> "[52] When it is reasonably practicable to receive tuition in a language of one's choice will depend on all the relevant circumstances of each particular case. . . . In short, the reasonableness standard built into section 29(2)(a) imposes a context sensitive understanding of each claim for education in a language of choice. . . . It must follow that when a learner already enjoys the benefit of being taught in an official language of choice the state bears the negative duty not to take away or diminish the right without appropriate justification.
>
> [53] The second part of section 29(2) of the Constitution points to the manner in which the state must ensure effective access to and implementation of the right to be taught in the language of one's choice. . . . In resorting to an option, such as a single or parallel or dual medium of instruction, the state must take into account what is fair, feasible and satisfies the need to remedy the results of past racially discriminatory laws and practices."[26]

[26] *Emerlo* above n 1 at paras 52-3.

[49] Our nation is still transitioning from an era of unrivalled racism and inequity that entailed the deliberate sub-standardisation of the quality of education for black people, to non-racialism, equity and high quality education for all. Educational institutions are also grappling with challenges of access to opportunities to study or enrol for high cost disciplines like medical sciences and engineering where space is very limited. For these reasons, effective access to the right to be instructed in an official language of choice must be given effect to, but without undermining equitable access, preserving exclusivity or perpetuating racial supremacy. It would be unreasonable to wittingly or inadvertently allow some of our people to have unimpeded access to education and success at the expense of others as a direct consequence of a blind pursuit of the enjoyment of the right to education in a language of choice. This, in circumstances where all could properly be educated in one common language.

[50] Reasonableness within the context of section 29(2) demands that equity, practicability and the critical need to undo the damage caused by racial discrimination, also be the intrinsic features of the decision-making process relating to effective access to education in a language of choice. For they are some of the decisive factors to which regard must be had even where "a learner already enjoys the benefit of being taught in an official language of choice".[27] Inequitable access and the unintended entrenchment or fuelling of racial disharmony would thus be the "appropriate justification"[28] for taking away or diminishing the already existing enjoyment of the right to be taught in one's mother tongue.

[51] At a conceptual level, dual medium institutions might well exist without necessarily nurturing or perpetuating unfair advantage or racial discrimination and its exceedingly harmful tendencies. When that is so, then the right to be taught in a

[27] Id at para 52.

[28] Id.

language of choice could be effectively accessible and implemented. That, by the way, is what the University did or hoped to achieve when it moved from a dispensation of Afrikaans as the sole medium of instruction to one where English and Afrikaans enjoyed equal status as media of instruction. It did so to facilitate equitable access for the previously excluded who are mostly better acquainted with English so that they too, could utilise this vital public resource for honing in their much-needed skills.

[52] Where the enjoyment of the right to be instructed in an official language of choice is achievable without undermining any constitutional aspiration or value, then the equity test might well have been met. The challenge could however arise when scarce resources are deployed to cater for a negligible number of students, affording them close, personal and very advantageous attention while other students are crowded into lecture rooms.[29] Where access, integration and racial harmony are imperilled by giving effect to the right to be educated in an official language of choice, then the criterion of reasonable practicability would not have been met.

[53] Reasonable practicability therefore requires not only that the practicability test be met, but also that considerations of reasonableness that extend to equity and the need to cure the ills of our shameful apartheid past, be appropriately accommodated. And that is achievable only if the exercise of the right to be taught in a language of choice does not pose a threat to racial harmony or inadvertently nurture racial supremacy.[30] That goes to practicability. The question then is, has the use of Afrikaans as a medium of instruction at the University had a comfortable co-existence with our collective aspiration to heal the divisions of the past or has it impeded the prospects of our unity in our diversity?[31] Has race relations, particularly among students, improved or degenerated as a consequence of the University's 2003

[29] This is alluded to in SCA judgment above n 17 at para 28.

[30] See *Ermelo* above n 1 at para 52.

[31] See that part of the report of Professor Jakes Gerwel quoted at [2].

language policy? If not, would it be "reasonably practicable" for the University to relegate Afrikaans to low-key utilisation in a constitutionally-permissible way?

[54] On that, Cachalia JA had the following to say:

> "[27] It follows, in my view, that even if a language policy is practical because there are no resource constraints to its implementation, it may not be reasonable to implement because it offends constitutional norms. The policy would therefore not meet the reasonably practicable standard. . . . A change in circumstances may materially bear on the question whether it is reasonably practicable to continue with the policy"[32]

[55] A conclusion that is embraced by many Afrikaners at all levels of the University community and in Council is that the use of Afrikaans as a parallel language of instruction unwittingly perpetuates segregation and racism – "because it offends constitutional norms". The policy does not work. And has lost support because many Afrikaner students prefer English which they see as a tool of communication that would enhance their prospects of being global players. Furthermore, it is quite telling that within two years of the implementation of the dual medium policy, the then Rector of the University, Professor Fourie, expressed concern about the unintended consequences of the parallel medium policy giving rise to or entrenching segregation in lecture rooms along racial lines. He would know whether that segregation was innocuous or toxic in its effect. Naturally, he would not have been concerned if it were not inimical to our shared constitutional vision of building "a common sense of nationhood".[33]

[56] Consistent with Professor Fourie's apparent discomfort, this policy eventually led to racial tension and concerns were raised by both staff and students about its injurious consequences. Its counter-productive effect featured regularly in progress

[32] SCA judgment above n 30 at para 27.

[33] Ministerial Policy above n 7 at Clause 3.

reports on dual medium policy implementation. Observations, daily experience, consultative processes in which Solidarity and AfriForum participated and empirical research, pointed to the need to progressively phase out Afrikaans as a medium of instruction.

[57] A particularly striking observation relates to what is not said about the need to consider "all reasonable alternatives". That process would require that equitable access and the need to redress the effects of racism be taken into account in exploring all reasonable alternatives. On the assumption that those alternatives do exist, they must be "reasonable". And that reasonableness requirement would have been met only when equity and the pursuit of non-racialism, listed in the section itself, were appropriately factored into the process of choosing the alternative. Both Solidarity and AfriForum were involved in the admittedly transparent, inclusive and robust consultative process. There is no suggestion that they, any stakeholder or language expert tabled any constitutionally-compliant alternative and that it was ignored.

[58] It is hard to imagine why the University would ignore known or available reasonable alternatives in wanton disregard for its constitutional obligations, particularly when the change it is effecting takes away a pre-existing entitlement. The only reasonable deduction to make from the non-implementation of any alternative that would allow the full retention of Afrikaans as a medium of instruction is that, but for its continued use in Education, Theology and tutorials, no other reasonable alternative was available for the University to consider.

[59] The University authorities', lecturers' and students' intimate connection to or daily experience on campus put them at a vantage point to understand better and speak with respectable authority on the true state of affairs in their own "house". Whether white Afrikaner students have demonstrated respect for the dignity of fellow students who are black in their daily interactions over the years, and whether a credible or vital connection has been made between racially segregated classes and the "racial tensions" alluded to, the University community would know better.

[60] It is common cause that the dual language policy was introduced by the University authorities, presumably in the genuine belief that President Mandela's fears, properly contextualised, would not materialise. Remember, he was concerned about the possibility of the use of Afrikaans resulting in the unjust deprivation of access to education for others. He said:

> "[N]on-speakers of Afrikaans should not be unjustly deprived of access within the system. And moreover, that the use and development of no single language medium should – either intentionally or unintentionally – be made the basis for the furtherance of racial, ethnic or narrow cultural separation".[34]

[61] The ministerial policy framework says that "the Ministry has built on this statement in the National Plan for Higher Education." Racial inclusivity and redressing the damage caused by racism and its tendencies are therefore a critical component of the ministerial policy. The implementation of any language policy that undermines these constitutional and policy objectives has to be desisted from.

[62] And the University is in effect saying that President Mandela's worst nightmares have come to pass. The use of Afrikaans has unintentionally become a facilitator of ethnic or cultural separation and racial tension. And this has been so from around 2005 to 2016. Its continued use would leave the results of white supremacy not being redressed but kept alive and well. It is for that reason that a policy revision or intervention has since become necessary. The link between racially segregated lectures and racial tensions has not been denied. While it may be practicable to retain Afrikaans as a major medium of instruction, it certainly cannot be "reasonably practicable" when race relations is poisoned thereby. Logic dictates that if there was a known way of addressing racial tension and other concerns relating to the use of Afrikaans as a medium of instruction, it would not only have been stated by the aggrieved parties but also implemented.

[34] Mandela above n 2.

[63] So, the challenge based on the correct meaning of "reasonably practicable" must fail. This then leaves us with the alternative, grounded on the alleged inconsistency between the ministerial policy framework and the University policy.

Inconsistency with ministerial policy?

[64] The Minister of Higher Education has the authority to determine a language policy framework for public higher education institutions.[35] The University's authority to develop its language policy derives from section 27(2) of the Act, which provides:

> "Subject to the policy determined by the Minister, the Council, with the concurrence of the Senate, must determine the language policy of a public higher education institution and must publish and make it available on request."

[65] The University's impugned language policy was determined by Council with the concurrence of Senate in terms of this statutory power. This policy is challenged on the basis that it flouts the essence of the ministerial policy and was therefore not developed "subject to" it. In particular, it is contended that the University's policy has strayed from the ministerial policy framework by phasing out Afrikaans as one of the two "dominant languages of instruction" when it should be retaining and not eroding it. That, by the way, is essentially the basis on which the High Court ruled in favour of AfriForum and Solidarity.

[66] It must be accepted as correct that the words "subject to" mean exactly that.[36] Whatever language policy a university determines in terms of section 27(2) of the Act, must take cue from and be fundamentally in sync with the ministerial policy.[37] The hallmarks of the former must be significantly traceable to or reconcilable with the

[35] Section 3 of the Act.

[36] See *S v Marwane* 1982 (3) SA 717 (A) at 747H-748B.

[37] Id.

latter.[38] That is the ordinary grammatical and correct meaning of the words "subject to" as used in this text. What must however not be lost sight of is that the applicability of the ministerial policy is, like all others, situational or context-specific. It largely depends for its relevance and effect on the particular circumstances that inform its existence as well as its compliance with our constitutional norms. When the situation has since changed in a way that would cause a university to undermine our Constitution and its foundational values if it were to adhere slavishly to parts of the policy framework, then a situation-sensitive and constitutionally-compliant policy-change would have to be effected.

[67] There can be no denying that Afrikaans is indeed a highly developed language of scholarship and science. Like all our official languages, it is truly a national resource to be treasured by all of us. The full support for the retention of Afrikaans as "a medium of academic expression and communication in higher education,"[39] was no doubt informed by what was known and hoped for then. And so was the commitment to ensure that "the capacity of Afrikaans to function as such medium is not eroded".[40] That position was thus inspired by the context of that time.

[68] Would these policy provisions prevent an institution of higher learning from revising its policy and prescribing English as the only medium of instruction even where no student wanted to be taught in Afrikaans? What if racial polarisation or tension has for years proved to be a direct consequence of using Afrikaans as the second medium of instruction and all reasonable endeavours to address it have failed? What if there were widely televised incidents of crass racism at the University, perpetrated by white Afrikaner students against black students or black staff members that drove a chill down the spines of well-meaning South Africans of all races?[41]

[38] Id.

[39] Ministerial Policy above n 7 at Clause 15.4.

[40] Id.

[41] Soudien "Who Takes Responsibility for the 'Reitz Four'? Puzzling our Way Through Higher Education Transformation in South Africa" (2010) 106 *South African Journal of Science* 1.

Would the University still be constrained by the ministerial policy framework from acting in line with changed circumstances and the Constitution?[42]

[69] Be that as it may, the ministerial policy framework highlights the need to "ensure that a language of instruction is not a barrier to access and success".[43] And there has already been a concern raised about access. One crucial aspect of the ministerial policy is the constitutional proviso "that these rights may not be exercised inconsistently with any provision of the Bill of Rights".[44] The other in-built constitutional qualifiers are the section 29(2) criteria like "reasonably practicable" as well as "equity, practicability and the need to redress the results of the past racially discriminatory laws and practices".[45]

[70] It follows from the language of the ministerial policy that it is meant to operate subject to these internal modifiers which it has expressly incorporated. In other words, if it would not be consistent with our core values or any provision of the Bill of Rights to develop or retain an institutional policy that retains Afrikaans as a medium of instruction, then the ministerial policy framework itself demands that a constitutionally-conformant institutional policy be determined. The express incorporation of constitutional norms and imperatives is meant to serve that purpose. Section 27(2) does not prescribe policy. It effectively recognises that section 3 vests power in the Minister to provide nothing more than a policy framework that universities must have regard to in developing their own policies in a way that is informed by the peculiarities and realities on the ground. As is the case with all other policy-determinations, the ministerial policy basically cautions universities not to develop their own language policy in total disregard for it and the constitutional provisions that are relevant to language policy.

[42] See [52] to [53].

[43] Ministerial Policy above n 7 at Clause 15.4.4.

[44] See id at clause 3.1.1 (quoting section 30 of the Constitution).

[45] Id at Clause 3.1.2.

[71] The ministerial policy framework provides that retention could be "ensured through a range of strategies" like "the use of Afrikaans as a primary but not a sole medium of instruction".[46] But, again this is to be done on condition that "language of instruction is not a barrier to access"[47] and that Afrikaans does not become an inadvertent tool for racial discrimination.[48]

[72] There is nothing in the framework to suggest that its preferred language policy option is to be followed by universities at all costs. Constitutional imperatives like access, equity and inclusivity could dictate a radical departure from the first prize or preferred option. That is what the University, supported by some Afrikaner students, staff members and University leaders, was constrained to do.

[73] What was done in effect heeds former President Mandela's wisdom-laden cautionary note delivered to the then exclusively or predominantly Afrikaans medium Stellenbosch University. This caution is an integral part of the same ministerial policy framework that expresses full support for the use of Afrikaans and commits to its retention and non-erosion.

[74] It bears emphasis that one cannot even begin to contend for a particular language policy stance or nuance without navigating her way around the qualifying aspects of section 29(2) of the Constitution and other constitutionally-inspired clauses of the ministerial policy. Inspired by this section, *Ermelo* rightly says:

> "In resorting to an option, such as a single or parallel or dual medium of instruction, the State must take into account what is fair, feasible, and satisfies the need to remedy the results of the past racially discriminatory laws or procedures."[49]

[46] Id at Clause 15.4.4.

[47] Id.

[48] Id.

[49] *Ermelo* n 1 above at para 53.

[75] Here, the University community, Council and Senate in particular, have satisfied themselves that instead of the dual language policy brightening up the prospects of redressing the damage caused by apartheid, it threatens to perpetuate racial discrimination or disharmony. The retention of the dual medium of instruction was neither considered to be fair nor feasible nor to satisfy the need to remedy the results of apartheid laws and practices. So, the University was at risk of violating poignant constitutional provisions, and the ministerial language policy, properly understood. Nobody is to blame for the out-turn of racially segregated lectures. It is the policy itself that yielded deleterious and certainly unintended consequences. The good sought to be achieved through a parallel medium of instruction, has backfired. The retention of that policy is therefore no longer reasonably practicable since it does not help students "to build a common sense of nationhood consistent"[50] with the ministerial policy framework in its entirety.

[76] The University's new language policy responds to the materialised warning, sounded by the ministerial policy framework, that unintended consequences could flow from a well-intentioned attempt to be as inclusive and sensitive as institutions of learning should always strive to be. Unjust denial of access and racial and narrow cultural segregation has become the consequence of seeking to have Afrikaans speaking students enjoy their own constitutional right to be taught in their official language of choice. And the likelihood of unjust exclusion and racial discrimination, alluded to in the ministerial framework, is so important that it is repeated in clause 10 of the self-same policy.[51] Not only does this cautionary note resonate with the section 29(2) internal qualifiers, imbedded in that policy, but also with what caused the University to scale down the use of the Afrikaans language. Afrikaans as a medium of instruction has unwittingly become an instrument of racial or cultural division and discrimination.

[50] Ministerial Policy above n 7 at para 3.

[51] That clause cautions against "non-Afrikaans speakers being unfairly denied access within the system or the use and development of the [Afrikaans] language as a medium of instruction wittingly or unwittingly becoming the basis for racial, ethnic or cultural division and discrimination."

[77] No criticism can justifiably be levelled at the University authorities on the basis that they are unfair, harsh, insensitive or vindictive. On the contrary, they have everything to be proud of for efficiently and considerately navigating this troubled and fragile ship to its correct constitutional destination, under challenging circumstances. A flexible, pragmatic and reasonable approach has been adopted for the implementation of a policy that unavoidably diminishes the status of Afrikaans as a medium of instruction. That this flexibility has left elements of its use intact in areas like tutorials, Education and Theology, does not detract from the soundness of the principle behind the new policy and the validity of its adoption. This accommodation is demonstrative of the University's commitment to uphold applicable constitutional norms in pursuit of what is in the best interests of all the people it serves.

[78] It was the use of Afrikaans as a second major medium of instruction that frustrated racial integration and generated racial tension. When the majority of white Afrikaner learners use English like all other students and only a few use Afrikaans, the prospects of we being "united in our diversity" and building "a united and democratic South Africa", alluded to by Professor Gerwel,[52] would be enhanced.

[79] The University's language policy was determined "subject to" and is thus consistent with the ministerial policy framework and the Constitution of the Republic. Its adoption is lawful and valid.

Costs

[80] There is no reason to interfere with the cost orders made by the SCA. Solidarity has failed to establish its standing and AfriForum has again been unsuccessful. The cost orders made by the SCA in the exercise of its discretion must, for these reasons, be left undisturbed.

[52] See the report annexed to the ministerial policy, which draws from the preamble to our Constitution and contains the advice that the Committee led by Professor Gerwel was asked to give by Minister Asmal.

[81] In the result the following order is made:

1. Leave to appeal is refused.
2. There will be no order as to costs.

FRONEMAN J (Cameron J and Pretorius AJ concurring):

[82] I have had the privilege of reading the Chief Justice's judgment (main judgment). I differ from him in that I consider that it would have been a wiser course for this Court to have set this matter down for hearing and then, in the interests of justice, to have granted leave to appeal. In my view this would have enhanced the legitimacy of the outcome of the matter in many ways. Nothing would have been lost and much would have been gained.

[83] Had that approach been followed, we would also have been in a better position to assess the merits of the appeal. Like the Supreme Court of Appeal, the main judgment accepts the University's assertion that it is impossible to provide education in a language of choice without indirectly discriminating on the basis of race.[53] This has enormous implications beyond the confines of the University's campus. It sanctions an approach that deprives speakers of one of our official languages of the constitutional right to receive education in the language of their choice. This is not an issue that has been dealt with authoritatively by this Court before. It seems self-evident that it is important, if this approach is to be sanctioned, to determine the factual and normative boundaries within which the Constitution will allow it. This has not been done – which is unfortunate because, in my view, the applicants' prospects of success are not as bleak as the main judgment suggests.

[84] This is a dissenting judgment that concerns language. It is best to acknowledge and take responsibility for "one's own ideological positioning within the disciplinary

[53] See [16] and [55].

constraints and commitments of one's craft".[54] My home language is Afrikaans and I went to a parallel medium of instruction school in Bloemfontein. That inevitably colours my perspective – as their own different backgrounds do for that of my colleagues – but the hope is that rational and critical self-reflection keeps our individual subjectivity at bay in pursuit of detached legal reasoning.

Central issue

[85] To me the central constitutional issue to be determined is this: what circumstances justify preventing someone from receiving instruction in the official language of his or her choice? That enquiry involves two of the issues addressed in the main judgment – the proper interpretation of section 29(2) of the Constitution and the role that ministerial policy has to play in the formulation of language policy at educational institutions.

Context

[86] I will start with context, as the main judgment does.

[87] The main judgment rightly emphasises the obligation of white Afrikaans speakers to ensure that their desire to protect their language does not disadvantage others. This is another necessary and constant reminder "that the past is not done with us; that it is not past; that it will not leave us in peace until we have reckoned with its claims to justice".[55] That inevitable reckoning must take place.

[88] However, as J R R Tolkien[56] reminds us, it is necessary "to distinguish, as far as that is possible, between languages as such and their speakers" and to remember

[54] *Salem Party Club v Salem Community* [2017] ZACC 46 at para 68.

[55] *Daniels v Scribante* [2017] ZACC 13; 2017 (4) SA 341 (CC); 2017 (8) BCLR 949 (CC) at para 154.

[56] Tolkien was born in Bloemfontein: Carpenter *J R R Tolkien: A Biography* (HarperCollins, London 2016) at 25. He would later say that "[his] cradle tongue was English (with a dash of Afrikaans)": J R R Tolkien "English and Welsh" in C Tolkien *The Monsters and the Critics and Other Essays* (HarperCollins, London 2013) at 191.

that languages "are not hostile one to another".[57] It is only when "men are hostile [that] the language of their enemies may share their hatred".[58] In the present matter, it is said to be impossible to distinguish the use of Afrikaans from its speakers, at least in respect of white students at the University. It is important that the burden of the undeniable injustices perpetrated by white Afrikaans speakers in the past, which are necessarily and justifiably condemned, should not be visited disproportionately and uncritically on future generations of white Afrikaans speakers. Of course, their own role in the possible perpetuation of racial injustice must be scrutinised; I will return to this aspect in due course.

[89] Because I fully endorse its analysis and exposition as well as its importance in setting the present matter in its proper context, I consider it necessary to repeat the passage from the Gerwel Committee's report quoted in the main judgment:

> "The level of development attained by the Afrikaans language is in demonstrable ways connected to aspects of history of colonial-settler domination and particularly in its latter phases to the dominant position of a sector of the Afrikaans-speaking communities in the apartheid order. Afrikaans became the language most closely associated with the formalisation and execution of apartheid. To a great proportion of South Africans it probably calls up first and foremost associations of discrimination, oppression and systematic humiliation of others.
>
> These associations understandably often affect the approaches people take to the role and future of Afrikaans. That history of association with racism and racially based practices is often one that Afrikaans-speaking communities will have to confront and deal with. That is part of the challenge of healing, reconciliation and reparation our society will continue to face for a considerable time to come."[59]

[90] What the main judgment neglects to mention, however, is that the Gerwel Committee ultimately recommended that the universities in Stellenbosch and

[57] Tolkien id at 178.

[58] Id at 179.

[59] See [2].

Potchefstroom be designated as "custodians" of academic Afrikaans.[60] The Ministry rejected this suggestion. It nevertheless acknowledged "that Afrikaans as a language of scholarship and science is a national resource" and therefore supported "the retention of Afrikaans as a medium of academic expression and communication in higher education" more broadly.[61] In its view, the sustainability of Afrikaans as a medium of academic expression and communication could be ensured "through a range of strategies, including the adoption of parallel and dual language medium options, which would on the one hand cater for the needs of Afrikaans language speakers and, on the other, ensure that language of instruction is not a barrier to access and success".[62]

[91] The context on which the main judgment exclusively concentrates is the use of Afrikaans as an instrument of oppression by a racist and nationalist government.[63] It refers only to Afrikaans single medium universities[64] and seeks to contrast the historic imposition of Afrikaans on the speakers of other languages with a modern refusal to "impose any of the home languages of those in government" on Afrikaans speakers.[65] It makes no reference to the state's constitutional obligation to advance the other official languages.[66]

[92] Again, the ministerial policy exhibits a richer understanding. It recognises that, in addition to its use in the oppression of the black community, language also featured as an instrument of control in the second of the "two great political struggles that

[60] Ministerial Policy above n 7 at clause 15.4.1.

[61] Id at clause 15.4.

[62] Id at clause 15.4.4.

[63] See [1] to [7].

[64] See [3].

[65] See [7].

[66] See section 6(2) of the Constitution, which provides:

> "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."

defined South Africa in the twentieth century" – the struggle waged by "Afrikaners against British imperialism".[67]

[93] The main judgment's emphasis on the institutional privileges that Afrikaans enjoyed – and, it must be said, still enjoys – exhibits no appreciation of the irony that the language favoured by the University, English, has long been equally, if not more, privileged.[68] And in that failure it loses the perspective that Afrikaans' struggle for recognition was in the first place a struggle against the dominance of English – a struggle that it shares with other official languages. Writing extra-judicially on the genesis of the inclusion of language rights in the Constitution, an "erstwhile negotiator" of our constitutional dispensation and former member of this Court, Sachs J, remarked that—

> "[t]o speakers of other languages . . . [t]he enforced omnipresence of English could be seen as inconvenient and suffocating, and as inducing a sense of disempowerment and exclusion. In a sense, all language rights are rights against English, which in the modem world is such a powerful language that it needs no protection at all and tends to resist being slotted into any system of rights".[69]

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[67] Ministerial Policy above n 7 at clause 2.

[68] English has been an official language in South Africa for more than a century: see section 137 of the South Africa Act 1909. Afrikaans only subsequently became an official language nearly two decades later: see section 1 of the Official Languages of the Union Act 8 of 1925.

[69] Sachs "The Language Question in a Rainbow Nation: The South African Experience" (1997) 20 *Dalhousie Law Journal* 5 at 2 and 6-7. He also referred, at 10, to the strategic balances that had to be struck:

> "The first strategic balance was between the principles of non-diminution and of extension. Existing rights in relation to privileged languages should not be reduced, while at the same time there should be an expansion of rights in relation to underprivileged languages.
>
> The second strategic balance was between rights and practicality. Rights and practicality should not be seen as principles in collision, but rather as mutually interacting concepts. The rights become meaningful to the extent that they are claimed in a reasonable fashion, and to the degree that all reasonable steps are taken to ensure their realization."

When considering the dominance of English, it may be worth recalling that the language – like all languages – has a "dual character" in the sense that "it is both a means of communication and a carrier of [British, and particularly English] culture" and that its imposition in Africa and elsewhere by colonisers intent on controlling the "social production of wealth through military conquest and subsequent political dictatorship" thus represented an attempt to dominate "the mental universe of the colonised" in order to ensure the effectiveness of that economic and political control: Wa Thiong'o *Decolonising the Mind: The Politics of Language in African Literature* (East African Educational Publishers Ltd, Nairobi 2004) at 13-6.

[94] The ministerial policy also recognises the Constitution's demand that the marginalisation of indigenous languages in the past be practically and positively addressed[70] and that the existing situation favouring Afrikaans and English should only endure "until such time as other South African languages have been developed to a level where they may be used in all higher education functions".[71]

[95] Thus, while I agree that context is important, I am concerned that an incomplete and partial rendering of that context may skew what follows.

The question of racial discrimination

[96] I am not aware that this Court has yet concluded that the mere exercise of a constitutionally-protected language right can amount to unfair racial discrimination that would necessarily justify taking away that right. This is a novel and important issue.

[97] The *Ermelo* case comes closest to addressing the issue, but certainly did not decide the point. In discussing section 29(2) of the Constitution,[72] Moseneke DCJ stated:

> "The provision is made up of two distinct but mutually reinforcing parts. The first part places an obvious premium on receiving education in a public school in a language of choice. That right, however, is internally modified because the choice is available only when it is 'reasonably practicable'. When it is reasonably practicable to receive tuition in a language of one's choice will depend on all the relevant circumstances of each particular case. They would include the availability of and accessibility to public schools, their enrolment levels, the medium of instruction of the school its governing body has adopted, the language choices learners and their parents make and the curriculum options offered. In short, the reasonableness standard built into section 29(2)(a) imposes a context-sensitive understanding of each

[70] Ministerial Policy above n 7 at clause 3.

[71] Id at clause 15.1.

[72] See [41].

> claim for education in a language of choice. An important consideration will always be whether the state has taken reasonable and positive measures to make the right to basic education increasingly available and accessible to everyone in a language of choice. It must follow that when a learner already enjoys the benefit of being taught in an official language of choice the state bears the negative duty not to take away or diminish the right without appropriate justification.
>
> The second part of section 29(2) of the Constitution points to the manner in which the state must ensure effective access to and implementation of the right to be taught in the language of one's choice. It is an injunction on the state to consider all reasonable educational alternatives which are not limited to, but include, single medium institutions. In resorting to an option, such as a single or parallel or dual medium of instruction, the state must take into account what is fair, feasible and satisfies the need to remedy the results of past racially discriminatory laws and practices."[73]

[98] The ultimate legal issue in *Ermelo* was whether a provincial department of education had the authority under section 22 of the South African Schools Act[74] to revoke the language policy adopted by a school's governing body and, if it had, whether that authority had been exercised properly.[75] The facts also differed: at stake was a change from single medium Afrikaans instruction to parallel instruction in both English and Afrikaans.[76] There was thus no "taking away" of a language right; at worst, there was merely a diminution of that right (assuming that instruction in English at a school where instruction in Afrikaans is also offered can ever be described as somehow diminishing the Afrikaans instruction). Here, however, the change was from parallel medium instruction to single medium instruction: a clear "taking away".

[99] So even if *Ermelo* is authority for the proposition that section 29(2) of the Constitution allows one to be deprived of the constitutional right to be educated in the

[73] *Ermelo* above n 1 at paras 52-3.

[74] 84 of 1996.

[75] *Ermelo* above n 1 at para 41.

[76] Id at para 26.

language of one's choice, it says nothing about the circumstances in which such deprivation would be justified. And it says nothing about whether the mere innocent exercise of that choice by a person of one race can or should be sanctioned as racial discrimination.

[100] The Supreme Court of Appeal held that the applicants' failure to challenge the implementation of the language policy somehow prevented them from arguing about the effect of the policy's adoption, which was the central aspect of their challenge on review.[77] Much of the discussion in the judgment of the Supreme Court of Appeal and in written argument in this Court also turned on whether the adoption of the new language policy amounted to administrative or executive action and the effect of this determination on the interpretation and application of section 29(2) of the Constitution.

[101] The applicants sought review of the adoption of the language policy partly on the ground that the adoption of the policy violated the language rights of Afrikaans speakers and amounted to unfair discrimination. I see no contradiction between the relief sought and the grounds for review in the founding affidavit. Had the applicants been successful in having the decision to adopt the new language policy reviewed and set aside, it would have necessarily followed that the implementation of the policy could not proceed. The emphasis placed in the Supreme Court of Appeal's judgment and the respondents' submissions on the fact that the implementation and constitutionality of the policy was not directly attacked on review seems to me to miss this obvious point.

[102] Whether the adoption of the policy amounted to administrative or executive action should play no role in the proper interpretation of section 29(2). At least there now seems to be agreement on that.

[77] SCA judgment above n 17 at paras 31-2.

[103] Both parties accept that the enquiry as regards compliance with section 29(2) is objective. The applicants contend that, because of this, it does not matter whether the adoption of the policy was administrative or executive action, although they take the view that it was administrative action. They argue that the less exacting standard does not apply "when it comes to interpreting the Constitution". The University, for its part, contends that it was executive action, but does not suggest that its interpretation of the Constitution deserves deference. Its position is instead that an appropriate degree of deference applies to its assessment of the factual circumstances relating to the application of the "reasonable practicability" criterion.

[104] The Supreme Court of Appeal held that the decision to adopt the language policy was executive in nature and neither adversely affect the rights of any person nor had the capacity to do so because it would only have legal consequences when implemented, "which the review is not concerned with".[78] It therefore proceeded on the basis that the only review ground was that of legality: "whether, objectively viewed, the decision was rationally connected to the purpose for which the power was given".[79]

[105] The Court interpreted section 29 as comprising both legal and factual elements:

> "The legal standard is reasonableness, which of necessity involves a consideration of constitutional norms, including equity, redress, desegregation and non-racialism. The factual criterion is practicability, which is concerned with resource constraints and the feasibility of adopting a particular language policy.
>
> It follows, in my view, that even if a language policy is practical because there are no resource constraints to its implementation, it may not be reasonable to implement because it offends constitutional norms. The policy would therefore not meet the reasonably practicable standard.
>
> . . .

[78] Id at para 18.

[79] Id at para 19.

> [The University's] assessment that it is no longer reasonably practicable to continue with the 2003 [policy] is, therefore, one that a court of law should be slow to interfere with on review."[80]

[106] In their written submissions to this Court, the parties disagree with each other, and with the Supreme Court of Appeal, as to the objective criteria for compliance with section 29(2). The applicants submit that—

> "[s]ection 29(2) does not impose a dual requirement that such education must be practicable *and* that such education must be reasonable. It imposes a single requirement: the education must be 'reasonably practicable'. Differently expressed, there is no self-standing requirement of reasonableness since 'reasonably' qualifies what is 'practicable'. . . . The relevant considerations are practical rather than normative".

[107] The respondent contends that "similar to section 25 of the Constitution, the inquiry as regards what is reasonably practicable is more demanding than merely imposing a rationality criterion, but less demanding than a proportionality analysis".

[108] The parties also have differing perspectives from each other, and the judgment of the Supreme Court of Appeal, on the additional questions relating to educational alternatives that need to be considered: whether only resource-related factors relate to the section 29(2) criterion; whether there is an internal limitation in section 29(2); and what role other constitutional rights to language, equality and culture play in determining the proper objective criteria.

[109] From different and opposing perspectives, then, neither party accepts the Supreme Court of Appeal's interpretation of the criteria laid down in section 29(2).

[80] Id at paras 26-8.

[110] As I understand the main judgment, it accepts the Supreme Court of Appeal's interpretation that the "reasonable practicability" requirement contains both factual and legal elements, the latter to be tested against constitutional norms.[81] I would have preferred more detailed debate and oral argument on this, but for present purposes I am constrained to accept that approach as correct. But the main judgment goes on to accept the correctness of the University's own assessment that the continuation of the existing policy amounted to racial discrimination.[82] In my view that is a step too far.

[111] One of the applicants' grounds of review was that this assessment in itself amounted to unfair discrimination against white students exercising their choice of instructional language.

[112] This squarely raises a question of great constitutional and legal import: can the exercise of one's constitutional right to choice of language in tertiary education result in discrimination proscribed by the Constitution? That is an objective legal question to be determined by a court. The University can claim no deference to its assessment of this legal question.[83] Whether the final assessment ought to take the usual form of a two-stage enquiry (whereby the first question is whether a rights-limitation has been established and the second is whether, if so, that limitation is justifiable) or instead should proceed under section 9(3) of the Constitution does not, for present purposes,

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[81] See [53].

[82] See [59], at which it is said that—

> "[t]he University authorities, lecturers and students' intimate connection to or daily experience on campus put them at a vantage point to understand better and speak with respectable authority on the true state of affairs in their own 'house'. Whether white Afrikaner students have demonstrated respect for the dignity of fellow students who are black in their daily interactions over the years, and whether a credible or vital connection has been made between racially segregated classes and the 'racial tensions' alluded to, the University community would know better".

[83] See, for example, *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Ltd* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) at para 45; *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* [2014] ZACC 12; 2014 (4) SA 179 (CC); 2014 (6) BCLR 641 (CC) at para 42; *MEC for Education, KwaZulu-Natal v Pillay* [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) at para 81; and *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para 47.

matter much. The crucial point is that this assessment must be made by this Court rather than the very institution that stands accused of discrimination.

[113] On the papers, there is no suggestion that all, most or even a substantial portion of white Afrikaans-speaking students being taught in that language have been guilty of racial discrimination. Any unfair discrimination was instead that of the University in its provision of instruction to different language groups and control of other activities on campus. It is thus for the University to provide a factual and normative justification for depriving innocent users of an official language of the right to receive education in that language.

[114] There are factual issues that are neither clear to me nor addressed in the main judgment. For example, if there were individual students or members of staff who were themselves guilty of racial discrimination, whether in the delivery and receipt of Afrikaans instruction or otherwise, why was it impracticable to discipline them? What exactly made it impossible to eradicate the racial discrimination? Did it have anything to do with the reaction to the continued use of Afrikaans in lectures by those who preferred another language? If so, was the reasonableness of that reaction assessed? Was an attempt made to address it by other measures?

[115] In the absence of evidence that the students receiving instruction in the language of their choice were themselves guilty of racial discrimination in the receipt of that instruction, what is the normative justification for visiting a sanction upon them? It is not at all obvious to me – and the main judgment does not address this question directly.

[116] All these questions should have formed part of this Court's own assessment of the legal question of racial discrimination. It may well be that, had the issues raised been fully ventilated, the conclusion of factual and normative impracticability would have been found justified. The applicants' failure to present practical alternatives may well have played an important part in that assessment.

[117] However, that assessment cannot now be made because this matter is being decided, without a hearing, by way of a summary refusal of leave to appeal.

A hearing and leave to appeal

[118] This Court will grant leave to appeal when it is "in the interests of justice" to do so.[84] An appeal's prospects of success are obviously an important consideration in making the decision whether to grant leave, "[b]ut they are not the only issue to be considered when the interests of justice are being weighed".[85] Even had this been as "open and shut" a case as the main judgment holds, the interests of justice would have been better served by holding a hearing before deciding whether to grant leave to appeal.[86]

[119] Our Constitution represents a negotiated revolution based on a historical compromise.[87] It was and is subjected to criticism across racial lines for its alleged

[84] See section 167(6) of the Constitution and, for example, *Fraser v Naude* [1998] ZACC 13; 1999 (1) SA 1 (CC); 1998 (11) BCLR 1357 at para 7.

[85] *Fraser* id. See also, for example, *Snyders N.O. v Louistef (Pty) Ltd* [2017] ZACC 28; 2017 (6) SA 646 (CC) at para 14; *Radio Pretoria v Chairperson, Independent Communications Authority of South Africa* [2004] ZACC 24; 2005 (4) SA 319 (CC); 2005 (3) BCLR 231 (CC) at para 22; *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* [2003] ZACC 19; 2004 (1) SA 406 (CC); 2003 (12) BCLR 1333 (CC) at para 3; *Islamic Unity Convention v Independent Broadcasting Authority* [2002] ZACC 3; 2002 (4) SA 294 (CC); 2002 (5) BCLR 433 (CC) at para 18; *National Education Health and Allied Workers Union v University of Cape Town* [2002] ZACC 27; 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) at para 25; *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at para 12; and *Brummer v Gorfil Brothers Investments (Pty) Ltd* [2000] ZACC 3; 2000 (2) SA 837 (CC); 2000 (5) BCLR 465 (CC) at para 3.

[86] This Court has regularly held hearings in matters in which leave to appeal is ultimately refused. In the past year alone, this approach was adopted in *Municipal Employees Pension Fund v Natal Joint Municipal Pension Fund (Superannuation)* [2017] ZACC 43; *S v Barlow* [2017] ZACC 27; 2017 (2) SACR 535 (CC); 2017 (11) BCLR 1357 (CC); *Department of Home Affairs v Public Servants Association* [2017] ZACC 11; (2017) 38 ILJ 1555 (CC); 2017 (9) BCLR 1102 (CC); and *Cape Town City v Aurecon SA (Pty) Ltd* [2017] ZACC 5; 2017 (4) SA 223 (CC); 2017 (6) BCLR 730 (CC).

[87] See, for example, *Agri SA v Minister for Minerals and Energy* [2013] ZACC 9; 2013 (4) SA 1 (CC); 2013 (7) BCLR 727 (CC) at para 105; *Albutt v Centre for the Study of Violence and Reconciliation* [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC) at para 54; *Masetlha v President of the Republic of South Africa* [2007] ZACC 20; 2008 (1) SA 566 (CC); 2008 (1) BCLR 1 (CC) at para 238; *Mashavha v President of the Republic of South Africa* [2004] ZACC 6; 2005 (2) SA 476 (CC); 2004 (12) BCLR 1243 (CC) at para 20; *President of the Republic of South Africa v Hugo* [1997] ZACC 4; 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) at para 103; *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) at para 10; *Azanian Peoples Organisation (AZAPO) v President of the Republic of South Africa* [1996] ZACC 16;

failure to fulfil different and conflicting aspirations and expectations.[88] For some people, particularly white Afrikaans speakers, the result in this case – the loss of the right to receive tertiary education in Afrikaans – may be seen as a betrayal of their expectations about the Constitution's guarantees in respect of their home language. For others, this result may be seen as a small step towards the transformation promised in the Constitution. It would have been better to confront these contradictions. In *Albutt*, Ngcobo CJ stated:

> "[T]his is not a case where the prospects of success are necessarily determinative of the interests of justice. The issue raised in the application for leave to appeal is of considerable constitutional importance . . . . It is an issue which goes to the 'unfinished business' of nation-building and national reconciliation. It is an issue which calls for an early and definitive decision of this Court."[89]

[120] The present matter also concerns "unfinished business" under the Constitution, at least for a significant portion of white Afrikaans speakers. Summarily disposing of this matter, without an oral hearing, will unfortunately strengthen, in certain quarters, what Sachs J memorably described as—

> "a genuinely-held, subjective fear that democratic transformation will lead to the down-grading, suppression and ultimate destruction of the Afrikaans language and the marginalisation and ultimate disintegration of the Afrikaans-speaking community as a vital group in South African society".[90]

1996 (4) SA 671 (CC); 1996 (8) BCLR 1015 (CC) at para 2; and *S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 307.

[88] Compare Giliomee *Historian: An Autobiography* (Tafelberg, Cape Town 2016) at chapter 14 (arguing that President de Klerk promised his voters power-sharing in the 1992 referendum and then surrendered it) with Modiri "Race, Realism and Critique: The Politics of Race and *AfriForum v Malema* in the (In)Equality Court" (2013) 130 *SALJ* 274 at 289 (suggesting that "the new legal order in post-1994 South Africa" may have "inaugurate[d] a bill of rights and legal order that . . . protect[s] and defend[s] the interests and values of whites").

[89] *Albutt* above n 87 at para 29.

[90] *Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* [1996] ZACC 4; 1996 (3) SA 165 (CC); 1996 (4) BCLR 537 (CC) (*Gauteng Legislature*) at para 48.

[121] The future of Afrikaans as a language of instruction is contested, not only at the University of the Free State, but also at universities in Pretoria and Stellenbosch.[91] It would have been in the interests of justice for this Court to allow those institutions a say, as intervening parties or friends of the court, before foreclosing the pertinent constitutional and legal issues in the manner that it has now done.

[122] The same applies to organisations that aspire to a more inclusive approach to Afrikaans than the applicants, AfriForum and Solidarity. White Afrikaans speakers are becoming a minority of Afrikaans-language users, and there is now greater awareness of those Afrikaans speakers whose role in the origin and history of the language has been shamefully marginalised.[92] It is vital that their voices be heard about the future of Afrikaans and how that future will affect them. It would be presumptuous of me, as a white Afrikaans speaker, to attempt to speak on their behalf, but I would have valued their input. It might very well be that many or most support the University's decision, but either way their contribution would have enhanced the legitimacy of the outcome in this matter.

[123] Of similar value would have been the input of users of other official languages. In *Ermelo* Moseneke DCJ referred to what he called the "collateral irony" in that case: that learners and their parents preferred English to their own home languages as a medium of instruction.[93] The reason for the acceptance of one language with a colonial heritage, but the rejection of another, could have been clarified. But apart from that, the implications of the conclusion that the use of an official language by people of one race constitutes discrimination is, I imagine, also important for those who wish to advance the cause of other official languages as media of instruction. Would the same kind of reasoning apply to their cause? If not, what distinguishes their cause from that of white Afrikaans speakers? I suspect that there may be good

[91] See, for example, *Kanse v Chairman of the Senate of the Stellenbosch University* [2017] ZAWCHC 119.

[92] See [50] to [51].

[93] *Ermelo* above n 1 at para 50.

reasons, reflecting the historic and still-pervasive inequality that afflicts our society, which would justify differential treatment – but would it not be in the interests of justice to have given substantive consideration to them?

[124] There is a total lack of appreciation in the main judgment that Afrikaans remains a minority language and that there is considerable foreign and international authority in support of the proposition that minority languages deserve special measures for their protection.[94]

[125] It would have served the interests of justice better to have granted leave to appeal after an oral hearing. A public hearing in this Court, where important and emotive issues are debated rationally and objectively, would have allayed any unjustified fears that people may harbour. The merits of the appeal should have been considered in a manner that took into account the wider context and the interests of those others to whom I have referred. This has not been done, to my deep regret.

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[94] For example, after the First World War, the Permanent Court of International Justice developed a jurisprudence on treaties intended to protect minority rights that is of "lasting importance in human rights law": Higgins "The International Court of Justice and Human Rights" in her *Themes and Theories: Selected Essays, Speeches, and Writings in International Law* (OUP, Oxford 2009) vol 1 at 639-42. In one particularly well-known case, the Court considered that—

> "[t]he idea underlying the treaties for the protection of minorities is to secure for certain elements incorporated in a State, the population of which differs from them in . . . language . . . the possibility of living peaceably alongside that population and co-operating amicably with it, while at the same time preserving the characteristics which distinguish them from the majority, and satisfying the ensuing special needs.
>
> In order to attain this object, two things were regarded as particularly necessary, and have formed the subject of provisions in these treaties.
>
> The first is to ensure that nationals belonging to . . . linguistic minorities shall be placed in every respect on a footing of perfect equality with the other nationals of the State.
>
> The second is to ensure for the minority elements suitable means for the preservation of their . . . peculiarities, their traditions and their . . . characteristics.
>
> These two requirements are indeed closely interlocked, for there would be no true equality between a majority and a minority if the latter were deprived of its own institutions, and were consequently compelled to renounce that which constitutes the very essence of its being as a minority."

Minority Schools in Albania [1935] PCIJ Ser A/B No 64 at 17. And domestic courts have been no less aware of these concerns. The Supreme Court of Canada, for example, has stressed that, in a minority language community, institutions that provide formal instruction in the community's language are both primary instruments of linguistic transmission and vital community centres: *Association des parents de l'école Rose-des-vents v British Columbia (Education)* 2015 SCC 21; [2015] 2 SCR 139 at para 27.

Disposition

[126] On the papers as they stand, I would have granted leave to appeal; allowed the appeal; reserved costs; and referred the matter back to the High Court in order to allow—

(a) the University to present evidence on:

(i) the nature and extent of any racial discrimination by students receiving instruction in Afrikaans;

(ii) the nature and extent of any racial discrimination by staff lecturing in Afrikaans;

(iii) the steps taken to address these acts of racial discrimination, in the form of disciplinary proceedings or other measures; and

(iv) if none of these measures were taken, the reason for not doing so.

(b) the applicants to present evidence on the practicable alternatives available to continue parallel medium instruction that would not result in indirect racial discrimination.

The future for other official languages

[127] I sincerely hope that I am proved wrong, but I fear that the main judgment's reasoning and outcome do not bode well for the establishment and nurturing of languages other than Afrikaans and English as languages of higher learning. It may well be that it is better for the country to concentrate on the inclusiveness that English might bring as the sole language of instruction – but that is a choice that ought to be made by the public rather than this Court. From my perspective, this Court's constitutional duty is instead to create space for other official languages. That is what true unity in diversity entails.

[128] In conclusion, I turn to the implications of the main judgment for the future of Afrikaans. This part of the judgment is in Afrikaans; however, I provide a translation

into English that I hope and trust will be accepted as evidence that no exclusion is intended.[95]

Allesverloren?

[129] Die geskiedkundige Professor Hermann Giliomee vertel dat toe hy die Afrikaanse skrywer Jan Rabie kort na 1994 besoek het, hy hom gevra het wat die toekoms van Afrikaans was en die kort antwoord was: "Allesverloren".[96]

[130] Is alles verlore vir Afrikaans?

[131] Die onderliggende boodskap van die hoofuitspraak is dat Afrikaans nie aanspraak kan maak op grondwetlike beskerming solank as wat dit eksklusief en rasgebonde bly nie. Dit is niks nuuts

Is all lost?

[129] The historian Professor Hermann Giliomee has described how, shortly after 1994, he asked the Afrikaans writer Jan Rabie about the future of the language, only to receive a short answer: "All is lost".[96]

[130] Is all lost for Afrikaans?

[131] The underlying message of the majority judgment is that Afrikaans cannot claim the guarantees of the Constitution so long as it remains exclusive and race-bound. That is

[95] Like Kriegler J in *Gauteng Legislature* above n 90, I adopted a similar approach in *Daniels* above n 55.

[96] Giliomee above n 89 at 294. See also Giliomee "Hul skrif was aan die muur" *Rapport* (13 August 2017). The same author has quoted a 1947 poem by C. Louis Leipoldt that describes two characters, the Fool and the Master, as they observe a chess match between white and black in which the prize is political control of South Africa:

> "The much belauded Fool
> Looked wise and pondered what he saw.
> 'I think' he said, 'that if he tries
> White still might make a draw!'
> The Master smiled and shook his head
> 'You have left it all too late.'
> 'There is no doubt of it,' he said,
> 'It's black to move and mate.'"

Giliomee "What future for South Africa?" *Politicsweb* (19 July 2017), available at http://www.politicsweb.co.za/opinion/what-future-for-south-africa.

nie.[97] Die keuse berus by almal wat Afrikaans praat. En die meerderheid Afrikaanssprekendes is nie blank nie.[98]

[132] Sommige het lankal reeds verkies om 'n inklusiewe pad te loop wat nie op ras of ander gronde diskrimineer nie. Vir blanke Afrikaanssprekendes is dit 'n pynlike maar ook bevrydende ervaring. Ons leer hoe ons ons taalgenote se ontstaansbydrae tot die taal wat ons liefhet en hul menswaardigheid liederlik misken en ontken het.[99] Maar terselfdertyd leer ons soveel nuuts wat 'n trots vir die taal aanwakker: byvoorbeeld dat dit ook deel van die bevrydingstryd was. Die akademikus Professor Hein Willemse vertel:

nothing new.[97] And it bears repeating that the majority of Afrikaans speakers are not white.[98]

[132] Some have long chosen to walk an inclusive route that is not based on racial or other prejudice. For white Afrikaans speakers it is a painful but also liberating experience. We learn of our denial of our fellow Afrikaans speakers' role in the origin of Afrikaans and our shameful disregard of their human dignity.[99] But at the same time we also learn something new that makes us proud of the language: it was also part of the liberation struggle. The academic Professor Hein Willemse tells us:

> "Up to that time of my life I had lived in small towns in the southern and western

[97] *Gauteng Legislature* above n 90 at paras 39-40 and *Tshwane City v AfriForum* [2016] ZACC 19; 2016 (6) SA 279 (CC); 2016 (9) BCLR 1133 (CC) at para 122.

[98] Willemse "The hidden histories of Afrikaans" (9 October 2015), available at http://www.up.ac.za/media/shared/45/willemse_mistra-20151105-2_2.zp80127.pdf:

> "Afrikaans is an African language, with its primary speech community concentrated on the African continent. Afrikaans is a southern African language. Today six in ten of the almost seven million Afrikaans speakers in South Africa are estimated to be black (in the generic sense of the word), a figure that will by all indications increase significantly in the next decade. Like several other South African languages, Afrikaans is a cross-border language spanning sizable communities of speakers in Namibia, Botswana and Zimbabwe. In South Africa and Namibia Afrikaans is spoken across all social indices, by the poor and the rich, by rural and urban people, by the undereducated and the educated. Afrikaans is a creole language, it shares traits common to creolized languages in the Caribbean, the Malayan Peninsula, Indonesia, the northern parts of South America, and an East-African Niger-Congo (or Bantu) creole like Kiswahili."

[99] Antjie Krog, "all the words used to humiliate, all the orders given to kill, belonged to the language of my heart": Krog *Country of My Skull* (Random House Struik, Cape Town 2009) at 238.

regions of the then Cape Province, in the southern Cape, the Boland, the Little Karoo. By the time I was eighteen, I was fortunate to have travelled north to the Northern Cape, to the Free State, Natal and Transvaal, and even further to Botswana, Mozambique and Rhodesia. On those travels I had witnessed deep poverty in isolated rural homesteads. The people that I had met in the far-flung villages of today's southern Namibia and Northern Cape were as desperately poor as I have seen elsewhere and they were mostly Afrikaans-speaking. How could they, these people – the poorest of the poor – be 'the oppressor'? Why were their stories not told? How could those people struggling in the townships of the towns that I've lived in or the people in Cape Town's townships where I helped out as a paralegal in the University of the Western Cape's student Law Society be 'the oppressor'? Why were their stories not told?

In 1976 UWC became the hub of the student uprising in the Western Cape and we as students sang revolutionary songs in isiXhosa, English and in Afrikaans . . . . We performed plays and poetry in Afrikaans and a young, eloquent firebrand named Allan Boesak whipped us all into rousing Black Consciousness fervour – in Afrikaans . . . . This is an example of Afrikaans in resistance; it is also an example of a counter narrative unknown to those outside the sphere of Afrikaans speakers. There are many such tales in the distant past and even closer to our time."[100]

[133] In *Gauteng Legislature* skryf Sachs R pragtig oor Afrikaans:

[133] In *Gauteng Legislature* Sachs J wrote beautifully about Afrikaans:

"[T]he Afrikaans language is one of the cultural treasures of South African national life, widely spoken and deeply implanted, the vehicle of outstanding literature, the bearer of a rich scientific and legal vocabulary and possibly the most creole or 'rainbow' of all South African tongues. Its protection and development is therefore the concern not only of its speakers but of the whole South African nation. In approaching the question of the future of the Afrikaans language, then, the issue should not be regarded as simply one of satisfying the self-centred wishes, legitimate or otherwise, of a particular group, but as a question of promoting the rich development of an integral part of the variegated South African national character contemplated by the Constitution. Stripped of its association with race and political

[100] Willemse above n 98.

> dominance, cultural diversity becomes an enriching force which merits constitutional protection, thereby enabling the specific contribution of each to become part of the patrimony of the whole."[101]

Maar ook verder:

> "In the first place, similar claims for constitutional regard can be made by ten or more other language communities, claims which could be weaker in some detailed respects than those made on behalf of Afrikaans, and very much stronger in others. It was evident from the intensity with which the matter was presented by some of the Petitioners that it represents an issue of deep meaning to them. One may accept that even abstract questions of law have to be considered in the concrete context of history, and we cannot ignore the fact, urged upon us by counsel, that, although the words of the constitutional text are generalised, they are also suffused with specific and (frequently contradictory) life experiences. Yet, even if the poignancy of history flows through the veins of the Constitution, we must always be guided by the words and spirit of the constitutional text itself, supporting, not this group or that, but the values articulated by the Constitution. In interpreting clause 19 of the Gauteng Education Bill in the light of section 32 of the Constitution, the rights of certain members of the Afrikaans-speaking community, therefore, cannot be considered in isolation from equally valid claims of members of other language groups. The very concept of multi-culturalism has to be looked at in a multi-cultural way."[102]

But also:

[134] Litigasie wat die regte van individue en groepe probeer bevorder is 'n ingewikkelde proses wat weldeurdag moet wees.[103] By 'n vorige geleentheid het hierdie Hof opgemerk dat AfriForum 'n indruk skep van rassisme waarvoor

[134] Litigating for the rights of individuals and groups is a complex endeavour that needs careful thought.[103] On a previous occasion members of this Court remarked that AfriForum created an impression of racism, for which it had

[101] *Gauteng Legislature* above n 90 at para 49.

[102] Id at para 51.

[103] Budlender "On Practising Law" in Corder (ed) *Essays on Law and Social Practice in South Africa* (Juta & Co Ltd, Cape Town 1988) at 319-33.

hulleself te blameer is.[104] Mens sou verwag dat die aanpak van ’n saak oor taalregte sou geskied met deeglike oorweginge van, onder andere, die uitsprake in *Gauteng Legislature* en in besonder diè van Sachs R. Maar vergeefs soek mens in die applikante se funderende eedsverklaring enige erkenning van die kompleksiteit van taalregte van andere en die ongelyke behandeling van onderdrukte mense van ander rasse in die verlede, wat nog te sê van die huidige voortsetting van hierdie historiese bevooregting. Geen praktiese voorstelle om ander rasse tegemoet te kom en taalgebruik te vergemaklik is blykbaar gemaak in die Universiteit se ondersoek daarna nie. Daar is klaarblyklik geen insig in hierdie realiteite nie, en ook nie ‘n besef van watter persepsie dit teenoor andere skep nie. Hierdie gebreke bevestig die karikatuur van Afrikaners as hardvogtig en mense wat min omgee vir andere. Die applikante moet ook hand in eie boesem steek oor die wyse waarop hulle taalregte probeer beskerm: bevorder hulle die saak van Afrikaans of benadeel hulle dit?

itself to blame.[104] In a case about language rights one would expect a proper consideration of, among others, this Court’s judgment in *Gauteng Legislature* – particularly the words of Sachs J. But what is singularly lacking in the applicants’ founding affidavit is any recognition of the complexity of the language rights of others and the unequal treatment of oppressed people of other races in the past, let alone the continued existence of historic privilege. No practical suggestions were apparently made to accommodate the needs of other race groups and facilitate language instruction during the University’s extensive inquiry into the problem. There is no apparent insight into these realities, nor any realisation of the perception that this creates in others. These failures entrench the caricature of Afrikaners as intransigent and insensitive to the needs of others. The applicants need to ask themselves whether their manner of attempting to protect language rights advances the cause of Afrikaans or hinders it.

[104] *Tshwane City* above n 97 at para 120.

[135] Die toekoms van Afrikaans lê in die hande van ’n jonger geslag wat Afrikaans praat. Of daar ooit ’n Derde Taalbeweging sal wees,[105] hierdie keer vir ’n inklusiewe Afrikaans ontdaan van ras- en ander vooroordele sal slegs die tyd leer.

[135] The future of Afrikaans lies in the hands of a younger generation of Afrikaans speakers. Whether there will ever be a “Derde Taalbeweging”,[105] this time for an inclusive Afrikaans shorn of racial and other prejudices, only time will tell.

[105] This literally translates as “Third Language Movement”. There have been two such movements in the history of Afrikaans: see, for example, Gérard *Contexts of African Literature* (Rodopi, Amsterdam 1990) at 108.

For the Applicants:	A Cockrell SC and M J Engelbrecht instructed Hurter Spies Inc
For the Respondent:	J J Gauntlett SC QC and F B Pelser instructed by Phatshoane Henney Inc