CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 135/20

In the matter between:

CHAIRPERSON OF THE COUNCIL OF THE UNIVERSITY OF SOUTH AFRICA	First Applicant
CHAIRPERSON OF THE SENATE OF THE UNIVERSITY OF SOUTH AFRICA	Second Applicant
UNIVERSITY OF SOUTH AFRICA	Third Applicant
and	
AFRIFORUM NPC	Respondent

Neutral citation: *Chairperson of the Council of UNISA v AfriForum NPC* [2021] ZACC 32

Coram: Khampepe ADCJ, Jafta J, Madlanga J, Majiedt J, Mhlantla J, Pillay AJ, Theron J, Tlaletsi AJ and Tshiqi J

Judgment: Majiedt J (unanimous)

Heard on: 20 May 2021

Decided on: 22 September 2021

Summary: University language policy — phasing out of Afrikaans as a language of teaching and learning — limitation of section 29(2) of the Constitution — justification required

ORDER/BEVEL

On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Gauteng Division, Pretoria):

1. Leave to appeal is granted.
2. Save as set out below, the appeal is dismissed.
3. The order of the Supreme Court of Appeal is suspended until the commencement of the University of South Africa's 2023 academic year.
4. In the event that the University of South Africa decides to continue with the language policy adopted in 2016, the requirements of section 29(2) of the Constitution must be complied with.
5. If, by the commencement of the 2023 academic year, the University of South Africa decides to adopt an entirely new language policy, the order of the Supreme Court of Appeal, save for the costs order, will fall away.

Op appèl vanaf die Hoogste Hof van Appèl (vir die aanhoor van 'n appèl vanaf die Hooggeregshof van Suid-Afrika, Gauteng Afdeling, Pretoria):

1. Verlof tot appèl word toegestaan.
2. Behalwe soos hieronder uiteengesit, word die appèl van die hand gewys.
3. Die bevel van die Hoogste Hof van Appèl word opgeskort tot die aanvang van die Universiteit van Suid-Afrika se 2023 akademiese jaar.
4. Indien die Universiteit van Suid-Afrika besluit om voort te gaan met die taalbeleid wat in 2016 aanvaar is, moet die vereistes van artikel 29(2) van die Grondwet nagekom word.
5. Indien, teen die aanvang van die 2023 akademiese jaar, die Universiteit van Suid-Afrika besluit om 'n heeltemal nuwe taalbeleid te aanvaar, sal die bevel van die Hoogste Hof van

6. The University of South Africa must pay AfriForum's costs in this Court, including the costs of two counsel.

Appèl, behalwe vir sy kostebevel, wegval.

6. Die Universiteit van Suid-Afrika moet AfriForum se koste in hierdie Hof betaal, insluitende die koste van twee advokate.

JUDGMENT/UITSPRAAK

MAJIEDT J (unanimous):

Introduction

[1] CJ Langenhoven, the celebrated Afrikaans writer and a fierce activist for the language, described Afrikaans as "our highest honour, our greatest possession, the one and only white man's language which was made in South Africa".[1] But another acclaimed Afrikaans writer of more recent times, Jan Rabie, tellingly observed that "we distort history when we present Afrikaans today as increasingly 'whiter' than it really

MAJIEDT R (eenparig):

Inleiding

[1] CJ Langenhoven, die gevierde Afrikaanse skrywer en vurige kampvegter van die taal, het Afrikaans beskryf as "ons hoogste eer, ons grootste besitting, die een en enigste witmans-taal wat in Suid-Afrika geskep is".[1] Maar 'n ander hoogs aangeskrewe Arikaanse skrywer van meer onlangse tye, Jan Rabie, het treffend opgemerk dat "ons die geskiedenis verwring wanneer ons Afrikaans vandag voorhou as

[1] Cited by Giliomee *The Afrikaners: Biography of a People* (Tafelberg Publishers Limited, Cape Town 2003) (Giliomee I) at 369. CJ Langenhoven lived between 1873 and 1932, and is acknowledged as having been staunchly conservative in his outlook. He is perhaps best known for authoring the lyrics of apartheid South Africa's national anthem, "Die Stem van Suid-Afrika".

[1] Aangehaal deur Giliomee *The Afrikaners: Biography of a People* (Tafelberg Uitgewers Beperk, Kaapstad 2003) (Giliomee I) op 369. CJ Langenhoven het tussen 1873 en 1932 geleef en hy word alom beskou as iemand met 'n stoere konserwatiewe lewensuitkyk. Hy is seker meeste bekend as skrywer van die lirieke van die volkslied van apartheid Suid-Afrika,"Die Stem van Suid-Afrika".

is so that it fits our ideology of increasing separation".[2] And a giant of Afrikaans literature, Breyten Breytenbach, said in an affidavit in *Gelyke Kanse*:

> "Afrikaans is the living and changing and change-making outcome of diverging and at times conflicting histories. These diverse origins characterised by adaptation, conquest, subjugation, oppression, survival, resistance, transformation – descended from European dialects, Malay, Portuguese, seafarer language, Khoi languages, Arabic Afrikaans, the Qur'an and the Bible, the courts and churches and kitchens and hospitals and vineyards and factories of our country – have made Afrikaans a unique hybridisation that finds unity as a Creole language which is the verbalisation of the complex world in which we move."[3]

[2] Rabie *Polemika* (John Malherbe (Pty) Limited, Cape Town 1966) at 106. Jan Rabie is recognised as a liberal Afrikaans writer of the 1960s and 1970s. He was born in 1920 and passed away in 2001.

[3] Breytenbach's supporting and expert affidavit at para 8, as cited in *Gelyke Kanse v Chairperson, Senate of the University of Stellenbosch* [2019] ZACC 38; 2020 (1) SA 368 (CC); 2019 (12) BCLR 1479 (CC) at para 87. Breytenbach was born in 1939 and is known for his fierce opposition to apartheid, having been imprisoned by that regime from 1975 to 1982 on terrorism charges. The translation from the original Afrikaans is by Froneman J in his separate concurrence in *Gelyke Kanse*.

toenemend 'witter' as wat dit werklik is ten einde ons ideologie van toenemende apartheid te pas".[2] En 'n reus van Afrikaanse literatuur, Breyten Breytenbach, het in 'n eedsverklaring in *Gelyke Kanse* verklaar:

> "Afrikaans is the living and changing and change-making outcome of diverging and at times conflicting histories. These diverse origins characterised by adaptation, conquest, subjugation, oppression, survival, resistance, transformation – descended from European dialects, Malay, Portuguese, seafarer language, Khoi languages, Arabic Afrikaans, the Qur'an and the Bible, the courts and churches and kitchens and hospitals and vineyards and factories of our country – have made Afrikaans a unique hybridisation that finds unity as a Creole language which is the verbalisation of the complex world in which we move."[3]

[2] Rabie *Polemika* (John Malherbe (Edms) Beperk, Kaapstad 1966) op 106. Jan Rabie word beskou as 'n liberale Afrikaanse skrywer van die 1960s en 1970s. Hy was in 1920 gebore en is oorlede in 2001.

[3] Breytenbach se ondersteunende en deskundige eedsverklaring in para 8, soos aangehaal in *Gelyke Kanse v Chairperson of the Senate of the University of Stellenbosch* [2019] ZACC 38; 2020 (1) SA 368 (CC); 2019 (12) BCLR 1479 (CC), in para 87. Breytenbach was in 1939 gebore en is bekend vir sy hewige teenstand teen apartheid, waarvoor hy van 1975 tot 1982 tronkstraf uitgedien het, nadat hy deur die apartheid regime gevonnis is op aanklagte van terrorisme. Die vertaling vanaf die oorspronklike Afrikaans is deur Froneman R in sy aparte samestemmende uitspraak in *Gelyke Kanse*.

[2] This stark contrast between three white Afrikaans writers of different eras and outlooks bears testimony to the troubled, warped discourse around Afrikaans. Today, "the majority of Afrikaans speakers are black, and it is spoken as a first language by people from multiple ethnic and social backgrounds".[4]

[3] This case concerns a decision to discontinue Afrikaans as a language of teaching and learning at South Africa's largest university. It is the latest in a trilogy of cases relating to policy decisions by universities to remove Afrikaans as a medium of teaching and learning. In the first, *University of the Free State*,[5] this Court had to decide "whether that university acted consistently with its obligations in terms of section 29(2) of the Constitution in adopting

[2] Hierdie skerp kontras tussen drie wit Afrikaanse skrywers van verskillende tydvakke en uitkyke, is tekenend van die troebel, verwronge diskoers aangaande Afrikaans. Vandag is "die meerderheid van Afrikaanssprekendes swart, en die taal word as eerste taal gebesig deur mense van veelvuldige etniese en maatskaplike agtergronde".[4]

[3] Hierdie saak handel oor die besluit deur Suid-Afrika se grootste universiteit om die onderrig en leer in Afrikaans te staak. Dit is die nuutste in 'n trilogie van sake wat verband hou met beleidsbesluite deur universiteite om Afrikaans as medium van onderrig en leer te verwyder. In die eerste een, *University of the Free State*,[5] moes hierdie Hof beslis "of daardie universiteit

[4] Willemse "The Afrikaans Cultural Expressions of the Powerless and Subjugated" in George (ed) *A Companion to African Literatures* (John Wiley & Sons Limited, Hoboken 2021) (Willemse I) at 252. See also 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 (Willemse II), where he states:

> "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."

[5] *AfriForum v University of the Free State* [2017] ZACC 48; 2018 (2) SA 185 (CC); 2018 (4) BCLR 387 (CC) (*University of the Free State*).

[4] Willemse "*The Afrikaans Cultural Expressions of the Powerless and Subjugated*" George (uitg) *A Companion to African Literatures* (John Wiley & Sons Limited, Hoboken 2021) (Willemse I) op 252. Sien ook: Willemse: *The Hidden Histories of Afrikaans* (9 Oktober 2015), beskikbaar by http://www.up.ac.za/media/shared/45/willemse_mistra-20151105-2_2.zp80127.pdf (Willemse II), waar hy aandui dat:

> "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."

[5] *AfriForum v University of the Free State* [2017] ZACC 48; 2018 (2) SA 185 (CC); 2018 (4) BCLR 387 (CC) (*University of the Free State*).

a policy that phases out Afrikaans as a co-equal medium of instruction with English”.[6] Next, in *Gelyke Kanse*,[7] the central issue was whether Stellenbosch University’s 2016 language policy that created three language specifications – parallel, dual and single medium, thereby removing the previous dominance of Afrikaans – was an infringement of the right of Afrikaans students to mother tongue education. And now, in this matter, this Court is asked to determine whether the decision to adopt a new language policy in 2016 by the third applicant, the University of South Africa (UNISA): (a) passes constitutional muster; (b) was rational; and (c) complied with procedural prescripts. This new language policy aimed to enhance the status of indigenous African languages, while also phasing out Afrikaans and removing the guarantee that courses be offered in both Afrikaans and English.

[4] This Court’s decisions in *Gelyke Kanse* and *University of the Free State* do not signal an acceptance that the Afrikaans language must ineluctably be diminished as a language of teaching and learning in our

[6] Id at para 22.

[7] *Gelyke Kanse* above n 3 at paras 1-6.

konsekwent opgetree het met sy verpligtinge ingevolge artikel 29(2) van die Grondwet, deur ’n beleid te aanvaar wat Afrikaans uitfaseer as ’n gelyke onderrig medium met Engels”.[6] Daarna, in *Gelyke Kanse,*[7] was die kernvraag of die Universiteit van Stellenbosch se 2016 taalbeleid wat drie taal spesifikasies vestig – parallel, dubbel medium en enkel medium, en sodoende wegdoen met Afrikaans se oorheersendheid – inbreuk maak op Afrikaanssprekende studente se reg op moedertaal onderrig. En nou, in hierdie saak, word hierdie Hof versoek om te bepaal of die besluit geneem in 2016 deur die derde applikant, die Universiteit van Suid-Afrika (UNISA), om ’n nuwe taalbeleid te aanvaar ten einde die status van inheemse tale te bevorder, en terselfdertyd Afrikaans uitfaseer en wegdoen met die waarborg dat kursusse in beide Afrikaans en Engels aangebied sal word, (a) grondwetlik; (b) rasioneel was; en (c) of die prosedurele voorskrifte nagevolg was.

[4] Hierdie Hof se beslissings in *Gelyke Kanse* en *University of the Free State* is glad nie aanduidend van ’n aanvaarding dat Afrikaans onafwendbaar afgeskaal moet

[6] Id in para 22.

[7] *Gelyke Kanse* n 3 hierbo in paragrawe 1-6.

country's institutions of higher education. Apart from the fact that each case must be decided on its facts, the role of Afrikaans in our institutions and civic life cannot be reduced to a simplistic narrative of hegemony and decline. We must resist such simplistic narratives, many of which feed on false myths about the origins and development of the Afrikaans language.

[5] With this in mind, before dealing with the present challenge to UNISA's revised language policy, the true origins and development of Afrikaans bear consideration. This is necessary to correct the false narrative concerning its origins, development and present position in our society.

Afrikaans in proper perspective

[6] Chinua Achebe reminded us that "until the lions have their own historians, the history of the hunt will always glorify the hunter".[8] And so it is too with the history of the origins and development of the Afrikaans language.

word as 'n taal van onderrig en leer in ons land se hoër onderwysinstellings nie. Buiten die beginsel dat elke saak op sy eie feite beoordeel moet word, kan Afrikaans se rol in ons instellings en gemeenskapslewe nie bloot verminder word tot 'n vereenvoudigde weergawe van oorheersing en agteruitgang nie. Ons moet waak teen sulke vereenvoudigde weergawes, baie waarvan ontaard uit valse mites aangaande die ontstaan en ontwikkeling van die Afrikaanse taal.

[5] Op hierdie grondslag, alvorens oorweging geskenk word aan die onderhawige aanslag teen UNISA se gewysigde taalbeleid, verg die ware oorsprong en ontwikkeling van Afrikaans eers betragting van naderby, ten einde die onegte weergawe van die taal se oorsprong, ontwikkeling en heersende plek in ons samelewing by te lê en reg te stel.

Afrikaans in behoorlike perspektief

[6] Chinua Achebe het ons herinner dat "totdat die leeus hulle eie geskiedenis skrywers het, sal die geskiedenis van die jag

[8] Chinua Achebe was a celebrated Nigerian poet, writer and academic, the author of *Things Fall Apart*, generally considered to be the most widely read book in modern African literature. See Brooks "Chinua Achebe, The Art of Fiction No. 139" (1994) 133 *The Paris Review.*

[8] Chinua Achebe was 'n gesogte Nigeriese digter, skrywer en akademikus, die skrywer van "Things Fall Apart", wat algemeen beskou word as die boek wat die meeste gelees is in moderne Afrika literatuur. Sien Brooks "Chinua Achebe, The Art of Fiction No. 139" (1994) 133 *The Paris Review.*

[7] Afrikaans is a creole language that developed during the 19th century under colonialism in South Africa.[9] It is a language that was once spoken by "peasants, the urban proletariat, whatever their ethnic background, and even the middle class of civil servants, traders and teachers".[10]

[8] Afrikaans is a veritable potpourri of different languages, melded into what has been referred to in this Court as "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".[11] A great injustice is being done to Afrikaans through the contorted hegemonic white history[12] that has been "inculcated by

altyd die jagter vereer".[8] En so is dit ook met die geskiedenis van die oorsprong en ontwikkeling van die Afrikaanse taal.

[7] Afrikaans is 'n kreoolse taal wat ontwikkel het gedurende die 19e eeu onder kolonialisme in Suidelike Afrika.[9] Dit is 'n taal wat destyds gepraat is deur eenvoudige grondbewoners, die stedelike werkersklas en selfs middelklas staatsamptenare, handelaars en onderwysers.[10]

[8] Afrikaans is 'n klassieke mengelmoes van verskillende tale, saamgesmelt tot, waarna daar in hierdie Hof verwys is as, "een van die kulturele skatte van Suid-Afrikaanse nasionale bestaan, wat wyd gebesig word en diep gesetel is, die medium van uitnemende literatuur, die draer van 'n ryk wetenskaplike en regs-woordeskat en moontlik die mees

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[9] Giliomee "The Rise and Possible Demise of Afrikaans as Public Language" (2004) *Nationalism and Ethnic Politics* 25 (Giliomee II) at 25-7.

[10] Willemse II above n 4 at 3-4.

[11] Per Sachs J in *Gauteng Provincial Legislature: In re Gauteng School Education Bill of 1995* [1996] ZACC 4; 1996 (3) SA 165 (CC); 1996 (4) BCLR 537 (CC) (*Gauteng Provincial Legislature*) at para 49.

[12] Van der Waal "Creolisation and Purity: Afrikaans Language Politics in Post-Apartheid Times" (2012) *African Studies* 71 446 (Van der Waal) at 449 and 456. See also Giliomee II above n 9 at 27; Van Heerden *Afrikaaps: A Celebratory Protest Against the Racialised Hegemony of "Pure" Afrikaans* (Master's thesis, Stellenbosch University, 2016) (Van Heerden) at 1, 24, 33, 35, 88-9. Van der Waal states that the creole origin of Afrikaans is contested. Many linguists minimised the influence of

[9] Giliomee "The rise and possible demise of Afrikaans as public language" (2004) *Nationalism and Ethnic Politics* 25 (Giliomee II) op 26-7.

[10] Willemse II n 4 hierbo op 3-4.

[11] Per Sachs R in *Gauteng Provincial Legislature In re: Gauteng School Education Bill of 1995* [1996] ZACC 4; 1996 (3) SA 165 (CC); 1996 (4) BCLR 537 (CC) (*Gauteng Provincial Legislature*) in para 49.

[12] Van der Waal "Creolisation and Purity: Afrikaans Language Politics in Post-Apartheid Times" *African Studies* 71 446 (Van der Waal) op 449 en 456; sien ook Giliomee n 9 hierbo op 27; Van Heerden *Afrikaaps: a celebratory protest against the racialised hegemony of 'pure' Afrikaans* (Meesters tesis, Universiteit van Stellenbosch, 2016) (Van Heerden) op 1, 24, 33, 35, 88-9. Van der Waal verklaar dat die kreoolse oorsprong van Afrikaans betwis word. Verskeie taalkundiges het bruin

Afrikaner Christian national education, propaganda and the media"[13] and shamefully overlooks its equally important black history.[14]

[9] During the era of Afrikaner nationalism,[15] a time when the language was used as a weapon for ethnic mobilisation, Afrikaans became a cultural symbol of "Afrikanerness" and national unity.[16] Afrikaans was deployed "to secure power in

kreoolse of 'reënboog' van alle Suid-Afrikaanse tale".[11] ''n Groot onreg word Afrikaans aangedoen deur die verwronge oorheersende wit geskiedenis[12] wat "ingeburger is deur Afrikaner Christelike nasionale onderwys, propaganda en die media"[13] en wat skaamteloos Afrikaans se ewe belangrike swart geskiedenis misken.[14]

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people of colour on Afrikaans and Giliomee describes the contested existence of Afrikaans (what I refer to as "white" history) as follows (Giliomee II above n 9):

> "Afrikaans was, in its essence, a dialect of Dutch that had over time undergone a limited measure of creolisation or deviation from the basic Dutch structure."

[13] Willemse II above n 4 at 1.

[14] I refer to the creolisation theory of Afrikaans as the "black" history of the language, which includes the stories of all people of colour that are side-lined from the dominant discourse. See Groenewald *Slawe, Khoekhoen en Nederlandse Pidgins aan die Kaap, CA. 1590-1720: 'n Kritiese Ondersoek na die Sosiohistoriese Grondslae van die Konvergensieteorie oor die Ontstaan van Afrikaans* (Master's thesis, University of Cape Town, 2002) at 42-3; Van der Waal above n 12 at 449; Willemse II above n 4 at 3-4; Conradie and Groenewald "Die Ontstaan en Vestiging van Afrikaans" in Carstens and Bosman *Die Ontstaan en Vestiging van Afrikaans* (Van Schaik, Pretoria 2014) (Conradie and Groenewald) at 28; Roberge "The formation of Afrikaans" *Stellenbosch Papers in Linguistics* 27 at 34-5.

[15] The era of Afrikaner nationalism arose towards the end of the 19th century (Giliomee II above n 9 at 30).

[16] Ponelis *The development of Afrikaans* (Peter Lang, New York 1993) at 52-3 and Van Heerden above n 12 at 22, citing Pokpas and Van Gensen "Afrikaans en Ideologie in Taalbeplanning: 'n Stryd van Standpunte" in Webb *Afrikaans ná apartheid* (Van Schaik, Pretoria 1992) (Pokpas and Van Gensen) at 170-1.

mense se invloed op Afrikaans tot 'n minimum beperk en Giliomee beskryf die betwiste bestaan van Afrikaans (wat ek die "wit" geskiedenis noem) soos volg (Giliomee II n 9 hierbo):

> "Afrikaans was, in its essence, a dialect of Dutch that had over time undergone a limited measure of creolisation or deviation from the basic Dutch structure."

[13] Willemse II n 4 hierbo op 1.

[14] Ek verwys na die kreoliseringsteorie van Afrikaans as die "swart" geskiedenis, wat die stories van alle mense van kleur wat opsy gestoot is vanaf die oorheersende diskoers insluit. Sien Groenewald *Slawe, Khoekhoen en Nederlandse Pidgins aan die Kaap, CA. 1590-1720: 'n Kritiese ondersoek na die Sosiohistoriese Grondslae van die Konvergensieteorie oor die ontstaan van Afrikaans* (Meesters tesis, Universiteit van Kaapstad, 2002) op 42-3; Van der Waal n 12 hierbo op 449; Willemse II n 4 hierbo op 3-4; Conradie and Groenewald "Die ontstaan en vestiging van Afrikaans" in Carstens en Bosman *Die Ontstaan en Vestiging van Afrikaans* (Van Schaik, Pretoria 2014) (Conradie and Groenewald) op 28; en Roberge "The formation of Afrikaans" *Stellenbosch Papers in Linguistics* 27 op 34-5.

[15] Die era van Afrikaner nasionalisme het teen die einde van die 19de eeu ontstaan. (Giliomee II n 9 hierbo op 30).

[16] Ponelis *The development of Afrikaans* (Peter Lang, New York 1993) op 52-3 en Van Heerden n 12 hierbo op 22 met verwysing na Pokpas en Van Gensen "Afrikaans en Ideologie in Taalbeplanning: 'n Stryd van Standpunte" in Webb *Afrikaans ná apartheid* (Van Schaik, Pretoria 1992) (Pokpas en Van Gensen) op 170-1.

the hands of an exclusive group" and became associated with the "marginalisation" and "exclusion" of "uncivilised" Afrikaans speakers.[17]

[10] There is a compelling argument that "the endeavour to establish Afrikaans as 'white' laid the foundation for 'racist nationalism, the rise of Afrikaner hegemony, and the politics of apartheid'".[18] As Willemse explains:

> "In the course of the 20th century, Afrikaner nationalism claimed proprietorship of Afrikaans, the first language of persons from divergent backgrounds, to such an extent that a discussion of it also becomes a discussion about the exclusion of a significant percentage of Afrikaans speakers. . . . Historically, [Afrikaans, as a body of knowledge,] bears the traces of conscious disregard and even continued suppression of a

[9] Gedurende die tydvak van Afrikaner nasionalisme,[15] 'n tyd toe die taal gebruik is as 'n wapentuig vir etniese mobilisering, het Afrikaans 'n kulturele simbool van "Afrikanerskap" en nasionale eenheid geword.[16] Afrikaans was aangewend "om mag te vestig in die hande van 'n eksklusiewe groep" en was vereenselwig met die "marginalisering" en "uitsluiting" van "onbeskaafde" Afrikaans-sprekendes.[17]

[10] Daar is 'n oorredende betoog dat die strewe na "die vestiging van Afrikaans as 'wit' die grondslag daarstel vir 'rassistiese nasionalisme, die toename van Afrikaner oorheersing, en die politiek van apartheid'".[18] Soos Willemse verduidelik:

> "In the course of the 20th century, Afrikaner nationalism claimed proprietorship of Afrikaans, the first language of persons from divergent backgrounds, to such an extent that a discussion of it also becomes a discussion about the exclusion of a significant percentage of Afrikaans

[17] Pokpas and Van Gensen id at 171. What is meant by "uncivilised" Afrikaans speakers is black Afrikaans speakers.

[18] Van Heerden above n 12 at 23 referring to Hendricks "The Potential Advantage of an Egalitarian View of the Varieties of Afrikaans" in Prah (ed) *Mainstreaming Afrikaans Regional Varieties* (Centre for Advanced Studies of African Society, Cape Town 2012) at 51.

[17] Pokpas en Van Gensen id op 171. Met "onbeskaafde" Afrikaanssprekendes word swart Afrikaanssprekendes bedoel.

[18] Van Heerden n 12 hierbo op 23 met verwysing na Hendricks "The potential advantage of an egalitarian view of the varieties of Afrikaans" in Prah (uitg) *Mainstreaming Afrikaans regional varieties* (Sentrum vir Gevorderde Studies van die Afrikaanse Samelewing, Kaapstad 2012) op 51.

considerable portion of the Afrikaans language community."[19]

[11] The history of Afrikaans is multi-faceted. The establishment and existence of the language cannot be attributed to a single race. Afrikaans speakers were of different languages, races, nationalities, and social classes.[20] This black history teaches us that Afrikaans is more than just the language of "racists, oppressors and unreconstructed nationalists", but instead that it "bears the imprint of a fierce tradition of anti-imperialism, anti-colonialism, of an all-embracing humanism and anti-apartheid activism".[21]

[12] Afrikaans evolved mainly from Dutch, Malay, Portuguese, Khoi languages, and Arabic-Afrikaans.[22] When the Dutch colonialists landed at the Cape of Good Hope in 1652 and established a refreshment station there, they were compelled to interact

speakers. . . . Historically, [Afrikaans, as a body of knowledge,] bears the traces of conscious disregard and even continued suppression of a considerable portion of the Afrikaans language community."[19]

[11] Die geskiedenis van Afrikaans is veelvuldig in sy fasette. Die vestiging en bestaan van die taal kan nie bloot toegeskryf word aan een enkele rassegroep nie. Afrikaanssprekendes was afkomstig vanaf verskillende rasse, nasionaliteite en sosiale stande.[20] Hierdie swart geskiedenis dui aan dat Afrikaans meer is as bloot die taal van "rassiste, onderdrukkers en ongekorrigeerde nasionaliste", maar eerder die "indruk dra van 'n vurige tradisie van anti-imperialisme, anti-kolonialisme, van 'n alles omvattende menswees en anti-apartheid aktivisme".[21]

[12] Afrikaans het grotendeels ontwikkel vanaf Hollands, Maleis, Portugees, Khoi

[19] Van Heerden above n 12 at 23-4, citing Willemse "Considering a more multi-faceted Afrikaans" in Prah id, at 65.

[20] Van der Waal above n 12 at 449. See also Giliomee II above n 9 at 25.

[21] Willemse II above n 4 at 1 and Van Heerden above n 12 at 31, 66-7, 133.

[22] See Conradie and Groenewald above n 14 at 46. See also the theory of DC Hesseling as described in Van Heerden above n 12 at 82-3; Roberge above n 14 at 34-5; and Giliomee II above n 9 at 27.

[19] Van Heerden n 12 hierbo op 23-4 met verwysing na Willemse "Considering a more multi-faceted Afrikaans" in Prah, id op 65.

[20] Van der Waal n 12 hierbo op 449. Sien ook Giliomee II n 9 hierbo op 25.

[21] Willemse II n 4 hierbo op 1 en Van Heerden n 12 hierbo op 31, 66-7, 133.

[22] Sien Conradie en Groenewald n 14 hierbo op 46. Sien ook die teorie van DC Hesseling soos beskryf in Van Heerden n 12 hierbo op 82-3; Roberge n 14 hierbo op 34-5; en Giliomee II n 9 hierbo op 27.

with Southern Africa's first peoples, the Khoisan, particularly for purposes of trade.[23] Later, probably around the early 1700s, enslaved people from East Africa and East Asia were brought to the Cape as forced labour.[24] The colonisers forced the Khoisan people and the enslaved Eastern people to speak Dutch, thus manifesting the first roots of the Afrikaans language.[25] Afrikaans linguists all agree that the Khoisan and the enslaved people played important roles in the origins and development of Afrikaans – they only differ on whether their roles were pivotal or less substantial.[26]

[13] The Cape Muslim community, that consisted primarily of enslaved people brought to the Cape from the Indonesian

tale, en Arabiese Afrikaans.[22] Toe die Hollandse kolonialiste in 1652 by die Kaap die Goeie Hoop geland en 'n verversingstasie daar gevestig het, was hulle genoodsaak om interaksie te hê met Suider-Afrika se eerste bewoners, die Khoisan, vernaamlik ten einde handel te dryf.[23] Later, moontlik teen die vroee 1700's, is slawe vanaf Oos-Afrika en Oos-Asië na die Kaap gebring as dwang arbeid.[24] Die kolonialiste het die Khoisan mense en die Oosterse slawe gedwing om Hollands te praat, en sodoende die eerste grondlegging van Afrikaans bewerkstellig.[25] Afrikaanse letterkundiges is dit eens dat die Khoisan en die slawe belangrike rolle gespeel het in die oorsprong en ontwikkeling van Afrikaans – hulle verskil slegs of daardie

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[23] Van Heerden above n 12 at 81.

[24] Roberge above n 14 at 53 and Conradie and Groenewald above n 14 at 39. The Netherlands gained control of the eastern parts of India when they conquered the Portuguese ruling there during the 1650s.

[25] Van Heerden above n 12 at 34. See also Valley and Valley "Hip Hop Masala" (2010) available at http://kaganof.com/kagablog/?s=hip+hop+masala, who state that, "Afrikaans developed as a bridging language to ease communication between the indigenous people, imported slaves and their masters."

[26] Giliomee II above n 9 at 27 and Groenewald above n 14 at 4. Scholars draw a distinction between the Philologists' school of thought and the Creolists. The former takes the view that Afrikaans developed primarily from dialectical Dutch, with minor influence from the Khoisan and the enslaved people. The latter school of thought, on the other hand, opines that the development of Afrikaans was largely due to the influence of the enslaved people and the indigenous Khoisan people.

[23] Van Heerden n 12 hierbo op 81.

[24] Roberge n 14 hierbo op 53 en Conradie en Groenewald n 14 hierbo op 39. Nederland het beheer oor die oostelike dele van Indië verkry toe hulle die regerende Portugese daar in die 1650s verslaan het.

[25] Van Heerden n 12 hierbo op 34. Sien ook Valley en Valley "Hip Hop Masala" (2010) beskikbaar by http://kaganof.com/kagablog/?s=hip+hop+masala, wat verklaar dat "Afrikaans het ontwikkel as 'n oorbruggingstaal om die kommunikasie tussen die inheemse volk, die ingevoerde slawe en hul meesters te vergemaklik".

[26] Giliomee II n 9 hierbo op 27 en Groenewald n 14 hierbo op 4. Kenners tref onderskeid tussen die Filoloë se denkrigting en die van die Kreoliste. Die eersgenoemde is van mening dat Afrikaans hoofsaaklik uit dialektiese Nederlands ontwikkel het, met geringe invloed van die Khoisan en die slawe. Die laasgenoemde denkskool is weer die mening toegedaan dat die ontwikkeling van Afrikaans grootliks te wyte was aan die invloed van die slawe en die inheemse Khoi- en San-mense.

archipelago, Bengal, the South Coast of India, Ceylon (now known as Sri Lanka) and the East Coast of Africa (including Madagascar), adopted Afrikaans as their first language during the 1830s.[27] This form of Afrikaans was presented in Arabic text and was recognised as Arabic-Afrikaans.[28] Recently, the role that Arabic played in the development of Afrikaans has been recognised.[29]

[14] Arabic-Afrikaans was predominantly used in religious contexts (the Islamic Cape Muslim community studied the Qur'an that was written in Arabic).[30] One of the first writings in Afrikaans emanated in 1860 from a Cape Town madrasah,[31] where a descendant of enslaved people copied a

rolle deurslaggewend of bloot minder omvattend was.[26]

[13] Die Kaapse Moslemgemeenskap, wat grootliks bestaan het uit slawe wat na die Kaap gebring is vanaf die Indiese eilandgroep, Bengalie, die Suidkus van Indië, Ceylon (tans bekend as Sri Lanka) en die Ooskus van Afrika (insluitende Madagaskar), het Afrikaans aangeneem as hul eerste taal gedurende die 1830s.[27] Hierdie vorm van Afrikaans is voorgehou in Arabiese teks en is erken as Arabiese Afrikaans.[28] Die rol wat Arabies in die ontwikkeling van Afrikaans vervul het, het onlangs erkenning ontvang.[29]

[14] Arabiese Afrikaans is oorheersend gebesig binne godsdienstige raamwerke (die

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[27] Groenewald above n 14 at 4. It is pointed out that, as long ago as 1897, Hesseling – widely recognised as the founder of the history of Afrikaans linguistics – alluded to the pivotal role that enslaved people played in the development of Afrikaans.

[28] In 1951, Van Selms discovered the role that Arabic played in the development of Afrikaans. See Davids and Willemse *The Afrikaans of the Cape Muslims* (Stigting vir die Bemagtiging van Afrikaans, Bellville 2018) (Davids and Willemse) at 11.

[29] Id. The authors opine that the reason why the Arabic influence was only discovered in the mid-20th century was the lack of Afrikaans students and academia who could read and understand Arabic.

[30] Conradie and Groenewald above n 14 at 52 and Davids and Willemse above n 28 at 11-3, 16.

[31] A madrasah is an Islamic educational institution.

[27] Groenewald n 14 hierbo op 4. Dit word daarop gewys dat Hesseling, wat al sedert 1897 algemeen erken word as die stigter van die geskiedenis van die Afrikaanse taalkunde, verwys het na die deurslaggewende rol wat slawe in die ontwikkeling van Afrikaans gespeel het.

[28] In 1951 ontdek Van Selms die rol wat Arabies in die ontwikkeling van Afrikaans gespeel het; sien Davids en Willemse "The Afrikaans of the Cape Muslims" (Stigting vir die Bemagtiging van Afrikaans, Bellville 2018) (Davids en Willemse) op 11.

[29] Id. Die skrywers is van mening dat die rede waarom die Arabiese invloed eers in die middel van die 20ste eeu ontdek is, te wyte is aan die gebrek aan Afrikaanse studente en akademici wat Arabies kon lees en verstaan.

[30] Conradie en Groenewald n 14 hierbo op 52 en Davids en Willemse n 28 hierbo op 11-3, 16.

[31] 'n Madrassa is 'n Islamitiese opvoedkundige instelling.

prayer in his exercise book.[32] That prayer, in Arabic script, closely resembles modern day Afrikaans.[33] One of the oldest Afrikaans books was authored prior to 1867 by Abubaker Effendi and was titled Bayān al-Din.[34] This guidebook to Islam was written in Arabic-Afrikaans, a language that was the bearer of intimate thoughts and religion of the literate Cape Muslim community.[35]

[15] Van Heerden notes that the contribution of Arabic-Afrikaans occurred before the time that Afrikaans was appropriated as a "white" language:

> "Before the appropriation of the creole language Afrikaans by 'patriotic male European colonists' during the late nineteenth century, 'men introduced the creole language into the public sphere' via '[t]he first book in Afrikaans . . . written

[32] Willemse II above n 4 at 1.

[33] Id at 1-3. Willemse mentions that an even earlier madrasah exercise book, dating back to 1806, was discovered by the writer Davids, in his path-breaking *The Afrikaans of the Cape Muslims* (above n 28). That would be the earliest known writing in Afrikaans.

[34] Willemse II above n 4 at 3.

[35] Id.

[36] Van Heerden above n 12 at 35, citing Shell *Children of Bondage: A Social History of the Slave Society at the Cape of Good Hope* (University Press of New England, Hanover 1994).

Islamitiese Kaapse Moslem gemeenskap het die Koran bestudeer wat in Arabies geskryf is).[30] Een van die eerste Afrikaanse geskrifte het in 1860 ontspruit by 'n madrassa in Kaapstad,[31] waar 'n afstammeling van slawe 'n gebed in sy skryfboek afgeskryf het.[32] Daardie gebed, in Arabiese skrif, het 'n nabye ooreenkoms met hedendaagse Afrikaans.[33] Een van die oudste Afrikaanse boeke is geskryf voor 1867 deur Abubaker Effendi met die titel van Bayan al-Din.[34] Hierdie handleiding oor Islam is geskryf in Arabiese Afrikaans, 'n taal wat die draer was van die intieme gedagtes en godsdiens van die geletterde Kaapse Moslem gemeenskap.[35]

[15] Van Heerden dui aan dat die bydrae van Arabiese Afrikaans plaasgevind het voordat Afrikaans toege-eien is as 'n wit taal:

[32] Willemse II n 4 hierbo op 1

[33] Id op 1-3. Willemse noem dat 'n selfs ouer madrassa-oefenboek deur die skrywer Davids ontdek is, in sy baanbrekerswerk *The Afrikaans of the Cape Muslims* (n 28 hierbo). Dit sou dus die oudste Afrikaanse geskrif wees.

[34] Willemse II n 4 hierbo op 3.

[35] Id.

[36] Van Heerden n 12 hierbo op 35, met aanhaling van Shell *Children of bondage: A social history of the slave society at the Cape of Good Hope* (University Press of New England, Hanover 1994).

by an imam, a slave descendant'. However, '[slave] owners would later adopt [Afrikaans]. . . and call it their own'."[36]

Further, Van Heerden notes that:

"The literature first also came from the black community. If we go back to the early Muslim scholars in the Cape, the teachers, who taught at the madrassas. This is where Afrikaans, written with Arabic script, first emerged. It's long before the Bible. The Bible is translated in the second decade of the 1900s. We're talking now about the last decade of the 1700s, and the first two decades of the 1800s, is where Islamic scholars, teachers, are teaching the children in Afrikaans, in phonetic Afrikaans, using Arabic script."[37]

[16] By 1870, the mixture of languages in the Cape was recognised as a distinct language – Afrikaans.[38] It is reported that by the end of the 19th century, Afrikaans, as a written medium, experienced a decline.[39] As a spoken language, it suffered against the

[37] Van Heerden id at 114.

[38] Id at 5.

[39] Giliomee II above n 9 at 29.

[40] Id.

"Before the appropriation of the creole language Afrikaans by 'patriotic male European colonists' during the late nineteenth century, 'men introduced the creole language into the public sphere' via '[t]he first book in Afrikaans. . . written by an imam, a slave descendant'. However, '[slave] owners would later adopt [Afrikaans]. . . and call it their own".

Van Heerden dui verder aan dat:

"The literature first also came from the black community. If we go back to the early Muslim scholars in the Cape, the teachers, who taught at the madrassas. This is where Afrikaans, written with Arabic script, first emerged. It's long before the Bible. The Bible is translated in the second decade of the 1900s. We're talking now about the last decade of the 1700s, and the first two decades of the 1800s, is where Islamic scholars, teachers, are teaching the children in Afrikaans, in phonetic Afrikaans, using Arabic script."[37]

[37] Van Heerden id op 114.

[38] Id op 5.

[39] Giliomee II n 9 hierbo op 29.

[40] Id.

dominance of English and Dutch.[40] Following the South African War of 1899-1902 (Anglo-Boer War), Britain colonised the remainder of South Africa (the Orange Free State and Transvaal were Afrikaner Republics with Dutch as the official language), and English was introduced as the official language.[41] In 1909, Dutch and English were recognised by the South Africa Act[42] as languages of equal force.[43] The struggle to replace Dutch with Afrikaans ensued in the 20th century. At the forefront was an obscure attorney and poet who contributed immensely to the development of Afrikaans literature and cultural history, CJ Langenhoven, referred to earlier.[44] However, as Giliomee notes, Langenhoven erred grievously when he described Afrikaans as a "white man's language".[45]

[17] During the twentieth century, activists of Afrikaans used the National Party (NP) as its vehicle to drive their cause.[46] Most activists, like

[16] Teen 1870 is die mengsel van tale in die Kaap erken as 'n aparte taal - Afrikaans.[38] Daar is opgeteken dat Afrikaans teen die einde van die 19^{de} eeu agteruit gegaan het.[39] Afrikaans as voertaal het gely onder die oorheersing van Engels en Hollands.[40] Na die Suid-Afrikaanse oorlog vanaf 1899 tot 1902 (Anglo-Boere oorlog), het Brittanje die res van Suid-Afrika gekolonialiseer (die Oranje Vrystaat en Transvaal was Afrikaner republieke met Hollands as die amptelike taal) en Engels is ingestel as die amptelike taal.[41] In 1909 is Hollands en Engels deur die Suid-Afrika Wet[42] erken as gelykwigtige tale.[43] Die strewe na die vervanging van Hollands met Afrikaans het 'n aanvang geneem gedurende die 20ste eeu. Aan die voorgrond was 'n onbekende prokureur en digter wat beduidend bygedra het tot die ontwikkeling van Afrikaanse letterkunde en kulturele geskiedenis, CJ Langenhoven, na wie vroeër verwys is.[44] Maar, soos Giliomee aanteken, Langenhoven het gruwelik gefouteer toe hy Afrikaans beskryf het as die "witman se taal".[45]

[41] Id.
[42] South Africa Act, 1909.
[43] Id at section 137.
[44] Giliomee II above n 9 at 34.
[45] Id at 35.
[46] Id at 36.

[41] Id.
[42] Suid-Afrika Wet, 1909.
[43] Id in artikel 137.
[44] Giliomee II n 9 hierbo op 34.
[45] Id op 35.
[46] Id op 36.

Langenhoven, chose to fight the battle for Afrikaans under the "white" flag and they established a racial community whose struggle for the advancement of Afrikaans was subordinate to the entrenchment of white supremacy, instead of forming a language community whose social identity was shaped by the struggle for the acceptance of Afrikaans as a public language enjoying similar status as English.[47] Giliomee considered the consequences of this thinking, stating as follows:

> "[T]he salience of race had to diminish and the creed 'Die taal is gans die volk' (the language constitutes the entire people), which activists often cited, had to be made a reality across racial boundaries."[48]

[18] The NP pursued a racially motivated agenda that eventually led to the "historic exclusivity of the Afrikaners, their culture and their language"[49] and the stance against Afrikaans by the black citizens of our country. Afrikaans became the language of the oppressor: "the medium used when white policemen arrested [b]lack pass offenders or

[47] Id.

[48] Id.

[49] Id at 39.

[17] Gedurende die twintigste eeu, het Afrikaanse aktiviste die Nasionale Party (NP) aangewend as die middel om hul saak te bedryf.[46] Die meeste aktiviste, soos Langenhoven, het verkies om die stryd vir Afrikaans te voer onder die "wit" vlag. In navolging daarvan het hulle 'n rassegemeenskap gevestig wie se stryd vir die bevordering van Afrikaans ondergeskik was aan die vestiging van wit oorheersing, instede daarvan om 'n taalgemeenskap te stig wie se maatskaplike identiteit gevorm is deur die stryd vir die aanvaarding van Afrikaans as 'n openbare taal met soortgelyke status as Engels.[47] Giliomee het die nagevolge van hierdie gesindheid oorweeg, en die volgende gesê:

> "[T]he salience of race had to diminish and the creed 'Die taal is gans die volk' (the language constitutes the entire people), which activists often cited, had to be made a reality across racial boundaries."[48]

[18] Die NP het 'n rasgemotiveerde agenda bedryf wat uiteindelik aanleiding

[47] Id.

[48] Id.

[49] Id op 39.

when white civil servants ordered [black people] or 'coloured' people out of their houses in racially mixed slum areas".[50] Afrikaans was forced upon the black community who strongly resisted and, sadly, the exclusive "white" history replaced the forgotten "black" history of our language.

[19] It bears emphasis that, to simplistically style Afrikaans as having a one-dimensional history and existence as "the language of the whites", and as "the language of the oppressor", is entirely misconceived and flies in the face of the true history of its origins and development sketched above. As Valley and Valley explain:

> "[W]hile [b]lack students in Soweto were protesting against the use of Afrikaans as the language of instruction, Afrikaans-speaking 'coloured' youth joined in the fight against the government, and used their Afrikaans to mobilise communities to fight against the injustices of the day. Members of the UDF, Ashley Kriel, Allan Boesak and Cheryl Carolus come to mind as some of the youth who were at the forefront of resistance politics

[50] Id at 42.

gegee het tot die "geskiedkundige eksklusiwiteit van die Afrikaners, hul kultuur en hul taal"[49] en die standpunt teen Afrikaans wat deur ons land se swart burgers ingeneem is. Afrikaans het die onderdrukker se taal geword: "die medium wat gebruik is wanneer wit polisiemanne swart pas oortreders gearresteer het, of wanneer wit staatsamptenare [swart mense] of 'gekleurde' mense gelas het om hul huise te verlaat in ras vermengde krotbuurtes".[50] Afrikaans was afgeforseer op die swart gemeenskap wat dit sterk teengestaan het en, betreurenswaardig, het die eksklusiewe "wit" geskiedenis die vergete "swart" geskiedenis van die taal vervang.

[19] Dit moet beklemtoon word dat die vereenvoudigde aantekening van Afrikaans se een-dimensionele geskiedenis en bestaan as "die taal van die witmense" en "die taal van die onderdrukker", geheel en al gegrond is op 'n wanvoorligting wat indruis teen die ware geskiedenis van die taal se oorsprong en ontwikkeling soos voorheen aangestip. Soos Valley en Valley verduidelik:

> "[W]hile black students in Soweto were protesting against the use of Afrikaans as the language of

[50] Id op 42.

in Cape Town in the 1970s and '80s."[51]

[20] Afrikaans was undeniably employed as a tool of oppression – it is part of our very painful past. As Gasnolar emphasises: "Afrikaans has a painful history in our country, and was used by the apartheid regime to degrade millions, and that past cannot simply be ignored."[52] But its history is far more multifaceted and nuanced than that. Valkhoff explains that "[i]t is not always *either* one thing *or* another in the evolution of such a delicate social phenomenon as speech or language".[53] And as Roberge rightly concludes:

> "In the history of Afrikaans it was not always Dutch *or* substratum grammar, but three linguistic traditions – European, African (Khoikhoi), and Asian – that have met and converged with one another to produce a new whole that is truly more than the sum of its parts."[54]

instruction, Afrikaans-speaking 'coloured' youth joined in the fight against the government, and used their Afrikaans to mobilise communities to fight against the injustices of the day. Members of the UDF, Ashley Kriel, Allan Boesak and Cheryl Carolus, come to mind as some of the youth who were at the forefront of resistance politics in Cape Town in the 1970s and '80s."[51]

[20] Afrikaans is ongetwyfeld aangewend as 'n instrument van onderdrukking – dit is deel van ons pynlike verlede. Soos Gasnolar benadruk: "Afrikaans het 'n pynlike verlede in ons land, en was aangewend deur die apartheid regime om miljoene mense te verneder, en daardie verlede kan nie net bloot ignoreer word nie".[52] Maar die taal se geskiedenis is baie meer veelledig en genuanseerd as dit. Valkhoff verduidelik dat "[d]it is nie altyd bloot die een of die ander aspek in die ewolusie van 'n delikate

[51] As cited by Van Heerden above n 12 at 85.

[52] Gasnolar "Afrikaans has a Painful History and was Used to Degrade Millions" (19 November 2015) available at http://www.dailymaverick.co.za/opinionista/2015-11-19-afrikaans-has-a-painful-history-and-was-used-to-degrade-millions/#.VzXkl5FcRBe.

[53] Valkhoff *Studies in Portuguese and Creole, with Special Reference to South Africa* (Witwatersrand University Press, Johannesburg 1966) at 231.

[54] Roberge above n 14 at 87.

[51] Soos aangehaal deur Van Heerden n 12 hierbo op 85.

[52] Gasnolar "Afrikaans has a painful history and was used to degrade millions" (19 November 2015) beskikbaar by http://www.dailymaverick.co.za/opinionista/2015-11-19-afrikaans-has-a-painful-history-and-was-used-to-degrade-millions/#.VzXkl5FcRBe.

[53] Valkhoff *Studies in Portuguese and creole, with special reference to South Africa* (Witwatersrand University Press, Johannesburg 1966) op 231.

[54] Roberge, n 14 hierbo op 87.

[21] While Afrikaans originated out of oppression and continued to be a tool of oppression, its subsequent development into a heterogeneous, "rainbow"[55] language, spoken today by more black people than white people, is a marvellous paradox of human ingenuity and creativity. Recognising the major role played by lowly indigenous peoples and enslaved people in its history and development is crucial. The misconception that it is "the language of whites" and "the language of the oppressor" is an iniquitous portrayal of the language and its true roots. It bears repetition that today, Afrikaans is spoken predominantly by black people. And it is spoken by black people in not only so-called "coloured" townships, but also in many African townships in several regions in this country. It is the language of prince and pauper alike, existing comfortably in academia and the professions on the one hand, and in every-day parlance on the other.

[22] It is apt to follow the example of Froneman J in *University of the Free State*, by borrowing from the world-renowned South African-born fantasy novelist

[55] To borrow from Sachs J in *Gauteng Provincial Legislature* above n 11.

maatskaplike verskynsel soos spraak of taal nie".[53] En soos Roberge tereg opmerk:

> "In the history of Afrikaans it was not always Dutch or substratum grammar, but three linguistic traditions - European, African (Khoikhoi), and Asian - that have met and converged with one another to produce a new whole that is truly more than the sum of its parts."[54]

[21] Alhoewel Afrikaans ontstaan het uit onderdrukking en 'n voortgesette instrument van onderdrukking was, is sy latere ontwikkeling tot 'n heterogene, "reënboog"[55] taal wat vandag gebesig word deur meer swartmense as witmense, 'n wonderlike paradoks van menslike ondernemendheid en kreatiwiteit. Die erkenning van die belangrike rol wat eenvoudige inheemse mense en slawe in die taal se geskiedenis en ontwikkeling gespeel het, is ontsettend belangrik. Die wanopvatting van Afrikaans as "die witmense se taal" en "die taal van die onderdrukker", is 'n skreiende wanvoorstelling van die taal en die ware oorsprong daarvan. Dit verg herhaling dat Afrikaans tans oorheersend die taal van swartmense is. En dit word gebesig deur

[55] Ontleen van Sachs R in *Gauteng Provincial Legislature* n 11 hierbo.

JRR Tolkien, who pointed out that "it is necessary 'to distinguish, as far as that is possible, between languages as such and their speakers' and to remember that languages 'are not hostile one to another'".[56] And that it is only when "men are hostile [that] the language of their enemies may share their hatred".[57] In our country, English has become the mainstream language of choice through necessity in virtually all spheres of everyday life, including commerce, law, culture and education. That is so, despite its colonial heritage. Universities as intellectual hubs of transformative constitutionalism must lead the charge for the decolonisation of language. The only way to achieve that is to ensure that all indigenous languages are progressively introduced as languages of teaching and learning, within the means reasonably available. In *Gelyke Kanse*, this Court recognised that "[e]ndorsing the University's 2016 Language Policy as conforming with section 29(2) comes at a cost. Our judgment must acknowledge it."[58]

swartmense, nie net in sogenaamde "kleurling" woonbuurte nie, maar ook in baie swart woonbuurte in verskeie streke van ons land. Dit is die taal van beide prinse en hul onderdane, wat gemaklik bestaan in die akademie en beroepe aan die een kant, en in gewone omgangstaal aan die ander kant.

[22] Dit is aangewese om Froneman R se voorbeeld in *University of the Free State* na te volg en te leen vanaf die wêreldbekende Suid-Afrikaans gebore fantasie skrywer, JRR Tolkien, wat uitgewys het dat "dit noodsaaklik is om 'te onderskei, so ver moontlik, tussen tale op sigself, en hul sprekers' en om te onthou dat tale 'nie vyandiggesind teenoor mekaar is nie'".[56] Verder moet ons onthou dat "slegs wanneer mense vyandiggesind is, hul teenstanders se taal hul vyandiggesindheid sal deel".[57] In ons land het Engels die hoof voertaal van keuse geword, bloot vanweë noodsaak, in alle sfere van alledaagse lewe, insluitend in die handel, regte, kultuur en opvoedkunde. Dit is die geval, ten spyte van die taal se

[56] Tolkien "English and Welsh" in Tolkien *The Monsters and the Critics and Other Essays* (HarperCollins, London 2013) at 178. As cited in *University of the Free State* above n 5 at para 88.

[57] Id at para 88.

[58] *Gelyke Kanse* above n 3 at para 47.

[59] Id at para 48.

[56] "English and Welsh" in Tolkien *The Monsters and the Critics and Other Essays* (HarperCollins, Londen 2013) op 178. Soos verwys na in *University of the Free State* n 5 hierbo in para 88.

[57] Id op para 88.

[58] *Gelyke Kanse* n 3 hierbo in para 47.

[59] Id op para 48.

This Court also cautioned that the "flood-tide of English" is a real threat to minority languages, including Afrikaans.[59] The cost and threat in this context were comprehensively articulated by Froneman J in his separate concurrence in that matter and need not be repeated. There, and also in *University of the Free State*, he rightly bemoaned the dominance of English over other indigenous languages, including Afrikaans.[60]

[23] To conclude under this rubric: the disturbing tendency of the one-dimensional portrayal of Afrikaans as a "white language", and as "the language of the oppressor", is manifestly misconceived, as I have attempted to show. Afrikaans speakers must accept, however, that their language now enjoys equal status with the other ten official languages. Afrikaans cannot continue to enjoy its privileged position to the exclusion of the other indigenous languages, which were so terribly neglected under apartheid. That said, it is imperative to dispute its one-dimensional, skewed hegemonic white history by asserting that Afrikaans constitutes heterogeneity. We

[60] Id at paras 75 and 79 and *University of the Free State* above n 5 at para 93.

kolonialistiese afkoms. Universiteite as intellektuele instellings van hervormende grondwetlikheid, moet die voortou neem in die soeke na die dekolonisering van taal. Die enigste manier om dit te bewerkstellig is om te verseker dat alle inheemse tale stelselmatig ingestel word as tale van onderrig en leer, binne geredelik beskikbare middele. In *Gelyke Kanse* het hierdie Hof as volg toegegee: "die bevestiging dat die Universiteit se 2016 Taalbeleid voldoen aan artikel 29(2) kom teen 'n koste. Ons uitspraak moet erkenning verleen daaraan".[58] Hierdie Hof het ook gemaan dat "die vloedgolf van Engels" 'n wesenlike bedreiging is vir minderheidstale, insluitend Afrikaans.[59] Die koste en bedreiging in hierdie verband is breedvoerig uiteengesit deur Froneman R in sy aparte samestemmende uitspraak in daardie saak en behoef geen herhaling nie. Daar, en ook in *University of the Free State*, het hy tereg Engels se oorheersing oor ander inheemse tale, insluitend Afrikaans, bekla.[60]

[23] Ter afsluiting van hierdie rubriek: die kommerwekkende tendens van die eensydige voorhou van Afrikaans as 'n "wit taal" en

[60] Id in paragrawe 75 en 79 en *University of the Free State* n 5 hierbo in para 93.

must remain mindful of Chinua Achebe's perspective of history that "until the lions have their own historians, the history of the hunt will always glorify the hunter".[61] In the present context in particular:

> "[W]e still have to recognise the multi-faceted nature of the Afrikaans speaking community, the numerical dominance of its black speakers, and the need to advance Afrikaans in a multilingual, all-inclusive antiracist environment, as an example and as part of the development and intellectualisation of African languages. We also have to recognise that Afrikaans is at the core of many fellow South Africans' sense of identity, and they are not necessarily white."[62]

[24] Let us turn, then, to the question at the heart of this matter, which is whether UNISA's revised language policy, which reduces the extent of teaching and learning in Afrikaans, passes constitutional muster.

Background

[25] UNISA is the sole distance-learning institution of higher education in

[61] Brooks above n 8.

[62] Willemse II above n 4 at 10.

"die onderdrukker se taal", is gegrond op 'n skreiende wanvoorligting, soos ek probeer aantoon het. Afrikaanssprekendes moet egter aanvaar dat hul taal nou gelyke status geniet met die ander tien amptelike tale. Afrikaans kan nie aanhou om sy bevoorregte posisie te geniet ten koste van die ander inheemse tale, wat so verskriklik afgeskeep is onder apartheid, nie. Daarby gesê, is dit noodsaaklik om die eensydige, verwronge oorheersende wit geskiedenis te bestry deur Afrikaans se diversiteit te beklemtoon. Ons moet gedagtig bly aan Chinua Achebe se perspektief van geskiedenis dat "totdat die leeus hulle eie geskiedenis skrywers het, sal die geskiedenis van die jag altyd die jagter vereer".[61] In die onderhawige verband veral:

> "[W]e still have to recognise the multi-faceted nature of the Afrikaans speaking community, the numerical dominance of its black speakers, and the need to advance Afrikaans in a multilingual, all-inclusive antiracist environment, as an example and as part of the development and intellectualisation of African languages. We also have to recognise that Afrikaans is at the core of many fellow South Africans'

[61] Brooks n 8 hierbo.

[62] Willemse II n 4 hierbo op 10.

South Africa and the largest on the continent. The vast majority of UNISA's students are unable to, or prefer not to, attend residential universities. UNISA was established in 1959 and it offered tuition in both Afrikaans and English. It emerged from the University of the Cape of Good Hope, which was established in 1873.[63] Upon its establishment, UNISA was incorporated into a distance-learning university.[64] In 2004 it merged with two other major distance-learning institutions, Technikon SA and Vista University.[65]

[26] At the outset, it is useful to expound UNISA's 2006 language policy. The stated objective of the 2006 language policy was to inform "the use of language in all aspects of communication of the University, i.e. tuition, public, internal and external communication". It promised, amongst other things, that UNISA would make tuition available in the official languages of South Africa on the basis of functional multilingualism. While English and Afrikaans could operate as higher

> sense of identity, and they are not necessarily white."[62]

[24] Vervolgens behandel ek dan die kernvraag in hierdie saak, die grondwetlikheid van UNISA se hersiene taalbeleid wat die omvang van die onderrig en leer in Afrikaans verminder.

Agtergrond

[25] UNISA is die enigste tersiêre instansie in Suid-Afrika wat afstandonderrig aanbied, dit is ook die grootste van sy soort op die kontinent. Die meerderheid van UNISA se studente is nie in staat, of verkies om nie by residensiële universiteite te studeer nie. UNISA is in 1959 gestig en het onderrig in beide Afrikaans en Engels aangebied. UNISA het ontstaan vanuit die Universiteit van die Kaap die Goeie Hoop, wat in 1873[63] gestig is, en is later omskep in 'n universiteit vir afstandsonderrig.[64] In 2004 het UNISA en twee ander groot instansies vir afstandonderrig, Technikon Suider-Afrika en Vista Universiteit, saamgesmelt.[65]

[63] UNISA "The Leading ODL University" (2020), available at https://www.unisa.ac.za/sites/corporate/default/About/The-leading-ODL-university.

[64] Id.

[65] UNISA *Access to Information Manual* (2006) at 1.

[63] UNISA "The Leading ODL University" (2020) beskikbaar by https://www.unisa.ac.za/sites/corporate/default/About/The-leading-ODL-university.

[64] Id.

[65] UNISA *Access to Information Manual* (2006) op 1.

education-level languages, UNISA would pro-actively support African languages with a view to them becoming the medium of instruction at higher education level. That 2006 language policy was revised in 2010. According to UNISA, this need for revision stemmed from a natural attrition of the demand for Afrikaans, a desire for equality between Afrikaans and other African languages as support, rather than as languages of teaching and learning, and students' preference to study in English. Consequently, after 2010, teaching and learning at UNISA was delivered in terms of a revised language policy that envisaged the promotion and advancement of multilingualism, whilst retaining Afrikaans and English as languages of teaching and learning.

[27] In 2012, UNISA introduced the "Guidelines for the Discontinuation of Afrikaans in Certain Modules" (the Guidelines). The Guidelines operated together with the revised 2010 policy. In terms of the Guidelines, all undergraduate modules were grouped into one of three categories. These were:

(a) Fully bilingual, English and Afrikaans, for tuition in any module that has consistently

[26] Uit die staanspoor is dit van nut om met UNISA se 2006 taalbeleid te begin. Die gestelde doelwit van UNISA se 2006 taalbeleid was om "die gebruik van taal in alle aspekte van kommunikasie van die Universiteit toe te lig, d.w.s. onderrig, openbare, interne en eksterne kommunikasie". Dit het, onder andere, beloof dat UNISA onderrig beskikbaar sou stel in die amptelike tale van Suid-Afrika volgens die beginsel van funksionele veeltaligheid. Terwyl Afrikaans en Engels op hoër onderwysvlak as onderrigtaal gebruik kon word, sou UNISA pro-aktief die gebruik van ander Afrikatale ondersteun, met die oog daarop om hierdie tale op hoër onderwysvlak as onderrigmedium aan te wend. Daardie 2006 taalbeleid is in 2010 hersien. Volgens UNISA het die behoefte om die taalbeleid te hersien ontspruit as gevolg van die natuurlike afname in die vraag na Afrikaans, 'n strewe na gelykheid tussen Afrikaans en ander Afrikatale as ondersteuningstale eerder as taal van leer en onderrig, asook die voorkeur van studente om in Engels te studeer. Gevolglik is leer en onderrig by UNISA aangebied na 2010 volgens die hersiene taalbeleid, wat die bevordering van meertaligheid beoog het,

not had fewer than 100 Afrikaans students in the last three years;

(b) Mixed mode delivery in terms of which all modules that have consistently had, over the last three years, between 15 and 100 Afrikaans students in every registration period, would automatically discontinue formal tuition and printed study material in Afrikaans; and

(c) English-only modules that consistently over the previous three years have had less than 15 Afrikaans students in every registration period, may discontinue tuition in Afrikaans, provided the Senate Language Committee (SLC), which was established by the Senate to review UNISA's language policy and, thereafter, make recommendations to the Senate, is informed accordingly. Departments would have the option to continue tuition in Afrikaans in these modules, but may

terwyl Afrikaans en Engels as onderrigtale behoue gebly het.

[27] In 2012 het UNISA die "Riglyne vir die Staking van Afrikaans in Sekere Modules" (die Riglyne) bekendgestel. Die Riglyne is in samehang met die hersiene 2010 beleid toegepas. Ingevolge die Riglyne was alle voorgraadse modules in een van die volgende drie kategorieë ingedeel. Dit was:

(a) Volkome tweetalig, Engels en Afrikaans, vir onderrig in enige module wat oor die voorafgaande drie jaar voortdurend nie minder as 100 Afrikaanse studente gehad het nie;

(b) Gemengde modus aanbieding, waarvolgens formele onderrig en gedrukte studiemateriaal outomaties gestaak sou word in alle modules wat oor die voorafgaande drie jaar voortdurend tussen 15 en 100 Afrikaanse studente in elke registrasietydperk gehad het; en

(c) Modules alleenlik in Engels aangebied wat oor die voorafgaande drie jaar voortdurend minder as 15

only make study materials available on a digital platform. Examination papers for these modules would be in English, but with an option to have Afrikaans papers so that students would be able to read the examination papers in Afrikaans and to answer them in that language.

[28] After a comprehensive review process, commencing in 2013, a draft language policy and its implementation plan, providing for only English as a language of teaching and learning, was formulated in 2014. Several meetings followed during the ensuing two years, in which UNISA's SLC, Senate and Council deliberated extensively on the draft language policy. Acting in terms of section 27(2) of the Higher Education Act (the Act),[66] UNISA's Senate (whose Chairperson is the second applicant) and Council (whose Chairperson is the first applicant) decided to adopt this revised language policy on 30 March 2016 and 28 April 2016 respectively (the impugned decision).

[66] 101 of 1997.

Afrikaanse studente in elke registrasietydperk gehad het kon gestaak word, mits die Senaat se Taal Kommittee (STK), wat deur die Senaat gestig is om UNISA se taalbeleid te hersien en aanbevelings aan die Senaat te maak, dienooreenkomstig ingelig is. Departemente sou die opsie hê om onderrig in hierdie modules in Afrikaans voort te sit, maar studiemateriaal moes slegs op 'n digitale platform beskikbaar gestel word. Eksamenvraestelle vir hierdie modules sou in Engels opgestel word, met die opsie om Afrikaanse vraestelle beskikbaar te stel sodat studente die vraestelle in Afrikaans kon lees en beantwoord.

[28] Na afloop van 'n omvattende hersieningsproses wat in 2013 begin is, is daar in 2014 'n konsep taalbeleid en implementeringsplan geformuleer wat slegs

[66] 101 van 1997.

[29] Section 27(2) of the Act empowers a university, subject to the policy framework determined by the Minister of Higher Education and Training, through its Council, and with the concurrence of its Senate, to determine its language policy, publish it and make it available upon request. The relevant policy framework for present purposes is the Language Policy for Higher Education (the National Language Policy), established by the Ministry of Education in November 2002.[67] The stated objective of UNISA's revised language policy was to institute measures to enhance the status of indigenous African languages, while also phasing out Afrikaans and thereby removing the guarantee that courses be offered in both Afrikaans and English. In effect, English became the sole medium of tuition and

vir Engels as leer- en onderrigtaal voorsiening gemaak het. In die daaropvolgende twee jaar is verskeie vergaderings belê waar UNISA se STK, die Senaat en die Raad breedvoerig beraadslaag het oor die konsep taalbeleid . Kragtens artikel 27(2) van die Wet op Hoër Onderwys,[66] het die Senaat (die Senaat se Voorsitter is die tweede applikant) en die Raad (die Raad se Voorsitter is die eerste applikant) onderskeidelik op 30 Maart 2016 en 28 April 2016 besluit om die hersiene taalbeleid aan te neem (die gewraakte besluit).

[29] Artikel 27(2) van die Wet bemagtig 'n universiteit om deur die Raad en met goedkeuring van die Senaat, 'n taalbeleid te ontwikkel, te publiseer en beskikbaar te stel

[67] The National Language Policy's main objectives are as follows:

> "[T]o promote multilingualism and to enhance equity and access in higher education through the development, in the medium to long-term, of South African languages as mediums of instruction in higher education, alongside English and Afrikaans; [t]he development of strategies for promoting student proficiency in designated language(s) of tuition; [t]he retention and strengthening of Afrikaans as a language of scholarship and science; [t]he promotion of the study of South African languages and literature through planning and funding incentives; [t]he promotion of the study of foreign languages; and [t]he encouragement of multilingualism in institutional policies and practices."

[67] Die Nasionale Taalbeleid se hoof doelwitte is:

> "[O]m veeltaligheid te bevorder en om billikheid en toegang tot hoër onderwys te versterk deur die ontwikkeling, in die medium- tot langtermyn, van Suid-Afrikaanse tale as onderrigmediums in hoër onderwys, tesame met Engels en Afrikaans; [d]ie ontwikkeling van strategieë om studente vaardigheid in 'n aangewese taal of tale van onderrig te bevorder; [d]ie behoud en versterking van Afrikaans as 'n taal van kundigheid en wetenskap, [d]ie bevordering van die studie van ander Suid-Afrikaanse tale en literatuur deur beplanning- en befondsings inisiatiewe; [d]ie bevordering van die studie van buitelandse tale; en [d]ie aanmoediging van veeltaligheid in institusionele beleide en praktyke".

learning. All formal course materials, assignments and examinations were available in English only.[68]

Litigation History

High Court

[30] The respondent, AfriForum NPC (AfriForum), launched an application in the High Court of South Africa, Gauteng Division, Pretoria, to review and set aside the language policy because of procedural irregularities and the policy's inconsistency with section 29(2) of the Constitution, and to interdict the implementation of the policy pending that review application.[69] AfriForum challenged the legality and rationality of the language policy. It also argued that it is not consistent with section 29(2) of the Constitution, as it does not accommodate Afrikaans students' desire to be taught in the language of their choice, even though it is reasonably practicable to do so.

op versoek. Hierdie beleidsbepaling is onderhewig aan die beleidsraamwerk wat deur die Minister van Hoër Onderwys en Opleiding daargestel word. Vir huidige doeleindes is die relevante beleidsraamwerk die Taalbeleid vir Hoër Onderwys (die Nasionale Taalbeleid) wat in November 2002 deur die Ministerie van Onderwys bekendgestel is.[67] Die verklaarde doelwit van UNISA se hersiene taalbeleid was om maatstawwe te implementeer wat die status van inheemse Afrikatale bevorder en terselfdertyd Afrikaans uit te faseer en daardeur die waarborg, dat kursusse in beide Afrikaans en Engels aangebied sal word, te verwyder. Die effek was dus dat Engels die enigste medium van onderrig en leer geword het. Alle formele kursus materiaal, opdragte en eksamens was slegs in Engels beskikbaar gestel.[68]

[68] Clause 4.2.1 of the revised policy unequivocally states: "The language of learning and teaching in all undergraduate courses will be English, with scaffolding in other official languages as outlined in 4.4." The "scaffolding" refers to learner support materials and activities.

[69] *AfriForum v Chairman of the Council of the University of South Africa* [2017] 1 All SA 832 (GP) (High Court judgment).

[68] Klousule 4.2.1 van die hersiende taalbeleid verklaar onomwonde: "Die taal van leer en onderrig in alle voorgraadse kursusse sal Engels wees, met ondersteuning in ander amptelike tale soos uiteengesit in 4.4". Die "ondersteuning" verwys na studente ondersteunings materiaal en aktiwiteite.

[69] *AfriForum v Chairman of the Council of the University of South Africa* [2017] 1 All SA 832 (GP) (Hooggeregshof uitspraak).

[31] The review application was partly based on the Promotion of Administrative Justice Act (PAJA),[70] on the assumption that the impugned decision constituted administrative action.[71] However, after the institution of the review application, it was held by this Court in *University of the Free State* that the language policy decision taken in that instance by the University of the Free State did not constitute administrative action within the meaning of PAJA.[72] AfriForum then abandoned its reliance on PAJA, but it persisted with its challenge on the principle of legality. That challenge failed in the High Court.[73]

[32] The High Court noted that the constitutional right to receive an education in the language of one's choice is qualified as "tuition in the language of choice must be 'where that education is reasonably practicable'".[74] Given the declining demand for Afrikaans, together with the need for resources to develop the academic status of other official languages, the High Court

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[70] 3 of 2000.

[71] High Court judgment above n 69 at para 20.

[72] Id; *University of the Free State* above n 5 at para 35.

[73] High Court judgment above n 69 at para 21 and 81.

[74] Id at para 28.

Litigasie geskiedenis

Hooggeregshof

[30] Die respondent, AfriForum NWO (AfriForum), het 'n aansoek in die Hooggeregshof van Suid Afrika, Gauteng Afdeling, Pretoria (Hooggeregshof) ingestel om die taalbeleid te hersien en tersyde te stel op grond van prosedurele onreëlmatighede en teenstrydigheid met artikel 29(2) van die Grondwet. Daarmee saam is aansoek gedoen vir 'n interdik om die implementering van die beleid te verhoed hangende daardie hersieningsaansoek.[69] AfriForum het die wetlikheid en rasionaliteit van die taalbeleid betwis. AfriForum het ook aangevoer dat die taalbeleid teenstrydig is met artikel 29(2) van die Grondwet, omrede dit nie Afrikaanse studente, wat 'n begeerte het om in die taal van hul keuse te studeer, akkommodeer nie, ten spyte daarvan dat dit redelik prakties uitvoerbaar is om dit te doen.

[31] Die hersieningsaansoek was gedeeltelik gebring in terme van die Wet op Bevordering van Administratiewe

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[70] 3 van 2000.

[71] Hooggeregshof uitspraak n 69 hierbo in para 20.

[72] Id; *University of the Free State* n 5 hierbo in para 35.

[73] Hooggeregshof uitspraak n 69 hierbo in paragrawe 21 en 81.

[74] Id in para 28.

found that UNISA was justified, because of considerations of equity, practicability, and the need to redress the results of past racially discriminatory practices, to discontinue the use of Afrikaans as a language of teaching and learning.[75] There was thus no violation of the section 29(2) right.

[33] On rationality, the High Court held that the language policy was rationally connected to UNISA's powers in terms of section 27(2) of the Act and the National Language Policy.[76] The High Court noted that, while the National Language Policy in general supports the retention of Afrikaans as a language of academia and science, this does not prohibit the adoption of policies that remove Afrikaans.[77] In respect of legality, the High Court dismissed AfriForum's submissions that certain procedures provided for in the rules of the Senate had not been complied with and that these procedural irregularities rendered the decision invalid.[78] While certain specific rules were not complied with – specifically, no formal vote had occurred and information was distributed to members later, outside the

[75] Id at para 41.

[76] Id at para 45.

[77] Id.

[78] Id at paras 65-72.

Geregtigheid (WBAG)[70] op die veronderstelling dat die gewraakte besluit administratiewe optrede behels.[71] Nadat die hersieningsaansoek ingestel is, het hierdie Hof egter in *University of the Free State* beslis dat die besluit aangaande die taalbeleid wat deur die Universiteit van die Vrystaat in daardie aangeleentheid geneem is, nie administratiewe aksie soos bedoel in die WBAG behels nie.[72] AfriForum het die steun op die WBAG laat vaar, maar steeds voortgegaan met bestryding op grond van die wetlikheidsbeginsel. Die aansoek in die Hooggeregshof was onsuksesvol.[73]

[32] Die Hooggeregshof het genotuleer dat die grondwetlike reg om onderwys in 'n taal van eie keuse te ontvang gekwalifiseer word as "onderwys in die taal van keuse moet wees 'waar daardie onderwys redelikerwys doenlik is'".[74] Gegewe die afname in die vraag na Afrikaans, tesame met die hulpbronne wat benodig word om die akademiese status van die ander amptelike tale te bevorder, het die Hooggeregshof bevind dat UNISA se besluit om die gebruik van Afrikaans as leer- en onderrigtaal te

[75] Id in para 41.

[76] Id in para 45.

[77] Id.

[78] Id in paragrawe 65-72.

official timeframe – the Senate had followed the rules it created for itself by convention, which allowed for flexibility.[79] In addition, the High Court held that AfriForum could not rely on *Albutt*[80] as the basis for its procedural challenge, because that case did not give rise to a general principle that public consultations must occur whenever institutions determine policy.[81] The High Court consequently dismissed the review application.[82]

Supreme Court of Appeal

[34] With the leave of the High Court, AfriForum successfully appealed to the Supreme Court of Appeal.[83] That Court, relying on *Ermelo*,[84] emphasised that in an instance where a student already enjoys the benefit of being taught in an official language of their choice, the state has a negative duty not to diminish this right

staak, geregverdig was vanweë oorweginge van billikheid, uitvoerbaarheid en die noodsaaklikheid om die gevolge van rasse diskriminerende praktyke van die verlede reg te stel.[75] Daar was dus geen skending van die artikel 29(2) reg nie.

[33] Wat rasionaliteit aanbetref, het die Hooggeregshof bevind dat die taalbeleid rasioneel verband hou met UNISA se bevoegdhede ingevolge artikel 27(2) van die Wet op Hoër Onderwys en die Nasionale Taalbeleid.[76] Die Hooggeregshof het genotuleer dat, hoewel die Nasionale Taalbeleid oor die algemeen die behoud van Afrikaans as akademiese- en navorsingstaal ondersteun, dit nie die aanneem van beleide wat Afrikaans verwyder, verbied nie.[77] Wat wetlikheid aanbetref, het die Hooggeregshof AfriForum se betoog, dat daar nie aan sekere prosedures wat in die Senaatreëls vervat

[79] Id at paras 70-2.

[80] *Albutt v Centre for the Study of Violence and Reconciliation* [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC).

[81] High Court judgment above n 69 at paras 78-9.

[82] Id at para 87.

[83] *AfriForum NPC v Chairperson of the Council of the University of South Africa*, unreported judgment of the Supreme Court of Appeal, Case No 765/2018 (30 June 2020) (Supreme Court of Appeal judgment) at para 3.

[84] *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* [2009] ZACC 32; 2010 (2) SA 415 (CC); 2010 (3) BCLR 177 (CC) (*Ermelo*).

[79] Id in paragrawe 70-2.

[80] *Albutt v Centre for the Study of Violence and Reconciliation* [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC).

[81] Hooggeregshof uitspraak n 69 hierbo in paragrawe 78-9.

[82] Id in para 87.

[83] *AfriForum NPC v Chairperson of the Council of the University of South Africa*; ongerapporteerde uitspraak van die Hoogste Hof van Appèl, Saak No 765/2018 (30 Junie 2020) (Hoogste Hof van Appèl uitspraak) in para 3.

[84] *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* [2009] ZACC 32; 2010 (2) SA 415 (CC); 2010 (3) BCLR 177 (CC) (*Ermelo*).

without appropriate justification. In order to justify the removal of the dual English/Afrikaans model of teaching and learning, UNISA had to show that it was not reasonably practicable to sustain it, but had failed to do so.[85] In addition, the Supreme Court of Appeal held that the justification offered by UNISA, based on the availability of resources, was unconvincing in light of the normative content of section 29(2) of the Constitution.[86] The Court emphasised that compliance with section 29(2) goes "beyond the availability of resources".[87]

[35] As for the considerations of equity that are central to the determination of reasonable practicability, the Supreme Court of Appeal held that the facts of the matter are distinguishable from those in *University of the Free State* and *Gelyke Kanse*.[88] UNISA is a distance-learning university, so there was no threat of Afrikaans creating segregated classes or fostering racial supremacy, the Court reasoned.[89] Ultimately, the Supreme Court of Appeal

word voldoen is nie en dat hierdie prosedurele onreëlmatighede die besluit ongeldig gemaak het, verwerp.[78] Alhoewel sekere spesifieke reëls nie nagekom is nie – meer spesifiek dat daar geen formele stemproses plaasgevind het nie en dat inligting eers na afloop van die amptelike spertydperk aan lede versprei is – het die Senaat in die besluitnemingsproses, deur konvensie, eie reëls geskep wat buigsaamheid moontlik gemaak het.[79] Boonop het die Hooggeregshof bevind dat AfriForum nie op *Albutt*[80] kan steun as die basis van die prosedurele argument nie, omdat *Albutt* nie 'n algemene beginsel geskep het wat bepaal dat openbare konsultasies moet plaasvind wanneer instellings beleide bepaal nie.[81] Die Hooggeregshof het gevolglik die hersieningsaansoek van die hand gewys.[82]

Hoogste Hof van Appèl

[34] Met verlof van die Hooggeregshof het AfriForum suksesvol appèl aangeteken na die Hoogste Hof van Appèl.[83] Daardie Hof,

[85] Supreme Court of Appeal judgment above n 83 at paras 35-7, 47.

[86] Id at para 38.

[87] Id.

[88] Id at para 42.

[89] Id.

[85] Hoogste Hof van Appèl uitspraak n 83 hierbo in paragrawe 35-7, 47.

[86] Id in para 38.

[87] Id.

[88] Id in para 42.

[89] Id.

concluded that UNISA had failed to establish that the adoption of its new policy in 2016 was conducted in a constitutionally compliant manner and did not detract from the section 29(2) right without appropriate justification.[90] The Supreme Court of Appeal declared the adopted language policy unconstitutional and unlawful and set it aside.[91] It ordered UNISA to reinstate Afrikaans modules that have been discontinued pursuant to the adoption of the language policy.[92]

[36] In upholding the appeal with costs, the Supreme Court of Appeal issued the following order:

> "The order of the court a quo is set aside and replaced with the following:
>
> (a) the resolutions of the Council and Senate of the University of South Africa to approve a new language policy on 28 April and 30 March 2016, respectively, are set aside;
>
> (b) the new language policy adopted by the University of South Africa is declared

wat op *Ermelo*[84] gesteun het, het beklemtoon dat die staat, in 'n geval waar 'n student reeds onderrig ontvang in 'n amptelike taal van eie keuse, 'n negatiewe plig het om nie sonder behoorlike regverdiging hierdie reg te beperk nie. Om die verwydering van die dubbelmedium (Engels/Afrikaans) model van onderrig en leer te regverdig, moes UNISA bewys dat dit nie redelik uitvoerbaar was om die model te onderhou nie,[85] maar het hierin misluk. Verder het die Hoogste Hof van Appèl bevind dat die regverdiging wat UNISA voorgehou het, wat verband gehou het met die beskikbaarheid van hulpbronne, nie oortuigend was nie, gegewe die normatiewe aard van artikel 29(2) van die Grondwet.[86] Die Hof het daarop gewys dat die nakoming van artikel 29(2) "meer verg as die beskikbaarheid van hulpbronne".[87]

[35] Ten opsigte van die billikheidsoorwegings, wat die kern van die bepaling van redelike uitvoerbaarheid vorm, het die Hoogste Hof van Appèl bevind dat die feite van die aangeleentheid onderskei kan word van dié in *University of the Free State* en *Gelyke Kanse*.[88] Aangesien UNISA

[90] Id at para 47.

[91] Id at para 48.

[92] Id.

[90] Id in para 47.

[91] Id in para 48.

[92] Id.

unconstitutional and unlawful and is set aside to the extent that Afrikaans has been removed as a language of learning and tuition;

(c) the University of South Africa shall prominently publish on its website and in three major Afrikaans newspapers in South Africa and transmit by email to all its students a notice:

(i) containing a full list of the modules that were on offer in Afrikaans as at 28 April 2016;

(ii) offering all prospective students for the next academic year admission in such modules as presented on first year level;

(iii) offering all existing students, if they were enrolled in any one of those courses or would have enrolled for the subsequent year course available in Afrikaans, but had perforce to follow

afstandsonderrig bied, was daar geen bedreiging dat Afrikaans aparte klasse sou skep of rasseoorheersing sou bevorder nie.[89] Die Hoogste Hof van Appèl het tot die slotsom gekom dat UNISA versuim het om aan te toon dat die aanvaarding van die nuwe taalbeleid in 2016 op 'n grondwetlike wyse geskied het en nie sonder regverdiging die artikel 29(2) reg beperk het nie.[90] Die Hoogste Hof van Appèl het die aanvaarde taalbeleid ongrondwetlik en onwettig verklaar en dit tersyde gestel.[91] Die Hof het UNISA gelas om die Afrikaanse modules, wat op grond van die nuwe taalbeleid gestaak is, weer in te stel.[92]

[36] Die Hoogste Hof van Appèl het die appèl met koste gehandhaaf en die volgende bevel uitgereik:

> "Die bevel van die hof a quo word tersyde gestel en vervang met die volgende:
>
> (a) die resolusie van die Raad en Senaat van die Universiteit van Suid Afrika op 28 April en 30 Maart 2016 onderskeidelik om 'n nuwe taalbeleid goed te keur, word tersyde gestel;
>
> (b) die nuwe taalbeleid wat deur die Universiteit van Suid

the module in English, a choice to enrol on the basis that they may follow the module in Afrikaans until completion of their studies;

(iv) all the modules mentioned above will be presented in full in the following academic years until the language policy has been lawfully amended, if at all.”[93]

In this Court

[37] UNISA argues that the Supreme Court of Appeal erred in concluding that the information that was before the Senate and Council was not sufficient to comply with the reasonable practicability requirement. This is so because, as set out in *Gelyke Kanse*, the constitutional criterion of reasonable practicability under section 29(2) is objective. UNISA contends that the continued provision of Afrikaans language modules at UNISA is not reasonably practicable. That is due to the low and

Afrika aanvaar is, word ongrondwetlik en onwettig verklaar en word tersyde gestel tot die mate dat dit Afrikaans as leer- en onderrigtaal verwyder;

(c) die Universiteit van Suid Afrika moet prominent ’n kennisgewing op sy webwerf en in drie groot Afrikaanse koerante in Suid Afrika publiseer en per e-pos aan al sy studente stuur wat:

(i) ’n volledige lys van die modules wat op 28 April 2016 in Afrikaans aangebied is bevat;

(ii) alle voornemende studente vir die komende akademiese jaar toelating bied in modules soos op eerstejaarsvlak aangebied;

(iii) aan alle bestaande studente, indien hulle ingeskryf was vir een van daardie kursusse of sou inskryf vir die

[93] Id.

[93] Id.

dwindling demand for courses in Afrikaans, and the need for equity in language policy so that past imbalances may be redressed. UNISA also invokes the substantial attendant costs and language demographics.

[38] UNISA points to the following shortcomings in the reasoning of the Supreme Court of Appeal:

(a) It failed to appreciate the objective nature of the test under section 29(2), manifested by its conclusion that UNISA made a mistake of law in its interpretation of the right in section 29(2).

(b) It took issue with UNISA's attempts to rely on evidence that had not served before the Senate or Council.

(c) It erred in departing from the *Plascon-Evans*[94] rule in respect of the facts upon which the objective test was to be applied.

(d) It erred in accepting AfriForum's argument on cost containment that study

[94] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (A) (*Plascon-Evans*).

daaropvolgende jaarkursus wat in Afrikaans beskikbaar is, maar die module in Engels moes neem, 'n keuse bied om in te skryf met die verstandhouding dat hulle die module in Afrikaans kan neem tot voltooiing van hul studies;

(iv) al die bogenoemde modules in die daaropvolgende akademiese jare volledig aangebied sal word totdat die taalbeleid wettiglik gewysig is, indien wel."[93]

In hierdie Hof

[37] UNISA voer aan dat die Hoogste Hof van Appèl gefouteer het deur tot die slotsom te kom dat die inligting wat voor die Senaat en die Raad was, nie voldoende was om aan die redelike uitvoerbaarheidsvereiste te voldoen nie. Dit is omrede, soos wat in *Gelyke Kanse* beslis is, die grondwetlike

[94] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (A) (*Plascon-Evans*).

materials could be provided online and that English modules could cross-subsidise Afrikaans modules.

[39] It is forcefully contended on behalf of UNISA that in applying an objective test, there is no concern with how the decision-maker understood her discretion, what her subjective reasons were for the decision, or what did or did not serve before her when making the decision. All that matters is whether that decision is justified on the facts before the Court. In support of this proposition, UNISA cites *Pharmaceutical Manufacturers*.[95] UNISA contends that, in determining the objective facts, a court applies the ordinarily applicable evidentiary rules. In motion proceedings, that entails applying the so-called *Plascon-Evans* test.[96]

[40] UNISA denies that its decisions were irrational, contending that it did not "remove", "abolish", "eradicate", "abandon" or "do away with" Afrikaans tuition. Instead, the new language policy

[95] *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) (*Pharmaceutical Manufacturers*) at paras 88-90.

[96] *Plascon-Evans* above n 94 at 634E-635C, cited at para 16 of *Gelyke Kanse* above n 3.

maatstaf van redelike uitvoerbaarheid kragtens artikel 29(2), objektief is. UNISA beweer dat die voortgesette aanbied van modules in Afrikaans by UNISA nie redelik uitvoerbaar is nie. Dit is as gevolg van die lae en kwynende vraag na kursusse in Afrikaans, en die behoefte aan billikheid in 'n taalbeleid, sodat die wanbalanse van die verlede reggestel kan word. UNISA steun ook op die aansienlike gepaardgaande koste en taaldemografie.

[38] UNISA wys op die volgende tekortkominge in die beredenering van die Hoogste Hof van Appèl:

(a) Dit het nie die objektiewe aard van die toets ingevolge artikel 29(2) begryp nie, wat blyk uit die hof se gevolgtrekking dat UNISA 'n regsfout begaan het met die interpretasie van artikel 29(2);

(b) Dit het fout gevind met UNISA se poging om te steun op bewyse wat nie voor die Senaat of die Raad gedien het nie;

[95] *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) (*Pharmaceutical Manufacturers*) in paragrawe 88-90.

[96] *Plascon-Evans* n 94 hierbo op 634E-635C, na verwys in para 16 van *Gelyke Kanse* n 3 hierbo.

preferred English as the language of teaching and learning, whilst placing Afrikaans on the same footing as the other official languages. Tuition in Afrikaans and the other official languages was being offered where there is capacity, with learner support in the student's language, and with the intent that Afrikaans' development as well as that of the other official languages should be promoted. This, UNISA points out, is best reflected in clause 4.2.3 of the new language policy, which provides:

> "Where there is capacity, a selected number of modules and programmes will progressively be offered in more than one official South African language in order to support relevant national policies."

It contends that this provision moves the university's new language policy into a "realm of genuine multilingualism". Whereas the previous language policy entrenched English and Afrikaans whilst paying lip service to developing other African languages, the new language policy enables UNISA to offer courses in African languages as well as in Afrikaans.

[41] On remedy, UNISA points to the practical difficulties of reinstating modules

(c) Dit het gefouteer deur af te wyk van die *Plascon-Evans*[94] reël ten opsigte van die feite waarop die objektiewe toets toegepas moes word;

(d) Dit het gefouteer deur AfriForum se betoog, dat studiemateriaal aanlyn verskaf kan word en vir kruissubsidiëring deur Engelse modules om koste te bespaar, te aanvaar.

[39] Dit word heftig namens UNISA aangevoer dat by die toepassing van 'n objektiewe toets dit nie saak maak hoe die besluitnemer haar diskresie verstaan het nie, wat haar subjektiewe redes vir die besluit was nie, en wat wel en wat nie voor haar gedien het tydens die neem van die besluit nie. Al wat tersaaklik is, is of die besluit geregverdig is deur die feite voor die Hof. As steun vir hierdie betoog, verwys UNISA na *Pharmaceutical Manufacturers.*[95] UNISA beweer dat by die bepaling van die objektiewe faktore, 'n hof die gewone toepaslike bewysreëls toepas. In mosieverrigtinge behels dit die toepassing van die sogenaamde *Plascon-Evans* toets.[96]

that have been discontinued for four years, which will require extensive resources without any guarantee that any, or a substantial number of, students will register for the modules. In addition, the reinstatement of the modules would be the same as introducing the modules afresh in Afrikaans, so that equity would require that the modules be offered in the nine other official languages as well. UNISA therefore challenges the orders granted by the Supreme Court of Appeal. It submits that the appropriate remedy would rather have been to suspend any order of invalidity of the decisions adopting the new language policy, so as to enable UNISA to consider what changes to make to the policy. In the event of this Court dismissing its appeal, UNISA requests that the order of invalidity be suspended until the beginning of the 2023 academic year, to enable it to implement an order properly, or to amend its language policy in a constitutionally compliant manner.

[42] AfriForum argues that section 29(2) requires UNISA, as an organ of state, to consider all reasonable alternatives and to take into account equity, practicability and the need to redress the injustices of the past. UNISA did not do this and has contended

[40] UNISA ontken dat die besluite irrasioneel was, en beweer dat dit nie Afrikaanse onderrig "verwyder", "afgeskaf", "uitgeroei", "weggelaat" of "mee weggedoen het" nie. Die nuwe taalbeleid het eerder Engels as taal van leer en onderrig verkies, terwyl Afrikaans op dieselfde grondslag as die ander amptelike tale geplaas is. Onderrig in Afrikaans en in die ander amptelike tale word aangebied waar daar kapasiteit is, met leerder ondersteuning in die student se taal, en met die bedoeling dat Afrikaans en die ander amptelike tale bevorder behoort te word. UNISA wys daarop dat dit die beste weerspieël word in klousule 4.2.3 van die nuwe taalbeleid, wat bepaal:

> "Where there is capacity, a selected number of modules and programmes will progressively be offered in more than one official South African language in order to support relevant national policies."

UNISA beweer dat hierdie bepaling die universiteit se nuwe taalbeleid laat aanbeweeg na "'n milieu van ware meertaligheid". Terwyl die vorige taalbeleid Engels en Afrikaans verskans het en slegs lippediens bewys het ten aansien van die ontwikkeling van ontwikkelende Afrika tale,

that this is an obligation borne by the state, not itself. Nor did UNISA present any evidence to show that formal tuition in Afrikaans would detract from the development of tuition in any other languages, or conduct a study on the demand for Afrikaans courses. AfriForum argues that the statistics which UNISA does present should be rejected, as they are not accurate. On the question of equity, it argues that UNISA failed to show that it would not be able to offer the benefits of the new language policy to students whose first language is neither English nor Afrikaans, while retaining Afrikaans as a language of teaching and learning.

[43] AfriForum submits that UNISA bears the "negative burden" of establishing "appropriate justification" for why the right to receive education in the language of one's choice should be abrogated. The justification must address the criterion of "reasonable practicability" referred to in section 29(2), and UNISA has failed to do so. In addition, UNISA did not consult with affected students before deciding to implement the language policy, and the Senate's decision to approve the language policy did not comply with the procedural requirements of section 27(2) of the Act.

stel die nuwe taalbeleid UNISA in staat om kursusse in ander Afrika tale sowel as Afrikaans aan te bied.

[41] Ten aansien van die remedie, verwys UNISA na die praktiese struikelblokke om modules weer in te stel wat al vir vier jaar gestaak is, wat omvattende hulpbronne vereis sonder enige waarborg dat studente vir die modules sal registreer. Die herinstel van die modules sal verder dieselfde uitwerking hê as om die modules in Afrikaans opnuut in te stel. Billikheid sou derhalwe vereis dat die modules ook in die ander nege amptelike tale aangebied moes word. UNISA betwis gevolglik die bevele uitgereik deur die Hoogste Hof van Appèl. Die submissie word verder voorgehou dat die gepaste remedie eerder sou wees om die bevel van die ongeldigheid van die besluite om die nuwe taalbeleid aan te neem, op te skort ten einde UNISA in staat te stel om veranderinge aan die taalbeleid te oorweeg. Ingeval hierdie Hof die appèl van die hand sou wys, versoek UNISA dat die bevel van ongeldigheid opgeskort word tot die begin van die 2023 akademiese jaar ten einde dit in staat te stel om die bevel behoorlik te implementeer, of om die taalbeleid te wysig op 'n grondwetlike wyse.

[44] In the alternative, AfriForum argues that UNISA's decision was irrational and not authorised by law. On rationality, it argues that the Senate and Council failed to have regard to relevant considerations and to consult persons who would be most directly affected by the decisions. In respect of legality, AfriForum argues that the Senate did not comply with its own rules. And on remedy, it submits that the order of the Supreme Court of Appeal is just and equitable. That order does not mean that UNISA is required to reinstate Afrikaans modules that had already been discontinued under the Guidelines at the time when the new policy was adopted. There is accordingly no merit in UNISA's contention that the order goes further than reinstating the status quo ante as at 28 April 2016.

Jurisdiction and leave to appeal

[45] This matter concerns a fundamental right in section 29(2) of the Constitution and, as stated, it is the latest in a trilogy of cases on the policy of Afrikaans as a language of teaching and learning. The source of UNISA's power to determine language policy is section 27(2) of the Act, which emanates from section 29(2) of the

[42] AfriForum betoog dat artikel 29(2) van UNISA, as 'n staatsorgaan, vereis om alle redelike alternatiewe te oorweeg en om billikheid, uitvoerbaarheid, en die noodsaak om die ongeregtighede van die verlede reg te stel. UNISA het dit nie gedoen nie, en beweer eerder dat dit 'n verpligting is wat op die staat rus, en nie op UNISA nie. UNISA het ook nie enige bewyse voorgelê wat aantoon dat formele onderrig in Afrikaans afbreuk sal doen aan die ontwikkeling van onderrig in ander tale, of 'n studie onderneem oor die behoefte vir Afrikaanse kursusse nie. Die statistieke wat UNISA wel voorlê moet verwerp word, aangesien dit nie akkuraat is nie. Aangaande billikheid, beweer AfriForum dat UNISA versuim het om te toon dat dit nie in staat sou wees om die voordele van die nuwe taalbeleid aan studente te bied wie se huistaal nie Engels of Afrikaans is nie, en terselfdertyd Afrikaans as 'n taal van leer en onderrig te behou.

[43] AfriForum voer aan dat UNISA die "negatiewe bewyslas" dra om "gepaste regverdiging" aan te toon waarom die reg om onderrig in jou taal van keuse te ontvang afgeskaf moet word. Die regverdiging moet die maatstaf van "redelike uitvoerbaarheid", soos na verwys in artikel 29(2), aanspreek, en UNISA het misluk om aldus te doen. Verder

Constitution. UNISA was thus exercising public power when it took the impugned policy decision, and that policy is reviewable under the doctrine of legality.[97] It is now settled that the question whether an official language that has been developed to convey complex scientific and technical concepts and which has been a medium of instruction for many decades could lose its status as a medium of instruction, is a constitutional issue.[98] Furthermore, the history and sensitivity of the choice of a specific language as a medium of instruction, Afrikaans in particular, ordinarily raises a point of law of general public importance.[99]

[46] Like *University of the Free State* and *Gelyke Kanse*, the issues here engage our jurisdiction and it is in the interests of justice to hear the matter. Leave should therefore be granted.

Section 29(2) of the Constitution

[47] Having examined the socio-political space occupied by Afrikaans, we must turn

het UNISA nie die geaffekteerde studente geraadpleeg voor die besluit geneem is om die taalbeleid te implementeer nie, en die Senaat se besluit om die taalbeleid goed te keur het nie voldoen aan die prosedurele vereistes van artikel 27(2) van die Wet.

[44] As alternatief voer AfriForum aan dat UNISA se besluit irrasioneel was en nie regtens gemagtig word nie. Betreffende rasionaliteit, betoog AfriForum dat die Senaat en die Raad versuim het om die tersaaklike oorwegings in ag te neem en om die persone wat die meeste geraak gaan word deur die besluit te raadpleeg. Ten aansien van wetlikheid, betoog AfriForum dat die Senaat nie sy eie reëls nagekom nie. Wat die remedie aanbetref, voer AfriForum aan dat die uitspraak van die Hoogste Hof van Appèl regverdig en billik is. Dié bevel beteken nie dat daar van UNISA vereis word om modules wat alreeds onder die Riglyne gestaak is toe die beleid aangeneem was, weer in te stel nie. Daar is gevolglik geen meriete in UNISA se aanname dat die bevel verder gaan as om die status quo ante soos op 28 April 2016 te herstel nie.

[97] *University of the Free State* above n 5 at para 37.

[98] Id at para 38.

[99] Id.

[97] *University of the Free State* n 5 hierbo in para 37.

[98] Id in para 38.

[99] Id.

our attention to its position in the law. Section 29(2) of the Constitution 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".

[48] The section, which consists of "two distinct but mutually reinforcing parts",[100] entrenches a qualified right to be taught in a preferred official language at a public institution of learning. The qualification is one of reasonable practicability,[101] that consists of both factual and normative components.[102] Factually, the question of practicability, relates to resource constraints

Jurisdiksie en verlof tot appèl

[45] Hierdie saak handel oor 'n fundamentele reg in artikel 29(2) van die Grondwet, en soos vermeld, is dit die nuutste in 'n trilogie van sake wat verband hou met beleidsbesluite oor Afrikaans as 'n medium van opvoeding en onderrig. Die bron van UNISA se bevoegdheid om die taalbeleid te bepaal is artikel 27(2) van die Wet, wat voortspruit uit artikel 29(2) van die Grondwet. UNISA het derhalwe 'n openbare bevoegdheid uitgeoefen toe die gewraakte beleidsbesluit geneem is, en dié beleid is hersienbaar onder die wetlikheids beginsel.[97] Dit is nou gevestigde reg dat die vraag of 'n amptelike taal, wat ontwikkel is om komplekse wetenskaplike en tegniese konsepte oor te dra, wat vir dekades 'n medium van onderrig was en nou moontlik daardie status kan verloor, 'n grondwetlike vraagstuk is.[98] Verdermeer is die geskiedenis en sensitiwiteit van taal as 'n medium van onderrig, veral Afrikaans, gewoonlik 'n regspunt van algemene openbare belang.[99]

[100] *Ermelo* above n 84 at para 52.

[101] *University of the Free State* above n 5 at paras 53-4.

[102] Id at para 113.

[100] *Ermelo* n 84 hierbo in para 52.

[101] *University of the Free State* n 5 hierbo in paragrawe 53-4.

[102] Id in para 113.

and the feasibility of adopting a particular language policy. The normative aspect concerns the legal standard of reasonableness, to be tested against constitutional norms which include equity, the need for redress of past discriminatory laws and practices, and non-racialism.

[49] With reference to *Ermelo*,[103] this Court described the process of establishing what "reasonable practicability" entails as follows:

> "After the words 'where that education is reasonably practicable' in section 29(2) follow factors to be

[46] Soos in *University of the Free State* en *Gelyke Kanse*, betrek die regsvrae hier ons jurisdiksie en dit is in die belang van geregtigheid om die aangeleentheid aan te hoor. Verlof tot appèl moet dus toegestaan word.

Artikel 29(2)

[47] Noudat die ondersoek na die sosio-politiese spasie wat deur Afrikaans ingeneem word afgehandel is, moet ons ons aandag verskuif na Afrikaans se posisie in die reg. Artikel 29(2) van die Grondwet bepaal:

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[103] *Ermelo* above n 84 at paras 52 and 53, where this Court explained:

> "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 [s]tate 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 [s]tate 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 [s]tate must take into account what is fair, feasible and satisfies the need to remedy the results of past racially discriminatory laws and practices."

[103] *Ermelo* n 84 hierbo in paragrawe 52 en 53 waar hierdie hof verduidelik het:

> "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 . . . 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."

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 for 'effective access' to it or its possible practical enjoyment . . . 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."[104]

[50] The right to education in a language of one's choice is entrenched in section 29(2), circumscribed only by appropriateness and reasonableness.[105] In that respect, it is aligned with international

[104] *University of the Free State* above n 5 at paras 47-8.

[105] *Gelyke Kanse* above n 3 at para 21.

"Elkeen het die reg om in openbare onderwysinstellings onderrig te ontvang in die amptelike taal of tale van eie keuse waar daardie onderrig redelik uitvoerbaar is. Ten einde die doeltreffende toegang tot, en verwesenliking van hierdie reg, te verseker, moet die staat alle redelike onderrig alternatiewe, met inbegrip van enkelmedium instellings, oorweeg, met inagneming van—

(a) billikheid;

(b) uitvoerbaarheid; en

(c) die noodsaak om die gevolge van wette en praktyke van die verlede wat op grond van ras gediskrimineer het, reg te stel."

[48] Hierdie artikel, wat bestaan uit "twee onderskeibare maar wedersyds versterkende dele"[100] vestig 'n gekwalifiseerde reg om onderrig te word in 'n amptelike taal van keuse by 'n openbare onderwysinstelling. Die kwalifikasie is een van redelike uitvoerbaarheid,[101] wat bestaan uit beide feitelike en normatiewe komponente.[102] Feitelik het die vraag oor uitvoerbaarheid betrekking op hulpbronbeperkings en die

[104] *University of the Free State* n 5 hierbo in paragraaf 47-8.

[105] *Gelyke Kanse* n 3 hierbo in para 21.

instruments.[106] In *University of the Free State*, this Court expounded:

> "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'. Inequitable access and the unintended entrenchment or fuelling of racial disharmony would thus be the 'appropriate justification' for taking away or diminishing the already existing enjoyment of the right to be taught in one's mother tongue."[107]

[51] A key consideration is equity, which is an aspect that is emphasised by UNISA in

haalbaarheid om 'n bepaalde taalbeleid aan te neem. Die normatiewe aspek het betrekking op die regsstandaard van redelikheid, wat getoets moet word teen grondwetlike norme wat billikheid, die behoefte van regstelling van diskriminerende wette en praktyke van die verlede en nie-rassisme insluit.

[49] Met verwysing na *Ermelo*,[103] het hierdie Hof die proses om vas te stel wat "redelike uitvoerbaarheid" behels, as volg beskryf:

> "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

[106] Id at para 22. In *Gelyke Kanse* id this Court cited Article 29 of the Universal Declaration of Linguistic Rights, 9 June 1996; Article 8 of the European Charter for Regional or Minority Languages, 5 November 1992; Article 29(1)(c) of the Convention on the Rights of the Child, 20 November 1989; Article 12 of the Framework Convention for the Protection of National Minorities, 1 February 1995; Article 5 of the Convention Against Discrimination in Education, 14 December 1960; and Article 27 of the International Covenant on Civil and Political Rights, 16 December 1966.

[107] *University of the Free State* above n 5 at para 50.

[106] Id in para 22. In *Gelyke Kanse* id het hierdie hof Artikel 29 van die Universele Verklaring van Taalregte, 9 Junie 1996, aangehaal; Artikel 8 van die Europese Handves vir Streeks- of Minderheidstale, 5 November 1992; Artikel 29(1)(c) van die Konvensie oor die Regte van die Kind, 20 November 1989; Artikel 12 van die Raamwerkverdrag vir die Beskerming van Nasionale Minderhede, 1 Februarie 1995; Artikel 5 van die Konvensie teen Diskriminasie in die Onderwys, 14 Desember 1960; en Artikel 27 van die Internasionale Verbond oor Burgerlike en Politieke Regte, 16 Desember 1966.

[107] *University of the Free State* n 5 hierbo in para 50.

this Court. UNISA stresses that there is a need for equity in language policy so that past imbalances may be redressed. In addition, it points out that English is accepted locally and internationally as a preferred medium of communication, business and teaching. This Court elaborated on the principle of equity in *University of the Free State*:

> "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. Where access, integration and racial harmony are imperiled 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. . . . Reasonable practicability therefore requires not only that the practicability test be met, but also that considerations of reasonableness that extend to equity broad options are alluded to for "effective access" to it or its possible practical enjoyment . . . 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."[104]

[50] Die reg tot onderrig in 'n taal van eie keuse is verskans in artikel 29(2), wat slegs deur toepaslikheid en redelikheid omskryf word.[105] In daardie opsig strook dit met internasionale instrumente.[106] In *University of the Free State* het hiedie Hof verduidelik:

> "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

> 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. 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?"[108]

Did UNISA comply with the prescripts of section 29(2)?

[52] Section 29(2) consists of two parts:

(a) first, it confers a right to receive education in the official language of one's choice at a public institution, subject only to the qualification that such education "is reasonably practicable";

[108] Id at paras 52-3.

> must be had even where 'a learner already enjoys the benefit of being taught in an official language of choice'. Inequitable access and the unintended entrenchment or fuelling of racial disharmony would thus be the 'appropriate justification' for taking away or diminishing the already existing enjoyment of the right to be taught in one's mother tongue."[107]

[51] 'n Belangrike oorweging is billikheid, 'n aspek wat beklemtoon word deur UNISA in hierdie Hof. UNISA beklemtoon dat daar 'n behoefte is vir billikheid in die taalbeleid ten einde die wanbalanse van die verlede aan te spreek. Verder, wys dit daarop dat Engels aanvaar word op beide plaaslike en internasionale vlak as 'n voorkeur medium van kommunikasie, besigheid en onderrig. Hierdie Hof het as volg uitgebrei op die beginsel van billikheid in *University of the Free State:*

> "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

[108] Id in paragrawe 52-3.

(b) secondly, it imposes an obligation for the state to "consider all reasonable educational alternatives", taking into account the considerations listed in paragraphs (a), (b) and (c), "in order to ensure the effective access to, and implementation of" the right.

[53] It is plain from this Court's jurisprudence that "reasonably practicable" envisages something that is reasonably capable of being done. In respect of the obligation on the state, UNISA adopted the startling position in Prof Moche's supplementary affidavit, that "as opposed to the [s]tate, UNISA is not liable to ensure the effective access to, and implementation of, the right concerned in the Republic". UNISA maintained this position throughout, until the litigation reached this Court. This is a fundamental misconception. UNISA is an organ of state. In *Harrielall* this Court held:

> "[I]t cannot be gainsaid that the University is an organ of [s]tate. It is a public institution through which the [s]tate discharges its constitutional obligation to make 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. Where access, integration and racial harmony are imperiled 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 . . . 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. 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?"[108]

> access to further education realisable."[109]

[54] As an organ of state, UNISA is therefore obliged in terms of section 29(2) to "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".

[55] UNISA was constrained to advance facts on affidavit to justify the decision it took by demonstrating that it applied its mind to the considerations listed in section 29(2) and that it complied with the prescripts of that section. This point was emphatically made by this Court in *Gelyke Kanse*:

> "Earlier, I noted it was the University's own decision-making structures that "judged" that the cost of securing inclusivity in teaching, while not diminishing Afrikaans, was too high. Well, who are they to judge that? It is a good question. Certainly, the Court owes no obvious deference to the institution

Het UNISA die voorskrifte van artikel 29(2) nagekom?

[52] Artikel 29(2) bestaan uit twee gedeeltes:

(a) Eerstens vestig dit 'n reg om onderrig te word in 'n amptelike taal van jou keuse by 'n openbare instelling, onderhewig slegs aan die voorbehoud dat sodanige onderrig "redelik prakties uitvoerbaar is";

(b) Tweedens plaas dit 'n verpligting op die staat om "alle redelike onderrig alternatiewe in ag te neem", met inagneming van die aspekte in paragrawe (a), (b) en (c), "ten einde die effektiewe toegang tot, en implementering van die reg te verseker".

[53] Dit is duidelik uit hierdie Hof se regspraak dat "redelike uitvoerbaarheid" iets vooropstel wat redelikerwys gedoen kan word. Ten aansien van die verpligting op die staat, het UNISA in Prof Moche se

[109] *Harrielall v University of KwaZulu-Natal* [2017] ZACC 38; 2017 JDR 1716 (CC); 2018 (1) BCLR 12 (CC) at para 15.

[109] *Harrielall v University of KwaZulu-Natal* [2017] ZACC 38; 2017 JDR 1716 (CC); 2018 (1) BCLR 12 (CC) in para 15.

making the judgment. *The Court must itself scrutinise the facts the institution advances for diminishing language-preferent tuition* while bearing in mind that it is a multifactored functional determination in which the judgment of those entrusted with the institution's well-being should be accorded what this Court has called 'appropriate respect'. This means that when considerations of cost are advanced, the Court's scrutiny will necessarily be tempered by some measure not of deferring to a judgment that might not be sound, but rather of prudent worldly-wise caution in supplanting the judgment of experienced others."[110] (Emphasis added.)

[56] When UNISA's decision to abandon Afrikaans as a language of teaching and learning is tested against objective considerations of reasonableness encapsulated in section 29(2), there must be some evidence of how it, as an organ of state, went about applying its mind. The decision must, after all, comply with the prescripts of that section, which specifically calls for an evaluation of whether the state (in this case, UNISA) did in fact "consider all reasonable

aanvullende eedsverklaring, die verbasende houding ingeneem dat "anders as die staat, UNISA geen verpligting het om toe te sien tot effektiewe toegang tot, en implementering van hierdie bepaalde reg in die Republiek nie". UNISA het deurgaans volgehou met hierdie standpunt, totdat die litigasie hierdie Hof bereik het. Hierdie is 'n fundamentele wanopvatting. UNISA is 'n staatsorgaan. In *Harrielall* het hierdie Hof bevind dat:

> "[I]t cannot be gainsaid that the University is an organ of [s]tate. It is a public institution through which the [s]tate discharges its constitutional obligation to make access to further education realisable."[109]

[54] As 'n staatsorgaan is UNISA derhalwe verplig om ingevolge artikel 29(2) "alle redelike onderrig alternatiewe te oorweeg, insluitend enkelmedium instellings, met inagneming van (a) billikheid; (b) uitvoerbaarheid; en (c) die noodsaak om die gevolge van voorheen rasgebaseerde diskriminerende wette en praktyke reg te stel".

[110] *Gelyke Kanse* above n 3 at para 42.

[110] *Gelyke Kanse* n 3 hierbo in para 42.

educational alternatives", taking into account the considerations listed in paragraphs (a), (b) and (c). UNISA cannot simply say that a decision was taken, regardless of how it was taken and without advancing any version of what was considered, and then leave it to this Court to test its objective reasonableness. That would be tantamount to a complete abdication of its constitutional obligations. As *Gelyke Kanse* makes plain, there must be facts advanced to justify UNISA's decision, for the Court to assess whether that decision passes muster.[111]

[57] It is unsurprising, given its fallacious stance in its papers in respect of these obligations, that UNISA singularly failed to adduce any evidence that it had regard to the considerations listed in section 29(2) at the time when the impugned decision was made. In respect of the justification of its decision and compliance with section 29(2), there is no evidence put up by UNISA that bears scrutiny. It is plain that neither the Senate, nor the Council, had regard to information relevant to any assessment of reasonable practicability. This includes information regarding:

[111] Id.

[55] UNISA was verplig om 'n eedsverklaring te maak waarin dit feite moes aanvoer ter regverdiging van die besluit wat dit geneem het, deur aan te toon dat dit wel aandag geskenk het aan die oorweginge vervat in artikel 29(2) en dat dit die voorskrifte van daardie artikel nagekom het. Daardie punt is onomwonde gemaak in *Gelyke Kanse*:

> "Earlier, I noted it was the University's own decision-making structures that 'judged' that the cost of securing inclusivity in teaching, while not diminishing Afrikaans, was too high. Well, who are they to judge that? It is a good question. Certainly, the Court owes no obvious deference to the institution making the judgment. *The Court must itself scrutinise the facts the institution advances for diminishing language-preferent tuition* while bearing in mind that it is a multifactored functional determination in which the judgment of those entrusted with the institution's well-being should be accorded what this Court has called 'appropriate respect'. This means that when considerations of cost are advanced, the Court's scrutiny will necessarily be tempered by some

[111] Id.

(a) what the demand for teaching and learning in Afrikaans at UNISA was;

(b) how many students requested tuition in Afrikaans;

(c) what financial and human resources were required to continue with teaching and learning in Afrikaans in order to meet that demand; and

(d) the extent to which UNISA did in fact have such resources, or put differently, the extent to which it was commercially feasible for UNISA to continue with tuition and learning in Afrikaans.

[58] It was incumbent upon UNISA to provide appropriate justification for the decision it took to change its language policy that had an adverse effect on the rights of Afrikaans students to receive tuition in their language of choice. The principles outlined in section 29(2) were not explicitly considered in the final meetings of the SLC, the Senate and the Council, which culminated in the adoption of the new language policy. "Reasonable practicability" as a concept and factors

measure not of deferring to a judgment that might not be sound, but rather of prudent worldly-wise caution in supplanting the judgment of experienced others."[110] (Klem gevoeg)

[56] Wanneer UNISA se besluit om weg te doen met Afrikaans as taal van onderrig en leer gemeet word aan die objektiewe oorweginge van redelikheid vervat in artikel 29(2), moet daar ten minste bewysmateriaal bestaan rakende die wyse waarop UNISA, qua staatsorgaan, te werke gegaan het om oorweging te skenk aan die voorskrifte. Per slot van sake moet die besluit tog daardie artikel se voorskrifte nakom, wat bepaald vereis dat die staat (in hierdie geval, UNISA), werklik as 'n feit, "oorweging geskenk het aan alle redelike onderrig alternatiewe", met inagneming van die oorweginge in paragrawe (a), (b) en (c). UNISA kan nie bloot verklaar dat 'n besluit geneem is nie, ongeag hoe dit geneem is en sonder om 'n weergawe voor te hou van wat in ag geneem is, en dit dan aan hierdie Hof oor te laat om die objektiewe redelikheid daarvan te toets nie. Dit sou neerkom op 'n totale afstanddoening van sy grondwetlike verpligtinge. Soos *Gelyke Kanse* dit duidelik stel, moet daar feite voorgehou word wat UNISA se besluit regverdig, ten einde

associated with it do not feature anywhere in the deliberations of those entities, and are not mentioned at all in the impugned decision or in UNISA's reasons for the decision.

[59] UNISA's reliance on *Pharmaceutical Manufacturers* is fallacious. The passage cited does not bear out UNISA's contentions that "there is no concern with how the decision maker understood her discretion, what her subjective reasons were for the decision and what did or did not serve before her when making the decision. All that matters is whether that decision is justified on the facts before the Court." These submissions, it will be recalled, relate to the objective approach to the reasonable practicability criterion in section 29(2). But that is not what was decided in *Pharmaceutical Manufacturers*. That case concerned the question whether a court has the power to review and set aside a decision by the President to bring into force the South African Medicines and Medical Devices Regulatory Authority Act.[112] That decision was challenged on the basis that bringing the Act into operation was premature, since the regulations necessary to give effect to other

[112] 132 of 1998.

hierdie Hof in staat te stel om te bepaal of daardie besluit wel aan die vereistes voldoen.[111]

[57] Gegewe UNISA se erge dwaling in sy stukke aangaande hierdie verpligtinge, is dit kwalik verrassend dat UNISA heeltemal versuim om enige bewysmateriaal voor te hou dat dit enigsins ag geslaan het op die oorweginge vervat in artikel 29(2), ten tyde van die bestrede besluit. Daar is geen aanvaarbare bewysmateriaal vanaf UNISA ten aansien van die regverdiging van sy besluit en die nakoming van artikel 29(2) nie. Dit blyk duidelik dat nog die Senaat, nog die Raad, enigsins ag geslaan het op tersaaklike inligting om redelike uitvoerbaarheid te bepaal. Dit sluit in inligting ten opsigte van:

(a) wat die aanvraag was by UNISA ten aansien van onderrig en leer in Afrikaans;
(b) hoeveel studente onderrig in Afrikaans aangevra het;
(c) welke finansiële en menslike hulpbronne nodig was vir die voortgesette onderrig en leer in Afrikaans ten einde te voorsien in daardie aanvraag; en

[112] 132 van 1998.

provisions of the Act were not made. It was also alleged that the Government Notice purporting to publish the schedules was invalid. The applicants consequently sought an order declaring invalid the Proclamation purportedly bringing the Act into operation[113] and the Government Notice.[114]

[60] Having become common cause, or at least not seriously disputed on the papers, that, viewed objectively, the decision to bring the Act into force before the regulatory framework was in place, was made in error, this Court held:

> "The President's decision to bring the Act into operation in such circumstances cannot be found to be objectively rational on any basis whatsoever. The fact that the President mistakenly believed that it was appropriate to bring the Act into force, and acted in good faith in doing so, does not put the matter beyond the reach of the Court's powers of review. What the Constitution requires is that public power vested in the Executive and other functionaries be exercised in an objectively rational manner. This the President manifestly,

[113] *Pharmaceutical Manufacturers* above n 95 at para 4.

[114] Id at para 6.

(d) die mate waartoe UNISA wel sulke hulpbronne gehad het, of anders gestel, tot welke mate dit kommersieel volhoubaar was vir UNISA om voort te gaan met onderrig en leer in Afrikaans.

[58] Dit was van UNISA verwag om behoorlike regverdiging voor te lê vir die besluit wat geneem is om die taalbeleid te verander, wat 'n nadelige uitwerking gehad het op die regte van Afrikaanse studente om onderrig te ontvang in die taal van hul keuse. Die beginsels vervat in artikel 29(2) is nie uitdruklik oorweeg in die STK, Senaat en die Raad se finale vergaderings wat uitgeloop het in die aanvaarding van die nuwe taalbeleid nie. "Redelike uivoerbaarheid" as 'n konsep en die faktore wat daarmee gepaard gaan, verskyn nêrens in die besprekings van daardie entiteite nie, en word glad nie vermeld in die bestrede besluit of in UNISA se redes vir die besluit nie.

[59] UNISA se steun op *Pharmaceutical Manufacturers* is misplaas. Die gedeelte wat aangehaal word bied geen steun vir UNISA

[113] *Pharmaceutical Manufacturers* n 95 hierbo in para 4.

[114] Id in para 6.

though through no fault of his own, failed to do.

Rationality in this sense is a minimum threshold requirement applicable to the exercise of all public power by members of the Executive and other functionaries. Action that fails to pass this threshold is inconsistent with the requirements of our Constitution, and therefore unlawful. The setting of this standard does not mean that the courts can or should substitute their opinions as to what is appropriate, for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a court cannot interfere with the decision simply because it disagrees with it, or considers that the power was exercised inappropriately. A decision that is objectively irrational is likely to be made only rarely but if this does occur, a court has the power to intervene and set aside the irrational decision. This is such a case. Indeed, no rational basis for the decision was suggested. On the contrary, the President himself approached the court urgently, with

se betoog dat "dit nie saak maak is hoe die besluitnemer haar diskresie verstaan het nie, wat haar subjektiewe redes vir die besluit was nie, en wat wel en wat nie voor haar gedien het tydens die neem van die besluit nie. Al wat tersaaklik is, is of die besluit geregverdig is deur die feite voor die Hof". Daar sal onthou word dat hierdie betoog betrekking het op die objektiewe benadering tot die redelike uitvoerbaarheid maatstaf in artikel 29(2). Maar dit is nie wat beslis is in *Pharmaceutical Manufacturers* nie. Daardie saak het gehandel oor die vraag of 'n hof die bevoegdheid het om die besluit van die President om die Wet op Suid-Afrikaanse Medisyne en Mediese Toestelle Regulerende Owerheid[112] in werking te stel, te hersien en tersyde te stel. Daardie besluit was betwis op die grondslag dat die inwerkingstelling van die Wet voortydig was, aangesien die nodige regulasies om uitvoering te gee aan die ander bepalings van die Wet, nog nie gemaak was nie. Dit was ook aangevoer dat die Goewermentskennisgewing wat voorgegee het om die skedules te publiseer, ongeldig was. Die applikante het gevolglik 'n bevel aangevra waarvolgens die Proklamasie wat voorgegee het om die Wet in werking te stel,[113] asook die Goewermentskennisgewing, ongeldig verklaar word.[114]

> the support of the Minister of Health and the professional associations most directly affected by the Act, contending that a fundamental error had been made, and that the entire regulatory structure relating to medicines and the control of medicines had as a result been rendered unworkable. In such circumstances, it would be strange indeed if a court did not have the power to set aside a decision that is so clearly irrational."[115]

[61] That dictum pertains to the proper approach to a review based on rationality and the power of a court to set aside irrational decisions. It does not support UNISA's approach for at least two reasons. The first is that the comments made by this Court in *Pharmaceutical Manufacturers* must be read alongside this Court's decision in *Simelane*, which confirmed that a decision will be irrational if the decision-maker ignores relevant considerations and thus arrives at a decision by way of an irrational decision-making process. So, insofar as the rationality leg of AfriForum's review is concerned, the process by which UNISA arrived at its decision is relevant. The second difficulty with UNISA's reliance on

[115] Id at paras 89-90.

[60] Behoudens die feit dat dit gemeensaak geword het, of ten minste nie ernstig betwis was op die stukke nie dat, objektief beskou, die besluit om die Wet in werking te stel alvorens die beheer maatreëls se raamwerk daargestel is, berus op 'n foutiewe besluit, het hierdie Hof beslis:

> "The President's decision to bring the Act into operation in such circumstances cannot be found to be objectively rational on any basis whatsoever. The fact that the President mistakenly believed that it was appropriate to bring the Act into force, and acted in good faith in doing so, does not put the matter beyond the reach of the Court's powers of review. What the Constitution requires is that public power vested in the Executive and other functionaries be exercised in an objectively rational manner. This the President manifestly, though through no fault of his own, failed to do.
>
> Rationality in this sense is a minimum threshold requirement applicable to the exercise of all public power by members of the Executive and other functionaries. Action that fails to pass this

[115] Id in paragrawe 89-90.

Pharmaceutical Manufacturers is that section 29(2) in its own terms expressly provides that the "state" (in this case, UNISA)—

> "must consider all reasonable educational alternatives . . . taking into account—
> (a) equity
> (b) practicability; and
> (c) the need to redress the results of past racially discriminatory laws and practices."

UNISA's suggestion that this Court should completely ignore the fact that UNISA did not consider reasonable practicability when taking its decision to revise the language policy would fly in the face of the language of section 29(2) itself. UNISA's submissions in this regard are therefore devoid of merit and the passages cited are misconceived.

[62] In any event, an objective consideration ex post facto bears out the soundness of the Supreme Court of Appeal's findings against UNISA. That Court correctly held that the present situation is distinguishable from the *Gelyke Kanse* and *University of the Free State* scenarios,

threshold is inconsistent with the requirements of our Constitution, and therefore unlawful. The setting of this standard does not mean that the courts can or should substitute their opinions as to what is appropriate, for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a court cannot interfere with the decision simply because it disagrees with it, or considers that the power was exercised inappropriately. A decision that is objectively irrational is likely to be made only rarely but if this does occur, a court has the power to intervene and set aside the irrational decision. This is such a case. Indeed, no rational basis for the decision was suggested. On the contrary, the President himself approached the court urgently, with the support of the Minister of Health and the professional associations most directly affected by the Act, contending that a fundamental error had been made, and that the entire regulatory structure relating to medicines and the control of medicines had as a result been rendered unworkable. In such

because UNISA is uniquely a distance-learning institution. *University of the Free State* concerned parallel-medium education that had led to racial segregation in the lecture rooms. The University of the Free State changed its own language policy because "the use of Afrikaans . . . unintentionally [became] a facilitator of ethnic or cultural separation and racial tension" in the lecture rooms.[116] In other words, "the use of Afrikaans as a parallel language of instruction unwittingly perpetuate[d] segregation and racism".[117]. By contrast, there is no prospect that the continuation of Afrikaans as a language of teaching and learning at UNISA would constitute a threat to racial harmony, precisely because at UNISA there is no tuition in lecture rooms. There can thus be no apprehension of the kind of racial segregation that arose at the University of the Free State – although this conclusion is subject to the qualification I make shortly.

[63] In *Gelyke Kanse*, the previous language policy created an exclusionary hurdle, specifically for black students studying at the University of

[116] *University of the Free State* above n 5 at para 62.

[117] Id at para 55.

> circumstances, it would be strange indeed if a court did not have the power to set aside a decision that is so clearly irrational."[115]

[61] Daardie uitspraak handel oor die korrekte benadering ten aansien van 'n hersiening gegrond op rasionaliteit en 'n hof se bevoegdheid om irrasionele besluite tersyde te stel. Dit verskaf geen steun vir UNISA se benadering nie, vir ten minste twee redes. Eerstens moet hierdie Hof se opmerkings in *Pharmaceutical Manufacturers* gelees word tesame met hierdie Hof se beslissing in *Simelane*, waar dit bevestig is dat 'n besluit irrasioneel sal wees as die besluitnemer tersaaklike oorweginge ignoreer en sodoende tot 'n besluit kom by wyse van 'n irrasionele besluitnemingsproses. Dus, vir soverre dit die rasionaliteitsaspek van AfriForum se hersiening aanbetref, is die proses waarvolgens UNISA tot sy besluit gekom het inderdaad relevant. Die tweede probleem met UNISA se steun op *Pharmaceutical Manufacturers* is dat artikel 29(2) in sy eie terme uitdruklik bepaal dat die staat (in hierdie geval, UNISA)—

[116] *University of the Free State* n 5 hierbo in para 62.

[117] Id in para 55.

Stellenbosch.[118] The policy made black students who were not conversant in Afrikaans feel marginalised, because they could not understand the lectures presented in Afrikaans. They felt stigmatised by real-time interpretation during lectures and these students felt excluded from other aspects of campus life, including residence meetings and official university events.[119] This Court identified that the previous language policy in that case created a barrier along racial lines to full access to the university's learning and other opportunities.[120] In the present instance, however, there is no suggestion that Afrikaans tuition will stigmatise students or prevent students who study in English from full access to UNISA's learning and other opportunities. Again, there is no spectre of possible marginalisation, stigmatisation or exclusion, since there is no teaching that occurs in lecture rooms. As an aside, it is noteworthy that, as was the case in *University of the Free State*, here Afrikaans is being abolished completely as a language of teaching and learning. That was not the

> "alle redelike onderrig alternatiewe moet oorweeg . . . met inagneming van—
>
> (a) billikheid
>
> (b) uitvoerbaarheid en
>
> (c) die noodsaak om die gevolge van voorheen rasgebaseerde diskriminerende wette en praktyke reg te stel."

UNISA se suggestie dat hierdie Hof die feit dat UNISA glad nie redelike uitvoerbaarheid in oorweging gebring het toe die besluit geneem is om die taalbeleid te hersien nie, eenvoudig moet ignoreer, sal lynreg indruis teen die taal van artikel 29(2). UNISA se voorlegging op hierdie aspek is derhalwe sonder enige meriete en die aangehaalde gedeeltes is wanvoorgelig.

[62] In elk geval bevestig 'n objektiewe ex post facto oorweging die korrektheid van die Hoogste Hof van Appèl se bevindinge teen UNISA. Daardie Hof het tereg bevind dat die onderhawige situasie onderskeidbaar is van die *Gelyke Kanse* en *University of the Free State* scenarios, juis omrede UNISA by

[118] *Gelyke Kanse* above n 3 at para 28.

[119] Id.

[120] Id at para 29.

[118] *Gelyke Kanse* n 3 hierbo in para 28.

[119] Id.

[120] Id in para 29.

case in *Gelyke Kanse*, where the university in question opted for dual medium tuition.

[64] It nonetheless bears recognition that it is conceivable that a language policy could affect racial tensions even in the context of distance-learning, as in the case of UNISA. It would be remiss not to acknowledge the justified resentment that may be felt by many students if their university adopts a language policy that caters for only one indigenous language. There is much to be said for the assertion that, in the context of South Africa's controversial history of education and languages of learning, the language policy choice of any institution of learning does matter. *University of the Free State* rightly emphasised "the obligation of white Afrikaans speakers to ensure that their desire to protect their language does not disadvantage others".[121]

[65] An objective assessment of the other issues that UNISA asks this Court to consider (without UNISA itself having considered them) also do not bear scrutiny. These are considerations of cost, demographics, a "dwindling demand" for

[121] *University of the Free State* above n 5 at para 87.

uitstek 'n afstandsonderrig instelling is. *University of the Free State* het gehandel oor parallel-medium onderrig wat aanleiding gegee het tot rasseskeiding in die lesingsale. Die Universiteit van die Vrystaat het sy eie taalbeleid verander omrede "die gebruik van Afrikaans . . . onopsetlik 'n fasiliteerder van etniese of kulturele skeiding en rassespanning" in die lesingsale geword het.[116] Met ander woorde, "die gebruik van Afrikaans as 'n parallele onderrigtaal het onwetend apartheid en rassisme voort[ge]sit".[117] Daarteenoor is daar geen vooruitsig dat die voortsetting van Afrikaans as taal van onderrig en leer by UNISA enigsins rasseharmonie sal bedreig nie, juis omrede daar by UNISA geen onderrig in lesingsale plaasvind nie. Daar kan dus geensins enige besorgdheid wees oor die tipe rasseskeiding wat ontstaan het by die Universiteit van die Vrystaat nie – hierdie gevolgtrekking is egter onderhewig aan die kwalifikasie wat ek binnekort maak.

[63] In *Gelyke Kanse* het die vorige taalbeleid 'n uitsluitingshekkie vir spesifiek swart studente wat aan die Universiteit van Stellenbosch gestudeer het, geskep.[118] Die beleid het veroorsaak dat swart studente wat

[121] *University of the Free State* n 5 hierbo in para 87.

Afrikaans tuition, and equity. The evidence simply does not support the various contentions advanced in respect of these aspects and the Supreme Court of Appeal's findings against UNISA in this regard are unassailable. It is not necessary to conduct a detailed analysis of this evidence, as the decision in this matter does not turn on the evidence. A brief synopsis of the shortcomings will suffice.

UNISA's purported justification of the impugned decision

Equity

[66] First, there are the equity considerations. As the central normative justification, UNISA asserts that it is inequitable to continue privileging Afrikaans as a language of teaching and learning at the expense of the development of African languages. But, there is an utter dearth of evidence to show that it is tuition in Afrikaans that has prevented the development of African languages as languages of higher education. There is no evidence that the discontinuation of the one (Afrikaans tuition) is essential for the enablement of offering tuition in the other

nie met Afrikaans vertroud was nie gemarginaliseerd gevoel het, omdat hulle nie die lesings wat in Afrikaans aangebied is verstaan het nie. Hulle het gestigmatiseerd gevoel deur die gelyktydige vertaling gedurende lesings en hierdie studente het ook uitgesluit gevoel van ander fasette van kampuslewe, insluitende koshuis vergaderings en amptelike universiteitsgeleenthede.[119] Hierdie Hof het uitgewys dat die vorige taalbeleid in daardie saak op rassegrondslag 'n grens geskep het tot volle toegang tot universiteitsonderrig en ander geleenthede.[120] In die onderhawige geval, is daar egter geen suggestie dat Afrikaanse onderrig studente sal stigmatiseer, of studente wat in Engels studeer sal verhoed om volle toegang tot UNISA se onderrig en ander geleenthede te geniet nie. Daar is hier ook geen bedreiging van moontlike marginalisasie, stigmatisering en uitsluiting nie, aangesien daar geen onderrig plaasvind in lesingsale nie. Dit is terloops insiggewend dat, soos wat die geval was in *University of the Free State*, Afrikaans as taal van onderrig en leer hier geheel en al afgeskaf word. Dit was nie die geval in *Gelyke Kanse* nie, waar dubbelmedium onderrig gekies is.

official languages, other than English.[122] Put differently, there is nothing on record that precludes UNISA from offering the benefits of its new language policy to students whose first language is neither English nor Afrikaans, even if Afrikaans were to be retained as a language of teaching and learning. After all, the question is not whether it is reasonably practicable for UNISA to offer tuition in all eleven official languages in all its modules.[123] What must be determined instead, is whether it is reasonably practicable to offer particular modules in particular languages where a demand exists for those modules in those languages. Since all official languages are not spoken by the same proportion of students, it may be reasonably practicable to offer tuition in some official languages but not in others.

[67] Equity considerations may well be met through dual medium tuition, as existed at UNISA. As this Court explicated in *University of the Free State*:

[64] Dit moet desnieteenstaande in ag geneem word dat 'n taalbeleid denkbaar rassespanninge kan affekteer, selfs in 'n afstandsonderrig milieu, soos in UNISA se geval. Dit sou onverskillig wees om nie erkenning te gee aan die geregverdigde renons wat deur baie studente ervaar mag word as hul universiteit 'n taalbeleid aanvaar wat vir slegs een inheemse taal voorsiening maak nie. Daar is veel te sê vir die aanname dat, in die konteks van Suid-Afrika se opspraakwekkende geskiedenis van opvoeding en onderrigtale, die keuse van taalbeleid van enige onderriginstelling wel saak maak. *University of the Free State* het tereg die "verpligting van wit Afrikaanssprekendes om te verseker dat hul begeerte om hul eie taal te beskerm nie andere benadeel nie" benadruk.[121]

[65] 'n Objektiewe bepaling van die ander oorweginge wat UNISA hierdie Hof versoek om in aanmerking te neem (sonder dat UNISA dit self oorweeg het) slaag ook nie die toets nie. Dit is oorweginge van koste, demografie en 'n "verminderde aanvraag"

[122] And, even if there were, it would not be constitutional to sacrifice one indigenous language in favour of another.

[123] The evidence is that out of a total of 2 300 modules on offer at UNISA, around 300 modules were offered in Afrikaans.

[122] Selfs al was daar bewysmateriaal sou dit nie grondwetlik wees om een inheemse taal op te offer ten gunste van 'n ander inheemse taal nie.

[123] Die bewysmateriaal dui aan dat uit die totaal van 2 300 modules wat UNISA aanbied, omtrent 300 modules in Afrikaans aangebied word.

> "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 language of choice could be effectively accessible and implemented. . . . 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."[124]

Cost

[68] UNISA also cited cost as a consideration for why it is not reasonably practicable to continue with Afrikaans as a language of learning and tuition. It contends that the monetary savings that could be generated by using English only could be spent on developing the other official languages. Cost is a legitimate consideration in this enquiry.[125] But, crucially, this aspect was not discussed at all

[124] *University of the Free State* above n 5 at paras 51-2.

[125] In *Gelyke Kanse* above n 3 this Court held at para 32 that "[i]n almost any conceivable issue of institutional management, whether in a profit-driven or no-profit enterprise, cost is an inevitable consideration".

vir Afrikaanse onderrig en leer. Die bewysmateriaal bied net eenvoudig geen steun vir die verskeie aannames wat voorgehou is ten aansien van hierdie aspekte nie, en die Hoogste Hof van Appèl se bevindinge teen UNISA in hierdie verband is onaanvegbaar. Dit is nie nodig om 'n breedvoerige ontleding van hierdie bewysmateriaal te onderneem nie, aangesien die beslissing in hierdie saak nie wentel rondom die bewysmateriaal nie. 'n Kort opsomming van die tekortkominge sal genoegsaam wees.

UNISA se gepoogde regverdiging van die bestrede besluit

Billikheid

[66] Daar is eerstens die billikheidsoorwegings. As kern normatiewe regverdiging benadruk UNISA dat dit onbillik is om voort te gaan met die bevoorregting van Afrikaans as taal van onderrig en leer ten koste van die ontwikkeling van ander Afrikatale. Daar is egter 'n totale gebrek aan enige

[124] *University of the Free State* n 5 hierbo in paragrawe 51-2.

[125] In *Gelyke Kanse* n 3 hierbo het hierdie Hof verklaar in para 32 dat: "[i]n byna elke denkbare aspek van institusionele bestuur, hetsy in 'n winsgedrewe of nie-winsgedrewe onderneming, is koste 'n onvermydelike oorweging".

at meetings of the SLC, Senate or Council. There is no indication at all that UNISA ever assessed the commercial viability of approximately 300 modules offered in Afrikaans as compared to the commercial viability of the total of approximately 2 300 modules offered in English. Nowhere in the papers is there any evidence of these cost considerations by the SLC, Senate or Council.

[69] Cross-subsidisation of the low demand modules by high demand modules was not considered at all. Instead, in this Court, UNISA vigorously contends that "to demand that a post-apartheid university continues to subsidise the beneficiaries of historical racial privilege at the expense of the broader student population" would be "fundamentally at odds with the ethos of our Constitution". Firstly, that contention represents a skewed reflection of Afrikaans speakers in this country, an aspect that has been extensively addressed earlier in this judgment. Secondly, it is a bald assertion without any substantiating evidence. It stands in stark contrast to the type of evidence adduced in *Gelyke Kanse* where a "*careful study*" conducted by the University of Stellenbosch, demonstrated that tuition in Afrikaans detracts from the development of

bewysmateriaal wat daarop dui dat dit onderrig in Afrikaans is wat die ontwikkeling van ander Afrikatale as tale van hoër opvoedkunde kniehalter. Daar is geen bewysmateriaal dat die beëindiging van die een (Afrikaanse onderrig) wesenlik noodsaaklik is vir die moontlikmaking van onderrig in die ander amptelike tale, buiten Engels, nie.[122] Anders gestel – daar is niks op rekord wat UNISA daarvan weerhou om die voordele van die nuwe taalbeleid aan te bied aan studente wie se eerste taal nog Engels, nog Afrikaans is nie, selfs al word Afrikaans behou as taal van onderrig en leer. Die vraag is per slot van sake nie of dit redelik uitvoerbaar is vir UNISA om onderrig in al die modules aan te bied in al elf amptelike tale nie.[123] Wat eerder bepaling verg, is of dit redelik uitvoerbaar is om bepaalde modules in bepaalde tale aan te bied waar daar 'n vraag bestaan vir daardie modules in daardie tale. Aangesien nie alle amptelike tale deur dieselfde verhouding studente gepraat word nie, mag dit wel redelik uitvoerbaar wees om onderrig aan te bied in sommige amptelike tale, maar nie in ander nie.

[67] Daar mag wel moontlik aan billikheidsoorwegings voldoen word deur dubbelmedium onderrig, soos wat by UNISA

the other official African languages as languages of higher education and was therefore not reasonably practicable.[126] And thirdly, it is utterly insensitive to our constitutional commitment to build "a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex".[127]

[70] Many of the contentions advanced in UNISA's written submissions in this Court are not supported by any evidence on the record. Some of these contentions are:

(a) that there is hardly any demand for the teaching of

bestaan het. Soos hierdie Hof uiteengesit het in *University of the Free State*:

> "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 language of choice could be effectively accessible and implemented . . . 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."[124]

[126] *Gelyke Kanse* n 3 above at para 31 where the Court noted:

> "The University determined by careful study that the cost of immediately changing to fully parallel-medium tuition would total about R640 million in infrastructure (including additional classrooms), plus about R78 million each year thereafter for additional personnel costs. This would entail a 20% increase in fees, an additional R8 100 on top of the approximately R40 000 per year students on average pay now."

[127] Mureinik, citing the post-amble to the Constitution, entitled "National Unity and Reconciliation", in Mureinik "A Bridge to Where - Introducing the Interim Bill of Rights" (1994) 10 *SAJHR* 31 at 31.

[126] *Gelyke Kanse* n 3 hierbo in para 31 waar die Hof die volgende opgemerk het:

> "The University determined by careful study that the cost of immediately changing to fully parallel medium tuition would total about R640 million in infrastructure (including additional classrooms), plus about R78 million each year thereafter for additional personnel costs. This would entail a 20% increase in fees, an additional R8 100 on top of the approximately R40 000 per year students on average pay now."

[127] Mureinik haal die Bylae van die Grondwet genaamd "Nasionale eenheid en Versoening" aan, in Mureinik "A Bridge to Where - Introducing the Interim Bill of Rights" (1994) 10 *SAJHR* 31 op 31.

Life Sciences modules in Afrikaans;

(b) that UNISA will incur substantial cost when translating all tuition material from English to Afrikaans; and

(c) that there is no capacity for the reconfiguration of its online learning and teaching environment to duplicate sites, so that there are both English and Afrikaans sites available in modules where Afrikaans online tuition has been discontinued since 2016.

[71] Moreover, UNISA is clearly wrong when it contends that its old language policy requires it to ensure that, in every course, it has academics able to teach in Afrikaans and to assess essays and examinations in Afrikaans. It is common cause on the papers that tuition would only be offered in Afrikaans in circumstances where there is adequate demand for it, and that only some 300 out of 2 300 modules were being offered in Afrikaans in 2016. That was what the former language policy entailed and that is all that was required by a reversion to that

Koste

[68] UNISA het ook koste as ’n oorweging voorgehou waarom dit nie redelik uitvoerbaar is om voort te gaan met Afrikaans as taal van onderrig en leer nie. Dit voer aan dat die geldelike besparings wat gegenereer kan word deur slegs Engels te gebruik op die ontwikkeling van die ander amptelike tale bestee kan word. Koste is inderdaad ’n geldige oorweging in die onderhawige ondersoek.[125] Maar, van wesenlike belang, is die feit dat hierdie aspek glad nie bespreek is tydens vergaderings van die STK, die Senaat of die Raad nie. Daar is geen aanduiding hoegenaamd dat UNISA ooit die kommersiële vatbaarheid van die aanbied van ongeveer 300 modules in Afrikaans vergelyk het met die aanbied van ongeveer 2300 modules in Engels nie. Nêrens in die stukke is daar enige bewysmateriaal van hierdie kosteoorweginge deur die STK, die Senaat of die Raad nie.

[69] Die kruis-subsidiëring van die lae aanvraag modules deur die hoë aanvraag modules is glad nie oorweeg nie. In hierdie Hof het UNISA eerder heftig betoog dat “om daarop aan te dring dat ’n post-apartheid universiteit voortgaan met die subsidiëring

policy, as ordered by the Supreme Court of Appeal.

The dwindling demand for Afrikaans

[72] In respect of the alleged dwindling demand for Afrikaans tuition, the record produced in terms of rule 53 relating to requests to discontinue tuition in Afrikaans modules does not evince a material decrease in demand for Afrikaans. AfriForum cited extensive figures in this regard, but it is not necessary to delve into the minutiae. It would suffice to note that the numbers show very significant demand for distance-learning tuition in Afrikaans, representing a portion of the approximately 24 000 students who elected to study a total of almost 100 000 modules in Afrikaans in 2016. There is merit in AfriForum's contentions that, if there had truly been a marked decline in demand for tuition in Afrikaans between 2012 and 2016, UNISA could simply have provided documentary evidence drawn from UNISA's computer system showing the year-on-year decline. That, it failed to do.

van die begunstigdes van geskiedkundige rasse bevoorregting ten koste van die breër studentegemeenskap" "wesenlik teenstrydig sal wees met die etos van ons Grondwet". Daardie aanname is eerstens 'n verwronge weergawe van Afrikaanssprekendes in hierdie land, 'n aspek wat alreeds breedvoerig hierin behandel is. Dit is tweedens 'n blote aanname sonder enige ondersteunende bewysmateriaal. Dit is in skrille kontras met die tipe bewysmateriaal wat in *Gelyke Kanse* aangebied is, waar 'n "uitvoerige studie" onderneem is deur die Universiteit van Stellenbosch, wat daarop gedui het dat onderrig in Afrikaans afbreuk doen aan die ontwikkeling van die ander nege amptelike Afrikatale as tale van hoër onderrig en derhalwe nie redelik uitvoerbaar is nie.[126] En derdens is dit uiters onsensitief tot ons grondwetlike verbintenis om "'n geskiedkundige brug te bou tussen die verlede van 'n erg verdeelde samelewing wat gekenmerk is deur twis, konflik, ongekende lyding en onreg en 'n toekoms gevestig op die erkenning van menseregte, demokrasie en vreedsame naasbestaan en die ontwikkeling van geleenthede vir alle Suid-Afrikaners, ongeag kleur, ras, klas, geloof of geslag".[127]

Demographics

[73] Lastly, in respect of demographics, UNISA outlined statistics in its answering affidavit and in its reasons for the impugned decision. The statistics relate to:

(a) the percentage of UNISA students who indicated that Afrikaans was their home language (8.6% in 2015, 8.7% in 2016 and an estimated 7.3% at some unspecified time in the future);

(b) the percentage of UNISA students who registered for modules in Afrikaans (0.6% in 2015 and 0.3% in 2016, but subsequently amended to 2% in 2015 and 1% in 2016); and

(c) the percentage of UNISA students who registered for at least one module in Afrikaans (5.3% in 2015 and 5.1% in 2016).

[74] Mark Twain skeptically said that "facts are stubborn things, but statistics are pliable".[128] AfriForum persuasively counters UNISA's statistics by demonstrating that:

[70] Verskeie van die submissies voorgehou in UNISA se skriftelike betoogshoofde in hierdie Hof word nie ondersteun deur enige bewysmateriaal op die rekord nie. Sommige van hierdie submissies is:

(a) die aanbied van Lewenswetenskappe modules in Afrikaans waarvoor daar beswaarlik enige vraag is;

(b) die koste van vertaling van alle onderrigmateriaal in Afrikaans; en

(c) die herkonfigurasie van aanlyn onderrig en leer omgewing ten einde webwerwe te dupliseer sodat daar beide Engelse en Afrikaanse webwerwe beskikbaar is in modules waar Afrikaanse aanlyn onderrig sedert 2016 gestaak is.

[71] Boonop is UNISA klaarblyklik verkeerd in die betoog dat die ou taalbeleid vereis dat UNISA moet verseker dat daar in elke kursus akademici beskikbaar is wat onderrig in Afrikaans kan aanbied en wat werkstukke en eksamens in Afrikaans kan assesseer. Dit is gemeensaak op die stukke dat onderrig in Afrikaans slegs aangebied sou word in omstandighede waar daar

(a) the table on which the figures in (b) in the preceding paragraph are based does not show the number of students taking modules in Afrikaans at all, but merely the alleged number of modules taken in English. This means that the total number of students cannot be discerned from the table at all; and

(b) the table employed in (a) in the preceding paragraph, relating to Afrikaans home language students, is based on erroneous figures and therefore cannot be relied upon at all.

[75] Overall, AfriForum pertinently disputes the statistics relied on by UNISA and comprehensively explains why the statistics did not appear to be plausible or correct. In this regard, it adduced the evidence and accompanying figures of Professors Smit and Potgieter. UNISA did not engage at all with these figures, let alone challenge them.

[128] Twain "Quotable Quote" *Goodreads* (2021), available at https://www.goodreads.com/quotes/100106-facts-are-stubborn-things-but-statistics-are-pliable.

voldoende aanvraag daarvoor is, en dat slegs sowat 300 uit 2 300 modules gedurende 2016 in Afrikaans aangebied is. Dit was wat die vorige taalbeleid behels het en dit is al wat vereis is deur 'n terugkeer na daardie beleid, soos gelas deur die Hoogste Hof van Appèl.

Die kwynende vraag vir Afrikaans

[72] Ten aansien van die beweerde kwynende vraag vir Afrikaans, toon die rekord wat voorgelê is ingevolge Reël 53 ten opsigte van versoeke om onderrig in Afrikaanse modules te staak, geensins 'n wesenlike afname in die aanvraag vir Afrikaans nie. AfriForum het uitvoerige syfers in hierdie verband aangehaal, maar dit is nie nodig om in fynere besonderhede in te gaan nie. Dit sal voldoende wees om daarop te let dat die getalle opmerklik noemenswaardige aanvraag vir afstandsonderrig in Afrikaans aandui, verteenwoordigend van die gedeelte van die nagenoeg 24 000 studente wat in 2016 verkies het om 'n totaal van bykans 100 000 modules in Afrikaanse te studeer. Daar is heelwat te sê vir AfriForum se betoog dat, indien daar werklik 'n noemenswaardige

[128] Twain "Quotable Quote" *Goodreads* (2021), beskikbaar by https://www.goodreads.com/quotes/100106-facts-are-stubborn-things-but-statistics-are-pliable.

[76] To compound matters further, these figures, alleged by UNISA to have formed the basis for the adoption of the new language policy, were not even placed before the Senate and the Council at the meetings where the resolutions were taken to adopt the new language policy. UNISA admits this.[129] And the Supreme Court of Appeal correctly found that to be the case.[130] This approach is plainly destructive of the case sought to be advanced on these figures by UNISA. One fails to see why the SLC would see no need for the Senate and Council to have regard to these important numbers. The figures resoundingly speak of the students who would be affected by the far-reaching decisions of the Senate and the Council, in determining whether it was reasonably practicable to retain Afrikaans as a language of teaching and learning. The omission to place the statistics, which founded the recommendation to remove Afrikaans as a language of teaching and learning, before the Senate and Council, is a

[129] It was stated that "[i]t was not necessary . . . for Senate and Council to have the exact figures and percentages before them on 30 March 2016 and 28 April 2016 respectively when UNISA's new language policy was adopted to know that the demand for Afrikaans tuition has dwindled to the extent that it had".

[130] Supreme Court of Appeal judgment above n 83 at para 41.

afname vir Afrikaanse onderrig was tussen 2012 en 2016, UNISA eenvoudig dokumentêre bewysmateriaal vanaf sy rekenaarstelsel kon voorlê om die jaar-op-jaar afname aan te toon. UNISA het versuim om dit te doen.

Demografie

[73] Laastens, ten aansien van demografie, het UNISA in sy antwoordende eedsverklaring statistieke uiteengesit, asook sy redes vir die bestrede besluit. Die statistieke het betrekking op:

(a) die persentasie van UNISA studente wat aangedui het dat Afrikaans hul huistaal is (8.6% in 2015, 8.7% in 2016 en 'n geraamde 7.3% op 'n ongespesifiseerde datum iewers in die toekoms);

(b) die persentasie van UNISA studente wat geregistreer het vir modules in Afrikaans (0.6% in 2015 en 0.3% in

[129] Dit was verklaar dat "[i]t was not necessary . . . for Senate and Council to have the exact figures and percentages before them on 30 March 2016 and 28 April 2016 respectively when UNISA's new language policy was adopted to know that the demand for Afrikaans tuition has dwindled to the extent that it had".

[130] Hoogste Hof van Appèl uitspraak n 83 hierbo in para 41.

further fatal shortcoming in UNISA's case. The Supreme Court of Appeal, notwithstanding its finding that these demographical statistics had not been placed before the Senate and Council, went further to consider those figures[131] and found that they did not meet the reasonable practicability test in section 29(2).[132] Both those findings are unassailable.

[77] An important consideration is that at the time of the impugned decision, Afrikaans tuition was available to UNISA students for some modules. UNISA bears a negative burden of establishing appropriate justification for why the right to receive education in the language of one's choice, Afrikaans, should be removed. This is because "when a learner already enjoys the benefit of being taught in an official language of choice, the [s]tate bears the negative duty not to take away or diminish the right without appropriate justification".[133] To establish that

2016, maar daarna gewysig tot 2% in 2015 en 1% in 2016); en

(c) die persentasie van UNISA studente wat vir ten minste een module in Afrikaans geregistreer het (5.3% in 2015 en 5.1% in 2016).

[74] Mark Twain het skepties opgemerk "feite is hardkoppige dinge, maar statistieke is buigbaar".[128] AfriForum het op oortuigende wyse UNISA se statistieke weerlê deur aan te toon dat:

(a) die tabel waarop die syfers in (b) in die voorafgaande paragraaf gegrond is, glad nie die aantal studente aantoon wat modules in Afrikaans neem nie, maar bloot die beweerde aantal modules wat in Engels geneem is. Dit beteken dat die totale getal studente glad nie uit die tabel bepaal kan word nie; en

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[131] Id at paras 39-40.

[132] Id at para 45.

[133] *Ermelo* above n 84 at para 52. See also: *Mazibuko v City of Johannesburg* [2009] ZACC 28; 2010 (4) SA 1 (CC); 2010 (3) BCLR 239 (CC) at para 47, where this Court held:

> "Traditionally, constitutional rights (especially civil and political rights) are understood as imposing an obligation upon the [s]tate to refrain from interfering with the exercise of the right by citizens

[131] Id in paragrawe 39-40.

[132] Id in para 45.

[133] *Ermelo* n 84 hierbo in para 52. Sien ook: *Mazibuko v City of Johannesburg* [2009] ZACC 28; 2010 (4) SA 1 (CC); 2010 (3) BCLR 239 (CC) in para 47, waar hierdie Hof verklaar:

> "Traditionally, constitutional rights (especially civil and political rights) are understood as imposing an obligation upon the State to refrain from interfering

appropriate justification, UNISA is constrained to demonstrate that it would not be "reasonably practicable" to continue with Afrikaans as a language of learning and tuition, or put differently, that it is not reasonably capable of doing so. To give meaningful effect to the right in section 29(2), all reasonable educational alternatives had to be taken into account and considerations of equity, practicability and the need to redress the consequences of our apartheid past, must feature prominently. For the reasons set out, UNISA failed to do so.

[78] To summarise: UNISA patently misconstrued the applicability of the provisions of section 29(2) to it as an organ of state. This resulted in its failure to have regard to the considerations listed in section 29(2) when the impugned decision was taken. UNISA failed to put up evidence in support of its averment that it had taken into account these considerations. In any event, an objective assessment of the factors

(b) die tabel aangewend in (a) in die voorafgaande paragraaf wat betrekking het op Afrikaanse huistaal studente, gebaseer is op foutiewe syfers en gevolglik glad nie op gesteun kan word nie.

[75] As geheel, het AfriForum pertinent die statistieke waarop UNISA steun, betwis en het breedvoerig verduidelik waarom die statistieke nie aanneemlik of korrek blyk te wees nie. In hierdie verband het dit die getuienis en gepaardgaande syfers van Professore Smit en Potgieter aangebied. UNISA het glad nie hierdie syfers aangespreek nie, en dit nog minder betwis.

[76] Om sake te vererger, is hierdie syfers, wat UNISA beweer die basis vorm van die aanvaarding van die nuwe taalbeleid, nooit eers voor die Senaat en die Raad geplaas by die vergaderings waar die resolusies aangeneem is om die nuwe taalbeleid te aanvaar nie. UNISA erken dit.[129] En die

(the so-called negative obligation or the duty to respect). As this court has held, most notably perhaps in *Jaftha v Schoeman*, social and economic rights are no different. The [s]tate bears a duty to refrain from interfering with social and economic rights just as it does with civil and political rights."

with the exercise of the right by citizens (the so-called negative obligation or the duty to respect). As this court has held, most notably perhaps in *Jaftha v Schoeman*, social and economic rights are no different. The State bears a duty to refrain from interfering with social and economic rights just as it does with civil and political rights."

that UNISA asks this Court to take into account (without UNISA itself having considered them), does not bear out its case that it was not reasonably practicable for UNISA to continue to offer tuition in Afrikaans. UNISA's decision in 2016 to adopt the new language policy, and discontinue Afrikaans as a language of learning and teaching, therefore contravened section 29(2) of the Constitution, rendering that decision invalid. The Supreme Court of Appeal was correct in setting aside the 2016 decision to adopt a new language policy. This is dispositive of the case, although the question whether UNISA's decision complied with procedural requirements will bear some consideration when the remedy is discussed. What then, must be done about UNISA's failure to comply with section 29(2) since it changed its language policy in 2016?

Remedy

[79] The relevant terms of the Supreme Court of Appeal's order have been set out.[134] This Court issued directions, calling for submissions regarding the practicalities of implementing the Supreme Court of Appeal's order. UNISA's response was

[134] See [16].

Hoogste Hof van Appèl het tereg bevind dat dit wel die geval is.[130] Hierdie benadering is onteenseglik vernietigend van die saak wat UNISA probeer uitmaak op grond van hierdie syfers. Dit is geheel en al onduidelik waarom die STK nie die nodigheid gesien het dat die Senaat en die Raad insae moet lewer in hierdie belangrike syfers nie. Die syfers spreek boekdele aangaande die studente wat geraak sou word deur die verreikende besluite van die Senaat en die Raad, om te bepaal of dit redelik uitvoerbaar was om Afrikaans te behou as 'n taal van onderrig en leer. Die versuim om die statistieke onderliggend aan die aanbeveling om Afrikaans te verwyder as taal van onderrig en leer voor die Senaat en die Raad te plaas, is 'n verdere noodlottige tekortkoming in UNISA se saak. Die Hoogste Hof van Appèl het, nieteenstaande sy bevinding dat hierdie demografiese statistieke nie voor die Senaat en die Raad geplaas is nie, verder gegaan om oorweging te skenk aan die syfers[131] en het bevind dat dit nie voldoen aan die redelik uitvoerbaarheidstoets in artikel 29(2) nie.[132] Beide hierdie bevindinge is onaanvegbaar.

[77] 'n Belangrike oorweging is dat Afrikaanse onderrig ten tyde van die bestrede

[134] Sien [16].

somewhat disappointing in respect of the detail provided. UNISA points out that five years have now elapsed since the decision to abolish Afrikaans as a language of teaching and learning. The order requires UNISA to continue to offer all modules in Afrikaans that were available in Afrikaans in 2016. UNISA emphasises that there have been numerous curriculum changes during the past five years. Courses and course materials have changed and there may also no longer be a demand for some of the courses.

[80] There is some merit in these submissions. But the contention, that the order requires UNISA to move beyond the status quo as it prevailed in 2016, is fallacious. All that is required in terms of the order, is for UNISA to reinstate those Afrikaans modules that were still on offer at that time. It does not require the university to reinstate Afrikaans modules that had already been discontinued under the Guidelines.

[81] There can be no quarrel with AfriForum's submissions that the Constitution requires that the consequences of constitutional invalidity be corrected or reversed where it can no longer be

besluit beskikbaar was aan UNISA studente vir sommige modules. UNISA dra 'n negatiewe las om behoorlik te regverdig waarom die reg tot onderrig in jou taalkeuse, Afrikaans, verwyder behoort te word. Dit is die geval omrede "wanneer 'n leerder alreeds die voordeel geniet om in 'n amptelike taal van keuse onderrig te word, die staat die negatiewe verpligting het om nie daardie reg weg te neem of te verminder sonder behoorlike regverdiging nie".[133] Ten einde daardie behoorlike regverdiging te bewys, word daar van UNISA verwag om aan te toon dat dit nie "redelik uitvoerbaar" sal wees om voort te gaan met Afrikaans as taal van onderrig en leer, of anders gestel, dat dit nie redelik in staat is om so te doen nie. Ten einde betekenisvolle effek te gee aan die reg in artikel 29(2), moet alle redelike opvoedkundige alternatiewe in aanmerking geneem word en oorweginge van billikheid, uitvoerbaarheid en die noodsaak om die gevolge van ons apartheid verlede reg te stel, moet 'n prominente rol speel. Vir die redes alreeds uiteengesit, het UNISA versuim om dit te doen.

[78] Om op te som: UNISA het ooglopend die toepaslikheid van die bepalings van artikel 29(2) op dit, as staatsorgaan, misverstaan. Dit het aanleiding gegee tot die

prevented,[135] and that where constitutional rights are violated, as is the case here, the relief must effectively vindicate those rights.[136] But for an order to be effective, it must be reasonably capable of implementation. It cannot be seriously disputed that, as UNISA points out, it will have to prepare comprehensive measures to reinstate the relevant Afrikaans modules. And those measures must self-evidently be implemented at the beginning of an academic year. This would require an assessment of personnel and information technology infrastructure adaptations and related costs, translation and printing costs and budget re-assessments – in the face of substantial cutbacks in tertiary education funding by government.

[82] UNISA's case is that if, after re-assessing its budget and the requirements of the judgment (on the assumption that this appeal on the merits is dismissed), it concludes that it is reasonably practicable to reinstate the 2010 language policy Afrikaans modules, the requisite personnel recruitment

versuim om ag te slaan op die oorweginge vervat in artikel 29(2) toe die bestrede besluit geneem is. UNISA het versuim om enige bewysmateriaal voor te hou ter ondersteuning van die bewering dat dit wel hierdie oorweginge in ag geneem het. In elk geval steun die objektiewe evaluering van die feite wat UNISA hierdie Hof versoek om in aanmerking te neem (sonder dat UNISA self dit oorweeg het), nie sy saak dat dit nie redelik uitvoerbaar was vir UNISA om voort te gaan met onderrig in Afrikaans nie. UNISA se besluit in 2016 om die nuwe taalbeleid te aanvaar, en om Afrikaans as taal van onderrig en leer te staak, het derhalwe artikel 29(2) van die Grondwet oortree, wat daardie besluit ongeldig maak. Die Hoogste Hof van Appèl het tereg die 2016 besluit om 'n nuwe taalbeleid te aanvaar tersyde gestel. Dit is deurslaggewend in hierdie saak, alhoewel die vraag of UNISA se besluit voldoen aan prosedurele vereistes weliswaar oorweging sal moet geniet wanneer die remedie bespreek word. Wat moet dan nou gedoen word met UNISA se versuim om te

135 AfriForum cites *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* [2013] ZACC 42; 2014 (4) SA 179 (CC); 2014 (1) BCLR 1 (CC) at para 29.

136 Reliance is placed on *Steenkamp N.O. v Provincial Tender Board, Eastern Cape* [2006] ZACC 16; 2007 (3) SA 121 (CC); 2007 (3) BCLR 300 (CC) at para 29.

135 AfriForum verwys na *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* [2013] ZACC 42; 2014 (4) SA 179 (CC); 2014 (1) BCLR 1 (CC) in para 29.

136 Daar word gesteun op *Steenkamp N.O. v Provincial Tender Board, Eastern Cape* [2006] ZACC 16; 2007 (3) SA 121 (CC); 2007 (3) BCLR 300 (CC) in para 29.

and information technology infrastructure changes must be timeously effected in order to re-introduce Afrikaans as a primary language of teaching and learning at the commencement of an academic year. But, on the other hand, contends UNISA, if after this exercise it becomes evident that it is not reasonably practicable to reinstitute the 2010 language policy, it will have to re-design a new constitutionally compliant policy and implement that new policy with the necessary personnel and infrastructure changes at the beginning of an academic year.

[83] The changes postulated by UNISA, on either scenario, are self-evidently far-reaching and will consume substantial time. The estimate of a six-month planning period for implementation prior to the start of an academic year is not unreasonable. UNISA is a very large organisation. The order of the Supreme Court of Appeal, that this Court is endorsing, is far-reaching. A pragmatic and effective order must reasonably enable UNISA to navigate properly on the course it chooses. And it is not for this Court to order what it should do. It may insist on a language policy that jettisons Afrikaans as a language of teaching and learning, after complying with all the

voldoen aan artikel 29(2) met die verandering van sy taalbeleid in 2016?

Remedie

[79] Die tersaaklike bepalings van die Hoogste Hof van Appèl se bevel is alreeds uiteengesit.[134] Hierdie hof het skriftelike voorleggings aangevra aangaande die praktiese uitvoerbaarheid van die Hoogste Hof van Appèl se bevel. UNISA se reaksie was ietwat teleurstellend ten opsigte van die gegewens wat verskaf is. UNISA wys daarop dat daar nou alreeds vyf jaar verstryk het sedert die besluit om weg te doen met Afrikaans as taal van onderrig en leer. Die bevel vereis van UNISA om alle modules wat in 2016 in Afrikaans beskikbaar was aan te bied in daardie taal. UNISA beklemtoon dat daar verskeie kurrikulum veranderinge plaasgevind het gedurende die afgelope vyf jaar. Kursusse en kursus materiaal het verander en daar mag verder moontlik ook geen aanvraag meer wees vir sommige van die kursusse nie.

[80] Daar is meriete in hierdie submissies. Die betoog dat die bevel van UNISA vereis om verder te gaan as die status quo soos dit in 2016 bestaan het, is egter onontvanklik. Al wat ingevolge daardie bevel vereis word,

constitutional and legal precepts, or decide to properly reinstate the status quo as it prevailed in 2016 before the impugned language policy was adopted. In any case, it is not for this Court to order what it should do – to act appropriately. Any attempt to be prescriptive as to the choice UNISA makes will be tantamount to judicial overreach, bearing in mind that, as stated, UNISA is an organ of state.

[84] Courts must remain within the bounds the Constitution sets for them.[137] In *Glenister*, this Court stated that:

> "In our constitutional democracy, the courts are the ultimate guardians of the Constitution. They not only have the right to intervene in order to prevent the violation of the Constitution, they also have the duty to do so. It is in the performance of this role that courts are more likely to confront the question of whether to venture into the domain of other branches of government and the extent of such intervention. It is a necessary component of the doctrine of separation of powers

is vir UNISA om die Afrikaanse modules wat op daardie stadium steeds aangebied was, weer in te stel. Dit vereis nie van UNISA om Afrikaanse modules wat alreeds ingevolge die Riglyne gestaak is, weer in te stel nie.

[81] Daar kan nie gekibbel word met AfriForum se submissies dat die Grondwet vereis dat die gevolge van grondwetlike ongeldigheid gekorrigeer of omver gewerp word waar dit nie meer verhoed kan word nie,[135] en dat waar grondwetlike regte geskend word, soos wat hier die geval is, die remedie effektiewelik daardie regte moet bekragtig.[136] Maar alvorens 'n bevel effektief kan wees, moet dit geredelikerwys vatbaar wees vir implementering. Dit kan nie ernstig betwis word dat, soos UNISA uitwys, dit omvattende maatreëls sal moet voorberei ten einde die tersaaklike Afrikaanse modules terug te plaas. Daardie maatreëls moet vanselfsprekend ingestel word by die aanvang van 'n akademiese jaar. Dit sal 'n evaluasie van personeel en inligtingstegnologie infrastruktuur aanpassings en aanverwante kostes, vertaling en drukwerk kostes en her-evaluasies van die

[137] *Mwelase v Director-General, Department of Rural Development and Land Reform* [2019] ZACC 30; 2019 (6) SA 597 (CC); 2019 (11) BCLR 1358 (CC) at paras 50-3, where this Court cited *Glenister v President of the Republic of South Africa* [2008] ZACC 19; 2009 (1) SA 287 (CC); 2009 (2) BCLR 136 (CC) at para 21.

[137] *Mwelase v Director-General, Department of Rural Development and Land Reform* [2019] ZACC 30; 2019 (6) SA 597 (CC); 2019 (11) BCLR 1358 (CC) in paragrawe 50-3, waar hierdie Hof *Glenister v President of the Republic of South Africa* [2008] ZACC 19; 2009 (1) SA 287 (CC); 2009 (2) BCLR 136 (CC) in para 21 aangehaal het.

> that courts have a constitutional obligation to ensure that the exercise of power by other branches of government occurs within constitutional bounds. But even in these circumstances, courts must observe the limits of their powers."[138]

[85] In this instance, UNISA as an organ of state must be afforded the deference to do the necessary feasibility investigations, take the decision it regards as most reasonably practicable and implement the required changes. If its decision is to design a new language policy, it must self-evidently comply with section 29(2). But there is a further caveat. UNISA plainly failed to follow its own internal processes when it took the impugned decision. So, for example:

(a) Senate failed to comply with its Rule 11.1, by sending out the draft language policy late to members of the Senate;[139] and

(b) The resolution regarding language policy was not

begroting verg, in 'n milieu van omvattende besnoeings in die regering se befondsing van tersiêre onderwys.

[82] UNISA se saak is dat indien, na her-evaluering van sy begroting en die vereistes van hierdie uitspraak (op die veronderstelling dat die appèl misluk op die meriete), dit tot die slotsom kom dat dit redelik uitvoerbaar is om die pre-2016 beleid (dus die 2010 beleid) se Afrikaanse modules weer in te stel, die nodige personeel werwing en inligtingstegnologie infrastruktuur veranderinge tydig verrig moet word om Afrikaans as primêre taal van onderrig en leer terug te plaas teen die aanvang van 'n akademiese jaar. Maar aan die ander kant, betoog UNISA, sou dit na hierdie oefening blyk dat dit nie redelik uitvoerbaar wees om die 2010 taalbeleid weer in te stel nie, dit 'n nuwe beleid wat aan die Grondwet voldoen sal moet herontwerp en daardie nuwe beleid met die nodige personeel en infrastruktuur veranderinge by die aanvang van 'n nuwe akademiese jaar sal moet implementeer.

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138 *Glenister* id at para 33.

139 Rule 11.1 of the Senate Rules provides that the agenda and all related documents of each meeting must be submitted to the members of Senate five working days before the meeting.

138 *Glenister* id in para 33.

139 Reël 11.1 van die Senaat Reëls bepaal dat die agenda en alle verwante dokumente van elke vergadering voorgelê moet word vir die lede van die Senaat binne vyf werksdae voor die vergadering.

adopted by a show of hands at the meeting of the Senate. This constitutes non-compliance with Rule 13.1.[140]

[86] The Senate Rules were plainly not complied with when the resolution to recommend a new language policy was taken. This invalidated the resolution of Senate, and it had a domino effect on the validity of the resolution of Council, since section 27(2) of the Act provides that Council must determine a language policy "with the concurrence of the Senate". UNISA will no doubt be mindful of these shortcomings if it chooses to fashion a new language policy.

[87] Having regard to the constraints placed on this Court in respect of the principles of the separation of powers, a suspended order is called for here.

[88] The following order is made:

1. Leave to appeal is granted.

[140] Rule 13.1 of the Senate Rules provides that, unless provided otherwise by the rules, resolutions of the Senate and its Committees are adopted by a majority of the members present and a show of hands.

[83] Die veranderinge wat UNISA voorhou, is op iedere scenario vanselfsprekend verreikend en sal aansienlike tyd in beslag neem. Die raming van 'n ses-maande beplanningsperiode vir implementering voor die aanvang van 'n akademiese jaar is nie onredelik nie. UNISA is 'n baie groot instansie. Die bevel van die Hoogste Hof van Appèl wat hierdie Hof nou bekragtig is verreikend. 'n Pragmatiese en effektiewe bevel moet redelikerwys vir UNISA in staat stel om behoorlik te navigeer op die roete wat dit kies. En dit is nie vir hierdie Hof om voor te skryf wat UNISA moet doen nie – om behoorlik op te tree as dit aandring op 'n taalbeleid wat Afrikaans laat vaar as taal van onderrig en leer nadat dit voldoen het aan al die grondwetlike en regsvoorskrifte, of om die status quo soos dit was in 2016 voordat die bestrede taalbeleid aangeneem is, weer in te stel. Enige poging om voorskriftelik te wees ten aansien van UNISA se keuse sal neerkom op geregtelike oorskryding, inaggenome die feit dat, soos aangedui, UNISA 'n staatsorgaan is.

[140] Reël 13.1 van die Senaat Reëls bepaal dat, tensy geen ander voorsiening in die reëls gemaak word nie, die resolusie van die Senaat en die Komitees aanvaar word deur 'n meerderheid van die lede teenwoordig deur die opsteek van hande.

2. Save as set out below, the appeal is dismissed.

3. The order of the Supreme Court of Appeal is suspended until the commencement of the University of South Africa's 2023 academic year.

4. In the event that the University of South Africa decides to continue with the language policy adopted in 2016, the requirements of section 29(2) of the Constitution must be complied with.

5. If, by the commencement of the 2023 academic year, the University of South Africa decides to adopt an entirely new language policy, the order of the Supreme Court of Appeal, save for the costs order, will fall away.

6. The University of South Africa must pay AfriForum's costs in this Court, including the costs of two counsel.

[84] Howe moet binne die grense bly wat die Grondwet vir hulle stel.[137] In *Glenister,* het hierdie Hof verklaar dat:

> "In our constitutional democracy, the courts are the ultimate guardians of the Constitution. They not only have the right to intervene in order to prevent the violation of the Constitution, they also have the duty to do so. It is in the performance of this role that courts are more likely to confront the question of whether to venture into the domain of other branches of government and the extent of such intervention. It is a necessary component of the doctrine of separation of powers that courts have a constitutional obligation to ensure that the exercise of power by other branches of government occurs within constitutional bounds. But even in these circumstances, courts must observe the limits of their powers."[138]

[85] In hierdie geval moet UNISA, as 'n staatsorgaan, die verskuldigde eerbied betoon word om die nodige vatbaarheidsondersoeke te doen, die besluit te neem wat dit as die mees redelik uitvoerbaar beskou, en die vereiste veranderinge te implementeer. As UNISA besluit om 'n nuwe taalbeleid te ontwerp,

moet dit uiteraard voldoen aan artikel 29(2). Maar daar is ’n verdere voorbehoud. UNISA het klaarblyklik versuim om sy eie interne prosesse te volg toe dit die bestrede besluit geneem het. Byvoorbeeld:

(a) Die Senaat het versuim om te voldoen aan Reël 11.1, deur die konsepbeleid laat uit te stuur aan lede van die Senaat;[139]

(b) Die resolusie aangaande taalbeleid was nie aanvaar deur die opsteek van hande by die Senaatsvergadering nie. Dit kom neer op nie-voldoening aan Reël 13.1.1.[140]

[86] Daar was onteenseglik geen voldoening aan die Senaat se Reëls toe die resolusie aanvaar is om ’n nuwe taalbeleid aan te beveel nie. Dit het die Senaat se resolusie ongeldig gemaak, en het ’n domino effek gehad op die geldigheid van die Raad se resolusie, aangesien artikel 27(2) van die Wet op Hoër Onderwys bepaal dat die Raad ’n taalbeleid moet neerlê “met die samestemming van die Senaat”. UNISA sal ongetwyfeld bewus wees van hierdie tekortkominge as dit besluit om ’n nuwe taalbeleid te skep.

[87] Inaggenome die beperkinge op hierdie Hof ingevolge die beginsels van die skeiding van magte, is ’n opskortingsbevel hier aangewese.

[88] Die volgende bevel word uitgereik:

1. Verlof tot appèl word toegestaan.
2. Behalwe soos hieronder uiteengesit, word die appèl van die hand gewys.
3. Die bevel van die Hoogste Hof van Appèl word opgeskort tot die aanvang van die Universiteit van Suid-Afrika se 2023 akademiese jaar.
4. Indien die Universiteit van Suid-Afrika besluit om voort te gaan met die taalbeleid wat in 2016 aanvaar is, moet die vereistes van artikel 29(2) van die Grondwet nagekom word.
5. Indien, teen die aanvang van die 2023 akademiese jaar, die Universiteit van Suid-Afrika besluit om ‘n heeltemal nuwe taalbeleid te aanvaar, sal die bevel van die Hoogste Hof van Appèl, behalwe vir die kostebevel, wegval.

6. Die Universiteit van Suid-Afrika moet AfriForum se koste in hierdie Hof betaal, insluitende die koste van twee advokate.

For the Applicants/Vir die Applikante:	M Chaskalson SC and/en CP Wesley instructed by Motalane Incorporated/in opdrag van Motalane Ingelyf
For the Respondent/Vir die Respondent:	A Cockrell SC and/en A D'Oliveira instructed by Hurter Spies Incorporated/in opdrag van Hurter Spies Ingelyf