

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT Case No: 311/17

WCHC Case No: 17501/2016

In the matter between:

GELYKE KANSE	First Applicant
DANIËL JOHANNES ROSSOUW	Second Applicant
THE PRESIDENT OF THE CONVOCATION OF THE UNIVERSITY OF STELLENBOSCH	Third Applicant
BERNARDUS LAMBERTUS PIETERS	Fourth Applicant
MORTIMER BESTER	Fifth Applicant
JAKOBUS PETRUS ROUX	Sixth Applicant
FRANCOIS HENNING	Seventh Applicant
ASHWIN MALOY	Eighth Applicant
RODERICK EMILE LEONARD	Ninth Applicant
and	
THE CHAIRMAN OF THE SENATE OF THE UNIVERSITY OF STELLENBOSCH	First Respondent
THE CHAIRMAN OF THE COUNCIL OF THE UNIVERSITY OF STELLENBOSCH	Second Respondent
THE UNIVERSITY OF STELLENBOSCH	Third Respondent

WRITTEN SUBMISSIONS ON BEHALF OF THE APPLICANTS

"... the building blocks of this nation are all our languages working together, our unique idiomatic expressions that reveal the inner meanings of our experiences. These are the foundations on which our common dream of nationhood should be built...The nurturing of this reality depends on our willingness to learn the languages of others, so that we in practice accord all our languages the same respect. In sharing one's language with another, one does not lose possession of one's words, but agrees to share these words so as to enrich the lives of others. For it is when the borderline between one language and another is erased, when the social barriers between the speaker of one language and

*another are broken, that a bridge is built, connecting what were previously two separate sites into one big space for human interaction, and, out of this, a new world emerges and a new nation is born."*¹

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¹ President Thabo Mbeki, 27 August 1999, quoted in the Language Policy for Higher Education (2002).

I INTRODUCTION

1. Gelyke Kanse brings this application on behalf of hundreds of thousands of South Africans who cannot receive tertiary education in their indigenous mother tongue and, in particular, the Brown Afrikaans-speaking people of the Western and Northern Cape Provinces.² It is joined by six student applicants of whom three are Brown.
2. The central issue underlying this application is the constitutionality of the new language policy at Stellenbosch University ("SU") which was approved by the SU Council on 22 June 2016 (the "NLP"). A second line of attack postulates the irrationality of the adoption of the NLP.
3. In what follows we expand on these and other features of the applicants' case without specifically traversing all the individual grounds of appeal, which we adhere to, set out in the founding affidavit in support of the application for leave to appeal.
4. If one considers that –
 - 4.1. section 29(2) of the Constitution of the Republic of South Africa (the "**Constitution**") bestows on every one a qualified right to receive education in the official language of their choice at public educational institutions;
 - 4.2. high judicial authority says this means that meaningful numbers of language-speakers have an enforceable right against the State to instruction in the language of their community as long as it is reasonably practicable;

² FA record page 13, par 19.2.

- 4.3. section 6(2) of the Constitution recognises the historically diminished use and status of the indigenous languages of the people and orders the State to take practical and positive measures to elevate their status and advance their use;
- 4.4. section 6(4) provides that the national and provincial governments must regulate and monitor the use of official languages and also provides that all official languages must enjoy parity of esteem and be treated equally;
- 4.5. universities are organs of State;
- 4.6. section 27(2) of the Higher Education Act, No. 1 of 1997 (the "**Act**"), provides that the Councils of Universities have to adopt language policies subject to the ministerial Language Policy for Higher Education ("**LPHE**");
- 4.7. the current LPHE is designed to promote multi-lingualism and to enhance equity and access in higher education through, *inter alia* –
 - 4.7.1. the development, in the medium to long term, of indigenous South African languages as mediums of instruction in higher education, alongside English and Afrikaans; and
 - 4.7.2. the retention and strengthening of Afrikaans as a language of scholarship and science;
- 4.8. the revised draft ministerial Language Policy for High Education 2017 acknowledges in its Preamble that "*there has been little progress made in exploring and exploiting the potential role of indigenous African languages in facilitating*

access and success as well as intellectualisation of these languages in Higher Education";

- 4.9. and seeks to promote parity of esteem of indigenous official African languages, including Afrikaans, in the higher education system of South Africa;
- 4.10. Zulu is the indigenous language which is the mother tongue of the largest group of South Africans followed by Xhosa, Afrikaans and, only then, English,

and contrast this with the fact that –

- (a) of 26 South African Universities, not one uses an indigenous language other than Afrikaans as a language of instruction;
- (b) it is only at the Potchefstroom Campus of the North West University where one can still obtain a degree in Afrikaans which, at that campus only, enjoys equal standing with English as a language of instruction;
- (c) of 4 Universities in the Western Cape Province, three use English as the exclusive language of instruction and Stellenbosch University ("SU") uses it progressively predominantly;
- (d) the Council of SU rejected a motion calling for the equality of Afrikaans and English as languages of instruction and a meaningful commitment to the development of Xhosa as a language of instruction;
- (e) the majority language in the Western Cape Province is Afrikaans, followed by Xhosa and only then English;

- (f) Brown people are the largest population group in the Western Cape;
- (g) the majority of them speak Afrikaans and many of them, particularly those from the rural areas can only receive tertiary education in that language;
- (h) they are by far the most under-represented group at tertiary education institutions and the drop out figure is by far the highest;
- (i) the White English-speaking component of the SU student corps is the largest English-speaking component by a significant margin,

it is clear that the statutory and policy provisions referred to at the outset are in danger of becoming obsolete.

5. Subsequent to this Court's Directions of 1 March 2018, we filed Written Submissions and Supplementary Written Submissions in relation to the issues mentioned therein (the "**Previous Written Submissions**").
6. We do not repeat what was stated in our Previous Written Submissions here, save to the extent that it bears relevance to a particular line of argument which we develop. We accordingly address only the following issues in these Submissions:
 - 6.1. In Part II, we provide an overview of the relevant aspects of the NLP as well as its predecessor, the 2014 Policy, the content of which we submit is relevant for the purposes of determining this matter.
 - 6.2. In Part III, we address the constitutional threshold that SU must comply with in

terms of its NLP.

- 6.3. In Part IV, we address the factual context against which the subject challenge falls to be determined.
- 6.4. In Part V, we show that the adoption of the NLP was the result of the dictates of the Open Stellenbosch collective ("**Open Stellenbosch**") and irrational.
- 6.5. In Part VI, we address the basis on which we submit that the Court of first instance erred when its findings and Orders are assessed against the appropriate test to be applied and the facts with reference to which the matter falls to be determined.

II THE LANGUAGE POLICY

The 2014 Policy

7. Prior to the adoption of the NLP, language at SU was governed by the 2014 Policy of which the following aspects deserve emphasis:
 - 7.1. First, notwithstanding SU having historically been an Afrikaans university, it sought to advance the use of English and Afrikaans equally in relation to their academic application.
 - 7.2. Second, it expressed a preference for parallel-medium teaching and real time educational interpreting where practically feasible and affordable; thereby incorporating the constitutional imperative of practicability into the 2014 Policy.
 - 7.3. Third, it provided for the use of both English and Afrikaans in respect of post-

graduate learning and teaching, recognising that there would be a significant utilisation of English as an international academic language.

The NLP

8. The NLP makes provision for three language of instruction modes, namely parallel medium, dual medium and single medium. Since paragraphs 1 to 6 pay mere lip service to, in particular, section 29(2) of the Constitution, the operative provisions are in paragraph 7. In what follows we focus on that paragraph.

9. The following aspects of the NLP are clear from its plain wording:

9.1. The language of instruction in undergraduate classes is, in the first instance, dependent on the proficiency of the assigned lecturer and, in particular, whether he/she is proficient to teach only in Afrikaans or English. The effect of this is that if there are no assigned lecturers who are proficient to teach in Afrikaans, it follows that no undergraduate classes will be in Afrikaans. At this level, the NLP has nothing to do with the needs, demands or indeed interests of the students; the language of assignment is based solely and exclusively on what language the lecturer is proficient in. In such circumstances, the only recourse to the student is the simultaneous interpreting which occurs under differential circumstances depending on whether the lecture is taught in English or Afrikaans. By 2015, 21% of the permanent academic staff members could not teach in Afrikaans whereas only 1% could not teach in English.³

9.2. Even if a lecturer of an undergraduate class is able to teach in English and

³ Annexure "DR12" to the FA, record page 1284.

Afrikaans, there will be more than one class only if it is reasonably practicable and pedagogically sound to do so. The NLP provides no guidance whatsoever as to how either of these criteria has to be assessed. The consequence of this is that notwithstanding the proficiency of a lecturer to teach in Afrikaans, or the demand of a class to be taught in Afrikaans, lectures may still (and do) occur in English only.

- 9.3. The effect of the NLP is that parallel medium instruction is no longer a preference for SU and, in single classes, all lectures have to be in English with only summaries in Afrikaans.
- 9.4. Paragraph 7.1.2 provides that undergraduate modules are offered by any of the measures set out in paragraphs 7.1.3, 7.1.4 and 7.1.5.
- 9.5. In the light of the unlimited scope for deviating from the prescribed Afrikaans offer, which is, in any event, less than the prescribed English offer, the provision in paragraph 7.1 that Afrikaans and English are SU's languages of learning and teaching, is meaningless.
- 9.6. Paragraph 7.1.3 provides for an undergraduate module involving separate lectures in Afrikaans and English where it is reasonably practicable and pedagogically sound to have more than one class group coupled with learning opportunities such as group work, assignments, tutorials and practicals involving students from both language groups to promote integration within programs.
- 9.7. The two significant features of this provision are that –

- 9.7.1. firstly, there are no guidelines to inform the application of the *"reasonably practicable"* and *"pedagogically sound"* criteria; and
 - 9.7.2. these concepts are uncertain and vague, generalised and overbroad and leave SU considerable scope to not have separate lectures in Afrikaans and English, the only feature of the policy that actually provides for equality between the two languages.
- 9.8. Paragraph 7.1.4 provides for a second category of measures by which undergraduate modules are offered. It provides that for undergraduate modules where both Afrikaans and English are used in the same class group, the combination of facilitated learning opportunities will see –
- 9.8.1. during each lecture, all information conveyed at least in English and summaries or emphasis on content also given in Afrikaans with questions in either language having to be answered in that language;
 - 9.8.2. students being supported in Afrikaans and English during a combination of *"appropriate, facilitated learning opportunities"*;
 - 9.8.3. for first year modules, SU making simultaneous interpreting available during each lecture and during second and subsequent years of study upon request by a faculty if the needs of the students warrant the service and SU has the resources to provide it; provided that if two weeks pass with no students making use of the interpreting service, it may be discontinued.
- 9.9. By far the most lectures will fall in this category it being abundantly clear that it

will be a 100% English offering with little or no Afrikaans offering.

- 9.10. Again there are no guidelines to inform the requirements of summaries and emphasis and significant leeway is provided for by the availability of the resources qualification, an aspect of the matter about which the SU itself takes the decisions. Nothing is measured against objective criteria and the scope for deviation as real as the scope for recourse is non-existent.
- 9.11. The uninformed choices that will have to be made for purposes of paragraph 7.1.3 will be made by lecturers, many of whom will prefer, as a result of the larger workload which parallel medium classes require, to avoid duplicating classes.
- 9.12. In any event, lecturers have been abandoning summaries and emphasis in Afrikaans on a grand scale across the board since the implementation of the policy as evidenced by the supplementary affidavits of the student applicants and those of Mr Frederik van Dyk and Mr Tobias Alberts.⁴
- 9.13. Paragraph 7.1.4.1 devalues the Afrikaans offer significantly. Paragraph 7.1.4.2 is so vague and so devoid of guidelines or criteria which have to inform the decision-making process, that it is completely meaningless.
- 9.14. Paragraph 7.1.4.3 effectively means interpreting will be available in first year modules and exclusively from English to Afrikaans, notwithstanding the fact that the RMT claimed that one of the objections to interpreting from Afrikaans to English in terms of the 2014 Policy was that users of the interpreting services were

⁴ Application for leave to appeal: page 68, par 150 and page 550.

embarrassed thereby.⁵ The availability of interpreting in the second and third years of study is similarly made dependent on vague criteria without any definitive guidelines, a fact which will facilitate random and arbitrary departures and render oversight and compliance virtually impossible.

- 9.15. Paragraph 7.1.5, which provides the third category of measures for offering undergraduate modules, further benefits English.
- 9.16. In the following instances lectures will be offered in one language only:
 - 9.16.1. Where the nature of the subject-matter of the module justifies doing so, for example when a module is the language itself.
 - 9.16.2. When the assigned lecturer is proficient to teach only in English or Afrikaans.
 - 9.16.3. Where all the students in a class group have been invited to vote by means of a secret ballot and those who have voted unanimously agree to the module being presented in English only or Afrikaans only, provided that the relevant lecturers and teaching assistants have the necessary language proficiency and agree to do so.
- 9.17. The first category is not informed by any objective criteria and clearly capable of abuse.
- 9.18. Paragraph 7.1.5.1 makes provision for an almost unfettered discretion without providing any real guidelines or criteria with reference to which recourse to that

⁵ Application for leave to appeal: page 68, par 148.

paragraph may be assessed.

- 9.19. Paragraph 7.1.5.2 discriminates directly against Afrikaans-speaking students, mostly because virtually all Afrikaans-speaking lecturers are able to also lecture in English whereas many English-speaking lecturers cannot lecture in Afrikaans as well.
- 9.20. Paragraph 7.1.5.3 also discriminates against Afrikaans-speaking students in as much as it capitalises on the fact that many of them are sufficiently proficient in English to receive an education in that language whereas the same is not true of English-speaking students, also because by 2015 already 21% of the permanent teaching staff could only lecture in English compared to the 1% who could only lecture in Afrikaans.
- 9.21. The way in which paragraph 7.1.2 has been formulated renders it capable of the construction that there is unlimited freedom of choice in respect of the measures enumerated in paragraphs 7.1.3, 7.1.4 and 7.1.5. This means that even when it is, as contemplated in paragraph 7.1.3, reasonably practicable and pedagogically sound to have more than one class group, there does not necessarily have to be parallel lectures in English and Afrikaans since an election can still be made for paragraph 7.1.4's dual medium where all information has to be conveyed at least in English, or paragraph 7.1.5's single language option only, i.e. where the lecturer can only speak that language.
- 9.22. Paragraphs 7.4.1.1 and 7.4.1.2 illustrate the bias against the Afrikaans graphically:

"7.4.1.1 The English offering is revised upwards so as to achieve full

accessibility to SU for academically deserving prospective and current students who prefer to study in English.

7.4.1.2 *The Afrikaans offering is managed so as to sustain access to SU for students who prefer to study in Afrikaans and to further develop Afrikaans as a language of tuition where reasonably practicable."*

9.23. The "protection" that Afrikaans derives from paragraph 7.4.1.2 is meaningless. Apart from the fact that it is rendered subject to the "reasonably practicable" criterion, it is inconsistent with the Council's position formulated at the Special Council Meeting of 21 May 2016 – which was adopted instead of the motion calling for equality for Afrikaans and English as languages of instruction and a meaningful commitment to the development of Xhosa – which calls for the English offer to be extended so that no admitted student is excluded and that it be ensured that the Afrikaans offer is not reduced and that Afrikaans as a language of instruction be further developed, not further developed where reasonably practicable.

10. The stark change from the 2014 Policy to the NLP raises the fundamental question of whether it can be justified in South Africa's current context, when tested and analysed against the constitutional precepts. We submit not.

III THE CONSTITUTIONAL THRESHOLD THAT SU'S LANGUAGE POLICY MUST COMPLY WITH

11. In our Previous Written Submissions, in addressing the first question posed by this Court,

viz, whether the tests of "*reasonable practicability*" and "*appropriate justification*" are one and the same test or two different tests, we addressed in some detail the case-law of this Court in relation to the reasonably practicable test. We highlight certain aspects in what follows.

12. In **Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995**,⁶ though in the context of the predecessor to section 29 of the Constitution,⁷ Justice Kriegler emphasised that the standard of reasonable practicability is objectively justiciable, which means that arbitrary governmental action can be restrained by the Courts. He concluded that meaningful numbers of language-speakers have an enforceable right against the government to instruction in the language of their community as long as it is reasonably practicable.
13. In **Minister of Education, Western Cape v Governing Body, Mikro Primary School**,⁸ the SCA held:
- 13.1. The right of everyone to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable is a right against the State.⁹
- 13.2. The Constitution recognises that there may be various reasonable educational alternatives available to the State to give effect to this right and has left it to the

⁶ 1996 (3) SA 165 (CC) at par 41.

⁷ Section 32 of the Interim Constitution provided:

"Education

Every person shall have the right -

(a) *to basic education and to equal access to educational institutions;*

(b) *to instruction in the language of his or her choice where this is reasonably practicable; and*

(c) *to establish, where practicable, educational institutions based on a common culture, language or religion, provided that there shall be no discrimination on the ground of race."*

⁸ 2006 (1) SA 1 (SCA).

⁹ At par 31.

State to decide how best to do so. In order to ensure the effective access to, and implementation of, this right, the State must in terms of the provision consider all reasonable educational alternatives, including single medium institutions.¹⁰

13.3. Section 29(2), therefore, empowers the State to ensure the effective implementation of the right by providing single-medium educational institutions. This is a clear indication that, in terms of section 29(2), everyone has a right to be educated in an official language of his or her choice at a public educational institution to be provided by the State if reasonably practicable, but not the right to be so instructed at each and every public educational institution, subject only to it being reasonably practicable to do so.¹¹

14. **In Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo,**¹² this Court found as follows in relation to section 29 of the Constitution:

14.1. An important consideration will always be whether the State has taken reasonable and positive measures to make the right to basic education increasingly available and accessible to everyone in a language of choice.¹³

14.2. It follows 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.¹⁴

14.3. In resorting to an option such as a single or parallel or dual medium of instruction,

¹⁰ At par 31.

¹¹ At par 31.

¹² 2010 (2) SA 415 (CC)

¹³ At par 52.

¹⁴ At par 52.

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.¹⁵

15. As with the case of **Afriforum and Another v University of The Free State**,¹⁶ this case also turns, to a large extent, on section 29(2) of the Constitution in the context of tertiary education and the relevant evidence.

16. In **Afriforum**, this Court interpreted the words "*reasonably practicable*" in the context of section 29(2) of the Constitution.¹⁷ The following aspects of this Court's analysis establish the test against which this matter falls to be determined:

16.1. First, it would be unreasonable to slavishly hold on to a language policy that has proved to be the practical antithesis of fairness, feasibility, inclusivity and the remedial action necessary to shake racism and its tendencies out of their comfort zone.¹⁸

16.2. Second, that in realising the right to education, the need for "*reasonable measures*" to be taken to make education "*progressively available and accessible*", and the impermissibility of racial discrimination, intended or otherwise, in all educational institutions are key; reasonable practicability must be given meaning with due

¹⁵ At par 53.

¹⁶ 2018 (2) SA 185 (CC)

¹⁷ Section 29 of the Constitution provides as follows:

"(1) Everyone has the right—
 (a) to a basic education, including adult basic education; and
 (b) to further education, which the State, through reasonable measures, must make progressively available and accessible.

(2) 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."

¹⁸ At par 46.

regard to these prescripts.¹⁹ Whatever model is chosen must be informed by, among others, the constitutional obligation to make education accessible to all so as to free the potential of all persons and to give effect to the constitutional values. That is why section 29(2) requires "*(a) equity; (b) practicability; and (c) the need to redress the results of past racially discriminatory laws and practices,*" to feature prominently in exploring the possibility of offering education in an official language of choice. These criteria relate to equality, responsiveness and non-racialism; all reasonable educational alternatives must be investigated within this context.²⁰

- 16.3. Third, effective access to the right to be instructed in an official language of choice must be given effect to, but without undermining equitable access, preserving exclusivity or perpetuating racial supremacy. It would be unreasonable to wittingly or inadvertently allow some people to have unimpeded access to education and success at the expense of others as a direct consequence of a blind pursuit of the enjoyment of the right to education in a language of choice.²¹
- 16.4. Fourth, reasonableness within the context of section 29(2) demands that equity, practicability and the critical need to undo the damage caused by racial discrimination, should also be the intrinsic features of the decision-making process relating to effective access to education in a language of choice.²²
- 16.5. Fifth, at a conceptual level, dual medium institutions might well exist without necessarily nurturing or perpetuating unfair advantage or racial discrimination and

¹⁹ At par 46.

²⁰ At par 48.

²¹ At par 49.

²² At par 50.

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.²³

16.6. Sixth, where the enjoyment of the right to be instructed in an official language of choice is achievable without undermining any constitutional aspiration or value, 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 imperilled by giving effect to the right to be educated in an official language of choice, the criterion of reasonable practicability would not have been met.²⁴

16.7. Finally, 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 South Africa's shameful apartheid past, be appropriately accommodated; this 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.²⁵

17. We understand this Court's judgment in **Afriforum** to mean:

17.1. First, that section 29(2) of the Constitution must be given effect to and cannot be denuded of its plain meaning. We submit that section 29(2) of the Constitution can never be interpreted to mean that any institution which gives preference to a

²³ At par 51.

²⁴ At par 53.

²⁵ At par 53.

"*historically privileged*" language will always fall foul of section 29(2); particularly not if one bears in mind that English is the only language that has enjoyed that status for as long as there has been institutions of tertiary education in South Africa.

17.2. Second, that where the right to be instructed in an official language of choice is achievable without undermining any constitutional aspiration or value, then, in terms of the equity test, the right must be given effect to. In this regard, we submit that it is an evidential based approach as to whether any constitutional imperative will be undermined when giving effect to a right to instruction in an official language of choice.

17.3. Third, that one acceptable way of giving effect to section 29(2) is by way of parallel medium instruction, at least at a conceptual level, a possibility entirely consistent with the LPHE as we shall show.

IV THE EVIDENCE AGAINST WHICH THE SECTION 29(2) THRESHOLD MUST BE ASSESSED

18. This Court has long recognised that rights must be interpreted in their context and that this requires two types of context, namely: (a) rights must be understood in their textual setting which requires a consideration of Chapter 2 and the Constitution as a whole; and (b) on the other hand, rights must also be understood in their social and historical context.²⁶

19. More recently, in **Head of Department: Mpumalanga Department of Education and**

²⁶ Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC) at par 22 to 25.

Another v Hoërskool Ermelo and Another,²⁷ this Court emphasised:

- 19.1. 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.
 - 19.2. The reasonableness standard built into section 29(2) imposes a context sensitive understanding of each claim for education in a language of choice.
20. We submit that the following considerations are relevant to the assessment of the NLP against the prescripts of section 29(2) of the Constitution:
- 20.1. First, the extent to which English and Afrikaans are used as first languages in the national and provincial context.
 - 20.2. Second, language of instruction in the context of SU.
 - 20.3. Third, language of instruction within the national tertiary education landscape.
 - 20.4. Fourth, the demand for Afrikaans at SU.
 - 20.5. Fifth, the historic position in respect of language of instruction at universities.
 - 20.6. Sixth, the NLP was not adopted because the previous state of affairs undermined any constitutionally protected value, right or aspiration.
 - 20.7. Seventh, the NLP was not adopted because the previous position was unaffordable, nor was full parallel medium considered unaffordable.

²⁷ [2009] ZACC 32; 2010 (2) SA 415 (CC); 2010 (3) BCLR 177 (CC) at par 52 and 53.

- 20.8. Eighth, it was not considered that parallel medium would lead to segregation because it obviously will not.
- 20.9. Ninth, the NLP constitutes a retrogressive measure which SU has failed to fully justify.
- 20.10. Tenth, the erosion of Afrikaans at tertiary institutions has a domino effect on the broader place of the language in South African society.

The choice of first language in the national and provincial context

21. Context, in the present matter, we submit, requires an assessment of the language demands in South Africa. In this regard, we submit that the Court of first instance erred in finding that the analysis of the present challenges only "*stretches to the boundaries of the University itself*" and that "*deeper issues about 'majoritarian hegemony'*" must be dealt with through an attack on the State's policy.²⁸ (Ironically the Applicants invoked the State's policy and claimed then, as they do now, that the NLP's adoption was also fatally inconsistent with the LPHE.) We submit that language in the broader South African context is an indispensable aspect to this Court's analysis of the issues. Of paramount importance in this regard are the following:

21.1. There are three English Universities in close proximity to SU, none of which cater for the 49.7% of the inhabitants of the Western Cape who have Afrikaans as their home language.²⁹ As evidenced by the confirmatory affidavits deposed to by the Student Applicants and our assessment of the NLP hereinabove, the SU no longer

²⁸ Application for leave to appeal: Annexure "DR7", page 253, par 65.

²⁹ FA record page 306, par 527.

caters for them either.³⁰

- 21.2. Of all the Western Cape inhabitants, the majority (49.4%) are Brown people,³¹ many of whom come from rural areas with a very limited command of English and are not empowered to obtain a tertiary education in any language other than Afrikaans.
- 21.3. In the mid-1980's large numbers of Black (African) students started flocking to the University of the Western Cape ("UWC"), established for Brown people in terms of the apartheid policy. That put the management under huge pressure to replace Afrikaans with English as medium of instruction. The Gelyke Kanse submission³² to the Language Review Working Group (the "WG") (to which we refer hereinbelow in paragraph 52.8) quotes the Vice Chancellor at the time, Professor Jaap Durand, as saying the following about these events: *"Our experience at UWC was that when we allowed black students, although it clashed with government policy, they began to flock in large numbers to UWC. As a result, we were compelled to make English the primary medium of instruction. The result was that the academic performance of our brown students declined markedly. Their limited command of English was a serious handicap."*
- 21.4. Presently the Brown community has the lowest participation rate in university education, partly because of the low income of their parents and partly because of the tendency of parents to choose English as a medium of instruction even if the

³⁰ FA record pages 4085-4121; and the supplementary affidavits of Frederik Rudolph van Dyk and Tobias Vivian Alberts.

³¹ FA record page 306, par 528.

³² 21 April 2016, page 6; FA record page 439.

- 21.5. home language is Afrikaans. In 2013 the Council for Higher Education commissioned a study to establish the success rate of the different population groups in studying for Bachelor's degrees during the period 1970 to 2010. The percentage of Brown students who were awarded Bachelor's degrees dropped from 10% in 1970 to 6% in 2010.³³
22. The extent of Afrikaans as a home language to the people of South Africa is apparent from the most recent Census figures (being 2011).
23. According to the 2011 Census, the land and population break-down by province is as follows:

Table 1

PROVINCE	LAND AREA IN SQUARE KILOMETRES³⁴	POPULATION³⁵
Western Cape	129 462	5 822 734
Eastern Cape	168 966	6 526 053
Northern Cape	372 889	1 145 861
Free State	129 825	2 745 590
KwaZulu Natal	94 361	10 267 300
North West	104 882	3 509 953
Gauteng	18 178	12 272 263
Mpumalanga	76 495	4 039 939
Limpopo	125 754	5 404 868
TOTAL	1 220 813	51 770 560

³³ Vital Stats Public Higher Education, Council for Higher Education (CHE) South Africa.

³⁴ Available at:

http://www.statssa.gov.za/census/census_2011/census_products/Census_2011_Census_in_brief.pdf at page 9.

³⁵ Available at:

http://www.statssa.gov.za/census/census_2011/census_products/Census_2011_Census_in_brief.pdf at page 18.

24. According to the 2011 Census, first language breakdown by Province (on a percentage basis) is as follows:³⁶

Table 2

Language	WC	EC	NC	FS	KZN	NW	GP	MP	LP	SA
Afrikaans	49.7	10.6	53.8	12.7	1.6	9	12.4	7.2	2.6	13.5
English	20.2	5.6	3.4	2.9	13.2	3.5	13.3	3.1	1.5	9.6
IsiNdebele	0.3	0.2	0.5	0.4	1.1	1.3	3.2	10.1	2.0	2.1
IsiXhosa	24.7	78.8	5.3	7.5	3.4	5.5	6.6	1.2	0.4	16.0
IsiZulu	0.4	0.5	0.8	4.4	77.8	2.5	19.8	24.1	1.2	22.7
Sepedi	0.1	0.2	0.2	0.3	0.2	2.4	10.6	9.3	52.9	9.1
Sesotho	1.1	2.5	1.3	64.2	0.8	5.8	11.6	3.5	1.5	7.6
Setswana	0.4	0.2	33.1	5.2	0.5	63.4	9.1	1.8	2.1	8.0
Sign Lang	0.4	0.7	0.3	1.2	0.5	0.4	0.4	0.2	0.2	0.5
SiSwati	0.1	0	0.1	0.1	0.1	0.3	1.1	27.7	0.5	2.5
TshiVenda	0.1	0.1	0.1	0.1	0	0.5	2.3	0.3	16.7	2.4
Xitsonga	0.2	0.0	0.1	0.3	0.1	3.7	6.6	10.4	17.0	4.5
Other	2.2	0.6	1.1	0.6	0.8	1.8	3.1	1.0	1.6	1.6

25. Despite a common misconception that Afrikaans is spoken as a first language mainly by historically privileged persons, who identify as White persons in South Africa, this is manifestly not the case. According to the 2011 Census, the first language break-down by race (on a percentage basis) is as follows:³⁷

³⁶ Available at:

http://www.statssa.gov.za/census/census_2011/census_products/Census_2011_Census_in_brief.pdf at page 25; Table 2.6.

³⁷ Available at:

http://www.statssa.gov.za/census/census_2011/census_products/Census_2011_Census_in_brief.pdf at page 27; Table 2.8.

Table 3

Language	Black African	Coloured	Indian/Asian	White	Other	South African
Afrikaans	1.5	75.8	4.6	60.8	15.2	13.5
English	2.9	20.8	86.1	35.9	29.5	9.6
IsiNdebele	2.6	0.2	0.8	0.2	2.1	2.1
IsiXhosa	20.1	0.6	0.4	0.3	1.9	16
IsiZulu	28.5	0.5	1.3	0.4	4.1	22.7
Sepedi	11.4	0.1	0.2	0.1	0.6	9.1
Sesotho	9.4	0.5	0.4	0.4	1.7	7.6
Setswana	9.9	0.9	0.4	0.4	2.4	8.0
Sign Lang	0.5	0.3	0.3	0.2	0.2	0.5
SiSwati	3.2	0.1	0.1	0.1	0.5	2.5
TshiVenda	3.0	0.1	0.1	0.1	0.5	2.4
Xitsonga	5.6	0	0.2	0.1	3.9	4.5
Other	1.5	0.1	5.1	1.1	37.4	1.6

26. What is clearly apparent from the above tables are the following:

26.1. First, Afrikaans is by far the most widely spoken first language in the Western Cape and Northern Cape (as appears from Table 2).

26.2. Second, in the Western Cape, Afrikaans is the first language of more than double the number of persons who have English as their first language (49.7% as compared to 20.2%) (as appears from Table 2).

26.3. Third, nationally, Afrikaans is the third highest first language spoken by the people of South Africa (as appears from Table 2).

26.4. Fourth, in the Western Cape, the second highest first language is that of Xhosa whereas English accounts for the third highest first language (as appears from Table 2).

- 26.5. Fifth, the highest number of Afrikaans first language persons in the Western Cape come from the Brown community (as appears from Table 3).
27. Despite the above statistics, we emphasise that there is only one of the country's 37 university campuses (the Potchefstroom campus of North West University) and 26 universities where Afrikaans is used as a language of instruction in all courses. There can be no dispute that this statistic is marginal when considered against –
- 27.1. the number of persons who have Afrikaans as their first language, which by far outweighs English.
- 27.2. the number of universities historically that used Afrikaans as a medium of instruction.
- 27.3. the number of persons of the Brown community who have Afrikaans as their first language.

The SU context

28. Also relevant to context, is the context at SU, the following features of which warrant highlighting:
- 28.1. First, that Afrikaans was traditionally the language of instruction at the SU.³⁸
- Given its geographic location in a province which is predominantly Afrikaans and of which the largest population group, the Brown community, is predominantly Afrikaans, the SU was at the beginning of the 1990's generally regarded as the

³⁸ FA record page 25, par 46.2.

institution best placed to remain a predominantly Afrikaans medium institution following the commencement of the new constitutional dispensation; and that it would make a contribution towards the preservation and development of Afrikaans as a language of science and learning.³⁹

- 28.2. Second, since 1994 the SU has become home to an ever-increasing number of mainly White students, whose mother-tongue was not Afrikaans.⁴⁰
- 28.3. Third, during the 20 years after 1995, the number of Afrikaans-speaking students at the SU moved in a band between 11 000 and 13 300.⁴¹ During the same period the number of non-Afrikaans-speaking and overall number of students tripled. In 2007 there were 2914 undergraduate White English-speaking students at Stellenbosch. By 2017 this number had increased to 5458. In the same period the number of undergraduate White Afrikaans-speaking students declined from 8152 to 6926, whereas the number of Brown Afrikaans-speaking students remained almost the same, 1449 in 2007 and 1433 in 2017. In 2017 there were 851 English-speaking Black (African) undergraduate students at the SU, of a total of 2390, 1515 of which spoke an official language other than English or Afrikaans.
- 28.4. Fourth, the increase in non-Afrikaans students was the result of the fact that White English-speaking students streamed to the campus; in certain faculties students began to use English more and more; SU started appointing lecturers who could not speak Afrikaans; and unlike the position in the past, it was not expected of them to become proficient in Afrikaans. In the result, in 2015 there were already

³⁹ FA record page 25, par 46.3.

⁴⁰ FA record page 26, par 46.4.

⁴¹ FA record page 27, par 46.8.

202 (21%) of the SU's permanent lecturing personnel component who could only lecture in English whereas only 8 Afrikaans-speaking lecturers could not also teach in English.⁴²

28.5. Fifth, as a result of this influx of White English-speaking students, the offering of single-medium Afrikaans classes decreased to 55% in 2009 and to 12% four years later, whereas dual-medium increased to 58%.⁴³

29. One of the most important reasons for the phasing out of Afrikaans at the SU was, therefore, the phenomenal growth of the number of White English-speaking students and the appointment of lecturers who were not prepared or able to lecture in Afrikaans. That the anglicisation of the SU had little to do with transformation is evident, for example, by the fact that 85% of the English-speaking students who entered the SU between 1995 and 2015 were White.⁴⁴

30. We submit that this context too is indispensable to the proper adjudication of the subject challenge, but that the Court of first instance, ignored (erroneously, we submit) this aspect of the challenge, relegating the concerns raised by the applicants as one pertaining to the implementation of the NLP.⁴⁵

Language of instruction within the national tertiary education landscape

31. The historic position prior to the adoption of the new constitutional dispensation was this:

31.1. Eight of the 26 Universities in South Africa had either Afrikaans as their only

⁴² FA record page 28, par 46.11; Annexure DR124, page 1284.

⁴³ FA record page 30, par 46.20.

⁴⁴ Application for leave to appeal: FA record page 20, par 16.

⁴⁵ At par 69 and 70.

language of instruction or as a primary language of instruction together with English. These Universities were: the University of the Western Cape; SU; the University of Port Elizabeth (now Nelson Mandela Metropolitan University); the Free State University; the Potchefstroom University for Christian Higher Education (now the North West University); UNISA; the Rand Afrikaans University (now Johannesburg); and the University of Pretoria.⁴⁶

- 31.2. The increasing number of Black students at the UWC resulted in it substituting English for Afrikaans and by 1990 Afrikaans was no longer a formal language of instruction.⁴⁷
- 31.3. The same thing occurred at the Nelson Mandela Metropolitan University and the Rand Afrikaans University.⁴⁸
- 31.4. On 11 March 2016, the Free State University adopted a new language policy which saw English become the primary language of instruction.⁴⁹
- 31.5. On 28 April 2016, UNISA adopted a new language policy in terms of which English became the only language of instruction of that tertiary institution notwithstanding the fact that approximately 24 000 Afrikaans-speaking students are enrolled at that university.⁵⁰
- 31.6. On 22 June 2016, English became the primary language of instruction at the University of Pretoria, while Afrikaans and Sepedi were assigned only symbolic

⁴⁶ Application for leave to appeal: FA record page 60, par 119.

⁴⁷ Application for leave to appeal: FA record page 61, par 121.

⁴⁸ Application for leave to appeal: FA record page 61, par 122.

⁴⁹ Application for leave to appeal: FA record page 62, par 128.

⁵⁰ Application for leave to appeal: FA record page 62, par 127. This figure has risen to 30 000.

roles.⁵¹

- 31.7. The result of the foregoing is that, with the notable exceptions of SU (before the adoption of the NLP) and North West Universities, all historically Afrikaans Universities no longer use Afrikaans as a primary medium of instruction at all.
32. Of the 26 Universities in South Africa (including the eight which previously used Afrikaans as a primary medium of instruction), there is presently only one (North West University) which adheres to a language policy that makes provision for English and Afrikaans as the primary languages of instruction.⁵²
33. We submit that in failing to have regard to this aspect of the case too, the Court of first instance erred. Evidence of this nature is, in our respectful submission, highly relevant to both the reasonably practicable test and the the appropriate justification test.

The demand for Afrikaans at SU

34. We submit that there are at least four factors which demonstrate the demand for a more equitable focus on Afrikaans at SU. These are:
- 34.1. First, nationally there is only one university which makes provision for English and Afrikaans as the primary languages of instruction and only at one campus.
- 34.2. Second, of the four Universities in the Western Cape, three are entirely English-

⁵¹ Application for leave to appeal: FA record page 63, par 122 and par 124.

⁵² Application for leave to appeal: FA record page 64, par 135.

speaking.⁵³

34.3. Third, the downscaling of Afrikaans at SU is not in order to accommodate the language needs of Black people; it is primarily in order to accommodate the needs of White English-speaking students. This is because in recent years SU has drawn significantly more White English-speaking students than it has Black students who would prefer to be educated in English.⁵⁴ Since 1994, SU has become home to an ever increasing number of mainly White students whose mother tongue was not Afrikaans.⁵⁵ As stated, during 20 years after 1995, the number of Afrikaans-speaking students at the SU moved in a band between 11 000 and 13 300; whereas during the same period the number of non-Afrikaans-speaking students tripled.⁵⁶

34.4. Finally, the pool from which universities draw their students is remarkably small.⁵⁷ A total of 2434 public schools (out of a total of 23 905 public schools countrywide) use Afrikaans as a medium of education. The Afrikaans medium schools educate about 900 000 Afrikaans-speaking learners.⁵⁸ The participation of Brown Afrikaans-speaking students in tertiary education is the lowest of all population groups in the country.

The historic position in respect of language of instruction at tertiary institutions

35. After the commencement of the new constitutional regime and speaking at SU, where he received an honorary doctorate, President Nelson Mandela said:

⁵³ Application for leave to appeal: FA record page 64, par 135.

⁵⁴ Application for leave to appeal: FA record page 63, par 133.

⁵⁵ Application for leave to appeal: FA record page 18, par 10.

⁵⁶ Application for leave to appeal: FA record page 18, par 11.

⁵⁷ Application for leave to appeal: FA record page 56, par 102.

⁵⁸ Application for leave to appeal: FA record page 56, par 104 and par 105.

"It surely must be possible in a system of more than 20 universities to come to an agreement that there would be at least one university whose main task would be to promote the sustained development of Afrikaans as an academic medium."

36. The following relevant aspects of the historic position warrant reference:⁵⁹

36.1. In 2001, Prof Kader Asmal (then Minister of Higher Education) appointed Professor G J Gerwel to convene an informal committee to provide him with advice specifically with regard to Afrikaans. In particular, the committee was requested to advise on ways in which Afrikaans *"can be assured of continued long term maintenance, growth and development as a language of science and scholarship in the higher education system without non-Afrikaans speakers being unfairly denied access within the system, or the use and development of the language as a medium of instruction wittingly or unwittingly becoming the basis for racial, ethnic or cultural division and discrimination"*.

36.2. According to the LPHE, the reason for this focus on Afrikaans was that apart from English, Afrikaans is the only other South African language employed as a medium of instruction and official communication in institutions of higher education.

36.3. In January 2002, the Gerwel Committee submitted its advice to the Minister. In addition, the Ministry considered the views expressed by a number of different constituencies, including those of the Vice-Chancellors of the Historically Afrikaans Institutions.

36.4. The Ministry acknowledged that Afrikaans as a language of scholarship and

⁵⁹ The Language Policy for Higher Education (November 2002), accessed on: <http://www.dhet.gov.za/Management%20Support/Language%20Policy%20for%20Higher%20Education.pdf>; Annexure "DR12" to the FA, record page 1296.

science is a national resource. It, therefore, fully supported the retention of Afrikaans as a medium of academic expression and communication in higher education and was committed to ensuring that the capacity of Afrikaans to function as such a medium is not eroded. In this regard, the Ministry endorsed the views of the then President, Mr Nelson Mandela, as expressed in his speech to the University of Stellenbosch in 1996 that:

"The real issues is (sic) not the extermination or preservation of Afrikaans as an academic medium. Rather, the question is this: Amongst ourselves, how are we to negotiate a dispensation for the South African university system that meets the following three criteria? Firstly, that a milieu should be created and maintained for Afrikaans to continue growing as a language of scholarship and science. At the same time, that non-speakers of Afrikaans should not be unjustly deprived of access within the system. And moreover, that the use and development of no single language medium should - either intentionally or unintentionally - be made the basis for the furtherance of racial, ethnic or narrowly cultural separation".

25 October 1996

- 36.5. The Ministry did not believe, however, that the sustainability of Afrikaans in higher education necessarily required the designation of SU and the Potchefstroom University for Christian Higher Education (as it then was) as "*custodians*" of the academic use of the Afrikaans language, as proposed by the Gerwel Committee.⁶⁰
- 36.6. In this regard, the Ministry agreed with the Rectors of the Historically Afrikaans Universities that the sustained development of Afrikaans should not be the responsibility of only some of the universities. The concern was that the designation of one or more institutions in this manner could have the unintended consequence of concentrating Afrikaans-speaking students in some institutions and in so doing setting back the transformation agendas of institutions that have

⁶⁰ Par 15.4.1.

embraced parallel or dual medium approaches as a means of promoting diversity.⁶¹

- 36.7. Instead, the Ministry was of the view that the sustainability of Afrikaans as a medium of academic expression and communication could be ensured through a range of strategies, including the adoption of parallel and dual language medium options, which would on the one hand cater for the needs of Afrikaans language speakers and, on the other, ensure that language of instruction is not a barrier to access and success. In this regard, the Ministry expressed the intention to, in consultation with the historically Afrikaans medium institutions, examine the feasibility of different strategies, including the use of Afrikaans as a primary but not a sole medium of instruction.⁶² We submit that the NLP is the antithesis of this.

The NLP was not adopted because the previous position undermined any constitutionally protected value, right or aspiration

37. As already explained, the very first basis on which language of instruction is to be determined is that of the language proficiency of the lecturers. As already submitted, this has nothing to do with the needs of the students; instead, it depends entirely on the lecturers.
38. The consequence of this is a far-reaching one in the context of the present debate inasmuch as it means that SU accepts (as it must) that if a lecturer is proficient in Afrikaans only, that is the sole determinant of whether or not a lecture is taught in Afrikaans. In light of this, it is not open to SU to contend that lecturing in Afrikaans undermines any constitutionally

⁶¹ Page 1308 of Annexure "DR126" to the FA, record page 1296.

⁶² At page 1309.

protected value, right or aspiration.

39. As already explained, the second basis on which language of instruction is to be determined is that even if a lecturer of an undergraduate class is proficient to teach in English and Afrikaans, there will be more than one class only if it is reasonably practicable and pedagogically sound to do so. It is difficult to understand the basis for this for at least two reasons:

39.1. First, the provision is so vague that it is difficult to understand its meaning or import. While the Constitution imposes a threshold of reasonable practicability, it is unclear as to what the additional requirement of "*pedagogically sound*" seeks to convey. On its plain wording, the term "*pedagogic*" refers to, *inter alia*, "*educational*", "*scholastic*" or "*academic*". How that relates to the requirement of reasonable practicability is left unstated in the NLP.

39.2. Second, clearly SU intends that a threshold of something more than reasonable practicability is intended in respect of this category. In light of the plain wording of section 29(2) of the Constitution, we submit that there is no basis for this additional criterion in that it is not founded in section 29(2) of the Constitution.

40. Notwithstanding the foregoing, the Court of first instance made the following findings, in respect of which we submit it erred:

40.1. During 2015 and the first half of 2016 it became clear that the 2014 Policy (although it was not its purpose) excluded students who were proficient in English but not proficient in Afrikaans. The majority of those students excluded were Black

(African) students.⁶³

- 40.2. As a result of their poor Afrikaans, the majority of Black (African) students could not fully understand the lectures presented in the A or T specifications; they felt stigmatised by the real-time interpretation, which was almost solely used for translating the lectures they could not understand; and, they felt excluded from other aspects of campus life, like residence meetings and official SU events which took place in Afrikaans, without interpretation.⁶⁴
41. Notwithstanding the Court of first instance having found that the 2014 Policy had the unintended consequence of excluding Black (African) students from full and equitable access to SU, elsewhere in its judgment, the Court accepted that this "exclusion" "*resulted from a combination of the linguistic and racial demographics of SU's student body, and the manner in which that policy was implemented*". Simply put, the Court of first instance accepted that the exclusion was the result of: (a) linguistic and racial demographics; and (b) the manner of implementation of the 2014 Policy; both these reasons, we submit, are entirely distinct from such a consequence having ensued from the 2014 Policy.
42. Notwithstanding the Court of first instance having recognised the legal principle (as endorsed by this Court) that "*what happens in practice may therefore point to a flaw in the application of the law but it does not establish a constitutional defect in it*", it failed to apply the principle in respect of its own reasoning on this score.⁶⁵

⁶³ Application for leave to appeal, Annexure "DR1", page 253, par 50.

⁶⁴ At par 50.

⁶⁵ Page 270, par 69. See too: *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae)* [2002] ZACC 22; 2002 (6) SA 642 (CC); *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others (Mukhwevho Intervening)* [2001] ZACC 19; 2001 (3) SA 1151 (CC); *South African Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC).

43. There is a final reason as to why the 2014 Policy, on its plain terms, could not have had the effect of excluding Black (African) students – this is because, in terms of the 2014 Policy –
- 43.1. Afrikaans and English were identified as SU’s languages of learning and teaching, and SU was committed to purposefully extending the academic application of both languages; and
- 43.2. parallel-medium teaching and real time educational interpreting were used as preferred options only where practically feasible and affordable.
44. It follows, we submit, that where dual medium instruction resulted in exclusion of Black (African) students, it could not have been practically feasible and therefore not sanctioned by the 2014 Policy. Accordingly, the consequence of exclusion complained of (if correct), could have been catered for through a proper application of the 2014 Policy.

The NLP was not adopted because the previous position was unaffordable nor was full parallel medium considered unaffordable

45. Although an attempt was made, for the first time, in the Respondents’ Answering Affidavit before the Court *a quo* to suggest that considerations of cost played a role in the adoption of the NLP as also in the decision not to accord equal status to English and Afrikaans as primary languages of instruction, it is submitted that it has been conclusively shown in the Replying Affidavit before the Court *a quo* as also in the Founding Affidavit in the application for leave to appeal directly to this Court, that such was not the case.⁶⁶

⁶⁶ Annexures A to C to the Previous Written Submissions dated 22 March 2018.

There was no question of segregation

46. The Senate and Council's record of proceedings conclusively show that there was no question of the possibility of segregation, unintentional or otherwise, being a motivation for declining the parallel medium option and opting for the English dominance option. That is hardly surprising considering the fact that a significant number of Black students (the Brown component) prefer to attend classes in Afrikaans.
47. Nor could there have been, considering that there are significant numbers of White and Black English and Afrikaans-speaking students at SU.

The NLP amounts to a retrogressive measure for first language Afrikaans-speaking students which SU has failed to justify

48. In **AfriForum**, this Court held that even where "*a learner already enjoys the benefit of being taught in an official language of choice*" (as was the case at SU in the past), inequitable access and the unintended entrenchment or fuelling of racial disharmony would be the "*appropriate justification*" for taking away or diminishing the already existing enjoyment of the right to be taught in one's mother tongue.
49. In the present instance, the question of inequitable access and the fuelling of racial disharmony do not arise, for reasons addressed under the preceding subheading. In this regard, we emphasise that in terms of the 2014 Policy, parallel-medium teaching and real time educational interpreting were used as preferred options only where practically feasible and affordable.

The domino effect of the erosion of Afrikaans at tertiary institutions

50. In our Previous Written Submissions, we addressed the question of whether public Universities have obligations in relation to the advancement of all official languages as contemplated under section 6 of the Constitution.⁶⁷

51. In addition to the submissions made therein, we advance the following further contentions:

51.1. The erosion of Afrikaans as a language of instruction at tertiary institutions does not, in our respectful submission have an impact only on the language of instruction at the tertiary institution in question. Rather, in our submission, it impacts on the proper place of that language within the national landscape on multiple levels.

51.2. Simply put, if speakers of Afrikaans are likely to face an impediment at the level of tertiary educational facilities on account of their home language, they are more

⁶⁷ Section 6 of the Constitution provides as follows:

"6 Languages

- (1) *The official languages of the Republic are Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu.*
- (2) *Recognising the historically diminished use and status of the indigenous languages of our people, the state must take practical and positive measures to elevate the status and advance the use of these languages.*
- (3) *(a) The national government and provincial governments may use any particular official languages for the purposes of government, taking into account usage, practicality, expense, regional circumstances and the balance of the needs and preferences of the population as a whole or in the province concerned; but the national government and each provincial government must use at least two official languages.*
(b) Municipalities must take into account the language usage and preferences of their residents.
- (4) *The national government and provincial governments, by legislative and other measures, must regulate and monitor their use of official languages. Without detracting from the provisions of subsection (2), all official languages must enjoy parity of esteem and must be treated equitably.*
- (5) *A Pan South African Language Board established by national legislation must-*
 - (a) *promote, and create conditions for, the development and use of-*
 - (i) *all official languages;...."*

likely to develop a proficiency in relation to the dominant language at tertiary institutions (English in this case) to the detriment and disadvantage of the development of Afrikaans.

- 51.3. So too, there would be little incentive for individuals or universities to embark on the "*sustained development of Afrikaans as an academic medium*", if ultimately, its place and relevance at tertiary institutions is being eroded.
- 51.4. Some may argue that the resultant position is no different from that of other indigenous languages, none of which is afforded the status of a language of instruction at tertiary institutions. It is evident that there is no substance to this submission if regard is had to the fact that there is a very specific imperative on the State to elevate their status and advance their use as contemplated by section 6(2) of the Constitution; this, as the provision recognises, is on account of their historic diminished use and status. The LPHE contains a similar requirement.
- 51.5. To neglect to discharge this duty would be as irresponsible as allowing the erosion of the use of Afrikaans, or even taking measures to erode the use of Afrikaans, as a language of instruction at tertiary institutions; and to advance, in its stead, the use of English at those institutions.
- 51.6. Such a course, we submit, ought not to pass constitutional muster for the inevitabilities that lie with it, namely, the erosion of Afrikaans with the concomitant elevation of English, and without promoting any advancement of other indigenous languages.
- 51.7. In addition, we submit that the gradual erosion of Afrikaans (on the basis that we

have contended) amounts to unfair discrimination in terms of section 9 of the Constitution. It warrants emphasis that language is a listed, prohibited ground of discrimination under section 9 of the Constitution, as a result of which it is automatically presumed to be unfair, which SU bears the obligation of rebutting.

Based on what we have stated, we submit that SU has manifestly failed to rebut the presumption. The result, we submit, is that the NLP constitutes unfair discrimination on the ground of language against Afrikaans-speaking persons.

V IRRATIONALITY AND SUCCUMBING TO THE DICTATES OF AN OUTSIDE PARTY

52. Having taken cognisance of the Appellate Division's position⁶⁸ (endorsed in Zondo J's judgment in **Solidarity and Others v Department of Correctional Services and Others**⁶⁹) that whether conduct is rational or not involves a value judgment and is not a question of fact, we submit that the objective facts which we enumerate at the outset, and those which follow, inform such a value judgment:

52.1. In 2015, Open Stellenbosch (which comprised approximately forty members of whom not all were students and not all of those who were, were SU students)⁷⁰ insisted that Afrikaans be abolished.

52.2. This was presented by the Rector's Management Team (the "**RMT**") as the reason for the acceleration of initiatives which it claimed were necessary to prevent

⁶⁸ Media Workers Association of South Africa & Others v Press Corporation of South Africa Ltd ("Perskor") 1992 (4) SA 791 (A) at 796E-J.

⁶⁹ 2016 (5) SA 594 (CC) at par 88.

⁷⁰ FA record page 65, par 61.3.

language from being a barrier to access or student success.⁷¹

52.3. Following talks with Open Stellenbosch in 2015, the RMT attempted to amend the 2014 Policy unilaterally when it wrote to the Senate on 12 November 2015 and issued a statement on the same day which revealed that there was consensus between Open Stellenbosch and the RMT regarding the "*principles of language implementation*".⁷²

52.4. It was clear that the RMT intended that the statement on language policy should be implemented in the 2016 academic year.⁷³

52.5. The significance of the Open Stellenbosch input is evidenced by the following statement: "*It should be noted that the attached statement was discussed with Open Stellenbosch (OS), and consensus has been reached on the principles, as points of departure, related to language implementation expressed by the RMT (the Rector's Management Team).*"⁷⁴

52.6. Apart from the fact that the statement acknowledges "*the distinctive contribution of the Open Stellenbosch collective*", management supported a number of principles as points of departure including that all learning at SU would be facilitated in English and in smaller class groups all information would be conveyed in English, "*principles*" which have since become features of the NLP.⁷⁵

52.7. Open Stellenbosch *inter alia* insisted that –

⁷¹ Application for leave to appeal: FA record page 20, par 18.

⁷² Application for leave to appeal: FA record page 29, par 19.

⁷³ Application for leave to appeal: FA record page 21, par 21.

⁷⁴ Application for leave to appeal: FA record page 22, par 22.

⁷⁵ Application for leave to appeal: FA record page 23, par 26.1 and 26.3.

52.7.1. in January 2016 all classes had to be available in English;

52.7.2. the interpreters and interpreting services had to be abolished;

52.7.3. Afrikaans could not be a qualification for employment or appointment to leadership positions.⁷⁶

52.8. Significantly, by 2016 the anglicisation of the SU had advanced so far that Professor Antoinette van der Merwe, later the Chair of the WG, told the Parliamentary Portfolio Committee that Afrikaans was no longer a prerequisite for the appointment of SU personnel.⁷⁷

52.9. Although the Council initially attempted to stem the tide, by 10 March 2016 the Chairman of the Council had to concede under oath that there had been deviations from language specifications in favour of English in 268 modules in 7 faculties.⁷⁸ It was clear that the Open Stellenbosch position had prevailed as evidenced by the acknowledgement in the statement of 12 November 2015 of "*the distinctive contribution of the Open Stellenbosch collective*".⁷⁹

52.10. Shortly before the matter was due to be heard in the Court *a quo*, a Council Member against whom disciplinary measures had been instituted for public statements made after the adoption of the NLP, Mr Johan Theron, revealed in his statement of defence *inter alia* that –

52.10.1. the Rector had on occasion told him that he foresaw that the SU would

⁷⁶ Application for leave to appeal: FA record page 24, par 29.5.

⁷⁷ Application for leave to appeal: FA record page 20, par 17.

⁷⁸ Application for leave to appeal: FA record page 21, par 20.

⁷⁹ Application for leave to appeal: FA record page 23, par 26.

become an English university;

52.10.2. the Vice-Rector had reported to Council that in the days immediately prior to 12 November 2015, the RMT again engaged in talks with Open Stellenbosch;⁸⁰ and

52.10.3. the Chairman of the Council had accused the RMT of deceiving him and the Council.⁸¹

52.11. Significantly these developments were also inconsistent with what the Student Representative Council wanted. It wanted parallel medium education with a more significant focus on parallel medium and a smaller one on translation; the US to be a fully parallel medium institution by 2020; and, giving Afrikaans and English equal status as languages of instruction.⁸² This is exactly the Applicants' position.

52.12. Having had to concede, in the Chairman of the Council's affidavit referred to hereinabove, that the deviations from the 2014 Policy were unlawful, the RMT appointed the WG to review the 2014 Policy,⁸³ notwithstanding the fact that on 9 September 2015 the Task Team which had to investigate the problematic aspects which have been raised by Open Stellenbosch and the SRC with the view to reviewing the 2014 Policy, recommended a commitment to the equal use of Afrikaans and English as languages of instruction.⁸⁴ Again, this is consistent with the Applicants' position.

⁸⁰ This should have been disclosed in the rule 53 Record of Proceedings.

⁸¹ Application for leave to appeal: FA record page 25, par 30.3.

⁸² FA record page 75, par 80 and 81; Annexure "DR25", page 664.

⁸³ FA record, page 99, par 134 and page 101, par 135.5.

⁸⁴ FA record, page 107, par 151 and par 152.

- 52.13. On 21 September 2015 the RMT announced that it had adopted these Task Team recommendations and that they would be submitted to the Council and Senate at their scheduled meetings.⁸⁵ This never happened.
- 52.14. According to the Task Team's report the recommendations were aimed at ensuring fair access for everyone and giving the assurance that Afrikaans and English would have equal status as languages of admission and instruction at the SU.⁸⁶
- 52.15. The WG was appointed by the RMT and became its master's voice. Even in its Proposed Language Approach of the SU of 24 February 2016 it committed itself to an approach which, unsurprisingly, eventually found expression in the NLP and proposed, *inter alia*, that for smaller class groups which cannot be divided, a dual language approach be followed in which the major portion of the lecture would be presented in English with emphasis or summaries in Afrikaans if the lecturer is able to lecture in both languages.⁸⁷
- 52.16. This indicates that the WG slavishly followed the RMT's statement of 12 November 2015 and did not heed any of the many public comments which called for equal status for Afrikaans and English as primary languages of instruction.⁸⁸

VI SOME REMAINING ERRORS OF THE COURT OF FIRST INSTANCE

53. We submit that the Court of first instance erred in a number of further material respects

⁸⁵ FA record, page 108, par 153.

⁸⁶ FA record, page 109, par 154.

⁸⁷ FA record, page 114, par 172 and par 173.

⁸⁸ FA record, page 116, par 175.

which ultimately tainted its resultant order. In particular:

- 53.1. It erred in finding that the 2016 Policy "*does not reduce the Afrikaans offering*".⁸⁹ The Court of first instance also found that the 2016 Policy "*does at the same time adopt a preference for English in certain circumstances in order to advance SU's multiple goals, namely, equal access, multilingualism, integration, and preserving Afrikaans, all within available resources*".⁹⁰ We have already provided an overview of both the 2014 Policy and the NLP. We submit that it is clear that the NLP in fact reduces the Afrikaans offering. The reality subsequent to its commencement confirms this. Even though the SU itself tried to minimise the effect of the reduction of the Afrikaans offering it, at least, admitted that there would be such a reduction.⁹¹
- 53.2. After engaging in a detailed analysis of the NLP, the Court concluded that, save for certain identified instances "*it would appear, English and Afrikaans are treated identically*".⁹² The Court immediately qualified this statement by stating: "*While English enjoys preference, it can safely be mentioned that the impact on Afrikaans speakers is extremely limited.*" According to the reasoning of the Court of first instance, this is so because: "*(a) in the first year of study there is no difference at all. All lectures are given simultaneous translation, students will have equal access; (b) the limitations are all linked directly to what is reasonably practicable. Whether SU will offer a module in parallel medium, and whether it will offer simultaneous translation in dual-medium or English lectures in later years of study*

⁸⁹ Application for leave to appeal, annexure "DR1", page 255, par 53. The SU admitted on numerous occasions in its answering affidavit that it reduces the Afrikaans offering.

⁹⁰ Page 244, par 53.

⁹¹ RA record page 3733, par 3.

⁹² Page 261, par 60.

*is expressly made subject to what is 'reasonably practicable', or to the needs of students and SU's resources; (c) the slight preference only applies to lectures and, to a limited degree, materials. For pedagogical reasons, SU intends – like other universities across the world – to move away from the lecture being the sole focus of learning and teaching. Other facilitated learning opportunities will become increasingly central to the learning process. Those will be equally available in English and Afrikaans and increasingly in IsiXhosa; (d) the Policy creates an accountability mechanism to ensure that Afrikaans teaching is not reduced significantly from pre-2016 Policy level and is increased (sic) where this is possible. Paragraph 7.4.1.2 of the Policy reads: 'The Afrikaans offering is managed so as to sustain access to SU for students who prefer to study in Afrikaans and to further develop Afrikaans as a language of tuition where reasonably practicable'. The Senate is obligated in terms of paragraph 7.4.3 to approve all language plans and so can send a plan back to the faculty for reconsideration if it fails to meet this requirement. The import of this provision is that: (i) the Afrikaans offering cannot be reduced materially as that would not 'sustain access' for Afrikaans students; and the Afrikaans offering should be increased to the extent that is logistically and financially practicable."*⁹³ In having analysed the Policy in these terms, we submit that the Court erred in that it: (a) ignored almost entirely that the starting point of the exercise in the NLP is the lecturer's proficiency in a language; (b) it conflated simultaneous translation with actual language of instruction; (c) it attached weight to the so-called "accountability mechanism" but failed to recognise that the language plans referred to, operate within the confines of the Policy.

⁹³ Page 261, par 60.

- 53.3. It also erred in finding that much of the Applicants' complaints and concerns were based on the implementation of the Policy as opposed to the Policy itself.⁹⁴ According to the Court, a reduction in Afrikaans is certainly not the intention of the Policy nor a consequence of implementing the Policy.⁹⁵ We submit that in reaching these conclusions, the Court of first instance failed to have regard to the evidence, particularly in relation to what has actually been happening in the lecture rooms since the commencement of the NLP and also the high numbers of lecturers who are not proficient in teaching in Afrikaans. The facts in this regard are entirely consistent with what the Applicants predicted would be the likely outcome of the NLP.
- 53.4. It erred in finding that the subject challenge fell to be determined in isolation of the broader context of the language policies of all Universities in South Africa.⁹⁶
- 53.5. It erred in finding that an apparent difficulty for the Applicants is that they do not provide any reasonable basis as to how the NLP should be amended to prevent exclusion while providing for more Afrikaans tuition.⁹⁷ We respectfully submit that in alleging an unconstitutionality, it is not for the applicant to identify the means by which to remedy the alleged unconstitutionality. However, the Applicants have clearly expressed a preference for equal status to English and Afrikaans as primary languages of instruction and a meaningful commitment to the development of Xhosa as a language of tertiary education.
- 53.6. It erred by applying the incorrect test, *viz*, that of appropriate justification as

⁹⁴ Page 262, par 61.

⁹⁵ Page 262, par 61.

⁹⁶ Page 268, par 65.

⁹⁷ Page 294, par 91.

opposed to reasonable practicability. We addressed this issue comprehensively in our Previous Written Submissions.

53.7. Finally, it erred in granting a costs order against the Applicants for reasons fully addressed in our Previous Written Submissions, an error since conceded by the Respondents.

VII CONCLUSION

54. For reasons addressed in these Submissions and in our Previous Written Submissions, we ask that the Order of the Court of first instance be set aside and replaced with the Order sought in the Applicants' Notice of Motion.

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