'[49] Of course, vital parts of the 'patrimony of the whole' are indigenous languages which, but for the provisions of s 6 of the Constitution, languished in obscurity and underdevelopment with the result that at high-school level, none of these languages have acquired their legitimate roles as effective media of instruction and vehicles for expressing cultural identity.

[50] And that perhaps is the collateral irony of this case. Learners whose mother tongue is not English, but rather one of our indigenous languages, together with their parents, have made a choice to be taught in a language other than their mother tongue. This occurs even though it is now settled that, especially in the early years of formal teaching, mother-tongue instruction is the foremost and the most effective medium of imparting education.'

[33] **Woolman & Bishop** *op cit* page 59 *supra*, point out that the right to receive education in the official language of one's choice in public educational institutions is not an unqualified right but is subject to a standard of reasonable practicability presupposing sufficient numbers of learners requiring instruction in a preferred language and that a failure to demonstrate that request for instruction is reasonably practicable ends the enquiry. The latter was also a finding by the Supreme Court of Appeal in **Mikro** case *supra.* The second sentence in Section 29 (2) requires that all reasonable educational alternatives that would make mother-tongue or preferred language instruction possible, ought to be considered. For instance, for a single medium institution to be preferred to another reasonable practicable institutional arrangement, such as dual medium instruction or parallel medium instruction, it has to be demonstrated that it is more likely to advance or

satisfy the three listed criteria of equity, practicability and historical redress. See in this regard **Woolman & Bishop** *supra op cit* p. 57-60.

[34] There are three factors which require consideration in the interpretation and implementation of Section 29 (2) of the Constitution. It is not necessary to further explore these factors. It suffices to mention, though that in Mr Heunis' contention, the third factor (which talks to redress) weighs strongly in favour of ensuring that the language is not a barrier to access for Black (African), Coloured and Indian students. In his contention though, this consideration (for reasons advanced by him infra) does not favour the new policy over the old. He proffered these reasons: (a) The old policy favoured multilingualism and sustaining the use of Afrikaans. (b) While Afrikaans is a barrier to Black (African) students, English is a barrier to many coloured students who were also victims of the past discrimination and a move that decreases the Afrikaans offering would negatively affect them, particularly when regard is had to the diminishing other options for Afrikaans-language higher education. (c) It will not benefit Black (African) students since the previous policy was not a barrier to access for them because in the prevailing parallel medium environment there is a 100% English offering. An important contention put forth by Mr Heunis is that the facts regarding language demography in the feeder areas of universities, as also statistics regarding the language offer, on one hand, and the demand of Afrikaans-speaking matriculants,

on the other, have to be important considerations when decisions are made as to whether or not Afrikaans as a language of choice is reasonably practicable. The concern expressed by the applicants is that not one university remains as a single medium Afrikaans University. This, according to Mr Heunis, is a fact testifying to compliance with (particularly) the third criterion in Section 29 (2). He brought it to the attention of the Court that as a consequence of the developments the NWU and the SU were (until the latter decided to adopt the impugned 2016 Policy), the only universities at which Afrikaans-speaking students had the benefit of a 100% Afrikaans offering. In the latter regard, the submission made on behalf of the applicants is:

'In our submission the fact that English has been introduced at all historical Afrikaans universities as a language of instruction, especially to comply with the redress criterion in section 29(2), does not mean that Afrikaans must inevitably be replaced by English as the dominant language of instruction since that would clearly fall foul of the fairness criterion without any commensurate benefit viewed from the perspective of the demand which derives from the redress criterion.'

[35] The applicants also postulate that the Constitution's recognition of community rights, associational rights, religious rights, cultural rights and linguistic rights, creates a set of background conditions against which the claim of continued parallel medium instruction at the SU has to be considered. The view taken on behalf of the applicants is that '*an overriding commitment to "equality" or "transformation"* cannot simply be invoked to dispense with Afrikaans as a

medium of instruction. See **Woolman & Bishop** *supra op cit* p. 60. Lastly on this aspect, the applicants place reliance on the following observation made by Professor Malherbe *supra*:

> *'A balance must also be struck between the constitutional values of dignity, equality and freedom. Aspects of current education policies fail to appreciate this, especially when it comes to reflecting language and religious diversity in education. Policies that deny this diversity, and impose uniformity* (including language uniformity) *in the name of equality, will fail in the long run, because a unified nation cannot be built by rejecting the bricks one has to use. As such policies marginalise people, and deny their self-respect and self-worth; they affect their human dignity. A clearer understanding is needed of what nation building is about, and in pursuing everyone's equal worth, it must be appreciated that equality will remain an illusive dream if people's uniqueness is ignored, and if we fail to pursue equality within the context of their diversity. In the final analysis it is a quest for human dignity rather than equality. That is what Brown v the Board of Education is about. That is what democracy in South Africa should be about.'*

JURISPRUDENCE THE APPLICANTS RELIED ON – DOMESTIC AND FOREIGN (re: FREEDOM AND DIVERSITY)

[36] The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ('the Equality Act') recognises in clause 2 of the Schedule thereto that the failure to reasonably and practicably accommodate diversity in education is an example of an illustrative unfair practice in the educational sector. Thus in **MEC for Education, KwaZulu-Natal v Pillay** 2008 (1) SA 474 (CC), the Constitutional Court recognised the significance of freedom and diversity to the constitutional agenda. What the Constitutional Court observed in this regard is the following: (a)

The centrality of freedom as one of the underlying values in the Bill of Rights and the injunction on the Courts to interpret all rights to promote the underlying values of human dignity, equality and freedom. (b) A necessary element of freedom and of dignity of any individual is an entitlement to respect for the unique set of ends that the individual pursues. (c) That our constitutional project not only affirms diversity, but promotes and celebrates it. The acknowledgment and acceptance of difference is particularly important in our country given its history. The Constitution thus acknowledges the variability of human beings (genetic and socio-cultural), affirms the right to be different, and celebrates the diversity of the nation.

The Court was also referred to **Prince v President of the Republic of South Africa and Others** 2002 (2) SA 794 (CC) which dealt with freedom of religion and the protection of the associational nature of cultural, religious and language rights. I accept that international law does have an important role to play in the interpretation of the Bill of Rights in our Constitution. Thus Section 39 (1) of the Constitution provides:

'(1) When interpreting the Bill of Rights, a court, tribunal or forum-

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

(b) must consider international law; and

(c) may consider foreign law.'

[37] The relevance of international law to the South African constitutional framework

was explained by the Constitutional Court as follows in **Glenister v President of the Republic of South Africa and Others** 2011 (3) SA 347 (CC) at para 97:

"[95] To summarise, in our constitutional system, the making of international agreements falls within the province of the executive, whereas the ratification and the incorporation of the international agreement into our domestic law fall within the province of Parliament. The approval of an international agreement by the resolution of Parliament does not amount to its incorporation into our domestic law. Under our Constitution, therefore, the actions of the executive in negotiating and signing an international agreement do not result in a binding agreement. Legislative action is required before an international agreement can bind the Republic.

[96] This is not to suggest that the ratification of an international agreement by a resolution of Parliament is to be dismissed 'as a merely platitudinous or ineffectual act'. The ratification of an international agreement by Parliament is a positive statement by Parliament to the signatories of that agreement that Parliament, subject to the provisions of the Constitution, will act in accordance with the ratified agreement. International agreements, both those that are binding and those that are not, have an important place in our law. While they do not create rights and obligations in the domestic legal space, international agreements, particularly those dealing with human rights, may be used as interpretive tools to evaluate and understand our Bill of Rights.

[97] Our Constitution reveals a clear determination to ensure that the Constitution and South African law are interpreted to comply with international law, in particular international human-rights law. Firstly, s 233 requires legislation to be interpreted in compliance with international law; secondly, s 39(1)(b) requires courts, when interpreting the Bill of Rights, to consider international law; finally, s 37(4)(b)(i) requires legislation that derogates from the Bill of Rights to be 'consistent with the Republic's obligations under international law applicable to states of emergency'. These provisions of our Constitution demonstrate that international law has a special place in our law which is carefully defined by the Constitution.

[98] But treating international conventions as interpretive aids does not entail giving them the status of domestic law in the Republic. To treat them as creating domestic rights and obligations is tantamount to 'incorporat[ing] the provisions of the unincorporated convention into our municipal law by the back door'."

The fact is that our Country (South African) ratified the International Covenant on Economic, Social and Cultural Rights ('the International Covenant'). Several General Comments have of course been issued under the International Covenant which have provided guidance to the Constitutional Court in its interpretation of certain rights in the Bill of Rights. An example would be **Motswagae v Rustenberg Local Municipality** 2013 (2) SA 613 (CC) at footnote 6; **Residents of Joe Slovo Community, WC v Thubelisha Homes (Centre on Housing Rights & Evictions, *Amici Curiae*)** 2010 (3) SA 454 (CC) para 237 and **Government of the RSA v Grootboom** 2001 (1) SA 46 (CC) paras 30 and 31.

[38] In support of the relief sought in these proceedings Mr Heunis referred to what he called the threshold of justification. He elucidated that the position at SU (a) was initially one of single medium Afrikaans instruction; (b) thereafter of dual and parallel medium English and Afrikaans instruction; and (c) currently of predominantly English medium instruction to the virtual exclusion of Afrikaans. He maintained that the consequence is that until the adoption of the current language policy, Afrikaans-speaking students at the university had the right and option of being taught in Afrikaans. In his contention, the current policy (the 2016

Policy) deprives them of this right and it thus implicates the negative elements of the right protected by Section 29 of the Constitution. In **Mazibuko v City of Johannesburg** 2010 (4) SA 1 (CC) at para 47, the Constitutional Court reaffirmed that traditionally, constitutional rights (especially civil and political rights) are understood as imposing an obligation upon the State to refrain from interfering with the exercise of the right by citizens (the so-called negative obligation or the duty to respect). According to the Constitutional Court social and economic rights are no different in that the State bears a duty to refrain from interfering with social and economic rights just as it does with civil and political rights. For example in **Government of the Republic of South Africa and Others v Grootboom** *supra* at para 34, the Constitutional Court held that a negative obligation placed on the State and all other entities and persons to desist from preventing or impairing the right of access to adequate housing. See too **Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa**, 1996 (4) SA 744 (CC) at 79 and **Minister of Health and Others v Treatment Action Campaign and Others** No2 2002 (5) SA 721 (CC) para 46.

[39] It is true that the Supreme Court of Appeal reaffirmed in **Afriforum** matter that a negative duty on the State exists not to take away or diminish the right to being taught in Afrikaans without justification. Key to the assessment of the justification,

according to the SCA, is whether the context and the circumstances have changed, and if so, whether good reason has been proffered for the change of policy. Mr Heunis argued that the current language policy constitutes a retrogressive measure in relation to the Afrikaans speaking students' rights to education whereas Section 29 (1) (b) of the Constitution requires that the State make rights to further education progressively available and accessible. The Court is privy to the fact that, drawing from International experience in this regard (in the context of the International Covenant), the Committee on Economic, Social and Cultural Rights stated in General Comment No. 3 that the duty to progressively realise rights imposes an obligation to move as expeditiously and effectively as possible towards the goal of realising the right. The committee commented that *'any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources'*. See General Comment No. 3 para 9.

[40] In Mr Heunis' contention the evidence tendered by the University does not meet the above threshold test because Afrikaans speaking students, although they are no longer more than 50% of the total student population, remain the largest group. He conceded that there is a significant number of students who require to be

educated in English. He hastened to add that there would be no justification for not lecturing the Afrikaans speaking students in Afrikaans. A mention must be made that according to the Constitutional Court, determining 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. I agree that the Constitutional Court has not considered the issue in the context of university education. It has indeed provided a non- exhaustive list of factors in the school context and to this end has emphasised the context-specific approach that must be employed. As far as the latter approach is concerned, the applicants contend that the following evidence is of relevance: (a) Historically, there were 7 universities that catered for Afrikaans medium of instruction. This has changed since the inception of democracy. Currently, there is only one university that offers Afrikaans as a medium of instruction. (b) In the Western Cape, the evidence demonstrates that despite the Afrikaans speaking population accounting for almost 50%, there is currently not a single university offering Afrikaans as a medium of instruction. (c) In the Western Cape, Afrikaans is the first language of a large majority of persons of colour whose interests are affected. The submission on behalf of the applicants is that when considering the threshold of reasonable practicability, this Court must have regard to other rights in the Constitution which emphasise the importance of language to the Constitutional Court agenda. A reference to Section 6, 31 and 9 was made.

[41] The Court was also referred to **Hartson v Lane N.O**. 1998 (1) SA 300 (CC) where the Court set out the stages for an equality enquiry. This was done with reference to the Interim Constitution. In **Prinsloo v Van der Linde** 1997 (3) SA 1012 (CC) reliance is placed by Mr Heunis on the following:

'It must be accepted that, in order to govern a modern country efficiently and to harmonise the interests of all its people for the common good, it is essential to regulate the affairs of its inhabitants extensively. It is impossible to do so without differentiation and without classifications which treat people differently and which impact on people differently. It is unnecessary to give examples which abound in everyday life in all democracies based on equality and freedom. Differentiation which falls into this category very rarely constitutes unfair discrimination in respect of persons subject to such regulation, without the addition of a further element. What this further element is will be considered later.'

A point is made on behalf of the applicants that a clear differentiation exists in the present case in that Afrikaans is being ousted as a language of instruction on an exclusive basis but SU has not demonstrated that the differentiation meets a legitimate government objective. The contention is that since differentiation is on the ground of language (listed in terms of section 9 (3) of the Constitution) it is presumed to be unfair. The impugned language policy is also attacked on the basis that its impact is that it impedes the constitutional objective of diversity as opposed to enhancing it. It is not only the Afrikaans speaking students, but it is also preferred by students of colour from this Province whose mother-tongue is Afrikaans. The 2016 Policy adopted by SU is described as having failed to foster diversity in language. According to Mr Heunis, the impugned policy instead, imposes a singular language option of English notwithstanding the provisions of

Sections 6 and 31 of the Constitution. I undertake to consider and analyse the 2016 Policy.

[42] Mr Heunis is of the view that the Afrikaans speaking persons who are unable to communicate adequately or at all in the language of instruction at the SU (English), they will, in all likelihood forego the opportunity to study at SU, and if they are unable to access another university that has Afrikaans as a medium of instruction, they may forego the opportunity for tertiary study completely. Talking to unfair discrimination a reference was made to Equality Court. In the latter instance the claimant has to show that there is discrimination. Direct discrimination occurs when a law or policy expressly singles out a group for inferior treatment. On the other hand, indirect discrimination (also argued Mr Heunis) happens when a law or policy appears to be neutral, but has a disproportionate adverse impact on the protected class of persons. In Mr Heunis' contention, since the vast majority of Afrikaans-speaking students are White and Coloured, the downscaling of Afrikaans as a language of instruction amounts to discrimination against them. One must observe that the argument that the policy discriminates on the grounds of language postulates that it withholds benefits from Afrikaans-speaking students that are enjoyed by English-speaking students since preference is given to English and there is no longer a clear commitment to equality of the two languages. The determination of fairness is not at all an easy

task to be involved in. In anticipation of an argument to be presented on behalf of the respondents, Mr Heunis contended as follows:

'Anticipating an argument that because the use of English imposes a burden on (primarily) Black (African) students whose home language is not English, it would be fair to expect Afrikaans students (including both White and Coloured students) to endure a similar burden by being taught in a language other than their home language, namely English, we submit that this type of formal equality is not what the Constitution (or the Equality Act) envisages. It is an argument for "the equality of the graveyard where all people must be equally badly off".

[43] In **Fourie** *supra*, the Constitutional Court responding to an argument that equality could be obtained by the State refusing to issue marriage licences to either heterosexual or homosexual couples made the following observation:

'Levelling down so as to deny access to civil marriage to all would not promote the achievement of the enjoyment of equality. Such parity of exclusion rather than of inclusion would distribute resentment evenly, instead of dissipating it equally for all. The law concerned with family formation and marriage requires equal celebration, not equal marginalisation; it calls for equality of the vineyard and not equality of the graveyard.'

One bears in mind that since the decision to adopt the new policy is apparently said to be subject to review in that it was made in the exercise of a public power, the question calling for consideration is whether, viewed objectively, the decision was rationally connected to the purpose for which the power was given. See **University of the Free State supra and Pharmaceutical Manufacturers Association of South Africa and Others** 2000 (2) SA 674 (CC) paras 85-86. Of course the above remains a factual enquiry and if a decision maker acts within its

powers, and considers the relevant material in arriving at a decision so that there is a rational link between the power given, the material before it and the end sought to be achieved, the rationality threshold would be met. Of course if the decision maker misconstrues its power, it ordinarily will offend the principle of legality thereby rendering the decision made reviewable. See **Masetlha v President of the Republic of South Africa and Another** 2008 (1) SA 566 (CC) para 81. Concluding on this aspect Mr Heunis accused the Working Group, the Senate and Council as follows:

'One of the most important shortcomings of the decision-making process which led to the adoption of the NLP is that neither the Working Group nor the Senate and the Council considered what would be reasonably practicable and overlooked the fact that the SU, as an organ of State, is co-responsible for taking steps to implement the right which derives from section 29(2) of the Constitution. The NLP falls foul of the LPHE, other provisions of the Constitutions and the requirement that existing rights may not be compromised without justification.'

In the process the SU is said to have abandoned its negative duty not to abrogate an existing right without proper justification.

INTERNATIONAL AND FOREIGN LAW

[44] Admittedly, the jurisprudence in this area is not well developed. The court was nevertheless referred to some international instruments and case law. Indeed there is some international and foreign authority suggesting that there may be an obligation upon States (in certain circumstances) to recognise and progressively

realise such a right; to deploy available resources to support the exercise thereof; and not to withdraw such a right once it has vested, save where retrogression in the implementation of the right can be shown to be justified. This court is obligated to interpret the Constitution and the law such that the interpretation complies with the relevant international law to the extent the latter is not inconsistent with our law. This was best elucidated by the Constitutional Court in **Glenister v President of South Africa and Others** *supra* at para 97 where the Court observed as follows:

'Our *Constitution reveals a clear determination to ensure that the Constitution and South African law are interpreted to comply with international law, in particular international human-rights law. Firstly, s 233 requires legislation to be interpreted in compliance with international law; secondly, s 39(1)(b) requires courts, when interpreting the Bill of Rights, to consider international law; finally, s 37(4)(b)(i) requires legislation that derogates from the Bill of Rights to be 'consistent with the Republic's obligations under international law applicable to states of emergency'. These provisions of our Constitution demonstrate that international law has a special place in our law which is carefully defined by the Constitution.'*

Article 26 of the **Universal Declaration of Human Rights** (*'UDHR'*) provides that *'Everyone has the right to education'*. The UN Committee on Economic, Social and Cultural Rights has stated that measures entailing the withdrawal of a vested right:

'Would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the covenant and in the context of the full use of the maximum available resources.'

See **UNDOC HR1/GEN 1** Rev 5.20; **Liebenberg, Socio-Economic Rights**

(2009) p.189.

[45] Mr Heunis referred also to the **International Covenant on Civil and Political Rights** (*'ICCPR'*) which affords protection to the right to education. Article 27 of ICCPR provides:

"In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."

See **GA res 2200A (XXI), 21 UN GAOR supp.** (No 16) at 52, **UNDOC** A/6316 (1966), 999 **UNTS** 171, which came into force on 23 March 1976. Although the above is expressed negatively, the provision is accepted by the UN Human Rights Committee as conferring a positive right. It places an obligation upon the State to protect a minority's identity *'and the right of its members to enjoy and develop their culture or language'*. See **Human Rights Committee**, General Comment No. 23 (50): **The Rights of Minorities** (Art 27) 08/09/04 CCPR/C/Rev. 1/Add. 5 (1994), paras 6.1 and 6.2. A reference was also made to the **United Nations Convention on the Rights of the Child** ('CRC'). Perhaps a mention must be made that while the CRC protects the right of a child from a minority group to *'enjoy his or her own culture'* and *'to use his or her own language'*, it does not guarantee a right to be taught in one's mother tongue or freedom from the assimilary effects of schooling, particularly in the State sector. See H Cullen –**Education Rights or Minority**

Rights? (1993) 7 **International Journal of Law and the Family** p. 143. Article 2 (1) of the UN General Assembly **Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities** defines the right of persons belonging to minorities as regards culture, language and religion in positive terms as follows:

'Persons belonging to national or ethnic, religious and linguistic minorities ... have the right to enjoy their own culture, to profess and practice their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination.'

The Court was also referred to the **European Convention on Human Rights** ('ECHR') particularly article 2 of the **First Protocol** providing thus:

'No-one shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State must respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.'

The judgment of the ECHR in **Belgian Linguistics (No.2)** (1979-80) 1 EHRR 252, is regarded the most influential authority on the interpretation of A2PI. The question was whether the failure to make French-language education available in the Flemish region, and the withholding of grants from schools which did not give instruction in Flemish, violated A2P1 read with article 14, by discriminating on the ground of language. It was held that Article 2 of Protocol 1 (A2P1) to the ECHR *'does not specify the language in which education must be conducted in order that the right to education should be respected"*, the right *"would be meaningless if it did not imply ... the right to be educated in the national language or one of the national languages, as the case may be'.*

SUBMISSIONS IMPLICATING PAJA SPECIFICALLY

[46] Mr Heunis contended that the impugned decisions and the New Language Policy (NLP) are subject to being reviewed and set aside under PAJA in that the SU is an organ of State. He referred to **Altech Autopage Cellular (Pty) Ltd v The Chairperson of the Council of the Independent Communications Authority of South Africa** (Case No 2002/08 (TPD). The latter is an unreported case where the Court reviewed and set aside ministerial 'policy' directives, rejecting arguments that the directions were not susceptible to review, because they constituted executive rather than administrative action. Davis J held that even if not so, the directives could not escape review since they would then be subject to the constitutional principle of legality. The latter judgment only has persuasive value that does not bind this Court. In Mr Heunis' contention the NLP and decisions which led thereto are invalid, reviewable and fall to be set aside by reasons of the provisions of Section 6 (2) (a) (iii), 6 (2) (c), 6 (2) (d) and further provisions of PAJA. He attacked the procedure followed contending that the process was procedurally unfair. The following are some of the accusations labelled against the respondents: (a) the decisions were influenced by errors of law; (b) they were taken for ulterior purposes or motives; (c) decisions were infected with bias; (d) were so unreasonable that no reasonable person could have supported such. Importantly, the submission made is that ignoring the comments of interested parties in respect of the draft language policy

overwhelmingly supportive of the retention of Afrikaans as a primary language of instruction testifies to bias and the inappropriate attachment to a pre-determined outcome. In Mr Heunis' contention, the whole process was designed to create the pretence of a consultation without there having been any real consultation. The respondents are accused of having not honoured undertakings made to Afriforum and the convocation regarding consultation. On the applicants behalf neither the Working Group nor the Senate and the Council considered the Constitution and the LPHE. Having documented the submissions made on behalf of the applicants, it is now time opportune to respond thereto. In the nature of this matter, the best response must be governed by subtopics. The discussion will be best facilitated if I first briefly describe the main elements of the 2014 Policy and the impugned 2016 Policy. I record briefly the reasons advanced by SU as to why it replaced the 2014 Policy with the 2016 Policy.

THE ELEMENTS OF 2014 AND 2016 POLICIES

[47] The SU adopted its first official language policy and an accompanying language plan on 12 December 2001 following the publication of the national language policy for higher education ('the LPHE') under Section 3 of the Act in November 2002. A mention must be made that under the 2002 Policy, Afrikaans was the default language of undergraduate learning and instruction, with the use of English being allowed only after the reasons had been thoroughly considered. Of

course Afrikaans was also the default institutional language with English being used alongside Afrikaans as a language of internal communication as circumstances may require. Both Afrikaans and English were used in postgraduate learning and instruction. Afrikaans, English and, where possible, isiXhosa were the languages of external communication. IsiXhosa would (reportedly) be promoted as a developing academic language.

[48] On 22 November 2014, the SU Council adopted the 2014 Policy and it made consequential amendments, to the language plan. Under the 2014 Policy (a) Afrikaans and English were SU's languages of learning and teaching – it was committed to purposefully extending the academic application of both; (b) Afrikaans and English would be employed in various usage configurations, which were spelled out in more detail in the Plan; (c) Parallel-medium teaching and real-time educational interpreting were the preferred options where practically feasible and affordable; (d) Postgraduate learning would happen in both languages, with significant utilisation of English; (e) Documentation of prime importance had to be available in Afrikaans and English; (e) Afrikaans and/or English and where feasible, isiXhosa had to be used by SU for external communication.

[49] The Plan, as amended by the Council on 22 November 2014, gave substance to the 2014 Policy. In particular, it created the following language – specifications for undergraduate teaching in the following order of preference: (a) for the first two years of undergraduate studies, normally: (i) parallel-medium teaching in separate groups for modules with 250 students or more (A+E); or (ii) real-time interpreting from Afrikaans to English (A+i) or from English to Afrikaans (E+i)), depending on the language the lecturer was more comfortable with. (b) For the third year of undergraduate studies and onwards: (i) preferred options: A+E; A+I or E+i, depending on the language the lecturer was more comfortable with; or (ii) provided the relevant faculty can show: (a) the preferred options are not feasible; and (b) the support offered for students who are not sufficiently academically literate in Afrikaans or English: (i) dual-medium teaching, i.e. the balanced use of Afrikaans and English to one class group, with the Afrikaans offering at least 50% (T-specification). The Plan states this exploits the proven advantages of bi-or multilingual teaching and is particularly suited in the senior years of study, when students' proficiency in the two languages should be more strongly developed. However, the Plan acknowledges the T-specification supposes a certain minimum proficiency in both these languages. Consequently, the Plan that students who do not understand one of the languages at all will miss content in a context where they are not well supported. (ii) English only (E), if the lecturer is not proficient enough in Afrikaans for the T-specification; (iii) Afrikaans only (A) where the resources for multilingual presentation are not yet available. (c) The Plan did

however, allow for the use of the T, E or A-specifications in the first two years of undergraduate study, provided it was indicated how students who lacked sufficient Afrikaans or English language skills would be supported to benefit from the full content of lectures.

WHY CHANGE THE 2014 POLICY?

[50] The 2014 Policy and Plan were intended to make it easier for English-speaking students to obtain an education at SU. We are told that during 2015 and the first half of 2016 it became clear that the 2014 Policy and Plan (although it was not their purpose) excluded students who were proficient in English but not proficient in Afrikaans. The majority of those students excluded were Black (African) students. As a result of their poor Afrikaans, the majority of Black (African) students (i) could not fully understand the lectures presented in the A or T specifications; (ii) they felt stigmatised by the real-time interpretation, which was almost solely used for translating the lectures they could not understand; and (iii) they felt excluded from other aspects of campus life, like residence meetings and official SU events which took place in Afrikaans, without interpretation.

[51] It is not disputed that by contrast, nearly all Afrikaans-speaking students were sufficiently proficient in English to understand SU's academic content presented in

English. Thus to require them to take certain lectures in English would not impose a comparable burden on them. Importantly for many years SU has prescribed text books in English, the result being that its students have at least to be able to read and understand English. We gather from the answering papers that SU undertook a study of the cost of an immediate change to a full parallel medium system and this indicated that it would be an amount of about R640 million in infrastructure and about R78 million per year for additional personnel. This reportedly, translated to an approximately 20% increase in fees (up by R8100 from about R40 000 per year).

[52] Consequently SU decided to adopt a new language policy (the 2016 Policy) which would result in a 100% English offering, but would not similarly increase the Afrikaans offering. According to the answering papers, instead, it (SU) would manage the sum total of the Afrikaans offering so as to maintain access for students who choose to study in Afrikaans and to further develop Afrikaans as a language of instruction where reasonably practicable. As hinted in the introduction the 2016 Policy was adopted by Senate on 9 June 2016 and by the Council on 22 June 2016.

THE 2016 POLICY

[53] The applicants in their contentions assume that the 2016 Policy will cause the 'virtual exclusion' of Afrikaans. The respondents, however, are of the view that this assumption is totally mistaken. Looking squarely at the 2016 Policy, one gathers that it does not reduce the Afrikaans offering at SU. In fact the expressly stated goal of the Policy (at its para 7.4.1.2) is to maintain and if possible increase the Afrikaans offering subject to demand and resources. Of course it 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. The purpose and aims of the Policy are: (a) The Policy expressly states that its purpose is to 'give effect to Section 29 (2) (language in education) and 29 (1) (b) (access to higher education) read with Section 9 (equality and the prohibition against direct and indirect unfair discrimination) of the Constitution'. (b) It records that *'[a]pplying and enhancing the academic potential of Afrikaans is a means to empowering a large and diverse community in South Africa'*. See Para 2 of the Policy. It explains in detail how SU will 'advance the academic potential of Afrikaans' in Para 7.5.3 of the Policy. (c) It repeatedly notes SU's commitment to multilingualism *'as a differentiating characteristics of SU'*, and devotes an entire Section to how SU will promote multilingualism and particularly the use of Afrikaans and isiXhosa. (d) One of its principles is that *'[l]anguage should promote access... and should not constitute a*

barrier to students or staff', particularly in the light of past racial discrimination. See Policy para 6.1. (e) It emphasises that the Policy *'and its implementation are informed by what is reasonably praticable'*. See Policy para 6.8. It then goes on to explain that reasonably practicability included an assessment of:

'The number of students who will benefit from a particular mode of implementation, the language proficiency of the students involved, the availability and language proficiency of staff members, timetable and venue constraints, as well as SU's available resources and the competing demands on those resources.'

[54] The operational parts of the Policy must be interpreted in light of the above stated goals, purposes and principles. The provisions regulating the use of Afrikaans as set out in the answering papers are the following: As to learning and teaching, the Policy provides: (a) Afrikaans and English are SU's two languages of learning and teaching; (b) undergraduate modules will be taught mainly in parallel medium (separate lectures in Afrikaans and English) or dual medium (during each lecture all information is conveyed at least in English and summaries or emphasis on content are also given in Afrikaans), or, in a limited range of circumstances, in either Afrikaans or English (Namely, where the nature of the subject matter of the module justifies doing so, where the assigned lecturer is proficient to teach only in Afrikaans or English or where all the students in the class group have been invited to vote by means of a secret ballot and these students who have voted, agree unanimously to the module being presented in Afrikaans only or English only]; (c)

in postgraduate learning and teaching, including final year modules at NQF level 8, any language may be used provided all the relevant students are sufficiently proficient in that language.

[55] In addition to the general policy provisions governing and teaching set out above, the following further provisions govern the use of Afrikaans at SU: (a) In dual-medium module lectures questions in Afrikaans are answered in Afrikaans. (b) In dual-medium module lectures and single-medium module lectures in English, during the first year of study SU makes simultaneous interpreting available in Afrikaans; and during the second and subsequent years of study, simultaneous interpreting is made available upon request by a faculty, if the needs of the students warrant the service and SU has the resources to provide it. (c) For all undergraduate modules, all SU module frameworks and study guides are available in Afrikaans compulsory reading material (excluding published material) is also provided in Afrikaans where reasonable practicable and students are supported in Afrikaans during a combination of appropriate, facilitated learning opportunities (e.g. consultations during office hours, or scheduled tutorials and practicals). (d) Question papers for tests, examinations and other summative assessments in undergraduate modules are available in Afrikaans and students may answer all assessments and submit all written work in Afrikaans. (e) A variety of information and communication technology (ICT) enhanced learning strategies,

including podcasts and vodcasts of lectures, are made available to students in Afrikaans for the further reinforcement of concepts and for revision purposes. (f) Afrikaans (together with English) is used for internal institutional communication, including in all documentation of primary importance. (g) Afrikaans (together with English) is used for external communication.

[56] Generally, SU advances the academic potential of Afrikaans by means of, for example, teaching, conducting research, holding symposia, presenting short courses, supporting language teachers and hosting guest lecturers in Afrikaans; presenting Afrikaans language acquisition courses; developing academic and professional literacy in Afrikaans; supporting Afrikaans reading and writing development; providing language services that include translation into Afrikaans, and editing of and document design for Afrikaans texts; developing multilingual glossaries with Afrikaans as one of the languages; and promoting Afrikaans through popular-science publications in the general media. Additionally the following further policy provisions govern the use of English at SU: (a) In dual-medium module lectures questions in English are answered in English. (b) In dual-medium module lectures, during the first year of study SU makes simultaneous interpreting available in English; and during the second and subsequent years of study, simultaneous interpreting is made available upon request by a faculty, if the needs of the students warrant the service and SU has

the resources to provide it. (c) In single-medium module lectures in Afrikaans, SU makes simultaneous interpreting available in English. (d) For all undergraduate modules, all SU module frameworks and study guides are available in English, all compulsory reading material is provided in English except where the module is about the language itself and students are supported in English during a combination of appropriate, facilitated learning opportunities (e.g. consultations during office hours, or scheduled tutorials and practicals). (e) Question papers for tests, examinations and other summative assessments in undergraduate modules are available in English and students may answer all assessments and submit all written work in English. (f) A variety of ICT-enhanced learning strategies, including podcasts and vodcasts of lectures, are made available to students in English for the further reinforcement of concepts and for revision purposes. (g) English (together with Afrikaans) is used for internal institutional communication, including in all documentation of primary importance. (h) English (together with Afrikaans) is used for external communication.

[57] In summary, the Policy creates three language specifications, namely, parallel medium, dual medium and single medium. The parallel medium is employed where it is reasonably practicable and pedagogically sound. Where parallel classes are not possible or appropriate, classes are taught in dual medium meaning that: all material is conveyed in English; (b) summaries or emphasis of

content is provided in Afrikaans; and (c) questions are answered in the language in which they are asked. Additionally, (i) All first year dual medium classes are supported by simultaneous translation; and (ii) Lectures in later years will be translated if there is a request by the faculty, the needs of students warrant it, and SU has the resources to provide it.

[58] Single medium classes are offered in only three limited circumstances: (a) where the subject matter justifies it; (b) where the lecturer is only proficient in one language; or (c) where the students unanimously vote by secret ballot to be taught in a single language. Where the lecture is single medium because of the lecturer's proficiency:

(a) SU will always provide simultaneous translation from Afrikaans to English; and (b) It will provide simultaneous translation from English to Afrikaans; (i) for all first year modules; and (ii) in second and third year modules if there is a request by the faculty, the needs of students warrant it, and SU has the resources to provide it.

[59] The details below testify to the assertion that the Policy is designed to grant the greatest possible tuition in English and Afrikaans, within SU's available resources. Indeed there are only three ways in which the Policy treats English differently from

Afrikaans and these are (a) in dual-medium module lectures all information is conveyed at least in English, whereas summaries or emphasis of content is also given in Afrikaans. However, simultaneous translation is made available in all first year dual medium modules, and in later years on request, considering student needs and available resources. (b) for undergraduate modules where the assigned lecturer is proficient to teach only in Afrikaans, SU will make simultaneous interpreting available in English during all years of undergraduate study. It is only during the second and subsequent years of study that there is a distinction. In those, English, simultaneous interpreting will only be made available upon request by a faculty, if the needs of the students warrant the service, and SU has the resources to provide it. (c) whereas all compulsory reading material is provided in English (the exception being where the module is about another language), there are two limitations on the provision of compulsory material in Afrikaans: (i) Material which is not published in Afrikaans need not be made available in Afrikaans; and (ii) Non-published compulsory material is made available in Afrikaans where reasonably practicable.

[60] In all other ways, it would appear, English and Afrikaans are treated identically. While English enjoys preference, it can safely be mentioned that the impact on Afrikaans speakers is extremely limited. The aforegoing 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 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 in increased 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.

[61] It is doubtful that there will be any reduction in the Afrikaans offering (to the level suggested on behalf of the applicants) compared to what was offered under the 2014 Policy. Obviously, that will depend on how faculties implement the policy. Arguably, it may be that the 2016 Policy under discussion will lead to more parallel medium classes and more simultaneous interpretation which will increase the total amount of Afrikaans tuition. Even if the reduction becomes a reality, that cannot be described as the intent of the Policy and will certainly not be an inevitable consequence of implementing the Policy. It clearly will be a direct consequence of the nature of student demand and the limits of SU's resources. I find it difficult to accept that the Policy intends to reduce Afrikaans. In my understanding, the Policy is crafted and/or designed to retain the extent of Afrikaans tuition under the 2014 Policy and to offer as much Afrikaans tuition as SU is reasonably able to do so, considering what is reasonably practicable (particularly the needs of students and SU's resources).

A CHALLENGE TO SU 2016 POLICY - BUT THE STATE POLICY NOT CHALLENGED

[62] It is abundantly clear from the aforegoing discussion that the applicants have sought to review and set aside SU's 2016 Policy and the decisions of the Senate and the Council adopting it. It has been sufficiently demonstrated that the right to receive education in the official language of one's choice in Section 29 (2) of the

Constitution is at the Centre of the applicants' attack. The applicants have not sought to challenge the State's language policy- the LPHE referred to earlier. It is trite that the LPHE has provisions that: (a) reject the idea that SU and the (then) Potchefstroom University for Christian Higher Education should be designed as 'custodians' of Afrikaans as an academic language, because doing so could concentrate Afrikaans speaking students in those institutions and thereby set back 'the transformation agendas of [the other] institutions that have embraced parallel or dual medium approaches as a means of promoting diversity]; (b) reject the idea of Afrikaans universities, as district from universities which accept institutional responsibility for promoting Afrikaans as an academic medium, because Afrikaans universities would be contrary to the end goal of a transformed higher education system which, as indicated in National Plan for Higher Education, envisages *'the creation of higher education institutions whose identity and cultural orientation is neither black nor white, English or Afrikaans-speaking, but unabashedly South African'*; and (c) State that to achieve the goal of sustaining Afrikaans as medium of academic expression and communication, there must be *'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'*.

[63] Indeed the fact that there is no challenge to the State's language policy is of importance in the light of the SCA's holdings in **UFS v Afriforum** *supra*. Needless to mention that the challenge there was limited to a review of the decision to adopt UFS'S language policy. The main constitutional ground of attack in the **UFS** case was that Section 29 (2) required the UFS to continue with its existing parallel medium policy because there were no resource constraints stopping it from doing so (and even though in practice it led to segregation along racial lines with mainly white students attending the Afrikaans lecture). It must be pointed out that, like the challenge in the present matter, the challenge in **UFS v Afriforum** *supra* did not extend to the LPHE.

[64] In view of the confined target of the challenge in **UFS v Afriforum,** the SCA held that difficult underlying questions about whether UFS's policy unfairly discriminated against linguistic and cultural minorities, or promoted '*majoritarian hegemony at the expense of linguistic and cultural diversity*', or undermined '*the fundamental language scheme of our constitutional order, which requires the state to take practical and positive measures to elevate the status and advance the use of all official languages, instead of diminishing their importance*', did not arise for decision. As Cachalia JA explained, '*such questions may only be confronted through a substantive constitutional challenge to the State's language*

policy, and not somewhat diffidently or obliquely through judicial review, as the respondents have done in this case'.

[65] Regard being had to the aforegoing one may go so far as to say that SU is not at all responsible for the fate of Afrikaans throughout South Africa. Its responsibility in this regard stretches to the boundaries of the University itself. The deeper issues about '*majoritarian hegemony*' must be dealt with through an attack on the State's policy, as expressed in the LPHE. SU's Policy complies with the LPHE which allows each university to take reasonable decisions on their own language policy. The Applicants' real complaint appears to be the cumulative effect of those decisions by multiple universities that negatively impact Afrikaans-speakers. As the SCA held, the target then is the State's language policy, not SU's Policy. The respondents contend that the 2016 Policy is constitutionally compliant. The applicants have, in my view, not persuaded this Court that the SU 2016 Policy is in any way unconstitutional.

DO THE IMPUGNED DECISIONS CONSTITUTE EXECUTIVE ACTION OR ADMINISTRATIVE ACTION?

[66] Notably both the applicants and the respondents have pleaded this case on the basis that the impugned decisions constitute administrative action as defined in

PAJA. Indeed that was the position the parties and the High Court adopted in **Afriforum v University of Free State** (A701 [2016] ZAFSHC 130 (21 July 2016). Seemingly, the same approach was adopted by the Full Court in **Afriforum and Another v Chairperson of the Council of the University of Pretoria and Others** [2017] 1 ALL SA 832 (GP) (even though in the latter case, there is no clear finding on the aspect). However, in **UFS v Afriforum** *supra*, the Supreme Court of Appeal held that the decision to adopt a language policy taken by the Council of the UFS was executive in nature and '*does not constitute administrative action as contemplated by PAJA.*' See para 18 of the judgment. Thus the challenges to the decisions of the Senate and Council could not be adjudicated under PAJA.

[67] As highlighted earlier in this judgment, the applicants contend that, because they (unlike UFS) have challenged the Policy, PAJA does apply. The point is, however, although the policy itself was not challenged in the **University of the Free State** case, Cachalia JA made it clear that the Policy itself does not amount to administrative action. He held: 'the policy itself does not adversely affect the rights of any person or have the capacity to do so. Neither does it have direct, external legal effect'. See **UFS v Afriforum** *supra* para 18. It seems, it would only be decisions taken in the implementation of the policy that would be subject to administrative review. Therefore on the authority of the Supreme Court of Appeal

PAJA remains inapplicable to the present application. Of course the decisions and the Policy are subject to review under the principle of legality. That would essentially mean that the grounds of review that apply are more circumscribed and that the intensity of review is reduced. The Supreme Court of Appeal observed guidingly as follows in this regard in **UFS v Afriforum** *supra:*

'The question to be considered in this context is whether, objectively viewed, the decision was rationally connected to the purpose for which the power was given. This is a factual enquiry and courts must be careful not to interfere with the exercise of a power simply because they disagree with the decision or consider that the power was exercised inappropriately. If, therefore, the decision-maker acts within its powers, and considers the relevant material in arriving at a decision so that there is a rational link between the power given, the material before it and the end sought to be achieved, this would meet the rationality threshold. The weight to be given to the material lies in the discretion of the decision-maker; so too does the determination of the appropriate means to be employed towards this end. But if a decision-maker misconstrues its power, this will offend the principle of legality and render the decision reviewable.'

[68] Therefore, the only grounds of review that the applicants can rely on are: (a) That the decision was substantively irrational. See **Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others** 2000 (2) SA 674 (CC). This of course is a far lower standard than reasonableness required under PAJA. See **Democratic Alliance v President of South Africa and Others** 2013 (1) SA 248 (CC) at paras 29-32. The important message to bear in mind is that Chaskalson CJ

explained that, it is not for the courts to decide that there were better ways for the executive to achieve its goal. He observed as follows:

'The fact that there may be more than one rational way of dealing with a particular problem does not make the choice of one rather than the others an irrational decision. The making of such choices is within the domain of the executive. Courts cannot interfere with rational decisions of the executive that have been made lawfully, on the grounds that they consider that a different decision would have been preferable.'

See **Bel Porto School Governing Body v Premier, Western Cape** 2002 (3) SA 265 (CC) at paras 41-5. (b) That the decision was procedurally irrational. This of course does not require full procedural fairness but merely a rational connection between the procedure adopted and the purpose of the decision. See **Albutt v Centre for the Study of Violence and Reconciliation** 2010 (3) SA 293 (CC) at paras 49, 72 and 74; **Democratic Alliance v President of South Africa and Others** *supra* at paras 27 and 34; **National Treasury and Another v Kubukeli** 2016 (2) SA 507 (SCA) at paras 16-18. (c) That the decision was unlawful. This includes that: (i) the decision and the policy are inconsistent with the Constitution; (ii) The decision-makers were biased or improperly influenced; (iii) The decision was taken for an ulterior purpose; and (iv) The decision was *ultra vires*.

Importantly, the applicants cannot attack the decisions or the Policy on the basis that they were unreasonable or procedurally unfair, nor on the ground that information was not considered, unless the failure to do so tainted the rationality of the process as a whole. The difficulty faced by the applicants is that even if

PAJA is nevertheless applicable, the Policy would still have been lawfully adopted and will thus survive substantive administrative law review.

THE IMPLEMENTATION OF THE 2016 POLICY IS NOT BEING ATTACKED

[69] The application was launched in September 2016 far before the Policy was implemented (it was implemented on 1 January 2017). The applicants clearly believed that the 2016 Policy and the process followed to adopt same are irredeemably flawed. In the evaluation of the substantive attack on the constitutionality of the Policy, this Court is duty bound to evaluate it as written accepting implementation as a reality. Several constitutional court cases have spoken to this. In **S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others** as *Amici Curiae*) 2002 (6) SA 642 (CC), the applicants argued that a law criminalising sex work was unfairly discriminatory because (in practice) it was only enforced against the sex workers, who were almost all female. The Court rejected the argument for the following simple reason: '*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.*'

[70] In **Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others (Mukhwevho Intervening)** 2001 (3) SA 1151 (CC), the Government established a transit camp to aid flood victims. An organisation challenged the decision to establish the camp on the basis that it was unlawful.

The High Court upheld the challenge because the government could not implement its decision without obtaining the necessary consents under various pieces of legislation (which had not yet been obtained). The Constitutional Court concluded that the High Court had been wrong to take that approach because it '*failed to distinguish between the taking of the decision and its implementation.*' As Chaskalson P (as he then was) explained, it was possible that the decision could '*be lawfully implemented if the necessary consents are obtained.* While the absence of the consents was a basis to interdict implementation, '*it is not a ground on which the decision can be set aside',* so the Constitutional Court reasoned. **South African Police Service v Solidarity obo Barnard** 2014 (6) SA 123 (CC) concerned the reverse situation – a challenge to implementation instead of the underlying policy itself. The Constitutional Court again stressed that the two types of challenges are distinct. As the policy itself – in that case an employment equity plan – had not been challenged, the Court had to accept that it was valid. The reverse is also true – where implementation has not been challenged, it must be accepted that it will occur according to the policy.

[71] Mr Muller took a point that the third applicant (Adv. JC Heunis SC) participates in these proceedings as a party – (as distinct from his role as lead counsel for the applicants) in his official capacity as the President of the SU Convocation; and that as the President of the Convocation he does not have legal

capacity to bring an application of this kind against SU, since the Convocation itself also does not have the requisite legal capacity and both the Convocation and its President are organs of SU and cannot adopt a position in litigation adversarial to the University. In this regard a reference was made to **Registrar of Pension Funds v Howie NO and Others** [2016] 1 ALL SA 694 (SCA). In the latter case it was held that the Financial Services Board does not have *locus standi* to review a decision of the Board of Appeal established by the Financial Services Board Act 97 of 1990 because it cannot adopt a position adversarial to the Board of Appeal. The above point was, however, not persisted with in view of the fact that there are a number of applicants involved in this matter. The point is thus not dispositive of the issues in this application.

THE CHALLENGES TO THE CONTENT OF THE 2016 POLICY

[72] It has been demonstrated above that on authority of the Supreme Court of Appeal in the **University of the Free State** matter, the decisions and the Policy are executive action and subject only to limited review on grounds of rationality and legality. We are mindful that the primary case presented by the applicants in the light of the findings in **UFS v Afriforum** supra is that: (a) the Policy is inconsistent with Section 29 (2) of the Constitution; (b) the Policy constitutes unfair discrimination against Afrikaans speakers and White and Coloured students; and (c) the Policy is contrary to the right of access to higher education in Section 29

(1) (b) of the Constitution. It is by now common cause that the aforegoing arguments rest on the standard of reasonableness and fairness. The contention by SU is that the Policy will not result in any reduction in the Afrikaans offering. In any event the differential treatment of English and Afrikaans is justified by the necessity to ensure that Black (African) students are not excluded from SU, to promote multilingualism, and to ensure integration. Another point made is that it is consistent with what SU is reasonably able to provide given its resources.

THE RIGHT TO EDUCATION IN THE LANGUAGE OF CHOICE (S 29 (2) OF THE CONSTITUTION)

[73] The legal position in the above regard has now been definitively set out by the Supreme Court of Appeal in **UFS v Afriforum** *supra.* The position is the following: (a) What is *'reasonably practicable'* is an assessment of equity and historical redress; (b) Courts should be extremely hesitant to interfere with a university's determination of what is reasonably practicable; and (c) it is rational for a university to conclude that it is not reasonably practicable to teach in Afrikaans because it will result in an unconstitutional situation on its campus, such as segregated classrooms. A mention must be made that the Supreme Court of Appeal upheld the UFS's language policy which ended Afrikaans tuition almost entirely, solely to ensure that the campus was racially integrated. There was no suggestion that UFS lacked the resources to continue to provide Afrikaans tuition,

or that any students were unfairly discriminated against as a result of the UFS's prior policy. I am of the view that the fact that SU acted on the basis of a more onerous understanding of the legal limits on its power to determine its own policy cannot be allowed to count against it.

INTERPRETATION OF S 29 (2) ITS HISTORICAL CONTEXT, PURPOSE AND STRUCTURE

[74] The above task has been embarked upon and concluded by the Supreme Court of Appeal in the recent **UFS v Afriforum** judgment. The right to own language education protected in Section 29 (2) has indeed a pedigree in international human rights law. See, for example, **UNESCO Convention Against Discrimination in Education, art 5; The Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSE, para 34; UN Declaration of the Rights of Persons Belonging National or Ethnic, Religious and Linguistic Minorities**, art 4.3 ('*States should take appropriate measures so that, wherever possible, persons belonging to minorities may have adequate opportunities to learn their mother tongue or to have instruction in their mother tongue*'); and the **Framework Convention for the Protection of National Minorities**, art 14. None of the instruments that South Africa has ratified includes this right. None of the following conventions contain an express right to own-language education: The **African Charter, the ICESCR, the ICCPR, the Convention on the Rights of the Child, and the African Charter on the**

Rights and Welfare of the Child. They include only general prohibitions against discrimination on the basis of language, *general* protections of minorities' rights to use their language, and rights to basic education (not higher education).

[75] As the applicants note, some commentators have argued that a limited right to own-language education can be gleaned from these provisions. SU accepts that. But it does not alter the analysis of s 29(2) because the international law does not impose a higher standard on SU than the Constitution does. The right is normally claimed by vulnerable minorities who have been disadvantaged by past or current oppression by a majority. It is vital for those communities to maintain their language and their community. One of the key ways in which they achieve those goals is through education in their own language.

[76] Nobody can deny that the South African context is more complicated. Afrikaans-speakers are a linguistic racial and ethnic minority in this country. White Afrikaans-speakers, as a group are also (together with White English-speakers) the beneficiaries of Apartheid and are as such undoubtedly economically and educationally an advantaged group. Given the historical advantage given to Afrikaans it enjoys far better reach educationally than any other official language, save for English. In this regard Moseneke DCJ has observed in **Head of**

Department of Education and Another v Hoërskool Ermelo and Another 2010 (2) SA 415 (CC) ('Ermelo') at para 46:

'It is so that white public schools were hugely better resourced than black schools. They were lavishly treated by the apartheid government. It is also true that they served and were shored up by relatively affluent white communities. On the other hand, formerly black public schools have been and by and large remain scantily resourced. They were deliberately funded stingily by the apartheid government. Also, they served in the main and were supported by relatively deprived black communities. That is why perhaps the most abiding and debilitating legacy of our past is an unequal distribution of skills and competencies acquired through education.'

This was of course in the context of schooling. See also **MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others** 2013 (6) SA 582 (CC) at paras 1-2.

[77] The Constitution addressed this history by allowing and mandating the State to take measures to address past discrimination. See Section 9 (2) of the Constitution which reads as follows:

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

Section 9 (2) needs to be read together with Section 7 (2) which imposes a positive obligation on all organs of State to *'respect, protect, promote and fulfil the rights in the Bill of Rights'*. Afrikaans speakers remain the bearers of the rights under Section 29 (2). The Constitutional Court has recognised that Afrikaans *'is*