



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: 17991/2021

In the matter between:

STUDENTEPLEIN

First Applicant

DEMOCRATIC ALLIANCE

Second Applicant

and

STELLENBOSCH UNIVERSITY

First Respondent

STELLENBOSCH UNIVERSITY COUNCIL

Second Respondent

STELLENBOSCH UNIVERSITY SENATE

Third Respondent

Coram: Justice J Cloete

Heard: 15 August 2022

Delivered electronically: 15 September 2022

JUDGMENT

CLOETE J:**Introduction**

[1] The first applicant ("SP") is a voluntary student organisation founded in 2020. It describes its main objectives as the promotion of linguistic freedom and multilingualism, and the sustainability and viability of Afrikaans as an academic and colloquial language at tertiary institutions in South Africa.

[2] Its current membership is located in nine faculties of the first respondent ("University"). The second applicant ("DA") supports the relief which SP seeks. *Mr Cockrell SC* appeared with *Mr De Beer* for the applicants, and *Mr Muller SC* with *Mr De Jager* for the University, the second respondent ("Council") and third respondent ("Senate"). I will refer to the parties either as identified above or collectively as the "applicants" and "respondents".

[3] In their further amended notice of motion the applicants now seek the following orders:

3.1 A declaration in terms of s 172(1)(a) of the Constitution that the decisions of Senate (and its committees) to deviate from the University's language policy approved on 22 June 2016 ("2016 policy"), and to make changes to its faculties' language implementation plans during the four (6-month) semesters of 2020 and 2021, are unconstitutional, unlawful and in violation of the 2016 policy;

3.2 Directing all of the respondents, in terms of s 172(1)(b) of the Constitution, to comply with paragraph 7.4.4 of the University's language policy approved on 2 December 2021 ("2021 policy") in making decisions about changes to language arrangements in the faculties' language implementation plans that fall outside its regular review process; and

3.3 Costs.

[4] It is convenient to place the relief now sought in proper legal context at the outset. Section 172(1) of the Constitution provides in relevant part that:

'Powers of courts in constitutional matters

(1) *When deciding a constitutional matter within its power, a court –*

(a) *must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and*

(b) *may make any order that is just and equitable...*'

[5] In *AllPay*¹ the Constitutional Court made clear that the just and equitable remedy in s 172(1)(b) is consequential upon a declaration of invalidity in terms of s 172(1)(a). Put differently, and using my own words, absent such a declaration the issue of a just and equitable remedy (or no remedy at all, given the deliberate use of the word 'may' in s 172(1)(b)) does not arise.

¹ *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others* 2014 (1) SA 604 (CC) esp. at para [25].

- [6] SP's founding affidavit was deposed to by its chairperson Mr Tobias Alberts ("Alberts"), and the DA's supporting affidavit by Mr Leon Schreiber ("Schreiber"), a member of Parliament as well as a member of the University's Convocation. The applicants say that they bring this application in their own interest as well as in the public interest in terms of s 38(a) and s 38(d) of the Constitution. The SP also approaches court in the interests of its members in terms of s 38(e) thereof.
- [7] It is unclear on what basis the DA claims to be acting in its own interest, given that Schreiber made the sole allegation that:

'The University has failed to comply with its language policy to the detriment of Afrikaans speaking students as set out in the founding affidavit [of Alberts]. It has breached the section 29(2) rights of these students to be educated in their home language.'

Relevant background

- [8] Section 29(2) of the Constitution provides in relevant part that:

'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...' (my emphasis)

[9] Section 27(2) of the Higher Education Act² provides that:

'Subject to the policy determined by the Minister, the council [of a public higher education institution], with the concurrence of the senate, must determine the language policy of a public higher education institution and must publish and make it available on request.'

[10] The University was established under the Act and is regulated by its Institutional Statute adopted and published in terms of s 32(1)(a) thereof.³ The Council is the governing body of the University and exercises public powers in terms of the Act and the Statute. The Senate is accountable to Council for the academic and research functions of the University and must perform such other functions as may be delegated or assigned to it by Council.

[11] Acting in accordance with s 27(2) of the Act the University adopted the 2016 policy which was implemented with effect from 2017. This policy recognised its integral link to s 29(2) of the Constitution, describing as its essence *'to give effect to section 29(2)... in relation to language usage in its academic, administrative, professional and social contexts'*.

[12] The 2016 policy explicitly recognises the University committing itself to *'multilingualism by using the province's three official languages, namely Afrikaans, English and IsiXhosa'*. In describing the multilingual context of the University, the 2016 policy includes the following: *'Afrikaans has developed an academic repertoire over decades, to which [the University] has contributed*

² No 101 of 1997.

³ In GN 1062, GG 42636 (16 August 2019).

significantly. Applying and enhancing the academic potential of Afrikaans is a means of empowering a large and diverse community in South Africa... [the University] advances the academic potential of Afrikaans by means of, for example, teaching...'

[13] The main relevant provisions of the 2016 policy are as follows:

13.1 Para 6, which stipulates *'the following principles must also be taken into account in interpreting and guiding the implementation of this Policy'* including para 6.8 which reads that *'...its implementation [is] informed by what is reasonably practicable in particular contexts'* (my emphasis) including but not limited to the University's *'available resources and the competing demands on those resources'*; and

13.2 Para 7, which provides that the *'principles above give rise to the following binding Policy provisions'*. These include that Afrikaans and English are the University's languages of learning and teaching (para 7.1.1); undergraduate modules are offered, broadly speaking, on a parallel-, dual-, or single-medium basis (para 7.1.3); and for 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 (para 7.1.9).

[14] In turn, para 7.1.11 stipulates that faculties may only deviate from these *'binding'* provisions in instances where: (a) the deviation is consistent with *'the*

principles’ of the policy; (b) justified by available human and physical resources, for pedagogical concerns or for faculty-specific considerations; and (c) approved by the relevant faculty board, reported with the justification therefor to Senate, and approved by Senate, or, when urgent, by Senate’s Executive Committee (“EC”).

[15] Para 7.4 pertains to language planning, which essentially entails the following. Annually, the Vice-Rector: Learning and Teaching agrees with the faculty deans the mechanisms to be put in place to ensure accountability in implementation of the policy for the year ahead *‘with due regard to the... principles detailed in paragraph 6 and... 7.4.1.1 and 7.4.1.2 below’*.

[16] The latter sub-paragraphs reflect two aims (or purposes). First, that the English offering is revised upwards to achieve full accessibility for academically deserving prospective and current students who prefer to study in English. Second, the Afrikaans offering is managed so as to sustain access for students who prefer to study in Afrikaans and further develop Afrikaans as a language of tuition where reasonably practicable.

[17] In terms of the policy it falls to each individual faculty to set out how it will implement its own language plan (para 7.4.2). Each faculty reviews its use of language for teaching or learning (para 7.4.3), referred to as a Faculty Language Implementation Plan (“Plan”). This must occur at least annually. The Plan is then reported to Senate via the faculty board concerned and Senate’s Academic Planning Committee (“APC”). Senate then has the power to either

approve it or refer it back to the faculty in question. Once Senate accepts a Plan it is implemented.

- [18] Necessary changes to a Plan that fall outside the regular review process (or as *Mr Cockrell* put it, when the unexpected happens) are dealt with in para 7.4.4. This provides that such changes '*can*' be made by the relevant department head and dean after consultation with the faculty student committee. These changes are then reported at the next faculty board and Senate meetings, and the affected students are informed of the changes and reasons therefor as soon as practically possible.

- [19] This is what the applicants refer to as a "bottom-up approach" in decision-making about the language for each faculty and individual modules. According to the applicants the University breached the 2016 policy in 2020 and 2021 because language policy deviations were decided at Senate and not faculty level, and simply imposed thereafter on the faculties concerned.

- [20] The applicants set out their complaints in reverse order, but they may be summarised as follows. At a meeting on 18 February 2021 (a year into the Covid-19 pandemic) the APC decided to request Senate to approve a blanket deviation so as to remove the requirement that new learning material be provided and presented in Afrikaans. This request was apparently based on the demands of converting to online teaching due to the pandemic and '*the practical reality of time constraints with regard to the making available of learning materials such as podcasts in both English and Afrikaans*' contained in a

memorandum from the Vice-Chancellor and considered at that meeting by the APC. On 19 March 2021 Senate approved the recommended deviation in relation to all of the University's faculties.

- [21] The applicants also refer to a media statement issued by the University on 18 March 2021, i.e. a day before Senate approved the recommendation. It reads as follows:

'Due to the COVID-19 pandemic and the immense pressure on lecturers because of Emergency Remote Teaching, Learning and Assessment (ERTLA) now being replaced by switching to Augmented Remote Teaching Learning and Assessment (ARTLA), faculties have proposed a deviation from their Language Implementation Plans for the first semester of the 2021 academic year. Senate is to consider this recommendation by both its Academic Planning Committee and the Committee for Teaching and Learning on 19 March 2021. Should the proposal be accepted, the deviation will be a temporary measure for the first semester. This proposal was also discussed at the recent Language Committee of Council meeting and will be reported at the next Council meeting.'
(my emphasis)

- [22] The applicants say that a similar process via the APC 'as opposed to via faculties' was followed earlier on 20 April 2020, to approve a blanket deviation from Plans at Senate level, so as to allow for new learning material to only be provided in English in respect of the 2020 first semester. The minutes upon which the applicants rely reflect that this was an urgent recommendation to Senate.

- [23] They also say that importantly, during the period 26 March 2020 (i.e. after the national state of disaster was declared) to 26 March 2021, it appears that no

requests emanated from faculties themselves to the APC and/or EC to this effect. The applicants complain that accordingly, para 7.4.4 of the 2016 policy was disregarded for three consecutive semesters. Instead the APC simply requested Senate to grant a blanket approval to all faculties to deviate and Senate *'imposed such decision on faculties'*.

[24] The present application was launched on 20 October 2021, because SP had received complaints about the *'blanket deviation'* continuing despite the media release of 18 March 2021 proclaiming that this would be a (further) temporary measure for the first 2021 semester only. SP had thus instructed its erstwhile attorneys to address a letter to the University, demanding an undertaking that such (continued) deviation be suspended. The University's response was contained in a letter from its attorneys dated 30 September 2021 which is annexed to the founding affidavit. It runs to 9 typed pages and is written entirely in what I would consider to be sophisticated Afrikaans. Despite English being the official language of the courts, the applicants made no attempt to attach an English translation, but I summarise hereunder what the applicants say that it said.

[25] According to them, the University admitted therein that para 7.4.4 was not followed in 2020, but maintained this was not practically possible given time constraints and faculty boards only meeting for the first time in May 2020. For the 2020 second semester, the University stated that deviations were approved by the Committee for Learning and Teaching ("CLT"), a standing committee of Senate where all the Vice-Deans: Learning and Teaching from the faculties

were represented. This body was referred to as the Vice-Dean's Forum ("Forum"). For the 2021 first semester the request emanated from the Forum via the APC and CLT.

[26] For the 2021 second semester and due to the ongoing pandemic and disruption caused by the lockdown, some faculties, after internal consultation, motivated for the deviation to continue for the same reasons as in the first. On 25 May 2021 the EC met and proposed that the deviation be extended to the second semester as well. On 4 June 2021 this was considered by Senate, but referred back to the faculties concerned for further consultation. On 20 June 2021, the EC met again and approved deviations for certain faculties on Senate's behalf, which were then ratified by the EC (again on Senate's behalf) on 10 September 2021.

[27] The applicants contend that none of these approvals complied with either para 7.1.11 or para 7.4.4 of the 2016 policy, since changes to Plans must be made by faculties *'and not imposed by the Senate'*. SP submits that the impugned procedures adopted by the University are a clear violation of the legitimate expectation of students that the 2016 policy would be followed and decisions of faculties in respect of individual modules respected; frustration of this expectation was compounded by the University simply extending the deviation beyond a single semester; and neither the University nor faculties consulted with students or even gave them notice before extending the deviation to the 2021 second semester. SP further contends that the University's conduct resulted in a violation of students' section 29(2) rights.

- [28] In a first supplementary founding affidavit, SP explained why it seeks what it describes as a '*mandatory order*' (a final interdict) against the respondents in terms of s 172(1)(b) of the Constitution. This affidavit was deposed to on 14 January 2022 at a time when, it is common cause, the 2016 policy had been replaced by the 2021 policy, although the parties are *ad idem* that paras 7.1.11 and 7.4.4 are identical.
- [29] The "clear right" asserted is that the '*repeated decisions made by the Senate and its Committees to depart from the binding provisions of the language policy, have violated [their s 29(2)] rights*'.⁴ The "injury reasonably apprehended" is that, based on the breach asserted, the '*applicants thus apprehend that, without the Court's intervention – the binding provisions of the language policy will be violated by the respondents again in future*'. The applicants contend that any argument that the binding provisions may be departed from unlawfully due to the impact of the pandemic must be rejected for two reasons. First, the policy itself makes provision for lawful departures from language plans of faculties during contingent circumstances. The pandemic cannot be a pass to justify persistent unlawful departures from the binding policy enacted to give effect to the constitutional right. Second, the 2021 policy was adopted during the course of the pandemic – had its provisions not been implementable, then it would not have been adopted. The applicants also assert that they have '*no alternative*

⁴ The review relief initially sought under s 33 of the Constitution has since been abandoned.

remedy’ since the internal complaints procedure contained in the 2021 policy is inappropriate for relief of the nature which they seek.

- [30] The University’s Deputy Vice-Chancellor: Learning and Teaching (“DVC”) deposed to the answering affidavit. After raising mootness, which I deal with hereunder, he responded in detail to the applicants’ averments. I refer to the most relevant aspects.
- [31] The CLT includes the Vice-Dean: Teaching and Learning of each of the 10 faculties (or an appropriately designated representative) as well as a member of the Academic Affairs Council (student representation). The APC includes the Chair of the Academic Affairs Council (student body). This is in addition to faculty representation on the Forum, which the DVC described as a *‘think-tank’*, with its meetings focused on brainstorming, sharing good practice and challenges regarding learning and teaching issues, educational leadership and professional learning.
- [32] Although the Forum has no formal decision-making powers *‘it has become a very important “engine room” to generate new ideas and solutions, discuss new initiatives and form a community of practice of vice-deans’*. All Forum meetings are scheduled in the two-hour time slot preceding CLT meetings to discuss issues for the CLT agenda. The Vice-Deans often use Forum meetings to provide feedback after consulting about issues within their respective faculties.

[33] Forum meetings were therefore the most logical forum to also discuss the challenges of the pandemic period and get feedback from faculties about their progress with their pandemic arrangements. Typically such issues would be raised at Forum meetings by the Vice-Deans, and taken back to their faculties for further discussion, whereafter feedback would be provided at the next Forum meeting and if any institutional decisions needed to be taken, the issue would be placed on the CLT agenda. The same applied to APC meetings and/or those of Senate.

[34] The DVC also explained the overall organisational structure of the University, which demonstrates that there is considerable overlap in the composition of the University's various organs, committees and bodies. As he put it:

'83. ...So, for instance:

83.1 *The EC(S) includes all the deans of all the faculties.*

83.2 *The deans and vice-deans of all the faculties are also all members of Senate.*

83.3 *All permanent academic staff (which includes professors, associate professors and so forth) are members of the faculty boards. This necessarily includes the deans and vice-deans of the faculties.*

83.4 *Deans and deputy deans (also referred to as vice-deans) and other professors, are members of Senate.*

83.5 *The CLT includes the Vice-Dean: Teaching and Learning of each of the 10 faculties (or the faculty board's designated person if the faculty does not have a Vice-Dean: Teaching & Learning in its structure).*

83.6 *The EC(S) includes all Deputy Vice Chancellors and the APC includes several of them, too.*

83.7 *The Forum comprises the vice-deans of all the faculties.'*

[35] The DVC accordingly submitted it is artificial for the applicants to approach this matter on the basis that certain University structures, for example, the EC, Senate and faculty boards operate '*in silos*' without any knowledge or insight into what each other is doing. That is simply not the case because of the overlap in composition of the various structures. He submitted that it is also plainly wrong to argue that Senate makes unilateral decisions top-down. Senate consists *inter alia* of professors and Heads of Departments. These professors and Heads of Departments operate at faculty level and serve on committees such as the APC and CLT that report to Senate.

[36] Furthermore, although Senate is a decision-making body, it is at the end of the decision-making process for most academic teaching and learning decisions. Proposals and decisions invariably originate at faculty or committee level, such as the APC and CLT, with wide faculty representation, and when recommended by them, their decisions and recommendations are reported to the EC and lastly sent to Senate for approval or ratification.

[37] During the latter half of 2019, faculties submitted their Plans for 2020 and these were implemented following ratification after the University reopened on 2 January 2020. On the day after the declaration of the national state of disaster (i.e. 15 March 2020) the Minister of Higher Education, Science and Technology

(“Minister”) issued a statement in which, as a result of the restriction placed on gatherings, institutions such as the University were required to develop alternative plans for managing teaching and learning, utilising technology wherever possible. The University immediately commenced the process of putting alternative measures in place in this unchartered territory, and staff and students were informed thereof. These alternative measures were detailed in the answering affidavit, as were the many, fluid challenges which the University faced in the months that followed.

[38] Were it not for the government measures implemented to address the pandemic, the University’s first term of 2020 would have ended on 20 March 2020, and the second term would have commenced on 30 March 2020. However the Minister, after meeting with stakeholders, announced that all tertiary institutions would close on 18 March 2020 with the plan to reopen on 15 April 2020. The University chose 20 April 2020 as a *‘planning horizon’* for the resumption of lectures. As we all know, the national lockdown came into effect on 26 March 2020, and South Africa was placed on alert level 5 until 30 April 2020.

[39] On 2 April 2020 a special CLT meeting took place to discuss the continuation of the academic offering during the pandemic. All 10 Vice-Deans: Learning and Teaching attended (online). The discussion centred around a framework document titled *‘Continuing the Academic Offering during Covid-19 Outbreak’* drafted at the end of March 2020 by the then Vice-Rector: Learning and Teaching, Prof Schoonwinkel.

- [40] In the document Prof Schoonwinkel made clear that the University's overall aim remained that students should not lose a full academic semester or year and that the recommendations in the document were aimed at providing faculties and staff with a framework to proceed with final planning for the remainder of the 2020 first semester and provisional planning for the 2020 second semester. The document stated that the University was not prescriptive on how faculties should implement the framework in their own contexts, but there were some specific expectations of what academic and support staff had to do and by when.
- [41] The document also stated that faculties' planning was likely to include changes to module outcomes, assessment schemes and language policy implementation, to adapt the academic offering to what was reasonably practicable in light of the then Covid-19 measures. The document acknowledged that normally changes to these aspects are subject to advance approval by Senate, but noted that most of the changes relating to the pandemic would have to be decided before the (first) May 2020 Senate meeting.
- [42] In summary, faculties were required to determine the details of changes by 15 April 2020, and report to the EC at its scheduled (online) meeting on 21 April 2020, via a special APC meeting. This framework document and the 2 April 2020 discussion with all Vice-Deans at the CLT meeting precipitated discussions in faculties that would take place in due course in order to plan for the second term of 2020.

- [43] On 8 April 2020 students were informed that the EC had on 6 April 2020 approved certain changes to the academic calendar. These too are detailed in the answering affidavit. In a nutshell, the University was required to shorten recess periods to ensure a complete academic learning and teaching offering for the rest of 2020. It is apparent that between 20 April 2020 and the then anticipated end of the academic year on 12 December 2020, there would be a total of just 3 weeks recess over a period of almost 8 months. On 15 April 2020 the Forum met and discussed the needs of the faculties for amendments to the language arrangements in their Plans for the first semester.
- [44] The DVC emphasised that the lockdown measures and restrictions were imposed by national government, not by the University itself. The University had to take steps to present all courses exclusively online in the second term 2020 because students were required to evacuate campus. Students and lecturers alike were caught unaware and unprepared. The unexpected shift to online teaching required '*a huge academic adjustment with huge challenges*' since no-one had the time during the pandemic to plan, design and develop proper online teaching and learning. The DVC explained the measures taken, which he stated were the best available to the University in the prevailing circumstances. The measures demonstrate the extent of the challenges and the enormous load placed on University staff and students alike and there is no reason to question them. Loadshedding added to the difficulties.
- [45] The DVC explained that not only was the move to online teaching and learning exceptionally difficult for the majority of lecturers, management and support

staff, but it necessitated producing a huge quantity of additional online learning materials. The consequent workload was such that it was impossible for lecturers to continue to present their coursework fully in accordance with their approved Plans.

[46] In particular it was not possible to make podcasts of new learning material available immediately in both Afrikaans and English. Adding a further burden to translate or re-record all new learning material in Afrikaans as '*data light*' podcasts was considered an unmanageable and impossible ask, given the overburdened staff and sacrifices already made by lecturers in an environment, the DVC stated, where all students were able to comprehend the new material in English. This led to the need for all new material (not current, which was already available by then in Afrikaans) to be developed and presented only in English. This change in language arrangements had to be approved before the commencement of the resumed first semester. Given that faculty boards and Senate were only meeting after 20 April 2020, it was consequently impossible to make any changes to faculty Plans strictly in accordance with the procedure specified in para 7.4.4 of the 2016 policy, namely via faculty boards presenting such changes to Senate for approval. What thus occurred is that faculties presented their intended changes to language arrangements for approval via the APC, to the EC, which *inter alia* has the capacity to deal with urgent matters on behalf of Senate.

[47] Certain records of the University indicate that from time to time during the approval processes in 2020 and 2021, changes in language arrangements

were referred to loosely as ‘departures’. The DVC explained however that these so-called departures were not those contemplated in para 7.1.11 of the 2016 policy, but rather changes to the language arrangements of the Plans as contemplated in para 7.4.4 thereof. He also explained that as far as was practically possible in the limited time available, students were consulted and kept informed throughout of all necessary changes to language measures, including changes to Plans. Students were represented in this regard by their student representative council (“SRC”) and student faculty committees.

[48] The second term commenced on 20 April 2020. The APC met and considered the faculties’ proposed amendments to the language arrangements, put forward by the Forum on 15 April 2020. It decided to recommend those amendments. On 21 April 2020 the EC met and considered the APC recommendation. The EC approved the amendments on behalf of Senate.

[49] On 29 April 2020 the alert level 4 regulations were published. In an announcement of 30 April 2020 the Minister advised *inter alia* that:

‘The risks of a return to normal campus-based activity for thousands of students and staff are simply too great and cannot function successfully outside of the national context of a general lockdown...’

Against this background and with the endorsement by the Command Council, we have decided that the current period, from 1 May until South Africa transitions into a lower COVID-19 risk phase, must be used to put a number of critical interventions in place across the ...system...’

- [50] These interventions included the development and implementation of effective multi-modal remote learning systems to provide a reasonable level of academic support to students. Moreover it was not possible to determine with any measure of certainty the dates when physical return to campuses for the bulk of students would be possible. The Minister continued *'(w)ithin a national framework currently in place, each university will have to put plans in place to ensure its specific programmes, resources, and capacity are adequate to offer various forms of remote and flexible learning from the beginning of June 2020 until a full return to contact teaching and learning is feasible'*.
- [51] South Africa was on lockdown alert level 4 from 1 to 31 May 2020. During the period 11 to 15 May 2020 the faculty boards held their first meetings for the 2020 academic year. On 28 May 2020 the alert level 3 regulations were published, and South Africa moved to lockdown level 3 from 1 June 2020 until 17 August 2020. On 5 June 2020 Senate met. At the meeting the EC reported to Senate about all amendments necessitated by the pivot towards online learning and teaching for the 2020 first semester, and which had been approved by the EC on Senate's behalf. Senate ratified that approval. On 8 July 2020 the Minister issued a statement in which *inter alia* he advised that the 2020 academic year would only be completed in the early part of 2021. This would necessitate a later start to the 2021 academic year for many students and a readjustment of the 2021 academic calendar.
- [52] In the interim, on 28 May 2020, the Forum met and discussed the necessity to extend the amendments to language arrangements, as had been applied in the

first semester, to the second semester. The motivation was contained in a memorandum dated 29 May 2020 which was submitted to the CLT for consideration. On 1 June 2020 the CLT met and considered that memorandum. On 3 June 2020 the APC met, considered the proposed changes, and recommended them to Senate at the same meeting previously referred to on 5 June 2020. Senate approved the amendments to the language arrangements for the second semester. It should also be mentioned that on 8 June 2020 the Minister published Directions for the phased-in return to campuses for students. Essentially, this entailed a maximum of 33% of the student population returning under alert level 3, a maximum of 66% under alert level 2 and 100% under alert level 1.

[53] On 16 August 2020 the alert level 2 regulations were published. South Africa moved to lockdown level 2 from 18 August to 20 September 2020. In a statement dated 26 August 2020 the Minister applauded the many students who had adapted to the difficult circumstances and developed new ways of learning and coping. He also expressly acknowledged this had been a challenging time for the academic staff of institutions, who had to adapt rapidly to new forms of teaching and student support, and who had shown commitment to teaching themselves and supporting students, often across multiple different platforms.

[54] After a meeting between the Covid-19 ministerial task team and Vice-Chancellors it was agreed that institutions would be targeting to complete the 2020 academic year by the end of February 2021, with starting dates for the

new 2021 academic year ranging from 15 March to 15 April 2021 (an earlier start was not possible, at least for first year students, because of the late release of Grade 12 exam results).

- [55] During the period August to November 2020 faculties submitted their reports on the implementation of the Plans for the 2020 first semester as well as their Plans for the 2021 academic year. On 18 September 2020 the alert level 1 regulations were published, and South Africa moved to lockdown level 1 from 21 September 2020 until 28 December 2020, when the country had to move back to lockdown level 3 on 29 December 2020 until 28 February 2021.
- [56] Since the pandemic continued into 2021, many of the same challenges continued for the University. The academic year started very early (on 4 January) because of A4 assessments for 2020 modules. This meant that most staff did not take any leave over December and January which was a major contributor to burnout and fatigue. In addition modules had to be adjusted to a combination of face-to-face and online teaching, due to gathering and venue constraints because of required social distancing. This too had to be learnt and was a separate and time-consuming exercise for lecturers.
- [57] In light of these challenges (and others as detailed in the answering affidavit) the DVC stated that it was again necessary for the University to make changes to the 2021 Plans (submitted under lockdown levels 2 and 1, in anticipation of lockdown level 1 continuing, but then unexpectedly being raised again to lockdown level 3). Accordingly, and after consultation at faculty level to the

extent practically possible, the Forum met on 4 February 2021 and, after discussion, made a similar proposal to the CLT in relation to new online material as it had in 2020. The CLT, which met thereafter on the same day, considered the proposal and decided to recommend it.

- [58] On 18 February 2021 the APC discussed a memorandum from the Vice-Chancellor: Learning and Teaching, concerning the proposed changes, accompanied by a motivation. The memorandum read as follows:

'Although there is a relaxation to COVID-19 Alert Level 3, it seems highly likely that a portion of 2021 semester 1's teaching will still have to occur online for many students. As for the past Semester 2 of 2020, lecturers will again be faced with the practical reality of the time constraints regarding provision of learning material like podcasts in both English and Afrikaans.

The motivation for and deviation requested from the [Plans] are:

That the practical reality of the time constraints regarding provision of learning material like podcasts in both English and Afrikaans (namely that all material cannot be translated timeously in Afrikaans) be accepted, and that new material may be offered in English only. However, lecturers are strongly encouraged to use the Language Centre's interpreters to translate English podcasts into Afrikaans as well, where practicable. During other forms of learning facilitation, e.g. online discussion forums and emails, the lecturers should continue to support students by means of Afrikaans and English as the module specifications require.' (my emphasis)

- [59] The APC decided to recommend the proposed changes. (It is noted that, according to the DVC, faculties also submitted their reports on language implementation for the 2020 second semester in February 2021) On 28 February 2021 the lockdown level 1 regulations were published and

amended a number of times thereafter before 30 May 2021. On 9 March 2021 the EC met and considered the APC report. It agreed with the proposed amendments and recommended them to Senate for approval. They were duly approved by Senate on 19 March 2021.

[60] On 29 March 2021 the Minister issued Directions on a national framework and criteria for the management of the 2021 academic year. In particular, the Minister directed that because of unique circumstances at each institution (locational spatial arrangements, local lockdown restrictions, capacity issues, actual and variable numbers of students, etc) a '*one-size-fits-all*' approach was not feasible. Therefore, each institution had to work out its own management plan for the 2021 academic year based on its context within the adjusted national lockdown regulations framework, which might be adjusted from time to time. The key criteria to be taken into consideration in developing management plans pertained in the main to ensuring health of staff and students by following various protocols. On 9 April 2021 the Minister issued a media statement in which he appealed to students, lecturers and all staff to remain vigilant and adhere to the Covid-19 regulations as the outbreak of Covid infections across some higher education institutions was extremely worrying. South Africa was placed on lockdown adjusted level 2 from 31 May 2021 until 15 June 2021; on adjusted level 3 from 16 to 27 June 2021; and on adjusted level 4 from 28 June to 25 July 2021.

[61] On 30 June 2021 the Minister issued a public statement, which included that although Universities would not officially close, all face-to-face teaching and

examinations must cease for the following two-week period and only online learning would be allowed. South Africa was on lockdown adjusted level 3 from 26 July to 12 September 2021. The University's 2021 second semester was from 10 August 2021 until 17 December 2021.

[62] In the interim and as a result of prevailing circumstances, 7 of the 10 faculties, after internal consultation, motivated for an extension of the existing arrangements into the 2021 second semester. The EC, after considering these, recommended on 25 May 2021 that *'...since the same conditions and pressures on academic staff brought about by Covid-19 and ARTLA, that informed Senate to make its previous decision regarding faculties' language implementation plans, persist, it is recommended that the relaxation of the requirement to make online learning material available in both Afrikaans and English be extended, subject to the continuation of ARTLA, for the second semester of 2021'* but with the same proviso that *'[w]here lecturer capacity is indeed available, lecturers are, however, encouraged to provide learning material in both English and Afrikaans and to use the Language Centre's interpreters to assist with translating English podcasts into Afrikaans, where practicable'*.

[63] On 4 June 2021 the recommendation of the EC served before Senate. However Senate resolved to refer the proposed changes back to the faculties for reconsideration and for them to follow the procedure prescribed in para 7.4.4 of the 2016 language policy. After this was seemingly done, the EC met on 20 June 2021 and approved certain changes in certain faculties. On

10 September 2021 these were ratified by Senate. On 2 December 2021, upon conclusion of a comprehensive and consultative language policy revision process that had commenced in October 2020, Council approved the 2021 language policy. The 2021 policy has thus replaced the 2016 policy since that date.

[64] In SP's replying affidavit Alberts stated that the applicants do not dispute *'in general'* the University's organisational structure explained by the DVC, nor the purposes of each of the organs and committees referred to by the University. However he persisted in maintaining that, irrespective of the circumstances, the University was obliged to follow the process in para 7.4.4 to the letter.

[65] He also took issue with the DVC's explanation of the purpose and function of the Forum, and went so far as to allege that it *'appears to be a secret decision-making body'* (which is plainly not supported by the uncontested evidence) and that *'to the extent that the Forum influenced decisions made concerning faculty language changes, that is also in violation of the language policy and unlawful'*. He further maintained that the University's opposition to the relief sought *'appears to be premised on an approach which entirely disregards the binding prescripts of para 7.4.4'*.

[66] Although Alberts also had much to say in advancing his criticisms of the University's version, what he did not pertinently dispute was the DVC's assertion that Afrikaans students were able to comprehend English. The purpose of Schreiber's replying affidavit (on behalf of the DA) appears to have

been to direct the court's attention to governmental policy in relation to Afrikaans qualifying as one of the indigenous languages of South Africa. This is irrelevant to the issues at hand since the constitutionality of the 2016 and 2021 policies is not the subject of the applicants' attack, and in any event the 2016 policy was declared constitutional in *Gelyke Kanse*⁵ on 10 October 2019.

Whether there is still a live controversy

[67] The respondents contend that at least the declaratory relief which the applicants seek is moot for two principal reasons. First, it relates to historical events (which occurred in the context of an unprecedented pandemic). Second, the policy that was in place when the events occurred has since also been replaced with a new policy, as the applicants know and accept.

[68] The applicants deny that the case is moot on the basis that a party who contends there have been rights violations cannot be precluded from seeking relief because the facts underpinning those violations relate to past or historical events. In any event, the applicants say, the relevant provisions in the 2016 policy for lawful deviations from, or changes to, Plans have remained exactly the same in the 2021 policy, even under the same paragraph numbers. They also say that the outcome of this case will '*patently*' have important practical consequences for the parties and students in general. Finally they contend that

⁵ *Gelyke Kanse v University of Stellenbosch* 2020 (1) SA 368 (CC).

the declaratory relief they seek is not advanced in terms of s 21(1)(c) of the Superior Courts Act⁶ but rather s 38 and s 172(1)(a) of the Constitution.

[69] Section 21(1)(c) of the Superior Courts Act provides:

'(1) A Division has jurisdiction over all persons residing or being in, and in relation to all causes arising... within, its area of jurisdiction and all other matters of which it may according to law take cognisance, and has the power –
(c) in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination...'

[70] Section 38 of the Constitution provides in relevant part that:

'Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are:

- (a) anyone acting in their own interest;*
- ...*
- (d) anyone acting in the public interest; and*
- (e) an association acting in the interest of its members.'*

[71] On its plain wording, no distinction is drawn in s 38 between past and existing rights infringements, and in turn s 172(1)(a) does not confer any discretion on a court whether to entertain an alleged constitutional infringement which, if found to exist, must be declared invalid to the extent of its inconsistency. By

⁶ No 10 of 2013.

contrast, s 21(1)(c) of the Superior Courts Act not only confers a discretion on the court to decide whether to entertain such relief, but it also expressly limits the enquiry to an existing, future or contingent right or obligation.

[72] But that is not the end of the matter, since it is well-established that even s 172(1)(a) relief depends on whether any order the court may make will have a practical effect, either on the parties or others. A helpful example for present purposes is *President, Ordinary Court Martial and Others v Freedom of Expression Institute and Others*⁷ where the Constitutional Court, albeit in the context of considering whether to confirm an order of constitutional invalidity by a High Court, stated:

'[15] However, where the relevant legislative provision has been repealed after the High Court has made the order of invalidity, but before this Court hears the confirmation or appeal proceedings or before it gives its order, the need for certainty may well fall away. There may, however, be a need for the Court to give a judgment on the appeal or confirmation proceedings in order to resolve the dispute which gave rise to the litigation between the parties, or for other reasons.

[16] In my view, however, s 172(2) does not require this Court in all circumstances to determine matters brought to it under that subsection. At least where the provision declared invalid by the High Court has subsequently been repealed by an Act of Parliament, the Court has a discretion whether or not it should deal with the matter. In this regard, the Court should consider whether any order it may make will have any practical effect either on the parties or on others.

⁷ 1999 (4) SA 682 (CC); see also *National Coalition for Gay & Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) at para [21] and the authorities referred to in fn 18 thereof.

[17] *In this case the new legislation replaces all relevant aspects of the legislative framework upon which the dispute between the parties was based. The basis upon which the parties approached the High Court has disappeared and the grant of the relief claimed, as well as any confirmation of any order of constitutional invalidity, can serve no purpose...*

[18] *A decision on the constitutional invalidity of the impugned provisions will have no practical effect on the parties to the litigation. Nor, as far as I am aware, are there any considerations of public policy that come into play...*

[73] In addition, in *Minister of Justice and Correctional Services and Others v Estate Late James Stransham-Ford and Others*⁸ the Supreme Court of Appeal pertinently drew a distinction between what a court of first instance may do, as opposed to a court of appeal, when there is no live controversy. In that matter the applicant was in the terminal stages of cancer when he sought an order in the High Court that a medical practitioner could assist him by administering a lethal agent at his request, or provide him with one he could administer himself. The matter was fully argued in the High Court but, a few hours before judgment was handed down, the applicant passed away. The appeal court held as follows:

[21] *...Constitutional issues, as much as issues in any other litigation, only arise for decision where, on the facts of a particular case, it is necessary to decide the constitutional issue.*

[22] *Since the advent of an enforceable Bill of Rights, many test cases have been brought with a view to establishing some broader principle. But none have been brought in circumstances where the cause of action advanced had been extinguished before judgment at first instance. There have been cases in which, after judgment at first instance, circumstances have altered so that the*

⁸ 2017 (3) SA 152 (SCA).

judgment has become moot. There the Constitutional Court⁹ has reserved to itself a discretion, if it is in the interests of justice to do so, to consider and determine matters even though they have become moot. It is a prerequisite for the exercise of the discretion that any order the court may ultimately make will have some practical effect either on the parties or on others. Other factors that may be relevant will include the nature and extent of the practical effect that any possible order might have, the importance of the issue, its complexity and the fullness or otherwise of the argument...

[24] ...I do not accept that it is open to courts of first instance to make orders on causes of action that have been extinguished, merely because they think that their decision will have broader societal implications. There must be many areas of the law of public interest where a judge may think that it would be helpful to have clarification but, unless the occasion arises in litigation that is properly before the court, it is not open to a judge to undertake that task...

[25] ...When a court of appeal addresses issues that were properly determined by a first instance court, and determines them afresh because they raise issues of public importance, it is always mindful that otherwise under our system of precedent the judgment at first instance will affect the conduct of officials and influence other courts when confronting similar issues. A feature of all the cases referred to in the footnotes to para 22 above¹⁰ is that the appeal court either overruled the judgment in the court below or substantially modified it. The appeal court's jurisdiction was exercised because "a discrete legal issue of public importance arose that would affect matters in the future and on which the adjudication of this court was required". The High Court is not vested with similar powers. Its function is to determine cases that present live issues for determination.

[26] The jurisprudence in appellate courts speaks of the case having become moot so that it no longer presents a live issue for determination. I do not think that the extinguishing of a claim by death before judgment is an instance of

⁹ And similarly the Supreme Court of Appeal in terms of s 16(2)(a) of the Superior Courts Act: see fn 20 of the judgment.

¹⁰ *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC) para [11]; *MEC for Education, KwaZulu Natal and Others v Pillay* 2008 (1) SA 474 (CC) para [32]; *Pheko and Others v Ekurhuleni Metropolitan Municipality* 2012 (2) SA 598 (CC). See also *Normandien Farms v PASA* 2020 (4) SA 409 (CC) at paras [46] to [56] and [58].

mootness in the sense in which that expression is used in these cases. If a cause of action ceases to exist before judgment in the court of first instance, there is no longer a claim before the court for its adjudication. Mootness is the term used to describe the situation where events overtake matters after judgment has been delivered, so that further consideration of the case by way of appeal will not produce a judgment having any practical effect. Here we are dealing with a logically anterior question, namely, whether there was any cause of action at all before the High Court at the time it made its order. Was there anything on which it was entitled to pronounce? The principles governing mootness have little or no purchase in that situation.' (my emphasis)

[74] I accept, as is common cause, that paras 7.1.11 and 7.4.4 of the 2016 policy have been carried over in identical terms into the 2021 policy. However in my view this does not assist the applicants for the following reasons. First, the consequential relief which they seek in relation to the 2021 policy can only be considered if this court finds that Senate (and its committees) violated the 2016 policy. That policy no longer exists, and accordingly as a court of first instance and following *Stransham-Ford* (by which I am of course bound), by the time the matter was argued the controversy was no longer a live one.¹¹

[75] Second, any finding I make would be based on a specific set of historical facts (i.e. the University's response to the pandemic, lockdown regulations and Ministerial directives) viewed in light of the 2016 policy as a whole and not only paras 7.1.11 and 7.4.4 thereof. I do not see how this will be of any assistance

¹¹ In *Minister of Cooperative Governance and Traditional Affairs and Another v British American Tobacco South Africa (Pty) Ltd and Others* [2022] 3 All SA 332 (SCA) the impugned lockdown regulations were repealed after argument but before the handing down of judgment by a Full Court of first instance in this Division. *Mr Cockrell* co-incidentally represented the applicants in the court *a quo* (i.e. the respondents in the court of appeal). During argument before me he kindly advised that the issue of a live controversy was not however raised at all during the appeal proceedings by any of the parties.

to the parties, or the student body at large, in future.¹² However, if I am wrong, it is nonetheless required of me to consider the remaining issues in dispute.¹³

Whether Senate (and its committees) violated the 2016 policy

[76] The applicants argue that in order to come home under para 7.4.4 of the policy, the University has to show that changes to the Plans during 2020 and 2021: (a) were made by the relevant department head and dean after consultation with the faculty student committee; (b) reported at the next faculty board and Senate meetings; and (c) that students were informed of the changes and reasons as soon as practically possible. They contend that the University's explanation of what occurred falls far short of this threshold.

[77] But the applicants' entire argument is premised squarely on their contention that the procedure prescribed in para 7.4.4 is mandatory since it is one of the '*binding Policy provisions*' referred to in the preamble to para 7 itself. For the reasons that follow I am unable to agree with the applicants.

[78] Para 6 of the 2016 policy is the starting point. It provides in clear terms that '*the following principles must also be taken into account in interpreting and guiding the implementation*' of the policy. It is thus incumbent upon the University to take these principles into account when implementing the policy. One of these principles, as previously stated, is para 6.8 which stipulates that the policy's

¹² See also *The South African Breweries (Pty) Ltd and Others v The President of the Republic of South Africa and Another* [2022] 3 All SA 514 (WCC) at paras [3] to [39].

¹³ *Spilhaus Property v MTN* 2019 (4) SA 406 (CC) at para [44].

implementation (thus including para 7 and in particular, for present purposes, para 7.4.4) is informed by what is reasonably practicable in particular contexts, including but not limited to the University's '*available resources and the competing demands on those resources*'.

[79] Although the preamble to para 7 provides (somewhat oddly) that the '*principles above give rise*' to the '*binding*' provisions that follow, when applying the established principles of interpretation,¹⁴ paras 6 and 7 must be read together, and a '*sensible meaning is to be preferred to one that leads to insensible and unbusinesslike results*'.¹⁵

[80] On a reading together of paras 6 and 7 there is, in my view, only one objective, sensible interpretation to be placed upon them, namely that para 7.4.4 is only binding (or mandatory) to the extent that its implementation is subject to what is reasonably practicable in particular contexts, including available resources and competing demands therefor.

[81] To my mind, support for such an interpretation may be found in the following. First, s 29(2) of the Constitution itself, and which is the genesis of the policy, expressly limits the right to receive education in the official language of one's choice to circumstances where that education is '*reasonably practicable*'. Second, para 7.1.11 caters for a deviation from the '*binding*' provisions if it is *inter alia* consistent with the principles of the policy. Third, annual language

¹⁴ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para [18].

¹⁵ See fn 14 above.

planning in para 7.4.1 is specifically subject to '*due regard*' being had to the guiding principles contained in para 6. Fourth, para 7.4.4 stipulates that changes falling outside the regular review process '*can*' (not must) be made at faculty level.

[82] Given that these are motion proceedings the affidavit evidence of the University, which I have attempted to summarise as comprehensibly as possible on the relevant issues, demonstrates that it applied para 7.4.4 to the extent that it was reasonably practicable in the context of an unprecedented pandemic, while at the same time adhering to the Ministerial directives by which it was also bound. Although the University candidly conceded that it was, in those circumstances, unable to follow the procedure contained in para 7.4.4 to the letter, I am persuaded that its explanation of involvement of faculties, some level of student representation in that involvement, and the decision-making process itself, substantially followed the purpose of giving meaningful content to changes to language arrangements falling outside the regular review process.

[83] It is accordingly my finding that Senate (and its committees) did not violate the policy as alleged, and the declaratory relief sought must fail. This being the case, the consequential s 172(1)(b) relief falls away.

Costs

[84] *Mr Muller* submitted, correctly in my view, that this is one of those matters where, insofar as the DA is concerned, the *Biowatch* principle¹⁶ may or may not apply, but it certainly applies to SP. Given that SP was the main protagonist in these proceedings, I am of the view that each party should pay their own costs.

[85] **The following order is made:**

1. **The application is dismissed; and**
2. **Each party shall pay their own costs.**



J I CLOETE

For applicants: Adv A **Cockrell** SC and Adv M **De Beer**

Instructed by: Minde Shapiro & Smith, Ms Elzanne Jonker

For respondents: Adv J **Muller** SC and Adv N **De Jager**

Instructed by: Cluver Markotter Inc., Ms Lorinda Van Niekerk

¹⁶ *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC) at para [56].