



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 311/17

In the matter between:

GELYKE KANSE First Applicant

DANIËL JOHANNES ROSSOUW Second Applicant

**PRESIDENT OF THE CONVOCATION
OF THE UNIVERSITY OF STELLENBOSCH** Third Applicant

BERNARDUS LAMBERTUS PIETERS Fourth Applicant

MORTIMER BESTER Fifth Applicant

JAKOBUS PETRUS ROUX Sixth Applicant

FRANCOIS HENNING Seventh Applicant

ASHWIN MALOY Eighth Applicant

RODERICK EMILE LEONARD Ninth Applicant

and

**CHAIRPERSON OF THE SENATE OF
THE UNIVERSITY OF STELLENBOSCH** First Respondent

**CHAIRPERSON OF THE COUNCIL OF
THE UNIVERSITY OF STELLENBOSCH** Second Respondent

UNIVERSITY OF STELLENBOSCH Third Respondent

Neutral citation: *Gelyke Kanse and Others v Chairperson of the Senate of the University of Stellenbosch and Others* [2019] ZACC 38

Coram: Mogoeng CJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mathopo AJ, Mhlantla J, Theron J, Victor AJ

Judgments: Cameron J (unanimous): [1] to [51]
Mogoeng CJ (concurring): [52] to [63]
Froneman J (concurring): [64] to [98]

Heard on: 8 August 2019

Decided on: 10 October 2019

Summary: Section 29(2) of the Constitution — “reasonably practicable” — constitutionality of the language policy of the University of Stellenbosch — Afrikaans as a medium of instruction – access to higher education

Section 6 of the Constitution — protection and promotion of indigenous minority languages — diminished use and status

ORDER

On direct appeal from the High Court of South Africa, Western Cape Division, Cape Town:

1. Leave to appeal is granted.
2. The appeal is dismissed, with no order as to costs in this Court.
3. The costs orders in the High Court are set aside.
4. In their place is substituted:
“There is no order as to costs.”

JUDGMENT

CAMERON J (Mogoeng CJ, Froneman J, Jafta J, Khampepe J, Madlanga J, Mathopo AJ, Mhlantla J, Theron J and Victor AJ concurring):

Introduction

[1] At issue is the 2016 Language Policy (2016 Language Policy) of Stellenbosch University, the third respondent. The applicants challenge it. They are a voluntary association committed to equal chances for Afrikaans and all indigenous languages, together with six brown¹ and white students of the University who wish to receive tuition in Afrikaans. I refer to them collectively as Gelyke Kanse.² In proceedings in the High Court of South Africa, Western Cape Division, Cape Town (High Court) they sought to set aside the 2016 Language Policy and reinstate its predecessor, the University’s 2014 Language Policy (2014 Language Policy). The High Court rebuffed their challenge.³ They now seek leave to appeal against its finding.

Background

[2] In 2014, the University, after a twelve-year break,⁴ adopted a new language policy — the 2014 Language Policy.⁵ That Policy stipulated Afrikaans as well as English as the University’s languages of learning and instruction. It committed the

¹ Gelyke Kanse itself, and the individual applicants concerned, used the term “brown Afrikaners” or “brown people” for persons sometimes referred to in South Africa as “coloured people” or “kleurlinge”.

² “Gelyke Kanse” can be translated as “even chances”, “fair chances” or “equal opportunities”.

³ *Kanse v The President of the Convocation of the Stellenbosch University* 2017 JDR 1687 (WCC) (Dlodlo J and Savage J concurring) (High Court judgment) at paras 86 and 170.

⁴ The 2002 Language Policy emphasised single-medium Afrikaans tuition. Afrikaans was specified as the “default” option in the “hierarchy of language options” – but the Policy also provided for parallel medium teaching and, in exceptional cases, single-medium English tuition. There was also a “bilingual option” (T-Option). This envisaged teaching in both English and Afrikaans in the same class, but with not less than 50% Afrikaans being used.

⁵ In terms of section 27(2) of the Higher Education Act 101 of 1997 (the Act), in accordance with the Ministerial Language Policy for Higher Education of 2002 (LPHE).

institution to purposeful extension of the academic application of both languages. As the preferred options, where practically feasible and affordable, the 2014 Language Policy offered parallel medium teaching of undergraduate courses, in English and Afrikaans, with interpreting. In practice, this was mostly from Afrikaans to English. Postgraduate learning was in both English and Afrikaans, with significant use of English. The 2014 Language Policy envisaged promotion of isiXhosa as an emerging academic language, where feasible and affordable.

[3] Under the 2014 Language Policy, at undergraduate level, a student wanting tuition in Afrikaans could obtain it in all courses and classes, while one seeking English tuition could not always do so: some classes, at least, would be in Afrikaans. In those cases, interpreting within the lecture aimed to bring non-Afrikaans-speakers up to speed in English.

[4] After the Fees Must Fall and Open Stellenbosch upheavals on its campus during 2015, the University thought again. It appointed a working group to re-examine its language policy.⁶ After an arduous process the working group recommended a reformulation. This resulted in the 2016 Language Policy, which came into effect on 1 January 2017 and is at issue here. The 2016 Language Policy creates three language specifications – parallel, dual and single medium. Parallel medium – involving equal tuition in both English and Afrikaans – is used “where reasonably practicable and pedagogically sound”. Where not, classes are in dual medium. This means, in effect, teaching in English, with Afrikaans translation (as opposed to real-time interpreting), though questions and answers are conducted in Afrikaans.

[5] The major change from the 2014 Language Policy was that the University now committed itself to a one hundred percent English offering of all classes. This means that students not conversant in Afrikaans can receive all their tuition in English. But while English tuition increased, there was no concordant increase in Afrikaans. This

⁶ The working group was chaired by Professor Antoinette van der Merwe.

means that Afrikaans students inevitably receive at least some tuition in English. Despite this fact, under the 2016 Language Policy, Afrikaans is still offered on large scale at undergraduate level. And, more pointedly, all first-year lectures continue to be offered in Afrikaans.

[6] Although the University disputed that the 2016 Language Policy “invariably” reduces Afrikaans tuition – claiming “it merely reconfigures it” – this is not so. The 2016 Language Policy effectively gives preference to English in circumstances the Policy specifies. It does so in order to advance the University’s goals of equal access, multilingualism and integration. The 2016 Language Policy does maintain and preserve Afrikaans, but – crucially – this is now subject to demand and to available resources.

[7] The practical effect is that, while undergraduate classes are still generally offered in Afrikaans, Afrikaans has lost its position of primacy. Instead it is placed on a sandy footing where the deluge of English predominance, both local and global, could well destabilise and eventually topple it.

[8] This is what the applicants foresee and what they fear and what they seek to forestall in these proceedings by reinstating the 2014 Language Policy.⁷ In doing so, they invoke the precious right of mother tongue education, which is specifically enshrined in section 29(2) of the Bill of Rights.⁸ Gelyke Kanse’s argument goes more

⁷ In *Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* [1996] ZACC 4; 1996 (3) SA 165 (CC); 1996 (4) BCLR 537 (CC) (*Gauteng Provincial Legislature*), Sachs J at para 48 sought to articulate ways in which retention of Afrikaans would not collide with equity. He appeared to note that—

“there exists amongst a considerable number of people in this country a genuinely-held, subjective fear that democratic transformation will lead to the down-grading, suppression and ultimate destruction of the Afrikaans language and the marginalisation and ultimate disintegration of the Afrikaans-speaking community as a vital group in South African society.”

This may still be so 25 years after democracy.

⁸ Section 29(2) provides:

“Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account—

- (a) equity;

widely, even. It invokes the value to us as human beings, as constitutive of our self-conception and elemental to our functioning as social beings, of the language or languages with which we grew up:

“It is undoubtedly true that a mother tongue is not merely a linguistic system which can, with impunity, be replaced by another language. A child’s mother tongue is the language which allows [them] to impose a structure on the universe. It is associated with [their] thought processes, [their] sense of identity and [their] solidarity with [their] family and environment. As [they] matures, [their] mother tongue may become a symbol of regional or national pride, a means of gaining access to knowledge and wisdom. And it will usually be associated with feelings of warmth, intimacy, spontaneity.”⁹

High Court

[9] The High Court judgment is detailed and comprehensive and it would be superfluous to repeat its constitutional and statutory expositions and analysis. The High Court concluded that the previous 2014 Language Policy fell foul of the “reasonably practicable” criterion in section 29(2) of the Constitution, while, by contrast, the 2016 Language Policy conformed with this standard.¹⁰

[10] Applying the Supreme Court of Appeal’s decision in *AfriForum SCA*¹¹ (given that this Court had not yet heard AfriForum’s application for leave to appeal), the High Court held that the University’s 2016 Language Policy did not constitute administrative action.¹² It thus fell to be reviewed under the principle of legality; but it passed muster

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- (b) practicability; and
 - (c) the need to redress the results of past racially discriminatory laws and practices.”

⁹ *Innis Empire and Communications* (Press Porcépic, Victoria 1986) at 130 as quoted in De Varennes *Language Minorities and Human Rights: International Studies in Human Rights* (Kluwer International Law, The Hague 1996) at 193.

¹⁰ High Court judgment above n 3 at para 86.

¹¹ *University of Free State v AfriForum* [2017] ZASCA 32; 2017 (4) SA 283 (SCA) (per Cachalia JA; Swain JA, Mathopo JA, Fourie AJA and Schippers AJA concurring) (*AfriForum SCA*).

¹² High Court judgment above n 3 at paras 66-7.

even under the stricter test of administrative review.¹³ The High Court scrutinised the process by which the 2016 Language Policy was adopted and concluded that it was neither irrational nor unfair.¹⁴

[11] The High Court concluded that the 2016 Language Policy did not violate section 29(2), which required a “context-sensitive analysis”.¹⁵ That provision’s test of “reasonable practicability”¹⁶ requires an assessment of what is fair, feasible and satisfies the need to remedy the results of past discriminatory laws and practices.¹⁷ Nor did the 2016 Language Policy infringe sections 29(1)(b) or 6(2)¹⁸ of the Constitution.¹⁹ The prohibition against retrogressive measures, where enshrined rights are currently being enjoyed, does not operate abstracted from changes in context and circumstances. The High Court found that the University had advanced “appropriate justification” for any possible reduction in Afrikaans tuition that inevitably flowed from the 2016 Language Policy.²⁰

¹³ Id at para 113.

¹⁴ Id at paras 116-44.

¹⁵ Id at para 82 and *Head of Department; Mpumalanga Department of Education v Hoërskool Ermelo* [2009] ZACC 32; 2010 (2) SA 415 (CC); 2010 (3) BCLR 177 (CC) (*Ermelo*) at para 52.

¹⁶ Section 29(2) is set out in full above n 8.

¹⁷ High Court judgment above n 3 at para 28 and *Ermelo* above n 15 at para 53.

¹⁸ Section 6 of the Constitution, which forms part of Chapter One, headed “Founding Provisions”, reads in so far pertinent to the applicants’ case:

- “(1) The official languages of the Republic are Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu.
- (2) Recognising the historically diminished use and status of the indigenous languages of our people, the state must take practical and positive measures to elevate the status and advance the use of these languages.
- ...
- (4) The national government and provincial governments, by legislative and other measures, must regulate and monitor their use of official languages. Without detracting from the provisions of subsection (2), all official languages must enjoy parity of esteem and must be treated equitably.”

¹⁹ High Court judgment above n 3 at paras 106-9.

²⁰ High Court judgment above n 3 at paras 85-6, applying the decision of this Court in *Ermelo* above n 15, where Moseneke DCJ, on behalf of the Court, at para 52 stated that “when a learner already enjoys the benefit of being taught in an official language of choice the state bears the negative duty not to take away or diminish the right without appropriate justification”.

[12] Gelyke Kanse invoked the fact that the 2016 Language Policy was dissonant from the 2002 Ministerial LPHE. The LPHE explicitly encourages multilingualism and envisages development of all indigenous languages as university mediums.²¹ It also acknowledges that, as a language of scholarship and science, Afrikaans “is a national resource”.²² In this, it commits to “ensuring that the capacity of Afrikaans to function as such a medium is not eroded”.²³ Despite these affirmations, the High Court considered the LPHE, though an important guiding document, was not binding on the University.²⁴ In adopting the 2016 Language Policy, the University was free to depart from the LPHE. And it had shown good reason why a departure was justified.

In this Court

[13] Gelyke Kanse contends not only that the 2016 Language Policy violates section 29(2), but that it also contravenes other constitutional provisions, including section 6(2), section 6(4), the equality clause and other provisions of the Bill of Rights.

Leave to appeal and jurisdiction

[14] A fundamental right is at issue. This Court plainly has jurisdiction. Gelyke Kanse however seeks leave to bypass the Supreme Court of Appeal and appeal directly to this Court. This requires special consideration. Interrelated factors weigh in its favour. The Supreme Court of Appeal pronounced recently and thoroughly on language rights, specifically Afrikaans, at tertiary level in *AfriForum SCA*. That judgment’s main findings and analysis were affirmed by this Court in *AfriForum CC*²⁵ though, before this Court’s judgment, the High Court carefully considered and applied *AfriForum SCA*. This renders the desirability of a further appellate-level pronouncement in this area less pressing. And the High Court analysed the issues with

²¹ LPHE above n 5 at para 18.2.

²² Id at para 15.4.

²³ Id.

²⁴ High Court judgment above n 3 at para 110.

²⁵ *AfriForum v University of the Free State* [2017] ZACC 48; 2018 (2) SA 185 (CC); 2018 (4) BCLR 387 (CC) (*AfriForum CC*).

deep-going rigour and thoroughness. That sets the table for the disposition of the issues in this Court, without a further intermediate appeal.

[15] Though this Court denied the applicants in *AfriForum CC* leave to appeal, the factual setting and the issues Gelyke Kanse raises, as will emerge, are more complex. I would grant leave to appeal.

Analysis

[16] In advancing its case in this Court, Gelyke Kanse's factual assertions ranged widely. Yet, despite the importance and the emotional intensity of the issues, we are obliged to play fair with the facts. The well-worn test for the disposition of cases brought on application²⁶ requires that we decide the matter on the facts stated by the University, together with those Gelyke Kanse states that the University cannot deny, or of which its denials plainly lack credence and can be rejected outright on the papers.

[17] So approached, it is clear that, though triggered by the upheavals of 2015 (which counsel for the University rightly called a "catalyst"), the process for adopting the 2016 Language Policy was thorough, exhaustive, inclusive and properly deliberative. Largely for the reasons the High Court set out in detail,²⁷ the challenge to the Policy on process and rationality grounds must fail.

[18] Gelyke Kanse also sought to introduce evidence showing that the 2016 Language Policy is currently being implemented in a way that gives warrant to its fears about sidelining Afrikaans. But the High Court rightly rejected this evidence,²⁸ as must we. The 2016 Language Policy was implemented with effect from 1 January 2017. Gelyke Kanse's challenge was brought before that, on 30 September 2016. That makes these proceedings a facial challenge to the 2016 Language Policy itself. They are not an "as-

²⁶ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (A) at 634E-635C.

²⁷ High Court judgment above n 3 at paras 116-44.

²⁸ *Id* at paras 69-71.

applied” challenge. That means Gelyke Kanse cannot in its replying papers bring in evidence creating doubt about the legitimacy of the Policy because of how it is being applied.

[19] This is not to stump Gelyke Kanse on technical points. It is to insist that a litigant should stick to the case it has set out in its challenge, and that it does not ambush its opponent in reply with a new case and new evidence entirely. Gelyke Kanse has ample remedies should the University betray the commitment to Afrikaans it embraced in the 2016 Language Policy. For now, the question before us must be, and be only, whether the University has sufficiently justified the diminished role for Afrikaans in the 2016 Language Policy, as issued, and not as applied.

[20] This puts the focus where it should be, on Gelyke Kanse’s challenge based on the right to tertiary tuition in Afrikaans that the individual applicants claim under section 29(2) and section 6 of the Bill of Rights. Gelyke Kanse rightly contended that section 29(2) entails an enforceable right against the State to provide education in the language of the community so long as it is reasonably practicable.

[21] At the outset, it is important to note two salient features of the right to language. One is that respect for language preference, where appropriate and reasonable, entails no special concession or privileged treatment. It flows from fundamental rights and values. It is an embodiment of the right to be treated equally and without discrimination, which inheres in everyone.²⁹ It requires no special pleading for its recognition.

²⁹ See De Varennes above n 9 at 117:

“[T]he respect of language preferences of individuals, where appropriate and reasonable, flows from a fundamental human right and is not some special concession or privileged treatment. Simply put, it is the right to be treated equally without discrimination, to which everyone is entitled.”

[22] Second, it is established in international human rights law that the way in which that respect is practically realised must depend on what is appropriate and reasonable.³⁰ Section 29(2) of our Bill of Rights recognises this. It accords the right to receive education in public educational institutions in a language of choice “where that education is reasonably practicable”. In this, the Constitution accords with international instruments.³¹

[23] It is also important to state that the constitutional test of “reasonable practicability” in determining whether the right in section 29(2) may be conferred is in essence synonymous with the test of “appropriate justification” for cutting it back, once afforded. It could be said that they are two sides of the same coin, the former dealing with the positive duty to fulfil the right, and the latter with the negative duty not to take it away, once enjoyed. In *Ermelo*, this Court stated:

“In short, the reasonableness standard built into section 29(2)(a) imposes a context-sensitive understanding of each claim for education in a language of choice. An important consideration will always be whether the State has taken reasonable and positive measures to make the right to basic education increasingly available and accessible to everyone in a language of choice. It must follow that when a learner already enjoys the benefit of being taught in an official language of choice the State bears the negative duty not to take away or diminish the right without appropriate justification.”³²

[24] Gelyke Kanse sought to differentiate between the two tests. It contended that, once the right had been afforded, “appropriate justification” it was harder to surmount.

³⁰ UN Committee on Economic, Social and Cultural Rights, General Comment No 21 “Right of Everyone to Take Part in Cultural Life” E/C.12/GC/21 (2009) at para 61 and see further De Varennes “Language Rights as an Integral Part of Human Rights” (2001) 3 *International Journal of Multicultural Societies* 15 at 20-1.

³¹ See Article 29 of the Universal Declaration of Linguistic Rights, 9 June 1996; Article 8 of the European Charter for Regional or Minority Languages, 5 November 1992; Article 29(1)(c) of the Convention on the Rights of the Child, 20 November 1989; Article 12 of the Framework Convention for the Protection of National Minorities, 1 February 1995; Article 5 of the Convention Against Discrimination in Education, 14 December 1960; and Article 27 of the International Covenant on Civil and Political Rights, 16 December 1966.

³² *Ermelo* above n 15 at para 52.

But the High Court rejected this contention,³³ rightly invoking the reasoning in *AfriForum SCA* and *University of Pretoria*.³⁴ Both judgments correctly affirm that *Ermelo* did not create two separate standards. *Ermelo* goes no further than reaffirming the distinction between positive and negative duties.³⁵

[25] Gelyke Kanse developed its section 29(2) case in tandem with section 6(2), which recognises the State’s duty to take practical and positive measures to elevate the status of indigenous and diminished languages.³⁶ Section 6(4) further requires national and provincial governments to regulate and monitor the use of official languages and ensure that they enjoy parity of esteem and equitable treatment.³⁷ Universities as organs of State, the argument proceeded, must heed section 27(2) of the Act which requires universities to adopt language policies “subject to” the LPHE.³⁸ In the light of all this, Gelyke Kanse urged, the 2016 Language Policy lacks meaningful guidelines, it directly discriminates against Afrikaans-speaking students, and diminishes Afrikaans tuition at the University in a way not justified on any basis.

³³ High Court judgment above n 3 at paras 85-6.

³⁴ *AfriForum v Chairperson of the Council of the University of Pretoria* 2017 JDR 0150 (GP) (Kollapen J) (*University of Pretoria*) at para 54.

³⁵ As Currie and De Waal explain in *The Bill of Rights Handbook* 6 ed (Juta, Cape Town 2013) at 639:

“[T]he Constitution recognises a right only to publicly funded mother-tongue education in an official language. Nevertheless, given that there are eleven official languages, the right imposes potentially onerous positive obligations. The subsection therefore contains an internal modifier. The right may only be claimed where instruction in an official language of choice is ‘reasonably practicable’. Where a learner already enjoys the benefit of being taught in an official language of choice the state bears the negative duty not to take away or diminish the right without appropriate justification.”

³⁶ Afrikaans is “a creole language, a variant of the Dutch 17th century colonists, with some lexical and syntactical borrowings from Malay, Bantu languages, Khoisan languages, Portuguese and other European languages” (Currie “Official Languages” in Woolman et al (eds) *Constitutional Law of South Africa* Service 6 (2014) at 15, drawing on Gordon (ed) *Ethnologue: Languages of the World* 15 ed (2005) available at <http://www.ethnologue.com>). In *Gauteng Provincial Legislature* above n 7 at para 49, Sachs J described Afrikaans as “possibly the most creole or ‘rainbow’ of all South African tongues”. From a linguistic standpoint, Afrikaans is properly classified not only as a fully-fledged, independent language rather than a dialect, but also as a language indigenous to South Africa.

³⁷ See section 6(4) as set out in full above n 18.

³⁸ Section 27(2) of the Act provides:

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

[26] Gelyke Kanse is correct in its assertion that the constitutional criterion of reasonable practicability is to be judged objectively, and that it requires an approach founded in evidence. But the evidence is against Gelyke Kanse. The evidence shows that, near-universally, brown and white-Afrikaans-speaking first-year entrants to the University are able to be taught in English. Conversely, though most entrants are able to receive tuition in Afrikaans, a significant minority cannot.

[27] And, of course, as so often in our country, there is a hard racial edge to the differences these facts entail. Two aspects stand out. First, most black (in contradistinction to brown) new entrants to the University are not conversant enough to be able to receive tuition in Afrikaans. Second, seen as a bloc, the new entrants for whom Afrikaans is an obstruction are not brown or white, but overwhelmingly black.

[28] The uneasy truth is thus that the primacy of Afrikaans under the 2014 Language Policy created an exclusionary hurdle for specifically black students studying at Stellenbosch. The racial colouring of the barrier is unavoidably freighted with implication. The evidence the University presented showed that elements of the 2014 Language Policy, when applied, left a sting. Separate classes in English and Afrikaans, or single classes conducted in Afrikaans, with interpreting from Afrikaans into English, made black students not conversant in Afrikaans feel marginalised, excluded and stigmatised. They were not proficient in Afrikaans, could not understand the lectures presented in Afrikaans or, where the balanced use of Afrikaans and English was offered, they felt stigmatised by real-time interpretation (which was almost solely used for translating lectures they could not understand). Also, less directly pertinent to the “right to receive education”, they felt excluded from other aspects of campus life, including residence meetings and official University events held in Afrikaans, without interpretation.

[29] These facts Gelyke Kanse cannot, and it seems, does not, contest. Its response was, in the technical language of legal pleadings, confession and avoidance. It said, “Yes, but” – with its “but” being this: in contrast to what happened at the University of

the Free State in *AfriForum CC*, classes separated by language at Stellenbosch University were not racially distinct. The University contended this is because numbers of brown students prefer to be taught in Afrikaans (although it seems that most are either comfortable with, or prefer, tuition in English). This meant that, unlike *AfriForum CC*, where racial segregation was the reason for dispensing with Afrikaans as a medium of instruction, this was not so with the 2016 Language Policy. It was something subtler, but still palpable, and still substantial: the erection along racial lines of a barrier to full access to Stellenbosch's learning and other opportunities.

[30] That sting Gelyke Kanse sought to deflect by urging the University to ameliorate the exclusionary impact of Afrikaans by upping its parallel medium offering for all undergraduates in both Afrikaans and English. With fully parallel tuition in both English and Afrikaans, with brown, white and black students distributed across both mediums, there would be no marginalisation, no exclusion, no stigma.

[31] The University conceded that this was feasible. But was it "reasonably practicable" in the sense of section 29(2), entitling Gelyke Kanse to insist on it? The University said No. The University determined by careful study that the cost of immediately changing to fully parallel medium tuition would total about R640 million in infrastructure (including additional classrooms), plus about R78 million each year thereafter for additional personnel costs. This would entail a 20% increase in fees, an additional R8 100 on top of the approximately R40 000 per year students on average pay now. Reasonably practicable? The University said No.

[32] Gelyke Kanse cried foul when the University's answering affidavits set out the cost as a justifying factor. It pointed out that cost did not specifically feature in either the working group processes or in the deliberations of Senate and Council when they adopted the 2016 Language Policy. Cost, Gelyke Kanse objects, is a belated make-do. This I think is incorrect. In almost any conceivable issue of institutional management, whether in a profit-driven or no-profit enterprise, cost is an inevitable consideration. The University was entitled to cite cost in answering Gelyke Kanse's challenge since,

albeit inexplicit, it would all along have been a real and substantial factor in its attempts to figure out what it could do to improve the 2014 Language Policy.

[33] In short, the University was entitled to defend the 2016 Language Policy by showing that the cost of offering all undergraduate courses in parallel English and Afrikaans, so that students not conversant in Afrikaans can have English tuition, but without diminishing Afrikaans, would be enormously, even if not prohibitively, expensive.

[34] To this, Gelyke Kanse's answer, which its counsel gave during argument, was that there are sources the University could tap to meet this cost. Counsel mentioned some. He alluded to wealthy alumni of the University who oppose diminishing the place of Afrikaans, and trust funds dedicated to protection of the heritage of Afrikaans. This does not seem to me to meet the point. Any institutional allocation of cost involves, not exactly a zero-sum calculation, but some detraction from resources that could be deployed elsewhere. The question is not whether the University could conceivably marshal the resources to sustain fully parallel English/Afrikaans undergraduate tuition, but whether doing so was reasonably practicable.

[35] In this there was a judgment about cost, combined with a judgment about value. The University's Senate and Council and executive officers made that judgment. They determined that the cost of sustaining fully parallel medium English/Afrikaans undergraduate tuition could not be justified, given other, often competing, claims on its resources.

[36] Does the University's judgment on this fail the Constitution's "reasonably practicable" test? Largely for the reasons the University gives, and which the High Court upheld,³⁹ I think not. The University's determinative motivation for introducing the 2016 Language Policy was to facilitate equitable access to its campus

³⁹ High Court judgment above n 3 at paras 51 and 90-3.

and to its teaching and learning opportunities by black students who are not conversant in Afrikaans. The University's decision-making structures, with a scrupulous eye on racial equity, access and inclusiveness, judged that (a) a downward adjustment of Afrikaans, without by any means eliminating it, was warranted; and (b) taking into account the overall needs of the institution, the cost of avoiding the down-adjustment was too high.

[37] The Supreme Court of Appeal's decision in *AfriForum SCA*⁴⁰ held that "reasonably practicable" in section 29(2) involves both a factual and normative (constitutional) element.⁴¹ This Court adopted and endorsed this approach in *AfriForum CC*.⁴² The University's motivation and judgment on cost here accords with that analysis. Both the factual and normative elements the provision envisages were satisfied.

[38] A different way to pose the dilemma Gelyke Kanse brings before us is this. Is it permissible under section 29(2), where tuition is being offered in an official language of choice at a public educational institution, to diminish that offering (while not extinguishing it) in order to enhance equitable access for those not conversant in that language, when the institution judges the cost of non-diminution too high? In my view the answer is Yes.

[39] Both the facts at issue, and the doctrine articulated, in *AfriForum CC* support this conclusion. There, the University of the Free State abolished parallel medium classes, and, with them, Afrikaans as a medium of instruction, because black students chose English, and the students who wanted Afrikaans were white. This resulted in classes

⁴⁰ *AfriForum SCA* above n 11 at para 27.

⁴¹ *Ermelo* above n 15 at paras 45-7 and 51-3.

⁴² *AfriForum CC* above n 27 at paras 53-4.

segregating white students from black students. In these circumstances, this Court accepted that separate parallel classes gave rise to racial friction and antagonism.⁴³

[40] Here, unlike at the University of the Free State, the University by no means abolished Afrikaans. Also dissimilar is that some students seeking tuition in Afrikaans are brown. This means that racial segregation of the kind at issue in *AfriForum CC* is not a feature. Nevertheless, the University's evidence indicates that dual medium classes with interpreting from Afrikaans to English peripheralise and stigmatise black students not conversant in Afrikaans. That, together with the non-prohibitive but significant cost of upscaling to full parallelism means that sustaining the 2014 Language Policy was not reasonably practicable for the University.

[41] This is to say that the exclusion of non-Afrikaans speakers from full participation in tuition and other institutional benefits seems to me a legitimate basis for upgrading English, while continuing to offer significant tuition in Afrikaans, even while sacrificing the previous primacy of Afrikaans. In this, a sliding scale of what is lost in language terms, and what is retained, as against the social justice objective sought to be attained, weighed together, where appropriate, with cost considerations, seems to me constitutionally justified.⁴⁴

⁴³ The dissentients, Froneman J, Cameron J and Pretorius AJ, objected that the Court did so, on this point, without oral argument or any specific factual basis. See *AfriForum CC* above n 25 per Froneman J at paras 96, 99-100 and 110-2.

⁴⁴ De Varennes above n 30 at 21-2, suggests a "sliding scale model":

"Beginning at the lower end of what will be called a "sliding-scale model", public officials should at the very least have official documents and forms available in appropriate areas where there is a low, though sufficient number of speakers of a minority language. As the numbers progressively get higher, in addition to bilingual or minority language documents, public officials would have to accept and respond to applications in a minority language. At the very top of the scale, there would have to be some kind of bilingual administration in districts where a minority language is used by a very high percentage of the population. This means that there would have to be a sufficient number of public officials who are in contact with the public in place to respond to the use of the non-official or minority language, and even that in these areas the minority language be used as an internal and daily language of work within public authorities. So the principle, based on the relevant treaty provisions or non-discrimination, would apply to all activities relating to "administrative or public authorities", all areas of state involvement, including the judiciary, state education, state-provided health services, public broadcasting, etc.

For example, where a sufficient number of students of a linguistic minority are concentrated territorially, it would be unreasonable - and in all likelihood be a breach of non-discrimination - for a state not to provide an appropriate degree of use of their language as medium of instruction in public schools. The degree of use of a minority language will vary according to what is "reasonable", "appropriate" or

[42] Earlier, I noted it was the University’s own decision-making structures that “judged” that the cost of securing inclusivity in teaching, while not diminishing Afrikaans, was too high.⁴⁵ Well, who are they to judge that? It is a good question. Certainly, the Court owes no obvious deference to the institution making the judgment. The Court must itself scrutinise the facts the institution advances for diminishing language-preferent tuition,⁴⁶ while bearing in mind that it is a multifaceted functional determination in which the judgment of those entrusted with the institution’s well-being should be accorded what this Court has called “appropriate respect”.⁴⁷ This means that when considerations of cost are advanced, the Court’s scrutiny will necessarily be tempered by some measure not of deferring to a judgment that might not be sound,⁴⁸ but rather of prudent worldly-wise caution in supplanting the judgment of experienced others.

“practical” in each situation: the extent of demand for such instruction, the level of use of the minority language as medium of instruction, the state’s ability to respond to these demands, etc.”

⁴⁵ See [31] and [35] above.

⁴⁶ See *Ermelo* above n 15 at para 52.

⁴⁷ It is in exactly this sense that this Court explained “deference” to administrative decision-making bodies in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) (*Bato Star*) at para 48:

“In treating the decisions of administrative agencies with the appropriate respect, a Court is recognising the proper role of the Executive within the Constitution. In doing so a Court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A Court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a court should give weight to these considerations will depend upon the character of the decision itself, as well as on the identity of the decision-maker. A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the Courts. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a Court should pay due respect to the route selected by the decision-maker. This does not mean however that where the decision is one which will not reasonably result in the achievement of the goal, or which is not reasonably supported on the facts or not reasonable in the light of the reasons given for it, a Court may not review that decision. A Court should not rubber-stamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker.”

⁴⁸ See further on deference *Bato Star* id; *Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd*; *Minister of Environmental Affairs and Tourism v Bato Star Fishing (Pty) Ltd* [2003] ZASCA 46; 2003 (6) SA 407 (SCA) at para 50; and *Logbro Properties CC v Bedderson N.O.* [2002] ZASCA 135; 2003 (2) SA 460 (SCA) at paras 20-1.

[43] This is not airy doctrine. It is practical. Chapter 4 of the Act,⁴⁹ partly through each university's institutional statute and rules,⁵⁰ vests very considerable decision-making responsibilities and fiduciary duties in the council,⁵¹ senate,⁵² and executive governance structures⁵³ of each higher education institution. Members of university councils and their committees must be persons "with knowledge and experience relevant to the objects and governance of the public higher education institution concerned".⁵⁴ These include both members of the university's executive team⁵⁵ and "outside" members of the council.⁵⁶ No sensibly functioning higher education institution can afford to be without senior persons in its governance structures who are both skilled in finance and knowledgeable about the institution's own needs, risks and opportunities.

[44] Given this, then, what do we make of the University's costs claims? It said that the additional 20% on top of existing student fees that Gelyke Kanse's solution to its dilemma entailed was not reasonably practicable. It does not require deference to flinch from substituting that judgment. It requires only accepting that cost considerations, when scrupulously calculated, as here, and conscientiously propounded, as here, should weigh seriously with a court that adjudicates a claim of rights infringement under section 29(2).

[45] Considering the facts and figures the University advances, it seems to me impossible to set aside or override its conclusion that it was not reasonably practicable

⁴⁹ Sections 26-38 of the Act.

⁵⁰ Section 32 of the Act.

⁵¹ Section 27 of the Act.

⁵² Section 28 of the Act.

⁵³ Section 30 of the Act.

⁵⁴ Section 27(7)(a) of the Act.

⁵⁵ Section 27(4)(a) and (b) of the Act.

⁵⁶ Section 27(4)(c) and (h) of the Act.

to introduce full parallel medium undergraduate teaching in order to avoid some diminution of Afrikaans.⁵⁷

Broader considerations

[46] Gelyke Kanse’s approach to whether Afrikaans is an “indigenous language” envisaged in section 6(2) seems to have fluctuated. It did not deny that, at least since Afrikaans supplanted Dutch as an official language in pre-democracy South Africa in 1925,⁵⁸ Afrikaans has not been disadvantaged by “historically diminished use and status”, as contemplated by the provision.⁵⁹ But Gelyke Kanse rightly insisted on Afrikaans’s indigeneity⁶⁰ and that it was entitled anyhow under section 6(4) to “parity of esteem” as an official language, and hence that it “must be treated equitably”. The High Court mentions Gelyke Kanse’s section 6(4) argument⁶¹ but does not engage with it; “parity of esteem” and “treated equitably” as constitutional injunctions not detracting from section 6(2) may require consideration.⁶²

⁵⁷ It must be stated that the University certainly made a far more convincing case of setting out and explaining its cost considerations relating to the 2016 Language Policy than the constitutional duty-bearer, the City, did in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* [2011] ZACC 33; 2012 (2) SA 104 (CC); 2012 (2) BCLR 150 (CC) at paras 68-75, where the City spoke “in the vaguest terms” about affordability.

⁵⁸ By the enactment of the Official Languages of the Union Act 8 of 1925.

⁵⁹ High Court judgment above n 3 at para 107. In *Ermelo* above n 15 at para 47, Moseneke DCJ on behalf of the Court explained that “[s]ection 6(1) read with section 6(2) warrants and widens the span of our official languages from a partisan pair to include nine indigenous languages which for long have jostled for space and equal worth”.

⁶⁰ See above n 36.

⁶¹ High Court judgment above n 3 at para 14.

⁶² Afrikaans enjoys protection under section 6(4) as the section speaks of “official languages”. However, unlike the positive duty placed upon the State by section 6(2) to take “practical and positive measures”, the duty imposed by section 6(4) is not oriented towards a strongly normative goal. It affords the State a wide margin in implementing its policy for the use of official languages. The subsection is thus a conserving constraint on government’s existing use and practice of official languages like Afrikaans. This is so because it explicitly stipulates that this does not detract from the corrective measures required by section 6(2) but rather seeks to ensure that, in doing so, no official language is disregarded or treated inequitably. Section 3(2) of the interim Constitution, in fact, explicitly required non-diminution:

“Rights relating to language and the status of languages existing at the commencement of this Constitution shall not be diminished, and provision shall be made by an Act of Parliament for rights relating to language and the status of languages existing only at regional level, to be extended nationally in accordance with the principles set out in subsection (9).”

See also section 3(5) of the interim Constitution, which provides for provinces to determine their own official languages.

[47] Gelyke Kanse implored the Court to set aside the 2016 Language Policy. Upholding the University’s policy change, counsel urged, would signal the end of Afrikaans as a language of tertiary instruction. While counsel’s plea on behalf of indigenous languages other than Afrikaans may have seemed opportunistic, the dire entreaty compels reflection. Endorsing the University’s 2016 Language Policy as conforming with section 29(2) comes at a cost. Our judgment must acknowledge it.

[48] Afrikaans has been recognised in this Court as “one of the cultural treasures of South African national life”.⁶³ The flood-tide of English risks jeopardising the precious value of our entire indigenous linguistic heritage. Gelyke Kanse is entitled to invoke that risk. This is because the march of history both in South Africa and globally seems relentlessly hostile to minority languages, including Afrikaans, which is the mother tongue of some seven million⁶⁴ on a planet inhabited by seven billion people.

[49] But that is not the University’s burden, as little is the fact that Afrikaans has all but vanished at other tertiary institutions, barring only one other.⁶⁵ And the dilemmas the global march of English poses is not the question before the Court. Yet we should not miss the cost that the diminution of Afrikaans at the University entails not only for Gelyke Kanse and its adherents, but for our world, and for ourselves.⁶⁶

⁶³ *Gauteng Provincial Legislature* above n 7 at para 49.

⁶⁴ Statistics South Africa *South African National Census of 2011* (Report No. 03-01-41, 2012) at 23.

⁶⁵ The Potchefstroom campus of North-West University.

⁶⁶ There is however also cause for hope. While indigenous languages do not (yet) enjoy parity of esteem at tertiary level, in 2017, Rhodes University awarded its first PhD in isiXhosa: Mahlakoana “PhD Written in isiXhosa Hailed as Milestone” *IOL* (23 April 2017) available at <https://www.iol.co.za/news/south-africa/phd-written-in-isixhosa-hailed-as-milestone-8779991>. The University of Fort Hare followed suit in 2018: “History Made As Fort Hare Awards First PhD written in isiXhosa” *News24* (23 October 2018) available at <https://www.news24.com/SouthAfrica/News/history-made-as-fort-hare-awards-first-phd-written-in-isixhosa-20181023>. This matches a growing trend in South African popular culture: in telenovelas such as *The Queen* and *The River* both set in Gauteng embracing Setswana, isiZulu, isiXhosa, *The Throne* which is set in Magaliesburg and embraces Setswana. *Skeem Saam* is set in Turfloop and embraces Sepedi, *Muwango* is set in Venda and embraces Tshivenda, *7de Laan* and *Binnelanders* are set in Johannesburg and embrace Afrikaans. Finally, in April 2019, South Africa celebrated the first-ever Xitsonga telenovela, *Giyani: Land of Blood* which is set in Giyani. See Hlaalethwa “‘Giyani’ Translates to Viewers” *Mail & Guardian* (12 April 2019) available at <https://mg.co.za/article/2019-04-12-00-giyani-translates-to-viewers>.

Costs

[50] The High Court, like *AfriForum SCA* ordered costs against Gelyke Kanse. Before this Court, the University – recognising early that the costs order was at odds with *Biowatch*,⁶⁷ which protects constitutional litigants against adverse costs orders when litigating against organs of state – abandoned that award. The High Court, however, made a separate award against Gelyke Kanse in respect of its misbegotten attempts to expand its case in reply and its failed resistance to an order striking out additional material in its reply. While counsel for the University did not disavow those costs when directly asked about them, he did not seek to cling to them. I appreciate that the High Court exercised its discretion in awarding those adverse costs, but would intervene to set them aside on the basis that, viewed overall, and notwithstanding its adventitious mistakes, Gelyke Kanse never forfeited its *Biowatch* shield. Clearly there should be no costs award in this Court

Order

[51] The following order is made:

1. Leave to appeal is granted.
2. The appeal is dismissed, with no order as to costs in this Court.
3. The costs orders in the High Court are set aside.
4. In their place is substituted:
“There is no order as to costs.”

MOGOENG CJ (Cameron J concurring):

[52] Stellenbosch University felt constrained to revise its 2014 Language Policy in order to keep up with the access to education demands of the times. The central features

⁶⁷ *Biowatch Trust v Registrar Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) (*Biowatch*).

of its new policy, the 2016 Language Policy, that have engaged us, read in relevant parts:

“7.1.3 For undergraduate modules where it is reasonably practicable and pedagogically sound to have more than one class group:

7.1.3.1 There are separate lectures in Afrikaans and English.

...

7.4.1.2 The Afrikaans offering is managed so as to sustain access to [Stellenbosch University] for students who prefer to study in Afrikaans and to further develop Afrikaans as a language of tuition where reasonably practical.”

[53] The words “reasonably practicable” and “access” are not a product of the University’s creativity, but an unmistakable consequence of its set determination not to veer off the dictates of the Constitution in relation to the right to instruction in one’s language of choice. For section 29(2) of our Constitution says:

“Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account—

- (a) equity;
- (b) practicability; and
- (c) the need to redress the results of past racially discriminatory laws and practices.”

[54] The University had English and Afrikaans as co-equal mediums of instruction for years before the impugned policy-shift came into being. The need for change was subsequently identified. Hence, the 2016 Language Policy that birthed this application. And a question does arise whether the pre-existing position could not perhaps have been maintained as long as some of our people desire to be taught in Afrikaans. On this, this Court has previously said:

“At a conceptual level, dual medium institutions might well exist without necessarily nurturing or perpetuating unfair advantage or racial discrimination and its exceedingly harmful tendencies. When that is so, then the right to be taught in a language of choice could be effectively accessible and implemented. That, by the way, is what the University did or hoped to achieve when it moved from a dispensation of Afrikaans as the sole medium of instruction to one where English and Afrikaans enjoyed equal status as media of instruction. It did so to facilitate equitable access for the previously excluded who are mostly better acquainted with English so that they too, could utilise this vital public resource for honing in their much-needed skills.”⁶⁸

[55] I reiterate that one of the critical features of the 2016 Language Policy-direction is said to be the need to facilitate access to education for those students who are not proficient in Afrikaans and are predominantly siXhosa-speaking. This is set to be achieved with due regard to the pre-existing entitlement of some students to be taught in Afrikaans. Additionally, the financial burden that comes with maintaining the two language streams struck the University as being just too onerous to bear. And the reasonable practicability of and effective access to, being taught in a language of choice must, regard being had to considerations of equity, practicability and the need to redress, be counterbalanced with the need to facilitate access to education through any medium even if some might, given a choice, not have preferred it.

[56] On that need to have our institutions of education accessible to all with due regard to the reasonable practicability of receiving education in a language of choice, we also said:

“Educational institutions are also grappling with challenges of access to opportunities to study or enrol for high cost disciplines like medical sciences and engineering where space is very limited. For these reasons, effective access to the right to be instructed in an official language of choice must be given effect to, but without undermining equitable access, preserving exclusivity or perpetuating racial supremacy. It would be unreasonable to wittingly or inadvertently allow some of our people to have unimpeded access to education and success at the expense of others as a direct consequence of a

⁶⁸ *AfriForum CC* above n 25 at para 51.

blind pursuit of the enjoyment of the right to education in a language of choice. This, in circumstances where all could properly be educated in one common language.”⁶⁹

[57] That access must of course be addressed with due sensitivity to the reality that students, desirous of being instructed in Afrikaans, would as in this case, have had that choice available to them all along. Taking away that enjoyment or minimising its availability must be permissible only for good reason. That prejudicial step may not be taken lightly, insensitively, maliciously or inconsiderately. In the belief that parts of section 29(2) of the Constitution, concerning the assertion of the right on the one hand and how to give practical expression to it on the other, are not to be construed disjunctively but conjunctively. We have had occasion to express ourselves in these terms, particularly on the need for “appropriate justification”:⁷⁰

“Reasonableness within the context of section 29(2) demands that equity, practicability and the critical need to undo the damage caused by racial discrimination, also be the intrinsic features of the decision-making process relating to effective access to education in a language of choice. For they are some of the decisive factors to which regard must be had even where ‘a learner already enjoys the benefit of being taught in an official language of choice.’ Inequitable access and the unintended entrenchment or fuelling of racial disharmony would thus be the ‘appropriate justification’ for taking away or diminishing the already existing enjoyment of the right to be taught in one’s mother tongue.”⁷¹

[58] Although facts may point to how a principle is to be applied to them, facts do not redefine a principle. A principle, particularly one that is constitutional in character, remains fundamentally unaffected by the dissimilarity of facts in different cases. Like the Constitution from which it is sourced, it ought to be applied to all subsequent matters to which it is relevant even if the new facts are different from those of the case in which the principle was first laid down. For this reason, while the facts in *AfriForum CC*

⁶⁹ Id at para 49.

⁷⁰ The term “appropriate justification” was first used in *Ermelo* above n 15 at para 52.

⁷¹ *AfriForum CC* above n 25 at para 50.

admittedly had more to do with blunt racial segregation or overtones than here, the principles we enunciated in relation to reasonable practicability, the need for redress and access to education, apply with equal force to this matter.

[59] The understanding and application of reasonable practicability and the need to equitably enhance access to education for all, as they have arisen here, stand to be guided by our articulation of these principles in *AfriForum CC*. That is what fidelity to precedent demands of us.

[60] I agree with Cameron J that, in effect, it is neither reasonably practicable nor equitable to adhere to the position that was obtained before the 2016 Language Policy came into being. It indeed frustrates access to education by many. In his judgment I concur.

[61] With all that done and dusted, it needs be said that Afrikaans is indeed an African language, our historic pride to be treasured by all citizens. Its existence precedes colonialism. And its subsequent development with the appropriately enriching infusion of terms from Dutch or any other European language and the unjust attempt to impose it on others, do not at all affect its original African DNA.

[62] Our highly challenged fiscus has however, imposed a constraint on us to share all the acutely limited public resources among ourselves as generously as considerations of justice, equity and reconciliation, informed by reasonable practicability, permit us to. As a result, it is most fitting to appeal particularly to our corporate citizens' spirit of generosity, to help preserve Afrikaans, and develop other indigenous languages, as essential tools for knowledge impartation and comprehension. And that they can do by deploying resources to the establishment of private institutions of learning envisaged by section 29(3) of the Constitution, which would obviously not be driven by any sinister agenda to discriminate against others on any unconstitutional basis

[63] None of the dignity-restoring and enhancing aspirational measures laid down in our Constitution should deliberately or inadvertently, be rendered unworthy of the constitutional space they occupy. Plans to enhance the status and promote the use of indigenous languages, in line with section 6 of our Constitution, must thus be developed and kept ready for implementation as soon as the contestation for our scarce resources, by key national priority areas, has ebbed out. Where immediate implementation is reasonably practicable it would arguably serve us well to act. And that process would hopefully extend to the possible recognition and equal development of all spoken languages of the First Nation people.

FRONEMAN J (Cameron J concurring):

[64] It is always a pleasure to read the elegant and persuasive judgments of my brother Cameron J. His judgment here (first judgment) is no exception. I concur in its reasoning and outcome. The first reason for doing so is that we are, of course, bound by this Court's judgment in *AfriForum CC* on which the first judgment builds. My separate concurrence does not question the legal reasoning underlying the first judgment's adherence to *AfriForum CC*, nor the legal reasoning of *AfriForum CC* itself. Judicial precedent is a fundamental aspect of the rule of law.⁷² This binding precedent is buttressed by

Dit is altyd 'n voorreg om my ampsbroeder, Cameron R, se elegante en meevoerende uitsprake te lees. Weereens is dit geen uitsondering nie. Ek stem saam met die eerste uitspraak se redevoering en uitslag. Die eerste rede daarvoor is natuurlik dat ons gebonde is aan hierdie Hof se uitspraak in *AfriForum CC*, waarop die eerste uitspraak voorbou. My afsonderlike uitspraak bevraagteken nie die onderliggende regsbeginsels van die eerste uitspraak se bevestiging en ondersteuning van *AfriForum CC* nie. Regspresedent is grondliggend tot 'n regstaat en die legaliteitsbeginsel.⁷² Maar

⁷² *Turnbull-Jackson v Hibiscus Coast Municipality* [2014] ZACC 24; 2014 (6) SA 592 (CC); 2014 (11) BCLR 1310 (CC) at paras 54-6.

recognising that, substantively, South Africa's history and current inequality entail that the white Afrikaans-speaking minority, because of its historically and currently privileged position, cannot exact the same treatment as historically disadvantaged minorities.⁷³ The substantive advantages the Afrikaans-language minority has generally enjoyed, in contradistinction to other linguistic minorities, makes this inevitable.

[65] Why, then, a separate concurrence? Simply put it is because, looking to the future, I believe a cautionary tale is needed.

[66] The first judgment candidly declares that “[e]ndorsing the University’s 2016 Language Policy as conforming with section 29(2) comes at a cost. Our judgment must acknowledge it”.⁷⁴ It recognises that the “flood-tide of English” is a real threat to minority languages, including Afrikaans.⁷⁵ It

hierdie bindende regspreudent word ondersteun deur die substantiewe erkenning dat ons Suid-Afrikaanse geskiedenis en huidige ongelykheid beteken dat wit Afrikaanssprekendes nie dieselfde behandeling as voorheen benadeelde taalminderheidsgroepe kan verwag nie.⁷³ Die wesenlike voordele wat Afrikaanssprekendes geniet het in teenstelling met ander taalminderhede maak dit onvermydelik.

Waarom ‘n afsonderlike instemmende uitspraak? Omdat, eenvoudig gestel, die pad vorentoe ‘n waarskuwing inhou.

Die eerste uitspraak verklaar rondborstig dat “[e]ndorsing the University’s 2016 Language Policy as conforming with section 29(2) comes at a cost. Our judgment must necessarily acknowledge it”.⁴ Dit erken dat die vloedgolf van Engels ‘n daadwerklike risiko inhou vir minderheidstale as onderrigtale,

⁷³ *Tshwane City v AfriForum* [2016] ZACC 19; 2016 (6) SA 279 (CC); 2016 (9) BCLR 1133 (CC) at para 120 and *AfriForum CC* above n 25 at para 134.

⁷⁴ First judgment at [47].

⁷⁵ *Id* at [48]:

“The flood-tide of English risks jeopardising the precious value of our entire linguistic heritage. Gelyke Kanse is entitled to invoke that risk. This is because the march of history both in South

proceeds then to state that this risk is not Stellenbosch University's burden, nor is the fact that Afrikaans has all but vanished as a language of instruction at other tertiary institutions.⁷⁶ I think it may be helpful for the future if we explore what that cost is and who will have to bear the burden of carrying it.

[67] The structure I will follow to do this is first to—

- (a) set out my understanding of the substantive justification in *AfriForum CC* and the first judgment for the use of different models of language instruction at tertiary education level; and then
- (b) translate the impact of that into the practical effect it has on different language speakers at Stellenbosch University and nationally.

On the basis of this analysis, I will then attempt to tease out the cost our

insluitend Afrikaans.⁵ Dit is nie die Universiteit van Stellenbosch se las nie, so ook nie die feitlike verdwyning van Afrikaans van ander tertiêre instellings nie.⁶ Ek dink dit sal waardevol vir die toekoms wees om na te gaan wat die gevolge is en wie uiteindelik die las daarvan sal dra.

Die werkswyse sal wees om eers—

- (a) my siening van die substantiewe regverdiging vir die gebruik van verskillende taalonderrig modelle op tertiêre vlak in *AfriForum CC* en die eerste uitspraak uiteen te sit; en dan
- (b) die impak daarvan op verskillende taalsprekers by die Universiteit van Stellenbosch en verder landswyd in praktiese terme te verduidelik.

Op grond van hierdie analise sal ek dan die gevolge van ons regspraak oor taalkeuse onder die Grondwet probeer

Africa and globally seems relentlessly hostile to minority languages, including Afrikaans, which is the mother-tongue of some seven million on a planet inhabited by seven billion people.”

⁷⁶ Id at [49]:

“[T]hat is not the University's burden, as little is the fact that Afrikaans has all but vanished at other tertiary institutions, barring only one other. And the dilemma the global march of English poses is not the question before the Court. Yet we should not miss the cost that the diminution of Afrikaans at Stellenbosch entails not only for Gelyke Kanse and its adherents, but for our world, and for ourselves.”

jurisprudence on language choice under the Constitution exacts – and on whom the burden of carrying that cost will fall.

Substantive justification

[68] The underlying rationale for the outcome that both *AfriForum CC* and the first judgment articulate is that the use of Afrikaans as a medium of instruction leads to the exclusion or stigmatisation of black students.⁷⁷ Because most Afrikaans-speaking students are proficient in English, but black students are not co-equally proficient in Afrikaans, policies that favour English as medium of instruction are judged normatively reasonable.⁷⁸ This emerges from the context of the historical and current institutional privileges that white Afrikaans-speakers enjoyed and still enjoy.⁷⁹

[69] This justification has an entailment. It exacts an inexorable price from any form of language instruction where Afrikaans is sought to be used.

ontrafel – en ondersoek doen oor wie dan die las daarvan sal dra.

Substantiewe regsverdiging

Beide *AfriForum CC* en die eerste uitspraak druk die onderliggende rede vir die uitslag uit as een waar die gebruik van Afrikaans as onderrigmedium daartoe lei dat swart studente gestigmatiseer word.⁷⁷ Omdat meeste Afrikaanssprekende studente Engels magtig is, maar swart studente nie eweneens Afrikaans magtig is nie, word ‘n taalbeleid wat voorkeur aan Engels as onderrigmedium verleen as normatief redelik geag.⁷⁸ Dit volg uit die konteks van historiese en huidige institusionele voorregte wat wit Afrikaanssprekendes geniet het en steeds geniet.⁷⁹

Hierdie regverdiging het gevolg. Daar is ‘n onverbiddelike prys wat betaal moet word vir enige vorm van taalonderrig in Afrikaans.

⁷⁷ Id at [30] and [40] and *AfriForum CC* above n 25 at para 62.

⁷⁸ See the discussion of “reasonableness” in *AfriForum CC* above n 25 at para 53.

⁷⁹ Id at para 2.

[70] It is most obvious in the provision of single-medium Afrikaans instruction where that automatically results in the exclusion of black students. The same applies to dual-medium instruction, where the need to have Afrikaans lectures translated into English for black students leads to their stigmatisation.

[71] That leaves parallel-medium instruction. Some may argue that the *AfriForum CC* finding that parallel-medium instruction inevitably results in segregation and, with it, indirect discrimination,⁸⁰ finds application even where brown or coloured learners are segregated from black learners.⁸¹ The first judgment avoids this conclusion,⁸² but instead finds normative justification for deviating from full parallel-medium instruction on reasonable cost-related impracticability grounds.⁸³

Die mees voor-die-hand-liggende voorbeeld is enkel-medium Afrikaanse onderrig wat outomaties uitsluiting van swart studente tot gevolg het. Dieselfde geld vir dubbel-medium Afrikaanse onderrig waar die vertaling van Afrikaanse lesings in Engels tot die stigmasering van swart studente lei.

Wat oorbly is parallel-medium onderrig. Dit kan geargumenteer word dat die *AfriForum CC* formulering – dat parallel-medium onderrig onvermydelik segregasie meebring, en daarmee saam ook indirekte diskriminasie,⁸⁰ ook geld waar bruin studente geskei word van swart studente.⁸¹ Die eerste uitspraak ontduik hierdie afleiding⁸² deur eerder normatiewe regverdiging vir die afwyking van volle parallel-medium onderrig te vind in redelike koste-gerigte praktiese uitvoerbaarheidsgronde.⁸³

⁸⁰ Id at paras 75-6.

⁸¹ Compare Bishop “The Challenge of Afrikaans Language Rights in South African Education” in Fredman, Campbell and Taylor (eds) *Human Rights and Equality in Education: Comparative Perspectives on the Right to Education for Minorities and Disadvantaged Groups* (Policy Press, Bristol 2018) at 88.

⁸² First judgment at [44] to [45].

⁸³ Id at [40] to [41].

Practical effect

[72] In practical terms, this normative justification means that at Stellenbosch—

- (a) all first-language English-speakers who so choose will receive instruction in English at both graduate and post-graduate level;
- (b) all second-language English-speakers who also choose English will receive instruction in English at graduate and post-graduate level;
- (c) first-language Afrikaans-speakers who choose Afrikaans will receive a diminished form of Afrikaans instruction, in varying degrees, and otherwise in English at graduate level. At post-graduate level they will receive instruction only in English; and
- (d) first-language siXhosa-speakers who wish to choose isiXhosa will not be able to do so, but may be progressively assisted in that language as the 2016 Language Policy develops.

Praktiese effek

In praktiese terme beteken dit dat op Stellenbosch—

- (a) alle eerstetaal Engels-sprekendes wat dit verkies, voor- en nagraadse onderrig in Engels sal ontvang;
- (b) alle tweedetaal Engels-sprekendes wat dit verkies, voor- en nagraadse onderrig in Engels sal ontvang;
- (c) eerstetaal Afrikaans-sprekendes wat Afrikaans verkies, sal voorgraads afgewaterde onderrig in Afrikaans in verskillende variasies ontvang. Andersins sal dit in Engels wees. Op nagraadse vlak sal hulle onderrig slegs in Engels ontvang; en
- (d) eerstetaal siXhosasprekendes wat isiXhosa verkies sal nie die geleentheid gebied word om dit te doen nie, maar sal op progressiewe wyse bygestaan word in daardie taal soos die 2016 Beleid ontwikkel.

[73] First-language English-speakers are mostly white people; first-language Afrikaans-speakers are mostly white and brown people; first-language siXhosa-speakers are mostly black people; and second-language English speakers comprise black, brown and white people.⁸⁴ In the Western Cape, first-language Afrikaans-speakers constitute almost exactly half of the provincial population (49.6%) while first-language siXhosa-speakers constitute one quarter (24.7%) and English-speakers only one fifth (20.2%).⁸⁵

[74] This situation is replicated countrywide:

- (a) All first-language English-speakers who choose English will receive instruction in English at both graduate and post-graduate level at any university in South Africa;
- (b) All second-language English-speakers who also choose English will receive instruction in English at

Eerstetaal Engelssprekendes is meestal witmense; eerstetaal Afrikaanssprekendes is meestal wit- en bruinmense; eerstetaal siXhosa-sprekendes is meestal swartmense en tweedetaal Engelssprekendes sluit swart-, bruin- en witmense in.⁸⁴ In die Wes-Kaap verteenwoordig eerstetaal Afrikaanssprekers amper helfte van die bevolking (49.6%), eerstetaal siXhosa-sprekendes amper 'n kwart (24.7%) en eerstetaal Engelssprekendes slegs 'n vyfde (20.2%).⁸⁵

Hierdie stand van sake word landswyd herhaal:

- (a) Alle eerstetaal Engels-sprekendes wat dit verkies, kan voor- en nagraadse onderrig in Engels ontvang by enige universiteit in Suid-Afrika;
- (b) Alle tweedetaal Engels-sprekendes wat dit verkies, kan voor- en nagraadse onderrig in Engels ontvang by

⁸⁴ I use these terms (black, brown and white people) because that is still how our demographics are described in legislation and in the University's policy documents, despite our Constitution's non-racial aspirations.

⁸⁵ See Statistics South Africa *Census 2011 Provincial Profile: Western Cape* (Report No. 03-01-70, 2014) at 26.

- graduate and post-graduate level at any university in South Africa;
- (c) First-language Afrikaans-speakers who choose Afrikaans will receive a diminished form of instruction at Stellenbosch University in Afrikaans and instruction in Afrikaans with English interpretation at the Potchefstroom campus of the North-West University;⁸⁶ and
- (d) First-language speakers of other indigenous African languages who wish to choose their language as a medium of instruction will not be able to do so at any university, except to the limited extent that these universities may offer assistance to them in their own language to supplement the main English language medium of instruction.
- enige universiteit in Suid-Afrika;
- (c) Eerstetaal Afrikaanssprekendes wat Afrikaans verkies, sal by die Universiteit van Stellenbosch afgewaterde onderrig in Afrikaans ontvang en onderrig in Afrikaans met Engelse vertaling by die Potchefstroom kampus van die Noordwes Universiteit;⁸⁶ en
- (d) Eerstetaalsprekendes van enige ander inheemse Afrika-tale wat onderrig daarin verkies sal nie die geleentheid gebied word om dit by enige universiteit te doen nie, behalwe tot die beperkte omvang wat enige van hierdie universiteite hulp in hul eie taal mag aanbied om die Engelse onderrigmedium beter onder die knie te kry.

[75] One does not need international studies, of which there are many,⁸⁷ to

Mens benodig nie internasionale studies nie, waarvan daar vele is,⁸⁷ om te besef

⁸⁶ See North-West University “Multilingualism”, available at <http://www.nwu.ac.za/content/nwu-multilingualism>.

⁸⁷ See, for example, Phillipson *Linguistic Imperialism* (Oxford University Press, Oxford 1992).

realise that this state of affairs entrenches English as the dominant language not only in tertiary education, but also, as we will see, from primary through secondary school to university. Opinions may differ on whether this is a good or bad thing, but it seems strange for this Court, the ultimate protector of minority language rights under the Constitution, to give its blessing to this result.

Burdens and benefits

[76] Cameron J speaks of the “racial edge” to all of this in relation to white Afrikaans-speakers.⁸⁸ But the “racial edge” has some further, and rather surprising, consequences too. The first is that the other main beneficiaries – and bearers – of our colonial and apartheid past, white English-speakers, come out tops (and thus linguistically unscathed) as far as choice of language of instruction is concerned. The second is that English second-language speakers who have the best chance of becoming academically proficient in English at tertiary level are those who can afford to attend private, independent English

dat hierdie stand van sake Engels as dominante taal bevestig, nie net op têrsiêre vlak nie, maar, soos ons sal sien, ook vanaf laerskool na hoërskool tot by universiteit. Menings mag wissel oor die wysheid hiervan, maar dit is seer eienaardig dat hierdie Hof, die uiteindelijke bewaker van minderheidstaalregte ingevolge die Grondwet, sy goedkeuring daaraan gee.

Laste en voordele

Cameron R praat van die rasse-byt (“racial edge”) wat hierdie het met betrekking tot wit Afrikaanssprekendes.⁸⁸ Hierdie rasse-aspek het egter ook ander, soms verrassende, gevolge. Die eerste is dat die ander medebevoorregtes en -draers van ons koloniale en apartheidsgeskiedenis, wit Engelssprekendes, heelhuids daarvan afkom (met hul taalregte ongeskaad) wat die uitoefening van taalonderrigkeuse betref. Die tweede is dat diegene wat die beste kans staan om akademies in Engels as ‘n tweede taal oor die weg te kom, juis persone sal wees wat dit kan bekostig om skoolonderrig te ontvang by onafhanklike

⁸⁸ First judgment at [27].

schools or previously privileged public schools.⁸⁹ These “newly” educationally privileged English second-language-speakers include black, white and brown people whose mother tongue is any of the other official languages, including Afrikaans.⁹⁰

[77] The third, and most troubling, consequence is that those mainly black and brown people from the lowest socio-economic rung who attend under-resourced and poorly staffed schools in rural and marginalised urban communities, will suffer most from effectively having their language of instruction being limited to English. Not only do they receive inadequate mother-tongue education when they start their education, but the education that they receive in English is also often of a poor quality.⁹¹

[78] The evidence before us shows that Afrikaans is the home language of a significant proportion of brown people

Engelse privaatskole of voorheen bevoorregte openbare skole.⁸⁹ Hierdie ‘nuut’ opvoedkundig bevoorregte Engelse tweedetaalsprekers sluit swart-, wit- en bruinmense in wie se moedertaal enige van die ander amptelike tale, Afrikaans inkluis, is.⁹⁰

Die derde, mees kommerwekkende, gevolg is vir die hoofsaaklik swart en bruin mense op die laagste sosio-ekonomiese skaal van ons samelewing. Hulle woon die swakste toegeruste skole by, beide in befondsing en personeel, in die landelike en stedelik gemarginaliseerde gemeenskappe en word die meeste benadeel deur slegs Engels as hul keuse van onderrig. Hulle ontvang onvoldoende moedertaalonderrig wanneer hulle hul opvoeding begin en die Engelse onderrig is ook dikwels van ‘n swak gehalte.⁹¹

Volgens die getuienis op rekord is Afrikaans die moedertaal van ‘n beduidende gedeelte van bruinmense in

⁸⁹ See Spaul “Poverty and Privilege: Primary School Inequality in South Africa” (2013) 33 *International Journal of Educational Development* 436 at 437-8 and Van der Berg “Apartheid’s Enduring Legacy: Inequalities in Education” (2007) 16 *Journal of African Economies* 849 at 853 and 859-860.

⁹⁰ See Soudien “‘Constituting the Class’: An Analysis of the Process of ‘Integration’ in South African Schools” in Chisholm (ed) *Changing Class: Education and Social Change in Post-Apartheid South African Schools* (HSRC Press, Cape Town 2004) at 89.

⁹¹ See Spaul above n 89 at 438.

in the Western Cape (and also the Northern Cape). It also shows that they are predominantly working-class people and that many of them are not proficient in English. Statistically they are the smallest of all population groups proceeding to tertiary education.⁹² Poverty means that it is more difficult for them than for most even to aspire to tertiary education. And if they do get that far, they have only one university to go to in the Western Cape where Afrikaans may be chosen as a medium of instruction.⁹³ Now, when they arrive at Stellenbosch, they will find that their choice of medium of instruction is not as comprehensive as those more privileged students who choose English. The grim message that seems to be sent to this segment of extremely marginalised brown people, is that, if they are be accommodated, they need to grow out of poverty and learn English fast.

die Wes-Kaap (asook in die Noord-Kaap). Dit toon ook aan dat hulle hoofsaaklik van die werkersklas afkomstig is en dat baie van hulle nie Engels magtig of vlot daarin is nie. Statisties gesproke is hulle die bevolkingsgroep met die kleinste verteenwoordiging in tertiêre opvoeding.⁹² Armoede beteken dat dit vir hulle moeiliker is om bloot net te aspireer na tertiêre onderrig as vir meeste andere. As hulle ooit so ver sou kom, is daar net een universiteit in die Wes-Kaap waar Afrikaans nog gekies kan word as medium van onderrig.⁹³ Wanneer hulle nou daar sou aankom, sal hulle vind dat hul keuse van Afrikaans as medium van onderrig nie so omvattend is as die meer bevooregte student wat Engels kies nie. Die bitter waarheid is dat hul armoede en agterstand in Engels hulle selfs slegter af laat.

⁹² See Statistics South Africa *Education Series Volume III: Educational Enrolment and Achievement, 2016* (Report No. 92-01-03, 2017) at 16 and 49 and Department of Higher Education and Training *Post-School Education and Training Monitor: Macro-Indicator Trends* (March 2019) at 27.

⁹³ Under apartheid, the University of the Western Cape (UWC) was initiated as an Afrikaans university for brown people but the ideological premises of this plan were undermined when, increasingly, black students started attending it and the medium of instruction changed to English. It eventually, under Vice-Chancellor Jakes Gerwel, turned apartheid intentions further on their head by becoming a self-styled “university of the left”. See Antia and Van der Merwe “Speaking with a Forked Tongue about Multilingualism in the Language Policy of a South African University” (2019) 18 *Language Policy* 407 at 410-1 and Bassey “University Multilingualism: A Critical Narrative from the University of the Western Cape, South Africa” (2015) 36 *Journal of Multilingual and Multicultural Development* 571 at 572 and 574-5.

[79] There is something deeply disturbing and wrong about this. What are the comparative numbers of this segment of brown people in contradistinction to those black Africans who felt or were excluded by the application of dual medium instruction at Stellenbosch University? The evidence on record is not clear. Nor was this at the centre of Gelyke Kanse's constitutional challenge to the 2016 Language Policy. But common sense inference indicates that it is a significant problem, and not only for the people concerned, but for all marginalised and poor people whose home language is not English.

[80] Nor is this only a local problem. It is an international one, mainly with regard to the dominance of English, but also in relation to other colonial languages like French, Spanish and Portuguese.⁹⁴ It is also a very specific post-colonial problem in Africa,⁹⁵ not only South Africa. Commenting on the

Dit is 'n diep ontstellende onreg. Wat is die vergelykende hoeveelheid mense in hierdie groep bruinmense teenoor daardie swartmense wat uitgesluit was, of uitgesluit gevoel het, deur die toepassing van dubbel-medium onderrig by Stellenbosch? Die prentjie is nie duidelik op die stukke nie. Dit was ook nie die middelpunt van Gelyke Kanse se grondwetlike aanval op die 2016 Beleid nie. Maar gesonde verstand dui aan dit is 'n wesenlike probleem, nie net vir die betrokke persone nie, maar vir alle gemarginaliseerde en arm mense met 'n moeder- of huistaal wat nie Engels is nie.

Dit is ook nie bloot 'n plaaslike probleem nie. Dit is 'n internasionale probleem, hoofsaaklik gespits op die dominansie van Engels, maar ook met betrekking tot ander koloniale tale soos Frans, Spaans en Portugees.⁹⁴ Voorts is dit ook 'n besondere post-koloniale probleem in Afrika,⁹⁵ nie slegs in Suid-Afrika nie. In 'n onlangse studie oor die

⁹⁴ Kamwangamalu *Language Policy and Economics: The Language Question in Africa* (Palgrave Macmillan, London 2016) at ix.

⁹⁵ See Mazrui "The World Bank, the Language Question and the Future of African Education" (1997) 38 *Race & Class: A Journal for Black and Third World Liberation* 35 and Ermelo above n 15 at para 50 and works cited in fn 30.

alarming rate of illiteracy in various African countries, a recent study noted:

“In so-called Anglophone, Francophone, and Lusophone Africa, the prominence given to English, French and Portuguese respectively has rendered African languages instrumentally virtually valueless. What is at issue . . . is whether it can be deemed appropriate and economically justifiable to devote so many resources to education through the medium of a foreign language such as English, for instance, especially since centuries of experimentation with Western education has not resulted in mass literacy development in the African continent.”⁹⁶

[81] Studies have shown that mother-tongue-based education, generally and in the more particular form of mother-tongue-based multilingual education, develops the necessary skills of children for cognitive language proficiency and interpersonal communicative skills

kommerwekkende graad van ongeskooldheid in verskeie Afrika lande merk die skrywer op:

“In so-called Anglophone, Francophone, and Lusophone Africa, the prominence given to English, French and Portuguese respectively has rendered African languages instrumentally virtually valueless. What is at issue . . . is whether it can be deemed appropriate and economically justifiable to devote so many resources to education through the medium of a foreign language such as English, for instance, especially since centuries of experimentation with Western education has not resulted in mass literacy development in the African continent.”⁹⁶

Studies toon aan dat die noodsaaklike vaardighede vir kognitiewe taalkundigheid en interpersoonlike kommunikasie beter ontwikkel onder moedertaalonderrig, in die algemeen en in die besondere vorm van moedertaal gebaseerde multi-taal onderrig.⁹⁷

⁹⁶ Kamwangamalu above n 94 at 72.

better than when they have to learn these in a language not known to them.⁹⁷

[82] The scientific literature suggests that, for mother-tongue-based multilingual education to be effective, it needs at least six years of teaching in the primary language, together with the second language as a subject to be learned in order for an eventual transition to tuition in that second language in some subjects.⁹⁸ But that is not the norm in Africa nor in our southern part of it.⁹⁹ Why not?

[83] Some ascribe it to elitism:

“Often, although individuals vote for the promotion of a national language . . . in their personal lives they act in a way that subverts that vote. In many cases, they enrol their children in schools where access to the former colonial

Wetenskaplike literatuur toon aan dat effektiewe moedertaal gebaseerde multi-taal onderrig minstens ses jaar se onderrig in die moedertaal verg, tesame met die tweede taal as die vak wat aangeleer moet word vir die moontlike oorskakeling daarna vir sekere akademiese vakrigtings.⁹⁸ Dit is egter nie die norm in Afrika nie en ook nie in ons suidelike deel daarvan nie.⁹⁹ Hoekom nie?

Sommige skryf dit toe aan elitisme:

“Often, although individuals vote for the promotion of a national language . . . in their personal lives they act in a way that subverts that vote. In many cases, they enrol their children in schools where access to the former colonial language is

⁹⁷ Id at 109. See further Spaul “Disentangling the Language Effect in South African Schools: Measuring the Impact of ‘Language of Assessment’ in Grade 3 literacy and numeracy” 2016 (6) *South African Journal of Childhood Education* 1 and Taylor and Von Vintel “Estimating the Impact of Language of Instruction in South African Primary Schools: A Fixed Effects Approach” (2016) 50 *Economics of Education Review* 75.

⁹⁸ Kamwangamalu above n 94 at 109.

⁹⁹ Id at 112. As Taylor and Von Vintel above n 97 at 76 observe, the choice of language of instruction in South African schools is left to School Governing Bodies but the prevailing practice, which is encouraged by national and provincial departments of education, is that most schools in which the majority of pupils are not English- or Afrikaans-speaking opt to use mother-tongue tuition in grades 1-3, and then transition to English as the language of instruction in grade 4. Spaul above n 97 at 5 shows that while roughly one third of students learn in English or Afrikaans in grades 1-3, this figure increases dramatically to 99% in grade 4.

language is ensured and, at the same time, demand equal favour for their vernacular. In the sardonic words of the Tunisian general secretary of secondary public education, ‘We do not cease to repeat ‘Arabization, Arabization,’ all the while sending our children to the [French private school system].”¹⁰⁰

And:

“[T]he behaviour of the elite speaks more loudly than their tiresome demonstrations of the alleged cognitive and intellectual benefits of early mother-tongue education. The duplicity of language planners has caused the elite who are not involved in the language industry to be sceptical, ambivalent, apathetic, or even hostile to the use of African languages in education. This, in turn, has hardened the resolve of parents against mother-tongue education in many French-speaking countries.”¹⁰¹

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¹⁰⁰ Laitin *Language Repertoire and State Construction in Africa* (Cambridge University Press, Cambridge 1992) at 69, as cited in Kamwangamalu above n 94 at 139.

¹⁰¹ Koffi *Paradigm Shift in Language Planning and Policy – Game Theoretic Solutions* (De Gruyter Mouton, Boston 2012) at 13, as cited in Kamwangamalu above n 94 at 139. In *Ermelo* above n 15 at para 50, Moseneke DCJ referred to the “collateral irony” that learners—

[84] In South Africa, there is a further reason for the turn away from mother-tongue education. The apartheid system “used promotion of the mother-tongue principle, specifically the advancement of the indigenous languages as subject and medium of instruction, as a central instrument of the policy of divide and rule”.¹⁰² And the 1976 Soweto school uprisings still resonate deeply in our national psyche.

[85] So to change the perception of mother-tongue education in this country to one cleansed of the stigma of apartheid will be a difficult task. But if we are ever to get past name-calling, and, indeed, past the past, one must become able to assess current inequalities anew. There is a dire inequality in the quality of education received by less-resourced and marginalised people in rural areas and less-resourced urban townships. Many

In Suid-Afrika is daar ‘n verdere rede om die rug te draai op moedertaalonderrig. Die apartheidstelsel “used promotion of the mother tongue principle, specifically the advancement of the indigenous languages as subject and medium of instruction, as a central instrument of the policy of divide and rule”.¹⁰² En die 1976 Soweto skoolopstande raak steeds diep aan ons nasionale bewussyn.

Om ontslae te raak van die stigma van apartheid in die persepsie van moedertaalonderrig in ons land sal ‘n gedugte taak wees. Maar as ons ooit verby moddergooi wil kom, inderdaad verby ons verlede wil kom, is dit noodsaaklik om huidige ongelykhede met nuwe oë te bekyk. Daar is ‘n gruwelike ongelykheid in die graad van opvoeding wat onderbefondse en uitgeslote mense in landelike en minder gegoede stedelike woonbuurte ontvang. Daar is baie wat

“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 well settled that, especially in the early years of formal teaching, mother tongue instruction is the foremost and the most effective medium of imparting education.”

¹⁰² Barkhuizen and Gough “Language Curriculum Development in South Africa: What Place for English?” (1996) 30 *TESOL Quarterly* 453-4. See also De Klerk “Mother-Tongue Education in South Africa: The Weight of History” (2002) 154 *International Journal of the Sociology of Language* 29.

contend that initial lengthier mother-tongue multilingual education would leave them better off, but that this is denied them.¹⁰³ They are thus obliged to make do with English language instruction from a very early stage in their education.

[86] It is a hard and uncomfortable truth, but the English education young people in this position receive is generally of a lower standard than what more privileged children in private high-fee schools and better-resourced urban public schools receive.¹⁰⁴ And because of their marginalisation they carry less political clout to alleviate their situation. So the cycle of marginalisation continues, and is reinforced. For them, the “choice” of English as medium of instruction at all levels, from primary to tertiary education, is not free but forced and the outcome bleak. Diminishing the Afrikaans offering at one of the two universities that still provides it will be cold comfort.

aanvoer dat langer aanvanklike moedertaalonderrig hul benarde posisie sal verbeter, maar dit is steeds hul nie beskore nie.¹⁰³ Hulle moet dus genoë daarmee neem om in Engels taalonderrig te ontvang vanaf ‘n uiters vroeë stadium.

Dit is ‘n harde en ongenaakbare werklikheid, maar die Engelse opvoeding wat jong kinders in hierdie posisie ontvang is in die algemeen van ‘n swakker gehalte as wat meer bevoorregte kinders in onafhanklike privaatskole en beter toegeruste stedelike openbare skole ontvang.¹⁰⁴ En as gevolg van hul uitsluiting verminder hul direkte politieke mag om die toedrag van sake te verander. So gaan die siklus van marginalisering dus voort en word dit al hoe dieper gevestig. Vir hulle is die ‘keuse’ van Engels as medium van onderrig nie vrywillig nie, maar geforseerd, en die vooruitsigte skraal. Verskraling van die Afrikaanse aanbieding by een van die twee universiteite waar dit nog aangebied word, sal bitter min vir hulle help.

¹⁰³ See Brock-Utne “Language of Instruction and Student Performance: New Insights from Research in Tanzania and South Africa” (2007) 53 *International Review of Education* 509 at 526.

¹⁰⁴ Spaul above n 89 at 438.

[87] What is lost when one's language is lost? Let others speak.

Wat verloor ons as 'n taal vergaan? Laat andere praat.

Ngũgĩ wa Thiong'o:

Ngũgĩ wa Thiong'o:

“Language as communication and as culture are then products of each other. Communication creates culture: culture is a means of communication. Language carries culture, and culture carries, particularly through orature and literature, the entire body of values by which we come to perceive ourselves and our place in the world. How people perceive themselves and affects how they look at their culture, at their places politics and at the social production of wealth, at their entire relationship to nature and to other beings. Language is thus inseparable from ourselves as a community of human beings with a specific form and character, a specific history, a specific relationship to the world.”¹⁰⁵

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Breyten Breytenbach:

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¹⁰⁵ Ngũgĩ wa Thiong'o *Decolonising the Mind: The Politics of Language in African Literature* (James Currey, London 1986) at 16.

“Taal is mens en mens is taal. Afrikaans is die lewende en veranderende en andersmakende uitvloeisel van uiteenlopende en by tye botsende geskiedenis. Hierdie diverse oorspronge gekenmerk deur aanpassing, verowering, onderdrukking, oorlewing, weerstand en omvorming – afkomstig uit Europese dialekte, Maleis, Portugees, seemanstaal, Khoi tale, Arabiese Afrikaans, die Koran en die Bybel, die howe en kerke en kombuise en wingerde en fabriek – het gemaak dat Afrikaans ‘n unieke hibridisering vergestalt as Kreoolse taal wat by uitstek die verwoording is van die komplekse wêreld waarin ons beweeg.”¹⁰⁶

“Taal is mens en mens is taal. Afrikaans is die lewende en veranderende en andersmakende uitvloeisel van uiteenlopende en by tye botsende geskiedenis. Hierdie diverse oorspronge gekenmerk deur aanpassing, verowering, onderdrukking, oorlewing, weerstand en omvorming – afkomstig uit Europese dialekte, Maleis, Portugees, seemanstaal, Khoi tale, Arabiese Afrikaans, die Koran en die Bybel, die howe en kerke en kombuise en wingerde en fabriek – het gemaak dat Afrikaans ‘n unieke hibridisering vergestalt as Kreoolse taal wat by uitstek die verwoording is van die komplekse wêreld waarin ons beweeg.”¹⁰⁶

[88] Without your own language, culture is lost, a sense of self is lost. And once that happens, diversity is lost. We will lose the belief set out in the

Sonder ‘n eie taal is deel van ons kultuur verlore, ons gewaarwording van onself vernietig. En as dit gebeur, word diversiteit verloor. Ons verloor dan die

¹⁰⁶ Breyten Breytenbach’s Supporting and Expert Affidavit in this matter, contained in volume 12 of the Afrikaans record, page 1387 at para 8. The passage can be translated as follows:

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

Preamble of the Constitution “that South Africa belongs to all who live in it, united in our diversity”.

[89] It really is not obscure. It is about being comfortable in one’s own skin. Anywhere and everywhere. Amongst your family and friends, talking the language you love. Going to a shop and expecting courtesy if you hope to be served in your language. And if that cannot be, to be courteous and friendly in explaining why you wanted it in the first place. And if someone else talks to you in a language with which you are unfamiliar, to apologise and say you’ll try to do better next time.

[90] But also, and as importantly, in the public life of our country, there should be no need to apologise or feel embarrassed when you speak or write in your own language, an official language of our country. All of us must learn to do it in a way that minimises the exclusion of others, but it should not mean that we are silenced from speaking it, writing, using it, as long as we make sure, to the best of our abilities, that we include others when we do so.

geloof verwoord in die aanhef tot die Grondwet dat Suid-Afrika aan almal wat hier leef behoort, verenig in ons diversiteit.

Dit is regtig eenvoudig. Dis om gemaklik met jou eie self te wees. Enige plek en orals. Om tussen familie en vriende die taal te praat wat ons liefhet. Om winkel toe te gaan en beskaafdheid te verwag as jy hoop om in jou taal bedien te word. En as dit nie moontlik is nie, om beskaafd en vriendelik te verduidelik waarom jy daarvoor gehoop het. En as iemand met jou praat in ‘n taal praat wat jy nie magtig is nie, om verskoning te maak en te sê jy hoop om volgende keer beter te kan doen.

Net so belangrik, ook so in die openbare lewe van ons land. Daar behoort geen rede te wees vir enigeen om verskoning te maak of ongemaklik te voel as jy praat of skryf in jou eie taal, ‘n amptelike taal van ons land, nie. Ons moet almal leer om dit te doen op ‘n manier wat die uitsluiting van andere verminder, maar dit beteken nie ons word die swye in ons praat, ons skrywe, ons gebruik daarvan, opgelê nie. Solank ons seker maak, so goed as wat ons kan, dat ons nie andere uitsluit

Otherwise it becomes an exercise of power.¹⁰⁷

[91] Successful mother-tongue or vernacular language education is not easily attained, but it can be done. It has been done in some countries in Asia, Europe and in North America in Canada.¹⁰⁸ In Africa, the support of Amharic in Ethiopia, kiSwahili in Tanzania and Somali in Somalia count as examples, but, deeply ironically, the “clear-cut and strongest case of successful vernacular language education in Africa is Afrikaans in South Africa, under the apartheid regime.”¹⁰⁹ This came about from the language loyalty of its speakers and from the massive political and material support it received from the state.¹¹⁰ That translated into its increased use in the economy and other public institutions, including universities. It became one of the few smaller world languages to be

wanneer ons dit doen nie. Want dan word dit uitoefening van mag.¹⁰⁷

Suksesvolle moeder- of huistaal opvoeding en onderrig kan gedoen word. Lande in Asië, Europa en in Kanada in Noord-Amerika het dit bewys.¹⁰⁸ Die ondersteuning van Amharies in Ethiopië, kiSwahili in Tanzanië en Somalies in Somalië is toonbeelde daarvan in Afrika. Ironies egter, is die “clear-cut and strongest case of successful vernacular language education in Africa . . . Afrikaans in South Africa, under the apartheid regime.”¹⁰⁹ Faktore wat daartoe gelei het was die lojaliteit van die taal se sprekers en massiewe politiese en materiële staatshulp.¹¹⁰ Dit is omskep in die toenemende gebruik daarvan in die ekonomie en ander openbare instellings, insluitende universiteite. Dit is een van die min kleiner wêreldtale wat ontwikkel het tot ‘n erkende akademiese taal.

¹⁰⁷ At the 1967 National Union of South African Students (NUSAS) conference at Rhodes University, Steve Biko stood up to deliver his regional report in isiXhosa to drive home the point about Black students’ alienation from the NUSAS agenda. The incident was the start of a separate black consciousness student movement, the South African Students Organisation (SASO). See South African History Online “National Union of South African Students (NUSAS) available at <https://www.sahistory.org.za/people/stephen-bantu-biko>.

¹⁰⁸ Kamwangamalu above n 94 at 197-202.

¹⁰⁹ Id at 197.

¹¹⁰ Id.

developed and then used as an academic language.

[92] An example is law. Textbooks were written in Afrikaans by Afrikaans legal academics that played an important part in the development of the law.¹¹¹ Before 1947, only a few Appellate Division judgments were written in Afrikaans.¹¹² Between 1947 to 1994 a greater number of judgments were written in Afrikaans particularly if it was the language of the parties.¹¹³ Since 1994, progressively fewer judgments have been written in Afrikaans. In this Court, three judgments have been written in Afrikaans and simultaneously translated into English.¹¹⁴ Maybe this one will be the last. That will be a sad ending and I hope it does not happen.

[93] As far as I am aware, not a single judgment of this Court has been written in any of the other official indigenous African languages.

‘n Voorbeeld daarvan is Afrikaans se ontwikkeling as ’n regstaal. Handboeke is in Afrikaans deur Afrikaanse akademië geskryf, met ’n groot en belangrike invloed op die ontwikkeling van ons reg.¹¹¹ Voor 1947 is slegs ’n paar Appèlhof uitsprake in Afrikaans geskryf.¹¹² Vanaf 1947 tot 1994 is veel meer uitsprake in Afrikaans geskryf, veral waar dit die litigante se moedertaal was.¹¹³ Sedert 1994 al hoe minder. In hierdie Hof is drie gepubliseerde uitsprake in Afrikaans geskryf en terselfdertyd in Engels vertaal.¹¹⁴ Miskien is hierdie die laaste een. Dit sal ’n kwade dag wees. Ek hoop dit sal nie gebeur nie.

Sover ek weet is daar nog nie ’n uitspraak in enige van die ander inheemse Afrika tale in hierdie Hof geskryf nie.

¹¹¹ See, for example, a reflection on the contribution of JC de Wet to South African jurisprudence in Du Plessis and Lubbe (eds) *A Man of Principle: The Life and Legacy of JC de Wet* (Juta, Cape Town 2013).

¹¹² Harms “Law and Language in a Multilingual Society” (2012) 15 *Potchefstroom Electronic Law Journal* 21 at 25.

¹¹³ Id.

¹¹⁴ Apart from this judgment, see *AfriForum CC* above n 25; *Daniels v Scribante* [2017] ZACC 13; 2017 (4) SA 341 (CC); 2017 (8) BCLR 949 (CC); and *Gauteng Provincial Legislature* above n 7.

[94] The point of this is that the Constitution enables each one of us to be proud of our language. We need not destroy one language to advance others. Yes, that means, for white Afrikaans-speakers, that we must acknowledge and be sensitive to the fact that Afrikaans was used as a means of power and oppression before we high-handedly complain of how we are treated now. But that does not disqualify us, and certainly not brown and black Afrikaans-speakers, from being proud of our language. A long way lies ahead to gain widespread acceptance of Afrikaans, as the verbalisation, or embodiment, of the complex world we live in (“die verwoording . . . van die komplekse wêreld waarin ons beweeg”),¹¹⁵ but it is already starting to happen.

[95] And perhaps more importantly, it means that more assertion by our fellow South Africans whose home languages are the other indigenous, African, languages should be welcomed when they assert their own right under the Constitution to use their languages

Die Grondwet bemagtig elkeen van ons om trots te wees op ons taal. Ons hoef nie een taal te vernietig om die ander te bevorder nie. Dit beteken wel ja, vir wit Afrikaanssprekendes, dat ons sensitief moet handel met die feit dat Afrikaans as magsinstrument in onderdrukking gebruik is. Dit moet erken word voordat ons te gou begin kla oor hoe ons nou behandel word. Maar dit keer nie dat ons, en beslis nie bruin en swart Afrikaanssprekendes, nie mag trots wees op ons taal nie. Daar lê ‘n lang pad voor voordat wye aanvaarding gevind sal word dat Afrikaans “die verwoording is van die komplekse wêreld waarin ons beweeg”,¹¹⁵ maar dit begin reeds gebeur.

Dit beteken ook, en miskien meer belangriker, dat ons mede Suid-Afrikaners wie se huistale die ander inheemse Afrika tale is, hul eie reg onder die Grondwet meer behoort te gebruik. Waar ookal, in enige plek en orals. As dit wit mense wat nooit ‘n poging aangewend

¹¹⁵ See above at [88].

anywhere and everywhere. If that causes white people who have never made the effort to understand any of those languages uncomfortable, that reflects on their own poverty. If it causes indigenous African language-speakers increasingly to assert the inherent value of their own, the Constitution promises its support.

[96] It is often stated that without legal back-up minority languages will wither away and die.¹¹⁶ But that need not be inevitable. Imagine a Stellenbosch University where the current emotional and often odious public oppositional discourse is displaced. Imagine a Stellenbosch University where there is a community working together to ensure that the university alumni and other sympathetic supporters raise awareness of the plight of less-resourced siXhosa- and black and brown Afrikaans-speaking communities that need access to its academic excellence. And then do something “reasonably practical” about it, by raising funds for the progressive institutionalisation of isiXhosa,

het om enige van daardie tale te verstaan nie ongemaklik maak, is dit hulle verlies. As dit ander inheemse Afrika-taalsprekers sal aanmoedig om die inherente waarde van hul eie taal te bevorder, is dit ook ons Grondwet se belofte.

Dit word dikwels beweer dat sonder geregtelike ondersteuning minderheidstale uiteindelik sal verdwyn.¹¹⁶ Maar dit behoort nie onvermydelik so te wees nie. Laat die verbeelding ‘n oomblik loop. Verbeel ’n Stellenbosch waar die huidige emosionele en dikwels onsmaklike openbare strydige debat verplaas word deur ‘n gemeenskap wat saamwerk. Alumni en ander welwillendes kom bymekaar om ’n gewaarwording aan te wakker wat klem lê op die nood van minder toegeruste siXhosa- en bruin en swart Afrikaanssprekende gemeenskappe om toegang te kry tot die universiteit se akademiese uitnemendheid. En dat iets “redelik prakties” daaromtrent gedoen

¹¹⁶ Smit “‘Collateral Irony’ and ‘Insular Construction’: Justifying Single-Medium Schools, Equal Access and Quality Education” (2011) 27 *SAJHR* 398 at 416, citing Skutnabb-Kangas *Linguistic Genocide in Education - or Worldwide Diversity and Human Rights?* (Routledge, Abingdon 2000). But compare Bishop above n 81 at 86.

Afrikaans or English as their choice of medium of instruction on an equal basis.¹¹⁷

[97] And imagine a Constitutional Court where judgments are written not exclusively in English, but in a variety of the indigenous official languages, with simultaneous translations in English in the column next to it, as in the Canadian law reports. Would that not be an occasion for joyous celebration at first, before we embrace it, mundanely, as the accepted norm?

word, naamlik befondsing word geïnisieer om die progressiewe institusionalisering van isiXhosa, Afrikaans en Engels as gelyke taalkeuses by die universiteit te verwesenlik.¹¹⁷

Verbeel 'n Grondwetlike Hof waar uitsprake nie uitsluitlik in Engels geskryf word nie, maar in 'n verskeidenheid van ander inheemse tale, met gelyktydige vertalings in Engels in die aangrensende kolom, soos in die Kanadese hofverslae. 'n Geleentheid vir aanvanklike feesviering, voordat ons dit later doodgewoon aanvaar as die norm.

¹¹⁷ At school level, an Afrikaans education initiative called MOS (for the Afrikaans equivalent of “Mother Tongue in Independent Schools”) has been started. It is the product of a long process in which all the organisations involved in Afrikaans education have participated. As one of its progenitors, Theuns Eloff, explains in his comment “Can Mother-Tongue Education in SA Schools Become a Reality?” Politicsweb (14 August 2019), available at <https://www.politicsweb.co.za/comment/can-mothertongue-education-in-south-african-school>:

“The word ‘mos’ also refers to the plant that grows almost everywhere and needs little moisture to thrive; and then also to the unique Afrikaans word used as a confirmation of the obvious: it is ‘mos’ beautiful! . . . The MOS Initiative . . . will create a network of sustainable, independent Afrikaans schools that will operate across South Africa - open to all, community-oriented, affordable and with high standards and innovative learning . . . to ensure that Afrikaans-speaking learners are well equipped for their future - in line with international research - consideration is being given to making English first language and another African language compulsory in MOS schools.

It will promote multilingualism and equip learners to play an active role in the broader South African community. Afrikaans learners who are fluent in another African language and can speak fluently will also help overcome the stigma of Afrikaans schools being racist.

It will take a lot of time and effort for this ambitious project to succeed, but there is consensus among leaders in the Afrikaans education arena of the urgency to make a start now.”

[98] Is that “reasonably impractical”? I do not think so. To say it inevitably is, will be to give up on part of our constitutional dream. We need not let it happen.

Is dit “redelik onprakties”? Ek dink nie so nie. Om te aanvaar dit is onvermydelik so is om deel van ons Grondwetlike droom prys te gee. Ons hoef dit nie te laat gebeur nie.

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