Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE FREE STATE HIGH COURT, BLOEMFONTEIN

CASE NO: A70/2016

In the matter between:

AFRIFORUM	1st Applicant
SOLIDARITY	2nd Applicant
and	
CHAIRMAN OF THE COUNCIL OF THE UNIVERSITY OF THE FREE STATE	1st Respondent
CHAIRMAN OF THE SENATE OF THE UNIVERSITY OF THE FREE STATE	2nd Respondent
THE UNIVERSITY OF THE FREE STATE	3rd Respondent
and	
FEDERATION OF GOVERNING BODIES OF SOUTH AFRICAN SCHOOLS	
AFRIKAANSE TAALRAAD	
SOUTH AFRICAN TEACHERS' UNION	Amici curiae

FULL BENCH REVIEW

HENDRICKS J, MOKGOHLOA J & MOTIMELE AJ

DATE OF HEARING	:	20 JUNE 2016
DATE OF JUDGMENT	:	21 JULY 2016
COUNSEL FOR APPLICANTS	:	ADV. JI DU TOIT SC with ADV.MJ ENGELBRECHT
COUNSEL FOR THE RESPONDENT	:	ADV. JJ GAUTLETT SC with ADV. FB PELSER
COUNSEL FOR AMICI CURAE	:	ADV. JC HEUNIS SC

JUDGMENT

HENDRICKS J

INTRODUCTION

[1] The University of the Free State ("UFS") is a university as defined in the Higher Education Act 101 of 1997. It comprises of three campuses namely the Qwaqwa Campus (representing 10% of the student population of the UFS); the South Campus near Bloemfontein (representing 20% of the student population of the UFS) and the Bloemfontein campus (representing 70% of the

student population of the UFS). The UFS was at first an Afrikaans University with tuition almost exclusively in Afrikaans.

[2] Since 1993 the UFS has offered Afrikaans and English parallel medium instruction. In June 2003 the UFS formally adopted a language policy of parallel medium instruction in Afrikaans and English ("**the 2003 language policy**"). This language policy was adhered to until March 2016. On 07 March 2016 the Senate of the UFS took a decision to adopt a new language policy. On 11 March 2016 the Council of the UFS embraced the decision to adopt a new language policy for the UFS ("**the 2016 language policy**") with English becoming the primary medium of instruction at all levels and Afrikaans remaining available only in particular professional programs such as teacher education and the training of students in theology. It is these decisions taken by the Senate and Council of the UFS respectively, which the Applicants seek to be reviewed and set aside by this Court, in this semi –urgent review application.

[3] This application is premise on *inter alia* the following grounds of review:-

> *"(a) in reaching the decision to adopt the new language policy of the UFS, the Council and Senate were unconcerned with:*
>
> *(i) considering whether it remain reasonably practicable for the UFS to offer Afrikaans as a medium of*

instruction, by having regard to the relevant factors to be brought into account in such an assessment;

(ii) the legal implications of its election forthwith to deprive Afrikaans speaking students (current and prospective) of the opportunity to assert their section 29 (2) of the Constitution of the Republic of South Africa Act 108 of 1996 ("the Constitution") right at the UFS;

(iii) the costs of and the human resource and infrastructural requirements for the effective implication of the new language policy (i.e. with its reasonable practicability).

(b) the UFS Council and Senate were also unconcerned and did not take into account (or effectively so) the result of a poll conducted across all three campuses that demonstrated substantial support for parallel medium instruction, with 3323 students in favour thereof compared to the 1107 that favoured English with tutorials in Afrikaans and Sesotho.

(c) The Language Committee tasked with preparing a report on the new language policy left it to the Council of the UFS to consider the legal and constitutional implications of its adoption. The UFS Council took no internal or external legal advice on this issue. Both members of the UFS Senate and the members of the UFS Council making the decision were led to believe that no constitutional issue for consideration arose. They considered that facts relevant to the determination of relative reasonable practicability of the 2003 language policy and the (then proposed) language policy (costs,

human resource and infrastructure availability) fell within the ambit of implementation, and therefore did not consider them. The decision turned on the perceived need to achieve integration of classes: the 'overarching consideration underlying the adoption of the impugned policy is to redress the classroom segregation brought by the previous policy. The new policy seeks racial integration…' This is surprising because the 2016 Prospectus proclaimed that the Bloemfontein campus is a multicultural, parallel medium institution, regarded as the most integrated campus in South Africa with the most diverse group of students."

[4] The applicants attack the decision to adopt the new language policy, on the basis that:

- relevant considerations were left out of account;
- account was taken of irrelevant considerations; and/or
- a material error of law influenced the adoption of the new language policy;
- no rational connection existed between the decision to adopt the new language policy and the purpose for doing so, the purpose of the empowering provision and/or the information available to the decision-maker;
- the decision to adopt the new policy was otherwise unconstitutional or unlawful.

[5] It behoves no argument that this case raises important constitutional issues. This was quite correctly conceded to by Mr. Gauntlett on behalf of the Second Respondent and the Third Respondent ("the Respondents"). [the First Respondent abide by the decision of this Court].

IS THE UFS AN ORGAN OF STATE?

[6] As a starting point, it need to be determined whether the UFS is an organ of State. The Constitution of the Republic of South Africa Act 108 of 1996 ("**the Constitution**") is the supreme law of the land. Any law or conduct inconsistent therewith is invalid and the obligations imposed thereby must be fulfilled. Section 7(1) of the Constitution echoes aspects of the Preamble to the Act inasmuch as it describes the Bill of Rights as a cornerstone of democracy which enshrines the rights of all people and affirms the democratic values of human dignity, equality and freedom.

[7] The Bill of Rights applies to all law and binds the legislature, the executive, the judiciary and all organs of state. In addition, a provision of the Bill of Rights binds a natural or juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right. Conversely, a juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the right and the nature of that juristic person.

[8] Section 239 of the Constitution provides:

> *"In the Constitution, unless the context indicates otherwise – ... 'organ of state' means –*
>
> *(a) any department of state or administration in the national, provincial or local sphere of government; or*
>
> *(b) any other functionary or institution –*
>
> *(i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or*
>
> *(ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer."*

In defining the concept "organ of state", section 239 covers all instances in which a public power is exercised or a public function is performed in terms of legislation, regardless of whether the person or institution exercising a power or performing the function is formally recognised as an organ of state or not. This raises the question whether a university, which exercises public powers and performs public functions in terms of legislation, is an organ of state for purposes of the Constitution.

[9] In **Minister of Education, Western Cape and Others v Governing Body, Mikro Primary School and and Another,** 2006 (1) SA 1(SCA), ["**the Mikro case**"], the Supreme Court of Appeal per **Streicher JA** (with whom **Cameron JA, Brand JA, Lewis JA** and **Mlambo JA** concurred) overturned a finding of the Court *a quo* that the governing body of the school was not an organ of

state and intended by the legislature to be independent of State or government control in the performance of its functions and concluded as follows at paragraph [20]:

> *"[20] ...In terms of the definition in the Constitution, any institution exercising a public power or performing a public function in terms of any legislation is an organ of State. The second respondent, a public school, together with its governing body, the first respondent, is clearly an institution performing a public function in terms of the Act. It follows that it is an organ of State as contemplated in the Constitution."*

[10] In my view, and by parity of reasoning, the UFS is also an organ of state and, therefore, bound by the Bill of Rights by virtue of the provisions of section 8(1) of the Constitution.

See also:- **Baloro and Others v University of Bophuthatswana** 1995 (4) SA 97 (B).

Gardener and Others v Central University of Technology: Free State [2012] ZALAC 23 (25 July 2012).

THE CONSTITUTION

[11] Section 6 (1) of the Constitution sets out the eleven (11) official languages of the Republic of South Africa (which includes Afrikaans). Section 6 (2) of the Constitution recognize the historically diminished use and status of the indigenous languages

of our people. These are languages other than Afrikaans and English.

Section 6(4) of the Constitution provides as follows:

> *"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."*

Sections 9(3), (4) and (5) of the Constitution provide as follows:

> *"(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.*
>
> *(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.*
>
> *(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."*

Section 29 of the Constitution provides as follows:

> *"(1) Everyone has the right –*

(a) to a basic education, including adult basic education; and

(b) to further education, which the state, through reasonable measures, must make progressively available and accessible.

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

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

[12] Section 29 (1) (a) of the Constitution states that everyone has the right to basic education. Unlike the right to basic education in Section 29 (1) (a) of the Constitution which is immediately realisable, the right to further education in terms of Section 29 (2) of the Constitution is progressively realisable and subject to reasonable measures.

[13] In the **Mikro** case, supra, **Streicher JA** held that paragraph [31]:

"[31] ..The right of everyone to receive education in the official language or languages of their choice in public educational institutions where that education is reasonable practicable is a right against the State".

[14] In **Head of the Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another** 2010 (2) SA 415 (CC), [" **the Ermelo case**"], **Moseneke DCJ** writing the unanimous judgment of that Court, stated as follows in paragraph [53]:

"[53] The second part of s 29 (2) of the Constitution points to the manner in which the State must ensure effective access to and implementation of the right to be thought in the language of one's choice. It is an injunction on the State to consider all reasonable educational alternatives which are not limited to, but include, single-medium institutions. In resorting to an option, such as a single or parallel or dual medium of instruction, the State must take into account what is fair, feasible and satisfies the need to remedy the results of past racially discriminatory laws and practices."

In so far as Section 29(2) of the Constitution is concerned, **Moseneke DCJ** said the following in paragraph [52] of this judgment:

"[52] The provision is made up of two distinct but mutually reinforcing parts. The first part places an obvious premium on receiving education in a public school in a

language of choice. That right, however, is internally modified because the choice is available only when it is 'reasonably practicable'. When it is reasonably practicable to receive tuition in a language of one's choice will depend on all the relevant circumstances of each particular case. These would include the availability of and accessibility to public schools, their enrolment levels, the medium of instruction of the school that its governing body has adopted, the language choices that learners and their parents make, and the curriculum options offered. In short, the reasonableness standard build into s 29(2)(a) imposes a context-sensitive understanding of each claim for education in a language of choice..."

[15] The "reasonably practicable" specific limitation provision in the section 29(2) right means that the State has to fulfil this right, unless it is not reasonably practicable or the State can establish on other grounds that its refusal or inability to provide such education complies with the general limitation provision of section 36 of the Constitution. Factors such as learner numbers, costs, availability of facilities and educators, the distance to the nearest similar institution that is able to provide education in the chosen language, and the chosen medium of instruction in the case of universities, can be relevant factors that may determine whether, in a particular case, it is reasonably practicable to provide such education.

See: **The Constitutional Framework for Pursuing Equal Opportunities in Education, Perspectives in Education** Vol 22 (3), September 2004.

[16] Accordingly, as the Supreme Court of Appeal quite correctly pointed out in the **Mikro** case, supra, that section 29(2) of the Constitution does not mean that:

> *"[30] In effect, the first and second appellants contended that s 29(2) of the Constitution should be interpreted to mean that everyone had the right to receive education in the official language of his or her choice at each and every public education institution where this was reasonably practicable. If this were the correct interpretation of s 29(2), it would mean that a group of Afrikaans learners would be entitled to claim to be taught in Afrikaans at an English medium school immediately adjacent to an Afrikaans medium school which has vacant capacity provided they can prove that it would be reasonably practicable to provide education in Afrikaans at that school. So interpreted, since the right in question extends to 'everyone', this would entail that boys have a constitutional right to be educated at a school for girls if reasonably practicable."*
>
> *(emphasis added)*

[17] Once it is shown that education in the language of choice is reasonably practicable, it becomes necessary to consider the second part of section 29(2), i.e. the means to fulfil the right. At that point, as the Constitutional Court said in the **Ermelo** case, supra, at paragraph [53], the second sentence of section 29(2) places "**an injunction on the State to consider all reasonable educational alternatives**" to achieve the right. It continue further by stating that in determining what alternatives to employ, "**the**

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

[18] Although the UFS is a historically Afrikaans university as alluded to earlier on in this judgment, it has established English as a language of learning and teaching to a considerable extent. The issue is not whether it should offer learning in English at all – as was the point of contention in the case concerning the Afrikaans-medium Mikro Primary School – but the issue is what the nature and extent of the UFS's English and Afrikaans offering should be. That brings one to the second part of section 29(2), i.e. the means to fulfil students' and prospective students' right to receive education in Afrikaans and English. It obliges the State to consider all reasonable educational alternatives to achieve the right.

[19] In the **Ermelo** case, the Constitutional Court emphasised that when determining what alternatives to employ, the State must take into account what is fair, feasible and satisfies the need to remedy the results of past racially discriminatory laws and practices. The Constitutional Court also held that when a person 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.

It is noteworthy that in the **Ermelo**-case the Constitutional Court saw nothing reprehensible about a parallel medium language policy that allowed for 'racial redress' for students demanding

institution in English without deprivation of the rights of those seeking tuition in Afrikaans.

[20] Therefore, what section 29(2) requires of the UFS is the following:

- It has to adopt reasonable measures to fulfil students' and prospective students' right to receive education in Afrikaans and English.

- When choosing what measures to adopt, it has to take into account what is fair, what is feasible and what will remedy the results of past racially discriminatory laws and practices.

- It may not take away or diminish the right of Afrikaans-speakers to receive education in Afrikaans, in order to increase the English offering.

[21] In **Ex Parte Gauteng Provincial Legislature: In Re Dispute Concerning The Constitutionality Of Certain Provisions Of The Gauteng School Education Bill of 1995.** 1996 (3) SA 165 (CC) ["**the Education Bill case**"], the Constitutional Court was confronted with the meaning and scope of section 32 of the Interim Constitution, the counterpart of section 29 of the Constitution, which provided as follows:

"Education

32. Every person shall have the right –

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

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

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

[22] In paragraph [9] of the judgment, **Mahomed DP** states:-

"[9] The interpretation of s 32 (c) as a defensive right, based on its grammatical and linguistic structure, seems to me also to be supported by its context within s 32 itself. Section 32 (a) creates a positive right that basic education be provided for every person and not merely a negative right that such a person should not be obstructed in pursuing his or her basic education. Section 32 (b), recognizing the diversity of languages in our country, again creates a positive right for every person to instruction in the language of his or her choice, where this is reasonably practicable, not merely a negative right to prevent any obstruction if such person seeks instruction in the language of his or her choice. Section 32 (c), by contrast, guarantees a freedom – a freedom to establish educational institutions based on a common culture, language or religion. It is that freedom which is protected by s 32 (c). A person can invoke the protection

of the Court where that freedom is threatened, but the language of s 32 (c) does not support a claim that such educational institutions, based on a commonality of culture, language or religion, must be established by the State, or a claim that any person is entitled to demand such establishment, notwithstanding the fact that his or her right to basic education and to instruction in the language of his or her choice is, where practicable, otherwise being satisfied by the State"

[23] In his concurring judgment **Kriegler J**, having expressed his "wholehearted agreement with **Mahomed DP's** clinical analysis" and his broad affirmation of "the more historical-international law trent of thought and conclusion of **Sachs J**", said that the government is constitutionally obligated to, inter alia, where reasonable practicable, provide instruction in the language of a pupil's choice. He states as follows:

"[39] Nietemin is daar enkele aspekte wat ek spesifiek wil toelig. Taal - en by name die behoud van Afrikaans - ontlok diepgewortelde emosie. Daarom is dit lewensnoodsaaklik dat daar nugter en oorwoë gelet word op die implikasies van hierdie saak. Subartikel 32(c) van die Grondwet dra weliswaar nie die breë betekenis wat die petisionarisse en die amicus daaraan wou heg nie. Dit is en bly egter 'n skans teen verswelging van enige minderheid se gemeenskaplike kultuur, taal of godsdiens. Solank 'n minderheid daadwerklik wagstaan oor sy gemeenskaplike erfgoed, solank is dit sy onvervreembare reg om eie onder-wysinstellings ter behoud van kultuur, taal of godsdiens tot stand te bring.

[40] Daar is egter twee belangrike voorbehoude. Ten eerste is die slotwoorde van die betrokke subartikel ondubbelsinnig; daar mag geen diskriminasie op grond van ras wees nie. Die Grondwet bied dus geen beskerming vir rassevooroordeel op die onderwysterrein nie. 'n Gemeenskaplike kultuur, taal of godsdiens met rassisme as 'n wesenselement het geen konstitusionele aanspraak op die vestiging van afsonderlike onderwysinstellings nie. Die Grondwet beskerm verskeidenheid, nie rassediskriminasie nie.

[41] Ten tweede moet daar duidelik ingesien word waaroor die debat in hierdie saak werklik gaan. Subartikels (a) en (b) van art 32 van die Grondwet boekstaaf en bevestig die reg van iedereen op basiese onderwys, gelyke toegang tot onderwysinstellings en, waar redelikerwys uit-voerbaar, onderrig in die taal van die leerling se keuse. Daartoe is die owerheid grondwetlik verplig. Die maatstaf van redelike uitvoerbaarheid is wel rekbaar - soos dit noodwendig moet wees om ruimte te laat vir 'n groot verskeidenheid omstandighede. Dit is egter objektief beoordeelbaar, wat beteken dat owerheidswillekeur deur die Howe aan bande gelê kan word. Betekenisvolle getalle taalsprekers het gevolglik 'n afdwingbare reg teenoor die owerheid op onderrig in hul gemeenskaplike taal solank dit maar redelikerwys uitvoerbaar is."

(emphasis added)

Translated into English, the underlined portion in paragraph [41] states that:-

"...The standard of reasonable practicability is elastic – as it necessarily has to be in order to leave room for a wide range of circumstances. It is, however, objectively justiciable, which means that arbitrary governmental action can be restrained by the Courts. Accordingly, meaningful numbers of language-speakers have an enforceable right against the government to instruction in the language of their community as long as it is reasonably practicable."

[24] **Sachs J**, in this judgment stated as follows:

"[46] The first assumption is that the 'never again' principle, which I feel should be one of our guides to interpretation, applies not only to bitter experiences of former State enforced segregation, but also to those of past compulsory assimilation. This was a major theme at the National Convention held to draft the document which became the Constitution of the Union of South Africa in 1910.

[47] The second assumption is that the Afrikaans language, like all languages, is not simply a means of communication and instruction, but a central element of community cohesion and identification for a distinct community in South Africa. We are accordingly dealing not merely with practical issues of pedagogy, but with intangible factors that, as was said in Brown v Board of Education of Topeka, form an important part of the educational endeavour. In addition, what goes on in schools can have direct implications for the cultural

personality and development of groups spreading far beyond the boundary fences of the schools themselves.

[48] The third assumption is 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.

[49] The fourth assumption is that the Afrikaans language is one of the cultural treasures of South African national life, widely spoken and deeply implanted, the vehicle of outstanding literature, the bearer of a rich scientific and legal vocabulary and possibly the most creole or 'rainbow' of all South African tongues. Its protection and development is therefore the concern not only of its speakers but of the whole South African nation. In approaching the question of the future of the Afrikaans language, then, the issue should not be regarded as simply one of satisfying the self-centred wishes, legitimate or otherwise, of a particular group, but as a question of promoting the rich development of an integral part of the variegated South African national character contemplated by the Constitution. Stripped of its association with race and political dominance, cultural diversity becomes an enriching force which merits constitutional protection, thereby enabling the specific contribution of each to become part of the patrimony of the whole."

[25] Significantly, in the **Ermelo** case, supra, **Moseneke DCJ** considered it appropriate, before examining section 29(2) of the Constitution, to **"echo and embrace the tribute Sachs J paid to minority rights in general and to Afrikaans in particular"** in the Ermelo area and, more specifically, what he said in relation to the fourth assumption.

Moseneke DCJ in the **Ermelo** judgment then stated the following:

> *"[49] Of course, vital parts of the 'patrimony of the whole' are indigenous languages which, but for the provisions of s 6 of the Constitution, languished in obscurity and underdevelopment with the result that at high-school level, none of these languages have acquired their legitimate roles as effective media of instruction and vehicles for expressing cultural identity.*
>
> *[50] And that perhaps is the collateral irony of this case. Learners whose mother tongue is not English, but rather one of our indigenous languages, together with their parents, have made a choice to be taught in a language other than their mother tongue. This occurs even though it is now settled that, especially in the early years of formal teaching, mother-tongue instruction is the foremost and the most effective medium of imparting education."*

[26] In my view, only once the reasonably practicable requirement has been satisfied, the import of the second sentence in Section 29 (2) of the Consitution, which states that "(i)n 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",

comes to the fore.

[27] The second sentence of Section 29 (2) of the Constitution makes it clear that single medium institutions are but one way of accommodating the right of a learner to instruction in the language of choice and the mere mention thereof does not privilege such institutions over dual or parallel medium institutions or institutions which accommodate multilingualism in some other way.

[28] What this portion of section 29(2) of the Constitution requires is that all reasonable educational alternatives that would make mother-tongue or preferred language instruction possible, ought to be considered. For a single medium institution to be preferred to another reasonable practicable institutional arrangement, such as dual medium instruction or parallel medium instruction, it has to be demonstrated that it is more likely to advance or satisfy the three listed criteria of equity, practicability and historical redress. Due consideration of all reasonable educational alternatives that would

make mother-tongue instruction possible, such as dual or parallel medium instruction, taking into account the three listed criteria of equity, practicability and historical redress, stands squarely in the way of dispensing with Afrikaans as a primary language of instruction at the UFS.

[29] Section 29(2) of the Constitution requires the consideration of three factors:

(i) The first is **equity** and there are two parts to the equity enquiry.

- The first is that from an educational perspective Black (African) students of whom the vast majority are neither Afrikaans nor English-speaking and of whom English or Afrikaans is the second language, will not benefit from the new policy.

- The second is that dispensing with Afrikaans as a primary language of instruction will necessarily come at a cost to the Afrikaans offering, a fact that would violate Afrikaans-speakers' section 29(2) right not to have their existing access to Afrikaans higher education interfered with.

(ii) The second is **practicability**. This is a consideration which is easily applied in casu since there is no suggestion that it is impracticable, a provisioning perspective, to continue

instruction with Afrikaans and English as primary languages of instruction by way of parallel medium.

(iii) The third is **redress**. This factor weighs strongly in favour of ensuring that language is not a barrier to access for Black (African), Coloured and Indian students. For the following reasons this consideration does not favour the new policy over the old:

- The old policy favoured multilingualism and sustaining the use of Afrikaans.

- While Afrikaans may be a barrier to Black (African) students, English is a barrier to many Coloured students who were also victims of past discrimination and a move that decreases the Afrikaans offering would negatively affect them, particularly when regard is had to the diminishing other options for Afrikaans-language higher education.

- It will not benefit Black (African) students since the previous policy was not a barrier to access for them because in the prevailing parallel medium environment there is a 100% English offering.

[30] The fact that English has been introduced at the UFS which was a historical Afrikaans university as a language of instruction,

especially to comply with the redress criterion in section 29(2) of the Constitution, does not mean that Afrikaans must inevitably be replaced by English as the dominant language of instruction since that would clearly fall foul of the fairness criterion without any commensurate benefit viewed from the perspective of the demand which derives from the redress criterion. Such an application of section 29(2) would clearly be unfair and discriminate against Afrikaans-speakers inconsistently with the requirements of section 29(2).

[31] Also, the Constitution's recognition of community rights, associational rights, religious rights, cultural rights and linguistic rights, creates a set of background conditions against which the claim of continued parallel medium instruction at the UFS has to be considered and "an overriding commitment to 'equality' or 'transformation'" cannot simply be invoked to dispense with Afrikaans as a medium of instruction.

[32] One of the crucial flaws in the decisions which led to the adoption of the new language policy is precisely that the Council and the Senate of the UFS did not consider what was "reasonably practicable" at the UFS and has clearly overlooked that, as an organ of state, it is co-responsible for taking the desired measures, and not to abolish measures that were in place and were consistent with the Ministerial Policy and the Constitution, particularly in the face of the **Ermelo** decision's affirmation of the principle of non-retrogression. This doctrine stands squarely in the

way of a decision that has the effect of curtailing vested rights that claim the protection of the Constitution.

THE HIGHER EDUCATION ACT

[33] Section 3 of the Higher Education Act 101 of 1997 ("**the Act**") provides that the Minister of Higher Education has to determine policy on higher education, which must include provisions on the language policy of public higher education institutions, i.e. universities.

Section 27(1) of the Act provides that the council of a public higher education institution has to govern it "subject to this Act, and the institutional statute".

Section 27(2) of the Act provides as follows:

> *"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."*

[34] Although the phrase "subject to", when used in litigation, has been said to have no generally applicable meaning, it is, in my view, used in section 27(2) of the Act in its common sense of establishing what is dominant (the policy determined by the Minister) and what is subservient (the policy determined by the Council in consultation with the Senate). This means the UFS's

language policy may not be inconsistent with the Ministerial Policy. It follows that section 27(2) of the Act is a peremptory requirement which compels the councils of universities to adopt language policies which are consistent with the Ministerial Policy determined by the Minister pursuant to the provisions of section 3(1) of the Act after consultation with the Council on Higher Education ("CHE").

THE MINISTERIAL POLICY ON LANGUAGES

[35] In my view, the language policy determined by the council of a university has to be compatible with the Ministerial Policy and all such policies, i.e. including the Ministerial Policy, have to comply with sections 29(1)(b) and 29(2) of the Constitution. Directly pertinent provisions of the Ministerial Policy, some of which echo provisions of the Constitution, are the following:

> "• *The role of all South Africa's languages "working together" to build a common sense of nationhood is consistent with the constitutionally enshrined values of "democracy, social justice and fundamental rights".*
>
> • *Everyone has the right to use the language and to participate in the cultural life of his or her choice, provided that these rights may not be exercised inconsistently with any provision of the Bill of Rights.*
>
> • *Everyone has the right to receive education in the official language or languages of his or her choice in public education institutions where such education is reasonably practicable. In order to ensure the effective access to, and*

implementation of, this right, the state has to consider all reasonable educational alternatives, including single medium institutions, taking into account equity, practicability and the need to redress the results of past racially discriminatory laws and practices.

- *The role of language and access to language skills are critical to ensure the right of individuals to realise their full potential to participate in and contribute to the social, cultural, intellectual, economic and political life of the South African society.*

- *The challenge facing higher education is to ensure the simultaneous development of a multilingual environment in which all South Africa's languages are developed as academic/scientific languages, while simultaneously ensuring that the existing languages of instruction do not serve as a barrier to access and success. This is what the policy framework, set out in the ministerial Policy, seeks to address."*

[36] The framework for language in higher education also reflects the values and obligations of the Constitution, especially the need to promote multilingualism, and it commits to an attempt to ensure that all the official languages are accorded parity of esteem.

[37] Subsequent to receiving advice from the CHE, the Minister invited Prof G J Gerwel to convene an informal committee to provide him with advice specifically with regard to Afrikaans as a language of instruction. The committee was requested, in particular, to advise

on ways in which Afrikaans could be assured of continued long-term maintenance, growth and development as a language of science and scholarship in the higher education system without non-Afrikaans-speakers being unfairly denied access within the system, or the use and development of the language as a medium of instruction wittingly or unwittingly becoming the basis for racial, ethnic or cultural division and discrimination. The reason for the focus on Afrikaans was that, with the exception of English, Afrikaans is the only other South African language which is employed as a medium of instruction and official communication in institutions of higher education.

[38] In relation to languages of instruction, the Ministry -

> "• *acknowledges the prevailing position of English and Afrikaans as the dominant languages of instruction in higher education and believes that it will be necessary to work within the confines of the status quo until such time as other South African languages have been developed to a level where they may be used in all higher education functions;*
>
> • *acknowledges that Afrikaans as a language of scholarship and science is a national resource and, therefore, fully supports the retention of Afrikaans as a medium of academic expression and communication in higher education and is committed to ensuring that the capacity of Afrikaans to function as such a medium is not eroded;*
>
> • *does not believe, however, that the sustainability of Afrikaans in higher education necessarily requires the*

designation of the University of Stellenbosch and the Potchefstroom University of Christian Higher Education (now the North West University ("NWU")) as "custodians" of the academic use of that language as proposed by the Committee;

- *also agreed with the Rectors of the Historically Afrikaans Universities that the sustained development of Afrikaans should not be the responsibility of only some of the universities;*

- *is of the view that the sustainability of Afrikaans as a medium of academic expression and communication can be ensured through a range of strategies which include the adoption of parallel and dual language medium options which would, on the one hand, cater for the needs of Afrikaans language speakers and, on the other, ensure that the language of instruction is not a barrier to access and success, to which end the Ministry committed itself, in consultation with the historically Afrikaans medium institutions, to examine the feasibility of different strategies, including the use of Afrikaans as a primary but not a sole medium of instruction. (The obvious point is, of course, that the UFS's language policy which had to make way for the NLP is entirely consistent with this, and other, features of the ministerial Policy whereas the NLP is not.)"*

[39] The Ministerial Policy seeks to balance, on the one hand, the need to transform higher education, and in particular to prevent institutions' languages of instruction from impeding access and success by people who are not fully proficient in English and Afrikaans, with, on the other hand, the development of

multilingualism in those institutions' day-to-day functioning and core activities, including the development of indigenous African and other languages as scientific and academic languages. It also seeks to assure the long-term maintenance and growth of Afrikaans as a language of science and scholarship in the higher education system. Based on Prof Gerwel's committee's findings, the Ministerial Policy acknowledges that Afrikaans, "as a language of scholarship and science is a national resource". It commits to "ensuring that the capacity of Afrikaans to function as such a medium is not eroded".

[40] It was submitted that in formulating its language policy, the UFS had to have regard to, and comply with (but failed to do so), the following features of the Ministerial Policy:

- The acknowledgement that Afrikaans as a language of scholarship and science is a national resource.

- The Ministry's support for the retention of Afrikaans as a medium of academic expression and communication in higher education and its commitment to ensure that the capacity of Afrikaans to function as such, is not eroded.

- The Ministry's position that the sustained development of Afrikaans is not the responsibility of only some of the historically Afrikaans universities.

- The Ministry's view that the sustainability of Afrikaans as a medium of academic expression and communication can be secured through a range of strategies, including the adoption of parallel and dual language medium options, which would, on the one hand, cater for the needs of Afrikaans language speakers and, on the other, ensure that language of instruction is not a barrier to access and success.

[41] The irony is, of course, that the UFS's 2003 language policy which is replaced by the 2016 language policy fit in perfectly with the aforementioned positions of the Ministry as expressed in the Ministerial Policy, whereas the 2016 language policy does not. It is clearly evident that section 27(2) of the Act requires that the UFS's language policy has to be compatible with the Ministerial Policy.

[42] By electing to abandon a policy in terms of which Afrikaans was a primary language of instruction with equal status to English, and used as such by way of a parallel medium dispensation, particularly in circumstances where instruction in Afrikaans has been abandoned or significantly curtailed at other universities, is clearly inconsistent with the Ministerial Policy as evidenced in particular by the summary according to which the framework is designed to promote multilingualism and to enhance equity and access in higher education inter alia through the retention and strengthening of Afrikaans as a language of scholarship and science.

[43] As far as the adoption and implementation of their language policies are concerned, the historical Afrikaans universities, at which a significant number of Afrikaans-speaking students still enrol, have a primary obligation, which derives from the Ministerial Policy, in respect of the retention and strengthening of Afrikaans as a language of scholarship and science.

THE TEST TO BE APPLIED IN A REVIEW

[44] This case being a review, the test to be applied for a review is set out as follow in **Bel Porto School Governing Body v Premier, Western Cape** 2002 (3) SA 265 (CC) at paragraph [87]:-

> *"[87] The role of the Courts has always been to ensure that the administrative process is conducted fairly and that decisions are taken in accordance with the law and consistently with the requirements of the controlling legislation. If these requirements are met, and if the decision is one that a reasonable authority could make, Courts would not interfere with the decision."*

In **Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs** 2004 (4) SA 490 (CC), the Constitutional Court reiterated this principle. It held at paragraph [48]:-

> *"[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."

[45] This principle is also applicable in labour matters. In **Sidumo & another v Rustenburg Platinum Mines Ltd & others** 2008 (2) SA 24(CC) the following is stated at paragraph [110]:-

"[110] To summarize, Carephone held that s 145 of the LRA was suffused by the then constitutional standard that the outcome of an administrative decision should be justifiable in relation to the reasons given for it. The better approach is that s 145 is now suffused by the constitutional standard of reasonableness. That standard is the one explained in Bato Star: Is the decision reached by the commissioner one that a reasonable decision maker could not reach? Applying it will give effect not only to the constitutional right to fair labour practices, but

also to the right to administrative action which is lawful, reasonable and procedurally fair."

[46] The following is stated in **Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)** (2013) 34ILJ 2795 (SCA):-

"[13] The distinction between review and appeal, which the Constitutional Court stressed is to be preserved, is therefore clearer in the case of the Sidumo test. And while the evidence must necessarily be scrutinized to determine whether the outcome was reasonable, the reviewing court must always be alert to remind itself that it must avoid 'judicial overzealousness in setting aside administrative decisions that do not coincide with the judge's own opinions'. The LAC subsequently stressed that the test 'is a stringent [one] that will ensure that ... awards are not lightly interfered with' and that its emphasis is on the result of the case rather than the reasons for arriving at that result. The Sidumo test will, however, justify setting aside an award on review if the decision is 'entirely disconnected with the evidence' or is 'unsupported by any evidence' and involves speculation by the commissioner.

[14] After Sidumo the position in regard to reviews of CCMA arbitration awards should have been clear. Reviews could be brought on the unreasonableness test laid down by the Constitutional Court and the specific grounds set out in s 145(2)(a) and (b) of the LRA. The latter had not been extinguished by the Constitutional Court but were to be 'suffused' with the constitutional standard of reasonableness. What this meant simply is that a 'gross irregularity in the conduct of the arbitration proceedings' as envisaged by s 145(2)(a)(ii) of the LRA, was not confined to a situation where the arbitrator misconceives the nature of the enquiry, but extended to those instances where the result was unreasonable in the sense explained in that case. Beyond that there was no reason to think that their meaning had been significantly

altered provided they were viewed in the light of the constitutional guarantee of fair labour practices."

[47] The question that arises for determination is: Is the decision by the decision-maker rational in relation to all the facts and circumstances? Furthermore, what informed the decision to adopt the 2016 language policy? Apparently, racial segregation was experienced at the UFS because of the 2003 language policy. Apparently, (and almost exclusively), white students attend the Afrikaans stream of classes proffered at the UFS while black students attend the English stream of classes. There was no indicator indicating that white students should attend the Afrikaans stream of classes and black students the English classes. Exclusivety did not inform this practice. That racial segregation was the most pertinent reason for the impugned decisions was confirmed by Mr. Gauntlett on behalf of the Respondents.

[48] The Respondent's explanation of why the decision was taken to adopt the policy is: **'The policy was adopted for transformation and academic reasons'**, and the **'entire language policy project was concerned with nothing other than the constitutional injunction of integration and how this is to be accomplished'.**

[49] Furthermore the UFS seems to consider that the English offering was of a poorer quality, but that is no basis to change the language policy. The duty of the UFS to offer an equitable

academic offering is manifest. It can – and must – do so through quality control measures. If the quality tuition offered in some classes does not meet the required standard, then steps must be taken to improve the quality of tuition offered in those classes. A change in language policy is not the axiomatic answer, particularly not if it is held out that English classes are of poorer quality than those offered in Afrikaans. Implicitly the UFS is contending that it would rather offer the poorer quality of tuition to all students than to make efforts to improve the quality of tuition offered in English classes.

[50] What the Respondents left out of account, was that there is no segregation, and certainly not segregation in the sense of compulsion. As the language committee noted, some African students at the UFS elect to receive their education in Afrikaans, as do some Coloured students. Together, these students account for about 10% of the demand for instruction in Afrikaans, and there is nothing to prevent them (or others) from exercising this option. The demand of instruction in English comes from all race groups. The Respondents' assertion that the 2003 language policy **'created a divided black and white campus'** is unsupported.

The UFS Council and Senate had as its goal to achieve great racial integration on its campuses. In striving to achieve this goal, the UFS Council and Senate did not apply the reasonable practicability test as required by Section 29 (2) of the Constitution.

[51] South Africa has indeed a history of racial segregation. That Afrikaans was in the pre-democratic era the language of the oppressor can't be wished away. That Afrikaans was also in the pre-democratic South Africa promoted and developed by the then government is also a fact. However, the drafters of our constitution deemed it appropriate and necessary that Afrikaans should be recognized as one of the official languages of our country- South Africa and be equal in status to the other ten (10) official languages. Applying the dicta in the cases of **Mikro, Ermelo** and the **Education Bill case**, supra, I am of the view that Afrikaans still has a role to play at the UFS.

[52] It is however not the policy as such that is seek to be reviewed but the decision to adopt it. In view of the demand for Afrikaans tuition under the 2003 parallel medium language policy, the UFS Council and Senate had to be satisfied that it was no longer reasonably practicable to offer instruction alongside English. The adoption of the new 2016 language policy led to a deprivation of the rights of the Afrikaans speaking students without appropriate justification as constitutionally required. The belief of the decision-makers that integration and transformation would justify their decision, without them taking into account factors universally accepted to form part of the reasonable practicability standard in Section 29 (2) of the Constitution, constituted, in my view, a material error of law. This alone renders the decisions reviewable.

[53] Ironically, in the faculties of education and theology the decision is to maintain the dual medium of instruction in both English and Afrikaans. The reasoning behind this decision is based on the required needs of society. It was argued that certain denominations of a particular religion still want to be served in Afrikaans by their reverends. So too, is there a need to train teachers in Afrikaans to equip them to teach at schools where the medium of instruction is Afrikaans. If this reasoning informed the decision to retain dual medium of instruction in the faculties of education and theology then surely the same can be said about the other faculties. Why should the right of a student who want to study in Afrikaans and who would serve his community in Afrikaans in the field in which he study, be denied of the opportunity to do so? Furthermore, if there is provision at the UFS for a student to study education in Afrikaans and to teach at an Afrikaans medium school to Afrikaans speaking learners, then surely the learners to be taught must also be allowed to study at the UFS in Afrikaans in which ever field they choose to study.
See: **Ermelo,** supra

[54] I echo the sentiments expressed by **Moseneke DCJ** in paragraph [49] of the **Ermelo** case. I am of the view that it is by time that something more needs to be done in South Africa to promote the other indigenous languages to the level of being languages of instruction until the level of tertiary institutions. More than twenty (20) years have passed since the advent of our democratic dispensation and not much was done in this regard. Perhaps it would be prudent for the UFS to develop the Sesotho language at

the Qwaqwa campus as a language of instruction alongside English and Afrikaans. The need for such development is informed by the feeder area of the communities near that campus.

[55] I am of the view that in taking the decision to abolish Afrikaans as a medium of instruction at UFS, the UFS Council and Senate did not take into account:-

- the obligation under s 29 (2) to be responsive to students seeking instruction in Afrikaans, where it is reasonably practicable;

- the preference of the Higher Education Language Policy for the retention, preservation and promotion of Afrikaans as scientific language;

- costs and human resources associated with the continued offer of Afrikaans, and whether this remained reasonably practicable.

[56] In **Westinghouse Electric Belgium SA V Eskom Holdings (SOC) Ltd** 2016 (3) SA1 (SCA) the following is stated in paragraph [45] on page 14 A – B:

"Once a bad reason plays a significant role in the outcome it is not possible to say that the reasons given for it provide a rational connection to it."

In my view, the reason that played the most important and significant part in determination of the 2016 language policy namely curing the segregation, is not one that is rationally connected to the purpose of the empowering provision namely the adoption of a language policy in the interest of the community, with due regard to the constitutional requirements and standards imposed by the Ministerial Policy.

[57] There are some other issues that need to be addressed. These relate to an application by the Respondents to have certain paragraphs in the affidavits deposed to on behalf of the Applicants strike out and the *locus standi* of the Second Applicant.
I have carefully examined the paragraphs referred to in so far as the striking out application is concerned and I am of the view that what is complained about is not material. It does not go to the root of the matter. That the identity of the informers is protected for fear of victimization is indeed not material to the determination of this matter. It is not vague, embarrassing or even vexatious. Not much turns on this application. It can simply be dismissed because it is frivolous. Costs should follow the result in this regard.

[58] In so far as the *locus standi* of the Second Applicant is concerned, it was contended that this is not a labour matter in which the rights of employees who are members of the Second Applicant is affected. Therefore, so it was contended, that the Second Applicant does not have any legal standing in this matter. I do not agree. The Second Applicant, in the protection of the interest of its members, do have legal standing. It was within its right (in order to

protect the interests of its members) that the Second Applicant be a party to these proceedings.

[59] No rational connection exist between the decision taken and the surrounding facts and circumstances. That the decision about the new 2016 language policy for the UFS involves constitutional issues is exactly what was not considered by the Council and Senate of the UFS. The record is self-evidently clear that the members of the Council and the Senate were made to belief that it is not a constitutional issue whereas it is in fact one. That it is a constitutional issue was, as already stated, conceded to by the counsel representing the UFS, Mr.Gauntlett. Had the members of both the UFS Council and Senate taken cognisance of the fact that changing the language policy of the UFS has a bearing on the Afrikaans speaking segment of the student population of the UFS, the result inevitably would have been different. Similarly, had they been made aware of the fact that what was at hand to be determined is a constitutional issue, the result would inevitably be different. The rationale of the decision taken was compromised by the fact that it was perceived not to be unconstitutional *per se* to change the language policy. The decision taken is in my view, not rationally connected to the facts and circumstances which informed the decision. I am of the view that these decisions must be reviewed and set aside.

COSTS

[60] I am mindful of the Biowatch – principle as enunciated in the case of **Biowatch Trust v Registrar, Generic Resources and Others** 2009 (6) SA 232 (CC). However, in the present case, the Applicants are successful in their challenge to the constitutionality of the adoption of the new 2016 language policy of the UFS. I can find no plausible reason why costs should not follow the result. As a result of the importance of the matter to all the parties concerned; the fact that the issues are involved; and that it is a new issue with regard to the interpretation of Section 29 (2) of the Constitution insofar as tertiary education is concerned, it justified the employment of two counsel (senior and junior). Costs should consequently also include the costs consequent upon the employment of two counsel where applicable.

ORDER

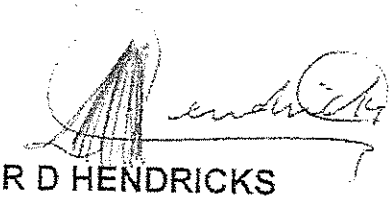
[61] Resultantly, the following order is made:

(i) The application is one of semi-urgent and non-compliance with the terms of Rule 6 (12) is condoned.

(ii) The decision by Council with the concurrence of the Senate of the University of the Free State to approve and adopt the new 2016 language policy for the University of the Free State on 07 and 11 March 2016 respectively, is reviewed and set aside.

(iii) The application to strike out is dismissed with costs.

(iv) The Third Respondent is ordered to pay the costs of this application, which costs shall include the costs consequent upon the employment of two counsel (senior and junior), where applicable.



R D HENDRICKS

JUDGE OF THE HIGH COURT, NORTH WEST PROVINCE

ACTING JUDGE OF THE FREE STATE HIGH COURT

I agree

F MOKGOHLOA

JUDGE OF THE HIGH COURT, LIMPOPO PROVINCE

ACTING JUDGE OF THE FREE STATE HIGH COURT

I agree

M MOTIMELE

ACTING JUDGE OF THE FREE STATE HIGH COURT

APPEARANCES:

ATTORNEYS FOR THE APPLICANT	:	SCHOEMAN MAREE INC.
ATTORNEYS FOR THE RESPONDENT:		PHATSHOANE HENNEY INC.
ATTORNEYS FOR THE AMICI CURAE :		HORN & VAN RESNBURG ATT.