IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / ~~NO~~.

(2) OF INTEREST TO OTHER JUDGES: YES / ~~NO~~.

(3) REVISED.

DATE 15/12/2016 SIGNATURE

CASE NO: 54451/2016

DATE: 15 | 12 | 2016

IN THE MATTER BETWEEN:

AFRIFORUM	**First Applicant**
SOLIDARITY	**Second Applicant**
and	
CHAIRPERSON OF THE COUNCIL OF THE UNIVERSITY OF PRETORIA	**First Respondent**
CHAIRPERSON OF THE SENATE OF THE UNIVERSITY OF PRETORIA	**Second Respondent**
THE UNIVERSITY OF PRETORIA	**Third Respondent**
THE MINISTER OF HIGHER EDUCATION AND TRAINING	**Fourth Respondent**

JUDGMENT

Kollapen J:

Introduction

1. This is a case involving the assertion of language rights. Language is considerably more than simply a means of communication; it has been recognised as central to human development and an inextricable part of the construction of human identity. In its 2004 Report titled 'Cultural Liberty in today's diverse World' the United Nations Development Programme described cultural liberty in the following terms:

> '*Cultural liberty is an important part of human development because being able to choose one's identity – who one is – without losing the respect of others or being excluded from other choices is important in leading a full life. People want the freedom to practise their religion openly, to speak their language, to celebrate their ethnic or religious heritage without fear or ridicule or punishment or diminished opportunity. People want the freedom to participate in society without having to slip off their chosen cultural moorings. It is a simple idea, but profoundly unsettling.*'

2. While language is indeed a positive and affirming component of human identity, history is also replete with examples of how powerful elites were able to harness language as a tool of domination, of subjugation and of exclusion. Those examples also exist in South Africa's own painful history.

3. The Senate and the Council of the University of Pretoria ('UP') resolved on the 20th and the 22nd of June 2016 respectively to change the language policy of UP to provide for English as the main language of learning and teaching.

4. The applicants seek to review and set aside those decisions of the Senate and Council. The first, second and third respondents oppose the relief sought, while the fourth respondent has elected to abide by the decision of the Court.

Background

5. It is however necessary in contextualising the dispute, to have regard to a number of factors and considerations all of which are relevant in assessing and determining the relief claimed. They include:

5.1 A brief history of UP and of its language policy over time;

5.2 The legal and policy framework relevant to the determination of language policy at UP; and

5.3 The process followed by UP prior to the decision to adopt the current language policy

➢ **A brief history of UP and its changing language policy over time**

6. The Pretoria branch of the Transvaal University College was the forerunner of UP and it commenced activities in 1908. Interestingly, English was the only medium of instruction. In 1917, UP initiated dual medium instruction offering subjects in English and Afrikaans where it was warranted and/or requested. In 1932 the Council of UP resolved that Afrikaans would be the only medium of instruction and this continued up until 1994 when UP adopted a bilingual language policy offering instruction in English and Afrikaans. In 2010 the policy was amended and while in the main it remained a policy of bilingualism, offering English and Afrikaans as languages of instruction and communication, it recognised Sepedi as a third language of communication. For the sake of completeness the policy adopted in June 2016 and which is the subject matter of this case, provides that English will be used as the language of teaching and learning while the development and advancement of Afrikaans and Sepedi will be promoted.

7. Over the time the demographics of the students at UP and their language choice and preference also underwent changes. In the years prior to 1994 UP was essentially a White university with Afrikaans as the only medium of instruction. The following tables, prepared by UP, illustrate how in the last 20 years or so there has been a radical transformation in the student profile of UP as well as in the language preference of those students.

- Demographics:

Year	Demographic
1990	Approximately 88% of the University's students are Afrikaans.
1994	At this stage, approximately 77% of the University's students are Afrikaans.
1997	The Constitution comes into effect.
2000	The number of Afrikaans students at the University as a proportion to the total number of students has now declined to 57%.
2005	The number of home-language Afrikaans speakers declines to 41.8% of the student population.
2010	At this stage, approximately 35.9% of students are home-language Afrikaans-speaking.
2016	The present proportion of home-language Afrikaans speakers in the student population of the University is 25.1%.

- Statistics in relation to mother-tongue speakers of Afrikaans:

Year	Event
2010	77.1% of mother-tongue speakers prefer Afrikaans as a language of tuition.
2016	Only 59.14% of the mother-tongue Afrikaans students of the University preferred Afrikaans as a language of tuition, with 40.86% of Afrikaans-speaking students expressing a preference for English tuition. These figures must be understood in the context of the percentage of Afrikaans at the University who, in 2016, numbered 25.1%.

- Projected demographics for planned enrolment between the 2017 and 2019 academic years:

Race group	Projected percentage increase in enrolment at the University
Black	4.5% increase
Coloured	5.8% increase

Indian	2.5% increase
White	-2.8% decrease

- Demand for Afrikaans as a language of tuition at the University:

Year	Overall University demand for Afrikaans as a language of tuition
2009	29.7%
2011	25.7%
2013	22.8%
2015	17.9%

8. The conclusion by UP that the decline in the enrolment of White students as well as the decline in the demand for Afrikaans are likely to continue, appear to be supported by the data in the tables above.

➢ The legal and policy framework relevant to the determination of language policy at UP

9. The University of Pretoria is a 'public higher education institution', as defined by section 1 of the Higher Education Act 101 of 1997 ('the Higher Education Act'). The University is also an 'organ of state' under section 239 of the Constitution of the Republic of South Africa, 1996 ('the Constitution'). As an organ of state and pursuant to section 8(1) of the Constitution, the University is bound by the Bill of Rights.

10. In deposing to an answering affidavit in these proceedings on behalf of UP, Professor Norman Duncan in alluding to the university's commitment to address the imperative of transformation and a past characterised by strife, conflict and injustice, pointed out that UP was committed to:

    i. *A decisive move away from exclusivity and privilege;*
    ii. *Promotion of an educational environment which recognises equal dignity and respect for all, seeking to actively overcome discriminatory practices of the past;*
    iii. *The creation of an education environment which is reflective of the diversity of society, specifically with regard to race; and*
    iv. *The promotion of social integration and a rejection of exclusivity and the perpetuation of privilege.*

➢ **<u>The Higher Education Act and Language Policy Framework</u>**

11. Section 26 of the Higher Education Act provides that a 'public higher education institution' such as the University must establish, *inter alia*, a 'council' ('the Council') and a 'senate' ('the Senate'). Furthermore, pursuant to sections 27(1) and 28(1) of the Higher Education Act:

    i. The Council of the University must govern it subject to the Higher Education Act and the University's Institutional Statute; and

ii. The Senate of the University is accountable to the Council for the academic and research functions of the University and must perform such other functions as may be delegated or assigned to it by the Council.

12. Section 27(2) of the Higher Education Act provides *inter alia* that the University must adopt a language policy: 'Subject to the policy determined by the Minister, the Council (of the University), with the concurrence of the Senate, must determine the University's language policy and must publish and make it available on request'.

13. The policy referred to in Section 27(2) of the Higher Education Act is the Higher Education Language Policy of 2002, which must itself be read with the National Language Policy Framework of 2003. That policy framework evidences a recognition of Afrikaans as a national resource where in paragraph 15.4 the following is stated:

> *'The Ministry acknowledges that Afrikaans as a language of scholarship and science is a national resource. It, 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.'*

14. In addition in recognising the right to receive education in the language of their choice, the policy points out in paragraph 3.2 thereof that:

> *'The Constitution delineates clearly the limit of the right of individuals to receive education in the language of their choice. The exercise of this right cannot negate consideration of equity and redress in the context of the values that underpin our shared aspirations as a nation. In this regard, as the late Chief Justice Ismail Mohamed, stated in 1995:*
>
> > '*All Constitutions seek to articulate, with differing degrees of intensity and detail, the shared aspirations of a nation; the values which bind its people and which discipline its government and its national institutions; the basic premise upon which judicial, legislative and executive power is to be wielded; the constitutional limits and the conditions upon which that power is to be exercised; the national ethos which defines and regulates that exercise; and the moral and ethical direction which the nation has identified for its future*'.

15. The parties were in agreement that while these are policy pronouncements and not law, Section 27(2) of the Higher Education Act enjoins UP to have consideration to the policy determined by the Minister. At the same time the

policy to which reference has already been made reflects a commitment to the retention and strengthening of Afrikaans as a language of scholarship and science while recognising that the right to be taught in the language of choice cannot negate consideration of race and redress.

- **The Constitution**

16. Section 29(2) of the Constitution provides as follows:

'***Education***

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

(a) Equity;

(b) Practicability;and

(c) The need to redress the results of past racially discriminatory laws and practices.'

18. A significant portion of the dispute in these proceedings relates to the interpretation to be given to Section 29(2) and in particular to the considerations that go into determining the question of 'where that education is reasonably practicable'. In ***HEAD OF DEPARTMENT, MPUMALANGA DEPARTMENT OF EDUCATION & ANOTHER v HOERSKOOL ERMELO & ANOTHER*** **2010 (2) SA 415 (CC)** ('Ermelo') the Court analysed Section 29(2) as follows at 433D-G):

> '*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 built into s 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 their 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.'

19. 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 Gauteng Education Bill case'), KRIEGLER J also referred to the concept of reasonably practicable as being elastic so that it leaves room for the consideration of a large number of factors.

20. Certainly in argument before us there was agreement that the concept of 'reasonably practicable' was not exhaustive in the number of factors that in any given case could go into its determination. To the extent that the parties seek to approach the interpretation of Section 29(2) differently, it is a matter I will return to later in this judgment.

- **<u>The process followed by UP prior to the decision taken to adopt the current language policy</u>**

18. During the early part of 2016 various internal processes were activated within the UP community on the question of its language policy culminating in a

decision by its Council on 16 March 2016 to appoint an Independent Transformation Panel ('the Panel) whose mandate, as an advisory body, was to advise UP 'on a range of transformation matters including the language policy and institutional culture at UP'. The Panel was chaired by retired Constitutional Court Justice Johann van der Westhuizen.

19. The Panel, in the discharge of its mandate, prepared a report dated 17 June 2016 dealing with the issue of a language policy for UP. The comprehensive report deals extensively with a number of issues including the history of language use at UP, the process the Panel followed in calling for receiving and considering submissions, the demographics, statistics and finances in so far as they were relevant to language policy, the legal position, its analysis and conclusions and finally its recommendations.

20. Some of the submissions it received and arguments considered were those in favour of a more comprehensively multilingual policy, others that were in favour of a monolingual policy as well as those that centred on the protection of Afrikaans.

21. The Panel in ultimately making its recommendations took into account some of the following considerations:

i. The considerable change in the language profile of UP students over the past 22 years where in 1994, 77.7% of students indicated Afrikaans as home language compared to 28.6% in 2016. In addition it also noted the decline in the number of Afrikaans home-language students who preferred to be taught in Afrikaans and concluded from the data that the demand for Afrikaans as a medium of instruction has been declining.

ii. It expressed the sentiment that 'Afrikaans must be spoken, written and further developed' and pointed out that 'a choice for English as the main medium of instruction on campus does not at all affect the right of Afrikaans-speaking academics and students to communicate in Afrikaans on campus or to publish in Afrikaans' cautioning that 'to portray the situation otherwise is dishonest'.

iii. On the question of the law and while recognising the right in Section 29(2) to receive education in the language of their choice where this was 'reasonably practicable' it pointed out that the Section was required to be interpreted purposively within the context of the Constitution as a whole and as far as possible in harmony with other rights.

iv. While it left open the question of the reasonable practicability of teaching in Afrikaans at UP, it did make the observation that 'it seems to be reasonable practicable, seeing that it has been and is still being done'.

v. It accepted as having merit a submission it received that Afrikaans-speaking students have a pedagogic advantage over speakers of Sepedi and other African languages on the basis that these latter students have no choice in the language in which they are taught whereas Afrikaans-speaking students have a choice between Afrikaans and English.

vi. In considering that class sizes for Afrikaans lectures were substantially much smaller in number than class sizes for English lectures (e.g. Law Faulty 97 to 360; Economic and Management Sizes 152 to 371) and while accepting that it did not have the benefit of expert evidence as to the impact of different class sizes on education, it nevertheless expressed the view that on the basis of general logic the figures seem to support a conclusion that this results in a disparate impact upon, and discrimination against, non-Afrikaans speakers .

vii. It appeared to favour the argument that separation academically on the basis of language may well undermine social cohesion as students (who may invariably have different social, economic and political backgrounds) will not have the opportunity in the same space to debate and engage with each other on matters of significance and this will thereby perpetuate the separateness that our Constitution is set against.

22. The Panel concluded its report by recommending English as the main language of teaching and communication.

23. The full report of the Panel served before Senate and Council at its meetings of the 20th and 22nd of June 2016 and was duly considered by these structures in their deliberations and the decision they ultimately made. In addition the Chair of the Independent Panel and other panel members were in attendance at those meetings, presumably to speak to the Report and provide clarification if and where this was required.

24. While the minutes of Senate and Council adopting the new language policy are part of the Record filed in terms of the provisions of Rule 53(3), reference was made in argument by both parties to a document prepared by the Vice-Chancellor of UP, Prof. C de La Rey titled 'Reasons for the University of Pretoria's decision to adopt the Language Policy on 22 June 2016 ('the Reasons Memo'). It may for the purpose of this judgment be more convenient to refer to this document as the parties have in argument and in any event there was no suggestion that the document does not correctly reflect and record the reasons for the decisions taken on the 20th and 22nd June 2016 by the Senate and Council. I will make further reference to this Memo later in this judgment.

The challenge of the applicants

25. In seeking to review and set aside the decisions of Senate and Council of UP of the 20th and 22nd June 2016 respectively, the applicants contend:

    i. That the decisions stand to be reviewed on the basis that they are not responsive to the right in Section 29(2) and under circumstances where they contend that it is reasonably practicable to offer tuition in Afrikaans;

    ii. That the decisions constitute a denial of the right in Section 9 of the Constitution not to be discriminated against on the basis of language;

    iii. That the decision constitutes a withdrawal of extant rights of students currently seeking instruction in Afrikaans and those who might do so in the future.

The stance of the respondents

26. The Respondents contend that the language policy does not violate Section 29(2) of the Constitution, but that even if the Court found that it did limit the rights in Section 29(2), then in such event the Respondents contend that the limitation is justifiable in terms of Section 36(1) of the Constitution.

27. Initially the Respondents sought relief that the application be dismissed on the basis that the applicants have not come to Court with 'clean hands', having based the application solely on an anonymous informant who unlawfully

procured confidential information from the University. At the hearing of the matter the Respondents indicated that they did not persist with the dismissal of the application on this ground but would nevertheless seek to continue rely on it in so far as it related to the costs order the Court would ultimately make. It is a matter I will return to.

Analysis

- **The scope and extent of the right under Section 29(2)**

28. As a starting point, it warrants mention that while the section creates the right to receive education in the official language or languages of choice in public educational institutions where that education is reasonably practicable, the Supreme Court of Appeal in ***MINISTER OF EDUCATION, WESTERN CAPE, AND OTHERS v GOVERNING BODY, MIKRO PRIMARY SCHOOL, AND ANOTHER*** **2006 (1) SA 1 (SCA)**, pointed out that it was not the right to be so instructed at each and every public educational institution subject only to it being reasonably practicable to do so. Clearly the claim to the right must be located and adjudicated upon within the context of the education system as a whole and the resources and other means that exists within it, as opposed to the confines of any single public educational institution at any given time where such a claim may arise.

29. Reverting to the content of the right, the Court in the ***ERMELO*** case, in its analysis of Section 29(2), described it as 'made up of two distinct but mutually reinforcing parts'. Thus while they are distinct parts of the section they remain mutually reinforcing and cannot be artificially separated.

30. The Applicants adopt the stance that in determining what is reasonably practicable as contemplated in the first part of the section, regard should not be had to the considerations referred to in the second part of the section i.e. equity, practicability and historical redress. While in ***ERMELO*** the Court alluded to some of the considerations that would ordinarily go into the determination of what is reasonably practicable such as the availability of public schools, enrolment levels and language choices of learners, it nevertheless went on to describe the reasonableness standard as imposing a 'context-sensitive understanding of each claim for education in a language of choice.'

31. In much the same vein this accords with KRIEGLER J's description in the ***GAUTENG BILL*** case of the concept of reasonable practicability as being elastic so as to accommodate and be open to a variety of considerations. Under such circumstances it would in my view be an exercise in artificiality to insulate factors relating to equity, practicability and historical redress in the determination of what is reasonably practicable. The South African Concise Oxford Dictionary describes practicable as 'able to be done or put into practise successfully.' Clearly this relates purely to what may be described as the

functional aspect of the task or put differently, whether the available resources enable the task to be undertaken. However the matter does not and should not end at the functional level. The section in requiring the importation of a standard of reasonableness certainly meant that the lawmaker contemplated much more than a functional ability to provide education in the language of choice.

32. The concept of reasonableness described in the Concise Oxford Dictionary as 'fair and sensible', introduces a value and qualitative standard into the determination of reasonable practicability. That being the case it is difficult to justify the exclusion of the factors in the second part of the section in the manner in which the claim to the right is dealt with. To do so may well have the unacceptable consequence that a determination of reasonable practicability may be arrived at under circumstances where it negates considerations of equity and race. This can hardly be consistent with the overall scheme, architecture and values of the Constitution, or the policy and legal framework adopted by the State in seeking to give effect to Section 29(2).

33. In this regard the Ministerial Policy Framework upon which the applicants place considerable reliance, explicitly accepts that the exercise of the right to receive education in the language of one's choice cannot negate considerations of race and equity.

34. Thus, reverting to the reasons advanced by UP for the June 2016 decisions of the Senate and Council, the Reasons Memo prepared by the Principal of UP dealt extensively with a number of factors and considerations including the Regulatory Framework (The Constitution, the Higher Education Act and Higher Education Policy and National Language Policy Framework as well as UP's Mission and Institutional Statute.) It then considered the history and changing demographics of the University, some of which has already been traversed in this judgment and then finally considered the Report of the Panel.

35. The Senate was clear in its view that the new language policy aimed at removing segregation and facilitating social cohesion, and that a parallel medium policy with Afrikaans and English as medium of tuition would perpetuate racial segregation. It described it's concern in the following terms:

> '*Keeping the two language groups apart in whatever configuration is educationally inferior to having them together because it teaches students it is acceptable to be taught apart and it makes the experience impossible of being taught in a truly diverse context, where one's views are challenged by people who hold views fundamentally different from your own.*'

36. When the matter came before Council, they also expressed themselves clearly and unequivocally on the need for the University Language policy to reflect the commitment of UP to move away from exclusivity and privilege, to promote an

educational environment that recognised equal dignity and social integration and one that was reflective of the diversity of society with specific regard to race. They expressed the view that the language policy which they ultimately adopted gave effect to the commitment of UP in this regard.

37. They then proceeded to consider the question of reasonable practicability and in doing so indicated the following:

i. That the question had to be understood in the light of a wide range of considerations. This is consistent with the context-sensitive understanding alluded to in ***ERMELO*** and the elasticity of the concept as so described in the ***GAUTENG EDUCATION BILL*** case.

ii. That in the light of the available data the implementation of a parallel medium language policy would not be practicable at all in the medium to long term.

iii. That the perpetuation of a language policy the utility of which in the context of the future demographics of the University, will increasingly be diminished, was considered to be directly relevant to what was reasonably practicable.

iv. The question of reasonable practicability had to be considered within a matrix of competing considerations and the choice of about 18% of

the student population was but one such factor, while the interests of the other 82% also required consideration.

38. Both Senate and Council then proceeded to adopt by resolution, the new language policy.

39. Before considering whether the decision and the reasons advanced in support thereof stand up to the scrutiny of the law and the Constitution, it is important to have regard to the role and expertise of those entrusted with decision-making as well as the avowed reluctance of Courts to usurp the functions of administrative agencies or other functionaries.

40. In ***BATO STAR FISHING (PTY) LTD v MINISTER OF ENVIRONMENTAL AFFAIRS AND OTHERS*** **2004 (4) SA 490 (CC)** the Court stated the following:

> '*What will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair procedure will depend on the circumstances of each case. Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests*

involved and the impact of the decision on the lives and well-being of those affected. Although the review functions of the court now have a substantive as well as a procedural ingredient, the distinction between appeals and reviews continues to be significant. The court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution.' (at 513B-D)

41. Also in ***MEC FOR ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING v CLAIRISON'S CC*** **2013 (6) SA 235 (SCA)** the Court expressed the following view:

'*When the law entrusts a functionary with a discretion it means just that: the law gives recognition to the evaluation made by the functionary to whom the discretion is entrusted and it is not open to a court to second-guess his evaluation. The role of a court is no more than to ensure that the decision-maker has performed the function with which he was entrusted.*' (at 239I-240A)

The Court added:

'*It has always been the law and we see no reason to think that PAJA has altered the position that the weight or lack of it to be attached to the*

various considerations that go into making up a decision, is that given by the decision-maker. As it was stated by Baxter: 'The court will merely require the decision-maker to take the relevant considerations into account; it will not prescribe the weight that must be accorded to each consideration, for to do so could constitute a usurpation of the decision-maker's discretion.' (at 240D)

'The law remains, as we see it, that when a functionary is entrusted with a discretion, the weight to be attached to particular factors or how far a particular factor affects the eventual determination of the issue, is a matter for the functionary to decide...' (at 240H-241A)

42. Thus regard being had to the above *dicta*, it is clear that both Senate and Council applied their minds to a number of relevant and often competing considerations and properly considered what was before them. The weight that they afforded to the different considerations that were before them is not a matter for the Court to prescribe. In any event it hardly appears that the considerations that occupied them were neither cogent nor relevant to the determination of what the law required of them.

43. If one has regard to the *dicta* in ***ERMELO*** then it does appear that what emerged was a careful consideration of context, a proper application of the mind as to the legal framework that was applicable including Section 29(2) of

the Constitution and then an engagement on the key question of the reasonable practicability of the demand to be taught in the language of choice.

44. To the extent that the applicants seek to rely on the judgement of the Full Court of the Free State High Court in the matter of ***AFRIFORUM AND ANOTHER v CHAIRMAN OF THE COUNCIL OF THE UNIVERSITY OF THE FREE STATE AND OTHERS*** **(A70/2016 [2016] ZAFSHC 130 (21 July 2016)** ('the UFS matter'), that matter is clearly distinguishable. In the UFS matter the Court in setting aside the decisions of the University said the following (in paragraph 52):

> '*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 decision reviewable*'.

45. The above *dicta* is certainly not supportive of the submission that integration and transformation are in themselves irrelevant considerations. As I understand it what the Court simply cautioned against was that the exercise in responding to a claim for education in the language of choice, had to be located within the parameters of Section 29(2) and that the factors universally accepted to form part of the standard had to be considered. Those factors were not circumscribed

nor is there anything in the judgment to suggest that integration and transformation were not legitimate factors to consider in the determination of what is reasonably practicable.

46. In these proceedings and if one has regard to the Reasons Memo then there was certainly an understanding by UP of the centrality of Section 29(2) in its formulation of a language policy and the various steps it embarked upon prior to taking the decisions of June 2016, as well as the decision and the reasons for it, reflect an ongoing engagement with the context-sensitive considerations it was required to take into account, including present and projected demand, the best utilisation of resources, the numbers involved as part of the whole, transformation, social cohesion and redress.

47. Accordingly on this leg of the challenge it could hardly be said that UP failed to be responsive to the constitutional rights of Afrikaans students seeking instruction in the language of Afrikaans. Being responsive can hardly equate to having to positively respond to the request made. What it requires is for the University of Pretoria to consider the request and determine whether the request is one that is reasonably practicable as contemplated in Section 29(2). I have demonstrated that this exercise, as required, was undertaken with a high level of engagement, thoroughness and transparency and the ultimate conclusion that it would not be reasonably practicable was reached after a proper consideration of all the necessary and relevant factors in a context-

sensitive understanding within which the claim was located. I must accordingly conclude that the relief sought on this leg of the argument must be destined to fail.

48. Before concluding on this aspect, and in the event that I am wrong that the determination of what is reasonably practicable is to exclude those considerations mentioned in the second part of Section 29(2), namely equity, practicability and the need to redress past racially discriminatory practises, then even on the narrow construction contended for by the applicant, I would conclude that the conclusion that providing tuition in Afrikaans was not reasonably practicable is supported and unassailable.

49. In this regard the Reasons Memo clearly indicates that in the light of the available data, it would not be practicable in the medium to long term and was thus unsustainable. This conclusion is buttressed by the data that indicates a steady decline in the demand for Afrikaans as a language of tuition as well as a steady decline in the number of White students at UP. The data certainly suggests that the decline is likely to continue and under such circumstances UP is justified in having regard to the medium and long term in its policy making and planning processes. Thus even on the narrow construction on Section 29(2) I am satisfied that UP has demonstrated that tuition in Afrikaans is not reasonably practicable and the application will have failed on this ground as well.

➢ **The equality argument**

50. While this aspect of the challenge was not pursued in argument, for the reasons already given the 2010 policy of bilingualism was certainly considered by the Independent Panel to be possibly discriminatory in so far as it deprived students whose mother tongue was neither English nor Afrikaans of any choice in the language of instruction. Most, if not all of them, were obliged to choose English as the medium of instruction. On the other hand students whose mother tongue was Afrikaans and who were proficient in English had the choice of English and Afrikaans as the medium of instruction and were certainly in a more advantageous position.

51. The new policy cannot be discriminatory simply because it ceases to offer Afrikaans as a language choice of instruction. If one has regard to the overall effect of the policy decision to make English the sole language of instruction, read together with the Report of the Independent Panel, then it may well constitute some levelling of the playing fields but in a constructive and forward-looking manner. The Panel accepted that English is a compromise without much of an alternative and in paragraph 206 of its Report says the following:

> '*It is true that instruction in English only may be to the advantage of a small number of mainly white English speakers. All students will, to*

some extent, be disadvantaged 'equally'. This is sometimes referred to as the 'graveyard' option, often illustrated by the analogy of a swimming pool being closed because black people are denied access to it, resulting in the area being left without a swimming pool. Whether an unlawfully discriminating swimming pool is better than no pool is a choice to be made.'

52. I am accordingly of the view that there is no substance in the discrimination argument.

➢ **The interference with extant rights**

53. The applicants in advancing this argument rely on the *dicta* of the Constitutional Court in ***ERMELO*** to the effect that where a student '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'. While this is indeed so, I did not understand the applicants to argue that the issue of reasonable practicability would not be sufficient justification.

54. I do not understand that there are two tests of application here, one located in Section 29(2) in so far as it relates to a request for education in the language of choice, and the other that applies to instances where the right is already

enjoyed. While it is and must be so when the State seeks to take the right away or diminish it, as is the case with the introduction of the 2016 language policy, there has to be sufficient justification. Such justification in this instance is to be found in the successful activation of the test of reasonable practicability found in Section 29(2). To suggest a different or a more onerous justification would have the effect of impermissibly entrenching language rights.

55. The challenge on this ground must in my view fail as well.

56. In the circumstances and for the reasons given, the application is destined to fail on all of the grounds upon which it has been advanced.

Costs

57. As alluded to earlier, the respondents persist in their stance that as the applicant came to Court with 'unclean hands', the Court should consider it against the applicant, in the determination of an appropriate costs order. It is not in dispute that the applicants relied on information in launching this application, from an informant who is a member of Council. In the Founding Affidavit it is stated that 'the informant that provided the documents is subject to the Rules of Council which impose confidentiality on him'.

58. Despite various requests on the part of the respondents insisting that the identity of the informer be disclosed, the applicants have refused to do so and have simply adopted the position that no further debate on the matter is required as the relevant documents and information are now before the Court.

59. While it is so that relevant documents and information were considered by the Court without regard being had to the manner of their procurement, the question of unclean hands raised by the respondents does require further and proper consideration.

60. In ***AFRISURE CC AND ANOTHER v WATSON NO AND ANOTHER*** **2009 (2) SA 127 (SCA)** the Court expressed the view that in the context of the unclean hands doctrine that it would be contrary to public policy to render assistance to those who defy the law.

61. In ***BROOKS v MINISTER OF SAFETY AND SECURITY*** **2009 (2) SA 94 (SCA)** the Court stated the following:

> '*It is true that in matters of human behaviour we are often told not to judge by results, but in law, when considering whether a contention is well founded, the absurdity of the results to which it will give rise is not an immaterial consideration. That a person in the position of Brooks could by his own intentional wrongful act create in favour of his*

dependants a cause of action that would not otherwise exist is nothing short of preposterous; indeed in my view that would be a dangerous proposition. After all it is a trite principle of our law, that a person should not be allowed to benefit from his/her own wrongful act'. (at 100E-F)

62. In these proceedings it is clear that the informant who is a member of Council has acted in an unethical and wrongful manner. As a member of Council he owes a duty to both the University and to Council and the office he holds requires at least some degree of fidelity to the University. It is remarkable that he chose to breach such a duty and when the respondents press for details of his identity, the response is that to disclose his identity would expose the informant to disciplinary steps and that withholding his name is necessary for his protection.

63. It is unconscionable that someone could act in the fashion in which the informant has done and then elect to hide behind the risk of disciplinary action to remain secret. Our Constitution seeks in many ways to advance the concept of individual and institutional integrity and to encourage conduct that is consistent with both the letter and the spirit of the law.

64. The information and documents in question relate to the legitimate business of the University and of Council. Their leaking has compromised the integrity of

Council and will invariably cast a shadow over Council and in particular its ability to engage in robust and honest debate such of the kind that universities invariably are involved in.

65. Finally it warrants mention that the information and documents in question are not in the nature of a protected disclosure or information evidencing corruption or illegality and thus no special measures exist to protect its disclosure. As indicated they relate to the proceedings of a Council meeting where the legitimate affairs of the University were discussed. In my view the unclean hands doctrine would certainly apply, in principle, to the information and documents that the informant, against the Rules of Council, made available to the applicant.

66. The question that arises from this is whether the applicant, who may not have necessarily requested or solicited the information and documents, should be visited with the consequences of their unlawful procurement. In my view it is not permissible for the applicant in the context of these proceedings to avoid the application of the unclean hands doctrine by asserting that it was not responsible for the unlawful behaviour that constituted the breach of Council Rules.

67. The documents that formed the basis of this application could have been secured through the rules of discovery and there was no need in my view to

rely on the information and documents made available by the informant. The applicant was aware at the time the founding affidavit was deposed to that the information and documents were procured in breach of the Rules of Council. Notwithstanding this knowledge it elected to use and act on the information and documents it received and in my view this conduct simply served to compound the unlawfulness of the actions of the informant. To clothe such conduct with legality and to adopt the approach that the matter is academic, as the information and documents are now before Court, will lose sight of the need to ensure that even litigation while governed by the rules of court in the main, is conducted with integrity and that the Court demonstrates a willingness to reprimand litigants who deliberately choose to act outside of these values. This is precisely the kind of case where such a reprimand is called for and in my view an appropriate costs order would be the kind of reprimand and sanction that would be justified.

68. For the reasons I have given the ordinary rule expounded in ***BIOWATCH TRUST v REGISTRAR, GENETIC RESOURCES, AND OTHERS*** **2009 (6) SA 232** in so far as it relates to constitutional litigation should not apply. In ***BIOWATCH TRUST*** the Court concluded that 'courts should not lightly turn their backs on the general approach of not awarding costs against unsuccessful litigants in proceedings against the State where matters of genuine constitutional import arise'.

69. The ***BIOWATCH TRUST*** principle is not an inflexible one and in ***LAWYERS FOR HUMAN RIGHTS v MINISTER IN THE PRESIDENCY AND OTHERS*** **[2016] ZACC 45 (1December 2016)** the Constitutional Court made the following observations:

> '*In both* Biowatch *and* Helen Suzman Foundation, *this Court emphasised that judicial officers should caution themselves against discouraging those trying to vindicate their constitutional rights by the risk of adverse costs orders if they lose on the merits. Particularly, those seeking to ventilate important constitutional principles should not be discouraged by the risk of having to pay the costs of their state adversaries because the Court holds adversely against them.*
>
> *This, of course, does not mean risk-free constitutional litigation. The Court, in its discretion, might order costs,* Biowatch *said, if the constitutional grounds of attack are frivolous or vexatious – or if the litigant has acted from improper motives or there are other circumstances that make it in the interests of justice to order costs. The High Court controls its process. It does so with a measure of flexibility. So a court must consider the 'character of the litigation and [the litigant's] conduct in pursuit of it', even where the litigant seeks to assert constitutional rights.*'

70. In my view the applicant's conduct as well as the interests of justice in so far as they relate to the protection of the integrity of UP and the litigation process should result in an adverse costs order. This would also signify that the imperatives of public policy located as they are within the values framework of the constitution should not and does not sanction such conduct.

71. I would for these reasons also direct that the costs of Part A which were reserved be dealt with on the same basis and essentially for the same reasons.

Some concluding observations

72. The idea of a society in transformation can, on the one hand, be positive and affirming while at the same time be unsettling and the source of much insecurity. These are but some of the formidable challenges we are required to navigate in translating the values and the imperatives of the Constitution into reality. The Constitution is not vindictive nor vengeful in charting the path for our future. It contemplates a principled, value-based trajectory for the change that must herald the unfolding of a new constitutional order.

73. Given the enforced separation that was the hallmark of our society for so long, we have the choice of continuing to thrive ensconced in our separateness or embracing the unifying diversity our Constitution contemplates for our society.

The language policy choice made by the University of Pretoria is not only consistent and in accord with the provisions of Section 29(2) but also signals a deep and sincere commitment to place the University at the forefront of being an agent in advancing social cohesion and in providing an important intellectual space where South Africans, in their bewildering diversity, can together reflect on the kind of issues and debates that a young and vibrant society such as ours must confront.

74. Accordingly it can hardly be further away from the truth when the Applicant, in its founding affidavit, describes the language policy as being part of a 'focussed countrywide clampdown on Afrikaans as language of learning and tuition'. Such language in the founding affidavit, only serves to impermissibly deepen the fault-lines that already characterise our fragile democracy and one should caution against it.

ORDER

75. In the circumstances the following order is made:

I. The application is dismissed.

II. The first and second applicants jointly and severally, the one paying, the other to be absolved, are ordered to pay the costs of the application

which costs shall include the costs of Part A, and the costs of two counsel.

I AGREE,

P M MABUSE
Judge of the High Court

N KOLLAPEN
Judge of the High Court

I AGREE,

S A M BAQWA
Judge of the High Court

IT IS SO ORDERED.

54451/2016

HEARD ON: 01 December 2016

DATE OF JUDGMENT: 15 DECEMBER 2016

APPEARANCES:

FOR THE 1ST & 2ND APPLICANTS:	Adv. J I du Toit SC (appearing with Adv. M J Engelbrecht)
INSTRUCTED BY:	Kriek Wassenaar & Venter Incorporated (ref.: P Wassenaar/JS/QB0068)

FOR THE 1ST & 2ND & 3RD RESPONDENTS:	Adv. G Marcus SC (appearing with Adv. M Stubbs)
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