26/04/2018

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 54450/2016

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.
26/4/2018 RKeightley
DATE SIGNATURE

In the matter between:

AFRIFORUM Applicant

and

CHAIRMAN OF THE COUNCIL OF THE UNIVERSITY OF SOUTH AFRICA First Respondent

CHAIRMAN OF THE SENATE OF THE UNIVERSITY OF SOUTH AFRICA Second Respondent

THE UNIVERSITY OF SOUTH AFRICA Third Respondent

J U D G M E N T

KEIGHTLEY, J

INTRODUCTION

1. In 2016 the University of South Africa (UNISA) adopted a revised language policy (the new language policy). One of the key elements of the new language policy (there are other key elements, which I refer to later), is that English is identified as the sole language of learning and tuition (LOLT). This represented a shift from the previous

language policy of 2010. In terms of that policy, both English and Afrikaans, were LOLT.

2. This is an application to review and set aside the new language policy on the grounds that it is contrary to the Constitution. The applicant is Afriforum. This is not the first constitutional challenge mounted by them against the language policies adopted by South African universities in recent years. In December 2017 the Constitutional Court handed down judgment in the matter of *Afriform & Another v University of the Free State*.[1] The decision followed a similar challenge by Afriforum to the language policy adopted by the University of the Free State. Afriforum succeeded in its challenge in the High Court,[2] but the University was successful in its appeal to the Supreme Court of Appeal. The Constitutional Courtesy dismissed Afriforum's leave to appeal the SCA decision.[3]

3. The present application was instituted after the High Court application in the *University of the Free State* case, but before the appeal in that matter was heard by the SCA. By the time the present application was heard, the parties and the court had the benefit of both the SCA judgment and the Constitutional Court judgment in the *University of the Free State* case. Consequently, the issues before this court were more refined than the issues outlined in Afriforum's founding affidavit, which was drafted before those two decisions were handed down.

4. One of the significant changes in the approach of Afriforum following the judgments in the *University of the Free State* case is that it no longer advanced its case on the basis

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[1] [2017] ZACC 48
[2] Unreported decision of the Free State High Court, case no. A70/2016, dated 21 July 2016
[3] The decision of the SCA is reported as *University of the Free State v Afriforum & Another* 2017 (4) SA 283 (SCA)

that the adoption of the new language police by Senate and the Council of UNISA was administrative action and subject to review under the Promotion of Administrative of Justice Act.[4] This is in line with the findings of both the SCA[5] and the Constitutional Court[6] in the *University of the Free State* case to the effect that the adoption of a language policy by a University is not administrative, but executive action. As a result, at the hearing of this matter Afriforum did not rely on PAJA for its grounds of review, but rather on the constitutional principle of legality or rationality. I deal with the grounds of review shortly.

PARTIES

5. As I have indicated, Afriforum is the applicant. It is a non-profit company and non-governmental organisation involved in the protection and development of civil rights within the context of the Constitution. It states that it has among its membership students currently studying at UNISA with Afrikaans as their elected LOLT. It also has members who are parents of students who are currently enrolled as well as those who are prospective students who, in the future, might wish to be given the opportunity to receive their tertiary education in Afrikaans at UNISA.

6. The respondents are all institutional parties: first respondent is the Chairman of Council of UNISA, the second respondent is the Chairman of Senate, and the third respondent is UNISA itself. Council is constituted under section 26(1)(a) of the Higher Education Act[7] (HEA) and UNISA's Institutional Statute. In terms of section 27(2) of the HEA, it determines the language policy of the University in concurrence with Senate.[8]

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[4] PAJA, Act 3 of 2000
[5] At paras 17-19
[6] At paras 34 & 35
[7] 101 of 1997
[8] Section 27(2) of the HEA

LOCUS STANDI

7. Afriforum basis its *locus standi* on a number of grounds. It says that it acts on behalf of prospective students who might wish to study in Afrikaans at UNISA in the future, current students receiving tuition in Afrikaans, as well as in the public interest on the grounds that the scope of tuition in Afrikaans as a parallel-medium language of tertiary education is under severe pressure.

8. The Constitutional Court accepted in the *University of the Free State* case that Afriforum had the requisite standing under section 38 of the Constitution. Afriforum's grounds for standing in that case were similar to those advanced in the present case. Consequently, there can be no real dispute that it enjoys standing before this court to mount its constitutional challenge to the adoption of the new language policy. One issue of standing remains. I deal with this later, as it is closely tied up with Afriforum's complaint regarding what it says were procedural irregularities in the adoption of the policy.

THE NEW LANGUAGE POLICY

9. UNISA is a distance learning institution. Historically, its students were able to access both English and Afrikaans as LOLT. In 2010 UNISA changed its language policy. The 2010 policy expressed a commitment to functional multilingualism, and a commitment to the promotion of equitable language rights, emphasising the upliftment of the status and use of marginalised indigenous languages. The effect of the policy was to retain both English and Afrikaans as LOLT at an undergraduate level. However, provision was made for the Senate Language Committee (the SLC) to

consider applications for undergraduate models to be offered in English only, based on various factors.

10. In 2013 UNISA embarked on a process of further revision of its language policy. In 2014 the University adopted Guidelines for the Discontinuation of Afrikaans in Certain Modules (the Guidelines). In terms of the Guidelines, apart from those modules that had already obtained permission from the SLC to offer English only as the LOLT, any undergraduate courses in respect of which there had been consistently for a period of three years less than 15 Afrikaans students in a module could discontinue tuition in Afrikaans. Further, those modules in respect of which there had been consistently between 15 and 100 Afrikaans students in a module could automatically discontinue formal tuition and printed study material in Afrikaans. In those modules, Afrikaans translations of material were required to be placed on an electronic platform as learner support. Summative assessment, and exam papers remained available in those modules in both English and Afrikaans. All modules where there were consistently no fewer than 100 Afrikaans students for the last three years were to remain fully bilingual (i.e. English and Afrikaans).

11. The new language policy was adopted in 2016. In its preamble, the policy notes that:

    "*Mother-tongue based multilingual education to support all South African students studying at UNISA is an ideal that must be the ultimate goal, even if the time span to achieve that goal may only be for further generations. First practical steps should, however, be taken now to start on this road.*"

12. The policy includes a long list of principles that informed it. These include:

1. recognition of the constitutional provision pertaining to the right to receive education in the official languages of choice, taking into consideration equity, practicability and the need to redress the results of past racially discriminatory laws and practices;
2. recognition of other constitutional values, including human dignity and the achievement of equality;
3. recognition that language is not only about communication but also about identity and respect;
4. recognition that UNISA graduates should have a high level of proficiency in English to be competitive both nationally and internationally;
5. recognition that indigenous African languages have been historically disadvantaged;
6. recognition that UNISA actively supports indigenous African languages with a view to them becoming LOLT;
7. acknowledgement and the active promotion of the use of all official languages in learner support and to "scaffold learning".

13. The policy goes on to adopt English as the LOLT in all undergraduate courses, with scaffolding in other official languages. In addition, the policy provides that:
    1. Where there is capacity, a selected number of modules and programmes will progressively be offered in more than one official South African language in order to support relevant national policies.
    2. The University is to set in place an infrastructure for all students to receive the necessary assistance in improving their cognitive academic language proficiency in English, as well as in their own languages.

3. All formal study material, formative and summative assessment as well as other formal tuition activities will be in English only, whereas learner support activities may be in the language of the student.
4. UNISA will actively strive to support its students in their own languages by phasing in compulsory multilingual glossaries in all eleven languages; translation support for basic study material in all eleven languages; learning objects in various languages as scaffolding and support; tutorial support in all the official South African languages.
5. The LOLT in all postgraduate courses will be English.
6. Postgraduate research students are allowed to write their proposals, theses or dissertations in any official South African language, provided that there is sufficient supervisory and examination capacity available for the estimated duration of the study.

14. While it is not formally contained in the new language policy document, it is common cause that it was implemented on a phased-in basis. Students who were existing students in 2017 (when the new language policy was implemented), and who elected to study modules offered in Afrikaans would be entitled to complete their studies in Afrikaans, or at least until 2019. In other words, the new language policy was applied to students who registered for the first time with UNISA from 2017.

AFRIFORUM'S CASE

15. When Afriforum instituted its challenge against the new language policy it did so in two parts. In Part A of its original notice of motion it sought urgent relief in the form of an interim interdict prohibiting the implementation of the new language policy pending the determination of the relief sought in Part B. It did so on the basis that once the policy

was implemented, it would be irreversible, or alternatively extremely difficult to reverse. In Part B, Afriforum sought final relief in the form of a review and setting aside of the new language policy.

16. The urgent Part A relief was heard by Sutherland J. It was dismissed on the basis that Afriforum had failed to establish irreparable harm to affected persons. At the time that the judgment in Part A (the Sutherland J judgment) was handed down, the High Court decision in the *University of the Free State* case had been delivered, but the SCA had yet to hear and rule on the appeal in that case.

17. In an amended Notice of Motion in this case, Afriforum sought:

    1. A review of the resolutions by Senate and Council to approve the new language policy;
    2. A declaration that the new language policy is unconstitutional and unlawful;
    3. The setting aside of the new language policy as a whole, alternatively to the extent that Afrikaans has been removed as a LOLT;
    4. An order directing UNISA to take various steps detailed in the Notice of Motion aimed at giving effect to the aforementioned prayer by reinstating Afrikaans as a LOLT and permitting students once again (and it would seem henceforth) to register for previously offered Afrikaans modules.

18. In the founding affidavit Afriforum contended that the new language policy was inconsistent with section 29(2) of the Constitution. It failed to be responsive to the desire of Afrikaans students to be educated in the language of their choice, despite the fact that it is reasonably practicable to offer Afrikaans; it denied their constitutional right not to be unfairly discriminated against; and it impaired their right to human dignity.

Further, the new language policy was inconsistent with, and constitutes a breach of, the Language Policy for Higher Education published in the Government Gazette in 2002 (the National Language Policy).

19. In its supplementary affidavit, filed after receipt of the record provided by the respondents, Afriforum described the gist of its case as being the following:
    1. Senate and Council failed to take into account all relevant factors in deciding to adopt the new language policy. Instead, they treated one factor, viz. the concerns raised by the SRC, as being overriding.
    2. Insufficient information was placed before Senate and Council before they adopted the language policy.
    3. The respondents made no attempt to discover whether comparable universities would be able to fill the gap left by an abolition of the Afrikaans stream at UNISA. This constituted a failure to take into account an obviously relevant factor.
    4. No consideration was paid to the constitutional and statutory parameters when the decision was made.
    5. A clear disconnect existed between the reasons adopted for the decisions and the decisions themselves. The reasons provided for the decisions were devised ex post facto after the application was launched.
    6. There were procedural irregularities that vitiated the decision to adopt the policy.

20. Afriforum relied expressly on variously stated breaches of PAJA in its supplementary affidavit. As I have already indicated, by the time the application was heard both the SCA and the Constitutional Court had ruled out PAJA as a path for review. In its judgment the Constitutional Court held as follows as regards the character of the decision-making process by University authorities in adopting a language policy:

"The University Counsel and Senate did not purport to implement a ministerial predetermined language policy. They sought to develop a policy in line with the ministerial policy framework so that the University Management could, in turn, put it into operation. Council, even when it acts with the concurrence of Senate, does not ordinarily function in the realm of performing duties that are administrative in nature. It takes policy decision. Here, it is enjoined by section 27(2) of the Act to make a policy that would then be executed by Management. Additional to the legal reality that Council does not exist to make decisions of an administrative nature, policy determination is, by its very nature, executive rather than administrative. And there is nothing about the kind of decision Council took in this regard that gives it a character that is even remotely administrative. The PAJA requirement for review that a decision must be of an administrative nature, has thus not been satisfied. And that alone is fatal to a review application that is primarily grounded on PAJA as outlined above."[9]

21. In light of this finding, Afriforum did not persist in its original reliance on PAJA as a pathway to review. Instead, it relied on the underlying principle of legality. This is in line with the approach adopted by the Constitutional Court in the University of the Free State case. In that case, the Court held that:

    "The source of the University's power to determine the language policy is section 27(2) of the Act which in turn owes its origin to section 29(2) of the Constitution. It follows that the University was exercising public power when it took the impugned policy decision and that policy is reviewable under the doctrine of legality. For, the University may neither exercise any power inconsistently with the Constitution nor perform any function or take decisions other than those it is legally authorised to

[9] At paras 35 & 36

make. If it took a decision that it lacked the power to take or that is unlawful - either by reason of its inconsistency with the Constitution, applicable legislation or ministerial policy - then that decision could be reviewed and set aside."[10]

22. In addition to ruling out PAJA as a pathway to review, the Constitutional Court dismissed Afriforum's contention in the *University of the Free State* case that the language policy was reviewable on the basis that it was inconsistent with paragraph 15.4 of the National Language Policy. That paragraph provides that:

    "*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.*"

23. Under section 3(1) of the HEA, the Minister must determine policy on higher education after consulting the Council on Higher Education. Section 27(2) of the HEA provides that:

    "*Subject to the policy determined by the Minister as contemplated in section 3, the council, with the concurrence of the senate, must-*

    (a) determine the language policy of the public higher education institution concerned. ..."

24. The Constitutional Court found that section 27(2) does not prescribe policy. It recognises that the power of the Minister under section 3 is to provide no more than a policy framework that universities must have regard to in developing their own policies.

[10] At para 37, footnotes excluded

Those policies will be informed by the peculiarities and realities on the ground. What the National policy does, said the Court, is to caution universities not to develop their own language policy in total disregard of it and the Constitution.[11]

25. Consequently, Afriforum's original contention that the new language policy was reviewable on this ground was stillborn by the time the matter was ripe for hearing. At best for Afriforum, the question of compliance with the National Language Policy may be relevant to the issue of whether the adoption of the new language policy was a rational exercise of public power.

26. Shorn of its PAJA-based origins, Afriforum's challenge to the validity of the new language policy may be summarised as follows:

    1. The policy is unconstitutional in that it breaches section 29(2) of the Constitution (the section 29(2) issue).
    2. The policy is not rational, in the constitutional sense (the rationality issue).
    3. The adoption of the policy was in breach of the constitutional principle of legality (the legality issue).

THE SECTION 29(2) ISSUE

27. Section 29(2) of the Constitution provides that:

> *"Everyone has the right to receive education in the official languages of their choice in public educational institutions where that education is reasonable 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-*

[11] At para 70

(a) equity;

(b) practicability; and

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

28. Thus, while the Constitution recognises the right to be taught in the language of one's choice, like all other rights, it is not unqualified. Section 29(2) includes an internal modifier: tuition in the language of choice must be "reasonably practicable". The meaning of "reasonable practicability" was a key consideration for the Constitutional Court in the *University of the Free State* judgment. The Court held as follows in this regard:

> "*Reasonable practicability therefore requires not only that the practicability test be met, but also that considerations of reasonableness that extend to equity and the need to cure the ills of our shameful past, be appropriately accommodated. And that is achievable only if the exercise of the right to be taught in a language of choice does not pose a threat to racial harmony or inadvertently nurture racial supremacy.*"[12] (Emphasis added)

29. What is clear, therefore, is that the right to be taught in a language of choice depends not only on the question of whether existing resources make this technically practicable or possible. Even if it is technically practicable to provide teaching in a language of choice, the right to receive it may nonetheless be curtailed by the broader societal and constitutional considerations of equity and the need to redress past discrimination. This was expressed as follows by the SCA in its judgment in the *University of the Free State* case:

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[12] At para 53

"... even if a language policy is practical because there are no resource constraints to its implementation, it may not be reasonable to implement because it offends constitutional norms. The policy would therefore not meet the reasonably practicable standard. ... A change in circumstances may materially bear on the question whether it is reasonably practical to continue with the policy."[13]

30. This means that the adoption of a policy, or a change in policy, permitting a single LOLT may be reasonable, and hence constitutionally compliant, taking into account the relevant constitutional considerations. The Constitutional Court considered various scenarios in which it would be reasonable not to provide for teaching and learning in a language of choice. Thus, it would not be reasonable to "*slavishly hold on to a language policy that has proved to be the practical antithesis of fairness, feasibility, inclusivity and the remedial action necessary to shake racism and its tendencies out of their comfort zone.*" [14] It would also be unreasonable for a language policy inadvertently to allow some people to have unimpeded access to education and success at the expense of others if this were as a direct consequence of a blind pursuit of the enjoyment of the right to education in a language of choice.[15] Where teaching in a language of choice has the effect of deploying scarce resources to cater for a negligible number of students, and thus affording them very advantageous attention in comparison with others, the equity principle similarly will be breached.[16]

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[13] At para 27, cited by the Constitutional Court at para 54 of its judgment
[14] *University of the Free State*, para 46
[15] At para 49
[16] At para 52

31. In its previous decision in *Hoerskool Ermelo*,[17] the Constitutional Court recognised that where the right to learning in a language of choice was already enjoyed at an educational institution, the institution bore the negative duty not to remove or diminish that right without appropriate justification. The factors listed in paragraphs (a) to (c) of section 29(2) are relevant to the determination of whether the removal or diminution was reasonable and hence justified. Further, the exercise of determining the question of reasonableness is context sensitive understanding of each case.[18]

32. These, then, are the main principles to apply in determining whether the decision by Senate and Council to adopt the new language policy complied with section 29(2).

33. It is common cause that the process of discussion and debate around the adoption of a new language policy was ongoing at UNISA since 2013. According to UNISA, a number of factors informed the ultimate decision to resort to English as the sole LOLT, and no longer to recognise Afrikaans as the other LOLT. These included the following:

    1. UNISA had experienced an ongoing decline over the last few years in the demand for tuition in Afrikaans. In 2015 8.6% of students indicated that their home language was Afrikaans, and in 2016 the figure was 8.7%. In addition, there was an inclination for students to want to study in English, as opposed to Afrikaans. A relatively small percentage of modules were taken by students in Afrikaans: in 2015, the percentage was 2%, and in 2016, it was 1%.[19] A further indication of the decline in the demand for Afrikaans tuition was the increased in the number of requests by academic departments under the 2014 Guidelines for modules to be

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[17] *Head of Department, Mpumalanga Department of Education v Hoerskool Ermelo* (Hoerskool Ermelo) 2010 (2) SA 415 (CC)

[18] At paras 52 and 53 of the Hoerskool Ermelo judgment

[19] In the original answering affidavit the figures were incorrectly referred to as 0,6% and 0,3% respectively. The error, and the reasons for it (a calculation error) were explained by UNISA in its supplementary answering affidavit.

offered only in English due to the lack of demand and lack of capacity for Afrikaans tuition.

2. Considerations of equity and the need to correct the imbalances of the past. According to UNISA the new language policy recognises the worth of each of the other official languages (other than English) on an equal basis. From a principled point of view, it was not reasonably practicable for UNISA to offer tuition in Afrikaans whilst not offering tuition in the remaining official languages. It was not yet reasonably practicable for UNISA to accept each of the official languages as LOLT. The cost associated with developing all of the languages to that level at this stage would be prohibitive. Thus, the new language policy adopted the approach of a single medium institution, while seeking the progressive advancement of the other official languages.
3. The language policy was informed by the fact UNISA is committed to redressing the imbalances that exist in languages. This means that mother tongue education cannot only be for Afrikaans students, and not also for speakers of the other African languages. The new language policy acknowledged the equal worth of all official languages and sought to put each of them (save for English, in regard to which see below) on an equal footing.
4. The discussion and debate around the new language policy included the argument that Afrikaans continued to receive preferential treatment over other African languages. This was an argument made particularly strongly (among other voices)[20] by the Student's Representative Council in its contribution.

[20] There are indications from the transcript of the Senate Committee meeting when the policy was adopted that others shared the view that the old language policy elevated the Afrikaans language above other African languages. These views were strongly expressed by Afrikaans-speaking members of Senate, Professor Labuschagne (at pg126 of the transcript bundle), and the COD of the Afrikaans Department (at pg 130 of the transcript bundle)

5. Considerations of economies of scale, and the additional cost involved in having to accommodate a language other than English as a generalised language of instruction also informed the new language policy. UNISA explained that economies of scale is a principle applicable in particular to distance learning institutions. It means that the greater the number of students who are registered for a course, the more the cost per individual student drops. Thus, it is in the interests of economies of scale to have as limited a number of courses as possible and to concentrate the students in those courses. To offer a course in both English and Afrikaans effectively leads to a loss of economies of scale. Where there are fewer Afrikaans students than English students doing courses, it has the further effect that there is an unequal concentration of resources, and hence a disproportion, in the resources spent on Afrikaans students as opposed to those who are studying in English because their mother-tongue is not a LOLT. Once again, this results in continued privilege for Afrikaans students. The cost savings generated by adopting a singly LOLT could be used to develop the academic status of the other official languages.
6. Both locally and internationally English was the accepted and preferred medium for communication, academia and business. The adoption of English as the sole LOLT under the new policy was a matter of simple practicality.

34. Afriforum did not unequivocally accept UNISA's explanation for the development and adoption of the new language policy. It disputed the figures claimed by UNISA for the numbers and percentages of students serviced by Afrikaans courses, and asserted that there were still a significant number of students who fell into this category. However, Afriforum did not dispute the overall decline in the demand for Afrikaans as a language of tuition. Nor could it really dispute (although it did not concede this point)

that the effect of retaining Afrikaans as a LOLT in the face of that declining demand had the effect (whether intentional or otherwise) of according Afrikaans a privileged status above that of other African languages at the University.

35. Afriforum contended that the facts of this case differ materially from those in the University of the Free State case:

    1. In the first place, Afriforum drew a distinction between the residential nature of the University of the Free State, on the one hand, and the distance learning nature of UNISA on the other. It submitted that this distinction was important as UNISA students did not suffer the same racially divided lecture settings by reason of parallel language classes as had been the case at the University of the Free State.
    2. It also submitted that access to UNISA simply would not be an issue if Afrikaans continued to be a LOLT because the university did not place any fetters on students gaining access.
    3. Finally, it drew attention to the fact that unlike the University of the Free State, UNISA had not claimed that by continuing with Afrikaans as a LOLT racial harmony or integration would be imperiled.

36. The conclusion that Afriforum sought to draw from these distinctions was that if the University of the Free State principles were applied to facts of this case, the court should conclude that it was reasonably practical to continue to offer Afrikaans as a LOLT. Further, by dispensing with the old language policy UNISA had acted unconstitutionally in breach of the right protected under section 29(2). According to Afriforum, UNISA could have achieved its objective of seeking progressively to develop parity between all African languages without losing Afrikaans as a LOLT. As I understand its argument, it was that section 29(2) does not permit the destruction of

one LOLT (Afrikaans) at the expense of the progressive objective of seeking to achieve parity between the African languages (including Afrikaans). Section 29(2) requires that Afrikaans should be retained as a LOLT, while steps were taken to achieve further parity.

37. It is so that there are differences between the factors that led to the adoption of the language police at the University of the Free State and those that led to the adoption of the new language policy at UNISA. However, the issue is not whether these factual differences in themselves warrant a different outcome. It is the principles laid down by the Constitutional Court that provide the starting point for the inquiry, rather than the factual differences that may exist between the two cases. These principles must then be applied to the factors that pertained at UNISA. Inevitably they will not be the same as those pertaining at the University of the Free State, but that is neither here nor there. The constitutional inquiry is context specific.

38. As my previous references to these principles make clear, it is justifiable under section 29(2) for a university to adopt a language policy that recognises one LOLT notwithstanding that the university has many students with different language requirements. Where it may be reasonably practicable to adopt a policy that recognises a demand for more than one LOLT, this possibility must be considered. However, it is critical to appreciate, as the Constitutional Court has indicated, that reasonable practicability is a polycentric inquiry: it involves not mere practicalities, but important considerations of transformation and equity. Universities play an important role as thought-leaders in society. They ought to be at the forefront of leading society forward. Therefore, in my view, it is acceptable and proper, as part of this inquiry, for a

university to consider how its policies reflect its role in the broader South African (and international) society.

39. The factors that UNISA took into account indicate that it was concerned with these issues. Language parity among the African languages was a critical driver in its adoption of the new language policy, as was the need to treat students equitably when it came to mother tongue tuition. This is reflected in the policy itself, as well as in the transcripts of the meetings that were held in the immediate period before the adoption of the policy. There were understandably voices that supported the retention of Afrikaans as a LOLT, particularly as it had enjoyed that status for decades. However, there were also other voices, from both students (as represented by the SRC) and academia, pointing to the need for UNISA to take its place as an African university. There were strong calls for UNISA to adopt a policy that did not merely pay lip service to facilitating parity between African languages, and equity among students. The SRC, in particular, voiced the view that the continued recognition of Afrikaans as a LOLT resulted in inequalities between Afrikaans-speaking students, whose mother tongue demands continued to be accommodated, and African language students who were required to elect to study in a language other then their mother tongues.

40. It was in this context that the revised status of Afrikaans as a LOLT was reconsidered. It had been a LOLT throughout South Africa's pre-1994 era. By 2014, the Guidelines had already given practical effect to the process of removing Afrikaans as a LOLT on a module-by-module basis, depending on demand. The new language policy extended this process by adopting the principle of a single medium LOLT. In adopting the new

policy, UNISA was conscious that it had moved from the pre-democratic era in terms of where it positioned itself in society, and in its relations with its students.[21]

41. Critically, Afrikaans had continued to enjoy its status as one of only two LOLT notwithstanding the ongoing decline in the demand for Afrikaans modules in more recent years. As I have already indicated, this fact inevitably marks Afrikaans as enjoying a privileged status at UNISA: in circumstances where a relatively small number of students was demanding teaching in Afrikaans, coupled with the call for resources to be put towards developing the academic status of other official languages, it seems to me to be plain that the removal of Afrikaans as a LOLT was justified on the basis of considerations of equity, practicability and the need to redress the results of past racially discriminatory laws and practices, as required under section 29(2), and in accordance with the principles laid down by the Constitutional Court.

42. UNISA stated in its answering papers that this was not an easy process. This is clearly reflected in the record. Ultimately, it said that it made a hard choice after many years of deliberation. There can be no question that through the process it adopted, UNISA considered, as it was required to do, whether it was still reasonably practicable to continue to recognise Afrikaans as a LOLT, given the changing university environment. For the reasons I have already stated, in deciding to adopt the new language policy, and to opt for a single medium LOLT, it did not breach section 29(2) of the Constitution.

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[21] This was expressed in clear terms by the chair of the SLC when she addressed Senate:

"*...I think it will be naive of us, and that's why I made reference to giving academic leadership, that it will be naive of us to look at this just as an isolated language issue, that this should, must be part of the academic transformation agenda of the institution ... it must be seen in the broader sense of how do we become an African university in shaping futures ...* ."

43. In the circumstances, there is no merit in Afriforum's first challenge to the new language policy.

RATIONALITY

44. The rule of law requires that the exercise of public power should not be arbitrary. There must be a rational relationship between the exercise of the power in question and the purpose for which the power was given. If not, the exercise of the power will fall short of the demands of our Constitution. The question calls for an objective inquiry.[22]

45. In terms of section 27(2) of the HEA the council of a university has the power to determine the language policy of the institution in concurrence with Senate. The exercise of the power must be in accordance with constitutional obligations, and must take into account the guidance provided by the National Language Policy. I have already found that in adopting the new language policy UNISA did not contravene its constitutional obligations under section 29(2). While the National Language Policy in general supports the retention of Afrikaans as a language of academia and science, the Constitutional Court has found that this does not prohibit the adoption of policies that remove Afrikaans as a LOLT. The ultimate question is whether that policy can be justified under section 29(2). From this point of view, UNISA's new language policy is rationally connected to the exercise of its powers.

46. Afriforum nonetheless sought to contend that the adoption of the new language policy was not rational. It submitted that this was indicated by what it said was the paucity of

[22] *Pharmaceutical Manufacturers Association of South Africa: In re ex parte Presdient of the Republic of South Africa* 2000 (2) SA 674 (CC) at paras 84-5

information placed before Senate and Council when they adopted the policy; the failure of these bodies to have reference to the principle of reasonable practicability in adopting the policy; and the compilation of what Afriforum says were *ex post facto* reasons for the decision to adopt the policy.

47. From the outset it is important to highlight that these contentions were originally advanced on the basis of a review under PAJA, and on the assumption that the adoption of the policy constituted administrative action. They do not sit easily within the context of rationality review. Another, and related, feature of Afriforum's rationality contentions is that they overlook the fact that the "decision" in this case is the development and adoption of a policy. In the *University of the Free State* case the Constitutional Court pointed out the important differences between decisions constituting administrative action, and those involving the exercise of executive powers, like policy-making:

> "*A decision or action that is administrative in nature is one that relates to the implementation or execution of a statutory function or policy that has already been fleshed out particularly in relation to what needs to be done. It is fundamentally about carrying out what the executive authority or the key decision-makers of an institution or entity have already pronounced upon definitively. A decision or action that is administrative in nature is therefore operational, for it is about carrying out what has already been prescribed often in some detail.*"[23]

48. Policy-making, by its nature, is often a process that evolves over time, and involves iterations and reiterations, depending on the various interactions between stakeholders. In the case of the new language policy at UNISA, the process

[23] At para 34

commenced in 2013 and continued on an ongoing basis. UNISA indicates that the process involved Senate (where it was a standing item on its agenda), Council, the SLC, as well as their constituent parts, UNISA management, the SRC and Convocation. It seems to be common cause that there was much debate over the years and disparate views were voiced. UNISA held a language colloquium. Research was conducted, including research by Prof Bornman, who is an academic at UNISA who supports the Afriforum application.

49. When the policy-making process is understood in this context, it is difficult to see how the rationality of the ultimate decision to adopt the policy could have been impugned by an alleged paucity of information before the Senate and Council at the particular meetings when the policy was adopted. The matter had been discussed many times in the Senate's own SLC, which reported to it. It had also been discussed previously in the Senate, and in the wider University community. The transcripts reveal that members of the relevant bodies were aware of the issues involved and of both sides of the debate after a process that had taken place over a number of years.

50. As to the alleged failure to consider whether it was reasonably practicable to continue to recognise Afrikaans as a LOLT, Afriforum's complaint is that the transcripts and the minutes etc of the deliberations do not record that this was a consideration. In my view, this complaint seeks to hold policy-makers to a standard more properly associated with implementation or operational actions. From a rationality point of view, provided the policy was informed by factors relevant to the principle of reasonable practicability, it will not be arbitrary. It does not matter whether the policy makers themselves used that terminology or not. Similarly, the complaint about *ex post facto* reasons is misplaced. The question is whether there is, objectively speaking, a rational

connection between the new language policy's removal of Afrikaans as a LOLT, and UNISA's obligation to act in accordance with its constitutional obligations in doing so. That determination is made with reference to the factors UNISA says it took into account. For the reasons already provided, on a consideration of those factors that connection, and hence rationality, is established.

51. I accordingly find no merit in Afriforum's complaints regarding rationality.

LEGALITY

52. The thrust of Afriforum's legality complaint is that the adoption of the policy was vitiated by various procedural irregularities. In the first instance, Afriform contends that prescribed rules of Senate were not followed when the policy was adopted. In the second instance, it contends that there was a failure to consult, and that this constituted procedural unfairness contrary to the principle of legality and the rule of law.

53. The power to adopt the institutional statute of the University and to approve institutional rules rests on Council in terms of section 32 of the HEA. Section 33 provides that the institutional statute must be submitted to the Minister for approval and published in the Government Gazette. The same does not apply to any institutional rules. The Statute of the University of South Africa was duly published in the Government Gazette on 3 February 2006 [24] whereafter it underwent some amendments. The current version of the Senate rules (the rules) were approved by Senate in July 2009. It is unclear when they were approved by Council.

[24] GN 108 of 3 February 2006, GG No. 28464

54. Rule 6.2 provides that:

> *"No resolution of Senate is valid unless adopted at a meeting at which a quorum is present, and unless the provisions of these rules relating to any such meeting have, in all other respects, been complied with."*

55. Rule 11.1 requires that all documents relating to the agenda for each meeting must be submitted to the members of Senate five working days before the meeting. Urgent matters may be raised for discussion at a meeting without previous notice provided that the consent of 75% of members present is given.[25] Rule 13.1 deals with the method of adopting resolutions. It requires a majority of members present by a show of hands. However, rule 13.5 qualifies this in that policy matters must be resolved by a two-thirds majority. Rule 13.2 provides for some flexibility in that it states that "*where appropriate Senate may resolve any matter by preferential order vote or by way of another procedure agreed upon by those present*". Finally, rule 13.6 provides that:

> *"Senate may, by a unanimous resolution during any meeting, dispense with the procedural provision in the rules if Senate is of the opinion that sufficient justification for such action exists. A resolution under this rule must be properly recorded."*

56. It is common cause that the documents supporting the agenda item covering the new language policy were only delivered to members on the evening preceding the Senate meeting at which the policy was adopted. Furthermore, it is common cause that the policy was not adopted by a show of hands and a two-thirds majority count. It is these procedural flaws that Afriforum contends vitiate Senate's approval of the policy, and hence, Council's subsequent adoption.

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[25] Rule 11.5

57. In response to the criticism about the process through which the policy was adopted, the Chair of Senate, Prof Makhanya indicated as follows in the answering affidavit:

> "*The manner in which Senate conducts its business is focused on achieving consensus amongst the members of the Senate. Senate conducts its business as follows. An item of business that is on the agenda is raised at the Senate meeting. The floor is then opened to all members of Senate to engage and/or raise any concerns that they may have regarding that item of business. Any concern that is raised by the members of Senate is then openly debated amongst and ventilated between the members of Senate. After this has happened, Professor Makhanya asks the members of the Senate whether there is support regarding the item of business. If even a single objection is raised by a member of the Senate, Prof Makhanya then calls for further engagement with the matter from Senators and he eventually calls for a vote if consensus cannot be reached. The item of business is then decided according to the outcome of the vote. ... this is in fact what happened at the Senate meeting of 21 October 2015 regarding UNISA's language policy.*[26] *... if, however, no members of the Senate indicate that they have such an objection, Professor Makhanya asks whether or not it can be accepted that there is consensus amongst the members of Senate regarding the items of business, and if no-one disagrees then the item of business is decided by consensus. The consensus thus reached is akin to and effectively constitutes a unanimous decision. ... this is in fact what happened at the Senate meeting of 30 March 2016 regarding UNISA's new language policy. At this meeting of the Senate no members of the Senate indicated that they had an objection ... after the Chair ...*

[26] At that meeting, a two-thirds majority was not obtained and the issue was sent back to the SLC for further consideration. It was subsequently tabled at the Senate meeting of 30 March 2016.

asked if members supported taking the policy forward and so no vote was called and UNISA's new language policy was adopted but the Senate by consensus."

58. The transcript of the Senate proceedings on 30 March 2016 support this explanation. There are many pages of discussion and debate following the presentation of the draft language policy. Towards the end of this process, the Chair asks whether members wish to continue making submissions or whether they should move on to considering the adoption of the policy. The chair asks: *"Can I test whether this is how we should be proceeding now? Are we happy to adopt this policy."* The transcription then records: "*MEMBERS: Yes*". There is then some clarification sought from a member about an earlier, and additional proposal regarding a future discussion on the question of developing indigenous languages, whereafter, the transcript records: "*(APPLAUSE)*".

59. UNISA points out in its supplementary answering affidavit that any member of Senate present at the meeting could have insisted on a formal vote being taken, but none did. Nor did any member raise any issue about the process followed in adopting the new language policy. This is confirmed by the transcript of the meeting. This situation prevailed despite the fact that some members of the UNISA staff who now support Afriforum's application were present at the Senate meeting.

60. As far as the complaint concerning the failure to circulate the draft policy earlier is concerned, UNISA explains that it was only obtained from the SLC the day before the meeting. The new language policy was a standard item on Senate's agenda, and Senate had seen and debated at least one previous version of the policy at the meeting in October 2015. The point about the late receipt of the new draft was raised

at the outset by some members of Senate. This is reflected in the transcript of the meeting. The matter was ventilated and debated and the Chair then asked whether there was any objection to Senate considering the policy despite the late circulation of the draft. There being no objection, Senate proceeded to discuss it.

61. The transcript of the Senate meeting once again confirms this explanation. It records that two members raised their concerns about the late receipt of the documents. After this, reasons were given for the documents not being circulated timeously, and the Chair, together with the Chair of the SLC, who was presenting the draft language policy, requested the indulgence of members nonetheless to proceed to a discussion of the policy as an agenda item. There were no further objections raised, and it appears from the transcript that Senate proceeded on the assumption that the requested indulgence was in order.

62. UNISA points out further that the text of the draft policy was projected onto a large screen so that all members could follow as Prof Moche took them through the document clause by clause. Once again, this is confirmed by the transcript of the Senate meeting. Prof Moche submits that in this manner all members of Senate were fully acquainted with the content of the draft language policy when it was discussed and ultimately accepted at the meeting. UNISA submits that notwithstanding that there may have been some procedural flaws in the process before Senate, that process was sufficiently fair to survive legal scrutiny.

63. As regards the alleged non-compliance with the Senate rules, Afriforum relies primarily on rule 6.2, (read with rule 11.1 and 13.1) with its injunction that a resolution of Senate will not be valid unless the provisions of the rules relating to Senate meetings have

been complied with. Afriforum's case is founded on the submission that these rules are legislative instruments in the nature of delegated legislation. As such, in failing to follow the rules, the Senate was acting outside of its powers and contrary to the constitutional principle of legality. In other words, Senate only had the constitutional power to act within the terms of its rules. Its failure to do so (because it did not adopt the resolution by a show of hands supporting a two-thirds majority, and because the draft policy was not circulated five days in advance) rendered the adoption of the policy *ultra vires.*

64. The respondents, on the other hand, contend that the Senate rules do not have the status of delegated legislation: they are internal rules, and consequently they do not determine the ambit of Senate's constitutional powers for purposes of the principle of legality. In addition, the respondents submit that for this reason, Afriforum does not have standing to challenge Senate's application of its rules. This approach found favour with this court in the hearing of the Part A proceedings. In the Sutherland J judgment it was found that:

> "*However, there is one qualification to the scope of grounds upon which relief can be sought. Afriforum is a stranger to UNISA, in the sense that UNISA's internal affairs are none of its business. This fact is relevant to the complaints of procedural irregularities in the decisions of the senate and council. ... it does not lie in the mouth of a stranger to complain about such irregularities. An academic staff association or a student body might have a legitimate foundation to do so, but an extraneous entity, regardless of its interest in the decisions of UNISA may not do so.*"[27]

[27] At para 24

65. While I have some doubt that Afriforum is correct in characterising the Senate rules as being in the nature of delegated legislation, in light of the decision I have reached, it is unnecessary for me to make a finding on this issue, or on its implications for the question of legality, or, indeed, on whether Sutherland J was correct in his decision that Afriforum had no standing in that regard. Even if Afriforum is correct in its contention that legality review is a justifiable basis on which to challenge the process followed by Senate when it adopted the new language policy (and I make no finding in this regard), the question remains whether Afriforum has established that the process adopted by Senate was not authorised under the rules.

66. I am not persuaded that it has done so. I say this for the reasons set out more fully below.

67. The Chair of Senate, who is the second respondent, explained the procedure usually followed in meetings. Afriforum does not dispute this explanation or the assertion by the Chair that it is the usual procedure at Senate to proceed by way of trying to achieve consensus, and only to move to a vote when it is clear that consensus will not be achieved. Consequently, I accept that this is the convention in terms of which Senate operates.

68. It is not an unusual convention in bodies of this kind. In my view, it is compatible with the rules. The purpose of rule 13.1 is to provide for the process to be followed when a matter is put to the vote. It does not prevent Senate from adopting a convention that permits consensus-seeking first. If consensus is not reached, voting will follow in accordance with rule 13.1, read with rule 13.5. This is why, as Prof Makhanya explained, the language policy was put to the vote at the previous Senate meeting: it

was clear after discussion and debate that consensus could not be reached at that stage. That consensus-seeking was the usual convention is supported by the fact that there was no dissent recorded when Senate followed this procedure on 30 March 2016. It was only subsequent to this that the issue was raised.[28]

69. As I have already indicated, Rule 13.2 permits Senate, where appropriate, to "*resolve any matter ... by way of another procedure agreed upon by those present.*" This permits Senate broad flexibility and discretion to decide on appropriate procedures to adopt. There was no dissent by any member of Senate at the meeting on 30 March 2016 as to the procedure that was followed in adopting the new language policy. The conclusion to be drawn is that there was at least tacit agreement by those present that the procedure was appropriate.

70. Rule 13.6 provides further flexibility in permitting Senate to dispense with any procedural provision. Afriforum contends that the respondents cannot rely on this provision because there was no record of a unanimous resolution to dispense with the rules regarding voting and the circulation of documents 5 days prior to the meeting. This rule is not the only rule that permits Senate a discretion to adopt alternative procedures. As discussed above, rule 13.2 does so too. Thus, provided there was agreement in terms of rule 13.2 to adopt an alternative procedure, it was not necessary for Senate to consider dispensing with any rules, and the need for rule 13.6 fell away.

71. Even if this were not the case, what Senate did in substance was to dispense with the requirement for a vote count and for the circulation of the documents five days before

[28] In an objection sent to Senate by a group called "The UNISA Forum for Afrikaans", dated 21 April 2016. Prof Bornman was one of the compilers of the objection, and she is recorded as having been at the Senate meeting.

the meeting. Although a formal unanimous resolution was not adopted to this effect, there was a record of the proceedings (as evidenced by the transcript and the minutes). Further, there was no dissent when the Chair requested the indulgence (as regards the circulation of documents), or when the Chair asked Senate whether they approved they new language policy. In the circumstances, in my view, there was at least substantial compliance with rule 13.6 if, indeed, it is applicable.

72. For these reasons, I find that Senate acted in accordance with the rules in adopting the new language policy.

73. Even if I am wrong in this regard, and even if the principle of legality was indeed breached as a result of the procedural irregularities complained of by Afriforum, I would decline to set aside Senate (and hence, Council's) approval of the new language policy. The review remedy of setting aside an illegality is discretionary, and may be refused by competing considerations such as, among others, certainty, finality and practicality,[29] the interests of the parties involved and the extent of the materiality of the constitutional breach.[30]

74. In this case it is common cause that the new language policy has been in place since the start of 2017. That represents more than a full academic year and at least three semesters (assuming there are two semesters per year). Students who had already registered for Afrikaans modules at the time the policy was implemented have been accommodated. Apart from these students, UNISA has already been operating for a considerable period of time on the basis on the basis of English as the sole LOLT.

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[29] *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) at para 36
[30] *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 (4) SA 113 (CC) at para 85

UNISA indicated in its answering affidavit that in the event that the court were to rule against it, it would not be practically possible to revert overnight to the position that obtained at the start of the 2016 academic year. In addition to this, it is also relevant in my view that Afriforum does not dispute that there has been a natural decline in the demand for Afrikaans tuition in recent years. It is inevitable that there would be a further reduction of demand as a consequence of UNISA having offered English-only tuition since the start of 2017. To turn the clock back would have obvious practical, resource and costs implications for UNISA for the benefit of an ever diminishing small number of students.

75. Moreover, I have found that the new language policy does not constitute a breach of section 29(2) of the Constitution. It furthers equity and is a significant step towards addressing the wrongs of the past, albeit, unfortunately, that English still retains a privileged status at the institution for purely pragmatic reasons. The materiality of any constitutional breach (if indeed, contrary to my earlier findings, one were found to exist) is limited to the procedure that was followed by Senate at its meeting on 30 March 2016. In my view, this is significantly outweighed by the obvious reasonable practicability of the new language policy.

76. For these reasons, even if I am wrong in concluding that the adoption of the new language policy was not vitiated by any procedural breaches committed by Senate under its rules, this is a case where that illegality should not be coupled with an order setting aside the relevant decisions of Senate and Council.

77. I turn now to the final challenge raised by Afriforum on the grounds of legality. This is the contention that there was a failure properly to consult before the new language

policy was adopted. Afriforum places the complaint under the head of legality on the basis that it has been held that procedural fairness forms part of the legality inquiry. Afriforum submits that as a matter of rationality and legality the public had a right to notice and to consultation before UNISA adopted its new language policy. It says that UNISA did not consult with public parties and organisations who have an interest in the retention of Afrikaans as a medium of tuition. This was unfair and contrary to the principle of legality.

78. Afriforum relies on the Constitutional Court decision in *Albutt v Centre for the Study of Violence and Reconciliation*[31] for its submission that under the principle of legality UNISA was required to consult with the public. However, that decision is not authority for the general principal that legality necessarily involves procedural fairness and the duty to consult. It dealt with the rights of victims to be heard before a presidential grant of pardon under the special dispensation set up by the then President after the conclusion of the Truth and Reconciliation process. The Court found that the legality principle required that victims be heard and that the decision to exclude them was irrational. However, it was at pains to point out that this related only to applications for pardon under the special dispensation, and that:

> "*Different considerations may very well apply to other categories of applications for pardon. This judgment does not therefore decide the question whether victims of other categories of applications for pardon are entitled to be heard. That question is left open.*"[32]

[31] 2010 (3) SA 293 (CC)
[32] At para 75

79. In the circumstances, Afriforum's reliance on *Albutt* is misplaced. There are no reasons to support the conclusion that, like the President in *Albutt*, UNISA was bound by considerations of rationality to invite consultation with members of the public before amending its language policy. Of course it was free to do so if it wished. However, the fact that it didn't does not render its processes unfair and irrational.

80. The public may be interested in the language policy that is adopted, but that does not mean that they have a legal interest rendering the policy irrational and illegal because of a lack of consultation with them. After all, considerations of reasonable practicability necessarily involve issues particular to the institution concerned. It is the institutional players whose interests are central to the process of adopting a new language policy. As I have already indicated, there is evidence of extensive consultation with the relevant institutional stakeholders over a number of years before the final adoption of the policy.

81. In the circumstances, I find that Afriforum's complaint in this regard cannot be upheld.

CONCLUSION, ORDER AND COSTS

82. For the detailed reasons set out above, Afriforum's application for the review and setting aside of the new language policy falls to be dismissed.

83. The respondents submitted that this is an appropriate case in which to depart from the principles laid down in *Biowatch*,[33] and to grant a costs order against Afriforum. The respondents submit that following the decision of the Constitutional Court in the University of the Free State case Afriforum ought to have appreciated that this

[33] *Biowatch Trust v Genetic Resources and Others* 2009 (6) SA 232 (CC)

application had no reasonable prospects of succeeding, and that they acted frivolously in persisting with it. The respondents say that this amounts to an abuse of the court process.

84. Understandably, Afriforum does not agree, and seeks the application of the principle laid down in *Biowatch* in terms of which an unsuccessful litigant may be excused from paying costs in circumstances where they were seeking to vindicate a constitutional right.

85. I appreciate that the *University of the Free State* judgment brought clarity to the applicable principles. Afriforum, as the litigant in that matter, ought to have appreciated the risk that these principles would again be applied against them, and that their challenge would be dismissed. However, I must also take into account that the factual circumstances, and the factors informing one tertiary institution in the adoption of a language policy removing Afrikaans as a LOLT, will never be *on par* with those at another institution. This is demonstrated in the present case. One of the key differences between the two cases is that in the *University of the Free State* case there was no legality challenge based on the Senate rules as there was in this case. That challenge introduced an added dimension to the matter before me.

86. Therefore, while Afriforum perhaps might be criticised for not fully appreciating the risk to their section 29(2) challenge introduced by the Constitutional Court judgment, I am not persuaded that their decision to persist with their application was frivolous and amounted to an abuse of court. In my view, there is no good reason to depart from the general principle laid down in *Biowatch* as regards costs.

87. In the circumstances, I make the following order:

1. The application is dismissed.
2. Each party is to pay its own costs.

R M KEIGHTLEY
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Date Heard	: 19 March 2018
Date of Judgment	: 26 April 2018
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