



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

**JUDGMENT**

**Reportable**

Case No: 765/2018

In the matter between:

**AFRIFORUM NPC**

**APPELLANT**

**and**

**CHAIRPERSON OF THE COUNCIL OF THE**

**UNIVERSITY OF SOUTH AFRICA**

**FIRST RESPONDENT**

**CHAIRPERSON OF THE SENATE OF THE**

**UNIVERSITY OF SOUTH AFRICA**

**SECOND RESPONDENT**

**THE UNIVERSITY OF SOUTH AFRICA**

**THIRD RESPONDENT**

**Neutral citation:** *AfriForum NPC v Chairperson of the Council of the University of South Africa & others* (765/2018) [2020] ZASCA 79 (30 June 2020)

**Coram:** MAYA P, PETSE DP, LEACH JA AND KOEN AND EKSTEEN AJJA

**Heard:** 27 November 2019

<p><b>Delivered:</b> This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 18h00 on 30 June 2020.</p>	<p><b>Ukuwiswa:</b> Esi sigwebo sawiswa ngeintanethi, ngokusiwa kubameli-mthethweni bamacala onke ngeimeyili, nangokupapashwa kwisiza sonxibelelwano seNkundla Yezibheno Engentla nangokufakwa kuSAFLII. Umhla nexesha lokuwiswa kwaso uthathwa njengokuba ngulo: 18h00 ngowama 30 kweyeSilimela 2020.</p>
<p>[1] <b>Summary:</b> Education – university language policy – whether historically English/Afrikaans university's decision to replace its dual-medium language policy with English-only policy infringed principle of legality and unlawful – held that the university failed to establish that it was not reasonably practicable to continue offering tuition in Afrikaans under s 29(2) of the Constitution – appeal upheld.</p>	<p><b>Isishwankathelo:</b> Ifundo – umgaqo-nkqubo wolwimi weyunivesithi – ingaba isigqibo seyunivesithi eyayikade ifundisa ngesiNgesi nangeAfrikaans sokuyeka lo mgaqo-nkqubo kalwimi-mbini wayo isebenzise umgaqo-nkqubo othi IsiNgesi-kuphela sacinezela umgqaliselo wobumthethweni saba ke asikho mthethweni – kugqitywe ukuba iyunivesithi yoyisakele ukucacisa ukuba bekungayi kuba nokwenzeka lula ukuqhutywa kufundiswa ngeAfrikaans phantsi kwecandelwana u-s 29(2) woMgaqo-siseko – isibheno savunyelwa.</p>

<b>ORDER</b>	<b>UMYALELO</b>
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<p><b>On appeal from:</b> The Gauteng Division of the High Court, Pretoria (Keightley J sitting as court of first instance):</p> <p>1 The appeal is upheld with costs, including the costs of two counsel.</p>	<p><b>Kwisibheno esivela:</b> kwiSahlulo saseGauteng seNkunda Ephakamileyo, eTshwane (uKeightley J ehleli njengenkundla yokuqala):</p> <p>1 Isibheno sivunyiwe, sihamba neendleko eziquka iindleko zabathetheleli bezomthetho ababini.</p>
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<p>2 The order of the court a quo is set aside and replaced with the following:</p> <p>‘(a) the resolutions of the Council and Senate of the University of South Africa to approve a new language policy on 28 April and 30 March 2016, respectively, are set aside;</p> <p>(b) the new language policy adopted by the University of South Africa is declared unconstitutional and unlawful and is set aside to the extent that Afrikaans has been removed as a language of learning and tuition;</p> <p>(c) the University of South Africa shall prominently publish on its website and in three major Afrikaans newspapers in South Africa and transmit by email to all its students a notice:</p> <p>(i) containing a full list of the modules that were on offer in Afrikaans as at 28 April 2016;</p> <p>(ii) offering all prospective students for the next academic year admission in such modules as presented on first year level;</p> <p>(iii) offering all existing students, if they were enrolled in any one of those courses or would have enrolled for the subsequent year</p>	<p>2 Umyalelo wenkundla ebiqalile ubekelwa bucala, ze kubekwe endaweni yawo lo ulandelayo:</p> <p>‘(a) izigqibo zeBhunga nezeSinethi zeYunivesithi yaseMzantsi Afrika zokuvumela umgaqo-nkqubo wolwimi omtsha ngowama-28 kuTshaziimpuzi nowama-30 kweyoKwindla ngo2016, ngokulandelelana, zibekelwa bucala;</p> <p>(b) kuyabhengezwa ke apha ukuba lo mgaqo-nkqubo mtsha usekwe yiYunivesithi yaseMzantsi Afrika awuhambisani noMgaqo-siseko futhi awukho mthethweni; waye ke ubekelwa bucala ngokubhekisele kumbandela wokuba iAfrikaans iyekisiwe ukuba lulwimi lwayo lokufunda nokufundisa;</p> <p>(c) iYunivesithi yaseMzantsi Afrika iya kupapasha ngokugqamileyo kwisiza sonxibelelwano sayo nakumaphephandaba amakhulu, amathathu eAfrikaans aseMzantsi Afrika ize idlulisele nangeimeyili kubo bonke abafundi bayo isaziso esinje:</p> <p>(i) esinoluhlu olupheleleyo lweemodyuli ezazizezokufundiswa ngeAfrikaans ngomhla wama-28 kuTshaziimpuzi ngo-2016;</p> <p>(ii) esivumela bonke abafundi abafuna ukufunda kulo nyaka-zifundo uzayo ukuba bazibhalisele ezo modyuli zikwinqwanqwa lokuqala;</p> <p>(iii) esithi bonke abafundi abahleli bekho, ukuba babeyibhalisele nokuba yeyiphi kwezo khosi okanye babeza kubhalisela</p>
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<p>course available in Afrikaans, but had perforce to follow the module in English, a choice to enrol on the basis that they may follow the module in Afrikaans until completion of their studies;</p> <p>(iv) all the modules mentioned above will be presented in full in the following academic years until the language policy has been lawfully amended, if at all.</p> <p>(d) the University of South Africa shall pay the costs of the application.’</p>	<p>ukufunda ikhosi yonyaka olandelayo ukuba yayikho ngeAfrikaans, kodwa banyanzeleka ukuba bayifunde loo modyuli ngesiNgesi, bayavunyelwa ukuba baphinde bazibhalisele ezo modyuli, kuxelwe ukuba baya kuzifunda ezo modyuli ngeAfrikaans bade bazigqibe izifundo zabo;</p> <p>(iv) zonke ezi modyuli zikhankanywe apha ngentla ziya kubakho ngokuzelayo kwakule minyaka-zifundo izayo ude umgaqo-nkqubo wolwimi ube ulungisiwe ngokwasemthethweni, ukuba iyenzeka ke loo nto.</p> <p>(d) iYunivesithi YaseMzantsi Afrika iza kuhlawula iindleko zesi sicelo.’</p>
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<b>JUDGMENT</b>	<b>ISIGWEBO</b>
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<b>Maya P: (Petse DP, Leach JA, Koen and Eksteen AJJA concurring):</b>	<b>Maya P: (Petse DP, Leach JA, Koen and Eksteen AJJA bevumelana naye):</b>
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<p>[1] This case brings into sharp focus remarks which were recently made by Chief Justice Mogoeng in <i>AfriForum and Another v University of the Free State</i>.<sup>1</sup> In that matter the appellant similarly challenged the validity of a university’s decision to replace a dual Afrikaans/English policy with an English-only policy. The Chief Justice said:<sup>2</sup></p>	<p>[1] Eli tyala liphuhlisa amazwi abesandula ukuthethwa yiJaji Eyongameleyo uMogoeng kwimbambano ebizwa ngokuthi, <i>AfriForum and Another v University of the Free State</i>. Kulaa mbambano, umbheni wenza into efana nale, waphikisana nesigqibo seyunivesithi sokuyekisa umgaqo-nkqubo kalwimi-mbini weAfrikaans/nesiNgesi kumiselwe umgaqo-</p>
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<sup>1</sup> *AfriForum and Another v University of the Free State* [2017] ZACC 48; 2018 (2) SA 185 (CC). See also *Daniels v Scribante and Another* [2017] ZACC 13; 2017 (4) SA 341 (CC) para 154.

<sup>2</sup> *AfriForum* ibid paras 3-4.

‘Issues around language policy are as emotive as the language itself. This would be especially so where plans are afoot to effect changes that would water down the role or usage of language, particularly Afrikaans. For, Afrikaans has for many years been associated with dominion or power. Those whose mother tongue it is once ruled this country. And everything official had to also be in Afrikaans. It was a compulsory subject for all African learners and all law students. In at least five of our universities, Afrikaans was the only medium of instruction for decades. To get to the point where Afrikaans now appears to be driven to virtual extinction as a university medium of instruction, was always going to give rise to disaffection, controversy or a suspicion that a less than innocent agenda was being pursued’

And he continued:<sup>3</sup>

‘Extremely difficult, sensitive and potentially divisive as the language issue in general, and Afrikaans in particular, was and is bound to be for many years to come, the historical role of

nkqubo othi IsiNgesi-kuphela. Ijaji Eyongameleyo yathi:

‘Imicimbi emalunga nomgaqo-nkqubo ichukumisa iimvakalelo kanye njengokuba ulwimi nalo lunjalo. Le nto iba njalo ngakumbi apho kukho izicwangeciso zokuzisa iinguqu eziya kunciphisa indima okanye ukusebenziseka kolwimi olo, ngakumbi iAfrikaans. Kaloku, iAfrikaans inonxulumano lweminyaka emininzi nokuphathangobungangamsha okanye namadla egunya. Ababantu ilulwimi lwabo lweenkobe, kaloku, babekhe balawula kweli izwe. Ke yonke into eyeyasemthethweni kwakunyanzeliswa ukuba ibe ngeAfrikaans. Yaye isisifundo esinyanzelekileyo kubo bonke abantwana besikolo abamnyama, nabo bonke abafundi bezomthetho. Ubuncinci, kwakukwiiyunivesithi ezintlanu zalapha apho iAfrikaans kwakukuphela kolwimi lokufunda nokufundisa amashumi ngamashumi eminyaka. Ke ukufikelela kule ndawo yokuba kubonakale ngathi iAfrikaans ityhalelwa ekubeni inyamalale, kungabi safundiswa ngayo eziyunivesithi, kuyinto ebisoloko iya kuvusa ukungevani, neempikiswano, okanye kubekho ukukrokrela ukuba kukho into ekujongwe kuyo engenabunyulu ncam.’

Waqhubeka ke wenjenje:

Nakuba umcimbi weelwimi ngokubanzi, ngakumbi olu lweAfrikaans, wawusoloko, nangoku usasoloko uya kuhlala uyinto enzima ngokugqithisileyo, enobuethe-ethe, ekulula

<sup>3</sup> Ibid paras 4-5.

Afrikaans inescapably has to be confronted whenever possibilities of its use or disuse as a language of instruction are explored. After all, we come from a racially divided past to which Afrikaans was inextricably linked ... The use of Afrikaans is thus one of the most likely areas of fierce disputation. “That is part of the challenge of healing, reconciliation, and reparation that our society will continue to face for a considerable time to come”. It is a difficult transformational issue that requires a meticulous and detached handling by all true defenders and ambassadors of our constitutional vision. We all must consciously guard against the possibility of a subliminal and yet effectively prejudicial disposition towards Afrikaans setting in, owing only to its past record as a virtual synonym to “racism and racially based practices”.’

ukuba idale iyantlukwano ngoku nakwiminyaka emininzi esezayo, kuyanyanzeleka, ngokungenakuphepeka, ukuba indima yeAfrikaans kwimbali yeli ixoxwe qho kwakubakho isizathu sokugoca-goca amathuba okusetyenziswa okanye okuyeka ukusetyenziswa kwayo njengolwimi lokufundisa. Kaloku, sivela kwixesha apho sasikade sahlula-hlulwe ngokobuhlanga, ixesha eyayinxulumene nalo iAfrikaans ngokunganamululekiyo ... Usetyenziso lweAfrikaans ke ngoko luyenye yemimandla engavusa iminyele nengxoxo-mpikiswano ebukhali. “Ke leyo yinxalenye yobunzima obuhamba nokuphiliseka, noxolelwaniso, nezilungiso; ezi zizinto uluntu esilulo oluseza kuhlala lujamelana nazo, ixesha elide”. Yingxaki esa kwinguqu, kodwa inzima, yaye ifuna ukuba iphathwe ngobuchule nokuzibamba imvakalelo ngabo bonke abavikeli noonozakuzaku bombono womgaqo-siseko wethu. Sonke masenze ngabom ukuzigada singabi nentliziyo engathi iyalungisa kodwa ibe eyona nto iphumelela ukuyenza ikukuphatha kakubi iAfrikaans, ngenxa yesizathu esinye kuphela, esi sokuba yayifaniseka ncam “nobuhlanga kunye nezenzo ezazisekwe kucalulo ngobuhlanga”.’

[2] This caution is particularly relevant in this appeal. The same party, AfriForum NPC, challenges the decision of the Gauteng Division, Pretoria (Keightley J). The high court dismissed AfriForum’s application in which it sought the review and setting aside of the decisions of the Senate and Council of the third respondent, the University of South

[2] Esi silumkiso singena kakuhle ngakumbi kwesi sibheni. Kwa eli qela linye, iAfriForum NPC, liyaphikisana nesigqibo seSahlulo SaseGauteng, eTshwane (esika Keightley J). Le Nkundla ePhakamileyo yasichitha isicelo seAfriForum apho yayicela ukuphononongwa-kwakhona okubekwa bucala kwezizigqibo zeSinethi neBhunga

<p>Africa (UNISA), relating to its adoption of a new language policy. In terms of that policy, which the Senate recommended and was approved by the Council, UNISA adopted English as its sole language of learning and tuition (LOLT) and departed from its previous policy in terms of which both English and Afrikaans were employed as the LOLT.</p>	<p>zommangalelwa wesithathu, iYunivesithi YaseMzantsi Afrika (iUNISA), ezazithetha ngokumisela kwayo umgaqo-nkqubo omtsha. Ngokwalaa mgaqo-nkqubo, owakhuthazwayo yiSinethi, waze wavunywa liBhunga, iUNISA yamisela isiNgesi saba kuphela kolwimi lwakhona lokufunda nokufundisa (iLOLT, ngesiNgesi) yaza ke yesuka kumgaqo-nkqubo wayo wangaphambili wona owawuvumela ukuba zombini ezi lwimi, isiNgesi neAfrikaans, zisetyenziswe njengeelwimi zokufunda nokufundisa.</p>
<p>[3] The review application was partly based on grounds rooted in the Promotion of Administrative Justice Act 3 of 2000 (PAJA), on the assumption that the impugned decisions constituted administrative action. However, after the institution of the review application, this Court<sup>4</sup> and the Constitutional Court<sup>5</sup> held that a language policy decision taken by the University of the Free State did not constitute administrative action within the meaning of PAJA. AfriForum then abandoned its reliance on PAJA. But it persisted with its challenge on the principle of legality. It nonetheless failed to persuade the high court, which then granted leave to appeal its decision to this Court.</p>	<p>[3] Isicelo sokujongwa-kwakhona sasisekelwe, nganxanye, kwinto ethethwa nguMthetho Wesi-3 ka-2000 Wokuthazo Lobulungisa Kwezolawulo (iPAJA), ngokuqikelela ukuba ezi zizathu ziphikiswayo zazisisenzo solawulo. Kodwa, emva kokuba sifakiwe isicelo sokujongwa-kwakhona, le Nkundla kunye neNkundla YoMgaqo-siseko zathi isigqibo esimayela nomgaqo-nkqubo wolwimi esasithathwe yiYunivesithi YaseFree State sasingesosenzo solawulo ngokwentsingiselo yalo Mthetho, iPAJA. IAfriForum ke ngoko yayeka ukwayama ngePAJA. Kodwa yema nkqi ayajika ekuceleni umngeni ngokomgqaliselo wasemthethweni. Noko kunjalo, yoyisakala ukuyiqondisa iNkundla ePhakamileyo,</p>

<sup>4</sup> In *University of the Free State v AfriForum and Another* [2017] ZASCA 32; 2017 (4) SA 283 (SCA) para 18.

<sup>5</sup> *AfriForum* fn 1 para 35.

	nkundla leyo eyayinika imvume yokuba ibhenele kule Nkunda malunga nesi sigqibo.
<p>[4] UNISA is a distance university with a long and distinguished history. It was born of the University of the Cape of Good Hope, which was established in 1877, and was incorporated into a correspondence university in 1959. In 2004 it merged with two other major distance educational institutions, Technikon Southern Africa and Vista University, and became the sole distance institution of higher learning in South Africa and the largest on the African continent. Through the years of its existence as a correspondence university, it has offered a wide variety of graduate courses, in English and Afrikaans, to a vast number of local and international students.</p>	<p>[4] IUNISA yiYunivesithi efundisa umntu ekude, enembali ende ebalaseleyo. Yazalwa yiYunivesithi yaseCape of Good Hope, eyayisekwe ngo-1877, yenziwa yaba yiyunivesithi yokufunda ngembalelwano ngo-1959. Ngo-2004 yadityaniswa namanye amaziko amabini amakhulu ezifundo zamagama, ezizezi: iTekhnikhon YaseMazantsi Afrika neYunivesithi YaseVista, yaza ke yaba kuphela kweziko lamagama lemfundo engentla apha eMzantsi Afrika, elaba lelona likhulu kwilizwekazi leAfrika. Kuyo yonke iminyaka yobukho bayo njengeyunivesithi yemfundo ngembalelwano, iye yafundisa izifundo zezidanga eziziindidi ngeendidi, izifundisa ngesiNgesi nangeAfrikaans, kwintlaninge yabafundi abangabalapha nabangabezizwe ngezizwe.</p>
<p>[5] In terms of s 26(2) of the Higher Education Act 101 of 1997, UNISA comprises institutional governance structures which include a Council and a Senate. Section 27(2) of the Higher Education Act empowers it, subject to the policy determined by the Minister of Higher Education and Training, its Council, and with the concurrence of its Senate, to determine its language policy, publish it and make it available upon request. The policy referred to</p>	<p>[5] Ngokwesolotyana u-26(2) loMthetho weMfundo ePhakamileyoa u-101 ka-1997, iUNISA inamaqonga olawulo lweziko-mfundo ekukho nala kuwo: iBhunga kunye neSinethi. ISolotyana u-27(2) loMthetho weMfundo ePhakamileyo liyayigunyazisa ukuba, phantsi komgaqo-nkqubo oqingqwe nguMphathiswa weMfundo ePhakamileyo Noqeqesho, iBhunga layo, livumelana nayo neSinethi yayo, liqingqwe umgaqo-nkqubo wolwimi wayo, liwupapashe liwenze</p>



<p>is the framework established by the Ministry of Education in November 2002, the Language Policy for Higher Education (LPHE).<sup>6</sup> Its chief aim is ‘to promote multilingualism and to enhance equity and access in higher education through the development, in the medium to long-term, of South African languages as mediums of instruction in higher education, alongside English and Afrikaans; [t]he development of strategies for promoting student proficiency in designated language(s) of tuition; [t]he retention and strengthening of Afrikaans as a language of scholarship and science; [t]he promotion of the study of South African languages and literature through planning and funding incentives; [t]he promotion of the study of foreign languages; and [t]he encouragement of multilingualism in institutional policies and practices’.</p>	<p>ufumaneka xa ufunwayo. Lo mgaqo-nkqubo kubhekiswa kuwo sisikhokelo esamiselwa liSebe LezeMfundo ngeyeNkanga ngo-2002, uMgaqo-nkqubo Wolwimi Wemfundo ePhakamileyo (iLPHE ngesiNgesi). Injongo yayo ephambili nantsi: ‘kukukhuthaza iilwimi-zonke nokuqiniseka ukulungelwa ngokulinganayo nokufikeleleka kwemfundo engentla ngokuphuhlisa, kwixesha elingekude-kuyaphi ukuya kwelikude, iilwimi zaseMzantsi Afrika ukuze zibe ziilwimi zokufundisa kwimfundo engentla, ndawonye nesiNgesi neAfrikaans; ukwenziwa kwezicwangciso ezinobulumko zokukhulisa ukwazi kwabafundi ukusebenzisa ulwimi olumiselwe, okanye iilwimi ezimiselwe, ukuba kufundwe ngalo/ngazo; ukugcinwa nokomelezwa kweAfrikaans njengolwimi lofundo-nzulu nolwenzululwazi; ukukhuthazwa kokufundwa kweelwimi zaseMzantsi Afrika noncwadi lwalapha, yenziwe loo nto ngokuyiplanela, nangokuyikhuthaza ngemali; ukukhuthazwa kokufundwa kweelwimi zasemzini; kwanokukhuthazwa kobulwimi-ninzi kwimigaqo-nkqubo nakwizenzo zamaziko (emfundo)’.</p>
<p>[6] The language policy sought to be replaced was approved by UNISA’s Council in 2006. Its aim was to inform ‘the use of language in all aspects of communication of the University, ie. tuition, public, internal and</p>	<p>[6] Lo mgaqo-nkqubo ozungulwa ukususwa wawuvunyiwe liBhunga laseUNISA ngo-2006. Injongo yawo yayikukunika iingcaciso ‘malunga nokusetyenziswa kolwimi kuzo zonke iindawo zoqhakamshelwano kule</p>

<sup>6</sup> ‘The Language Policy for Higher Education, GN R1485, GG 24101, 25 November 2002.’

external communication'. It promised, inter alia, that UNISA would make tuition available in the official languages of South Africa on the basis of functional multilingualism<sup>7</sup> and that where English and Afrikaans already had the capacity to operate as higher education-level languages, UNISA would pro-actively support African languages with a view to them becoming the medium of instruction at higher education level.<sup>8</sup> Its preamble provided:

'The University adheres to a policy of functional multilingualism in order to accommodate linguistic diversity. The promotion of the principle of multilingualism is enshrined in the Constitution of South Africa.

The University is committed to the promotion of equitable language rights with particular emphasis on uplifting the status and usage of the marginalized indigenous languages. Multilingualism is also acknowledged as a powerful tool to promote social cohesion between diverse groups in our society.

The development of the diverse languages of our country will take time and resources and should

Yunivesithi, oko kukuthi, ekufundiseni, nakuqhakamshelwano nowonke-wonke, nolwangaphakathi, nolwangaphandle'. Wawuthembisa, phakathi kwezinye izinto, ukuba iUNISA iya kwenza ukuba kufundwe ngeelwimi ezisemthethweni zaseMzantsi Afrika, kulandelwe inkqubo esebenzisekayo kwelwimi-ninzi, kanjalo, apho isiNgesi neAfrikaans sele zinawo amandla okusebenza njengeelwimi zemfundo ekwinqwanqwa elingentla, iUNISA yayiza kukusungula ngokwayo ukuxhasa iilwimi zesiNtu ukuze zide zibe ziilwimi zokufundisa kwinqwanqwa lemfundo engentla. Imbula-mbethe yawo yayisithi:

'Le Yunivesithi ihambisana nomgaqo-nkqubo wobulwimi-ninzi obusebenzisekayo isenzela ukuba ikhuthaze ubundidi-ninzi ngokweelwimi. Ukukhuthazwa komgqaliselo wobulwimi-ninzi kumiliselwe ngokukhuselekileyo kuMgaqo-siseko WaseMzantsi Afrika.

Le Yunivesithi izimisele ukukhuthaza amalungelo akhuthaza ulingano kwiilwimi, ngokugxininisa ekuphakamiseni iwonga kunye nosetyenziso lweelwimi ezicinezelekileyo zakweli lizwe. Ubulwimi-ninzi buyavunywa ukuba busisixhobo esinamandla sokukhuthaza udibano lwabantu phakathi kwamaqela andidi-ninzi kuluntu esilulo.

Ukuphuhliswa kweelwimi eziziindidi-ndidi zelizwe lethu kuya kuthatha ixesha, kufune nezinto zokwenza ezininzi; ke kufanele ukuba

<sup>7</sup> Clause 4.2.1.

<sup>8</sup> Clause 4.2.6.

<p>be pursued in a phased way, as resources and developmental opportunities allow.’</p>	<p>kwenziwe ngokwezigaba ngezigaba, kangangokuba izincedi-kwenza kunye namathuba ophuhliso zivuma.’</p>
<p>[7] In 2010, the Council approved the revision of the language policy. According to UNISA, the need for the revision arose from a natural attrition of the demand for Afrikaans, the move for parity between Afrikaans and other African languages as support, rather than as language of learning, and the inclination of students wanting to study in English. Accordingly, in 2012 it introduced the ‘Guidelines for the Discontinuation of Afrikaans in Certain Modules’,<sup>9</sup> which operated together with the old policy. In terms of these guidelines, all undergraduate modules were grouped into three categories. These were:</p> <p>(a) Fully Bilingual, English and Afrikaans, for any module that had consistently not had fewer than 100 Afrikaans students in the last three years;</p> <p>(b) Mixed Mode Delivery in terms of which all modules that consistently had, over the last three years, between 15 and 100 Afrikaans students in every registration</p>	<p>[7] Ngo-2010, iBhunga lakuvumela ukuhlaziywa komgaqo-nkqubo wolwimi. Ngokutsho kweUNISA, olu hlaziyo lwaba yimfuneko ngokusuke kunciphe abafuna iAfrikaans, nokuzama ukuvala isithuba phakathi kweAfrikaans nezinye iilwimi zesiNtu ngokuthi izixhase, endaweni yokuba lulwimi ekufundwa ngalo, kwanokukekelela kwabafundi ekufuneni ukufunda ngesiNgesi. Ngokwezi meko ke, yathi ngo-2012 yaqingqa iZalathandlela Zokuphelisa iAfrikaans Kwiimodyuli Ezithile, ezaye zasebenza kunye nalaa mgaqo-nkqubo mdala. Ngokwezi zalathandlela ke, zonke iimodyuli zabangekabi nazidanga zahlelwa zaba ngamaqela amathathu. Yayingala loo mahlelo:</p> <p>(a) Abanobulwimi-mbini obupheleleyo, besiNgesi neAfrikaans, babeza kufunda nayiphi na imodyuli eyayithe gqolo ukuba nabafundi ababengekho ngaphantsi kwekhulu (kwe-100) abenza iAfrikaans kwiminyaka emithathu edluleyo,</p> <p>(b) Abafunda Ngendlela Engumxube apho zonke iimodyuli ezazithe gqolo, kwiminyaka emithathu edluleyo, ukuba nabafundi beAfrikaans abaphakathi kwe-15 ne-100 ngawo onke amaxesha obhaliso, zaziza</p>

<sup>9</sup> The Guidelines were approved by the Senate on 14 March 2012 and revised and approved by the Senate on 14 June 2014. They would be valid for the period 2013 to 2015 and would be revised after the results of a student preference survey became available in 2014.

<p>period, would automatically discontinue formal tuition and printed study material; and</p> <p>(c) English-only. Modules that consistently over the previous three years had less than 15 Afrikaans students in every registration period, could be discontinued, provided the Senate Language Committee (SLC), which was established by the Senate to review UNISA’s language policy and, thereafter, make recommendations to the Senate, was informed accordingly. Departments had the option to continue tuition in Afrikaans in these modules but make study materials available on a digital platform. Examination papers for these modules would be in English, but with an option to have Afrikaans papers.</p>	<p>kuvele ziphelise ukufundisa okumiselweyo kwanoshicilelo lwamaxwebhu ezifundo; kunye neli</p> <p>(c) AbesiNgesi-kuphela. Ngokweli lokugqibela ihlelo, iimodyuli ezasoloko zithe gqolo, kwiminyaka emithathu edluleyo, ukuba nabafundi beAfrikaans abangaphantsi kwe-15, ngawo onke amaxesha obhaliso, zazisenokuyekiswa, kuqinisekiswa ukuba yazisiwe ngaloo nto iKomiti Yeelwimi YeSinethi (iSLC, ngesiNgesi). Le Komiti yayiye yamiselwa yiSinethi ukuba ijongekwakhona umgaqo-nkqubo wolwimi waseUNISA, ize, emva koko, inike iSinethi iingcebiso ngalo mba. Amasebe ayenemvume yokuzikhetela ukuba aqhubeke nokufundisa ngeAfrikaans kwezi modyuli kodwa izinto zokufunda azenze zifumaneke kwindawo edijithali. Amaphepha eemviwo ezi modyuli ayesenokuba ngesiNgesi sodwa, kodwa kuvumeleke ukuba abekho naweAfrikaans amaphepha.</p>
<p>[8] The review process started in 2013 and the various minutes of the Senate’s meetings reflect that the issue was a standing item on its agenda since that time. The process involved the Senate, the Council, the SLC and their constituent members, and UNISA management. The Student Representative Council (SRC), one of the constituent members, is a statutorily recognised and</p>	<p>[8] Le nkqubo yokujongwa-kwakhona yaqala ngo-2013; kukho imizuzu ngemizuzu yeentlanganiso zeSinethi; loo mizuzu ibonisa ukuba lo mcimbi wawuhlala ungumba okhoyo kwiajenda yeSinethi ukususela kwelo xesha. Kule nkqubo ke kwakusebenzisana iSinethi, iBhunga, iKomiti yeSinethi (iSLC) kunye namalungu eengingqi-zomelo zazo, kunye nabolawulo</p>

<p>democratically elected students' representative body at UNISA. It expressed its views, which supported the change to an English-only LOLT. As UNISA described it, 'many disparate views' were expressed and considered. These included the objection to the adoption of an English only language policy, by the UNISA Forum vir Afrikaans, represented by Professor Elirea Bornman, who deposed to affidavits in support of AfriForum's case.</p>	<p>baseUNISA. IBhunga Labameli Babafundi (iSRC), elinye lamalungu eengingqi-zomelo, liliqumrhu elivunywe ngokomtheto nelihoyiweyo futhi elinyulwa ngabafundi baseUNISA ngokwentando yoninzi. Lazivakalisa izimvo zalo, ezazixhasa inguqu le yokuba ibe sisiNgesi-kuphela ulwimi lokufunda nokufundisa (iLOLT). Njengoko ichaza iUNISA, 'zaba ninzi iibono ezahlukileyo' ezavakaliswayo, futhi zaphononongwa. Phakathi kwazo kwakukho noluyichasayo le nto yokumisela lo mgaqo-nkqubo wolwimi wesiNgesi-kuphela, olwalulolweUNISA Forum vir Afrikaans, yona eyayimelwe nguNjingalwazi uElirea Bornman, owenza amaxwebhu obungqina obufungelweyo exhasa lo mcimbi weAfriForum.</p>
<p>[9] In 2014, a draft language policy and its implementation plan, which provided for an English-only LOLT, was formulated. On 22 October 2014, the Senate noted that the SLC had approved the draft document. On 10 March 2015, the Management Committee resolved to recommend the amended language policy and implementation plan to the Senate and the Council for approval. At a Senate meeting of 21 October 2015, a number of concerns were raised by the members, including that they had not been afforded sufficient opportunity to give their inputs, that it was regressive for UNISA to</p>	<p>[9] Ngo-2014 kwakhiwa umqaliso womgaqo-nkqubo wolwimi nowesicwangciso sokuwenza usebenze, zombini zithetha ngesiNgesi-kuphela njengolwimi lokufunda nokufundisa (iLOLT). Ngomhla wama-22 kweyeDwarha ngo-2014, Isinethi yaba nenqaku elithi iKomiti iSLC, iyaluvuma olu xwebhu lwaloo mqaliswa. Ngowe-10 kweyoKwindla ka-2015, iKomiti Yolawulo yenza isigqibo sokuba ikhuthaze ukuba uvunywe lo mgaqo-nkqubo utshintshiweyo nesicwangciso sokuwusebenzisa yiSinethi naliBhunga. Kwintlanganiso yeSinethi yangowama-21</p>

<p>offer its tuition in English only, and that it made no sense for students to be offered tuition in their mother tongue and then write the examinations in English as was proposed. In the event, the Senate resolved to refer the matter back to the SLC to address these concerns.</p>	<p>kweyeDwarha ka-2015, kwabakho ukungaqondi kakuhle izinto ezininzi okwavakaliswa ngamalungu ayo, ezaquka ukuba la malungu eSinethi ayengazange anikwe thuba laneleyo ukwenza awawo amagalelo, nokuba yayikukubuya umva le nto yeUNISA yokufundisa ngesiNgesi kuphela, kwanokuthi yayingavakali inantsingiselo ibhadlileyo ncam into yokuba abafundi kuthwe mabafundiswe ngolwimi lwabo lweenkobe, ze kuphinde kuthiwe iimviwo baza kuzibhala ngesiNgesi, njengokuba kwakusitshiwo. Kwathi kwakuba njalo ke, yabona iSinethi ukuba le ndaba mayiphindiswe kwiKomiti iSLC, ukuze yona iphonononge la maxhala.</p>
<p>[10] A draft language policy was ultimately presented to the Senate at its meeting held on 26 August 2015. It elicited a number of objections from the members once more and was consequently not adopted. Instead, it was remitted to the SLC for further development that would address the objections. It met the same fate in subsequent Senate meetings convened on 26 August and 21 October 2015.</p>	<p>[10] Kwade kwathi ke, ngomhla wama-26 kweyeThupha ka-2015 kwintlanganiso yeSinethi wanikezelwa umqaliso womgaqo-nkqubo wolwimi. Kwaphinda kwabakho iimpikiswano eziliqela ezivela kumalungu eSinethi, waza loo mqaliso waphela ungadange uvunywe. Koko, wabuyiselwa kwakwiKomiti iSLC, ukuba iphinde iwusebenze kude kugqibeke ezi nkcaso. Yaphinda yaba kwayiloo nto ukungavunywa nakwezilandelayo iintlanganiso zeSinethi ezazibizwe ngowama-26 kweyeThupha ka-2015 nangowama-21 kweyeDwarha ka-2015.</p>
<p>[11] Thereafter, the SLC revised the language policy draft document. On 11</p>	<p>[11] Emva koko, iKomiti iSLC yalihlaziya ixwebhu elingumqaliso womgaqo-nkqubo</p>

<p>March 2016 a SLC meeting was convened to consider and finalise the task in anticipation of a Senate meeting which was scheduled for 30 March 2016. The Senate’s minutes of that meeting record that:</p> <p>‘Prof IOG Moche made a presentation on the Language Policy.</p> <p>The implementation process would be tabled at the meeting scheduled for 19 October 2016.</p> <p><b><u>RESOLUTION</u></b></p> <p>Senate resolved that the Language Policy to be recommended to Council for approval.’</p>	<p>wolwimi. Ngowe-11 kweyoKwindla ka-2016 kwabizwa intlanganiso yeKomiti iSLC ukuze kujongisiswe kugqityezelwe lo msebenzi, kulungiselelwa intlanganiso yeSinethi eyayimiselwe ukuba iza kuba ngowama-30 kweyoKwindla ka-2016. Kwimizuzu yeSinethi yaloo ntlanganiso kubhaliwe kwathiwa:</p> <p>‘UNJing IOG Moche uye wathetha ngawo lo Mgaqo-nkqubo Wolwimi.</p> <p>Inkqubo yokusetyenziswa kwawo iya kubekwa etafileni kwintlanganiso emiselwe owe-19 kweyeDwarha ku-2016.</p> <p><b><u>ISIGQIBO</u></b></p> <p>ISinethi igqibe kwelokuba lo Mgaqo-nkqubo Wolwimi mawusiwe kwiBhunga, likhuthazwe ukuba liwuvume.’</p>
<p>[12] According to minutes of the Council’s meeting held on 28 April 2016, Prof Moche presented the revised language policy for approval, which was granted. The implementation plan compiled by the task team appointed by the SLC would, accordingly, be recommended to the SLC, Senate and Council for approval.</p>	<p>[12] Ngokwemizuzu yentlanganiso yeBhunga eyayikho ngowama-28 kuTshaziimpuzi ngo-2016, uNjing Moche wathetha ngalo mgaqo-nkqubo wolwimi ulungisiweyo wacela ukuba uvunywe; wavunywa ke. Ke isicwangciso sokuwusebenzisa esasisenziwa liqelana laloo msebenzi elalityunjwe yiKomiti iSLC sasiza kuthi naso, ngokwaloo ndlela, sisiwe kwiSLC, nakwiSinethi, nakwiBhunga, ukuze sivunywe.</p>
<p>[13] AfriForum took issue with the decisions of the Senate and the Council and launched urgent application proceedings in the Gauteng Division of the High Court,</p>	<p>[13] I-AfriForum yavakalisa ukungaxoliswa zizigqibo zeSinethi neBhunga, yaza yafaka enkundleni isicelo esingxamisekileyo kwiSahlulo SaseGauteng seNkundla</p>

<p>Johannesburg to challenge them. It sought an order that UNISA suspend ‘the implementation of the new language policy adopted by the Council of the University of South Africa on 28 April 2016 (with the concurrence of the Senate ... granted on 30 March 2016)’ pending the final decision of the application for a review and the following relief:</p> <p>‘1. That the respective resolutions of the Council and the Senate of the University of South Africa to approve a new language policy on 28 April and 30 March 2016 respectively be reviewed and set aside;</p> <p>2. That the new language policy adopted by [UNISA] be set aside as being unconstitutional and unlawful;</p> <p>3. That the new language policy be set aside as a whole; alternatively be set aside insofar and to the extent that Afrikaans has been removed as language of learning and tuition at the University of South Africa;</p> <p>4. That within 10 days from date of judgment, [UNISA] shall prominently publish on (a) its website and (b) in the three major Afrikaans newspapers in the country, (c) as well as by transmitting by email to all students a notice with the following content:</p> <p>4.1. A full list of the modules that had been on offer in Afrikaans as on 28 April 2016;</p>	<p>ePhakamileyo, eJohannesburg, iphikisana nazo ezi zigqibo. Ngaphezu kokufuna ‘ukumiswa kokusebenziseka komgaqo-nkqubo omtsha owawumiselwe liBhunga leYunivesithi YaseMzantsi Afrika ngowama-28 kuTshaziimpunzi ka-2016 livumelene neSinethi ... okwavunywayo ngowama-30 kweyoKwindla ngo-2016’ yafuna noku kuphunyezwa kulandelayo:</p> <p>‘1. Ukuba ezaa zigqibo zeBhunga neziya seSinethi zeYunivesithi YaseMzantsi Afrika zokuvuma umgaqo-nkqubo omtsha ngowama-28 kuTshaziimpuzi nowama-30 kweyoKwindla ngo-2016, ngokulandelelana, zijongwekwakhona, zibekwe ecaleni;</p> <p>2. Ukuba laa mgaqo-nkqubo wolwimi mtsha uye wamiselwa yiyo [iYunivesithi YaseMzantsi Afrika] kubhengezwe ukuba awuhambi ngokoMgaqo-siseko, futhi awukho mthethweni;</p> <p>3. Ukuba lo mgaqo-nkqubo wolwimi mtsha ubekwe bucala xa uwonke; kungenjalo ubekwe bucala ngokwendlela nangangokuba iAfrikaans iye yayekiswa ukuba ibe lulwimi lokufunda nelokufundisa eYunivesithi YaseMzantsi Afrika;</p> <p>4. Ukuba maze kuthi kwisithuba seentsuku ezili-10 ukususela ngomhla wesigwebo, yona [iYunivesithi YaseMzantsi Afrika] ipapashe ngokugqamileyo (a) kwisiza sonxibelelwano sayo (b) kumaphepha amakhulu amathathu eAfrikaans akweli lizwe, (c) kwanangokudlulisela ngeimeyili kubo bonke abafundi isaziso esinesi siqulatho silandelayo:</p> <p>4.1 Uluhlu olupheleleyo lweemodyuli ezazizezokufundiswa ngeAfrikaans ngomhla wama-28 kuTshaziimpuzi ngo-2016;</p>
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<p>4.2 Offering all prospective students for the next academic year admission in such modules as presented on first year level;</p> <p>4.3 Offering all existing students, if they were enrolled in any one of those courses or would have enrolled for the subsequent year course available in Afrikaans, but had perforce to follow the module in English, to re-enrol on the basis that they may follow the module in Afrikaans until completion of their studies;</p> <p>4.4 That all those modules will be presented in full in the following academic years until the language policy had been lawfully amended if at all;</p> <p>4.5 That it shall, within 10 days after compliance with prayers 4, 4.1, 4.2 and 4.3 submit to this court proof that it has complied with the terms of the order.’</p>	<p>4.2 Bavunyelwe bonke abafundi abafuna ukufunda kulo nyaka-zifundo uzayo ukuba bazibhalisele ezo modyuli zikwinqwanqwa lokuqala;</p> <p>4.3 Bavunyelwe bonke abafundi abahleli bekho, ukuba babeyibhalisele nokuba yeyiphi kwezo khosi okanye babeza kubhalisela ukufunda ikhosi yonyaka olandelayo ukuba yayikho ngeAfrikaans, kodwa banyanzeleka ukuba bayifunde loo modyuli ngesiNgesi, bayavunyelwa ukuba baphinde bazibhalisele ezo modyuli, kuxelwe ukuba baya kuzifunda ezo modyuli ngeAfrikaans bade bazigqibe izifundo zabo;</p> <p>4.4 zonke ezi modyuli ziya kubakho ngokuzeleyo kwakule minyaka-zifundo izayo ude umgaqo-nkqubo wolwimi ube ulungisiwe ngokwasemthethweni, ukuba iyenzeka ke loo nto;</p> <p>4.5 Ukuba iya kuthi, kwisithuba seentsuku ezili-10 emva kokuba ithobele izikhalo eziku-4, 4.1, 4.2 naku-4.3, ingenise kule nkundla isibonakaliso sokuba iye yayithobela imiqathango yalo myalelo.’</p>
<p>[14] AfriForum trenchantly criticised the process followed by UNISA in reviewing its language policy. Its core contention, in addition to the abandoned PAJA-based review grounds, was that the impugned decisions violated the rights, by its count, of approximately 30 000 existing and prospective Afrikaans students, which included White, Black and Coloured students from Afrikaans speaking communities, to</p>	<p>[14] I AfriForum iyayigxeka kabukhali inkqubo eyalandelwa yiUNISA xa yayijijonga kwakhona umgaqo-nkqubo wolwimi wayo. Ingxam yokungavumelani kwayo, ethi iyidibanise nezaa zizathu zozongo-kwakhona ezisekwe kwiPAJA eyaziyekayo, yayikukuba ezi zizathu ziphikisekayo zanyhasha amalungelo abafundi beAfrikaans ngokubala kwayo ababemalunga nama-30 000 ababekho</p>

receive tuition in their mother tongue. This was in breach of s 29(2) of the Constitution as there was no justification for the adoption of an English only LOLT policy when no feasibility study had shown that it was no longer reasonably practicable to use the old dual language policy, so went the contention. The change was slated for breaching the LPHE by not being responsive to the desire of Afrikaans students at UNISA to be educated in the language of their choice when it was reasonably practicable to offer tuition in Afrikaans; denying them their right under s 9 of the Constitution not to be unfairly discriminated against; and impairing their right to human dignity by removing Afrikaans, which was already developed as a language of science and academic learning, as a LOLT.

nababesengakho, ekukhokubo abaNhlophe, abaNyama, nabeBala ababesuka kwiindawo ezinoluntu oluthetha iAfrikaans, baze bona bavaleleka ukuba bafumane ukufundiswa ngolwimi lwabo lweenkobe. Oku, yayikukwaphulwa kwesolotyana u-s 29(2) woMgaqo-siseko, njengoko kwakungekho kuthetheleleka kokusetyenziswa kweNgesi kuphela njengolwimi lokufunda nokufundisa (iLOLT), ekubeni kwakungazange kubekho luphando lolwenzeko olwaye lubonisile ukuba kwakungasekholula ukwenzeka ukusebenzisa laa mgaqo-nkqubo wolwimi mdala kalwimi-mbini, yayisitsho ke ingxoxo yokungavumelani. Laa nguqu yaxatyelwa kukugxekwa oku, kusithiwa yaphule iLPHE ngokungakhathaleli umnqweno wabafundi beAfrikaans eUNISA wokuba banikwe imfundo ngolwimi lokuzikhethela kwabo ekubeni kwakuyinto enokwenzeka lula ukuba kufundiswe ngeAfrikaans, nto leyo yabahlutha ilungelo labo eliphantsi ku-s 9 woMgaqo-siseko lokuba bangacalu-calulwa ngokungalunganga, ngaloo ndlela kuqhwaliswa ilungelo labo lokuba nesidima njengabantu ngokususa iAfrikaans, eyayisele iphuhlisekile njengolwimi lwenzululwazi nokufundiseka kwaseyunivesithi njengolwimi lokufunda nokufundiswa (iLOLT).

[15] AfriForum further contended that the language review process breached the principle of rationality. This was so because organisations advocating for the promotion and protection of linguistic rights at tertiary institutions did not participate in the review process<sup>10</sup> and no research or formal investigation as envisaged by the old policy was conducted to determine the needs, attitudes and preferences of Afrikaans students whose rights would be adversely affected.<sup>11</sup> The SLC also failed to table the representations of the Forum for Afrikaans, which were timeously submitted, before the Council. This was despite the fact that the representations were compiled by respective members of the Senate and the SLC, Professors Bornman and Potgieter, who had participated in published research on the subject and sought to advise the Council on the impact its decision would have on the approximately 30 000 Afrikaans UNISA students.

[15] IAfriForum yaqhuba yaxoxa ngelithi inkqubo yokujongwa-kwakhona kolwimi yawaphula umgqaliselo wokucingisisa. Le nto yayinjalo kuba amaqumrhu athethelela ukhuthazo nokhuselo lwamalungelo olwimi kumaziko emfundo enqwanqwa lesithathu zange athathe nxaxheba kuloo nkqubo yokujongwa-kwakhona kanti zange kubekho naluphando-nzulu, okanye uxilongo oluqingqiweyo, izinto ezazibonelelwe kulaa mgaqo-nkqubo mdala, zokuqikelela kubonwe iimfuno, neemo-ntliziyo, nazinto kukhethwa zona, zabafundi beAfrikaans abamalungelo abo ayeza kuchaphazeleka kakubi. IKomiti iSLC kanjalo yoyisakala ukuzibeka etafileni phambi kweBhunga izimvo zeQonga LeAfrikaans (iForum for Afrikaans), ezazingeniswe ngexesha kuyo. Le nto yenzeka nakuba ezo zimvo zaziqokelelwe ngamalungu eSinethi nawayo iSLC, ooNjingalwazi uBornman noPotgieter, ngokokulandelelana, abantu ababethathe iinxaxheba kuphando-nzulu olupapashiweyo malunga nombamba wolwimi, baze bazama ukucebisa iBhunga malunga neempembelelo esasiza kuba nazo isigqibo salo kubafundi

<sup>10</sup> AfriForum referred to various organisations which it claimed support the retention of Afrikaans as a language of tuition and should have been consulted, namely Die Afrikaanse Taalraad, Die ATKV, Dagbreek Trust and Trust for-Afrikaanse Onderwys, Die Afrikanerbond, Die Dameskring, Die Voortrekkers, the FW de Klerk Foundation, The SA Akademie vir Wetenskap en Kuns and Afriforum Youth.

<sup>11</sup> The Proposals for amending UNISA's Language Policy encapsulated in the Presentation of College of Human Sciences titled 'First UNISA Consultative Indaba on the UNISA Language Policy dated 10 March 2014, envisaged, inter alia, a complete overhaul of the Preamble to 'reflect a commitment to multilingualism and to the development of African Languages', 'decisions by Council and Senate made in a consultative manner, and including research and formal investigations' and consultation which would 'include some external stakeholders, eg Convocation'.

	<p>abamalunga nama-30 000 beAfrikaans baseUNISA.</p>
<p>[16] AfriForum pointed out that the Senate, at its meeting of 21 October 2015, referred the matter back to the SLC. It lamented that the SLC nonetheless failed at its subsequent meeting of 11 March 2016 to address the concerns for which the matter was remitted. Some of those concerns were raised by students, it was argued. But only the SRC, which in AfriForum's view did not represent the students with an interest in Afrikaans tuition and actually associated itself with the 'Afrikaans must Fall' student protests, was given a hearing, to appease protesting students and avoid student revolt, it claimed. Thus, the SRC exerted 'unauthorised or unwarranted dictates' on the review process and no attention at all was given to the Senate's decision that there had been insufficient consultation.</p>	<p>[16] IAfriForum yayixela into yokuba iSinethi, kwintlanganiso yayo yowama-21 kweyeDwarha ka-2015, yayiwuphindisile lo mcimbi kwiSLC. Yakhathazeka ke yinto yokuba iSLC nangona kunjalo yoyisakala kwintlanganiso yayo elandelayo yowe-11 kweyoKwindla ngo-2016 ukuwahoya amaxhala owawungeniselwe wona kuloo ntlanganiso. Kwakuxeliwe ukuba amanye aloo maxhala ayevakaliswe ngabafundi. Kodwa kwamanyelwa iSRC kuphela, kanti ngokwembono yeAfriForum, yona yayingabamelanga bona abafundi ababenomdla ekufundeni ngeAfrikaans, futhi yayizinxulumanise nemiqhankqalazo yabafundi eyayisithi 'iAfrikaans Mayiwe'; loo mkhethe wawusenzelwa ukuze kuthonyalaliswe abafundi abo babeqhankqalaza ukuze kuthintelwe uvukelo lwabafundi, yatsho ke. Ngoko ke iSRC yaba namandla nefuthe lokuphatha 'okwakungekho gunyeni layo futhi kungafunekanga nganto' kulaa nkqubo yokujonga-kwakhona, akwabikho luhoyo tu olwanikwa isigqibo seSinethi esasisithi khangе kubekho ludliwano-ndlebe lwaneleyo.</p>
<p>[17] Regarding the Senate's meeting of 30 March 2016, it was contended that Prof Moche misled the Senate by holding out that</p>	<p>[17] Malunga nentlanganiso yeSinethi yowama-30 kweyoKwindla ku-2016, kwakhalazwa kwathiwa uNjing Moche</p>

the issue of the number of modules offered in English and those offered in Afrikaans was debated and taken into consideration by the SLC, when this was, in fact, not done. Thus, it was contended, the Senate resolved to recommend the Council's adoption of a new LOLT on insufficient information, without considering whether the SLC had addressed any of the concerns that were raised at its previous meeting; and it adopted the new language policy without notice and proper consultation with the persons who would be most directly affected by it. Moreover, neither the Senate nor the Council made any reference at all to the reasonable practicability of their impugned decisions at the relevant meetings, and the reasons for these decisions were compiled after the fact.

wayilahlekisa iSinethi ngokuthi ingxaki yenani leemodyuli ezazifundiswa ngesiNgesi nezo zazifundiswa ngeAfrikaans yayiye yaxoxwa, yanikwa umqwalasela yiSLC, ekubeni le nto yayingazange yenzeke phofu. Ngoko, kwakhalazwa kwathiwa, iSinethi yagqiba kwelokuba ikhwezelele ukuba iBhunga limisele ulwimi lokufunda nokufundisa olutsha lingabanga nazinkcukacha zaneleyo, kungakhange kuqwalaselwe nokuba iSLC yayiye yaxoxa na ngawo la maxhala awayevakaliswe kwintlanganiso yayo yangaphambili, yaza ke yawuvuma umgaqo-nkqubo omtsha ingaziswanga futhi ingabanga naludliwano-ndlebe lufanelekileyo kunye naba bantu babeza kuchaphazeleka ngokuthe ngqo kakhulu nguwo. Ngaphezulu, zombini, iSinethi neBhunga zange zibhekise kuko konke ukusebenziseka okulula kwezi zigqibo zabo ziphikiswayo kwezo ntlanganiso zazifanelwe zizo; ke izizathu zezi zigqibo zabhalwa emva kokuba sezenziwe.

[18] AfriForum further criticised the Senate's conduct at its meeting of 30 March, alleging a breach of a number of provisions of the Senate's own delegated legislation, namely Senate Rules 6.2, 11.1 and 13.1 to 13.6. These rules respectively require:

[18] IAfriForum yaqhuba ukugxeka iSinethi ngokuziphatha kwayo kwintlanganiso yayo yowama-30 kweyoKwindla, ityhola ngelithi kubekho ukwaphulwa kweqela lemimiselo yomthetho wayo ngokwayo iSinethi, le Imigaqo YeSinethi engu-6.2, 11.1 no-13.1 ukuya ku-13.6. Ngokulandelelana kwayo le migaqo, ifuna oku:

<p>(a) the adoption of Senate resolutions in a meeting at which a quorum is present;</p> <p>(b) the submission of the agenda and related documents to members of the Senate five days before the meeting;</p> <p>(c) resolutions of the Senate and its Committees to be adopted by a majority of the members present and on a show of hands;</p> <p>(d) resolution of a matter by preferential order vote or another procedure agreed upon by those present;</p> <p>(e) the resolution of policy matters by a two-thirds majority of the members present; and</p> <p>(f) a unanimous resolution, which must be properly recorded, to dispense with the procedural provisions prescribed by the rules, if the Senate is satisfied that there is sufficient justification therefor. AfriForum contended that the Senate’s failure to comply with each of these rules invalidated its resolution and that this permeated and tainted the resolution of the Council as well.</p>	<p>(a) ukuthathwa kwezigqibo zeSinethi kwintlanganiso ekhoyo kuyo ikhworam;</p> <p>(b) ukunikwa kwamalungu eSinethi iajenda kunye namaxwebhu ahamba nayo iintsuku ezintlanu phambi kwentlanganiso leyo;</p> <p>(c) ukuba izigqibo zeSinethi nezeeKomiti zayo zenziwe luninzi lwamalungu akhoyo kuphakanyiswa izandla;</p> <p>(d) ukugqitywa komcimbi ngevoti evumela ulandelelaniso ngokuzikhethela okanye ngenye indlela- yokwenza ekuvunyelwene ngayo ngabo bakhoyo;</p> <p>(e) ukugqitywa kwemicimbi yemigaqo-nkqubo ngesininzi esisisibini kwisithatu samalungu akhoyo; kunye</p> <p>(f) nesigqibo somntu wonke, ekufuneka sibhalwe ngokufanelekileyo, sokuba ingalandelwa imimiselo yendlela-yokwenza ehambisana nemigaqo ukuba iSinethi yanelisekile kukuba iyathetheleleka ngokwaneleyo loo nto. I AfriForum ixoxa ngelithi ukoyisakala kweSinethi ukuthobela le migaqo ngaminye kwaphelisa ukuba namadla okusebenza kwesigqibo sayo, nangelithi le meko yasityhutyha yaza yasidyobha neso seBhunga isigqibo.</p>
<p>[19] UNISA conceded at the outset in its papers that the procedure it followed ‘may not have been perfect in every respect’. However, it contended that the procedure was still ‘sufficiently fair to survive legal scrutiny’. Regarding the question of</p>	<p>[19] IUNISA yayivumile ekuqaleni kumaphepha ayo ukuba indlela-yokwenza eyayilandelayo ‘isenokuba yayingagqibelelanga kuyo yonke into.’ Kodwa, yaxoxa ngelithi laa ndlela-yokwenza yayisenako ‘ukuba yelungileyo</p>

consultation, it admitted that it did not consult with the public and averred that it was not obliged ‘to separately consult with specific parts of or groupings in the student population in order to obtain their views,’ as demanded by AfriForum. It sufficed, in its view, that it consulted with each of its constituent bodies that took part in the decision-making process. It further highlighted that the SRC, which was engaged in the review process, in its capacity as a statutorily recognised and democratically elected body that is a constituent part of the Senate, represents all UNISA students, including the Afrikaans speaking students.

ngokwaneleyo ukuba isinde ekugxekekeni ngokwasemthethweni’. Malunga nendaba yodliwano-ndlebe, yavuma ukuba zange icebisane nowonke-wonke, yatsho isithi yayinganyanzelekanga ‘ukuba ithetha-thethane ngokwahlukeneyo namabutho athile okanye amaqela athile akhoyo kwisihlewele sabafundi ukuze ifumane izimvo zawo’ njengokunyanzelisa kweAfriForum. Ngokokubona kwayo, kwakwanele ukuthetha-thethana kwayo nayo nganye kwiingingqi-zomelo zayo ezathatha inxaxheba kuyo laa nkqubo yolwenziwo lwezigqibo. Yacacisa ngakumbi ukuba iSRC, eyayisebenza kulaa nkqubo yokujongwa-kwakhona ngokwewonga layo lokuba iliqumrhu elivunyiweyo ngokomthetho nelanyulwa ngokwentando yesininzi, eliyinxalenye eyakha iSinethi, limele bonke abafundi baseUNISA, bedibene nabo nabafundi abathetha iAfrikaans.

[20] UNISA denied that its decisions were irrational, contending that it did not ‘remove’, ‘abolish’, ‘eradicate’ or ‘abandon’ or ‘do away with’ Afrikaans tuition, as AfriForum claimed. Instead, it said, ‘the new language policy favoured the use of English as the language of learning and tuition at the university, whilst placing Afrikaans on the same footing as the other official languages in the Republic, with tuition in Afrikaans and the other official languages being offered

[20] IUNISA yakhanyela ukuba izigqibo zayo bezingacingisiswanga, ixoxa ngelithi, yona zange ‘isuse’, ‘igxotho’, ‘incothule neengcambu’, okanye ‘iyilahle’ okanye ‘iyiphelise’ imfundo yeAfrikaans njengokuba isitsho iAfriForum. Endaweni yoko, yathi, ‘lo mgaqo-nkqubo wolwimi mtsha ubeke phambili ukusetyenziswa kwesiNgesi njengolwinmi lokufunda nokufundisa apha kule yunivesithi, ngeli lixa uyibeke iAfrikaans endaweni efanayo

<p>where there is capacity, with learner support, in the student’s language, and with the intent that the development and place [of] Afrikaans as well as the other official languages should be promoted’.</p>	<p>neyezinye iilwimi zasemthethweni zeRiphabliki, apho kuthi kufundiswe ngayo iAfrikaans nangazo ezinye ezi iilwimi zasemthethweni apho kukho umntu onokuyenza loo nto, ekukwakho nenkxaso yabafundi nolwimi lwakhe umfundi, nangokuzimisela ukuba uphuhliso kwanendawo yeAfrikaans kwanazo ezi ezinye iilwimi zasemthethweni, ezo nto zikhuthazwe’.</p>
<p>[21] To bolster its contention, UNISA pointed to clause 4.2.3 of the new language policy, which provides that ‘[w]here 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’. This clause, it stated, ‘takes UNISA’s new language policy into a realm of genuine multilingualism’ because ‘the previous language policy entrenched English and Afrikaans whilst paying lip service to developing other African languages, whereas the new language policy made it possible to offer courses in African languages as well as Afrikaans’.</p>	<p>[21] Ukunika ukomelela kwingxoxo-mpikiswano yayo iUNISA yabhekisa kwigatya 4.2.3 lomgaqo-nkqubo wolwimi omtsha, elithi, ‘apho kukho umntu onolwazi, inani elikhethiweyo leemodyuli neeprogramu liya kufundiswa ngokumana kusongezwa, kufundiswe ngeelwimi zasemthethweni ezingaphezu kolunye, zaseMzantsi Afrika ukuze kuxhaswe imigaqo-nkqubo efaneleneyo yesizwe’. Eli gatya, yatsho ke, ‘liwusa umgaqo-nkqubo wolwimi omtsha waseUNISA kummandla wobulwimi-ninzi obunyanisekileyo’ kuba ‘lo wangaphambili umgaqo-nkqubo wawubethelele isiNgesi kunye neAfrikaans wabe uthetha nje ngomlomo kuphela malunga nokuphuhlisa ezinye iilwimi zesiNtu, kanti lo mtsha umgaqo-nkqubo wolwimi wayenza yaba nokwenzeka into yokuba kubekho iikhosi ezifundiswa ngeelwimi zesiNtu nangeAfrikaans.’.</p>



[22] UNISA further contended that the consideration of ‘reasonable practicability’ infused the entire language policy review process, even if it was not specifically referenced at every turn, and was pertinently raised at the First Consultative Indaba that was held in the early stages, in April 2014. It pleaded that it did not have the capacity to offer study materials, online tuition and an automatic translation programme, which were being developed, in all the official languages to bring them on par with Afrikaans. Offering a course in both English and Afrikaans, it contended, was not in the interest of the ‘economies of scale’<sup>12</sup> because it necessitated doubling the number of courses and splitting the student numbers between the two courses. To illustrate its point, UNISA provided as an example that if a course had only ten Afrikaans students, printing only ten study guides would be more expensive per student than for the same course which had a thousand English students. Thus, it was contended, an Afrikaans student cost UNISA more than an African language student who studied in English. This resulted in disproportionate resources being spent on students studying in Afrikaans as opposed to other students who had to study in English because tuition was not offered in their mother tongue. Mother

[22] IUNISA yaqhuba yaxoxa ngelithi ukuqwalaselwa ‘kokwenzeka ngokulula’ kwayizalisa yonke laa nkqubo yokujongwa-kwakhona komgaqo-nkqubo wolwimi, nokuba kwakungasoloko kukhankanywa lonke ixesha; futhi kwakuye kwathethwa ngako ngokubalulekileyo kwiNdibano Yokuqala Yodliwano-ndlebe eyayithe yabakho kwizigaba zasekuqaleni, nngenyanga kaTshaziimpuzi ngo-2014. Yacenga ke yathi ayinabo ngokwaneleyo abantu bokunika amaxwebhu okufunda, ukufundisa kwi-intanethi, kunye neprogramu yoguqulo oluhlala lukho, kodwa olusakhuliswayo kuzo zonke iilwimi zasemthethweni ukuze zikhuliswe zibe mgangathweni mnje neAfrikaans. Ke, ukufundisa ikhosi ethile ngazo zombini ezi lwimi, isiNgesi neAfrikaans kwakungazikhuthazi ‘indlela zolungelelwaniso kwezoqoqosho kuba bekusenza ukuba kufuneke ukuba ikhosi inye ifundiswe kabini, baze nabafundi bahlulahlulwe phakathi kwezo khosi zifanayo. Ukucacisa eli nqaku, iUNISA yenza umzekelo othi ukuba ikhosi ibinabafundi abalishumi kuphela beAfrikaans, ukushicilela izikhokelo-zifundo zabafundi abalishumi kuphela bekusiba duru ngomfundi ngamnye ngaphezu kokuba kunjalo kwakuloo khosi

<sup>12</sup> A concept which was described as applying only to the provision of distance education and means that the greater the of students who are registered for a course, the more the cost for each individual student drops.

tongue tuition could not be reserved only for Afrikaans students which, it was alleged, would be better supported and have a better chance to survive as a LOLT under the new language policy. Existing UNISA students receiving tuition in Afrikaans would still be able to complete their courses in Afrikaans.

inye xa inabafundi abaliwaka besiNgesi. Ngoko, kwaxoxwa kwathiwa, umfundi weAfrikaans uziindleko kwiUNISA ngaphezu komfundi wolwimi lwesiNtu ofunda ngesiNgesi. Le nto yazala ukuba kusetyenziswe izincedi-kwenza ezingalinganiyo nezinye kubafundi abafunda iAfrikaans, kungekho njalo kwabanye abafundi ababeyanzelekile ukuba bona bafunde ngesiNgesi ngenxa yokuba kwakungafundiswa ngolwimi lwabo lweenkobe. Akubanga yinto enokwenzeka ke ukuba kugcinelwe abafundi beAfrikaans bodwa ukufundiswa ngolwimi lwabo lweenkobe, le kubangwa ukuba iya kuxhaseka ibe nethuba elingcono lokungaphelelwa xa isebenza njengolwimi lokufunda nokufundisa (iLOLT) phantsi kwalo mgaqo-nkqubo wolwimi mtsha. Kodwa ke abafundi baseUNISA abakhoyo ngoku ababefundiswa ngeAfrikaans baya kuba nako ukuzigqiba iikhosi zabo ngeAfrikaans.

[23] The high court was not persuaded by AfriForum's submissions. The first leg of its application, in which it sought interim relief in terms of Part A of its notice of motion, was heard by Sutherland J. He dismissed the application on the basis that the element of irreparable harm to the affected persons had not been established. Keightley J, who heard the main application in the high court under

[23] INkunda ePhakamileyo zange yaneliswe kukubaluleka kwezimangalo zeAFRIFORUM. Isigaba sokuqala sesicelo sayo, apho yayicela ukumiswa okwethutyana ngokweNdawo A yesaziso sayo sokuthatha inyathelo, wawuchotshelwe nguSutherland J. Yena ke wasichitha esi sicelo esithi, le ndawo yokubeka engozini ngokungenakulungiseka kwabo bantu bachaphazelekayo

<p>Part B of AfriForum’s amended notice of motion, was equally unimpressed by its case and dismissed the application in its entirety.</p>	<p>ayicaciswanga. UKeightley J, owachophela undoqo wesicelo eNkundleni ePhakamileyo phantsi kweNdawo B yothatho-manyathelo olulungisiweyo lweAfriForum naye zange abone kubaluleka kweso simangalo sayo, waza wawuchitha loo mcimbi.</p>
<p>[24] Regarding the contention that the new language policy was unconstitutional, the Judge accepted that UNISA changed its language policy and resolved to offer tuition ‘only in English due to the lack of demand and lack of capacity for Afrikaans tuition’. In her view, language parity and the need to treat students equitably when it came to mother tongue tuition were ‘critical drivers’ in UNISA’s adoption of the new language policy. She found that on the evidence it was not reasonably practicable for UNISA, which is committed to redressing the imbalances that exist in languages, to offer tuition in Afrikaans while not offering tuition in the remaining official languages as the LOLT, as ‘the cost associated with developing all ... the languages to that level at this stage would be prohibitive’. She held that ‘[b]oth 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’. In sum, as she put it, ‘it was plain that the removal of Afrikaans was justified on the basis of considerations of equity,</p>	<p>[24] Malunga nembambano yokuba lo mgaqo-nkqubo mtsha awuhambisani nomgaqo-siseko, iJaji yangaphambili yayiqale yayivuma into yokuba iUNISA yawutshintsha umgaqo-nkqubo wayo yaza yagqiba kwelokuba ifundise ‘ngesiNgesi kuphela ngenxa yokuba kungekho bafundi baninzi nabantu baneleyo bokufundisa ngeAfrikaans’. Ngokwembono yayo, ulinganiso ngokweelwimi kunye nemfuneko yokuba abafundi baphatheke ngobulungisa obulungeleleneyo, xa kufikwa ekufundisweni ngolwimi lweenkobe, yayizezona ‘zimeko zibukhali’ ekumiseleni kweUNISA lo mgaqo-nkqubo wolwimi mtsha. Wafumanisa ukuba ngokobo bungqina kwakungekho lula ukwenzeka ukuba iUNISA, ezimisele ukulungisa iimeko zokungalungelelani ezikhoyo kwiilwimi, ikwazi ukufundisa ngeAfrikaans ekubeni ingafundisi ngazo ezinye ezi iilwimi zasemthethweni njengoko ‘iindleko ezinxulumene nokuziphuhlisa zonke ... ezi lwimi de kube kwelaa nqwanqwa okwangoku ziya kugqithisa’. Wayithetha into yokuba ‘apha ekhaya kanti nakwizizwe ngezizwe isiNgesi lulwimi olukhethwayo</p>

<p>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'. The court thus concluded that the new language policy did not violate s 29(2).</p>	<p>lukhethelwa uqhakamshelwano, nezemfundo, nezamashishini. Ukumiselwa kwesiNgesi sibe kuphela kolwimi lokufunda nokufundisa phantsi kwalo mgaqo-nkqubo mtsha kwakukusebenzisa umgqaliselo 'wokwenzeka lula'. Ukushwankathela, ngokutsho kwakhe, 'kwakucace phandle ukuba ukususwa kweAfrikaans kwakuthetheleleka ngenxa yokuqwalasela ukulungiselelwa ngokulinganayo, nokuba nokwenzeka, kunye nemfuneko yokulungisa iziphumo zemithetho yocalucalulo ngokobuhlanga nezenzo zalo zexesha eladlulayo, njengoko kutshiwoyo phantsi kwesolotya lama-29(2) mangokuhambelana nemigqaliselo eyabekwa yiNkundla YoMgaqo-siseko'. Laa nkundla ke ngoko yagqiba kwelokuba laa mgaqo-nkqubo mtsha wawungalinyhasi isolotya u-s 29(2).</p>
<p>[25] The high court further dismissed AfriForum's argument that the adoption of the new language policy was not rational. In its view, the review process conducted by UNISA since 2013, including the language colloquium, research and continuous debate in the SLC, the Senate and in the wider university community, could not be 'impugned by the alleged paucity of information before the Senate and the Council when the policy was ultimately adopted. The legality complaint based on the alleged failure by the SLC to consult affected</p>	<p>[25] INkundla le iPhakamileyo yaqhubeka ukuyichitha ingxoxo yeAfriForum ethi ukumiselwa komgaqo-nkqubo oomtsha kwakungacingisiswanga. Ngokwembono yayo inkqubo yokujongwa-kwakhona eyenziwa yiUNISA ukususela ngo-2013, equka imboniswano malunga nolwimi, uphando, kwaneengxoxo ezingapheziyo kwiSLC, nakwiSinethi, nakuluntu lwaseyunivesithi zizinto ezazingenako 'ukuphikiswa ngenxa yeenkcukacha ekubangwa ukuba zazingaphelelanga ezaya kwiSinethi nakwiBhunga xa wawude waba</p>

persons, and the procedural irregularities relating to the Senate’s meeting of 30 March 2016, namely the breaches of the Senate’s rules,<sup>13</sup> was given short shrift. The high court found that there was evidence of extensive consultation with the relevant institutional stakeholders over a number of years before the adoption of the new policy. It also accepted UNISA’s evidence that all members of the Senate were fully acquainted with the content of the draft language policy when it was discussed and adopted at that meeting and that there was substantial compliance with the rules. In any event, held the court, even if the rules were breached, considerations of certainty, finality and practicality would still save the adoption of the new language policy from being set aside. Otherwise, ‘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’.

uyamkelwa umgaqo-nkqubo lowo. Isikhalazo esingobumthethweni esisekwe kwinto ekuthiwa kukoyisakala kweSLC ukudlana indlebe nabantu abachaphazelekayo kunye nezizingqi zendlela-yokwenza malunga nentlanganiso yeSinethi yowama-30 kweyoKwindla ngo-2016, ukwaphulwa kwemigaqo yeSinethi,<sup>14</sup> naso sathiwa qwaka-qwaka nje sajulwa phaya. Inkundla ephakamileyo yafumanisa ukuba babukhona ubungqina bodliwano-ndlebe olubanzi nabantu abaneenxaxheba phaya eyunivesithi ngethuba leminyaka eliqela phambi kokumiselwa kwawo lo mgaqo-nkqubo mtsha. Yabamkela nobungqina beUNISA bokuba onke amalungu eSinethi ayeqhelaniseke ngokupheleleyo nesiqulathi salomgaqo-nkqubo wolwimi lo xa yayixoxwa, yaza yamiselwa kulaa ntlanganiso, futhi kwakukho uthobelo oluninzi lwemithetho. Phofu ke, yatsho inkundla, nokuba imigaqo yayaphulwe, ukuqwalaselwa kwengqiniseko, nokuba sekugqibeleni, nokuba nokwenzeka kwakusaya kukuhlangula ukumiselwa komgaqo-nkqubo lo mtsha wolwimi kuwenze ungabekwa bucala. Kungenjalo ‘ukubuyisa ixesha umva kwakuya kuyingenisa ezingxakini ezininzi zokusebenza nezezincedisi-kwenza iUNISA

<sup>13</sup> Proclaimed in terms of s 32 of the ‘Statute of the University of South Africa, GN R 108, GG 28464, 3 February 2006’.

<sup>14</sup> Made in terms of s 32 of the ‘Statute of the University of South Africa, GN R 108, GG 28464, 3 February 2006’.

	kulumgelwe kuphela abafundi abanani labo lihleli lisiya lisehla’.
<p>[26] On appeal before us, the issues were pared down to whether</p> <p>(a) the impugned decisions contravened s 29(2) of the Constitution;</p> <p>(b) the Senate did not follow its rules, in breach of the principle of legality; and</p> <p>(c) UNISA did not consult the persons most affected by the new language policy, in breach of the principle of procedural rationality. AfriForum contended that UNISA’s review process and the new language policy fell short in respect of each of these aspects.</p>	<p>[26] Kwisibhenno esasiphambi kwethu, le micimbi yayibekwe ngolu hlobo: Ingaba</p> <p>(a) ezi zigqibo ziphikiswayo zazinxamnye na no s 29(2) woMgaqo-siseko,</p> <p>(b) iSinethi yayingayilandelanga imigaqo yayo, ibe ke njalo yayaphule umgqaliselo wobumthethweni, nokuba</p> <p>(c) iUNISA zange idlane ndlebe nabona bantu babechaphazeleka ngakumbi ngulo mgqaqo-nkqubo, olo ilulwaphulo lomgqaliselo wokucingisiswa kwendlela-yokwenza. IAfriForum yaxoxa ngelithi inkqubo yeUNISA yokujongwa-kwakhona kunye nomgaqo-nkqubo lo mtsha wolwimi zazisilela ngazo zombini ezindawo.</p>
<p>[27] Regarding issue (a), it was contended for UNISA that the new language policy constituted an attempt at a reasonable measure to make education progressively available and accessible to all, on an equitable basis, taking into account the practicability of a single medium English tuition, the dwindling demand for Afrikaans tuition, the responsibility not to continue entrenching historical privileges accorded to Afrikaans which were no longer justified by student numbers, and the alternative of unqualified multi-medium tuition not yet being reasonably feasible owing to constrained resources. Thus, it accorded with</p>	<p>[27] Malunga nomcimbi oku-(a), kwaxoxelwa iUNISA ngelithi, lo mgqaqo-nkqubo mtsha wawungumzamo owawunesizathu esivakalayo wokwenza ukuba imfundo iye ibheka phambili ukufumaneka, nokufikeleleka, kuye wonke ubani, ngokolungiselelo okunolingwano, kuqwalaselwa ukuba nokwenzeka kokufundisa nolwimi lokufundisa olunye, olusisiNgesi, njengoko kwakubonakala ukuba iAfrikaans iya iphelelwa kukufunwa ukuba kufundwe ngayo, kuqwalaselwa noxanduva lokuthintela ukuqhubeka ukubethelela ukulungelwa calanye okusezimbalini zeli lizwe okwakunikwe</p>

s 29(2). Issue (b) was dismissed on the basis that AfriForum had no standing to complain about any non-compliance with the Senate’s rules, which were in fact observed, but would not have vitiated the impugned decisions in any event. As to issue (c), it was contended once more that considerations of rationality did not oblige UNISA to consult with existing or prospective students who studied in Afrikaans and that its consultations with the institutional bodies sufficed.

iAfrikaans, okwakungasenakuthetheleleka ngamanani abafundi bayo, ekubeni ke enye indlela le yokufundisa ngokungathandabuzisiyo ngolwimi-ninzi iseyinto engekabi nakwenzeka ngokuyimbadla ngenxa yokunqaphazeka kweizinedisi-kwenza. Ngaloo ndlela ke kwathiwa iyahambelana no-s 29(2). Umcimbi oku-(b) wachithwa kusithiwa iAfriForum ayinamhlaba wakuma ikhalaze ngako nakuphi na ukungathotyelwa kwemigaqo yeSinethi, eyaye eneneni yenziwe, kodwa nokuba kwakungenjalo laa migaqo yayingasoze iyenze mbi imeko yezaa zizathu ziphikiswayo. Ke wona umcimbi (c) kwathiwa ngawo ukuqwalaselwa kokuba ucingisisiwe na, kwakungayinyanzeli iUNISA ukuba mayidlane iindlebe nabafundi ababekho okanye ababeza kuza ababefunda ngeAfrikaans nokuba ukudlana iindlebe kwayo namaqumrhu angaweziko eliya kwakwanele.

[28] I deal first with the question whether UNISA gave effect to the right of its Afrikaans students, enshrined in s 29(2), when it made the impugned decisions. The provisions read:  
 ‘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

[28] Mna ngoku into endiqala ngayo ukuyiqwalasela ngumbuzo othi ingaba iUNISA yalihoya yalisebenzisa na ilungelo labafundi bayo beAfrikaans, lungelo elo limiliselwe ngokukhuselekileyo ku-s 29(2) ngokuya ngokuya yayisenza ezaa zigqibo zayo ziphikisekayo. Imimiselo leyo ifundeka ngolu hlobo:  
 ‘Wonke ubani unalo ilungelo lokufumana imfundo ngolwimi lwasemthethweni okanye ngeelwimi zasemthethweni azikhethele

<p>consider all reasonable educational alternatives, including single medium institutions, taking into account—</p> <p>(a) equity;</p> <p>(b) practicability; and</p> <p>(c) the need to redress the results of past racially discriminatory laws and practices.’</p>	<p>ngokwakhe kumaziko karhulumente emfundo apho loo mfundo inako ukwenzeka lula noko. Ukuze kuqinisekiswa ufikeleleko olunembadla kulo eli lungelo, nokusetyenziswa kwalo, urhulumente kufuneka eqwalasele zonke iindawo zemfundo zokukhetha kuzo, eziquka ezo zifundisa ngolwimi olunye, kuhoywe nendaba—</p> <p>(a) yolungiselelo olunolingano;</p> <p>(b) neyokuba nokwenzeka; kunye</p> <p>(c) nemfuneko yokuba kulungiswe iziphumo zemithetho yocalu-calulo yangaphambili nezenzo ezazihamba nezotho.’</p>
<p>[29] It is readily apparent from the wording of its provisions that s 29(2) entails an enforceable right against the State to provide education in the language of choice where this is ‘reasonably practicable’.<sup>15</sup> The Constitutional Court described the constitutional test of ‘reasonable practicability’ in determining whether the right in s 29(2) may be invoked in <i>Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another</i>. It said:<sup>16</sup></p> <p>‘[T]he reasonableness standard built into section 29(2)(a) imposes a context-sensitive understanding of each claim for education in a</p>	<p>[29] Kuzicacele kwakwindlela abhalwe ngayo u-s 29(2) ukuba uphetho ilungelo elifanelwe kukusetyenziswa ngokunyanzelwa kukarhulumente ukuba abonelele ngemfundo efunda ngolwimi lokuzikhethela apho le nto ‘inokwenzeka ngokulula’. Inkundla Yomgaqo-Siseko yayichaza indlela yoMgaqo-siseko yokuvavanya ‘ukuba nokwenzeka okulula’ ekuqwalaselenei ukuba elaa lungelo liku-s 29(2) lingenziwa lisebenze, kwityala ekuthiwa ukubizwa kalo: <i>Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another</i>. Kwelo tyala yathi leNkundla: ‘Umgangatho wolwenzeko olulula omiliselwe ku-29(2)(a) unyanzelisa ukuba kufuneka umntu ngamnye ajonge le ndawo aza kuwusebenzisa</p>

<sup>15</sup> *Gelyke Kanse and Others v Chairperson of the Senate of the University of Stellenbosch and Others* [2019] ZACC 38; 2020 (1) SA 368 (CC) para 22.

<sup>16</sup> *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* [2009] ZACC 32; 2010 (2) SA 415 (CC); 2010 (3) BCLR 177 (CC) para 52. See also *Mazibuko and Others v City of Johannesburg and Others* [2009] ZACC 28; 2010 (4) SA 1 (CC) para 47; *Jaftha v Schoeman and Others* 2005 (2) SA 140 (CC) paras 31-34.



<p>language of choice. An important consideration will always be whether the State has taken reasonable and positive measures to make the right to basic education increasingly available and accessible to everyone in a language of choice. It must follow that when a learner already enjoys the benefit of being taught in an official language of choice the State bears the negative duty not to take away or diminish the right without appropriate justification.’</p>	<p>kuyo, aqonde ukuba kuloo ndawo inako na ukwenzeka le nto ayifunayo, le yokufunda ngolwimi oluthile azikhethelweyo. Into eya kuhlala ibalulekile kukuba kuqwalaselwe ukuba uRhulumente kukho mizamo inembadla na nencedayo ayenzayo kuloo ndawo, imizamo yokwenza ilungelo lemfundo esisiseko liye linyuka ukufumaneka nokufikeleleka kuye wonke ubani ngolwimi azikhethela lona. Kufuneka ke into emayilandele ibe kukuba uRhulumente uqinisekisa ukuba xa umfundi sele elifumene eli lungelo lokufundiswa ngolwimi lwasemthethweni azikhethela lona, uRhulumente ngumsebenzi wakhe ukuba agade angalisusi okanye alinciphise elo gunya kuloo mfundi, angayenzi loo nto engabekanga zizathu zivakalayo’.</p>
<p>[30] In light of the fact that UNISA students could elect to be taught in Afrikaans in respect of some modules when the new language policy was adopted, UNISA bears the negative obligation of establishing appropriate justification for taking away their right to receive tuition in the language of their choice. And in doing so, it must show that it was not reasonably practicable’ to sustain the dual English/Afrikaans tuition. The enquiry into whether s 29(2) has been complied with is objective. This Court held in <i>University of the Free State v AfriForum</i>,<sup>17</sup> that the requirement contains both factual and legal elements – the latter, the legal</p>	<p>[30] Ke njengokuba abafundi baseUNISA babenako ukukhetha ukufundiswa ngeAfrikaans iimodyuli ezithile wakuba umiselwe laa mgaqo-nkqubo wolwimi mtsha, iUNISA ke ngumsebenzi wayo ukuba ize nezizathu ezifanelekileyo zokuba ilisuse eli lungelo labo kubo, eli lokuba bafumane imfundo ngolwimi abazikhethela lona. Kunjalo nje, xa isenza le nto, kufuneka ibonise ukuba ‘kwakungenakwenzeka ngokulula’ ukuhlala iyigicinile imfundo kalwimi-mbini engesiNgesi/neAfrikaans. Ukubuzisa ukuba ingaba u-s 29(2) wathotyelwa na kusisenzo esingenachuku. Ke njengokuba le Nkundla yatshoyo kule</p>

<sup>17</sup> *University of the Free State v AfriForum and Another* [2017] ZASCA 32; 2017 (4) SA 283 (SCA) para 26.

<p>standard of reasonableness, to be tested against constitutional norms which include equity, redress, desegregation and non-racialism, and the former entails practicability, which is concerned with resource constraints and the feasibility of adopting a particular language policy.</p>	<p>indaba: <i>University of the Free State v AfriForum</i>,<sup>18</sup> into esiyifunayo iqulethe izinto eziziinyani, nezizezomthetho – ezi zesibini, ezizezomthetho, zezalo mgangatho wokuba lula ngokusemthethweni; zona kufuneka zivavanywe ngokwemimiselo yoMgaqo-siseko equka ulungiselelo ngokolingwano, ukulungiswa, ukupheliswa kocalucalulo, nokungabikho kwempathwano ngobuhlanga; ezi zokuqala zikokwaa kujonga imo yokuba nokwenzeka, yona ke ichaphazeleka zizinto ezinjengokunqongophala kwezincedisikwenza nokuba lula kangakanani ukumisela umgaqo-nkqubo wolwimi othile.</p>
<p>[31] As mentioned above, AfriForum complained that UNISA failed to provide ‘appropriate justification’ for abrogating its students’ right to be taught in Afrikaans. The principles underlying s 29(2) were not explicitly considered in the final meetings of the SLC, Senate and Council which culminated in the adoption of the new language policy. ‘[R]easonable practicability’ was also not mentioned in UNISA’s reasons for the decision. Without in any way underrating the substance of these submissions, there is, however, a bigger hurdle for UNISA in this regard, even assuming that ‘reasonable practicability’ remained a consideration in the review process as it strenuously contended.</p>	<p>[31] Njengokua kukhankanyiweyo apha ngentla, iAfriForum yayikhalazela ukuba iUNISA yoyisakala ukuxela ‘izizathu neenkcazo ezifanelekileyo’ zokwaphula ilungelo labafundi bayo lokuba bafundiswe ngeAfrikaans. Imigqaliselo eseke u-s 29(2) zange iqwalaselwe ngokuphandle kwiintlanganiso zokugqibela zeSLC, nezeSinethi, nezeBhunga, ezi yaba zizo eziphela zikuvuma ukumiselwa kwalo mgaqo-nkqubo wolwimi mtsha; kunjalo ‘imo yokwenzeka ngokulula’ zange ikhankanywe nayo kwizizathu zeUNISA zaso esi sigqibo. Andizithathi ngokungathi azinaxabiso ezi ntetho zeUNISA; kodwa ndithi kukho, nakuba kunjalo, umqobo othe kratya ukuba mkhulu elindwe nguwo iUNISA kulo mba,</p>

<sup>18</sup> *University of the Free State v AfriForum and Another* [2017] ZASCA 32; 2017 (4) SA 283 (SCA) para 26.

	<p>nditsho naxa sesinokuyicingela into yokuba ‘imo yokwenzeka ngokulula’ yaqwalaselwa ngexesha besenza ukujongwa kwakhona komgaqo-nkqubo wolwimi wabo wangaphambili, njengokuba begxininisa kanobom ukuba bayiqwalasela le mo.</p>
<p>[32] Criticism voiced against the SLC and Senate for failing to address s 29(2), especially in view of the guidelines which provided for a methodical discontinuation of Afrikaans module by module, the new policy adopting as a principle and purpose the importance of mother tongue education, and that Afrikaans has developed to an equal status with English as an academic language, fully capable of giving effect to this principle, drew a concerning response from UNISA. In her supplementary answering affidavit, the SLC’s chairperson, Prof Moche, stated that the considerations prescribed by s 29(2) ‘would arguably be relevant to the State when it is required to fulfil its responsibility ... to ensure the effective access to and implementation of the right concerned, but are not relevant to UNISA when [it] determines its language policy’. This was so, she went on, because ‘[a]s opposed to the State, UNISA is not liable to ensure the effective access to, and implementation of the right concerned’.</p>	<p>[32] Isigxeko esibekwa iSLC neSinethi ngenxa yokoyisakala kwazo ukuhoya u-s 29(2), ngakumbi ngenxa yokubakho kwezalathandlela ezaye zenza kwabakho indlela equlunqekileyo yokupheliswa kweAfrikaans, ngemodyuli emva kwenye, lo mgaqo-nkqubo mtsha, ngokuthatha njengomgqaliselo kunye nenjongo, ukubaluleka kwemfundo ngolwimi lweenkobe, nale nto yokuba iAfrikaans sele yaphuhliseka yafika kwiwonga elilinganayo nelesiNgesi njengolwimi lobumfundimani, olukwazi ngokuzeleyo ukuwenza usebenze lo mgqaliselo, njengoko yatsho iAfriForum, eso sigxeko sahlangu nempendulo exhalabisayo ephuma kwiUNISA. Kuxwebhu lobungqina bakhe obongezelelweyo, usihlalo weSLC, uNjing Moche, waxela ukuba eza ngqwalasela ezimiselwe ngu-s 29(2) ‘kungaxoxwa kuthiwe ziya kuba nokungena kuRhulumente xa kufuneka ukuba enze uxanduva lwakhe ... ukuqinisekisa ufikeleleko olunomphumela kulo, nokusebenziseka kwalo, eli lungelo sibhekisa kulo, kodwa azingeni ndawo kwiUNISA xa iziqingqela umgaqo-nkqubo</p>

	<p>wolwimi wayo’. Uhambise wathi, le nto injalo, kuba ‘ngokungafaniyo noRhulumente, iUNISA ayinaxanduva lokuqinisekisa ufikeleleko olunemiphumela kulo, nasekusetyenzisweni kwalo, eli lungelo kubhekiswa kulo’.</p>
<p>[33] This interpretation does not, however, conform with the meaning which the Constitutional Court has ascribed to s 29(2) and the ambit of its application. In <i>AfriForum and another v University of the Free State</i>,<sup>19</sup> the Court stated unequivocally that ‘[s]ection 29 of the Constitution applies in its totality to the education sector’<sup>20</sup> and that ‘no sound legal basis exists for the isolation of parts of s 29(2) in seeking to understand the totality of the requirement of ‘reasonable practicability’ as its different parts are mutually reinforcing.’<sup>21</sup> The court went to define the meaning of the ‘reasonableness’ envisaged in these provisions as follows:</p> <p>‘Reasonableness within the context of s 29(2) demands that equity, practicability and the critical need to undo the damage caused by racial</p>	<p>[33] Le ndlela yokucacisa ayihambelani ke kodwa nentsingiselo enikwe yiNkundla Yomgaqo-siseko uyinika u-s 29(2) kwanommandla wosebenziseko lwayo. Kwityala elibizwa kanje, <i>AfriForum and another v University of the Free State</i>, iNkunda yatsho ngokuvakala phandle ukuba ‘Isolotya u-29 loMgaqo-siseko lisebenza lonke ngobunjalo balo kwicandelo lezefundo.’ Nokuba ‘akukho sizathu siphilileyo ngokwasemthethweni sokwahlula mhlaba wasemthethweni uphilileyo sokwahlula ngazine iindawo zika-s 29(2) ekuzameni ukuqonda zonke ziphelele izinto ezihamba nale nto yokuba kufuneka iqwalaselwe ‘imo yokwenzeka ngokulula’ kuba kaloku iindawo zayo ezahlukileyo zinikana amandla. Inkundla yaya kuchaza intsingiselo ‘yokuba lula ngokweemeko ezivumayo’ le exelwa kule mimiselo ngale ndlela ilandelayo:</p>

<sup>19</sup> *AfriForum and Another v University of the Free State* [2017] ZACC 48; 2018 (2) SA 185 (CC) para 50.

<sup>20</sup> *Ibid* para 46.

<sup>21</sup> *Ibid* para 45; *Ermelo* fn 15 para 52.

<p>discrimination, also be the intrinsic features of the decision-making process relating to effective access to education in a language of choice. For they are some of the decisive factors to which regard must be had even where ‘a learner already enjoys the benefit of being taught in an official language of choice’.</p>	<p>‘Ubulula bokwenzeka ngokweemeko ezivumayo’ apha ku-s 29(2) buthetha ukubakho kolungiselelo ngokolingwano, ukuba nokwenzeka, kunye nale mfuno ibaluleke gqitha yokuba kususwe umonakalo owabangelwa lualulo ngokobuhlanga, kwaneempawu ezendeleyo zenkqubo yokwenza izigqibo ezibhekisa kufikeleleko olunemiphumela emfundweni ngolwimi ozikhetheleyo. Kuba zikhona ezi meko zimele ukusetyenziswa ukwenza izigqibo ezithile, ezo meko zifuna ukujongwa kanye nalapho umfundi sele enayo le nto ilungileyo yokufundiswa ‘ngolwimi lwasemthethweni azikhethele lona.’</p>
<p>[34] Suffice it to say that UNISA’s understanding of its responsibility under s 29(2) was fallacious. It ineluctably suggests that the institution did not properly comprehend the implications of the right to receive education in the official language of one’s choice, the constitutional parameters within which its powers had to be exercised, and the precise ambit of responsibility which s 29(2) imposed upon it, when it reviewed its language policy and adopted a new one. This, of necessity, affects the validity of the decision to adopt the new policy.</p>	<p>[34] Kwanele ke apha ukuba sitsho ukuba indlela iUNISA eyayilufunda ngayo uxanduva lwayo phantsi kuka-s 29(2) yayineziphene. Ikwenza ungabi nakuzinceda ukucinga ukuba eli ziko lalingaziqondi ngokufanelekileyo izinto ezizalwa lilungelo lokuba ufumane imfundo ngolo lwimi lwasemthethweni ozikhetheleyo, abayiqondi nemida yomgaqo-siseko ekufanele ukuba igunya lalo eli lungelo lisetyenziswe kuyo, kanti nobungakanani obuthe ngqo, ncam bomhlaba woxanduva lwalo, ezabekwa ngu-s 29(2) kuyo iUNISA mhla yajongakwakhona umgaqo-nkqubo wolwimi wayo yaza yamisela omtsha umgaqo-nkqubo.</p>
<p>[35] There is a further chink in UNISA’s armour. The considerations upon which it relied to prove that it was not ‘reasonably practicable’ to continue with dual-medium</p>	<p>[35] Kukho esinye isikroba kwisikrweqe seUNISA. Leyo yile miqwalasela yayiqamele ngayo ukuze ikwazi ukubonakalisa ukuba kwakungekho</p>

<p>tuition, were the cost-saving that it claimed would be generated by offering tuition in English only which could be used to develop the other official languages and would avoid giving Afrikaans students preferential treatment by offering tuition in their mother tongue, while mother tongue tuition was not available to non-Afrikaans and English speaking students.</p>	<p>‘ukwenzeka ngokulula’ ukuba iqhube ngemfundo kalwimi-mbini, nokuba ukungaqhubi nayo kuyinceda ekuphunguleni iindleko ngokuthi ifundise ngesiNgesi kuphela ize isebenzise loo mali iyigcinileyo ekuphuhliseni ezinye iilwimi zasemthethweni, nokwa kukwazi ukuthintela ukunika abafundi beAfrikaans ukuphatheka okukhethekileyo ngokufundisa ngeAfrikaans ngeli lixa ufundo ngolwimi lweenkobe lungafumaneki kubafundi abangathethi Afrikaans, kwanokwehla kwamanani abafundi abafunda ngeAfrikaans.</p>
<p>[36] The first problem is that none of these issues was discussed at the final meeting of the SLC, Senate and Council in which it was resolved to adopt the new policy, as the relevant minutes show. Regarding cost-saving, the only reference is to a document titled ‘Template for Council Documents’, which served before Council in a meeting of 22 April 2016. It reads:</p> <p><b>‘3. BUDGET / FINANCIAL IMPACT</b></p> <p>The financial impact of the amendments will be a reduction in the operational budget for the printing and despatch of study material. The use</p>	<p>[36] Ingxaki yokuqala ke yile yokuba ezi zinto akukho nanye yazo ezakhe zaxoxwa kwiintlanganiso zokugqibela yeSLC, neyeSinethi, neyeBhunga apho kwakuye kwagqitywa ekubeni umiselwe lo mgaqo-nkqubo mtsha, njengoko imizuzu yezintlanganiso ibonisa. Malunga nokunciphisa iindleko, imibhalo yakhona ibonakalisa ukuba kwathethwa kwaba kanye kuphela ngale nyewe, kuxwebhu olunetayitile ethi, ‘Template for Council Documents’ Elo xwebhu lalibekwe etafileni phambi kweBhunga kwintlanganiso yowama-22 kuTshaziimpuzi ka-2016. Elo nqaku lifundeka ngolu hlobo:</p> <p><b>‘3. ISICWANGCISO-MALI / ISIPHUMO NGAKWEZEMALI</b></p> <p>Isiphumo sezi zilungiso esiphathelele kwezemali siya kuba kukuncipha kwesicwangciso-mali sokusebenza ebesenzelwe</p>

of one language only will reduce these costs when the language policy is implemented.’

The challenge posed by this entry is that it is not explained anywhere in UNISA’s papers and there is no indication at all that it was debated at the relevant meeting. This is despite AfriForum’s pertinent challenge in its supplementary affidavit (in terms of Uniform Rule 53(4)) that ‘there is no costing whatsoever to arrive at a rational comparison of costs with or without the cost of retaining Afrikaans ... [no consideration of the fact that] if a student elected to proceed in English and joined a module with more than 100 students, the cost of printing and despatch would increase because such a student would be entitled to receive hard copy study material ... [t]here is no costing of the “scaffolding”.’

ukushicilela nokuhanjiswa kwamaxwebhu okufunda. Ukusetyenziswa kolwimi olunye kuphela kuya kuziphungula ezi ndleko wakuba lo mgaqo-nkqubo wolwimi sele usetyenziswa.’

Ingxaki ebekwa leli nqaku yile yokuba alicaciswanga naphina kumaphepha aseUNISA, kwaye akukho nento ebonisayo tu ukuba kwakhe kwaxoxwa ngayo nakuloo ntlanganiso kwimizuzu yayo. Le nto yenzeka nangona iAfriForum sele iyicele umngeni ngokugxininisayo kwixwebhu lobungqina bayo obusisixokomezelo (ngokoMgaqo Wofaniso u-53(4)) isithi akukho kubala zindleko kwakha kwenziwa nje tu, okwenza ukuba kufikelelwe ekuthelekiseni iindleko ngendlela eqiqisisiweyo, apho zikhoyo, nalapho zingekhoyo iindleko zokuyeka ihlale ikho iAfrikaans ... [akukho ngqwalasela yale nyaniso yokuba] ukuba umfundi uye wakhetha ukuqhubela phambili ngesiNgesi, waza wajoyina imodyuli enabafundi abangaphezulu kwe-100, iindleko zokushicilela nokuthumela ziya kwanda kuba loo mfundi uya kuba efanele kakade ukuba afumane amaxwebhu aprintiweyo ezifundo ... akukho kubala zindleko kunjalo zalo “olo pahla”.’

[37] Moreover, AfriForum’s undisputed contention that Afrikaans study guides were not printed but were made available and accessible online, so that the cost of printing would be borne by the student instead of UNISA, was not addressed. UNISA merely alleged that economies of scale are lost when course materials have to be printed in many languages. This obviously did not apply when the study guides were made available

[37] Ngaphezulu, ukungavumelani nabo kweAfriForum okungenakuphikiswa okuthi izikhokelo-zifundo zeAfrikaans zazingashicilelwanga, kodwa zazenziwe zafumaneka zaza zafikeleleka kwi-intanethi, nto leyo ithetha ukuba ke iindleko zoshicilelo zaziya kuba zezomfundi, endaweni yokuba zibe zezeUNISA, zange kuhoywe. I-UNISA yavele yathetha nje ityhola ukuba iindlela zolungelelwaniso kwezoqoqosho ziyalahleka

online. As AfriForum pointed out, UNISA never assessed the commercial viability of the approximately 300 modules offered in Afrikaans in comparison to the average commercial viability of about 2 300 modules offered in English. I agree that an equitable comparison would have been one comparing the commercial viability of the 300 Afrikaans modules to the 300 least profitable modules offered in English, as part of the exercise. This was not done.

xa kufuneka ukuba kushicilelwe izinto-kufunda zeekhosi zishicilelwe zibe kwiilwimi ezininzi. Kodwa ke le ingxoxo ngokucacileyo yayingangeni ndawo xa izikhokelo-zifundo zazenziwe zafumaneka ngeintanethi. Njengoko yatshoyo iAfriForum, iUNISA zange ikhe yenze luhlolo lokujonga igalelo kwezemali elenziwa zezi modyuli zimalunga nama-300 ezifundiswa ngeAfrikaans ize ithelekise nelenziwa ziimodyuli ezimalunga nama-2 300 ezifundiswa ngesiNgesi. Ndiyayivuma into yokuba uthelekiso olunolinganiso beluya kuba luthlekiso lokusebenza kweemodyuli ezingama--300 zeAfrikaans kolwemodyuli ezingama-300 lweemodyuli ezinenzuzo eninzi ezifundiswa ngesiNgesi njengexalenye yolo thelekiso. Lento zange yenziwe.

[38] UNISA also did not explain why Afrikaans modules could not be cross-subsidised by English modules in terms of the common feature of university funding. AfriForum stated, without any challenge, that many university courses, such as philosophy, French and their ilk, are not commercially viable, as the cost of presenting them cannot be covered by the revenues they generate because of the low numbers of students who register for these courses. But they are still offered because they are of strategic and national importance,

[38] IUNISA kanjalo zange icacise ukuba kwakutheni iimodyuli zeAfrikaans zingenakuhlawulelwa kwimali yezesiNgesi ngokwendlela edibanisayo yoniko-mali yiyunivesithi. IAfriForum yaxela, ayaphikiseka, ukuba iikhosi ezininzi zaseyunivesithi, ezifana nefilosofi, isiFrentshi, nezinye ezilolu didi, azingenisi njengoko iindleko zokuba nazo zingenako ukuhlawulelwa kwiimali ezivela ngazo ngenxa yokuba mbalwa kwabafundi abazibhaliselayo. Kodwa ziyafundiswa kuba ukubaluleka kwazo kokwesizwe



enhance the university's intellectual environment, and are cross-subsidised by the more popular courses which are highly profitable owing to the large student numbers who take them, and the attendant economies of scale. It is well to bear in mind that even if the removal of Afrikaans as a LOLT would result in a cost saving, that it would not necessarily render the decision to adopt the new language policy compliant with the test in s 29(2), which has a normative content that goes beyond the availability of resources. Nevertheless, UNISA failed to support its reliance on resource constraints because the figures it produced were not substantiated: there was no record showing any investigation or research with reference to proper data and the source of such data. It did not establish that it was not 'reasonably practicable' from a commercial standpoint to continue to offer tuition in Afrikaans.

nokwezicwangciso-ezinobulumko, zinegalelo kudidi oluphezulu lobomi baseyunivesithi kwezobunkcuba-buchopho. Zithi ke zihlawuleleke zezinye iikhosi ezi zithandwa kakhulu zona, ezithi ke zingenise inzuzo enkulu ngenxa yokuba baninzi kwabafundi abazithathayo, kwakunye nezozoqoqosho lolungelelwano olusisiphumo soko. Kuya kuba kuhle ukuba kuhlale kukhunjulwa ukuba nokuba ukususwa kweAfrikaans njengolwimi lokufunda nokufundisa bekuya kudala ucutheko-zindleko, loo nto ibingayi kusenze esaa sigqibo sokumisela umgaqo-nkqubo omtsha sibe sesifanelekileyo xa sivavanywa ngo-s 29(2), yena onesiqulatho esinika iimpawu zovavanyo ezidlulayo lee kubukho bezincedisi-kwenza. Nakuba kunjalo, IUNISA yoyisakala ukuxhasa oku kwayama kwayo kunqongophalo lwezincedisi-kwenza, kuba amanani eyawavezayo ayengaxhaswanga njengoko kwakungekho rekhodi libonisa uxilongo okanye uphando-nzulu apho kukho iinkukacha-luphando ezifanelekileyo. Zange ke ngoko ikwazi ukuzoba umfanekiso obonisa ukungabi nako 'ukwenzeka okulula' xa kujongwa ngakwezemali, into ke ebiya kwenza ukuba ingabi nako ukuqhuba ifundisa ngeAfrikaans.

<p>[39] Concerning UNISA’s reliance on its student demographics, it contended that the percentage of students:</p> <p>(a) who indicated that Afrikaans was their home language, was 8,6 per cent in 2015, that it increased to 8,7 per cent in 2016 and that it would drop to an estimated 7,3 per cent in future;</p> <p>(b) who registered for modules in Afrikaans was 0,6 per cent in 2015, and which decreased to 0,3 in 2016 (although these figures were subsequently changed to 2 per cent in 2015 and 1 per cent in 2016); and</p> <p>(c) who registered for at least one module in Afrikaans was 5,3 per cent in 2015 and 5,1 per cent in 2016. In sum, the number of its Afrikaans students halved between 2015 and 2016 and remained ‘extremely low’.</p>	<p>[39] Malunga nokwayama kweUNISA kwiimpawu-buntu zabafundi bayo, yaxoxa ngelithi, ipesenti yabafundi:</p> <p>(a) abaxela ukuba iAfrikaans yayilulwimi lwabo lweenkobe yayingu-8,6 ekhulwini ngo-2015, yanda yaba ngu-8,7 ekhulwini ngo-2016, ke kwakuqikelelwa ukuba iza kuhla kwixesha elizayo iyo kutsho ku-7,3 ekhulwini;</p> <p>(b) ababebhalisele iimodyuli zeAfrikaans babeyi-0,6 ekhulwini ngo-2015, behlela ku-0,3 ngo-2016, nangona la manani aye aguqulwa emva koko aya kustho ku-2 ekhulwini ngo-2015 no-1 ekhulwini ngo-2016; kanjalo</p> <p>(c) ababebhalisele imodyuli yanye, ubuncinci, yeAfrikaans babengu-5,3 ekhulwini ngo-2015 no-5,1 ekhulwini ngo-2016. Ngokufutshane, inani labafundi bayo beAfrikaans lafikelela kwisiqingatha phakathi ko-2015 no-2016, laza lahlala ‘lisezantsi ngokugqithisileyo’.</p>
<p>[40] AfriForum disputed these statistics as implausible because UNISA did not disclose their source and they did not tally with the national language demographics when applied to UNISA’s student numbers. For its part, AfriForum relied on statistics extracted from UNISA’s Structured Query Language database system and from which a qualitative analysis was drawn. According to this data, in 2016 out of 1 881 267 module and year</p>	<p>[40] IAfriForum yaziphikisa ezinkcukacha-manani yathi azinabunyani, kuba iUNISA zange iyixele indawo ebizithatha kuyo, zaye zingahambelani nazo neempawu-buntu zolwimi zesizwe xa ezi mpawu zifanekiswa namanani abafundi baseUNISA. Kule indawo, iAfriForum yaxhomekeka kwiinkcukacha-manani ezazikhiwe kwezaseUNISA, ezikwi Structured Query Language database system yathi yenza ngazo</p>

course registrations, 96 816 were offered in Afrikaans. This number translated to 15 per cent of the total modules offered at UNISA out of which 5,15 per cent were chosen by approximately 25 000 students, each taking an average of four modules. Afriforum contended that removing Afrikaans as a LOLT thus destroyed about 100 000 study opportunities in that language. Importantly, AfriForum highlighted that a single digit percentage was not indicative of a small number of students as, for example, 5 per cent could amount to as many as 600 students. So, whilst 25 000 students may be a negligible number in UNISA, which has massive student numbers, that number generally constituted the total student population in other major residential universities in South Africa and was far from insignificant.

uhlahlelo-luphando lophando  
 olukhunyushwa kuthiwe luqualitative.  
 Ngokwe nkcukacha luphando ngo-2016 kwakukho iikhosi neemodyuli ezisisigidi i-1 881 267 ezabhaliselwayo. Phakathi kwazo ezingama-96 816 zazifundiswa ngeAfrikaans. Eli nani laba yi-15 yeepesenti, ekhulwini, yazo zonke iimodyuli ezazifundiswa eUNISA. Phakathi kwazo i-5,15 ekhulwini zazikethwe ngabafundi abamalunga nama-25 000, umfundi ngamnye ethatha umyinge weemodyuli ezine. Ukuyekisa iAfrikaans ukuba lulwimi lokufunda nokufundiswa ke ngoko kwachitha amathuba amalunga ne-100 000 okufunda ngalo olu lwimi, njengoko yayixoxa isitsho iAfriForum. Into ebalulekileyo, iAfriForum yagxininixa ukuxela ukuba ipesent elinani elinye yayingaxeli ukuba inani labafundi ephuma kulo lincinci, njengoko, umzekelo, i-5 pesent isengaba ngabafundi abangama-600. Ngoko ke, ngeli lixa abafundi abangama-25 000 basenokuba linani elincinci gqitha eUNISA, kuba iba namanani amakhulu gqitha abafundi, elaa nani lalilini elingabafundi abapheleleyo kwezinye iiyunivesithi ezinkulu apho bahlalayo abafundi apha eMzantsi Afrika, laye lingelonani lidelekileyo tu.

[41] UNISA had two challenges to overcome under this heading. First, without even taking

[41] IUNISA yayineengxaki ezimbini ekwakufuneka izoyisile phantsi kwesi

the disputes relating to the actual statistics into account, it was indisputable that despite the decreasing demand for Afrikaans tuition, a number of students still wanted to enrol for tuition in Afrikaans. And what is evident from the record is that the statistics, which UNISA claimed formed the basis of the adoption of the new language policy, were not placed before the Senate and the Council at the critical meetings which resolved to adopt the policy. This was indeed confirmed by its own admission that '[i]t was not necessary ... for Senate and Council to have the exact figures and percentages before them on 30 March 2016 and 28 April 2016 respectively when UNISA's new language policy was adopted to know that the demand for Afrikaans tuition has dwindled to the extent that it had'. It is incomprehensible why the SLC would see no need for the Senate and Council to have recourse to the hard numbers of the students who would be affected by its far-reaching decision, in determining whether it was reasonably practicable to retain Afrikaans as a LOLT. Its stance is entirely insupportable. The omission to place the statistics which founded the recommendation to remove Afrikaans as a LOLT before the Senate and Council breached s 29(2) and rendered the decision to adopt the new language policy unlawful.

sihloko. Okokuqala, singekahoyi neempikiswano ezimalunga neenkukachamanani, kwakuyinto engenakuphikiswa ukuba nangona ayesihla amanani abafundi beAfrikaans, lalikhho iqela elivakalayo labafundi ababesafuna ukubhalisela ukufunda ngeAfrikaans. Kunjalonje, into ebonakalayo kwirekhodi kukuba ezi nkukachamanani, eyaye iUNISA isithi ziyinxalenye yesizathu sayo sokumisela umgaqo-lwimi omtsha, zazingazange zibekwe phambi kweSinethi naphambi kweBhunga kwiintlanganiso ezazibaluleke gqitha, ezathatha isigqibo sokuba umgaqo-nkqubo wolwimi omtsha mawumiselwe. Lento yabuya yaqinisekiswa kukuba kwayona iUNISA yavuma yathi, 'zange kubekho mfuneko ... yokuba iSinethi neBhunga zifumane amanani athe ncam kunye neepesenti phambi kwabo ngowama-30 kweyoKwindla ngo-2016 nangowama-28 kuThshaziimpunzi ngo-2016, ngokulandelelana, xa umgaqo-nkqubo omtsha waseUNISA wawumiselwa, ukuze zazi ukuba ukufunwa kweAfrikaans kwakuhlile, kangangale ndlela kwakuhle ngayo.'. Akuqondakali tu ukuba kwakutheni na ukuze iUNISA ingayiboni imfuneko yokuba iSinethi neBhunga zibone amanani acacileyo abafundi ababeza kuchaphazeleka sisigqibo sayo esinabele ezintweni ezininzi kangaka, ekuqikeleleni ukuba kwaye kukho na 'ukwenzeka okulula' okanye hayi ukuze

	<p>bayiyeke iAfrikaans ihlale ilulwimi lokufunda nokufundisa. Indlela eyithatha ngayo le nto ayinakuxhaseka konke-konke, futhi ukulitsiba eli nyathelo lokuzisa iinkcukacha-manani ezasisiseko sokuvuma ukuba mayisuswe iAfrikaans njengolwimi lokufunda nokufundisa kwaba kukwaphula u-s 29(2) kwaza kwasenza esaa sigqibo sokumisela umgaqo-nkqubo wolwimi omtsha saba sesingekho mthethweni.</p>
<p>[42] It should be made clear that this matter is distinguished from <i>Gelyke Kanse</i> and <i>AfriForum v University of the Free State</i>, which upheld the language policies, by some critical factors. First, in those two matters the affected universities, Stellenbosch and UFS, which are conventional residential universities, the primacy of Afrikaans as a LOLT, in settings which provided for dual medium classes with interpretation from Afrikaans to English coupled with a significant cost of upscaling in one and separate parallel classes in English and Afrikaans in the other, created a critical problem. It was not in dispute there that the arrangement caused the black students, who were in the majority in the University of the Free State, and were not all conversant in Afrikaans, to feel excluded and marginalised in the classrooms and excluded from other aspects of campus life, including university events conducted in Afrikaans. UNISA is, as</p>	<p>[42] Mayicace ke into yokuba lo mcimbi wahlukile kule: <i>Gelyke Kanse</i> and <i>AfriForum v University of the Free State</i>, apho imigaqo-nkqubo yolwimi ephikisekayo kwavunyelwana nayo, ngenxa yeemeko ezithile ezibalulekileyo. Okokuqala, kwezi mbambano zimbini, kwezaa yunivesithi zazichaphazeleka iStellenbosch neUFS, zona eziziiyunivesithi ekuhlaliwa kuzo ngabafundi, ukuba phambili kweAfrikaans njengolwimi lokufunda nokufundisa, kwiindawo ezazifundisa ngolwimi-mbini, ekwakukho notoliko lweAfrikaans itolikelwa kwisiNgesi, kudibene neendleko ezivakalayo zokunyusela umgangatho kwiklasi enye, nakwiiklasi ezaziqhubeka xeshanye kwenye kube ngesiNgesi kwenye kube ngeAfrikaans, kwadala ingxaki eyayinzulu kunene. Yayingaphikiseki ke apho into yokuba abafundi abamnyama, eyayingabo abaninzi phaya eYunivesithi YaseFree State, baye bengayazi ke iAfrikaans, ukuba bazive</p>

previously mentioned, a distance university with no conventional, physical classes or any campus life to speak of. There is no risk of racially segregated classes or any danger of a racial barrier to full enjoyment of any of the opportunities offered to its students, that might offend constitutional rights and norms. In the circumstances I fail to see how the exercise of the right of UNISA's Afrikaans speaking students to tuition in their mother tongue could pose a threat to racial harmony and possibly nurture racial supremacy as happened in Stellenbosch and Free State Universities.

bekhutshelwe ngaphandle kwezinye izinto zobomi, ekwakukho kuzo nezinto ezenzeka eYunivesithi, ezaziqhutywa ngeAfrikaans. IUNISA njengokuba sekukhe kwatshiwo, yiyunivesithi efundisela mgama, engenazo iiklasi eziqhelekileyo ezisezindlini, ingenabo nabomi basekhampasini esingathetha ngabo. Akukho ngozi yokuba kungakho iiklasi ezicalucalulwe ngokobuhlanga, okanye nayiphi na ingozi yothinteleko ngokobuhlanga ukuba umfundi angakhululeki ukuba axhamle ngokuzeleyo kuwo onke la mathuba ewanika bonke abafundi nayo, obelungaphula imimiselo yoMgaqo-siseko. Andiboni, kwezi imeko ukuba bekuza kwenzeka njani ukuba bathi abafundi baseUNISA beAfrikaans xa befumana ilungelo labo lokufunda nokufundiswa ngolwimi lwabo lweenkobe babe bayingozi ngokobuhlanga baze futhi baphakamele ezinye iintlanga, ngokwendlela ekwakusenzeka ngayo kwiYunivesithi yaseStellenbosch nakweyaseFree State.

[43] Secondly, there was no dispute in the two matters that the universities had executed their mandate in reviewing their language policies meticulously and properly. In *Gelyke Kanse*, the Court set out the precise manner in which the 'University determined by careful study that the cost of immediately changing to fully parallel medium tuition would total about R640 million in

[43] Okwesibini, kwakungekho mpikiswano malunga nezaa meko zimbini zokuba ezaa yunivesithi zenza umsebenzi wazo ofanelekileyo ngokujonga- kwakhona imigaqo-nkqubo yolwimi yazo ngobunono nangokufanelekileyo. Kwindaba ye*Gelyke Kanse*, iNkundla yayiqingqa kakuhle indlela ethe ngqo yokuba 'iYunivesithi yayiqiqqa ngophando olunenkathalo into yokuba

<p>infrastructure (including additional classrooms), plus about R78 million each year thereafter for additional personnel costs ... which would entail a 20% increase in fees, an additional R8 100 on top of the approximately R40 000 per year students on average pay now'. There was no dispute on the steps which had been followed in the language policy review process and no procedural objections thereto. The universities had been driven by increasing racial segregation to downgrade Afrikaans in Stellenbosch University and abolish it completely in the University of the Free State which, incidentally, had no resource constraints to continuing with a dual-medium language policy. Here, there is furthermore no risk that the retention of Afrikaans as a LOLT would have the consequence of concentrating Afrikaans-speaking in the institution against which the LPHE cautioned.</p>	<p>iindleko zokuthi ngesiquphe itshintshe ingenise ukufundisa ngolwimi-mbini ozeleyo zaziya kufika kuma-R640 ezigidi zeziseko, (eziquka neeklasi ezongezelelweyo) kunye malunga nama-R78 ezigidi unyaka nonyaka emva koko, ukuze kongezwe abasebenzi ... nto leyo yayiya kubangela ukwanda kwemali yokufunda nge-20%, ibe ke leyo ngama-R8 100 eyongezelelekayo, phezu kwale sele ihleli imalunga nama-R40 000 ngonyaka kumfundi ngamnye imali ayihlawulayo kungoku'. Kakwungekho mbambano malunga namanyathelo ayethathiwe ukujonga-kwakhona imigaqo-nkqubo leyo. Ezaa yunivesithi zaziqhutywe kukwanda kocalucalulo ngokubuhlanga ukuba uthotywe umgangatho weAfrikaans eYunivesithi yaseStellenbosch, waze wayekwa tu eYunivesithi yaseFree State. Kodwa ke yona yayingenayo ingxaki yokuncitshelwa zizincedi-kwenza ukuba ingaqhubeki nemfundo kalwimi-mbini. Apha akukho ngozi yokuba ukuhlala kweAfrikaans ilulwimi lweLOLT bekungabangela ukuphinda kwande abafundi abathetha iAfrikaans kweli ziko, elalilunyukisiwe ke ngayo yiLPHE.</p>
<p>[44] I am not convinced that UNISA has established on the evidence that the practicability test or the considerations of reasonableness – equity, inclusivity and</p>	<p>[44] Andikholelwa ukuba iUNISA iye yanabo ubungqina bokuba uvavanyo lokuba nokwenzeka okanye ukuqwalasela ukuba lula kokwenzeka – ulungiselelo</p>

access of other students – would be offended by the retention of Afrikaans as one of UNISA’s LOLTs. To find otherwise would, in my view, mean that the mere exercise of one’s right to be taught in their mother tongue would be rendered unconstitutional where it has not been shown that non-Afrikaans students would be deprived of learning and other educational opportunities by the retention of Afrikaans as a LOLT, or that maintaining it as a LOLT was unaffordable, or would result in unlawful racial discrimination in an institution of learning with a proclaimed, ambitious vision to promote multilingualism by developing all the official languages including the San languages.

olunolungelelwano, ukudibana-nabanye, nokukwazi kwabanye abafundi ukufikelela – beluya kuphatheka kakubi kukuyekwa kweAfrikaans ikhona njengolunye lweelwimi zeUNISA zokufundisa. Ukufumanisa ngolunye uhlobo kumkungathetha ukuba ukusebenzisa nje komntu ilungelo lakhe lokuba afundiswe ngolwimi lwakhe lweenkobe bekuya kuthiwa kuyahlabana noMgaqo-siseko, ekubeni kungakhange kubonakaliswe ukuba abafundi abangathethi iAfrikaans bebeya kuvimbeka ukufunda namanye amathuba emfundo ngokuhlala kweAfrikaans iyiLOLT, okanye ukuba ukuyiyeka ihlale ibe yiLOLT bekuduru okanye bekuya kukholelela kucalulo ngokobuhlanga olungeluhle, kwiziko lemfundo apho kuthiwa kuzanywa ulwimi-ninzi, kuquka neelwimi zomthonyama zaseMzantsi Afrika.

[45] Stripped to its core, UNISA’s case was that it was not reasonably practicable to continue Afrikaans tuition for a minority of its students because the other indigenous official languages were not as developed as academic and science languages as Afrikaans was, and that it would be redeveloped later, alongside the other indigenous languages to bring them all on par. This raises the question how UNISA’s noble and self-admittedly progressive goal to develop all South Africa’s indigenous languages to become

[45] Xa sele kususwe ingxam yayo, ikheyisi yeUNISA ibikukuthi kwakungekho kwenzeka ngokulula ukuba kuqhutyekwe nemfundo ngeAfrikaans isenzelwa imbinana yabafundi bayo, kuba ezinye iilwimi zasemthethweni ezizezalapha zazingaphuhlisekanga ukuba zibe ziilwimi zobumfundimani nezenzululwazi, njengokuba yona yayinjalo, nokuthi yayiza kuphinde iphuhlise kamva, ndawonye nezinye ezi iilwimi zalapha, ukuze nazo zilingane nayo ngomgangatho. Le nto ivusa



<p>LOLT's, to benefit its students and sustain this precious and threatened national resource, will be advanced, and what useful purpose will be served by knocking down a fully developed and functional language of learning and tuition to 'develop the other official languages to its standard', when there is apparently no sound reason to do so other than dwindling interest in the language, and avoiding offering mother tongue tuition to a portion of students. To my mind, there is a lot to be said for AfriForum's argument that there was already a better alternative in place to deal with the challenge of dwindling demand for Afrikaans tuition in the form of the Guidelines for the Discontinuation of Afrikaans in courses or modules. Taking away a constitutional right that is already being enjoyed, in these circumstances hardly satisfies the rationality test and cannot be justified.</p>	<p>imibuzo yokuba iyakuphuhla njani le njongo incomekayo yeUNISA, ezitsholo ngokwayo ukuba inohambelo-phambili, yokuphuhlisa zonke iilwimi zalapha eMzantsi Afrika zabantu, ukuze zide zibe ziilwimi zokufundisa nokufunda, ukwenzela ukulungelwa kwabafundi bayo nokuyenza ihlale ikhona le ndyebo yesizwe, iyakwenzeka njani, kona yintoni injongo ebalulekileyo eya kuzalisekiswa kukudodobalisa ulwimi olusele lwaphuhliseka ngokuzeleyo nolusebenzayo lokufunda nokufundisa, ukuze 'iphuhlise ezinye iilwimi zasemthethweni zifike kumgangatho wayo' xa nje kubonakala kungekho sizathu sicacayo sokwenjenjalo, ngaphandle komdla onciphayo kulo olu lwimi nokungafuni ukufundisa ngolwimi lweenkobe kwigcuntswana labafundi bayo. Ngokwam ukubona, ininzi into ethethelela izimvo zeAfriForum, ezi zokuba yayisele ikhona into ekwakunokusetyeziswa yona, futhi ingcono, yokujongana nomngeni wokuncipha kwabantu abafuna ukufunda ngeAfrikaans. Iphaya kwiZalathandlela Zokuphelisa IAfrikaans kwiikhosi nakwiimodyuli. Ke ukususa ilungelo lomgaqo-siseko elisele libasebenzela abaninilo kwezi meko aluphumeleli nakancinci kuvavanyo lokuba icingisisiwe na le nto, kungathetheleleki kananjalo.</p>
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<p>[46] <i>AfriForum v University of the Free State</i> envisaged the possibility of cases where dual-medium language policies could be maintained without causing any harm. The Chief Justice said:<sup>22</sup></p> <p>‘At a conceptual level, dual medium institutions might well exist without necessarily nurturing or perpetuating unfair advantage or racial discrimination and its exceedingly harmful tendencies. When that is so, then the right to be taught in a language of choice could be effectively accessible and implemented ... Where the enjoyment of the right to be instructed in an official language of choice is achievable without undermining any constitutional aspiration or value, then the equity test might well have been met.’</p> <p>This seems to me to be such a case.</p>	<p>[46] Ndisabuyela kule kheyisi ethi, <i>AfriForum v University of the Free State</i> eyaye yabonisa ubukho beemeko apho imigaqo-nkqubo kalwimi-mbini inako ukugcinwa kungabikho mntu uviswa buhlungu. Yathi iJaji eYongameleyo:</p> <p>‘Xa ucinga ngawo nje, amaziko kalwimi-mbini asengahlala ekho kungekho mfuneko yakukokosa okanye yakuqhubekisa ukulungelwa okucalanye okanye ucalulo ngokobuhlanga kunye nezimbo zalo. Xa injalo loo nto, ilungelo ke lokuba ufundiswe ngolwimi ozikhethelweyo lingaba nako ukufikeleleka lize lenzeke ngokunemiphumela ... Apho inako ukwenzeka le nto yokulifumana eli lungelo lokufunda ufundiswe ngolwimi lwasemthethweni ozikhethelweyo, loo nto kungenzekanga ukuba kujongelwe phantsi umnqweno okanye isiko ezingokoMgaqo-siseko, apho ke uvavanyo olumalunga nolungiselelo olunolingwano lubonakala ngathi luya kuba luphumelele.’</p> <p>Kubonakala ngathi kube njalo apha.</p>
<p>[47] To sum up: While the evidence suggests that there may have been a need for a revision of UNISA’s language policy, it has not been established that the adoption of the new policy in 2016 was conducted in a constitutionally compliant manner, ie that the factual and normative ‘reasonably practicable’ requirement in s 29(2) of the Constitution was satisfied. UNISA failed to discharge the burden that it was not</p>	<p>[47] Ukushwankathela: Nakuba ubungqina bubonakalisa ingathi kusenokuba ibikho imfuneko yokuba umgaqo-nkqubo wolwimi waseUNISA uhlaziye, ayikwazanga ukuphuhlisa kakuhle into yokuba ukumiselwa komgaqo-nkqubo omtsha ngo-2016 kwenziwa ngendlela ehambisanayo na noMgaqo-siseko, oko kukuthi, ingaba laa mmiselo uqulethe izinto ezibambekayo nezinto ezalatha umgangatho, lo wokuba</p>

<sup>22</sup> Paras 51 and 52.

<p>detracting from the right contained in s 29(2) of the Constitution without appropriate justification. This finding, in my view, is dispositive of and dispenses with the need to determine the other issues raised in the appeal.</p>	<p>makuvavanywe imeko yokuba ‘nokwenzeka ngokulula’, uku-29(2) woMgaqo-siseko, wathotyelwa ngokwanelisayo. IUNISA isilele ukuphuhlisa uxanduva lwayo lokuba ingalisusi okanye ilinciphise ilungelo eliku-s 29(2) woMgaqo-siseko kungekho sizathu sivakalayo. Oku kufumanisa ngoluhlobo ngokwendlela endibona ngayo, kwenza kungabi sabakho mfuneko yokuba sacubungula eminye le imiba ekhankanyiweyo phaya kwisibheni.</p>
<p>[48] The appeal accordingly succeeds and costs must follow the result. The following order is made:</p> <p>1 The appeal is upheld with costs, including the costs of two counsel.</p> <p>2 The order of the court a quo is set aside and replaced with the following:</p> <p>‘(a) the resolutions of the Council and Senate of the University of South Africa to approve a new language policy on 28 April and 30 March 2016, respectively, are set aside;</p> <p>(b) the new language policy adopted by the University of South Africa is declared unconstitutional and unlawful and is set aside</p>	<p>[48] Isibheni, ngokokufanelekileyo, siyaphumelela, ke iindleko kufuneka zilandele iziphumo. Kwenziwa lo myalelo ulandelayo:</p> <p>1 Isibheni sivunyiwe, sihamba neendleko eziquka iindleko zabathetheleli bezomthetho ababini.</p> <p>2 Umyalelo wenkundla ephakamileyo ubekelwa bucala, ze kubekwe endaweni yawo lo kulandelayo:</p> <p>‘(a) izigqibo zeBhunga nezeSinethi zeYunivesithi yaseMzantsi Afrika zokuvumela umgaqo-nkqubo wolwimi omtsha ngowama-28 kuTshaziimpuzi nowama-30 kweyoKwindla ngo2016, ngokulandelelana, zijongwa kutsha, zize zibekelwe bucala;</p> <p>(b) kuyabhengezwa ke apha ukuba lo mgaqo-nkqubo mtsha usekwe yiYunivesithi yaseMzantsi Afrika awuhambisani noMgaqo-siseko futhi awukho mthethweni;</p>

to the extent that Afrikaans has been removed as a language of learning and tuition;

(c) the University of South Africa shall prominently publish on its website and in three major Afrikaans newspapers in South Africa and transmit by email to all its students a notice:

(i) containing a full list of the modules that were on offer in Afrikaans as at 28 April 2016;

(ii) offering all prospective students for the next academic year admission in such modules as presented on first year level;

(iii) offering all existing students, if they were enrolled in any one of those courses or would have enrolled for the subsequent year course available in Afrikaans, but had perforce to follow the module in English, a choice to enrol on the basis that they may follow the module in Afrikaans until completion of their studies;

(iv) all the modules mentioned above will be presented in full in the following academic years until the language policy has been lawfully amended, if at all.

waye ke ubekelwa bucala ngokubhekiselele kumbandela wokuba iAfrikaans iyekisiwe ukuba lulwimi lwayo lokufunda nokufundisa;

(c) iYunivesithi yaseMzantsi Afrika iya kupapasha ngokugqamileyo kwisiza sonxibelelwano sayo nakumaphephandaba amakhulu, amathathu eAfrikaans aseMzantsi Afrika ize idlulisele nangeimeyili kubo bonke abafundi bayo isaziso esinje:

(i) esinoluhlu olupheleleyo lweemodyuli ezazizezokufundiswa ngeAfrikaans ngomhla wama-28 kuTshaziimpuzi ngo-2016;

(ii) esivumela bonke abafundi abafuna ukufunda kulo nyaka-zifundo uzayo ukuba bazibhalisele ezo modyuli zikwinqwanqwa lokuqala;

(iii) esithi bonke abafundi abahleli bekho, ukuba babeyibhalisele nokuba yeyiphi kwezo khosi okanye babeza kubhalisela ukufunda ikhosi yonyaka olandelayo ukuba yayikho ngeAfrikaans, kodwa banyanzeleka ukuba bayifunde loo modyuli ngesiNgesi, bayavunyelwa ukuba baphinde bazibhalisele ezo modyuli, kuxelwe ukuba baya kuzifunda ezo modyuli ngeAfrikaans bade bazigqibe izifundo zabo;

(iv) zonke ezi modyuli zikhankanywe apha ngentla ziya kubakho ngokuzeleyo kwakule minyaka-zifundo izayo ude umgaqo-nkqubo wolwimi ube ulungisiwe ngokwasemthethweni, ukuba iyeneka ke loo nto.

(d) the University of South Africa shall pay the costs of the application.’

(d) iYunivesithi YaseMzantsi Afrika iza kuhlawula iindleko zesi sicelo.’

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**MM MAYA**  
**PRESIDENT OF THE SUPREME COURT OF APPEAL**  
**UMONGAMELI WENKUNDLA ENGASENTLA YEZIBHENO**

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