O P I N I O N

FOR

STELLENBOSCH UNIVERSITY

ABOUT

THE LEGALITY OF PROPOSED 2021 LANGUAGE POLICY

ANDREW BREITENBACH SC

MICHAEL BISHOP

ESHED COHEN (PUPIL)

INSTRUCTED BY LORINDA VAN NIEKERK
OF CLUVER MARKOTTER INC

26 JULY 2021

CONTENTS

I INTRODUCTION

1. We have been instructed to advise Stellenbosch University (**SU**) on the legality of the Draft of its proposed 2021 Language Policy dated 22 July 2021 (**2021 Policy** or **the Draft Policy**).

2. The question arises out of SU's revision of the 2016 Language Policy and Plan (**2016 Policy**). Clause 10 of the 2016 Policy provides that the policy lapses after five years and needs to be reviewed in its final year.

3. Our opinion is that the 2021 Policy is constitutional and lawful. This is so for two main reasons:

    3.1. First, the policy complies with s 29(2) of the Constitution. The 2021 Policy does not amend the primary clauses of the 2016 Policy. The facts underlying the 2021 Policy are not materially different from the facts underlying the 2016 Policy. Since the 2016 Policy was declared constitutional by the Constitutional Court,[1] the 2021 Policy is constitutional.

    3.2. Second, the 2021 Policy complies substantially with the Language Policy Framework for Public Higher Education Institutions Determined in Terms of sections 3 and 27(2) of the Higher Education Act 101 of 1997 (**the National Policy** and **the Act**).[2]

---

[1] *Gelyke Kanse and Others v Chairperson of the Senate of the University of Stellenbosch and Others* 2020 (1) SA 368 (CC) (***Gelyke Kanse CC***).

[2] GN 1160 in *GG* 45860 of 30 October 2020.

4.   The most important documents with which we have been briefed are discussed in this opinion.

5.   We have provided three preliminary opinions:

5.1.   An opinion on 8 March 2021 on the first draft of the 2021 Policy;

5.2.   An opinion on 27 May 2021 which set out the general legal principles governing SU's revision process but did not advise on the legality of the Draft Policy; and

5.3.   An opinion on 14 July 2021 that raised concerns about the legality of two aspects of a revised draft of the 2021 Policy dated 5 July 2021, namely (a) the language for assessments, answers and written work of fourth-year undergraduate modules; and (b) the availability in Afrikaans, English and isiXhosa of official, internal, institutional communication. Both concerns have been addressed in the current draft to which this opinion is directed.

We highlight where we depart from advice in those opinions.

6.   This opinion is structured as follows:

6.1.   **Part II**: The historical background.

6.2.   **Part III**: The legal framework.

6.3.   **Part IV**: The current factual position.

6.4.   **Part V**: The compatibility of the Draft Policy with the Constitution.

6.5.   **Part VI**: The compatibility of the Draft Policy with the National Policy.

6.6.   **Part VII**: Conclusion.

II HISTORICAL BACKGROUND

7. This Part considers the history of SU's language policies under two headings:

    7.1. Language at SU before 2016; and

    7.2. The 2016 Language Policy.

8. This background is important because the Draft Policy is based on the 2016 policy and needs to be understood in its historical context.

Language at SU before 2016

9. Following the publication of the first Language Policy for Higher Education in terms of sections 3 and 27(2) of the Act in November 2002, in December 2002 SU adopted its first official language policy (and an accompanying language plan) (**the 2002 Policy**). Under the 2002 Policy, Afrikaans was the default language of undergraduate learning and instruction. English was allowed only after the reasons had been thoroughly considered. Afrikaans was also the default institutional language. Both Afrikaans and English were used in postgraduate study.

10. In November 2014 the SU Council adopted a new language policy (**the 2014 Policy**) and made consequential amendments to the language plan (**the 2014 Plan**). The 2014 Policy marked a substantial break from the 2002 position. Under the 2014 Policy:

10.1. Both Afrikaans and English were SU's languages of learning and teaching and it was committed to purposefully extending the academic application of both;[3]

10.2. Afrikaans and English would be employed in various usage configurations,[4] which were spelt out in more detail in the Plan;

10.3. Parallel-medium teaching and real-time educational interpreting were the preferred options where practically feasible and affordable;[5] and

10.4. Postgraduate study would happen in both languages, with significant utilization of English.[6]

11. The 2014 Plan gave substance to the 2014 Policy. In particular, it created the following language-specifications for undergraduate teaching in the following order of preference:

11.1. For the first two years of undergraduate studies, normally:

11.1.1. parallel-medium teaching in separate groups for modules with 250 students or more (**A+E**); or

11.1.2. real-time interpreting from Afrikaans to English (**A+i**) or from English to Afrikaans (**E+i**), depending on the language the lecturer was more comfortable with.

11.2. For the third year of undergraduate studies and onwards:

---

[3] 2014 Policy para 7(a).
[4] 2014 Policy para 7(b).
[5] 2014 Policy para 7(c).
[6] 2014 Policy para 7(d).

11.2.1. preferred options:

11.2.1.1. A+E;

11.2.1.2. A+i or E+i, depending on the language the lecturer was more comfortable with; or

11.2.2. provided the relevant faculty could show the preferred options were not feasible and support would be offered to students who were not sufficiently academically literate in Afrikaans or English:

11.2.2.1. dual-medium teaching, i.e. the balanced use of Afrikaans and English to one class group, with the Afrikaans offering at least 50% (**T-specification**);

11.2.2.2. English only (**E**), if the lecturer was not proficient enough in Afrikaans for the T-specification; or

11.2.2.3. Afrikaans only (**A**), where the resources for multilingual presentation were not yet available.

11.3. The Plan did however allow for the use of the T, E or A-specifications in the first two years of undergraduate study, provided it was indicated how students who lacked sufficient Afrikaans or English language skills would be supported to benefit from the full content of lectures.

12. As is evident from a comparison with the 2002 Policy, the 2014 Policy and Plan were intended to make it easier for English-speaking students to obtain an education at SU.

13.   However, during 2015 and the first half of 2016 for three main reasons it became clear that the 2014 Policy and Plan unintentionally excluded students who were proficient in English but not sufficiently proficient in Afrikaans.

14.   <u>First</u>, while virtually all Afrikaans-speaking students could learn in English, a significant portion of English-speaking students could not learn in Afrikaans. All but two of the 2015 first-year Afrikaans-speaking students were able to speak English at a sufficient level that English teaching would not exclude them. By contrast, 539 first-year students did not take Afrikaans to Grade-12 and would therefore have difficulty learning in Afrikaans. That constituted 10.15% of all first-year students and 21% of all English-speaking first-year students.

15.   The statistics were even more concerning when linguistic ability was considered together with race:

15.1. 63% of the 539 first-year students without Grade 12 Afrikaans were Black (African); and

15.2. 61% of all Black (African) first-year students did not have Grade 12 Afrikaans.

16.   Put simply, the majority of Black (African) students could not learn in Afrikaans, and the majority of those who could not learn in Afrikaans were Black (African).

17.   In addition:

17.1. 82.7% of the Afrikaans-speaking students were White; and

17.2. Only 17% of the Afrikaans-speaking students were Coloured, while 62% of Coloured students were English-Speaking.

18.   Second, although the 2014 Policy adopted various language specifications or options aimed at making SU more accessible to English-speaking, and particularly Black (African), students, the manner in which the 2014 Policy was being implemented did not have that effect:

18.1.   The majority of modules (54.7%) were offered in the T-option;

18.2.   Nearly 40% (39.52%) of student enrolments were for T-option modules;

18.3.   Nearly 18% of modules were offered in A-option or A+i-option; and

18.4.   11.5% of modules were offered with simultaneous translation (either A+i, or E+i).

19.   Third, there were significant complaints by both the Student Representative Council and a campus organization called Open Stellenbosch about how the T-option was implemented and how simultaneous translation was provided:

19.1.   In some T-option modules lecturers were unable or unwilling to lecture in both languages and sometimes ended up teaching almost entirely in one language; and

19.2.   The T-option was far more burdensome for the English-speaking students who could not understand Afrikaans, than for Afrikaans-speaking students who were sufficiently proficient in English.

19.3.   With regard to simultaneous translation:

19.3.1.   Students complained that the interpretation was often of poor quality;

19.3.2. It was primarily used to translate from Afrikaans to English. There were ten times as many modules and enrolments in the A+i specification as in the E+i specification. This was largely because Afrikaans-speaking students did not, in fact, require translation. Many modules that began as E+i ended up being taught solely in English because students would not make use of the translation facilities; and

19.3.3. The result was that only those students who could not understand Afrikaans (the majority of whom were Black (African)) had to make use of the interpretation services. This imposed both a barrier to access (interpretation was not as good as the original language) and had a stigmatizing effect (those students who used the interpretation services felt marginalized and excluded).

20. Consequently: In 2015 and the first half of 2016 it became clear to SU that the 2014 Policy discriminated directly against English speakers, and indirectly against Black (African) students. It was easier for White students to understand lectures than Black (African) students. It created a serious burden for Black (African) students to access further education that was not experienced by their White counterparts.

21. SU undertook a study of the cost of an immediate change to a full parallel-medium system, which indicated it would be an amount of about R640 million in infrastructure and about R78 million per year for additional personnel. That translated to an approximately 20% increase in fees (up by about R8 100 from about R40 000 per year), which SU regarded as unaffordable.

22. SU consequently decided to adopt a new language policy – the 2016 Policy – aimed at a 100% English offering and at managing the sum total of the Afrikaans offering so as

to maintain access for students who choose to study in Afrikaans and to further develop Afrikaans as a language of instruction where reasonably practicable.

The 2016 Policy

23.   The 2016 Policy did not significantly reduce the Afrikaans offering at SU. Instead, it preferred English in limited circumstances in order to advance SU's multiple goals, especially equal access, multilingualism and integration, within available its resources.

24.   In what follows, we:

24.1.   Set out the general principles that underpin the 2016 Policy; and

24.2.   Summarize how the Policy operates.

General Principles

25.   The Policy expressly states that its purpose is to '*give effect to section 29(2) (language in education) and 29(1)(b) (access to higher education) read with section 9 (equality and the prohibition against direct and indirect unfair discrimination) of the Constitution.*'[7]

26.   One of the Policy's core principles is that '*[l]anguage should promote access ... and should not constitute a barrier to students or staff*', particularly in the light of past racial discrimination.[8]

---

[7] 2016 Policy para 5.1.

[8] 2016 Policy para 6.1.

27.   As regards Afrikaans, it records that '*[a]pplying and enhancing the academic potential of Afrikaans is a means to empowering a large and diverse community in South Africa.*'[9] It explains in detail how SU will '*advance the academic potential of Afrikaans*'.[10]

28.   The 2016 Policy notes SU's commitment to multilingualism '*as a differentiating characteristic of SU*',[11] and includes a section dealing with how SU will promote multilingualism and particularly the use of Afrikaans and isiXhosa.[12] SU is committed to both institutional and individual multilingualism. It seeks to encourage its students to learn and utilize both English and Afrikaans.

The Operative Provisions of the 2016 Policy

29.   The 2016 Policy provides that Afrikaans and English are SU's two languages of learning and teaching.[13] It then sets out a mechanism to determine when, and how each language should be employed.

30.   Undergraduate[14] modules are taught in one of three ways:

30.1.   Parallel-medium teaching (separate lectures in Afrikaans and English);[15]

30.2.   Dual-medium teaching (during each lecture all information is conveyed at least in English, summaries or emphasis of content are also given in Afrikaans and

---

[9] 2016 Policy para 2.

[10] 2016 Policy para 7.5.3.

[11] 2016 Policy para 5.4. See also 2016 Policy para 2.

[12] 2016 Policy para 7.5.

[13] 2016 Policy para 7.1.1.

[14] In postgraduate learning and teaching any language may be used provided all the relevant students are sufficiently proficient in that language. 2016 Policy para 7.1.4.

[15] 2016 Policy para 7.1.3.

questions are answered in the language in which they are asked, e.g. questions in Afrikaans are answered in Afrikaans);[16] and

30.3. In a limited range of circumstances (discussed below), single-medium teaching (either Afrikaans or English).[17]

31. The 2016 Policy also makes use of simultaneous translation to ensure equitable access for all students.

32. The 2016 Policy has a strong preference for parallel-medium teaching followed by dual-medium teaching. The determination of how an undergraduate module will be taught is governed as follows:

32.1. Parallel-medium teaching is employed whenever it is reasonably practicable and pedagogically sound.[18]

32.2. Where parallel-medium lectures are not possible or appropriate, lectures are taught in dual-medium. In addition:

32.2.1. All first-year dual-medium lectures are supported by simultaneous translation; and

32.2.2. Lectures in later years will be translated if there is a request by the faculty, the needs of students warrant translation and SU has the resources to provide it.[19]

---

[16] 2016 Policy para 7.1.4.

[17] 2016 Policy para 7.1.5.

[18] 2016 Policy para 7.1.3.

[19] 2016 Policy para 7.1.4.

32.3. Single-medium lectures are offered in only three limited circumstances: (a) where the subject matter justifies it; (b) where the lecturer is only proficient in one language; or (c) where the students vote unanimously by secret ballot to be taught in a single language. Where the lecture is single-medium because of the lecturer's proficiency:

32.3.1. SU will always provide simultaneous translation from Afrikaans to English; and

32.3.2. It will provide simultaneous translation from English to Afrikaans: (a) for all first-year modules; and (b) in second and third year modules if there is a request by the faculty, the needs of students warrant it and SU has the resources to provide it.[20]

33. In postgraduate teaching and learning, including any final year undergraduate modules at National Qualifications Framework ('**NQF**') level 8, any language may be used provided all the students are sufficiently proficient in that language.[21]

34. In addition to the general policy provisions governing learning and teaching set out above, the following further policy provisions govern the use of Afrikaans at SU:

34.1. For all undergraduate modules, all SU module frameworks and study guides are available in Afrikaans,[22] compulsory reading material (excluding published material) is also provided in Afrikaans where reasonable practicable[23] and students are supported in Afrikaans during a combination of appropriate,

---

[20] 2016 Policy para 7.1.5.2.

[21] 2016 Policy para 7.1.9.

[22] 2016 Policy para 7.1.7.3.

[23] 2016 Policy para 7.1.7.2.

facilitated learning opportunities (e.g. consultations during office hours, or scheduled tutorials and practicals).[24]

34.2. Question papers for tests, examinations and other summative assessments in undergraduate modules are available in Afrikaans and students may answer all assessments and submit all written work in Afrikaans.[25] (As explained in para 235 below, this applies to all undergraduate modules, even those with an NQF level 8 rating.)

34.3. A variety of information and communication technology (ICT) enhanced learning strategies, including podcasts and vodcasts of lectures, are made available to students in Afrikaans for the further reinforcement of concepts and for revision purposes.[26]

35. The Policy is designed to grant the greatest possible tuition in English and Afrikaans, within SU's available resources. As a result, there are only three ways in which the Policy treats English differently from Afrikaans:

35.1. First, as explained, in dual-medium module lectures all information is conveyed at least in English, whereas only summaries or emphasis of content are given in Afrikaans.[27] To ameliorate any adverse impact of this on Afrikaans-speaking students, simultaneous translation is made available in all first-year dual-medium modules, and in later years on request, considering student needs and available resources.

---

[24] 2016 Policy paras 7.1.3.2, 7.1.4.2 and 7.1.5.2(b).

[25] 2016 Policy para 7.1.8.

[26] 2016 Policy para 7.1.6.

[27] 2016 Policy para 7.1.4.1.

35.2. Second, for undergraduate modules where the assigned lecturer is proficient to teach only in Afrikaans, SU will always make simultaneous interpreting available in English during all years of undergraduate study. The same position holds for first-year modules where the assigned lecturer is proficient to teach only in English; SU will always make simultaneous interpreting available in Afrikaans. During the second and subsequent years of study simultaneous interpreting will only be made available upon request by a faculty, if the needs of the students warrant it and SU has the resources to provide it.[28]

35.3. Third, whereas all compulsory reading material is provided in English (except where the module is about another language),[29] there are two limitations on the provision of compulsory material in Afrikaans:

35.3.1. Material which is published but not in Afrikaans need not be made available in Afrikaans; and

35.3.2. Non-published material is made available in Afrikaans where reasonably practicable.[30]

36. All the other learning opportunities – tutorials, practicals, consulting hours, podcasts and vodcasts – are available in both Afrikaans and English.

37. The Policy creates an accountability mechanism to ensure that Afrikaans teaching is not reduced significantly from pre-2016 Policy level and is increased where possible. Each year the deans of the faculties and the Vice-Rector: Learning and Teaching must

---

[28] 2016 Policy paras 7.1.4.3 and 7.1.5.2(a).

[29] 2016 Policy para 7.1.7.1.

[30] 2016 Policy para 7.1.7.2.

develop Language Implementation Plans. When doing so they must comply with paragraph 7.4.1.2, which reads: '*The Afrikaans offering is managed so as to sustain access to SU for students who prefer to study in Afrikaans and to further develop Afrikaans as a language of tuition where reasonably practicable.*'[31] The Senate must approve all language plans, and can send a plan back to the faculty for reconsideration if it fails to meet this requirement.[32] The clear import of paragraph 7.4.1.2 is that: (a) the Afrikaans offering cannot be reduced materially as that would not '*sustain access*' for Afrikaans-speaking students; and (b) the Afrikaans offering should be increased to the extent that is reasonably practicable.

III   THE LEGAL FRAMEWORK

38.   This Part considers the legal framework within which the constitutionality of the Draft Policy must be determined. It addresses two central issues:

    38.1.   SU's constitutional obligations in terms of s 29(2) of the Constitution; and

    38.2.   SU's statutory obligations to comply with the 2020 National Policy.

Section 29(2) of the Constitution

39.   Section 29(2) of the Constitution establishes a right to education, including higher education, in the person's official language of choice. It reads:

---

[31] 2016 Policy para 7.4.1.2.

[32] 2016 Policy para 7.4.3.

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

(a)   equity;

(b)   practicability; and

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

40.   The right in s 29(2) is not absolute. It is limited by what is '*reasonable practicable*', and by an assessment of other reasonable educational alternatives. The recent litigation over several universities' language policies – including SU's 2016 Policy – provide comprehensive guidance as to what s 29(2) requires in the higher education context generally, and particularly for the provision of Afrikaans learning opportunities.

41.   We address the meaning of s 29(2) with reference to the following:

41.1.   The context of s 29(2);

41.2.   The purposes of the s 29(2) right;

41.3.   The two mutually-reinforcing parts of s 29(2);

41.4.   The meaning of '*reasonably practicable*';

41.5.   The central importance of equitable access;

41.6.   Both parallel-medium and dual-medium teaching are, in principle, permissible options; and

41.7.   A unified test for positive and negative claims under s 29(2).

Context

42.   Section 29(2) must be interpreted in light of the historical context in which it was enacted. For the majority of South Africans, '*Afrikaans has for many years been associated with dominion or power.*'[33] It received significant state investment to turn it into an academic language that was a language of instruction in schools and universities across the country.   The Apartheid government was composed '*predominantly Afrikaans-speaking people who sought to thrust their mother tongue upon others in the furtherance of sectional and self-serving white supremacist policies.*'[34] At the same time, '*all African universities and languages were deliberately starved of resources and capacities critical for a similar developmental agenda.*'[35] The result was not only the stultification of African languages, but the intentional subjugation of African people by denying them education.

---

[33] *AfriForum and Another v University of the Free State* 2018 (2) SA 185 (CC) (***University of the Free State CC***) para 3.

[34] *University of the Free State CC* para 6.

[35] *University of the Free State CC* para 2.

Purposes

43. The s 29(2) right serves three mutually supporting purposes:

43.1. To improve the quality of education, as people learn better in their mother tongue: It is therefore related to s 29(1) of the Constitution and, in the context of universities, to s 29(1)(b) which guarantees the right to '*further education, which the state, through reasonable measures, must make progressively available and accessible.*'

43.2. To promote and maintain cultural communities: As Sachs J explained in an early Constitutional Court judgment about language rights, language '*is not simply a means of communication and instruction, but a central element of community cohesion and identification for a distinct community in South Africa.*'[36] Section 29(2) is therefore linked to the rights to culture in sections 30 and 31 of the Constitution.

43.3. To mediate between competing demands for limited education resources: In an ideal world, all people would be able to learn in the language of their choice, at their university of choice. In reality, that is not possible. Section 29(2) is the carefully negotiated structure for determining when own-language education

---

[36] See *Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995 1996 (3) SA 165 (CC)* para 47. See also *University of the Free State v Afriforum and Another* 2017 (4) SA 283 (SCA) (*University of the Free State SCA*) para 31; and *Mahe v Alberta* [1990] 1 SCR 342 362 ('*any broad guarantee of language rights, especially in the context of education, cannot be separated from a concern for the culture associated with the language. Language is more than a mere means of communication, it is part and parcel of the identity and culture of the people speaking it. It is the means by which individuals understand themselves and the world around them.*').

must be privileged over the practical and constitutional benefits that can be advanced by teaching in other languages.

Structure

44.   Section 29(2) achieves these purposes in '*two distinct but mutually reinforcing parts*':[37]

44.1.   The first determines <u>when</u> the right to own-language exists. As the Constitutional Court has emphasized, s 29(2) affords a <u>qualified</u> right to own-language tuition only where that tuition is '*reasonably practicable*'.

44.2.   The second part explains <u>how</u> the state should provide the right if it is triggered by the first part – if own-language education is reasonably practicable. Then the mechanism used to provide the education must be a '*reasonable educational alternative*'.

Reasonably Practicable

45.   What is '*reasonably practicable*' must be assessed not only in the light of the practicalities, but also in the light of what is reasonable in the circumstances, something which includes the factors mentioned in the second part of s 29(2): equity, practicability, and redress. What is reasonably practicable therefore requires a court to

---

[37] *Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (2) SA 415 (CC) (Ermelo) para 52.

consider both a '*factual criterion*', and a '*constitutional criterion*'. As regards the latter:

> '*even if a language policy is practical because there are no resource constraints to its implementation, it may not be reasonable to implement because it offends constitutional norms. The policy would therefore not meet the reasonably practicable standard.*'[38]

46. The need for non-racialism and racial redress in the assessment is particularly important: '*Reasonable practicability therefore requires not only that the practicability test be met, but also that considerations of reasonableness that extend to equity and the need to cure the ills of our shameful apartheid past, be appropriately accommodated.*'[39]

47. What is reasonably practicable must '*be judged objectively, and … it requires an approach founded in evidence*'.[40]

48. Ultimately, the reasonably practicable test requires a court to apply '*a sliding scale of what is lost in language terms, and what is retained, as against the social justice objective sought to be attained, weighed together, where appropriate, with cost considerations*'.[41] This is the closest that we have to a definition of "reasonably practicable". In simple language, it requires the University to weigh: (a) the right to tuition in the official language of choice; (b) the need to enhance access to higher education and other constitutional objectives; and (c) the financial cost and other

---

[38] *University of the Free State SCA* paras 26-7. Approved in *University of the Free State CC* para 54.

[39] *University of the Free State CC* para 53.

[40] *Gelyke Kanse CC* para 26.

[41] *Gelyke Kanse CC* para 41.

practical obstacles. None of these considerations trumps the others. All must be considered and weighed.

Equitable Access

49.   As Mogoeng CJ held in the *University of the Free State* matter:

> '*[T]he constitutional obligation to make education accessible to all*'[42] is a vital consideration in determining what is reasonably practicable;

> '*[E]ffective access to the right to be instructed in an official language of choice must be given effect to, but <u>without undermining equitable access</u>, preserving exclusivity or perpetuating racial supremacy. It would be unreasonable to wittingly or inadvertently allow some of our people to have unimpeded access to education and success at the expense of others as a direct consequence of a blind pursuit of the enjoyment of the right to education in a language of choice*';[43] and

> '*Where <u>access</u>, integration and racial harmony are imperilled by giving effect to the right to be educated in an official language of choice, then the criterion of reasonable practicability would not have been met.*'[44]

---

[42] *University of the Free State CC* para 48.

[43] *University of the Free State CC* para 49 (emphasis added).

[44] *University of the Free State CC* para 52 (emphasis added).

50.   As the judgments we consider below demonstrate, a language policy that limits own-language access in order to ensure equitable access for other students would likely be consistent with s 29(2).

Parallel-medium Teaching and Dual-medium Teaching are Permissible in Principle

51.   In *Ermelo* the Constitutional Court said the second part of s 29(2) '*is an injunction on the State to consider all reasonable educational alternatives which are not limited to, but include, single-medium institutions. In resorting to an option, such as a single or parallel or dual medium of instruction, the State must take into account what is fair, feasible and satisfies the need to remedy the results of past racially discriminatory laws and practices*'.[45]

52.   In *University of the Free State CC* the Constitutional Court sanctioned the abolition by the university of parallel-medium classes and, with them, Afrikaans as a medium of instruction. It did so because Black students chose English, and the students who wanted Afrikaans were White, resulting in classes segregating White students from Black students. The Court accepted the university's evidence that the separate parallel classes had given rise to racial friction and antagonism.

53.   In *Gelyke Kanse CC* the Constitutional Court held that at SU, because some students seeking tuition in Afrikaans are brown, racial segregation of the kind at issue in *University of the Free State CC* was not a feature.[46]

---

[45] *Ermelo* para 53.

[46] *Gelyke Kanse CC* para 40.

54.	It follows that parallel-medium teaching is permissible, unless it results in the segregation of Black and White students and racial friction and antagonism.

55.	As to dual-medium teaching, in *Gelyke Kanse CC* the Constitutional Court accepted SU's evidence indicating that dual-medium classes which are predominantly in Afrikaans coupled with interpreting from Afrikaans to English, peripheralized and stigmatized black students not conversant in Afrikaans. The same however did not apply to dual-medium classes which are predominantly in English because, there, very little interpreting from English to Afrikaans was required.[47]

56.	It follows that dual-medium teaching is permissible unless it stigmatizes the students for whose benefit parts of a lecture are translated. That is unlikely to be the case at SU with dual-medium classes which are predominantly in English.

One Standard

57.	There is no difference in the constitutional standard if existing access to own-language education is reduced.

58.	In *Ermelo* the Constitutional Court held that there must be an '*appropriate justification*' for reducing existing access to own-language education.[48]

59.	In *Gelyke Kanse CC* the Constitutional Court confirmed that '*the constitutional test of 'reasonable practicability' in determining whether the right in section 29(2) may be conferred is in essence synonymous with the test of 'appropriate justification' for*

---

[47] *Gelyke Kanse CC* paras 28-29 and 40.

[48] *Ermelo* para 23.

cutting it back, once afforded.'[49] The two tests, the Court held, '*are two sides of the same coin, the former dealing with the positive duty to fulfil the right, and the latter with the negative duty not to take it away, once enjoyed.*'[50]

60. In short, in assessing whether SU has an obligation to provide education in the language of choice, the same test applies regardless of whether it is currently providing education in that language or not. SU has both a positive obligation to provide language of choice education, and a negative duty not to reduce existing language of choice education. In both instances, SU's decisions must be guided by what is reasonably practicable.

The Application of section 29(2) by our courts

61. In our case law there are four recent applications of the above principles to the language policies of universities. Most importantly, as already mentioned, in *Gelyke Kanse* the Constitutional Court upheld the constitutionality of SU's 2016 Policy. We focus on the reasons for that decision. We also consider the challenges to the language polices of the University of the Free State, the University of Pretoria and the University of South Africa.

---

[49] *Gelyke Kanse CC* para 23.

[50] *Gelyke Kanse CC* para 23. See also *University of the Free State CC* para 50; *University of the Free State SCA* para 27; *Afriforum and Another v Chairperson of the Council of the University of Pretoria and Others* [2017] 1 All SA 832 (GP) (***University of Pretoria***) para 54.

Gelyke Kanse CC

62.   The Constitutional Court, unanimously, accepted SU's central justification for amending its language policy in 2016 – '*the primacy of Afrikaans under the 2014 Language Policy created an exclusionary hurdle for specifically black students studying at Stellenbosch.*'[51] This was a result of two uncontested[52] facts (as to which, see paras 14 to 16 above):

62.1.   '*near-universally, brown and white-Afrikaans-speaking first-year entrants to the University are able to be taught in English*'[53], and

62.2.   conversely, '*most black (in contradistinction to brown) new entrants to the University are not conversant enough to be able to receive tuition in Afrikaans.*'[54]

63.   Gelyke Kanse's response was to accept these facts but seek to distinguish the case from *University of the Free State CC* where parallel-medium classes had resulted in near total Black/White racial segregation. This was not the case at SU because a large percentage of Coloured students prefer to learn in Afrikaans.

64.   But, the Court held, there was still a racial impact: '*the erection along racial lines of a barrier to full access to Stellenbosch's learning and other opportunities.*'[55]

---

[51] *Gelyke Kanse CC* para 28.

[52] *Gelyke Kanse CC* para 29.

[53] *Gelyke Kanse CC* para 26.

[54] *Gelyke Kanse CC* para 27.

[55] *Gelyke Kanse CC* para 29.

65.   The Court therefore accepted the rationale for ensuring full English teaching at SU. The question was whether it was justified in achieving that goal by reducing the Afrikaans offering (something which the Court found to be the case despite paragraph 7.1.4.2 of the 2016 Policy, which required that the Afrikaans offering be managed so as to sustain access to SU for students who prefer to study in Afrikaans). Gelyke Kanse argued that the University could cure both problems by adopting full parallel-medium tuition.

66.   The question this raised was whether full parallel-medium teaching was reasonably practicable. SU conceded it was feasible, but claimed it would be too expensive.[56] As explained in para 21 above, at the time it was estimated a move to full parallel-medium teaching would cost R640 million in infrastructure and recurring expenditure of R78 million per year. That would require a 20% increase in student fees. The Court described this cost as '*enormously, even if not prohibitively, expensive*'.[57] While it refused to 'defer' to the University's assessment, the Court held it was appropriate to adopt '*a prudent worldly-wise caution in supplanting the judgment of experienced others.*'[58] As Cameron J noted, SU had to make '*a judgment about cost, combined with a judgment about value*' – it had to decide not only how much it would cost, but whether the cost was worth it.[59]

67.   There was a debate about whether cost had been properly considered by SU when it amended its language policy. Gelyke Kanse argued that SU had only raised it in its

---

[56] *Gelyke Kanse CC* para 31.

[57] *Gelyke Kanse CC* para 33. See also para 40 ('*non-prohibitive but significant*').

[58] *Gelyke Kanse CC* para 42.

[59] *Gelyke Kanse CC* para 36.

answer to the litigation and had not considered it when it took the decision.[60] The Court rejected this argument, holding that cost was inevitably a factor, and that SU was entitled to defend the policy with reliance on the cost of the proposed alternative.[61]

68.   The Court summarized its holding in these terms:

'*Is it permissible under section 29(2), where tuition is being offered in an official language of choice at a public educational institution, to diminish that offering (while not extinguishing it) in order to enhance equitable access for those not conversant in that language, when the institution judges the cost of non-diminution too high? In my view the answer is Yes.*'[62]

69.   As mentioned in para 48 above, the Court endorsed a '*sliding scale*' test. In the case of SU's 2016 Policy, Cameron J, wrote, '*what is lost in language terms, and what is retained, as against the social justice objective sought to be attained, weighed together, where appropriate, with cost considerations, seems to me constitutionally justified*'.[63]

---

[60] This submission was factually incorrect – the figures mentioned in para 21 above were in the documentation placed before the Council, including in para 85 of our opinion on the constitutionality of the 2014 Policy and Plan of 27 November 2015 and in para 7.12 of senior counsel's memorandum on the applicable legal principles of 21 May 2016

[61] *Gelyke Kanse CC* paras 32-33.

[62] *Gelyke Kanse CC* para 38.

[63] *Gelyke Kanse CC* para 41.

University of the Free State SCA and CC

70.   Both the Supreme Court of Appeal and the Constitutional Court upheld the new language policy of the University of the Free State (**UFS**) that almost completely abolished Afrikaans tuition.

71.   As mentioned earlier, the rationale for the UFS's language policy was primarily that teaching in English and Afrikaans had resulted in Black/White racial segregation on its campus. The English classes were mostly Black, and the Afrikaans classes were mostly White. The segregation in classrooms was linked to racial tension between White and Black students on campus.

72.   Both courts held that curing this racial segregation and tension was a permissible reason to effectively eliminate Afrikaans tuition. As the majority of the Constitutional Court put it, the policy '*unwittingly perpetuates segregation and racism*'.[64] In the context of the UFS, parallel tuition while financially possible, was inconsistent with the normative or constitutional element of reasonable practicability under s 29(2).

University of Pretoria

73.   In 2016 the University of Pretoria (**UP**), like the UFS, amended its language policy to move from largely parallel-medium tuition to an almost purely English language policy. It advanced similar rationales to the UFS: parallel-medium teaching led to segregation; and there was decreasing demand for Afrikaans tuition. In light of the decreasing

---

[64] *University of the Free State CC* para 55.

demand, UP concluded that continuing Afrikaans tuition was not viable in the medium to long term.

74.   The High Court (which was where that matter stopped) upheld this reasoning. It held that UP's decision-making process reflected '*an ongoing engagement with the context-sensitive considerations it was required to take into account, including present and projected demand, the best utilization of resources, the numbers involved as part of the whole, transformation, social cohesion and redress.*'[65]

UNISA SCA

75.   Until 2016 UNISA had a policy that provided for tuition in English in all modules, and Afrikaans where there was sufficient demand. In 2016, it moved to an English-only policy. The Supreme Court of Appeal upheld a challenge by Afriforum to the removal of Afrikaans.[66]

76.   The judgment emphasizes the need for a proper evidential basis for any decision that limits access to education in the official language of choice – particularly if that results in a decrease of existing access.

77.   UNISA sought to defend its decision by arguing that the costs saved by not offering Afrikaans tuition could be used to develop other African official languages.[67] The

---

[65] *University of Pretoria* para 46.

[66] *AfriForum NPC v Chairperson of the Council of the University of South Africa and Others* [2020] ZASCA 79 (*UNISA SCA*). An application by UNISA for leave to appeal to the Constitutional Court is currently pending.

[67] *UNISA SCA* para 35.

Supreme Court of Appeal rejected the argument largely for the following evidential reasons:

77.1. It was not raised when UNISA took the decision, and there was no study to support it;[68]

77.2. There was no proper comparison of the cost of the modules offered in Afrikaans to the modules offered in English;[69] and

77.3. UNISA did not explain why Afrikaans modules could not be cross-subsidized by profitable modules, as happened with many courses such as philosophy and French which are offered because of their strategic and national importance.[70]

78. Importantly, Maya P made it clear that, even if this evidence existed, it would not necessarily have justified the abolition of Afrikaans because s 29(2) has a normative content that goes beyond the availability of resources – but the absence of the evidence meant UNISA could not cross the 'reasonably practicable' threshold.[71]

79. However, things were even worse for UNISA. Not only had it not considered any evidence of the financial consequences of abandoning Afrikaans, when taking the decision to adopt the new policy its Senate and Council did not know what the demand for Afrikaans tuition was, except that it was decreasing. The relevant statistics were not placed before the Senate and the Council by the committee established to review UNISA's existing language policy. As the demand for Afrikaans tuition was obviously a central consideration, Maya P fairly described the failure to brief the Senate and the

---

[68] *UNISA SCA* para 36.

[69] *UNISA SCA* para 37.

[70] *UNISA SCA* para 38.

[71] *UNISA SCA* para 38.

Council with those statistics as '*incomprehensible*' and '*entirely unsupportable*'.[72] It rendered UNISA's decision unlawful.

80. Maya P was careful to distinguish the Supreme Court of Appeal's decision in the UNISA case from the Constitutional Court's earlier decisions that had upheld the new language policies of SU and the UFS, pointing out the following:

80.1. Both SU and the UFS were residential universities. In both cases language was linked to concerns about racial segregation or discrimination and the stigmatization of Black students. At the UFS, parallel-medium classes had resulted in racial segregation. At SU, dual-medium classes had disproportionately disadvantaged Black students who were proficient in English but not Afrikaans. Those universities' language arrangements caused Black students to feel marginalized in the classrooms and excluded from other aspects of campus life. As UNISA was a correspondence university, these concerns did not arise.[73]

80.2. Those universities – unlike UNISA – had carefully considered all the relevant evidence.[74]

81. Finally, the SCA rejected the logic of the High Court that the retention of Afrikaans was inconsistent with the rights of other students whose home language was not English but could not receive an education in that language at UNISA:

---

[72] *UNISA SCA* para 41.

[73] *UNISA SCA* para 42.

[74] *UNISA SCA* para 43.

'*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-speaking students would be deprived of learning and other educational opportunities by the retention of Afrikaans as a LOLT [language of learning and teaching], 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.*'[75]

82. The Constitutional Court recently heard an appeal by UNISA against the SCA's decision. It is possible judgment will be delivered before Council and Senate make a decision on the Draft Policy. If that occurs, we may need to update this opinion.

---

[75] *UNISA SCA* para 44.

The National Policy

83.   We address first the status of the National Policy, and then its purpose, and the requirements it imposes. Finally, we separately consider the obligation relating to conveying "official, internal, institutional communication".

The Status of the National Policy

84.   The National Policy was promulgated on 20 October 2020 in terms of s 27(2) of the Higher Education Act (**HEA**).[76]   The National Policy comes into effect on 1 January 2022.

85.   Section 27(2) of the HEA provides:

> '***Subject to*** *the policy determined by the Minister as contemplated in section 3, the council, with the concurrence of the senate, must—*
>
> *(a)   determine the language policy of the public higher education institution concerned;*
>
> *(b)   publish the policy; and*
>
> *(c)   make the policy available on request.*'

---

[76] Act 101 of 1997.

86.   Section 3(1) of HEA provides:

> '*The Minister must, taking into consideration the provisions of the Constitution and after consulting the CHE, determine policy on higher education, which policy includes, but is not limited to—*
>
> *(a)   transformation goals and oversight mechanisms for these goals;*
>
> *(b)   articulation and recognition of prior learning frameworks across the education system; and*
>
> *(c)   criteria for recognition as a university, university college, or higher education college.*'

87.   The National Policy is binding on university councils in that their language policies are 'subject to' the National Policy, as the Constitutional Court explained when in *University of the Free State CC* it considered the meaning of '*subject to*' in s 27(2).[77] This was done in the context of the National Policy's predecessor, the 2002 National Policy.[78]

88.   The judgment appears to require universities to comply with a s 27(2) policy, while leaving some room for universities to act contrary to such a policy. The following three passages in the Court's judgment are relevant:

88.1.   '*It must be accepted as correct that the words 'subject to' mean exactly that. Whatever language policy a university determines in terms of section 27(2) of the Act, must take [its] cue from and be fundamentally in sync with the*

---

[77] *University of the Free State CC* paras 66-74.

[78] Paragraph 10 of the National Policy makes it clear that it replaces the 2002 Language Policy for Higher Education.

ministerial policy. The hallmarks of the former must be significantly traceable to or reconcilable with the latter. That is the ordinary grammatical and correct meaning of the words 'subject to' as used in this text. What must however not be lost sight of is that the applicability of the ministerial policy is, like all others, situational or context-specific. It largely depends for its relevance and effect on the particular circumstances that inform its existence as well as its compliance with our constitutional norms. When the situation has since changed in a way that would cause a university to undermine our Constitution and its foundational values if it were to adhere slavishly to parts of the policy framework, then a situation-sensitive and constitutionally-compliant policy-change would have to be effected'.[79]

88.2. '*Section 27(2) does not prescribe policy. It effectively recognises that section 3 vests power in the Minister to provide nothing more than a policy framework that universities must have regard to in developing their own policies in a way that is informed by the peculiarities and realities on the ground. As is the case with all other policy-determinations, the ministerial policy basically cautions universities not to develop their own language policy in total disregard for it and the constitutional provisions that are relevant to language policy*'.[80]

88.3. '*It bears emphasis that one cannot even begin to contend for a particular language policy stance or nuance without navigating her way around the*

---

[79] *University of the Free State CC* para 66.

[80] *University of the Free State CC* para 70.

qualifying aspects of section 29(2) of the Constitution and other constitutionally-inspired clauses of the ministerial policy'.[81]

89. Four principles can be distilled from the Court's reasoning:

    89.1. First, universities' language policies must be consistent with the National Policy in the following sense: they '*must take [their] cue from and be fundamentally in sync with the ministerial policy. The hallmarks of the former must be significantly traceable to or reconcilable with the latter*'.[82]

    89.2. Second, universities' language policies need not slavishly follow the National Policy. Rather, it is '*a policy framework that universities must have regard to in developing their own policies in a way that is informed by the peculiarities and realities on the ground*'.[83] The applicability of the National Policy is '*situational or context specific. It largely depends for its relevance and effect on the particular circumstances that inform its existence as well as its compliance with our constitutional norms*'.[84]

    89.3. Third, the National Policy can be departed from if adherence to the National Policy would result in the university acting inconsistently with the Constitution. When developing their language policies, universities must have regard for '*the constitutional provisions that are relevant to language policy*'[85] including '*the

---

[81] *University of the Free State CC* para 74.

[82] *University of the Free State CC* para 66.

[83] *University of the Free State CC* para 70.

[84] *University of the Free State CC* para 66.

[85] *University of the Free State CC* para 70.

qualifying aspects of section 29(2)'.[86] As explained earlier, central among the latter is that the use of language must be reasonably practicable.

89.4. Fourth, and flowing from the third principle, '*[w]hen the situation has since changed in a way that would cause a university to undermine our Constitution and its foundational values if it were to adhere slavishly to parts of the policy framework, then a situation-sensitive and constitutionally-compliant policy-change would have to be effected'*.[87]

90. Accordingly, if a university's policy is inconsistent with the National Policy, then the university's policy is vulnerable to review. The only time a university can depart from the National Policy is if adherence would result in inconsistency with s 29(2) and the other constitutional provisions relevant to language policy.

91. Finally, the duties in the National Policy are not suspended pending the provision of funding by the Department of Higher Education and Training (**the Department**).

91.1. Paragraph 43 of the National Policy envisages the establishment of a funding model. The model will allow universities to submit language plans and, on approval by the Department, receive funding.

91.2. Paragraph 43 does not provide, either expressly or impliedly, that universities are only obliged to implement their plans after funding has been provided.

91.3. At best, it may be the case that the language plan submitted to the Department can include proposed steps conditional on funding. But an institution cannot

---

[86] *University of the Free State CC* para 74.

[87] *University of the Free State CC* para 66.

fail to comply with obligations under the National Policy pending funding from the Department.

The Purpose of the National Policy

92.   The National Policy's primary purpose is to '*provide a framework for the development and strengthening of indigenous languages as languages of scholarship, teaching and learning and communication at South African public higher education institutions, in particular, universities.*'[88]

93.   The National Policy defines indigenous languages as follows:

> '*Languages that have their heritage roots in Africa (also referred to as African languages in literature and some policy documents) and that belong to the Southern Bantu language family, where 'Bantu' is used purely as a linguistic term. An indigenous language is a language that is native to a region or country and spoken by indigenous people.*'

94.   SU is not bound by this definition in how it defines indigenous languages. Indeed, the definition is inconsistent with the conclusion of the Constitutional Court in *Gelyke Kanse* that Afrikaans *is* an indigenous language.[89] However, absent a successful legal challenge to the National Policy, SU must comply with it. This definition determines the meaning of "indigenous language" for purposes of the National Policy. While it is

---

[88] This purpose is set out in the covering notice to the National Policy. See also paragraph 11.1 of the National Policy.

[89] *Gelyke Kanse* at para 25 note 36 and para 46.

free to define Afrikaans as an indigenous language for its own purposes, it will not count as one in assessing compliance with the National Policy as it currently stands.

95.   The National Policy's primary purpose is thus narrow. The preamble to the National Policy mentions that it '*aims to promote and strengthen the use of all official languages across all functional domains of public higher education*'.[90] But the remainder of the National Policy focuses on indigenous languages and promoting in higher education indigenous languages (as it defines them), i.e. to enhance '*the status and roles of previously marginalised South African languages to foster institutional inclusivity as well as social cohesion*'.[91]

96.   The National Policy provides that it must be interpreted in line with the Constitution.[92]

97.   The National Policy is equivocal about whether it sets out requirements which are binding on all universities. On the one hand, consistently with the characterization of a language policy made in terms of ss 3 and 27(2) in *University of the Free State CC*[93] the National Policy is called a '*policy framework*'; and, it says, it '*provides guidelines for the development, implementation, monitoring and evaluation of institutional language policies*'.[94] Despite the non-peremptory connation of '*guidelines*', elsewhere the National Policy provides that universities '*are required to develop or revise their language policies to ensure alignment with this policy framework*'.[95]

---

[90] Preamble 7.

[91] The National Policy para 11.3.

[92] The National Policy para 14.

[93] *University of the Free State CC* para 70.

[94] See the covering notice to the National Policy and para 11.2 of the policy document.

[95] The National Policy para 41.

98.   In our view, the apparent contradiction between these parts of the National Policy, is resolved if it is interpreted in line with the four principles laid down the Court in *University of the Free State* described in para 89 above. The required 'alignment' is not slavish adherence. While public universities must have regard to the National Policy, they must develop their own policies in a way that is informed by the peculiarities and realities on the ground. A university must apply the National Policy in a way that promotes the s 29(2) right (with its limitations) in that university's particular context. In addition, a university may depart from the National Policy if adherence to it would result in the university acting inconsistently with the Constitution, including if its adherence to the National Policy would be inconsistent with any of the three main determinants of reasonably practicability, namely equity, practicability and/or the need to redress the results of past racially discriminatory laws and practices.

The Requirements of the National Policy

99.   The following eight main obligations can be distilled from the National Policy.

100.   <u>First</u>, the language policies of both public higher education institutions must:

100.1. consider constitutional imperatives such as access, equity and inclusivity;

100.2. be context sensitive to avoid racial discrimination, unjust exclusion, preservation of exclusivity; and

100.3. promote social cohesion and nation building.[96]

---

[96] The National Policy para 15.

101.	Second, public universities must take practical and positive measures to develop, elevate the status and advance the use of indigenous languages.[97] These positive measures must include:

101.1.	Implementing mechanisms to enhance the development and promotion of indigenous African languages as centres of research and scholarship;[98]

101.2.	Investing in the development of indigenous languages into languages of teaching and learning, scholarship, and research;[99] and

101.3.	Strengthening African Language Departments and Language Departments to explore and document strategies for intellectualizing indigenous languages for use in higher education.[100]

102.	Third, universities' language policies must indicate at least two official languages, other than the medium of instruction or language of teaching and learning, '*for development for scholarly discourse as well as official communication.*'[101] In our opinion, this cannot be interpreted as saying that once an official language becomes a language of teaching, the university is obliged to start promoting another official language. Instead, given the context of the National Policy, our interpretation of this duty is that it assumes that a university only has one language of instruction, and then obliges a university to advance two other languages. Otherwise, the duty is not reasonably practicable. It would also create a perverse incentive. A university would be encouraged not to elevate

---

[97] The National Policy paras 16 and 33.

[98] The National Policy para 25.

[99] The National Policy para 31.

[100] The National Policy paras 31 and 39.

[101] The National Policy para 24.

an indigenous language to one of instruction to avoid having to promote a further language. For SU, that means that the duty applies to only <u>one</u> official language in addition to its two official languages of teaching and learning – English and Afrikaans.

103. <u>Fourth</u>, the National Policy provides that all "*official internal institutional communication* must be conveyed in at least two official languages other than English, as a way of cultivating a culture of multilingualism".[102] We deal with this requirement separately and in detail below.

104. <u>Fifth</u>, language policies must include programs that encourage the study of international languages, in particular those languages that are important for the promotion of South Africa's cultural, trade and diplomatic relations. However, priority should be given to historically marginalized South African languages, particularly those which are official languages.[103]

105. <u>Sixth</u>, universities must assist in preparing sufficient language teachers, interpreters, translators and other language practitioners, to serve the needs of South Africa's multilingual society.[104]

106. <u>Seventh</u>, universities must be flexible in implementing English as a medium of instruction and provide support necessary for academic success to those whose home language is not English.[105]

---

[102] The National Policy para 32.

[103] The National Policy para 27.

[104] The National Policy para 28.

[105] The National Policy para 29.

107.   <u>Eighth</u>, universities must support the creation of a receptive institutional culture which embraces linguistic diversity.[106]

108.   For purposes of monitoring, evaluation and funding by the Department, universities' language policies must be supported by implementation and language development plans. The implementation plans are to be submitted to the Department for approval on or before a set deadline. The submission of language development plans is a prerequisite for funding from the Department. Institutions are further required to report annually to the Department on progress made in implementing their language policies and language development plans.[107]

Official Internal Institutional Communication

109.   Paragraph 32 of the National Policy provides that all "*official internal institutional communication must be conveyed in at least two official languages other than English, as a way of cultivating a culture of multilingualism*".[108] In the same paragraph, the National Policy provides: "*Institutions must consider all possible options to accentuate the use of indigenous African languages in official communication and ceremonies.*"[109]

110.   Before we consider the details of the terms used, we stress two contextual factors that influence the interpretation of this obligation.

111.   <u>First</u>, the National Policy provides some guidance on the purpose of the obligation. Providing this communication in three languages is intended "*as a way of cultivating a*

---

[106] The National Policy para 35.

[107] The National Policy paras 41-43.

[108] The National Policy para 32.

[109] The National Policy para 32.

culture of multilingualism". This places both a ceiling and a floor on the obligation imposed on universities by paragraph 32:

111.1. If providing a type communication in two additional languages will not promote "*a culture of multilingualism*", then the National Policy does not require it to be in three languages.

111.2. Second, it imposes a lower limit on the amount of communication hit by paragraph 32. The obligation cannot be so narrowly interpreted that it would not serve to cultivate multilingualism.

112. <u>Second</u>, like all official policies, the National Policy must be interpreted in line with the Constitution. In this instance, it must be interpreted in line with ss 6 and 29(2). What is notable about those provisions is they are not absolute, and acknowledge the practical impossibility of providing immediate equality between languages:

112.1. Section 6 requires government to "*take practical and positive measures to elevate the status and advance the use of*" indigenous languages, and entitles government to use any official language "*taking into account usage, practicality, expense, regional circumstances and the balance of the needs and preferences of the population*"; and

112.2. Section 29(2) – as we have set out in detail above – limits the right to higher education in the official language of choice to what is reasonably practicable.

113. An interpretation of the obligation in paragraph 32 of the National Policy that would impose an unreasonable financial burden on a university that requires it to divert significant resources from its primary task – providing higher education – would not be a constitutionally appropriate reading.

114. Turning to the phrase "*all official internal institutional communication must be conveyed*". The meaning of this requirement is not clear. The ambiguity lies both in the meaning of "*official internal institutional communication*" as well as "*convey*".

115. To begin with, the term "communication" has a wide ambit. It includes any message containing information. It includes letters. But it also includes more formal documents through which information is transmitted, like policies, guidelines and so on. In our view, this term also includes SU's website.

116. It appears that the National Policy envisages four direct substantive limits to the communication that must be conveyed in three languages.

117. The *first* substantive limit is that the communication must be "official". There are two relevant definitions of the term: "*relating to an authority or public body and its activities and responsibilities*"; and "*having the approval or authorization of such a body*".[110] In our view, the National Policy intends to include both limitations. The communication must relate to SU's activities, and it must have the approval of SU. It must reflect the position of SU, not just of a staff member.

118. The *second* limit is that the communication must be internal. Communication between organs of the University, or from the University to students or employees of the university is internal to the University. Communication to persons outside the university, like potential students, applicants for employment, third party contractors or the media, is external. While this is easy to apply in many cases, in some cases communication is both internal and external. For example, SU's website is intended both for internal use and external use. In our view, the National Policy is not intended

---

[110] *Concise Oxford English Dictionary* (12 ed, 2011).

to cover this type of communication. Its focus is on communication that is purely internal. We expand on these reasons when we consider the reason for the obligation below.

119. The *third* limit is more complicated. "Institutional" communication is capable of various meanings. It must mean something other than "official" as that is a separate qualifier and each word must be given meaning.

120. In our view, institutional communication is communication that:

120.1. Is made by SU as a university. Institutional communication does not include communications by the constituent parts of SU – its faculties, departments, support structures etc. It also does not include communications by subsidiary bodies like the Student Representative Council, Institutional Forum or Convocation. The obligation only applies to communications made by those governing organs that can speak on behalf of the University as a whole. As set out in its Statute,[111] those are the Chancellor, Council, Senate, Rector, Vice-Rectors, Chief Operating Officer and Registrar. In each of their spheres, these office-bearers and entities communicate on behalf of the University as a whole.

120.2. Is addressed to the entire university. The communication is institutional in the sense that it is disseminated institution-wide. For instance, a letter from the Rector to the entire university would be institutional. But so too would a policy of the university – adopted by Council and Senate – that affects the entire University.

---

[111] Government Notice 1062 in *Government Gazette* 42636 of 16 August 2019.

121. In short, institutional communication is a communication: (a) by the Chancellor, the Council, the Senate, the Rector, a Vice-Rector, the Chief Operating Officer or the Registrar; (b) to the entire University.

122. The *fourth* limit is in the words "must be conveyed". The National Policy does not require that existing documents must be in three different languages. The duty is only that communication must, in the future, "be conveyed" in three languages. This imposes a temporal limitation. Only communication going forward should be trilingual. There is no need to go back and translate internal, official, institutional communication that is not conveyed after 1 January 2022. However, documents that are still in use and that are repeatedly conveyed after that date – like policies that remain in force – must be made available in three languages.

123. To sum up, we understand official internal institutional communication at SU, as envisaged in paragraph 32 of the National Policy, as follows: All communications made after 1 January 2022 by the Chancellor, Senate, Council, Rector, Vice-Rectors, Chief Operating Officer or Registrar to the entire University. It does not include SU's website as a whole because: (a) it is not made by the Senate, Council or Rector; (b) it is both an internal and an external communication; and (c) if the National Policy had intended that it include the whole website, it would have said so.

124. If however any of the communications by the Chancellor etc just mentioned are posted on the website, the relevant part must comply with this aspect of the National Policy. This includes posting (conveying) existing policies after 1 January 2022. Those will therefore need to be translated because SU will continue to convey them.

125. We must, however, sound a note of caution: the National Policy is far from clear. The term "official internal institutional communication" is capable of a variety of

interpretations. In our first opinion we adopted a wider interpretation that included communications by organs of SU. On closer consideration that interpretation was flawed because it did not account for all four of the limits discussed above. We are confident the narrower interpretation of the obligation in this opinion better interprets the National Policy.

126. But our earlier view demonstrates that there are alternative interpretations that are wider. There is a risk that if SU adopts our narrow interpretation, it may be found to have fallen short of its obligation under the National Policy. There are two ways to alleviate this risk:

126.1. SU could communicate directly with the Department of Higher Education to ascertain whether, in its view, SU's proposal would comply with the National Policy. While the Department's view is not determinative of what the National Policy means,[112] it is one of the entities that may challenge SU on its approach.

126.2. While limiting its interpretation of the immediate obligation, SU could build in a commitment to gradually translate other communications that fall outside our interpretation of "official internal institutional communication". For example, it could translate key portions of the website, without committing to translate the entire website.

---

[112] *Marshall and Others v Commission for the South Africa Revenue Service* [2018] ZACC 11; 2018 (7) BCLR 830 (CC); 2019 (6) SA 246 (CC).

IV   THE FACTUAL CONTEXT

127.   The relevant factual context can be divided into three strands:

127.1. The current demographics of SU compared to 2016;

127.2. The implementation of the 2016 Policy; and

127.3. The costing of the 2016 Policy, the 2021 Policy and alternatives to the 2021 Policy.

Current Demographics

128.   In this section, we review the key statistics provided to us relating to staff and student demographics.[113] These statistics impact directly on what is reasonable and practicable for SU. We deal first with **staff** demographics, and then with **student** demographics.

Staff Demographics

129.   The key question for staff is how many are able to teach in English, Afrikaans and/or isiXhosa? SU has provided us with a *Report on Staff Language Proficiency* (**Staff Language Report**). The Report is based on an online staff language proficiency survey done in December 2020 and January 2021. 1 261 staff – out of 4 543 who were contacted – completed the survey.

---

[113] In our first opinion, we were provided with the 2016-2020 statistics. For the purposes of this opinion, we have been provided with a more detailed statistics for 2017-2021. The differences between the two were relatively minor and do not affect our analysis.

130. There are three key factors:

    130.1. Home language;

    130.2. General language proficiency; and

    130.3. Proficiency to teach and assess.

131. <u>First</u>, regarding home languages of staff:

    131.1. 63.4% of staff identified one of their home languages as Afrikaans;

    131.2. 43% of staff identified one of their home languages as English;

    131.3. 3.8% of staff identified one of their home languages as 'Other (International)';[114]

    131.4. 3.4% of staff identified one of their home languages as isiXhosa; and

    131.5. 1.2% of staff identified one of their home languages as isiZulu.

132. <u>Secondly</u>, with respect to general proficiency of staff in speaking, reading, and writing South African official languages:

    132.1. 98.5% indicate language proficiency when speaking English, 85.6% Afrikaans, 8.4% isiXhosa and 4% isiZulu;

    132.2. For reading, the percentages are: 98.5% for English, 87% Afrikaans, 5% isiXhosa and 3.5% isiZulu; and

---

[114] These other languages were identified as follows: Dutch; Flemish; French; German; Hindi; Italian; Portuguese; Romanian; Shona; Tamil; and Yoruba.

132.3. For writing, 98.8% English, 77.3% Afrikaans and 4.1% isiXhosa.

133. The overwhelming majority of staff are thus proficient in English, with a slightly smaller (but still significant) majority proficient in Afrikaans. Only a small minority consider themselves proficient in isiXhosa and an even smaller minority in isiZulu (with even smaller percentages for all of the other South African official languages).

134. <u>Thirdly</u>, staff who taught undergraduate courses were asked to assess their language proficiency in presenting, preparing study material for, and assessing undergraduate modules. The responses were as follows:

134.1. Nearly all surveyed teaching staff indicate that they are comfortable presenting undergraduate classes in English (97,3%), while 58.4% indicate they are comfortable presenting in Afrikaans, and 0.7% in isiXhosa. As 56.6% said they were able to present in English <u>and</u> Afrikaans, it means almost all respondents who indicated they were comfortable presenting in Afrikaans (all but 1.8%) were also comfortable in English.

134.2. Similar percentages are indicated for the preparation of undergraduate learning materials, with 98.2% comfortable doing so in English, 54.7% in Afrikaans, and 1.1% in isiXhosa. 53.6% of staff could prepare in English and Afrikaans, i.e. all but 1.1% of those comfortable in Afrikaans.

134.3. As for preparing and marking undergraduate assessments, 98.7% responded they were comfortable doing so in English, 62.1% in Afrikaans, and 0.9% in isiXhosa. 60.8% could assess in English and Afrikaans, i.e. all but 1.3% of those comfortable in Afrikaans.

135. The self-perceived language proficiency of academic staff providing postgraduate supervision is as follows: 98.1% are comfortable supervising in English, 50.7% in Afrikaans, and 1.1% in isiXhosa. 50.1% were comfortable in both English and Afrikaans, i.e. all but 0.6% of those comfortable in Afrikaans.

136. Interestingly, the percentage of staff who believe they are proficient to teach and assess in Afrikaans and isiXhosa is lower than the staff who have those as their home language. There are, therefore, staff whose home language is Afrikaans or isiXhosa, who are nonetheless unable to teach or assess in their home language.

137. <u>In summary</u>, almost all academic staff are comfortable teaching in English. While a significant majority consider themselves proficient to speak, read and write in Afrikaans, a lower proportion – between 54% and 62% – consider themselves proficient to teach and assess in Afrikaans. Almost all those staff who can teach and assess in Afrikaans can also do so in English. Only around 1% are comfortable teaching and assessing in isiXhosa.

Student Demographics

138. The central issues relating to students' demographics are:

   138.1. The demand for learning in the three languages;

   138.2. The ability of students to learn in those languages; and

   138.3. Correlations between students' language proficiency or preference and their race.

139. With respect to students, the key statistics are contained in the SU Division for Information Governance's statistical report on the language profile of students enrolled at SU between 2017 and 2021 (**Student Language Profile Report**).

140. We focus on undergraduate students, and address postgraduate students separately. In doing so, we look both at the position in 2021, and compare it to earlier years. We address the following issues:

140.1. Students' home language;

140.2. Students' preferred language for teaching and learning;

140.3. Students' ability to learn in Afrikaans, English and isiXhosa;

140.4. The position of postgraduate students;

140.5. How the demographics of SU's students compares to the demographics of youth (age 15 to 24 years) in the Western Cape; and

140.6. Comparing SU's demographics to other universities in the Western Cape, and nationally.

141. First, with respect to home language, in 2021:

141.1. 48.7% of undergraduate students identify English as their home language;

141.2. 37.4% Afrikaans;

141.3. 4.8% isiXhosa (up from 2.8% in 2017);

141.4. 6.8% other official South African languages; and

141.5. 2.3% other international languages.

142. Compared to 2017, English and other official South African languages increased by about 1% and 2% respectively, whereas Afrikaans declined by about 5%.

143. We have been provided with the following statistics regarding undergraduates' race and home languages:

143.1. 57.4% of undergraduates are White, 19.8% Coloured, 17.6% Black African, 3.6% are Indian/Asian.

143.2. Of White undergraduates, about 53% have Afrikaans and about 46% have English as their home language (2019 statistic).

143.3. Of Coloured undergraduates, about 32% have Afrikaans and about 68% have English as their home language (2019 statistic).

143.4. Of Black African undergraduates, about 60% have an official language other than Afrikaans or English as their home language (2019 statistic).

144. The statistics we have been given do not break down the other official South African languages. If they are available, those statistics should be provided, so that the racial demographics of undergraduates whose home language is not English or Afrikaans, specifically the percentage of undergraduates who are isiXhosa speakers, are known to persons commenting on the Draft Policy and especially to Senate and the Council when determining whether to adopt it as SU's new language policy.

145. Secondly, the following percentages of undergraduate students indicated that they prefer English as the language of teaching and learning:

145.1. 80.8% of all undergraduates (increased from 65.6% in 2016);

145.2. 99.4% of undergraduates with a home language other than Afrikaans;

145.3. 49.5% of undergraduates with Afrikaans their as home language;

145.4. 99.7% of Black African undergraduates;

145.5. 99.7% of Indian/Asian undergraduates;

145.6. 80.7% of Coloured undergraduates; and

145.7. 73.8% of White undergraduates (compared to 56.8% in 2016).

146. There is a steady decline in the overall demand for Afrikaans as the preferred language of teaching and learning since 2017, as reflected in this table from the Student Language Profile Report.[115]
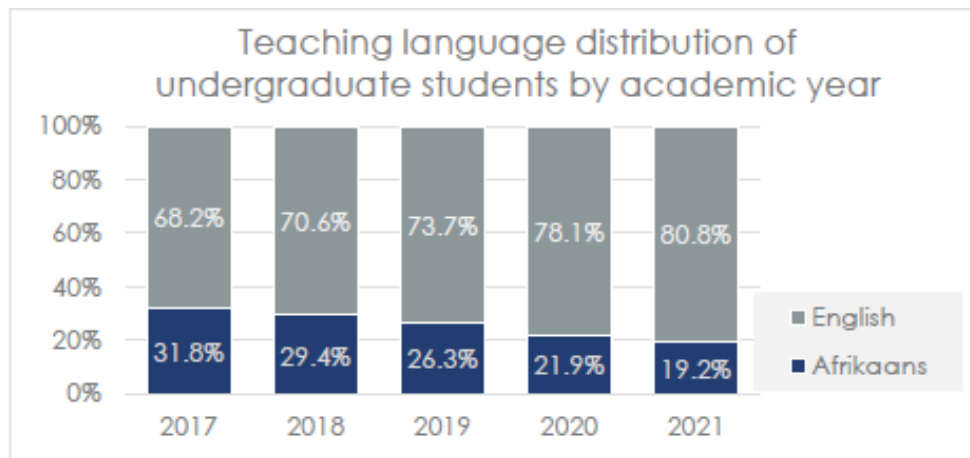
147. A similar pattern holds for newcomer first years, where demand for Afrikaans tuition has decreased from 29.7% in 2017 to 20.4% in 2021.

148. The decline also exists for Afrikaans speakers. In 2017, 72.8% of Afrikaans home language undergraduates wanted to be taught in Afrikaans. In 2021, that number is

---

[115] Figure 20, p 6.

50.5%. For new first years, the trend is similar: in 2017 74.2% wanted to learn in Afrikaans, in 2021 that number is 53.9%.

149.	This preference for English holds across all faculties. The highest percentages of undergraduates per faculty who prefer Afrikaans as the language of teaching and learning, are 38.8% in the AgriSciences, 37.7% in Education, 35.5% in Theology and 26.2% in Engineering. In all other faculties, less than 20% of students prefer Afrikaans as the language of teaching and learning.

150.	We do not know the cause of this declining demand. It could be argued that it is driven, in part, by the 2016 Policy. However, demand was declining even before the 2016 Policy was implemented. It is likely caused by a wide combination of factors. Whatever the cause, it is the reality SU confronts.

151.	Thirdly, with respect to English and Afrikaans as Grade 12 subjects for newcomer first-years in 2021:

151.1.	99.9% of all students had done English in Grade 12, either as a home language (59.7%), a first additional language (33.4%) or 'Other' (6.8%).[116] 99.9% of Black African students had done English, either as a home language (43.9%), first additional language (40.8%), second additional language (0.2%) or 'Other' (15.0%). 100% of all other race groups had English as a Grade 12 subject.

151.2.	85.8% of all students had done Afrikaans, either as a home language (34.7%), first additional language (48.8%), second additional language (0.2%) or 'Other' (2.1%). 36.3% of Black African students had done Afrikaans, either as a home

---

[116] In this context, we understand 'Other' to mean as a second or further additional language.

language (1.9%), first additional language (30.5%), second additional language (0.8%) or 'Other' (3.1%).

151.3. 98.5% of Coloured, 88.4% of Indian/Asian, and 95.8% of White students had Afrikaans in some form as a subject in Grade 12.

151.4. Only 224 (4.3%) of the newcomer first-years of 2021 had isiXhosa as a Grade 12 subject, of whom 155 (3.0%) had it at Home Language level. Black African newcomer first-years accounted for the highest proportion with isiXhosa as subject (86.2%). A total of 17.7% of Black African newcomer first-years had isiXhosa at Home Language level, and 4.0% had it as First Additional Language.

152. In absolute numbers, of 873 Black African students, 317 had some Afrikaans in Grade 12, while 556 had none. For all races, 743 had no Afrikaans in Grade 12. Black African's make up 75% of those students.

153. These statistics demonstrate that:

153.1. Virtually all incoming first year students did English in Grade 12.

153.2. Nearly all Black African students prefer English for learning.

153.3. Two-thirds of Black African students did not do Afrikaans in any form in Grade 12. They make up 75% of the students who did not learn Afrikaans in Grade 12.

154. Fourthly, the statistics for postgraduate students are not significantly different. The home language of postgraduate students in 2021 were:

154.1. 47.7% English;

154.2. 30.2% Afrikaans;

154.3. 5.6% isiXhosa; and

154.4. 16.5% other South African languages and international languages.

155. These have changed slightly since 2017, when 36.5% of postgraduate students spoke Afrikaans as their home language, 44.1% spoke English and 4.9% spoke isiXhosa.

156. The Student Language Profile Report breaks down these home language figures by honours, masters and doctoral students, and by faculty. There are no meaningful differences by qualification type. There are similar variations between faculties as there are for undergraduate students.

157. The Student Language Profile Report does not include statistics on the preferred language of teaching and learning for postgraduate students, or their language proficiency. We return to this below.

158. The racial demographics of postgraduate students in 2017 compared to 2021 were relatively stable:

158.1. In 2017, 51.3% of postgraduate students were White. That reduced to 47.1% in 2021;

158.2. In 2017, 30.8% of postgraduate students were Black African. That increased to 32.6% in 2021; and

158.3. In 2017, 14.8 % of postgraduate students were Coloured. That increased to 15.2% in 2021.

159.   Fifthly, when deciding on the 2016 Policy, SU compared its demographics to that of persons aged 18 to 24 in the Western Cape. The Western Cape is SU's main feeder area, with 60.1% of newcomers in 2021 coming from the Western Cape. In our opinion on the 2016 Policy we compared SU's demographics to that of the Western Cape based on the 2011 Census. The comparison was to assess whether SU had a representative number of English and Afrikaans speaking students.

160.   The Student Language Profile Report contains a table illustrating the Western Cape Province's home language distribution statistics for persons between 18 and 24 years of age in both 2011 and 2016. The data is from Statistics South Africa's 2011 Census and its 2016 Community Survey:
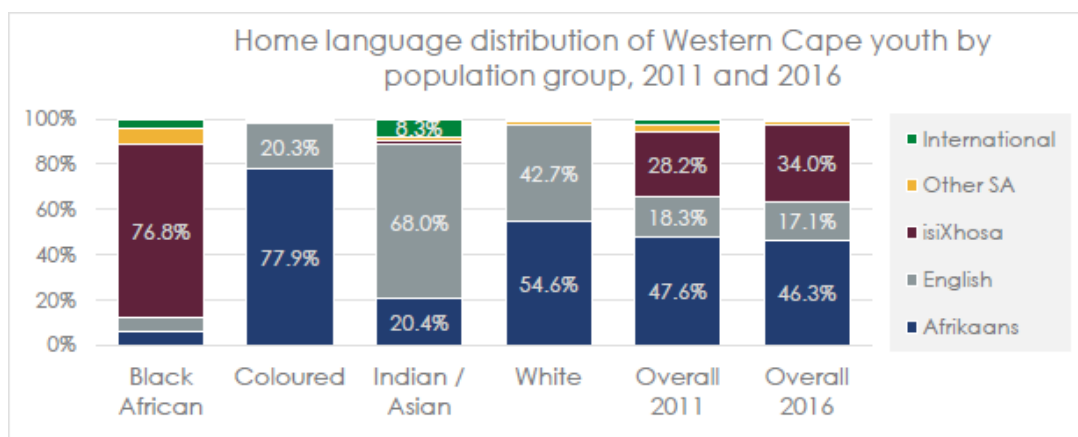
161.   The table reveals that in the Western Cape, for 15-24 year-olds:

161.1. In 2011, 47.6% spoke Afrikaans as a home language. By population group, 6% of Black African persons, 77.9% of Coloured persons, 20.4% of Indian persons, and 54.6% of White persons spoke Afrikaans as a home language. The total percentage of Afrikaans home language speakers reduced to 46.3% in 2016.

161.2. In 2011, 18.3% of people spoke English as a home language. By population group, 6.4% of Black African persons, 20.3% of Coloured persons, 68% of Indian persons, and 42.7% of White persons spoke English as a home language. The total percentage of English home language speakers reduced to 17.1% in 2016.

161.3. In 2011, 28.2% of people spoke isiXhosa as a home language. By population group, 76.8% of Black African persons, 0.3% of Coloured persons, 1.6% of Indian persons, and 0.4% of White persons spoke isiXhosa as a home language. The total percentage of Afrikaans home language speakers increased to 34% in 2016.

162. Bearing in mind that there are significant differences in the demographics of students in higher education versus the entire population in the age group 15-24, it appears that SU does not have a representative number of English, Afrikaans, and isiXhosa speakers:

162.1. 48.7% of undergraduate students at SU identify English as their home language, compared to 18.3% in 2011 and 17.1% in 2016 in the Western Cape.

162.2. 37.4% of undergraduate students at SU identify Afrikaans as their home language, compared to 47.6% in 2011 and 46.3% in 2016 in the Western Cape.

162.3. 4.8% of undergraduate students at SU identify isiXhosa as their home language, compared to 28.2% in 2011 and 34% in 2016 in the Western Cape.

163. Sixthly, the statistical report also provides a racial and language comparison with the other Western Cape universities (in 2019), from which it appears that:

163.1. Significantly more undergraduate students at SU had Afrikaans as a home language than at both UCT and UWC. The Afrikaans home language distribution of White and Coloured undergraduates of SU is comparable to the national distribution. The same pattern holds for newcomer first years. For postgraduate students, SU had more Afrikaans-speaking students (both White and Coloured) than the national average.

163.2. 59.8% of the Black African undergraduates at SU had an official SA language, other than Afrikaans or English, as their home language, compared to 82.3% and 87.5% of undergraduates at UCT and UWC respectively.

163.3. Amongst all South African universities, after the North West University, SU has the second highest numbers (6 588 White and 1 304 Coloured) of undergraduate students with Afrikaans as their home language. That constitutes 17.4% of all Afrikaans speaking undergraduates at SA universities.

164. There are three gaps in the demographic information about students provided to us:

164.1. SU previously conducted language proficiency tests for first year students. Since 2017 it has not conducted them. SU has instead relied on whether students studied a language in Grade 12 as a proxy to assess proficiency.

164.2. It appears that SU does not assess students' preferred language of learning, but only whether they preferred English or Afrikaans. Whether students would prefer a language other than English or Afrikaans, like isiXhosa, ought in future to be determined given the discussion below of the implications of the National Policy for SU's new language policy.

164.3. The statistics provided to us do not contain the preferred languages of teaching and learning of postgraduate students or information about their capability to study in English, Afrikaans and isiXhosa.

165. We have based our analysis on the following assumptions:

165.1. The results of the proficiency tests would roughly track the number of undergraduate students that have taken English and/or Afrikaans as a Grade 12 subject.

165.2. The vast majority of the SU undergraduate students who indicate proficiency in, or desire to be taught in, another African language are proficient in, or wish to be taught in, isiXhosa.

165.3. The vast majority of SU postgraduate students are proficient in English and, as with undergraduate students, a similar majority wish to be taught in English.

166. Based on the statistics we have seen as well as those assumptions, the central demographic facts that motivated the 2016 Policy remain true:

166.1. The majority of Black African students cannot learn in Afrikaans;

166.2. The majority of the students who cannot learn in Afrikaans are Black African; and

166.3. Virtually all of Afrikaans-speaking students are able to learn in English.

167. In addition, the following facts seem relevant:

167.1. There is a declining demand for Afrikaans teaching and learning – and an increasing demand for English learning – even amongst Afrikaans home

language speakers. This is true for both White and Coloured Afrikaans speakers. While SU's racial demographics have remained roughly constant, the number of students who want to learn in Afrikaans has declined.

167.2. The number of White and Coloured students whose home language is Afrikaans is higher at SU than at the other Western Cape universities. The number of Black African students whose home language is English or Afrikaans is significantly higher at SU than at the other Western Cape Universities.

Implementation of the 2016 Policy

168. We were provided with information relating to the implementation of the 2016 Policy. The information took the form of surveys, reports and feedback from faculties on implementing the 2016 Policy.

169. Overall, the feedback was positive. The following three points are noteworthy.

170. <u>First</u>, two undergraduate student surveys were conducted in 2017 and a student and staff survey was conducted in 2019. Although the 2019 survey had a low response rate for undergraduates (4.37%), together the surveys show prominent levels of student satisfaction with the implementation of the 2016 Policy, including the percentage of lectures available in students' language of preference. The staff survey shows similar levels of satisfaction.

171. The noteworthy statistics from the surveys with respect to undergraduates includes:

171.1. Despite the higher number of Afrikaans respondents (52% compared to 35% English), in 2019 there was a preference for English lectures (66%, up from

61% in 2017), tutorials (63%, up from 61%) and learning material (71%, up from 65%).

171.2. In the 2019 survey there was a downward trend in participants' preference for Afrikaans-only lectures and tutorials, with 19% of respondents (down from 24% in 2017) indicating a preference for Afrikaans-only lectures and tutorials, and 15% of the respondents (down from 21% in 2017) indicating a preference for Afrikaans-only learning material.

171.3. More than 85% of the respondents in 2019 indicated that the lectures, tutorials/ practicals/ clinical sessions and learning material were available in their language of preference.

171.4. More than half of the respondents indicated that some of their modules were taught in parallel-medium.

171.5. In 2019, 78% of the respondents indicated that their parallel-medium courses were implemented as communicated by their lecturer.

171.6. In the 2017 and 2019 surveys more than half of the respondents indicated that some of their modules were presented in both Afrikaans and English during the same class session, with 18% of those students having more than 5 dual-medium courses.

171.7. The overwhelming majority of the respondents (more than 80% agreed or strongly agreed) felt in 2017 and 2019 that they could express themselves in their language of preference in living, co-curricular and administrative environments.

171.8. A minority of the respondents (around 15%) indicated that they had a reason to report dissatisfaction with language-related matters in the learning, living, co-curricular and administrative environments. In the learning environment, most of those respondents felt that their grievance was adequately addressed (91%). The same is not true of complaints in the living (38%), co-curricular (20%), and administrative environments (26%).

172.   With respect to staff (there was a response rate of 13.7% in 2019), the 2019 survey has the following noteworthy statistics.

172.1. Roughly half of the respondents (48%) indicated that they were to a large extent familiar with the Language Policy, followed by the respondents (39%) indicating that they were only familiar to some extent. The minority of the respondents (13%) indicated that they were not at all familiar with the Language Policy.

172.2. Roughly half of the respondents (47%) indicated that they used the dual-medium option in teaching and learning. However, only 60% of the lecturers indicated that they provided summaries in Afrikaans in all their modules, and only 35% provided interpreting.

172.3. Only a very small minority (7%) of the respondents indicated that their students complained about their implementation of the Language Policy.

172.4. With respect to staff's working environment, Afrikaans is preferred mostly in informal meetings (27%), and English is preferred mostly in the research environment (64%). Across all aspects of the working environment, English is the most preferred language by staff.

172.5. Around 70% of all respondents strongly agreed or agreed that they could express themselves in all environments, except for the research environment (where 63% strongly agreed or agreed) and postgraduate environment (where 64% strongly agreed or agreed).

173. Second, as required by paragraphs 8.1 and 8.2 of the 2016 Policy, the Vice-Rector: Learning and Teaching prepares an annual report to Senate and the Council, after receiving and considering the language implementation reports of the faculties and the responsibility centres. These reports are also discussed annually at meetings of SU's Language Implementation and Management Committee (**the LIMC**) so as to advise the Vice-Rector: Teaching and Learning.

174. An analysis of the Language Implementation Plans of the faculty and professional academic support service (**PASS**) environments from 2017 to 2020 points to the following positive trends:

174.1. The annual reporting and planning procedures have allowed faculties and professional academic support services to reflect on how they promote multilingualism in their respective environments. The LIMC's feedback on these reports further stimulates discussions within their environments.

174.2. Faculties reported few complaints from students and staff.

174.3. There are many examples of good practice and creative and original techniques to promote multilingualism in the faculty reports, e.g., the use of dual-medium tutorials, translanguaging projects, interpreting some foundational modules to isiXhosa, etc.

174.4. Faculties report fewer deviations from the 2016 Policy and where there were minor deviations, valid explanations are provided for these deviations.

174.5. The required PASS reports on implementation have led to a focus on how environments engage with their clients and stakeholders in a multilingual context. Recommendations such as creating a multilingual environment in meetings and the redesign of the SU website are direct results of these reports.

174.6. The shift to online learning prompted by Covid-19 has unlocked new possibilities and opportunities for multilingualism that should be investigated and harnessed. Fully translated podcasts in some modules are advantageous for students and a valuable resource for promoting multilingualism. Podcasts also provide opportunities for additive bilingualism, as students can go through the podcast again in their own time and make sure that they know the terminology.

175. There were no serious issues with implementing the 2016 Policy. The reports do note, however, the following concerns:

175.1. Faculties reported concerns with accurate and correct translations of assessments, core notes and PowerPoint presentations. The LIMC recommends that the faculties use their Language Implementation funds, which are allocated to them annually.

175.2. Fewer students are comfortable tutoring in Afrikaans.[117]

---

[117] 2017 report, Faculty of Arts and Social Sciences.

175.3. Fewer lecturers can lecture and mark assessments in both English and Afrikaans.[118] The LIMC recommends that faculties contract external assessors to grade assessments in Afrikaans. But some faculties are concerned that students can pass courses without ever being graded by the convenor.

175.4. Many students whose home language is not English choose the English lecture stream when offered in parallel. Faculties are making a conscious effort to support Afrikaans-speaking students by means of tutorials, podcasts and other opportunities. In some instances, additional support is provided in isiXhosa.

175.5. The language options of professional bodies (e.g. the South African Institute of Chartered Accountants) impact language usage at university level.

175.6. Funding remains a concern for faculties, although funding is provided annually to faculties and there does appear to be some underspending.

175.7. The uptake of interpreting services has declined over the past four years and concerns were raised by the Faculties of Education, and Medicine and Health Sciences about those services' effectiveness. However, since emergency remote teaching, learning and assessment started in April 2019 in response to the Covid-19 pandemic and the nationwide shutdown, the interpreters have been engaged in making podcasts (also referred to as 'dubbing' of lectures), which as mentioned below has advantages for promoting multilingualism.

176. The two chief concerns arising from the reports are (a) the effectiveness of translation; and (b) the decline in demand and capacity for Afrikaans teaching. Overall, these

---

[118] See 2017 report and Law 2018 report.

concerns are not widespread and appear limited in nature. Moreover, the overwhelming response from students and staff is <u>not</u> that the 2016 Policy prejudices Afrikaans-speaking students or fails to contribute to the promotion of Afrikaans.

177. <u>Third</u>, faculties must specify in their annual Language Implementation reports which of the three language options they will employ in the following year for their undergraduate modules. The Division for Information Governance prepares an overview for the SU undergraduate offering annually.

178. The latest overview shows that there has been a decrease in the percentage of parallel-medium options since the implementation of the 2016 Policy in 2017 (17.8% for 2021, down from 20.7% in 2017), there has been a decrease in the percentage of dual-medium options since 2017 (63.2% for 2021, down from 64.6%% in 2017) and there has been a corresponding increase in the percentage of single-medium options (19% for 2021, up from 14.5% in 2017). None of these changes suggests that a fundamental change in the policy is warranted at this juncture, particularly since the percentages of each option have fluctuated from year to year.

179. The implementation of the 2016 Policy does not appear to have materially altered the general percentages of classes offered by means of each of the three options either. If 2021 is compared with the first year of implementation of the 2014 Policy, the percentage of parallel-medium options has increased by less than one percent (17.8% for 2021, 16.6% in 2014), the percentage of dual-medium options has increased by less than one percent (63.2% for 2021, 62.9% in 2014), and the percentage of single-medium options has decreased by 1.4% (19% in 2021, 20.4% in 2014).

180. When considering these statistics, however, it is important to bear in mind that the 2014 Policy's dual-medium option (the T-option) favoured Afrikaans (at least 50%), whereas

the 2016 Policy's dual-medium option favours English (during each lecture all information is conveyed in English, with summaries or emphasis of content given in Afrikaans). What these statistics also do not show is the relative periods of time in which lecturers use English and Afrikaans in lectures delivered in accordance with the 2016 Policy's dual-medium option, or the percentages of English and Afrikaans lectures making up the single-medium options. These figures, if available, should be considered by SU when reviewing the 2016 Policy.

181. While the information provided to us paints an overall positive picture regarding the 2016 Policy's implementation, further data relating to the impact the 2016 Policy has had on Black African students, if available, should be collated and considered. The Constitutional Court considered the impact the 2014 policy had on Black African students as a key reason for why the 2016 Policy was constitutional.[119] If it can be shown that the 2016 Policy has addressed that previous impact, and the measures aimed at increasing the access and promoting success of Black African students in the 2021 Policy are materially the same as in the 2016 Policy, then that would strongly support a finding that the 2021 Policy is constitutional.

---

[119] *Gelyke Kanse CC* para 28:

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

182. Examples of further data that could demonstrate that the 2016 Policy was – and the 2021 Policy will likely be – effective at addressing marginalization of Black African students are:

182.1. Pass rates and grades by race in faculties that reported successful implementation of the 2016 Policy;

182.2. Student involvement by race in SU student societies, student governance (both university-wide and in residences), and sport; and

182.3. The results of any surveys in which Black African students have been asked whether they experience marginalisaton or exclusion at SU because of language.

Costing of the 2016 Policy, the 2021 Policy, and Alternatives

183. One of the key considerations in considering whether alternatives to the current policy are reasonably practicable is their financial cost. This section summarises SU's assessment of the cost of various options for its language policy.

184. SU has prepared a report entitled *Costing of Three Language Policy scenarios* (**the Costing Report**). It was finalized on 27 May 2021. It assesses the costs of the current, 2016 Policy, and three alternative scenarios:

184.1. The cost of the 2016 Policy;

184.2. The cost of the Draft 2021 Policy;

184.3. The cost of full, face-to-face parallel medium teaching; and

184.4. The cost of full, technology-mediated parallel medium teaching.

The Cost of the 2016 Policy

185.   The total budgeted *direct* cost of implementing the 2016 Policy in 2021 is R44 906 291. This constitutes 0.7% of SU's total integrated budget (of about R6.9 billion). It is made up of awards to faculties for parallel medium teaching (**PMT**) and translation, contributions to the Language Centre, interpretation and sign language services, and the costs of translation and editing. The money comes from the R318.5 million discretionary part of SU's main budget. Implementing the current language policy makes up 14% of the discretionary part of the main budget.

186.   The implicit staff related costs of implementing the 2016 Policy are estimated at R90 million per year. This is calculated by estimating the amount of time that academic and non-academic staff spend on activities related to implementing the language policy, such as translating lecturing materials, exam papers, reports, presentations and correspondence. Consequently, SU estimates the total cost of implementing the 2016 Policy in 2021 at about R135 million.

The Cost of the 2021 Policy

187.   The cost of implementing the Draft 2021 Policy will be roughly the same because the general specifications for the use of language for teaching and learning are largely the same as in the 2016 Policy. The Costing Report does not directly calculate the cost of the Draft that we consider in this opinion. However, as noted above, there are no significant changes that would be likely to alter the assessment of its cost.

188. It is likely that a significant additional cost of implementing the Draft 2021 Policy will arise from the requirement in paragraph 32 of the National Policy that SU provide all "*official internal institutional communication*" in two official languages in addition to English. That cost is independent from whether SU maintains its current approach to language for teaching and learning, or moves to parallel medium (with technology or not). It must be incurred because of the National Policy, not because of any decision SU may make.

189. SU's Costing Report calculates the cost of compliance with this obligation, based on our earlier understanding of "*official internal institutional communication*" as set out in our March preliminary opinion, namely that it entails all codes, guidelines, policies, regulations and statutes; SU's website; official communications from the Rectorate and Council; all Senate and Council documents; the Annual Report; and the annual Calendar. The Costing Report estimates that:

189.1. The initial cost of translation of all of these documents so that they are available in Afrikaans, English and isiXhosa would be R3 648 901. However, the cost of translating all existing codes, guidelines, policies, regulations and statutes would be only R589 651.

189.2. The annual cost going forward would be R13 814 464. If recovered from non-NSFAS[120] students' fees, the annual cost would require a R820, or 1.6%, increase per student.

---

[120] National Students Financial Aid Scheme, a bursary scheme funded by the Department of Higher Education and Training for those who do not have the financial means to fund their studies and cannot access bank funding, study loans or bursaries.

190.   While the cost of compliance with paragraph 32 of the National Policy as we now understand it,[121] will be different, it will doubtless nevertheless still be significant.

The Cost of Full Face-to-Face PMT

191.   The cost of moving to full face-to-face PMT for all undergraduate modules which are not exempt from the ordinary language specification rules under the 2016 Policy because they are modules about a language, will be very large indeed. To determine this cost, the Costing Report focuses on the non-exempted undergraduate modules which are not currently offered in parallel-medium. It determines – based on data from January 2021 – that there are 897 such modules and with 82 137 module enrolments (i.e. students enrolled for them) not currently being taught in parallel medium. This amounts to 3 409 lectures per week. 10 395 or approximately 45.6% of undergraduate students, are enrolled in these modules. The Costing Report calculates that SU would require an additional 4 069 seats in order to offer full face-to-face PMT.

192.   The Costing Report then assesses the cost of providing those additional seats, and the additional lecturers to teach the additional classes.

193.   The <u>infrastructure costs</u> for full face-to-face PMT are:

193.1.   The cost of constructing the additional buildings would be R636.7 million. The annual cost of repaying a 20-year loan for that amount would be R60.102 million.

---

[121] It will be recalled that we have now interpreted "*official internal institutional communication*" to mean all communications made after 1 January 2022 by the Chancellor, Senate, Council, Rector, Vice-Rectors, Chief Operating Officer or Registrar to the entire University.

193.2. There would be further indirect operational costs (e.g. electricity usage, insurance, property tax) of R6.870 million per year, and annual lifecycle costs (including the cost of maintenance) of R9.417 million.

193.3. Consequently, the total annual infrastructure cost would be R76.386 million per year for the next twenty years.

194. These estimates assume that there would be sufficient physical space available for construction in the campus, and that SU would be able to obtain all the necessary planning permissions. Obtaining that space will, itself, be a costly process.

195. The staff costs for full face-to-face PMT are:

195.1. For additional staff capacity to teach the additional lectures in the 897 modules, the total cost is R96.839 million per year.

195.2. In addition, there is an implicit staff related cost. This is the time that existing staff will need to spend to translate documents to permit full PMT. The Costing Report estimates this cost at R90 million per year. This is made up of R52 million for academic staff, and R38 million for non-academic staff.

195.3. Consequently, the total annual staff cost would be R186.839 million per year.

196. The total cost of full face-to-face PMT is therefore **R263.228** million per year.[122]

197. This would likely have to be funded by an increase in student fees (we consider in Part IV the possibility of funding the cost through donations). The increase could only be

---

[122] The Costing Report does not appear to factor in the saving SU would make from not having to provide simultaneous translation services. This is costed at R6.872 570. However, even if this is factored in, it would only reduce the total cost by 2.7%.

recovered from non-NSFAS students because NSFAS students' fees are capped. That amounts to approximately 16 845 students. Using an average fee of R50 000 per year and based on an ongoing cost per year of R256.214 million (i.e. about R7 million less than we have calculated), the Costing Report estimates that funding full face-to-face PMT by increasing these fees would amount to an additional **R15 210 per student, or 30.4%**.

The Cost of Full Technology Mediated PMT

198.　The other option considered in the Costing Report is full technology-mediated PMT. The 2016 Policy would remain more-or-less as it is; but, in addition, for those lectures that are not offered in parallel medium, SU would provide dubbed versions of all lectures. These would be available after the lecture has been delivered. Students would be able to both attend the lecture (which may not be in their preferred language) and access the dubbed lecture (which is in their preferred language) online later.

199.　This would require sound and video recordings of all lectures in the 897 non-PMT and non-exempt modules, and then dubbing them into Afrikaans or English from the language they were delivered in. This has already been trialled during 2020/21 as a result of the Covid pandemic.

200.　The Costing Report relies on the Language Centre's estimate that it costs R5 160 to dub a 45-minute lecture. On a simple approach, the total dubbing cost would be, on average, R14 703 per module, or R13 188 960 in total. However, that is a significant under-estimation of the actual cost.

201. The problem is that these costs do not scale linearly. In order for the Language Centre to meet the increased demand, it will require more staff. How many more staff will depend on how quickly the dubbing needs to be done.[123] If the lectures only need to be dubbed within 12 months, it would only require an additional R8.6 million per year. But if the dubbing must be completed within one month, it will cost **R124.27 million** in additional staff costs per year.

202. The Costing Report rightly recognises that "*for the technology-mediated PMT option to be even marginally comparable with the face-to-face PMT option … that dubbed material should be available to students within a month or even less after the actual lecture would have happened.*"[124] Accordingly – using the same non-NSFAS student numbers and fees – the true cost of full technology-mediated PMT is at least **R8 160** per student per year, or an increase of **16.3%**.

The Benefit of Dubbed Lectures

203. SU has prepared a report entitled *Pedagogical Soundness of technology-enhanced Parallel Medium Teaching* (**the Dubbing Report**) that assesses the value of dubbed lectures. It appears from this report that the pedagogical value of dubbing would be limited as it would not permit engagement between student and lecturer in their language of choice during the lecture. There are two elements.

---

[123] See the table at para 7.4 of the Costing Report.

[124] Costing Report para 9.2.

204.   First, "*class attendance is important for student success*".[125] Relying on academic studies, the Dubbing Report advises that "*recording lectures and dubbing them to support asynchronous PMT, and consuming them asynchronously will not support the interactive participation in a quality synchronous learning experience and so be less pedagogically sound than taking part actively in a class through synchronous PMT*".[126] The concern is that for those students who only rely on the dubbed lectures, their learning will be "*an event of knowledge transmission, as opposed to a collaborative and equitable learning opportunity for all students where all can contribute to the learning experience*".[127]

205.   It is not entirely clear to us what the concern is here. It could be that dubbed lectures are not as valuable as face-to-face lectures. Or it could be that the availability of dubbed lectures will discourage students from participating in face-to-face lectures. Or it could be both.

206.   Second, dubbed lectures do have a benefit as "*part of a hybrid offering*". When used with face-to-face learning, dubbed lectures have "*value for revision [and] reinforcement of learning material*".

207.   While we accept that dubbing is not a panacea and will offer only limited benefits, the Dubbing Report seems to be based on a flawed assumption. It seems to posit one language group having access to in person lectures, and the other language group only having access to the dubbed lectures. That is not our understanding of the proposal for full technology-mediated PMT. If it was, the costing report would have to factor in the

---

[125] Dubbing Report at 1.

[126] Dubbing Report at 2.

[127] Dubbing Report at 1.

reduced demand for face-to-face lecturing for those that will rely only on the dubbed lectures. But, the proposal is not to reduce access to face-to-face lectures from the position under the 2016 Policy, but to add dubbed lectures to the existing language offering.

208. When considering whether requiring dubbed lectures is a "reasonably practicable" or a "reasonable educational alternative", it must be considered in comparison to the correct alternative. When compared to full face-to-face PMT, dubbing plainly offers less benefit. But that is not the only comparison to make. In our view, the more important comparison is the draft 2021 Policy with mandatory dubbing for the 897 non-PMT and non-exempt modules, compared to the draft 2021 Policy without dubbing for those modules.

209. The 2016 Policy, and the Draft 2021 Policy are based on the assumption that Afrikaans students – at least from the second year – can learn in English. The Afrikaans students using the dubbed lectures would still be expected to attend English or dual-medium lectures. They would be able to interact with lecturers in those lectures. But, in addition, they would be able to rely on the dubbed lectures after the fact.

210. It is also not clear to us whether technology mediated PMT would still provide simultaneous translation. If it would, that satisfies concerns about the effectiveness of lectures. If not, then there would be a saving of R6 872 570 because SU would no longer have to provide simultaneous translation. That would reduce the total cost from R124.27 million to **R117.4 million**.

211. The concern for English students does not arise directly because, under the draft 2021 Policy, all information must be conveyed in English (with summaries and highlights in Afrikaans). Moreover, the English students would get a minor benefit from the dubbing

because they would have access to the recorded, primarily English lecture, and the dubbed lecture which would translate any Afrikaans portions into English.

212. Just considering the benefits, the question is whether students are better off also having the lectures dubbed into their preferred language after the fact, or not. While the benefit may be limited, based on the Dubbing Report, there **is** a benefit to attending the lectures <u>and</u> having dubbed lectures available afterwards. The more difficult question – which we address below – is whether that benefit justifies the cost.

V   THE CONSTITUTIONALITY OF THE DRAFT POLICY

213. The 2016 Policy was upheld by the Constitutional Court. There are two ways that a court could reach a different conclusion with regard to the 2021 Policy:

213.1. The factual circumstances that the Constitutional Court held justified the 2016 Policy have changed materially; or

213.2. The 2021 Policy is significantly different from the 2016 Policy.

214. If the 2021 Policy makes no material changes from the 2016 Policy, and the background circumstances have remained largely the same (or have altered in a way that further supports the reasoning the upheld the 2016 Policy), a 2021 Policy based on the 2016 Policy will also survive constitutional attack.

215. There are four factors that could lead to a different outcome for the 2021 Proposed Policy:

215.1. Changes in racial and linguistic demographics;

215.2. SU's experience in implementing the 2016 Policy;

215.3. Changes to the 2016 Policy; and

215.4. The costs of alternatives.

Changes in Racial and Linguistic Demographics

216. A key factor in the Constitutional Court's reasoning was: (a) the inability of the majority of Black African students to learn in Afrikaans; and (b) the ability of virtually all Afrikaans students of all races to learn in English. If that has changed, it would affect the constitutional analysis.

217. Are there any changes racial and linguistic demographics of SU's student's body that might affect the Constitutional Court's holding that SU's language policy is constitutional? In our view, the answer is 'No'.

218. The basic pattern remains the same. The majority of Black African students are not proficient in Afrikaans, and the majority of those who are not proficient in Afrikaans are Black Africans. 99.9% of students took English in Grade 12.

219. The demographics that justified the 2016 Policy remain. If the 2021 Policy is substantially similar, the same demographic arguments can be used to defend it.

220. In addition, there is declining demand for Afrikaans tuition – only 19.2% of undergraduates want to learn in Afrikaans. Even amongst Afrikaans speakers, just under half prefer to learn in English.

SU's Experience in Implementing the 2016 Policy

221. Does SU's experience in implementing the 2016 Policy demonstrate any significant difficulties that would undermine the basis on which the Constitutional Court upheld that policy? In our view, the answer is 'No'.

222. While implementation has not been perfect – and could not be expected to be – it has fulfilled the basic structure and purpose of the 2016 Policy. There have been no radical shifts in the way lectures are taught compared to what is required by the 2016 Policy, with the exception of the Covid-19 enforced shift to online learning and teaching in 2020.

223. The vast majority of both students and staff appear to be happy with the existing language policy.

224. There are no elements of the 2016 Policy that have proved to be unworkable, or to have unintended or unforeseen negative consequences. That experience does not require any significant change in the 2016 Policy.

Changes to the 2016 Policy

225. The Draft Policy is largely the same as the 2016 Policy, particularly on the core issue of how lectures are taught and assessed. While there have been some minor changes in language, the core structure followed in the 2016 Policy remains in place.

226. Are there any changes to the 2016 Policy that might affect the Constitutional Court's holding that SU's language policy is constitutional? No. While there are some minor amendments or clarifications, none reduce the existing access under the 2016 Policy.

227. We focus on those elements of the Draft Policy that differ from the 2016 Policy and that might affect the constitutionality of the Policy. The following changes to the operational elements of the 2016 Policy are relevant:

227.1. The introduction of dubbed, recorded lectures;

227.2. The line between undergraduate and postgraduate modules; and

227.3. Additional use of isiXhosa.

Recorded Lectures

228. The Draft Policy adds an additional method for translating undergraduate lectures.

229. The 2016 Policy requires that:[128]

229.1. All dual-medium first-year modules (where both Afrikaans and English are used in the same class group), and all modules in all years offered in Afrikaans because the lecturer is proficient to teach only in Afrikaans, must have simultaneous translation; and

229.2. Dual-medium lectures in the second and subsequent undergraduate years, and all modules in all years offered in English because the lecturer is proficient to teach only in English, will have simultaneous translation if the faculty request it, the needs of the students warrant it, and SU has the resources to provide it.

230. The Draft 2021 Policy makes two minor changes that appear to be prompted by SU's experience with the move to online lectures during the Covid-19 pandemic:

---

[128] 2016 Policy paras 7.1.4.3 and 7.1.5.2(a).

230.1. It provides that the simultaneous translation rules apply whether the lecture occurs on-site or online; and

230.2. It provides that, wherever simultaneous translation is provided, SU will also provide a '*recorded version of the original unedited lecture and the real-time interpretation (if the interpreting took place online)*'. We understand this to mean that a recorded version of the real-time interpretation will be provided if the interpreting took place online, but not if the interpreting took place on-site.

231. SU does not commit to subsequently translating lectures that were not simultaneously translated.

232. This change does not reduce the extent of the English or Afrikaans offering. If anything, it adds to both by making the translations of certain lectures that the 2016 Policy requires be available only at the time, *also* available after the fact. This enhances the realisation of the s 29(2) right for both English and Afrikaans speakers.

233. A related, minor, change to paragraph 7.1.6 is to alter the reference to '*podcasts and vodcasts of lectures*' to '*educational (audio and/or video) recordings of lecture material*'. We understand this to be a change in terminology rather than substance.

Undergraduate and Postgraduate modules

234. Paragraphs 7.1.8 to 7.1.10 of the Policy have been altered to clarify the line between undergraduate and postgraduate modules. This was necessitated by the position taken by the Engineering and Law faculties which treated fourth year undergraduate modules at NQF level 8 as postgraduate modules for all purposes and therefore did not offer assessments in Afrikaans.

235. Under the 2016 Policy <u>all</u> undergraduate assessments have to be available and may be answered, and <u>all</u> undergraduate written work may be submitted in Afrikaans and English.[129] That included NQF level 8 modules for an undergraduate degree. If that were not the case, those modules would have been mentioned in (i.e. expressly excluded from) para 7.1.8 of the 2016 Policy. The Law and Engineering Faculties' contrary interpretation of the 2016 Policy, based on para 7.1.9 of the 2016 Policy, is, in our view, incorrect. Para 7.1.8 of the 2016 Policy is a special provision (dealing with the language for assessments). Para 7.1.9 of the 2016 Policy is a general provision (dealing with postgraduate learning and teaching, including final year modules at NQF level 8). There is nothing in those two paragraphs which dislodges the presumption of interpretation that general provisions do not derogate from special provisions.[130] In addition, the Policy must – like all laws and policies – be interpreted to "*promote the spirit, purport and objects of the Bill of Rights*".[131] If there were ambiguity, the correct interpretation is the one that enhances rather than reduces access to education in the official language of choice.

236. To the extent there was any doubt, the Draft Policy now clarifies that:

236.1. For postgraduate learning and teaching, including undergraduate modules at NQF level 8 and postgraduate modules at NQF level 7, English or any language may be used provided the lecturer(s) and students are academically proficient in it.[132]

---

[129] 2016 Policy para 7.1.10.

[130] *Ruta v Minister of Home Affairs* 2019 (2) SA 329 (CC) para 42.

[131] Constitution s 39(2).

[132] Draft Policy para 7.1.8.

236.2. Question papers for assessments in all undergraduate modules, but not postgraduate NQF level 7 modules, must be available in English and Afrikaans. Students may answer all assessments and submit other written work in English or Afrikaans, or by prior arrangement and if the lecturer is proficient to grade the assessment in isiXhosa, in isiXhosa.[133]

236.3. Question papers for assessments in postgraduate modules, including postgraduate NQF level 7 modules, "*are at least available in English*". Students may answer all assessments and submit other written work in English, or by prior arrangement and if the lecturer is proficient to grade the assessment in Afrikaans or isiXhosa, in Afrikaans or isiXhosa.[134]

237. The Draft Policy also adds the following definition of "*postgraduate qualifications*":

Postgraduate qualifications are accredited programmes, registered on the National Qualifications Framework, for which the minimum admission requirements are an appropriate Diploma at NQF level 6 or a Bachelor's Degree at NQF level 7, or higher, as specified by the Higher Education Qualifications Sub-Framework. Postgraduate qualifications include the: Advanced Diploma, Bachelor Honours Degree, Postgraduate Diploma, Master's Degree and the Doctoral Degree

238. The effect of these amendments is to repeat what was already the position under the 2016 Policy. The only substantive change is to add the possibility – for both

---

[133] Draft Policy para 7.1.9.

[134] Draft Policy para 7.1.8.

undergraduate and postgraduate modules – for students to answer assessments or submit written work in isiXhosa, by prior arrangement and if the lecturer is proficient.

239. These clarifications do not diminish access for any language group compared to the 2016 Policy. Indeed, the changes enhance access for isiXhosa speakers. They will not, therefore, affect the Constitutional Court's conclusion that the 2016 Policy is constitutional.

The Cost of Alternatives

240. Are there alternative language options that are reasonably practicable, and would provide greater access to Afrikaans learning?

241. As explained, SU has considered the financial and practical feasibility of two types of PMT: face-to-face; and dubbing recorded lectures (or technology-mediated PMT). In what follows, we consider whether it would be reasonably practicable for SU to adopt either of these options. We then discuss whether SU is obliged to find alternative sources of funding.

Full, face-to-face PMT

242. An option to increase the Afrikaans offering at SU is to move to full parallel-medium teaching for all undergraduate modules other than those where the nature of the subject-matter of the module justifies lecturing in one language only. As explained earlier, this issue was considered by the Constitutional Court in *Gelyke Kanse*. The evidence put up by SU in the litigation about the 2016 Policy showed that a move to full face-to-face PMT would require an increase of approximately 20% in student fees. As appears from

para 66 above, the Constitutional Court held this increase was not prohibitive but was enormously expensive, and it deferred to SU's assessment that full PMT was not reasonably practicable.

243. The cost of full, face-to-face PMT remains enormously expensive. Indeed, SU's current estimation of the costs is *higher* than it was in 2016:

    243.1. In 2016, SU estimated it would cost R640 million in infrastructure costs, and R78 million each year thereafter. That would require SU to increase student fees by 20% to fund full PMT.

    243.2. In 2021, SU estimates that it would cost R263.228 (including infrastructure costs) million per year, and would require a 30.4% increase in student fees. See para 197 above.

244. This is 50% more than the previous estimate. The current costing document is more thorough and hence probably more reliable than the costing prepared in 2016, which omitted some of the cost components now identified. Thus while the 2021 figure is significantly higher, that higher figure is reliable.

245. In addition to the cost of full face-to-face PMT there is the declining demand for Afrikaans tuition among undergraduate students. It has decreased from 31.8% in 2017 to 19.2% in 2021. Even amongst Afrikaans speakers, just under half prefer to learn in English. See para 220 above.

246. Consequently, the cost of full face-to-face PMT is higher than it was thought in 2016, and the demand among undergraduate students is lower than it was in 2016.

247. Accordingly, the Constitutional Court's reasoning in *Gelyke Kanse* remains applicable. A court will defer to SU's assessment of whether this cost is too high. It will not compel SU to incur this massive cost increase once it has determined it is unaffordable, or that the increased costs are unjustifiable.

248. In a document entitled *The Rectorate's perspective on multilingualism and the SU Language Policy* (dated 31 May 2021) the Rector and Vice-Rectors make the following further points against moving to full undergraduate PMT.

249. <u>First</u>, as mentioned earlier, the discretionary part of SU's main budget, i.e. the funds that are not dedicated to obligatory expenses like salaries, is allocated annually to SU's institutional priorities. As mentioned earlier, for 2021 that part comprises R318.5 million. If further money (i.e. more than the current about R44.9 million) is to be spent on implementing full PMT, then, unless additional funding can be found, the result will have to be ceasing or downscaling other priority activities (e.g. bursaries, library and information services, research etc). The Rectorate believes that SU is already spending a significant percentage of its available funds on multilingualism and additional expenditure on it at the expense of other important institutional objectives cannot be justified.

250. <u>Second</u>, direct government subsidy and student fees account for 95% of SU's main budget income. Neither of these two income streams can be adjusted at SU's discretion. On the contrary, they are determined by the Department.

251. <u>Third</u>, the language proficiency of SU's academic staff complement poses a challenge to the implementation of a full undergraduate PMT offering because only 58.4% of those who responded to the recent (December 2020 and January 2021) survey indicated that they would be comfortable presenting in Afrikaans. While proficiency in Afrikaans

could be included as a recruitment requirement to address this difficulty, the Rectorate's perspective is that SU should recruit the best applicants nationally and internationally and Afrikaans language proficient should not be a barrier to achieving that.

252. <u>Fourth</u>, full undergraduate PMT could be a catalyst for differentiation between groups of students and will not promote inclusiveness.

253. To say the least, none of these points is unreasonable.

254. All things considered, we are confident that a court will uphold SU's position in the Draft 2021 Policy not to require full face-to-face PMT.

Dubbing

255. The second alternative is full technology-mediated PMT. This would require that every lecture (except those already offered in parallel medium or exempt from the ordinary language rules) would be dubbed into the other language after the fact and made available online.

256. There are two factors to consider: the cost, and the benefit.

257. For dubbing to be meaningful, the lectures would have to be available within a month of when they were delivered. That means the total cost would be R124.27 million per year. This translates to a 16.3% increase in non-NSFAS students' fees.[135] See para 202 above.

258. That cost can be reduced by increasing the amount of time it takes to produce the dubbed lectures. If it takes two months, the cost is less than half. But two months is

---

[135] This may reduce slightly if it is no longer necessary to provide simultaneous translation.

almost the length of a quarter of the academic year. Dubbed lectures will lose much of their value if they take more than a month to produce.

259. Coupled with that cost, the value of dubbed lectures is limited. They are valuable only for revision and reinforcement, not for creative learning as they do not permit interaction between student and lecturer. However, they will provide a benefit to all students, and particularly to Afrikaans students. They will not increase inequality because all students will still attend live lectures, although not always in their preferred language. But they will all have access to the additional benefit of a recorded lecture in their language of preference. They also seem to promote multilingualism as they create a permanent record of translated lectures.

260. The only question is whether that benefit is worth the cost. To repeat, in *Gelyke Kanse* the Constitutional Court accepted that SU's determination that a 20% increase in fees to move to full face-to-face PMT was too high was constitutional. The increase here would be 16.3%, and the benefit in terms of fulfilling the s 29(2) right, significantly lower. This must be weighed with the declining demand for Afrikaans tuition. On the other hand, dubbing has none of the negative consequences that potentially accompany full face-to-face PMT.

261. In our view, a court is again likely to defer to SU's judgment on that question. It requires a context-sensitive weighing of multiple factors. The ultimate judgment of whether a significant increase in fees justifies a limited pedagogical benefit, is a decision where courts are unlikely to interfere with a reasonable judgment of a university. In our view, it is reasonable not to dub all lectures.

262. Accordingly, we advise that the Draft 2021 Policy, which does not provide for full technology mediated PMT, is constitutional.

A Duty to Seek Alternative Sources of Funding?

263. The costing of moving to either face-to-face or technology-mediated PMT is presented as an increase in student fees because that is the only way that SU sees to raise additional funds, although as mentioned earlier its discretion in that regard is constrained by the Department. But what if it was possible to raise funds without increasing student fees? If donors were willing to cover the costs of full PMT or dubbing, would it still be constitutional for SU to refuse to implement it?

264. If, today, SU had a reliable donor who was willing to cover all or most of the cost, it would certainly alter the equation. The primary reason why we have advised it is constitutional for SU not to move to full PMT (face-to-face or technology-mediated) is the cost of doing so. If SU and its students would not bear those costs, that justification falls away.

265. But, as matters stand, so we are instructed, SU does not have such a donor. Despite the widespread publicity that the language revision process has received, no donor with the necessary funds to support full PMT has approached SU and made a firm (legally enforceable) commitment to fund full PMT or even technology-enhanced PMT (dubbing).

266. Is there a duty on SU to actively seek out these donors? In our view, for the following reasons the answer is 'No'.

267. If SU had determined that full PMT was desirable, but the only thing holding it back was funding, then there may be such a duty. But cost is not SU's only rationale for rejecting full PMT.

267.1. For face-to-face PMT it is also concerned about: (a) how that would affect its ability to attract the best lecturers; (b) the declining demand for Afrikaans teaching; (c) the impact on SU's other priorities; and (d) the problem that motivated the Constitutional Court in *University of the Free State* – the risk that PMT creates unintentional racial segregation.[136]

267.2. For technology-mediated PMT it is concerned about the limited value of dubbing and that, despite the cost, it will not create language equality.[137]

268. In addition, we should stress that any donor would have to be willing to commit for the long term. Take face-to-face PMT. To achieve that, SU would have to commit to a massive infrastructure project, the recruitment of more Afrikaans-speaking staff, and a reorganisation of its calendar. It is not something that can be reversed a few years later if the donor's enthusiasm or funds dries up. The same is true for dubbing, which would require a massive increase in the staff of the language centre. In the case of full face-to-face PMT a donor would thus have to make the endowment sufficient to fund the initial capital expenditure and the recurrent annual expenditure for at least the 20 year period during which the cost of the new infrastructure is redeemed.

269. Finally, although SU is not obliged to seek a donor to cover the cost of a shift to full undergraduate PMT it must seriously consider any unsolicited offers it receives. Nonetheless, since money is not the only factor in deciding whether to move to full

---

[136] Rectorate's Perspective at 5. While the demographics in SU are different from UFS, full PMT would have the result that virtually all Black African students would be in the English stream, and therefore would not interact with their colleagues (almost all Coloured and White) in the Afrikaans class.

[137] While we think these concerns are overstated, they are not without merit. Dubbing is not a panacea and will offer only limited benefits. See paras 203 to 212 above.

PMT, a donor willing to cover the cost would not require SU to go down that path. But it would change the equation and may well justifiably result in a different outcome.

VI   COMPLIANCE WITH THE NATIONAL POLICY

270.   In Part III, we set out the status and content of the National Policy. In this Part, we consider each duty imposed by the National Policy on SU in turn.

271.   The Draft Policy complies with the <u>first</u> duty imposed by the National Policy (described in para 100 above). The Draft Policy considers constitutional imperatives, especially the need to prevent unfair discrimination. Part of the motivation for replacing the 2014 Policy with the 2016 Policy was to ameliorate the discrimination experienced by Black students. The Constitutional Court recognized SU's motivation in this respect.[138] The Draft Policy refines the 2016 Policy and retains its central feature of having English as a medium of teaching and learning so as to promote access to and success at SU by Black African students who are not capable of learning in Afrikaans.

272.   In our view, the Draft Policy also meets the requirements of the <u>second</u> duty (described in para 101 above). The second duty, essentially, is to take positive steps to promote the use of indigenous languages.

273.   The Draft Policy identifies isiXhosa as the primary indigenous African language in the Western Cape and commits broadly to its advancement and increasing use.[139] The Draft Policy provides:

---

[138] *Gelyke Kanse CC* para 28.

[139] Draft 2021 Policy para 2.

273.1. Where reasonably practicable and where there is a pedagogical need, isiXhosa and other languages are used to further reinforce concepts by, e.g., the inclusion of multilingual glossaries of key concepts and academic terms.[140]

273.2. ICT-enhanced learning opportunities are, in some cases, made available in isiXhosa.[141]

273.3. Undergraduate and postgraduate students may, by prior arrangement and if the lecturer is proficient in isiXhosa, answer assessments and submit written work in isiXhosa.[142]

273.4. SU is committed to increasing the use of isiXhosa, to the extent that this is reasonably practicable and pedagogically sound, for example through teacher training, basic communication skills short courses for staff and students, career-specific communication, discipline-specific terminology guides (printed and mobile applications) and phrase books.[143]

273.5. The academic role and leadership of the Department of African Languages, through its extensive experience in advanced-level teaching and research in language and linguistic fields will be harnessed to the full.[144]

---

[140] This is in the undergraduate teaching context. Para 7.1.7.4 of the Draft 2021 Policy.

[141] Draft 2021 Policy para 7.1.6.

[142] Draft 2021 Policy paras 7.1.9 and 7.1.10.

[143] Draft 2021 Policy para 7.5.4.

[144] Draft 2021 Policy para 7.5.4.

273.6. SU commits to the judicious use of isiXhosa at official events,[145] and uses isiXhosa as a language of external communication where reasonably practicable.[146]

273.7. Each faculty, in its language implementation plan, must ensure that modules are accessible and multilingualism is purposefully promoted. This requires that "*isiXhosa is used where and to the extent that this is reasonably practicable and pedagogically sound.*"[147]

273.8. The Draft 2021 Policy specifically mentions the National Policy and states that the Department of African Languages and the Language Centre "*will be strengthened to enable it to develop South African official languages other than Afrikaans, English and isiXhosa into languages of learning and teaching, scholarship, and research in South Africa.*"[148] SU also commits to work to intellectualising other languages, including Khoi, Nama and San languages.[149]

274. In our view, these steps are sufficient to satisfy the duty imposed by the National Policy. We take that view for two reasons:

274.1. The National Policy requires SU to "*enhance the development and promotion of indigenous African languages as centres of research and scholarship*",[150] invest in developing indigenous languages into languages of scholarship,[151] and

---

[145] Draft 2021 Policy para 7.2.4.

[146] Draft 2021 Policy para 7.3.1.

[147] Draft 2021 Policy para 7.4.2.3.

[148] Draft 2021 Policy para 7.5.5

[149] Ibid.

[150] The National Policy para 25.

[151] The National Policy para 31.

strengthen African Language Departments "*to explore and document strategies for intellectualizing indigenous languages for use in higher education.*"[152] The Draft 2021 Policy does these things, and more.

274.2. At present, only approximately 1% of SU's lecturers are able to teach in isiXhosa, and only 4.9% of its new first year students' home language is isiXhosa. While the percentage of isiXhosa students are increasing, the total numbers are still low.

275. As for the <u>third</u> duty (described in para 102 above) – namely, indicating at least two official languages, other than the medium of instruction or language of teaching and learning, for development for scholarly discourse as well as official communication – the duty is largely discharged.

276. The Draft 2021 Policy *does*:

276.1. Indicate an official language, other than the media of instruction or language of teaching and learning (English and Afrikaans), for development: isiXhosa;

276.2. Provide that Afrikaans, English and isiXhosa are used judiciously at official events, such as official meetings, ceremonial occasions and inaugural lectures;[153] and

276.3. Require that Afrikaans and English and, where reasonably practicable, isiXhosa are SU's languages of external communication.[154]

---

[152] The National Policy paras 31 and 39.

[153] The 2021 Policy para 7.2.4.

[154] The 2021 Policy para 7.3.1.

277. The Draft 2021 Policy also complies with the <u>fourth</u> duty that "*official internal institutional communication must be conveyed in at least two official languages other than English*" (paragraph 32 of the National Policy). The issue is dealt with in two places:

    277.1. Paragraph 7.2.1 the Draft 2021 Policy which reads: "*All official internal institutional communication will be conveyed in Afrikaans, English and isiXhosa. The translation of existing policies only available in Afrikaans and English will be phased in from 2022 to 2024 by a third of the total number of policies per year.*"

    277.2. Paragraph 13 of the Draft Policy defines "*official internal institutional communication*" in line with the interpretation advanced above as being "*all communication by the Chancellor, the Council, the Senate, the Rector, a Deputy-Vice Chancellor, the Chief Operating Officer or the Registrar to the entire University*".

278. This is consistent with the National Policy. The two elements that require comment are: (a) the definition; and (b) the phasing in of the translation of existing policies.

279. <u>First</u>, as noted above (paras 109 to 126) there is uncertainty about the precise meaning of "official internal institutional communication". The Draft Policy adopts what we believe is the best interpretation of the term. There remains a risk that our interpretation is too narrow. We have suggested how SU could ameliorate that risk. Nonetheless, in our view the University is justified in adopting that interpretation.

280. <u>Second</u>, the Draft Policy's approach ensures that all new communication will be in three languages, while the task of translating existing policies will be done over three years.

While the National Policy does not expressly contain a phasing-in requirement, in our view SU is justified in phasing in its translations of existing policies over three years. As we understand the justification, it is primarily one of practicability.

281. The cost of full and immediate compliance is not high – only R589 651 (see para 189 above). That is not an excessive cost that would prevent immediate compliance.

282. However, we are instructed that there are other limitations that render it unlikely that SU will be able to translate all the existing policies into isiXhosa by 1 January 2022 – which strict compliance with the National Policy would demand – or even by the end of 2022. Our instructions are as follows:

282.1. There are approximately 1 600 pages of policies that will need to be translated.

282.2. Translation from Afrikaans or English to isiXhosa is generally a difficult and sensitive task. SU has learned from experience that it is necessary to consult widely to ensure that the correct terminology and register are used. This complexity is significantly enhanced for the translation of legal documents like policies. It is vital that the translation is accurate. SU believes the best way to meet this challenge is to develop a specific database of appropriate isiXhosa translations of the Afrikaans and English words commonly used in its policies. This will be a time-consuming process, but accurate translation thereafter will be easier.

282.3. SU does not currently have sufficient translators to complete the task by the beginning of 2022.

282.4. SU does not wish to outsource the development of the database and the translation, for two reasons. First, it has to have a quality assurance process to

assure itself that the translation is accurate. It does this for all translations, but it is particularly important for the translation of policies. SU's experience has shown that quality assurance of this kind of work is easier if the work is done internally. Secondly, it wants to build internal capacity to translate. Part of the process of translation will include employing additional translators, and upskilling all its translators to be able to translate policies into isiXhosa.

282.5. While SU has committed to translating one third of its existing policies each year from 2022, that is a target, not an upper limit. It intends to translate the policies as quickly as possible, and not to confine itself to the targets in the Policy.

283. As set out above, the National Policy must be interpreted in line with s 29(2)'s commitments to reasonable practicability. It should be read as a guide, and not interpreted to impose unduly onerous obligations. In addition, SU may depart from the National Policy if adherence would result in inconsistency with s 29(2), including where adherence is not reasonably practicable (see paras 89.3 and 90 above).

284. In that light, we advise that the three-year phasing-in period for existing policies is consistent with the National Policy. Alternatively, if it constitutes a departure, that departure is constitutionally justified. The delay is justified both by the practical limitations, and by SU's desire to do so properly as part of its broader effort to develop isiXhosa as a language to be used in higher education.

285. We would add only that, in line with SU's commitment mentioned in para 282.5 above, the three-year phasing-in period should be read as a minimum requirement not a maximum. If SU is reasonably able to translate the existing policies in less time, it should do so.

286.	As to the <u>remaining four duties</u> in the National Policy (described in paras 104 to 107 above), the 2021 Policy materially fulfils them.

VII   CONCLUSION

287.   The Draft 2021 Policy is substantively identical to the 2016 Policy. The 2016 Policy passed constitutional muster. There have been no material changes in the underlying circumstances that justified the 2016 Policy. The costs of moving to full parallel medium remain extremely high and the demand for Afrikaans tuition had declined significantly since 2017. The implementation of the 2016 Policy has not revealed any constitutional flaws in the 2016 Policy. Therefore, the current draft policy, if adopted, will also pass constitutional muster.

288.   In addition, the Draft 2021 Policy is consistent with the National Policy. The only area where there may be some uncertainty concerns the translation of official internal institutional communication. But in our view, the position adopted in the Draft 2021 Policy is consistent with the National Policy, or if not is constitutionally justifiable.

Andrew Breitenbach SC

Michael Bishop

Eshed Cohen (pupil)

Instructed by Lorinda van Niekerk
of Cluver Markotter Inc

26 July 2021