THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 1027/2016

In the matter between:

UNIVERSITY OF THE FREE STATE **APPELLANT**

and

AFRIFORUM **FIRST RESPONDENT**

SOLIDARITY **SECOND RESPONDENT**

Neutral citation: *University of the Free State v Afriforum* (1027/2016) [2017] ZASCA 32 (28 March 2017)

Coram: Cachalia, Swain and Mathopo JJA and Fourie and Schippers AJJA

Heard: 17 February 2017

Delivered: 28 March 2017

Summary: Review : whether decision of University to adopt language policy administrative action under Promotion of Administrative Justice Act 3 of 2000 : whether University misconstrued its power under principle of legality : test for legality review restated : whether language policy 'reasonably practicable' as contemplated in s 29(2) of the Constitution : whether in the exercise of its power to decide language policy University constrained by requirement that policy 'subject to' Higher Education Language Policy in terms of s 27(2) of the Higher Education Act 101 of 1997.

ORDER

On appeal from: Free State Division of the High Court, Bloemfontein (Hendricks and Mokgohloa JJ and Motimele AJ sitting as court of first instance):

1 The appeal in the review application is upheld with costs including the costs of two counsel, save that in the case of the first respondent, each party shall pay its own costs.

2 The appeal in the strike-out application is upheld with costs including the costs of two counsel, on a scale as between attorney and client. As a consequence the following parts of the respondents' papers are struck out:

(a) para 3.2 of the founding affidavit: 'that were too scared to divulge their identity for fear of intimidation and reprisal';

(b) para 10 of the founding affidavit: 'they informed Messrs Human and Kruger that they are absolutely fearful that their positions may be jeopardised should their identities be disclosed, but were prepared to do so in view of the constitutional principle of transparency and since the UFS will in any event in good time have to make disclosure of these very documents';

(c) para 101.14 of the founding affidavit: 'Nothing could be further from the truth than this misleading statement of the second respondent to the UFS Senate, the one body which has to make a decision on something as serious and contentious as the possible validity of a new language policy which was in the process of formulation';

(d) para 125.1.4 of the founding affidavit (excluding the first three sentences): 'On the basis of the assurance given by a member attending that meeting to Mr Human, I sincerely believe that it is true that Prof Jansen dismissed the letter as being irrelevant as coming from a third party . . . the new language policy';

(e) para 154 of the founding affidavit: ‘because the persons who provided them were too scared to reveal their identities and’;

(f) para 20.5.3 of the supplementary founding affidavit: ‘it nonetheless amounts to a serious misrepresentation vitiating the legality of any decision taken on that basis’; and

(g) para 41 of the supplementary founding affidavit: ‘led to believe’ and ‘the assertions were misleading’.

3 The order granted by the Free State Division of the High Court, Bloemfontein (under case no. A70/2016) is set aside and substituted by the following order:

(a) ‘The applicants’ application to review and set aside the decision by the Council of the University of the Free State to adopt a new language policy is dismissed with costs including the costs of two counsel, save that in the case of the first applicant, each party shall pay its own costs.

(b) The respondents’ application to strike out is upheld with costs including the costs of two counsel on a scale as between attorney and client. As a consequence the parts identified in the applicants’ papers at paras 2 (a) to (g) of the order of this court are set aside.’

JUDGMENT

Cachalia JA (Swain and Mathopo JJA and Fourie and Schippers AJJA concurring)

[1] The legal dispute in this case concerns a decision by the University of the Free State (UFS) to adopt a new language policy in March 2016. The new policy replaces Afrikaans and English as parallel mediums of instruction with English as the primary medium. A full court of the Free State Division of the High Court,

Bloemfontein, reviewed and set aside the decision in July 2016 on the ground that it constituted unlawful administrative action as defined in s 1 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). This appeal is with its leave.

[2] The respondents, Afriforum and Solidarity, were the successful applicants in the full court. I shall consider their standing to seek relief in these proceedings later in the judgment. However, I accept their legitimate concern that the new language policy, which prefers English over Afrikaans at UFS, and the adoption of similar policies at other universities, will erode the position of Afrikaans as a language of instruction and its constitutionally protected status as an official language.[1] Their disquiet should be shared by all South Africans who value our diverse cultural and language heritage. Because Afrikaans is, as Sachs J colourfully observed in the *Gauteng School Education Bill* case: 'one of the cultural treasures of South African national life, widely spoken and deeply implanted, the vehicle of outstanding literature, the bearer of rich scientific and legal vocabulary and possibly the most creole or "rainbow" of all South African tongues'.[2]

[3] UFS has a 113-year history. It may come as a surprise to some that from 1904, English was the sole medium of instruction. This changed to Afrikaans in 1953. In 1993 a parallel-medium policy was introduced.

[4] In November 2002 the Education Ministry outlined a framework for a Higher Education Language Policy (LPHE), which encouraged the promotion of multilingualism. It advocated 'the retention and strengthening of Afrikaans as a language instruction', in historically Afrikaans universities. But it also acknowledged that this will practically create a tension with other constitutional imperatives, particularly considerations of equity, the need to redress past racially discriminatory laws and practices and practicability, identified in s 29(2) of the Constitution. In this

[1] Section 6(1) of the Constitution says: 'The official languages of the Republic are Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu.'
[2] *Ex Parte Gauteng Provincial Legislature: In re Dispute concerning the constitutionality of certain provisions of the Gauteng School Education Bill 1995* 1996 (3) SA 165 (CC) para 49.

regard the LPHE cautioned that the sustained development of Afrikaans should not have the 'unintended consequence of concentrating Afrikaans-speaking students in some institutions' thereby retarding attempts to promote diversity. In addition historically Afrikaans-medium institutions had to submit plans to show that language instruction was not impeding access by non-Afrikaans speaking students to their academic programmes. One of respondents' contentions is that UFS ignored this policy in formulating the new language policy, an issue I shall consider later.

[5] Following the publication of the LPHE, UFS approved a language policy in June 2003. The 2003 policy acknowledged that English and Afrikaans shall be the dominant languages of instruction for the foreseeable future, and also that multilingualism shall be promoted so that other South African languages, particularly Sesotho, are ultimately accepted as mediums of instruction.

[6] The 2003 policy had an inauspicious beginning. In its second year of operation already, Professor Fourie, who was rector at the time, acknowledged the 'unintended consequence' of the parallel-medium policy segregating the lecturing rooms along racial lines. This problem persisted and was repeatedly mentioned in various reports, including one by the Language Policy Committee of Council, in the years that followed. It also generated racial tensions and complaints from both staff and students.

[7] Professor Lange, the Vice-Rector (Academic), deposed to the answering affidavit in the present proceedings. She described the persistence of the problem as 'untenable on a post-apartheid campus'. The UFS's Management accordingly sought and obtained a mandate from its Council to formulate a new language policy in June 2015. The task was to be undertaken by the Language Committee (the Committee), which the minutes of the Council meeting record as having to be 'balanced and representative'. Furthermore, the Committee had to ensure that an 'open process of consultation would be followed, with no preconceived agenda regarding the desired outcome'.

[8] There is no dispute that the Committee executed its mandate diligently. The process undertaken is recorded fully in the papers. It spanned several months and involved thorough investigation, vigorous debate and full deliberation. Linguistic experts assisted the process.

[9] The draft report was considered by both UFS's Senate and Council and the final report, including faculty submissions, served before Council. The final report, the respondents accept freely in their written argument, embodies a qualitative analysis of the arguments for and against a policy change and encapsulates every standpoint adopted in the course of the debate. The respondents participated actively throughout the process. So it is hardly surprising that they have not raised any procedural objections to the decision to adopt a new policy.

[10] Council ultimately adopted the report on 11 March 2016 by twenty votes in favour, one abstention and one vote against it. The key finding in the report – that the parallel-medium policy was entrenching racial separation and impeding racial integration – is captured in the executive summary, which states:

'The consensus finding of the review committee is that the current parallel medium language policy does not work. It divides students, largely by race, and therefore works against the integration commitments of the university; it does not, from the student point of view, guarantee equality of access to knowledge in the two different language class groups; it has not kept up with the dramatic changes in the racial and language demography of the university in recent years; and the continuation in Afrikaans is a declining language of preference among students who see themselves as living, learning and labouring in a global world where English competence provides more access and mobility than any other South African language.'

[11] The finding formed the basis of six policy recommendations the Committee made to Council, which were also approved. They were:

'1. That English becomes the primary medium of instruction in undergraduate education and, as largely exists already, in postgraduate education.

2. that the [UFS] embeds and enables a language-rich environment committed to multilingualism with particular attention to Afrikaans, Sesotho, isiZulu and other languages represented on the three campuses.

3. that an expanded tutorial system is available to especially first-year students in Afrikaans, Sesotho, isiZulu and other languages to facilitate the transition to English instruction.

4. that in particular professional programmes, such as Education and the Agricultural Sciences, the parallel-medium policy continues given the well-defined Afrikaans markets that still makes such language-specific graduate preparation relevant at the moment.

5. that the language of administration be English.

6. that the English-medium language policy be implemented with flexibility and understanding rather than as a rigid rule regardless of the circumstances.'

[12] The approved policy authorised the Committee, in consultation with the faculties and the Centre for Teaching and Learning, to approve a phased implementation plan for the period 2016 to 2021 commencing in 2017. The respondents are dissatisfied with the new policy and sought to have the decision to adopt the policy reviewed and set aside.

[13] On 21 July 2016 the full court delivered its judgment reviewing and setting aside the Council decision to 'adopt and approve' the new policy. UFS then sought leave to appeal to the Constitutional Court directly, alternatively to this court, against the order. The Constitutional Court refused direct access, but as the full court had conditionally granted UFS leave to appeal to this court, its order was suspended pending the outcome of this appeal.

[14] The respondents then applied to the full court for an order in terms of s 18 of the Superior Courts Act 10 of 2013 for its order of 21 July 2016 not to be suspended pending the determination of the appeal. The application was granted. Believing that

the effect of this order would stymie the implementation of the new policy, UFS exercised its automatic right of appeal to this court, which then set aside the order of the full court. The judgment is reported sub nom *UFS v Afriforum & another* [2016] ZASCA 165 (17 November 2016); [2017] 1 All SA 79 (SCA).

[15] It is now necessary to set out the nature of the relief the respondents sought in the review and the case they made out on the papers. In their founding affidavit, the respondents say their application is concerned first, with preventing UFS from *implementing* the new language policy, and secondly, setting it aside. Neither is correct and both misconceive the nature of the relief sought. The notice of motion pertinently seeks only to have the Council decision to *adopt* the new policy on 11 March 2016 set aside,[3] principally on the ground that it constituted unlawful administrative action. The respondents did not seek to interdict the policy from being implemented, nor did they seek to have it set aside on administrative law or constitutional grounds.

[16] The court a quo and both parties approached the matter on the basis that the impugned decision constituted 'administrative action' as defined in s 1 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).[4] I turn first to consider whether it is.[5]

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[3] The notice of motion seeks to have both the decisions of the Senate on 7 March 2016, and that of the Council on 11 March 2016, set aside. However, only the Council decision is in issue in this appeal.

[4] In terms of s 1 of PAJA: ''administration action' means any decision taken, or any failure to take a decision, by-

(a) an organ of state, when-

(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation; or

(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect . . . .'

[5] In *Head, Department of Education, Free State Province v Welkom High School & another* [2012] ZASCA 150; 2012 (6) SA 525 (SCA) para 23, this court stated that the decision by a school governing body to adopt a pregnancy policy is an administrative decision. It did not analyse the nature of the decision in making this statement.

[17] The determination of whether an action by an organ of state[6] is administrative action requires an analysis of its nature and a positive decision that it is of an administrative character.[7] In general policy-making lies within the realm of an organisation's executive authority, and the implementation or application of policy, lies within its administrative domain. The more closely a decision is related to the formulation – or the adoption – of policy, the more likely it is to be executive in nature; where it is closer to the implementation of policy, this suggests it is administrative. Administrative decisions are generally and appropriately subjected to a more exacting administrative standard of review than executive decisions.[8]

[18] In this case, the review is aimed at attacking the decision to adopt the policy, which the Council has the authority to decide under s 27(2) of the Higher Education Act 101 of 1997 (the Act). The policy is not impugned, nor is it sought to be set aside. Importantly, the policy itself does not adversely affect the rights of any person or have the capacity to do so. Neither does it have a direct, external legal effect. The policy will only have these legal consequences when implemented, which the review is not concerned with. So, properly understood, it is the UFS's executive decision to determine its language policy that is being attacked and not any of its administrative actions flowing from the adoption of the policy. The impugned decision therefore does not constitute administrative action as contemplated by PAJA.

[19] I accept, however, that the decision to adopt the new policy may be subject to legality review on the ground that it was made in the exercise of a public power. The question to be considered in this context is whether, objectively viewed, the decision was rationally connected to the purpose for which the power was given.[9] This is a factual enquiry and courts must be careful not to interfere with the exercise of a power simply because they disagree with the decision or consider that the power

[6] There is no dispute that that a university is an organ of state.
[7] *Tshwane City & others v Nambiti Technologies (Pty) Ltd* [2015] ZASCA 167; 2016 (2) SA 494 (SCA) para 25.
[8] See generally *Minister of Defence and Military Veterans v Motau* [2014] ZACC 18; 2014 (5) SA 69 (CC) paras 37-44 and *Minister of Home Affairs & others v Scalabrini Centre & others* [2013] ZASCA 134; 2013 (6) SA 421 (SCA) para 57.
[9] *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa & others* 2000 (2) SA 674 (CC) paras 85-86.

was exercised inappropriately.[10] If, therefore, the decision-maker acts within its powers, and considers the relevant material in arriving at a decision so that there is a rational link between the power given, the material before it and the end sought to be achieved, this would meet the rationality threshold. The weight to be given to the material lies in the discretion of the decision-maker; so too does the determination of the appropriate means to be employed towards this end.[11] But if a decision-maker misconstrues its power, this will offend the principle of legality and render the decision reviewable.[12]

[20] The complaint advanced in the respondents' papers was that UFS failed to take into account the requirements of s 29(2) of the Constitution and the LPHE, for which provision is made in s 27(2) of the Act. In its answering affidavit, UFS says it took both s 29(2) and the LPHE into account. There is ample evidence that it did. There is therefore no substance in this attack. The court a quo, therefore, erred in upholding this argument, albeit that it did so in the belief that it was concerned with administrative action.

[21] The respondents advance a more nuanced complaint in their written submissions before this court. They now contend that in exercising its power to adopt the new policy, UFS did so without appreciating the constitutional and statutory parameters within which the power had to be exercised. The constitutional constraint, it is contended was s 29(2) of the Constitution, which affords the right to language instruction in a language of choice where this is 'reasonably practicable'. And the statutory limitation on the power was s 27(2) of the Act, which made the exercise of the power 'subject to' the LPHE. Properly understood, the complaint on both grounds is that UFS misconstrued its powers in formulating its new language policy.

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[10] *Pharmaceutical Manufacturers Association of South Africa* para 90; *Scalabrini Centre* fn 8 above para 66.
[11] *Democratic Alliance v President of the Republic of South Africa & others* [2012] ZACC 24; 2013 (1) SA 248 (CC) paras 39-40.
[12] *Masetlha v President of the Republic of South Africa & another* 2008 (1) SA 566 (CC) para 81.

[22] I deal first with the s 29(2) complaint, which lies at the heart of this appeal. Section 29 of the Constitution reads thus:

'(1) Everyone has the right–

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

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

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

(a) equity;

(b) practicability; and

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

[23] As I understand the respondents' case regarding s 29(2), it is this: In 2003 UFS adopted a dual-medium language policy. There were no resource constraints (cost, human resources and infrastructure) to continuing with the policy. Section 29(2) therefore required UFS to continue with the 2003 policy because it was 'reasonably practicable' to do so. When the problem of the racial segregation arose, UFS was not entitled to abandon the 2003 policy only because of this problem. It had to consider all 'reasonable educational alternatives' before departing from the 2003 policy. This assessment involved taking the listed criteria of equity, practicability and historical redress into account. A proper consideration of these criteria, would have involved balancing the relevant constitutional considerations and standards, and would not have led to the 2003 policy being abandoned solely to promote racial integration. In other words, UFS ought to have employed other means, without limiting the right of Afrikaans language speakers to their language of choice, to solve this problem. The respondents do not explain what other means were available to UFS.

[24] Professor Lange's response on behalf of UFS is embodied in the following pithy statement in her answering affidavit, which emphasises that the 'reasonably practicable' requirement in s 29(2) has a normative content, and is not just concerned with resource constraints:

'It is inherently impossible to avoid racial division when language division is maintained and where the statistics show that one of the two language streams comprises of white and the other of black students. While this is at times described by different individuals as an "ethical" or "redress" issue, it is equally a matter of what is reasonably practicable. The fact of the matter is that the "reasonably practicable" criterion is far exceeded: it is *absolutely impossible* to provide language of choice without indirectly discriminating on the basis of race.' [Emphasis added]

[25] UFS submits that the right to receive an education in a language of choice is not only a matter of practicality, but also of reasonableness. In other words the existence of the right depends on an important internal modifier: that it is *reasonably* practicable.[13] Relying on *Hoërskool Ermelo*[14] it contends that the assessment of whether the attainment of the right is reasonably practicable involves a 'context-sensitive' appraisal of 'all the relevant circumstances of each particular case'. This of necessity must include constitutional norms. On this interpretation, the criteria mentioned in the second part (equity, practicability and redress), which are relevant when considering effective access to, and implementation of the right, also enter into the assessment. It is thus incorrect, UFS says, to read the first part of s 29(2) as a mere provisioning provision, which is hermetically sealed from the second part. To use the language used in *Hoërskool Ermelo*, the two parts are 'mutually reinforcing'.[15]

[26] In my view, the crux of the dispute regarding s 29(2) as to whether UFS misconstrued its powers turns on which of the two interpretations of the reasonably

[13] B Fleisch and S Woolman 'On the constitutionality of single medium public schools' (2007) *SAJHR* 34 at 50. *Head of department, Mpumalanga Department of Education v Hoërskool Ermelo & another* [2009] ZACC 40; 2010 (2) SA 415 (CC) para 52.
[14] Ibid.
[15] Ibid.

practicable requirement – UFS's or the respondents' – is correct. Once it is accepted, as the respondents were constrained to accept, that the very existence of the right depends on a 'context-sensitive' assessment of what is reasonably practicable, this can hardly exclude any factor that may bear on this assessment. As Kriegler J said of the reasonably practicable standard in the *Gauteng School Education Bill* case, it is 'elastic – as it necessarily has to be in order to leave room for a wide range of circumstances'.[16] The legal standard is reasonableness, which of necessity involves a consideration of constitutional norms, including equity, redress, desegregation and non-racialism. The factual criterion is practicability, which is concerned with resource constraints and the feasibility of adopting a particular language policy.

[27] It follows, in my view, that 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. I am mindful that once the standard is met and the right to a language of choice exists, the State bears a negative duty not to take it away or diminish the right without justification.[17] But this does not mean that once the right exists it continues, regardless of whether the context and the circumstances have changed. A change in circumstances may materially bear on the question whether it is reasonably practicable to continue with a policy. What is required of a decision-maker, when there is a change in circumstances, is to demonstrate that it has good reason to change the policy. In other words, it must act rationally and not arbitrarily.

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[16] *Ex Parte Gauteng Provincial Legislature: In re Dispute concerning the constitutionality of certain provisions of the Gauteng School Education Bill 1995* 1996 (3) SA 165 (CC) para 41. That case concerned s 32 of the Constitution of the Republic of South Africa 200 of 1993. Section 32(b) dealt with the reasonable practicability standard. Section 32 read as follows:

'Every person shall have the right-

a. to basic education and to equal access to educational institutions;

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

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

[17] *Hoërskool Ermelo* fn 13 above para 52.

[28] UFS's research has shown conclusively that as the demographic and language profile of its student population has changed with ever-increasing numbers of black students opting for English-medium language instruction, and correspondingly fewer numbers of white Afrikaans students seeking Afrikaans-medium instruction, racial segregation is becoming an increasing problem. The ratio of Afrikaans speaking students per lecturer and per classroom is significantly lower than is the case with non-Afrikaans-speaking students, who choose the English stream. This in turn leads to a perception that Afrikaans-speaking students are receiving closer supervision than students who choose to study through the English medium of instruction. While the problem was observed by Professor Fourie more than a decade ago, the circumstances now have led UFS to conclude that the continuation of the 2003 policy is not only not reasonably practicable, but absolutely impossible. That conclusion has the support of the overwhelming majority of the University community, including substantial numbers of Afrikaans speakers. It was arrived at after proper research, debate and deliberation. UFS's assessment that it is no longer reasonably practicable to continue with the 2003 is, therefore, one that a court of law should be slow to interfere with on review.

[29] What is more, it is apparent from reading the policy that it was carefully calibrated. Those students, who currently use Afrikaans as a medium of instruction, shall be allowed to complete their studies using this medium. The policy will first be piloted in only three faculties for the 2017 academic year, namely medicine, law and the humanities, and only rolled out thereafter.[18] An expanded tutorial system will be made available to especially first-year students in Afrikaans, Sesotho, isiZulu and other languages to facilitate the transition to English instruction. In the case of professional programmes, such as Education and the Agricultural Sciences, the parallel-medium policy shall continue because there remains a market-demand for them. Importantly, the intention is to implement the new policy with 'flexibility and understanding rather than as a rigid rule regardless of the circumstances.'

[18] *UFS v Afriforum & another* [2016] ZASCA 165 (17 November 2016) para 17; [2017] 1 ALL SA 79 (SCA) para 17.

[30] I therefore conclude that the respondents' contention that UFS misconstrued its powers by failing to properly apply the 'reasonably practicable' standard in s 29(2) must fail. UFS's conduct has been exemplary in the manner it approached the decision to reconsider the 2003 policy and adopt a new policy. It also gave careful consideration to the content of the new policy. It is the respondents, not UFS, who misconstrue this provision.

[31] I should add that this dispute raises potentially difficult constitutional questions, including whether the new policy's pursuit of racial integration and equality has the effect of: unfairly discriminating against linguistic and cultural minorities; impermissibly promoting majoritarian hegemony at the expense of linguistic and cultural diversity, or undermining the fundamental language scheme of our constitutional order, which requires the State to take practical and positive measures to elevate the status and advance the use of all official languages, instead of diminishing their importance.[19]

[32] But such questions may only be confronted through a substantive constitutional challenge to the State's language policy, and not somewhat diffidently or obliquely though judicial review, as the respondents have done in this case.

[33] I turn to consider the respondents' second complaint, that UFS's statutory power to adopt a language policy was constrained by the LPHE, which required the retention and strengthening of Afrikaans, as a medium of instruction. Put differently it is contended that UFS misconstrued its power by adopting a language policy that was in conflict with the LPHE.

[19] Section 6(1) of the Constitution says: 'The official languages of the Republic are Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu.' Section 6(2) reads as follows: 'Recognising the historically diminished use and status of the indigenous languages of our people, the State must take practical and positive measures to elevate the status and advance the use of these languages.'

[34] The source of the power to decide its language policy is s 27(2) of the Act, which authorises the council of a university, with the concurrence of the senate, to determine its language policy. But it may only do so, 'subject to' the policy determined by the Minister of Higher Education, which in this case refers to the LPHE.[20]

[35] Drafters usually use the words 'subject to' – as in s 27(2) – as subordinating language to denote that if clause A is made subject to clause B, clause A is subordinate to clause B. In other words clause A may not contradict clause B. In this case the respondents' contend that the new policy impermissibly contradicts the LPHE's injunction to retain and strengthen Afrikaans as a language of instruction.

[36] Before considering the ambit of the LPHE it must be borne in mind, as Harms JA pointed out, in *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd*,[21] that the word 'policy' is 'inherently vague and may bear different meanings'. He went on, in the context of the statute he was dealing with, to say the following:

'I prefer to begin by stating the obvious, namely that laws, regulations and rules are legislative instruments, whereas policy determinations are not. As a matter of sound government, in order to bind the public, policy should normally be reflected in such instruments. Policy determinations cannot override, amend or be in conflict with laws…'

[37] This brings me to the LPHE. I mentioned earlier that the LPHE encouraged the promotion of multilingualism, and it also advocated 'the retention and strengthening of Afrikaans as a language of instruction' in historically Afrikaans universities. At the same time it acknowledged that this will practically create a tension with other constitutional imperatives including equity and redress. It also presciently cautioned that the sustained development of Afrikaans should not have the 'unintended consequence of concentrating Afrikaans-speaking students in some

[20] Section 27(2) provides: 'Subject to the policy determined by the Minister, the council, with the concurrence of the senate, must determine the language policy of a public higher education institution and must publish it and make it available on request.'
[21] *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd* 2001 (4) SA 501 (SCA) para 7.

institutions' thereby retarding attempts to promote diversity. This is precisely what happened at UFS.

[38] The question is whether the LPHE – in particular the sentiment that Afrikaans be retained and strengthened – was intended to be prescriptive and bind universities in the formulation of their language policies, or merely to act as a guideline from which they could depart if the circumstances warranted this? In my view there are clear indications in the LPHE and in the Act that it was not meant to be binding: first, the language used in the LPHE is noticeable for its absence of any prescriptive language; secondly, the LPHE envisaged the unintended consequence that may result from the retention and strengthening of Afrikaans as a language of instruction, which must mean that it was left to universities to decide how best to deal with this problem in their language policies, and thirdly, while s 49(A) of the Act gives the Minister of Higher Education the authority to issue directives to universities to deal with, among other things, financial impropriety, ineffectiveness in the performance of their functions and failure to comply with any law, it conspicuously omits any authority for him or her to intervene in their language policies.

[39] In my view, and having regard to the language of the preamble of the Act that it is 'desirable for higher education institutions to enjoy freedom and autonomy in their relationship with the State within the context of public accountability . . .', the words 'subject to' in s 27(2), contextually understood, do not impose a legal obligation on any university to adopt the LPHE. The LPHE goes no further than to provide a policy guideline for the universities from which they are free to depart. The only obligation on universities that choose this course is to justify their departure. In this case UFS has done so adequately. The contention that it failed to appreciate the statutory constraint on its power in s 27(2) of the Act read together with the LPHE must therefore fail.

[40] This brings me to UFS's application to strike out certain damaging allegations in the respondents' papers regarding its conduct. The court a quo dismissed the

application because these allegations were 'not material'. But allegations that are immaterial and irrelevant should be struck out, especially when they advance damaging, vague and unsubstantiated allegations regarding a party's conduct.[22] The respondents did not seek to suggest that they were true.[23] And neither did they withdraw or apologise for them. The prejudice to UFS is evident. When pressed in this court the respondents' response was a grudging, half-hearted 'apology': 'To the extent that the allegations were damaging we apologise for them'. This is simply not good enough. In the circumstances UFS is entitled to a striking-out order.

[41] In regard to standing, it is settled that a party must establish a legal interest in the subject matter of the relief sought. UFS does not dispute Afriforum's standing, but I have some doubt that it has a legal interest in these proceedings. Afriforum does not purport to represent all Afrikaans speaking students, and has not shown that any of its members' rights are adversely affected by the new policy. It seeks, in these proceedings, to review and set aside UFS's executive decision to adopt a new language policy, and not the policy itself, but has not demonstrated that its legal interest extends to this relief. There is also no constitutional challenge to the policy in the public interest. However, in view of UFS's stance regarding Afriforum's standing, there is no need to decide this question.

[42] Solidarity stands on a different footing. It is a trade union under the Labour Relations Act 66 of 1995. It claims standing in its own interest and on behalf of its members, but not in the public interest. However, neither Solidarity nor its members, who are employees of UFS, have any entitlement to assert the s 29(2) right to a choice of language. The rights-bearers of s 29(2) rights are students. It follows that Solidarity has no legal interest in these proceedings.

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[22] In terms of Uniform rule 23(2):
'(2) Where any pleading contains averments which are scandalous, vexatious, or irrelevant, the opposite party may, within the period allowed for filing any subsequent pleading, apply for the striking out of the matter aforesaid, and may set such application down for hearing in terms of paragraph *(f)* of subrule (5) of rule 6, but the court shall not grant the same unless it is satisfied that the applicant will be prejudiced in the conduct of his claim or defence if it be not granted.'

[23] *Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd & others* 1974 (4) SA 362 (T).

[43] What remains is the question of costs. Afriforum relies on what has now become known as the *Biowatch* principle to avoid a costs order against unsuccessful litigants who seek to vindicate constitutional rights.[24] As I have mentioned, Afriforum has not challenged the constitutionality of the policy, nor shown that any of its members' constitutional rights are adversely affected by the new policy. However, I accept that these proceedings have, as their main purpose, to protect the constitutional rights of Afrikaans-speaking students, and that the proper interpretation of s 29(2) of the Constitution lies at the heart of this dispute. I also accept that language rights, which overlap with cultural rights, is a very emotive issue and of considerable importance to many South Africans, and not only to Afrikaans-speakers, many of whom Afriforum represent. In the circumstances of this case I would relieve Afriforum of having to pay the costs of the litigation. This excludes the costs of the striking-out application, which respondents could have avoided with a bit more circumspection. Solidarity has no standing and has no basis to avoid a costs order in its case.

[44] To sum up: the respondents sought an order reviewing and setting aside the decision of UFS to adopt a single-medium English language policy. That decision was not reviewable under PAJA. And the respondents failed to make out a proper case for review under the principle of legality. UFS was entitled to adopt a new policy because it was no longer reasonably practicable to continue with the 2003 policy, which had the effect of segregating the student community along racial lines. UFS was under no legal obligation to apply the LPHE and was free to depart from it for good reason. It did so.

[45] The *Biowatch* principle applied in the case of *Afriforum* as its real purpose was to vindicate the language rights of Afrikaans-speaking students, but not to *S*olidarity, which had no legal interest in the relief claimed. Both parties are however liable for UFS's costs in the striking-out application on a scale as between attorney and client.

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[24] *Biowatch Trust v Registrar, Genetic Resources & others* [2009] ZACC 14; 2009 (6) SA 232 (CC) para 21.

[46] The following order is made:

1 The appeal in the review application is upheld with costs including the costs of two counsel, save that in the case of the first applicant, each party shall pay its own costs.

2 The appeal in the strike-out application is upheld with costs including the costs of two counsel, on a scale as between attorney and client. As a consequence the following parts of the respondents' papers are struck out:

(a) para 3.2 of the founding affidavit: 'that were too scared to divulge their identity for fear of intimidation and reprisal';

(b) para 10 of the founding affidavit: 'they informed Messrs Human and Kruger that they are absolutely fearful that their positions may be jeopardised should their identities be disclosed, but were prepared to do so in view of the constitutional principle of transparency and since the UFS will in any event in good time have to make disclosure of these very document';

(c) para 101.14 of the founding affidavit: 'Nothing could be further from the truth than this misleading statement of the second respondent to the UFS Senate, the one body which has to make a decision on something as serious and contentious as the possible validity of a new language policy which was in the process of formulation';

(d) para 125.1.4 of the founding affidavit (excluding the first three sentences): 'On the basis of the assurance given by a member attending that meeting to Mr Human, I sincerely believe that it is true that Prof Jansen dismissed the letter as being irrelevant as coming from a third party . . . the new language policy';

(e) para 154 of the founding affidavit: 'because the persons who provided them were too scared to reveal their identities and';

(f) para 20.5.3 of the supplementary founding affidavit: 'it nonetheless amounts to a serious misrepresentation vitiating the legality of any decision taken on that basis'; and

(g) para 41 of the supplementary founding affidavit: 'led to believe' and 'the assertions were misleading'.

3 The order granted by the Free State Division of the High Court, Bloemfontein (under case no. A70/2016) is set aside and substituted by the following order:

(a) 'The applicants' application to review and set aside the decision by the Council of the University of the Free State to adopt a new language policy is dismissed with costs including the costs of two counsel, save that in the case of the first applicant, each party shall pay its own costs.

(b) The respondent's application to strike out is upheld with costs including the costs of two counsel on a scale as between attorney and client. As a consequence the parts identified in the applicants' papers at paras 2 (a) to (g) of the order of this court are set aside.'

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A Cachalia

Judge of Appeal

APPEARANCES

For Appellant:	J J Gauntlett SC (with him F B Pelser) Instructed by: Phatshoane Henney Inc, Bloemfontein
For First Respondent:	J I du Toit SC (with him M J Engelbrecht; M J Merabe) Instructed by: Hurter Spies Inc, Centurion Schoeman Maree Attorneys, Bloemfontein
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