Chapter 8

Is Multilingualism merely a Dream? Recognition of Official Languages in South Africa's Higher Education Institutions

AfriForum v University of the Free State[1]

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"It is only when 'men are hostile [that] the language of their enemies may share their hatred'. In the present matter, it is said to be impossible to distinguish the use of Afrikaans from its speakers, at least in respect of white students at the University. It is important that the burden of the undeniable injustices perpetrated by white Afrikaans-speakers in the past, which are necessarily and justifiably condemned, should not be visited

> disproportionately and uncritically on future generations of white Afrikaans-speakers" (*AfriForum* par 88).

Abstract

This chapter examines the landmark constitutional case of *AfriForum v University of the Free State*, which marks the first time that the Constitutional Court addressed the complex tension between official language recognition and practical implementation in South Africa's higher education context. The case centres on the University's decision to shift from dual-medium instruction in English and Afrikaans to English-only instruction, a change contested by AfriForum and Solidarity. The court's majority judgment interpreted section 29(2) of the Constitution, which guarantees the right to education in an official language of choice where "reasonably practicable", as requiring consideration of equity, practicability and the need for redress. Crucially, the court held that it would be unreasonable to maintain a language policy that entrenched racial segregation, even unintentionally, thereby prioritising transformation and non-discrimination over language rights. The judgment's significance lies in establishing a precedent that would influence subsequent cases including *Gelyke Kanse v Chairperson of the Senate of the University of Stellenbosch* and *Chairperson of the Council of UNISA v AfriForum NPC*. However, the dissenting judgment by Froneman J provided an alternative perspective that questioned whether the exercise of a constitutionally protected language right could amount to unfair racial discrimination and emphasised the broader implications for all official languages beyond Afrikaans. His minority judgments in this case and *Gelyke Kanse* ultimately influenced the court's approach in the *UNISA* case, which took a more nuanced view of Afrikaans as a heterogeneous language and emphasised the importance of progressively introducing all indigenous languages in education. The chapter critiques the majority judgment for its narrow interpretation that fails to adequately recognise language diversity and for neglecting to consider relevant legislation such as the Use of Official Languages Act, which requires national entities to use at least

three official languages. This constitutional landmark thus represents a key moment in South Africa's ongoing negotiation between its commitment to multilingualism and the practical challenges of implementation in a post-apartheid society still grappling with historical inequities.

8.1 Introduction

The recognition of official languages in South Africa may be seen as one of the cornerstones of its democratic transformation as envisioned by the Constitution of the Republic of South Africa, 1996. Section 6 of the Constitution now recognises 12 languages as official languages of the Republic. The provision aims to promote parity of esteem and advance historically marginalised indigenous languages. In higher education institutions, this constitutional mandate, however, poses unique challenges. Language policies in higher education institutions in South Africa have often been contested before the courts, reflecting the tension between promoting multilingualism and addressing practicalities such as accessibility and resource constraints. The first time that this issue was addressed by the Constitutional Court in the higher education context was in the case of *AfriForum v University of the Free State*. The judgment is important because of its impact on the interpretation and recognition of official languages in the higher education context, although arguably, the court's interpretation is a narrow one that does not give adequate recognition to official languages and language diversity. This chapter emphasises the significant aspects of the judgment and shows the ripple effect that these aspects have had on the jurisprudence of the South African courts in the years that followed.

The case concerns a challenge by AfriForum and Solidarity against the University of the Free State's decision to change its language policy from dual-medium instruction in English and Afrikaans to English-only instruction.[2] In 2003, the University formalised a bilingual policy that had been proactively introduced in 1993.[3] However, within two years of implementation, the then Rector, Professor Fourie, acknowledged that the policy had led to the undesirable consequence of having separate lecture

rooms for white and black students.[4] This trend was regularly reported on and persisted, with concerns being raised by staff members and students that the dual-medium policy had given rise not only to racially segregated lecture rooms but also to racial tensions.[5]

Professor Lange, the Vice-Rector (Academic) of the University, characterised the worrisome and persistent challenge of racial segregation as "untenable on a post-apartheid campus".[6] She stated that it was "inherently impossible to avoid racial division when language is maintained and where statistics show that one of the two language streams comprises white and the other black students".[7] Professor Lange went on to say that while this was sometimes described as an ethical or redress issue, it was equally a matter of what was reasonably practicable. She concluded that it was "absolutely impossible to provide language of choice without indirectly discriminating on the basis of race".[8]

A report commissioned by the University authorities to investigate the appropriateness of the continued use of Afrikaans as a medium of instruction highlighted its entrenchment of racial division amongst students and virtual subversion of racial integration.[9] As a result, the University Management recommended a language policy shift. After open and admittedly extensive consultations with interested parties, including AfriForum, Solidarity and language experts, the final report was presented to the University Council for approval.[10] The major finding of the review committee was that the parallel-medium language policy was not working.[11] It was found to divide students largely by race and, therefore, work against the integration commitments of the University. The policy did not, from the student point of view, guarantee equality of access to knowledge in the two different language class groups. It had not kept up with the dramatic changes in the racial and language demography of the University in recent years. Furthermore, the continuation of Afrikaans was seen as a declining language of preference amongst students who viewed themselves as living, learning and labouring in a global world

where English competence provides more access and mobility than any other South African language.[12]

Based on these findings, the University Council adopted a new language policy in 2016.[13] The key points of this policy were that English would become the primary medium of instruction in undergraduate and postgraduate education; the University would embed and enable a language-rich environment committed to multilingualism; an expanded tutorial system would be available in Afrikaans and other languages to facilitate the transition to English instruction; parallel-medium instruction would continue in some professional programmes, the language of administration would be English, and the policy would be implemented flexibly over a period of about five years.[14]

AfriForum and Solidarity challenged this new policy in court.[15] They argued that proper research was not conducted and that most white and some black Afrikaans-speaking students preferred to be taught in Afrikaans. In essence, they saw no justification for the language policy shift.[16]

The High Court ruled in the favour of AfriForum and Solidarity and set aside the decision by the University of the Free State (UFS) Council and Senate to adopt a new language policy in March 2016 that made English the primary medium of instruction. First, the court found that the UFS is an organ of state bound by the Bill of Rights, including section 29(2) of the Constitution, which provides the right to receive education in an official language of choice where reasonably practicable.[17] Second, in adopting the new policy, the UFS Council and Senate failed to properly consider whether it remained reasonably practicable to offer instruction in Afrikaans alongside English, as required by section 29(2).[18] The court found this constituted a "material error of law" that rendered the decision reviewable.[19]

Third, the UFS did not adequately consider the constitutional implications of depriving Afrikaans-speaking students of their existing right to be taught in Afrikaans.[20] The court held that when a person already enjoys the benefit of being taught in their language of choice, "the State bears the negative duty not to take away or diminish the right without

appropriate justification".[21] Put differently, the court recognises that Afrikaans-speaking students at the UFS already had the benefit of receiving education in their chosen language under the previous language policy. By using the term "negative duty", the court is indicating that the state (in this case, the UFS as an organ of state) has an obligation to refrain from interfering with or removing an existing right. This contrasts with a "positive duty", which would require the state to actively provide something. This principle aligns with the doctrine of non-retrogression in human rights law, which holds that once a right has been realised, it should not be diminished or taken away without strong justification.

Fourth, the court held that the decision of the UFS was inconsistent with the Ministerial Policy on Languages in Higher Education, which supports retaining Afrikaans as a medium of instruction and commits to ensuring that its capacity as an academic language is not eroded.[22] The UFS policy had to comply with this Ministerial Policy under the Higher Education Act.[23] The Ministerial Policy acknowledges Afrikaans "as a language of scholarship and science is a national resource".[24] The court viewed the UFS's decision to phase out Afrikaans as a primary medium of instruction as inconsistent with this acknowledgment. The Ministerial Policy expresses support for "the retention of Afrikaans as a medium of academic expression and communication in higher education" and commits to "ensuring that the capacity of Afrikaans to function as such, is not eroded".[25] The UFS's new policy, which significantly reduced the role of Afrikaans, was seen as contrary to this commitment. The Ministerial Policy states that the sustained development of Afrikaans is not the responsibility of only some historically Afrikaans universities.[26] By abandoning Afrikaans as a primary language of instruction, especially when other universities had also curtailed its use, the UFS was seen as failing to uphold this shared responsibility. The Ministerial Policy suggests that the sustainability of Afrikaans as a medium of academic expression can be secured through strategies including "parallel and dual language medium options".[27] The UFS's decision to move away from its previous parallel-medium policy to an English-dominated policy was viewed as inconsistent with this

recommendation. The court emphasised that the UFS's previous 2003 language policy, which provided for parallel-medium instruction in English and Afrikaans, aligned perfectly with the Ministerial Policy, whereas the new 2016 policy did not.[28] This inconsistency was particularly problematic because section 27(2) of the Higher Education Act requires university language policies to be compatible with the Ministerial Policy.[29]

Fifth, the court found there was no rational connection between the decision taken and the surrounding facts and circumstances.[30] While the UFS aimed to address racial segregation, the court held that this was "not one that is rationally connected to the purpose of the empowering provision namely the adoption of a language policy in the interest of the community".[31] The court applied a rationality test, which requires that decisions made by public bodies must have a logical connection to the facts, circumstances and purpose for which the decision-making power was granted. The UFS argued that its primary reason for changing the language policy was to address racial segregation on campus, which it believed was caused by the parallel-medium language policy.[32] The court found that the UFS did not provide sufficient evidence to support its claim that the parallel-medium policy was causing racial segregation. It noted that some African and coloured students chose to study in Afrikaans, and that the demand for English instruction came from all racial groups.[33]

The court interpreted the purpose of adopting a language policy as being "in the interest of the community" and in line with constitutional requirements and ministerial standards.[34] While addressing racial segregation might be a laudable goal, the court found that it was not directly related to the primary purpose of determining a language policy for the University community. The court criticised the UFS for not adequately considering other relevant factors, such as the constitutional right to education in one's chosen language where reasonably practicable, and the practical aspects of continuing to offer Afrikaans instruction.[35] By highlighting this lack of rational connection, the court essentially found that the UFS had based its decision on grounds that were not sufficiently related

to the core purpose of a language policy, and had failed to consider more directly relevant factors. This reasoning formed a significant part of the court's justification for setting aside the UFS's decision. The judgment concluded that had the UFS Council and Senate properly considered the constitutional issues at stake, "the result inevitably would have been different".[36] The court, therefore, reviewed and set aside the decision to adopt the new language policy.

However, the University successfully appealed this decision of the High Court to the Supreme Court of Appeal.[37] The court found that AfriForum failed to prove the existence of "exceptional circumstances" as required by section 18(1) of the Superior Courts Act.[38] AfriForum's argument that the mere deprivation of students' constitutional right to education in their language of choice constituted exceptional circumstances was rejected as conceptually flawed, as it conflated the deprivation of a right with adverse consequences flowing from it, without proving such consequences.[39]

The court held that AfriForum failed to meet the additional requirements in section 18(3) of the Act. AfriForum did not prove on a balance of probabilities that students would suffer irreparable harm if the order was not implemented pending appeal.[40] No evidence was provided of any actual harm to potential first-year Afrikaans students, and no student was identified who intended to exercise the right to study in Afrikaans in the affected faculties.[41] Furthermore, the SCA (Supreme Court of Appeal) found that AfriForum failed to prove that implementing the order pending appeal would not cause irreparable harm to the UFS.[42] The court accepted the UFS's evidence that it had undertaken substantial planning and preparation to implement the new language policy in 2017, expending extensive human and financial resources. Preventing implementation would result in wasted public resources, constituting irreparable harm to the UFS.[43] The Supreme Court of Appeal criticised the High Court for failing to provide proper reasons for its order as required by section 18(4)(*i*) of the Act.[44] The court found the High Court's reasons "materially lacking in substance" and amounting to "an assortment of

some conclusions" rather than a proper attempt at furnishing reasons.[45] Aggrieved by this outcome, AfriForum and Solidarity sought leave to appeal to the Constitutional Court.

8.2 Significant aspects of the judgment

8.2.1 Interpretation of section 29 and the requirement of "reasonable practicability"

The court interpreted section 29(2) of the Constitution as requiring that education in an official language of choice must be "reasonably practicable". This involves considering equity, practicability and the need for redress.[46] The court held that it would be unreasonable to maintain a language policy that entrenched racial segregation or discrimination, even if unintentionally.[47] The Constitutional Court's interpretation of section 29(2) of the Constitution is a central aspect of its judgment. Section 29(2) of the Constitution provides for the right to receive education in an official language of choice "where that education is reasonably practicable".[48] The court emphasised that this right is not unqualified, but subject to the all-inclusive condition of reasonable practicability.[49] In interpreting "reasonably practicable", The court considered the entire context of section 29(2), including the factors listed in the provision: equity, practicability and the need to redress past racially discriminatory laws and practices.[50] The court rejected the notion that these factors could be isolated from each other or from the concept of reasonable practicability.[51]

The court held that reasonable practicability requires not only that the practicability test be met, but also that considerations of reasonableness, extending to equity and the need to address historical injustices, be appropriately accommodated.[52] This interpretation means that even if it is practically possible to offer education in a particular language, it may not be reasonable to do so if it conflicts with broader constitutional imperatives. Crucially, the court stated that it would be unreasonable to adhere to a language policy that has proved to be "the practical antithesis of fairness, feasibility, inclusivity and the remedial action necessary to shake racism

and its tendencies out of their comfort zone".[53] This indicates that the court views the reasonable practicability requirement through the lens of the Constitution's transformative goals.

The court further elaborated that the enjoyment of the right to be instructed in a language of choice must not undermine equitable access, preserve exclusivity, or perpetuate racial supremacy.[54] It held that it would be unreasonable to allow some people to have unimpeded access to education at the expense of others as a direct consequence of pursuing the right to education in a language of choice, particularly when all could be properly educated in one common language.[55] This interpretation effectively means that even if a language policy does not intentionally discriminate or segregate, it may still be deemed unreasonable and impracticable if it has the effect of entrenching racial divisions or hindering transformation. The court thus prioritised the broader constitutional goals of equity, redress and non-racialism in its interpretation of section 29(2).

The court accepted the University's assessment that continuing parallel English-Afrikaans instruction had resulted in racial segregation and tension on campus.[56] It found that the University had reasonably concluded that it was no longer practicable to offer Afrikaans instruction, given these racial dynamics.[57] The court placed significant weight on the University's own evaluation of the situation on campus. It noted that within two years of implementing the dual-medium policy, the then Rector, Professor Fourie, had expressed concerns about unintended consequences, particularly the entrenchment of segregation in lecture rooms along racial lines.[58] The court accepted the University's reports that the policy had led to racial tension, with concerns raised by both staff and students about its injurious consequences.[59] It noted that these issues featured regularly in progress reports on the dual-medium policy implementation.[60] The court emphasised the University authorities' intimate connection to and daily experience on campus, stating that this put them "at a vantage point to understand better and speak with respectable authority on the true state of affairs in their own 'house'".[61] This suggests a degree of deference to the University's assessment of the

situation on the ground. The court accepted the University's conclusion that the use of Afrikaans had unintentionally become a facilitator of ethnic or cultural separation and racial tension from around 2005 to 2016.[62] It agreed with the University's assessment that continued use of Afrikaans would "leave the results of white supremacy not being redressed but kept alive and well".[63]

In addition, the court found that while it may be practicable to retain Afrikaans as a major medium of instruction, it "certainly cannot be 'reasonably practicable' when race relations is poisoned thereby".[64] This finding links back to the court's interpretation of "reasonably practicable" in section 29(2) of the Constitution, emphasising that practicability alone is not sufficient if it conflicts with broader constitutional imperatives. The court also noted the absence of any suggested alternatives that could address the racial tensions while retaining Afrikaans as a medium of instruction.[65] It interpreted this as indicating that no other reasonable alternative was available for the University to consider.[66] In essence, the court found that the University had made a reasonable assessment based on its direct experience and empirical evidence, and that this assessment aligned with the constitutional requirement of reasonable practicability as interpreted by the court. This led to the conclusion that the University's decision to phase out Afrikaans instruction was justified and constitutionally sound.

8.2.2 Compliance with the legislative and policy framework

On the issue of compliance with the ministerial language policy framework, the court held that the University's new policy was not inconsistent with it. The framework allowed for flexibility based on changing circumstances and constitutional imperatives.[67] The court found that the University had adopted a "flexible, pragmatic and reasonable approach" in phasing out Afrikaans instruction to advance transformation and integration.[68] The court acknowledged that the University's language policy must be developed "subject to" the ministerial policy, as required by section 27(2) of the Higher Education

Act. This means that the University's policy must be fundamentally in sync with the ministerial policy.[69] However, the court emphasised that the applicability of the ministerial policy is situational and context-specific.[70] It held that when circumstances change in a way that would cause a university to undermine constitutional 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.[71]

The court noted that the ministerial policy framework itself incorporates constitutional norms and imperatives. It highlighted that the framework cautions universities not to develop their language policies in total disregard of constitutional provisions relevant to language policy.[72] Importantly, the court found that there is nothing in the framework to suggest that its preferred language policy option is to be followed by universities at all costs.[73] It held that constitutional imperatives like access, equity and inclusivity could dictate a radical departure from the preferred option.[74] The court interpreted the ministerial policy as allowing for flexibility in implementation, provided that the language of instruction does not become a barrier to access or an inadvertent tool for racial discrimination.[75]

In assessing the University's approach, the court found that it had adopted a flexible, pragmatic and reasonable approach to implementing a policy that unavoidably diminishes the status of Afrikaans as a medium of instruction. The court noted approvingly that the University had left elements of Afrikaans use intact in areas like tutorials, and in Education and Theology. The court viewed this accommodation as demonstrative of the University's commitment to uphold applicable constitutional norms while pursuing what is in the best interests of all the people whom it serves.[76] The court found that the University's language policy was "subject to" the ministerial policy framework and the Constitution.[77] This finding emphasises the court's view that compliance with the ministerial policy does not require rigid adherence, but rather a flexible approach that balances language rights with

other constitutional imperatives, particularly those related to transformation and non-discrimination.

Although the court held that the University's new language policy was, therefore, consistent with section 29(2) of the Constitution and the ministerial policy framework,[78] the court's reasoning is rather astonishing. First, if universities need not comply with the ministerial policy framework, why have it at all? Surely, universities should comply with, at the very least, the broad purposes of the policy – which is multilingualism. Second, the court's assertion that it would be "unreasonable to… 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. This, in circumstances where all could properly be educated in *one common language*",[79] is also remarkable. No student at the UFS was denied *access* to education based on language, nor can *success* in higher education be guaranteed, whether you study in your preferred language or otherwise.[80] Third, historically, education in *one common language* in South Africa has led to much conflict and linguistic persecution – one can only think of the Soweto uprisings (against compulsory education in Afrikaans under apartheid), or even the Great Trek (against compulsory education in English under British rule).[81] In light of our unique history, would it be reasonable to continue along such a course, given the diverse nature of the South African nation?[82]

Another issue regarding the majority judgment's decision is that it did not consider existing legislation regulating the use of official languages by "national departments, national public entities and national public enterprises". In terms of the Use of Official Languages Act 12 of 2012, national departments, national entities or enterprises must use *at least three* official languages for official communication.[83] This Act and its implications were, however, not considered by the court, although it clearly applies to public universities as organs of state.

8.2.3 Dissenting judgment: An alternative approach to the recognition of official languages

Froneman J, in his dissenting judgment, expressed concern that the majority judgment accepted the University's assertion that it was impossible to provide education in a language of choice without indirectly discriminating on the basis of race.[84] He argued that this stance has significant implications beyond the University's campus, as it sanctions an approach that deprives speakers of an official language of their constitutional right to receive education in their chosen language.[85] The dissenting judgment emphasised the importance of determining the factual and normative boundaries within which the Constitution would allow such an approach.[86] Froneman J believed that the applicants' prospects of success were not as bleak as the majority judgment suggested.[87]

Froneman J identified the central constitutional issue as determining what circumstances justify preventing someone from receiving instruction in their chosen official language.[88] He argued that this enquiry involves two key issues: the proper interpretation of section 29(2) of the Constitution and the role of ministerial policy in formulating language policy at educational institutions.[89] The dissenting judgment criticised the majority's focus on the historical context of Afrikaans as an instrument of oppression, arguing that this perspective was incomplete.[90] Froneman J emphasised the need to consider the broader context, including the struggle of Afrikaans against the dominance of English and its shared struggle with other official languages.[91] The dissenting judgment took issue with the majority's heavy emphasis on the historical context of Afrikaans as an instrument of oppression during apartheid.[92] While acknowledging the importance of this history, Froneman J argued that this perspective was incomplete and potentially skewed the analysis.[93]

Froneman J advocated for a broader contextual understanding. He highlighted that the struggle for recognition of Afrikaans was initially a struggle against the dominance of English, drawing parallels with the struggles of other official languages.[94] This perspective, he argued, was largely absent from

the majority judgment. The dissenting judgment referenced the ministerial policy, which recognised that language was an instrument of control not only in the oppression of the black community but also in the struggle of Afrikaners against British imperialism.[95] Froneman J argued that this more nuanced historical understanding was crucial for a comprehensive analysis of the language rights issue. Furthermore, Froneman J pointed out that the majority judgment failed to acknowledge the constitutional obligation to advance other official languages besides English and Afrikaans.[96] He suggested that this oversight could have implications for the future development of all South African languages in higher education. By emphasising these broader contextual factors, Froneman J argued for a more holistic approach to interpreting section 29(2) and evaluating the University's language policy. He contended that this approach was necessary to fully address the complex issues surrounding language rights in South African education.

Froneman J expressed concern that the majority judgment did not adequately address the question of whether the mere exercise of a constitutionally protected language right can amount to unfair racial discrimination.[97] He argued that this was a novel and important issue that the court had not previously decided. The dissenting judgment questioned the majority's acceptance of the University's assessment that continuing parallel English-Afrikaans instruction had resulted in racial segregation and tension.[98] Froneman J argued that this assessment raised factual issues that were not adequately addressed in the majority judgment.[99]

Froneman J contended that the court should have held a hearing and granted leave to appeal to allow for a more comprehensive examination of the issues.[100] He argued that this approach would have better served the interests of justice and allowed for input from other affected parties, including other universities, Afrikaans-speakers from diverse backgrounds and users of other official languages.[101] Firstly, he contended that even if the case appeared to be "open and shut" as the majority judgment suggested, the interests of justice would have been better served by holding a hearing before deciding whether to

grant leave to appeal.[102] This approach, he argued, would have enhanced the legitimacy of the outcome. Froneman J emphasised that the Constitution represents a negotiated revolution based on a historical compromise.[103] He noted that it has been subjected to criticism across racial lines for its alleged failure to fulfil different and conflicting aspirations and expectations.[104] In this context, he argued that the court's decision could be seen by some, particularly white Afrikaans-speakers, as a betrayal of their expectations about the Constitution's guarantees regarding their home language.[105]

The dissenting judgment stressed that the matter concerned "unfinished business" under the Constitution, at least for a significant portion of white Afrikaans-speakers. Froneman J warned that summarily disposing of the matter without an oral hearing might strengthen fears in certain quarters about the downgrading of Afrikaans.[106] Crucially, Froneman J argued that a hearing would have allowed for input from other affected parties. He noted that the future of Afrikaans as a language of instruction is contested not only at the University of the Free State but also at universities in Pretoria and Stellenbosch.[107] He suggested that it would have been in the interests of justice to allow those institutions a say as intervening parties or friends of the court.

Furthermore, Froneman J emphasised the importance of hearing from organisations that aspire to a more inclusive approach to Afrikaans than the applicants, AfriForum and Solidarity. He noted that white Afrikaans-speakers are becoming a minority of Afrikaans-language users and stressed the need to hear from those Afrikaans-speakers whose role in the origin and history of the language has been marginalised.[108]

Froneman J also argued for the value of input from users of other official languages. He suggested that their perspective on the implications of the court's decision for the advancement of other languages as media of instruction would have been valuable.[109] In essence, Froneman J contended that a more inclusive and comprehensive hearing process would have allowed for a fuller examination of the complex issues

at stake, potentially leading to a more nuanced and widely accepted decision.

The dissenting judgment concluded by expressing concern about the implications of the majority's reasoning for the future of Afrikaans and other official languages in higher education.[110] Froneman J stated that he hoped to be proven wrong, but feared that the majority judgment's reasoning and outcome "do not bode well for the establishment and nurturing of languages other than Afrikaans and English as languages of higher learning".[111] This statement reflects his worry that the court's decision might set a precedent that could hinder the development of other indigenous languages as mediums of instruction in higher education. He acknowledged that it might be better for the country to focus on the inclusiveness that English might bring as the sole language of instruction but argued that such a choice should be made by the public rather than the court. Froneman J asserted that the court's constitutional duty is instead "to create space for other official languages".[112] Froneman J provided additional comments in Afrikaans, emphasising the importance of an inclusive approach to the language and the need for careful consideration of language rights.[113]

8.3 Impact of the judgment

8.3.1 Impact of the court's interpretation of section 29 and the requirement of "reasonable practicability" and compliance with the legislative and policy framework

The *AfriForum* (CC) judgment is the first of its kind to be considered by the Constitutional Court. The use of official languages in higher education, however, remains a contentious issue. The *AfriForum* (CC) Court's interpretation of section 29 of the Constitution has, however, become significant in cases dealing with language rights in higher education. This section considers how the *AfriForum* (CC) judgment was used in subsequent cases dealing with official languages in the South African higher education context.

The constitutional validity of Stellenbosch University's 2016 language policy was challenged in the case, *Gelyke Kanse v Chairperson of the Senate of the University of Stellenbosch*,[114] in terms of section 29(2) of the Constitution. Gelyke Kanse, a non-profit organisation advocating for equal opportunities for Afrikaans and other indigenous languages, sought to reinstate the University's 2014 language policy, arguing that it the previous policy better aligned with section 29(2) and the Ministerial Language Policy for Higher Education (2002).[115] The 2014 policy ensured that students could study in Afrikaans across all courses and levels, whereas English was not universally available.[116] However, in response to student protests and language debates in 2015, the university revised its approach and implemented the 2016 policy, which introduced three modes of instruction: parallel-, dual-, and single-medium.[117] Under this new framework, English became the primary language of instruction, with Afrikaans translations being provided in most cases (dual-medium), and parallel instruction in both languages only where feasible.[118]

The Western Cape High Court ruled that the 2016 policy did not violate section 29(2), as it met the criterion of "reasonable practicability".[119] The court found that the 2014 policy disadvantaged black students who were not proficient in Afrikaans, and measures such as real-time translation marginalised and excluded them.[120] It also rejected the argument that fully parallel instruction in Afrikaans and English across all courses was a viable solution, citing the significant financial burden that it would impose, including a projected 20% increase in tuition fees.[121] Ultimately, and in accordance with the reasoning in the *AfriForum* (CC) case, the Constitutional Court upheld the ruling, affirming that Stellenbosch University had satisfied both the factual and constitutional requirements of reasonable practicability under section 29. Regarding the judgment's adherence to the legislative and policy framework, in the *Gelyke Kanse* case, the court did not consider the University's adherence to the broader legislative and policy framework regarding its language policy. Remarkably, neither the Use of Official Languages Act nor any provincial legislation was referred to in the judgment.

In the most recent Constitutional Court ruling on language policy in higher education, *Chairperson of the Council of UNISA v AfriForum NPC*,[122] the court reviewed an appeal against a Supreme Court of Appeal (SCA)[123] decision that had overturned a revised language policy at the University of South Africa (Unisa). The new language policy purportedly aimed to promote indigenous African languages in teaching and learning while simultaneously removing Afrikaans as a language of instruction.[124] The SCA, however, held that Unisa's

> "understanding of its responsibility under s 29(2) was fallacious. It ineluctably suggests that the institution did not properly comprehend the implications of the right to receive education in the official language of one's choice, the constitutional parameters within which its powers had to be exercised, and the precise ambit of responsibility which s 29(2) imposed upon it, when it reviewed its language policy and adopted a new one."[125]

AfriForum successfully challenged Unisa's policy in the SCA, leading the Constitutional Court to determine whether the University's decision violated section 29(2) of the Constitution.[126] In a unanimous bilingual decision, the Constitutional Court first investigated the history of the Afrikaans language[127] and its depiction as a language of "whites", "racists, oppressors and unreconstructed nationalists".[128] The development of the Afrikaans language, the court held,

> "into a heterogeneous, 'rainbow' language, spoken today by more black people than white people, is a marvellous paradox of human ingenuity and creativity. Recognising the major role played by lowly indigenous peoples and enslaved people in its history and development is crucial. The misconception that it is 'the language of whites' and 'the language of the oppressor' is an iniquitous portrayal of the language and its true roots."[129]

The court ultimately found that Unisa failed to provide sufficient justification for its new language policy and did not offer

compelling evidence that continuing Afrikaans instruction was not "reasonably possible".[130] The university's arguments, citing equity, costs, declining demand for Afrikaans, and demographic changes, were also deemed unsupported by evidence.[131] As a result, the court ruled that, as an organ of state, Unisa must conduct thorough investigations and feasibility studies before altering its language policy to ensure compliance with section 29(2).[132]

Although the *UNISA* ruling suggests a degree of judicial caution in broadly expanding language rights within government institutions, the *UNISA* judgment, nevertheless, represents progress towards a more inclusive approach to multilingualism in public higher education institutions. Despite this, the court did not consider the Use of Official Languages Act or the Gauteng Provincial Languages Act, nor did it address their potential implications for higher education institutions – a significant shortcoming of the judgment.[133]

8.3.2 Impact of Froneman J's minority judgment in *AfriForum* (CC)

Although merely a minority judgment, Froneman J's separate judgment in the *AfriForum* (CC) case, and, arguably, his minority decision in the *Gelyke Kanse* (CC) case, has had a significant impact on both the Supreme Court of Appeal and Constitutional Court judgments in the *UNISA* case. In *Gelyke Kanse* (CC), Froneman J's minority judgment echoed his sentiments in the *AfriForum* judgment, acknowledging the socio-historical context of linguistic rights in South Africa, particularly the privileged position historically occupied by Afrikaans-speaking communities in contrast to other linguistic minorities.[134] Froneman J highlighted the broader linguistic implications of endorsing the University's 2016 Language Policy, particularly the increasing dominance of English in higher education.[135] He further recognised that, while the specific burden of preserving Afrikaans as an academic language does not rest solely on Stellenbosch University, the policy shift represents a broader trend of linguistic marginalisation.[136] He warned that the prioritisation of English in education may contribute to the

erosion of South Africa's linguistic diversity, a phenomenon that extends beyond Afrikaans to our other indigenous languages.[137] Froneman J's minority judgment in *AfriForum* (CC) also emphasised that the ministerial language policy endorsed a much wider view of language usage than the University policy in question, recognising the Constitution's

> "demand that the marginalisation of indigenous languages in the past be practically and positively addressed and that the existing situation favouring Afrikaans and English should only endure 'until such time as other South African languages have been developed to a level where they may be used in all higher education functions.'"[138]

Furthermore, in the *Gelyke Kanse* (CC) case, Froneman J engaged with the constitutional implications of language policy in higher education, particularly in relation to access, equity, and historical redress. He acknowledges the exclusionary consequences of single-medium Afrikaans instruction, which effectively denies access to non-Afrikaans-speaking students, predominantly black students.[139] In addition, he criticised the dual-medium model, arguing that real-time translation from Afrikaans to English may result in the stigmatisation of non-Afrikaans-speakers.[140] Regarding the debate surrounding parallel-medium instruction, Froneman J noted the potential for unintended racial segregation within such a system, particularly between coloured and black students.[141]

Froneman J further interrogated the rationale supporting the argument that retaining Afrikaans as a full-fledged medium of instruction is not "reasonably practicable". He acknowledged the financial and infrastructural constraints cited by the University but warned against the broader consequences of diminishing Afrikaans in higher education and the importance of promoting mother-tongue education at all levels.[142] Drawing from comparative international examples, such as Canada's bilingual legal framework, he suggested that South Africa could adopt a more deliberate approach to fostering multilingualism rather than using English as the default language for

instruction.[143] In the *AfriForum* (CC) minority judgment, Froneman J rightly noted that the majority judgment portrays a "total lack of appreciation" that "Afrikaans remains a minority language and that there is considerable foreign and international authority in support of the proposition that minority languages deserve special measures for their protection".[144]

In his concluding remarks, Froneman J cautioned against an overly rigid application of the principle of "reasonable practicability" in relation to linguistic rights. He argued that dismissing Afrikaans as a viable language of instruction risks undermining South Africa's constitutional commitment to linguistic diversity and inclusion.[145] Rather than viewing multilingualism as an insurmountable challenge, he advocates for a more nuanced and context-sensitive approach that recognises the value of preserving and promoting all official languages in higher education.[146]

In the *UNISA* (CC) judgment, however, there seems to be a distinctly different tone than the one used in Constitutional Court's majority judgments in the *AfriForum* and *Gelyke Kanse* cases. First, the whole judgment in *UNISA* (CC) is bilingual; second, the *UNISA* (CC) judgment starts off with a discussion of the importance and history of the Afrikaans language, instead of only focusing on the Afrikaans language as an instrument of discrimination and oppression.[147] Furthermore, the *UNISA* (CC) judgment unequivocally stated that

> "[t]his Court's decisions in *Gelyke Kanse* and *University of the Free State* do not signal an acceptance that the Afrikaans language must ineluctably be diminished as a language of teaching and learning in our country's institutions of higher education. Apart from the fact that each case must be decided on its facts, the role of Afrikaans in our institutions and civic life cannot be reduced to a simplistic narrative of hegemony and decline. We must resist such simplistic narratives, many of which feed on false myths about the origins and development of the Afrikaans language."[148]

We, therefore, argue that the *UNISA* (CC) judgment took a distinctly different approach to the matter of language usage in higher education than the previous decisions in *AfriForum* (CC) and *Gelyke Kanse* (CC). The *UNISA* (CC) judgment, like Froneman J's minority judgments, also emphasised the importance of developing other languages and their use in education: "[t]he only way to achieve that is to ensure that all indigenous languages are progressively introduced as languages of teaching and learning, within the means reasonably available" – which approach should be welcomed.[149] In this regard, Mokgokong and Phooko agree with Froneman J's judgment in *AfriForum* (CC) that the majority's view that the use of one's constitutionally protected language constitutes unfair discrimination, is unacceptable.[150]

8.4 Conclusion

From the preceding discussion, it is apparent that the decision in the *AfriForum v University of the Free State* (CC) case has had a significant effect on the South African courts' jurisprudence regarding the use of official languages in higher education. Although, as noted by Cameron et al., the *AfriForum* (CC) judgment "did not exude the best of the Court… [forsaking] the aspirations of the 'rainbow' narrative in favour of harsher political realities".[151] Significantly, however, it seems that it will not necessarily be the majority judgment in the *AfriForum* (CC) case which has the greatest impact on the question of the use of languages, other than English, in higher education institutions in South Africa. It is, therefore, submitted, and hoped, that the wider interpretation to the language question, as proffered by Froneman J in his minority judgments in *AfriForum* (CC), as well as in *Gelyke Kanse* (CC), will have a greater impact on the language issue in the long run.

Building on the judgment in the *AfriForum* (CC) case, the court in *Gelyke Kanse* (CC), followed a similar approach, finding that, if the demographics and socio-political context of the universities in question are considered, the continued use of Afrikaans as a medium of instruction would lead to marginalisation, stigmatisation and racial division on their

campuses. These considerations, together with considerations of practicality and costs, led the court in *Gelyke Kanse* (CC) to find that the University of Stellenbosch's new language policy was consistent with section 29 of the Constitution. Unfortunately, like the decision in the *AfriForum* (CC) case, the court in *Gelyke Kanse* (CC) also did not refer to, nor consider the applicable language legislation in the matter, namely the Use of Official Languages Act, as well as the applicable provincial language legislation. In both cases, however, Froneman J, delivered a thoughtful separate judgment wherein he provided a wider and more inclusive perspective on the issue of the use of official languages in the higher education context. It is these minority judgments, we argue, which had a significant impact on the subsequent judgment in the *UNISA* (CC) case.

In the *UNISA* (CC) judgment, the court held that its previous rulings (referring to *AfriForum* and *Gelyke Kanse* (CC)) should not be construed to mean that Afrikaans (and other indigenous languages) should be eliminated from use by all higher education institutions. The court pointed out that all cases should be decided on their own merits, and that the *UNISA* (CC) case could be distinguished from the *AfriForum* and *Gelyke Kanse* (CC) cases in that Unisa was an institution providing distance learning, meaning that there was no possibility of Unisa students feeling excluded, stigmatised, or marginalised by the use of Afrikaans by the institution in the same way as those universities that provide face-to-face on campus teaching. Notwithstanding the different facts in these cases, the broader, more inclusive approach in the *UNISA* (CC) case should be welcomed – indeed, a broader more inclusive view of our language diversity is exactly what is needed in a country as diverse as South Africa with a rich linguistic and cultural heritage. It can only be hoped that the courts will follow the trend set by Froneman J's minority judgments and the *UNISA* (CC) case.

Endnotes

1 2018 2 SA 185 (CC) (*AfriForum* (CC)).
2 *AfriForum* (CC) (n 1) par 15–20.
3 *AfriForum* (CC) (n 1) par 15.
4 *AfriForum* (CC) (n 1) par 15.
5 *AfriForum* (CC) (n 1) par 15.
6 *AfriForum* (CC) (n 1) par 16.
7 *AfriForum* (CC) (n 1) par 16.
8 *AfriForum* (CC) (n 1) par 16.
9 *AfriForum* (CC) (n 1) par 17.
10 *AfriForum* (CC) (n 1) par 17.
11 *AfriForum* (CC) (n 1) par 18.
12 *AfriForum* (CC) (n 1) par 18.
13 *AfriForum* (CC) (n 1) par 19–20.
14 *AfriForum* (CC) (n 1) par 19–20.
15 *AfriForum v Chairman of the Council of the University of the Free State* (A70/2016) 2016 ZAFSHC 130 (21 July 2016) (*AfriForum* (HC)).
16 *AfriForum* (HC) (n 15) par 21.
17 *AfriForum* (HC) (n 15) par 10–11.
18 *AfriForum* (HC) (n 15) par 52.
19 *AfriForum* (HC) (n 15) par 52.
20 *AfriForum* (HC) (n 15) par 52.
21 *AfriForum* (HC) (n 15) par 19.
22 *AfriForum* (HC) (n 15) par 39–42.
23 *AfriForum* (HC) (n 15) par 34; Act 101 of 1997.
24 *AfriForum* (HC) (n 15) par 39.
25 *AfriForum* (HC) (n 15) par 40.
26 *AfriForum* (HC) (n 15) par 40.
27 *AfriForum* (HC) (n 15) par 40.
28 *AfriForum* (HC) (n 15) par 41.
29 *AfriForum* (HC) (n 15) par 41–42.
30 *AfriForum* (HC) (n 15) par 59.
31 *AfriForum* (HC) (n 15) par 56.
32 *AfriForum* (HC) (n 15) par 47–48.
33 *AfriForum* (HC) (n 15) par 50.
34 *AfriForum* (HC) (n 15) par 56.
35 *AfriForum* (HC) (n 15) par 55.
36 *AfriForum* (HC) (n 15) par 59.
37 *University of the Free State v AfriForum* 2018 3 SA 428 (SCA) (*AfriForum* (SCA)).
38 *AfriForum* (SCA) (n 37) par 20–21; Act 10 of 2013.
39 *AfriForum* (SCA) (n 37) par 21.
40 *AfriForum* (SCA) (n 37) par 22.
41 *AfriForum* (SCA) (n 37) par 22.
42 *AfriForum* (SCA) (n 37) par 23–25.
43 *AfriForum* (SCA) (n 37) par 24–25.
44 *AfriForum* (SCA) (n 37) par 27–28.
45 *AfriForum* (SCA) (n 37) par 27.
46 *AfriForum* (CC) (n 1) par 41–50.
47 *AfriForum* (CC) (n 1) par 46.
48 *AfriForum* (CC) (n 1) par 41.
49 *AfriForum* (CC) (n 1) par 42.

50 *AfriForum* (CC) (n 1) par 43-44.
51 *AfriForum* (CC) (n 1) par 45.
52 *AfriForum* (CC) (n 1) par 53.
53 *AfriForum* (CC) (n 1) par 46.
54 *AfriForum* (CC) (n 1) par 49.
55 *AfriForum* (CC) (n 1) par 49.
56 *AfriForum* (CC) (n 1) par 55-62.
57 *AfriForum* (CC) (n 1) par 63.
58 *AfriForum* (CC) (n 1) par 55.
59 *AfriForum* (CC) (n 1) par 56.
60 *AfriForum* (CC) (n 1) par 56.
61 *AfriForum* (CC) (n 1) par 59.
62 *AfriForum* (CC) (n 1) par 62.
63 *AfriForum* (CC) (n 1) par 62.
64 *AfriForum* (CC) (n 1) par 62.
65 *AfriForum* (CC) (n 1) par 62-63.
66 *AfriForum* (CC) (n 1) par 58.
67 *AfriForum* (CC) (n 1) par 65-75.
68 *AfriForum* (CC) (n 1) par 77.
69 *AfriForum* (CC) (n 1) par 66.
70 *AfriForum* (CC) (n 1) par 66.
71 *AfriForum* (CC) (n 1) par 66.
72 *AfriForum* (CC) (n 1) par 70.
73 *AfriForum* (CC) (n 1) par 72.
74 *AfriForum* (CC) (n 1) par 72.
75 *AfriForum* (CC) (n 1) par 71.
76 *AfriForum* (CC) (n 1) par 77.
77 *AfriForum* (CC) (n 1) par 79.
78 *AfriForum* (CC) (n 1) par 79.
79 *AfriForum* (CC) (n 1) par 49.
80 See Venter "Official languages and higher education: The story of an African university" 2019 *Tydskrif vir die Suid-Afrikaanse Reg* 558 570; Laubscher "Innovations in constitutional law: Recognition of language rights in South Africa: innovation or a dismal failure?" 2022 *Gdansk Legal Studies* 63 72.
81 Laubscher (n 80) 72.
82 Laubscher (n 80) 72.
83 See s 4(2)(*b*) of the Use of Official Languages Act.
84 *AfriForum* (CC) (n 1) par 83.
85 *AfriForum* (CC) (n 1) par 83.
86 *AfriForum* (CC) (n 1) par 83.
87 *AfriForum* (CC) (n 1) par 83.
88 *AfriForum* (CC) (n 1) par 85.
89 *AfriForum* (CC) (n 1) par 85.
90 *AfriForum* (CC) (n 1) par 87-93.
91 *AfriForum* (CC) (n 1) par 92-93.
92 Laubscher (n 80) 72-73.
93 *AfriForum* (CC) (n 1) par 87-93.
94 *AfriForum* (CC) (n 1) par 92-93.
95 *AfriForum* (CC) (n 1) par 92.
96 *AfriForum* (CC) (n 1) par 91.
97 *AfriForum* (CC) (n 1) par 96-97.

98 *AfriForum* (CC) (n 1) par 110–114.
99 *AfriForum* (CC) (n 1) par 114.
100 *AfriForum* (CC) (n 1) par 117–125.
101 *AfriForum* (CC) (n 1) par 120–123.
102 *AfriForum* (CC) (n 1) par 118.
103 *AfriForum* (CC) (n 1) par 119.
104 *AfriForum* (CC) (n 1) par 119.
105 *AfriForum* (CC) (n 1) par 120.
106 *AfriForum* (CC) (n 1) par 120.
107 *AfriForum* (CC) (n 1) par 121.
108 *AfriForum* (CC) (n 1) par 122.
109 *AfriForum* (CC) (n 1) par 123.
110 *AfriForum* (CC) (n 1) par 127–128.
111 *AfriForum* (CC) (n 1) par 127.
112 *AfriForum* (CC) (n 1) par 127.
113 *AfriForum* (CC) (n 1) par 129–135.
114 2020 1 SA 368 (CC); also see Laubscher "Overview of the constitutional court judgments on the bill of rights – 2019" 2020 *Tydskrif vir die Suid-Afrikaanse Reg* 308, 318–319; and Munyai "Language conundrum in higher education institutions in South Africa: One step forward or two steps back?" 2024 *De Jure* 177–195.
115 *Gelyke Kanse* (n 114) par 1–12.
116 *Gelyke Kanse* (n 114) par 3.
117 *Gelyke Kanse* (n 114) par 4.
118 *Gelyke Kanse* (n 114) par 4.
119 *Gelyke Kanse* (n 114) par 9; also see *Gelyke Kanse v Chairman of the Senate of Stellenbosch University* 2018 1 All SA 46 (WCC).
120 *Gelyke Kanse* (n 114) par 27–28.
121 *Gelyke Kanse* (n 114) par 30–31.
122 2022 2 SA 1 (CC) (*UNISA* (CC) case); also see Laubscher "Overview of constitutional court judgments on the bill of rights – 2021" 2022 *Tydskrif vir die Suid-Afrikaanse Reg* 356, 367–368.
123 *AfriForum NPC v Chairperson of the Council of the University of South Africa* (765/2018) [2020] ZASCA 79 (*UNISA* (SCA) case).
124 *UNISA* (CC) (n 122) par 3.
125 *UNISA* (SCA) (n 123) par 34.
126 *UNISA* (CC) (n 122) par 37.
127 *UNISA* (CC) (n 122) par 6–23.
128 *UNISA* (CC) (n 122) par 10, 11.
129 *UNISA* (CC) (n 122) par 21.
130 *UNISA* (CC) (n 122) par 57.
131 *UNISA* (CC) (n 122) par 65–77.
132 *UNISA* (CC) (n 122) par 85.
133 Laubscher (n 80) 75.
134 See *Gelyke Kanse* (n 114) par 64–66; also see *AfriForum* (CC) (n 1) par 87, 91.
135 *Gelyke Kanse* (n 114) par 66.
136 *Gelyke Kanse* (n 114) par 66; also see *AfriForum* (CC) (n 1) par 91.
137 *Gelyke Kanse* (n 114) par 67–69.
138 *Afriforum* (CC) (n 1) par 94.
139 *Gelyke Kanse* (n 114) par 70.
140 *Gelyke Kanse* (n 114) par 71.

141 *Gelyke Kanse* (n 114) par 72-74.
142 See *Gelyke Kanse* (n 114) par 77-91.
143 *Gelyke Kanse* (n 114) par 91.
144 *AfriForum* (n 1) par 124.
145 *Gelyke Kanse* (n 114) par 94-95; *AfriForum* (CC) (n 1) par 127.
146 *Gelyke Kanse* (n 114) pat 96-98.
147 *UNISA* (CC) (n 122) par 1-23.
148 *UNISA* (CC) (n 122) par 4.
149 *UNISA* (CC) (n 122) par 22.
150 Mokgokong and Phooko "What has the Constitutional Court given us? *AfriForum v University of the Free State* 2018 (4) BCLR 387 (CC)" 2019 *Obiter* 228 237.
151 Cameron, Cheng, Gore and Webber "Rainbows and realities: Justice Johan Froneman in the explosive terrain of linguistic and cultural rights" 2022 *CCR* 261 287.