WHAT HAS THE CONSTITUTIONAL COURT GIVEN US?

AfriForum v University of the Free State 2018 (4) BCLR 387 (CC)

1 Introduction

> "The use of Afrikaans has unintentionally become a facilitator of ethnic or cultural separation and racial tension [in higher education]" (*AfriForum v University of the Free State* 2018 (4) BCLR 387 (CC) (*UFS* case (CC)).

The history of South Africa is an unpleasant one. It was a society based on racial segregation with the promotion of Afrikaner culture and the Afrikaans language above all other languages (Nudelman *Language in South Africa's Higher Education Transformation: A Study of Language Policies at Four Universities* (University of Cape Town) (2015) 15). This can be traced to the architect of apartheid, the Afrikaner National Party, which introduced apartheid (Hofmeyr and Buckland "Education System Change in South Africa" in McGregor and McGregor (eds) *McGregor's Education Alternatives* (1992) 20). Afrikaans-speaking people, through the Afrikaner National Party, dominated South Africa politically. Their language too, was promoted above all other languages. For example, Afrikaans enjoyed more privileges than other languages in that it was used for drafting laws, as the language of record in the courts and was also the only compulsory subject for learning (Khalawan *Afrikaans in Democratic South Africa: A Survey of Scholarly Contributions and Tendentious Reporting Regarding the Status of Afrikaans and the Other Official Languages of South Africa* (2002) 12).

The apartheid government, through its racial policies, used the Afrikaans language as a tool to control Black South Africans in almost all spheres of life, including education, which had to be undertaken in Afrikaans (Khalawan *Afrikaans in Democratic South Africa* 12). It is therefore no surprise that there were five universities that offered education mainly in Afrikaans. These are Stellenbosch University, University of the Free State, University of Pretoria, Potchefstroom University for Christian Higher Education (now North-West University) and Randse Afrikaanse Universiteit (now University of Johannesburg).

The use of the Afrikaans language as an instrument for social control was not sustainable. The new constitutional dispensation ushered in an era wherein respect for fundamental human rights and freedoms is at the top of the South African agenda. The right to further education is constitutionally recognised in section 29(1)(*b*) of the Constitution of the Republic of South Africa, 1996 (the Constitution). Section 29(2) of the Constitution further recognises and embraces the diversity of South African society and provides

that "everyone has the right to receive education in the official language or languages of their choice in public education institutions where that education is reasonably practicable" (s 29(*b*) of the Constitution). The State has an obligation to take reasonable measures on a progressive basis to ensure that further education is available and accessible (s 29(1)(*b*) of the Constitution). In ensuring "effective access to and implementation" of the right to further education,

> "the state is required to consider all reasonable educational alternatives, including single medium institutions, taking into account ... *the need to redress the results of past racially discriminatory laws and practices*." (emphasis added) (s 29(2)(*c*) of the Constitution)

It is notable that, in its endeavour to make further education available and accessible, the State is required to consider several factors such as language policies. In an effort to facilitate the realisation of the right to further education, the Higher Education Act (101 of 1997) was enacted in order *inter alia* to "redress past discrimination and ensure representivity and equal access to higher education institutions" (preamble to the Act).

In the *UFS* case (CC), the Constitutional Court applied section 29(1)(*b*) of the Constitution, which provides for the right to further education and the "right to receive education in the official language or languages of [one's] choice". This note centres on this decision and seeks to critically discuss and analyse both the majority and minority decisions of the Constitutional Court. The question presented is whether the Constitutional Court has given the public a solution to the issue surrounding the use of either Afrikaans or English as a language medium of instruction in the higher education sector and what the effect of this has been on the development of other languages. The case note is divided into five sections. The facts of the case, the issues put before the court for consideration and the finding of the court are discussed in part 2. Part 3 contains an analysis of the minority and majority judgments. Part 4 considers whether the court has given us any solutions. Part 5 sets out the authors' recommendations and their conclusions.

2 Facts of the case

The *UFS* case (CC) was an appeal from the decision of the Supreme Court of Appeal (SCA) to the Constitutional Court. The majority judgment dismissed the application for leave to appeal. Froneman J, writing for the minority, disagreed with this approach. The minority would have granted leave to appeal and set the matter down for hearing (*UFS* case (CC) par 82–83). The minority argued that this approach would have allowed the court to assess the extremely important question – namely, whether depriving someone of an education in an official language of their choice can in itself amount to unfair discrimination. This is a nuanced (yet critical) issue and could have been better reflected in the majority judgment (ie not merely discussed in the minority judgment).

During the course of 2003, the University of Free State (the University) adopted a language policy providing for a parallel medium of instruction in Afrikaans and English. However, it later came to the conclusion that the use of both Afrikaans and English languages was having the unintended result of

perpetuating racism. Black students went to one set of lecture halls and White students went to others (*UFS* case (CC) par 55). Consequently, there were racial tensions at the University.

In order to address racial tensions at the institution, in 2016 the University decided to phase out Afrikaans as a parallel medium of instruction. English became the sole medium of instruction in the institution. AfriForum, a non-governmental organisation that claims to protect and advance civil rights, sought to have this policy reviewed and set aside. The basis of this claim was that the University *inter alia* failed to consider whether it was reasonably practicable to offer Afrikaans as a medium of instruction, and that a substantial number of students still preferred to be taught in Afrikaans and not English. Furthermore, AfriForum was of the view that the University deprived Afrikaans-speaking students of their constitutionally protected right to be taught in a language of their choice. AfriForum successfully challenged the University policy before the Free State High Court, which held that the dual language medium of instruction was to be reinstated (*AfriForum v Chairman of the Council of the University of the Free State* (A70/2016) [2016] ZAFSHC 130 (21 July 2016) (unreported)). Unsatisfied with the decision of the High Court, the University appealed to the SCA on the grounds that the dual medium of instruction was, *inter alia*, not promoting unity. The SCA ruled in favour of the University on the grounds that the use of both Afrikaans and English had produced unintended results such as racial tensions (*University of the Free State v AfriForum* [2017] 1 All SA 79 (SCA)). AfriForum challenged the decision of the SCA in the Constitutional Court on the basis that the University decision to implement a new language policy was reviewable by the court in terms of the principle of legality (*UFS* case (CC) par 37). The court then assessed whether the University acted consistently with section 29(2) of the Constitution and whether its new language policy accorded both with the ministerial language policy framework for higher institutions developed in terms of the Higher Education Act (101 of 1997) and section 27(2) of the Higher Education Act (*UFS* case (CC) par 39). In addition, the court had to consider whether it was reasonably practicable for the University "to retain Afrikaans as the second major medium of instruction" (*UFS* case (CC) par 9). The majority judgment answered the first question in the affirmative finding that the "University's language policy was determined 'subject to' and is thus consistent with the ministerial policy framework and the Constitution" (*UFS* case (CC) par 79) and responded to the second issue in the negative finding 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" (*UFS* case (CC) par 62–63). The minority judgment differed with the majority judgment on both issues.

3 An analysis of the judgments

This section analyses both the majority judgment (per Mogoeng CJ) and the minority judgment (per Froneman J). The authors submit that the sensitivity of language usage in the higher education sector is apparent from the fact that the court was divided in reaching its conclusion (*UFS* case (CC) par 1–7, 37, 76 and 84). It is also interesting to note that all the Black justices

hearing the case were of the view that the appeal to have Afrikaans also used as a medium of instruction should fail (Mogoeng CJ, writing for the majority with Nkabinde ADCJ, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Mojapelo AJ and Zondo J concurring), while all the White justices were of the view that the appeal should succeed (Froneman J writing for the minority with Cameron J and Pretorius AJ concurring).

3 1 Majority judgment

Prior to addressing the issues for determination, the majority judgment (the court) placed much emphasis on the historical development of Afrikaans as a scientific and scholarly language (*UFS* case (CC) par 1–9). The court *inter alia* recognised that Afrikaans had an advantage over all other official languages and that it was the language of the oppressor. Therefore, it enjoyed more attention, which led to its development.

In determining whether the University acted consistently with the Constitution, the court considered what the phrase "reasonably practicable" as used in the Constitution entails in a given case. The "reasonably practicable" concept has received considerable attention and diverse approaches from the courts and litigants alike (*Gelyke Kanse v The Chairperson of the Senate of the University of Stellenbosch* CCT Case No: 311/2017 (judgment pending); *Head of Department: Mpumalanga, Department of Education v Hoërskool Ermelo* 2010 (2) SA 415 (CC) and *University of the Free State v AfriForum* [2017] 1 All SA 79 (SCA)). The court recognised that every South African has the right to receive education in the language of their choice provided that it is reasonably practicable to do so. According to the court, the provisions of section 29(2) of the Constitution were to be given their ordinary grammatical meaning in order to find a constitutionally permissible interpretation. In its view, the majority judgment indicated that it would be "unreasonable to hold on to a policy that is against fairness, feasibility, inclusivity and the remedial actions necessary" to change racism and segregation (*UFS* case (CC) par 46). The court continued to observe that the right to education requires reasonable measures to be taken to make education progressively accessible, without racial discrimination or segregation on any grounds including race. The court stated that there was no legal basis for the isolation of any part of section 29 of the Constitution in seeking to understand the totality of the requirement of reasonable practicability. In other words, section 29 of the Constitution had to be read in a holistic manner, as its subsections are interdependent. To this end, the court relied on the decision in *Hoërskool Ermelo* (*supra*) to deal with the question whether it was "reasonably practicable" to receive education in a language of one's choice (*UFS* case (CC) par 55). The court accepted that this qualification will depend on the circumstances of each case. The reasonableness standard built into section 29(2)(*a*) of the Constitution imposes a context-sensitive understanding of each claim to receive education in an official language of one's choice. This entails that the right to receive education in one's preferred language will apply differently to each case, taking into account the different circumstances. In light of the above, the majority judgment concluded that "it would be unreasonable to wittingly or inadvertently allow some of our people to have" access to

education in a language of their choice to the exclusion of others (*UFS* case (CC) par 49). The court observed that the right to receive education in one's language "is made up of two distinct but mutually reinforcing parts" (*Hoërskool Ermelo supra* par 52). According to the court, the first aspect entails receiving education in a public institution in one's preferred language" (*Hoërskool Ermelo* par 52). However, the court observed that the first part has an internal limitation because the choice to receive education in one's language is available only when it is "reasonably practicable" (*Hoërskool Ermelo supra* par 52). The court stated that when it is reasonably practicable to receive education in one's preferred language will depend on the circumstances of each case (*Hoërskool Ermelo* par 52). In particular, the court stated:

> "[T]he reasonableness standard built into section 29(2)(*a*) imposes a context-sensitive understanding of each claim for education in a language of choice. An important consideration will always be whether the state has taken reasonable and positive measures to make the right to … education increasingly available and accessible to everyone in a language of choice. It must follow that when a learner already enjoys the benefit of being taught in an official language of choice the state bears the negative duty not to take away or diminish the right without appropriate justification." (par 52)

> "The second part of section 29(2) of the Constitution points to the manner in which the state must ensure effective access to and implementation of the right to be taught in the language of one's choice. It is an injunction on the state to consider all reasonable educational alternatives which are not limited to, but include, single medium institutions. In resorting to an option, such as a single or parallel or dual medium of instruction, the state must take into account what is fair, feasible and satisfies the need to remedy the results of past racially discriminatory laws and practices." (par 53)

In summary, the *Hoërskool Ermelo* judgment requires the State to enable an environment wherein a person is able to receive education in their preferred language provided that it is reasonably practicable to do so. Where a student is already receiving education in the language of their choice, such as in the present case, the State should be slow to interfere with the enjoyment of such a right.

Interestingly, the SCA has indicated also that section 29 consists of both legal and factual elements in that the legal standard is reasonableness, which involves a consideration of several constitutional imperatives such as non-racialism (*University of the Free State v AfriForum* [2017] 2 All SA 808 (SCA) par 26). There, the SCA indicated that the "factual criterion is practicability which is concerned with resource constraints and the feasibility of adopting a particular language policy" (*University of the Free State v AfriForum* 2 All SA 808 (SCA) par 26). According to the court:

> "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." (*University of the Free State v AfriForum* [2017] 2 All SA 808 (SCA) par 27)

In light of the above, the SCA was of the view that the University's assessment that it was no longer reasonably practicable to continue with both English and Afrikaans was "one that a court of law should be slow to

interfere with on review" (*University of the Free State v AfriForum* [2017] 2 All SA 808 (SCA) par 27). The SCA nonetheless cautioned that a decision-maker who seeks to effect change in language policy has to demonstrate that it has good reason to change the policy by *inter alia* acting rationally (*University of the Free State v Afriforum* [2017] 2 All SA 808 (SCA) par 27). The majority judgment appears to be in line with the decision of the SCA in that section 29(2) consists of both legal and factual elements. This is evident when the court says:

> "Reasonable practicability therefore requires not only that the practicability test be met, but also that considerations of reasonableness that extend to equity and the need to cure the ills of our shameful apartheid past, be appropriately accommodated. And that is achievable only if the exercise of the right to be taught in a language of choice does not pose a threat to racial harmony or inadvertently nurture racial supremacy. That goes to practicability. The question then is, has the use of Afrikaans as a medium of instruction at the University had a comfortable co-existence with our collective aspiration to heal the divisions of the past or has it impeded the prospects of our unity in our diversity? Has race relations, particularly among students, improved or degenerated as a consequence of the University's 2003 language policy? If not, would it be "reasonably practicable" for the University to relegate Afrikaans to low-key utilisation in a constitutionally permissible way?" (*UFS* case (CC) par 53)

The court relied on the SCA's observation 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" (*UFS* case (CC) par 53). It therefore found that on reasonableness, the continued use of Afrikaans unintentionally promoted segregation and racism *(UFS* case (CC) par 75).

The minority judgment stressed the need for the court to explore this test (factual and legal elements) in more detail and the question of whether it encompasses a dual test (*UFS* case (CC) par 110). The basis for this was that the parties before the court had differing views on the SCA's "objective criteria for compliance with section 29(2)" (*UFS* case (CC) par 106). For example, on the one hand, the applicants argued that "[s]ection 29(2) does not impose a dual requirement that such education must be practicable *and* that such education must be reasonable" (*UFS* case (CC) par 106). According to the applicants, "it imposes a single requirement: the education must be 'reasonably practicable'" (*UFS* case (CC) par 106). In other words, they contended that there is "no self-standing requirement of reasonableness" because "'reasonably' qualifies what is 'practicable'" (*UFS* case (CC) par 106). Based on this, the applicants submitted that the "relevant considerations are practical rather than normative" (*UFS* case (CC) par 106). On the other hand, the respondents, argued that "similar to section 25 of the Constitution, the inquiry as regards what is reasonably practicable is more demanding than merely imposing a rationality criterion, but less demanding than a proportionality analysis" (*UFS* case (CC) par 107).

In addition, the litigants differed with each other and the judgment of the SCA regarding the questions related to educational alternatives that had to be considered, such as whether

> "only resource-related factors relate to the section 29(2) criterion; whether there is an internal limitation in section 29(2); and what role other constitutional rights to language, equality and culture play in determining the proper objective criteria." (*UFS* case (CC) par 107)

We submit that in light of the aforesaid different views regarding the interpretation of section 29(2) of the Constitution, the court ought to have deliberated on this issue and provided clarity. The difficulty associated with the interpretation is also evident in the *Gelyke Kanse v The Chairperson of the Senate of the University of Stellenbosch* (*supra*), in which the applicants are seeking relief for students to be taught in Afrikaans (judgment pending). In particular, the applicants are of the view that

> "[t]here are no guidelines to *inter alia* inform the application of the *reasonably practicable* and … criteria; and these concepts are uncertain and vague, generalised and overbroad and leave SU considerable scope to not have separate lectures in Afrikaans and English, the only feature of the policy that actually provides for equality between the two languages." (Applicant's written submissions par 9.7.1–9.7.2)

The aforesaid paragraph indicates the broadness of the "reasonably practicable" concept in a given case. It is hoped that the decision will finally provide clarity on the precise interpretation of section 29(2) and the future of Afrikaans in the higher education sector as a medium of instruction.

It is submitted that the court ought to have been slow to accept the decision of the SCA for the reasons already stated. The preceding statement was also observed by the minority judgment and indicated that it would have preferred the matter to be fully ventilated in oral argument (*UFS* case (CC) par 109–110). The minority decision nonetheless found itself "constrained" to accept the approach taken by the Constitutional Court (*UFS* case (CC) par 110).

The majority decision further accepted the claim by the University that, upon its assessment, the continued use of Afrikaans amounted to racial discrimination (*UFS* case (CC) par 110). The minority judgment viewed this approach as a "step too far" because the assessment was conducted by the same institution that was accused of discrimination (*UFS* case (CC) par 112). According to the majority judgment, this is a matter that raised important constitutional issues, such as whether the "exercise of one's constitutional right to choice of language in tertiary education results in discrimination prescribed by the Constitution?" (*UFS* case (CC) par 112). In view of the minority decision, this was an objective legal question that required to be resolved by the court (*UFS* case (CC*)* par 112).

The majority judgment correctly highlighted that "when a learner already enjoys the benefit of being taught in an official language of choice, the State bears the negative duty not to take away or diminish the right without appropriate justification" (*UFS* case (CC) par 48). Despite this positive acknowledgement, the majority judgment opted to take away the said constitutional right when it upheld the University's decision to phase out Afrikaans. It justified its conclusion by *inter alia* indicating that "the unintended entrenchment or fuelling of racial disharmony would thus … [be] appropriate justification for taking away or diminishing the already existing enjoyment of the right" to receive education in one's preferred language

(*UFS* case (CC) par 50). It is submitted that this is where the majority judgment erred. In giving effect to the duty to implement the right to receive education in one's preferred language, the State must take into account what is fair and feasible, and must satisfy itself about the need to remedy past discriminatory practices in the education sector. It is important that effective access to education in the language of one's choice is realised without undermining equitable access to higher education. Additionally, this should not be done in a way that unnecessarily demotes other languages such as Afrikaans on the basis that they were used as a tool to control others during apartheid.

The majority judgment indicated that it would be unreasonable to allow a section of the student population the right to have unimpeded access to education and success at the expense of others, as a direct consequence of the blind pursuit of the enjoyment of the right to education in a language of choice. This is especially so if all students could be educated in one language – English (*UFS* case (CC) par 49).

The majority judgment also states that the criterion of reasonable practicability will not be met where scarce resources are channelled to a small group of students, "affording them close personal and very advantageous attention" while other students are swamped in lecture halls with very little attention (*UFS* case (CC) par 52). The majority judgment states that where integration and racial harmony are compromised because of giving effect to the right to be educated in the language of one's choice, the "criterion of reasonable practicability would not be met" (*UFS* case (CC) par 52). It is submitted that reference to scarcity of resources was never an issue in this case. It is in our view misplaced as it was never raised by the University. The University's contention has always been that the use of Afrikaans perpetuates racial tensions. In our view, whether the use of Afrikaans was "reasonably practicable" does not arise because there are already resources such as text books and lecture halls for teaching in Afrikaans.

The authors align themselves with the majority judgment in that the use of Afrikaans had "unintentionally become a facilitator of ethnic or cultural separation and racial tension" (*UFS* case (CC) par 62). This is where their association with the majority judgment ends.

The authors disagree with the majority judgment in that failure to address the racial tensions caused by the use of both Afrikaans and English "will result in white supremacy not being redressed but kept alive and well" (*UFS* case (CC) par 62). According to the majority judgment,

> "it might be reasonably practicable to retain Afrikaans as a language of instruction, but it will definitely not be reasonable to retain it if it affects race relations negatively" (*UFS* case (CC) par 62).

The authors agree with the aforesaid view because it may, for example, be reasonably practicable to demand the right to be educated by using Sepedi as a language of instruction at the University of Limpopo where the majority of the students have historically been and continue to be Sepedi speakers but it might not be reasonably practicable to make the same claim at the University of Cape Town where the student population is diverse. The

right to receive education in one's language will apply differently to different cases.

The court held that the respondents have adopted a flexible, pragmatic and reasonable approach in the implementation of the policy that unavoidably diminishes the status of Afrikaans as a medium of instruction. The court also held that the respondent's language policy was determined subject to and is thus consistent with the ministerial policy framework and the Constitution.

The majority judgment emphasised the importance of the proper interpretation of what is "reasonably practicable". In interpreting the concept, the court must apply the textual or ordinary meaning, having reference to context and purpose and ensuring consistency with the constitutional provisions. An interpretation that encapsulates the furtherance of equity and the need to redress past injustices such as racial segregation must be favoured over one that does not. In light of the above, the court found the policy of the University to be lawful and valid (*UFS* case (CC) par 79). It then dismissed AfriForum's appeal.

According to the majority judgment, the circumstances had changed: the intended promotion of both languages had instead seen a perpetuation of racial tensions, which meant that the dual policy was no longer in line with the constitutional norms such as the promotion of a non-racial society (*UFS* case (CC) par 7). It is submitted that the majority judgment did not show any connection between the option to study in Afrikaans and the alleged racial conduct being carried out by some Afrikaans-speaking students. This was also correctly pointed out by the minority judgment. It is submitted that the majority judgment failed to show objectively how the option to study in Afrikaans was to blame for the racial conduct committed by students especially where the court made reference to the "Reitz Four" hostel incident (*UFS* case (CC) par 68). The Reitz Four incident involved Black women and a Black gardener who were on their knees eating or drinking a mixture, allegedly urinated in by White students (Soudien "Who Takes Responsibility For the 'Reitz Four'? Puzzling Our Way Through Higher Education Transformation in South Africa" 2010 106 *South African Journal of Science* 1). The Reitz Four incident was mentioned in the judgment without being contextualised. It's relevance to the language issue is unknown.

Finally, the majority judgment further suggests that AfriForum ought to have presented practical alternative solutions to the problem of racial tensions. The authors submit that this was not the duty of AfriForum but a duty incumbent on the State. Additionally, AfriForum was never requested to make submissions on possible solutions.

3 2 Minority judgment

In the authors' view, the matters raised in this case about language in the higher education sector were novel and concerned important constitutional issues that have never been heard by the courts. The right to receive education in one's preferred language of choice is constitutionally protected. Therefore, the authors align themselves with the minority judgment and are of the view that it would have been better for the majority judgment to invite

oral arguments in order to determine the appeal. Oral argument is important; *inter alia* in answering questions that may not be clear to the justices, it also clarifies their understanding of the law, and is an opportunity to hear further aspects of the untold story (Hatchett and Telfer "The Importance of Appellate Oral Argument" 2003 33 *Stetson Law Review* 143).

The authors further agree with the minority judgment that it is unacceptable that the use of one's constitutionally protected language constitutes unfair discrimination. The majority judgment appeared to be agreeing with the University that the use of Afrikaans was perpetuating discrimination. It is submitted that only the University conducted an assessment and came to the conclusion that the continued use of Afrikaans resulted in racial tensions. The authors submit that given the sensitivity of the issues, the University ought at the very least to have appointed an independent body to conduct the study on the effects of the continued use of Afrikaans to elicit suggestions on how to prevent the racial tensions. Oral argument may have assisted in clarifying issues such as whether the parties were willing to explore other possible ways of retaining both languages, and to ascertain what may have worked.

The minority judgment correctly observed:

> "There are factual issues that are neither clear to me nor addressed in the main judgment. For example, if there were individual students or members of staff who were themselves guilty of racial discrimination, whether in the delivery and receipt of Afrikaans instruction or otherwise, why was it impracticable to discipline them? What exactly made it impossible to eradicate the racial discrimination? Did it have anything to do with the reaction to the continued use of Afrikaans in lectures by those who preferred another language? If so, was the reasonableness of that reaction assessed? Was an attempt made to address it by other measures?" (*UFS* Case (CC) par 114)

The above observation is true. As indicated earlier, the majority judgment makes reference *inter alia* to racial discrimination as one of the reasons for ruling in favour of the University. However, it is does not indicate those who are perpetuating racial discrimination. In the authors' view, clarity on the aforesaid issues could have been sought through oral argument.

The authors also submit that, as a matter of fact, Afrikaans is not only spoken by White people. There are also Black South Africans, in many so-called Coloured communities who speak only Afrikaans. They further submit that the majority judgment appears to have overlooked this factor.

4 What has the Constitutional Court given us?

While it is correct that Afrikaans was used as an instrument for social control, the authors submit that the court overlooked the notion of transformative constitutionalism, which *inter alia* enjoins South Africans to build a just society based on human rights (*Hoërskool Ermelo* par 47 and 55; preamble to the Constitution). Transformative constitutionalism is a concept devised by Karl Klare and he views the Constitution of South Africa as transformative in nature (Klare "Legal Culture and Transformative Constitutionalism" 1998 14 *South African Journal on Human Rights* 150). According to Klare, transformative constitutionalism means

> "a long term project of constitutional enactment, interpretation and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law …" (Klare 1998 *SAJHR* 150–151)

The authors agree with Klare's definition in that the Constitution enjoins everyone to reconstruct our society by addressing structural social and economic inequalities that are based on race, among others, in order to promote a peaceful co-existence (Phooko and Radebe "Twenty-Three Years of Gender Transformation in the Constitutional Court of South Africa" 2016 8 *Constitutional Law Review* 312). It is possible to argue that, in this case, the University management embraced the notion of transformative constitutionalism when they "decided in favour of English as the sole medium of instruction" (*UFS* case (CC) par 7). By doing so, the University was advancing a constitutionally mandated transformational imperative *inter alia* by deracialising classes, fostering unity and reconciliation (*UFS* case (CC) par 7). However, in our view, the court ought to have fully acknowledged the diversity of South Africans and called for tolerance and mutual respect (*Kievits Kroon Country Estate (Pty) Ltd v Mmoledi* 2014 (1) SA 585 (SCA)). We submit that building a future of peaceful coexistence does not entail erasing or demoting other languages such as Afrikaans. In this case, students were already receiving their education in Afrikaans (*UFS* case par 65). In our view, the court was aware that preventing someone from receiving education in their language was no easy task. This can be seen when the court said that the University's decision to prefer English was "[c]ertainly not to impose any of the home languages of those in government on Afrikaners or others" (*UFS* case (CC) par 7). In the circumstances of this case, the authors submit that it appears that the idea of reconstruction of society has been applied in a manner that subconsciously erases a language because it was used by the oppressor.

The court had an opportunity to deal with the matter and to provide clarity on future problems that may arise in a situation where, for example, Sepedi- or Sesotho-speaking people might demand to be taught in their mother tongue languages. In the authors' view, the Sesotho or Sepedi languages also have the possibility of dividing students if they were to be introduced, for example, at the University of Cape Town where the majority of students are English and IsiXhosa speaking. The question is how are Sesotho or Sepedi to be promoted in these universities? The authors submit that the demand for the introduction of Sesotho or Sepedi as a language of medium of instruction is likely to arise in the near future, especially in the light of recent calls for decolonisation and transformation of the curriculum in higher education. We submit that the Constitutional Court has missed an opportunity to open doors for other languages to prosper. Therefore, it is submitted that the court should have deliberated on this matter in order to provide guidance. As things stand, the authors submit that there is no formula or guidance to address a similar case in future as the current judgment suggests that any language that has the potential to divide students should be phased out. In the authors' view, this is a lost

opportunity. The authors further submit that given the sensitivity and the constitutional imperative to develop other languages, this matter ought to have been argued before the court instead of being decided based on the pleadings and written submissions of the parties. All in all, the authors submit that the majority judgment does not provide guidance for the protection of Afrikaans, and nor does it foster the development of other languages, including Sesotho and Sepedi.

5 Recommendation and conclusion

The authors submit that there should be an open dialogue that would revive the debate around the use and promotion of languages in the higher education sector. In their view, the Constitutional Court decision in the present discussion has closed off the possibility of other languages being used as they are more likely to result in the use of separate lecture halls.

In their view, the courts are not there to resolve all social challenges. The language issue too cannot be resolved by the courts. In our view, it can only be resolved by South Africans, united in their diversity, through meaningful engagement that is aimed at finding a sustainable solution. The concept of meaningful engagement has been developed by the courts and it is in the authors' view applicable in this case (see for e.g., *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg* 2008 (3) SA 208 (CC); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2009 (9) BCLR 847 (CC)). According to Chenwi and Tissington, "meaningful engagement is an expression of 'bottom-up' participatory democracy" (Chenwi and Tissington "Engaging Meaningfully with Government on Socio-Economic Rights" 2010 *Community Law Centre, University of the Western Cape* 17–18). It further promotes transparency and accountability (Chenwi and Tissington 2010 *Community Law Centre, UWC* 17–18). It further means that the "parties make final decisions together" (Chenwi and Tissington 2010 *Community Law Centre, UWC* 10). The courts have acknowledged that skilled and sympathetic people are needed to make engagement processes effective (*Occupiers of 51 Olivia Road et al v City of Jhb supra* par 19 and 20). This is especially needed in emotive cases such as the current one. The Constitutional Court has said that "the requirement of engagement flows from the need to treat residents with respect and care for their dignity" (*Residents of Joe Slovo Community v Thubelisha Homes supra* par 238, 261 and 406; *Occupiers of 51 Olivia Road et al v City of Jhb supra* par 10–11; *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC) par 83).

The Constitutional Court has said that engagement should ordinarily happen before issues go to court, and not after (*Abahlali Basemjondolo Movement SA v Premier of the Province of Kwazulu-Natal* 2010 (2) BCLR 99 (CC) par 119–120).

The calls for curriculum transformation continuously gain momentum and cannot be ignored for too long. In our view, the parallel use of Afrikaans and English as a primary medium of instruction was something that demanded monitoring and the exploring of other alternatives. The use of Afrikaans

could have provided guidance on how to promote other languages such as Sepedi or Sesotho.

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