SOUTH AFRICAN HUMAN RIGHTS COMMISSION REPORT

WC/2021/0210

In the complaint of:

Freedom Front Plus First Complainant

Dr Leon Schreiber Second Complainant

against

Stellenbosch University Respondent

INVESTIGATIVE REPORT

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1. INTRODUCTION

The South African Human Rights Commission ("Commission/SAHRC") is a state institution, established by S181 of the Constitution of the Republic of South Africa, 1996 ("Constitution"), as one of the institutions that support constitutional democracy.

The Commission is mandated by S184 (1) of the Constitution, to promote respect for human rights, promote the development, protection and attainment of human rights, and monitor and assess the observance of human rights.

S184 (2) (a) and (b) of the Constitution further invests the Commission with the powers to conduct investigations of alleged human rights violations and

report on same. In addition, the Commission is mandated to take steps to secure appropriate redress where it finds rights have been violated.

The South African Human Rights Commission Act, 40 of 2013 ("the Act") further affords the Commission specific powers to enable it to carry out investigations of human rights violations.

2. THE PARTIES

The First Complainant is the Freedom Front Plus, represented before the Commission herein by Dr Pieter Groenewald MP.

The Second Complainant is Dr Leon Schreiber MP, in his capacity as a Member of Parliament.

The Respondent is Stellenbosch University ("SU" or "the Respondent"), represented before the Commission herein by its Rector and Vice-Chancellor, Professor Wim de Villiers.

3. THE COMPLAINTS RECEIVED

In March 2021, the Commission received a number of complaints alleging that students at SU were being prevented from communicating in Afrikaans.

The Commission received complaints from the Freedom Front Plus as well as Dr Leon Schreiber MP containing the following allegations:

a) SU, elected student leaders and administrators at certain SU residences, prohibited students from conversing or otherwise communicating in Afrikaans;
b) the ban on the use of Afrikaans extended even to prohibiting its use in private, including certain residences, bedrooms, digital platforms such as *WhatsApp* and even on park benches in front of certain residences;

c) students reported being threatened with disciplinary action, or were subject to public bullying, if they used Afrikaans on campus or in their residences;

d) the abovementioned ban on Afrikaans was being enforced in the Minerva Women's Residence, Irene Women's Residence, Huis Francie van Zyl Women's Residence, Capri Student Organisation and Tygerberg Residence (referred to collectively hereinafter as "the Residences"), although it may have been broader reaching than this; and

e) numerous students complained to SU management about the above without the issue being addressed.

4. SALIENT FACTS DETERMINED THROUGH THE COMMISSION'S INQUIRY

4.1. *The Inquiry process*

4.1.1 Section 15 (1) (b) of the Act provides that:

"Pursuant to the provisions of section 13 (3) the Commission may, in order to enable it to exercise its powers and perform its functions –

(a) …

(b) through a commissioner, or any member of staff duly authorised by a commissioner, require from any person such particulars and information as may be reasonably necessary in connection with any investigation".

4.1.2 In terms of section 15 (1) (b) of the Act above, and in response to the complaints received in this matter, the Commission initiated an Inquiry, whereby the Commission collected information in the form of written and oral submissions from involved and interested parties.

4.1.3 The Commission, during its inquiry, received submissions from

a) the First and Second Complainants;

b) SU management (including Vice Chancellor Wim de Villiers and numerous senior members of SU management and faculty heads);

c) affected students of SU;
d) residence heads of the affected residences;
e) House Committee members of affected residences;
f) the DAK Netwerk (a non-governmental organisation supporting the rights of disadvantaged Afrikaans communities); and
g) Studente Plein (a student organisation promoting the rights of Afrikaans students in universities).

4.2. ***Matters under consideration***

4.2.1 Arising out of the complaints received and the response thereto, the Commission must consider whether the respondent has (through its Residences or other means) taken steps to require the exclusive or predominant use of English or the prohibition of Afrikaans either at its university residences or elsewhere on campus and in that event, whether this constituted a violation of the rights of any student/s to, among others:

a) freedom of expression (section 16 of the Constitution);
b) human dignity (section 10 of the Constitution);
c) not be unfairly discriminated against on the basis of language, culture or any other prohibited ground (section 9 of the Constitution); and
d) use the language and to participate in the cultural life of their choice (section 14 of the Constitution).

4.2.1 The Commission is aware that many of the individuals involved in and/or implicated in this investigation are young university students, with years of further study and personal growth (as well as professional and social development) ahead of them. The complaints under investigation do not seek to single out any particular student and doing so would be unlikely to benefit this investigation enough to justify the potential negative impact on the personal, social and career development of these young individuals, should any of them be put under the spotlight in this public forum. While the Commission need not ensure the anonymity of any person involved in this investigation (unless such protection has been expressly requested from a

particular person and there is good reason for the Commission to not reject this request), it sees no need to draw unnecessary attention to any student involved in this controversial matter, or single out any one particular residence (and thus the students who lead and reside in that residence) unless not doing so in a particular instance would lead to lack of clarity. The matter at hand is one that can be addressed in relatively broad strokes, without needing to delve too deeply into the actions of any particular student or residence. As a result, the Commission will not herein publish the names of students and will also refer to the Residences involved collectively as far as possible.

4.3. ***The policy leading to the complaints***

4.3.1 The Commission was able to determine that the Residences had implemented a policy during the two opening weeks of the 2021 academic year that required all students at the Residences, for the duration of the opening weeks only, to speak English exclusively. The Commission acknowledges that where these policies were implemented by Residences, this was done without any official consent by SU and, if anything, in contravention of the US 2016 Language Policy.

4.3.2 The “English-only” policy (“the residence policy”) applied in all welcoming activities and presentations led by the Residences, as well as during ordinary socialising in and around the Residences.

4.3.3 It is important to note that the residence policy did *not* apply within academic contexts or on the campuses of SU; it was limited to the Residences in question and their daily operations during the welcoming period of 2021.

4.3.4 In spite of the above, the Commission did receive testimony from a number of students that, in numerous contexts within the university, including during interactions with lecturers and others, they were faced with hostility due to them speaking Afrikaans.

4.3.5 The Commission notes that, save for the case of Minerva and Irene Residences, the relevant facts regarding the other Residences were disputed and the Commission does not make an actual finding in this regard. It is considered to be unnecessary to do so since the principles set out in this report, and the proposed remedial steps, are applicable whether or not these exclusionary policies occurred in one residence or more.

4.3.6 The aforementioned testimony was corroborated to a significant extent by SU's Department of Afrikaans and Dutch, which wrote an open letter to SU on 31 March 2021, raising concerns that Afrikaans was being denigrated as a language at the university and that the Department had received numerous complaints from Afrikaans students alleging they had been subject to "micro-aggressions" at SU due to their language choice. The open letter also criticised SU for the 2016 Language Policy as well as the processes involved at the time in preparation of the 2021 Language Policy. The Department also criticised SU for not recognising Afrikaans as an indigenous language. The Department of Afrikaans and Dutch, in its testimony during the Inquiry, confirmed the contents of this open letter, but indicated that, following the publication of the letter, they met with SU leadership in May 2021 and felt confident that SU would address the concerns that the Department had raised.

4.3.7 The fact that the Department of Afrikaans and Dutch was satisfied that SU would address the issues raised in the open letter of 31 March 2021 is a positive development. However, it does not do away with the fact that the Department of Afrikaans and Dutch needed to raise these issues in the first place, and in fact shows sufficiently that the issues raised by the Department were not without enough merit to warrant a meeting with SU and SU's subsequent undertakings of intervention.

4.3.8 The Commission also remains cognisant of Professor Wim De Villiers' opinion editorial published by News24 on 2 April 2021, in which he highlighted that while SU was "doing more in and for Afrikaans than most

other universities", the University uses "English as one of [its] mediums of instruction because [it] want[s] to serve the entire population, and not only a certain portion." Prof De Villiers further expressed discontent with "political parties' and lobbies' mobilisation around SU's Language Policy", alleging that "[t]hey pay no regard to the facts and are apparently oblivious to the complexities associated with implementing multilingualism at a large higher education institution." He further expressed 'pity' that existing communication channels at the university were not utilised by the Department of Afrikaans and Dutch, since the information requested through the media was available. At the same time, Professor De Villiers addressed the allegations, by apologising if there were students who were instructed not to use Afrikaans in a social context, and emphasised that "it is wrong", was not the policy of the university, and committed to an ongoing investigation and rectification process.

4.3.9 The Commission cannot but accord with the above quoted views of Professor De Villiers. The issue that remains, however, is how this matter is to be rectified, which the Commission aims to determine herein.

4.3.10 The Commission also notes Professor De Villiers' mention in his open letter above of how it would be wrong for students to be instructed not to use Afrikaans in a *social* context. The Commission also herein considers whether students can be instructed on what language to use or not use in a *formal* context as well, at least within the setting of a residence, such as during welcoming events at such residences. Such events may be social in nature and appearance, to some extent, but can also be considered formal in the context of a residence, which has a formal duty to welcome new students and introduce them to fellow students and residence leadership. Therefore, all references to the regulation of language use in residences herein, should be read to include both social and formal settings.

4.3.11 The abovementioned evidence points to the strong possibility that, in SU more broadly, an anti-Afrikaans atmosphere or environment had manifested itself. The manifestation of this atmosphere or environment seemed to stem from a multitude of sources, take many different forms and was often underpinned by the subjective experiences of particular individuals, which is one reason the Commission's investigation herein does not seek to make a specific finding in this regard. It is recorded that the university vigorously denies this and the charge is, by its very nature, very difficult to prove or disprove. However, the Commission cannot and will not ignore these allegations, no matter how broad, insofar as they may give context to the specific incidents under investigation herein and guide the Commission in how to traverse these issues.

4.3.12 Coming back to the issues under direct consideration herein, the Commission received testimony from Afrikaans students that they had been told not to speak Afrikaans and to only speak English when interacting with fellow students in the Residences. At some residences, it is alleged that this extended even to interactions on benches in the gardens of the residences, on social media platforms such as *WhatsApp*, as well as at least one conversation between two Afrikaans students in their shared room.

4.3.13 At least one student reported being threatened with disciplinary action by leadership of their residence, should they not adhere to the residence policy.

4.3.14 The Commission was informed that, during a series of introductory video presentations at one of the Residences, an Afrikaans video was skipped by residence leadership due to it not complying with the residence policy.

4.3.15 There were numerous other examples given of the residence policy being applied, and there are no doubt many more, given the reality that daily life at residences involves a great many interactions between students. However, the Commission will not list every alleged example or seek to investigate

each possible manifestation of the complained-of residence policy, as doing so may lead to unnecessary disputes of fact and draw out the process without cause. The examples cited above are sufficient to establish the issue at hand.

4.3.16 A further aspect of the examples set out above, is that no party has denied that the residence policy existed and was implemented, at least in certain ways and to certain extents.

4.3.17 While the manner in and degree to which the policy was implemented seemed to be recalled by some stakeholders with varying levels of intensity and the minutia of incidents recalled naturally were not always entirely congruent, the Commission was never given the impression that parties were trying to mislead the Commission or other parties when explaining the facts from their perspective.

4.4. ***The perspectives of the Complainants***

4.4.1 The First Complainant's perspective seemed to be that certain residences were promoting an English-only policy (as opposed necessarily to a no-Afrikaans policy or an "Afrikaans ban") and that this was a violation of cultural and language rights of affected students. The First Complainant further noted the disparate impact that the English-only policy was having on Afrikaans-speaking students. Nevertheless, the First Complainant remained aware that the policy had a similarly disparate effect on speakers of all official South African languages.

4.4.2 As opposed to the First Complainant, the Second Complainant repeatedly referred to the residence policy as a "ban on Afrikaans", and alleged numerous incidences of Afrikaans students being told specifically *not* to speak Afrikaans in residences (as opposed to being told *to* speak English). The Second Complainant and a number of students (although not all) who provided testimony in support of his complaint, seemed to emphasise that

the Residences/Respondent were trying actively and primarily to “ban” Afrikaans.

4.4.3 Neither the First nor the Second Complainant (including the students who provided written testimony to the Commission in March 2021) made clear in their initial written complaints that the residence policy was only being applied during the welcoming period, but this was clarified in oral testimony during the Inquiry.

4.4.4 The Second Complainant in particular, seems to take aim at the Respondent’s 2016 Language Policy broadly and the role he alleges it played in the incidences leading to the complaint. The Second Complainant submitted further information to the Commission on 31 March 2021 regarding a statement allegedly made by Professor Wim de Villiers to Mr Johan Theron during a council meeting on 24 November 2015. Professor De Villiers, during the aforementioned meeting, allegedly told Mr Theron that it was his (Professor De Villiers’) wish that SU would eventually be able to provide all tuition in English, as he was of the view that would be the easiest option. The Second Complainant alleged that this was evidence that the Respondent and Professor De Villiers personally were not in fact committed to multilingualism as an institution of higher learning, that the 2016 Language Policy was intended as a coordinated effort to “eliminate mother-tongue education” at SU and that this was linked to the residence policy under investigation by the Commission herein.

4.5. ***The perspective of the Respondent***

The Residences

4.5.1 The purpose of the residence policy, according to the Residences, was to promote as inclusive an environment as possible during the welcoming week,

to ensure that new students were able to converse in a commonly understood language.

4.5.2 The Respondent informed the Commission that the majority of its students (approximately 50 percent) have English as their home language, while approximately 40 percent have Afrikaans as their home language. The remaining students spoke other official languages (primarily isiXhosa), as well as foreign languages. This is supplemented by the Op-Ed published by Professor De Villiers, in which he stated that at registration in 2021, 37,7% of undergraduates indicated Afrikaans as their home language (49,2% of whom said they would prefer to be taught in English). Those with isiXhosa and other official South African languages other than English and Afrikaans as their home language accounted for 11,5% of the undergraduate student body. The demand for tuition in Afrikaans was 20% of all undergraduates.

4.5.3 Testimony from leadership at the Residences indicated that the Residences themselves had decided that they would request their new students to all speak English during the welcoming period of 2021. The Residences did not indicate that they had coordinated together to implement this policy or that they had received direct instructions from the Respondent to do so, but there was testimony from certain leaders in these Residences that they were of the view that their English-only policy was in line with (if not necessarily directly as a result of) the requirement in paragraph 7.2.5 of the 2016 Language Policy that:

"In residencies and other living environments, language is used in such a way that where reasonable or practical, no stakeholder is excluded from participating in any formal activities in these environments."

4.5.4 The Residences strongly denied that it was their intention to ban Afrikaans or any other particular language, but rather to require or promote English as a form of communication above all other languages during the welcoming

period, seeing as it was the language most commonly understood among their students. This would, in the Residences' estimation at least, lead to fewer students feeling excluded during welcoming events, social activities and general conversation between students getting to know one another and integrate into an important and unique chapter in their lives. By requiring only English to be spoken, the unavoidable result was the disallowance of all other languages, including Afrikaans, but with a disproportionately severe effect on Afrikaans speakers given language demographics in the residences.

4.5.5 The Residences denied that there was any "anti-Afrikaans" sentiment or intention behind the residence policies, and that their intent was always to promote inclusion of speakers of all languages, not exclusion of Afrikaans-speakers. Huis Francie van Zyl, for example, did admit that they were aware that Afrikaans has in the past been used as a tool of exclusion, but this did not motivate their policy – their intention was merely to promote as inclusive an environment as possible.

4.5.6 Residences did raise a number of examples, however, of where in recent years students alleged that they had felt excluded by the use of language that they did not understand, and that this served as a motivation for the residence policies.

4.5.7 A very unfortunate incident was reported to the Commission by a black student at one of the Residences. This student (who was a residence monitor) alleged that earlier in 2021 she tried to stop a student and her mother, both unmasked, from entering the residence in question. The monitor recited the COVID 19 guidelines for entry and requested that the student and her mother please put on masks before entering the residence. The student turned her back to the monitor, spoke in Afrikaans to her mother, and carried on walking to her room, completely ignoring the monitor.

4.5.8 The leadership of the Residence in question claimed that incidents such as the abovementioned, were examples of how language was at times used to exclude and even discriminate against students.

The Respondent

4.5.9 The Respondent denies that it has a policy requiring students in residences to only speak English. The Respondent, as represented by Professor De Villiers, furthermore has stated that it is not University Policy that any student be prevented from speaking Afrikaans or any other language.

4.5.10 It is here that the Respondent draws an important distinction between the overarching policies of the Respondent (primarily, the 2016 Language Policy) and the residence policies that were implemented at the Residences in question. It is also here that the Respondent denies instructing any residence to implement an "English-only" policy or "Afrikaans ban" in addition to any other university policies.

4.5.11 Nevertheless, the Respondent does admit that the Residences in question did, during welcoming week 2021, ask students to speak only English.

4.5.12 The Respondent avoids referring to the residence policies as "policies" per se, and rather recognises them as activities performed by these Residences as part of their welcoming period (the Respondent in one instance refers to the residence policies as an "All-English Welcoming Period", for example).

5. LEGAL FRAMEWORK

Domestic legislation

5.1. The Constitution of the Republic of South Africa, 1996

"Supremacy of Constitution

2. This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."[1]

*"**Application***

8. (1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state."[2]

"***Equality***

9. (1) everyone is equal before the law and is entitled to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."[3]

"***Human Dignity***

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[1] Constitution, Section 2.
[2] Ibid at Section 8(1).
[3] Ibid at Section 9.

10. Everyone has inherent dignity and the right to have their dignity respected and protected."[4]

"The right to freedom of expression

16 (1) Everyone has the right to freedom of expression, which includes –

(a) freedom of the press and other media;

(b) freedom to receive or impart information or ideas;

(c) freedom of artistic creativity; and

(d) academic freedom and freedom of scientific research.

(2) The right in subsection (1) does not extend to –

(a) propaganda for war;

(b) incitement of imminent violence; or

(c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

"Language and culture

30. Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.

5.2. Promotion of Equality and Prohibition of Unfair Discrimination Act No. 4 of 2000

The Promotion of Equality and Prohibition of Unfair Discrimination Act No. 4 of 2000 (hereinafter referred to as the "Equality Act") gives expression to Section 9 (Equality) of the Constitution.

<u>Definitions</u>

[4] Ibid at Section 10.

Section 1 provides the following definitions relevant to this complaint:

"***'discrimination'*** *means any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly—*

(a) Imposes burdens, obligations or disadvantage on; or

(b) withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds;"[5]

"***'prohibited grounds'*** *are-*

(a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth, or

(b) …[6]

Application

Section 6 of the Equality Act prohibits discrimination by the State or any other person.[7]

Determination of fairness

Section 14 of the Equality Act specifies the relevant factors when assessing fairness:

"*14. (1) It is not unfair discrimination to take measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination or the members of such groups or categories of persons.*

(2) In determining whether the respondent has proved that the discrimination is fair the following must be taken into account:

(a) The context;

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[5] Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (hereinafter "Equality Act"), Section 1.

[6] Equality Act, Section 1.

[7] Ibid at Section 6.

(b) the factors referred to in subsection (3);

(c) whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned.

(3) The factors referred to in subsection (2)(b) include the following:

(a) Whether the discrimination impairs or is likely to impair human dignity;

(b) the impact or likely impact of the discrimination on the complainant;

(c) the position of the complainant in society and whether he or she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns of disadvantage;

(d) the nature and extent of the discrimination;

(e) whether the discrimination is systemic in nature;

(f) whether the discrimination has a legitimate purpose;

(g) whether and to what extent the discrimination achieves its purpose;

(h) whether there are less restrictive and less disadvantageous means to achieve the purpose;

(i) whether and to what extent the respondent has taken such steps as being reasonable in the circumstances to—

(i) address the disadvantage which arises from or is related to one or more of the prohibited grounds; or

(ii) accommodate diversity."[8]

5.3. **Case Law**

Freedom of expression

In Ford v. Quebec (A.G.)[9], the Supreme Court of Canada stated the following regarding the right to freedom of expression and using the language of one's choice:

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[8] Ibid at Section 14.

[9] 1988 S.C.R. 712 (Can.).

"Language is so intimately related to the form and content of expression that there cannot be true freedom of expression by means of language if one is prohibited from using the language of one's choice. Language is not merely means or medium of expression; it colours the content and meaning of expression"

The Supreme Court of Canada has gone further in this regard by holding that: *"… the choice of the language through which one communicates is central to 'ne's freedom of expression. The choice of language is more than a utilitarian decision; language is, indeed, an expression of 'ne's culture and often of 'ne's sense of dignity and self-worth. Language is, shortly put, both content and form."*[10]

6. FACTUAL ANALYSIS

6.1. Limits of the Commission's investigation herein

6.1.1 The Second Complainant's submissions to the Commission took direct aim at the 2016 Language Policy as the direct cause of the residence policies, but went further to allege that this situation is a symptom (and thus proof) of the unconstitutionality of the 2016 Language Policy and of how this policy is and always was an unconstitutional attack on Afrikaans people, language and culture. The Second Complainant's supplementary information provided on 31 March 2021 also raises allegations that delve deeper into the history and constitutionality of the 2016 Language Policy. In this respect, the Commission must emphasise that the 2016 Language Policy (as well as the general allegations of its unconstitutionality, similar to those raised by the Second Complaint and other stakeholders opposed to the Policy) was closely

[10] *Reference* Re *Criminal Code (Manitoba),* [1990] 1 S.C.R. 1123 (Canada), p. 1181.

scrutinised by the Constitutional Court in the 2016 *Gelyke Kanse* judgment[11] and upheld as being constitutional.

6.1.2 The Commission does not herein intend re-entering the arena already trodden by the Constitutional Court or allow a proverbial "second bite at the cherry" for critics of that particular judgment. Although this judgment and its impact on the higher functions of Afrikaans has been widely debated and criticised, it is not for the Commission to revisit a decision of the Constitutional Court in this manner.

6.1.3 However, despite the above, the Commission is aware that the Constitutional Court in *Gelyke Kanse* did not hold the 2016 Language Policy in such high esteem as to consider any and all applications thereof beyond reproach regardless of the context or consequences. Justice Cameron specifically noted at paragraph 19 of the judgment that there are "*ample remedies should the University betray the commitment to Afrikaans it embraced in the 2016 Language Policy*".

6.1.4 The Commission also notes the input and guidance of Justice Froneman in his concurring judgment below, which seems particularly relevant to the matter at hand:

> *"[I]mportantly, in the public life of our country, there should be no need to apologise or feel embarrassed when you speak or write in your own language, an official language of our country. All of us must learn to do it in a way that minimises the exclusion of others,* ***but it should not mean that we are silenced from speaking it****, writing, using it, as long as we make sure,* ***to the best of our abilities****, that we include others when we do so. Otherwise it becomes an exercise of power."*[12] [emphasis added]

[11] *Gelyke Kanse and Others v Chairperson of the Senate of the University of Stellenbosch and Others* (CCT 311/17) [2019] ZACC 38; 2019 (12) BCLR 1479 (CC); 2020 (1) SA 368 (CC).

[12] *Ibid* at para 90.

6.1.5 The Commission is of the view that the complaints received herein and this investigative report of the Commission constitute one such potential remedy as envisaged above by Justice Cameron. However, the Commission must note that the remedy sought in this investigation must be limited to the *application* of the 2016 Language Policy, not the constitutionality of its provisions, nor should incorrect application of the policy (if any) be seen as evidence that the policy is in fact unconstitutional and that the apex court erred in its 2016 judgment.

6.1.6 More specifically, the Commission is only going to analyse the application of the 2016 Language Policy herein insofar as it relates to the residence policies applied during the 2021 welcoming period.

6.1.7 The Commission acknowledges and appreciates the submissions from numerous stakeholders regarding the alleged effect of the 2016 Language Policy and the Respondent's alleged general approach to language and the Afrikaans language and culture more broadly at SU. These submissions have assisted in providing helpful context for the Commission's investigation herein.

6.1.8 Therefore, while keeping in mind the broader context as raised by stakeholders, the Commission maintains that the complaints forming the basis of this investigation were limited to alleged violations created by the residence policies during the 2021 welcoming period, therefore, the Commission's investigation, findings, directives and recommendations herein will be limited to these specific circumstances.

6.2. **Enforcement of the residence policy**

6.2.1 The most important factual question faced by the Commission at the outset, was the extent to and manner in which the residence policy was enforced or promoted in the Residences in question.

6.2.2 The conclusion reached by the Complainants and stakeholders opposed to the residence policies, seemed to be that the requirement to speak English during the welcoming week was exactly that – a *requirement*. The consequences for not complying with this requirement did not seem entirely clear to the affected students, but there was at least one allegation that clear threats of formal disciplinary action had been made (although the leaders of the Residence in question denied making these threats).

6.2.3 The Residences and the Respondent seem to deny that it was ever an absolute *requirement* that all students needed to speak English at the Residences during the welcoming period. Rather, they argue that these Residences merely requested or suggested (perhaps strongly at times) that English be used.

6.2.4 Whether formal disciplinary consequences were in fact threatened does not seem possible to decisively determine at this stage, but the relevance of this determination is diminished when one considers that no such disciplinary proceedings were initiated against any student for not speaking English during the welcoming period.

6.2.5 The Commission was not able to determine with sufficient certainty whether any student was in fact expressly threatened with formal disciplinary action, fines or other such punitive consequences. Some students alleged that this happened, but the leadership of all the Residences denied this allegation entirely, and there was no written or recorded evidence to corroborate either side of this particular issue.

6.2.6 However, none of the above detracts from the fact that the affected Afrikaans students felt severely pressured to speak English, regardless of whether formal punitive steps were in fact threatened at any point. To this end the Commission must take note of the effect that social pressure and structures of authority and leadership within a university or residence setting can have on a young adult coming to grips with the world after leaving home and coming to a residence for the first time.

6.2.7 Whether Residences only intended to *promote* English as a medium of communication during the welcoming period (as opposed to prohibiting the use of other languages), or whether they took more or less stringent measures to achieve either outcome, does not make much difference when one considers that a new, young student, whose mother tongue was anything other than English, would feel intense pressure to not speak the language of their choice in such a setting. The Commission can accept that most new university students feel a strong need to fit in and feel accepted by their peers, and when their peers (particularly those who are in leadership positions) make “requests” like this, voluntariness can be a loaded term. This is particularly true if one considers that the 2016 Language Policy states that language shall not be used in a way that excludes any person, because students who have apparently been requested to use a particular language for purposes of inclusion, would not be unreasonable in thinking that refusing this request may be seen as a violation of University Policy and that the consequences of such a refusal are potentially severe.

6.2.8 The Commission is therefore satisfied that affected students in these Residences were at certain times and to certain extents prevented from speaking the language of their choice and pressured or even forced to speak another. Whether for fear of ostracisation or other social repercussions, or even of formal disciplinary proceedings in terms of University Policy, the Commission accepts that the affected students were given a choice to speak

a particular language or face negative consequences in a new and overwhelming environment. In the Commission's view, therefore, compliance with the residence polices was compulsory, and not a mere recommendation. Furthermore, the Commission is thereof of the view the aforementioned reinforces that this requirement in respect of language use was part of a *policy*, and was not merely a practice – thus the referral to residence *policies* (as opposed to "practices") in this report.

6.3. **Disproportionate effect on Afrikaans students**

6.3.1 Accepting that the residence policies did place pressure on students to speak English during the welcoming period of 2021 and was therefore a requirement, the Commission also needs to analyse whether this requirement had a disproportionate impact on Afrikaans students.

6.3.2 The Commission does not fully accept allegations from certain stakeholders that the residence policies were a blatant and concentrated ban on Afrikaans, inspired and motivated by a concerted effort from the Respondent and certain individuals in university management to eradicate Afrikaans from SU. The evidence presented to the Commission during this process does not bear out such a conclusion. However, having an English-only policy in practice resulted in the exclusion of other languages, including Afrikaans, and the objective effect thereof is undeniable.

6.3.3 If the residence polices were as a result of the Respondent's alleged plan to systematically eradicate Afrikaans from SU, then there would be clear evidence of English-only welcoming periods being implemented in most if not all of the 31 residences at SU, as well as multiple examples of a direct and clear instruction to this effect being communicated from university management to residences. The fact is that a small number of the 31 residences implemented these residence policies, and there was no evidence, even within this small grouping of residences, that there existed

any collective or organisational planning between them in this regard, or that they were operating under direct instruction from any higher authority within SU.

6.3.4 The evidence before the Commission points rather at a situation where a handful of residences decided, somewhat (for it will be shown, not entirely) coincidentally to implement similar policies in order to pursue a more inclusive welcoming environment for new students.

6.3.5 Another argument that the Commission heard from a few stakeholders, was that Afrikaans was not recognised as an indigenous language, at least not in the higher education space, and that this is one of the ways in which, as well as one of the reasons it is shown less respect than other languages. Whether this is true from a broader perspective is not under consideration by the Commission herein. In the context of the residence policies specifically, it seems unlikely that the indigenousness of Afrikaans or any other language played a meaningful role, as the residence policies chose English, which most certainly is not an indigenous South African language, as the preferred language of communication during the welcoming period.

6.3.6 What cannot be overlooked, however, is the fact that Afrikaans students make up the vast majority of non-English speaking students at SU. Therefore, whatever effect the residence policies may have had on students, was felt disproportionately by Afrikaans students purely by virtue of the demographic make-up of those to whom the residence policies applied.

6.3.7 Furthermore, the Commission is cognisant of the fact that, in the Western Cape in particular (as well as the Northern Cape), Afrikaans is the mother-tongue of many rural and underprivileged people, particularly in the black and coloured communities. This point was raised particularly well by the *Dak Netwerk* in their testimony before the Commission. If SU is to open its doors to the more underprivileged in our society, and in particular the underprivileged youth, it must be borne in mind that, for many underprivileged and rural youths, these doors can only remain truly open if Afrikaans remains

not only a reasonably practicable language of academic learning, but also a respected language of communication in other contexts within university life.

6.3.8 In addition to the simple consideration of language demographics, the Commission has also taken into consideration the significant amount of evidence and argument raised by stakeholders who have made the following allegations (which, although canvassed in more detail in other areas of this report, are summarised below for convenience):

a) Students are often made to feel bad about speaking Afrikaans in academic and non-academic settings by lecturers and fellow students.
b) Afrikaans is seen as the “language of the oppressor” given South Africa’s history and is treated like something that students need to be protected from.
c) Afrikaans has been systemically hindered as a language through policies in education and changes within social spaces, with a disproportionate impact on the majority of Afrikaans speakers in the Western Cape, namely, coloured South Africans.

6.3.9 While the Commission does not find it appropriate herein to deeply analyse or making any findings in respect of the abovementioned issues individually, given the scope of this investigation, it is still telling that, in the context of the residence policies, the following is seen by the Commission as sufficiently proven:

a) Leadership at a number of the Residences have shown concern that Afrikaans has been used by students to unfairly exclude and even discriminate against non-Afrikaans and particularly, black, students. This concern is one of the factors considered by the Residences who decided to implement the residence policies.
b) Leadership of more than one of the Residences have indicated that, while they hold no ill-will against the Afrikaans language and its speakers, they hold the view that Afrikaans does have a historical record of being used to oppress non-white South Africans prior to the constitutional era. While there is insufficient evidence to show that this reasoning was clearly used

to justify vilification of any individual or group during the welcoming period, the Commission is of the view that this is still a factor that was considered by Residences when trying to create an inclusive welcoming period.

6.3.10 In addition to the above, the Commission notes the following *WhatsApp* message placed as evidence before the Commission, quite apparently in relation to the welcoming period and in line with the objectives of the residence policy, that was shared on the house committee group of one of the Residences on 3 March 2021, a day before the welcoming period was due to start:

"*Hi everyone*
!!PLEASE PLEASE PLEASE remember to speak English to newcomers and their parents!!
Even if they're speaking Afrikaans to you, please revert to English.
Thank you Team"

6.3.11 This message clearly and exclusively singles out Afrikaans as a language that must *not* be spoken during the welcoming period, even if newcomers and their parents chose to speak in Afrikaans when addressing or asking questions of the leadership of Irene Residence. The message is also clearly not a mere request, given the exaggerated use of capitalisation, repeated words and exclamation points, but a reiteration of an agreed-upon approach[13] that the residence was to follow.

6.3.12 In considering all the above, one begins to see a picture in which Afrikaans is painted as the official language most in need of limiting in favour of English, not merely because it is spoken by more students than other languages, but because it was assumed that it was the language most likely (given our country's history as well as recent examples of exclusion in residences) to threaten the Residences' pursuit of inclusivity through language.

[13] Which the Commission gleans from the use of the word "remember", which shows that this approach had already been discussed and agreed upon: The Whatsapp message was merely a reminder of this agreement.

6.3.13 The unfortunate reality is that it was probably not illogical of any of the Residences to make the abovementioned assumption. While Afrikaans, if spoken within these Residences in a single conversation, is in fact likely to exclude *fewer* people from that conversation than isiZulu, for example (seeing as more people overall understand Afrikaans than isiZulu in the relevant setting), the prevalence of Afrikaans in these Residences means it is the language that would lead most conversations not already happening voluntarily in English, if an English-only policy were not adopted.

6.3.14 The Commission therefore understands the logic of residences insofar as they may have focused on promoting English more strongly over Afrikaans than over other official languages in terms of the residence policies. However, logic is only helpful insofar as it pursues sound and, most importantly, constitutional ends. Furthermore, a finding as to whether these policies were in line with the Bill of Rights can be made regardless of the true logic and intent behind the residence policies, as the focus of the investigation remains the effect of the policies in question on human rights.

6.3.15 There is not complete clarity on the exact extent, intent and operation of this policy in these Residences, as such clarity would be impossible to attain considering the massive factual web presented by a situation involving hundreds of individuals, all with their own unique perspectives and views on what happened. But from what the Commission has been able to determine at the very least, is that the Residences required students to speak English during the welcome period, and that a number of Afrikaans students felt compelled to speak English for fear of retribution of some kind from their new leaders and peers.

6.3.16 It may be true, as testified by one Residence's leadership, that at least one Afrikaans student, in apparent defiance, spoke Afrikaans "loudly and proudly" in the dining area of the Residence and apparently showed no fear of retribution, which the Residence leadership argues was proof that the policy was not being enforced rigidly and was not truly impacting on the rights of Afrikaans speakers. In the Commission's view, this particular Residence seems here to have confused fearless indignation, with conviction.

6.4. **The role of the 2016 Language Policy and the Respondent**

6.4.1 In order to determine the extent to which the 2016 Language Policy influenced the issues at hand, one important common denominator is paragraph 7.2.5 of the Policy. Neither paragraph 7.2.5 nor any other section of the 2016 Language Policy explicitly *require* residences to implement anything even resembling the residence policies under investigation herein, but could be interpreted (incorrectly) to allow or even promote such approaches. Therefore, it is not unreasonable to conclude that the residence policies themselves were implemented by leadership of the Residences as a result, either directly or in pursuance of the spirit, of paragraph 7.2.5.

6.4.2 The above conclusion is reasonable particularly in light of the fact that at least one residence (Huis Francie van Zyl) testified unequivocally of their consideration of paragraph 7.2.5 in addressing language use during their welcoming week as well as more generally.

6.4.3 The Respondent, particularly through its top leadership, reiterated that the 2016 Language Policy did not allow for any residence to ban any language or require any student to speak a particular language in any setting. What the Respondent did not seem to recognise, was the possibility that the 2016 Language Policy itself, if interpreted and/or applied incorrectly, could in fact be a cause of banned or compulsory language in residences. Further to this, the Respondent did not seem to realise that it holds a positive duty to educate and train its students, residence leaders and other representatives in proper interpretation of the 2016 Language Policy to ensure that outcomes of this nature are avoided.

6.4.4 The Commission concurs with the Respondent that the 2016 Language Policy, as written and if applied properly, would *not* allow any student to be prohibited from speaking their language of choice in residences and would thus prohibit the residence policies under investigation herein. The 2016 Language Policy does state that language should not be used to exclude

within residences, but with the clear proviso that this is dependent on requirements of reasonableness and practicability, thus recognising that language, as a reality of human discourse, will inevitably exclude people from time to time when it would be unreasonable or impracticable to do otherwise. Staying in line with this principle, the Respondent, through Professor De Villiers, has testified as follows:

"There is no English-only policy in residences, and students should not be prohibited from speaking Afrikaans, or any other language for that matter. The University cannot condone that, as it would be incongruous with our vision, our values, as well as our Language Policy."

The Commission agrees with Professor De Villiers' testimony above – there is no English-only policy in residences, but only if one is looking solely through the prism of the 2016 Language Policy (properly applied) and on the assumption that the Residences themselves clearly understood (and were educated/trained by SU to understand) that it would not be reasonable or practicable to require students at any time and through any means to speak a particular language and/or not speak another.

6.4.5 The Respondent, through Professor De Villiers' testimony, is clearly of the view that an English-only policy in residences would not meet the tests of reasonableness and practicability and thus would be in violation of the 2016 Language Policy. Despite Professor De Villiers' testimony, there was, however, an English-only policy in certain SU residences. It may not have been the Policy that Professor De Villiers had in mind when testifying before the Commission, and it may have been incongruous with SU's vision, but it was a policy nonetheless, and one that was being practiced by SU through a number of its Residences, whether Professor De Villiers or any of the other leadership of the Respondent were actively aware of it or not.

6.4.6 The Commission acknowledges that the Respondent has taken steps to address the incidents, including correcting the conduct, when it came to its attention. However, some of the student leaders who testified before the

Commission did not leave it with the impression that they considered the residence policy to have been a serious violation of anyone's rights. The Commission furthermore records that, at the time of finalising this report, further allegations have come to light (through complaints to the Commission) that the 2023 welcoming period has also seen a repeat of similar English-only policies at residences (including Minerva). These latest allegations are yet to be investigated and will not form part of this report save to raise possible concerns that the steps taken by the Respondent may not have been sufficient to address the underlying issue.

6.4.7 What the Respondent has not recognised, however, is that a failure on the part of its Residences to properly implement the 2016 Language Policy (and the human rights violations that may occur as a result) is not a buck that can be passed. These residence policies were not implemented by students acting in their private capacities, who could be disciplined for violating SU's disciplinary code; they were implemented by the Residences themselves, under the guidance of the relevant house committees and residence heads, who saw to the enforcement of these policies (whether through threats of formal disciplinary steps, social pressure or the new students' fear of unknown consequences for non-conformity in a new environment).

6.4.8 Residences, in implementing the residence policies, cannot be seen as separated from SU. While this report has referred to the Respondent and the Residences separately as needed for the purposes of clarity in factual analysis, when considering where constitutional responsibility falls for the human rights implications of these residence policies, they are one and the same. The Residences are not companies, associations, non-profit organisations or any other legal entity that can be seen to exist separately from the Respondent.

6.4.9 The Respondent therefore cannot separate itself from the Residences and the residence policies by claiming that these policies, if they infringed any rights, were not in line with the 2016 Language Policy. It is the responsibility of the Respondent to ensure that all its officials, whether they be lecturers,

resident heads or house committee members, comply with the policies of the SU, including the 2016 Language Policy, and to train and educate these individuals on proper interpretation and application of the policy. If the 2016 Language Policy was infringed in this matter, then it was the Respondent who infringed it, through its residences.

6.4.10 Regarding Capri, the Private Student Organisation ("PSO"), while it may not form part of SU in the same way as the other residences, it is still bound by the rules of SU, including the 2016 Language Policy. If this or any other PSO violated the 2016 Language Policy, then while the Respondent may not be directly responsible for any such violation, it would still fall on the Respondent to take appropriate steps against such a PSO to ensure compliance with the 2016 Language Policy in terms of any agreement existing between these respective bodies. The Commission is of the view that there also exists a positive duty on SU to educate and train private student organisations on proper interpretation and application of its policies.

6.4.11 If the Respondent wishes to deny that it attempted to distance itself from the Residences on this issue, the Commission would reiterate Professor De Villiers' testimony where he states that SU would not *condone* any policy or practice at residences that did not comply with the 2016 Language Policy. In the ordinary course, one does not condone their own actions; condonation or the refusal thereof is a judgment passed over another, not over oneself. While the Respondent may perhaps refuse to condone the conduct of a PSO that is not in line with the 2016 Language Policy (and take appropriate steps to address this non-compliance), the same cannot be said in respect of the Residences, which as explained, form part and parcel of the Respondent itself. While this may seem semantic, it is telling when also considering that the Respondent has not at any stage during this investigation given any indication that it is willing to accept direct responsibility, should the residence policies be shown to have been in violation of the 2016 Language Policy and were prejudicial to the rights of affected students.

6.4.12 Again, the Commission acknowledges that the residence policies were not in accordance with the 2016 Language Policy of SU, but the residence management/leadership forms part of the university management structure. In its relationship with residence students, the university acts through its residence management/leadership.

6.5. **Conclusion of factual analysis**

6.5.1 Following the abovementioned considerations, the Commission has concluding the following salient points following its factual analysis:

a) During the welcoming period of 2021, the Respondent (through some of its Residences) implemented a policy that sought to regulate what language students were allowed to speak under certain circumstances during this period.
b) Students were required by Residence Leadership to speak English for the purpose of inclusivity. At the very least, certain students were made to feel pressured into speaking a language other than their mother tongue either entirely or from time to time, as a result of the residence policies. In other words, if students wished to not face adverse consequences of some kind, they were required to speak English. The Residence Policies therefore unequivocally placed a *requirement* on students to comply.
c) The residence policies were purportedly implemented in line with paragraph 7.2.5 of the 2016 Language Policy. The Respondent, however, denies that the residence policies were in line with the 2016 Language Policy.
d) The residence policies were implemented to promote inclusion. However, Afrikaans was identified as the language most in need of avoidance, for both demographic as well as historical reasons.

6.5.2 The Commission will now proceed to analyse the application of relevant law to the facts.

7. LEGAL ANALYSIS

7.1. **Freedom of expression**

7.1.1 The Commission is concerned that the Respondent (through the Residences) is of the view that language comprises only two particularly important axioms, at least when deciding whether and to what extent to regulate speech within residences.

7.1.2 The first axiom seems to be that language is merely a tool to convey facts and opinions, and that provided a person can understand and speak more than one language, it matters not which language they use, provided they can communicate effectively enough that they are understood by their audience.

7.1.3 The second axiom seems to be that language is also something that can either include or exclude listeners and speakers, and therefore presents a potential tool for building inclusion, or a potential weapon to create exclusion.

7.1.4 If the above were the Residences' two primary considerations (which seems was the case) and they were correct in this assumption, then it may seem reasonable and practicable to simply require bilingual students to prefer one language above the other in certain settings, in order to promote inclusion or avoid exclusion.

7.1.5 However, neither South Africa's democracy nor the truth are served by this utilitarian approach to language.

7.1.6 The reality is that choice of language is inextricably linked to the right to freedom of expression. The Commission concurs with the views held by the Canadian Supreme Court that *"the choice of the language through which one communicates is central to one's freedom of expression. The choice of language is more than a utilitarian decision; language is, indeed, an expression of one's culture and often of one's sense of dignity and self-worth"*[14].

[14] Ibid.

7.1.7 Therefore, if a person were to be forced, required, coerced or pressured, particularly by an authority figure or structure, to speak a language other than their home tongue, and thus diminish the choice of language through which one communicates, this would constitute a limitation of the right to freedom of expression.

7.1.8 While the right to freedom of expression can be limited through the Equality Act's prohibitions on discrimination, hate speech and harassment as well as section 16 of the Constitution's own internal limitations under subsection 2, there is no evidence to show, nor did any stakeholder suggest, that the use of Afrikaans, generally, in residences constituted prohibited speech of this nature.

7.2. **Language and Culture**

7.2.1 Section 30 of the Constitution is clear that everyone has the right to use the language and engage in the culture of their choice.

7.2.2 If this choice of language were to be diminished through the use of any legal or social authority, this would constitute a limitation on the right to speak the language of one's choice.

7.2.3 Language and culture exist mutually in the constitutional space, and limiting a person's ability to speak the language of their choice, also limits their ability to participate fully in the culture of their choice, even if only for a limited period of time.

7.2.4 Section 30 does state that the rights to choice in language and culture cannot be exercised in a way that is inconsistent with any provision in the Bill of Rights.

7.2.5 While the Commission does accept that language and culture are at times used in ways inconsistent with the Bill of Rights, and that when this happens it can lead to unjust limitations of other human rights, the Commission does

not accept that the use of any language can in and of itself be seen generally to be inconsistent with the Bill of Rights.

7.2.6 The Commission must here note that there is no constitutional right to be *spoken to* in the language of your choice, or even a language that you understand (at least in social settings). There also is no constitutional right to be included in every interaction and happening that one would like to be included in. Inclusion may be a noble goal, but the legal reality is that what our Constitution requires is a society free from discrimination, not one that guarantees absolute inclusion of everyone in everything.

7.2.7 If Afrikaans or any other language were used to unfairly discriminate or limit any other rights in an identifiable instance (examples of which were presented to the Commission and noted herein), then in such instances it would be appropriate to take focused steps to address such a situation. However, a blanket limitation on the use of languages other than English, even over a short period, is unlikely to protect more rights than it is sure to limit.

7.3. **Equality and the right to non-discrimination**

7.3.1 Unfair discrimination on the basis of language is prohibited by the Constitution and the Equality Act.

7.3.2 In the present case, students whose language of choice was anything other than English, were able to, and did, allege that they had been subjected to discrimination on the basis of their language, as these students were being given a different, less favourable, option than those who were more comfortable with or even highly fluent in English.

7.3.3 Furthermore, any discrimination against non-English speaking students would have impacted disproportionately on Afrikaans-speaking students, given their overwhelming majority within the relevant demographic.

7.3.4 Once discrimination is established, the Commission must consider whether such discrimination was unfair, in which respect the Commission is guided by section 14 of the Equality Act, quoted again below:

"

14. (1) It is not unfair discrimination to take measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination or the members of such groups or categories of persons.

(2) In determining whether the respondent has proved that the discrimination is fair the following must be taken into account:

(a) The context;

(b) the factors referred to in subsection (3);

(c) whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned.

(3) The factors referred to in subsection (2)(b) include the following:

(*a*) *Whether the discrimination impairs or is likely to impair human dignity;*

(b) the impact or likely impact of the discrimination on the complainant;

(c) the position of the complainant in society and whether he or she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns of disadvantage;

(d) the nature and extent of the discrimination;

(e) whether the discrimination is systemic in nature;

(f) whether the discrimination has a legitimate purpose;

(g) whether and to what extent the discrimination achieves its purpose;

(h) whether there are less restrictive and less disadvantageous means to achieve the purpose;

(i) whether and to what extent the respondent has taken such steps as being reasonable in the circumstances to—

(i) address the disadvantage which arises from or is related to one or more of the prohibited grounds; or

(ii) accommodate diversity."[15]

7.3.5 The Commission will only analyse factors under subsection (3) above that it deems appropriate to the circumstances of this case. To this end, any discrimination that may have been caused, on the basis of language, by the residence policies, is underpinned by the following considerations:

a) The residence policies are likely to have impaired dignity and impacted severely on the affected non-English students, seeing as the right to choose one's language of communication is closely related to self-worth and dignity (relevant to factors in subsection 3(a), (b) and (d)).

b) The residence polices may have been intended to achieve the purpose of inclusivity (which may or may not be a legitimate purpose, seeing as inclusivity is a noble societal goal but not actually a human right or legal requirement), but all the evidence indicates that the residence policies achieved the opposite of this purpose, as they led to a large number of non-English students, especially Afrikaans students, feeling excluded and in fact led to increased tension and division within the Residences. In the case of Minerva residence, the Respondent submits, through a report from its appointed auditors, that, as a result of tension arising from the residence policies, *"[i]nstead of language becoming a bridge for building inclusivity, language became a barrier that divided Minerva"* (relevant to factors in subsection 3(f) and (g)).

c) There also seems to clearly be less restrictive means of achieving inclusivity through language than those set out in the residence policies. Instead of risk limiting the rights of every student in these Residences by trying to control what language they would all speak, Residences could have educated students about the dangers of unfairly excluding and discriminating against fellow students through language. The Respondent's Equality Unit could have assisted to deal with individual incidents where any student was unfairly excluded on the basis of language where it would have been reasonable and practicable to rather include him or her. Simply put, dealing with unfair language exclusion on a case by case basis is within the Respondent's resources and abilities,

[15] Ibid at Section 14.

which would have been a less restrictive and less disadvantageous means to achieve the purpose of inclusion than trying to control what language every student should speak in multiple contexts (subsection 3(h)).

7.3.6 In light of the above analysis, the Commission does not see any reason that discrimination that was caused by the residence policies could be seen as fair.

7.4. **Human Dignity**

7.4.1 As shown above, a person's choice of language is closely tied to their sense of self-worth and dignity.

7.4.2 The same can be said of one's connection to their cultural heritage.

7.4.3 The Commission is also of the view that unfair discrimination constitutes an attack on human dignity, as a person would surely feel undignified after being told that they are not entitled to the same respect and rights as someone else, because of an immutable characteristic or a part of themselves, such as their language and culture.

7.5. **Conclusion**

7.5.1 After consideration and analysis of the facts (as far as they could reasonably be established) and the law, the Commission has made what it deems to be appropriate findings in this investigation.

7.5.2 The Commission wishes to emphasise that the residence policies were indeed in violation of the 2016 Language Policy, as they led to not only unreasonable and impracticable outcomes, but in fact absurd and disturbing outcomes, including unreasonable and unjustifiable limitations of a number of human rights.

7.5.3 A number of stakeholders, particularly those from leadership within the Residences, seemed to not understand what all the fuss was about. Many repeated the view that they were just asking the students to please speak English, for the sake of inclusivity – was it so much to ask? Another Residence Leader in fact told the Commission it was wasting its time – surely there were more important things to investigate?

7.5.4 And while it may be true that certain stakeholders may have pushed too hard to try make what happened in these residences the spark that would reignite the 2016 Language Policy debate already decided by the Constitutional Court, it most certainly is not the case that rights were not violated, or that young South Africans were not deeply affected by what happened.

7.5.5 Emphasis on inclusivity over respect for all human rights and constitutionalism, together with a language policy that could be (and was) misinterpreted by lay people in the absence of proper training/education, is likely to result in unconstitutional ends. In this case, inclusivity at all costs led to exclusion in a manner that resulted in unfair discrimination and other human rights violations.

7.5.6 Requiring or even asking students in one of the most culturally and linguistically diverse provinces in our country to all speak the same language when they first arrive at their new university residence was always going to have severely negative results. The apparent surprise with which these Residences reacted to these results during their testimony was an indictment of the higher education system. If student leaders still do not understand that South Africans are proud (and have the right to be proud) of their cultural and language heritage, then these leaders have not been properly taught to understand our history. And if they think they can dictate or in any way influence which language should be used by speakers of indigenous South African languages (regardless of good intentions) without causing significant harm to the structures they are trying to build, then these leaders also have a very poor understanding of our present.

8. FINDINGS

8.1. In light of the Commission's investigation and analysis herein, the Commission finds that the Respondent, through the residence policies, unfairly violated the human rights of the affected students to

a) freedom of expression;
b) language and culture;
c) equality and to not be discriminated against on the basis of language; and
d) human dignity.

9. PROPOSED REMEDIAL ACTION

9.1. The Respondent should, through the office of the Rector and Vice-Chancellor, issue a written public apology to any students who were negatively affected by the residence policies. This apology must make clear that the Respondent recognises that

a) SU is responsible for the conduct and policies of its Residences and the human rights violations found by the Commission to have been perpetrated herein; and
b) SU undertakes to ensure that residences do not implement any policies or practices in future that will require any student to, or prevent any student from, speaking a particular language in residences.

9.2. The Respondent, through the office of the Rector and Vice-Chancellor, should within 14 days, write to all residence leadership, directing them expressly to not implement English-only or similar language policies and should provide the Commission with a copy of this correspondence.

9.3. The Respondent should, within 60 days hereof, provide training of residence leadership (residence leadership, including heads, HK, residence mentors and monitors) in respect of the correct interpretation and application of the 2021 Language Policy with specific reference to para 7.2.5.

10. RECOMMENDATION

10.1. The Commission recommends that SU consider rephrasing of section 7.2.5 of the 2021 Language Policy, which states that *"In student communities, language is used in such a way that ensures that, where reasonably practicable, everybody is included and able to participate.*"

10.2. While section 7.2.5 of the new 2021 Language Policy is different from its past counterpart in the 2016 Language Policy (also section 7.2.5), it nevertheless requires only that language should be used inclusively (in other words, *not* in an exclusionary manner, as was the formulation in the 2016 Language Policy), provided that doing so would be reasonably practicable.

10.3. Reasonable practicability is a helpful standard, particularly where language and educational settings intersect. The Constitution itself uses this standard when codifying the rights under section 29(2)[16].

10.4. And while reasonable practicability in achieving an outcome is helpful, when applied correctly, and can and should be read to include the requirement that human rights must not be unfairly limited in the process, there is still the risk that this constitutional aspect of the requirement may be overlooked (with the realisation of this risk forming a large part of the foundation of the Commission's investigation herein).

10.5. Therefore, the Commission recommends that SU insert an additional qualifier to section 7.2.5 of the 2021 Language policy so that it reads as follows [emphasis added]:

"In student communities, language is used in such a way that ensures that, where reasonably practicable ***and provided that the fundamental human rights of those affected are not unreasonably and unjustifiably limited****, everybody is included and able to participate.*"

[16] Section 29(2) of the Constitution states that "[e]veryone has the right to receive education in an official language or languages of their choice in public educational institutions, where that education is reasonably practicable".

SIGNED AT CAPE TOWN ON THIS 14TH DAY OF MARCH 2023.

Chris Nisse

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COMMISSIONER CHRIS NISSEN

SOUTH AFRICAN HUMAN RIGHTS COMMISSION

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COMMISSIONER ANDRE GAUM

SOUTH AFRICAN HUMAN RIGHTS COMMISSION