



# higher education & training

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Higher Education & Training  
**REPUBLIC OF SOUTH AFRICA**

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Dear Dr Schreiber, MP

## **REQUEST FOR ACCESS TO RECORDS IN TERMS OF PAIA: DR LEON SCHREIBER MP**

Your notice of appeal in terms of PAIA dated 10 May 2022 refers

Attached kindly receive the copy of the document you requested. I would also like to confirm that the Department of Higher Education and Training (DHET) only obtained one (1) legal opinion regarding the status of Afrikaans and Khoe languages as indigenous languages in South Africa.

We trust that you shall find this to be in order.

Kind regards

**Mr D Makhaye**  
**Deputy Information Officer**  
**Department of Higher Education and Training**

Date: 11/05/2022

**OPINION**

**In the matter of:**

**THE DEPARTMENT OF HIGHER EDUCATION AND TRAINING**

**ON**

**THE STATUS OF AFRIKAANS AND KHOE LANGUAGES AS  
INDIGENOUS LANGUAGES IN SOUTH AFRICA**

**I.P. NGOBESE, SC  
T. MABUZA**  
Tshwane Society of Advocates  
Waterkloof Glen 2  
Menlyn Maine  
Pretoria  
**11 October 2021**

## **INTRODUCTION**

1. Consultant is the Department of Higher Education and Training having its offices at 123 Francis Baard Street, Pretoria, Gauteng Province.
  
2. On 13 September 2021, we (Adv IP Ngobese SC and Adv T. Mabuza) were instructed by the State Attorney, Pretoria to provide an opinion on the following question:
  - 2.1 The status of Afrikaans and Khoe languages as indigenous languages in South Africa.

## **SOURCE OF INFORMATION**

3. Our opinion is produced on the basis of the information contained in the documents furnished to us by the Consultant and mentioned hereunder as follows:
  - 3.1 Language Policy Framework for Public Higher Education Institutions determined in terms of section 27 (2) of the Higher Education Act, 101 of 1997 as amended and signed by the Minister of Higher

Education, Science and Innovation, Dr B.E. Nzimande on 09 August 2020;

- 3.2 Memorandum from the parliamentary office, National Assembly for written reply question 1603;
- 3.3 Memorandum from Dr Thandi Lewin: Acting Deputy Director General to Dumisani Makhaye, dated 18 June 2021;
- 3.4 A letter dispatched by the member of parliament, Dr Leon Schreiber to the Minister of Higher Education and Training, Dr Blade Nzimande, dated 11 June 2021;
- 3.5 White Paper on Education and Training published on 15 March 1999 and gazetted under notice no. 16312;
- 3.6 Report compiled by the Ministerial Committee appointed by the Ministry of Education in September 2003 on the development of indigenous African languages as mediums of instruction in higher education;
- 3.7 An article written by Patrick Ngulube on Revitalising and Preserving endangered indigenous languages in South Africa through writing and publishing;

- 3.8 Report prepared by Council on Higher Education to the Minister of Higher Education, Science and Innovation on the revised language policy for Higher Education, 2017;
- 3.9 An article by Ann- Marie Beukes on language policy incongruity and African languages in post-apartheid South Africa;
- 3.10 An article by Hassam O. Kaya and Yonah N. Seleti on African indigenous knowledge systems and relevance of higher education in South Africa;
- 3.11 Education White Paper 3 dated 15 August 1997 by Professor SME Bengu, former Minister of Education;
- 3.12 Challenges to the promotion of indigenous languages in South Africa by Kwesi Kwaa Prah, the Center for Advanced Studies of African Society, Cape Town, January 2007.

#### **SUCCINCT BACKGROUND FACTS**

4. The request for the opinion was prompted by the questions raised by Dr L.A. Schreiber (DA member of Parliament) to the Honourable Minister of Higher Education, Science and Innovation, Dr Blade Nzimande. Dr L.A. Schreiber posed the following questions to the Minister of Higher Education, Science and Technology:

- “- In view of the latest Language Policy Framework for Higher Education Institutions, published by the department on 30 October 2020, which uses a certain definition to define indigenous language in the Republic (details furnished), Afrikaans and all Khoe- and San languages, such as Khoekhoegowab, are excluded thereby effectively designating the specified languages to the status of being non-indigenous, on what factual basis does the policy exclude both Afrikaans and Khoekhoegowab from the definition of indigenous South African languages, thereby effectively designating the languages as non-indigenous.”*
- whether, since the policy regards both Afrikaans and Khoekhoegowab as foreign and/or non-indigenous languages in the Republic, the Minister is required to indicate in which countries Afrikaans and Khoe languages are indigenous; if not, why not; if so, what are the relevant details?*
- whether, since the policy explicitly states that an indigenous language is a language that is native to a region or country and spoken by indigenous people, the Government regards the speaking of Afrikaans and Khoekhoegowab as foreign, alien or otherwise non-*

*indigenous to the Republic; if not, what is the position in this regard; if so, what are the relevant details?"*

5. The Minister responded to the questions posed by Dr Schreiber as follows:

5.1 The definition of indigenous languages in the 'Language Policy Framework for Public Higher Education Institution' (2020) was developed subsequent to broader consultations with different language practitioners and stake holders in the country. The usage of the term 'indigenous language' is in line with the Constitution of the Republic of South Africa.

5.2 The definition of the term 'indigenous languages' in the Policy is used purely to highlight the historical marginalisation of African languages as a result of both colonial and apartheid legacies, and the need to develop these languages for scholarly ends.

5.3 The definition includes the Khoe language family.

5.4 The Policy does not imply that Afrikaans must be removed and/or not further developed but to achieve the aspiration of section 29 (2) of the Constitution by making certain that

all previously marginalised languages enjoy parity of esteem and that language is not an obstacle to access for all South Africans.

6. Dr Schreiber is of the view that the explanation provided by the Minister regarding the definition of indigenous languages as set out in the Language Policy Framework for Public Higher Education Institutions, 2020 ("Language Policy, 2020) is irrational, hurtful to Afrikaans and Khoe languages speakers in South Africa.

#### **THE QUESTION TO BE ADDRESSED BY THE OPINION**

7. In order to address the Consultant's question it is apposite at this juncture to take cognisance of the following:

- 7.1 Preamble of the Language Policy, 2020;

- 7.2 Definition of the indigenous language as set out in the Language Policy, 2020;



- 7.3 The purpose of the Language Policy, 2020.
- 7.4 Section 6 of the Constitution Act 108 of 1996 (“The Constitution”).

### **Preamble**

- 8. In brief, the preamble of the policy is to:
  - 8.1 Address the challenge of the underdevelopment and underutilisation of official African languages at higher education institutions whilst simultaneously sustaining the standard and utilisation of languages that are already developed.
  - 8.2 Promote and strengthen the use of all official languages across all functional domains of public higher education including scholarship; teaching and learning; as well as wider communication in line with section 29 (2) of the

Constitution of the Republic of South Africa, Act 108 of 1996.

### **Definition of indigenous languages**

9. The Language Policy, 2020 defines *'indigenous languages'* as follows:

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

### **Purpose**

10. The purpose of Language Policy, 2020 is to:
- provide a framework for the development and strengthening of indigenous languages as languages of

- scholarship, teaching and learning and communication at higher education institutions.
- provide guidelines for the development, implementation, monitoring and evaluation of institutional language policies;
  - contribute to transformation in higher education with specific reference to universities through enhancing the status and roles of previously marginalised South African languages to foster institutional inclusivity and social cohesion.

### **Section 6 of the Constitution**

11. Section 6 (1) of the Constitution states that there are eleven official languages of South Africa, namely: Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu.
12. Section 6 (2) recognises the historically diminished use and status of indigenous languages of South Africa and implore the

State to take positive measures to elevate the status and advance the use of indigenous languages.

13. It is worth mentioning that the Constitution does not indicate which languages should be considered as *'indigenous languages'* and also does not describe the term *"indigenous languages"*.

**Description given to Afrikaans by Language Policy of the Department of Justice and Constitutional Development and Pan South African Language Board Act (59/1995)**

14. In terms of Clause 5.4. of the Language Policy of the Department of Justice and Constitutional Development, dated 26 April 2019, Afrikaans is acknowledged as an indigenous language that enjoys popularity in the country except in the Mpumalanga and Limpopo provinces.
15. According to section 1 of the South African Languages Act proposed by the Pan South African Board, the term 'indigenous

languages' means the languages which originated in South Africa and includes the African official languages and Afrikaans.

### **Court's view on Afrikaans**

16. In *Gelyke Kanse v Chairperson, Senate of the University of Stellenbosch*<sup>1</sup>, Cameron J described Afrikaans as follows:

*"A creole language, a variant of the Dutch 17th century colonists, with some lexical and syntactical borrowings from Malay, Bantu languages, Khoisan languages, Portuguese and other European languages.... In Gauteng Provincial Legislature ...., Sachs J described Afrikaans as 'possibly the most creole or 'rainbow' of all South African languages". From a linguistic standpoint, Afrikaans is properly classified not only as a fully-fledged, independent language rather than a dialect, but also as a language indigenous to South Africa." (our own emphasis)*

17. At paragraph 48, Cameron J held that Afrikaans has been recognised by the Constitutional Court as one of the cultural treasures of South African national life.<sup>2</sup>

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<sup>1</sup> 2020 (1) SA 368 (CC) at paragraph 25, footnote no. 36.

<sup>2</sup> *Gelyke Kanse v Chairperson, Senate of the University of Stellenbosch*, supra.

18. Mogoeng CJ stated the following regarding Afrikaans “..., *it needs be said that Afrikaans is indeed an African language, (our own emphasis) *our historic pride to be treasured by all citizens. Its existence precedes colonialism. And its subsequent development with the appropriately enriching infusion of terms from Dutch or any other European language and the unjust attempt to impose it on others, do not at all affect its original African DNA.*”<sup>3</sup> (our own emphasis)*
19. In *The Chairperson of the Council of Unisa v Afri Forum NPC* (2021) ZACC32, Majiedt J began her judgment in paragraph 1 by referring to the description provided by CJ Langenhoven to Afrikaans. CJ Langenhoven described Afrikaans as ‘*our highest honour, our greatest possession, the one and only white man’s language which was made in South Africa.*’ (our own emphasis)
20. At paragraph 7, Majiedt J described Afrikaans as “*creole language that developed during the 19<sup>th</sup> century under colonialism in South Africa. It is a language that was once*

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<sup>3</sup> Gelyke Kanse v Chairperson, Senate of the University of Stellenbosch, supra at paragraph 61.

*spoken by 'peasants, the urban proletariat, whatever their ethnic background, even the middle class of civil servants, traders and teachers'".<sup>4</sup>*

21. At paragraph 8, Majiedt J went further and stated the following *"Afrikaans is a veritable potpourri of different languages, melded into what has been referred to in this Court as 'one of the cultural treasures of South African national life, widely spoken and deeply implanted, the vehicle of outstanding literature, the bearer of a rich scientific and legal vocabulary and possibly the most creole or 'rainbow' of all of South African tongues".<sup>5</sup>*

22. From the foregoing, we submit that it is apparent that the Constitutional Court regards Afrikaans as an African language and indigenous to South Africa.

**Is definition of the indigenous languages in the Language Policy,**

**2020 include Afrikaans as an indigenous language**

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<sup>4</sup> The Chairperson of the Council of Unisa v Afri Forum NPC (2021) ZACC 32.

<sup>5</sup> The Chairperson of the Council of Unisa v Afri Forum NPC (2021) ZACC 32.

23. Afrikaans has been for many years associated with dominion or power and Afrikaans speaking people have been enjoying more privileges in terms of accessing educational materials compared to other African indigenous languages speakers, and used as a medium of instruction in five universities of South Africa.<sup>6</sup>
24. In *Chairperson of the Council of Unisa v Afri Forum NPC*, supra, Majiedt J states “Afrikaans became a cultural symbol of *“Afrikanerness”* and national unity. Afrikaans was deployed *“to secure power in the hands of an exclusive group and became associated with the “marginalisation” and exclusion of “uncivilised” Afrikaans speakers.”*<sup>7</sup>
25. Before we address the above question, it is important to mention that it is palpable that the Language Policy, 2020 is aimed at developing previously marginalised indigenous

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<sup>6</sup> In *Afri Forum v University of Free state* 2018 (2) SA 185 (CC) at paragraph 67, *Mogoeng CJ* stated *“There can be no denying that Afrikaans is indeed a highly developed language of scholarship and science.”*

<sup>7</sup> At paragraph 9. At footnote 17, *“uncivilised”* Afrikaners speakers are black Afrikaans speakers.



languages of the people of South Africa and to promote multilingualism in institutional policies and practices.

26. The Language Policy, 2020 seeks to develop the previously marginalised African languages whilst simultaneously sustaining the standard and utilisation of languages that are already developed i.e. Afrikaans and English.

27. However, we are of the view that the definition of indigenous languages in the Language Policy, 2020 does not include Afrikaans as an indigenous language for the following reasons:

27.1 The description refers to a language that has heritage roots in Africa (and also as African Language in literature and Policy documents) and belonging to Southern Bantu family.

27.2 It is a well-known fact that:

- 27.2.1 Most of the literatures and the Policy documents do not include Afrikaans as an African language;<sup>8</sup>
- 27.2.2 The term '*Bantu*' was utilised to make reference to Black people during apartheid; and
- 27.2.3 Southern bantu (Black) families do not speak Afrikaans.
- 27.3 The usage of the word '*Native*' and spoken by '*indigenous people*' implies Afrikaans is not an indigenous African language because Afrikaans started to exist after the seafarers arrived in South Africa and developed during the 19<sup>th</sup> century under colonialism.
28. The exclusion of Afrikaans in the Language Policy, 2020 as an indigenous language is inconsistent with the Constitutional Court's consideration of Afrikaans as an indigenous language.

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<sup>8</sup> For instance, paragraph 3.2 of the Advice to the Minister of Higher Education, Science and Technology on the revised language policy for higher education 2017 states "*the term "official languages" should refer to languages that intrinsically originate on the African continent, and which have the official status in South Africa, whereas 'official South African Languages' should refer to the eleven (11) official languages in South Africa including English and Afrikaans, that are not African languages in the indigenous sense*". (our own emphasis)

29. We are in agreement with the response given by the Minister of Higher Education that the Language Policy, 2020 includes Khoe language family as an indigenous language in that it is native and spoken by indigenous people.
30. From the foregoing, we urge the Consultant to consider amending its definition of indigenous languages taking into account that the purpose of the Policy is to develop previously marginalised African indigenous language as enjoined by the Constitution.<sup>9</sup>
31. We propose that the term *'previously marginalised indigenous languages'* will be appropriate as it also prevents any unnecessary conflict with the other language policies of the departments i.e. Department of Justice and Constitutional Development and the proposed definition of *"indigenous languages"* by the Pan South African Language Board.

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<sup>9</sup> Section 6 (2) of the Constitution.

32. The proposed term supports the purpose of the Language Policy of the Department of Higher Education and is also in line with the language policy of the Legal Aid (another organ of state), gazetted under Notice No. 40733, dated 31 March 2017. The Legal Aid language policy is utilising the term '*previously marginalised indigenous languages*' to distinguish between Afrikaans as a developed language and other marginalised indigenous languages.

33. We are of the view that the proposed term will circumvent any potential litigation to challenge the definition and unnecessary legal costs that might be incurred as a result of the litigation.

34. We so advise, and we are available to discuss any issues that may arise from this opinion.

**Adv I.P. Ngobese, SC**

**Adv T. Mabuza**

Tshwane Society of Advocates

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**11 October 2021**