THE RIGHT TO PRACTICE CULTURAL AND RELIGIOUS BELIEFS IN THE WORKPLACE – A DOUBLE-EDGED SWORD

Department of Correctional Services v Popcru (107/12) [2013] ZASCA 40

1 Introduction

In modern society, employees face a dilemma regarding the extent to which they may practise their cultural and religious beliefs in the workplace (Griffiths "The Eighteenth Hugh Kay Memorial Lecture – Religion in the Workplace" 2007, lecture delivered to the Christian Association of Business Executives http://176.32.230.3/cabe-online.org/clients/cabe/wp-content/uploads/downloads/2012/12/HKLectureNotes07.pdf (accessed 2014-08-29)). This dilemma is often as a result of the tension between the employee's rights to practise his religious or cultural beliefs and the inherent requirements of the job. The employee's right to practise his/her (hereinafter "his" will include "her") religion or culture stems from sections 15, 30 and 31 of the Constitution of the Republic of South Africa, 1996 (hereinafter "Constitution"), which affords everyone the right to practise beliefs. Section 9(3)–(4) of the Constitution prohibits unfair discrimination based on, *inter alia*, religion and culture.

The constitutional rights to freedom of religion and culture are not absolute and may be limited in terms of section 36 of the Constitution. For instance, in *Prince v President, Cape Law Society* (2002 (2) SA 794 (CC) hereinafter "*Prince*"), the Constitutional Court remarked that the "failure to make provision for an exemption in respect of the possession and use of cannabis by Rastafari is thus reasonable and justifiable under our Constitution" (*Prince* par 139). In the workplace, the right to practise religious and cultural beliefs is given effect to by section 187(1)(f) of the Labour Relations Act 66 of 1995 (hereinafter "LRA"), which regards a dismissal on the grounds of religion and culture as an automatically unfair dismissal, and section 6(1) of the Employment Equity Act 55 of 1998 (hereinafter "EEA"), which prohibits discrimination based on religion and culture in the workplace.

These protections too are not absolute, as the employer may in both instances justify the discrimination on the basis of the inherent requirements of the job (s 187(2)(a) of the LRA, read with s 6(2)(b) of the EEA). In *Dlamini v Green Four Security* ((2006) 27 *ILJ* 2098 (LC) hereinafter "*Dlamini*"), the Labour Court held that even though employees had the right to practise their religious beliefs, a balance had to be struck between the competing interests of their religious beliefs and the countervailing commercial concerns of the workplace. It stated that a workplace rule could be justified if it was an

inherent requirement of the job (*Dlamini* par 31, 39–40). Workplace rules in the form of dress codes often have an adverse impact on an employee's right to practise his religious/cultural beliefs, if formulated and enforced without the above constitutional and labour-law provisions in mind.

This is what transpired in *Department of Correctional Services v POPCRU* ((107/12) [2013] ZASCA 40 hereinafter "*POPCRU*"). The Department had a dress code which prohibited males from wearing dreadlocks. This prohibition did not apply to females. The respondent male persons refused to cut their dreadlocks, which they wore according to their sincerely held religious and cultural beliefs. This led to their dismissal.

The decision of *POPCRU* is worthy of note, as the Supreme Court of Appeal specifically dealt with a dress code which did not recognize the constitutional rights of employees to their religious and cultural beliefs. There are important lessons to be learnt from this case for other governmental departments, as well as the private sector, with regard to the formulation and enforcement of a dress code in the workplace.

Firstly, the facts, arguments and judgment will be stated briefly. Secondly, this note will evaluate the right to religion/culture within the workplace and provide a brief perspective on the right to religion within the American workplace. Lastly, this note will conclude by providing the way forward for the exercise of religious and cultural beliefs within the workplace.

2 Facts and judgment

The respondents in this case were all male persons employed as correctional officers by the Department of Correctional Services (hereinafter "Department"), and were stationed at Pollsmoor Prison, Cape Town prior to their dismissal in June 2007. They were dismissed for failing to cut their dreadlocks in terms of the Department's Corporate Identity Dress Code (hereinafter "dress code"). The dress code prohibited the wearing of dreadlocks by male officers, but this prohibition did not apply to their female counterparts. It is common cause that the prohibition of dreadlocks was not enforced in the past. This lack of enforcement of the dress code ended when a new area commissioner was appointed. The commissioner sought to enforce the dress code (in particular the rule relating to dreadlocks), and in pursuance thereof issued a written instruction to that effect (*POPCRU* par 2–5).

The respondents failed to abide by the instruction, and this resulted in the commissioner requesting them to furnish reasons as to why they should not be suspended for contravening the dress code (rule relating to dreadlocks). The responses that were provided varied and are briefly stated here. The second, fifth and sixth respondents (Lebatlang, Jacobs and Khubheka) adhered to the Rastafarian religion and the wearing of dreadlocks was seen as an outward manifestation of their beliefs. They contended that the instruction to cut their dreadlocks in accordance with the dress code undermined their right to freedom of religion and constituted unfair discrimination (*POPCRU* par 5–6).

The third and fourth respondents (Ngqula and Kamlana) cited cultural reasons for wearing dreadlocks. Ngqula said that he was required to wear dreadlocks in accordance with the Xhosa culture, as his ancestors had instructed him to become a s*angoma* (traditional healer). Kamlana said that he was required to wear dreadlocks by his ancestors in order to overcome *intwasa* (an injunction from the ancestors to become a traditional healer). They both considered the instruction to cut their dreadlocks to be an infringement on their right to practise their culture, as well as amounting to unfair discrimination against them on the ground of same (*POPCRU* par 7).

The commissioner's attitude towards the reasons furnished by the respondents was to the effect that compliance with policy cannot be negotiated and employees have to adapt to policy as it cannot be adapted to suit them, irrespective of their religious beliefs. This led to the respondents being charged with contravening the dress code by wearing dreadlocks, alternatively failing to cut their dreadlocks in accordance with an instruction, in the absence of having a reasonable excuse for failing to do so. The respondents refused to attend the disciplinary hearing and were dismissed (*POPCRU* par 8–9).

Aggrieved by this, the respondents referred their dispute to the Labour Court (reported as *POPCRU v Department of Correctional Services* [2010] 10 BLLR 1067 (LC)). They contended that their dismissals were automatically unfair because they were unfairly discriminated against based on their religion and culture, respectively (they also relied on the grounds of conscience and gender). The Labour Court found in favour of the respondents, holding that their dismissals were automatically unfair on the grounds of gender, as the commissioner had failed to provide a justification (explanation) for differentiating between males and females with regard to the wearing of dreadlocks (*POPCRU* par 10,15–16).

The Department did not accept the judgment and launched an appeal to the Labour Appeal Court (reported as *Department of Correctional Services v POPCRU* [2012] 2 BLLR 110 (LAC). In short, the Labour Appeal Court held that the dismissals were automatically unfair on the grounds of religion, culture and gender, and accordingly dismissed the appeal (*POPCRU* par 17).

The Department, dissatisfied with the judgment of the Labour Appeal Court, once again launched an appeal, this time to the Supreme Court of Appeal. The Department conceded that the dress code (rule relating to dreadlocks) resulted in disparate treatment of correctional officers and was directly discriminatory on the grounds of religion, culture and gender. The Department put forward a *new argument* to justify the discrimination. The argument was that the discrimination sought to eliminate the risk posed by placing officers who adhere to a religion or culture that promotes criminality (the use of dagga) in control of a prison (*POPCRU* par 18–19).

The argument no longer related to the wearing of dreadlocks, but rather the use of dagga, which is part of the observance of the religion or culture in question. It was further argued that the risk posed by wearing dreadlocks took the form of male Rastafari officials being rendered conspicuous and susceptible to manipulation by Rastafari and other inmates into smuggling dagga into correctional centres. The Department contended that it was not

concerned about female officials who wore dreadlocks because they did not participate in the use of dagga in Rastafarianism (reliance for this contention was placed on *Prince, POPCRU* par 19–20).

The Supreme Court of Appeal held that the dress code (rule relating to dreadlocks) condemned the practice of a religion and culture, and consequently degraded and devalued the followers of that religion and culture in society. It further held that this amounted to a profound invasion of the respondents' right to dignity, with the inevitable conclusion that their religion and culture were not worthy of protection. The Court remarked that the result of this was devastating, as the respondents were dismissed for failing to obey an instruction which was at odds with their sincerely held beliefs (*POPCRU* par 22).

The Court remarked that the Department had not established that short hair was an inherent requirement of the job. The Court concluded by stating that a policy is unjustifiable if it restricts the practice of a religious or cultural belief that does not relate to the employee's ability to do his work, and does not affect the safety of the public or other employees, or create any hardship for an employer. The appeal was accordingly dismissed (*POPCRU* par 25–26).

3 Comments

3 1 A brief evaluation of the right to religion/culture within the workplace

This judgment is welcomed, as it shows the disdain with which the courts will treat egregious violations of employees' rights to freedom of religion and culture in the workplace. This is further buttressed by the judgment of *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi* ((2012) 33 *ILJ* 2812 (LAC) par 26 per Tlaletsi JA), wherein the LAC held that:

> "It would be disingenuous of anybody to deny that our society is characterised by a diversity of cultures, traditions and beliefs. That being the case, there will always be instances where these diverse cultural and traditional beliefs and practices create challenges within our society, the workplace being no exception. The Constitution of the country itself recognises these rights and practices. It must be recognised that some of these cultural beliefs and practices are strongly held by those who subscribe in them and regard them as part of their lives."

Govindjee notes that a belief may be purely religious and it may also be both religious and cultural. He further notes that the overlap between the concepts of religion and culture widens the scope of the right to freedom of religion (Govindjee "Freedom of Religion, Belief and Opinion" in Govindjee and Vrancken (eds) *Introduction to Human Rights Law* (2009) 111). It is thus clear that there is an overlap between these concepts, and comments made hereinafter with regard to religion apply *mutatis mutandis* to culture.

The right to practice religious/cultural beliefs is zealously protected and recognized as a fundamental human right in most international human-rights instruments. For example, Article 18 of the Universal Declaration of Human

Rights of 1948 provides that everyone has the right to freedom of religion, and this right includes the freedom to practise religion. The Discrimination (Employment and Occupation) Convention (111 of 1958) defines discrimination as including any distinction, exclusion or preference on the basis of religion, *inter alia*, and recognizes the inherent requirements of a job as a ground of justification (articles 1(a), 1(1)). Article 15(1)(a) of the International Covenant on Economic Social and Cultural Rights (1966) provides that everyone has the right to participate in cultural life.

Article 9(1) of the European Convention on Human Rights (1950, "Convention") provides that everyone has the right to freedom of religion and the attendant freedom to practise same. Furthermore, article 9(2) of the same Convention provides that the freedom to manifest one's religion or beliefs shall be subject to limitations as prescribed by law and necessary to protect the rights and freedom of others, *inter alia*.

It is then self-evident that a limitation of the right to practise religious and cultural beliefs will have to be viewed within an international and constitutional paradigm. This is because the right is widely protected in international law and specifically protected in terms of the Constitution. An employee who claims that he should be exempted (or reasonably accommodated) from a certain workplace rule because this is prohibited by his religion will have to prove that the prohibition is an essential tenet of his religion and observance thereof is compulsory (*Dlamini* par 23). In *POPCRU,* the respondents had established that the wearing of dreadlocks was an essential tenet of their religion/culture by calling expert evidence, which was not disputed by the Department (par 11–12). In *S v Lawrence* (1997 (4) SA 1176 (CC)), the Constitutional Court held that in order to enjoy the right to freedom of religion, *tolerance* is decisive (par 147).

In *Dlamini,* the Labour Court held that an employer is required to *reasonably accommodate* the religious beliefs of its employees, but an employer is not under any obligation to accommodate same if it will result in undue hardship. It remarked that employees are not mechanically exempted by their beliefs from obeying workplace rules, but they have to apply for an exemption or accommodation in this regard if they wish to practise these beliefs in the workplace (par 32, 69; and see also *MEC for Education: Kwazulu-Natal v Pillay* (CCT 51/06) [2007] ZACC 21 par 72–79 for a detailed discussion of reasonable accommodation and the role it plays in determining fairness).

In *POPCRU*, the respondents applied for an exemption from the rule prohibiting dreadlocks when they furnished reasons to the commissioner as to why they could not cut their dreadlocks. This request was simply dismissed by the Department. The aspect of reasonable accommodation of the respondents' beliefs was not entertained by the commissioner, as he was of the view that the rule could not be adapted, but that the respondents should rather adapt to the workplace rule (*POPCRU* par 6–8). It is clear from the above case law that this view flagrantly violates the right to practise one's religious/cultural beliefs.

The Department's *initial argument* was that the rationale for the dress code (rule prohibiting dreadlocks) was "to entrench uniformity and *neatness* in the dress and appearance of correctional officials which would engender

discipline and enhance security in the prison facility" (*POPCRU* par 24, authors' emphasis added). *Dlamini* is authority for the view that an employer is entitled to establish a dress code, which serves to promote a certain image of the employer. It held that the rule against wearing beards was based on the inherent need to be *neat* (*Dlamini* par 63).

It should be noted that unlike in *POPCRU,* the employees in *Dlamini* failed to satisfy the Court that the wearing of beards was a fundamental tenet of their faith, and they refused to trim their beards, hence the issue of reasonable accommodation was not dealt with (*Dlamini* par 26 and 70). The Department could have maintained their initial argument of neatness, relying on *Dlamini,* but they would ultimately have had to exempt the respondents from cutting their dreadlocks and could have imposed neatness requirements falling short of cutting the dreadlocks, in order to reasonably accommodate them. It is important to note that the respondents were keeping their dreadlocks neat and some wore an official beanie to cover same (*POPCRU v Department of Correctional Services* [2010] 10 BLLR 1067 (LC) par 23, 38 and 64).

3 2 A brief perspective on the right to religion within the American workplace

In America the practice of religion in the workplace is an important feature in the lives of employees. Kutcher *et al* note that almost 95 per cent of Americans believe there is a God, and 81 per cent of American adults belong to a specific religious affiliation They further note that it is not realistic for employers to expect employees to leave their religion at the door when they come to work (Kutcher, Bragger, Rodriguez-Srednicki and Masco "The Role of Religiosity in Stress, Job Attitudes, and Organizational Citizenship Behaviour" 2010 95(2) *Journal of Business Ethics* 319).

King defines religion as a set of values, *inter alia*, that provides a moral and ethical structure for understanding, motivation and behaviour. He asserts that:

> "Religion is often understood as an institutional and organizational domain, confined and determined by creeds, theologies, and doctrines about man's current and eternal destiny, his relationship with himself and others around him, and God or some other transcended or supreme being (King "Religion, spirituality, and the workplace: Challenges for public administration" 2007 67 (1) *Public Administration Review* 103 104)."

The practice of religious belief is constitutionally protected under the First Amendment of the Constitution of America. It provides that Congress is not permitted to enact laws prohibiting the free exercise of religion (United States Constitution, Bill of Rights, First Amendment, 1791 http://www1.umn.edu/humanrts/education/all_amendments_usconst.htm (accessed 2014-08-29)). In addition, the practice of religious belief is also protected under Title VII of the Civil Rights Act of 1964. It prohibits employers from discriminating against employees in the workplace based on their religious beliefs. It further places a duty on employers to accommodate employees' religious practices reasonably in the workplace (s 200e-2(a) and 200e(j); Sakrani "The Third

Circuit's Massacre of Title VII's Undue Hardship Test" 2011–2012 45 *UC Davis LR* 1557 1562).

In most cases, disputes involving religion are based on one of two theories, which are, failure to make reasonable accommodations and unequal treatment (Schlei and Grossman *Employment Discrimination Law* 2ed (1983) 206). In *Ansonia Board of Education v Philbrook* Justice Marshall dissenting from the majority judgment of the United States Supreme Court remarked that:

> If the employer has offered a reasonable accommodation that fully resolves the conflict between the employee's work and religious requirements, I agree that no further consideration of the employee's proposals would normally be warranted. But if the accommodation offered by the employer does not completely resolve the employee's conflict, I would hold that the employer remains under an obligation to consider whatever reasonable proposals the employee may submit. (*Ansonia Board of Education v Philbrook* 479 US 60 (1986) http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=479&invol=60 (accessed 2014-8-29).

Beerworth, referring to *Employment Division v Smith* (494 U.S. 872 (1990)), states that it entrenches the rule that for the law to pass constitutional muster its treatment of similar religious and secular conduct must be equal (Beerworth "Treating Spiritual and Legal Counsellors Differently: Mandatory Reporting Laws and the Limitations of Current Free Exercise Doctrine" 2004 10(1) *Roger Williams University LR* 73 75–76 http://docs.rwu.edu/rwu_LR/ vol10/iss1/2 (accessed 2014-08-29); and see also *Tenafly Eruv Association v Borough of Tenafly* 309 F.3d 144, 157 (3rd Cir.2002) par 42–44 http://openjurist.org/309/f3d/144/tenafly-eruv-association-inc/ (accessed 2014-08-29); for a detail discussion on the Constitution of America and the protection of freedom of religion see Griffin (*Law and Religion Cases and Materials* 3ed (2013); Jelen "The Constitutional Basis of Religious Pluralism in the United States: Causes and Consequences" 2007 612 *Annals of the American Academy of Political and Social Science* 26–39; and see also Yarnold "Did Circuit Courts of Appeals Judges Overcome Their Own Religions in Cases Involving Religious Liberties? 1970–1990" 2000 42(1) *Review of Religious Research* 79–84).

Cash *et al* state that there is a movement by the political and legal institutions in America towards a "value-expressive environment that will put even greater pressure on companies to honour employees' requests for religious and spiritual accommodation" (Cash, Gray and Rood "A framework for accommodating religion and spirituality in the workplace [and Executive Commentary]" 2000 14(3) *The Academy of Management Executive* 124 132). They argue for a legal framework that is religion-neutral in terms of which all reasonable accommodation requests should be granted subject to productivity and process considerations. According to them, this will assist in creating an equitable, open, and desensitized working environment (Cash *et al* 2000 14(3) *The Academy of Management Executive* 132).

4 Conclusion

It is clear from the above discussion that the right to practise religious/cultural beliefs is firmly entrenched in the Constitution (as well as

international law) and applies in the workplace through employment law. This right is not absolute as it has to be weighed against the inherent requirements of the job (employer's commercial interests) where required. The weighing up of the two interests has to be done in a constitutionally compliant manner. This is by no means an easy task but it does require a certain level of understanding and respect by an employer for an employee's religious/cultural beliefs.

It is further clear that American law, to some degree, deals with the right to practise religious beliefs in the workplace in a similar manner to South African law. For instance, American law like South African law, recognizes the need for reasonable accommodation measures with regard to religious practices of employees provided that it does not cause undue hardship to an employer.

This requires workplace rules relating to hair (and other dress requirements) to be in accordance with the Constitution, in order not to be unfairly discriminatory. Where such rule has an impact on employees' religious/cultural beliefs, exemptions from the rule should be allowed, and if this is not possible, then the employer should endeavour to accommodate such religious/cultural practices reasonably. A dress code should be drafted in a constitutionally compliant manner. A constitutionally compliant manner does not mean that an employer has to accommodate an employee where such accommodation would result in the employer suffering undue hardship. The Constitution recognizes that discrimination can be justified, and this is evinced in both the LRA and the EEA.

Finally, it is clear that the right to practise religious/cultural beliefs in the workplace may be unjustly restricted by an employer, thus infringing the right and it may also result in an undue hardship on an employer. This aptly demonstrates the double-edged sword.

Shamier Ebrahim and Clarence Tshoose
University of South Africa (UNISA)