



SOUTH AFRICAN HUMAN RIGHTS COMMISSION REPORT

File Ref No: FS/2012/0103

In the matter between:

Vumile Ernest Mokgatla

Complainant

And

Hodisa Technical Secondary School

Respondent

REPORT

(In terms of Article 21 of the Complaints Handling Procedures of SAHRC)

1. Introduction

1.1. The South African Human Rights Commission (hereinafter referred to as the "**Commission**") is an institution established in terms of Section 181 of the Constitution of the Republic of South Africa Act, 108 of 1996 (hereinafter referred to as the "**Constitution**").

1.2. The Commission and the other institutions created under Chapter 9 of the Constitution are described as “*state institutions supporting constitutional democracy*”.

1.3. The Commission is specifically required to:

1.3.1. Promote respect for human rights;

1.3.2. Promote the protection, development and attainment of human rights; and

1.3.3. Monitor and assess the observance of human rights in the Republic.

1.4. Section 184(2) of the Constitution empowers the Commission to investigate and report on the observance of human rights in the country.

1.5. Further, section 184(2)(c) and (d) affords the Commission authority to carry out research and to educate on human rights related matters.

1.6. The Human Rights Commission Act, 54 of 1994, further supplements the powers of the Commission.

1.7. Section 9(6) of the Human Rights Commission, 1994 determines the procedure to be followed in conducting an investigation regarding the alleged violation of or threat to a fundamental right.

2. Nature of the Complaint

2.1. On Tuesday, 17 July 2012, the Commission received a complaint from Yumile Ernest Mokgatla (hereinafter referred to as "**Complainant**") a Grade 11 pupil at a public Secondary School in the Free State Province.

2.2. The Complainant was a major who represented himself, having attained the age of majority at the time of the lodging of this complaint.

2.3. The Complainant states that he subscribes to the Rastafarian religion, and is an adherent to the practices thereof, that following his conversion into this faith he began to grow his hair long, into dreadlocks, consistent with the vow of the Nazarene not to shear his hair with a razor.

2.4. In his complaint, the Complainant alleges that Hodisa Technical Secondary School (hereinafter referred to as the "**Respondent**"), acting on the strength of a Code of Conduct¹ regulating discipline in the school, had:

2.2.1 suspended him from school for violating the grooming requirements set out in the Code, and

2.2.2 ordered him to shear his dreadlocks from his head and not to return to school until he had done so.

2.5. The Complainant further alleges that in effecting the suspension, the Respondent did not afford him a reasonable opportunity to be heard; and that

¹ In this regard, the Commission wishes to point out that it is aware of similar limitations placed by School Governing Bodies in public schools in the Free State Province, and in the country, on the practice of religion within the school environment.

had he been provided with such opportunity, he would have argued that he is an adherent of the Rastafari religion, and that the wearing of dreadlocks is an integral part of the practice of his religious beliefs and on this ground, he should be exempted from the operation of the prohibition set out in the School Code.

2.6. The Complaint, yet further, that as a result of this administrative decision, and having no option, he sheared his hair and returned to school tuition.

2.7. Consequently, the Complainant alleges that his human right to hold religious beliefs, and practice his religion, as set out by the Constitution, have been violated.

3. History and Elements of the Rastafarian Movement

3.1 There is some debate in literature as to whether Rastafarianism is a formal religion or a movement. Some argue that Rastafarianism is merely a spiritual movement. Others suggest that Rastafarianism is more of an ethnicity than a religion.

3.2 The preponderance of literature suggests that is a religion. Those that argue that it is a religion define it as a monotheist religion that worships a single God, who takes the form of the Holy Spirit and inhabits humans.

3.3 It first arose in the 1930's in Jamaica² as a solution to the concerns of black people in the African diaspora.³

² It is largely derived from the thought of Jamaican political activist Marcus Garvey (1887-1940), who advocated a return to Africa as a means of solving the problems of Black oppression. Chambers Dictionary of beliefs and religions (1992) p430

³ Hunt, Stephen, *Alternative religions: A sociological introduction* (2003) p126

3.4 The adherents of this movement worship Haile Selassie I, Emperor of Ethiopia (ruled 1930-1974) as Jesus Christ incarnate. Haile Selassie is accorded the title, 'King of Kings and Lord of Lords' and thus the returned Christ, the saviour and the redeemer of his people.⁴

3.5 Members of the Rastafarian movement are known as "*Rastas*" and they call their God after the Christian God "*Jah*" or "*Jah Rastafari*".⁵ Many of their teachings are derived from the Bible.

3.6 The practice of Rastafarianism encompasses a number of key themes such as:

3.6.1 The spiritual use of cannabis or "*ganja*" as part of a spiritual act often accompanied by Bible Study⁶, believed to be a sacrament that cleanses body and mind, that heals the soul, exalts consciousness, facilitates peacefulness⁷, and brings adherents closer to God;

3.6.2 The rejection of western society, called "*Babylon*", together with its norms, values and cultures;

3.6.3 The embrace of various afro-centric and pan-africanist social and political aspirations of liberation from bondage and captivity by "*Babylon*",

⁴ Chryssides, George D. *Exploring new religions* (1999) p273

⁵ Rastafari is derived from the name of Emperor Haile Selassie, Prince Ras Tafari (1891-1975)

⁶ Scriptural warrant is found for the practice in the Book of Genesis. God said to Adam: 'I have given you every herb bearing seed, which is upon the face of all earth...to you it shall be for meat.' (Genesis 1:29).

⁷ Better a dinner of herbs where love is, than a stalled ox and hatred therewith. (Proverbs 15:17)

3.6.4 The growing of hair in its natural pattern without cutting, combing or brushing same, thereby developing into dreadlocks;

3.7 Rastafarians associate dreadlocks with a spiritual journey of discipline and patience that one takes in the process of growing and locking one's hair.

3.8 The spiritual command and authority for the growing and locking of hair into dreadlocks is based on a scripture in the Book of *Numbers 6:5* of the Christian Bible:

"They must never cut their hair throughout the time of their vow, for they are holy and set apart to the Lord. Until their vow has been fulfilled, they must let their hair grow long". (New Living Translation)

3.9 Consequently, Rastafarians regard the shearing of hair as a serious act of mutilation and a transgression of a sacred vow of priesthood. Adherents believe that the wearing of locks is in fulfillment of a Nazarite vow of the Biblical Priesthood in terms of *Leviticus Chapter 21, verses 5 & 6* of the Christian Bible:

"The priests must not shave their heads or trim their beards or cut their bodies.... they must be set apart as holy to their God and must never bring shame on the name of God. They must be holy....." (New Living Translation)

4. Preliminary Assessment

4.1. The Provincial Office of the Free State made a preliminary assessment of the complaint. The preliminary assessment of the Office was:

- 4.1.1 That the alleged incident constituted a *prima facie violation* of the human rights of the learner. In particular, the assessment determined that Sections 9 (Equality on the grounds of religion), 10 (human dignity) , 12 (freedom and security of the person), 15 (freedom of religion, belief and opinion), section 29 (1) (right to education) and 33 (just administrative process) of the Constitution had *prima facie* been violated;
- 4.1.2 That the assessed violations *fell within the mandate and jurisdiction* of the South African Human Rights Commission;
- 4.1.3 That there was no other organisation that could more effectively and expeditiously deal with the complaint.

5. Steps Taken by the Commission

- 5.1. On Friday, 10 August 2012, the Free State Provincial Office sent an allegation letter providing full details regarding the alleged violation to the Respondent and requested a response thereto within twenty-one (21) days of receipt of the letter.
- 5.2. On Tuesday, 14 August 2012, the Free State Provincial Office received a response from the Respondent, which did not address itself to the merits of the complaint but merely stated the Respondent's desire to have the matter resolved amicably.

5.3. In addition to the response letter, the Provincial Office sought from the Respondent a copy of the Respondent's Code of Conduct. A copy of same was received on the 21st September 2012.

5.4. The Respondent asserts that the Code of Conduct of the School requires that all students should wear their hair short and unstyled, as a necessary practice for grooming and for discipline of learners.

5.5. The relevant section of the Code of Conduct read:

"The following hair styles are not allowed: Dreadlocks, curled hair, braiding and blonde hair".

6. Issues for Determination

The Provincial Office determined that the following five (5) aspects of the complaint constituted the salient issues for determination:

- 6.1 Whether the prohibition of the wearing of dreadlocks by learners, constituted a violation of the right to equality and an act of unfair discrimination against learners on grounds of religion in terms of Section 9 (3) of the Constitution;
- 6.2 Whether the decision to order the Complainant to shear his dreadlocks, constituted a violation of the Complainants right to human dignity in terms of Section 10 of the Constitution;

- 6.3 Whether the prohibition of the wearing of dreadlocks, in terms of the Code of Conduct, constituted a violation and a reasonable limitation to Complainant's right to practice his religion in terms of Sections 15 (1) of the Constitution;
- 6.4 Whether the suspension of the Complainant from educational tuition, constituted a violation of his right to education in terms of Section 29 (1).
- 6.5 Whether the failure of the Respondent to consult with the Complainant prior to suspending him from tuition, and further not allowing an opportunity for the Complainant to appeal the sanction, constituted a violation of the Complainant's right to just administrative process in terms of Section 33 (1).

7. Applicable Legal Framework

(a) International Instruments

7.1 International Convention on Economic, Social and Cultural Rights

The United Nations has described the right to education in Article 13 as follows:

Education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which

*economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities.*⁸

7.2 International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights provides in Article 18(1) that:

"Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching."

Article 27 of the International Covenant on Civil and Political Rights provides –

"In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."

7.3 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief⁹

The Declaration reaffirmed that freedom of thought, conscience, religion and belief is a human right derived from the inherent dignity of the human person and guaranteed to all without discrimination.¹⁰

7.4 Declaration on the Rights of Persons Belonging to National or Ethnic Religions and Linguistic Minorities¹¹

The Declaration reaffirmed that one of the main purposes of the United Nations, as proclaimed in the *Charter of the United Nations*, is to achieve international

⁸ General Comment No. 13 on the Right to Education – UN Document p6

⁹ Adopted by the United Nations General Assembly on November 25, 1981

¹⁰ Resolution Adopted by the UN General Assembly A/Res/55/97

¹¹ Declaration approved by the UN General Assembly on 20 July 1992

cooperation in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion.¹²

7.5 United Nations Human Rights Council Resolution Combating Defamation of Religions¹³

The Human Rights Council expressed deep concern at the stereotyping and defamation of religions and manifestations of intolerance and discrimination in matters of religion or belief still evident in the world, which have led to intolerance against the followers of these religions.

The Human Rights Council reaffirmed the pledge made by All States under the Charter of United Nations to promote and encourage universal respect for and of human rights and fundamental freedoms for all, without distinction as to race, sex, language and religion.

(b) Regional Human Rights Instruments

7.6 African Human Rights Charter

The first part of the Charter (Articles 1 to 18) lists the rights acknowledged to every individual “without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status” (Article 2).

¹² Resolution Adopted by the UN General Assembly A/Res/47/135

¹³ Adopted as Resolution 13/16 on April 15, 2010

(c) Constitutional Rights

The complaint before the Commission is an alleged violation of various rights enshrined in the Constitution.

7.7 Foundational Values

Section 1 of the Constitution determines that South Africa is one, sovereign, democratic state founded on the values of human dignity, the achievement of equality, the advancement of human rights and freedoms, supremacy of the Constitution and the rule of law and a system of democratic government that is accountable, responsive and open.¹⁴

7.8 The Right to Equality

Section 9 (3) of the Constitution provides that the State may not unfairly discriminate directly or indirectly against anyone on the basis of religion.

Subsection 4 provides that, 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 prevent or prohibit unfair discrimination.

7.9 The Right to Human Dignity

Section 10 is the right to have the inherent dignity of everyone dignity respected and protected. Given the facts of this matter and the intrinsic nature of the right, it has central significance.

7.10 Freedom of Religion, Belief and Opinion

Section 15 (1), entrenches the right to freedom of religion.

¹⁴ Constitutional values in Section 1 of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996)

Section 15 (2) (b) provides that religious observances may be conducted at state or state aided institutions, provided that they are conducted on an equitable basis.

7.11 The Right to Education

Section 29 (1) (a) of the Constitution guarantees the right to a basic education. It provides in the relevant part that:

(1) "Everyone has-

(a) *the right to a basic education, including adult basic education.*"

In terms of Schedule 4 to the Constitution, basic education is an area of concurrent national and provincial competence. Both organs of state are responsible for the protection, respect, promotion and fulfilment of the right to a basic education.

7.12 The Right to Just Administrative Action

Section 33 of the Constitution provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

Section 7(2) of the Constitution requires the State, and therefore the Respondent, to respect, protect, promote and fulfil all fundamental rights.

(d) Domestic Legislation

7.13 South African Schools Act¹⁵

The legislative framework relevant to this complaint is to be found in the Act.

¹⁵ 84 of 1996

In terms of section 7 of the Act, religious observances may be conducted at a public school under rules issued by the governing body if such observances are conducted on an equitable basis and attendance at them by learners and members of the staff is free and voluntary.

Section 8 of the Act provides that the governing body of a public must adopt a code of conduct for the learners after consultation with the learners, parents and educators of the school. The purpose of a code of conduct is to establish a "disciplined and purposeful school environment, dedicated to the improvement and maintenance of the quality of the learning process."

In terms of subsection 3, the Minister may, after consultation with the Council of Education ministers, determine guidelines for the consideration of governing bodies in adopting a code of conduct for the learners. These guidelines by the Minister states are for the "consideration" of schools and not mandatory.

Section 8 (5) of the Act provides that a code of conduct must contain provisions of due process safeguarding the interests of the learner and any other party involved in disciplinary proceedings.

In terms of Section 9 of the Act, *the governing body of a public school may, after a fair hearing, suspend a learner from attending the school, as a correctional measure for a period not longer than one week, or pending a decision as to whether the learner is to be expelled from school by the Head of Department.*

According to section 16 of the Schools Act, the governance of every public school is vested in its governing body.

Subsection 3 of the aforesaid section provides that the professional management of a public school must be undertaken by the Principal under the authority of the Head of Department.

Section 18 of the Schools Act provides that governing bodies must function in terms of a written constitution which must comply with minimum requirements determined by provincial MECs for Education in the Provincial Gazettes.

In terms of section 20, the governing body of a public school must adopt a code of conduct for learners at the school.

Section 23 provides that public school governing bodies are to comprise elected members, the principal in his or her official capacity and co-opted members. The elected members comprise a member or members of each of the following categories:

- Parents of learners at the school;
- Educators at the school;
- Members of staff at the school who are not educators and learners in the eighth grade or higher at the school.

The number of parent members on the governing body must comprise one more than the combined total of other members who have voting rights.

The primary function of the School Governing Body is to promote the interests of the school and ensure provision of quality education for its learners.¹⁶ The powers of the governing body are limited and it may only perform such functions and obligations and exercise only such rights as prescribed by the Act.¹⁷

¹⁶ Section 20(1) (a) of the Act

¹⁷ Section 16 (1) of the Act

7.14 Promotion of Administrative Justice Act¹⁸

Section 3(1) of PAJA provides that administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.

In terms of section 3(2)(b), an administrator, must a person referred to in subsection (1) –

- (a) Adequate notice of the nature and purpose of the proposed administrative action;*
- (b) A reasonable opportunity to make representations;*
- (c) A clear statement of the administrative action;*
- (d) Adequate notice of any right of review or internal appeal, where applicable; and*
- (e) Adequate notice of the right to request reasons in terms of section 5.*

7.15 Promotion of Equality & Prevention of Unfair Discrimination Act¹⁹

Section 1 of the Equality Act defines “discrimination” as:

“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”.*

Section 6 of the Equality Act reiterates the Constitution’s prohibition of unfair discrimination by both the State and private parties on listed grounds including, of course, religion.

¹⁸ 3 of 2000

¹⁹ 4 of 2000

The prohibited grounds provided in the definitions section are "race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."

The Act also provides guidance for the determination of unfairness.

Section 14 of the Act provides that –

"(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.”

(e) Case Law

The Constitution entreats the Commission to consider relevant case law in determining the nature and scope of a human right:

7.16 In *Ferreira v Levin NO and Others and Vryenhoek and Others v Powell NO and Others*²⁰ Ackermann J stated that:

“Human dignity has little value without freedom; for without freedom personal development and fulfilment are not possible. Without freedom, human dignity is little more than an abstraction. Freedom and dignity are inseparably linked. To deny people their freedom is to deny them their dignity.”

7.17 In *NM v Smith (Freedom of Expression Institute as Amicus Curiae) 2007*

(5) SA 250 (CC)²¹ the Court held:

“[49] A constant refrain in our Constitution is that our society aims at the restoration of human dignity because of the many years of oppression and disadvantage. While it is not suggested that there is a hierarchy of rights it cannot be gainsaid that dignity occupies a central position. After all, that was the whole aim of the struggle against apartheid - the restoration of human dignity, equality and freedom.

[50] If human dignity is regarded as foundational in our Constitution, a corollary thereto must be that it must be jealously guarded and protected. As this Court held in *Dawood and Another v Minister of Home Affairs and Others*, Shalabi and

²⁰ 1996 (1) SA 984 (CC)

²¹ at paras [49]–[51]

Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others:

The value of dignity in our constitutional framework cannot therefore be doubted. The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings. Human dignity therefore informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. This Court has already acknowledged the importance of the constitutional value of dignity in interpreting rights such as the right to equality, the right not to be punished in a cruel, inhuman or degrading way, and the right to life. Human dignity is also a constitutional value that is of central significance in the limitations analysis. Section 10, however, makes it plain that dignity is not only a value fundamental to our Constitution, it is a justiciable and enforceable right that must be respected and protected.²¹

[51] In S v Makwanyane and Another, this Court observed as follows:

"Respect for the dignity of all human beings is particularly important in South Africa. For apartheid was a denial of a common humanity. Black people were refused respect and dignity and thereby the dignity of all South Africans was diminished. The new Constitution rejects this past and affirms the equal worth of all South Africans. Thus recognition and protection of human dignity is the touchstone of the new political order and is fundamental to the new Constitution."

7.18 In *Minister of Home Affairs and Another v Fourie and Another; Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others*, the Court held that:²²

²² 2000 (2) SA 1 (CC)

"The acknowledgment and acceptance of difference is particularly important in our country where for centuries group membership based on supposed biological characteristics such as skin colour has been the express basis of advantage and disadvantage. South Africans come in all shapes and sizes. The development of an active rather than a purely formal sense of enjoying a common citizenship depends on recognising and accepting people with all their differences, as they are. The Constitution thus acknowledges the variability of human beings (genetic and socio-cultural), affirms the right to be different, and celebrates the diversity of the nation."

7.19 In **S v Lawrence**,²³ the Constitutional Court has accepted that the right to freedom of religion at least comprehends:

The right to entertain such religious beliefs as person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination.

7.20 The Constitutional Court also noted in the aforesaid case that, in terms of the Constitution, no religion should be favoured above another as part of what is called religious neutrality, but that it is also not expected of the state to be completely secular.

7.21 In **Christian Education**,²⁴ in the context of accommodating religious belief in society, a unanimous Court identified the underlying motivation of the concept as follows:

"The underlying problem in any open and democratic society based on human dignity, equality and freedom in which conscientious and religious freedom has to be regarded with appropriate seriousness, is how far such democracy can and must go in allowing members of religious communities to define for themselves which laws they will obey and which not. Such a society can cohere only if all its participants accept that certain basic norms and standards are binding. Accordingly, believers cannot claim an automatic right to be exempted by their beliefs from the

²³ 1997 (4) SA 1176 (CC). See also Currie I and De Waal J *The Bill of Rights Handbook* (Juta, Cape Town 2005) 338

²⁴ *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC)

laws of the land. At the same time, the State should, wherever reasonably possible, seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful of the law.”

This Court further held:

“It is true that to single out a member of a religious community for disadvantageous treatment would, on the face of it, constitute unfair discrimination against that community. The contrary, however, does not hold. To grant respect to sincerely held religious views of a community and make an exception from a general law to accommodate them, would not be unfair to anyone else who did not hold those views.”

7.22 In *MEC for Education: KwaZulu Natal v Pillay*,²⁵ the court ordered that, the Governing Body of Durban Girls’ High School, in consultation with the learners, parents and educators of the School and within a reasonable time, to effect amendments to the School’s Code of Conduct to provide for the reasonable accommodation of deviations from the Code on religious or cultural grounds and a procedure according to which such exemptions from the Code can be sought and granted.

7.23 In *Head of Department, Mpumalanga Department of Education & Another v Hoerskool Ermelo & Another*, Moseneke DCJ stated that a governing body has a ‘defined autonomy over some of the domestic affairs of the school.’

7.24 In *Prince v President of the Law Society of the Cape of Good Hope*,²⁶ Sachs J in his dissenting judgment held that,

“The test of tolerance as envisaged by the Bill of Rights comes not in accepting what is familiar and easily accommodated, but in giving reasonable space to what is “unusual, bizarre or even threatening”

²⁵ 2008 (1) SA 474 (CC)

²⁶ CCT36/00 [2002] (2) SA 794

8 Analytical Framework

In analysing this complaint, the Commission considered the following constitutional tests and guidelines for the interpretation of the reasonableness of the limitations posed by the Respondent on the rights of the Complainant:

(a) Test for Reasonableness of Limitation of Rights

Section 36 of the Constitution provides that the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

- (a) The nature of the right;*
- (b) The importance of the purpose of the limitation;*
- (c) The nature and extent of the limitation;*
- (d) The relation between the limitation and its purpose; and*
- (e) Less restrictive means to achieve the purpose.*

(b) Interpretation of the Bill of Rights

Section 39 of the Constitution provides that, when interpreting the Bill of Rights, a court, tribunal or forum –

- (a) Must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;*
- (b) Must consider international law; and*

(c) *May consider foreign law.*

Section 39(2) of the Constitution makes it clear that the Act must be interpreted in light of the "*spirit, purport and objects of the Bill of Rights.*"

9. Legal Analysis

9.1 The Respondent has not disputed that the Complainant learner is an adherent of the Rastafari religion that wore dreadlocks as a consequence. The Commission will thus not concern itself with questions whether, as a matter of religious doctrine, a particular practice, the practice of dreadlocks, is central to the complainant's religion.

9.2 In assessing whether the discrimination in this case is unfair, it is necessary for the Commission in the first instance to consider the reasonableness of the limitation and its impact on the Complainant's right to practice his religion.

9.3 To do so, the Commission has considered whether there was a rational relationship between the regulation (prohibition against the wearing of dreadlocks) and the legitimate interest asserted by the school (that of upholding discipline and grooming of learners).

9.4 A third consideration that occupied the mind of the Commission is whether there was an alternative means available to the Respondent that existed which could sufficiently have accommodated the right and interest of the Respondent to exercise and achieve learner discipline and grooming (e.g. requiring learners who wore long hair for religious purposes, to wear it in a manner that rendered it neat and tidy, and sufficiently well-groomed).

9.5 A fourth consideration in analysing the merits of the complaint was the impact that the exercise of the limitation (the prohibition against the wearing of dreadlocks) had on the right of the Complainant to education.

9.6 A review of the Code of Conduct of the School reflects that the list of hairstyles prohibited by the school have been arbitrarily determined without a clear, underlying and objective *characteristics-based criteria* to them (e.g. length, colour, texture, neatness etc).

9.7 Further analysis of the Code indicates that no exemption has been made by the Respondent for hairstyles maintained by learners for religious purposes or in keeping with religious codes and practices.

9.8 The dicta of the Constitutional Court in the **Lesbian and Gay Equality Project** case²⁷ is instructive with regard to the levels of tolerance for diversity required in a democratic South Africa: "...the acknowledgment and acceptance of difference is particularly important in our country.... South Africans come in all shapes and sizes. The Constitution thus acknowledges the variability of human beings (genetic and socio-cultural), affirms the right to be different, and celebrates the diversity of the nation."

9.9 The Constitutional Court, in **S v Lawrence**²⁸, addressing itself to tolerance of diversity of religions in the new South Africa, also affirms "The right to entertain such religious beliefs as a person chooses and the right to manifest religious belief by worship and practice....."

9.10 It is therefore the view of the Commission that in an open and democratic society based on human dignity, equality and freedom "in which conscientious and religious freedom has to be regarded with appropriate seriousness.... the State [including state bodies such as public schools] should, "wherever reasonably possible, seek to avoid putting believers to extremely painful and

²⁷ Minister of Home Affairs and Another v Fourie and Another, Lesbian and Gay Equality Project and Others v Home Affairs and Others 2000 (2) SA 1 (CC)

²⁸ 1997 (4) SA 1176.

intensely burdensome choices of either being true to their faith or else disrespectful of the law."

9.11 The facts of this case, in the view of the Commission did exactly that. It placed the Complainant in an unenviable position where he either had to remain true to his faith, or be disrespectful of the Code and be expelled from the School. As a matter of fact, the Complainant was summarily suspended from educational tuition, and instructed not to return to the school until he had sheared his dreadlocks. This clearly left the Complainant with no choice but to shear his dreadlocks in order to return to the Respondent to enjoy his right to education. There can be little argument against the conclusion that the shearing of the dreadlocks of a Rastafarian is an extremely humiliating experience that undermined his human dignity. There also can be little argument that the suspension of the learner from educational tuition impacted adversely on his right to education.

9.12 Implicit in the right to freedom of religion is the absence of coercion or restraint. Thus as a broad principle, freedom of religion may be impaired by any measure that force people to act or refrain from acting in a manner contrary to their religious beliefs on the pain or threat of sanction.

9.13 What compounds unreasonableness of the actions of the Respondent is that the decision to exclude the Complainant from tuition was taken *without any form of prior consultation or hearing* that would afford the Complainant an opportunity to be heard.

9.14 Further still, the administrative decision having been taken to suspend the learners, the Respondent did not afford the Complainant an opportunity to appeal the decision of the school.

9.15 The right to be heard before an adverse administrative decision is taken against any person (procedural fairness), the right to be given reasons for decision in writing and the right to appeal a decision before its execution are fundamental rights of the person. This right is set out and entrenched in section 33 of the Bill of Rights.

9.16 *In casu*, in order for the Respondent to succeed in its assertion that the limitation to the exercise of the right to religion was reasonable, and in its assertion that the decision to order the Respondent to shear a crop of hair that was being worn and maintained in observance of a religious belief and practice, the Respondent ought to have arrived at the decision in a manner that was both *substantively fair* and also *procedurally fair*.

9.17 Because no formal hearing was held in which both the Complainant and the Respondent exchanged views and positions with regard to the maintenance of dreadlocks within the school environment, the Commission cannot find any basis to conclude that the Respondent considered the impact of the exercise of the right to religion by the learner on other learners and the educational environment; nor the impact of the ultimate administrative decision on the learner and his rights to religion and to education.

9.18 The Commission cannot find any evidence that allowing a religious exemption from the school's code would negatively impact on discipline at the school and as a result, on the quality of the education provided. There was no evidence that

wearing dreadlocks on religious grounds had a disruptive effect on the smooth running and discipline of learners in the school.

9.19 It is therefore clear that, when a school or other body draws up a code of conduct or religious policy, it should reasonably provide for the reasonable accommodation of all the different cultural and religious practices of the pupils in that school. This requires more than mere tolerance of what is perceived as “familiar”. In the dissenting judgement of Sachs J in the case of **Prince v President of the Law Society of the Good Hope**²⁹ the Court stated that the test for tolerance as envisaged by the Bill of Rights of South Africa “*comes not in accepting what is familiar and easily accommodated, but in giving reasonable space to what is ‘unusual, bizarre or even threatening’*”.

9.20 Ideally, in a democracy and open society, School Codes of Conduct should be enabling of the exercise of diversity to the greatest possible extent. This should ideally include provisions in the code that allow for the exercise of all religions, not just those that are considered orthodox and mainstream. The Respondent school had the opportunity to demonstrate its commitment to creating such a tolerant environment that accepts diversity but chose instead, to suspend the complainant, without any hearing whatsoever.

9.10 Finally, it should be pointed out that the Complainant in this matter missed formal classes for approximately three (3) weeks due to the Principal's decision. The administrative decision of the Respondent of restraining the complainant from entering the school's premises until such time he had removed the dreadlocks had an adverse effect on his right to education. The conduct of the Respondent clearly violated the complainant's right of access to education.

²⁹ CCT36/00 [2002] (2) SA 794

10.Findings

On the basis of the analysis in the preceding section, the Commission makes the following findings:

- 10.1 The Respondent's Code of Conduct constitutes an unreasonable limitation, and a violation of, the Complainants right to practice his religion.
- 10.2 The directive of the Respondent to the Complainant to shear his dreadlocks, constitutes a violation of the Complainant's right to human dignity.
- 10.3 The directive of the Respondent to the Complainant to shear his dreadlocks as a precondition to access education constitutes a violation of the right of the Complainant to education.
- 10.4 The failure of the Respondent to consult with the Complainant prior arriving at the administrative decision to suspend the Complainant constitutes a violation of the Complainant's right to administrative justice.
- 10.5 The failure of the Respondent to provide the Complainant with an opportunity to appeal the decision of the Respondent, constitutes a violation of the Complainant's right to administrative justice.

11.Recommendations

In terms of the Human Rights Commission Act, the Commission is entitled to "*make recommendations to organs of state at all levels of government where it considers such action advisable for the adoption of progressive measures for the promotion of fundamental rights within the framework of the law and the Constitution.*"

11.1 The Commission recommends accordingly that:

11.1.1 The Respondent Governing Body review and amend the School Code of Conduct within a period of three (3) months from date of this finding. Such amended Code should demonstrate the following:

(a) reasonable accommodation of religious and culturally based deviations;

(b) set out the procedure for applying and possibly granting such exemptions; exemptions to be made only on religious considerations.

11.1.2 The Free State Provincial Department of Education to conduct an audit and review of the Codes of Conduct of other public schools in the Province, within twelve (12) months from date of this finding, to determine whether there is reasonable flexibility and accommodation of religious and cultural deviations from mainstream religious practices;

11.1.3 The Free State Provincial Department of Education to issue revised Public School Guidelines on religious diversity in all public schools in the Province within a period of eighteen (18) months from date of this finding;

11.1.4 The Free State Provincial Department of Education to provide the Commission with a Report within six (6) months of date of this finding on the steps it intends to take to eliminate all forms of intolerance and of discrimination based on religion or belief, and reasonable accommodation of religious diversity in public schools in the Province.

12. APPEAL

You have the **right to lodge an appeal** against this decision. Should you wish to lodge such an appeal, you are hereby advised that you must do so in writing **within 45 days of the date of receipt of this finding**, by writing to:

The Chairperson, Adv M.L. Mushwana

South African Human Rights Commission

Private Bag X2700

Houghton, 2041

SIGNED IN Johannesburg THE 3rd DAY OF
April 2013.



Commissioner Lindiwe F Mokate

South African Human Rights Commission

