THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case No: 107/12

In the matter between:

DEPARTMENT OF CORRECTIONAL SERVICES	**First Appellant**
AREA COMMISSIONER: POLLSMOOR MANAGEMENT AREA	**Second Appellant**

and

POLICE AND PRISONS CIVIL RIGHTS UNION (POPCRU)	**First Respondent**
EGANAMANG JAMES LEBATLANG	**Second Respondent**
THAMSANQA RUSSEL NGQULA	**Third Respondent**
LUCKY THAMSANQA KAMLANA	**Fourth Respondent**
COHEN JACOBS	**Fifth Respondent**
MDUDUZI KHUBHEKA	**Sixth Respondent**

Neutral citation:	*Department of Correctional Services & another v POPCRU & others* (107/12) [2013] ZASCA 40 (28 March 2013)
Coram:	NUGENT, MAYA, and PILLAY JJA, PLASKET and MBHA AJJA
Heard:	19 FEBRUARY 2013
Delivered:	28 MARCH 2013

Summary: Labour Relations Act 66 of 1995 – section 187(1)(*f*) – departmental dress code prohibiting wearing of dreadlocks by male correctional officers – whether dismissal of Rastafari and Xhosa respondents for refusing to cut their dreadlocks worn in observance of sincerely held religious and cultural beliefs discriminatory and automatically unfair on grounds of religion, culture and gender – meaning of s 187(2)(a).

ORDER

On appeal from: the Labour Appeal Court, Cape Town (Murphy AJA, Waglay DJP and Davis JA sitting as court of appeal).

The appeal is dismissed with costs that include the costs of two counsel.

JUDGMENT

MAYA JA (NUGENT, PILLAY JJA, PLASKET AND MBHA AJJA concurring)

[1] This is an appeal from a judgment of the Labour Appeal Court ('the LAC', per Murphy AJA, Waglay DJP and Davis JA concurring), with special leave of this court. The LAC upheld the decision of the Labour Court (Cele J) that the dismissals of the second to sixth respondents (the respondents) were automatically unfair as contemplated in section 187(1)(*f*) of the Labour Relations Act 66 of 1995 (the LRA). As a basis for its conclusion, the Labour Court had found that the respondents were unlawfully subjected to gender discrimination. On appeal, the LAC added two grounds of discrimination, religion and culture, as further support for the finding.

[2] The facts are largely common cause. The respondents are male former correctional officers of the first appellant (the department). All were members of the first respondent, a trade union, and held various positions at Pollsmoor Prison, Cape Town (Pollsmoor) at the time of their dismissals in June 2007. They each had long service with the department and were exemplary employees. A common feature among them was their hairstyle. They all wore dreadlocks albeit for different reasons. It is their refusal to cut their hair when ordered to do so under the department's Corporate Identity Dress Code (the dress code) that led to their dismissals and these proceedings.

[3] The dress code made provision, in clause 5, for 'Personal appearance' relating to wearing of jewellery, make-up, moustaches and beards and hairstyles. Clause 5.1 dealt pertinently with hairstyles and read:

'Hairstyles

The following guidelines are [laid] down for the hairstyles of all Departmental officials. In judging whether a hairstyle is acceptable, neatness is of overriding importance.

5.1.1 Hairstyles: Female officials

5.1.1.1 Hair must be clean, combed or brushed and neat at all times (taken good care of). Unnatural hair colours and styles, such as punk, are disallowed.

5.1.2 Hairstyles: Male officials

5.1.2.1 Hair may not be longer than the collar of the shirt when folded down or cover more than half of the ear. The fringe may not hang in the eyes.

5.1.2.2 Hair must always be clean, combed and neat at all times (taken good care of)

5.1.2.3 Hair may not be dyed in colours other than natural hair colours or cut in any punk style, including a "Dreadlocks" hairstyle.

5.1.2.4 No decorations (e.g. beads, clips)

5.1.2.5. May be worn on the hair.'

It is the ‘Rasta man’ hairstyle prohibition in clause 5.1.2.3 that the respondents contravened.

[4] Until the appointment of the second appellant as area commissioner of Pollsmoor on 15 January 2007, there does not appear to have been any clear guide in the institution about the enforcement of the dress code and other departmental policies pertaining to discipline and security. There had been no objection whatsoever to the respondents’ hairstyle which was also sported by a handful of women correctional officials.

[5] The commissioner immediately set about bringing sweeping changes to tighten controls and bring the prison to order. On 18 January 2007 he convened a meeting with the prison personnel and managers. Various issues relating to compliance with departmental policies, performance management and human resource management were discussed. Chief on the agenda were the commissioner’s concerns about security risks and the flouting of the dress code and other policies in the institution. Following the deliberations, he issued a written instruction on the next day directing correctional officers to attend to their hair in compliance with the dress code or advance reasons by 25 January 2007 why corrective action should not be taken against them. Some of the officers abided the instruction and some of those who wore dreadlocks promptly cut their hair to meet the requirements set out in the dress code. The respondents did not.

[6] On 26 January 2007 the commissioner wrote to ask them to give reasons why they should not be suspended for contravening the dress code. Their responses were varied. Messrs Lebatlang, Jacobs and Khubheka attributed their hairstyle to their Rastafarian religion. They said

their hairstyle, an outward manifestation of the religion, did not prejudice the department's interests. The instruction to cut their hair undermined their freedom of religion, which was recognised and protected by the Constitution, and constituted unfair discrimination on that basis.

[7] Messrs Ngqula and Kamlana gave cultural reasons for their hairstyle. Mr Ngqula said he wore his dreadlocks to obey his ancestors' call, given through dreams, to become a 'sangoma' or traditional healer in accordance with his Xhosa culture. He requested permission to wear them until December 2007 when he would shave his head as part of a cleansing ritual to complete the process. Mr Kamlana said he was instructed to wear his dreadlocks by his ancestors and did so to overcome 'intwasa', a condition understood in African culture as an injunction from the ancestors to become a traditional healer, from which he had suffered since childhood. Both viewed the instruction to cut their hair as an incursion on their fundamental right to practice their culture and discrimination against them on the ground of culture.

[8] On 2 February 2007 the respondents were suspended from duty. The commissioner's attitude was that 'compliance with policy cannot be negotiated at management area and notwithstanding any religion, beliefs or otherwise, employees have to adapt to the employer's policy and not the other way round'. Thereafter, the respondents were charged with breaching the Disciplinary Code and Procedure and the dress code by wearing dreadlocks on duty, alternatively failing to carry out a lawful order or routine instruction without just or reasonable cause by refusing to keep their hair in accordance with the dress code while on duty.

[9] The respondents refused to participate in the disciplinary hearing conducted between 4 and 7 June 2007. They believed that the chairperson of the proceedings, who denied them legal representation despite a previous undertaking to allow it and refused their consequent request for his recusal, was biased. They were dismissed with immediate effect.[1] They lodged an internal appeal but it was disregarded after they neglected to file the requisite grounds of appeal.[2]

[10] The respondents referred the dispute to the Labour Court. Their primary claim was for a declarator that their dismissals were automatically unfair because the department had unfairly discriminated against them directly or indirectly on the grounds of religion, conscience, belief, culture and gender as envisaged by section 187(1)(*f*) of the LRA. Section 187(1)(*f*) renders a dismissal 'automatically unfair if the … reason for the dismissal is … that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility.' In addition to further and alternative claims which became redundant and need not be detailed here, the respondents sought ancillary relief including damages, compensation and reinstatement to their posts.

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[1] The presiding officer, Mr SB Masemula, seems to have assumed a particularly hard line to the matter, judging from the tone of his findings. For example, in respect of the fifth respondent he said 'Mr Jacobs is a married man with two dependents … and he should have th[ought] about his family but he has a BA law degree and LLB in qualification that is why he display[s] this behavior so [it] is better for him to look where they will accommodate him with that hairstyle but the relationship with the Department is broken and I have no other option than to dismiss him with immediate effect to give him a chance to wear his dreadlocks freely.'

[2] Department of Correctional Services Resolution 1 of 2006 provides for the appeal procedure and submission of grounds of appeal.

[11] The respondents' testimony expatiated on their reasons for wearing the dreadlocks that they had advanced to the commissioner to repel suspension. Its gist was that they were adherents of Rastafarianism and Xhosa culture, respectively. They wore the impugned hairstyle as a ritual in observance of their sincerely held religious and cultural beliefs. A traditional healer, Mr Toyo Khandekana, was called as an expert witness on behalf of Messrs Ngqula and Kamlana. He described dreadlocks or 'ivitane', as he said they are called in isiXhosa, as a symbol in the realm of Xhosa spiritual healing that their wearer has heeded the call of his ancestors to become a traditional healer. The hair is, however, kept only temporarily. It is shaved off at a cleansing ceremony, a sacred, elaborate affair which includes the use of dagga, conducted at completion of the process to signify the initiate's transition into a traditional healer.

[12] None of the respondents' evidence was disputed. The appellants merely sought to establish that there had been no motive to discriminate against them and that they were dismissed, not for their religion, culture or gender, but for their failure to comply with a neutral policy and a lawful instruction to cut their hair.

[13] The commissioner testified about the large scale non-compliance with departmental policies in numerous areas including security, human resource issues, corporate dress and prison management that he found when he commenced duties at Pollsmoor. He told of serious problems with discipline and security and the flouting of the dress code and human resource policies which resulted in high levels of absenteeism, assaults among inmates and correctional officers, escapes by inmates, corruption and misuse of official vehicles and finances and many other issues. His interventions through the enforcement of the department's policies,

including the dress code, yielded positive results as service delivery, discipline, team work and security improved dramatically in the institution.

[14] According to the commissioner, supported by the expert witness called on the appellants' behalf, Mr Ndebele, the uniformity of dress and appearance provided by the dress code is intertwined with and critical for the enforcement and maintenance of discipline and security in a prison environment. Any deviations from uniformity to accommodate diversity would open the floodgates for exemption requests to the department's detriment. Dreadlocks also posed a particular risk because they could easily be grabbed by an inmate to disarm an official.

[15] The Labour Court accepted that the respondents were dismissed because they wore dreadlocks and disobeyed the commissioner's instruction to cut them; that they wore the dreadlocks in pursuance of sincerely held religious or cultural beliefs and that their female counterparts were not prohibited from wearing dreadlocks. In the court's view, it was 'beyond doubt that the impact of the instruction would have a devastating impact on their beliefs' and faith. However, the court found that they failed to draw their beliefs to the commissioner's attention and to assert their right to their faith. Thus, they failed to establish a 'causal link … between the prohibited reasons for dismissal and the circumstances of the dismissal' and 'factual causation, that is a belief in religious and cultural practices had not been proved to have been the *sine qua non* or prerequisite reason for the dismissal'.

[16] The court therefore found no direct or indirect discrimination against the respondents on the grounds of religion, belief or culture. Instead, it

held that the respondents had established discrimination against themselves on the basis of gender as the appellants did not show 'why the biological differences between men and women had to justify discriminating between them … when it came to dreadlocks'. The court concluded that the appellants had failed to rebut the presumption of unfairness of the commissioner's instruction and that the dismissals were automatically unfair. It ordered reinstatement of those the respondents who sought it and compensation for those who no longer wanted their jobs.

[17] The appellants did not accept the judgment and took the matter to the LAC. Without first applying for leave, the respondents also noted a cross-appeal against the Labour Court's failure to find unfair discrimination also on the grounds of religion, belief or culture. As indicated, the LAC dismissed the appeal and held the dismissals automatically unfair on the bases of religion, culture and gender. The court found the cross-appeal, which it said required no leave to be instituted as the rules of court made no provision therefor, unnecessary because the respondents accepted the order of the Labour Court but merely sought to have its judgment confirmed on additional grounds. The court made no order in respect of the cross-appeal and ordered each party to bear its own costs.

[18] On further appeal to this court, the appellants raised a number of grounds which were duly motivated in their heads of argument. However, the issues trimmed down significantly in argument before us. The appellants' counsel conceded most of the issues previously raised by his predecessor. These included a concession that the dress code operated disparately among correctional officers and was directly discriminatory

on all three proscribed grounds, namely religion, culture and gender. The concession was well made. Indeed, but for their religious and cultural beliefs, the respondents would not have worn dreadlocks. And but for that fact and their male gender, they would not have been dismissed. The disparate treatment constituted discrimination and the appellants' motives and objectives of the dress code are entirely irrelevant for this finding.[3]

[19] In the event, the appellants' case distilled to simply that the discrimination was justifiable because it sought to eliminate the risk and anomaly posed by placing officers who subscribe to a religion or culture that promotes criminality – in the form of the use dagga – in control of a high regulation, quasi-military institution such as a prison. It was contended that the department's real problem lay not with the hairstyle worn by Rastafari and 'intwasa' initiates as such but their faiths which require the use of dagga, an illegal and harmful drug, as an integral ritual in their observance.

[20] The appellants' counsel pointed out that South Africa expends a huge effort in the discharge of its international obligation to combat the drug war to which the use of dagga is central. The risk posed by dreadlocks, it was argued, is that they render Rastafari officials conspicuous and susceptible to manipulation by Rastafari and other inmates to smuggle dagga into correctional centres. This would negatively affect discipline and the rehabilitation of inmates. It was also submitted that the department was not particularly concerned with female officials who wore dreadlocks. This was so because the risk in females was significantly reduced as it is not unusual for them to wear long hair. Further, it is notorious and was accepted as true by the Constitutional

[3] *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) para 44; *R v Birmingham City Council Ex parte Equal Opportunities Commission* [1989] AC 1155 at 1194A-D.

Court in *Prince v President, Cape Law Society*,[4] that women and children are not involved in the use of dagga in Rastafarianism. The dress code therefore served an important and legitimate government purpose because Rastafari officials would not be easily identifiable if they did not wear dreadlocks.

[21] Once discrimination has been established on a listed ground, unfairness is presumed, and the employer must prove the contrary.[5] Relevant considerations in this regard include the position of the victim of the discrimination in society, the purpose sought to be achieved by the discrimination, the extent to which rights or interests of the victim of the discrimination have been affected, whether the discrimination has impaired the human dignity of the victim,[6] and whether less restrictive means are available to achieve the purpose of the discrimination.[7]

[22] Without question, a policy that effectively punishes the practice of a religion and culture degrades and devalues the followers of that religion and culture in society; it is a palpable invasion of their dignity which says their religion or culture is not worthy of protection and the impact of the limitation is profound.[8] That impact here was devastating because the respondents' refusal to yield to an instruction at odds with their sincerely held beliefs cost them their employment.

[23] Whether the discriminatory impact of the dress code was justifiable stands to be decided under the provisions of s 187(2)(*a*) of the LRA as the

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[4] *Prince v President, Cape Law Society* 2002 (2) SA 794 (CC).
[5] *Harksen v Lane NO* 1998 (1) SA 300 (CC) para 48.
[6] *Hoffman v South African Airways* [2000] 12 BLLR 1365 (CC) para 27; *Harksen v Lane NO* 1998 (1) SA 300 (CC) para 51.
[7] *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) para 31.
[8] *Prince v President, Cape Law Society* 2002 (2) SA 794 (CC) para 51.

constitutionality of the policy was not challenged.[9] According to the section 'a dismissal may be fair if the reason for dismissal is based on an inherent requirement of the particular job'. An inherent requirement of a job has been interpreted to mean 'a permanent attribute or quality forming an … essential element … and an indispensable attribute which must relate in an inescapable way to the performing of a job'.[10]

[24] The appellants face an insurmountable hurdle. The case they advanced in evidence was that the rationale for the dress code 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. The about turn during argument in this appeal did their cause no good. The dress code was not shown to be concerned with the use of dagga, the prevention of which it is now touted to have targeted. The appellants laid no foundation for their belated argument, as their counsel properly acknowledged.

[25] Even assuming otherwise, no evidence was adduced to prove that the respondents' hair, worn over many years before they were ordered to shave it, detracted in any way from the performance of their duties or rendered them vulnerable to manipulation and corruption. Therefore, it was not established that short hair, not worn in dreadlocks, was an inherent requirement of their jobs. A policy is not justified if it restricts a practice of religious belief – and by necessary extension, a cultural belief – that does not affect an employee's ability to perform his duties, nor jeopardise the safety of the public or other employees, nor cause undue

[9] *Minister of Health v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign and another as Amici Curiae)* 2006 (2) SA 311 (CC) (2006 (1) BCLR 1) paras 96, 434-437; *MEC for Education, KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC) para 40.
[10] *Dlamini v Green Four Security* [2006] 11 BLLR 1074 (LC) para 40; Cooper, Carole 'The Boundaries of Equality in Labour Law' (2004) 25 *ILJ* 813.

hardship to the employer in a practical sense.[11] No rational connection was established between purported purpose of the discrimination and the measure taken. Neither was it shown that the department would suffer an unreasonable burden if it had exempted the respondents. The appeal must, therefore, fail.

[26] In the result the following order is made.

The appeal is dismissed with costs that include the costs of two counsel.

MML MAYA

JUDGE OF APPEAL

[11] *Bhinder v Canadian National Railway Co* [1985] 2 SCR 651 para 29.

APPEARANCES:

For appellants:	N Arendse SC (with S O'Brien)
	Instructed by: State Attorney, Cape Town State Attorney, Bloemfontein
For respondents:	M L Sher G A Leslie
	Instructed by: Parker & Khan Inc, Cape Town EG Cooper Majiedt Inc, Bloemfontein