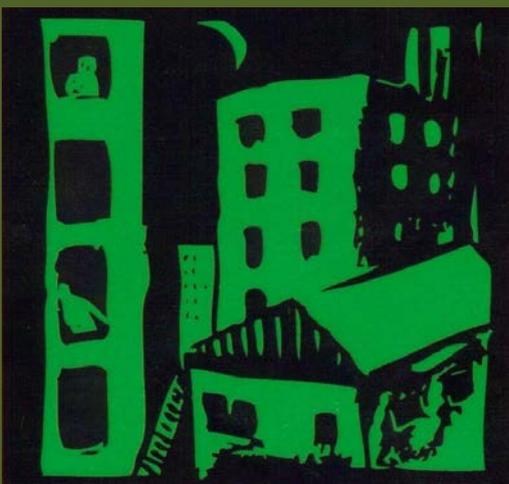


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## Cultural and Religious Diversity: Are they effectively accommodated in the South African workplace?

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### 1 INTRODUCTION

Justice Yvonne Mokgoro<sup>1</sup> and Archbishop Emeritus Desmond Tutu<sup>2</sup> are but two of many public figures who have described South Africa as a “Rainbow Nation” – an expression used to highlight South Africa’s multicultural diversity.<sup>3</sup> “Rainbow” is used to visually emphasise the various races, cultures,

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<sup>1</sup> Justice Mokgoro was a judge of the Constitutional Court of South Africa from 1994 until 2009. See at <http://www.constitutionalcourt.org.za/site/judges/justiceyvonnemokgoro/index1.html> (accessed 17 February 2016).

<sup>2</sup> Archbishop Tutu is a human rights activist. See at <http://desmondtutu.org/> (accessed 17 February 2016).

<sup>3</sup> South African Tourism “South Africa’s Rainbow Nation” available at <http://www.southafrica.net/za/en/articles/entry/article-southafrica.net-south-africas-rainbow-nation> (accessed 20 August 2015).

backgrounds and religions, to name but a few, of South Africa's inhabitants.<sup>4</sup> Yet, whilst diversity is in general regarded as good and necessary for societies to progress and evolve, practically managing diversity in micro-entities, such as places of work, unfortunately often turns out to be quite complicated.

With diversity in mind, the general focus of this article will be on cultural and religious diversity in the South African workplace. Consequently, the meaning of "culture" and "religion" will be explored, albeit briefly, in contextualising the rest of the discussion. The article will attempt to illustrate that despite the competing cultural and religious interests of parties (with a focus on the competing interests of employers and employees in particular), South African courts appear willing to go to considerable lengths to protect the exercise of employees' constitutional rights in this regard.<sup>5</sup> In doing so the article will briefly explore cultural and religious diversity in South Africa, and in particular how such diversity filters through to, and is addressed in, the work environment. The article will proceed to consider existing legislation which addresses cultural and religious diversity in the South African workplace, and how such legislation has been implemented and interpreted by arbitrators and judges to date.

## 2 UNDERSTANDING CULTURE AND RELIGION

Culture is said to be dynamic - it can take many forms and has many levels. It is therefore not surprising that there are varied notions of what constitutes the essence of culture. Some writers claim that culture boils down to practices.<sup>6</sup> Others again advocate the idea that symbols are clear manifestations of culture.<sup>7</sup> Symbols are understood to be "words, gestures, pictures, or objects that carry a particular meaning that is recognised as such only by those who share the culture".<sup>8</sup> None of these are incorrect, and in fact, in order to fully address culture within the workplace, one needs to remain mindful of the various means through which culture may be expressed. Kluckhohn defined culture as

"patterned ways of thinking, feeling and reacting, acquired and transmitted mainly by symbols, constituting the distinctive achievement of human groups, including their embodiment in artifacts; the essential core of culture consists of traditional (i.e. historically derived and selected) ideas and especially their attached values".<sup>9</sup>

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<sup>4</sup> Mokgoro Y "Ubuntu and the law in South Africa" (1998) 1(1) *Potchefstroom Electronic Law Journal* 4 and LeBaron M & Pillay V *Conflict across cultures: a unique experience of bridging differences* (Boston: Intercultural Press 2006) 2.

<sup>5</sup> The discussion will take place against the background of the Constitution of the Republic of South Africa, 1996, which protects and preserves both cultural and religious rights.

<sup>6</sup> Hofstede G, Hofstede GJ & Minkov M *Cultures and organisations: software of the mind* 3ed (New York: McGraw-Hill Education 2010) 9.

<sup>7</sup> Kluckhohn C *The study of culture* (1951) 86, in Hofstede, Hofstede & Minkov (2010) 7 & 8.

<sup>8</sup> Hofstede, Hofstede & Minkov (2010) 8.

<sup>9</sup> Kluckhohn (1951) 86 in Hofstede, Hofstede & Minkov (2010) 7 & 8.

Hofstede similarly defined culture as “the collective programming of the mind which distinguishes the members of one human group from another... Culture, in this sense, includes systems of values; and values are among the building blocks of culture”.<sup>10</sup>

The above seems to suggest that culture to a large extent abides within traditions and legacies of communities.<sup>11</sup> Culture forms the foundation of what groups regard as right and wrong. It encompasses value and belief systems - a shared and frequently unspoken understanding of individuals.<sup>12</sup> Moreover, culture underpins the way in which individuals perceive and interpret ideas and concepts.<sup>13</sup> Culture forms a pertinent part of life as it is experienced on a day-to-day basis and can consequently not be escaped.

Religion again is generally understood as being based on faith, belief and practices.<sup>14</sup> It comprises doctrines, teachings, ethical standards and principles, all containing specific views of the world.<sup>15</sup> In attempting to better understand the constitutional right to freedom of religion, considering Constitutional Court (CC) decisions on the issue is important.<sup>16</sup> In *S v Lawrence; S v Negal; S v Solberg (Lawrence)*,<sup>17</sup> Chaskalson P referred to the definition of freedom of religion as relied on in the Canadian case *R v Big Drug Mart Ltd.*<sup>18</sup> In this case it was held that

“[t]he essence of the concept of freedom of religion is the right to entertain such religious beliefs as a 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”.<sup>19</sup>

It becomes evident that the right to freedom of religion becomes compromised when there is a limitation on an individual’s ability to act on his/her religious beliefs.<sup>20</sup> Many writers are of the opinion that there seems to be a notable overlap between culture and

<sup>10</sup> Hofstede G *Culture’s consequences: international differences in work-related values* (London: Sage 1984) 21.

<sup>11</sup> LeBaron & Pillay (2006) 2.

<sup>12</sup> LeBaron & Pillay (2006) 14.

<sup>13</sup> LeBaron & Pillay (2006) 14.

<sup>14</sup> In *Prince v President of the Law Society of the Cape of Good Hope and others* 2001 (2) SA 388 (CC), para 97, the following was stated: “Religion is a matter of faith and belief. The beliefs that believers hold sacred and thus central to their religious faith may strike non-believers as bizarre, illogical or irrational. Human beings may freely believe in what they cannot prove. Yet that their beliefs are bizarre, illogical or irrational to others, or are incapable of scientific proof, does not detract from the fact that these are religious beliefs for the purposes of enjoying the protection guaranteed by the right to freedom of religion. The believers should not be put to the proof of their beliefs or faith. For this reason, it is undesirable for courts to enter into the debate whether a particular practice is central to a religion unless there is a genuine dispute as to the centrality of the practice.”

<sup>15</sup> Crawford RG *What is religion?* (London: Routledge 2003) at 1-8.

<sup>16</sup> *S v Lawrence; S v Negal; S v Solberg* 1997 (10) BCLR 1348 (CC). *Christian Education South Africa v Minister of Education* (2000) (4) SA 757 (CC), *Prince v President of the Law Society of the Cape of Good Hope and others* 2001 (2) SA 388 (CC) and *MEC for Education, Kwazulu-Natal, and others v Pillay* 2008 (1) SA 474 (CC).

<sup>17</sup> 1997 (10) BCLR 1348 (CC).

<sup>18</sup> (1985) 18 DLR (4<sup>th</sup>) 321.

<sup>19</sup> *Lawrence* para 92.

<sup>20</sup> *Lawrence* para 92.

religion.<sup>21</sup> The key components thus shared between culture and religion include ideas, values, and the behaviour of individuals or a group. It is contended that culture has a religious affiliation and component to it,<sup>22</sup> and that culture and religion might even be a subset of each other.<sup>23</sup> For purposes of this article it is accepted that culture and religion indeed often overlap, and in fact frequently co-exist. Therefore, a clear distinction between the concepts in the arbitration and court judgments discussed below is not always achieved. The article will now discuss how cultural and religious diversity is addressed in the South African workplace. In order to properly do so, a brief overview of legislation relevant to culture and religion in the workplace is first required.

### 3 LEGISLATION ADDRESSING CULTURE AND RELIGION IN THE SOUTH AFRICAN WORKPLACE

On entering an era of democracy, and the subsequent dismantling of apartheid, South Africans were introduced to a new era of relationship building by way of reconciliation and forgiveness. Accordingly, relationships had to be built anew across all races and cultures.<sup>24</sup> Steering South Africa into this new democratic era of relationship building were, first, the interim Constitution of 1993 (interim Constitution), and thereafter the final Constitution of 1996 (Constitution).

Prior to the adoption of the interim and ultimately the final Constitutions, discrimination was a widely occurring practice, and in some instances even entrenched in legislation.<sup>25</sup> With the adoption of a Constitution, however, values underlying an open and democratic society, such as, human dignity, equality, and the advancement of human rights and freedoms, became a reality for *all* individuals.<sup>26</sup> Whilst on paper these rights should without fail or undue delay be available to all, complete enjoyment thereof remains out of reach for many, particularly in the employment environment.<sup>27</sup>

The Constitution further states that South Africa “belongs to all who live in it, united in our diversity”.<sup>28</sup> Accordingly the Constitution pronounces that, among others,

<sup>21</sup> Lee I ‘In re culture: the cross-cultural negotiations course in the law school curriculum’ (2005) 20 *Ohio St. J. on Disp. Resol.* 375 & 378.

<sup>22</sup> LeBaron & Pillay (2006) 14.

<sup>23</sup> Lee (2005) 375 & 378. See also Hofstede, Hofstede & Minkov (2010) 18 in which the writer argues that culture has many levels, one of which includes religion.

<sup>24</sup> LeBaron & Pillay (2006) 22.

<sup>25</sup> See, inter alia, the Masters and Servants Acts of 1856, the Group Areas Act 41 of 1950 and the Prohibition of Mixed Marriages Act 55 of 1949.

<sup>26</sup> Constitution s 1. Section 7 of the Constitution further states that the Bill of Rights “...enshrines the rights of all people in our country...”. See further, s 9 of the Constitution which stipulates that “[e]veryone is equal before the law and has the right to equal protection and benefit of the law”.

<sup>27</sup> Constitutional rights and values have not been realized in practice by the majority of previously disadvantaged individuals. See, inter alia, the Labour Court’s First Discrimination Case (1998) 19 *ILJ* 709, Not ‘Work Like Any Other’: Towards a Framework for the Reformulation of Domestic Workers’ Rights (2011) 32 *ILJ* 1, and ‘Strike Law, Structural Violence and Inequality in the Platinum Hills of Marikana’ (2013) 34 *ILJ* 836.

<sup>28</sup> Preamble of the Constitution.

culture and religion should be safeguarded and protected.<sup>29</sup> This is profound in appreciating the role that both religion and culture, in all their diverse forms, could potentially play in uniting a country. The equality clause of the Constitution states that “[t]he state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including...religion..., [and] culture...”.<sup>30</sup> It thus becomes clear that in drafting the Constitution the significance of protecting culture and religion was strongly appreciated.

The Constitution is the supreme law of South Africa against which all government action and legislation must be measured. Any law or conduct inconsistent with the values enshrined in the Constitution is invalid,<sup>31</sup> and may consequently be declared unconstitutional.<sup>32</sup> There is therefore no single area of law in South Africa that remains unaffected by constitutional principles. With regard to labour relations, section 23 of the Constitution is the central provision.

Section 23(1) affords *everyone* the right to equality and fair labour practices. The constitutional right to fair labour practices should generally be widely interpreted, and includes rights, such as, protection against unfair discrimination, unfair treatment, and unfair disciplinary action or dismissal. The constitutional right to fair labour practices accordingly co-exists with those of cultural and religious beliefs and practices. Within the protection afforded by section 23, the Labour Relations Act 66 of 1995 (LRA), the Basic Conditions of Employment Act 75 of 1997 (BCEA), and the Employment Equity Act 55 of 1998 (EEA), among others, were enacted. Of particular importance to religion and culture in the workplace are the LRA and the EEA.

The LRA protects employees against dismissal for a reason based on unfair discrimination. This entails that where the reason for the dismissal is that the employer unfairly discriminated against an employee on any arbitrary ground, which includes the grounds of culture and religion, such dismissal will be regarded as automatically unfair.<sup>33</sup> Similarly, a core feature of the EEA is to promote equal opportunity and fair treatment in the workplace by eradicating unfair discrimination.<sup>34</sup> Section 6(1) of the

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<sup>29</sup> Constitution ss 15, 30 & 31.

<sup>30</sup> Constitution s 9(3).

<sup>31</sup> Constitution s 2.

<sup>32</sup> Govindjee A & Van der Walt AJ “Labour law and the Constitution” in Van der Walt A et al (eds) *Labour law in context* (Cape Town: Pearson Education 2012) 3.

<sup>33</sup> LRA s 187(1)(f). However, in terms of s 187(2)(a), “a dismissal may be fair if the reason for the dismissal is based on an inherent requirement of the particular job”. See further, s 6(2)(b) of the EEA, that “It is not unfair discrimination to distinguish, exclude or prefer any person on the basis of an inherent requirement of a job”, and the ILO, Discrimination (Employment and Occupation) Convention, C111, 25 June 1958, C111, art 1(2) available at [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C111](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C111) (accessed 29 September 2016). South Africa ratified this Convention (Discrimination Convention) on 05 March 1997. It states: “Any distinction, exclusion or preference in respect of a particular job based on an inherent requirement thereof shall not be deemed to be discrimination”. Thus, the inherent requirements of a particular job can be raised as a defence, if a job necessitates a certain characteristic, and it will not amount to unfair discrimination where the employer excludes individuals without that exact characteristic.

<sup>34</sup> EEA s 2(a).

EEA states that “[n]o person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including...religion...[and] culture...”.<sup>35</sup> The article now considers selected case law illustrating how South African arbitrators and judges have approached balancing an individual’s cultural and religious beliefs and practices against an employer’s rights within the employment environment.

## **4 EXPRESSING RELIGION AND CULTURE IN THE WORKPLACE: A DISCUSSION AND ANALYSIS OF SELECTED ARBITRATION AND COURT DECISIONS**

### **4.1 Physical expression of cultural and religious beliefs**

In *Dlamini & others v Green Four Security*<sup>36</sup> (*Dlamini*) the Labour Court (LC) was called upon to consider a claim of unfair discrimination. The employees, security guards, were dismissed after refusing to shave/trim their beards on the order of the employer. The employees argued that they were members of the Baptized Nazareth group and that it was against their religious convictions to trim their beards. The employees contended that their dismissals were automatically unfair in terms of section 187(1)(f) of the LRA, in that they were discriminated against on the basis of their religion. The employer however maintained that the employees were contractually bound to be clean-shaven. The LC applied the following enquiry to determine whether unfair discrimination took place

“(a) Did the rule that security guards should be clean-shaven differentiate amongst employees? The answer is 'No'. Everyone had to be clean-shaven. (b) Did the respondent apply the rule consistently to all employees? The answer is 'Yes'. (c) Did the rule impact on all employees alike, irrespective of their religion? The answer is 'Yes'. Anyone who wore a beard ran the risk of being disciplined. (d) Did the rule trench upon the applicants’ religion? The applicants failed to prove the no-shaving rule was an essential tenet of the Nazareth faith. They have therefore not proven that they were discriminated on account of their religious beliefs.”<sup>37</sup>

In considering the workplace rule itself, the LC concluded that the importance of the workplace policy (that guards had to be clean-shaven) in this specific matter outweighed the reliance placed by the employees on a specific religious rule. The LC balanced the two competing views, and ultimately found in favour of the workplace policy. The rationale for the rule was to promote neatness within the workplace. The LC was of the view that the rule was justified by the integral need to be orderly and tidy, and to uphold the company’s unique image.<sup>38</sup> The employer was entitled to set a dress

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<sup>35</sup> See also, the constitutional law test for discrimination based on *Harksen v Lane NO and others* (1) SA 300 (CC) (1997). There are only two exceptions to this general rule: it is not unfair discrimination where an employer has to take affirmative action measures; or where an employer distinguishes, excludes or prefers a person based on an inherent requirement of the job, s 6(2)(b) EEA.

<sup>36</sup> (2006) 27 ILJ 2098 (LC).

<sup>37</sup> *Dlamini* para 27.

<sup>38</sup> *Dlamini* para 63.

code as one of the conditions of employment as a security officer.<sup>39</sup> The LC held that the rule was not arbitrary or irrational.<sup>40</sup> In balancing the employees' religious rule against the company's workplace rule, the workplace rule prevailed under the circumstances as it had a legitimate purpose.

In *Police & Prisons Civil Rights Union & others v Department of Correctional Services & another (Police & Prisons Civil Rights Union)*<sup>41</sup> the Court was again required to deal with issues of personal appearance and culture. The dismissed employees, all practising members of the Rastafarian faith, failed to follow an instruction from their employer to cut their dreadlocks. The employer argued that the wearing of dreadlocks breached its dress code policy. The employees argued that they wore dreadlocks due to their religious and cultural beliefs and practices. Consequently, the employees challenged their dismissals as being automatically unfair in terms of section 187(1)(f) of the LRA. The claim was based on grounds of cultural and religious discrimination.

The employees argued that based on their religious and cultural beliefs there was no justification for the employer to force them to remove their dreadlock hairstyles. The LC found in favour of the employees, albeit not on gender discrimination. Female employees were permitted to continue wearing their dreadlocks. The employer took the matter on appeal to the Labour Appeal Court (LAC).<sup>42</sup> The employees lodged a cross-appeal, remaining adamant that they had been dismissed on the grounds of religion and cultural practices, and not as a result of gender discrimination.

The LAC held that the employer's dress code, which prohibited so-called "Rasta man" hairstyles, were not neutral in its operation. It enforced mainstream notions to the detriment of minority and historically excluded groups. The dreadlocks in no manner compromised the employer's concerns of discipline, security and performance. Hence, there was no basis for forcing the employees to get rid of their dreadlocks. Ultimately the rule restricted the employees from expressing their Rastafarian beliefs without any rational justification. Wearing a dreadlock hairstyle signaled allegiance to the Rastafarian religion.<sup>43</sup> The LAC concluded that it was de facto simply the dreadlock hairstyle and the refusal to cut the dreadlocks that led to the employees' dismissals. The matter was subsequently also taken on appeal to the Supreme Court of Appeal (SCA), but the SCA dismissed the appeal, thus upholding the LAC's judgment. The SCA summarised its stance concisely in holding that "[w]ithout 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".<sup>44</sup>

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<sup>39</sup> Dlamini para 63.

<sup>40</sup> Dlamini para 62.

<sup>41</sup> (2010) 31 ILJ 2433 (LC).

<sup>42</sup> *Department of Correctional Services & another v Police & Prisons Civil Rights Union & others* (2011) 32 ILJ 2629 (LAC).

<sup>43</sup> Grogan J "Dreadlocked: much hairdo about nothing?" (2010) 26(5) *Employment Law* 11.

<sup>44</sup> *Department of Correctional Services & another v POPCRU & others* (107/12) [2013] ZASCA 40 para 22.

Whilst not an employment matter, the case of *MEC for Education, Kwazulu-Natal, and others v Pillay (Pillay)*,<sup>45</sup> further illustrates the lengths our courts, in this instance the CC, are willing to go to protect the expression of cultural and religious beliefs. A student, Sunali Pillay, wore a nose stud to school. The school, however, did not permit the wearing of nose studs. The student's mother (Ms Pillay) was of the view that by not permitting her daughter to wear a nose stud the school was unfairly discriminating against her daughter on the basis of religious and cultural rights.

Langa CJ maintained that where it was of significant importance for a learner to wear a nose stud for purposes of religious and/or cultural beliefs, then it should be permitted notwithstanding the fact that this was at odds with the particular school's code of conduct. In this instance the wearing of a nose stud was a long-standing family tradition and part of the student's South Indian, Tamil and Hindu identity/heritage.<sup>46</sup> Nose studs in the Indian faith are quite significant as they embody a very special meaning.<sup>47</sup> By forming a principal part of Indian descendants' culture, the student was symbolically affirming her connection to the Indian community by wearing a nose stud.<sup>48</sup>

Grogan suggests that a core reason why the Constitution seeks to protect individual freedoms is to prevent discrimination based on innate characters of individuals.<sup>49</sup> The golden thread throughout all the aforesaid cases seem to be that the physical appearances in question all formed part and parcel of the specific individuals' make-up and identity, based on their cultural and/or religious belief systems. Adhering to certain appearances or styles in a particular manner was of significant importance to these individuals. By disregarding their belief systems, it essentially meant that the employers were disregarding their individuality.

## **4.2 Adherence to cultural and religious based practices and beliefs**

The discussion will now turn to cases where employees were absent from work, without permission, for reasons related to cultural beliefs and practices. In *Food & Allied Workers Union & others v Rainbow Chicken Farms (Food & Allied Workers Union)*,<sup>50</sup> the LC was called upon to consider the issue of adhering to specific cultural holidays within the workplace. Eid ul Fitr (Eid) is a momentous day celebrated in the Islamic faith.<sup>51</sup> Eid is however not a recognised national public holiday in terms of South Africa's Public Holidays Act.<sup>52</sup> Eid is a celebration of the end of the holy month of Ramadan when Muslims celebrate with family and friends.<sup>53</sup> In the matter under discussion, the

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<sup>45</sup> 2008 (1) SA 474 (CC).

<sup>46</sup> *Pillay* paras 7, 17, 23, 58 & 90.

<sup>47</sup> *Pillay* paras 11, 15 & 58.

<sup>48</sup> *Pillay* para 11.

<sup>49</sup> Grogan (2010) 4.

<sup>50</sup> (2000) 21 ILJ 615 (LC).

<sup>51</sup> *Food & Allied Workers Union* paras 7 & 33.

<sup>52</sup> Act 36 of 1994. See further, *Food & Allied Workers Union* para 8.

<sup>53</sup> *Food & Allied Workers Union* para 7.

employees refused to report for duty on Eid, despite their employer's insistence that they do so. The employees were subsequently dismissed for insubordination.

The LC was of the opinion that the employees had a good reason for failing to report for duty because of their religious beliefs and practices. The employer showed little, if any, regard for the employees' cultural and religious beliefs. Ramadan and the celebration of Eid constitute a great part of the employees' identities, and the employer blatantly disregarded these celebrations. Accordingly, the Court concluded that the employees' dismissals were substantially unfair.

In *Lewis v Media 24 Ltd (Lewis)*<sup>54</sup> the applicant employee, a Jewish male, was required by his employer to work long and late hours. As a result, the employee would have been unable to observe the Sabbath.<sup>55</sup> Apart from attempting to force him to work on the Sabbath, the employee also claimed that the employer made offensive remarks regarding his celebration of the Sabbath. Subsequently, the employee's contract was terminated because of his absence from work without permission.<sup>56</sup> The employee alleged that he had been unfairly discriminated against based on religious, cultural and political beliefs.<sup>57</sup> The employer raised the issue of whether the employee was sincerely committed to observing his religious practice. The Court held that when appointed the employee did not declare to his employer that he was a Jew, and neither did he object to working on the Shabbat. Doubt existed as to whether the employee was sincere in his religious commitment. The application was accordingly dismissed.

In the matter of *Building Construction & Allied Workers Union on behalf of Zondi and Kusile Civil Works Joint Venture*,<sup>58</sup> the employee, an African male, approached a traditional healer.<sup>59</sup> The employee argued that he required the assistance of the traditional healer in order to part with his grandfather's spirit which he claimed was harassing him. This resulted in the employee's dismissal for being absent from work without permission. The arbitrator presiding over the matter concluded that the reason for the employee's absenteeism was justifiable since it was inherently linked to his culture. It was held that the employer had 'shown a lack of empathy and understanding for cultural diversity'.<sup>60</sup>

In *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi & others*,<sup>61</sup> the employee claimed to suffer from visions/premonitions. She approached a traditional healer to assist her to interpret these visions. It was the opinion of the traditional healer that the

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<sup>54</sup> (2010) 31 ILJ 2416 (LC).

<sup>55</sup> This is the seventh day of the week to Jews, and the day on which they rest in order to honour God.

<sup>56</sup> *Lewis* paras 117 & 119.

<sup>57</sup> EEA s 50(2)(a).

<sup>58</sup> *Building Construction & Allied Workers Union on behalf of Zondi and Kusile Civil Works Joint Venture* (2013) 34 ILJ 2395 (BCA) (hereafter, *Building Construction & Allied Workers Union*).

<sup>59</sup> A traditional healer is someone who utilises traditional medicine to cure various illnesses, commonly referred to as a traditional African sangoma.

<sup>60</sup> *Building Construction & Allied Workers Union*, para 57.

<sup>61</sup> *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi & others* (2014) 3 BLLR 207 (SCA) (hereafter *Kievits Kroon Country Estate*).

employee's ancestors were calling her to become a sangoma.<sup>62</sup> In order to do so the employee had to undergo a training process. The training consisted of ritual ceremonies conducted over an extended period. This would require the employee to take leave from work in order to undergo the training.

Initially the employee's employer was willing to accommodate her with leave requests. The employee's absence from work eventually however become an issue, especially on instances where the employee allegedly stayed away from work without permission. The employee was ultimately dismissed for continued absence from work without permission. The Commission for Conciliation Mediation and Arbitration (the CCMA) held that the employee had a valid reason for being absent from work and therefore her conduct had been justified. The LC confirmed the CCMA's award as having been rational.

The matter was subsequently taken on appeal to the LAC, and ultimately the SCA, where the employee's dismissal was found to have been substantively unfair. According to the SCA it was important for the employee "[t]o obey [her] ancestors' call to become [a] traditional healer in accordance with [her] Xhosa culture".<sup>63</sup> The SCA held that although, if seen from the employer's perspective, the reason for the employee's absence might have seemed trivial, because of her cultural and traditional beliefs she genuinely believed that she had to adhere to her ancestors calling. Therefore, from the perspective of the employee, she had to respect her ancestors calling. If this meant taking unpaid leave from work, it was the route the employee was willing to take, and the employer could have reasonably accommodated her. The SCA concluded by stating that as a community, individuals need to reasonably accommodate each other in order to live in harmony and achieve a united society.

Both the *Kievits Kroon Country Estate* and the *Building Construction & Allied Workers Union* cases involved cultural practices linked to traditional healers. In the African tradition, the use of sangomas is part of custom, with custom forming "part of a culture's norms, which is, accepted and prescribed models of behavior (sic)".<sup>64</sup> Hofstede defines rituals as a collective activity that is crucial to achieve a goal within a particular culture.<sup>65</sup> The Constitution acknowledges and recognises the traditional beliefs and practices of individuals and groups.<sup>66</sup> The conduct and practices of the employees in the aforesaid cases were part of their identities. Whilst some might find it strange for individuals to claim that they are able to communicate with the departed and have supernatural powers, these practices form part of culture, and subsequently individuality.

It is understandable that someone who does not practise these rituals would not understand the meaning and importance thereof. However, individuals living in a

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<sup>62</sup> In Southern Africa, a traditional healer or diviner.

<sup>63</sup> *Kievits Kroon Country Estate* para 23.

<sup>64</sup> Ackerman GR (ed) *Cross-cultural negotiations & dispute resolution: readings & cases* (East Brunswick, NJ: University Publishing Solutions 2003) 4.

<sup>65</sup> Hofstede, Hofstede & Minkov (2010) 9.

<sup>66</sup> Constitution ss 30 & 31(1).

diverse country, such as South Africa, should respect and have due regard for other individuals who carry out certain rituals that are essential features of their identities. The *Kievits Kroon Country Estate* and the *Building Construction & Allied Workers Union* cases illustrate how far our courts are willing to go to uphold cultural beliefs and practices. The different outcomes of the two cases could however be attributed to the fact that the LC and LAC approached their respective cases differently. The LC did not consider the cultural component of the dispute, whereas the LAC's outcome was predominantly based on the cultural component.

## 5 CLASH BETWEEN LAW AND CULTURE/RELIGION

The awareness of culture is fundamental to addressing cultural conflict.<sup>67</sup> Yet, what happens where cultural and religious beliefs and practices are argued to be against a national law?

The Court in *Prince v President of the Law Society of the Cape of Good Hope and others (Prince)*<sup>68</sup> had the opportunity to consider this question. The CC had to consider what should happen where culture dictated certain actions and behaviour where these actions were regarded as being unlawful. In the *Prince* matter, the appellant was a practising Rastafarian who utilised cannabis for alleged religious purposes. He was also a candidate attorney who had applied to the Cape Law Society to be admitted as an attorney. The Cape Law Society (Society) rejected his application on the basis that he did not satisfy the Society's prerequisite of being a "fit and proper" person.<sup>69</sup> The Society contended that the appellant had previous convictions pertaining to the possession of cannabis. The appellant further also indicated that he would continue utilising cannabis.

The possession and utilisation of cannabis was at the time of the *Prince* judgment still prohibited under South African law.<sup>70</sup> Mr Prince approached the SCA to plead for a religious exemption in order to practise as a Rastafarian. The case was subsequently referred to the CC on constitutional grounds. The CC held that though "[t]he appellant has shown himself to be a person of principle, willing to sacrifice his career and material interests in pursuance of his beliefs",<sup>71</sup> the exemption could not be granted as it was not in the public interest to do so.

The *Prince* case clearly illustrates the extent to which some individuals will go to protect their cultural and religious beliefs. Seen from Mr Prince's perspective, the smoking of cannabis was essential to his spirituality, and that spirituality was deeply rooted in his religion and culture. It would however be difficult to argue that the CC's

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<sup>67</sup> Cultural conflict occurs when individuals disagree on matters pertaining to their personal set of values and beliefs. LeBaron & Pillay (2006) 15.

<sup>68</sup> 2001 (2) SA 388 (CC).

<sup>69</sup> "Fit and proper" means not having a criminal record and not being involved in any illegal activities.

<sup>70</sup> Drugs and Drug Trafficking Act 140 of 1992.

<sup>71</sup> *Prince* para 17.

ultimate finding was incorrect. The CC had the difficult task to balance the factors of legality and public policy with an individual's cultural beliefs.

In *Uasa on behalf of Zulu and Transnet Pipelines (Uasa)*<sup>72</sup> it emerged that the applicant employee was making demands for sex to a female colleague. When his colleague rejected him on a particular occasion, he grabbed her and tried to lift her skirt. Fortunately, a supervisor interrupted the incident. During the arbitration hearing, the applicant openly admitted to the charges. He however professed that his conduct was "part of his Zulu culture". The arbitrator rejected the argument that asking for sex and subsequently harassing a female colleague formed part of the applicant's "Zulu culture". The arbitrator referred to the constitutional right individuals have, to have their dignity respected and protected.<sup>73</sup> The arbitrator reasoned that the female employee's right to dignity far outweighed the male employee's alleged cultural behaviour.

## 6 STEREOTYPING

*Stokwe v Member of the Executive Council Department of Education, Eastern Cape Province and another (Stokwe)*<sup>74</sup> involved issues of stereotyping, bias and prejudice towards a certain individual due to his language. Mr Stokwe had applied for the position of principal at a primary school. Based on the scoring model used, the interview panel had ranked the applicant first of the shortlisted candidates. However, the panel preferred the second ranked candidate merely because the applicant had an African name. Based on this one factor the panel had subjectively concluded that the employee would not be able to speak Afrikaans fluently.

The LC was of the view that this was a clear example of the manifestation of stereotypes, bias and prejudice. The LC further held that this conduct indicated a blatant disregard for South Africa's democratic constitutional order and transgressed the values that the South African Constitution sought to uphold.

Grant Ackerman<sup>75</sup> maintains that there are various elements to culture and that language is one of these elements.<sup>76</sup> An important relationship exists between culture and language,<sup>77</sup> leaving "communication and culture... inseparable".<sup>78</sup> In a country, such as South Africa, where there are eleven official languages, prejudicing an employee for not speaking a particular language is fundamentally prejudicing someone on cultural grounds. The LC in the *Stokwe* confirmed that it was the value of culture that the LC sought to maintain.

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<sup>72</sup> (2008) 29 *ILJ* 1803 (ARB).

<sup>73</sup> Constitution s 10.

<sup>74</sup> (2005) 26 *ILJ* 927 (LC).

<sup>75</sup> Grant Ackerman is a professor of management at Columbia Business School whose teaching highlights cross-cultural issues in management.

<sup>76</sup> Ackerman (2003) 5 & 9.

<sup>77</sup> Ackerman (2003) 9.

<sup>78</sup> Ackerman (2003) 4.

## 7 CONCLUSION

At any given time in the workplace, it is quite common to find a large number of diverse individuals. Diversity presents in many forms, with religion (faith, practices, beliefs) and culture (customs, traditions, rituals, practices) having been the focus of this article. Within organisations these customs and traditions may lead to tension and conflict between employers and employees. Individuals express themselves and behave in ways that are different from those of others.<sup>79</sup> Culture and religion are present in all areas of life and cannot be isolated from everyday life. It is therefore pertinent for individuals to be able to clearly identify cultural differences, and in doing so adapt to differences. Individuals will not always agree with others on all cultural and religious behaviours and practices, but they should respect and acknowledge different cultural beliefs within the bounds of reasonableness.

From the above it should be evident that culture and religion and workplace rules and policies are likely to be in conflict with each other at some point. In fact, how the courts and different parties decide to deal with such conflicts also has a cultural element to it. From the case law discussed above it is clear that South African courts are quite willing to advocate for reasonable accommodation to be provided to individuals and groups on the basis of cultural and/or religious grounds. Such accommodation will however be reconsidered where there is conflict between claimed cultural and religious rights and the law itself. In such instances, legal preference and public policy will be favoured. The question that remains open though, is how far South African courts and other dispute resolution forums are willing to go to accommodate and protect culture and religion within the workplace. In conclusion, it is perhaps worth mentioning that in South African labour law itself, a certain culture seems to exist. It seems to be a culture that South African labour dispute resolution forums highlight that employers should be more understanding, tolerant and empathetic towards issues of culture and religion in the workplace.

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<sup>79</sup> LeBaron & Pillay (2006) 1.