CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE: CCT 51/06

MEC FOR EDUCATION: KWAZULU-NATAL	First Applicant
THULANI CELE: SCHOOL LIAISON OFFICER	Second Applicant
ANNE MARTIN: PRINCIPAL OF DURBAN GIRLS' HIGH SCHOOL	Third Applicant
FIONA KNIGHT: CHAIRPERSON OF THE GOVERNING BODY OF DURBAN GIRLS' HIGH SCHOOL	Fourth Applicant
versus	
NAVANEETHUM PILLAY	Respondent
with	
GOVERNING BODY FOUNDATION	First Amicus Curiae
NATAL TAMIL VEDIC SOCIETY TRUST	Second Amicus Curiae
FREEDOM OF EXPRESSION INSTITUTE	Third Amicus Curiae

Heard on : 20 February 2007
Decided on : 5 October 2007

JUDGMENT

LANGA CJ:

Introduction

[1] What is the place of religious and cultural expression in public schools? This case raises vital questions about the nature of discrimination under the provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Equality Act) as well as the extent of protection afforded to cultural and religious rights in the public school setting and possibly beyond. At the centre of the storm is a tiny gold nose stud.

The Parties

[2] The first and second applicants are the Member of the Executive Council for Education in KwaZulu-Natal and the School Liaison Officer for the KwaZulu-Natal Education Department. I will refer to them collectively as "the Department". The third and fourth applicants are the headmistress of Durban Girls' High School, Mrs Martin, and Mrs Knight, the Chairperson of the Governing Body of that School. I will refer to the two collectively and the Durban Girls' High School itself interchangeably as either "the School" or "DGHS". Any reference to "the applicants" is to all four applicants.

[3] The respondent is Ms Navaneethum Pillay who appears on behalf of her minor daughter, Sunali Pillay (Sunali) who was, until the end of last year, a learner at DGHS. Ms Pillay runs a holistic centre known as Yabba Dabba Do! Centre of Creativity.

Factual Background

[4] Sunali applied for admission to DGHS for the 2002 school year. Her mother signed a declaration in which she undertook to ensure that Sunali complied with the Code of Conduct of the School (the Code). Sunali was admitted to the School.

[5] During the school holidays in September 2004 Ms Pillay gave Sunali permission to pierce her nose and insert a small gold stud. When she returned to School after the holidays on 4 October 2004, Ms Pillay was informed that her daughter was not allowed to wear the nose stud as it was in contravention of the Code. The relevant part of the Code reads:

> "Jewellery: Ear-rings – plain round studs/sleepers may be worn, ONE in each ear lobe at the same level. No other jewellery may be worn, except a wrist watch. Jewellery includes any adornment/bristle which may be in any body piercing. Watches must be in keeping with the school uniform. Medic-Alert discs may be worn."

[6] Mrs Martin told Ms Pillay that Sunali had received a laminated card to indicate that she had been permitted to wear the nose stud only until the end of October 2004. This was in order to allow the piercing to heal so that the nose stud would be capable of being inserted and removed on a daily basis. October came and went and Sunali did not remove the nose stud. When the new academic year of 2005 commenced, Sunali returned to school with the nose stud still in place.

[7] The School then requested Ms Pillay to write a letter motivating why Sunali should be allowed to continue to wear the stud. In a letter dated 1 February 2005, Ms Pillay apologised for not having discussed the issue of Sunali's nose stud with Mrs Martin beforehand. She explained that she and Sunali came from a South Indian family that intends to maintain cultural identity by upholding the traditions of the women before them. The insertion of the nose stud was part of a time-honoured family tradition. It entailed that a young woman's nose was pierced and a stud inserted when she reached physical maturity as an indication that she had become eligible for marriage. The practice today is meant to honour daughters as responsible young adults. When Sunali turned sixteen, her grandmother would replace the gold stud with a diamond stud. She claimed that this was to be done as part of a religious ritual to honour and bless Sunali. Ms Pillay made it clear that the wearing of the nose stud was not for fashion purposes but as part of a long-standing family tradition and for cultural reasons.

[8] Following a meeting with the Governing Body on 2 February 2005, Mrs Martin consulted with recognised experts in the field of human rights and Hindu tradition in order to determine the School's position. She was advised that the School was not obliged to allow Sunali to wear the nose stud. The Governing Body accepted this advice and, on 3 March 2005, Mrs Martin informed Ms Pillay of the decision not to permit Sunali to wear the nose stud.

[9] Ms Pillay was aggrieved by the Governing Body's decision. A stream of increasingly acrimonious correspondence ensued between her and Mrs Martin relating to the reasons for the decision and the steps that would be taken as a result. On 8 March 2005 Ms Pillay wrote to the Department of Education seeking clarity about its position, since she believed that the Governing Body's decision violated her daughter's constitutional right to practice her religious and cultural traditions. In May 2005, however, Ms Pillay was informed that the MEC supported the School's approach. The School decided that if Sunali did not remove the nose stud by 23 May 2005 she would face a disciplinary tribunal. Sunali did not remove the nose stud and a hearing by the disciplinary tribunal was then re-scheduled for 18 July.

[10] The disciplinary hearing in fact never took place as Ms Pillay took the matter to the Equality Court on 14 July and obtained an interim order restraining the school from interfering, intimidating, harassing, demeaning, humiliating or discriminating against Sunali. The Equality Court hearing for confirmation of the interim order was set down for 29 September 2005.

The Equality Court hearing

[11] The issue before the Equality Court was whether the School's refusal to permit Sunali to wear the nose stud at school was an act of unfair discrimination in terms of the Equality Act. The evidence presented by Ms Pillay amounted to the following: the practice of wearing the nose stud is a tradition that is some 4000 to 5000 years old, hailing predominantly from the south of India. When a girl comes of age, a stage

marked by the onset of her menstrual cycle, the family honours the fact of her becoming a young woman. As part of the ritual, a prayer is performed and her nose is pierced on the left side for the insertion of the nose stud. The ritual also serves the purpose of endowing daughters with jewellery since a woman's dowry in patriarchal society went to her husband and all she could claim as her own was her jewellery. Further, according to Ayurvedic medicine, the medicinal branch of the Vedas, the left side of the nose is directly related to fertility and childbearing. Ms Pillay stressed that the practice of wearing the nose stud or ring plays an important part in many religions and is not limited to Hinduism. On the other hand, Hinduism has a variety of sects that observe different practices.

[12] Mrs Martin, on behalf of the School, made the point that the Code had been drawn up in consultation with the learners' representative council, parents and the governing body. It is the practice of the School that exemptions, based on religious considerations, are made from the provisions of the Code. Asked why an exemption was not granted to Sunali on the basis of the religious reasons given by Ms Pillay, she stated that Ms Pillay had made it clear in her letter that the nose stud was worn as a personal choice and tradition and not for religious reasons.

[13] Dr Vishram Rambilass, called by the School as an expert in Hindu religion, told the Court that the practice in question is an expression of Hindu culture. It was not obligatory, nor was it a religious rite. Under cross-examination, however, he conceded that it was difficult to distinguish between Hindu culture and Hindu religion

and described the situation as a "universal dilemma of all cultures and religions". He stated further that it is difficult to pinpoint what constitutes Hinduism, since there are various schools that have developed very differently.

[14] The Equality Court held that although a prima facie case of discrimination had been made out, the discrimination was not unfair. It characterised the purpose of the Code as being "to promote uniformity and acceptable convention amongst the learners" and accepted Mrs Martin's evidence that undue permissiveness could result in a conflict with the Code, "thereby creating a disorderly environment." In reaching its conclusion the Court took into account several factors namely: Ms Pillay had agreed to the Code when she took Sunali to the School; the Code was devised by the School in consultation with the students, parents and educators; and also that Ms Pillay had failed to consult with the School before sending Sunali to it with the nose stud. The Court held that no impairment to Sunali's dignity or of another interest of a comparably serious nature had occurred and concluded that DGHS had acted reasonably and fairly. In addition, the Court held that any harm that may have been caused "was as a result of [Sunali's] and her mother's own doing." This decision by the Equality Court was taken on appeal by Ms Pillay to the Pietermaritzburg High Court.

The High Court

[15] In its judgment, the High Court[1] (Kondile J with Tshabalala JP concurring) held that the conduct of the School was discriminatory against Sunali and was unfair in terms of the Equality Act. It held that our society prohibits both direct and indirect discrimination and aims to eliminate entrenched inequalities. It held further that the Equality Court had failed to consider properly the impact of the Constitution and the Equality Act on the Code and that both religion and culture are equally protected under the Equality Act and the Constitution. Because the nose stud had religious and/or cultural significance to Sunali, the failure to treat her differently from her peers amounted to withholding from her "the benefit, opportunity and advantage of enjoying fully [her] culture and/or of practising [her] religion" and therefore constituted indirect discrimination.

[16] The High Court rejected arguments by the applicants that Sunali had waived her right to insist on wearing the nose stud; that she could not complain about the prohibition because the Code had been the product of extensive consultations; and that because Sunali had failed to testify on her own behalf her religious or cultural belief in relation to the nose stud had not been established. The High Court held that Sunali's failure to testify was irrelevant as her mother had acted on her behalf, in her role as a parent and as a representative of the "Hindu/Indian" community.

[17] In reaching the conclusion that the conduct of the School amounted to unfair discrimination, the High Court noted that Sunali was part of a group that had been

[1] *Pillay v MEC for Education, KwaZulu-Natal, and Others* 2006 (6) SA 363 (EqC); 2006 (10) BCLR 1237 (N).

historically discriminated against and that the School's contention that its rule prohibiting the wearing of jewellery was a general one applicable to every learner served only to prolong that discrimination. It highlighted the vulnerable and marginalised status of Hindus and Indians in South Africa's past and present, the demeaning effect of denying Sunali's religion — and hence her identity — and the systemic nature of the discrimination. It held that the insistence by the School on uniformity or similar treatment was inappropriate as it failed to dismantle structures of discrimination. The Court held further that the desire to maintain discipline in the School was not an acceptable reason for the prohibition as there was no evidence that wearing the nose stud had a disruptive effect on the smooth-running of the School. The High Court found that, in any event, there were less restrictive means to achieve the laudable objectives of the School as it could simply explain to its learners that Sunali's religion or culture entitles her to wear the nose stud.

[18] The High Court accordingly set aside the decision and order of the Equality Court and replaced it with an order declaring "null and void" the School's "decision, prohibiting the wearing of a nose stud, in school, by Hindu/Indian learners". The School now applies for leave to appeal to this Court against the decision of the Pietermaritzburg High Court.

Proceedings in this Court

[19] The application for leave to appeal against the decisions of the Pietermaritzburg High Court was set down for hearing in this Court on 2 November 2006. The hearing

was however postponed at the request of Ms Pillay because Sunali was about to write her examinations. The hearing eventually took place on 20 and 21 February 2007.

[20] The Department then lodged a notice purporting to withdraw from the case on the basis that the matter had become moot on two grounds. Firstly, Sunali would no longer be at school by the time the case was decided and, secondly, new guidelines[2] on school uniforms had been issued by the National Department of Education after the institution of the case. The Department contended that any future case on the issue would have to be brought in terms of the new guidelines and any decision in the present case would no longer be relevant.

[21] New directions specifically required the parties to address the issue of mootness as well as the merits. The Department was directed to file written submissions notwithstanding their purported withdrawal.

[22] Three institutions were admitted as amici curiae. These were: the Governing Body Foundation (GBF); the Natal Tamil Vedic Society Trust (NTVS); and the Freedom of Expression Institute (FXI). The GBF, a voluntary association of 500 public school governing bodies with a total population of over 300 000 learners, generally supported the appeal. It stated that it interacts with government on issues relating to education and believes that the High Court judgment will have significant consequences for all schools, including its members and accordingly it has a keen

[2] The National Guidelines on School Uniforms were issued in terms of the South African Schools Act 84 of 1996 and published in Government Gazette 28538 GN 173, 23 February 2006.

interest in the case. It has conducted a survey of its member schools to determine their opinion on the nose stud issue and the responses indicate that the majority of schools do not allow nose studs to be worn. In the view of the member schools, the wearing of a nose stud pursuant to the High Court's decision would impact negatively on discipline in their schools.

[23] The NTVS had been admitted as amicus curiae in the High Court and applied for that status again in this Court. It is a religious and cultural organisation with origins as far back as 1957. Its members are Tamil speakers and its aims are to "foster the Tamil language and culture and the religious practices of Tamil South Africans." The NTVS also has a more general interest in the promotion of cultural and religious diversity. The NTVS supported Sunali's right to wear the nose stud as part of her Tamil heritage.

[24] Finally, the FXI, a non-profit organisation with the stated objective of promoting freedom of expression in South Africa averred that it is particularly concerned with the development of South African law relating to freedom of expression. Its interest in the matter involved highlighting freedom of expression issues raised by the case in addition to the equality issues already raised by the parties.

Submissions before this Court

[25] The Department contended that the High Court erred in characterising the matter as an equality claim within the contemplation of the Equality Act. It argued

that there can be no case for discrimination where it cannot be said that there is a "dominant group" that is treated better than Sunali. The complaint should rather have been brought as a freedom of religion claim and recourse to the Equality Court was, according to the applicants, entirely misplaced. The applicants submitted that in any event, the Code cannot be said to be discriminatory as it affected all religions equally. The School further criticised the failure to lead Sunali's evidence as, in their view, this makes it impossible to determine if discrimination had occurred.

[26] It was further contended that in the event of it being found that there was discrimination against Sunali, such discrimination was not unfair. In that context the applicants pointed to a number of factors, namely: that the Code was compiled on the basis of prior consultations with all relevant parties; the fact that Ms Pillay had agreed to the Code; the popularity of nose studs outside of Sunali's culture; the importance of uniforms in maintaining discipline; the need to give deference to school authorities; and the fact that the ban on the wearing of a nose stud could only have a limited effect on Sunali's culture since she was at liberty to wear the nose stud when she was not at school.

[27] These contentions were substantially supported by the GBF. The Department did not persist with its contention that the issue before the Court was moot; on the other hand, the School and the GBF argued that the matter was not moot because of its impact on all other schools. It also disputed the claim that Sunali formed part of an identifiable culture.

[28] For her part, Ms Pillay took the view that the issue is moot because Sunali was no longer a learner at DGHS and, according to her, the new guidelines have changed the legal landscape. She also submitted that under the Equality Act it was unnecessary to show a comparator or a dominant group. As long as a rule imposes disadvantage, it can be discriminatory. She contended further that Sunali's failure to testify was irrelevant as it was not raised when Ms Pillay was cross-examined in the Equality Court. Ms Pillay downplayed the need to accord deference to the school authorities as well as the role of consultation. She argued that there was no evidence that refusing Sunali an exemption improved discipline at the School. While her primary case was based on equality, she also sought to assert the rights to freedom of expression and freedom of religion as independent claims.

[29] The NTVS and the FXI submitted argument together. They emphasised the importance of culture. While accepting that culture and religion differ, they argued that once a cultural practice is established, it should be treated exactly the same as a religious practice. They also took issue with the reliance placed by the School and the GBF on the perception of the nose stud as a desirable fashion accessory. They further argued that freedom of expression could be considered as a separate right but that even if it could not, it was still relevant in interpreting the Equality Act. They contended that Sunali's right to freedom of expression had been unjustifiably limited because Sunali's nose stud posed no risk of substantial disruption to school activities.

Leave to Appeal

[30] The parties were agreed that the case raises a constitutional issue; it was also not disputed that the applicants have reasonable prospects of success on appeal. There are, however, two issues that must be examined in order to determine whether leave to appeal should be granted. The first is the fact that the Supreme Court of Appeal has been bypassed and the second is the issue of mootness. The central enquiry is whether it is in the interests of justice for leave to appeal to be granted.

[31] It is clear that the issues in this case involve matters that must eventually be decided by this Court. The parties themselves have made this patently clear. These issues have been fully canvassed in two courts. We have also had the benefit of comprehensive argument, presented by the parties and the three amici curiae. In my view, it is not in the interests of justice in this case to require the parties to incur the additional expense of going to the Supreme Court of Appeal before the matter is decided by this Court.

[32] With regard to mootness, this Court has held that:

> "A case is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law."[3]

[3] *National Coalition for Gay and Lesbian Equality and Others v Minister for Home Affairs and Others* 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at fn 18. See also *JT Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others* 1997 (3) SA 514 (CC); 1996 (12) BCLR 1599 (CC) at para 15.

Sunali is no longer at DGHS and the issue is therefore moot. This Court has however held that it may be in the interests of justice to hear a matter even if it is moot if "any order which [it] may make will have some practical effect either on the parties or on others."[4] The following factors have been held to be potentially relevant:

- the nature and extent of the practical effect that any possible order might have;[5]
- the importance of the issue;[6]
- the complexity of the issue;[7]
- the fullness or otherwise of the argument advanced;[8] and
- resolving disputes between different courts.[9]

[33] I do not agree with Ms Pillay's contention that the new guidelines that have been issued by the Department have altered the "legal landscape" in which these questions must be considered. The implication of this submission is that any decision this Court may make will have no relevance as it will have been decided under a legal regime that is no longer applicable.

[4] *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC); 2001 (9) BCLR 883 (CC) at para 11. See also *AAA Investments Pty (Ltd) v Micro Finance Regulatory Council and Another* 2007 (1) SA 343 (CC); 2006 (11) BCLR 1255 (CC) at para 27.

[5] *Langeberg* above n 4 at para 11.

[6] Id.

[7] Id.

[8] Id.

[9] *AAA Investments* above n 4 at para 27.

[34] The guidelines are not mandatory but are exactly what they purport to be – a guide. The following features all demonstrate the non-binding nature of the guidelines: section 8(3) of the South African Schools Act[10] which empowers the Minister to make the guidelines states that they are for the "consideration" of schools; while some of the regulations are couched in mandatory language,[11] the vast majority – including those relating to religious and cultural diversity – use the suggestive word "should"; the section on religious and cultural diversity is solely to "assist" schools in determining their uniform policy;[12] when a governing body adopts a new code, the only requirement is that it "should make [its] decision in terms of these guidelines";[13] and the strongest obligation that exists on governing bodies is that they must "consider" the guidelines.[14] That hardly alters the "legal landscape" as schools, including DGHS, might consider the guidelines and lawfully decide to adopt exactly the same provision that is currently before us. Any aggrieved party would be entitled to bring exactly the same challenge. That Ms Pillay might have an additional challenge based on a failure to consider the guidelines does not seem relevant.

[35] As already noted, this matter raises vital questions about the extent of protection afforded to cultural and religious rights in the school setting and possibly beyond. The issues are both important and complex, as is evidenced by the varying

[10] Act 84 of 1996.

[11] For example: "The uniform *must* allow learners to participate in school activities with comfort, safety and decorum" (regulation 11); "*No* child may be refused admission to a school because of an inability to obtain or wear the school uniform" (regulation 14). (Emphasis added.)

[12] Regulation 29.

[13] Regulation 23.

[14] Preamble to guidelines.

approaches of the courts below as well as courts in foreign jurisdictions. Extensive argument has been presented, not only from the parties but from three amici curiae. There is accordingly no doubt that the order, if the matter is heard, will have a significant practical effect on the School and all other schools in the country, although it will have no direct impact on Sunali. It is therefore in the interests of justice to grant leave to appeal.

What is at issue?

[36] The first question is whether the discrimination complained of by Ms Pillay flows from the Code or from the decision of the School to refuse an exemption. Ms Pillay specifically identifies the decision of the School as the problem, but the major part of the arguments addressed to the Court by all the other parties focused on the discriminatory nature of the Code. To my mind, it is the combination of the Code and the refusal to grant an exemption that resulted in the alleged discrimination, not the one or the other in isolation.

[37] There are two problems with the Code, which operate together. The first is that it does not set out a process or standard according to which exemptions should be granted, for the guidance of learners, parents and the Governing Body. The School has itself developed a tradition of granting exemptions in certain circumstances. The second problem is the fact that the jewellery provision in the Code does not permit learners to wear a nose stud and accordingly required Sunali to seek an exemption in the first place.

[38] It is true, however, that even taking these flaws into account, this dispute would never have arisen if the School had granted an exemption to Sunali. Whether the policy according to which that decision was taken was part of the Code, or existed only as the Governing Body's tradition, would ultimately have made no difference. Nonetheless, it is still necessary for the Court to address the underlying problems of the Code. A properly drafted code which sets realistic boundaries and provides a procedure to be followed in applying for and the granting of exemptions, is the proper way to foster a spirit of reasonable accommodation in our schools and to avoid acrimonious disputes such as the present one. In sum, the problem is both the decision to refuse Sunali an exemption and the inadequacies of the Code itself.

The correct approach to "discrimination" under the Equality Act

[39] Unfair discrimination, by both the State and private parties, including on the grounds of both religion and culture, is specifically prohibited by sections 9(3) and (4) of the Constitution, which read:

> "(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
>
> (4) 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."

The Equality Act is clearly the legislation contemplated in section 9(4) and gives further content to the prohibition on unfair discrimination.[15] Section 6 of the Equality Act reiterates the Constitution's prohibition of unfair discrimination by both the State and private parties on the same grounds including, of course, religion and culture.[16] Although this Court has regularly considered unfair discrimination under section 9 of the Constitution, it has not yet considered discrimination as prohibited by the Equality Act. Two preliminary issues about the nature of discrimination under the Act therefore arise.

[40] The first is that claims brought under the Equality Act must be considered within the four corners of that Act. This Court has held in the context of both administrative and labour law that a litigant cannot circumvent legislation enacted to give effect to a constitutional right by attempting to rely directly on the constitutional right.[17] To do so would be to "fail to recognise the important task conferred upon the legislature by the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights."[18] The same principle applies to the Equality Act. Absent a direct

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[15] See the long title of the Equality Act which reads:

> "To give effect to section 9 read with item 23(1) of Schedule 6 to the Constitution of the Republic of South Africa, 1996, so as to prevent and prohibit unfair discrimination and harassment; to promote equality and eliminate unfair discrimination; to prevent and prohibit hate speech; and to provide for matters connected therewith."

[16] Section 6 reads: "Neither the State nor any person may unfairly discriminate against any person." The "prohibited grounds" on which discrimination is barred, are defined in section 1 which repeats the list in section 9(3) of the Constitution.

[17] *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign and Another as* Amicus Curiae*)* 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) at paras 96 (Chaskalson CJ) and 434-437 (Ngcobo J); *South African National Defence Union v Minister of Defence and Others* CCT 65/06, 30 May 2007, as yet unreported at para 51. See also *NAPTOSA and Others v Minister of Education, Western Cape, and Others* 2001 (2) SA 112 (C) at 123I-J; 2001 (4) BCLR 388 (C) at 396I-J.

[18] *SANDU* above n 17 at para 52. See also *New Clicks* above n 17 at para 96. Section 7(2) of the Constitution reads: "The state must respect, protect, promote and fulfil the rights in the Bill of Rights."

challenge to the Act, courts must assume that the Equality Act is consistent with the Constitution and claims must be decided within its margins.

[41] The second issue is how the definition of "discrimination" in the Equality Act should be interpreted. 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".

[42] The School, the GBF and, to a lesser extent, the Department argued that in this case, there was no comparator in the form of a group that was treated better than Sunali. They contended that although a comparator is not specifically mentioned in the definition in the Equality Act, it should be implied as a requirement. Absent a comparator therefore, no discrimination could be established. Ms Pillay's response to this line of reasoning spawned a deeper debate about the extent to which the Act must be informed by section 9 of the Constitution and this Court's interpretation of that section.

[43] I deal with that deeper problem first and then turn to the specific question of the need for a comparator. 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" which includes section 9. That does not mean that the Act must be interpreted to restate the precise terms of section 9. The legislature, when enacting national

legislation to give effect to the right to equality, may extend protection beyond what is conferred by section 9. As long as the Act does not decrease the protection afforded by section 9 or infringe another right, a difference between the Act and section 9 does not violate the Constitution. It would therefore not be a problem if the definition of discrimination in the Act included forms of conduct not covered by section 9 as long as the prohibition of those forms of conduct conformed to the Bill of Rights.

[44] Fortunately, on the approach I adopt below, the final determination of the more direct question of whether the Equality Act always requires a comparator can be left for another day. I hold that there is an appropriate comparator available in this case. It is those learners whose sincere religious or cultural beliefs or practices are not compromised by the Code, as compared to those whose beliefs or practices are compromised. The ground of discrimination is still religion or culture as the Code has a disparate impact on certain religions and cultures. The norm embodied by the Code is not neutral, but enforces mainstream and historically privileged forms of adornment, such as ear studs which also involve the piercing of a body part, at the expense of minority and historically excluded forms. It thus places a burden on learners who are unable to express themselves fully and must attend school in an environment that does not completely accept them. In my view, the comparator is not learners who were granted an exemption compared with those who were not.[19] That approach identifies only the direct effect flowing from the School's decisions and fails to address the underlying indirect impact inherent in the Code itself.

[19] This is the conclusion reached by O'Regan J at para 164 below.

[45] It follows, therefore that the Code coupled with the decision to refuse Sunali an exemption will be discriminatory if they imposed a burden on her or withheld a benefit from her. In the circumstances of this case that will require a showing that Sunali's religious or cultural beliefs or practices have been impaired. It is to that question that I now turn.

Discrimination

[46] The prohibition of discrimination on the basis of religion or culture in terms of the Equality Act and section 9 of the Constitution is distinct from the protection of religion and culture provided for by sections 15[20] and 30[21] of the Constitution. The two rights may overlap, however, where the discrimination in question flows from an interference with a person's religious or cultural practices.[22] Therefore, in order to

[20] Section 15 reads:

> "**Freedom of religion, belief and opinion.—**
> (1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion.
> (2) Religious observances may be conducted at state or state-aided institutions, provided that—
> (a) those observances follow rules made by the appropriate public authorities;
> (b) they are conducted on an equitable basis; and
> (c) attendance at them is free and voluntary.
> (3) (a) This section does not prevent legislation recognising—
> (i) marriages concluded under any tradition, or a system of religious, personal or family law; or
> (ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.
> (b) Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution."

[21] Section 30 reads:

> "**Language and Culture.—**
> Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights."

[22] Discrimination on religious or cultural grounds might also be present where one religion or culture is treated in an inferior manner, even though the treatment does not interfere with their religious or cultural beliefs or practices.

establish discrimination in this case, Ms Pillay must show that the School in some way interfered with Sunali's participation in or practice or expression of her religion or culture. This inquiry is similar to an inquiry under sections 15 or 30, but it is not identical because the Court must go on to consider whether the discrimination, if any, was unfair.

[47] The alleged grounds of discrimination are religion and/or culture. It is important to keep these two grounds distinct. Without attempting to provide any form of definition, religion is ordinarily concerned with personal faith and belief, while culture generally relates to traditions and beliefs developed by a community. However, there will often be a great deal of overlap between the two; religious practices are frequently informed not only by faith but also by custom, while cultural beliefs do not develop in a vacuum and may be based on the community's underlying religious or spiritual beliefs. Therefore, while it is possible for a belief or practice to be purely religious or purely cultural, it is equally possible for it to be both religious and cultural.

[48] With that brief introduction in mind, I now address the facts of this specific case. The first question is whether Sunali is part of an identifiable religion or culture. It was not contended that Hinduism is not a religion or that Sunali is not a Hindu. The GBF argued however that Sunali did not show that she was part of an identifiable culture. While I do not propose to provide a comprehensive definition of culture, it is necessary to consider the matter briefly. The GBF supported Lord Fraser's

understanding of "ethnic group" in the United Kingdom's Race Relations Act 1976[23] as being an appropriate starting point to define "culture". Lord Fraser held that for a group to constitute an "ethnic group" it must at least have a long shared history and a cultural tradition of its own, including family and social customs and manners. Other relevant factors would include a common geographical origin; a common language; a common literature peculiar to the group; and a common religion different from that of neighbouring groups or from the general community surrounding it.[24]

[49] While foreign jurisprudence is useful, the context in which a particular pronouncement was made needs to be carefully examined.[25] Lord Fraser's remarks were crafted in the specific context of the English Race Relations Act and concerned legislation specifically directed at race and ethnicity, not at the concept of culture, broadly understood. They are accordingly, in my view, not a reliable guide in interpreting the Equality Act. In addition, discrimination on the basis of race, ethnic or social origin, religion and language is already prohibited by the Constitution and the Equality Act. Our understanding of "culture" must therefore extend beyond the limits of those terms which seem to have been the focus of Lord Fraser's definition. At the same time, if too wide a meaning is given to culture, "the category becomes so

[23] *Mandla and another v Dowell Lee and another* [1983] 1 All ER 1062 (HL) at 1066j-1067d.

[24] Id.

[25] See, for example, *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) at para 133 (Kriegler J); *Alexkor Ltd and Another v Richtersveld Community and Others* 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) at para 33.

broad as to be rather useless for understanding differences among identity groups."[26] (Footnote omitted.)

[50] The outer limits of culture fortunately do not concern us in this case. Even on the most restrictive understanding of culture, Sunali is part of the South Indian, Tamil and Hindu groups which are defined by a combination of religion, language, geographical origin, ethnicity and artistic tradition. Whether those groups operate together or separately matters not; combined or separate, they are an identifiable culture of which Sunali is a part.

[51] Next, we need to consider the religious and cultural significance of the nose stud. There were two interrelated areas of contention. The first was whether a claim that a practice has religious or cultural significance should be determined subjectively or objectively. The second concerned the absence of any evidence from Sunali herself.

[52] It is accepted both in South Africa[27] and abroad[28] that, in order to determine if a practice or belief qualifies as religious a court should ask only whether the claimant professes a sincere belief. There is however no such consensus concerning cultural

[26] Gutmann *Identity in Democracy* (Princeton University Press, Princeton 2003) at 38.

[27] *Prince v President, Cape Law Society, and Others* 2002 (2) SA 794 (CC); 2002 (3) BCLR 231 (CC) (*Prince II*) at para 42. The majority in *Prince II* did not express any disagreement with this part of Ngcobo J's judgment.

[28] See, for example, *Syndicat Northcrest v Amselem* [2004] 2 SCR 551 (SCC) at para 43; *Ross v New Brunswick School District No 15* [1996] 1 SCR 825 at paras 70-71; BVerfGE 33, 23 at 29; *Thomas v Review Board of the Indiana Employment Security Division* 450 US 707 (1981) at 715-716; *United States v Ballard* 322 US 78 (1944) at 86-87; and *In re Chikweche* 1995 (4) SA 284 (ZSC) at 289J.

practices and beliefs. There was much argument in this Court that because culture is inherently an associative practice, a more objective approach should be adopted when dealing with cultural beliefs or practices. It is unnecessary in this case to engage too deeply in that debate as both the subjective and objective evidence lead to the same conclusion. It is however necessary to make two points.

[53] Firstly, cultural convictions or practices may be as strongly held and as important to those who hold them as religious beliefs are to those more inclined to find meaning in a higher power than in a community of people. The notion that "we are not islands unto ourselves"[29] is central to the understanding of the individual in African thought.[30] It is often expressed in the phrase *umuntu ngumuntu ngabantu*[31] which emphasises "communality and the inter-dependence of the members of a community"[32] and that every individual is an extension of others. According to Gyekye, "an individual human person cannot develop and achieve the fullness of his/her potential without the concrete act of relating to other individual persons".[33] This thinking emphasises the importance of community to individual identity and

[29] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC) at para 37.

[30] A recognition of the importance of the community to the individual is by no means unique to African thought. See, for example, Kymlicka *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Claredon Press, Oxford 1995) at 89-90 quoting and discussing Margalit and Raz "National Self Determination" (1990) *Journal of Philosophy* 439 at 447-449; Donders *Towards a Right to Cultural Identity?* (Intersentia, Antwerpen 2002) especially at 30-31 and Almqvist *Human Rights, Culture and the Rule of Law* (Hart Publishing, Oxford and Portland 2005) especially at 40-42.

[31] This translates literally as "a person is a person through other people".

[32] *Bhe and Others v Magistrate, Khayelitsha, and Others (Commission for Gender Equality as* Amicus Curiae*); Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa and Another* 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) at para 163 (Ngcobo J).

[33] Gyekye *Person and Community: Ghanaian Philosophical Studies* (1992) reprinted as "Person and Community in African Thought" in Coetzee and Roux (eds) *Philosophy from Africa: A Text with Readings* (Oxford University Press, Cape Town 1998) at 321.

hence to human dignity. Dignity and identity are inseparably linked as one's sense of self-worth is defined by one's identity.[34] Cultural identity is one of the most important parts of a person's identity precisely because it flows from belonging to a community and not from personal choice or achievement. And belonging involves more than simple association; it includes participation and expression of the community's practices and traditions.

[54] Secondly, while cultures are associative, they are not monolithic. The practices and beliefs that make up an individual's cultural identity will differ from person to person within a culture: one may express their culture through participation in initiation rites, another through traditional dress or song and another through keeping a traditional home. While people find their cultural identity in different places, the importance of that identity to their being in the world remains the same. There is a danger of falling into an antiquated mode of understanding culture as a single unified entity that can be studied and defined from outside. As Martin Chanock warns us:

> "The idea of culture derived from anthropology, a discipline which studied the encapsulated exotic, is no longer appropriate. There are no longer (if there ever were) single cultures in any country, polity or legal system, but many. Cultures are complex conversations within any social formation. These conversations have many voices."[35]

[34] See, for example, *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at para 59 and *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) at para 26.

[35] Chanock "Human Rights and Cultural Branding: Who Speaks and How" in An-Na'im *Cultural Transformation and Human Rights in Africa* (Zed Books, London 2002) at 41. See also Benhabib *The Claims of Culture: Equality and Diversity in the Global Era* (Princeton University Press, Princeton 2002) especially at 3-9.

Cultures are living and contested formations. The protection of the Constitution extends to all those for whom culture gives meaning, not only to those who happen to speak with the most powerful voice in the present cultural conversation.

[55] The second debate I mentioned earlier related to the absence of any evidence from Sunali. The School argued that Sunali's failure to testify in the Equality Court or to provide any affidavit renders it impossible for a court to determine what her beliefs are and this Court is accordingly precluded from making a finding of discrimination.

[56] It is always desirable, and may sometimes be vital, to hear from the person whose religion or culture is at issue. That is often no less true when the belief in question is that of a child. Legal matters involving children often exclude the children and the matter is left to adults to argue and decide on their behalf. In *Christian Education South Africa v Minister of Education*[36] this Court held, in the context of a case concerning children, that their

> "actual experiences and opinions would not necessarily have been decisive, but they would have enriched the dialogue, and the factual and experiential foundations for the balancing exercise in this difficult matter would have been more secure."[37]

That is true for this case as well. The need for the child's voice to be heard is perhaps even more acute when it concerns children of Sunali's age who should be increasingly taking responsibility for their own actions and beliefs.

[36] 2000 (4) SA 757 (CC); 2000 (10) BCLR 1051 (CC).

[37] Id at para 53.

[57] However, as an analysis of the evidence shows, Sunali's failure to testify is not fatal to Ms Pillay's case. It is important to note that the School does not directly challenge the veracity of Ms Pillay's testimony; it simply argues that we should have heard Sunali as well. I agree with Ms Pillay that any difficulties they had with her testimony should have been raised in the Equality Court during cross-examination, and not for the first time on appeal. It is possible that if Ms Pillay had been challenged on whether she correctly represented Sunali's belief, she would have called Sunali, who was present in court, as a witness.

[58] In any event, we have the specific admission of Mrs Martin that the nose stud has cultural significance to Sunali although she denies it has independent religious significance. And we know how Sunali acted. Although when Mrs Martin first confronted her about the nose stud she agreed to remove it, she consistently thereafter defied the will of the School in order to adhere to her belief. The initial failure can easily be explained as a young woman uncertain about the consequences of standing up against the imposing authority of the School's headmistress. Sunali also endured a large measure of insensitive treatment from her peers, including the prefects of the School, and media exposure, yet continued to stand by her belief. All this points to the conclusion that Sunali held a sincere belief that the nose stud was part of her religion and culture.

[59] The expert evidence of Dr Rambilass, the School's own expert witness, confirms the impression that Sunali's own conduct created. The Doctor accepted that the nose stud is a cultural practice that clearly has "significance and value" and testified that according to Hindu tradition, nose piercing is part of the Shringaar which is concerned with love, beauty and adornment, not from the religious texts. While Dr Rambilass disputed that the nose stud had independent religious significance, he accepted under cross-examination that it is difficult to separate Hindu culture and Hindu religion and that there are many different sects of Hinduism with different beliefs and practices. His evidence on religion was also self-consciously focused on defining Hindu religion according to the specific wording of the Vedic texts rather than on a broader view of religion as being informed and even defined by culture, tradition and practice.

[60] In conclusion, the evidence shows that the nose stud is not a mandatory tenet of Sunali's religion or culture; Ms Pillay has admitted as much. But the evidence does confirm that the nose stud is a voluntary expression of South Indian Tamil Hindu culture, a culture that is intimately intertwined with Hindu religion, and that Sunali regards it as such. The question arises whether the nose stud should be classified as a religious or cultural practice, or both. This Court has noted that "the temptation to force [grounds of discrimination] into neatly self-contained categories should be resisted."[38] That is particularly so in this case where the evidence suggests that the borders between culture and religion are malleable and that religious belief informs

[38] *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) at para 50; 1997 (11) BCLR 1489 (CC) at para 49.

cultural practice and cultural practice attains religious significance. As noted above, that will not always be the case: culture and religion remain very different forms of human association and individual identity, and often inform peoples' lives in very different ways. But in this matter, culture and religion sing with the same voice and it is necessary to understand the nose stud in that light – as an expression of both religion and culture.

[61] The final question is whether the Equality Act and the Constitution apply to voluntary religious and cultural practices. This question has not yet arisen before South African courts. The School and the GBF have argued that voluntary practices should not be protected or should be accorded less protection while Ms Pillay has taken the opposite stance.

[62] The traditional basis for invalidating laws that prohibit the exercise of an obligatory religious practice is that it confronts the adherents with a Hobson's choice between observance of their faith and adherence to the law.[39] There is however more to the protection of religious and cultural practices than saving believers from hard choices. As stated above, religious and cultural practices are protected because they are central to human identity and hence to human dignity which is in turn central to equality.[40] Are voluntary practices any less a part of a person's identity or do they affect human dignity any less seriously because they are not mandatory?

[39] See, for example, *Prince v President, Cape Law Society, and Others* 2001 (2) SA 388 (CC); 2001 (2) BCLR 133 (CC) (*Prince I*) at para 26; *Prince II* above n 27 at paras 145-147 (Sachs J); *Christian Education* above n 36 at para 35.

[40] See above n 34.

[63] Freedom is one of the underlying values of our Bill of Rights[41] and courts must interpret all rights to promote the underlying values of "human dignity, equality and freedom".[42] These values are not mutually exclusive but enhance and reinforce each other. In *Ferreira v Levin NO and Others and Vryenhoek and Others v Powell NO and Others*[43] Ackermann J wrote 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."[44]

[64] A necessary element of freedom and of dignity of any individual is an "entitlement to respect for the unique set of ends that the individual pursues."[45] One of those ends is the voluntary religious and cultural practices in which we participate. That we choose voluntarily rather than through a feeling of obligation only enhances the significance of a practice to our autonomy, our identity and our dignity.

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[41] Section 7(1) reads: "This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and *freedom*." (Emphasis added.)

[42] Section 39(1)(a) reads: "When interpreting the Bill of Rights, a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and *freedom*". (Emphasis added.)

[43] 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC).

[44] Id at para 49. While the majority in *Ferreira v Levin* distanced themselves from Ackermann J's broad construction of freedom as a self-standing right, there is nothing to suggest they questioned his link between freedom and dignity.

[45] See Woolman "Dignity" in Woolman et al (eds) *Constitutional Law of South Africa* 2 ed (Juta, Cape Town 2006) at 36-11.

[65] The protection of voluntary as well as obligatory practices also conforms to the Constitution's commitment to affirming diversity. It is a commitment that is totally in accord with this nation's decisive break from its history of intolerance and exclusion. Differentiating between mandatory and voluntary practices does not celebrate or affirm diversity, it simply permits it. That falls short of our constitutional project which not only affirms diversity, but promotes and celebrates it. We cannot celebrate diversity by permitting it only when no other option remains. As this Court held 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*:[46]

> "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."[47] (Footnotes omitted.)

These values are shared with other jurisdictions, such as Canada, to name one, where the Supreme Court has affirmed the necessity of protecting voluntary religious practices.[48]

[46] 2006 (1) SA 524 (CC); 2006 (3) BCLR 355 (CC).

[47] Id at para 60.

[48] See *Syndicat* above n 28 at paras 67-68.

[66] The protection of voluntary practices applies equally to culture and religion. Indeed, it seems to me that it may even be more vital to protect non-obligatory cultural practices. Cultures, unlike religions, are not necessarily based on tenets of faith but on a collection of practices, ideas or ways of being. While some cultures may have obligatory rules which act as conditions for membership of the culture, many cultures, unlike many religions, will not have an authoritative body or text that determines the dictates of the culture. Any single member of a culture will seldom observe all those practices that make up the cultural milieu, but will choose those which she or he feels are most important to her or his own relationship to and expression of that culture. To limit cultural protection to cultural obligations would, for many cultures and their members, make the protection largely meaningless.

[67] It follows that whether a religious or cultural practice is voluntary or mandatory is irrelevant at the threshold stage of determining whether it qualifies for protection. However, the centrality of the practice, which may be affected by its voluntary nature, is a relevant question in determining the fairness of the discrimination. That is a point I return to later.

[68] I therefore find that Sunali was discriminated against on the basis of both religion and culture in terms of section 6 of the Equality Act. I proceed now to consider whether or not that discrimination was fair.

Unfairness

[69] Section 13(2)(a) of the Equality Act[49] tracks section 9(5) of the Constitution[50] in placing the onus on the applicants to prove that discrimination on a listed ground is fair. Section 14 of the Equality Act deals with the determination of unfairness. It reads:

> "(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;

[49] Section 13(2)(a) reads:

> "If the discrimination did take place—
> (a) on a ground in paragraph (a) of the definition of 'prohibited grounds', then it is unfair, unless the respondent proves that the discrimination is fair".

[50] Section 9(5) reads: "Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

(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."

[70] The list of factors in section 14(3) includes issues that traditionally fall under a fairness analysis ((a), (b), (c) and (e))[51] and questions normally relevant to a limitation analysis under section 36(1) of the Constitution[52] ((d), (f), (g) and (h)). Accordingly, the fairness test under the Equality Act as it stands may involve a wider range of factors than are relevant to the test of fairness in terms of section 9 of the Constitution. Whether that approach is consistent with the Constitution is not before us, and we address the question on the legislation as it stands.

[71] Before considering the fairness of the discrimination in this case, it will be convenient to make a few comments about the form of the unfairness inquiry under the Equality Act in circumstances such as the present. Much was said by both parties in argument about the principle of "reasonable accommodation". Ms Pillay specifically argued that Sunali's case should be decided on that principle. It is

[51] See, for example, *Harksen v Lane* above n 38 at para 51 and para 50 respectively.

[52] Section 36(1) reads:

"**Limitation of Rights.—**
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."

therefore necessary to consider both the content of the idea of reasonable accommodation and its place in the Equality Act.

[72] The concept of reasonable accommodation is not new to our law – this Court has repeatedly expressed the need for reasonable accommodation when considering matters of religion.[53] The Employment Equity Act[54] defines reasonable accommodation as "any modification or adjustment to a job or to the working environment that will enable a person from a designated group to have access to or participate or advance in employment"[55] and recognises making reasonable accommodation for designated groups as an affirmative action measure.[56] There is also specific mention of the concept in the Equality Act. It recognises that "failing to take steps to reasonably accommodate the needs" of people on the basis of race,[57] gender[58] or disability[59] will amount to unfair discrimination. The Equality Act places a duty on the state to "develop codes of practice . . . in order to promote equality, and develop guidelines, including codes in respect of reasonable accommodation"[60] and permits courts to order that a group or class of persons be reasonably

[53] *Prince I* above n 39 at para 17; *Prince II* above n 27 at para 76 (Ngcobo J) and paras 146-148 and 170-172 (Sachs J); *Fourie* above n 46 at para 159. The High Court has also mentioned the principle on at least two occasions relating to employment. See *McLean v Sasol Mine (Pty) Ltd Secunda Collieries; McLean v Sasol Pension Fund* 2003 (6) SA 254 (W) at para 45; *Public Servants Association of South Africa and Others v Minister of Justice and Others* 1997 (3) SA 925 (T) at 976G.

[54] Act 55 of 1998.

[55] Section 1.

[56] Section 15(2)(c).

[57] Section 7(e).

[58] Section 8(h).

[59] Section 9(c).

[60] Section 25(1)(c)(iii).

accommodated.[61] Finally, section 14(3)(i)(ii) lists as a factor for the determination of fairness the question whether the applicant has taken reasonable steps to accommodate diversity.

[73] But what is the content of the principle? At its core is the notion that sometimes the community, whether it is the State, an employer or a school, must take positive measures and possibly incur additional hardship or expense in order to allow all people to participate and enjoy all their rights equally. It ensures that we do not relegate people to the margins of society because they do not or cannot conform to certain social norms. In *Christian Education*,[62] 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 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."[63]

[61] Section 21(2)(i).

[62] Above n 36.

[63] Id at para 35.

[74] The idea extends beyond religious belief. Its importance is particularly well illustrated by the application of reasonable accommodation to disability law. As I have already mentioned, the Equality Act specifically requires that reasonable accommodation be made for people with disabilities. Disabled people are often unable to access or participate in public or private life because the means to do so are designed for able-bodied people. The result is that disabled people can, without any positive action, easily be pushed to the margins of society:

> "Exclusion from the mainstream of society results from the construction of a society based solely on 'mainstream' attributes to which disabled persons will never be able to gain access. Whether it is the impossibility of success at a written test for a blind person, or the need for ramp access to a library, the discrimination does not lie in the attribution of untrue characteristics to the disabled individual. The blind person cannot see and the person in a wheelchair needs a ramp. Rather, it is the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation, which results in discrimination against them."[64]

[75] While the extent of this exclusion is most powerfully felt by the disabled, the same exclusion is inflicted on all those who are excluded by rules that fail to accommodate those who depart from the norm. Our society which values dignity, equality, and freedom must therefore require people to act positively to accommodate diversity. Those steps might be as simple as granting and regulating an exemption from a general rule or they may require that the rules or practices be changed or even that buildings be altered or monetary loss incurred.

[64] *Eaton v Brant County Board of Education* [1997] 1 SCR 241 at para 67.

[76] The difficult question then is not whether positive steps must be taken, but how far the community must be required to go to enable those outside the "mainstream" to swim freely in its waters. This is an issue which has been debated both in this Court[65] and abroad[66] and different positions have been taken. For instance, although the term "undue hardship" is employed as the test for reasonable accommodation in both the United States and Canada, the United States Supreme Court has held that employers need only incur "a *de minimis* cost" in order to accommodate an individual's religion,[67] whilst the Canadian Supreme Court has specifically declined to adopt that standard[68] and has stressed that "more than mere negligible effort is required to satisfy the duty to accommodate."[69] The latter approach is more in line with the spirit of our constitutional project which affirms diversity. However, the utility of either of these phrases is limited as ultimately the question will always be a contextual one dependant not on its compatibility with a judicially created slogan but with the values and principles underlying the Constitution.[70] Reasonable accommodation is, in a sense, an exercise in proportionality that will depend intimately on the facts.

[77] It is now necessary to crystallise the role that reasonable accommodation can play in the Equality Act. As noted earlier, the principle is mentioned on a number of occasions in the Equality Act. What concerns us in this case, however, is section

[65] See *Prince II* above n 27.

[66] For a useful summary of the various positions see Pretorius et al *Employment Equity Law* (LexisNexis Butterworths, Durban 2001) at 7-6–7-18.

[67] *Trans World Airlines Inc v Hardison* 432 US 63 (1977) at 84.

[68] *Central Okanagan School District No 23 v Renaud* [1992] 2 SCR 970 at 983g-985a.

[69] Id at 984a.

[70] See *Prince II* above n 27 at para 155 (Sachs J).

14(3)(i)(ii) which states that taking reasonable steps to accommodate diversity is a factor for determining the fairness of discrimination.[71] From this it is clear that reasonable accommodation will always be an important factor in the determination of the fairness of discrimination. It would however be wrong to reduce the test for fairness to a test for reasonable accommodation, particularly because the factors relevant to the determination of fairness have been carefully articulated by the legislature and that option has been specifically avoided.

[78] There may be circumstances where fairness requires a reasonable accommodation, while in other circumstances it may require more or less, or something completely different. It will depend on the nature of the case and the nature of the interests involved. Two factors seem particularly relevant. First, reasonable accommodation is most appropriate where, as in this case, discrimination arises from a rule or practice that is neutral on its face and is designed to serve a valuable purpose, but which nevertheless has a marginalising effect on certain portions of society. Second, the principle is particularly appropriate in specific localised contexts, such as an individual workplace or school, where a reasonable balance between conflicting interests may more easily be struck.[72] Even where fairness requires a reasonable accommodation, the other factors listed in section 14 will always remain relevant.

[71] Section 14 is quoted in para 69 above.

[72] See the concurring judgment of Deschamps and Abella JJ in *Multani v Commission Scolaire Marguerite-Bourgeoys* [2006] 1 SCR 256 at paras 129-134.

[79] The present case bears both these characteristics and therefore, in my view, fairness required a reasonable accommodation. Whether that required the School to permit Sunali to wear the nose stud depends on the importance of the practice to Sunali on the one hand, and the hardship that permitting her to wear the stud would cause the School. Before I address that question, there were two points raised about the context within which fairness should be determined. These relate to the need for deference and the consultation that went into the making of the Code.

Deference

[80] The School and the GBF argued that courts should show a measure of deference to governing bodies that are statutorily required to run schools and have the necessary expertise to do so. They relied for this proposition on decisions of the European Court of Human Rights[73] and the House of Lords[74] which invoke the doctrine of the "margin of appreciation". The doctrine has been described as

> "a recognition by the [European Court] that the domestic authorities of any given Member State are generally in a better position than an international court of supervisory jurisdiction to reach a decision on an individual case or to determine the extent to which a measure was 'necessary' to deal with a particular issue."[75]

[73] *Sahin v Turkey* (2005) 41 EHRR 8 at paras 100-102.

[74] *R (on the application of Begum) v Head Teacher and Governors of Denbigh High School* [2006] 2 All ER 487 (HL) at para 64.

[75] Gordon et al *The Strasbourg Case Law: Leading Cases from the European Human Rights Reports* (Sweet and Maxwell, London 2001) at 4.

This Court has held that the doctrine is not a useful guide when deciding either whether a right has been limited[76] or whether such a limitation is justified.[77]

[81] This Court has recognised the need for judicial deference in reviewing administrative decisions where the decision-maker is, by virtue of his or her expertise, especially well-qualified to decide.[78] It is true that the Court must give due weight to the opinion of experts, including school authorities, who are particularly knowledgeable in their area, depending on the cogency of their opinions. The question before this Court, however, is whether the fundamental right to equality has been violated, which in turn requires the Court to determine what obligations the School bears to accommodate diversity reasonably. Those are questions that courts are best qualified and constitutionally mandated to answer. This Court cannot abdicate its duty by deferring to the School's view on the requirements of fairness. That approach is obviously incorrect for the further reason that it is for the School to show that the discrimination was fair. A court cannot defer to the view of a party concerning a contention that that same party is bound to prove.

Consultation

[82] In urging that the Code should be respected, the School stressed the fact that it was devised after extensive consultation with parents, educators, staff, and learners,

[76] *NCGLE v Minster of Justice* above n 34 at para 41.

[77] *S v Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 109 (Chaskalson P).

[78] The reasons both for deference in administrative review, and for limiting it, were well expressed in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para 48.

and accordingly represented the combined wisdom of all who participated in its construction and should therefore be respected. There is no doubt that consultation and public participation in local decision-making are good and deserve to be applauded. They promote and deepen democracy. In the context of the Code, it means that the School community is involved in the running of the School and acquires a sense of ownership over the Code. In *Doctors for Life v Speaker of the National Assembly and Others*[79] Ngcobo J held, in the context of public participation in crafting national legislation, that:

> "participation by the public on a continuous basis provides vitality to the functioning of representative democracy. It encourages citizens of the country to be actively involved in public affairs, identify themselves with the institutions of government and become familiar with the laws as they are made. It enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of. It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice. It strengthens the legitimacy of legislation in the eyes of the people."[80]

[83] This, however, does not immunise the resultant decisions, in effect the opinion of the school community, from constitutional scrutiny and review.[81] The reality is that many individual communities still retain historically unequal power relations or historically skewed population groups which may make it more likely that local decisions will infringe on the rights of disfavoured groups. In sum, while local democratic processes and consultation are important constitutional values in their own

[79] 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC).

[80] Id at para 115 and at 1442B-D respectively.

[81] *Makwanyane* above n 77 at para 88 (Chaskalson P).

right, their role in the evaluation of the substance of decisions, if any, should not be overstated.

[84] I turn now to the question of the importance of the nose stud to Sunali and its effect on the School.

The severity of the infringement

[85] The School submitted that the infringement of Sunali's right, if any, is slight, because Sunali can wear the nose stud outside of school. I do not agree. The practice to which Sunali adheres is that once she inserts the nose stud, she must never remove it. Preventing her from wearing it for several hours of each school day would undermine the practice and therefore constitute a significant infringement of her religious and cultural identity. What is relevant is the symbolic effect of denying her the right to wear it for even a short period; it sends a message that Sunali, her religion and her culture are not welcome.

[86] The School further argued that the nose stud is not central to Sunali's religion or culture, but is only an optional practice. I agree that the centrality of a practice or a belief must play a role in determining how far another party must go to accommodate that belief. The essence of reasonable accommodation is an exercise of proportionality. Persons who merely appear to adhere to a religious and/or cultural practice, but who are willing to forego it if necessary, can hardly demand the same adjustment from others as those whose identity will be seriously undermined if they

do not follow their belief. The difficult question is how to determine centrality. Should we enquire into the centrality of the practice or belief to the community, or to the individual?

[87] While it is tempting to consider the objective importance or centrality of a belief to a particular religion or culture in determining whether the discrimination is fair, that approach raises many difficulties. In my view, courts should not involve themselves in determining the objective centrality of practices, as this would require them to substitute their judgement of the meaning of a practice for that of the person before them and often to take sides in bitter internal disputes. This is true both for religious and cultural practices. If Sunali states that the nose stud is central to her as a South Indian Tamil Hindu, it is not for the Court to tell her that she is wrong because others do not relate to that religion or culture in the same way.

[88] Centrality must be judged with reference only to how important the belief or practice is to the claimant's religious or cultural identity.[82] In reaching that decision the Court can properly look at a range of evidence including evidence of the objective centrality of the practice to the community at large. That evidence however is only relevant in so far as it helps to answer the primary inquiry of subjective centrality. The fact that a practice is voluntary may also be relevant as many people will not feel that voluntary practices are central to their religious or cultural identity. But there will also be those who, although they do not feel obliged to observe a certain practice, feel

[82] See the debate between the majority and minority in *Lyng, Secretary of Agriculture, et al v Northwest Indian Cemetery Protective Association et al* 485 US 439 (1988) at 457-458 and 474-475. Despite their disagreement, both the majority and minority seem to support a purely subjective approach to determining centrality.

that it is central to their identity that they do so. They too deserve protection. In sum, the School and this Court must consider all the relevant evidence, but the ultimate question they must answer is: "How central is the nose stud to Sunali's religious and cultural identity?" However, the need for a subjective investigation takes us back to the complaint that Sunali did not give evidence regarding that importance.

[89] Ms Pillay's case would no doubt have been assisted by Sunali's evidence. However, the Court must evaluate such evidence as there is. Ms Pillay stated that the nose stud was not imposed on Sunali; she had wanted her nose pierced since the age of four. The nose stud was not worn for fashion reasons but was inserted as part of a traditional ritual and an expression of her religious and cultural identity. In her first letter to the School, Ms Pillay wrote that the stud "serves not only to indicate that we value our daughters, but in keeping with Indian tradition, that our daughters are the Luxmi (Goddess of Prosperity) and Light of the house." In her testimony Ms Pillay stated that by inserting the stud:

> "we acknowledge our daughters, the women in our family, as a very vital part of family life. We honour them and we honour the divine within them. And that's important. It's important for every child to know that she garners respect."

[90] The wearing of the nose stud was also not without consequences to Sunali. She was obviously under a great deal of stress and her grades dropped because of the School's reaction to the nose stud and the related publicity. She was regularly required to explain herself to staff members and prefects at the school and was threatened with disciplinary action. In spite of these difficulties, Sunali did not alter

her conduct or belief. None of this evidence was disputed and it all points to a very strong belief on Sunali's part that the nose stud was important for her identity. I am accordingly convinced that the practice was a peculiar and particularly significant manifestation of her South Indian, Tamil and Hindu identity. It was her way of expressing her roots and her faith. While others may have expressed the same faith, traditions and beliefs differently or not at all, the evidence shows that it was important for Sunali to express her religion and culture through wearing the nose stud.

[91] The next string of the School's centrality bow was that the infringement of Sunali's right to equality is less severe because the nose stud is a cultural rather than a religious adornment. This was also the basis originally relied upon by the School for refusing the exemption and why it could recognise the stud's cultural significance without granting Sunali an exemption. To my mind the argument is flawed. As stated above,[83] religious and cultural practices can be equally important to a person's identity. What is relevant is not whether a practice is characterised as religious or cultural but its meaning to the person involved. Pre-determining that importance based on what will often be an imperfect or artificial categorisation reinforces ideas about the respective roles and importance of religion and culture in peoples' lives and fails to accommodate those who do not conform to that stereotype.

[92] The School also argued that if Sunali did not like the Code, she could simply go to another school that would allow her to wear the nose stud. I cannot agree. In my

[83] At para 53.

view the effect of this would be to marginalise religions and cultures, something that is completely inconsistent with the values of our Constitution. As already noted, our Constitution does not tolerate diversity as a necessary evil, but affirms it as one of the primary treasures of our nation.[84] There may, however, be occasions where the specific factual circumstances make the availability of another school a relevant consideration in searching for a reasonable accommodation. However, there are no such circumstances in this case and the availability of another school is therefore not a relevant consideration.

The Code limits freedom of expression

[93] While considering the centrality of the practice to Sunali or the effect that its prohibition would have on her dignity, it bears mentioning that the ban affects other constitutional rights as well. The dual purpose of the NTVS and FXI's submission was to stress the relevance of the right to freedom of expression to the case and to show that it had been infringed. They argued that freedom of expression was relevant both as a self-standing right and as a relevant factor in determining unfair discrimination. This was disputed by the applicants and the GBF on the basis that the case had been brought under the Equality Act which does not make provision for non-equality claims.

[94] It is unnecessary in this case to decide whether it is possible to rely directly on the right to freedom of expression under the Equality Act, or whether the ban on the

[84] See *Fourie* above n 46 at para 60.

nose stud is an unjustifiable limit on that right. It suffices to say that the extent to which discrimination impacts on other rights will be a relevant consideration in the determination of whether the discrimination is fair and that the ban on the nose stud limited Sunali's right to express her religion and culture which is central to the right to freedom of expression.

The effect on the School

[95] It is no doubt true that even the most vital practice of a religion or culture can be limited for the greater good.[85] No belief is absolute, but those that are closer to the core of an individual's identity require a greater justification to limit. The question is whether, considering the importance of the stud to Sunali, allowing her to wear the stud would impose too great a burden on the School.

[96] The primary argument of both the School and the GBF was that allowing Sunali to wear the nose stud or allowing others like her similar exemptions would impact negatively on the discipline in schools and, as a result, on the quality of the education they provide.

[97] This evaluation is correctly characterised by Ms Pillay as relating to the factors in section 14(3)(f), (g) and (h) of the Equality Act that are also part of the traditional section 36 analysis. It is also part of determining whether allowing the stud imposes an undue burden. If allowing the stud would cause indiscipline and a drop in

[85] See *Prince II* above n 27 at paras 128-139 and *Christian Education* above n 36 at paras 29-31.

academic standards, that might indeed be an undue burden to impose on the School.[86] It is helpful to separate the inquiry into its constitutive parts: Is there a legitimate purpose? Does the limitation achieve the purpose? Are less restrictive means available to achieve the purpose?

[98] Both discipline and education are legitimate goals. However, care must be taken not to state the School's interest too broadly. Sunali's interest in wearing her nose stud could never outweigh the general importance of ensuring discipline in schools. The interest of the School must be confined to refusing Sunali an exemption, not to the wearing of uniforms in general because this case is not about uniforms, but about exemptions to existing uniforms.[87]

[99] This is important because Mrs Martin presented evidence about the importance of uniforms in promoting a culture of discipline and respect for authority. According to her, children, especially teenagers, need boundaries and the school environment should be a place where the influences of modern commercial life are moderated to create a better learning environment. The pressures of modern fashion are particularly intense as girls try to imitate and out-do each other. Uniforms help to limit the impact of that competition on the learning experience. There is no reason to question this

[86] See, for example, *Canady v Bossier Parish School Board* 240 F 3d 437 (5th Cir 2001) at para 8.

[87] See *Prince II* above n 27 at para 47 citing the dissenting judgment of Blackmun J in *Employment Division, Department of Human Resources of Oregon, et al v Smith, et al* 494 US 872 (1990) at 911.

evidence and Ms Pillay does not do so. The guidelines too recognise the importance of uniforms in the school environment.[88]

[100] Rules are important to education. Not only do they promote an important sense of discipline in children, they prepare them for the real world which contains even more rules than the schoolyard. Schools belong to the communities they serve and that ownership implies a responsibility not only to make rules that fit the community, but also to abide by those rules. Nothing in this judgment should be interpreted as encouraging or condoning the breaking of school rules.

[101] But this case is not about the constitutionality of school uniforms. It is about granting religious and cultural exemptions to an existing uniform. The admirable purposes that uniforms serve do not seem to be undermined by granting religious and cultural exemptions. There is no reason to believe, nor has the School presented any evidence to show, that a learner who is granted an exemption from the provisions of the Code will be any less disciplined or that she will negatively affect the discipline of others.

[102] I am therefore not persuaded that refusing Sunali an exemption achieves the intended purpose. Indeed, the evidence shows that Sunali wore the stud for more than two years without any demonstrable effect on school discipline or the standard of education. Granting exemptions will also have the added benefit of inducting the

[88] Regulation 6.

learners into a multi-cultural South Africa where vastly different cultures exist side-by-side.

[103] The only confirmed effect of granting Sunali an exemption is that some of the girls might feel it is unfair. While that is unfortunate, neither the Equality Act nor the Constitution require identical treatment. They require equal concern and equal respect.[89] They specifically recognise that sometimes it is fair to treat people differently. In *Christian Education*[90] this Court 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."[91]

[104] This reasoning can and should be explained to all the girls in the School.[92] Teaching the constitutional values of equality and diversity forms an important part of education. This approach not only teaches and promotes the rights and values enshrined in the Constitution, it also treats the learners as sensitive and autonomous people who can understand the impact the ban has on Sunali.

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[89] *Fourie* above n 46 at paras 60, 95 and 112; *Pretoria City Council v Walker* 1998 (2) SA 363 (CC); 1998 (3) BCLR 257 (CC) at paras 81 (Langa DP) and 130 (Sachs J); *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) at para 41; *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) at para 32.

[90] Above n 36.

[91] Id at para 42.

[92] This matter was pertinently dealt with in *Multani* above n 72 at para 76.

[105] The School and the GBF made two more specific arguments about the effect of the nose stud on the School. First, they argued that the nose stud should be treated differently because it is also a popular fashion item. Second, they contended that even if the nose stud was acceptable, allowing it would necessitate that many undesirable adornments be permitted. I address each in turn.

[106] Asserting that the nose stud should not be allowed because it is also a fashion symbol fails to understand its religious and cultural significance and is disrespectful of those for whom it is an important expression of their religion and culture.[93] In addition, to uphold the School's reasoning would entail greater protection for religions or cultures whose symbols are well known; those are in fact often the ones least in need of protection. It would also have the absurd result that if a turban, yarmulke or headscarf became part of popular fashion they would no longer be constitutionally protected, while they have constitutional protection as long as they remain on the fringes of society. I accept that the popularity of the nose stud may make it more difficult to determine if a learner is practicing her religion or culture or trying to impress her friends. But once the former is established, as it has been in this case, the mainstream popularity of a religious or cultural practice can never be relevant.

[107] The other argument raised by the School took the form of a "parade of horribles"[94] or slippery slope scenario that the necessary consequence of a judgment in

[93] Id at paras 71 and 74.

[94] This term was employed by O'Connor J in *Oregon v Smith* to describe the majority's list of extreme examples of possible religious exemptions which they employed to justify their decision that neutral rules would not violate the First Amendment. See *Oregon v Smith* above n 87 at 902.

favour of Ms Pillay is that many more learners will come to school with dreadlocks, body piercings, tattoos and loincloths. This argument has no merit. Firstly, this judgment applies only to bona fide religious and cultural practices. It says little about other forms of expression. The possibility for abuse should not affect the rights of those who hold sincere beliefs. Secondly, if there are other learners who hitherto were afraid to express their religions or cultures and who will now be encouraged to do so, that is something to be celebrated, not feared. As a general rule, the more learners feel free to express their religions and cultures in school, the closer we will come to the society envisaged in the Constitution. The display of religion and culture in public is not a "parade of horribles" but a pageant of diversity which will enrich our schools and in turn our country. Thirdly, acceptance of one practice does not require the School to permit all practices. If accommodating a particular practice would impose an unreasonable burden on the School, it may refuse to permit it.

The manner in which the matter was raised

[108] One final issue needs attention. It is common cause that the way in which Ms Pillay dealt with the problem left much to be desired and the School has quite rightly complained about it. The School argued that this should count against Ms Pillay in the determination of whether the conduct of the School was unfair. Ms Pillay has accepted that it would have been preferable to approach the School before the nose stud was inserted, rather than to confront the School with the nose stud and demand that it should be accommodated. Ms Pillay has apologised for her conduct.

[109] It is obviously preferable for these matters to be dealt with by approaching the relevant authority before the issue arises. It indicates an important degree of respect and a desire to resolve the matter amicably rather than through confrontation. In *South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others*[95] Sachs J pointed out, in the context of television broadcasting of court proceedings, that

> "it is not in the interests of justice for matters such as these to be resolved under a sword of Damocles. All the questions concerning [these difficult issues] should be worked out through an appropriate process of negotiation. This not only establishes clear points of reference. It gives sufficient time for all those involved to accustom themselves to the major changes involved."[96]

While it is uncertain whether there would have been a different result, the process of negotiation is inherently valuable. It is part of a search for a reasonable accommodation that will suit both parties.

[110] It would be perfectly correct for a school, through its code of conduct to set strict procedural requirements for exemption. It would also be appropriate for the parents and, depending on their age, the learners, to be required to explain in writing beforehand why they require an exemption. That would ensure that these difficult matters are resolved responsibly, fairly and amicably. It seems that the absence of such a procedure in the Code is largely to blame, not only for the manner in which the complaint was raised, but for the way in which it was resolved. It is a serious obstacle

[95] 2007 (1) SA 523 (CC); 2007 (2) BCLR 167 (CC).

[96] Id at para 152. See also *Central Okanagan* above n 68 at 995f-996f.

to a search for reasonable accommodation that an appropriate procedure was not in place.

[111] That said, the manner in which the matter was raised can have only minimal relevance to the question of fairness. Sunali should not be adversely affected because of the confrontational manner in which the complaint was raised. However the complaint was originally made, the School made a decision on the exemption with input and co-operation from Ms Pillay. I therefore find that the conduct of Ms Pillay in this case is not a weighty consideration in the determination of fairness.

Conclusion

[112] The discrimination has had a serious impact on Sunali and, although the evidence shows that uniforms serve an important purpose, it does not show that the purpose is significantly furthered by refusing Sunali her exemption. Allowing the stud would not have imposed an undue burden on the School. A reasonable accommodation would have been achieved by allowing Sunali to wear the nose stud. I would therefore confirm the High Court's finding of unfair discrimination.

[113] It is necessary, however, to add the following: everything on the record indicates that DGHS maintains high academic standards and that it has taken meaningful steps to accommodate diversity in its community. It regularly allows religious exemptions and promotes the expression of culture at various events on the school calendar. It is, in other words, an excellent school. This judgment is not an

indictment on DGHS but an indication of the complexities that have to be overcome in order to achieve a fully religiously and culturally sensitive society, not least of all in the schools of our land.

[114] It is worthwhile to explain at this stage, for the benefit of all schools, what the effect of this judgment is, and what it is not. It does not abolish school uniforms; it only requires that, as a general rule, schools make exemptions for sincerely held religious and cultural beliefs and practices. There should be no blanket distinction between religion and culture. There may be specific schools or specific practices where there is a real possibility of disruption if an exemption is granted. Or, a practice may be so insignificant to the person concerned that it does not require a departure from the ordinary uniform. The position may also be different in private schools, although even in those institutions, discrimination is impermissible. Those cases all raise different concerns and may justify refusing exemption. However, a mere desire to preserve uniformity, absent real evidence that permitting the practice will threaten academic standards or discipline, will not.

The order

[115] I have found that the Code coupled with the decision to refuse an exemption is discriminatory. This is not a review of administrative action but a claim based on the Equality Act. If the matter were not moot, it would therefore not be appropriate simply to set the decision aside and send it back to the School for reconsideration. It would instead be just and equitable to set aside the School's decision and grant Sunali

the exemption. However, as Sunali is no longer at the School, that is not appropriate. But Ms Pillay and Sunali are still entitled to a declarator that she was unfairly discriminated against. That the matter is moot does not alter that position. The declarator is simply a reflection of this Court's findings. A failure to grant a declarator would, to my mind, fail to vindicate Sunali's right and would therefore not qualify as effective relief.

[116] There was a dispute amongst the parties as to whether this Court should confirm the High Court's order, or fashion a new order. I find it unnecessary to determine the precise meaning of the order. At best, it is ambiguous and I prefer to replace it with an order specifically limited to Sunali.

[117] In addition, I deem it appropriate to make an order rectifying the procedural defect in the Code. I have held that the lack of a procedure for exemption is one of the primary reasons this dispute has arisen. As noted earlier, section 21(2)(i) of the Equality Act specifically allows for an order that reasonable accommodation be made for a group or class of persons. Section 8(1) of the South African Schools Act[97] gives the power to the School's Governing Body to adopt a code of conduct in consultation with learners, parents and educators.[98] The power to adopt must necessarily include the power to amend. Although the Governing Body itself is not before us, it is properly represented by its chairperson. In this case it is therefore appropriate to order

[97] Above n 10.

[98] Section 8(1) reads: "Subject to any applicable provincial law, a governing body of a public school must adopt a code of conduct for the learners after consultation with the learners, parents and educators of the school."

the School's Governing Body to amend the Code to provide for reasonable accommodation for deviations from the Code on religious and cultural grounds and a procedure for the application and granting of those exemptions.

[118] Neither the High Court nor the Equality Court made any order as to costs. Ms Pillay has raised an important constitutional issue and has been successful. She should not have to bear her costs. The School has been at the centre of a difficult constitutional issue. If it is required to pay costs the funds must come from what would otherwise be spent on the learners. While it has been ultimately unsuccessful, it has played an important role in ventilating a difficult constitutional issue. It will accordingly be appropriate in my view for Ms Pillay's costs to be paid solely by the Department.

[119] The following order is made:

1. Leave to appeal is granted.
2. The appeal is dismissed.
3. The order of the High Court is set aside and replaced with the following:
    a. It is declared that the decision of the Governing Body of Durban Girls' High School to refuse Sunali Pillay an exemption from its Code of Conduct to allow her to wear a nose stud, discriminated unfairly against her.
    b. The Governing Body of Durban Girls' High School is ordered, 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.

4. The first and second applicants are ordered to pay the respondent's costs.

Moseneke DCJ, Madala J, Mokgoro J, Navsa AJ, Ngcobo J, Nkabinde J, Sachs J, Skweyiya J and Van der Westhuizen J concur in the judgment of Langa CJ.

O'REGAN J:

[120] I have had the pleasure of reading the judgment prepared by the Chief Justice in this matter. Although there is much in his judgment with which I agree, I dissent in part from the order he proposes. It is necessary therefore for me to set out my approach to the matter which leads to this different conclusion.

[121] Education is the engine of equal opportunity. Education in South Africa under apartheid was both separate and deeply unequal. Notoriously, HF Verwoerd proclaimed in 1953 that –

> "Native education should be controlled in such a way that it should be in accord with the policy of the state . . . If the native in South Africa today in any kind of school in existence is being taught to expect that he will live his adult life under a policy of equal rights, he is making a big mistake . . . There is no place for him in the European community above the level of certain forms of labour. . . ."[1]

And the apartheid state implemented this vision. Spending on Black school children in 1976 was a fraction of spending on White school children. It is not surprising then that education was the trigger for the Soweto revolt by Black school children. Throughout the 1970s and 1980s, the issue of unequal education mobilised thousands of South Africans of all ages to oppose the apartheid state.

[122] When democracy dawned in 1994, the picture was bleak. By and large South African children of different colours were educated separately in institutions which bore the scars of the appalling policy of apartheid. Excellence in the matriculation examination at the end of twelve years of formal schooling reflected this unequal past. A tremendous challenge faced the new government.

[123] Things have improved somewhat but the pattern of disadvantage engraved onto our education system by apartheid has not been erased. In 2003 there were 440 396 candidates for matriculation, of whom 77,4% were Black, 7,2% were Coloured, 3,8% were Indian and 10,5% were White. Only 73% of these candidates passed and a tiny 19% obtained a university entrance pass. While more than 50% of all white

[1] Quoted in Omond *The Apartheid Handbook: A Guide to South Africa's Everyday Racial Policies* (Penguin Books, Great Britain 1985) at 80.

candidates who wrote obtained a university entrance pass, only just over 10% of Black candidates who wrote did so.[2] There is much to be done to achieve educational equality of opportunity.

[124] As importantly, although the law no longer compels racially separate institutions, social realities by and large still do. Most Black learners are educated in township schools where there are generally no White learners at all. Many White learners are educated in schools where there is only a sprinkling of Black learners. The absence of racial integration in our schools remains a problem for us all. It deprives young South Africans of the ability to meet, and to learn and play together.

[125] Durban Girls' High School, the school at issue in this case, is one of the exceptions. Although historically it was a school for White girls under apartheid law, that has changed dramatically in the last fifteen years. Now, we were told from the bar, of its approximately 1300 learners, approximately 350 are Black, 350 are Indian, 470 are White and 90 are Coloured. Moreover, it is an educationally excellent school which produces fine matriculation results. It is at the cutting edge of non-racial education, facing the challenges of moving away from its racial past to a non-racial future where young girls, regardless of their colour or background, can be educated. This context is crucial to how we approach this case.

[2] Kane-Berman (ed) *South Africa Survey 2004/2005* (South African Institute of Race Relations, Johannesburg 2006) at 293-296.

[126] At one level, this is a case about a school learner ("the learner") who, after having had her nose pierced, sought an exemption from the school rule which prohibited adornment of this sort. At another level, it is about how schools and other educational institutions establish rules and processes to accommodate diversity in a manner which makes all learners in the school feel that they are equally worthy and respected.

[127] The school, like most South African schools, requires its learners to wear a uniform. The requirements of the uniform are set out in the school's Code of Conduct which provides as follows –

> "SCHOOL UNIFORM
>
> - Only the official school uniform may be worn to school. This includes regulation shoes, shirts, skirts and bags.
> - Jerseys may only be worn under a blazer. Learners may wear a jersey without the blazer in the school grounds but not to assembly. Jerseys must be regulation school jerseys with no logos.
> - Girls must leave the grounds after sport in full correct sports kit or the official track suit, with appropriate footwear otherwise they must be in full school uniform.
> - All items of school uniform must be clearly marked with your name.
> - Hair must be worn in a style that is acceptable to the school. Once the hair is long, it must be tied up using navy-blue or black clips, ribbons or bands. Hair may not be dyed or tinted. Appropriate braids are permitted. Braids may only be from colours 0 – 6. Any other braid colour is unacceptable. Braid colouring must match the natural hair colour.
> - Jewellery: Ear-rings – plain round studs/sleepers may be worn, ONE in each ear lobe at the same level. No other jewellery may be worn, except a wrist watch. Jewellery includes any adornment/bristle which may be in any body piercing. Watches must be in keeping with the school uniform. Medic-Alert discs may be worn.

- Nails must be kept short and must NOT be varnished.
- Name badges are compulsory during school times. Each learner must wear her own badge.
- Only official school badges are permitted.
- Learners are not permitted to wear any other adornment even of a sentimental nature.

. . . .

Learners are obliged to abide by the regulations which have been adopted by the school, regarding the wearing of school or sports uniform. Failure to do so will lead to Community Service or Detention."

[128] Section 8 of the South African Schools Act, 84 of 1996 ("the Schools Act"), requires governing bodies[3] of schools to "adopt a code of conduct for learners after consultation with learners, parents and educators of the school."[4] 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."[5] According to Mrs Martin, the principal of the school ("the principal"), the

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

[4] Section 8 of the Schools Act provides in pertinent part that –

"(1) Subject to any applicable provincial law, a governing body of a public school must adopt a code of conduct for the learners after consultation with the learners, parents and educators of the school.

(2) A code of conduct referred to in subsection (1) must be aimed at establishing a disciplined and purposeful school environment, dedicated to the improvement and maintenance of the quality of the learning process.

(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 learners.

(4) Nothing contained in this Act exempts a learner from the obligation to comply with the code of conduct of the school attended by such learner.

(5) A code of conduct must contain provisions of due process safe-guarding the interests of the learner and any other party involved in disciplinary proceedings."

[5] See section 8(2) of the Schools Act.

Code of Conduct was drawn up by the school's Governing Body in consultation with parents and the Learners' Representative Council.

[129] When parents apply for the admission of their daughters to the school, they are required to sign a form declaring that they will ensure that their daughters comply with the Code of Conduct and regulations of the school. This the learner's mother[6] did.

[130] The Code of Conduct does not contain any express procedure for exemption from its terms. However, in her evidence, the principal made clear that from time to time exemptions are granted by the school. For example, at certain times during the year, some learners of the Hindu faith apply to wear "Lakshmi strings" in honour of the Goddess Lakshmi, the deity of prosperity and well-being in the home. Similarly, requests from learners to wear hide bracelets as a mark of respect on the death of a close relative are granted. When exemptions of this sort are granted, the learner is given a card noting the permission, should any teacher query her non-compliance with the Code of Conduct.

[131] It is also clear from the principal's evidence that the basis upon which exemptions are granted is not clearly established. An important consideration is whether the exemption is sought on religious grounds, but this is not a pre-requisite for the exemption to be granted. In this case, the learner sought an exemption after

[6] She shall also be referred to as the applicant.

having had her nose pierced. The principal then asked for an account as to why the exemption was sought. That account was provided by the learner's mother as follows:

> "I also regret that Sunali and I did not discuss the piercing of her nose and seek your endorsement prior to acting on her decision. Simultaneously, I reiterate my need, indeed my duty as a parent, to support Sunali's choices for herself.
>
> As you know shortly after her 15th birthday, Sunali decide to pierce her nose with a small gold stud. She has been requesting permission to do this since the age of 4. As per our traditions, her ears were pierced at age 1.
>
> I allowed the piercing for several reasons:
> (a) It is a time-honoured family tradition. Sunali and I come from a South Indian family that has sought to maintain a cultural identity by respecting and implementing the traditions of the women before us. Usually, a young woman would get her nose pierced upon her physical maturity (the onset of her menstrual cycle) as an indication that she is now eligible for marriage. While this physically oriented reasoning no longer applies, we do still use the tradition to honour our daughters as responsible young adults. After her 16th birthday, Sunali's grandmother will replace the current gold stud with a diamond. This will be done as part of a religious ritual to honour and bless Sunali. It is also a way in which the elders of the household bestow worldly goods, including other pieces of jewellery, upon the young women. This serves not only to indicate that we value our daughters, but in keeping with Indian tradition, that our daughters are the Luxmi (Goddess of Prosperity) and Light of the house.
> (b) Sunali has demonstrated both at school and at home that she is a responsible and emotionally mature young woman capable of making independent choices.
> (c) I promised Sunali over the years, each time she requested permission to pierce her nose, that I would allow her to do so when she was old enough and sufficiently aware of her own identity to make this choice. I consciously choose to keep my word to my daughter.
> (d) I myself have adhered to this tradition and wear a nose ring. From this perspective, I cannot and will not impose a double standard on my child.
> (e) Sunali and I live in a spiritually aware holistic centre based on the values of integrity, respect and compassion. This is the system by which we relate to each other and to the rest of the world. Our independent choices are not intended to impact

> negatively on any person or institution, but rather to reflect who we truly are. I respect Sunali's choices for herself. It is not a choice that will damage her in any way. Instead, it has given her and will continue to give her a sense of belonging, a heritage . . . something missing from most children's lives as they struggle with a series of identity crises."

[132] The school read this primarily as seeking an exemption based on family tradition, though they did recognise that there was a cultural and religious aspect to the question. Accordingly, the Governing Body sought some advice from experts in Hinduism who advised them that it was not necessary to make an exemption for the learner on the basis that she sought. The school refused the request for an exemption and instructed the learner to stop wearing the nose-stud. When she failed to desist, they initiated disciplinary proceedings against her.

[133] The learner's mother then instituted proceedings in the Equality Court to prevent the disciplinary proceedings going ahead on the ground that the school was discriminating against her daughter on the grounds of culture and religion. The Equality Court dismissed the claim, but the Equality Appeal Court upheld it. The school and the educational authorities now seek leave to appeal to this court.

[134] I agree with Chief Justice Langa that this case falls to be determined under the Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000 ("the Act" or "Equality Act"), not directly on the basis of section 9 of the Constitution[7] although I also accept that the Act should, where reasonably possible, be interpreted

[7] See Langa CJ's judgment at para 40 above.

consistently with section 9 of the Constitution.[8] I turn now to a brief consideration of that Act.

[135] Section 6 of the Act prohibits unfair discrimination in the following terms –

> "Neither the State nor any person may unfairly discriminate against any person."

Discrimination is defined in the Act as –

> "any act or omission . . . which directly or indirectly—
> (1) imposes burdens, obligations or disadvantage on; or
> (2) withholds benefits, opportunities or advantages from,
> any person on one or more of the prohibited grounds."[9]

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."[10] This is not a closed list and it includes additional criteria for identifying further grounds,[11] though this has no relevance in the present case.

[136] The Act also provides guidance for the determination of unfairness. Section 14 of the Act provides that –

[8] Id at para 43.

[9] Subsection 1(1)(viii).

[10] Subsection 1(1)(xxii)(a).

[11] Subsection 1(1)(xxii)(b).

"(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."

[137] This provision is not a model of legislative clarity, as some observers have commented.[12] Section 14(2) is the key provision and provides that in determining unfairness, a court will have regard to the context, the list of criteria in section 14(3)

[12] See Albertyn et al (eds) *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act, Act 4 of 2000* (Witwatersrand University Press, Johannesburg 2001) at 41 - 48.

and whether the discrimination is reasonably and justifiably based on objective criteria intrinsic to the activity concerned. The criteria in section 14(3) are suggestive of a proportionality analysis: in particular, it seems as if the criteria identified in section 14(3)(a)-(e) should be weighed against the criteria in section 14(3)(f)-(i). How this analysis should chime with section 14(2)(c) is not clear. Section 14(2)(c) seems similar to the exception of genuine occupational requirement in English labour law,[13] or the bona fide occupational qualification analysis of the Civil Rights Act in the United States of America.[14] Section 14(2)(c) is not in issue in this case so it is not necessary to consider how it interrelates with the criteria identified in section 14(3). I shall return to a discussion of the application of section 14 later in this judgment.[15]

[13] Regulation 7(2) of the Race Relations Act 1976 (Amendment) Regulations 2003 introduced the following exception to the prohibition in the Race Relations Act 1976 against discrimination in the employment sphere –

> "This subsection applies where, having regard to the nature of the employment or the context in which it is carried out –
>
> (a) being of a particular race or of particular ethnic or national origins is a genuine and determining occupational requirement;
>
> (b) it is proportionate to apply that requirement in the particular case; and
>
> (c) either –
>
> (i) the person to whom that requirement is applied does not meet it, or
>
> (ii) the employer is not satisfied, and in all the circumstances it is reasonable for him not to be satisfied, that that person meets it."

[14] Section 703e(1) of Title VII of the Civil Rights Act of 1964 provides that –

> ". . . it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise".

[15] See paras 167-168 below.

[138] The court tasked with the determination of whether unfair discrimination has taken place in the first place is the Equality Court. The scheme contemplated by the Act is for the Equality Court to determine whether a complainant has shown that there has been an act or omission that caused harm by imposing a burden or withholding a benefit on a prohibited ground. Once the complainant establishes this, discrimination has been established. Then it is for the respondent to show that the discrimination was not unfair.

[139] Section 21 of the Act[16] provides that a court may make a range of orders including a declaratory order,[17] an order requiring the payment of damages,[18] an

[16] Section 21(2) of the Act provides that –

> "After holding an inquiry, the court may make an appropriate order in the circumstances, including –
> (a) an interim order;
> (b) a declaratory order;
> (c) an order making a settlement between the parties to the proceedings an order of court;
> (d) an order for the payment of any damages in respect of any proven financial loss, including future loss, or in respect of impairment of dignity, pain and suffering or emotional and psychological suffering, as a result of the unfair discrimination, hate speech or harassment in question;
> (e) after hearing the views of the parties or, in the absence of the respondent, the views of the complainant in the matter, an order for the payment of damages in the form of an award to an appropriate body or organisation;
> (f) an order restraining unfair discriminatory practices or directing that specific steps be taken to stop the unfair discrimination, hate speech or harassment;
> (g) an order to make specific opportunities and privileges unfairly denied in the circumstances, available to the complainant in question;
> (h) an order for the implementation of special measures to address the unfair discrimination, hate speech or harassment in question;
> (i) an order directing the reasonable accommodation of a group or class of persons by the respondent;
> (j) an order that an unconditional apology be made;
> (k) an order requiring the respondent to undergo an audit of specific policies or practices as determined by the court;
> (l) an appropriate order of a deterrent nature, including the recommendation to the appropriate authority, to suspend or revoke the licence of a person;
> (m) a directive requiring the respondent to make regular progress reports to the court or to the relevant constitutional institution regarding the implementation of the court's order;
> (n) an order directing the clerk of the equality court to submit the matter to the Director of Public Prosecutions having jurisdiction for the possible institution of criminal proceedings in terms of the common law or relevant legislation;
> (o) an appropriate order of costs against any party to the proceedings;

interdict restraining unfair discrimination,[19] a mandatory order including an order directing the reasonable accommodation of a group or class of people,[20] an order that an apology be made[21] and an order requiring progress reports to be made.[22]

[140] In this case, the applicant argues that the conduct of the school constituted unfair discrimination on the grounds of culture and religion. Argument was also presented by the applicant and the Freedom of Expression Institute concerning freedom of expression. I am in complete agreement with the Chief Justice's consideration of these arguments and have nothing to add.[23] Before turning to the question of unfair discrimination, I consider it necessary to consider briefly the constitutional approach to culture and religion.

Culture and religion

[141] Both "culture" and "religion" are terms that resist definition. And it is not desirable in this case to seek to identify a determinative definition of either. However our Constitution does treat them differently. And that different treatment gives us some understanding of where the difference between the two concepts lies. Section 9 of the Constitution prohibits discrimination on the grounds of both culture and

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(p) an order to comply with any provision of the Act."

[17] Subsection 21(2)(b).

[18] Subsections 21(2)(d) and (e).

[19] Subsection 21(2)(f).

[20] Subsection 21(2)(i).

[21] Subsection 21(2)(j).

[22] Subsection 21(2)(m).

[23] At paras 93-94 above.

religion,[24] but section 15 entrenches the right to freedom of "conscience, religion, thought, belief and opinion" and does not mention culture or cultural identity.[25] Here the different constitutional treatment of the two concepts arises.

[142] Section 30 entrenches the rights to language and culture, without mention of religion, in the following terms –

> "Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights."

Section 31 provides for certain rights to members of cultural and religious communities in the following manner –

> "(1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community –
>
> (a) to enjoy their culture, practise their religion and use their language; and
>
> (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

[24] Section 9(3) of the Constitution provides – "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including . . . religion, conscience, belief, culture, language and birth."

[25] Section 15 of the Constitution provides –

> "(1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion.
>
> (2) Religious observances may be conducted at state or state-aided institutions, provided that –
>
> (a) those observances follow rules made by the appropriate public authorities;
>
> (b) they are conducted on an equitable basis; and
>
> (c) attendance at them is free and voluntary.
>
> (3) (a) This section does not prevent legislation recognising –
>
> (i) marriages concluded under any tradition, or a system of religious, personal or family law; or
>
> (ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.
>
> (b) Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution."

> (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights."

[143] Although it is not easy to divine a sharp dividing line between the two, it does seem to me that our Constitution recognises that culture is not the same as religion, and should not always be treated as if it is. Religion is dealt with without mention of culture in section 15, which entrenches the right to freedom of belief and conscience. By associating religion with belief and conscience, which involve an individual's state of mind, religion is understood in an individualist sense: a set of beliefs that an individual may hold regardless of the beliefs of others. The exclusion of culture from section 15 suggests that culture is different.

[144] The inclusion of culture in section 30 and section 31 makes it clear that by and large culture as conceived in our Constitution, involves associative practices and not individual beliefs. So, section 31 speaks of the right of persons who are members of religious, linguistic or cultural communities "with other members of that community" to enjoy their culture. This formulation is drawn almost directly from Article 27 of the United Nations International Covenant on Civil and Political Rights, which provides that people who belong to a particular "minority" shall not be denied "in community with other members of their group" the right to enjoy their own culture.[26]

[26] 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."

See also Article 15(1)(a) of the International Covenant on Economic, Social and Cultural Rights which recognises the right of everyone to take part in cultural life.

In this sense, it is understood that individuals draw meaning and their sense of cultural identity from a group with whom they share cultural identity and with whom they associate. As Currie and De Waal reason –

> "The right of a member of a cultural or linguistic community cannot meaningfully be exercised alone. Enjoyment of culture and use of language presupposes the existence of a community of individuals with similar rights. . . . Therefore an individual right of enjoyment of culture assumes the existence of a community that sustains a particular culture."[27] (Footnote omitted.)

[145] By including religion in section 31, the Constitution makes plain that when a group of people share a religious belief, that group may also share associative practices that have meaning for the individuals within that religious group. Where one is dealing with associative practices, therefore, it seems that religion and culture should be treated similarly. In the case of an associative practice, an individual is drawing meaning and identity from the shared or common practices of a group. The basis for these practices may be a shared religion, a shared language or a shared history. Associative practices, which might well be related to shared religious beliefs, are treated differently by the Constitution because of their associative, not personal character.

[146] Religion however need not be associative at all. A religious belief can be entirely personal. The importance of a personal religious belief is more often than not

[27] See Currie and De Waal *The Bill of Rights Handbook* 5 ed (Juta & Co, Lansdowne 2005) at 623-624. Currie and De Waal, at 623 at fn 3, also rely on the General Comment adopted by the Human Rights Committee under Article 40, Paragraph 4 of the International Covenant on Civil and Political Rights, No 23(50) (art 27) (26 April 1994) at para 5.2.

based on a particular relationship with a deity or deities that may have little bearing on community or associative practices. Where one is dealing with personal and individualised belief, religion is to be considered differently to culture, as the Constitution makes clear. In such circumstances, it is appropriate for a court to ask whether the belief is sincerely held in order to decide whether a litigant has established that it falls within the scope of section 15. If a sincere religious belief is established, it seems correct that a court will not investigate the belief further as the cases cited by the Chief Justice in his judgment make plain.[28] A religious belief is personal, and need not be rational, nor need it be shared by others. A court must simply be persuaded that it is a profound and sincerely held belief.

[147] A cultural practice on the other hand is not about a personal belief but about a practice pursued by individuals as part of a community. The question will not be whether the practice forms part of the sincerely held personal beliefs of an individual, but whether the practice is a practice pursued by a particular cultural community. This distinction needs to inform how we deal with discrimination on the grounds of religion and culture. Where one is dealing with an associative religious practice such as protected by section 31, religion and culture will be treated very similarly. In this regard it is worth noting that some religions are far more associative in character than others. Many African religions and traditions are profoundly associative in character. Our Constitution recognises this and does not privilege one form of religion over another, although associative practices are treated differently to what can loosely be

[28] See, for example, *Prince v President, Cape Law Society and Others* 2002 (2) SA 794 (CC); 2002 (3) BCLR 231 (CC) at para 42; *Syndicat Northcrest v Amselem* [2004] 2 SCR 551 (SCC); *Thomas v Review Board of the Indiana Employment Security Division* 450 US 707 (1981), cited in the judgment of Langa CJ at para 52 above.

described as personal beliefs. Where one is dealing with religious belief that is personal, as contemplated by section 15, it will be treated differently to culture. At times, this line may be difficult to draw but that is not the case here and nothing further need be said at this stage.

[148] I set out the difference between the constitutional protection of religion, on the one hand, and associative religious and cultural practices, on the other, because I am uneasy with the approach taken by Langa CJ on two issues. The first is whether religious and cultural practices are to be dealt with on the basis of the sincerely held beliefs of a particular complainant;[29] and the second relates to the implications for the principles of unfair discrimination as to whether a particular practice is mandatory or not.[30] I shall return to these issues in a moment. First, I wish to consider briefly the constitutional approach to culture.

The constitutional approach to culture

[149] Culture is a difficult concept to define. As O'Keefe has highlighted, it has at least three senses in modern usage: the first is the concept of culture as involving the arts; the second concept is culture in a more plural form including handicraft, popular television, film and radio; and the third is anthropological conception of culture which refers to the way of life of a particular community.[31] There can be no doubt that it is the third concept of culture to which our Constitution refers in sections 30 and 31,

[29] Langa CJ's judgment at para 87 above.

[30] Id at para 67.

[31] O'Keefe "The 'Right to Take Part in Cultural Life' under Article 15 of the ICESCR" (1998) 47 *International and Comparative Law Quarterly* 904 at 905.

although the expression of the right to culture in international law may embrace the first two conceptions, as O'Keefe argues.

[150] In the anthropological sense, all human beings have a culture. Human beings live in communities and ordinarily share practices that make life meaningful to that community. Sections 30 and 31 of the Constitution protect the rights of individuals within communities to pursue cultural practices. There can be no doubt that these are important rights which protect diversity within our country. The rights, like all others in our Constitution, must be interpreted in light of the founding value of human dignity which asserts the equal moral worth of human beings and the right of each and every person to choose to live the life that is meaningful to them. Understanding the right to cultural life against the background of human dignity emphasises that the rights in sections 30 and 31 are associative rights exercised by individual human beings and are not rights that attach to groups. They foster association and bolster the existence of cultural, religious and linguistic groups so long as individuals remain committed to living their lives in that form of association.

[151] These rights are important in protecting members of cultural, religious and linguistic communities who feel threatened by the dominance or hegemony of larger or more powerful groups. They are an express affirmation of those members of cultural or other groups as human beings of equal worth in our society whose community practices and associations must be treated with respect. However, there is

a constitutional limit on the protection of associative practices. The rights may not be exercised in a manner inconsistent with other provisions of the Bill of Rights.

[152] It is also important to remember that cultural, religious and linguistic communities are not static communities that can be captured in constitutional amber and preserved from change. Our constitutional understanding of culture needs to recognise that these communities, like all human communities, are dynamic. It is tempting as an observer to seek to impose coherence and unity on communities that are not, in the lived experience of those who are members of those communities, entirely unified. As Benhabib observes –

> "In my view, all analyses of cultures, whether empirical or normative, must begin by distinguishing the standpoint of the social observer from that of the social agent. The social observer – whether an eighteenth-century narrator or chronicler; a nineteenth-century general, linguist, or educational reformer; or a twentieth-century anthropologist, secret agent, or development worker – is the one who imposes, together with local elites, unity and coherence on cultures as observed entities. Any view of cultures as clearly delineable wholes is a view from the outside that generates coherence for the purposes of understanding and control. Participants in the culture, by contrast, experience their traditions, stories, rituals and symbols, tools, and material living conditions through shared, albeit contested and contestable, narrative accounts. From within, a culture need not appear as a whole; rather, it forms a horizon that recedes each time one approaches it."[32] (Footnote omitted.)

[153] Benhabib's distinction between the observer of a community and the member of a community must remind South Africans of the colonial approach to customary law which sought to impose coherence and unity on a set of customary rules and

[32] Benhabib *The Claims of Culture: Equality and Diversity in the Global Era* (Princeton University Press, Princeton 2002) at 5.

practices. The result of this, as this Court has recently observed, was to fossilise customary law and to produce a distinction between customary law in the courts and textbooks.[33] This is counter to what has been called "living customary law"[34] – the evolving nature of customary law as practised and experienced by members of communities. Our history must warn us that when approaching culture in our new constitutional order, courts, as outsiders, must seek to avoid imposing a false internal coherence and unity on a particular cultural community.

[154] How then should we approach culture? The Chief Justice's answer to this question is that courts should urge respect for the sincerely held beliefs of those who assert cultural rights. My difficulty with that approach is threefold. First, it does not acknowledge sufficiently that cultural practices are associative and that the right to cultural life is a right to be practiced as a member of a community and not primarily a question of a sincere, but personal belief. If the right to cultural life "cannot be meaningfully exercised alone"[35] then an individualised and subjective approach to what constitutes culture is faulty. In probing whether a particular practice is a cultural practice, some understanding of what the cultural community considers to be a cultural practice, is important. Of course, we must approach this task with an acknowledgement of the caution sounded by Benhabib. Cultures are not generally unified and coherent but are dynamic and often contested. Nevertheless, the need to

[33] *Bhe and Others v Magistrate, Khayelitsha, and Others (Commission for Gender Equality as* Amicus Curiae*); Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa and Another* 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) at para 90.

[34] Id at para 87.

[35] Currie and De Waal above n 27.

investigate whether a particular asserted practice is shared within the broader community, or portion of it, and therefore properly understood as a cultural practice rather than a personal habit or preference, is central to determining whether a cultural claim has been established.

[155] Secondly, I am anxious that an approach to cultural rights which is based predominantly on subjective perceptions of cultural practices may undervalue the need for solidarity between different communities in our society. After all, the Preamble of our Constitution proclaims that, "South Africa belongs to all who live in it, united in our diversity."[36] It does not envisage a society of atomised communities circling in the shared space that is our country, but a society that is unified in its diversity. That unity requires a "pluralistic solidarity"[37] between our different racial, cultural, religious and linguistic communities. That solidarity, of course, must not be based on domination by a majority culture or group, but on a shared understanding of the human dignity of all citizens and the recognition of our need for solidarity with one another in our common land.

[156] My third difficulty with Langa CJ's conclusion – that a subjective sincerely held belief regarding a cultural practice is the central point of the constitutional enquiry into a complaint of unfair discrimination on the ground of culture – is that it obscures the need to approach diversity with the fundamental value of human dignity

[36] Preamble to the Constitution.

[37] See Addis "On Human Diversity and the Limits of Toleration" in Shapiro and Kymlicka (eds) *Nomos XXXIX: Ethnicity and Group Rights* (New York Press, New York 1997) 112 at 126.

firmly in mind. With human dignity as the lodestar, it becomes clear that treating people as worthy of equal respect in relation to their cultural practices requires more than mere tolerance of sincerely held beliefs with regard to cultural practices. As Addis has observed –

> "To treat individuals with 'equal respect' entails, at least partly, respecting their traditions and cultures, the forms of life which give depth and coherence to their identities. And to treat those forms of life with respect means to engage them, not simply to tolerate them as strange and alien. . . . [I]nsofar as paternalistic toleration does not provide for . . . the notion of the tolerator taking the tolerated group seriously and engaging it in a dialogue, the polity cannot cultivate an important virtue . . . 'civility (reciprocal empathy and respect).' One can hardly develop empathy for those that one only knows as the alien and strange. To have reciprocal empathy is to first attempt to understand the Other, but there cannot be understanding the Other if one is not prepared to engage the Other in a dialogue."[38] (Footnote omitted.)

[157] My understanding of how our Constitution requires us to approach the rights to culture, therefore, emphasises four things: cultural rights are associative practices, which are protected because of the meaning that shared practices gives to individuals and to succeed in a claim relating to a cultural practice a litigant will need to establish its associative quality; an approach to cultural rights in our Constitution must be based on the value of human dignity which means that we value cultural practices because they afford individuals the possibility and choice to live a meaningful life; cultural rights are protected in our Constitution in the light of a clear constitutional purpose to establish unity and solidarity amongst all who live in our diverse society; and solidarity is not best achieved by simple toleration arising from a subjectively asserted

[38] Id at 121.

practice. It needs to be built through institutionally enabled dialogue. Once again as Addis reasons –

> "A genuine sense of shared identity, social integration, in multicultural and multiethnic societies will develop only through a process where minorities and majorities are linked in institutional dialogue. Shared identity, like justice itself, is defined discursively."[39]

[158] It is necessary now to return to the Equality Act to consider how this understanding of culture and cultural rights in our Constitution affects the interpretation and application of that Act in the light of the facts of this case.

Was there discrimination in this case?

[159] As set out above, the Equality Act prohibits unfair discrimination on the ground of culture. In determining whether an applicant has established discrimination on the ground of culture, a court will need to bear in mind that the Constitution protects culture as an associative right. It will not ordinarily be sufficient for a person who needs to establish that he or she has been discriminated against on the grounds of culture to establish that it is his or her sincerely held belief that it is a cultural practice, or that his or her family has a tradition of pursuing this practice. The person will need to show that the practice that has been affected relates to a practice that is shared in a broader community of which he or she is a member and from which he or she draws meaning.

[39] Id at 128.

[160] It is clear on the facts of this case that there are many women within the southern Indian community who consider that wearing a nose-stud or nose-ring identifies them as members of that community. Wearing the nose-stud connects them with their community and establishes continuity with former generations. In his affidavit placed before the Equality Court, Dr Rambilass, the principal of the Westville Hindu School and an expert in Hinduism, averred that although ear-piercing is one of the religious sacraments prescribed by the *Sanskaras*, nose-piercing is not. He accepted, however, that nose-piercing is a form of cultural expression common amongst Hindu women. His oral evidence in the Equality Court was to the same effect. During it, he acknowledged that although wearing a nose-stud is not a religious practice, it is a cultural practice of significance and value.

[161] Although the applicant disputed whether Dr Rambilass's account of Hindu scriptures was correct, in describing the reason that the learner wished to wear the nose-stud, she emphasised the cultural aspects of wearing the nose-stud. Her evidence was as follows –

> "The nose ring is not jewellery, nor is it simply a body piercing. I don't regard it as such, my heritage and culture do not regard it as such. If it were jewellery it would be something that I'd be taking off my nose and wearing to match my outfit. It's not merely an accessory, it is an expression of my cultural identity. It proclaims to the world who I am and where I come from. It gives us a sense of belonging."

[162] Although the applicant argues that the nose-stud was part of religious practice, it is clear that its primary significance to her family arises from its associative meaning as part of their cultural identity, rather than from personal religious beliefs.

This is consistent with Dr Rambilass's evidence which made plain that wearing a nose-stud is not a part of Hindu religion. Indeed, it is also clear that within the applicant's family, the wearing of the nose-stud is a matter of choice. Two of the applicant's sisters, for example, do not wear nose-studs and the applicant's mother made plain that it was the learner herself who chose to wear the stud. In light of all the above, I conclude that the applicant has established that the wearing of the nose-stud is a matter of associative cultural significance, which was a matter of personal choice at least for the learner in this case, but that it is not part of a religious or personal belief of the applicant that it is necessary to wear the stud as part of her religious beliefs.

[163] Having established that wearing the nose-stud is a cultural practice with associative significance, the question arises whether the applicant has shown that the failure to afford the learner an exemption to wear the nose-stud imposed a burden on the learner's exercise of her cultural practice that has caused her harm. In formulating the question in this way, it should be emphasised that this case does not concern a challenge to the general prohibition on the wearing of jewellery set out in the school's Code of Conduct itself. It concerns a challenge to the failure by the school to provide an exemption to the learner.

[164] In answering this question, one of the issues that arises is whether the Equality Act, properly construed, requires a complainant to show that he or she has been treated differently to some comparably-situated person. I agree with the Chief Justice,

that it is not necessary in this case to determine whether it is always necessary for a complainant to point to a comparator in order to establish discrimination in terms of the Equality Act, as there is a comparator in this case.[40] Langa CJ finds the comparator to be those learners whose sincere religious or cultural beliefs are not compromised by the Code. In my view, the correct comparator is those learners who have been afforded an exemption to allow them to pursue their cultural or religious practices, as against those learners who are denied exemption, like the learner in this case. Those learners who are not afforded an exemption suffer a burden in that they are not permitted to pursue their cultural or religious practice, while those who are afforded an exemption may do so.

[165] This is the correct comparator in my view because the challenge really relates to a failure by the school to afford the learner an exemption. The challenge is thus based on a failure to provide reasonable accommodation to the learner in respect of a neutral rule. In this I differ from the position taken by the Chief Justice who sees the complaint both in the text of the Code and in the failure to grant an exemption.[41] In my view, the Code is entitled to establish neutral rules to govern the school uniform. Indeed, uniforms by definition require such rules. The only cogent complaint to be directed at the Code is its failure to provide expressly for a fair exemption procedure, a matter to which I return later.

[40] Langa CJ's judgment at para 44 above.

[41] Id at para 36. Further, in para 37 the Chief Justice states that "[t]he second problem is the fact that the jewellery provision in the Code does not permit learners to wear a nose stud and accordingly required Sunali to seek an exemption in the first place."

[166] I conclude that the applicant has established that in failing to grant her an exemption to wear the nose-stud in circumstances where other learners are afforded exemptions to pursue their cultural practices, the school did discriminate against her.

Was the discrimination unfair?

[167] Where discrimination on the basis of a cultural or religious practice is established by an applicant, the next question will be whether that discrimination is unfair. It is clear from section 13 of the Act that once the applicant has established a prima facie case of discrimination, the respondent will have to prove that the discrimination is not unfair in terms of section 14(2).[42] The following criteria are relevant: the context;[43] the question whether the discrimination impairs or is likely to impair human dignity;[44] the impact or likely impact of the discrimination on the complainant;[45] the position of the complainant in society and whether he or she belongs to a group which suffers from patterns of disadvantage;[46] the nature and extent of the discrimination;[47] whether it is systemic in nature;[48] whether it has a legitimate purpose;[49] whether and to what extent it achieves its purpose;[50] whether there are less restrictive and less disadvantageous means to achieve the purpose;[51] and

[42] The provisions of section 14 are set out in para 136 above.

[43] Subsection 14(2)(a).

[44] Subsection 14(3)(a).

[45] Subsection 14(3)(b).

[46] Subsection 14(3)(c).

[47] Subsection 14(3)(d).

[48] Subsection 14(3)(e).

[49] Subsection 14(3)(f).

[50] Subsection 14(3)(g).

[51] Subsection 14(3)(h).

whether and to what extent the respondent has taken steps that are reasonable to address the disadvantage or to accommodate diversity.[52]

[168] As stated above,[53] section 14 is not a model of clarity, nor is it particularly helpful to a court faced with the determination of what constitutes fairness. As the Chief Justice has noted, there is not a challenge to section 14 in this case[54] and it must be applied consistently with the Constitution as best possible.

[169] In assessing whether the discrimination in this case is unfair, it is necessary to recognise that it arises from the school's refusal to grant an exemption to the learner to wear a nose-stud. There is no clear statement on the record as to why the school refused to grant an exemption. In her letter communicating the School Governing Body's decision to the applicant, the principal stated the following –

> "Thank you for your email detailing and explaining Sunali's wearing of a small gold stud in her nose.
>
> The information was presented at the Governing Body meeting on 02 February 2005. The Governing Body supports the Code of Conduct of the school and are unanimous in upholding the regulation which does not allow the wearing of a stud in a learner's nose.
>
> Sunali may not wear this stud at school. . . .

[52] Subsection 14(3)(i) of the Act.

[53] See para 137 above, especially the comment concerning section 14(2)(c).

[54] Langa CJ's judgment at para 70 above.

> The school has not taken this decision lightly and has consulted more widely than our own area of expertise. The school's uniform rule takes precedence over Sunali's desire to continue in the traditional pattern of her previous generations."

[170] In her evidence before the Equality Court, the principal stated that the consultations she had undertaken had involved discussions with leading members of the Hindu community who informed her that wearing a nose-stud was not a requirement of the Hindu religion. It appears from this that the school took the view that if the practice was a mandatory form of religious adherence it would qualify for an exemption, but if it were not mandatory, it would not. This appears inconsistent with the school's practice in relation to other exemptions. Two examples were given of when an exemption had been granted previously: the wearing of red "Lakshmi strings" at certain times of the year; and the wearing of hide bracelets to mark respect after a funeral. It is not clear in either case that these are mandatory requirements of religious adherence. Indeed, it seems likely that both these practices are not mandatory but are associative cultural or religious practices. It is not clear then why exemptions were granted in these circumstances but not in the present case.

[171] Given that the school had in the past granted exemptions from rules for cultural practices, it has not established that it acted fairly in refusing an exemption in this case on the ground that the applicant had not established that the practice constituted a mandatory requirement of her religion. Exemptions had in the past been afforded to others for cultural practices, so the justification afforded by the school does not establish the fairness of the refusal in this case.

[172] An issue that was raised on the papers that might have been relevant to the decision to refuse the exemption was the fact that the wearing of nose-studs is now considered to be fashionable by many teenagers. This consideration may have been taken into account by the school in its decision to refuse to permit the wearing of the nose-stud. Although this factor may be a relevant factor, it cannot be a determinative one. Once it is established that the desire to wear a nose-stud is genuinely based on a cultural practice that is important to a learner, the fact that it may coincide with current fashions, cannot without more justify a refusal to permit the learner to wear the nose-stud. A school is an ideal place to educate other learners about the difference between fashion and cultural practices and should an exemption for nose-studs be granted, a school would be obliged to furnish such education to its learners.

[173] The unfairness I have identified in this case lies in the school's failure to be consistent with regard to the grant of exemptions. It is clear that the school has established no clear rules for determining when exemptions should be granted from the Code of Conduct and when not. Nor is any clear procedure established for processing applications for exemption. Schools are excellent institutions for creating the dialogue about culture that will best foster cultural rights in the overall framework of our Constitution. Schools that have diverse learner populations need to create spaces within the curriculum for diversity to be discussed and understood, but also they need to build processes to deal with disputes regarding cultural and religious rights that arise.

[174] In this case, as required by the Schools Act, the school established a consultation process to draft a code of conduct which contained the rules regulating the uniform. I pause here to emphasise the importance of this consultative process. The first step in accommodating a plurality of traditions within one institution is the need to consult widely and carefully on common rules. The process is likely not only to improve the content of the rules, but also to foster their legitimacy. On the other hand, one of the great difficulties for schools and other educational institutions is the relevant transience of the learner population. This transience makes it desirable, especially in schools with changing demographic profiles, to repeat the process of consultation at regular intervals.

[175] The Code of Conduct once adopted did not contain any express provision for exemptions, either to regulate in what circumstances they would be granted or to establish a procedure whereby an exemption could be obtained. In my view, it is this absence which was a significant factor in giving rise to the unfairness in this case. An exemption procedure was established in an ad hoc fashion which allowed certain exemptions to be made but which did not establish the principles for the granting of an exemption, nor the process that had to be followed to obtain one.

[176] In this regard, I conclude that the school failed in its obligations to the learner. Where a school establishes a code of conduct which may have the effect of discriminating against learners on the grounds of culture or religion, it is obliged to

establish a fair process for the determination of exemptions. This principle requires schools to establish an exemption procedure that permits learners, assisted by parents, to explain clearly why it is that they think their desire to follow a cultural practice warrants the grant of an exemption. Such a process would promote respect for those who are seeking an exemption as well as afford appropriate respect to school rules. An exemption process would require learners to show that the practice for which they seek exemption is a cultural practice of importance to them, that it is part of the practices of a community of which they form part and which in a significant way constructs their identity. The school's authorities would in this way gain greater understanding of and empathy for the cultural practices of learners at the school.

[177] In this case, the learner has never set out either orally or in writing her view as to why she thinks the school should afford her an exemption. This failure is unexplained on the record. Only the learner's mother's voice has been heard. This is unfortunate. A fifteen-year old learner who is seeking an exemption from school rules should as part of a fair exemption process be required to set out in writing or orally her reasons for seeking an exemption. As citizens of a diverse society we need to be able to explain to the other members of society why it is that our cultural practices require protection. An exemption process in a school environment, particularly where one is dealing with learners in their teens, should require learners to take responsibility for the exemption they are seeking by setting out their reasons for requiring the exemption. Such a process contributes to an enhancement of human dignity and autonomy.

[178] Once those reasons have been provided, the school decision-making body would need to take into account the following considerations: the cultural or religious practice on which the application for an exemption is based; the importance of that practice to the learner concerned; whether the cultural or religious practice is mandatory or voluntary; whether the relevant cultural or religious community considers it to be a practice which ordinarily warrants exemption from school rules; the extent of the exemption required (in other words how great the departure from the ordinary school rule); and the effect of granting the exemption on the achievement of a "disciplined and purposeful school environment, dedicated to the improvement and maintenance of the quality of the learning process."[55]

[179] There can be no doubt that a key factor in considering an application for exemption will be the beneficial function of a school uniform in the school environment and the effect of the grant of any exemption on the wearing of uniforms. The principal, both in her affidavit and her oral evidence before the Equality Court pointed to that function. In her supplementary affidavit in the Equality Court, the principal stressed the value of a school uniform as follows:

> "Broadly speaking the aim was to adopt a policy in regard to school uniform and appearance that would ensure that the learners would not be distracted by issues of fashion from focussing on the task of getting a good education and deriving the maximum benefit from school activities. The aim is to provide an environment where the girls are less subject to peer pressure in regard to lifestyle issues than is

[55] As provided for in section 8(2) of the Schools Act.

> generally the case outside the school and to avoid both distractions and manifest distinctions between girls, particularly distinctions based on financial differences, that are easily created by different forms of dress and appearance."

[180] The benefit of school uniforms is also affirmed in the National Guidelines on School Uniforms issued by the Minister of Education.[56] These guidelines state that school uniforms serve important "social and educational purposes".[57] Paragraph 6 of the guidelines provides as follows:

> "The adoption of a school uniform can promote school safety, improve discipline, and enhance the learning environment. In addition, a school uniform is also useful in:
>
> (1) assisting school officials in the early recognition of persons not authorised to enter a school;
> (2) helping parents and learners resist peer pressure that leads children to make unnecessary demands for particular and often expensive clothing;
> (3) decreasing theft, particularly of designer clothing, jewellery and expensive footwear;
> (4) minimising gang violence and activity;
> (5) instilling discipline in learners; and
> (6) helping learners concentrate on their schoolwork."

[181] The approach to the granting of exemptions will thus require an exercise in proportionality. The importance of the cultural practice to the learner, including the question of whether it needs to be pursued during school hours, will need to be weighed against the effect that the grant of the exemption may have on the important and legitimate principles that support the wearing of a school uniform. In performing

[56] The National Guidelines on School Uniforms were issued in terms of the Schools Act and published in Government Gazette 28538 GN 173, 23 February 2006.

[57] Id at para 1.

this exercise, a school needs to be fully apprised of the cultural importance of the practice.

[182] In this case, if the learner had still been attending the school, it would have been appropriate to refer the matter back to the school to determine the exemption in the light of the considerations set out above. This would have promoted dialogue about culture within the school and would have required the learner to set out why she seeks an exemption from the Code of Conduct. She would have had to persuade the school of the importance of the practice to her. There is no longer any purpose in pursuing this course as the learner has left school. In the circumstances, it seems to me that no order should be made in this regard.

[183] I do not agree with Langa CJ that it is appropriate to make a declaratory order that the learner's rights have been infringed.[58] The learner has left the school and the matter is accordingly moot as between the learner and the school as Langa CJ accepts in his judgment.[59] I do not think an order in such circumstances is just and equitable.

[184] On the other hand, I agree with Langa CJ that the Court should make an order calling upon the school to effect amendments to its Code of Conduct to provide for the granting of exemptions from the Code of Conduct in the case of religious and cultural practices.[60] The amendments to the Code of Conduct should only be adopted after a

[58] Langa CJ's judgment at para 115 above.

[59] Id.

[60] Id at para 117.

proper process of consultation in terms of section 8 of the Schools Act has taken place. Once they have been adopted, the school should provide a place in its curriculum for the Code of Conduct to be discussed with all learners in the classroom. That discussion should include a discussion of the principles on which exemptions from the rules are granted and the process whereby that happens. In particular, it seems important to stress that parents and learners need to accept that school rules should ordinarily be observed. Where processes are established for exemptions to be granted, they must be followed. Encouraging the observance of rules is the first step towards establishing civility in an institution.

[185] Finally, I should add that this has been an important case concerning the ground rules that should apply in schools that have a diverse student body. As stated at the outset, sadly there are still too few schools in South Africa whose learner population is genuinely diverse. There can be no doubt of the good faith of the applicant, the learner and the school involved in this case. It is inevitable given the extraordinary transformation that the school in this case has undergone that conflict about the school and its rules should arise from time to time. It needs to be emphasised however, that the strength of our schools will be enhanced only if parents, learners and teachers accept that we all own our public schools and that we should all take responsibility for their continued growth and success. Where possible processes should be available in schools for the resolution of disputes, and all engaged in such conflict should do so with civility and courtesy. By and large school rules should be observed until an exemption has been granted. In this way, schools will model for learners the way in

which disputes in our broader society should be resolved, and they will play an important role in realising the vision of the Preamble of our Constitution: a country that is united in its diversity in which all citizens are recognised as being worthy of equal respect.

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