IN THE LABOUR COURT OF SOUTH AFRICA

SITTING IN DURBAN

REPORTABLE

CASE NO: D671/2003

DATE HEARD: 24 April 2006

DATE DELIVERED: 25 April 2006

DATE EDITED AND SUPPLEMENTED: 20 June 2006

In the matter between

P M DLAMINI AND OTHERS Applicants

and

GREEN FOUR SECURITY Respondent

JUDGMENT DELIVERED BY

THE HONOURABLE MADAM JUSTICE PILLAY

ON 25 APRIL 2006

ON BEHALF OF APPLICANTS: MR A NGCONGO
Durban Justice Centre

ON BEHALF OF RESPONDENT: ADVOCATE I PILLAY, instructed by Attorney K Kruger

TRANSCRIBER

SNELLER RECORDINGS (PROPRIETARY) LTD - DURBANJUDGMENT 24 APRIL 2006

PILLAY D, J

Background

1) The applicants pleaded that they were discriminated against because of their religious beliefs. Their dismissal, they said, was automatically unfair in terms of section 187(f) of the Labour Relations Act No 66 of 1995 (LRA).

2) It was common cause that the applicants were dismissed for refusing to shave or trim their beards. They belong to the Baptised Nazareth Group which, they submitted, did not allow them to trim their beards. Mr Ngcongo, who appeared for the applicants, accepted that the applicants bore the onus of proving that this was an essential tenet of Nazareths and had adjourned the matter on a previous occasion to secure expert evidence on the issue.

3) The Applicants denied that the rule that required them to be clean-shaven existed when they commenced employment. They saw the rule about mid-February 2003 before the commencement of the disciplinary action which resulted in their dismissal. The employment policy document, Exhibit B, requires employees to be clean-shaven. The applicants alleged that they had beards when they were employed. This was disputed by the respondent.

4) Mr Ngcongo submitted that the rule about being clean-shaven was recently formulated. It was not uniformly applied as the respondent acted only against the first applicant initially. Only after the second applicant tried to

assist the first applicant was he too disciplined for having a beard. The first applicant conceded that a senior shop steward was dismissed for having a "swine", which is a stub of hair under the lower lip. Both applicants confirmed that the shop steward was not a Nazarene.

5) Irrespective of when the rule was introduced it was common cause that it existed and that it resulted in their dismissal. Previously, they had received final written warnings for being unshaven on duty. They knew the rule by the time the hearings that led to their dismissal began. There is a dispute about whether the parties engaged each other about an exemption or accommodation. However, it is not an issue that the parties identified for resolution by the court.

6) Furthermore, even if the applicants were unshaven when they commenced employment, the respondent could introduce a workplace rule thereafter. The applicants did not attack the rule as being a unilateral change to their conditions of service.

7) The only challenge against the rationale for the rule was that it discriminated indirectly against the applicants on religious grounds. The respondent put in issue that the applicants were contractually bound to be clean-shaven because they had been made aware of the employment policy on engagement and that they had been clean-shaven for the initial part of their employment. As the respondent applied for absolution at the end of the applicants' case, there was no evidence led for the respondent. Consequently, this dispute of fact cannot be resolved. Nor is it necessary to do so.

8) The applicant's case is not based on contract. No findings therefore need be made as to whether they agreed to be clean-shaven on employment. Even if they had given such an undertaking then, their faith might have changed since to the extent that they now wished to practice their religion more seriously. (*Dahlab v Switzerland* (dated 15 February 2000 (Case No 42393/98) ILLR (21) 13) The Constitution will always prevail over a workplace rule that trenches on a right unlawfully or unjustifiably. It is of little consequence, therefore, for the purposes of this case, if they had contracted to be clean-shaven.

9) Whether the clean-shaven rule was an inherent requirement of the job (IROJ) was identified as one of the issues in dispute for determination by the court. Despite the respondent bearing the onus of proving the existence of the rule and that it was an as an IROJ, the applicants agreed to begin. They did not ask that the rule be set aside. Nor did they plead that they were not reasonably accommodated. The relief they sought was compensation being the equivalent of twelve months pay, without reinstatement.

A Constitutional Approach

10) As a general principle, if it is possible to decide a case without reaching a constitutional issue, that is the course that should be followed. (*S v Mhlungu and Others* 1995 (3) SA 867 (CC) (1995 (2) SACR 277; 1995 (7) BCLR 793) in para [59], per Kentridge J) This is not such a case. Although the applicants pleaded a claim for automatically unfair dismissal in terms of section 187(f) of the LRA, the source of the right is the Constitution of the Republic of South Africa Act No 108 of 1996. One of the objectives of the LRA is to give effect to the fair labour practice provision of the

Constitution, which incorporates the right not to be discriminated. (s1(a) of the LRA) Furthermore, the LRA must be interpreted in compliance with the Constitution. (s3(b) of the LRA.) The constitutional question was therefore always in the forefront and the parties had acknowledged this when the matter was adjourned on a previous occasion to call expert evidence.

11) Regrettably, neither party made any submissions about interpreting and applying sections 36 and 39 of the Constitution. Nor did they offer any international or foreign authorities for the court to consider. The Constitutional Court has said that responsibility for the development of constitutional jurisprudence rests as much on practitioners as it does on the courts. (*Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) (2000 (8) BCLR 837) at paras [15] - [17]; *Khosa and Others v Minister of Social Development and Others; Mahlaule And Others v Minister of Social Development and Others* 2004 (6) SA 505 (CC) 2004 (6) SA p505 para [19] at 520B/C - E.)

12) The failure by the parties to adopt a constitutional approach does not relieve the court of its obligation to apply constitutional principles to constitutional cases. The judgment of a court left to its own devices suffers from all the consequences of the lack debate, as this judgment must.

13) The conceptual framework adopted in the analysis of this dispute is the following :

Stage One: Are the facts relied upon to

substantiate the complaint of discrimination proved?

Stage Two: If discrimination is proved, is it justified? At this stage the court must establish whether the workplace rule can be justified as an IROJ. (section 187(2)(a) of the LRA) If it cannot, that is the end of the enquiry. The rule would be unjustifiably discriminatory and therefore unlawful. (Grogan *Workplace Law* Chapter 15 Section 2 – 8; Cooper, Carole *The Boundaries of Equality in Labour Law* (2004) 25 ILJ 813, at 830)

Stage Three: If it is an IROJ, it may still be discriminatory, if the impact is not ameliorated by a reasonable accommodation or modification of the rule, or an exemption from it.

Stage One: Proof of Discrimination

14) The applicants bear the onus. It is common cause that the applicants were dismissed for not being clean-shaven. The applicants have to show that their dismissal is connected to their religious beliefs. It is not disputed that they were Nazarenes. That they held the belief that they could not trim their beards was not contested. However, they have to prove that trimming their beards is prohibited as a violation of an essential tenet of their faith. If they establish this they would prove that they were discriminated indirectly.

15) Proof of religious faith and beliefs did not arise in *TransWorld Airlines Inc v Hardison et al*. 432 U.S. 63 (1976); ILLR (3) USA (4) 69; *Cooper v Oak Rubber Company* 15 F.3d 1375 (1994); ILLR (14) USA 5 177; *Bhinder v*

Canadian National Railway Co [1985] 2 S.C.R. 651; (discussed below) *Dahlab* above.

16) In *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) para 14, the Constitutional Court accepted the sincerity of the beliefs of parents that corporal punishment was an integral part of the Christian ethos and their right to practise their religion in association with each other.

17) Similarly, in *Prince v President of the Law Society of the Cape of Good Hope and Others* [2002] 3 BCLR 231 (CC), the court did not have to decide whether the use of cannabis was central to the Rastafarian religion. It accepted that legislation prohibiting the possession and use of cannabis trenched upon the religious practices of Rastafari. (*Prince* para 97). In adopting this approach Sachs J said :

> "Religion is a matter of faith and belief. The beliefs that believers hold sacred and thus central to their religious faith may strike non-believers as bizarre, illogical or irrational. Human beings may freely believe in what they cannot prove. Yet that their beliefs are bizarre, illogical or irrational to others, or are incapable of scientific proof, does not detract from the fact that these are religious beliefs for the purposes of enjoying the protection guaranteed by the right to freedom of religion. The believers should not be put to the proof of their beliefs or faith. For this reason, it is undesirable for courts to enter into the debate whether a particular practice is central to a religion <u>unless there is a genuine dispute as to the centrality of the practice</u>." (this court's underlining)

18) That is precisely the situation in this case. The respondent

did not question the applicants' beliefs. Its principal defence was that the Nazareth faith did not prohibit the cutting of hair or beards. Consequently, the parties had agreed to lead expert evidence on this issue.

19) The applicants led the evidence of a preacher, Mr Mfanukhona Gideon Nzimande, who professed to be an expert in the doctrine of the Nazareths. The relevance of his testimony would have been to show that the "Book of 'Leviticus': Various Laws, 19:27", the "Book of 'Judges', The birth of Samson, 13:1-6" and the "Book of 'Numbers': the Nazarite, 6:1-6" together prohibit baptised Nazarenes from shaving their beards. Mr Nzimande's only relevant qualification was that he was a preacher since 1989. He performed various ceremonies. There was no evidence that he has ever testified previously as an expert in his field or qualified himself in any other way. Most significantly, however, he was unable to explain the source of 19:27 of "'Leviticus': Various Laws," which reads:

> "Do not cut the hair at the sides of your head or clip off the edges of your beard."

20) Initially, he merely repeated that it was a rule that had to be obeyed. It was put to him that the rule came about to prevent people from sacrificing their hair to pagan gods. He denied this. Instead, he gave an explanation about Delilah cutting off Samson's hair to weaken him. He informed the court that this was an historical fact and not a fable and that it was recorded in the Bible. However, he was not able to indicate where in the Bible this information was recorded, despite the fact that he had the Old Testament with him. It was put to him that in terms of verse 19:19 of "'Leviticus': Various Laws", Nazarenes were instructed not to wear clothing woven of two kinds of material. He became evasive

and refused to admit that the clothing he wore was woven of different material.

21) The cross-examination of Mr Nzimande put in issue his expertise, the validity and relevance of the religious tenet and the seriousness of the applicants in observing them.

22) From Mr Pillay's cross-examination it emerged that Nazareths have a relatively small following in South Africa and America. That does not mean that Nazarenes are any less deserving of the freedom to practice their religion. As the Constitutional Court pointed out, the right to religious freedom embraced all religions, big and small, new and old. (*Prince* para 132) The right to practice one's religion, it said, is not a statistical one dependent on a counter-balancing of numbers, but a qualitative one based on respect for diversity. (*Christian Education* para 25)

23) However, those claiming the right to do or abstain from doing something because it is permitted or prohibited by their religion must prove that to be an essential tenet of their religion and that they are obliged to observe it. Otherwise, it will be open to anyone to seek refuge under the pretext of religion to claim an accommodation, avoid an obligation or simply break the rules.

24) Whether the tenet came about to prevent sacrifices to pagan gods or to weaken Samson, the applicants have not shown that the rule still exists or is relevant today. Furthermore, even if it were accepted that the cutting of hair is prohibited, the applicants have not proved that it is an essential tenet. No evidence was led in chief as to what penance might ensue if the tenet was not adhered to. Under cross-

examination Mr Nzimande testified that if the applicants trimmed their beards then “they would be against God.”

25) Mr Nzimande, the priest himself, wore clothing woven of different materials in violation of “‘Liviticus’ : Various Laws”, which is also his source of the tenet prohibiting the clipping of beards. The applicants worked on the day of the Sabbath, which was prohibited. Mr Nzimande testified that the penance for that was to give away their earnings; but because they had to work, they were not penalized.

26) There was, therefore, some flexibility about observance of the tenets. The applicants were selective about the ones they followed. The religion itself accommodated different ways in which it could be practiced. If the applicants were exempted by their religion to work on the Sabbath, it was not explained why they could not be exempted to trim their beards. Mr Nzimande has not demonstrated that it is an essential tenet of Nazareths not to trim their beards. He has also not convinced the court that he has sufficient expertise in the Nazareth faith. His evidence must therefore be rejected.

27) Questions that the court has to ask and answer are the following:

a) Did the rule that security guards should be clean-shaven differentiate amongst employees? The answer is "No". Everyone had to be clean-shaven.
b) Did the respondent apply the rule consistently to all employees? The answer is "Yes".
c) Did the rule impact on all employees alike, irrespective of their religion? The answer is "Yes". Anyone who wore a beard ran the risk of being disciplined.
d) Did the rule trench upon the applicants religion? The

applicants failed to prove the no shaving rule to be an essential tenet of the Nazareth faith. They have therefore not proven that they were discriminated on account of their religious beliefs.

28) Consequently, the claim must be dismissed at the end of the first stage of the enquiry.

29) In so far as the court is wrong in making this finding, say, because it exacts too high a standard of proof from the expert witness, it proceeds to the second stage of the enquiry. For the purposes of this leg of the enquiry, the court assumes that the workplace rule trenched upon the applicants' religious freedom and that discrimination has been established *prima facie*. The second stage of the enquiry begins with the respondent bearing the onus of proving that the workplace rule, as a limitation on the right to religious freedom, was justified.

Stage Two: Proof of Justification

(a) The Test for justification

30) The US courts apply a "strict scrutiny" test which requires proof that a measure which impairs freedom of religion must serve a "compelling State interest". Rejecting this test, the Constitutional Court favoured "a nuanced and context-sensitive" balance. (*Christian Education* para 29-30) The context in which this dispute arises is the workplace. Here, consistency in the application of workplace rules enjoys a high priority in order to maintain labour peace. Individual rights have therefore to be balanced in a collective setting where other rights and the rights of others interact.

31) In a case in which a scholar wished to dress in a way that was expressive of Islam, the House of Lords pointed out that what constitutes interference with the freedom of religion also depends on the extent to which individuals can reasonably expect to be at liberty to manifest their beliefs in practice. (*R. (on the application of SB) v Denbigh High School Governors* (HL) House of Lords 2006 2 W.L.R. 719; [2006] 2 All E.R. 487) A balance has to be struck between the competing interests of religious conviction and practice based on faith, and countervailing commercial concerns based on reasonableness and rationality, between individual conviction and collective endeavour. (*Christian Education* para 33). Should the applicants be allowed to wear beards and satisfy their faith? Or, is the respondent entitled to exact a standard of neatness that requires employees to be clean-shaven and thereby satisfy a commercial need? If both interests cannot be met with tolerance and accommodation, the one has to yield to the other. Workplaces are typically home to diverse religions and the balance has to be struck sensitively. To balance freedom of religion against other rights and the interests of a diverse workforce, even-handedness is required, not subtle or explicit bias in favour one or other religion, or scrupulous secularism, or complete neutrality. (*Lawrence* para 122; *S v Negal; S v Solberg* 1997 (4) SA 1176 (CC) para 122) However the balance is struck, it cannot be to the detriment of the enterprise or other workers.

32) Society in general and workplaces in particular can cohere if everyone accepts that certain basic norms and standards are binding. Workers are not automatically exempted by their beliefs from complying with workplace rules. (*Christian Education* para 35) If they wish to practice their religion in

the workplace, an exemption or accommodation must be sought.

(b) The nature of the rights

33) No one can doubt the importance of freedom of religion. Its elevation to the Bill of Rights marks its valued status. Dickson CJC in *R v Big M Drug Mart Ltd* (1985) 13 CRR 64 described the essence of freedom of religion as

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

34) On the other hand, South Africa is a secular state. Religious freedom is guaranteed in that context. No freedom is without limitation. For everyone to enjoy the right to religious freedom, tolerance is crucial. In a society as diverse as South Africa no single religion should be preferred over another. (*Lawrence* para 127-129) This approach is also followed in other democracies where religious freedom is promoted as a constitutional value.

35) For instance, the Establishment Clause of the First Amendment of the US Constitution states:

> "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."

Thus the Federal Supreme Court held that a Connecticut statute that gave Sabbath observers an absolute and unqualified right not to work on their chosen Sabbath

violated the Establishment Clause. (*Estate of Thornton v Caldor, Inc* 105 S.Ct 2914 (1985); ILLR (5) USA (4) 118.

36) The Supreme Court of Canada found that the Lord's Day Act offended freedom of religion because it compelled sabbatical observance. (*Big M Drug Mart Ltd* above)

37) The nature of the right is such that in order for everyone to enjoy it equally, some limitation of the right itself may be necessary.

(c) Justification of the limitation of the right to religious freedom

38) As a general rule, the more serious the impact of the workplace rule on the freedom of religion, the more persuasive or compelling the justification must be. Ultimately, the question is one of degree to be assessed in the concrete legislative and social setting of the measure, *(S v Manamela and Another (Director-General of Justice Intervening)* 2000 (3) SA 1 (CC) para 32; *Christian Education* para 31)

39) A workplace rule is justified if it is an IROJ. Article 1(2) of ILO Convention 111 states:

> "Any distinction, exclusion or preference in respect of a particular job based on an inherent requirement thereof shall not be deemed to be discrimination."

40) What is an IROJ? "Inherent" has been interpreted to mean "existing in something as a permanent attribute or quality; forming an element, especially an essential element, of something, intrinsic, essential" and as an "indispensable

attribute" which "must relate in an inescapable way to the performing of the job" (Cooper, above, citing ILO sources at 835).

41) In the controversial decision of the LAC in *Woolworths (Pty) Ltd* v *Whitehead* (2000) 21 ILJ 571 (LAC), continuity of employment was found to be an IROJ of the job. The decision resulted in the dismissal of a pregnant employee being held to be fair. Being HIV/AIDS negative is not an IROJ of cabin attendant in the national airline. (*Hoffman v SAA* (2000) ILJ 2357 (CC)) Not being dependent on insulin is not an IROJ for the position of firefighter in a municipality. (*IMATU v City of Cape Town* (2005) 26 ILJ 1404 (LC)

42) Other jurisdictions also have to justify the limitation of religious freedom. *Bona fide* occupational requirement (BFOR), a concept similar to IROJ, has been developed. A BFOR is a limitation that is imposed honestly, in good faith, and in the sincere belief that it is in the interests of the adequate performance of the work involved with all reasonable dispatch, safety and economy, and not for ulterior or extraneous reasons. Furthermore, it must be objectively related to the performance of the job in that it is reasonably necessary to assure its efficient and economical performance without endangering the employee, his fellow workers and the general public. (*Canadian Supreme Court in Ontario Human Rights Comm v Etobicoke*, (1982) 3 CHRR D/781 (SCC) at 783.

43) If a requirement in a code conflicts with human rights law, the latter prevails. (*Bhinder* (dissent) para 45). Thus a policy is not justified if it restricts a practice of religious beliefs that does not affect an employee's ability to perform his duties,

nor jeopardize the safety of the public or other employees, nor cause undue hardship to the employer in a practical or economic sense (*Bhinder* (dissent) para 29)

44) *Dahlab* involved a complaint by a primary school teacher who was banned from wearing an Islamic headscarf. The authorities submitted that a scarf, as a sign of identity, was unacceptable in a public, secular education system; furthermore, the State's religious neutrality was "all the more precious in permitting the preservation of freedom of conscience of persons in a pluralist democratic society". The European Court of Human Rights took into account the tender age of the children for whom the teacher was responsible and agreed that the ban was not unreasonable. It agreed with the authorities that "in a democratic society, where several religions co-exist within the population, it may be necessary to subject this freedom to limitations with a view to reconciling the interests of the various groups and ensuring respect for every person's beliefs." The ban was held to be justified and "proportionate to the stated aim of protecting the rights and freedoms of others, public order and public security."

45) Jain H writes about the unreported decision of the Ontario Human Rights Commission in *Ishar Singh v Security and Investigation* 1977. (Bulletin of Comparative Labour Relations 14 of 1985 69 at 70) Singh, a Sikh, wore a turban and a beard as required by his religion. He was therefore unable to comply with his employer's dress and grooming regulations which required employees to be clean-shaven and have their hair trimmed. The Ontario board of enquiry found that the effect of the employer's policy was to deny employment to Sikhs, despite the absence of any malice towards Sikhs or intention to discriminate.

46) Insufficient information about the employment context in which that decision was made does not permit a meaningful comparative analysis with this case, other than to note firstly, that being clean-shaven is a requirement of the security industry here and abroad. Secondly, it is possible to accommodate unshaven employees in the security industry.

47) The difference in the legal settings and the terminology anticipates that IROJ and BFOR could attract different results, as the discussion of *Bhinder* below shows.

48) In *Bhinder,* a Sikh employed as a maintenance electrician, complained of religious discrimination because his employer compelled him to wear a hard hat; his religion forbade him to wear anything but a turban on his head.

49) The majority of three in the Supreme Court of Canada held that the hard hat rule was not discriminatory as it applied to all workers equally, and its different effect on the employee was unintended and incidental to its purpose. In coming to this conclusion the court set the test for BFOR to apply to all members of the employee group, and not on an individual basis. "Occupational requirement", it said, was a requirement of the occupation, not a requirement limited to an individual. The court found that the employer adopted the rule for genuine business reasons, aimed at reducing the risk of injury to employees. The rule, it said, did not lose its character as a BFOR only because it had the effect of discriminating against the Sikh employee. (*Bhinder* para 13)

50) The dissent is worth discussing not only because of the seniority of the two judges, but also because it shows the

difference in the discrimination-justification-accommodation dynamic as applied in Canada and South Africa. The minority agreed that the words “occupational requirement” refers to a requirement relevant to the occupation as a whole, but that the words “*bona fide*” required the employer to justify imposing an occupational requirement on a particular individual if it has a discriminatory effect. (*Bhinder* para 37) This interpretation arises in the context where the statutory definition of “discriminatory practice” is that a limitation is not discriminatory if it is based on a BFOR. If the practice is found to be a BFOR, no enquiry is made into its adverse impact or indirect discrimination on individuals. Consequently, the duty to accommodate or exempt also does not arise. (*Bhinder* para 35)The duty to accommodate is, the minority said, an essential aspect of human rights law and necessary for the protection of individuals from adverse effect discrimination. (*Bhinder* para 33) It then proceeded to reason that the stipulation that the occupational requirement must be “*bona fide*” had to take into account the discriminatory impact on the individual. (*Bhinder* para 39)

51) In order to advance the purpose of Canada’s Human Rights Act, the minority had to adopt this stance. Otherwise adverse impact discrimination would persist and, if the occupational requirement is not regarded as discriminatory, there would be no accommodation.

52) While the minority decision is to be preferred because of the words *“bona fide”* and the legislative context in which the decision arises, the context in which IROJ arises as a ground for justification in South Africa does not require a similar dilution of the definition of IROJ. The IROJ must relate to the job, not the individual. Furthermore, in South Africa there is a staged process of determining whether

discrimination is proved; if so, whether it is justified, and if justified, whether difference can be accommodated. Adopting the definition of the majority in *Bhinder* would work better in workplaces in South Africa because it calls for objective standards to be set for an IROJ.

(d) Is the workplace rule that security guards should be clean-shaven an IROJ?

53) It was common cause that the applicants were informed that they had to be neat. They denied that this meant that they had to be clean-shaven or trim their beards.

54) The respondent's policy requires employees

> "to be personally clean, neat and hygienic. The employee acknowledges that he/she is in the Security Industry for which a clean-shaven facial appearance is required at all times."

55) The applicants denied being shown the respondent's employment policy document (Exhibit B) regarding their dress code when they were employed. However, they were aware of it by the time disciplinary action was being taken against them. They knew the standard of neatness required of them and the reason for it, namely, that they were employed in the security industry. They did not dispute that neatness was an IROJ but only that having an untrimmed beard was untidy. The issue for determination by the court therefore boils down to whether an untrimmed beard is neat.

56) Neatness is relative. To the applicants, wearing untrimmed beards was not untidy. Others may not feel the same way.

57) As shown in *Ishar Singh*, grooming is a high priority in the security services. Appearance is strictly regulated in minute detail by codes, standing orders and policies in other security services.

58) The South African National Defence Force (SANDF) issued standing orders 01/99 on 22 January 1999 which states :

> "To ensure a neat and tidy appearance in uniform, a high level of individual personal care is essential in the military environment. The undermentioned aspects shall be noted:
>
> a. **Facial Hair** Men shall keep the facial area from the temple down to the chin, including the cheekbones as well as the neck area, clean and well shaven. (Sideburns may be grown but these are to be kept neat and tidy and are not to extend below the middle of the ear.) The exception to the aforementioned is where men are authorized to cultivate moustaches and/or beards in terms of the specifications contained in Appendix C."
>
> (Clause 97(a) of Standing Orders)

Appendix C prescribes the hairstyles, and the size and shape of beards and mustaches.

59) Provision is made for members of the Force to obtain official permission to wear beards for medical or cultural reasons. (Clause 95 of the Standing Orders)

60) Section 7 of Chapter 6 of the South African Police Service : Dress Order issued in terms of section 25(1) of the Police Service Act, 1995 (Act No 68 of 1995) stipulates

> "7.4 A member may not wear a beard without the permission, in writing, of the area commissioner or, in the case of Head Office or head office divisions, the divisional commissioner concerned. An

application for authorization to wear a beard must be accompanied by a medical certificate. If a member is given permission to wear a beard on medical grounds, the beard must always be kept tidy and short.

Permission granted for the wearing of a beard is valid for three (3) months. If it is apparent that a member has a chronic skin condition the authorization he is granted to wear a beard may not exceed six (6) months.

NB: Beard includes that stub of hair on the chin or below the lower lip ("bokkie beard/goatie")

7.5 Every application to wear a beard must be accompanied by a motivated recommendation by the member's immediate commander regarding the necessity for wearing a beard. He must also indicate where the member is to be employed.

7.6 Members who wear a beard may wear uniform.

7.7 For any deviation from the instructions contained in this Order (such as, for example, the wearing of a beard for reasons other than medical reasons and the wearing of hair which is longer than the prescribed length as, for example, in the cases where policemen have to perform clandestine operations, or are members of the Reserve Police Service), permission has to be obtained from the area commissioner, in the case of Head office, from a divisional commissioner or an officer of higher rank."

61) The Durban Metro Police Standing Order No. 20 of 2001 regulates appearance and dress codes similarly.

62) In the three services surveyed, neatness is the rationale for regulating beards. The standard of neatness observed in security services is high. Particular criteria are set to achieve that standard. The respondent's rule is therefore neither arbitrary nor irrational.

63) As a general proposition, untrimmed beards are untidy. Whether in the particular case of the applicants their untrimmed beards were neat is not the only inquiry. Sikhs could have longer beards which, if left untrimmed, would be more untidy than the applicants' beards. If the applicants are allowed to have untrimmed beards but Sikhs are denied this privilege, the perception could arise that one religion is being preferred over another. Conflict in the workplace arises as much from perception as from fact. The issue at stake here is the validity of the rule and its application. An employer is entitled to set a uniform dress code as a condition of employment. Compliance with a dress code can be compulsory for practical reasons related to the nature of the job, such as the wearing of safety gear, or for purposes of promoting an image or brand. In this case the rule against wearing beards was driven by the practical and inherent need to be neat, to look like security guards and to project the respondent as a security company with a distinctive image. On the first applicant's own version, he was nicknamed "*fundise*" because his beard made him look like a priest. That is not consistent with the image that the respondent sought to project.

64) Mr Ngcongo denied that neatness was the reason for wanting clean-shaven or trimmed beards, because the respondent was not prepared to employ the shop steward who had merely a "swine".

65) The shop steward broke the rule. He did not need an

accommodation on religious grounds. In so far as Mr Ngcongo suggested that the clean-shaven rule was applied unfairly amongst the workforce and between the applicants because the second applicant was charged only after he tried to assist the first applicant, or that there was some other perverse motive, that is not the case that was pleaded. If there was any ulterior motive for dismissing the applicants they failed to prove what that motive was.

66) The impact of the clean-shaven rule would have been more serious if the applicants were not flexible in the way they practiced their religion. The applicants worked on the Sabbath, despite this not being allowed by the Nazareth faith. They, including the preacher, Mr Nzimande, were selective about which rules of the Nazareth faith they would follow. Furthermore, the religious rule that prohibited them from trimming their beards was not enforced by any penalty whereas the workplace rule was. The religious rule had no apparent reason for existence whereas the workplace rule had. Balancing both rules against each other, the workplace rule must prevail.

67) The clean-shaven rule is an IROJ and is accordingly justified.

Stage Three : Accommodation

68) In *Prince* the majority court applied the proportionality test in section 36 of the Constitution and concluded that allowing the use of cannabis by Rastafarians would impede the State's ability to enforce its legislation in the interests of the public at large and to honour its international obligations to do so. The exemption was refused. (Paragraph 139 of

Prince) Likewise, granting an exemption in *Christian Education* would have encroached upon the rights of children to be protected. Granting the exemptions in both cases would have resulted in the law being broken in other respects. These two cases represent one extreme of the kind of accommodation or exemption that can be sought in pursuit of religious freedom.

69) Although employers are required to reasonably accommodate the religious needs of their employees, "reasonable accommodation" has not involved undue hardship for the employer. Thus to accommodate an employee who refused to work on Saturdays, an employer was not required to deny the shift and job preferences of some employees and deprive them of their contractual right in order to accommodate the religious needs of others. To require an employer to bear more than a *de minimis* cost would likewise be an undue hardship, according to the US Supreme Court. (*Hardison,* above) *Hardison* was followed in *Cooper* (above) to relieve the employer of employing even one extra person to accommodate the employee who refused to work on Saturdays because it was a tenet of her religion as a Seventh Day Adventist.

70) The respondent bore the onus of proving that it considered accommodating the applicants. Its alleged failure to do so in this case was not a ground on which the applicants challenged their dismissal. It was not the applicants' case that the respondent should and could have accommodated them. Under cross-examination they denied that the respondent tried to accommodate them by allowing them to keep their beards, provided they trimmed them neatly. Even if the respondent had made such an offer, they said that they would not have accepted it as they firmly believed that

it was against their religion to trim their beards. Consequently, whether the respondent attempted to accommodate the religious practices of the applicants, as he is required to as a fair employer, is not relevant. Hence, whether the test set in *Hardison* and *Cooper* (above) will be followed in South Africa need not be decided here.

71) In the circumstances, the applicants were not discriminated against. Their dismissal is accordingly not unfair.

72) As this is a matter turning on a novel constitutional issue the court makes no order as to costs.

Pillay D, J
20 June 2006