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Organisasie vir Godsdienste-Onderrig en Demokrasie v Laerskool Randhart et al: The right to freedom of religion, diversity and the public school

Abstract

The South African High Court judgment namely *Organisasie vir Godsdienste-Onderrig en Demokrasie v Laerskool Randhart et al (Randhart)* confirms the importance of the accommodation of religion in the public sphere, more specifically pertaining to schools. This means that religious observances may be practised at public schools under the *Constitution's* prescription that such observances ought to take place freely and voluntarily, equitably and in accordance with the rules of the applicable governing authorities. *Randhart* also made it clear that diversity necessitates a public school not to promote or allow its staff to promote that, as a public school, it adheres to only one or predominantly only one religion to the exclusion of others, as well as from holding out that it promotes the interests of any one religion in favour of others. This article, in addition to confirming the importance of the *Randhart* decision for the plight of religious rights and freedoms, provides a commentary on how this should be further interpreted to negotiate insights related to diversity that may still be of a marginalising nature towards the accommodation of religion (as a substantive category of belief) in the public sphere. The message in *Randhart* is that a public school may not be exclusive towards belief. This needs to be understood as *also* (in addition to religious observances) allowing for inclusivity regarding forms of expression that, although not reflective of a specific religion, are reflective of religion in the traditional sense in a generalised and collectively representative manner. This would naturally lead to the advancement of diversity, and it is also the responsibility of civil society, school governing bodies and parents to play an active part in such advancement.

1. Introduction

Since the emergence in 1994 of a democratic dispensation in South Africa, the judiciary has been confronted with various challenges related to the protection of freedom of religion. The South African Constitutional Court has proved to be sensitive, respectful and supportive of religious practices, even in those judgments in which religious interests did not receive the sought-after protection.¹ Decisions by the Constitutional Court in favour of the party seeking protection of the right to freedom of religion have been met with applause. For example, Lourens du Plessis, with special reference to *MEC for Education: KwaZulu-Natal v Navaneethum Pillay*,² observes that this is noteworthy for its “affirmation and the celebration of religion as the other”,³ in that it awarded protection to a learner at a public school to express herself in accordance with her religious beliefs.⁴ Also of special note is the bolstering of the autonomy of religious associations by the Supreme Court of Appeal in *Ecclesia De Lange v The Presiding Bishop of the Methodist Church of Southern Africa*.⁵ In this case, the freedom of churches to decide for themselves on matters related to appointments of spiritual leaders regarding conduct that was opposed to the core doctrine of such a church was confirmed.⁶ Approximately two decades into a democratic South Africa, the High Court received an application for the granting of what can briefly be described as a rigid limitation of religious practices by a public school. This heralded the introduction of the next important case on the South African jurisprudential calendar regarding the right to freedom of religion. More specifically, this relates to the High Court of South Africa being approached by a pro-atheist group known

1 See, for example, *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC); paras. 34-36; *Prince v President of the Law Society of the Cape of Good Hope* 2002 (2) SA 794 (CC); par. 160; *Minister of Home Affairs v Fourie*; *Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 (1) SA 524 (CC); paras. 89-90.

2 *MEC for Education: KwaZulu-Natal v Navaneethum Pillay* 2008 (1) SA 474 (CC).

3 See Du Plessis 2008:396-400.

4 Similar allowance by the South African judiciary was made for religion in the cases of *Antonie v Governing Body, Settlers High School* (2002 4 SA 738); *Department of Correctional Services and another v POPCRU and others* (2013 (4) SA 176 (SCA)); *Lerato Radebe and Others v Principal of Leseding Technical School and Others* (1821/2013) [2013] ZAFSHC 111 (30 May 2013).

5 *Ecclesia De Lange v The Presiding Bishop of the Methodist Church of Southern Africa* (726/13) [2014] ZASCA 151.

6 For more on this, see De Freitas 2016:1-22. Referring to the SCA judgment of *Ecclesia de Lange v The Presiding Bishop of the Methodist Church of South Africa*, the South African Constitutional Court (as per Justice Van der Westhuizen) commented that: “[t]he Constitution ... not only leaves, but guarantees space to exercise our diverse cultures and religions and express freely our likes, dislikes and choices, as equals with human dignity. In this sense, one could perhaps talk about a “constitutionally permitted free space”, *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the Time Being and Another* [2015] ZACC 35; par. 83.

as the *Organisasie vir Godsdiensle-Onderrig en Demokrasie*⁷ (OGOD) in 2014 to determine whether a public school may hold out to be affiliated to a specific religion (or predominantly one religion); whether religious observances at public schools may be driven by the school itself (and not by persons or institutions beyond the school), and whether a learner may be asked to convey whether or not s/he adheres to a particular (religious) faith.⁸ Accompanying this was the Applicant's prayer to prohibit practices by a public school such as proclaiming to be Christian; having a value that encourages learners to strive towards faith; the endorsement of a Christian character; recording that its school badge represents the Holy Trinity; having religious instruction and singing; distributing Bibles; opening the school day with Scripture and explicit prayer dedicated to a particular God; referring to any deity in a school song; working with learners to understand and self-discover their relationship with Jesus; teaching creationism, and having children draw pictures depicting Bible stories.⁹

This led to the High Court decision in *Organisasie vir Godsdiensle-Onderrig en Demokrasie v Laërskool Randhart et al*¹⁰ (*Randhart*) in June 2017, prohibiting a public school from promoting or allowing its staff to promote the notion that, as a public school, it adheres to only one or predominantly one religion to the exclusion of others and from holding out that it promotes the interests of any one religion in favour of others. However, the High Court still supported religious observances in accordance with the rules of the applicable governing authorities, and on condition that such observances take place free, voluntarily and equitably. *Randhart* confirms the awarding of a degree of protection to the right to freedom of religion at public schools, which most probably explains there being no application by the respondents for leave to appeal.

Bearing this in mind, and although *Randhart*'s contribution towards religious rights and liberties at public schools is explained, this article delves into the interpretive leeway evident from the judgment. This is attained by primarily arguing for an understanding of *Randhart* that accommodates "generalised and collectively reflective" religious (in the traditional sense) terms in a public school's motto and constitution, as well as the mission and vision statements of a public school. This means that terms such as "God" or the "Divine" or "Faith" ought to be accommodated, where there is a reasonable and sincere need for such. It is important to note that it is not only about the accommodation of a plurality of ways of living, but also the accommodation of expressive forms in the public sphere that represent religion (as understood in the traditional sense) as a category of foundational beliefs in many democratic societies. Consequently, the article argues for an understanding of 'diversity' that allows for religion, in

7 This reads as follows: *Organisation for Religion Education and Democracy*.

8 *Organisasie vir Godsdiensle-Onderrig en Demokrasie v Laerskool Randhart et al*; par. 18.

9 *Randhart*; par. 6.

10 GPJHC 27-06-2017 case no. 29847/2014.

general (and as a collective), to be recognised and respected, and which will ultimately lead to the advancement of diversity in South Africa.

2. Facts

The applicant, the *Organisasie vir Godsdiensle-Onderrig en Demokrasie*, applied to the High Court for the granting of relief comprised of two sets of prayers. The first prayer related to six declarations sought against not only the six respondent public schools, but also to “any public school, as defined in terms of the South African Schools Act 84 of 1996”.¹¹ These declarations sought to have “declared as a breach of the National Religion Policy and as unconstitutional” among others and pertaining to public schools, the inclusion of the promotion of only one religion in favour of others; the association with any particular religion; requiring of a learner to disclose (to the school) adherence to any particular religion, and permitting religious observances during school programmes on the basis that a learner may choose to opt out.¹² The second prayer was for seventy-one final interdicts against the respondent public schools, which, by means of the first prayer, were incorporated as part of the latter prayer.¹³ This, in turn, meant that the said interdicts were sought against the six respondent public schools as well as against all public schools.¹⁴ The said interdictory relief was to restrain the six respondent public schools from participating in various forms of religiously connoted conduct (some of which pertain to the Christian faith).¹⁵

According to the Court, the Applicant’s central submission was that the provisions of sec. 15(1)¹⁶ of the *Constitution*, as understood against the background of “equitable” in sec. 15(2)¹⁷ of the *Constitution*, “stood in the way of the adoption by a public school of any religion at all” and that “all that was permitted – and then limited to ‘religious observances’ – was the window opened under Section 15(2) of the Constitution”.¹⁸ The applicant also submitted that indirect coercion (against the background of ‘free and voluntary’, as included in the said section),

11 *Randhart*:par. 3.

12 *Randhart*:paras. 4, 11.

13 *Randhart*:par. 3.

14 *Randhart*:par. 5.

15 These forms of conduct, as more specifically described by the Court, “range from the more contentious (‘holding itself out as a Christian school’) to the possibly more neutral (‘having a value that includes learners to strive towards faith’)”, *Randhart*:par. 6. Some of these forms of conduct are referred to in the “introduction” above.

16 *Constitution of the Republic of South Africa*, 1996:sec. 15(1): “Everyone has the right to freedom of conscience, religion, thought, belief and opinion.”

17 *Constitution of the Republic of South Africa*:sec. 15(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.”

18 *Constitution of the Republic of South Africa*:par. 15.

was also proscribed even in an instance where a learner was required to disclose whether she subscribed to a faith (and, if so, which or what faith); or even if a learner were given the choice to 'opt out' of attending religious observances conducted by a school that would impinge on her fundamental right to religious freedom.¹⁹

The Court also stated that, central to the applicant's submission pertaining to the "permissive window" (referred to earlier) afforded in terms of sec. 15(2) of the *Constitution*, was the proposition that permission was hereby granted to persons beyond the school and, therefore, not the school itself, to conduct religious observances "at" (and not "by") the school, as is evident by the wording of sec. 15(2).²⁰

As summarised by the Court, the respondents' (the schools') argument was that they have a right of freedom of religion; they are entitled by law to have an ethos, and the school governing bodies are entitled to determine this ethos (with reference to the religious make-up of the feeder community that serves the particular school).²¹ The respondents also confirmed that their practices complied with the stipulations set out in sec. 15(2) of the *Constitution*, namely that they took place "under rules issued by the governing body"; "on an equitable basis", and that "attendance at them by learners and members of staff was free and voluntary".²²

Bearing the above in mind, the Court presented a summary of the essential issues between the parties as constitutive of the following:

- Whether a public school may *hold itself out* as a Christian school (and, if in the affirmative, to what extent);
- Whether a public school *itself* may conduct religious observances (and the extent to which these may be religion-specific), and
- Whether a learner may be asked to convey whether or not he or she adheres to a particular (religious) faith.²³

19 *Randhart*:par. 16.

20 *Randhart*:par. 17.

21 *Randhart*:par. 12.

22 *Randhart*:par. 13.

23 *Randhart*:par. 18 (emphasis added).

3. The Judgment

The Court's judgment comprises two main categories, namely the procedural concern as elaborated upon against the background of the principle of *subsidiarity*, and the substantive concern as elaborated upon against the background of *diversity*. Pertaining to the former, the Court confirmed that the applicant based its case for unlawfulness on two overarching grounds, namely a direct call on the *Constitution* and a direct call on the National Religion Policy. Therefore, according to the Court, the applicant "contended for unlawfulness of the conduct, irrespective of whether national legislation, provincial legislation, or the school governing body (SGB) rules might have provided validation of the impugned conduct."²⁴ Regarding the applicant's reliance on the National Religion Policy, the Court, by scrutinising the terms of the said policy, found that the said policy disqualified itself from being regarded as enforceable law.²⁵

Against the background of the applicant's direct reliance on the *Constitution*, the Court noted that there was legislation dealing with religious matters, including religious observances, in both the national and provincial spheres as well as the rules emanating from SGBs regarding religious practices.²⁶ Since the applicant's case did not involve an attack against any of the said legislation (and rules) as being inconsistent with the *Constitution*, the Court deemed it necessary to place the originating source and the reach of such laws under consideration so as to determine whether such laws *were intended to give effect to the protection and enjoyment afforded by sec. 15 of the Constitution*.²⁷ In this regard, the Court found that "religious observances", specifically at public schools, pertain to "all external manifestations of belief systems".²⁸ Therefore, the regulation of "religious observances" devolves down through the *Schools Act*, provincial Acts, and into the rules of SGBs.²⁹ The Court consequently found that the said legislation provided "the embodiment" of sec. 15 of the *Constitution*.³⁰ This, in turn, the Court argued, required the application of the "principle of subsidiarity", the meaning of which is found in the South African Constitutional Court judgment of *My Vote Counts NPC v Speaker of the National Assembly and Others*.³¹ In this regard, Cameron J stated, *inter alia*, that the said principle "denotes a hierarchical ordering of institutions, of norms, of principles, or of remedies,

24 *Randhart*:par. 56.

25 *Randhart*:paras. 51-52.

26 See, for example, *Randhart*:par. 59. This authority and responsibility placed on the shoulders of SGBs emanate from both the *Schools Act* and the relevant provincial legislation. See, for example, *Randhart*:paras. 27 & 35.

27 *Randhart*:par. 27 (emphasis added), par. 48.

28 *Randhart*:par. 63. Regarding the meaning to accompany "religious observances", which is included in sec. 15(2) of the *Constitution*, the Court was of the view that it pertains to all forms of external manifestations of freedom of religion.

29 *Randhart*:par. 65.

30 *Randhart*:paras. 57-58.

31 *My Vote Counts NPC v Speaker of the National Assembly and Others* 2016 (1) SA 132 (CC).

and signifies that the central institution, or higher norm, should be invoked only where the more local institution, or concrete norm, or detailed principle or remedy, does not avail".³² Subsidiarity in this regard was extended upon by Cameron J (in the said judgment) by linking it to an understanding of constitutional subsidiarity meaning:

The Constitution is primary, but its influence is mostly indirect. It is perceived through its effects on the legislation and the common law – to which one must look first. These considerations yield the norm that a litigant cannot directly invoke the Constitution to extract a right he or she seeks to enforce without first relying on, or attacking the constitutionality of, legislation enacted to give effect to that right ... where legislation has been enacted to give effect to a right, a litigant should rely on that legislation in order to give effect to the right or alternatively challenge the legislation as being inconsistent with the Constitution.³³

As a result, the Court came to the conclusion that the matters confronting it, namely (and as stated earlier³⁴)

- Whether a public school may hold itself out as a Christian school;
- Whether a public school itself may conduct religious observances; and
- Whether a learner may be asked to convey whether or not he or she adheres to a particular (religious) faith are:

[m]atters for regulation at grass roots, SGB level; and that the principle of subsidiarity requires that in this case a constitutional attack must be founded on the level of that regulation, and not directly on the Constitution itself. The schools' policies did not form part of the Applicant's founding affidavits, but of the schools' answering affidavits. No cause of action was formulated on such regulation, and consequently no analysis of the policies was done. No particular clause or paragraph in them was lifted out for scrutiny.³⁵

Based mainly upon this consideration, the Court concluded that the interdictory relief sought by the applicant could not be granted (whether or not it was dressed up as declaratory relief).³⁶

32 Cited in *Randhart*:par. 26.

33 Cited in *Randhart*:par. 26.

34 See also *Randhart*:par. 18.

35 *Randhart*:par. 73. The Court, stated that "given the principle of subsidiarity, the issue of religion at public schools is a matter dealt with in the subsidiary laws to which we have referred, and causes of action should, in principle, be founded there" (*Randhart*:par. 98).

36 *Randhart*:par. 77. The Court's furtherance of this view reads as follows: (1) The plethora of detailed instances of conduct that the applicant opposed as well as the myriad of detailed arrangements covered by the school's religious policies makes it very challenging for a court to "fish through such policies so as to discern whether any of the conduct complained of is actually covered by such policies" (*Randhart*:par. 74), and (2) because, especially in Gauteng, the MEC has the authority in certain instances to direct that a school's religious

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Having dealt with this procedural matter related to the applicant's direct call upon the *Constitution* and the National Religion Policy, and the implication this had against the background of the principle of subsidiarity, the Court dealt with its concern pertaining to what it referred to as "single faith branding" and the implications thereof for the upholding of diversity. This issue was raised in the first two declarations sought by the applicant.³⁷ The Court consequently posed the question: "May a public school, through rules laid down by its SGB relative to say its heraldry, hold out that it is exclusively a Jewish, or a Christian, or a Muslim, or a Buddhist, or an atheist school?"³⁸ The respondent schools confirmed that Christianity served as the basis for their ethos and that they endorsed Christianity in accordance with such an ethos.³⁹ This concern by the Court constitutes the substantive aspect related to the *Randhart* judgment and comprises the focus of this article. The Court's emphasis on diversity, particularly in the context of public schools, was accompanied by references to the Preamble of the *Constitution's* mentioning of "unity in diversity",⁴⁰ the equality clause,⁴¹ associational rights,⁴² and the *Schools Act's* references to past injustices and the remedying thereof.⁴³ This moved the Court to conclude that:

[a]t the level of principle then, the overarching constitutional theme is that our society is diverse, that that diversity is to be celebrated, and that specific rights are conferred and dealt with in pursuance of that principle. Within this context, public schools are public assets that serve the interests of society as a whole.⁴⁴

Added to this, the Court was of the view that:

[n]either the Constitution nor the Schools Act confers on a public school or SGB the right to adopt the ethos of one single religion to the exclusion of others. Rather, the Constitution authorises and the subsidiary laws to which we have referred provide for appropriately representative bodies that are required to make rules that provide for religious policies and for religious observances that are to be conducted on a 'free and voluntary' and on an 'equitable' basis. Moreover, as we have seen, 'this requirement of equity demands the State act even-handedly in relation to different religions.'⁴⁵

policy be reformulated, such an MEC, had the policies properly come up for adjudication, would have to be a party to the litigation at hand due to their being a direct and substantial interest in the matter (*Randhart*:par. 76).

37 *Randhart*:par. 78.

38 *Randhart*:par. 79.

39 *Randhart*:par. 80.

40 *Randhart*:par. 82.

41 *Randhart*:par. 83.

42 *Randhart*:par. 84.

43 *Randhart*:paras. 86-87.

44 *Randhart*:paras. 89, 82.

45 *Randhart*:par. 91.

Against this backdrop, the Court argued that, first, “feeder communities continually evolve”,⁴⁶ hereby implying that what may seem to be, for example, the need of Christian parents who are substantively represented in a given community to have their children educated at a public school with a Christian ethos, may, over time, develop towards no such need at all. Secondly, the Court reasoned that a public school that “holds itself out as subscribing to the ethos of a religion different from and exclusionary of” a non-religious learner, “could inculcate a sense of inferior differentness” in such a learner.⁴⁷ Thirdly, the Court argued that the “adoption of a single faith brand that excludes others” would not “provide equitably for all faiths” and would be in opposition to making learners of all faiths feel welcome.⁴⁸ The Court consequently issued an order declaring that, for a public school “to promote or allow its staff to promote that it, as a public school, adheres to only one or predominantly only one religion to the exclusion of others; and to hold out that it promotes the interests of any one religion in favour of others”, constitutes an offence of sec. 7 of the *Schools Act*.⁴⁹ However, the Court refused to support the applicant’s contention that there needs to be a differentiation between “by” or “at” pertaining to sec. 15(2) in that doing so, according to the Court, would be to “take too narrow a view of the constitutional appreciation for practicalities”.⁵⁰ This confirms the Court’s view that a public school, if so decided by the SGB, may, for example, initiate and manage itself (and not by, for example, religious clergy from the community) regarding for example, assembly sessions comprised of readings from Scripture and the singing of Christian songs (provided, of course, that it is in line with the conditions set out in sec. 15(2) of the *Constitution*). South African public schools may, therefore, accommodate religious observances in line with sec. 15(2) of the *Constitution* and sec. 7 of the *Schools Act*, and the responsibility rests on the shoulders of the SGBs to formulate arrangements regarding such practices. According to the Court, the foundational understanding in support of the above relates to the context of diversity within which public schools in South Africa should function. Added to this, was the Court’s reliance on equitable practices. This, in turn, relates to treating all religions (and beliefs) even-handedly.

46 *Randhart*:par. 92.

47 *Randhart*:par. 93.

48 *Randhart*:par. 96.

49 *Randhart*:par. 102. The Court refused the remainder of the relief claimed. The said *Act* reads as follows: “Subject to the Constitution and any applicable provincial law, religious observances may be conducted at a public school under rules issued by the governing body if such observances are conducted on an equitable basis and attendance at them by learners and members of staff is free and voluntary”, see *Randhart*:par. 28.

50 *Randhart*:par. 66. In this instance, the Court added: “The SGBs in their tripartite partnership, but no-one else, govern public schools. If outside religious instructors were to be permitted on the school premises, it will occur only if the SGBs laid down the conditions under which this would occur. So s. 7 of the *Schools Act* refers to ‘religious observances’ at a public school, whoever conducts them at the public school acting on authority of the SGB”.

4. Analysis

The protection of the right to education as well as the right to freedom of religion is qualified by international and regional human rights instruments and the constitutions of democratic states around the world. As universal and consensual as this may be understood to be, concerns related to rights protection regarding the interplay between education and religion naturally include contrasting points of view. This is evidenced in, for example, the situation where all concerned parties may call upon the same right in seeking protection, but where insights related to such a right come into conflict with one another. An example is where parents who want their children exposed to a Christian school education call upon the protection of their human dignity (as well as that of their children) to merit such education, whereas atheistic parents who do not want their children to be exposed to religion at school, also claim protection of their (and their children's) human dignity. Both sets of parents may similarly resort to the importance of claiming protection against "harm" (regarding themselves and their children) to substantiate their argument further. For these reasons, any finding by a Court in a plural and democratic society pertaining to a determination of the parameters of religious freedom within the context of a public school is prone to criticism. However (and based on the premise of the importance of diversity), the challenge is to determine the best path to accommodate high levels of diversity,⁵¹ without limiting the essential liberties of the parties involved, as well as maintaining the public order. *Randhart* poses no exception to such a challenge.

Randhart is supportive of the freedom to be awarded to religious observances at public schools (if the prescriptions as set out in sec. 15(2) of the *Constitution* are adhered to). In addition, an encouraging development in *Randhart* was the Court's refusal to support the applicant's contention that there needs to be a differentiation between "by" or "at" pertaining to sec. 15(2). To allow for such a differentiation would be, according to the Court, to "take too narrow a view of the constitutional appreciation for practicalities".⁵² This implies that a public school is not obligated to have religious observances initiated and practised on the school grounds by persons external to the school (such as church representatives) – in other words, the school itself may play a more direct role in this regard. Added to this, the Court refused (based on the principle of subsidiarity) to award the interdictory relief sought by the applicant pertaining to a list of a multitude

51 Meaning, for purposes of this article, forms of expression that are, clearly representative of religion and situated in those parts of the public sphere that are usually seen to be exclusionary towards religion.

52 *Randhart*:par. 66. In this instance, the Court added: "The SGBs in their tripartite partnership, but no-one else, govern public schools. If outside religious instructors were to be permitted on the school premises, it will occur only if the SGBs laid down the conditions under which this would occur. So s. 7 of the Schools Act refers to "religious observances" at a public school, *whoever conducts them at the public school acting on authority of the SGB* (*Randhart*:par. 66) (emphasis added).

of religiously inclined practices within the public school context.⁵³ For the same reason, the Court did not make a finding pertaining to the question as to whether a learner may be asked to convey whether or not s/he adheres to a particular (religious) faith (according to the applicant, a learner may not be asked whether or not s/he adheres to a particular religious faith).⁵⁴ Having said this, *Randhart* prohibits a public school from “promoting or allowing its staff to promote that it adheres to only one or predominantly only one religion *to the exclusion of others* and from holding out that it promotes the interests of any one religion *in favour of others*”.⁵⁵ This, in effect, limits, to some extent, a public school from having a religious ethos against the background of an understanding of ethos as explained in the following: “Religious ethos” (or “institutional identity”⁵⁶) refers to “[t]he characteristic spirit of a culture, era, or community as manifested in its attitudes and aspirations”.⁵⁷ According to Van der Walt, “ethos” is understood as the distinctive character, spirit and attitudes of a particular group or organisation. It embraces the philosophy, life-view and values system of the particular school as well as the concomitant set of beliefs, ideas and conceptions about social behaviour and relationships at the institution.⁵⁸ Institutional identity pertains to those typical characteristics that make a particular school unique, that the stakeholders in the school share with one another and that endure for a time.⁵⁹

Bearing this in mind, it is opined that a school with a specific religious ethos constitutes a school where religious observances related to, for example, Christianity are practised, *and* where such a school’s mottos, mission and vision statements, school emblem, logo, code of conduct, constitution as well as the school’s “outward branding” reflect Christian attributes. Stated otherwise, if a public school were to discard its Christian attributes expressed by, for example, its emblem and logo as well as in its motto, vision and mission statements, its code of conduct, constitution, and also as part of its “outward branding”, then surely such a school

53 Some of these practices are listed in the “Introduction” above.

54 The applicant was of the view that indirect coercion was also prohibited by sec 15(2) of the *Constitution* in that, even if a learner were required to disclose whether s/he subscribed to a specific faith or when given the choice to “opt out” of attending a religious observance conducted by a school, it would violate the “free and voluntary” criteria set out in sec. 15(2) and, consequently, intrude on the learner’s right to religious freedom, see *Randhart*:par. 16. It seems then that the Applicant wanted the schools to have a completely hands-off approach when it comes to organising religious observances and let the religious institutions, parents or learners organise it themselves so that it is not a school event where children are allowed to choose whether they wish to attend, see *Randhart*:par. 17.

55 *Randhart*:par. 102 (emphasis added).

56 Van der Walt 2010:335.

57 *Oxford Dictionaries* “Ethos”, <http://www.oxforddictionaries.com/definition/english/ethos> (accessed on 29 November 2017).

58 Van der Walt 2010:335.

59 Van der Walt 2010:335.

cannot be viewed as having a Christian ethos in the fullest sense of the meaning (even though it may be accommodating a substantive number of observances related to the Christian religion).⁶⁰ Therefore, and as referred to earlier, *Randhart* constricts a public school from having a specific religious ethos in the fullest sense of the meaning. Having said this, *Randhart* signifies a fitting approach (also bearing in mind the diverse profile of believers, whether religious or non-religious, who may constitute any public education institution in a highly diverse democratic society) to the South African context.⁶¹ The ideal would be to have government subsidise both religious and non-religious schools such as is the position in some European states, for example. (This is, unfortunately, not the position in South Africa.) Nevertheless, it is important to delve critically into the implications resulting from *Randhart* pertaining to a school's identity or character in a way that is respectful towards the *Constitution* and diversity.

It is argued that, relating to the public sphere, the divide between the religious and the non-religious, resulting in the exclusion of the former in many liberal democracies, should not be followed, in the sense that generalised and collectively representative religious terms such as "God" or "Divine" (or any similar terms) be excluded from mottos, mission and vision statements. By this is not meant that there needs to be connotations with specific religions, but that religion (in the traditional sense of meaning), in general, and as an important societal category of a certain type of belief, also be accommodated. In other words, a reference to, for example, "God", the "Divine", or even "Faith" in, for example, phrases

60 This, however, does not necessarily exclude the presence of *some or other* religious ethos (albeit not in its fullest meaning) being connoted to a specific school. An example in this regard may be a public school that, even though it may not formally promote itself to the public as being a Christian school, it may well be reflective of a school that substantively includes Christian observances (based on a free, voluntary, and equitable basis). This is confirmed in, for example, an understanding of ethos as that which implies a feeling and atmosphere that is perceived by the members of a school, but which may not always be easy to describe, see Hemming 2011:1064.

61 Ideally-speaking, what lacks in *Randhart* is that, although the Court elaborated on the importance of diversity so as to motivate the point that public schools in South Africa may not be seen to promote a specific religion to the exclusion of others (and rightly so), it did not elaborate (even briefly), beyond that of *S v Lawrence*; *S v Nagel*; *S v Solberg* [1997 (4) SA 1176 (CC)] pertaining to the importance and relevance of the protection of the right to freedom of religion for millions of South Africans. This especially in light of the importance of diversity, as emphasised by the Court itself, which gains in meaning and relevance when considering the weight of the matter with which the Court had been confronted, as well as the Constitutional Court's repeated emphasis on the importance and relevance of religion. The best the Court did in this regard was to quote part of par. 116 of *S v Lawrence*; *S v Nagel*; *S v Solberg*, which states that "... our Constitution recognises that adherence to religion is an important and valued aspect of the lives of many South Africans and that the Constitution seeks to protect, in several ways, the rights of South Africans to freedom of religion", see *Randhart*:par. 24.

such as “God is our trust”,⁶² “It flourishes under the will of God”,⁶³ “Believe and Strive”,⁶⁴ “We Build in Faith”,⁶⁵ and “We Believe”,⁶⁶ should not be prohibited in, for example, the motto of a public school.⁶⁷ This should not be understood as steering towards such a degree of marginalisation, harm or of not feeling welcome, to merit exclusion or limitation. This would also be aligned with higher ideals related to the accommodation of diversity (as alluded to earlier), which should be a priority for any democratic and liberal society. De Freitas, in his critique of the removal of “God” from the motto of a public university in South Africa, comments:

By excluding ‘God’ from the picture, the idealistic aim of attaining absolute (and even substantial) accommodation is a misnomer. In the process, one will be establishing some other underlying belief in a motto, a belief that is reflected in the motivations of those persons who feel that, in the name of pluralism, one has to move towards a supposedly more neutral or inclusivist direction. Excluding ‘God’ from the picture essentially excludes all of those interest groups who find a reference to ‘God’ important and relevant for whatever reason.⁶⁸

Therefore, the removal or exclusion of “God” from the motto of a public school does not necessarily bring about neutrality; rather, what enters is the marginalisation of any expression that is remotely religious, hereby favouring an encompassing anti-theistic approach. This is not about which religion’s “God” is referred to; rather, it is about also accommodating

62 Motto of George Washington University.

63 Motto of Princeton University.

64 Skuilkrans Primary School, <http://www.skuilkrans.com/adres-en-kontak-besonderhede/> (10 December 2017).

65 Waterkloof High School, <http://www.klofies.co.za/> (10 December 2017).

66 Voortrekkerhoogte High School, <http://hsvth.co.za/> (10 December 2017).

67 Other examples are: “In God is Truth”; “In God is Wisdom”; “God and Knowledge”; “Faith and Courage”; “To Believe breeds Success” and “Faith, Hope and Charity”.

68 De Freitas 2012:183-184. In any event, “Views on ‘God’ do not necessarily have to be limited to ‘God’ in a religious sense or be understood as somehow excluding those who do not believe in the concept. There can be many interpretations of the term ‘God’ ... it is very difficult (perhaps even impossible) to give a definition of God that will cover all usages of the word (and of equivalent words in other languages)” De Freitas 2012:181. Referring to Justice Sachs’ comment in *Christian Education v The Minister of Education* 2000(4) SA 757 (CC) regarding the importance of “the religious”, De Freitas (2012:180) adds that “[i]f, according to Sachs, ‘religious sects’ play a large part in public life through schools, amongst others, if they form part of the fabric of public life, and if they constitute active elements of the diverse and pluralistic nation contemplated by the Constitution, then their relevance to the motto of a public university ... is clear – even more so bearing in mind that the term ‘God’ in all its perceived manifestations has contributed much to virtues such as grace, humility, forgiveness, reconciliation and charity. Similarly, ‘God’ understood in a religious sense has contributed much to projects in health care and education and the upliftment of society, the alleviation of poverty, charity towards one’s neighbour and as an external and objective set of principles based on equality, non-discrimination, and fairness”.

generalised and highly representative concepts related to religious beliefs as a whole (especially where such religions constitute a substantive part of a society). Pierik refers to that branch of neutrality understood as “exclusive neutrality” that “contends that an impartial framework can be achieved only if the state completely disregards religious and cultural differences”.⁶⁹ This stoutly marginalises religion from the public sphere, whilst introducing, and paradoxically so, an encompassing and subjective non-religious frame of reference that cannot be neutral precisely because of its exclusivist effect. The danger in this is a public sphere that is excessively limiting towards “the religious” (as a substantive collective segment of South African society). This understanding is, therefore, relevant and of concern regarding the identity or character that a public school expresses to the public and towards that substantive segment of its staff, learners (and their parents), who find meaning in it and on which the relevant SGB (which should be representative of the interests of all the direct participants of a school) has decided.

Calls for protection against harm, marginalisation and the attainment of an equitable approach in the context of the right to freedom of religion will emanate from all involved, whether from the religious or from the non-religious. This, in turn, necessitates transcending the clashes between interpretive differences of the same concepts (for example, harm, fairness, even-handedness, and human dignity), provided, of course, that the public order is not grossly violated. This, in turn, is accomplished by seeking higher levels of diversity, which implies the inclusion and protection of public schools that include generalised and collectively representative religious words or phrases (as addressed earlier). To eradicate this option would be reflective of an arbitrary, subjective and dominant view, which, in turn, would result in the exclusion of religion from the public sphere and consequently the negation of higher levels of diversity. Why should only minority interests be the focus of attention and why should an equitable (and egalitarian) approach not also be relevant to public schools that express their identity by referring to generalised and collectively representative theistic terms such as “God” or the “Divine” (or anything similar)? On both sides of the religious-non-religious debate, there are reasonable and concerned calls for an equitable (and egalitarian) approach. The SGB should not be prohibited from choosing this where, needless to say, there is a sincere, representative and reasonable need for this.

Diversity understood against the background of *Randhart* may run the risk of being interpreted as supportive of the stripping of a public school from any reference whatsoever to expressions of theism and, by implication, of religion. In addition, equity and even-handedness understood from a view of diversity implies the inclusion of public schools with generalised and collective religious identities. Of interest, in this instance, is that neither the *Constitution* nor the *Schools Act* prohibits a public school (or SGB) from having a religious identity or character. To allow public schools, therefore, to include generalised and collectively representative religious terms or

69 Pierik 2012:209.

phrases adds momentum to the endeavour towards the advancement of diversity and true tolerance. This overlaps with developing scholarship calling for higher levels of pluralism and tolerance, an example being Inazu's proposal regarding "a confident mode of pluralism". In this regard, Inazu mentions that the State has a responsibility to protect society against *substantive* harm; harm that constitutes "violence and criminal activity".⁷⁰ This implies that practices potentially resulting in instability,⁷¹ disruption,⁷² or offence,⁷³ or practices that may lead to emotional, psychological, or reputational injury (save practices constituting defamation or libel)⁷⁴ should not serve as qualification for prohibiting certain practices – the practice needs to be *substantively disadvantageous* to merit limitation or prohibition.

Harm is ubiquitous; yet, in many instances, people continue with their lives and tolerate that which to them may seem harmful, offensive, disruptive, uncomfortable, or psychologically injurious. For example, the corporate world is highly competitive and, in the process, harm is caused; yet, a competitive business environment is not deemed harmful enough to prohibit such competitiveness; parents tolerate having to spend money on private religious education while paying tax money that is apportioned towards the payment for public non-religious schools; many tolerate the celebration of Christmas, even though they are not Christians; religious believers attend public schools and institutions of higher education that practise a non-religious ethos (yet, they tolerate exposure to the dominant non-religious values at such schools and institutions). The religious have to endure frequent derogatory expressions directed towards their faith emanating from, *inter alia*, the media or the entertainment world, not to even mention the non-religious (which may also be anti-religious) curricular influences that may come into opposition to the religious beliefs of many learners (and their parents) within the domain of the public school and that go by unnoticed or ignored.⁷⁵ Added to this, there are references on

70 Inazu 2016:48.

71 Inazu 2016:52.

72 Inazu 2016:58.

73 Inazu 2016:101.

74 Inazu 2016:95.

75 Parents and learners may, for example, have religious objections against the teaching of evolution in science, but still subject themselves to the formal curriculum and tolerate it (even when such an experience may be harmful to them). In this regard, an example is the South African curriculum that requires learners in Grade 12 to learn about Darwinism, natural selection and human evolution (Department of Basic Education, 2011. National Curriculum Statement, Life Sciences. Further Education and Training Phase – Grades 10-12. *Department of Basic Education*, <http://www.education.gov.za/LinkClick.aspx?fileticket=%2FyUNfV0A%2F8o%3D&tabid=570&mid=1558> (accessed on 10 January 2018)). A myriad of other possibilities of subtle and non-subtle influences may prove contrary to traditional religious beliefs or to denominations within specific religious beliefs in, for example, the fields of sex education, literature, and history, as these fields lend themselves to subjective interpretive approaches that overlap with views on moral rights and wrongs, the nature of reality, purpose in life,

prominent public platforms that reflect the relevance and importance of a term such as “God”. For example, the South African national anthem includes the following: ‘Nkosi Sikelel’ iAfrika (God Bless Africa) Nkosi sikelela, thina lusapho lwayo (God bless us, us the family), Morena boloka setjhaba sa heso (God save our nation)’. To date there have been no collective and urgent calls for the removal of this, due to some or other form of harm that this may have caused.

In order to attain higher levels of diversity and toleration, the necessity arises to surpass the prohibition of something merely because it seems, as the Court in *Randhart* itself referred to, “not welcoming” or “inculcating a sense of differentness”. How is the disadvantage that could be said to result from this be explained as qualification for the prohibition thereof in any event? Can we truly talk about “harm” in such cases and, if so, what degree of harm are we talking of? These are surely not offences against the public order. There is no reason why Inazu’s understanding should not relate to a public school being given the opportunity to show an affiliation towards a generalised and collectively representative religious term or phrase. Although this may be understood as being trivial to some, not doing so is reflective of a partisan view that is disrespectful, insensitive and not concomitant with the democratic and liberal ideals in support of the inclusion of substantive levels of diversity. In any event, if viewed as trivial, then why the fuss for change? There should, therefore, be no reason why some SGBs, where the need for this is convincing, should exclude “generalised and collectively representative” religious connotations from a public school’s expression of identity.⁷⁶

foundational truths and epistemological views on authoritative sources. In addition, the teaching of the various religions, which forms part of the curricula of many public schools in South Africa, has the potentiality of deflating the importance of a specific religion. In this regard, Malherbe (2013:7-8) comments that “[t]he official motivation advanced for the study of different religions is that to expose the child to different belief systems will promote understanding and national unity and, by implication, that religion education along these lines is in the best interest of the child. This reflects precisely the so-called secularist and humanist value system underlying the policy and the way in which religion education is offered at schools. Religion education pursues a secular objective and enforces on learners a particular worldview determined by the state, and in the process violates their religious freedom”. The maintenance of the *status quo* in this regard is indicative of the sacrifices and high degree of tolerance practised by “the religious”.

76 This understanding is also in line with an advisory notice pertaining to the *Randhart* judgment, distributed by Federation of Governing Bodies of South African Schools (FEDSAS) to schools in South Africa, more specifically the following: “All references to a *single religion* in the school’s religious policy, constitution, vision and mission statement, code of conduct or any other policy must be removed, as this can be seen as promoting a single religion” (Colditz 2017:8) (emphasis added). Referring to generalised or collectively representative terms such as “God” or “Divinity” or “Faith” does not constitute references to “a single religion”.

In conclusion, it should be noted that the Court in *Randhart* was of the view that South Africa is not a secular State.⁷⁷ It can safely be deduced that the meaning to be ascribed to “secular”, according to the Court, pertains to that which is non-religious and by implication that the public sphere is accommodative towards religion. Having said this, how nuanced is this view taken by the Court? What is the degree of accommodation of religion in the public sphere that is required for a State to qualify as “non-secular”? In Canada and France, countries that are viewed by many as substantively rigid and limiting towards the accommodation of religion in the public sphere, forms of State subsidy are provided to religious schools. This is not the case in South Africa. One can, therefore, argue that Canada and France are also, to some extent, “non-secular” when it comes to subsidising some religious schools. In other words, countries such as France, Canada, America and South Africa, for example, are (irrespective of degree) accommodative towards religion in the public sphere. As alluded to earlier, what should the specific parameters be to qualify as a non-secular State?⁷⁸ This becomes even more challenging to determine when taking cognisance of South Africa’s rather young democratic dispensation as well as the rather sparse number of challenges (and successes) related to freedom of religion that have confronted the South African judiciary (with special reference to the *Constitution*). In addition, in the context of school education, there are suggestions that support a divide between religion and public school education; for example, the *National Policy on Religion and Education*’s⁷⁹ exclusion of “religious instruction” from public schools, as well as that, according to the *Constitution*, anyone has the right to establish and maintain independent educational institutions, which may include religious educational institutions, but that government be excluded from financial obligations related to the establishment and maintenance thereof.⁸⁰ It would, therefore, be wise to refrain from any typification or categorisation of South Africa as a secular or non-secular state. To infer that South Africa has a more accommodative stance towards religion *in public schools* than, for example, is to be witnessed in America, reflects a more nuanced approach.

5. Conclusion

According to *Randhart*, public schools are prohibited from promoting or allowing its staff to promote that, as a public school, it adheres to only one or predominantly one religion to the exclusion of others, as well as from holding out that it promotes the interests of any one religion in favour of others. In addition, *Randhart* confirms that religious observances (also under the direct involvement and management of the school) in accordance with especially sec. 15(2) of the *Constitution* remain intact. Unfortunately, the failure by the applicant to address the constitutionality of the relevant rules,

77 *Randhart*:par. 95.

78 See also Venter 2012:443.

79 Department of Education 2003.

80 See Constitution of the Republic of South Africa:sec. 29(3).

for which the specific SGBs are responsible, resulted in a somewhat bland outcome for those who were hoping for a more in-depth and informative jurisprudential outcome pertaining to specific religious practices (against the background of especially sec. 15 of the *Constitution*). It is agreed with Sibanda that, because the applicant challenged the schools based primarily on the *Constitution* (and not the rules of the SGBs), the nation was deprived “of a more substantial analysis of the issues at hand”.⁸¹ Irrespective, *Randhart* places the spotlight on the importance of the SGBs of public schools in formulating or revising policies that allow for religious practices in accordance with the *Constitution* and relevant legislation.⁸² In this regard, there is also a constructive and hopeful message, namely that the SGBs of public schools may want to rework their policies to conform properly to especially sec. 15(2) of the *Constitution* (and sec. 7 of the *Schools Act*), where this has not been done yet. In other words, *Randhart* serves as a reminder to the thousands of public schools in South Africa to review their compliance with sec. 15(2) of the *Constitution*.⁸³ In addition, further guidelines by FEDSAS have been provided so as to properly advise public schools regarding the accommodation of diverse beliefs in general.⁸⁴ It must be noted, in this instance, that the word “equitable” and not “equal” enjoys the emphasis in the said sec. 15(2).

81 Sibanda. Case Discussion: *Organisasie vir Godsdienste-Onderrig en Demokrasie v Laerskool Randhart and Others*, Centre for Constitutional Rights. <http://www.cfc.org.za/index.php/latest/727-case-discussion-organisasie-vir-godsdienste-onderrig-en-demokrasie-v-laerskool-randhart-and-others> (accessed on 24 January 2018). As a result, matters related to the teaching of knowledge that is either affiliated to a specific religion's view on things or that is in opposition to a specific religion's view, and how this relates to the approaches taken regarding religious observances, is also in dire need of being explored by the judiciary.

82 This also involves government on both a national and provincial level.

83 The following advisory note distributed by FEDSAS to schools in South Africa enhances the relevance of this point: “Learners must also be able to opt out of any religious observances, irrespective of their religion. Schools must provide for learners who do not want to take part in any religious practice, without letting the learners feel excluded, victimised or in any way discriminated against. The choice remains the learner's (or the parents'). This can be done by making different venues available for the different religious observances practised by the learners in the school at the same time” (Colditz 2017:par. 33). In addition, there are guidelines set for the establishment of various SGB committees to focus on specific issues, and one of these may surely be established so as to focus its attention on matters related to freedom of religion and belief in a public school. See FEDSAS & loDSA:13-14.

84 See Colditz 2017:par. 21: “Firstly, learners should be admitted to a school and enter its premises not having been enticed to attend that school by virtue of its advertising a religious preference that corresponds with the learners'. Conversely, learners who are compelled to attend a public school nearest to them may not be repelled by having to enter a school with a religious preference adverse to their own”. In addition, “(a) All outward manifestations of religious affiliation must be removed, including signage outside a school portraying it as Christian or Muslim. (b) All such manifestations should also be removed from school websites (which the schools' adversaries normally

Although the *Randhart* judgment constitutes a welcome and important development towards the advancement of diversity in South Africa, an interpretation of *Randhart* should be followed that is supportive of a “diversity of public school identity or character”, with special reference to also accommodating “the religious” (to be understood in a generalised or collectively representative manner). More specifically, this is of relevance regarding the inclusion of references to, for example, “God,” the “Divine”, or “Faith” (or any similarly generalised and collectively representative religious terms) in, for example, a school’s motto, mission and vision statements, constitution and school emblem. Rather this than an understanding of diversity that excludes any connotation to religion, hereby leaving all forms of identity or character stripped across the board from that which is theistic and by implication religious. It also takes due cognisance of the importance of the accommodation of theistic generalised and collectively representative forms of identity which constitutes a true “celebration of difference”. If this is how the *Randhart* judgment is interpreted, then it can surely be confirmed that such jurisprudence truly “affirms and, indeed, celebrates Otherness beyond the confines of mere tolerance or even magnanimous recognition and acceptance of *the Other ...*”.⁸⁵ This type of “unique” accommodations will signify the true willingness towards the advancement of diversity. In this regard, one is reminded of the words of Justice Jackson of the U.S. Supreme Court⁸⁶ commenting that “freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order”.⁸⁷ This is important for societies that have grown averse towards the inclusion of the religious in the public sphere (and yet which paradoxically pride themselves on plurality), to take cognisance of. In addition, it is also the responsibility of civil society (especially school advisory bodies), the SGBs of public schools, and parents to claim the liberty courageously and with conviction to express an affiliation to, even if in general or collective terms, a transcendental divinity. Implied in this is also the responsibility of those parents who are of the view that their children are being educated in matters contrary to their religion, to formally raise the matter regarding their right to have their children exempted from such education. In addition, what continues to require attention is the accommodation of religion within the curriculum itself where a need arises in a public school to have, for example, a Christian approach included in subjects such as natural science, social science, literature, history, and

pounce on), including religious rules, ethos or mission statements. In pursuing equity, a school should make absolutely certain that these references are sanitised from all its documents. In addition, beware of traps such as a caller attempting to elicit a response from a principal confirming that the school has an allegiance to a particular faith” (Colditz 2017:paras. 23, 31-35).

85 Du Plessis 2008:378.

86 In *West Virginia Board of Education v. Barnette* 319 U.S. 624 (1943).

87 Cited in Leigh 2017:182.

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life skills.⁸⁸ This is said, taking due cognisance of Cinotti's comment that the question of what place religion should hold in society is not one for the Courts alone; it is a continuous process involving society in the broader, more inclusive sense.⁸⁹

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88 This also relates to fn. 75 above.

89 Cinotti 2003:532.

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