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THE SCOPE OF REASONABLE CULTURAL AND RELIGIOUS ACCOMMODATION IN PUBLIC SCHOOLS IN SOUTH AFRICA, WITH A FOCUS ON ANCESTRAL CALLINGS EXPERIENCED BY LEARNERS

SUMMARY

This article examines the scope of reasonable cultural and religious accommodation in South African public schools, with a focus on ancestral callings experienced by learners. It analyses the relevant legislative framework and key court decisions shaping jurisprudence on this issue. The authors argue that schools must balance protecting sincerely held beliefs against maintaining an effective learning environment for all students. They recommend formal exemption procedures and a consultative approach involving parents, cultural leaders, and education authorities to determine appropriate accommodations, particularly for complex situations such as ancestral callings. The article concludes that reasonable efforts should be made to accommodate diversity in schools without imposing undue burdens.

1. INTRODUCTION

In South Africa, a diverse nation with a rich tapestry of cultural and religious practices, the scope of reasonable cultural and religious accommodation in schools has become an important and complex issue. However, determining the extent of such accommodations can be challenging, as it requires striking a delicate balance between preserving individual rights and maintaining a harmonious learning environment for all students. This article explores the scope of reasonable cultural and religious accommodation in public schools in South Africa, reflecting on the legal framework, practical considerations, and potential challenges associated with this important issue. This exploration is undertaken to assist schools when learners experience an ancestral calling while at school.



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Sec. 29(2) of the *Constitution of the Republic of South Africa*, 1996 (hereafter, the *Constitution*) provides that every person has a right to basic education. Furthermore, the best interest of the child is of paramount importance in every matter concerning the child.¹ Where the exercise of cultural and religious rights of children in public schools needs to be accommodated, most often these two rights must be balanced.

Several pieces of legislation, regulations, and guidelines govern the management of schools and set out the responsibilities of the role players in education. A myriad of policies and guidelines may become a confusing administrative burden to keep up with. The authors attempt to provide an overview of the education law landscape in terms of the cultural and religious aspects. They then report on important case law to assist in navigating the legislative and regulatory landscape.

This article examines the scope of reasonable cultural and religious accommodation in South African public schools, with a focus on ancestral callings experienced by learners. It provides an overview of the relevant legislative framework, including the *Constitution*, the *South African Schools Act* 84 of 1996, and other policies and guidelines related to religious and cultural rights in schools. The article also analyses key court cases that have shaped jurisprudence on religious and cultural accommodation in educational settings, particularly the Constitutional Court's decision in *MEC for Education: KwaZulu-Natal and Others v Pillay*.²

The authors conclude that sincerely held religious and cultural beliefs deserve protection and respect in schools but must be balanced against maintaining a harmonious learning environment and protecting all learners' right to basic education. They argue that schools should have formal exemption procedures to consider accommodation requests and should make reasonable efforts to accommodate diversity without placing an undue burden on the school or other learners. For ancestral callings specifically, the authors recommend that schools communicate with parents, cultural leaders, and education authorities to understand the situation and determine appropriate accommodations within educational policies and laws. Overall, the article emphasises the need for a consultative, balanced approach to navigating religious and cultural diversity in South African schools.

2. LEGISLATIVE FRAMEWORK

2.1 The Constitution

The *Constitution* guarantees many cultural and/or religious rights in Chapter 2 of the Bill of Rights. Sec. 15 guarantees the freedom of religion, belief, and opinion; sec. 30 provides for the right to language and culture, and sec. 31 provides for the protection of cultural, religious, and linguistic communities.

1 *Constitution*:sec. 28(2).

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

2.2 Cultural and religious rights of children

It is commonly understood that, in all matters concerning the care, protection, and well-being of a child, the standard that the child's best interest is of paramount importance must be applied.³

The definition of care in the *Children's Act* 38 of 2005 (hereafter, the *Children's Act*) includes "guiding, directing and securing the child's education and upbringing, including religious and cultural education and upbringing, in a manner appropriate to the child's age, maturity and stage of development".⁴ The *Children's Act* also prescribes that a child's need to maintain a connection with his or her family, culture, and tradition must be considered when the best interest of the child standard is applied. Children may not be subjected to any cultural, religious, or social practices that are detrimental to their well-being.⁵ The *Children's Act*, therefore, clearly speaks to the cultural and traditional rights of children, also in the context of their care and well-being. The scope of the best interest principle extends to schools and the school environment.⁶

The United Nations Convention on the Rights of the Child (hereafter, CRC)⁷ determines that the education of children in State Parties must be aimed towards developing the child's cultural identity, language, values, and respect for societies that differ from their own.⁸ Similarly, the African Charter on the Rights and Welfare of the Child⁹ (hereafter, the Charter) states that a child's education must be directed to, *inter alia*, the preservation and strengthening of positive African morals, traditional values, and cultures.¹⁰ The Charter states that education should be directed towards preparing the child for a responsible life "in the spirit of understanding tolerance" among other ethnic, tribal, and religious groups.¹¹ Children also have the right to freedom of thought, conscience, and religion.¹²

The South African Charter for Religious Rights and Freedoms (hereafter, SACRRF), which was publicly endorsed in 2010, was drafted by a committee of religious leaders and academics in consultation with all the major religions in South Africa.¹³ Even though this is not a binding legal document, it specifically

3 *Children's Act* 38/2005:sec. 9.

4 *Children's Act*:sec. 1(e).

5 *Children's Act*:sec. 12(1).

6 *Centre for Child Law and Others v Minister of Basic Education and Others* (2840/2017) [2019] ZACGHC 126:127.

7 The CRC was adopted on 20 November 1989 by United Nations General Assembly Resolution 44/25. South Africa became a signatory on 29 January 1993 and ratified the CRC on 16 June 1995.

8 United Nations Conventions on the Rights of the Child:sec. 29(1)(c).

9 African Union "African Charter on the Rights and Welfare of the Child Ratification Table", <https://www.acerwc.africa/en/member-states/ratifications> (accessed on 3 July 2023). The Charter on the Rights and Welfare of the Child entered into force on 29 November 1999 and was ratified by South Africa in 2000.

10 The Charter:sec. 11(2)(c).

11 The Charter:sec.11(2)(b).

12 The Charter:sec 9(1).

13 Coertzen 2014:128.

addresses the rights of parents and children in the religious education sphere. The authors point out that it is necessary to consider what the vast majority of religious leaders in our pluralistic nation deemed necessary to include in such a document.

The SACRFF specifically speaks to religion in school. It states that public schools and the state must inform and consult with parents on matters of education in accordance with religious or philosophical convictions and that parents “may withdraw their children from school activities or programs inconsistent with their religious or philosophical convictions”.¹⁴ It also states that independent schools may choose a religious ethos that may be imparted on children enrolled in this institution and may refuse to promote, teach, or practise any religious or other conviction other than its own. Enrolled learners, who do not subscribe to the ethos of the school, should participate in the religious activities of these institutions.¹⁵

The explanatory note published for the Charter, compiled by the Council for Religious Rights and Freedoms, refers to school governing bodies (SGBs): “(t)here is a particular duty on school governing bodies to determine and monitor religious observances and instruction taking place in school, and to liaise with parents on all matters relating to religion in school.”¹⁶

This echoes the values and principles of education and training set down in the First White Paper for Education, where the Department of Education acknowledge that parents have the primary responsibility for the education of their children. This includes the right to

be consulted by the state authorities with respect to the form that education should take and to take part in its governance. *Parents have an inalienable right to choose* the form of education which is best for their children [...]. The parents' right to choose includes choice of the language, cultural or religious basis of the child's education, with due regard for the rights of others and the rights of choice of the growing child.¹⁷

14 SACRRF:par. 7.1.

15 SACRRF:par. 7.3.

16 Explanatory notes: SACRRF:par. 7.1.

17 GK 196, *Government Gazette* 1995:4(3).

2.3 Cultural and religious rights in schools

2.3.1 *South African Schools Act* 84 of 1996

The South African Education system envisioned during the consultative process for the drafting of the *South African Schools Act* 84 of 1996 (hereafter, the *Schools Act*) is one where the National Department of Basic Education, Provincial Departments, Districts, Circuits, parents, educators, and learners co-operate to provide quality education for all children in South Africa.¹⁸

The preamble to the *Schools Act* confirms that South Africa requires a new national system for schools that will protect and advance our diverse cultures and languages. Similarly, the preamble to the *Constitution* promises that South Africa belongs to all who live in it, united in our diversity.

The *Schools Act* allows for religious observances in public schools, subject to the *Constitution* and provincial law, and must be conducted on an equitable basis; attendance by learners and staff must be free and voluntary.¹⁹

The SGB is required to adopt a code of conduct after consultation with learners, parents, and educators of the school.²⁰ The purpose of this code of conduct is aimed at establishing a disciplined and purposeful school environment, dedicated to the improvement and maintenance of the quality of the learning process.²¹

The Basic Education Laws Amendment Act 32 of 2024²² proposes adding two sections to sec. 8 of the *Schools Act*, which will require this code of conduct to take into account the diverse cultural beliefs, religious observances, and medical circumstances of the learners at the school. The code of conduct must also make provision for an exemption application.²³ These amendments align with the court's judgment in the matter of *MEC for Education, Kwazulu-Natal, and Others v Pillay*, to be discussed later.²⁴

The National Guidelines for School Uniforms²⁵ (hereafter, the Guidelines), which was published in terms of the *Schools Act*, aims to ensure that practices related to school uniforms do not impede access to education or breach the constitutional rights of learners.²⁶ It should be noted that these Guidelines

18 The White Paper on Education and Training in a Democratic South Africa: First Steps to Develop a New System, 15 March 1995 (Notice 196 of 1995) GG 16312; Hunter Committee Report: Released in August 1995. The recommendations in the Hunter Report were taken up in the White Paper on Education 2; Draft Education White Paper 2: The Organisation, Governance and Funding of Schools: A Draft Policy for Discussion, 24 November 1995 (Notice 1229 of 1995) GG 16839.

19 *Schools Act* 84/1996:sec. 7.

20 *Schools Act*:sec. 8.

21 *Schools Act*:sec. 8(2).

22 Act 32/2024.

23 B2-2022:sec. 7.

24 *MEC for Education, Kwazulu-Natal, and Others v Pillay* 2008 (1) SA 474 (CC).

25 GK 173, *Government Gazette* 2006

26 GK 173, *Government Gazette* 2006:2.

are non-binding in nature.²⁷ Essop argues that the Department of Education is obliged to make the Guidelines mandatory, thereby ensuring that “SGBs develop codes of conduct that consider significant constitutional developments relating to the best interests of children and adequately accommodate for diversity in schools”.²⁸

The Guidelines advise that refusal to wear the approved school uniform may be treated as a disciplinary matter in terms of the Code of Conduct.²⁹ Regarding cultural and religious diversity, however, the Guidelines advised schools to consider the diverse views of the community and that measures should be taken to accommodate learners whose religious beliefs are compromised by a uniform requirement.³⁰ It also indicates that a school is permitted to ask for a letter from a “religious teacher or organization substantiating the validity of the request” where an exemption is applied for.³¹

2.3.2 National Education Policy Act 27 of 1996

Sec. 4 of the *National Education Policy Act 27 of 1996* (hereafter, *National Education Policy Act*) states that the national policy for education at education institutions shall be directed to the advancement of the Bill of Rights and, particularly, to the right to freedom of conscience, religion, thought, belief, opinion, expression, and association within education institutions.³² Many policies have indeed been published in terms of this *Act*. The authors provide a short overview of its relevant aspects below.

The *National Policy on Religion and Education*³³ was published in 2003 and aimed to provide guidelines to public schools on religion and education and “religion education”.³⁴ In this policy document, the Department of Basic Education proposes a cooperative model in the relationship between religion and public education.³⁵

The Policy on Learner Attendance³⁶ provides a list of valid reasons for a learner’s absence from school.³⁷ One valid reason is “physical or psychological illness, for which a principal may require communication from the parent that the learner is unable to attend school, or written confirmation by a registered medical practitioner or traditional healer if the illness lasts longer than three days”.³⁸

27 *MEC for Education: KwaZulu-Natal and Others v Pillay*:16.

28 Essop 2023:23.

29 GK 173, *Government Gazette* 2006:15.

30 GK 173, *Government Gazette* 2006:29.

31 GK 173, *Government Gazette* 2006:29(2).

32 *National Education Policy Act 29/1996*:sec.4(a)(vi).

33 GK 1307, *Government Gazette* 2003.

34 Defined on page 26 of the Policy as “a set of curriculum outcomes which define what a pupil should know about religion. Further definition is provided in paragraphs 17 to 19 of the Policy.”

35 GK 1307, *Government Gazette* 2003:4(4).

36 GK 361, *Government Gazette* 2010.

37 GK 361, *Government Gazette* 2010:E(13).

38 GK 361, *Government Gazette* 2010:E(13)(b).

Another relevant reason, for purposes of this article, is “religious or cultural observances approved by the School Governing Body in terms of the *National School Calendar Policy*”.³⁹ Parents are responsible for informing the principal or class teacher if their child will be absent or is expected to be absent or late with a valid reason.⁴⁰ The parents must cooperate with the school “in resolving the problem if the learner is absent from school without a valid reason”.⁴¹ The SGB must ensure that rules dealing with attendance and punctuality are part of the code of conduct for learners.⁴²

With regards to commemorating religious holidays not provided for in Schedule 1⁴³ of the *Public Holidays Act* 36 of 1994, the principal may recommend to the Head of Department that the school should close for religious commemorations of a particular faith, where the vast majority of learners are members of that particular faith.⁴⁴ These closures may be for a maximum of two days a year. The policy states that the SGB “must decide very carefully how to use the two days a year”.⁴⁵ Minority religious groups may also be given permission to take two recognised religious holidays off from school⁴⁶ and should not be academically disadvantaged as a result of their absences.⁴⁷

Lastly, the Policy on the South African Standard for Principals,⁴⁸ published in 2016, aims to assist principals in many competencies, including cultural leadership:

Culture refers to the way of life of a specific group of people and encompasses behaviour, beliefs, values, customs, style of dress, personal decoration such as make-up and jewellery, relationships with others, and special symbols and codes. The fact that the principal is expected to deal with people from various cultural backgrounds means that he/she must have knowledge of how to promote cultural diversity, gender equality, religious tolerance and multilingualism in the school context.⁴⁹

The policy requires principals, under cultural leadership, to embrace diversity and to behave with integrity towards people of all cultures. Furthermore, the principal must support and uphold the traditions of the school community and ensure that policies on religion and language are adhered to.⁵⁰

39 GK 361, *Government Gazette* 2010:E(13)(d).

40 GK 361, *Government Gazette* 2010:F(18)(c).

41 GK 361, *Government Gazette* 2010:F(18)(d).

42 GK 361, *Government Gazette* 2010:F(19).

43 Schedule 1 of the *Public Holidays Act* 36/1994 lists all official public holidays in South Africa. The few religious public holidays on the list, Good Friday and Christmas Day, are Christian holidays. No other religious holidays are on this list.

44 GK 57, *Government Gazette* 2015:5.6.1.

45 GK 57, *Government Gazette* 2015:5.6.2(a), (b).

46 GK 57, *Government Gazette* 2015:5.6.3(a).

47 GK 57, *Government Gazette* 2015:5.6.3(c).

48 GK 323, *Government Gazette* 2016.

49 GK 323, *Government Gazette* 2016:5.1.1.4.

50 GK 323, *Government Gazette* 2016:5.1.1.4(a)-(f).

2.4 Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

The *Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* (hereafter, *PEPUDA*) was enacted to give effect to sec. 9 of the *Constitution* – the equality clause. The *Act* is undoubtedly important whenever reasonable accommodation is discussed and will be touched upon again when the *Pillay* case is considered.

PEPUDA defines discrimination in sec. 1 of the *Act* as “any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly imposes burdens, obligations or disadvantages on; or withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds”.

Sec. 6 deals with the prevention and general prohibition of unfair discrimination and confirms, in line with the Bill of Rights and our international law obligations, that neither the State nor any person may unfairly discriminate against any person.

To answer the question posed by our article, sec. 14 of *PEPUDA* is helpful, as it deals with the determination of fairness or unfairness. For a person to prove that discrimination is fair, several factors will be taken into account, including the context of matter, the impact on the complainant, whether the discrimination impairs dignity, and whether the respondent took steps to ‘reasonably accommodate’ the complainant.⁵¹

It follows that schools and SGBs are obliged to take reasonable steps to address the disadvantage that arises from, or is related to religious or cultural rights and whether they took reasonable steps to accommodate diversity.

2.5 Conclusion of legislative overview

After considering the legislative landscape, the authors conclude that education, culture, religion, and traditions cannot be viewed in a vacuum. They interact with one another and need to be balanced and understood. The protection of children is an aspect that must be afforded substantial consideration. The right of the parents to choose the form of education for their children could almost be considered one of the founding values of the education system created and envisioned post-apartheid.

51 Sec. 14 can be summed up as follows: The following factors will be used to determine the fairness of the discrimination: the context, whether it is reasonable and justifiable differentiation based on objectively determined rules which are intrinsic to the activity, whether dignity will be impaired, the impact on the complainant, the position of the claimant in society and the group he or she belongs to, the nature and extent of the discrimination, whether it is systemic in nature, has a legitimate purpose and whether less restrictive means are available to achieve the purpose. Lastly, whether and to what extent the respondent has taken such steps as being reasonable in the circumstances to address the disadvantage which arises from, or is related to one or more of the prohibited grounds or accommodate diversity.

Religion, culture, and traditions indeed have a place in the education sphere and in schools. It is our view that the international legal instruments considered do, perhaps, speak about education in a broader sense. Education is not only about what a child must be taught at school, but also about the things that should form part of a child's life and experience growing up, in order for him or her to become a responsible adult in a village that is. This is, increasingly, being considered a global understanding.

The diverse values that characterise our country in terms of race, religion, culture, and ethnicity need to be reflected in the curriculum.⁵² Education is not merely about the teaching of the co-called hard sciences. It includes the teaching of values and respect for others. "Value education forms part of the hidden curriculum, meaning that education cannot just be seen as the transferring of knowledge" prescribed by a curriculum.⁵³ Embedding values in the curriculum must be more broadly based than what is being taught in the Life Orientation classes at the present juncture.⁵⁴

3. CASE LAW

In 2008, the Constitutional Court handed down judgment in the matter of *MEC for Education, Kwazulu-Natal, and Others v Pillay*⁵⁵ (hereafter, the *Pillay* case). More than ten years later, the case still offers valuable insights for cultural and religious accommodation in the schooling environment. It also offers an important precedent on the interpretation of *PEPUDA*.⁵⁶ The matter was a clear development of the Constitutional Court's jurisprudence on religious liberty and cultural accommodation.⁵⁷

The SGB of a public school in Kwazulu-Natal would not allow an exemption to Sunali Pillay, a learner who had started wearing a nose stud as part of a cultural and religious practice.⁵⁸ The learner's mother approached the Equality Court on her daughter's behalf and the matter was eventually heard in the Constitutional Court. The question that had to be answered was whether Sunali had been discriminated against unfairly, based on her religion and culture.⁵⁹ The Equality Court found that the school did discriminate against the learner, but that it was fair.⁶⁰ The High Court found that it was unfair discrimination in terms of *PEPUDA* and this decision was taken on appeal directly to the Constitutional Court.⁶¹

52 Maphalala & Mpofu 2018:2.

53 Reyneke & Reyneke 2020:174.

54 Maphalala & Mpofu 2018:9.

55 *MEC for Education, Kwazulu-Natal, and Others v Pillay* 2008 (1) SA 474 (CC).

56 Please note that the court refers to *PEPUDA* as the *Equality Act* throughout the judgment.

57 Lenta 2008:14.

58 *MEC for Education, Kwazulu-Natal, and Others v Pillay*:paras. 5-10.

59 *MEC for Education, Kwazulu-Natal, and Others v Pillay*:par. 112.

60 *MEC for Education, Kwazulu-Natal, and Others v Pillay*:par. 14.

61 *MEC for Education, Kwazulu-Natal, and Others v Pillay*:par. 15.

By the time the Constitutional Court heard the matter, the learner almost completed her schooling, and it was argued that the issue was moot.⁶² The National Guidelines for School Uniforms had also been published by then. The Constitutional Court heard the case and delivered judgment, stating that moot matters may be heard when it is in the interest of justice and that the matter will “have a significant practical effect on the school and all other schools in the country, although it will have no direct impact on Sunali”.⁶³

The Constitutional Court confirmed the High Court’s finding of unfair discrimination and held that the discrimination negatively impacted on Sunali and that the purpose of school uniforms would not have been impeded by allowing this exemption. The Constitutional Court held that allowing Sunali to wear a nose stud would not have imposed an undue burden on the school and reasonable accommodation would have been achieved if she were merely allowed to wear the nose stud.⁶⁴

The question was, therefore, not about a general prohibition in the school’s code of conduct to wear a nose stud but the refusal of the SGB to allow the exemption to Sunali.⁶⁵ The Constitutional Court determined that the code of conduct, coupled with the refusal to allow the exemption, imposed a burden on Sunali and withheld a benefit from her and is, therefore, discriminatory.⁶⁶ The school’s code of conduct, first, did not allow any nose studs to be worn⁶⁷ and, secondly, did not contain a formal exemption application procedure.

It should be noted that Sunali continued to wear the stud throughout the dispute, facing comments from other students, constant queries from staff members, threats of disciplinary actions, and media attention.⁶⁸ This court held that it was convinced that the practice was a significant manifestation of Sunali’s cultural and religious identity.⁶⁹ Culture and religion are treated separately in the *Constitution*.⁷⁰ The *Pillay* case made many valuable comments and decisions on the grey areas between a culture or a religion and whether it means that one is offered less protection than the other. The court found that the *Constitution* protects cultural and religious rights in an equal manner, as well as voluntary and obligatory practices.⁷¹ Cultural and religious practices are linked to a person’s identity within his or her community and his or her own individual identity and this is closely connected to human dignity,⁷² which is, in turn, central to equality.⁷³

62 *MEC for Education, Kwazulu-Natal, and Others v Pillay*: paras. 20, 27-28.

63 *MEC for Education, Kwazulu-Natal, and Others v Pillay*: paras. 32, 35.

64 *MEC for Education, Kwazulu-Natal, and Others v Pillay*: par. 112.

65 *MEC for Education, Kwazulu-Natal, and Others v Pillay*: paras. 36, 163.

66 *MEC for Education, Kwazulu-Natal, and Others v Pillay*: paras. 45, 67, 112, 115.

67 *MEC for Education, Kwazulu-Natal, and Others v Pillay*: par. 127.

68 *MEC for Education, Kwazulu-Natal, and Others v Pillay*: paras. 58, 90.

69 *MEC for Education, Kwazulu-Natal, and Others v Pillay*: par. 90.

70 *Constitution*: secs. 15, 30.

71 *MEC for Education, Kwazulu-Natal, and Others v Pillay*: paras. 65-67.

72 *MEC for Education, Kwazulu-Natal, and Others v Pillay*: paras. 52-53.

73 *MEC for Education, Kwazulu-Natal, and Others v Pillay*: par. 62.

The school cited discipline as a reason to not grant the exemption, as the rules for the school uniform play an important part of discipline in the schooling environment.⁷⁴ The court acknowledged that discipline and education are legitimate goals.⁷⁵ The court did, however, hold that there was no evidence to show that allowing this exemption would, indeed, have negatively affected discipline.⁷⁶ Even though school uniforms serve an important purpose, allowing Sunali to wear the stud would not have imposed an undue burden on the school.⁷⁷ The court held that “a reasonable accommodation would have been achieved by allowing Sunali to wear the nose stud”.⁷⁸

The school also argued that the code was drafted in consultation with parents, learners’ representatives, and the SGB. By enrolling their children in the school, parents agree to the rules in the code.⁷⁹ The court stated that consultative processes should be applauded but that consultation, *per se*, does not make a code or policy immune to reviews or constitutional scrutiny.⁸⁰

It was argued that allowing one exemption will have the effect of other students abusing the exemption procedure not to comply with school uniform rules.⁸¹ The Constitutional Court held that acceptance of one practice will not require a school to permit all practices. The possibility for abuse should also not affect the rights of learners who hold sincere beliefs.⁸²

Reasonable accommodation requires organisations such as schools or employers to take positive measures and “possibly incur hardship or expense” to allow people to enjoy their rights in an equal manner.⁸³ The purpose of this is to prevent groups who do not conform to the majority religion or culture to be ignored and not considered or acknowledged.⁸⁴ To accommodate diversity requires positive steps such as changing a policy or granting an exemption to be taken.⁸⁵ Reasonable accommodation is “an exercise in proportionality that will depend intimately on the facts of each case”.⁸⁶ Exemptions, therefore, should not be allowed for every application received and calls for a proportionality exercise.⁸⁷

The *Pillay* case made many important observations on cultural and religious practices within the schooling environment. Among these is that space should be made for sincerely held beliefs that do not place an undue burden on the school. The most important implication for schools from this

74 *MEC for Education, Kwazulu-Natal, and Others v Pillay*:par. 26.

75 *MEC for Education, Kwazulu-Natal, and Others v Pillay*:par. 98.

76 *MEC for Education, Kwazulu-Natal, and Others v Pillay*:par. 101.

77 *MEC for Education, Kwazulu-Natal, and Others v Pillay*:par. 112.

78 *MEC for Education, Kwazulu-Natal, and Others v Pillay*:par. 112.

79 *MEC for Education, Kwazulu-Natal, and Others v Pillay*:paras. 12, 14.

80 *MEC for Education, Kwazulu-Natal, and Others v Pillay*:paras. 82-83.

81 *MEC for Education, Kwazulu-Natal, and Others v Pillay*:par. 107.

82 *MEC for Education, Kwazulu-Natal, and Others v Pillay*:par. 107.

83 *MEC for Education, Kwazulu-Natal, and Others v Pillay*:par. 73.

84 *MEC for Education, Kwazulu-Natal, and Others v Pillay*:par. 73.

85 *MEC for Education, Kwazulu-Natal, and Others v Pillay*:par. 75.

86 *MEC for Education, Kwazulu-Natal, and Others v Pillay*:par. 76.

87 Lenta 2008:15.

case was that a school's code of conduct should and may contain a strict, yet fair procedure for an exemption application. This will fall within the ambit of reasonable accommodation. It is appropriate to require learners or parents to explain in writing why they require an exemption.⁸⁸

The relief sought in the 2017 matter of *Organisasie vir Godsdiens- Onderrig en Demokrasie v Laerskool Randhart and Others*⁸⁹ is twofold. First, the applicant sought a declaratory order regarding the conduct of a public school in connection with religion-related activities to be unconstitutional.⁹⁰ Secondly, the applicant sought interdictory relief, attempting to restrain the respondent schools from partaking in a specified list of religion-related activities.⁹¹ The applicant's case was unsuccessful, due to the applicant basing its case directly on the *Constitution* and not adhering to the principle of subsidiarity which entails attacking an individual school's religious policies and rules.⁹² However, the Gauteng High Court provided great insights into religion in public schools: "Neither the Constitution nor the Schools Act confer on a public school or SGB the right to adopt the ethos of one single religion to the exclusion of others."⁹³

The court took into account the need for flexibility in our feeder communities, which are still evolving after the skewed geographical demographic configurations brought about by apartheid legislation.⁹⁴ The court, therefore, reminds us that some learners might not have a choice in the school they attend, due to economic or other circumstances.⁹⁵ The student might adhere to a minority religion, not practised in the community of the area. Rules laid down by SGBs should provide equally for all religions and faith-based communities.⁹⁶

88 *MEC for Education, Kwazulu-Natal, and Others v Pillay*:par. 110.

89 *Organisasie vir Godsdiens- Onderrig en Demokrasie v Laerskool Randhart and Others* 2017 (6) SA 129 (GJ).

90 *Organisasie vir Godsdiens- Onderrig en Demokrasie v Laerskool Randhart and Others*: paras. 4-5.

91 *Organisasie vir Godsdiens- Onderrig en Demokrasie v Laerskool Randhart and Others*:par. 6.

92 *Organisasie vir Godsdiens- Onderrig en Demokrasie v Laerskool Randhart and Others*:paras. 55-57.

93 *Organisasie vir Godsdiens- Onderrig en Demokrasie v Laerskool Randhart and Others*:par. 91.

94 *Organisasie vir Godsdiens- Onderrig en Demokrasie v Laerskool Randhart and Others*:par. 92.

95 *Organisasie vir Godsdiens- Onderrig en Demokrasie v Laerskool Randhart and Others*:par. 93.

96 *Organisasie vir Godsdiens- Onderrig en Demokrasie v Laerskool Randhart and Others*:par. 97.

In *Christian Education South Africa v MEC of Education*,⁹⁷ the Constitutional Court had to decide whether corporal punishment can be permitted in independent schools, where parents consented to its use, due to their religious convictions.⁹⁸ The case was brought after Parliament enacted national legislation to prohibit corporal punishment in schools.⁹⁹

The court was mindful of the overlapping and competing constitutional values that are present when considering the corporal punishment of children in the educational sphere. Parents have a right to choose the community in which, and religious convictions according to which they want to raise their children. The child also remains an individual, deserving of protection from harm.¹⁰⁰ The respondent argued and it seems that the court agreed that the trend in South Africa is strongly in favour of regarding corporal punishment in schools as a violation of a child's dignity.¹⁰¹

The court based its decision on the assumption that corporal punishment in this matter is not inconsistent with the Bill of Rights.¹⁰² It considered the nature of religion and sec. 15 of the *Constitution*¹⁰³ and the role it plays in the private and public spheres and in people's public and private lives and how it intertwines in these spaces.¹⁰⁴ The applicants' religious convictions were based on the conviction that corporal punishment represents "an integral part of the upbringing of their children" and placed their children in independent schools with a Christian ethos to have their children educated in this manner.¹⁰⁵ The Department of Education argued that it is not in line with the Bill of Rights to "use physical force to achieve scholarly correction".¹⁰⁶

Corporal punishment in the education sphere differs from corporal punishment in the home environment. The prohibition protects children, by forbidding teachers from administering corporal punishment.¹⁰⁷

The *Schools Act* aims to address a grossly unequal part of our society – education – by bringing together many fragmented institutions under one broad educational dispensation. The legislation prohibiting corporal punishment was part of this process to break free from our authoritarian past.¹⁰⁸ Allowing exemptions would be impractical and would place children in a vulnerable situation.¹⁰⁹

97 *Christian Education South Africa v MEC of Education* 2000 (4) SA 757 (CC).

98 *Christian Education South Africa v MEC of Education* 2000 (4) SA 757 (CC) [2000] JOL 7320 (CC):par. 2

99 *Christian Education South Africa v MEC of Education*:par. 1.

100 *Christian Education South Africa v MEC of Education*:par. 15.

101 *Christian Education South Africa v MEC of Education*:par. 49.

102 *Christian Education South Africa v MEC of Education*:par. 27.

103 *Christian Education South Africa v MEC of Education*:paras. 30-35.

104 *Christian Education South Africa v MEC of Education*:paras. 34-35.

105 *Christian Education South Africa v MEC of Education*:par. 37.

106 *Christian Education South Africa v MEC of Education*:par. 43.

107 *Christian Education South Africa v MEC of Education*:par. 49.

108 *Christian Education South Africa v MEC of Education*:par. 34.

109 *Christian Education South Africa v MEC of Education*:paras. 34-35.

The Constitutional Court found that the legislation was not unconstitutional, and the case was dismissed.¹¹⁰ Parents could still raise their children in accordance with Christian beliefs, yet they may not consent to the use of corporal punishment in independent schools.¹¹¹ Independent schools “could still pursue other aspects of their ethos” and the parents “were allowed to pursue their particular ethos as before”.¹¹²

Further readings of case law regarding the cultural and religious rights of children create the impression that SGBs and schools might not always be tolerant towards cultural or religious observances. In a 2002 case, *A v Governing Body, The Settlers High School and Others*,¹¹³ a learner was not permitted to wear dreadlocks as part of her Rastafarian faith.¹¹⁴ She was charged and found guilty of serious misconduct in terms of the school’s code of conduct.¹¹⁵ The court set aside the decision of the SGB and held that codes of conduct should not be rigidly enforced. The student’s conduct was held to fall short of the definition of “serious misconduct”.¹¹⁶ In 2013, *Radebe and Others v Principal of Leseding Technical School and Others*¹¹⁷ was heard in the Free State High Court and concerned a learner being constantly excluded from academic classes, due to her wearing dreadlocks because of her Rastafarian faith.¹¹⁸ The case was heard on an urgent basis and the court found that the learner was being excluded from receiving her right to education and that the school’s actions were unlawful and discriminatory.¹¹⁹

For the sake of completeness, we include a pre-apartheid case, where religious rights and freedoms and their limitations within a school environment were acknowledged. In 1976, the Witwatersrand Local Division heard the matter of *Simonlanga and Others v Masinga and Others*,¹²⁰ where the *Bantu Education Act 47 of 1953* still applied to the school in question. Fifteen children had been expelled after refusing to participate in the prayers and the singing of hymns during daily assemblies. The children were all Jehovah’s Witnesses and cited that their faith does not allow them to take part in inter-faith activities, as the prayers and hymns did not align with the beliefs of their faith, even though some aspects happen to overlap. Interestingly, there was a departmental instruction that each school day should commence with assembly and devotion, consisting of, at least, scripture reading, prayer, and

110 *Christian Education South Africa v MEC of Education*:par. 52.

111 *Christian Education South Africa v MEC of Education*:par. 51.

112 Van Der Schyff 2005:205.

113 *A v Governing Body, The Settlers High School and Others* [2002] JOL 9663 (C).

114 *A v Governing Body, The Settlers High School and Others*.

115 *A v Governing Body, The Settlers High School and Others*:par. 18.

116 *A v Governing Body, The Settlers High School and Others*:paras. 19-20.

117 *Radebe and Others v Principal of Leseding Technical School and Others* [2017] JOL 37268 (FB).

118 *Radebe and Others v Principal of Leseding Technical School and Others*:par. 20.

119 *Radebe and Others v Principal of Leseding Technical School and Others*:paras. 20-21.

120 *Simonlanga and Others v Masinga and Others* [1976] 4 All SA 270 (W).

a hymn, and that all teachers and pupils are required to assemble for this purpose.¹²¹ Following a judgment from the court *a quo*, the principal and the school committee conceded that the children may abstain from participation in the prayers and hymns and that the expulsions were unlawful.¹²² The applicants also sought an order against suspension or expulsion for not participating in “other religious activities”. The court held that

(c)ertain activities which would not be regarded as religious in the ordinary sense, could have an important religious connotation to members of the applicants’ faith. There are many examples of laws in which the general rule of freedom of religion and of conscience has to yield to a clear indication by the lawgiver that obedience by all concerned is required in the common general interest of society or of the relative segment thereof.¹²³

The court opted to not grant the requested relief, as there was no proper definition of actions against which the applicants sought an interdict.¹²⁴ The expulsions were accordingly set aside.¹²⁵

4. WHAT IS THE SCOPE OF REASONABLE RELIGIOUS AND CULTURAL ACCOMMODATION IN OUR SCHOOLS?

After considering the education law landscape and the case law, the authors have reached the following conclusions.

Sincerely held beliefs and practices in the religious and cultural context deserve protection and respect. Religious and cultural matters are often public and private matters and are not always separable in the different spaces of a pluralistic society and these practices will, undoubtedly, enter the education sphere. Where an SGB is required to allow an exemption for religious or cultural reasons, a proportionality exercise must be done and “the strength of the claim must be determined”. This entails determining whether the belief or practice is genuine and sincere, the burden it imposes, and equal consideration of competing interests.¹²⁶

A child’s first encounter with religion and culture is in his or her community, and most likely, through his or her parents. The parents/guardians subsequently also decide which type of school the learner attends. The authors note that, in some provinces, learners are placed wherever they find a school, due to lack of space and difficulties with admission. The parents can nevertheless have an active say in the governance of the school by voting for, or by making themselves available to serve on the SGB. This duty is not to promote their

121 *Simonlanga and Others v Masinga and Others*:271.

122 *Simonlanga and Others v Masinga and Others*:272.

123 *Simonlanga and Others v Masinga and Others*:273.

124 *Simonlanga and Others v Masinga and Others*:275.

125 *Simonlanga and Others v Masinga and Others*:276.

126 Lenta 2008:15.

own interests or only that of their children but to ensure a representative voice of the parents or community on the decision-making body of the school. The SGB is obliged to ensure that children are protected and that the school continues to run smoothly and in line with the provisions of the *Schools Act*.

The primary mandate of the school is to provide quality education to all learners. Where a religious or cultural practice is not in line with the code of conduct, the governing body must use a formal exemption procedure, which is applied in the same fashion in every case. The child's sincere belief and the impact on his or her human dignity should be considered, and the governing body may ask for written submissions by the parents or leaders in the religion or culture.

Should there be a reasonable way of accommodating this religious and cultural practice without placing an undue burden on the school or disproportionately affecting the other children's right to basic education, the school is obliged to allow the religious or cultural practice to take place within the education space.

The authors agree with Reyneke and Reyneke who confirm that a school, which creates and promotes an understanding of diversity, contributes towards a more tolerant school environment and sensitivity towards different learners.¹²⁷ The authors reiterate the views of Essop, who suggests that, since the vast majority of children will attend public schools, schools will consist of children from various cultural origins, and the educational system should adapt to accommodate the various backgrounds.¹²⁸

These cultural and religious practices we have unpacked so far, have, however, considered choices made by parents or learners to adhere to the practices or traditions. This begs the question: How do schools go about making decisions about cultural or religious happenings, which are seemingly *not* a choice, such as an ancestral calling?

5. ANCESTRAL CALLINGS

The studies and literature regarding ancestral callings concern the practices and experiences of a specific culture or group. Callings are experienced differently by every person, and it is, therefore, difficult and, perhaps, unnecessary to engage with, and explore the concept any further in this particular article.¹²⁹

Some of the most recent literature regarding traditional healing and the calling experienced from ancestors illustrates that a calling often manifests in a physical manner and that it has to be answered to ease the physical symptoms. A calling must be accepted by the person being called and is followed by training, depending on the specific calling.¹³⁰ According to Cumes,

127 Reyneke & Reyneke 2020:156.

128 Essop 2023:13.

129 Sigida & Sodi 2023:2.

130 Sigida & Sodi 2023:2; Cumes 2013:58.

the person who is called by his or her ancestors to become a *sangoma* “becomes ‘possessed’ by the ancestors who draw attention to their needs by making the selected one ill”.¹³¹

Van der Zeijst *et al.* write that, in rural Kwa-Zulu Natal, the call to become a traditional health practitioner involves accidents, misfortunes, and physical symptoms, including “(severe) headache, stomach ache, burning feet, back pain, loss of appetite, fatigue, palpitations and fainting”.¹³² It can also include hearing voices.¹³³ Under Vhavenda indigenous healers, symptoms include dreams and sickness, which can be physical or psychological.¹³⁴ Cumes observes that the calling to become a *sangoma* includes symptoms such as “psychosis, severe headaches, abdominal pain, shoulder and neck complaints, among others”.¹³⁵ Both men and women can be called to be a *sangoma*.¹³⁶ Gavin *et al.* report that *sangomas* can receive a calling through illness or “dreams with people in traditional dress, drums, or ancestral animals”. Prophets could receive a calling through illness or dreams containing candles, churches, “holding a Bible, or placing hands on people to heal them”.¹³⁷ Under the Nguni healing traditions, a calling is often a dream and/or illness and is linked to images or experiences with water.¹³⁸ Traditional health practitioners being called can also experience dreams, visions, and hear voices.¹³⁹ In some cultures, these dreams often include visions of snakes.¹⁴⁰

Answering a calling often involves the person in question having to go through an initiation process.¹⁴¹ The training and the knowledge acquired through it is also a process of becoming a new person or a rebirth.¹⁴² Ignoring a calling can often cause misfortunes or continued illness, as cited in this paper on the Xhosa culture.¹⁴³ When the calling is accepted, the illness stops.¹⁴⁴ However, Cumes writes that a person being called can explain to ancestors why they cannot undergo training at that time. This explanation must be respectful and reasonable.¹⁴⁵ Accepting a calling is also not always an easy decision.¹⁴⁶

Answering a calling to be a healer can entail various rituals, which can include not cutting hair or nails and wearing animal skins.¹⁴⁷

131 Cumes 2013:60.

132 Van der Zeijst *et al.* 2021:475.

133 Van der Zeijst *et al.* 2021:475.

134 Sigida & Sodi 2023:4, 5.

135 Cumes 2013:60.

136 Cumes 2013:58.

137 Galvin *et al.* 2023:5.

138 Bernard 2013:139.

139 Galvin *et al.* 2023:11.

140 Edwards 2010:217.

141 Galvin *et al.* 2023:10-11.

142 Sigida & Sodi 2023:3, 6.

143 Van der Watt *et al.* 2021:4.

144 Cumes 2013:60.

145 Cumes 2013:60.

146 Sigida & Sodi 2023:2.

147 Edwards *et al.* 2009:3.

Ancestral callings in schools have been increasing.¹⁴⁸ Even with the lengthy legislative backdrop, how to address ancestral callings is not an easy query. Based on the above legislative and case discussions, we pose the question of whether ancestral callings fall within the ambit of what a school must accommodate.

The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities' (CRL Rights Commission) Report for 2021/2022 states that one "thorny issue" raised during awareness campaigns is

children who become disruptive in schools who were said to be under a spell or who say that they have a calling to become healers. In most cases, the school authorities do not know what to do with such cases. They sometimes ended up calling Christian religious leaders to pray for the learners, as part of what was termed deliverance services.¹⁴⁹

The CRL Rights Commission then asks: Why do the school authorities not contact parents or traditional healers to deal with the situation?¹⁵⁰

It is commonly understood among scholars that when a school is faced with a learner experiencing an ancestral calling, they may not discriminate against the learner. The learner has the same right to education and dignity as all learners and to practise or experience this traditional or cultural episode. Based on the discussed case law and legislation, the school may not refuse to act upon it timeously and procedurally. Because it is a cultural experience or practice, it is deserving of protection and acknowledgement.

The scope and ambit of the constitutional right to basic education can assist in how much space should be offered to an ancestral calling and its consequences. It is understood that the right to basic education is immediately realisable, and unlike other socio-economic rights, not subject to external modifiers such as the resources of the state.¹⁵¹ The right to culture and religion is to be protected and acknowledged, and reasonable accommodation must be made not to infringe on the learner's right to basic education in dealing with the calling.

148 Ngcobo "Bid to address 'ancestral callings' in pupils", <https://www.citizen.co.za/witness/news/bid-to-address-ancestral-callings-in-pupils/> (accessed on 29 June 2023); Ruiters & Kasa "Ancestral callings incidents at schools could be mass hysteria", <https://www.iol.co.za/weekend-argus/news/ancestral-callings-incidents-at-schools-could-be-mass-hysteria-4231a129-966e-4d31-927b-af0ab6d22bb9> (accessed on 29 June 2023); Mkalipi "Ancestors call learners", <https://www.news24.com/news24/community-newspaper/city-vision/ancestors-call-learners-20220824> (accessed on 29 June 2023).

149 CRL Rights Commission RP229/2022:37.

150 CRL Rights Commission RP229/2022:37.

151 *Governing Body of the Juma Masjid Primary School and Others v Essay NO and Others* 2011 (8) BCLR 761 (CC):par. 37.

The right to basic education may still be limited in terms of the limitation clause contained in sec. 36 of the *Constitution*.¹⁵² If a learner can prove that his or her right to basic education has been infringed, the onus shifts to the state/respondent. The respondent must show that the infringement is both allowed in terms of law and that it is reasonable and justifiable within the context of our constitutional values of dignity, freedom, and equality.¹⁵³ The right to basic education will be balanced against the reasonable steps that were taken to fulfil the right of the aggrieved.

The authors suggest that the SGB should make a sincere attempt to contact and communicate with the parents when a calling happens, in order to explain that the calling may, unfortunately, not be accommodated on the school premises, *per se*. The SGB must enquire as to the impact that the calling is expected to have on the learner's presence at school and that the parents have a duty to communicate with the school, for the right to basic education needs to be met at all times. The duty to respect all our differences, however, does not mean that everyone may do as they please – there must be a system in place to balance conflicting rights.¹⁵⁴ The right to basic education extends to all other learners and is not like the religious or cultural accommodation where a specific practice is under consideration. The authors suggest that the onus first rests on the parents to take control of the culture and tradition and that they are obliged to communicate the consequences and implications thereof, after consulting the leaders in their community. The child's own voice in these matters and the child's right to participate must also be respected.¹⁵⁵

The education district should also be contacted, in order for the DBE to be aware of the prevalence of these practices in schools and to consider training educators or principals with respect to acting upon such incidents in a respectful manner that does not unreasonably interfere with any child's right to basic education.

It is our advice that schools do not get involved in the actual event of the child's calling, other than making sure that the child is safe until his or her parents can pick him or her up from the school. The school is obliged to liaise with the parents/guardians, cultural leader/s and the Department of Education to secure an understanding of what is happening and to offer and make decisions within the ambit of the legislation and policies of the Department of Education.

6. CONCLUSION

Different cultures and religions are undoubtedly part of a pluralistic society such as South Africa and space must be made within an educational environment to accommodate diversity. The *Pillay* case reminds us that the community, including a school or an employer, "must [sometimes – authors' input] take

152 *Constitution*:sec 36; De Vos *et al.* 2021:826.

153 *Constitution*:sec. 36.

154 Woolman 2015:2085.

155 Reyneke 2013:232.

positive measures and *possibly incur additional hardship* or expense in order to allow all people to participate and enjoy all their rights equally (emphasis added).¹⁵⁶ Culture, religion, and language “are essentially *communal* objects, and are the means for expression of a common sense of identity, value, and traditions” (emphasis added).¹⁵⁷ Cultural and religious rights have to be balanced with the right to education in a disciplined environment.¹⁵⁸ It is our opinion that, to respect religious and cultural diversity within a school, school governing bodies or governance structures, parents, community leaders, and the Department of Education will need to embrace a consultative process, in order to balance competing interests within the scope of accommodation the school is able to provide.

As at the time of publication, the Department of Education confirmed that a consultative process is in place to investigate and advise on the prevalence of callings in schools and that public consultations will be held in 2024 to receive insight on policy guidelines from all critical stakeholders.

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156 *MEC for Education: KwaZulu-Natal and Others v Pillay*:par. 73.

157 Currie & De Waal 2013:627.

158 *MEC for Education: KwaZulu-Natal and Others v Pillay*:par. 98; Reyneke & Reyneke 2020:69.

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