Dismissal on the Grounds of Refusing to Cut Dreadlocks Worn in Observance of Religious and Cultural Beliefs: Discriminatory or Not?[1]

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Abstract

In this article, we revisit and comment on the three Popcru cases, with a particular focus on the Labour Appeal Court and Supreme Court of Appeal judgments. We argue that Popcru 2013 should be welcomed for upholding the Labour Court and Labour Appeal Court judgments. We submit that Popcru 2013 is progressive and brings clarity in the law for any potential employer, who may have contemplated the prospects of employing the arguments rejected in that case. We submit that the Department of Correctional Service's main argument on appeal at the Supreme Court of Appeal was doomed to failure in light of recent legal and political developments in South Africa. We highlight these developments. Part one of this article focuses on the decisions of the Labour Court and Labour Appeal Court on the exercise of religion in the workplace. Part two examines the Supreme Court of Appeal judgment. In part three, we offer our comments on all the judgments discussed. We offer our concluding remarks in part four.

1 Department of Correctional Services v Police and Prisons Civil Rights Union (POPCRU) 2013 7 BCLR 639 (SCA); 2013 3 All SA 1 (SCA) (hereinafter *Popcru* 2013).

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1 INTRODUCTION

In *Department of Correctional Services v POPCRU* (*POPCRU* 2012)[2] a full bench of the Labour Appeal Court (LAC) ruled that the employer unfairly discriminated against prison officials on the grounds of religion and culture when they were dismissed for refusing to cut their dreadlocks for religious and cultural reasons. This ruling reversed the judgment of Cele J in the Labour Court (LC) around his dismissal of certain claims based on religion and cultural discrimination and upheld his finding that their dismissal was automatically unfair. Commentators welcomed these decisions as progressive and as promoting the free exercise of freedom of religion in the workplace.[3] In 2013, the Department of Correctional Services (DCS) appealed against the LAC ruling. In a judgment penned by Justice Maya, the Supreme Court of Appeal (SCA) dismissed this appeal.

One might ask why we examined a four-year-old judgment of the SCA. There are at least three reasons why *Popcru* 3 and its predecessors remain relevant for academic debate. The first is our academic urge to comprehensively tell the story of the *POPCRU* cases. We aim to inform the reader about the jurisprudence that emerged in these cases. The second reason relates to the main argument advanced by the DCS in its appeal to the SCA. The DCS argued that the dress code in that case was justifiable because it sought to eradicate the danger of employing officials, who subscribe to a religion or culture that promotes criminal activity, namely the use of marijuana, in a quasi-military institution such as a prison. In our view, this argument was doomed to fail. Given that the only argument on appeal was predicated on the proposition that the use of marijuana is a criminal offence under South African law, coupled with the fact that the DCS did not properly develop that argument, a question remains in the minds of the authors as to the validity of that argument, particularly in light of recent legal and political developments in South Africa and abroad to decriminalise the recreational and medical use of marijuana. We seek to address whether a future employer, who properly develops that argument, can successfully limit the wearing of dreadlocks or natural long hair by employees. The final reason relates to the impact of the *POPCRU* cases on South Africa's labour market and society in general regarding the wearing of dreadlocks or natural long hair (Afro)[4] – whether for religious, cultural or mere expressive purposes. The wearing of dreadlocks or long black natural hair has become common practice in an envisaged decolonised South Africa, thereby raising new questions on how the wisdom of *Popcru* 2013 and its forerunners will likely be applied to address these issues.[5]

In this article, we revisit and comment on the *POPCRU* cases, with a particular focus on the LAC and SCA judgments. Despite the fact that the argument by the DCS was not well developed, we argue that *Popcru* 2013 should be welcomed for upholding the LC and LAC judgments. We submit that *Popcru* 2013 is progressive and brings clarity in the law for any potential employer, who may have contemplated the prospects of utilising that argument. We submit that the DCS's main argument on appeal to the SCA was bound to be rejected in light of recent legal and political developments in South Africa. We highlight these developments. Part one of this article focuses on the decisions of the LC and LAC on the exercise of religion in the workplace. Part two examines the SCA judgment. In part three, we offer our comments on all the judgments discussed. We provide our concluding remarks in part four.

2 *Department of Correctional Services v POPCRU* 2012 2 BLLR 110 (LAC) (hereinafter as *Popcru* 2012).

3 See Mhango "Religious Recognition: Emerging Jurisprudence in South Africa" 2012 *Journal of the Study of Religion* 23.

4 Nyoka "Lesufi gives Kempton Park School Deadline to Change Hair Policy" http://www.news24.com/SouthAfrica/News/lesufi-gives-kempton-park-school-deadline-to-change-hair-policy-20170725 (accessed 24-02-2004); Sokanyile "Boys-only School Accused of Racism over Hair Policy" http://www.iol.co.za/news/south-africa/western-cape/boys-only-school-accused-of-racism-over-hair-policy-10535785; (accessed 24-02-2004) and Ngoepe "Parktown High School for Girls Amends Hair Policy" http://www.news24.com/SouthAfrica/News/parktown-high-school-for-girls-amends-hair-policy-20160831 (accessed 24-02-2004).

5 For a discussion of black hair in the workplace from a critical race theory perspective, see Carbado and Gulati "The Law and Economics of Critical Race Theory" 2003 *Yale Law Journal* 1772–1816. The scholars discuss how hair plays a role in how an employer perceives an employee of colour and argue that today's workplace is buttressed by institutionalised racial norms manifested by grooming regulations and English only rules. See also Caldwell "A Hair Piece: Perspectives on the Intersection of Race and Gender" 1991 *Duke Law Journal* 365, who looks at anti-braiding policies in the workplace.

2 FREE EXERCISE OF RELIGION IN THE WORKPLACE: THE LC AND LAC JUDGMENTS

Popcru 2012 is an important case for the emerging jurisprudence on religious and cultural discrimination in South Africa. The case was an appeal by the DCS against a decision by the LC.[6] In that case, the respondents (five correctional officers) were employed by the DCS.[7] In December 2007, the correctional officials were dismissed on the basis that they wore dreadlocks and refused to cut them when the DCS ordered them to do so.[8] All the affected officials had worn dreadlocks at work for several years before they were ordered to cut them. In January 2007, when directed to cut their dreadlocks, three of the affected officials justified their refusal to cut their dreadlocks on the basis that they had embraced Rastafari, and that the instruction to cut their dreadlocks infringed on their freedom of religion and constituted unfair discrimination on grounds of religion. Two other correctional officials advanced cultural-based arguments for their refusal to cut their dreadlocks. They argued that the order to cut their dreadlocks encroached on their right to participate in the cultural life of their choice and thus discriminated against them on the basis of culture.

The correctional officials were charged with violating the DCS's dress code in a disciplinary hearing. Paragraph 5.1 of the dress code stated the following:

> 5.1 Hairstyles
>
> The following guidelines are down [sic] for the hairstyles of all departmental officials. In judging whether a hairstyle is acceptable, neatness is of overriding importance.
> 5.1.1 Hairstyles: Female Officials
> 5.1.1.1 Hair must be clean, combed or brushed and neat at all times (taken good care of). Unnatural hair colours and styles, such as punk, are disallowed.
> 5.1.2 Hairstyles: Male Officials
> 5.1.2.1 Hair may not be longer than the collar of the shirt when folded down or cover more than half of the ear. The fringe may not hang in the eyes.
> 5.1.2.2 Hair must always be clean, combed and neat at all times (taken good care of).
> 5.1.2.3 Hair may not be dyed in colours other than natural hair colours or out [sic] in any punk style, including 'Rasta man' hairstyle.9

The correctional officials were found guilty and dismissed with immediate effect.

Following their dismissal, the correctional officials brought an application against the DCS in the LC, which ruled that the officers had been discriminated against on the basis of gender (and not on a cultural or religious basis), and that their dismissals were automatically unfair.[10] During the trial, the correctional officials testified to their sincerely held religious and cultural practices. Their testimony was never contested.[11] The LAC summarised this evidence as follows: none of the officers wore dreadlocks at the time they joined the DCS because they had not at that stage began to subscribe to Rastafari religious and cultural practices.[12] Over the years, three of the correctional officials became attracted to Rastafari and converted to it. The three officials observed the various practices of Rastafari, including the growing of dreadlocks. The other two correctional officials grew dreadlocks as part of traditional Xhosa practices related to healing arts and rituals of the Xhosa culture. A traditional healer was invited as an expert. He testified that in the spiritual healing tradition of Xhosa culture, dreadlocks are a symbol that a person is following the calling that comes from his forefathers. The main argument of the correctional officials was thus that their dismissal amounted to unfair discrimination on the grounds of their religion, belief or culture.

In reversing the LC decision, a full bench of the LAC observed that the correctional officials wore dreadlocks because of their religious and cultural practices, which they held sincerely.[13]

6 *POPCRU v Department of Correctional Services* 2010 10 BLLR 1067 (LC) (hereinafter *Popcru* 2010).
7 *Popcru* 2010 para 7.
8 *Popcru* 2010 para 8.
9 *Ibid.*
10 *Popcru* 2010 paras 226-229 and 239.
11 *Popcru* 2012 para 13.
12 *Ibid.*
13 *Popcru* 2012 para 53.

The LAC further remarked that courts would ordinarily not be concerned with the validity or correctness of the beliefs of the relevant religion or culture, so long as they were beliefs sincerely held by the concerned individuals.[14] It is important to note that this statement was informed by the two-pronged sincerity test adopted by the Constitutional Court in *MEC for Education: Kwazulu-Natal v Pillay* ,[15] which aims to examine whether a practice sought to be protected is a central part of the religion or culture, and whether a plaintiff's belief in a religious or cultural practice is sincere.

Further, in *Pillay* the Constitutional Court ruled that constitutional protection of a sincere practice or belief, which is central to a religion or culture, will be granted regardless of whether the practice or belief is mandatory or voluntary.[16] The Constitutional Court reasoned that the fact that people "choose voluntary rather than through a feeling of obligation only enhances the significance of a practice to our autonomy, our identity and our dignity."[17] In the context of *Popcru* 2010, where all the elements of the sincerity test was present, the LAC was perplexed with the LC's ruling that the correctional officials did not establish direct or indirect discrimination on the grounds of religion or culture.[18]

In order to resolve whether there had been unfair discrimination on proscribed grounds, the LAC correctly, and in line with the equality jurisprudence, pronounced that it had to determine whether there had been any differentiation between employees, which imposed burdens or withheld benefits from certain employees, on one or more proscribed grounds. The LAC found that two grounds demonstrated that there was a differentiation between employees on the basis of which the court could determine the matter. Firstly, it found that the dress code introduced differentiation in respect of hairstyles, which is not facially neutral because Rastaman hairstyles are directly prohibited among male correctional officials.[19] To put it plainly, the LAC found that the dress code made a distinction between male and female officials whereby male officials are not allowed to wear Rastaman hairstyle as opposed to female officials who are allowed to wear such hairstyles.[20] Secondly, the LAC observed that besides gender, there was another comparator in the circumstances of this case, and it is those male officials whose sincere religious or cultural beliefs are not compromised by the dress code, as compared to those whose beliefs or practices are compromised. In its view, the norm embodied in the dress code is not neutral, but enforces mainstream male hairstyles at the expense of minority and historically excluded hairstyles such as dreadlocks. According to the LAC, this places a burden on male officials, who are prohibited from expressing themselves fully in a work environment where their practices are rejected and not completely accepted.[21]

14 *Popcru* 2012 para 15.
15 *MEC for Education: Kwazulu-Natal v Pillay* 2008 1 SA 474 (CC); 2008 2 BCLR 99 (CC)(Pillay).
16 *Pillay* para 65–67.
17 *Pillay* para 64. See also, LaFevers v Saffle, 936 F.2d 1117, 1119 (10th Cir. 1991) (holding that free exercise rights violated by denial of special vegetarian diet when inmate's beliefs sincerely held, regardless of whether Seventh Day Adventist Church required vegetarianism); *Martinelli v Dugger*, 817 F.2d 1499, 1503 (11th Cir. 1987) (holding that although the prisoner must be sincere in his religious beliefs, there is no requirement that the beliefs be held by a majority of the members of the particular religion in order to have free exercise protection).
18 *Popcru* 2012 para 15.
19 *Popcru* 2012 para 25.
20 *Ibid.*
21 *Ibid.*

The LAC then turned to address the question of whether Rastafari practices and traditions of Xhosa spiritual healing are entitled to constitutional protection. The LAC correctly cited *Prince v President, Cape Law Society*, to support its holding that Rastafari is a religion entitled to recognition and protection under the Constitution, and that spiritual practices of Xhosa culture were similarly entitled to recognition and protection.[22] Moreover, the LAC found that there was no dispute between the parties concerning whether the wearing of dreadlocks is a central feature of Rastafari and a form of personal adornment resorted to by some who follow Xhosa spiritual traditions. Emphasising the reluctance in examining the validity of religious or cultural practice (as demonstrated in the Constitutional Court jurisprudence)[23] the LAC added that when such examination is undertaken courts would apply a subjective standard because the quality and freedom of religion and culture protects the subjective belief of an individual provided it is sincerely held.[24] One of the questions that the Constitutional Court in *Pillay* resolved, in relation to the standard of determining the centrality of a religious or cultural practice, was that the centrality of a practice should be resolved based on a subjective rather than objective standard.[25] According to the Constitutional Court in *Pillay,* the emphasis of a court's determination must be on the meaning of the practice or belief for the affected individual.[26] It is for this reason that the LAC correctly emphasised the subjective and not objective standard in its analysis.

22 *Popcru* 2012 para 26.

23 See Justice Ngcobo in *Prince v President of the Law Society of the Cape of Good Hope* [2002] ZACC 1; 2002 (2) SA 794; 2002 (3) BCLR 231 para 42 (*Prince* 2002) reasoning that "as a general matter, the Court should not be concerned with questions whether, as a matter of religious doctrine, a particular practice is central to the religion. Religion is a matter of faith and belief. The beliefs that believers hold sacred and thus central to their religious faith may strike non-believers as bizarre, illogical or irrational. Human beings may freely believe in what they cannot prove. Yet, that their beliefs are bizarre, illogical or irrational to others or are incapable of scientific proof, does not detract from the fact that these are religious beliefs for the purposes of enjoying the protection guaranteed by the right to freedom of religion. The believers should not be put to the proof of their beliefs or faith. For this reason, it is undesirable for courts to enter into the debate whether a particular practice is central to a religion." This reasoning is generally accepted by courts. See also Mhango "The Constitutional Protection of Minority Religious Rights in Malawi: The Case of Rastafari Students" 2008 *Journal of African Law* 218; Mhango "Upholding the Rastafari Religion In Zimbabwe: *Farai Dzvova v Minister of Education Sports and Culture and Others*" 2008 *African Human Rights Law Journal* 226-227; and *In re Chikweche* 1995 4 BCLR 533 (ZS) 538.

24 *Popcru* 2012 para 15.

25 *Pillay* para 52-58. See also Dyani and Mhango "The Protection of Religious Freedom under the Promotion of Equality and Prevention of Unfair Discrimination Act: *MEC for Education, Kwazulu-Natal and Others v Pillay*" 2009 *Journal of Contemporary Roman-Dutch Law* 499. Dyani and Mhango show that the Court ruled in favour of judging the centrality of a practice with reference only to how important the belief or practice is to the claimant's religious or cultural identity. They further point out that for a learner to be accommodated, he/she will have to demonstrate that the wearing of cultural or religious attire is a central feature of his/her religious or cultural practice. The advantage for the learner seeking accommodation is that this analysis is based on a subjective standard. In other words, learners will only have to show that the practice for which they seek an exemption or accommodation is central to their personal religious or cultural belief).

26 *Pillay* para 52-58.

Nonetheless, the LAC declared that in rare cases the judiciary could apply an objective standard, particularly in relation to cultural practices of an associative nature.[27] The latter declaration should be construed in the context of the disagreement between the majority and minority judgments in *Pillay*. The minority opinion written by Justice O'Regan criticised the majority opinion for ignoring the fact that cultural practices are associative and not individualistic in nature and signalled against an individualistic approach to associative practices.[28] Whereas this disagreement was not connected to the resolution of the issues in *Pillay*, the minority opinion was correctly forward-looking in raising this issue. In other words, even if the majority opinion had accepted Justice O'Regan's minority views in *Pillay*, the outcome in *Pillay* would not have changed. At best, Justice O'Regan was simply warning the Constitutional Court, as any good dissenting opinion should do, not to make broad statements of the law, but to ensure that the line between individual and associative practices is preserved. Therefore, the LAC's remark about the rare use of an objective standard in relation to associative practices is arguably reflective of its endorsement of the dissenting opinion of O'Regan which stated that, where appropriate, a distinction will be maintained between individual religious or cultural practices on the one hand and associative practices on the other.

Another important aspect of the LAC's judgment focused on whether there were any measures carried out by the DCS to reasonably accommodate the correctional officials. In addressing this question, the LAC acknowledged that it needed to extend a measure of deference to the authorities, who are statutorily required to run the security organs of state, but that such deference had to be tempered by a concern that the fundamental right to equality had not been breached. The LAC highlighted that the Constitutional Court had consistently expressed the need for reasonable accommodation when considering matters of religion and culture. Hence, it noted that employers should avoid putting religious and cultural adherents to the burdensome choice of being true to their faith at the expense of being respectful of the management prerogative and authority.[29]

In response to the DCS's security-based argument that short hair was preferred as it offered greater protection against assaults by inmates as it left them with less hair to grab during an assault, the LAC held that this argument cannot be taken seriously because it did not apply to women. There was furthermore no evidence that such events were genuine or recurring threats outweighing the rights to equality and dignity. In the LAC's view, the DCS's prohibitions simply "reinforce the impression that dominant or mainstream hairstyles, representing peculiar cultural stereotypes are to be favoured over those of marginalised religious and cultural groups."[30] The LAC was not persuaded that a ban on dreadlocks contributed positively to the issues of discipline, security, probity, trust and performance, which were the focal concerns of the DCS.[31] Based on this observation, it concluded that there was no rational connection between a ban on dreadlocks and the achievement of greater probity by officials at the prison, and no rational basis to the apprehension that dreadlocks led to ill-discipline. Consequently, the LAC resolved that the LC's reasons for rejecting the claims of discrimination on religious and cultural grounds could not withstand scrutiny.

3 *POPCRU* 2013

On further appeal to the SCA, the DCS conceded that the dress code operated differently among correctional officials and was discriminatory on three prohibited grounds, namely religion, culture and gender. However, the gist of the ground for appeal by the DCS was that the discrimination was justified on the basis that it sought to eliminate the risk associated with placing officials, who subscribe to a religion or culture that endorses law-breaking in the form of the use of marijuana, in control of a highly regulated and quasi-military institution such as a prison.[32] In other words, the DCS's contention was that the true nature of the problem was not the dreadlocks worn by the Rastafari and *intwasa* initiates (Xhosa cultural initiates), but their

27 *Popcru* 2012 para 26.
28 *Pillay* para 146. See also *Prince* 2002 para 247, which observed that section 31(1) of the Constitution emphasises the associated nature of cultural, religious and language rights; and Mhango "Religious Recognition: Emerging Jurisprudence in South Africa" (2012) *Journal of the Study of Religion* 23 37-41.
29 *Popcru* 2012 para 44.
30 *Popcru* 2012 para 47.
31 *Popcru* 2012 para 48.
32 *Popcru* 2013 para 19.

faith, which requires the use of marijuana – an illegal and harmful drug – in their observance.[33] To expand on this argument, the DCS pointed out that the risk presented by dreadlocks is that they render Rastafari officials noticeable and prone to manipulation by inmates and other potential criminals to smuggle marijuana into prisons.[34] It was contended that this has a negative effect on discipline and the rehabilitation of inmates.[35]

With regard to female officials, the DCS submitted that the risk in female officials was significantly diminished because it was not unusual for them to have long hair.[36] It is important to note that this contention was motivated by the mainstream notions of male hairstyles that were rejected by the LAC.[37] Moreover, the submission was buttressed by an observation that the Constitutional Court in *Prince 2002* accepted as true that women and children are not involved in the use of marijuana in Rastafarianism. According to the DCS, the dress code served an important and legitimate government purpose because, if implemented, Rastafari officials would not be easily identifiable, thus presumably reducing the risk of them being manipulated into smuggling marijuana into prisons.

In resolving the appeal, the SCA acknowledged what the Constitutional Court has long held in *Harksen v Lane NO*:[38] in the case of discrimination on a specified ground, the unfairness of the discrimination is presumed, but the contrary may still be established.[39] Based on this principle, the SCA found that once discrimination had been established on listed grounds, unfairness is presumed and the employer must prove the contrary.[40] Further, the SCA made a few important observations. It stated that a policy that penalises the practice of a religion and culture demeans and diminishes the adherents of that religion or culture in society. Such policy, the SCA noted, assaults the dignity of those adherents because it signals that their religion or culture is not worthy of protection. According to the SCA, the impact of such a restriction is intense.[41] In the context of this case, the effect was even more harmful as it cost the correctional officials their employment.[42]

Given that the constitutionality of the dress code was not under attack, the SCA reasoned that whether the discriminatory impact of the dress code was justifiable had to be determined against the provisions of section 187(2)(a) of the Labour Relations Act 1995.[43] That section provides that "a dismissal may be fair if the reason for dismissal is based on an inherent requirement of the particular job."[44] Courts have interpreted an inherent requirement of a job to mean "a permanent attribute or quality forming an essential and indispensable attribute which must relate in an inseparable way to the performing of a job."[45] For instance, in *Dlamini v Green Four Security,* [46] the LC interpreted the phrase 'inherent requirement of a job' to mean the following: "Existing in something as a permanent attribute or quality; forming an element, especially an essential element, of something, intrinsic, essential" and as an "indispensable attribute" which "must relate in an inescapable way to the performing of the job."[47]

33 *Ibid.*
34 *Popcru* 2013 para 20.
35 *Ibid.*
36 *Ibid.*
37 There is also a problematic assumption within this argument that Rastafari would be inclined to sell marijuana because they use it for religious purposes.
38 1997 11 BCLR 1489; 1998 1 SA 300.
39 *Popcru* 2013 para 48, citing *Harksen v Lane.*
40 *Popcru* 2013 para 21, citing *Harksen v Lane.*
41 *Popcru* 2013 para 22.
42 *Ibid.*
43 *Popcru* 2013 para 23.
44 Section 187(2)(a) of the Labour Relations Act 1995.
45 *Popcru* 2013 para 23, citing *Dlamini v Green Four Security* 2006 15 LC 834/ 2006 27 ILJ 2098 (LC); and Cooper "The Boundaries of Equality in Labour Law" 2004 *Industrial Law Journal* 813.
46 *Dlamini v Green Four Security.*
47 *Dlamini* 2104.

In addressing the argument advanced by the DCS, the SCA noted that the DCS faced a huge hurdle because the case they advanced in the lower courts was that the rationale for the dress code was to entrench uniformity and neatness in the dress code and appearance of officials, which would engender discipline and enhance security in prisons.[48] In this respect, the SCA noted that the "about turn during argument in this appeal did their cause no good."[49] The court found that the dress code was not shown to be concerned with the criminal use of marijuana, which was now couched as the target of the dress code.[50] Additionally, the DCS laid no proper foundation for this shift in its argument.

To illustrate the weakness in the DCS's argument, the SCA observed that no evidence was adduced to demonstrate that the correctional officials had undermined in any way the performance of their duties or rendered them vulnerable to manipulation and corruption.[51] According to the SCA, it was equally not established that "short hair, not worn in dreadlocks, was an inherent requirement of their job."[52] As a result, the SCA held that the dress code is not defensible if it impedes a practice of religious belief, and by extension a cultural belief, that does not impact on an employee's ability to perform his duties, nor endanger the safety of the general population or fellow employees, nor cause undue suffering to the employer in a practical sense. It dismissed the appeal on the basis that no rational connection was established between the purpose of the discrimination and the measure adopted, and that the DCS did not show it would suffer unreasonable inconvenience if it exempted the correctional officials.[53]

4 OUR COMMENTARY

The SCA judgment, as well as the LAC judgment which preceded it, should be welcomed and, as alluded to earlier, remains relevant for academic debate for several reasons. Firstly, four years after the DCS advanced its argument in this case, the High Court in the Western Cape delivered a judgment in *Prince v Minister of Justice,*[54] which effectively undermines the proposition on which the DCS argument was founded. In *Prince v Minister of Justice*, the High Court found that sections 4(b) and 5(b) of the Drugs and Drug Trafficking Act 140 of 1992 read with Part III of schedule 2 to that Act and section 22A(9)(a)(i) of the Medicines and Related Substances Control Act 101 of 1965 read with schedule 7 of GN R509 of 2003 published in terms of section 22A(2) of that Act were unconstitutional to the extent that they prohibit the use of marijuana by an adult in private dwellings. The High Court ordered Parliament to amend the two pieces of legislation within two years and bring them in line with the Constitution. These pieces of legislation criminalise the use of marijuana in South Africa, and if the High Court decision is confirmed by the Constitutional Court, it means the DCS's argument may never be sustained by another employer in a South African court.

In other words, it is important for us to speculate on the High Court's decision and its impact on the DCS's argument had it been successful, or in the event that it is raised again by another employer, particularly since the argument was not properly ventilated in the SCA. We submit that even if the DCS's argument had been well articulated and accepted by the SCA, the argument was bound to be unsuccessful for two reasons. Firstly, the findings of the High Court in *Prince v Minister of Justice* point to the fact that the National Prosecuting Authority (NPA) has in the last several years refrained from prosecuting the crime of possession of marijuana in small dosages, opting for alternative dispute resolution in relation to personal use of marijuana. The High Court, relying on an affidavit by Mr Hofmeyr, the Deputy National Director of Public Prosecution, described its finding as follows:

48 *Popcru* 2013 para 24.
49 *Ibid.*
50 *Ibid.*
51 *Popcru* 2013 para 25.
52 *Ibid.*
53 *Ibid.*
54 *Prince v Minister of Justice and Constitutional Development; Rubin v National Director of Public Prosecutions; Acton v National Director of Public Prosecutions* 2017 2 All SA 864 (WCC); 2017 4 SA 299 (WCC) (*Prince v Justice Minister*).

> It would appear from this affidavit that commendably, the NPA already recognises the problem of the blunt instrument of the criminal law being employed insofar as the possession and consumption of cannabis strictly for personal use is concerned. Diversion is a policy approach which appears to have gained significant traction within the NPA. In itself, this leads to the conclusion that the NPA itself recognises the limitations contained in the strictly wording of legislation which provides for the use of the criminal law as the default censure for possession for personal use and consumption of cannabis. [55]

Furthermore, the High Court paints a picture that the continued criminalisation of marijuana or cannabis in South Africa – the genesis of the DCS's submission – remains in doubt. In this regard, the High Court said:

> In summary, if the NPA considers that a policy of diversion may be the more appropriate approach to personal consumption use in the context of cannabis in South Africa, this adds weight to the broader argument that the criminalisation of the use of cannabis for personal use and consumption is open to significant doubt. Diversion and other policy choices as opposed to the blunt use of the criminal law and, in particular, imprisonment, support the conclusion that the state cannot justify the prohibition as contained in the impugned legislation as it stands at present.[56]

Secondly, there is growing political pressure in South Africa and abroad for governments to legalise the use of marijuana.[57] One manifestation of this pressure is the Medical Innovation Bill of 2014, which was introduced in the National Assembly as a private member bill. One of the objectives of the Bill is to legalise and regulate the use of marijuana for medical purposes and for beneficial commercial and industrial uses. While the Bill has yet to be passed by the National Assembly, the pressure continues to mount on politicians to legalise the medical and recreational use of marijuana.[58] Notwithstanding the legal developments in *Prince v Minister of Justice* and the political developments around the legality of the use of marijuana, we submit that *Popcru* 2013 remains a relevant judgment in labour law.

The second reason why *Popcru* 2013 should be welcomed is because it brought clarity in South Africa's labour law concerning the place of religion and culture in the workplace. Following the SCA judgment and its precursors, some could argue that these judgments are open to abuse as employees could wear dreadlocks under the guise of religion or culture. You may recall that in *Pillay* a similar argument was made that "that the necessary consequence of a judgment in favour of Ms Pillay is that many more learners will come to school with dreadlocks, body piercings, tattoos and loincloths."[59] In response to this argument, the Constitutional Court held

> This argument has no merit. Firstly, this judgment applies only to bona fide religious and cultural practices. It says little about other forms of expression. The possibility for abuse should not affect the rights of those who hold sincere beliefs. Secondly, if there are other learners who hitherto were afraid to express their religions or cultures and who will now be encouraged to do so, that is something to be celebrated, not feared. As a general rule, the more learners feel free to express their religions and cultures in school, the closer we will come to the society envisaged in the Constitution.[60]

Similarly, we submit that any argument against the SCA judgment in *Popru* 2013 along the lines dismissed in *Pillay* should be rebuffed. If there are other employees who were fearful to express their religions or cultures and who are now emboldened to do so, this should be welcomed. The more employees in South Africa who feel free to express their religions and cultures in the workplace following the SCA judgment, the more this "conforms to the Constitution's commitment to affirming diversity … [because] [i]t is a commitment that is totally in accord with this nation's decisive break from its history of intolerance and exclusion… [and] which not only

55 *Prince v Minister of Justice* para 100.
56 *Ibid* para 101.
57 See AFP "Thousands Demand Legalisation of Cannabis in South Africa" http://www.dailymail.co.uk/wires/afp/article-3578654/Thousands-demand-legalisation-cannabis-South-Africa.html (accessed 07-05-2016).
58 *Ibid.*
59 *Pillay* para 107.
60 *Ibid.*

affirms diversity, but promotes and celebrates it."[61]

Lastly, we submit that the *Popcru* 2013 and its forerunners will have an impact on South African society where the wearing of dreadlocks has become common. We submit that despite the fact that the claims in the *POPCRU* cases were predicated upon religious or cultural beliefs, we submit that the cases are the authority for the proposition that an employee, who wears dreadlocks in circumstances that do not affect his ability to perform his job, should not be prevented by an employer from keeping dreadlocks. In other words, based on *Popcru* 2013 and its predecessors, employees in South Africa have a right to wear dreadlocks unless an employer can prove that short hair, not worn in dreadlocks, is an inherent requirement of a job or that the wearing of dreadlocks detracts in any way from the performance of an employee's job. If the SCA was persuaded that the wearing of dreadlocks was not a distraction from the performance of an employee's job in a quasi-military institution such as a prison, we suspect that most employers are unlikely to succeed in preventing employees who wear dreadlocks even for non-religious use. You may also recall that in *Pillay*, the Constitutional Court held that the protection of religious or cultural rights extends to voluntary as well as involuntary practices. This means that an employee who voluntary wears dreadlocks may be protected under the authority of *Pillay*, and an employer cannot discriminate unless on good cause as declared in *Popcru* 2012 and *Popcru* 2013.

To put this differently, we submit that the reasoning in the *POPCRU* cases will likely influence how South Africa resolves questions concerning the legality of the wearing of dreadlocks or long hair in the broader labour market, as well as in other contexts. We see no reason why the rationale in *Popcru* 2013 and its precursors should not be applied in schools, the military, the police and in other settings as the Constitution is ultimately the supreme law of the country. It constrains both public and private conduct by declaring any law or conduct that is inconsistent with it invalid. The significance of the *POPCRU* cases is that they laid a foundation for the proposition that the wearing of dreadlocks or other types of hairstyles for religious or cultural reasons in a workplace is protected. The question that remains open for debate is whether these cases should be limited to the labour context or extended to other areas of society. We submit that the cases should be employed to resolve similar questions beyond the labour context.

5 CONCLUSION

The decision in *Popcru* 2013 is of great magnitude as it clarified the scope of an employer's right to regulate the wearing of dreadlocks for religious or cultural reasons in the workplace. This case is furthermore significant for its clarification that a dismissal (for refusal to comply with a dress code policy) may be considered fair if the employer can show that the reason for dismissal is an inherent requirement for the performance of a particular job. Lastly, the lesson from *Popcru* 2013 is that unless the dress code is an essential requirement of a job, an employer should allow deviations from the dress code in circumstances where the code encroaches on religious and cultural beliefs. What is clear is that any future cases, whether within or beyond the labour context, will be informed by this emerging jurisprudence.

61 *Pillay* para 65.