

**IN THE HIGH COURT OF SOUTH AFRICA
(NATAL PROVINCIAL DIVISION)**

REPORTABLE

NPD EQUALITY COURT

CASE NO: AR 791/05

In the matter between:

NAVANEETHAM PILLAY

Appellant

and

**KWAZULU-NATAL MEC OF EDUCATION,
INA CRONJE**

First Respondent

**MR THULANI CELE, SCHOOLS LIASON
OFFICER**

Second Respondent

**MRS A MARTIN, PRINCIPAL: DURBAN
GIRLS HIGH SCHOOL**

Third Respondent

**MRS F KNIGHT, CHAIRPERSON
SGB: DGHS**

Fourth Respondent

JUDGMENT

KONDILE J:

Introduction

1. This matter comes before us on appeal against a Judgment of Ms.
A C Moolman, a Magistrate of the Durban Equality Court (“the

Court below”), delivered on 29th September 2005. The Court below dismissed the complaint lodged by Appellant, in which, in effect, she sought an order:

- (a) interdicting and restraining Third Respondent from violating her daughter’s right to equality or conducting unfair discriminatory practices against her, on the grounds of religion, conscience, belief and culture.
- (b) directing First Respondent to assess progress made by Third Respondent to achieve the goal of transformation.

The background

2. Appellant’s daughter who is a learner at Durban Girls High School (“the school”) returned from the school holiday in the first week of the fourth term in the year 2004 wearing a nose stud, having had her nose pierced during the holiday.
3. The school’s code of conduct provides that, in respect of jewellery, earrings – plain round studs/sleepers may be worn with one in each ear lobe at the same level and further that no other jewellery may be worn except a watch.
4. Third Respondent sought an explanation from Appellant for her

daughter's decision to wear the nose stud. Appellant, in response, stated that she allowed the piercing for several reasons including the fact that this is a time honoured tradition. She and her daughter come from South Indian family that has sought to maintain a cultural identity by respecting and implementing the traditions of the women before them.

5. Usually, a young woman, upon her physical maturity, would get her nose pierced, as an indication that she is now eligible for marriage. While this physically orientated reasoning no longer applies, they do still use the tradition to honour their daughters as responsible young adults.
6. After her sixteenth birthday, her grandmother will replace the current gold stud with a diamond stud. This will be done as part of a religious ritual to honour and bless her daughter. It is also a way in which the elders of the household bestow worldly goods including other pieces of jewellery upon the young women. This serves not only to indicate that they value their daughters but is in keeping with Indian tradition, that their daughters are the Luxmi (goddess of prosperity) and Light of the house.

7. She herself has adhered to this tradition and wears a nose stud. From this perspective she cannot and will not impose a double standard on her daughter. Her daughter is not wearing the nose stud for adornment and fashion purposes. Family traditions are handed down from generation to generation, not taken up as a trend.

Decision against the wearing of the nose stud.

8. On 2nd February 2005 Fourth Respondent took a decision that Appellant's daughter should not be allowed to wear the nose stud. This decision was to take effect on 4th April 2005.
9. Appellant then addressed a letter to First Respondent appealing and asserting that Fourth Respondent's decision was a violation of her daughter's constitutional rights to practise the religious and cultural traditions of her choice especially when they are common practice to the rest of her family; that this right takes precedence over any school code particularly when it is not related to, nor has any bearing on, the actual manner, attitude and conduct of the learner at school.
10. Second Respondent, in letter dated 6th May 2005 replied on behalf

of First Respondent refusing Appellant's appeal. In endorsing the decision of the Fourth Respondent, Second Respondent wrote that "Schools are not obliged, as it is unreasonable to expect them, to accommodate all idiosyncratic practices."

11. In letter dated 13th May 2005 Third Respondent advised Appellant that the nose stud should be removed. Appellant's daughter was accordingly given until Monday 23rd May 2005 to remove the nose stud, failing which the matter would be referred to Fourth Respondent for disciplinary action to be taken against Appellant's daughter.
12. The rebuff from Respondents prompted Appellant, as complainant, to institute proceedings and seek an order referred to in paragraph 1 above, in terms of section 20 of the Promotion of Equality and Prevention of Unfair Discrimination Act no. 4 of 2000 ("the Equality Act").
13. After hearing the evidence of Appellant, Dr. Rambilass and Mrs. A Martin, who were the only witnesses who testified, the court below came to the conclusion that:
 - (a) the school's actions against Appellant's daughter were

reasonable and fair in the circumstances.

- (b) the school did not discriminate or unfairly discriminate against Appellant's daughter.
- (c) Appellant's daughter's wearing of the nose stud was in violation of the school's code.

14. The preparation of the code of conduct, in schools, is a requirement imposed on the governing body of a public school by section 8 (1) of the South African Schools Act 84 of 1996 ("the Schools Act").
15. The Minister of Education may in terms of section 8 (3) of the Schools Act determine guidelines for the consideration of governing bodies in adopting a code of conduct for learners.
16. The Guidelines for the consideration of governing bodies in adopting a code of conduct for learners were promulgated in Government Notice 776 of 1998 – Government Gazette 1890 dated 15th May 1998 ("the Guidelines").

Basis of the decision of the Court below

17. The reasoning of the Court below is as follows: The governing

body was obliged in terms of the Schools Act, to adopt a code of conduct for learners. The nose stud is, in terms of the definition in the School's code of conduct, jewellery. The purpose of the code of conduct is, among other things, to promote discipline, uniformity and acceptable convention among the learners. Appellant, although fully aware of the school's code of conduct, ignored it. "Having regard to the nature of the school's requirements contained in its code of conduct it is hardly feasible to expect the school to bend the rules to suit (Appellant's daughter's) personal choice pertaining to her culture or tradition." The school acted within the ambit of the School's Act.

18. It is apparent from para 17 above that the Court below merely applied, literally, the School's code of conduct and disregarded religious and cultural rights it found to have been established by the evidence. It failed to properly or sufficiently consider whether the code of conduct is consistent with the Constitution of the Republic of South Africa Act 108 of 1996 ('the Constitution') and the Equality Act or whether it complies with the requirements of the empowering statute, the Schools' Act and Guidelines. This Court must therefore come to its own conclusion based on all the evidence.

19. A conspectus of the evidence at the enquiry established, in my view, that the wearing of the nose ring by Hindu women of South India is of cultural and religious significance. I am further satisfied that that is also the conclusion reached by the Court below.

Contentions

20. Counsel for Respondents, whilst not disputing the cultural significance of the nose stud, submitted that there is no suggestion in the complaint that the wearing of a nose stud has any religious significance. I disagree. That suggestion is made both in Appellant's complaint (pleading) and in her evidence. Appellant testified that religion historically evolved from culture; that the nose stud is directly related to every female deity in Hindu mythology; that Hinduism is not the only religion that has the nose stud as more than a mere body piercing or piece of jewellery; that in the Bible it is said that Rebecca received a nose stud from Isaac as a betrothal gift. Further the Court below held that Dr. Rambilass, the expert called by Respondents, conceded that Hindu religion can include Hindu culture; that the wearing of a nose stud comes from the Hindu culture and that when it comes to Hinduism it is difficult to distinguish between religion and culture. Such a

conclusion is borne out by the record of the evidence.

21. In any event it is irrelevant, for purposes of this case, whether the unfair discrimination complained of, is based on culture only. In terms of section 9 of the Constitution it is sufficient that the disadvantageous or harmful or prejudicial treatment is primarily based on one of the listed prohibited grounds. See *Brink v Kitshoff* NO 1996 (4) SA 197 (CC) para 43 and section 13 of the Equality Act.

22. The following remarks of O'Regan J in *Brink* above highlight the importance of the issue in this case.

“(41) Section 8 (now section 9 of the Constitution) was adopted then in recognition that discrimination against people who are members of disfavoured groups can lead to patterns of group disadvantage and harm. Such discrimination is unfair: It builds and entrenches inequality amongst different groups in our society. The drafters realised that it was necessary both to proscribe such forms of discrimination and to permit positive steps to redress the effects of such discrimination. The need to prohibit such patterns of discrimination and to remedy their results are the primary purposes of s 8 and, in particular, ss (2), (3) and (4).”

23. It has also been contended by Respondents that Appellant chose to send her daughter to Durban Girls High School and in doing so both Appellant and her daughter were aware that the school had a code of conduct which they accepted. The relevance of these contentions escape me as both counsel for the parties have stated

that fundamental rights and freedoms cannot be waived.

24. The Respondents have further submitted that the code of conduct was adopted by the fourth Respondent after consultation with the learners, their parents and the educators of the school; that the consultation also involved people drawn from every racial, religious and cultural group in South Africa. The issue, however, is not only whether there was extensive consultation on and support for the code of conduct but also whether it accords with the Constitution, the Schools Act and the Guidelines. Compare *S v Makwanyane and Another* 1995 (3) SA 391 (CC) at para 206.

25. The further contention by Respondents, that it is important for the school to adopt an approach in which all girls are seen to be treated in the same way, is also flawed. The Constitution prohibits both direct and indirect discrimination, that is, practices whose purpose is to discriminate unfairly, or whose effect or impact or outcome, irrespective of the motive or intention, amounts to unfair discrimination. Langa DP (as he then was) remarked as follows, in this regard, in *Pretoria City Council v Walker* 1998 (2) SA 363 (CC):

“(31) The inclusion of both direct and indirect discrimination, within the ambit

of the prohibition imposed by s 8 (2), evinces a concern for the consequences rather than the form of conduct. It recognises that conduct which may appear to be neutral and non-discriminatory may nonetheless result in discrimination and, if it does, that it falls within the purview of s 8 (2).”

See also *Equality and Non-Discrimination in South Africa* by S. B. O. Gutto p 127.

26. The conception of equality which insists on symmetrical treatment fails to recognise or repair or avoid establishing or entrenching or intensifying deep patterns of historic group discrimination and disadvantage which inevitably impair an individual’s human dignity. Sachs J expressed his views as follows, in this respect, in *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC):

“(132) The present case shows well that equality should not be confused with uniformity; in fact, uniformity can be the enemy of equality. Equality means equal concern and respect across difference. It does not presuppose the elimination or suppression of difference. Respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a levelling or homogenisation of behaviour but an acknowledgment and acceptance of difference. At the very least, it affirms that difference should not be the basis for exclusion, marginalisation, stigma and punishment. At best, it celebrates the vitality that difference brings to any society.”

27. Counsel for Respondents has submitted that it is necessary for a person complaining that their rights have been infringed to demonstrate that fact; that there was no evidence from Appellant’s

daughter; that in this case whilst one is left in no doubt regarding the Appellant's stance she is not the person in respect of whom the alleged discrimination has taken place. In my view this submission overlooks the fact that Appellant has, in the particulars of the complaint and the accompanying affidavit, alleged that the ongoing struggle with the school has been traumatic and the source of much anxiety for her and her daughter. The evidence shows that she is acting in her personal and representative capacities and in the interest of her ethnic group, the Hindu/Indian.

28. Appellant's interests in this matter are inextricably entwined with those of her daughter and their group and the Schools Act affirms the rights of a parent in addition to the rights of the learners and educators. The matter, therefore, affects Appellant as much as it affects her daughter and their group. Appellant's testimony and cross-examination of Respondents witnesses also reflect her comprehensive or intimate understanding of the facts of or the issues in this case. The Appellant's evidence has shown, to the satisfaction of the Court below and this Court, that the wearing of a nose stud does in fact manifest their culture and that she and her daughter sincerely believe that it is necessary for their cultural identity, to observe the practice in question.

29. In any event, Appellant was acting in person, in the Court below and section 4 of the Equality Act refers to the principles that should apply in the adjudication of proceedings instituted in terms of or under the Equality Act. They include the expeditious and informal processing of cases, which facilitates the participation by the parties to the proceedings and access to justice to all persons in relevant judicial forums. The principle of access to justice is particularly important for unrepresented parties. Fairness, the right to equality and the interest of justice should, as far as possible, prevail over mere technicalities.

30. The Respondents seem to imply that because the preparation of a code of conduct in school is a requirement imposed on Fourth Respondent by the Schools Act there should be adherence to it notwithstanding any inconsistency with the Constitution and the Equality Act and even if it does not comply with the requirements of the empowering statute. In this regard they reflect the opinion of the Court below, referred to in para 17 above.

31. On this issue, the Respondents and the Court below overlook the principle of legality. The Schools Act does not give Fourth Respondent carte blanche to impose on learners, in its code of

conduct, any type of provision. The parameters which have been determined by the Schools Act and the Guidelines have to be observed.

32. The preamble to the Schools Act states that the country requires a new national system for schools which will advance democratic transformation of society, combat racism and sexism and all other forms of unfair discrimination and intolerance and protect and advance our diverse cultures and languages, and uphold the rights of learners, parents and educators.

33. The Guidelines provide that the code of conduct of a school must, among other things, be subject to the Constitution, the Schools Act and the Provincial Legislation and reflect constitutional democracy, human rights and transparency; that every learner has an inherent dignity and has the right to have his/her human dignity respected and that that implies mutual respect including respect for one another's convictions and cultural traditions. They also provide that the learners freedom of expression is more than freedom of speech. It includes the right to seek, hear, read and wear.

34. Clearly therefore the impugned provision of the schools code of conduct is inconsistent with the Constitution, the Schools Act and the Guidelines. It therefore contravenes the Law and/or is not authorised by the empowering statute and/or fails to comply with what the empowering legislation requires. It persists with the practice that is specifically condemned in the schedule to the Equality Act namely the failure to reasonably and practicably accommodate diversity in education.

35. A ban against the wearing of the nose stud undermines the value of religious and cultural symbols and sends learners the message that Religious beliefs and cultural practices do not merit the same protection as other rights or freedoms. If the school accommodates Appellant's daughter and allow her to wear the nose stud it would demonstrate the importance that our society attaches to protecting religious and cultural rights or freedoms and to showing respect for its minorities. Compare *Multani v Commission Scolaire Marguerite-Bourgeoys* 2006 SCC 6.

36. Respondents have also relied on the provisions of section 8 (2) of the Schools Act which state that a code of conduct must be aimed at establishing a disciplined and purposeful School environment,

dedicated to the improvement and maintenance of the quality of the learning process. What this entails, in my view, in the circumstances of this case, is that if some learners consider it unfair that Appellant's daughter may wear her nose stud, it is incumbent on the school to discharge the obligation which the Constitution, the Schools Act and the Equality Act impose upon it, to instil in their learners the value of cultural and religious tolerance. There is no need to suppress individuality to achieve harmony. Compare Multani above.

37. The school should understand that the Constitution and the Equality Act embrace a commitment to substantive equality in which the right to equality includes not only protection against unfair discrimination but also the duty imposed on all South Africans, to engage in positive measures to eradicate systemic patterns of inequality and unfair discrimination.

Appropriate approach.

38. In their heads of argument counsel for the parties seek to rely directly on the provisions of section 9 of the Constitution. I do not consider such an approach appropriate. The Equality Act was enacted to give effect to the rights contained in that section.

Appellant has found a cause of action on the Equality Act. The Court below decided the matter in terms of that Act. It is therefore impermissible for this Court, in the circumstances, to avoid the provisions of the Equality Act, by going behind it and seeking to rely on section 9 of the Constitution. Support for this view is found in *Minister of Health v New Clicks SA (Pty) Ltd and Others* 2006 (2) SA 311 (CC) where Ngcobo J remarked at para 437:

“Where, as here, the Constitution requires Parliament to enact legislation to give effect to the constitutional rights guaranteed in the Constitution, and Parliament enacts such legislation, it will ordinarily be impermissible for a litigant to found a cause of action directly on the Constitution without alleging that the statute in question is deficient in the remedies that it provides. Legislation enacted by Parliament to give effect to a constitutional right ought not to be ignored. And where a litigant founds a cause of action on such legislation, it is equally impermissible for a court to bypass the legislation and to decide the matter on the basis of the constitutional provision that is being given effect to by the legislation in question.”

See also paragraphs 95 and 96 of *New Clicks* case, pages 25, 35 and 36 of the *Annual Survey of South African Law* 2000 and *Multani* above. This Court will therefore adopt the analysis developed specifically for the Equality Courts set out in chapter 3 of the Equality Act.

Foreign Law

39. The parties, presumably because of the provisions of section 39 (1) of the Constitution, have referred us to a number of cases decided

in foreign courts. These other jurisdictions may have legal systems which may be different from ours. The Constitutional Court has warned that it may be dangerous to rely on ostensibly analogous material from other jurisdiction. This means we have to tread warily. In *Brink* above the Court remarked as follows, in this regard.

“(39) (V)arious conventions and national constitutions are differently worded and that the interpretation of national constitutions, in particular, reflects different approaches to the concepts of equality and non-discrimination. The different approach adopted in the different national jurisdictions arise not only from different textual provisions and from different historical circumstances, but also from different jurisprudential and philosophical understandings of equality.”

Determination of discrimination

40. In terms of section 13 (1) of the Equality Act, Appellant has to make out a *prima facie* case of discrimination. In that event the Respondents have to prove, on the facts before the Court, that the discrimination did not take place as alleged or that the conduct is not based on one or more of the prohibited grounds.

41. The Court below held that the Appellant made out a *prima facie* case of discrimination against Respondents. I share that view. Substantive equality involves understanding that equality includes a recognition of difference. People who are not similarly situated

should not be treated alike. The school failed to differentiate in favour of Appellant's daughter, whose minority group is different in material or significant ways from the majority group of the learners of the school.

42. The school's code of conduct prevents Appellant's daughter from wearing a nose stud which on the evidence, correctly accepted by the Court below, is of cultural and/or religious significance to her and her group. The code of conduct, accordingly withholds from her and her group the benefit, opportunity and advantage of enjoying fully their culture and/or of practising their religion. That constitutes discrimination in terms of section 1 (viii) of the Equality Act. Religion and culture, in respect of which the discrimination has occurred, form two of the prohibited grounds listed in section 1 (xxii) (a) of the Equality Act. Therefore unfair discrimination can immediately be presumed.

43. In view of the fact that Appellant has made out a prima facie case of discrimination and in view of the fact that Respondents have not proved, on the facts before Court, that the indirect discrimination that has been alleged by Appellant has not taken place and have not proved that their conduct is not based on one or more of the

prohibited grounds, Respondents need to prove, in terms of section 13 (2) (a) of the Equality Act, that the discrimination is fair.

Determination of fairness

44. It is clear from the evidence that the impugned provision of the code of conduct does not constitute a measure designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination or the members of such groups or categories of persons. It therefore cannot be said that Respondents' conduct is not unfair discrimination in terms of section 14 (1) of the Equality Act.

Section 14 (2)

(a) The Context

45. The adjudication of this factor requires a historical understanding of the type of society that South Africa once was and against which the Constitution has set itself. See *The Bill of Rights Handbook* by Iain Currie & Johan de Waal fifth edition p 231. There should be an understanding of the position of Appellant's group within the structures of advantage and disadvantage in society in the past. Racial, gender and other differences have been deeply entrenched in our society. The discrimination enquiry should therefore look

beyond the form of impugned provision of the code of conduct to understand its actual harmful effect or impact on real people in the context of the place of the group in the entire ethnic or social, political, economic and legal structure of our society.

46. I share the view that attention to social context and the recognition of the cultural diversity of people by judicial officers, help to construct a society in which difference and diversity are not tied to prejudice and disadvantage but are affirmed and celebrated. The failure to recognise difference and disadvantage could lead to injustice for communities and individuals whose values, circumstances and way of life are different from those in authority.

47. The school, by adopting formal equality which does not take into account actual social and economic disparities or material and significant differences between groups and individuals and which ignores the historical burden of inequality which the Constitution seeks to overcome, neglects the deepest commitment of the Constitution. Support for this view is found in *Minister of Finance and Another v Van Heerden* 2004 (6) SA 121 (CC) para 26 where Moseneke J held:

“The jurisprudence of this Court makes plain that the proper reach of the

equality right must be determined by reference to our history and the underlying values of the Constitution. As we have seen a major constitutional object is the creation of a non-racial and non-sexist egalitarian society underpinned by human dignity, the rule of law, a democratic ethos and human rights. From there emerges a conception of equality that goes beyond mere formal equality and mere non-discrimination which requires identical treatment, whatever the starting point or impact.”

48. Appellant and her daughter are members of a group that was subjected to systemic legal, political, social and economic inequalities in the past. These inequalities still remain embedded in the social structures, practices and attitudes. The conduct of the school towards Appellant, her daughter and their ethnic group in this context is not fair as it forbids the unobtrusive celebration of their religious or cultural tradition.

b) Factors referred to in section 14 (3).

a) Whether the discrimination impairs or is likely to impair human dignity.

49. The value aspect of human dignity referred to in section 1 read with sections 7 (1), 36 (1) and 39 (1) of the Constitution is at issue. The Constitution asserts dignity to contradict our past and to inform the future of the necessity to show respect for the intrinsic worth of all human beings. See *Dawood and Others v Minister of Home Affairs* 2000 (3) SA 936 (CC) at para’s 34-37. In *President*

of South Africa and Another v Hugo 1997 (4) SA 1 (CC)

Goldstone J stated at para 41:

“At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitution and democratic order is the establishment of a society in which all human beings will be accorded dignity and respect regardless of their membership of particular groups . . .”

50. In para 23 of National Coalition for Gay and Lesbian Equality above, Ackermann J associated himself with the point made in the Supreme Court of Canada, in the case of Vriend v Alberta, that fear of discrimination leads to concealment of true identity and this is harmful to personal confidence and self esteem and a potential harm to the dignity and perceived worth.
51. Appellant and her daughter revealed their true identity. It is not just fear of, but discrimination itself, in their case. Here we have actual harm to dignity as a result of unfair treatment and not just potential harm. The failure by the school to recognise the full place of Appellant’s group in its society and to allow Appellant, her daughter and their group the right to enjoy their culture and to practise their religion, as embodied in the nose stud and the reference to their religion and culture, by First and Second Respondents, as “idiosyncratic practices”, amount to a repudiation of their equal worth and respect as human beings, regardless of

individual differences. The discrimination in this case impairs human dignity and is unfair.

52. Appellant's own sentiments, expressed during her testimony, and which are fitting under this factor, and found at page 213 of the record are the following:

"I think it is important that we promote respect for other people's religions and other people's understanding of themselves and acts of discrimination are personal. They speak directly to a person's self-esteem and self-respect. They speak directly to our mental body, our emotional body and our spiritual body and to denigrate that, to demean or humiliate or hurt another's soul negates every religion in the world, not just Hinduism . . ."

- (b) The impact or likely impact of the discrimination on the complainant.

53. Appellant, her daughter and their group have been victims of systemic inequality and unfair discrimination in the past. The consequence or effect of the equal treatment or apparently neutral actions of the school on them without any regard to underlying patterns of inequality is the reinforcement and perpetuation of the social and structural inequalities or patterns of group disadvantage or exclusion. The focus of the equality clause in the Constitution is not treatment but impact. The school's action threatens the self-esteem or disturbs the internal equilibrium and undermines the

dignity of Appellant and her daughter. They feel harassed, demeaned, humiliated and traumatised as a result of the discrimination. The indirect discrimination with such group based negative and prejudicial impact nurture, entrench and intensify the patterns of social disadvantage and harm and is not fair.

(c) The Position of the Appellant in society and whether she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns of disadvantage.

54. Appellant and her daughter belong to the Hindu/Indian group. This is a group that is socially vulnerable and suffers from historically created patterns of disadvantage. The impugned provision of the code of conduct adds another form of subordination and marginalisation of a disfavoured group, by the school. In failing to differentiate, on the grounds of culture or religion, between groups that are materially different the school commits what is regarded as a major contemporary form of unfair discrimination.

(d) The nature and extent of discrimination.

55. The discrimination is not limited to Appellant and her daughter only. There is evidence that thirty other school principals do not allow nose studs, in their codes of conduct. Appellant correctly

characterised that state of affairs as systematic discrimination. The discrimination affects a broader group. The situation has been ongoing. It is however not part of a necessary broader scheme to overcome particular discrimination. The discrimination negates traditions which, on the evidence, have been followed by generations of Appellant's group for centuries. The drafters of the Constitution and of the Equality Act saw fit to specify culture and religion as two of the prohibited grounds of discrimination, as they recognised that systematic patterns of discrimination on grounds other than race have caused and many continue to cause considerable harm. See Brink above at para 41. The discrimination in this regard is not fair.

(e) Whether the discrimination is systemic in nature.

56. A discrimination suffered by Appellant, her daughter and their group is deep-rooted and entrenched in the structures and institutions of society. There is evidence that the Hindus/Indians constitute a cultural and religious minority in the schools governing council, teaching staff and learners which is vulnerable to discriminatory treatment. It is individuals who are members of such minorities who must look to the Constitution and the Equality Act for protection. The failure to recognise difference and

disadvantage leads to injustice for communities and individuals whose values, circumstances and ways of life are different from those of the majority. The form of discrimination which results from a schools code of conduct is invisible as it is meted out through practices and rules that appear to be neutral yet they operate to exclude the disfavoured groups. As the code of conduct reinforces social, structural and institutionalised inequality and unfair discrimination it is systemic in nature and is not fair.

(f) Whether the discrimination has a legitimate purpose.

57. The Schools Act states, in its preamble, that the country requires a new national system for schools which, among other things, advance the democratic transformation of society and combat all forms of unfair discrimination and intolerance, protect and advance our diverse cultures and languages. According to the Guidelines, the school must protect, promote and fulfil the rights identified in the Bill of Rights, including respect for one another's convictions and cultural traditions. As the impugned provision of the school's code of conduct violates cultural and religious rights of Appellant and her daughter, it does not serve a legitimate or an authorised purpose and is therefore not fair.

58. Counsel for Respondents has submitted that the rules in the code of conduct serve the important purpose of the equality of treatment and that it is important that the rule in this case is facially neutral and is not directed or targeted at the particular cultural practice on which the Appellant relies. This submission cannot be sustained. Substantive equality does not require symmetry. It demands asymmetry. I have made it clear hereinbefore that the failure to differentiate or the facially neutral rule relied on by Respondents is regarded as a major contemporary form of unfair discrimination. It fails to dismantle structures and practices which unfairly obstruct or unduly attenuate enjoyment of rights and freedoms. Therefore its purpose is illegitimate.

(g) and (h) Whether and to what extent the discrimination achieves its purpose and whether there are less restrictive and less disadvantageous means to achieve the purpose.

59. The criteria set out in section 14 (3) (g) and (h) involve the assessment and weighing up of the relationship between the discriminatory conduct and its purpose. If the conduct does not achieve its purpose or if the purpose could be achieved by less burdensome means, the discrimination is more likely to be unfair.

Since the impugned provision of the schools code of conduct reinforces what the empowering legislation and the Constitution require it to address and eliminate, indirect discrimination, it serves no legitimate purpose. When no legitimate purpose is served the discrimination is unfair and an assessment and weighing up stage cannot be reached.

60. Respondents have alleged that a wearing of a nose stud, in contravention of the schools code of conduct, affects the smooth running of the school. This suggests that the discrimination has a disciplinary purpose. Respondents have however provided no evidence of how the smooth running of the school was, at any stage, affected by the wearing of the nose stud by Appellant's daughter. The existence of concerns relating to discipline must be unequivocally established and be sufficient for the infringement of a constitutional right or freedom to be justified. Here there is no or no compelling justification. Compare *Multani* above. Kriegler J in *S v Makwanyane and Another* 1995 (3) SA 391 (CC) at para 210 said in this regard:

“At the very least the reasonableness of a provision which flies directly in the face of an entrenched right would have to be cogently established. . .”

61. Another point raised by Respondents is that learners are very quick to notice whether other learners are exempted from compliance with the code of conduct and this leads to discontent. The following response by Appellant to counsel for Respondents' question, during cross-examination at page 241 of the record, is to me, apposite.

“Q You see I just want to know your response as a parent, and one of the people entitled to elect the governing body, how you expect the school to deal with those problems or is that irrelevant to you?

A Absolutely not. I think it is a very simple matter to explain to any child that legally (Appellant's daughter) has a right to follow her religious and cultural tradition.”

Appellant's reply, in fact, reminds the Respondents of their general duty to educate the learners about the provisions of the Constitution, the Schools Act and the Guidelines, relevant to the rights and freedoms of each learner. This is a less restrictive and less disadvantageous means to achieve discipline.

62. The Respondents attempts to let the unfair discrimination creep in, in the guise of discipline, cannot therefore succeed. Even if we assume that the impugned provision has a legitimate schools disciplinary purpose there is a less restrictive and less disadvantageous means to achieve that purpose, as I have mentioned above. I repeat that if some learners consider it unfair

that Appellant's daughter may wear her nose stud to school, it is incumbent on the school to discharge its obligation to instil in its learners the values of religious and cultural tolerance, in other words, to instil discipline in them. The Respondents would, at the same time, thereby be affirming Appellant's daughter's dignity which is at the foundation of our democracy.

(i) Whether and to what extent the Respondents have taken such steps as being reasonable in the circumstances to:

- (i) address the disadvantage which arises from or is related to one or more of the prohibited grounds; or
- (ii) accommodate diversity

63. There is no evidence indicating that Respondents have taken any steps, let alone reasonable steps, to address the disadvantage caused by the discrimination suffered by Appellant, her daughter and their group or to accommodate diversity. Respondents have also not shown that they have initiated any process to redress the inequality and indirect discrimination which on the evidence has occurred.

64. The factors (a) – (e) above objectively considered, either singly or

cumulatively, conclusively establish, in my view, that Respondents have failed to prove that the discrimination in this matter is fair.

65. The factors (f) – (i) above have not established that the unfair discrimination has a legitimate purpose as it does not comply with what the empowering legislation, the Guidelines and the Equality Act require: to protect, promote and fulfil the rights identified in the Bill of Rights including respect for one another's convictions and cultural traditions. They also have not established that Respondents have taken steps to address the disadvantage which has arisen or to accommodate diversity.

Section 14 (2) (c) whether the discrimination reasonably and justifiably differentiates or fails to differentiate between persons according to objectively determined criteria intrinsic to the activity concerned.

66. The impugned provision of the code of conduct allows the wearing, in school, of jewellery in the form of earrings – plain round studs/sleepers, probably for fashion and adornment purposes but forbids the wearing, in school, of a very tiny nose stud, for cultural and/or religious purposes. This differentiation is not rationally connected to a legitimate objective and is arbitrary. The Court below found that the evidence established that cultural and

religious rights are implicated in this case. The Respondents acknowledge that the evidence established that the wearing of a nose stud is, at least, of cultural significance to Appellant, her daughter and their group.

67. Appellant described the nose stud worn by her daughter as an extremely small stud that can barely be noticed. The Court below described it as a very tiny gold stud. Third Respondent realises that the nose stud is small. Appellant also asserted that the nose stud does not, in any way, hinder the educational system or the smooth running of the school or her daughter's performance as a learner. There is no evidence to contradict these assertions.

68. The indirect discrimination, on the evidence, is not capable of objective substantiation in terms of criteria intrinsic to the educational system. It is not authorised by the empowering statute. It does not accommodate diversity. Such indirect discrimination is, in my view, arbitrary, unlawful, unreasonable and unjustifiable in an open and democratic society based on human dignity, equality and freedom.

69. In all the circumstances, I find that unfair discrimination against

Appellant, her daughter and their group has taken place as alleged by Appellant.

70. I accordingly propose the following order:

- (a) The appeal is allowed.
- (b) The order of the Court below is replaced with the following:
“The decision, prohibiting the wearing of a nose stud, in school, by Hindu/Indian learners, is declared null and void.”
- (c) No order is made in respect of costs.

I agree. It is so ordered.

TSHABALALA JP

JUDGMENT RESERVED:

21ST APRIL 2006

JUDGMENT HANDED DOWN:

5TH JULY 2006

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