IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT CAPE TOWN

CASE NO.: C544/2007
Reportable

In the matter between :

POLICE AND PRISONS RIGHTS UNION (POPCRU)	First Applicant
LEBATLANG E.J.	Second Applicant
NGQULA T.R.	Third Applicant
KAMLANA L.T.	Fourth Applicant
JACOBS C.	Fifth Applicant
KHUBHEKA M.W.	Sixth Applicant

and

THE DEPARTMENT OF CORRECTIONAL SERVICES	First Respondent
AREA COMMISSIONER : POLLSMOOR MANAGEMENT AREA	Second Respondent

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JUDGMENT

Cele J

Introduction

[1] The Applicants seek an order declaring that the dismissal of the second to the sixth applicants was automatically unfair as contemplated by section 187(1) (f) of

the Labour Relations Act no 66 of 1995 (the Act) and/or that their dismissal amounted to unfair discrimination, on the basis of their religion and culture, in terms of section 6 of the Employment Equity Act no 55 of 1998 (the EEA). In the alternative, the applicants seek an order that their dismissal was substantively and procedurally unfair. They seek compensation and/or damages in respect of their dismissal. In addition, they seek retrospective reinstatement into the posts that they held prior to their dismissal and an order declaring that the Department's Dress Code with particular reference to a failure or refusal to cut dreadlocks is unconstitutional. Further, the applicant contended that the chairperson of the internal disciplinary hearing was biased against them when he refused to allow them to be legally represented in a matter involving constitutional issues and after the initiator had shown that he was not opposed to such legal representation.

[2] The respondents opposed the claim by contending that, the claim that the dismissal of the second to sixth applicants was automatically unfair in terms of s 187(1)(f) of the LRA, is simply not borne out by the evidence. The reason for their dismissal had nothing to do with discrimination or unfair discrimination. They were dismissed because they failed to comply with the Dress Code. The same would have happened to the four correctional officers who complied with the Dress Code by cutting their hair, had they not carried out the instruction to attend to their hairstyles.

[3] Furthermore, the disciplinary action against the applicants was but one step in the enforcement of departmental policies which happened when the second respondent assumed duty at Pollsmoor in January 2007. In addition, the Dress Code – as the applicants themselves concede – applies equally to all members of the Department, regardless of their religion or culture, and does not have a disparate impact on any member or class of members, on the grounds of religion or culture. For the same reasons, the applicants' claim under the EEA must fail.

[4] There is accordingly no basis for an order that the Department pay damages for discrimination. The applicants were treated fairly. They were not entitled to legal representation in terms of resolution 1 of 2006. They were legally represented by Mr. Casner, an advocate with experience in defending employees of the Department.

[5] In any event, the decision refusing them legal representation was reasonable. They walked out of the disciplinary hearing with full knowledge and appreciation of the consequences. Their claim that the chairperson was biased has no merit. They themselves say that the alleged bias is based simply on the fact that the chairperson disagreed with their representative. Their appeals could not be considered because they did not furnish any grounds of appeal, despite being requested to do so on more than one occasion. Consequently their dismissal was rightly confirmed.

[6] The constitutional attack on the Dress Code is misconceived. It was wholly inadequately pleaded. In addition, the applicants have sought to attack the entire Dress Code without any identification of its unconstitutional features, any identification of the constitutional provisions which it is said to contravene, or indeed any explanation at all of the way in which the Dress Code is alleged to be unconstitutional.

Background facts

[7] The second to the sixth applicants henceforth referred to as the applicants were in the employ of the first respondent, hereafter referred to as the Department or the employer as Correctional officers based at Pollsmoor Prison. They were members of the first applicant, the union. Whilst in the employ of the Department and in the course of carrying out their duties, the applicants wore dreadlocks. The Area Commissioner of Pollsmoor Prison in 2007 was the second respondent.

[8] On 19 January 2007 the second respondent issued a written instruction to the applicants as well as other correctional officers in the Department, to comply with the Dress Code by attending to their hairstyles. These officers were also requested to advance reasons on or before 25 January 2007, why corrective action should not be taken against them in the event that they did not comply with the written instruction. Four correctional officers complied with the instruction by cutting their hair. The applicants refused to carry out the instruction.

[9] On 15 February 2007 the second respondent addressed a letter to the applicants, stating that their conduct amounted to a failure to carry out a lawful order or instruction without just or reasonable cause. They were also informed that management was contemplating their suspension from duty. They were required to submit reasons why they should not be suspended. They made written representations concerning their suspension to the second respondent. The second, fifth and sixth applicants contended that they wore dreadlocks for religious reasons as they were Rastafarians. The third and fourth applicants stated that they had worn dreadlocks for cultural reasons. Notwithstanding their explanations, on 2 February 2007 they were all suspended from duty with immediate effect, pending a disciplinary inquiry.

[10] At their disciplinary hearing on 4 June 2007, Mr. Casner, an advocate, and Mr. Arendse of the union, represented the applicants. They argued that the applicants were entitled to legal representation based on the provisions of a collective agreement, Resolution 1 of 2006. The chairperson declined the request for legal representation. Mr. Casner then asked the chairperson to recuse himself on the ground of bias. The application for recusal was refused. The applicants then walked out of the hearing.

[11] After the proceedings were adjourned on 4 June 2007, the initiator wrote to the applicants advising them that the hearing had been postponed to the next day and that if they did not turn up at the hearing, it would continue in their absence. On 5 June 2007 the hearing was again postponed to 7 June 2007. The applicants were again represented by Messrs Casner and Arendse. They walked

out of the hearing a second time when the chairperson affirmed his decision regarding recusal. The hearing proceeded in their absence and all five applicants were found guilty and were dismissed with immediate effect, for failing to comply with the Dress Code by wearing a dreadlocks hairstyle while on duty. They were advised in writing of their right to appeal against that decision.

[12] On 3 July 2007 the applicants noted an appeal against the chairperson's decision but they did not submit a detailed motivation of the grounds of appeal, as required by Resolution 1 of 2006. On 17 July 2007 they were again informed in writing and orally that they had to submit written grounds of appeal. They failed to do so. Their appeals were consequently not considered by the Department and their dismissal was confirmed.

The evidence

[13] While the dismissal of the applicants by the Department was common cause, the respondents denied that discrimination was ever the basis for it. The applicants were then settled with the onus of proving the facts in support of the alleged discrimination. The five applicants testified in their case and they further called three more witnesses. Six witnesses testified for the respondents.

1.The version of the applicants.

1.1Thamanqa Russel Ngqula

[14] Mr Ngqula testified that he was an HRD practitioner in the human resource department and had been in this job since 2003 up to his dismissal in 2007. He only interacted with offenders at weekends twice a month His qualifications included a B.Tech in human resource management.

[15] He began growing dreadlocks in April 2001 because of his calling to become a traditional healer. The calling had started when he began to have dreams in 1993. These dreams involved African dancing, and there were voices that told him that he needed to be part of this calling. He asked his elders to interpret the dreams. In 1993 when he woke up he found that his hair was cut on the back side and this again happened in 2001 when he heard the voice that was saying *"Thamasanqa we have dreaded you so that you should accept the calling"*.

[16] His mother had been called to be a traditional healer in 2000. Eventually in 2001 after speaking with his mother she referred him to her mentor. In the process of accepting the calling he changed his surname from his mother's surname Ntsasa. He reclaimed his father's surname Ngqula, and he had to go to the Eastern Cape where a ritual took place which included amongst other things the slaughtering of goats, and speaking to his ancestors in the kraal to accept him. That ritual took place in 2002, and then in 2003 another ceremony took place. He was unable to give the precise dates of the rituals performed in respect of his calling in December 2002. However he stated that he was there for two weeks. The ritual in 2003 was also held in December. However he stated that he was there for two weeks. It marked the acceptance of the calling in the Eastern Cape. His mother's mentor was in charge of the rituals and consultation with the elders of his family. The question of the timeframe during which he was required to wear dreadlocks was determined by his mentor and this was determined to be up to December 2007. His dreadlocks were shaved in December 2007.

[17] Mr. Ngqula was shown his record of service by counsel for the Respondents and to his leave record. He was called to explain why these records did not reflect the two weeks holiday he had testified to taking in December 2002. Mr. Ngqula explained that what he could recall was that five days of the period were composed of national public holidays as well. With those days included, the period amounted to about 10 days on the basis of the documents presented. In respect of 2003, he stated that he worked at the prison up to and including the weekend of 16 December so that he could take his days off. He had accumulated a couple of days off. The time off, public holidays and three days in which he took sick leave covered the period during which he was away. He stated that the "days off" were not recorded in the persal system. He said that they are recorded in the register. He requested counsel to make available the information in the register. He said that the register was the Z168 which indicated whether one was on duty or not, whether one was on vacation leave or took days off.

[18] When he faced disciplinary charges relating to his dreadlocks he told the respondents that he would be cutting them in December 2007. From 2001, until facing the disciplinary charges in 2007, none of his superiors in the Department commented on his dreadlocks except for his supervisor who said that the dreadlocks looked neat.

[19] He referred to the letter he had written to Respondent to explain the wearing of his dreadlocks after receiving a complaint from the Second Respondent. In the letter he set out that he had received the calling in 2001 and referred the Second Respondent to the name of his mentor who could be contacted to confirm the calling. The letter stated that all he was asking for was the Department to *"respect my culture as an African and to allow me to fulfil my calling"*. He informed the Respondents that his hair would be cut in December 2007.

[20] In early 2006 he had been nominated by the Director of Corporate Services, Pollsmoor Management Area, to participate in the drafting of a new dress code policy which was more in line with the Constitution of South Africa. He stated that part of a document entitled "Chapter 27" that was presented to those at the workshop made an example about "Rastaman" hairstyle. He stated that Chapter 27 as discussed was not a finalised policy but a draft. He mentioned at the group discussion on the draft policy that the term Rastaman hairstyle was demeaning to other religions.

[21] When it was put to Mr. Ngqula that a Mr Opperman would give evidence that he had told Mr. Ngqula that he would have to explain his dreadlocks at the workshop, he said that he did not remember that and that the workshop was about refining the draft dress code policy to be in line with the White Paper. It was also put to him that Mr. Opperman would testify that Mr. Ngqula was asked to explain his dreadlocks at the workshop and that his explanation was to the

effect that the Constitution gave one the right of freedom of speech and association. Mr. Ngqula testified that Mr. Opperman must have misunderstood him. What he had to do at the workshop was not to explain his personal situation, but part of the input he gave at the workshop was that it was a workshop whereby everybody was free to air his views to contribute to refining of the document. Mr. Ngqula further denied that other members of the workshop had disagreed with what he was saying. It was a debate that took place at the workshop. Mr. Ngqula denied that Mr Petersen had told him that his braids were not according to the dress code. He further denied that Mr. Opperman was correct that he only wore dreadlocks from 2004. Mr. Ngqula stated that he interacted closely with Mr. Opperman as from the time he was at Pollsmoor Prison, from 2003. He already had dreadlocks. He conceded that he had not disclosed to anybody at Pollsmore Prison that he had received the calling. He did not think it necessary. It was something that was within him.

[22] In answer to questions from Court regarding his calling, Mr. Ngqula explained that he was specialising as a fortune teller and prophet, and that the nature of his calling did not include the regalia of a Sangoma, and that according to his mentor, the wearing of the beads depended on whether one dreamt about the beads or not. It was not something one was compelled to do. He further explained that the main purpose of his calling was to ensure that he was living a healthy life and that he did not have the intention of having a “surgery”, just responding to the calling, and he was exempted from practising as a Sangoma. Although he did

not have a “surgery”, if someone needed his wisdom he was there to assist that person depending on what his ancestors were saying. On asking whether he was possessed when he got the calling, he said that he was not, but what came to him were things that he was shown by his ancestors in the dreams that he could not explain. Court further asked him if he was not possessed and for example making strange noises during the time that he was resisting the calling.. Mr. Ngqula stated that the only thing that he could recall was that he kept on having a terrible headache. He said that although he had received the calling he was still active in the Presbyterian Church of Africa and that his calling did not clash with Christian principles.

[23] Mr. Ngqula testified that there were five women correctional officers wearing dreadlocks that he knew of, one of whom was Ms Mjobi from Medium B, a traditional healer. The women wore their dreadlocks without a cap most of the time. He said that he only wore a cap when he found that his dreadlocks were not neat and presentable.

[24] He referred to clause 5.1.1 of the dress code relied upon by Respondent at the disciplinary hearing of the Applicants, in particular the clause which stated that the guidelines are laid down for the hairstyle of all departmental officials and in judging whether officials hairstyles are acceptable, neatness was of an overriding importance. He further referred in his evidence to a “final draft” of the Respondent’s policy approach to corporate wear, in particular that its aims were

to *"deal with the challenges which are being encountered around issues of corporate wear, that is inflexibility in accommodation issues of diversity which is religious, gender and cultural".*

[25] Mr. Ngqula conceded that when he joined the Department he knew there was a disciplinary code and there was a dress code. He further agreed that the uniform indicates that all correctional officials are from the same organisation. Mr. Ngqula agreed that in 1998 he knew that the wearing of dreadlocks would have been against the dress code, but stated that in 2001 he was not sure if the code was in place because of the fact of the White Paper, and documents that were in the pipeline. He further conceded that the dress code applies equally to all of the different cultures in the department. Mr. Ngqula persisted with his view that the policy was not in line with the Constitution of South Africa because it contained an element of discrimination. He referred to the transcript of the disciplinary enquiry discovered by the respondents, which included the testimony of his immediate supervisor, Ms Ngoma. She was asked whether she knew about the dress code of the department and had stated that: *"I don't think there was a dress code because the last time I remember there was a session I think in 2005 where there was a discussion about the dress code, which Mr Ngqula also formed part of those discussion. Their formulation a policy around dress code. So that is as far as I know. I don't hear that the policy was finalised"*. (sic) Ngqula said that Ms Ngoma was the acting head of the human resources department.

[26] As regards the issue of drugs being smuggled into correctional centres, Ngqula testified that of those officials that he knew about who had been caught for this crime, none of them were wearing dreadlocks. He further confirmed that not just dagga but other drugs such as cocaine and tik were smuggled into the prison. To his knowledge those who were trying to smuggle drugs in could conceal the drugs in their bags, jackets and even under their hats. He stated that all Correctional Service officials were liable to random searches. Mr. Ngqula testified that he did not regard his dreadlocks as a risk in terms of his personal security.

[27] With regard to the investigation into his alleged misconduct, Mr. Ngqula testified that the investigator, Mr Manyamati, interviewed him for 5 minutes and asked 3 questions. He had stated in his sworn statement that he did not know the correct procedure to follow in order to wear dreadlocks. He even asked the investigator during the interview what the procedure was but he would not give him that information. Mr. Ngqula was adamant that the sworn statement he had made before the investigator did not indicate that he knew the procedure to follow in regard to asking permission to wear dreadlocks. His letters to the second respondent were not guided by procedures that he was familiar with.

[28] In as far as the decision by applicants to withdraw from the disciplinary hearing was concerned, Mr. Ngqula testified that they asked to have legal representation because they felt their case was a constitutional issue and they would be better served to have legal representation. He said that after a discussion with the

initiator of the disciplinary hearing, Mr Manyamati, the initiator had agreed that legal representation was to be permitted. He said that the decision by the applicants to withdraw from the disciplinary hearing was due to their apprehension of bias on the part of the chairperson.

[29] Mr. Ngqula said that he submitted a notice of appeal after the finding that he should be dismissed in which he gave his reasons as procedural and substantive unfairness, and asked for reinstatement or a properly constituted disciplinary hearing that was of an unbiased chairperson. He had spoken to the labour relations officer to ask for the verbatim minutes or the transcripts of the minutes that were taken during the hearing, which had taken place in his absence in order that he and his fellow applicants could see the whole details of the case and identify areas that they could quote when doing detailed grounds of appeal. The transcript was not made available to them and the first time they saw it was when it was with his legal representatives. In relation to the applicable guidelines regarding the right to obtain a transcript of the disciplinary enquiry, Mr. Ngqula stated that the applicants had gone to one of the union members to find these. The guidelines in respect of Resolution 1 of 2006, stated clearly in sub-section (g) that the verbatim minutes shall be available within 10 working days so that the Applicants could give detailed grounds of appeal.

[30] In regard to his post-dismissal situation, Mr. Ngqula testified that he had found a job in September 2007 at the Department of Public Works. However, from

September 2007 until February 2008 he was not earning a salary because the persal system indicated that he had been dismissed. Public Works had investigated the matter with Correctional Services and the Director-General of Public Works had finally approved the unblocking of the dismissal code. He had assisted in processing the unblocking.

[31] He said that on the 11th October 2007, he had faxed his suspension letter and the reasons why he should not be suspended, the notification of dismissal, the finding of the disciplinary hearing and the notice of appeal and dismissal letter to his head office. His interaction with the Department of Public Works on this problem had been directed to a Deputy Director at head office. On being shown a letter which had been discovered by the Respondent from the Cape Town Department of Public Works, which suggested that Mr. Ngqula had not been co-operative regarding the circumstances of his termination, he explained that this must have been a misunderstanding or a communication breakdown because the writer of the letter had never interacted with him regarding the problem. He said the fact that he was not paid for 5 months had a major effect on his house bond and his ability to maintain his daughter and support his family. In addition it led to a break in service of his employment with the Public Service which affected his pension. He said that he did not wish to be reinstated in the employ of the Respondent.

[32] He conceded that when he applied for the job at Public Works he did not disclose the fact that he was suspended. When he applied he had not yet received confirmation of his dismissal because the appeal was still in process. It was his understanding that during the appeal process he would still be able to have an opportunity to resign. On this basis he did not see any need to disclose the dismissal while there was an appeal still pending. He testified that on the 10th September 2007, when he arrived in the regional office of the Department of Public Works he went to the Deputy-Director and disclosed the matter of his dismissal and stated that he had been dismissed by Correctional Services but that he was pursuing the matter through the CCMA.

[33] In regard to the curriculum vitae that he submitted to the Department of Correctional Services which he made available to Court, he confirmed again that he did not indicate that he had been dismissed from Pollsmoor. He reiterated that at the time he sent the application for employment he was not dismissed and the disciplinary processes were still ongoing.

1.2 Eganamang James Lebatlang

[34] He explained that when he joined the Department of Correctional Services the demilitarisation process was in place, and even the instructors at the college were not sure if they were suppose to use the old system of training or which one to follow. He stated that that is why there was this confusion about the policy of the department and the dress code. At college they were given uniforms and told

how to wear the uniform and how to look as an ideal correctional officer. When he had signed his oath of office and assumed duty on 7 February 1997, he knew the dress code applied just by seeing how his colleagues were dressed. He did not know there was a written code.

[35] He said that he worked at Boksburg Prison, between August 1998 and September 2002 and was thereafter transferred to Pollsmoor Prison. He stated that he could not recall whether there was any official that had dreadlocks in Boksburg but that correctional officials, over the 4 years he was there could wear their hair as they wished. He was asked if he had worn dreadlocks at Boksburg whether it was fair to say that he would have been disciplined, and he stated that he could not answer that because he did not know. Mr. Lebatlang said that in Boksburg he worked under a Mr Magagula who was the head of the correctional centre. He did not know that Mr Magagula was an Orlando Pirates supporter as he was not socialising with him. He denied that he shared a mutual friend with Mr Magagula, as his friend Mr. Terence Mahlangu was not a friend of Mr Magagula. He denied that he had various discussions with Messrs Magagula and Mahlangu regarding the football games.

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[36] He testified that he had worn dreadlocks for approximately 4 years as from late 2003. Nobody had raised any problem from management regarding his dreadlocks before 2007. He began growing the dreadlocks when he became a Rastafarian. He was aware that the respondent disputed he was a Rastafarian,

because when he had spoken to his mother a week before he testified she had told him that she had visitors from the Department of Correctional Services who asked her about him and as to whether he was a Rastafarian and what he was eating, and they also told his mother that they had been sent by him to her.

[37] He testified that he had become a Rastafarian because it practised peace, respect and love. He had Rastafarians friends, and he used to sit and discuss with them and that is when he changed to become a Rastafarian. He testified that he still met with those people, and they discussed the Bible and religion sometimes about twice a month. He followed a vegetarian diet in which only fish and vegetables were eaten as per the Rastafarian religion. As Rastafarians dreadlocks were to be worn because dreadlocks were considered as a crown, and were one's identity as a Rastafarian. He stated that in Rastafarianism they observed Sabbath and whatever was said in the Christian Bible was followed by Rastafarians so that they celebrate Christmas, Good Friday and Ascension Day. He testified that he embraced every aspect of the Rastafarian culture.

[38] He wore a beanie or cap sometimes at work, but did not always because nobody had any problem with his dreadlocks. The beanie covered his dreadlocks completely when he wore it. Further, he testified that his dreadlocks were neat and that he cared for them in order to ensure they were neat. Mr. Lebatlang stated that if he had been required to wear a cap or hat at all times he would have been definitely prepared to do so. When he received the letter from second

respondent regarding his hairstyle he wanted to know what the current policy was regarding the Department's dress code but he did not receive a response to this. He stated that in basic training they were given a uniform and told how to wear the uniform and he wore the uniform in service as required.

[39] He had never had a special relationship with Rastafarian inmates, and for that matter he was not working in the prison. He was only working in community corrections. In community corrections, he did not work in the centre with inmates. He merely met with them at the reception to interview them there.

[40] Mr. Lebatlang testified that the reason why he asked for the original dress code was because he was given a document with the first letter of complaint from the second respondent. He had been given this by Mr De Beer from Pollsmoor Correctional Services. It was stamped in Swellendam and was dated 15 May 2002. He was never informed about a procedure to get permission to get an exemption from the dress code. He stated that he always complied with the dress code of the Department because he was always dressed in his uniform, even when he went to Pollsmoor or he was coming back working in his office he was always dressed in his uniform and he always wore it neatly, even after he started to wear dreadlocks. He conceded that he was aware of the rules relating to hairstyle and moustaches but saw it for the first time in writing in 2007. He said that he did not know the detailed content of the written dress code before 2007. He agreed that if there are rules and regulations they must be observed and it is

no answer for an official to say he can break a rule because nobody is enforcing it. He said that he was not charged with the other applicants and did not attend the first day of the disciplinary hearing.

[41] He knew women correctional officers who wore dreadlocks. He knew several of them wearing dreadlocks while he was working at Pollsmoor. He did not know the reason for them wearing dreadlocks. He referred to one lady working in labour relations with the surname of Majuva and also to Ms Mjobe, and two women working in Medium A reception.

[42] He said that he had told a journalist who had written an article about this case that he started wearing dreadlocks when he arrived at Pollsmoor, and not as was written in the article, when he started working with the Department.

[43] He had not been able to find employment since his dismissal although he had made several efforts but had not been fortunate to get a job. He has a wife and three children. At the time of his employment he was living in the residence of the department where he was still staying because he had no income to stay at any other place. He wanted to be reinstated in his post.

1.3 Cowen Jacobs

[44] He had been working for the department since February 1999 and was employed in Pollsmoor Female Correctional Centre where he had various functions including being an arsenal controller. He started legal studies but had not yet obtained his legal qualifications, he had not sat for the final examination of his LL.B as yet.

[45] He began to grow his dreadlocks in late 2004 or early 2005. He had been an atheist but in early 2005 he started a spiritual battle with himself and his hair started to grow. Usually he cut his hair when it grew, but he could not touch his hair and that is how it started even before he submitted to ‘’Jah Rastafari”. As a Rastafarian he attended festivals and partook in sessions where he read the scripture, had discussions and listened to teachings of various elders. The discussions were about “Jah Rastafari,” the daily life of a Rastafarian.

[46] He had not received any official objection to his dreadlocks prior to 2007, and he had worn the applicable uniform at work including the official hats when the need arose. Mr. Jacobs confirmed that the initiator of the disciplinary proceedings was in agreement regarding the issue of legal representation, and that he noted an appeal against his dismissal. The appeal notice was dated the 3rd July 2007. The document entitled “DCS Disciplinary code and Procedure DBC resolution 1 of 2006” which was dated 2nd of July 2007, had not been seen by him at the time of

his disciplinary hearing nor at the time of his appeal. He had asked Ms Mpa of labour relations for the document but she had not produced it. When he noted an appeal he had not provided detailed grounds for the appeal because according to the "DCS Disciplinary Code and Procedure DBS Resolution 1/2006" the applicants had to give a notice of appeal within 5 days, and then wait for the verbatim minutes of the hearing and to do a detailed appeal application. He referred to the clause relating to the right to receive verbatim minutes for more serious misconduct.

[47] Mr. Jacobs said that he was aware of a document entitled "guidelines for offenders belonging to the Rastafarian faith". He knew there were certain services for Rastafarian offenders and there were specific inmates who made food just for the Rastafarians in the prison kitchens. In terms of the guidelines these inmates were allowed to wear dreadlocks. He himself followed the Rastafarian diet known as "Ital", which included fish, seafood, vegetarian diets and bread.

[48] The first time he was told that it was necessary to ask permission to wear dreadlocks was when he was issued with a letter in 2007 and went to see the investigator. It was also during the interview with the investigator that he was told that he had to inform the department when one changed or adopted a particular religion. He asked the investigator to provide him with the relevant documentation which he did not give to him. He said that the document entitled "Chapter 27"

which included the words “Rastaman hairstyle” was not included in the documents given to him with his suspension letter.

[49] Mr. Jacobs referred to the “final draft” document entitled “corporate wear policy final draft together building a caring correctional system that clearly belongs to all”. He referred in particular to the paragraph that stated “the department shall endeavour to provide a special corporate wear upon application to accommodate religious and cultural needs where possible. Such application shall be considered in consultation with the relevant religious or cultural bodies and taken into account the security and financial implication of such request”. He had seen the excerpt from the alleged dress code for the first time when given the letter contemplating his suspension. At college in 1999, he was informed about the colour of the uniform and how it must be ironed but he was never given a document to scrutinise. He was not even issued with the uniform at his training college because there were too many students and there was not enough equipment for everybody.

[50] He had never faced a disciplinary enquiry during his employment with the Department. He had applied for a transfer in 2006 to Goodwood Prison as it would be easier for him to pursue his studies closer to the university and his home. The Department had recommended his further studies and said it could not stand in the member’s way for a better career but it also had to look at its own

interest. He was never given the transfer. In February 2002 his supervisor had described him as a hard working disciplined member.

[51] Mr. Jacobs testified that Correctional Services officials could be searched at random. In his experience there were no Rastafarian officials who were ever arrested for smuggling drugs into the prison. He did not have a clue regarding how drugs were smuggled in the Centre except from the stories and cases he had heard about like being brought in sport bags, and even with the bread truck delivery. He said that the job of a correctional official was risky and dangerous work. He had sustained an injury when he had to wrestle with an HIV positive inmate and that this was the kind of violence any official was likely to meet especially at the female facility.

[52] In regard to his finding employment after his dismissal, he said that he was not successful in South Africa until his brother invited him to New Zealand because they were looking for experienced correctional officials. He had tried to find work in South Africa and had applied to the Department of Justice as a trainer prosecutor but had not received any reply. In the interim he had utilised his own vehicle to drive school children to school just to have some income. He went to New Zealand in February 2008 and applied at their Department of Corrections. He had been employed at the department and had indicated to them that he had a dispute with his previous employer and that he had to come back because of that dispute. He would start his job in New Zealand in October 2008. He said

that at his interview in New Zealand he was put at ease when he informed them about the labour dispute and he was thrilled to hear that not all countries discriminate against the Rastaman or against their dreadlocks.

[53] When he was asked whether in his written application for the job in New Zealand, he had disclosed the fact that he was dismissed from DCS in South Africa. Mr. Jacobs stated that he did not disclose that he was dismissed. He had not kept a copy of his application and certain of the documentation relating to the job application were thrown out because he had stored them in his brother's garage and it had been mixed up with other people's belongings which were stored in the garage to be returned to South Africa. He stated that he unfortunately did not have a copy of receipt of his application. He undertook to get a copy of his application for employment submitted to Auckland Department of Corrections.

[54] As to whether he had disclosed that he was a Rastafarian in his application, he said that the application form did not make provision for one's religion. He said that when he entered the interview room he tied his hair up but his hair fell loose. The panellists comforted him by saying he was not to worry about the hair as they would not discriminate against his religion in any way because hairstyles were not an issue there. As to how a panellist would spontaneously say he was not to worry as they did not discriminate against religion, he said that his features were Rastafarian through his dreadlocks and his beard. He stated that a child had once stopped him in the street in New Zealand and asked to touch his hair and told him

that he was just like Bob Marley and that anyone could have recognised him as a Rasta.

[55] Mr. Jacobs maintained that he was never officially approached regarding his dreadlocks but that his supervisors Ms Lulama and Mr Mbuli had informally raised the issue with him. Mr. Lulama had told him that looked funny and Mr. Mbuli had asked why his hair was growing and he told Mr. Mbuli that he was converting to the Rastafarian religion, where after Mr. Mbuli said that it was fine, as long as he did his work and was neat. Those officials had neither given him permission nor had they disapproved his dreadlocks. .

[56] Mr. Jacobs conceded that after he had received the letters and the relevant documentation on the dress hairstyle, he realised that the dress code was in existence. However, he said certain parts of it were never implemented and he was under the impression that it was because the country was going through that transitional stage of democracy and certain policies and laws were changed and certain were still intact but were not enforced. He assumed the same thing happened with the dress code.

1.4 Lucky Thamsanqa Kamlana

[57] Mr. Kamlana testified that he was first employed by the Department on 9 March 2000 and that he had worn dreadlocks since March 2001. He referred to the

letter he had sent to the second respondent explaining the reasons for wearing his hair in the manner that he did. He explained the nature of his sickness 'intwaso' that he mentioned in the said letter, and testified that as he was growing up, he was a person who had a lot of dreams and some of these necessitated him approaching the elders. As he was growing older these became stronger and they changed his whole personality and he started having mood swings. Besides mood swings, he would sometimes go into convulsions. He would dream about people that he had never seen and did not even know and those people would indicate to him in his dream that at certain times during his life things would happen and those things would indeed happen. The people in his dreams were wearing long white robes and beads with something white on their faces. His great-grandfather had had this kind of sickness and he had ended up becoming a traditional healer. He spoke to his uncle and then to a person that he knew by the name of Mr Hadebe who was a traditional healer. Mr. Hadebe called the family together and the family indicated that he was still too young to become a traditional healer and there were a lot of things that he needed to do in the house.

[58] His family decided they needed to connect with the ancestors to be advised on how to deal with the illness. A ritual was held at his grandmother and grandfather's place in Gugulethu where an appeal was made to the ancestors. A ritual was enacted at the grave of his great grandfather where a white rooster was slaughtered and the blood poured over the grave. The family then went back to the house and spoke to the ancestors and traditional beer was then served. He

was still waiting for the ancestors to indicate to him when he needed to cut his dreadlocks. Before 2007 his employers had never raised the problem about his hairstyle. He wore a hat at work almost every day. This was the beanie which covered his dreads. When he was still employed his dreads came just below his ear. All his dreadlocks were folded under the beanie. He said that his family's religion was Methodist and he had not changed his religion and still attended at the Methodist church. He confirmed that up until the date on which he testified, he had not accepted the calling and said that he had put an appeal to the ancestors and was awaiting a response of that appeal.

[59] He was never told by his employers that he had to apply to wear dreadlocks. At his training all that was indicated to him was that he needed to iron his uniform, and he was told that he could not wear windbreakers with his uniform and other clothes other than the corporate uniform. He expected the employer to positively respond to his explanation about "intwaso" because being Africans themselves he thought they would have understand what this exactly means. Mr Magagula, his manager, never raised the issue of dreadlocks with him nor did he ask him for permission to wear dreadlocks. At the time Mr. Magagula arrived at the centre he was already wearing dreadlocks. He had never told the department that he had been "called", because he did not see the need to do that, because the illness of his was of a personal nature. He was not aware of any procedure to ask permission to wear them. Mr. Kamlana stated that the investigator during the two or three minute interview with him, asked him if he was aware of the fact that he

needed to get permission to wear dreadlocks and he indicated that he was not aware of that. Mr Kamlana stated that the initiator for the disciplinary enquiry had a positive attitude towards allowing legal representation.

[60] Mr. Kamlana testified that he has a diploma in education and that subsequent to his dismissal he found a job as a teacher on 15 January 2008 at a primary school in Hout's Bay. He had indicated to the principal of the school under what circumstances he was dismissed and she said that they were not prejudiced against such people. Although he had the job, he could not get permanent employment because the persal systems interlock between the present job and his previous employment. He suspected that the persal system indicated that government dismissed him at his previous job. As a casual he did not enjoy the benefits of a permanent educator and did not receive a bonus or a pension. He did not wish to be reinstated in the Department of Correctional Services.

[61] He confirmed that he had signed an acknowledgement that he had received a copy of the code of conduct and familiarised himself with that. He further conceded that a code of conduct was important for security at a correctional centre, and that the code of conduct was important for discipline and that as part of discipline all correctional officials wore uniforms and that there was a standard uniform for officials and also standard requirements relating to personal appearance; and further that the reason for a standard uniform and standard personal appearance requirements was that correctional officials should work as

a team. He conceded that all correctional officers had to comply with the code of conduct and that such compliance was essential for security and discipline. Mr. Kamlana further conceded that if the code of conduct helped to maintain unity amongst correctional officials and because of its critical role in the correctional centre an official could not say that the code of conduct was not being enforced therefore could be disobey. Mr Kamlana was referred to the code of conduct, including the provision that a member of the Department, during official duties, dressed and behaved in a manner that advanced the reputation of the Department and also respected the corporate wear and adhered to the dress code.

[62] Mr. Kamlana was referred to the code of conduct and read out the following clause: **"a member of the Department of Correctional Services executes all reasonable instructions by persons officially assigned to give him, provided these are not contrary to the provisions of the Constitution and/or any other law"**. He confirmed that this clause was contained in the code of conduct.

1.5 Mduduzi Kubheka

[63] Mr. Kubheka testified that he commenced his employment with the Department on 14 November 1993 and had worn dreadlocks since late 1994. Dreadlocks ware a crown that reflected the true identity of the Rastafarians. He first got interested in Rastafarians in the 1980's when he was in Durban. When practising their religion Rastafarians met as groupings and read the Bible. They

also explained to new members what a Rastafarian was all about. Mr Kubheka stated that it was only after he had stopped living with his parents who were very strict, that he was able to embrace the faith of Rastafarian more deeply although he had been interested in it from the age of 13. During the early 1990's he accepted its principles but he wasn't that deeply into the practice of the faith. He had left home in 1992 to come to Cape Town. He stated that after 1994 when the new Constitution came into being, he actually started practising the principles of Rastafarianism and that Rastafarians had problems prior to that because Rastas were unacceptable. The dreadlocks had started in 1994 but he was not practising the faith on a very large scale at that time.

[64] He was part of the last group of recruits during the era of militarisation in the Department. At college he was taught mostly in Afrikaans which he did not understand. When he arrived at Pollsmoor, he was the first to be dreaded but was followed by a Ms Mjobi who was a traditional healer. He did not know he had to declare he had become a Rastafarian. The officials he knew about who were arrested for smuggling drugs were not, to his knowledge, Rastafarians. His relationship with Rastafarian inmates was limited to directing them as to where they could obtain bibles. When seeing the department's guidelines for offenders practising the Rastafarian faith he thought that law breakers were allowed and yet he was allowed to practise his beliefs when he was a law abiding person. No one ever complained about his dreads between 1994 and 2007. He said that officials could wear two types of hats and that he wore the beanie most of the time and it covered his dreads. He was known at Pollsmoor as "Rasta".

[65] As to the alleged security risk of wearing dreadlocks, he stated that anything on one's body could be pulled and that there were ladies who had braids and dreadlocks. Offenders also fought amongst themselves. He referred to the submissions he had written to the second respondent regarding his dreadlocks. He explained that he had received assistance in the legal drafting that was contained in the submission from his wife. On 22 October 2004, he had applied for a temporary transfer to do in-service training for one year to one of the government departments for his national diploma in civil engineering. The Department had strongly recommended his transfer and had also stated in the letter that he was to report back at Pollsmoor after his in-service training. That letter was signed by the Area Commissioner of that time.

[66] Mr Kubheka further testified that he had approached the South African Human Rights Commission regarding his dismissal and read from a letter from the SAHRC to his attorneys of record stating that *inter alia* "our legal department at the SAHRC considered the complaints and determine that *prima facie* it may constitute a violation of the rights to equality, freedom of religion, belief, culture as per sections 9, 15, 30 and 31 in the Bill of Rights". The letter further stated that the Department had continuously failed to provide a copy of the dress code under which the employees were disciplined despite several requests in writing and by phone. Kubheka explained that as a Rastafarian, people get the notion that if you are, you may bring "herbs" to the prison, but he had always done his work strictly

according to the rules. He gave evidence that he had never during his 13 years employment with the Department been charged with any disciplinary infraction. None of his supervisors had complained about his dreadlocks nor had the previous heads of prison that he had worked under, including Mr Marcus, Mr Schultz and Mr Klein raised any complaint. .

[67] He did not know of any procedure in order to make an application to wear religious dresses. His dreadlocks were neat. He said that he knew by sight those officials who had cut their hair in response to the receipt of a letter by the Area Commissioner. None of those officials were Rastafarians nor to his knowledge, were they traditional healers. He testified that Mr Nyube's hair was not dreadlocked. His hair was long and as to the other three officials their dreadlocks were still short and might have been their style. He was referred to the record of the disciplinary enquiry discovered by the respondents, and in particular to the testimony of his supervisor, Mr Molefe. He said that it was recorded that Mr Molefe had stated that he was not aware of any dress code but that when he was appointed he was given a uniform to wear. He stated that Mr. Lebatlang had approached him to give him more information pertaining to the Rastafarian faith. When asked whether the two of them worshipped together at a particular place he said that Rastafarians did not need a specific time that they had to go together to a place. When they got together they would reason and would have discussions about Jah. He said that there was no place of worship but that the Sabbath must be observed. On what days are celebrated in his faith he stated

that they were 23 July, a Christmas day, 17 August, a Marcus Gavey's day and that Rastafarians also celebrate Africa day.

[68] As to whether he had ever received a response to the representations he had made on 25 January 2007, he said that the only response from the Department was the letter saying that he did not adhere to the dress code and he was thee after served with a letter of suspension.

[69] He had not found any employment since his dismissal but he was making sandals which he was selling to earn a living. He had tried to get other work in in-service training to finish his studies but he had not been successful on anything yet. He was married and had three children. He wished to be reinstated into his position with first respondent.

1.6 Zola Ganjana

[70] Mr Ganjana gave evidence as a representative of the union and testified that he was the head of the Department for Correctional Services within Popcru. He was involved in about 20 disciplinary enquiries per year and that he had dealt with charges against officials for smuggling drugs. He had never had a case of a Rastafarian official charged for this in all his years of doing disciplinary enquiries.

[71] He stated that in his experience the rule regarding dreadlocks was not uniformly applied in the Department and there was a Mr Vokwana who had dreadlocks in

the Department who had left. He was based at the regional office in Goodwood. The head of legal services at head office of the Department also wore dreadlocks.

[72] According to him, the role of a human resource practitioner in a disciplinary hearing was very limited. It was only to guide the hearing and was limited to that aspect not to any other. He said that the human resources representative could not get involved in decision-making within a tribunal.

1.7 Ndilisa Toyo

[73] Mr Toyo gave evidence that he was a traditional healer and practised from 1990 to the present. He stated that he knew Mr Ngqula and also knew his mother whom he had met in 2000. His mother was his student. He stated that he was also a teacher to Mr. Ngqula and that he was asked to meet with him because Mr. Ngqula was not well in that he had a headache problem and he had hair that was twisted. He had woken up with hair that was twisted. They met in Mr. Ngqula's mother's house in Khayelitsha in 2001 when he was busy with his mother's ritual. The advice he gave to the family of Mr. Ngqula about his sickness was that they were to take him home to where his clan name was, that is, to his "father's side" to do the rituals. He told Mr. Ngqula that what he was going through and the dreams he had all showed that he was to go home, to his father's side and do his rituals.

[74] He was present at the ceremony connected to the reclaiming of Mr. Ngqula's father's clan name which took place in Xolo in Transkei. The ritual took place in December 2002. Mr. Ngqula had to accept his clan name and then would have to do a ritual as to his calling. He said that there was a ceremony to mark the acceptance of the calling where a goat was slaughtered and they made some traditional beer. This ceremony took place in Xolo in Transkei at the end of 2003. It was at the end of December/ the beginning of January. The ceremony took a week. He was involved in the ceremony to shave Mr. Ngqula's "ivitani" in December 2007 where again they slaughtered and made traditional beer. He and members of Mr. Ngqula's family shaved his head. His participation was limited to the three rituals and did not go beyond that. He said that he was able to dispense traditional medicine.

[75] In response to questions by court on how he treated his patients, Mr. Toyo said that he sat down on a goat skin and would then call ancestors from both his mother's and father's side. He would then enquire from them as to why a patient with him had come for consultation. The ancestors would give him the answer in a continued communication with them which he would continuously convey to that patient. If the patient was deserving of a healing, he would give the medicine that was needed.

1.8 Ndihleli Albert Kandekana

[76] Mr Khandekana was called as an expert witness and he confirmed the summary of his qualifications and opinions as set out at page 76 of the pleadings bundle.

[77] Mr. Khandekana stated that dreadlocks are a symbol that a person is following the calling that comes from their forefathers. It is believed that if you do not wear the dreadlocks you will be punished and that you may end up like a mad person. He confirmed and expanded upon the opinions contained in the expert summary.

[78] Mr. Khandekana stated on questioning by the Court that there are two groups of persons, one group being fortune tellers, and the other who dispense medication, even though there may be an overlap between the two.

[79] Propositions were put to Mr Khandekana gleaned from published works of academics such as Dr. Harriet Ngubane and Mr Hammond Tooke. He agreed with this proposition made in a book written in 1989 that Hammond Tooke had written that throughout South Africa herbalists are almost all exclusively male while diviners are frequently often female, almost entirely so. He conceded that once a person has graduated that person does not go and work alone. He usually works with his mentor for some time until he can be by himself. Mr. Khandekana stated that not all traditional healers were equally skilled. It

depended on their mentor because if the mentor did not know the medicine, that student could not equal other students.

[80] He confirmed his opinion that those who are called are not always suffering from "intwaso" but have dreams which are messages from the ancestors that that person should be called. He said that there are ceremonies that take place in relation to the ancestor to try and postpone the calling. He testified that a Westerner might not be likely to recognise the symptoms of "intwaso" suffered by someone who received the calling. As to whether a person could also become a prophet or a diviner, he stated that it could be so, saying that even in his tradition most of the traditional healers were women but also a man could become a traditional healer. He stated that when he went to work or to visit somewhere he did not always wear his beads as he had them in court. He said that there would be some beads under his clothes even though not visible.

2.The version of the respondents

2.1 Mandla Jephtha Mkhabela

[81] The second respondent, Mr. J. M. Mkhabela was the Deputy Commissioner of the Pollsmoor Management Area. He occupied the position since January 2007. He has been employed with the Department for the past 22 years and has served in various correctional centres throughout the country.

[82] On his arrival at Pollsmoor he found that there was a large scale of non-compliance with departmental policies including the dress code of the department. He said that non-compliance with policies of the Department could cause poor service delivery and a poor image of the Department as there was negative publicity about Pollsmoor Then after compliance and adherence to the rules, departmental policies were enforced, it tended to be better and the image of the Department reflected also on the image of the government at the end of the day because if one looked at what the Department's vision said, "to be one of the best of the world in delivering Correctional Services with integrity and commitment to excellence", that meant that the Department needed not to look at this thing in a myopic way. It was necessary to look at this thing in a broader way to say Correctional Services was operating and competing with other Correctional Services in the world and also South Africa belonging to the job as well. So there could not be a situation where there was no compliance with policies and at the end of the day there would be lawlessness, with all things that were not helping the Department.

[83] He testified at length about the various issues that he found to be reflective of a lack of discipline at Pollsmoor Prison. Dagga was the drug of choice at Pollsmoor. He further stated that during his term of office at Pollsmoor, there had been cases involving dagga smuggling by correctional officials. An example was one Mr Gouws in 2007 who was caught in possession of dagga hidden in his lunch box, and a Mr Mayekiso who in 2008 was found in the possession of dagga hidden in the sleeves of his jersey. Other drugs are also used and offenders are found in possession of other drugs like Tik and Mandrax.

[84] The second respondent's evidence was largely unchallenged and certainly not contradicted. He said that the lack of discipline and security as a result of non-compliance with departmental policies manifested itself in a high rate of

absenteeism; numerous audit queries; prisoner-on-prisoner and member-on-prisoner assaults; escapes; negative publicity for the institution; and a lack of accountability.

[85] As a first step to put things right, the second respondent dealt with non-compliance with the corporate wear policy by issuing a written instruction to correctional officials (including the applicants) to comply with the Dress Code and to advance reasons why corrective action should not be taken against them if they did not comply. Four officials complied with the Dress Code and cut their hair. The applicants did not. To address the problem of officials leaving their place of work without permission during working hours, the second respondent introduced a permission slip. This ensured that officials remained at their place of work which enhanced service delivery.

[86] The third issue that the second respondent addressed was punctuality. Numerous officials were coming late. A column was added to the duty list to note down the times when officials reported late for duty. A new system in terms of which officials who continuously came late were given a verbal warning valid for six months, was also introduced.

[87] The next problem which the second respondent dealt with was non-compliance with the leave policy. There was a high rate of absenteeism. Officials were

taking leave before it was approved. Officials who had taken study leave did not submit their results to the Department.

[88] The second respondent also discovered that the funds of the Members' Club were being used for an unauthorised purpose. The club gets its funding from trading points in the management area such as tuck shops, a petrol station, a mess and guest houses. It exists for the wellbeing of members. Its duty is to ensure that recreational facilities such as the gymnasium, tennis court, swimming pool and the soccer and rugby fields are maintained and upgraded. But the funds of the club were being used to make loans to officials. Once that was stopped the bank balance of the club improved from R533 000 in 2006 to about R1.3 million in 2008.

[89] Another way in which there was no compliance with departmental policies related to the use of official vehicles. Accidents involving these vehicles were not being reported and investigated. Disciplinary steps were not being taken against officials who were negligent. That changed and the figure relating to accidents went up in 2007 because accidents were being investigated and disciplinary steps taken against officials. There was corruption regarding repairs to vehicles – the same service providers were being used without obtaining competitive quotations and expenditure could not be accounted for. That too, was remedied. Traffic fines were recorded, followed up and action was taken against officials in respect of whom fines were imposed.

[90] The smoking policy was also not being implemented in Pollsmoor Management Area. Officials were smoking in offices and corridors and offenders who smoked were placed with those who do not. Contrary to the policy, child offenders were allowed to smoke in the juvenile centre. Steps were taken to enforce the smoking policy. Officials were not allowed to smoke in the workplace and smoking in the juvenile centre was stopped. The enforcement of departmental policies and stepping-up discipline resulted in more dismissals in 2007 and 2006.

[91] On a practical level, compliance with the Department's policies, including the Dress Code, has improved service delivery. In the audit report for the 2007/2008 financial year, there was not a single query about leave administration. The level of absenteeism had gone down and officials have stopped going to Pick & Pay and Spar in a nearby mall during working hours. Officials are now carrying out their duties as they are supposed to do and performance is being improved but there is still a long way to go.

[92] Compliance with departmental policies has also improved discipline at Pollsmoor. Present management and more specifically prisoner-on-prisoner assaults, stabbings and complaints by inmates have declined. Escapes have also declined. The result of enforcing compliance with the Dress Code has enhanced discipline and team work which as portrayed Pollsmoor in a positive light. As a result, there was no longer negative publicity concerning Pollsmoor.

[93] On being asked why he did not accede to the Applicants' request to keep their dreadlocks, he stated that there was no concession in the dress code for deviation or for accommodating such requests except for medical reasons. He further stated that he did not accede to their request because that request would open the flood gates and that to allow one or two cultures or religions that would mean we would need to allow for everybody. In his view at the end of the day this would mean there was no uniform in Correctional Services. He stated that in his view the applicants' dismissal did not constitute unfair discrimination because the dress code applied across the board and it did not target anyone.

[94] Mr. Mkhabela conceded that the draft dress code that was annexed to the investigation report did not include the word "Rastaman" in it. He further conceded that the dress code referred to by respondent's expert witness was different to that annexed to his enquiry report, in that it included the two extra words "Rastaman hairstyle". Mr. Mkhabela confirmed that the expert witness "for the respondent was a senior man in the department". He said that Ms Ngomo as the acting head of HR should have known about the dress code because she was working at HRD.

[95] He was also referred to the evidence of one of his managers, Mr Molefe given at the disciplinary enquiry where he stated that he was not aware of any dress code and he conceded to the correctness of the transcript of the enquiry. Mr. Mkhabela confirmed that he had signed an oath which included a clause that officials should

execute all reasonable instructions by persons officially assigned to them provided these are not contrary to the provisions of the Constitution and/or any other law. He also confirmed that the dress code applied before the Constitution came into effect. When asked as to how he applied his mind as to the constitutional issues arising from the dress code he replied that he had to look at what the code said and also the interests of the Department.

[96] When questioned as to whether he asked his legal department to assess whether the code complied with the Constitution, he stated that at management areas they implement policies. He asserted that he was able to consider the legal issues contained in the submissions by Mr. Kubheka without reference to legal experts. He stated that he was aware that Mr. Kubheka had never in 13 years had one disciplinary infraction when considering his suspension. He was not aware that a transfer to do training in civil engineering had been approved by his previous incumbents. Mr. Mkhabela stated that he did not ask for his HR officials to brief him when he applied his mind to the suspension of Mr. Kubheka. He further stated that he did not meet with Mr. Kubheka nor consult with him.

He said that the initiator of the disciplinary enquiry had stated in the enquiry report presented to him that, if Mr Kubheka needed to comply with the Departmental policies on receipt of second respondent's of 19 January 2007, he would have enquired of the correct procedure he needed to follow, rather than later stating that he did not know the procedure and still refused to cut his beard and dreadlocks.

[97] Mr. Mkhabela stated that he had read the Correctional Services Act and was referred to section 134(2)(f) which provides that the national commissioner might issue orders on the wearing of attire for religious or cultural purposes. He said that he did not remember the provision, but that if it was in the Act that meant it was applicable. In relation to the rule or standard on the dress code not being consistently applied by the Department before he joined it and that he had said in his evidence there was a general culture of non-compliance he said that as he had started on 15 January 2007 at Pollsmoor, he did not know what was happening before his arrival but he conceded that he was aware that managers of the applicants did not tell them to cut their hair as they were wearing their dreadlocks and no one took action.

[98] He conceded a receipt of a letter with submissions made by Mr. Ngqula regarding his dreadlocks, requesting the Department to grant him the necessary permission to keep his dreadlocks until December 2007. He replied to Mr. Ngqula's submissions in one day. He said that he had applied his mind to the submissions made by Mr. Ngqula and it took him a day to consider them. Mr. Makabela conceded that Mr. Ngqula was not working with offenders as his primary task and that his training and skills were relevant to the organisation but that he had not met and consulted with him.

[99] Mr. Mkhabela said that he did not ask legal services to look at Mr Jacobs' submissions nor did he read the cases cited in the submissions himself. He conceded that the dress code allowed females to wear dreads. He said that it did not make provision for the males because of their differences: Males and females were not the same. If a woman member becomes a sangoma because she received a calling she would be permitted to wear dreads as it did not make any difference because the dress code allowed them to have dreads. He said that if he had been given a policy that contained provisions that he considered to be racist he would have implemented it .as such would have been checked by legal services and employee relations and all the specialists leaving him to implement such a policy. He stated that he would not permit a woman correctional official who had asked him permission to wear a gold stud in her nose for culture reasons on the basis that the dress code specifies about earrings, about bracelets, about necklaces but not about a gold stud on the nose. He stated that the dress code was a package and that one could not separate it from discipline and compliance with departmental policy. He stated that the national commissioner had not made any orders in regard to religious and cultural policies.

2.2 Ephraim Bheki Ndebele

[100] Mr Ndebele gave evidence as an "expert witness" for the respondents and confirmed the contents of the expert summary were his opinions. He stated that he had held positions in Correctional Services since 27 February 1995. He

described himself as a loyal member of the Department. He said that he held the rank of a Director, and that as such, he was given performance assessments by the Department. He further confirmed that his immediate superior the Chief Deputy Commissioner Operations and Management Support was aware that he was testifying in the trial. In regard to the expert summary he stated that the dress code quoted in it applied at the time that the applicants were disciplined and when they were dismissed.

[101] In his opinion, an official who was a Rasta would stand out as a person who believed in Rastafarian religion. Offenders always looked for a soft spot which they were going to use to get a grip on the official so as to be able to manipulate him or her. Offenders knowing the beliefs of Rastafarians would make the official targets of manipulation. He stated that dagga was central to the Rastafarian religion and once the offenders had got hold of such an official, they would want him to supply them with what they wanted to get.

[102] He conceded that it was correct that the copy of the dress code annexed to the disciplinary investigation report and in particular clause 5.1.2.3 thereof, was different from the code that he referred to in his expert report. Ndebele conceded that he had not been able to provide figures relating to Rastafarian officials who may have been involved in any disciplinary infractions.

[103] A proposition was put to him, which he agreed with that if it was commonly regarded that Tik was most prevalent amongst the Coloured community, it would then mean that he would have a worry about the relationship between Coloured correctional officials and Coloured inmates.

[104] Mr. Ndebele stated that women correctional officials worked with offenders at correctional centres. He conceded that women who have long hair could be grabbed by their long hair. He stated that as a precaution for them not to fall prey easily they should not wear their hair loose. He stated that he had heard that the applicants wore their hair most of the time under a beanie or tied back.

[105] Ndebele agreed that a member of the Department was to execute all reasonable instructions, provided they are not unconstitutional. He further conceded that all officials were targets of manipulation. When asked if it was his evidence that someone who believed in the Rastafarian faith was more likely to be dishonest or corrupt than another official simply because of the tenets of his faith he said such a member was at risk of being approached because of his religion and there was a need to protect officials from being manipulated and corrupted.

[106] Ndebele was referred to findings of the disciplinary hearing of Mr. Kamlana in particular the aggravating factors presented by the initiator, that the Department was a security cluster and had its own corporate wear which accommodate religious wear on application and Mr Kamlana knew about it but did not make an

application in writing. He said that the statement by the initiator regarding the accommodation of religious wear on application was incorrect.

2.3 Jabulani Samuel Mahlangu

[107] Mr Mahlangu stated that he was the head of the correctional centre, Kroonstad management area. From March 2002 until December 2002 he was head of prison at the juvenile centre in Boksburg. He stated that there was a case in Boksburg where an official wore dreadlocks, a man by the name of Koloti who came from the Western Cape, while Mr Lebatlang was working there. Mr. Mahlangu testified that Koloti was working at the juvenile section with Lebatlang. An investigation was conducted against Koloti and Koloti decided to cut his hair. Mr. Mahlangu testified that Koloti was represented by a Popcru shop steward Mr. Terence Mahlangu who was a close friend of Mr Lebatlang. He said that it was incorrect that correctional officials at Boksburg could wear their hair in any way they felt comfortable and that Koloti had been investigated because his dreadlocks were in conflict with the dress code. Koloti had removed his dreadlocks while the investigation was on. He said that Mr. Lebatlang had left Boksburg before the disciplinary process against Koloti had ended, and would not have been in a position to know the outcome or whether Koloti kept his dreads or not.

2. 4 Mr Graham Wickham

[108] Mr G. Wickham, a correctional officer had been in the department since 1986. He had investigated an incident when an inmate was assisted by a member of Correctional Services to escape out of the admission centre by providing him with a uniform. This was the only incident of this kind that he had been involved with.

2.5 Ms Kegomoitswe Mpa

[109] She was employed for 21 years in the Department of Correctional Services, and was in the position of Employee Relations Manager for the Pollsmoor management area for the past 2 years and was responsible for the processing of internal appeals by employees. Her evidence was that the applicants did not comply with Resolution 1 of 2006 in lodging their internal appeal. In relation to the guidelines for managers dated 2 July 2007 and in particular the clause stating: *"although disciplinary hearings must be recorded there is no entitlement to minutes as in the previous disciplinary procedure",* she said that she explained to applicants' representative who had approached her that they did not need to wait for the minutes in order for them to submit their motivation for their appeal, because they were not entitled to any minutes.

[110] Ms Mpa was referred to a document entitled *"Disciplinary code for the Department of Correctional Services DBC resolution 1 of 2001 dated the 23rd February 2001"* which she said was no longer in force. She was further referred

to annexure "C" of the document headed *"Disciplinary procedure manual for the Department of Correctional Services"*. She confirmed that this document stated that the employer must provide verbatim word for word minutes of the disciplinary hearing to the appellant/representative within 10 days working days on receipt of the intention to appeal. She stated that all tapes of disciplinary hearings were to be transcribed once enquiries were completed, whether an appeal was filed or not and she said that the verbatim minutes are normally made available to the Department. She stated that the applicants had a representative at the disciplinary hearing who could have told them what transpired there. She however said that the verbatim minutes provide a safe and secure record of the enquiry proceedings. She was referred to the notes of the chairperson of the disciplinary enquiry and confirmed them as such. She conceded that the disciplinary chairperson had referred to clause 7.3.8(g) of the guidelines dealing with legal representation contained in the *"DCS disciplinary code and procedure DBC Resolution 1/2006",* which she had said did not exist prior to the 3rd July 2007.

[111] She was referred to the document entitled "Chapter 27" "Corporate Identity dress code" and she stated that she was familiar with it and said that, given it referred to PSCBC Resolution 3 of 1999, the document was prepared after that resolution. She testified that she had never applied any other resolution other than Resolution 1 of 2006 and the only guidelines that exist in relation to that resolution were those dated the 2nd July 2007. She was referred to a document

entitled *"DBS disciplinary code and procedure DBC Resolution 1 of 2006"* stamped on its cover draft *"do not copy".* The draft was dated 9 February 2007 and was entitled *"guidelines for managers DCS disciplinary code and procedure DBC resolution 1 of 2006"*. She confirmed that these were the guidelines she referred to that were in draft before the guidelines dated the 2nd July 2007 were published.

[112] Ms Mpa testified that she had written a letter regarding the case of Mr. Ngqula because there was some concern about whether the process had been fair. She confirmed that she had written in the letter *"there is nothing like old policy in the Department. If the policy is phased out the new one is phased in and if it is not phased out it means that the one that is used will still be used"*. She denied though that she was referring to the dress code when she made this statement in the letter because the query at hand was about suspension, yet conceding that the suspension policy had not changed.

[113] Ms Mpa was referred to the disciplinary guidelines dated the 2nd July 2007. She conceded that the documents was not part of the resolution but were departmental guidelines and prepared by the Department itself rather than as a collective agreement. She stated that she could not account why the HR representative in the disciplinary hearing of the applicants referred to the *"DCS disciplinary code and procedure DBC Resolution 1 of 2006"* because they were not using those guidelines. It was suggested to her that if the guidelines of July

2007 were approved only after the disciplinary hearing, there must have been earlier guidelines that the HR department had regard to but she insisted that no guidelines were in place before the approved one.

2.6 Mr. Themba Shadrack Magagula

[114] Mr Magagula was then the current Regional Head Corporate Services in the Western Cape and was employed at Boksburg Prison from 14 August 1996 until 31 March 2005. He knew Mr. Lebatlang as they worked together at Boksburg and they used to discuss issues of soccer because they were both supporters of Orlando Pirates. That would be when he took rounds in the institution. Mr. Mahlangu would join in such discussions which took place on many occasions. At that time Mr. Magagula was an Assistant Director and Mr. Lebatlang was at the lowest grade in the Department and that was in the period 2000 up to 2002.

[115] As to whether he was a witness in the 2007 disciplinary enquiry against the applicants, he said: he did submit an affidavit in the form of a reply to the investigating officer that was impacting on one of the correctional service officials working at his centre He confirmed that he gave evidence at the hearing in respect of Mr. Kamlana who, if wanted to keep his dreadlocks should have made a request to make a submission to head office, in that case being the area commissioner, to give indication as to why he could not comply with the policy, and a decision would be taken. He said that there was a procedure for an

application not to comply with the dress code by making a submission to the Area Commissioner.

2.7 Gerdt Martin Opperman

[116] Mr Opperman testified that he was a Co-ordinator, Human Resources and had been in that position since 1999. He said that he attended a workshop with Mr. Ngqula on corporate wear and insignia run by the Department He stated that he had a discussion with Mr. Ngqula about his dreadlocks before the workshop and informed him that he had been selected to go to the course because he was wearing dreadlocks and Mr. Ngqula told him he would explain it at the workshop. He testified that Mr. Ngqula was not chosen because of his intelligence, qualifications and his role in human resources. He said that Ngqula had stated at the workshop that according to the Constitution he was allowed to wear dreadlocks because of the freedom of speech and association. He conceded though that Mr. Ngqula might have said that everyone should have freedom of expression to give their inputs thereat. He testified that Ngqula did not have dreadlocks in September 2003 and that he started to wear dreadlocks in 2004.

[117] Opperman gave evidence in respect of Mr. Ngqula's service record with particular reference to leaves he had taken and referred to forms Z1039 and G122. According to the G122 form Mr. Ngqula worked on 16 December 2002. He took a day off on 28 February 2003. The form showed that he worked on 25 and 26

December 2003. Mr. Opperman testified that according to the records, Mr. Ngqula had no vacation leave in December 2003 and that he had 3 days of sick leave from 29 to 31 December 2003. He said that Mr. Ngqula applied for leave of absence for the period 23 to 31 December 2002. He conceded however that the Z168 register was different from other kinds of registers because it also recorded when people had days off, and that days off would be days other than sick leave or vacation leave because people worked shifts.

Submissions by parties

Applicants' submissions

[118] Applicants submit that by applying the workplace rule, the alleged dress code, to dismiss them, the respondents unfairly discriminated against them. The direct discrimination is in that female correctional officials are permitted to wear dreadlocks. The indirect discrimination is in that such a rule infringed against the rights of Rastafarian correctional officials to practice their religion, and in the case of third and fourth applicants, the rights of correctional officials to practice their culture.

[119] Section 187 of the Act identifies a specific category of dismissals that, if proved to exist, are regarded as automatically unfair. Should this Court be satisfied that a causal link is established on a balance of probabilities between the prohibited reasons for dismissal and the circumstances of the dismissal, no justification can

be proffered by the employer, and the employee automatically qualifies for the privileges conferred upon the special category of dismissals, namely a rebuttal presumption of unfairness and an entitlement to double the ordinary compensation awarded.

[120] The Labour Appeal Court has held that section 187 imposes an evidential burden upon an employee to produce evidence which is sufficient to raise the credible possibility that an automatically unfair dismissal has taken place. It then behoves the employer to prove to the contrary, that is, to produce evidence to show that the reason for the dismissal does not fall within the circumstances envisaged in section 187 for constituting an automatically unfair dismissal.

[121] Applicants' further claim that they have been unfairly discriminated against in terms of the section 6 of the EEA. Section 6(2)(b) provides as a defence, that it is not unfair discrimination to distinguish, exclude or prefer any person on the basis of an inherent requirement of the job. Moreover, section 11 of the EEA provides that whenever unfair discrimination is alleged, the employer against whom the allegation is made must establish that it is fair. This in effect creates a rebuttal presumption that once discrimination is shown to exist by the applicant it is assumed to be unfair and the employer must justify it. Once discrimination has been established, the employer has to prove that the discrimination was fair or has to justify that discrimination as justifiable under section 6(2)(b).

[123] Direct discrimination refers to situations in which some people are treated differently from others on the basis of their race, sex, religion or other protected trait. Indirect discrimination on the other hand occurs when an employer utilises an employment practice that is apparently neutral, but disproportionately affects members of disadvantaged groups in circumstances where it is not justifiable.

[124] Section 187 of the LRA and section 6 of the EEA provide for a defence to unfair discrimination on the basis of the inherent requirement of the job. The respondents have not sought to rely on the inherent requirement of the job defence. It is not pleaded in their statement of opposition nor was such defence put to witnesses during the course of the trial. Respondents' defence to the claims of the applicants is that there was no discrimination, alternatively the discrimination was fair, and in the further alternative the discrimination was justified in terms of section 36 of Act 108 of 1996.

[125] It should be noted that the respondents further did not dispute that the wearing of dreadlocks is a requirement for adherence to the Rastafarian religion or for adherence to the cultural beliefs of third and fourth applicants. Rather, the approach taken by the respondents, as is evident from their statement of response, was that the applicants did not wear dreadlocks for religious or cultural reasons. It was on this basis that much of respondents' cross-examination of the applicants was directed towards destroying their credibility. It is submitted that such an approach was premised on the inherently improbable notion that the

applicants would have been prepared to forego their jobs and livelihood merely on the basis of their preference for a particular hairstyle.

DID THE DISMISSAL OF THE APPLICANTS AMOUNT TO UNFAIR DISCRIMINATION?

[126] It is respectfully submitted that the evidence before Court establishes that the applicants wore dreadlocks because of their adherence to the Rastafarian faith, in the case of second, fifth and sixth applicants and for the reason of their culture and beliefs, in the case of the third and fourth applicants.

[127] Oral evidence can only be properly evaluated by testing it against the inherent probabilities. The failure to do so constitutes a misdirection. It is submitted that even should Court find that some of the applicants' evidence was not satisfactory, on the crucial question as to whether the applicants wore their dreadlocks for the reasons they alleged, the probabilities are overwhelmingly in their favour. As submitted above, it is highly improbable that the applicants would have foregone their jobs and livelihood merely because they preferred a hairstyle as a statement of fashion.

[128] It was Mr. Kubheka's evidence that those correctional officers who had acceded to the cutting of their hair were not to his knowledge of the Rastafarian faith nor traditional healers. The respondents did not call any of the said officials to refute

this evidence. Although Mr. Kubheka evinced a deeper knowledge of the Rastafarian faith than Mr. Lebatlang, the difference can be attributed to the fact that he had been a member of the Rastafarian faith from 1994 i.e. a period of some 17 years while Lebatlang had only joined the faith for a period of approximately 4 years. In any event, it is submitted that Court is not concerned with the validity or correctness of the Rastafarian faith or beliefs, only with their sincerity.

[129] The respondents' attack on the credibility of Mr. Lebatlang focussed on his statement that he did not know whether, if he had worn dreadlocks at Boksburg, he would have been disciplined and that he could not recall whether there was an official that had dreadlocks when he worked at Boksburg. It was not put to Mr Lebatlang that a certain Kolati had been investigated for wearing dreadlocks at Boksburg. This failure contravened the principles governing the practice of cross-examination. A witness is entitled to an opportunity to defend himself or herself against an allegation of mendacity. Such an opportunity was never afforded to Mr. Lebatlang. It is submitted even were Court to find that Mr. Lebatlang's evidence was not satisfactory in all respects, on the material issue as to whether he wore his dreadlocks in conformity with his belief in the Rastafarian religion, the inherent probabilities are strongly in his favour.

[130] It is submitted that as far as Mr. Ngqula was concerned, his evidence as to his calling and as to the times of the ceremonies he attended was corroborated by

Mr.Toyo. Furthermore, he made every effort to make available the curriculum vitae he had provided to the Department of Public Works and his sick leave record from the Public Service persal system. Despite producing various documents in order to disprove Mr. Ngqula's evidence regarding the periods he spent in the Eastern Cape, the respondent, although invited to, did not produce the register Z168 which respondent's witness confirmed would indicate not only vacation and sick leave, but also days off which are taken because correctional officials work according to a shift system. Mr. Kamlana's evidence regarding the rituals performed to plead with the ancestors to delay his calling were not seriously disputed by the respondent. That such a practice does take place was confirmed by the expert witness for the applicants, Mr. Khandekana.

[131] In respect of Mr. Jacobs, the respondent did not seriously challenge his adherence to the Rastafarian faith, but rather focussed on an attempt to undermine his credibility in relation to what he had testified he had stated at an interview for a job in New Zealand. Crucially, it must be emphasised that Mr. Jacobs clearly stated in his evidence that he had not disclosed his dismissal to his prospective employer in New Zealand. It is submitted that the respondents' initiative to write to the New Zealand Correctional Services department notwithstanding this fact, without regard to the possibility that such a communication may have negatively impacted on the job prospects of its former employee, can be explained either an extraordinary display of vindictiveness or a desperation to use any means to win its case. This approach was also apparent

when one has regard to the undisputed evidence of Mr. Lebatlang who informed Court that correctional officials had recently visited his mother on the pretence that they had been sent by him, and interrogated her regarding whether he was a Rastafarian or not.

THE APPLICANTS EVIDENTIAL BURDEN

[132] It is submitted that the Applicants have discharged the evidential burden upon them to produce evidence sufficient to raise the credible possibility that an automatically unfair dismissal had taken place. Further in regard to the provisions of the EEA, and specifically sections 6 and 11 thereof, the applicants have shown that differentiation/discrimination has taken place on the listed grounds in the EEA. It is further submitted that Court should be satisfied that on an assessment of the evidence produced at trial, a causal link has been established between their dismissals and the prohibited reasons listed in section 187 of the Act on the one hand, and the grounds listed in section 6 of the EEA on the other.

[133] It is submitted that the applicants' refusal to cut their dreadlocks was a *sine qua non* for the dismissal. In as far as legal causation is concerned, the most probable inference that may be drawn from the established facts of the case was that their refusal to cut their dreadlocks on religious and/or cultural grounds was the main or dominant or proximate or most likely cause of their dismissal. It was abundantly clear from the evidence of second respondent that the dismissal of

applicants was due to the enforcement of the alleged dress code on a basis that did not recognise or accommodate religious and/or cultural diversity in any respect whatsoever.

[134] Once the applicants have established that discrimination took place and a causal link between such discrimination and their dismissal, the respondents are burdened with establishing that such discrimination was fair.

[135] As stated above, the respondents have not pleaded the specific defences provided for in the EEA and the Act against unfair discrimination, nor was such a defence put to the applicants at trial. Insofar as respondents may attempt to rely on the evidence of their witnesses and in particular their so-called "expert witness" that absolute adherence to the dress code is an inherent requirement of the job, alternatively that the wearing of short hair by male warders is an inherent requirement of the job, such propositions are, on the basis of the evidence before Court, not sustainable.

[136] Firstly, it should be stated that Mr. Ndebele's evidence although proffered as evidence of an expert witness, was in fact given by a person who has been employed for the first respondent for more than 23 years and who conceded that he was a loyal member of the Department. It is submitted that the impartiality and/or objectivity of his evidence must be called into serious question. Moreover, the premise for his "opinion" that members of the Rastafarian faith are

more prone to corruption in a correctional centre is as an extraordinary as it was unsubstantiated, and appears to reflect what can only be described as prejudice on his part. It is submitted that his "opinion" as regards to the dangers caused by non-adherence to the dress code do not meet the standard required of an expert opinion.

[137] Mr Ndebele could proffered no facts nor data to support his opinion as regards the potential of male correctional officers wearing dreadlocks being prone to corruption, nor indeed any data regarding alleged corrupt activities by any Rastafarian official in the employ of the first respondent. Indeed his reasoning was characterised by a series of unsubstantiated claims with no basis on fact. Similarly no facts or data were proffered by Mr. Ndebele or by the second respondent to support their view that non-adherence to the dress code is a threat to the security of the first respondent. The second respondent's approach amounted simply to a bald allegation that any deviation from the detail of the alleged dress code, even to the extent of the wearing of a small nose stud or the wrong type of earring by a female official, was not to be tolerated and would undermine the security and discipline of the first respondent.

[138] The respondents relied on the limitation test contained in the Constitution as a defence, and put it to the applicants that even if their dismissal amounted to unfair discrimination, such unfair discrimination would be permitted in terms of section 36 of the Constitution. It should be borne in mind that both the EEA and

the Act are legislative instruments enacted to give effect to the provisions of the Constitution. Where legislation has been enacted to give effect to the provisions of the Constitution, it is impermissible for a litigant to bypass that legislation and rely directly on the provisions of the Constitution in the absence of a constitutional challenge to the legislation so enacted.

[139] Section 1 of the Act similarly states that the purpose of the Act is *inter alia* to give effect to the obligations incurred by the Republic as a member State of the international labour organisation. It is submitted that the respondents' failure to lay claim to the defences set out in both the EEA and the Act in the absence of attacking such provisions as being unconstitutional, falls foul of the principal enunciated in *Sidumo & Another v Rustenberg Platinum Mines Ltd & Others [2007] 12 BLLR 1097 (CC)* . It is further submitted that their defence of applicants' main claims may well fall on the basis of this omission alone.

[140] Should Court not be of the view that respondents' case fails as aforesaid, it is submitted that in any event, a consideration of the issue as to whether the respondents have proved that the discrimination was fair, will take account of the notion of justification and proportionality as contained in section 36 of the Constitution. In considering whether the respondents are able to justify the discrimination suffered by the applicants as fair, the following is relevant:

- The Correctional Services Act 111 of 1998 has as its object the changing of the law governing the correctional system and giving effect to the Bill of Rights in the Constitution, 1996 *(inter alia)* (Preamble);
- Section 134(2) of the Correctional Services Act provides that the Commissioner may issue orders, not inconsistent with that Act and the regulations made there under, which must be obeyed by all correctional officials and other persons to whom such orders apply as to *inter alia* the wearing of attire for religious or cultural purposes; (sub-section (f));
- Correctional officials such as the applicants are bound by a code of conduct which explicitly provides that they must follow lawful orders provided these are not in conflict with the provisions of the Constitution;
- The fact that (as was made abundantly clear in second respondent's evidence), the respondents' case does not contemplate the principle of "reasonable accommodation" of applicants' religious and cultural beliefs.
- As far as the concept of reasonable accommodation is concerned, note should be taken of section 5 of the EEA which places a duty on all employers "to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice".

[141] Women correctional officials who also work with offenders are permitted to wear their hair long, including in dreadlocks. Furthermore, the corporate wear policy allows hats to be worn at all times and as applicants were permitted to demonstrate in Court, these concealed the dreadlocks. The respondents have not offered any evidence of a single incident to show that applicants' dreadlocks were a threat to safety, security and *esprit de corps*. Moreover it should be noted that Mr. Lebatlang did not in any event work with inmates. Mr. Ngqula's work with inmates was restricted to weekend shifts.

[142] Part of the justification proffered by the respondents in this case was that "an old policy stands till a new policy is adopted". However, this justification was in stark contradiction to their stance as regards the disciplinary code guidelines, which on their version could not be applied at all while new guidelines were being devised. It must be emphasised that the bulk of the document relied on by the respondents called *"Disciplinary code for the Department of Correctional Services* is not a collective agreement but as confirmed twice by the respondents' witness Ms Mpa, but is in fact a departmental guideline policy based on the collective agreement of 2001. This guideline policy making up the bulk of the document is entitled *"Disciplinary Procedure Manual"*. Counsel for respondents persisted in referring to the whole document as a collective agreement despite his own witness' insistence on more than one occasion that it was not.

[143] It is submitted that the above analysis focussing as it does on the issue of whether the discrimination was unfair, and including the enquiry as to whether the policy relied on by the department was the least restrictive means of enforcing its purpose in having a dress code for the Department, provides Court with a means to decide on the claims in this case without resorting to the application of the Constitution. Such an approach is in line with the *Sidumo* judgment *supra*.

[144] It is respectfully submitted on the basis of the above submissions, that Court should find that the dismissal of the applicants was automatically unfair and in addition amounted to unfair discrimination in terms of the Employment Equity Act.

PROCEDURAL AND SUBSTANTIVE FAIRNESS OF THE DISMISSALS

[145] It is submitted that should Court hold that the dismissal of the applicants did not involve unfair discrimination, it should find in favour of the applicants' claim in the alternative, that their dismissal was procedurally and substantively unfair. It is trite that the respondents bear the onus to prove their dismissals were fair. With reference to this alternative claim the following submissions are made:

- Schedule 8 of the Act is incorporated into the 2006 collective agreement DCS Resolution 1 of 2006 including clause 7 thereof should be considered;

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- It is submitted that from the summary of evidence above, the alleged dress code was not only inconsistently applied but from the evidence of the respondents themselves, the applicants could not have reasonably be expected to have been aware of the rule or standard as their senior managers were themselves not aware of the rule and furthermore had not been applying it consistently or at all. Furthermore there was confusion as to which dress code applied. Ms Mpa confirmed the dress code containing the word “Rastaman” was introduced after 1999, while Mr. Mkhabela insisted that the dress code had never changed since demilitarization in 1996. The dress code upon which the charges against applicants were brought was not the code containing the words “Rastaman”. According to the transcript of the disciplinary hearing, the Acting Head of Human Resources did not know whether there was a dress-code at all, as the department was busy drafting a new policy to bring the code in line with the constitution.

- The entire premise of the disciplinary investigation and of the disciplinary hearing, was based on an approach which found the applicants guilty of misconduct because they had not applied according to the procedure for exemption from the dress code.

- Respondents' witnesses gave conflicting evidence in regard to whether there was such a procedure. Second respondent asserted that there was no such exemption while Mr. Magagula (who had clearly not been prepared in relation to this evidence for trial) was referred to his statement during the disciplinary enquiry and conceded that there was such a procedure. Respondents' notable failure to bring either the chairperson or the initiator/investigator of the disciplinary proceedings to give evidence at the trial did not give an opportunity for Court to examine the seeming contradictions in this respect. It is submitted that the only inference to be drawn from the failure to bring these witnesses is that they would have undermined the department's approach in the trial, which was on second respondent's evidence, to present a case that no application for exemptions existed in the department. The failure to bring these witnesses also prevented the applicants from testing the premise of the hearing with them and from furthermore confirming that the chairperson and initiator had regard to the guidelines which predated those of July 2007. Their non-appearance at trial in essence means that the first respondent cannot discharge its

onus to prove the dismissals were procedurally and substantively fair.

- It was apparent from the evidence given by first applicant's representative that the human resource's representative's role at the hearing did not involve decision-making. This was undisputed. The disciplinary hearing transcript discovered by the respondent reflected that her role in the decision to not allow legal representation was clearly not limited to one of merely advice. It reads that the *"Chairman request the parties to adjourn and leave him with the HR rep to consider the submission by the alleged transgressors representation.*

- It is submitted that the guidelines relating to conducting disciplinary hearings and appeals applied up to the day before the applicants' appeal was noted. The new guidelines document of 3 July 2007 had not been given to the applicants by the department's labour relations department. In these circumstances, it is submitted that it was not procedurally fair for the record to be refused to them, more especially given that the minutes were prepared for the department in any event. Furthermore, had the

applicants been informed that there would be no right to the transcript of the disciplinary hearing this may have impacted on their decision to walk out of the hearing.

- Contrary to the respondents' case, there were guidelines i.e. a procedure manual which applied in the Department before the 3rd of July 2007. This is established if one has regard to the Correctional Services Regulations of 30th July 2004 and specifically the disciplinary procedure for the Department contained therein. This makes reference to the "*disciplinary procedure manual*". It should be noted that these regulations insofar as they apply to the disciplinary procedure, published on the 30th July 2004, were amended by proclamation on the 3rd August 2007. In terms of this proclamation, the new disciplinary procedure regulations, (Schedule A), commenced on the 23rd July 2007. It must therefore be stated that the proposition put by counsel for the respondents that Resolution 1 of 2001 was abolished by Resolution 1 of 2006 is simply incorrect. Respondents' assertion that there were no guidelines until July of 2007 is untrue. The disciplinary procedure manual for the Department of Correctional Services is referred to in the Government Gazette of the 30th July 2004 which states" *"for*

a pro-forma model containing the steps aimed at ensuring a procedurally fair disciplinary hearing, refer to the Disciplinary Procedure Manual".

- It is further evident from the transcript of the disciplinary enquiry that the sworn statements made by the applicants were not put before the chairperson nor referred to by him.

- On the question of whether the decision to exclude legal representation amounted to procedural unfairness, it is submitted that this question needs to be considered in relation to the code of conduct signed by all members of Correctional Services and the qualification that reasonable orders must also be in conformity with the Constitution. Furthermore, the guidelines referred to in the disciplinary hearing clearly allowed for the chairperson to exercise a proper discretion in complex cases. This trial itself has indicated just how complex the issues that were relevant to the enquiry are. It is submitted that it was procedurally unfair to deny the applicants a legal representative, more especially in the face of the employer's agreement to allow legal representation for the parties.

[146] In the circumstances of the evidence given at the trial, and the failure of the respondents to bring the chairperson or initiator to give evidence, it is submitted that the only conclusion that Court can come to is that the disciplinary hearing was substantively unfair. On respondents' version in Court there was no exemption procedure in regard to the dress code on religious and cultural grounds. On the documents discovered by the respondents the disciplinary inquiry and hearing was conducted on an entirely different premise, as was the decision for the applicants' dismissals.

[147] In view of the above should Court find against applicants in their primary claims, it is respectfully prayed that the Court find that the applicants' dismissals were procedurally and substantively unfair. Wherefore the applicants respectfully pray for the relief as set out in the Notice of Motion.

Respondents' submissions

[148] The applicants contend that their dismissal was automatically unfair. In any proceedings involving a dismissal, the employee is required to establish that he was in fact dismissed. It is common cause that the applicants were dismissed because they failed to comply with the dress code. The next question is whether the applicants' dismissal entailed any discrimination.

There was no discrimination

[149] The starting point in determining whether there is discrimination, we submit, is the Constitution. Thus s 39(2) enjoins a court, when interpreting any legislation, such as the Act or the EEA, to give effect to the spirit, purport and objects of the Bill of Rights.] Section 9(1) of the Constitution provides that everyone is equal before the law and has a right to equal protection and benefit of the law. In terms of s 9(3) the State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including inter alia, gender, religion, conscience, belief or culture. Section 9(5) provides that discrimination on one or more of the grounds listed in s 9(3) is unfair unless it is established that the discrimination is fair.

[150] The first question then is whether the challenged law (the Dress Code) or conduct (the decision to dismiss the applicants) differentiates between people or categories of people. It is submitted that the Dress Code does not differentiate between categories of people, more specifically, officials of the Department. As such it is not discriminatory. The Dress Code is facially neutral. It applies equally to all officials of the Department. In fact, the applicants in evidence conceded this. Furthermore, the Dress Code is not indirectly discriminatory. It does not have a disparate impact on the followers of any religion (let alone, Rastafari) or

culture. Its impact and enforcement are felt equally by members of different religions and cultures. This too, the applicants conceded.

[151] Many of these religions and cultures have specific dress- and personal appearance requirements, and practices. But they are also precluded by the Dress Code from fulfilling those requirements or engaging in those practices. In this regard, the second respondent testified that officials could not be allowed to practice their culture at work; and that observing culture goes beyond dress. It has to do with rituals also, for example, correctional officers could not be allowed to burn incense at work. He also said that a correctional officer on duty could not be permitted to dress in traditional sangoma wear in accordance with her culture.

[152] Moreover, in the instant case the respondents applied the Dress Code consistently. It is common ground that apart from the applicants, the same instruction was given to four other correctional officials to comply with the Dress Code. These officials however complied with the Dress Code and cut their hair. It is submitted that had these officials not complied with the Dress Code, the respondents would have initiated disciplinary proceedings against them as well. If they had persisted in their refusal to comply with the Dress Code, they too probably would have been dismissed.

[153] Inasmuch as the Dress Code is not discriminatory on its face, its effect, or the way in which it is applied, it is submitted with respect, that the applicants' claim

that their dismissal was automatically unfair, fails at the first hurdle. It is further submitted that the decision by the chairperson of the disciplinary enquiry to dismiss the applicants, had nothing to do with discrimination, for the reasons advanced below.

- Ms. Mpa gave evidence that the record of the disciplinary hearing which appears at respondents' bundle was filed with the Office of Employer Relations and Pollsmore. The disciplinary record shows the following:

- The second to sixth applicants were charged with a contravention of the Disciplinary Code and Procedure contained in Resolution 1 of 2006, in that on or about 19 January 2007 they had contravened the Dress Code by wearing dreadlocks whilst on duty; alternatively that they had failed to carry out a lawful order or instruction without just and reasonable cause by refusing to keep their hair in accordance with the Dress Code.

- The initiator presented evidence demonstrating that the second to sixth applicants had failed to comply with the Dress Code or carry out a lawful instruction.

- Based on the unchallenged evidence, the chairperson found that the second to sixth applicants had contravened the Disciplinary Code contained in Resolution 1 of 2006, by undermining the Dress Code of the

Department by wearing dreadlocks while on duty. They were dismissed and advised of their right to appeal the chairperson's decision.

[154] It is submitted that the disciplinary record does not contain a hint of discrimination, let alone unfair discrimination on the grounds of gender, religion or culture. On the contrary, a perusal of the record reveals that the decision to dismiss the second to sixth applicants was reasonable and justifiable in the light of the evidence placed before the tribunal.

[155] The evidence on behalf of the Department before the disciplinary hearing went unchallenged. This happened because the applicants elected to walk out of the hearing, with full knowledge of the consequences of doing so. In fact, the applicants concede that they were aware of the consequences.

[156] It is accordingly submitted that when taking the decision to dismiss the applicants, the chairperson did not differentiate between people or categories of people, and accordingly that there was no discrimination. Apart from this, it is submitted that there was no discrimination when the decisions to suspend the applicants and to initiate disciplinary proceedings against them, were taken. The applicants do not challenge the decisions to suspend them. As already submitted, the second respondent did not differentiate between officials of the Department on any basis, when he decided to enforce compliance with the Dress Code. Had the four correctional officials who complied with the Dress Code by

cutting their hair not done so, disciplinary proceedings would also have been instituted against them.

If there was discrimination it would not be unfair

[157] If the discrimination is on a specified ground, as in this case, religion, conscience, belief, culture and gender, the respondents must show that the discrimination was fair. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. The following factors are taken into account when determining whether discrimination has an unfair impact:

- The nature of the discriminating law or conduct and the purpose sought to be achieved by it. An important consideration is whether the primary purpose of the law or conduct is to achieve a worthy and an important societal goal.

- The position of the complainants in society and whether they have been victims of past patterns of discrimination. Differential treatment that burdens people in a disadvantaged position is more likely to be unfair than burdens placed on those who are relatively well off.

- The extent to which the rights of the complainants are impaired and in particular whether there is an infringement of their fundamental rights to dignity.

[158] It is submitted that in any event, the second respondent's evidence places it beyond question that the enforcement of the Dress Code was but one step in the enforcement of a number of departmental policies which were not being complied with at Pollsmoor. In this regard, the second respondent's evidence went unchallenged. He said that a lack of compliance with departmental policies, including the Dress Code, will lead to a lack of discipline and lack of security. That, in turn, will adversely affect service delivery. It is accordingly respectfully submitted that the applicants have not established any discrimination and that on this basis alone, their claim under s 187(1)(f) of the LRA, stands to be dismissed. But even if there was discrimination, it is submitted that the applicants would still not succeed because such discrimination would not be unfair.

[159] The right to be afforded a fair hearing before one's dismissal is indeed an integral part of our law. This right is explicitly recognized by the Act and has been restated in numerous decisions of this court. However once an employer institutes disciplinary action and gives the affected employee notice thereof, it is open to the employee to attend or refuse to attend the enquiry. Should the employee refuse to attend the enquiry such employee must be prepared to

accept the consequences thereof, one of which is that the enquiry will proceed in his absence and adverse findings may be made. These factors are assessed objectively and cumulatively. However, they do not constitute an exhaustive list.

[160] Applying the above principles in the instant case, it is submitted that the applicants were not dismissed as a result of unfair discrimination on the part of the respondents.

- As already submitted, the applicants concede that all officials are subjected to the Dress Code. That has always been the case regardless of gender, religion or culture. The applicants further concede that discipline is essential for good order and the essential functioning of the Department. They also concede that that dress code is an essential part of correctional management and the enforcement and maintenance of security and discipline. As such, the Dress Code fulfils an important societal goal. It cannot therefore be said that the applicants (even though all are from the previously disadvantaged group) have been victims of discrimination in the application or enforcement of the Dress Code.

- The applicants' rights to religion and culture have not been limited to such an extent that their rights to dignity have been impaired. As stated above, the applicants also concede that the Dress Code is facially neutral – it applies equally to all correctional officials in the Department. It is not

indirectly discriminatory – it impacts equally on all religions, beliefs and cultures.

[161] It is accordingly submitted that the applicants were not dismissed as a result of unfair discrimination. Indeed, their dismissal had nothing to do with discrimination at all. It is to this issue that the focus will now turn.

[162] The disciplinary action taken against the applicants was but one step in a series of actions taken by the respondents to ensure compliance with departmental policies. Non-compliance with these policies, as the second respondent stated in his evidence, led to a lack of discipline and security, non-compliance with the Dress Code and adversely affected service delivery. The applicants pay no regard to this.

[163] The second respondent testified that when he assumed duty at Pollsmoor on 15 January 2007, his first impression was that there was large scale non-compliance with departmental policies, including the Dress Code. This non-compliance manifested itself inter alia as follows. There was no access control at the entrance to the prison, people could come and go without being searched or asked for identity. Correctional officials did not comply with the Dress Code. They mixed the uniform, wore private shoes and had different hairstyles. Some female officials had dyed their hair purple.

[164] The second respondent had extensive experience as an Area Commissioner. However, what he encountered at Pollsmoor was different from his experience at other correctional centres in that there was large scale non-compliance with departmental policies in many areas. However, a similar experience in Pietermaritzburg Management Area enabled the second respondent to deal with the problems at Pollsmoor.

[165] Three days after taking up his position, the second respondent on 19 January 2007 called a meeting of correctional officials. There were five issues on the agenda which the second respondent addressed at the meeting, namely compliance with departmental policies; security; employee relations; performance management; and human resource development. He said inter alia that officials had to comply with the Dress Code; that there was too much movement on the terrain and that security measures would be put in place; that he was committed to work closely with trade unions; and that it was important that officials carried out their functions according to their job descriptions so that service delivery could be enhanced. After each topic was discussed, time was allowed for questions, comments and input. At the end of the meeting officials were asked whether they had any objection in relation to compliance with departmental policies. There was no objection.

[166] It is appropriate at this juncture to point out that these facts are common cause. Mr. Ngqula confirmed that the meeting of 18 January 2007 took place as well as the agenda. Mr. Kamlana also confirmed that it was not business as usual when the second respondent became the Area Commissioner at Pollsmoor.

[167] As to whether the applicants could be exempted from compliance with the dress code, the second respondent said that it would open the floodgates. That was also the evidence of the respondents' expert, Mr. Ndebele. The second respondent explained the purpose of insisting on compliance with departmental policies.

[168] It appears that the applicants are not pressing their claim based on gender discrimination. It is submitted that it has no merit, for the following reasons.

- The applicants themselves concede that there are distinctions in the Dress Code because of the biological difference between men and women, especially in this case.
- The second respondent's answer under cross-examination provides a complete answer. He said that the female officials were permitted to wear dreadlocks and that a distinction needed to be made here because female officials are different from males and the dress code makes that difference and for him or any manager to say if a male official wants to wear pantyhose and high heels and the manager declines permission and that member says it is discrimination, that would not be discrimination. It is a provision that is made by the dress code.

No unfair discrimination under the EEA

[169] What all of this shows, it is submitted, is that it cannot be suggested that the reason for the applicants' dismissal was that the respondents unfairly discriminated against them on the ground of gender, religion, conscience, belief or culture. It is accordingly respectfully submitted that the applicants' claim that their dismissal was automatically unfair as envisaged in s 187(1)(f) of the LRA, is without foundation.

[170] Section 6 of the EEA provides that no person may unfairly discriminate directly or indirectly against an employee in any employment policy or practice, on one or more grounds including gender, religion, conscience, belief or culture. It is submitted that the test for discrimination under the Constitution and s 187(1)(f) of the Act applies equally in determining whether there is discrimination under s 6(1)

of the EEA. For the reasons advanced above, it is submitted that the applicants' dismissal does not constitute unfair discrimination under s 6(1) of the EEA.

THE DRESS CODE IS CONSTITUTIONAL

[171] The applicants seek an order declaring that the Dress Code is unconstitutional.

The constitutional attack was not properly pleaded

[172] At the outset it is submitted that the constitutional attack on the Dress Code is misconceived. It was wholly inadequately pleaded. The statement of case merely in a single sentence states that the Dress Code is unconstitutional. The applicant has thus attacked the Dress Code without any identification of its unconstitutional features, any identification of the constitutional provisions which it is said to contravene or indeed any explanation at all of the way in which the Dress Code is alleged to be unconstitutional. The Constitutional Court has held that a litigant must lay a proper foundation for a constitutional challenge in the papers or the pleadings as the other party must be left in no doubt as to the nature of the case it has to meet.

[173] A proper foundation for a constitutional challenge in the papers, it is submitted, is moreover essential to enable a party seeking to justify a limitation of a constitutional right to place before the court information relevant to the issue of

justification. As a result of this inadequacy of pleading, there are complex issues arising from the constitutional attack which could not, and have not, been addressed by either party. These include the following:

- The identification of the particular features of the Dress Code which are said to be unconstitutional.

- The specific constitutional provisions said to be contravened by the Dress Code. The respondents have assumed that it is s 9(3) of the Constitution – the right not to be unfairly discriminated against.

- The question whether the offending features of the Dress Code indeed contravene the constitutional provisions concerned (which are not identified) and if so, in what respect and to what extent they do so.

[174] On this basis alone, it is respectfully submitted, the applicants' attack on the constitutionality of the Dress Code falls to be dismissed.

[175] It is submitted that there is a further reason related to the applicants' inadequate pleading, why the constitutional attack must fail. It is that the applicants' have attacked the entire Dress Code. In other words, they are seeking an order declaring that the whole of the Dress Code is inconsistent with the Constitution, including its requirements relating to: work dress for various categories of staff

such as nurses; insignia; civilian dress guidelines; personal appearance; and identification.

[176] It is accordingly submitted, with respect, that for this reason also, the constitutional attack on the Dress Code should be dismissed. It is plainly bad.

The Dress Code is justifiable under s 36 of the Constitution

[177] It is however submitted that even if the applicants had properly pleaded the unconstitutionality of the Dress Code, it would make no difference to the outcome of this case, since the Dress Code would easily pass muster under s 36 of the Constitution.

[178] Section 36 of the Constitution provides that the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including the nature of right; the importance of the purpose of the limitation; the nature and extent of the limitation; and whether there are less restrictive means to achieve the purpose. The Dress Code, a form of subordinate legislation, constitutes law of general application.

[179] It is submitted that the evidence of the respondents' expert, Mr. Ndebele, that the Dress Code is necessary for the enforcement and maintenance of security and discipline within a correctional centre environment, is compelling. The bulk of his

evidence was unchallenged and uncontradicted. Mr. Ndebele testified that the Dress Code is an essential part of correctional management and the enforcement and maintenance of security and discipline. As such, it is designed to achieve important societal goal.

[180] Mr. Ndebele also testified that a correctional centre is an institution focused on tight security, the implementation of sentences imposed by the courts and discipline. Security and discipline are critical to the orderly operation of a correctional centre or system. The very nature of the correctional system demands a strict code of behaviour supported by a clear and effectively disciplinary code with effective disciplinary procedures. This applies to both personnel and offenders. All members of personnel are required at all times to comply with instructions and conduct themselves and perform their duties in a way that influences offenders for good and commands their respect.

[181] The Dress Code reinforces security. If dreadlocks are allowed, Rastafarian officials will stand out and undesirable associations between such officials and Rastafarian offenders are likely. This is likely to result in offenders finding ways to influence Rastafarian officials to bring dagga – central to the Rastafarian religion – into correctional centres. These officials will be manipulated. Discipline will also be adversely affected because officials will have to look the other way. This, in turn, will adversely affect the rehabilitation of offenders.

[182] The Dress Code also advances prison security through the quick identification of officials. It has happened that offenders have escaped from correctional centres by impersonating officials.

[183] The Department's personnel comprise members of various faiths, cultures and beliefs, many of whom have specific dress requirements. In enforcing the Dress Code the Department treats all religions and cultures uniformly. If the Department were to allow officials to wear dreadlocks it would find itself in the untenable position of being faced with numerous requests for exemptions from compliance by followers of other religions to wear non-uniform garments that those individuals believe are required by the tenets of their particular religion. For example, a Shembe believer would want to wear calf skin; a Christian a crucifix over his or uniform; and a Muslim a scarf or a fez. This will create chaos in a correctional centre which is underpinned by security and discipline.

[184] It is submitted that on the level of the facts, the second respondent confirmed Mr. Ndebele's evidence.

- Where there is a lack of compliance with departmental policies, including the Dress Code, it will lead to a lack of discipline and lack of security.

- Dagga is the drug of choice at correctional centres. There have been cases where offenders have been involved in the possession and smuggling of dagga. Correctional officials also smuggled dagga into prisons. The second respondent gave examples of two cases. In the first, a correctional officer, Mr. Gouws smuggled dagga into Pollsmoor in his lunch box in 2007. In 2008 Mr. Mayekiso attempted to smuggle dagga into the prison by hiding it inside the sleeves of his jersey. Both these officials were dismissed.

- The use of dagga, tik and mandrax in a correctional centre impedes rehabilitation. Dagga is the source of power for the 26 gang. In fact, prison gangs control and market dagga. When these inmates have drugs they are able to exchange goods and services and it is also a source of conflict. Some of the gang fights and uprisings that take place in correctional centres are as a result of these drugs.

- Dreadlocks also pose a particular security risk to officials because their hair could easily be grabbed by an inmate when they have to break up gang fights in prison. In fact, Mr. Ndebele's evidence was not only confirmed factually by the second respondent, but also by Jacobs himself, who testified that he was attacked and injured by

an offender without provocation – and inherent risk in a correctional centre environment.

- As regards undesirable associations between Rastafarian officials and Rastafarian inmates which is likely to result in inmates finding ways to influence officials to bring dagga into correctional centres, the second respondent referred to an incident that happened at Pollsmoor in April 2008. A large group of people under the auspices of the Rastafari Working Council marched to Pollsmoor where they demanded to hand over a memorandum that offenders in prison for dagga-related crimes should be released, because they did not do anything wrong. The police ordered the group to leave.

- The second respondent also confirmed Mr. Ndebele's evidence that a violation of the Dress Code by allowing male correctional officials to wear dreadlocks would open the gates for personal preferences by other officials.

- Finally, the second respondent testified that there is a link between discipline and rank or insignia. He was with the Department during the demilitarization process in 1996. When that happened, correctional centres were difficult to manage as the level of respect

went down. That also had an adverse impact in exercising discipline over offenders who were used to military ranks and levels of authority.

[185] The applicants however submit that Mr. Ndebele's evidence must be called into serious question because he is employed by the Department. The applicants however miss the point.

- The applicants themselves concede that security and discipline is critical in a correctional centre environment. Mr. Kamlana testified that in terms of the Code of Conduct, a member of the Department is required to dress and behave in a way that advances the reputation of the Department, respects the corporate wear and complies with the Dress Code. This is important for security and discipline. He further conceded that as part of discipline all correctional officers wear a standard uniform and comply with standard requirements relating to personal appearance, because they have to work as a team within a risky and dangerous environment.

- Mr. Kamlana in fact confirms Mr. Ndebele's evidence that the Dress Code promotes and enhances unity which is part of the organizational culture; that compliance with the Dress Code shows a disregard for personal preferences and evinces self-discipline and obedience to the team concept; and that it is an essential part of correctional

management and the enforcement and maintenance of security and discipline.

- Mr. Jacobs also confirmed Mr. Ndebele's evidence that a correctional centre is an institution focused on security and discipline, which includes ensuring the safety of its own officials in the performance of their functions. Mr. Jacobs testified that a correctional centre is not a safe environment and officials could encounter violence on a daily basis. He himself was the victim of an unpredictable and unprovoked attack in 2005 which involved a struggle with an inmate and caused him to sustain an open wound. He did not have dreadlocks at the time. It is submitted that this underscores Mr. Ndebele's evidence that dreadlocks pose a security risk to officials because their hair could easily be grabbed by an offender.

- Mr. Kubheka also confirmed Mr. Ndebele's evidence that dreadlocks pose a security risk in that they could be grabbed by offenders; and that there could be undesirable associations between Rastafari officials and Rastafari offenders. He said that Rastafari offenders had approached him, and not correctional officials belonging to the Christian faith, to provide them with Bibles.

[186] Finally, the applicants make much of the *"reasonable accommodation"* principle, namely that failing to take steps to reasonably accommodate the applicants on

the basis of religion or culture, will amount to unfair discrimination. They refer to numerous foreign authorities for the contention that the policy relied on by the Department was not the least restrictive means to achieve its purposes.

[187] It is submitted that the applicants' reliance on the principle of reasonable accommodation and foreign authorities is misplaced, essentially for two reasons. First, the applicants ignore the evidence of the second respondent and the expert, Ndebele. Secondly, the foreign authorities are distinguishable.

[188] It is respectfully submitted therefore that the applicants' attack on the constitutionality of the Dress Code has no merit, and should be dismissed.

PROCEDURAL FAIRNESS

[189] The applicants contend that the dismissal of the second to sixth applicants was procedurally unfair, for the following reasons:

- The second to sixth applicants were unreasonably refused legal representation.

- The chairperson of the disciplinary hearing failed to recuse himself.

- The hearing was held in the absence of the second to sixth applicants.

- The appeal was not properly considered.

[190] In their heads of argument however, the applicants impermissibly seek to broaden the attack based on procedural unfairness, in two respects. The first is that the role of the human resource representative at the disciplinary hearing was not limited merely to furnishing advice. The second is that the failure to provide the applicants with the record of the disciplinary proceedings, was procedurally unfair.

[191] As to the first new attack, the applicants are not permitted to raise in their heads of argument, issues not covered by the pleadings. That is a trite principle of law. But in any event, it is submitted that these new challenges have no foundation. In fact, the evidence goes the other way.

- The statement in the disciplinary record that *"chairman request (sic) the parties to adjourn and leaving with the HR rep to consider the submission by the alleged transgressors representation (sic)"*, does not suggest that the human resource representative was in any way involved in the chairperson's decision to refuse the applicant's legal representation.
- The new challenge based on the minutes of the disciplinary hearing is opportunistic. The applicants now, for the first time, say that had they been informed that there would be no right to a transcript of the

disciplinary hearing, *"this may have impacted on their decision to walk out of the hearing"*. But there is no such evidence on record. In any event, the unchallenged evidence of Ms. Claasen was that the record had been typed only on 25 July 2007 – long after the applicants were required to lodge their appeals in terms of Resolution 1 of 2006.

[192] Before dealing with the grounds upon which the applicants allege that their dismissal was procedurally unfair, it is necessary to deal with the applicants' submission that the *"entire premise of the disciplinary investigation … and … the disciplinary hearing was based on an approach which found the applicants guilty of misconduct because they had not applied according to the procedure for exemption from the Dress Code"*.

[193] Their submission is simply wrong. The record shows that the respondents launched an investigation into the applicants' failure to comply with the Dress Code. That is clear from: the letters addressed to them, their own evidence that what they had told the investigator was true and correct regarding their failure to comply with the Dress Code, and what happened at the disciplinary hearing. Indeed, it is common cause that the second to sixth applicants were charged with contravening the Dress Code by wearing dreadlocks, alternatively failing to carry out a lawful order or instruction without just or reasonable cause by refusing to wear their hair in accordance with the Dress Code.

The grounds of procedural unfairness advanced by the applicants.

Legal representation.

[194] At the outset it is submitted that it was established in evidence that the *DCS Disciplinary Code and Procedure: DBC Resolution 1/2006 Guidelines for Managers* were approved on 2 July 2007. Before that date there were no disciplinary guidelines issued under Resolution 1 of 2006.

[195] Resolution 1 of 2006 was entered into between the State and the relevant trade unions, including POPCRU on 4 August 2006. Its stated purpose was to replace the previous collective agreement (Resolution 1/2001 annexes A, B and C) relating to the Disciplinary Code and Procedure of the Department; and to amend the regulations on the Disciplinary Code and Procedure issued under the Correctional Services Act 111 of 1998.

[196] Resolution 1 of 2001 did not provide for an employee to be legally represented. Likewise, the regulations made under the Correctional Services Act did not provide for legal representation. The Disciplinary Guidelines however provide for legal representation in defined circumstances. This provision however, came into force only on 2 July 2007, after the applicants' disciplinary hearing. The applicants were thus not entitled to legal representation. Consequently their application for legal representation to the chairperson of the disciplinary enquiry

was misconceived. On this basis alone, it is respectfully submitted that the attack on the decision dismissing them on the basis that they were refused legal representation, falls to be dismissed. The right to legal representation in this case is governed by the Disciplinary Code, the product of a collective agreement.

[197] Even accepting that the applicants were entitled to legal representation, it is submitted that their claim to procedural unfairness on this ground must fail, for the following reasons:

- The applicants were legally represented. Mr Casner informed the chairperson at the disciplinary enquiry that he was a qualified advocate. He regularly represented employees of the Department at disciplinary enquiries. Moreover, the applicants themselves conceded that there was nothing preventing Mr. Casner and Mr. Arendse from representing them at the disciplinary hearing.

- In addition, the chairperson had regard to the fact that he was required to make a ruling that was fair and just in the circumstances, and the fact that legal representation should be considered only in cases that were highly technical and complicated and where it would be in the interest of both parties as well as the interest of justice.

[198] It is accordingly submitted that the contention advanced on behalf of the applicants that the proposition that Resolution 1 of 2001 was abolished by Resolution 1 of 2006 is incorrect, is quite wrong. So too, is the submission that it is untrue that there were no guidelines until July 2007.

- Regulation 33 of the Correctional Services Regulations made under the Correctional Services Act (*"the Correctional Services Regulations"*), which deals with discipline provides that correctional officials are subject to the disciplinary code and procedure as provided for in Resolution 1 of 2001. As already stated, that Resolution was replaced by Resolution 1 of 2006. There were thus no disciplinary guidelines issued under Resolution 1 of 2001. Neither were there any guidelines under Resolution 1 of 2006, until 2 July 2007.

- The applicants in any event, we submit, miss the point. They cannot demonstrate that the disciplinary code and procedure referred to in Schedule A and B to the Correctional Services Regulations, nor the Disciplinary Procedure Manual to which the applicants refer, allows legal representation in circumstances such as the present, or entitles them to the *verbatim* minutes of disciplinary proceedings.

[199] It is accordingly respectfully submitted that the applicants' claim that they were treated unfairly because they were refused legal representation, is without merit.

[200] As already stated, it appears that the applicants are no longer persisting with the relief that the chairperson failed to recuse himself. In any event, it is submitted that any allegation that the chairperson was bias should fail.

The hearing in absentia

[201] In this regard, the following facts are common cause:

- On 5 June 2007 when their request for legal representation was declined the applicants walked out of the hearing.

- When the hearing recommenced on 7 June 2007 the applicants again walked out of the hearing when the chairperson refused to recuse himself.

- Nothing prevented Messrs Casner and Arendse from representing the applicants at the disciplinary enquiry. Mr. Casner is qualified advocate experienced in representing employees of the Department at disciplinary enquiries.

- Numerous attempts were made to secure the applicants' presence at the hearing. After they walked out on 4 June 2007, the initiator wrote to them advising them that if they did not turn up for the hearing it would continue in their absence. When the applicants did not appear at the hearing on 5 June 2007, they were informed that the hearing was postponed to 7 June 2007. They were again advised that if they did not turn up for the hearing

it would continue in their absence. On 7 June 2008 the applicants walked out of the hearing for a second time. The applicants knew that if they walked out of the hearing, it would continue in their absence. Nevertheless they decided to walk out.

[202] It is accordingly respectfully submitted that the applicants accepted the consequences of their walk out – that the hearing would proceed in their absence and adverse findings may be made. They cannot now complain that they were not treated fairly.

The appeals could not be considered

[203] It is common cause that the applicants all filed notices of appeal on 3 July 2007. The notice of appeal contained an instruction that a detailed motivation of the grounds of appeal must be attached to the appeal documents. It is further common cause that none of the applicants submitted a detailed motivation of their grounds of appeal. The unchallenged evidence of Mpa was that she had asked the applicants on numerous occasions to comply with annexure E to Resolution 1 of 2006, by submitting a detailed motivation of the grounds of appeal. In this regard, she testified as follows:

- The notices of appeal were completed by all the applicants in her office with the assistance of Casner. He regularly assisted Pollsmoor employees in disciplinary enquiries. Two shop stewards, Mrs. Lepuwana and Mrs. Malgas were also present.

- Ms. Mpa explained to Casner that it was not necessary to wait for the minutes of the disciplinary proceedings in order for the applicants to submit their motivation of the grounds of appeal. She specifically asked them for the motivation and explained to them that they needed to submit the grounds of appeal within a period of five days.

[204] On 17 July 2007 Ms. Mpa addressed a letter to all the applicants which stated inter alia, that on 03July 2007 they submitted the notice to appeal to her office without any grounds or reason as expected and they were once more invited to submit their reasons or grounds for appeal within the prescribed period of five days failing which her office would be left with no option but to confirm their sanction of dismissal. Ms. Mpa handed the letter to Messrs Ngqula and Kamlana when they called at her office. They said that they would read it outside her office and that they would return. They never did. She telephoned Mr. Jacobs regarding the letter and he told her to contact Mr. Casner, which she did. There was another discussion about the motivation of the grounds of appeal. Mr. Casner however said that he was waiting for the minutes.

[205] The applicants failed to submit the motivation of the grounds of appeal by 25 July 2007. Consequently, their appeals could not be considered and the Area Commissioner, Corporate Services, Pollsmoor Management Area, confirmed the sanction of dismissal. Ms. Mpa made numerous attempts to get the applicants to comply with the requirement that they submit a detailed motivation of the grounds

of appeal when they signed the suspension register in her office every Wednesday.

[206] In these circumstances, it is submitted that it cannot be suggested that the applicants were not treated fairly because their appeals were not properly considered – they could not be considered because the applicants failed to submit the grounds of appeal despite repeated requests by the first respondent that they do so. But when faced with this insurmountable hurdle, the applicants changed their tack. They now allege procedural unfairness on the basis that they were not provided with the minutes of the disciplinary hearing. This new challenge, it is submitted, fails for two reasons. First, it is not covered by the pleadings. Second, on the law and the facts, it has no foundation.

[207] Unsurprisingly, item 8 of the Disciplinary Code and Procedure contained in Schedule A to the Correctional Services Regulations, also does not provide that an appellant should be furnished with the minutes of a disciplinary enquiry. It is submitted that the reason why an appellant is not entitled to minutes is not far to seek – an appeal must be heard and decided expeditiously. Appeals are decided on the papers. An employee must note an appeal within five working days of receiving notice of the final outcome of a hearing or other disciplinary procedure. The Department must finalise appeals within 30 working days from the date of receipt of the appeal, failing which, in cases where the employee is on

suspension after dismissal, he or she, after expiry of the 30 working days, must resume duties immediately and await the outcome of the appeal.

[208] It is accordingly submitted that the challenge that the applicants were not treated fairly because they were not provided with the minutes of the disciplinary hearing, fails on the level of the law.

[209] On the level of facts, it is submitted that the challenge is contrived. When he completed the applicants' notices of appeal, Casner was informed that they were not entitled to minutes. Mpa explained to him that they could get the tapes of the disciplinary hearing if they needed the minutes. None of the applicants called at her office for the tapes. Before 2 July 2007 the union lodged an appeal without minutes in the case Mr. Mbiko. The union also lodged an appeal without minutes after 2 July 2007 in two cases. In the first, Mr. Casner himself noted an appeal without minutes against his own dismissal. The second was the case of Mr. Siebritz. The applicants now say that it was procedurally unfair for the record to be refused, given that the minutes were prepared for the Department in any event. The applicants miss the point. They do not (and indeed cannot dispute that they were required to file their notice of appeal within 5 days). They did so on 3 July 2007. But the undisputed evidence is that the minutes were completed on 25 July 2007.

[210] It is accordingly respectfully submitted that none of the grounds for procedural unfairness bear scrutiny, and accordingly that the applicants' claim that they were not treated fairly, should be dismissed.

[211] In the circumstances, the respondents ask that the applicants' claim be dismissed with costs, including the costs of two counsel.

Evaluation

[212] The first claim of the applicants is premised on the provisions of sections 187 (1) (f) of the Act and section 6 of the EEA. Section 187 (1) (f), to the extent relevant here reads:

> :"*187 Automatically unfair dismissals*
>
> *(1) A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5* or, if the reason for the dismissal is-*
>
> *(a)…….*
>
> *(f) that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility;.."*

[213] Sub-section (1) needs to be read together with sub-section (2) of the same section for purposes of this claim and it reads:

> "*(2) Despite subsection (1) (f)-*
>
> *(a) a dismissal may be fair if the reason for dismissal is based on an inherent requirement of the particular job;"*

[214] Section 6 of the EEA on the other hand reads:

"*6 Prohibition of unfair discrimination*

(1) No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.

(2) It is not unfair discrimination to-

(a) take affirmative action measures consistent with the purpose of this Act; or

(b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.

(3) Harassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination of grounds of unfair discrimination listed in subsection (1)."

[215] It behooved the applicants to prove the discriminatory conduct of the respondents which they sought to place reliance on. It was common cause that all applicant employees kept and maintained a dreadlock hair style while they were on duty. Soon after the second respondent assumed duty at Pollsmoor Prison, he issued an instruction to all correctional officers, inter alia, that those who kept a dreadlock hair style were to cut their hair and forego the hair style. With the exception of the applicant employees, other male staff members co-operated with the instruction. It has never been the case of the applicants that the instruction was directed at them and to the exclusion of some other staff members, with the exception of the female colleagues. Therefore, to the extent that the claim of the applicants suggests that the respondents treated them differently from the female colleagues who were excluded from the instruction, their claim is one of a direct discrimination on the basis of gender. The second

level at which the applicants sought to pitch their case to fit within a discriminatory category is one of indirect discrimination. This refers to situations when an employer utilises an employment practice that is apparently neutral, but disproportionately affects members of disadvantaged groups in circumstances where it is not justifiable. See *Leonard Dingler Employee Representative Council & Others v Leonard Dingler (Pty) Ltd & Others (1998) 19 ILJ 285 (LC) at 289.* It is within this grouping that I understand the discriminatory case of the applicants to be falling. It has not been the case of the applicants that the respondents directly prohibited a belief in Rastafarianism and in cultural beliefs. Their case is that the second respondent utilized an employment practice that was apparently neutral, in the form of an instruction to remove the dreadlock hair style, which disproportionately affected them as members of disadvantaged grouping, without justification.

[216] The applicants were settled with the onus of proving the discrimination they complained of. If successful, the onus would then shift to the respondents as the proved discrimination would be presumed to be unfair.

Section 187 of the Act identifies a specific category of dismissals that, if proved to exist, are regarded as automatically unfair. Should this court be satisfied that a causal link is established on a balance of probabilities between the prohibited reasons for dismissal and the circumstances of the dismissal, no justification can be proffered by the employer, and the employee automatically qualifies for the privileges conferred upon the special category of dismissals, namely a rebuttal presumption of unfairness and an entitlement to double the ordinary compensation awarded. See *Tammy Cohen "Onus of Proof in Automatically Unfair Dismissals 'Janda vs First National Bank'; (2006) 27 ILJ 2627 (LC) (2007) 28 ILJ 1465.*

[217] Under the legal issues the applicants pleaded in their statement of case that:

> *"The dismissal of the second to Sixth Applicants is substantively unfair and amounts to an automatically unfair dismissal in terms of s189 (1) (f) of the Labour Relations Act 66 of 1996 (sic) and/or unfair discrimination as contemplated by section 6 (1) of the Employment Equity Act No 55 of 1998 in that the respondent discriminated against the second to Sixth Applicants directly and or indirectly on the grounds of religion and/or conscience and/or belief and/or culture and/or gender."*

[218] The respondents' denial was couched in the following terms:

> *"The dismissal of the Second to Sixth Applicants was fair in terms of the Labour Relations Act No 68 of 1996 (sic) and the dismissal of the second to Sixth Applicants was fair discrimination as contemplated by section 6 (1) of the Employment Equity Act No 55 of 1998 in that the Respondent did not discriminate against the Second to Sixth Applicants directly and/or indirectly on the grounds of religion and/or conscious (sic) and/or belief and/or culture and/or gender.*

[219] The allegation of gender discrimination was accordingly well pleaded by the applicants and well responded to by the respondents. It remained the undisputed version of the applicants that none of the female correctional officers at Pollsmore Prison who had a dreadlock hair style were similarly disciplined as the applicant employees were. This was an allegation of gender based discrimination. I propose to return to this later.

Discrimination on the grounds of religion and/or conscience and/or cultural beliefs.

[220] There is an overwhelming probably in favour of the applicants' version that all of them kept their dreadlock hair style because of the belief that the second, fifth and sixth applicants had to Rastafarianism and the third and fourth had towards cultural practices. This is so notwithstanding the various concerns that may be raised on the evidence of each applicant employee, such as the exact period when Mr. Ngqula would have taken leave to go and attend to the cultural ceremony pertaining to his calling. In this regard the evidence of Mr. Toyo, the traditional healer went a long way towards confirming the performance of the traditional ritual ceremony connected to the reclaiming by Mr. Ngqula of his father's clan name and one for the acceptance of the calling where "ivitani" or the dreadlock hair style was cut in December 2007. Various challenges were made on the version of the second, fifth and sixth applicants on their faith and its practices but it was never suggested to them that they were lying about their faith, nor am I able to find the basis for the rejection of their evidence on the issue. I therefore hold that all five applicants kept a dreadlock hair style because of their religious, Rastafarianism, and cultural beliefs.

[221] In relation to the beliefs that the applicants had, Ms Hilary Rabkin-Naicker appearing for the applicants submitted, correctly in my view, that court is not concerned with the validity or correctness of the Rastafarian faith or beliefs but only with their sincerity. It is to her indebtedness that I will refer to some of the cases she places reliance on, such as in the case of *United States v Bellard 322 US 78 (1944)* at p86 – 87 where the following appears:

> "*Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others yet the fact that they be beyond the ken of mortals does not mean that they can be made suspect before the law."*

[222] In *Prince v President, Cape Law Society and Others 2002 (2) SA 794 (SA)* court held that

> *:" [49] The right to freedom of religion is especially important for our constitutional democracy which is based on human dignity, equality and freedom. Our society is diverse. It is comprised of men and women of different cultural, social, religious and linguistic backgrounds. Our Constitution recognises this diversity. This is apparent in the recognition of the different languages; the prohibition of discrimination on the grounds of, among other things, religion, ethnic and social origin; and the recognition of freedom of religion and worship. The protection of diversity is the hallmark of a free and open society. It is the recognition of the inherent dignity of all human beings. Freedom is an indispensable ingredient of human dignity."*

[223] In *SACWU & Others v Afrox Ltd (1999) 20 ILJ 1718 (LAC)* court, albeit not in the context of a discrimination claim, was faced with the question whether an employer had dismissed striking employees based on operational reasons as a result of their participation in a protected strike which would have made the dismissal automatically unfair in terms of section 171(1)(a) of the Act. It endorsed the following approach:

> *"The enquiry into the reason for the dismissal is an objective one, where the employer's motive for the dismissal will merely be one of a number of factors to be considered. This issue (the reason for the dismissal) is essentially one of*

causation and I can see no reason why the usual twofold approach to causation, applied in other fields of law, should not also be utilized here (compare S v Mokgethi & others 1990 (1) SA 32 (A) at 39D-41A; Minister of Police v Skosana 1977 (1) SA 31 (A) at 34). The first step is to determine factual causation: was participation or support, or intended participation or support, of the protected strike a sine qua non (or prerequisite) for the dismissal? Put another way, would the dismissal have occurred if there was no participation or support of the strike? If the answer is yes, then the dismissal was not automatically unfair. If the answer is no, that does not immediately render the dismissal automatically unfair; the next issue is one of legal causation, namely whether such participation or conduct was the 'main' or 'dominant', or 'proximate', or 'most likely' cause of the dismissal. There are no hard and fast rules to determine the question of legal causation (compare S v Mokgethi at 40). I would respectfully venture to suggest that the most practical way of approaching the issue would be to determine what the most probable inference is that may be drawn from the established facts as a cause of the dismissal, in much the same way as the most probable or plausible inference is drawn from circumstantial evidence in civil cases. It is important to remember that at this stage the fairness of the dismissal is not yet an issue (see para [33] below). Only if this test of legal causation also shows that the most probable cause for the dismissal was only participation or support of the protected strike, can it be said that the dismissal was automatically unfair in terms of s 187(1)(a) . If that probable inference cannot be drawn at this stage, the enquiry proceeds a step further."

[224] In *Hoffman v SA Airways (2000) 21 ILJ 2357 (CC) at 2370* court held in relation to discrimination that

"the determining factor regarding the unfairness of the discrimination is its impact on the person discriminated against. Relevant considerations in this regard include the position of the victim of the discrimination in society, the purpose sought to be achieved by the discrimination, the extent to which the rights or interests of the victim of the discrimination have been affected, and whether the discrimination has impaired human dignity of the victim".

[225] When assessing whether discrimination or differentiation is unfair, court explained as follows in *Harksen : v Lane NO & Others 1998(1) SA 300 (CC) at 325 A:*

> *"Firstly, does the differentiation amount to "discrimination"? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon on whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner…*
>
> *If (the differentiation) has been found to have been on a specified ground, then unfairness will be presumed… The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.*

[226] It has now to be determined whether the respondents did in fact violate the right of the applicants to exercise their freedom of religion and cultural practices through their retention of a dreadlock hair style without being subjected to a disciplinary enquiry which had the sequel of a dismissal. It was always beyond dispute that the applicants never brought it to the attention of either of the respondents that the instruction issued by the second respondent was in conflict with the applicants' religious and cultural practices. The applicants knew very well that the second respondent had just arrived in Pollsmoor Prison and that therefore he would not have known about their beliefs. No evidence was led that the second respondent acted in flagrant disregard of the rights of the applicants

to their religious and cultural beliefs. In fact the evidence of the third and the fourth applicants left no doubt that the respondents would not have known that they were undergoing a cultural calling towards being traditional healers. The second respondent testified. It was never put to him that he knew any of the second, fifth or sixth applicants to be Rastafarians. It is probable that some of the correctional officers, including supervisors knew that some of the applicants practised Rastafarianism. It is this group that would have done nothing about that practice until the arrival of the second respondent.

[227] I have to remind myself that the enquiry into the reasons for the dismissal is an objective one, where the employer's motive for the dismissal will merely be one of a number of factors to be considered, see the *Afrox* decision *supra*. Clearly therefore the motive for the instruction to cut dreadlocks which led to a disciplinary action that was a precursor to the dismissal of the applicants could never have been as a result of a direct intention (my emphasis) to discriminate against neither applicant. It was very strange that the applicants who well knew their rights to religious and cultural practices did not see it fit to assert such rights at the very critical moment when the issue of their hair style arose for consideration. The case of the applicants is therefore that the respondents unconsciously and yet directly discriminated against them in their exercise of their religious and cultural practices. In my view, that would be a contradiction in terms.

[228] The evidence of the second respondent on why he issued the instructions to have dreadlocks cut must not be confused with this approach I have adopted. Nowhere in his evidence did he say that he issued the instruction well knowing the beliefs of the applicants. His evidence on what his reaction would be to a staff member who would want to wear a nose earing was the position he took as a witness. By then the applicants had been dismissed without the knowledge of their beliefs. What the second respondent said about a right to cultural beliefs did not give the reason for the dismissal of the applicants. It revealed the attitude of the second respondent as he stood in the witness box which, however had no bearing on the reasons for dismissal as he had not been informed of such beliefs when disciplinary actions against the applicants were initiated and completed.

[229] Accordingly, I find that the applicants, who bore the onus of proving that the respondents *rationale* for the dismissal of the applicants was based on direct discrimination, have failed to discharge the duty resting on them as I am not satisfied that a causal link is established on a balance of probabilities between the prohibited reasons for dismissal and the circumstances of the dismissal, Factual causation, that is a belief in religious and cultural practices has not been proved to have been a *sine qua non* or prerequisite reason for the dismissal of the applicants.

[230] The next enquiry is about whether or not indirect discrimination has been shown to have been the basis for the dismissal of the applicants. The case of the

applicants is that the indirect discrimination was constituted by the rule which infringed against the rights of Rastafarian correctional officials to practice their religion, and in the case of third and fourth applicants, the rights of correctional officials to practice their culture. The respondents did not dispute that the keeping of the dreadlock hair style was a practice consistent with the beliefs held by the applicants. In fact, the applicants produced overwhelming evidence in this regard. Court has already found that the keeping of the dreadlock hair style constituted part of the Rastafarian and cultural practices. The instruction of the second respondent to have the applicants cut their dreadlocks had the effect of the introduction of an employment practice that was apparently neutral but disproportionately affecting members of a disadvantaged grouping. It is to be ascertained whether such a practice by the respondents was justifiable or reasonable in the circumstances. It will depend on this aspect whether the presumption of unfairness will or will not arise. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation, the *Harksen* case *supra*. Relevant considerations in this regard include the position of the victim of the discrimination in society, the purpose sought to be achieved by the discrimination, the extent to which the rights or interests of the victim of the discrimination have been affected, and whether the discrimination has impaired human dignity of the victim, see *Hoffman* case above.

[231] It is beyond doubt that the impact of the instruction would have a devastating effect on their beliefs which they held high at the time. Rastafarians stood to be

scorned at by those who knew them and the practice of their faith. The third and fourth applicants would similarly be frustrated in their traditional calling, for the period during which they had to keep the dreadlocks hair style. In relation to the position of the applicants in society, not much turns on this as they were among a number of other correctional officers with divergent religious and cultural beliefs and similarly entitled to practice their faith. The purpose sought to be achieved by the second respondent was no doubt, the restoration and maintenance of discipline which was intended to improve security measures in prison. It was common cause that the instruction of the second respondent to have dreadlocks cut was but one of the many other instructions he had issued to improve the working environment in prison. As already found, the attention of the second respondent was never drawn to the effect his instruction would have on their beliefs so that he would have had to apply his mind to it. The modality of informing the second respondent was, in my view irrelevant, It could have been a formal or informal application to keep dreadlocks with an accompanying explanation or it could have been a response to his instruction. What matters it that his attention should have been drawn to their beliefs and he was not.

[232] In relation to the extent to which the rights or interests of the victim of the discrimination have been affected, it needs to be said that the applicants had a strong faith in the practice which was the basis for the keeping of their dreadlocks. The right to practice their faith was adversely affected and their dignity was no doubt impugned. The applicants had a right to their faith. In my view, they erred by failing to assert that right. The consequence is that the

practice by the respondents, through the instruction issued by the second respondent, was justifiable and reasonable in the circumstances. The presumption of unfairness has therefore been negated by irrefutable evidence. It has to be borne in mind that the existence of a right is one thing and the exercise thereof is another. Accordingly it had not been shown that the respondents indirectly discriminated against the applicant employees. .

[233] Quite some time and effort were spent by the parties on the issue of the dress code. What initiated the dismissal of the applicant employees was the issue of the instruction by the second respondent followed by the disciplinary hearing. The investigation should therefore have been about the legitimacy and reasonableness of the instruction. The dress code merely formed the basis of the legitimacy of the instruction issued by the second respondent. For purposes of this judgment I found it unnecessary to have had to deal with the issue of the dress code alone, believing that the final answer to this matter, will provide the necessary determination of that issue.

[234] I now return to the gender discrimination issue. The basis on which the respondents' counsel, Mr. Schippers, appearing with Mr. O' Brien submitted that the applicants were not pressing their claim on gender discrimination is not supported by the pleadings and the evidence, as already pointed out. It was submitted that the gender discrimination had no merits on two reasons. The first was that the applicants themselves conceded that there were distinctions in the

dress code because of the biological difference between men and women, especially in this case.

[235] The second, it was said lay in the second respondent's answer under cross-examination as providing a complete answer. He said that the female officials were permitted to wear dreadlocks and that a distinction needed to be made here because female officials were different from males and the dress code marked that difference and for him or any manager to say if a male official wanted to wear pantyhose and high heels and the manager declined permission and that member said it is discrimination, that would not be discrimination. It was a provision that was made by the dress code.

[236] It was never made clear why the biological differences between men and women had to justify discriminating among them. The biological differences between Blacks and Whites would never be an acceptable basis for racial discrimination which constitutes the very said past of this country. Gender based discrimination in fact forms a listed ground on the basis of which dismissal would be automatically unfair both in terms of section 187 (1) (f) of the Act and section 6 of the EEA. Both of these sections must be seen against the background of the provisions of section 9 under the Bill of rights of the Constitution Act, 1996. The relevant subsections are (1) and (2) which read:

> *"(1) Everyone is equal before the law and has the right to equal protection and benefit of the law;*

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken. "

[237] The second explanation suffers from a similar discrepancy as was the first. In addition, legislated discrimination is not by that fact alone justified and reasonable. Racial discrimination was legislated and protected by legislation in the past. That fact alone did not render it fair. That a differentiation between male and female officers was provided for in the dress code does not mean that such differentiation was fair. Factors for the determination of fair discrimination have been outlined and referred to. No evidence was led by and on behalf of the respondents as the basis for discriminating between the male and the female correctional officers when it came to the keeping of a dreadlock hair style. One has to guard against a bias in favour of a view held by some that hair platting is a practice for women and not men and thus using that as a difference between men and women. The view that male correctional officer who keep dreadlocks may compromise security in that prison inmates may use dreadlocks as a means of escape, by pulling them, was not supported by any evidence. Female correctional officers are not immune from such vulnerability. Evidence of the second, fifth and sixth applicants was that they kept their dreadlocks neat and covered with uniform hats.

[238] The factual basis on which it can be said that the instruction of the second respondent, as based on the dress code, was reasonable and justifiable and therefore covered by the provisions of section 36 of the Constitution Act, 1996, has therefore not been successfully laid. Mr Ndebele's evidence on the necessity of the dress code for prison officials is not the issue. The need to draw the differentiation in that code has been the issue. That Rastafarian correctional officers would stand out and an undesirable association between then and the Rastafarian prison inmates was likely to take place, was rather speculative and devoid of any evidential support. The fear of Mr. Ndebele that Rastafarian correctional officers were likely to be manipulated by prison inmates is nothing but a prejudicial bias against these officials. Not one example of such an instance could be given by him, yet it was the undisputed evidence of the applicants that they had had their dreadlocks for sometime before the intervention of the second respondent.

[239] Accordingly, the applicants have succeeded in proving that the respondents did discriminate against them on the basis of gender. The respondents have on the other side not succeeded in rebutting the presumption on the unfairness of the instruction issued by the second respondent which was a precursor to the dismissal of the five applicants. It has therefore been shown that the dismissal of each of the five applicants on the basis of gender was automatically unfair. I consider it unnecessary that the further grounds on which the applicants relied to attack the fairness of their dismissal be examined.

[240] The next stage relates to the relief to be granted to the successful applicants. Section 193 (2) of the Act states that this court, upon finding the dismissal of an employee to have been unfair, must require the employer to reinstate or re-employ the employee unless any of the four circumstances outlined in (2) (a) to (2) (d) are found to exist. Court has a discretion which it has to exercise judiciously. Paragraph 38 of the statement of case outlined the relief sought by the applicants, in the event of being successful with their claim and the relief they seek is couched in the alternative. Essentially they seek to be reinstated to the employment positions they held before their dismissal and in the alternative, compensation. During the course of the trial there was a shift by some from the relief of reinstatement but at the end of the trial, all seek the pleaded relief. There has not been a suggestion that a continued employment relationship of any of the applicants would be intolerable. Nor am I able to find that it is not reasonably practicable for the respondents to reinstate the applicants that were unfairly dismissed.

[241] The undisputed evidence of the second and the sixth applicants was that they never found any employment since their dismissal. The third applicant found employment with the Department of Works in September 2007 although he had salary payment problems due to the persal system. The fourth respondent had a diploma in education and he found a temporary employment post as an educator. The fifth applicant found employment in New Zealand as a Correctional Officer

but he now wants to come back home. The third, fourth and fifth applicants have received some earnings during the period of their dismissal by the respondents. They were therefore able to mitigate their damaged during that period.

[242] I have considered the issue of costs. I am alive to the effect that the order to be issued will have to the parties. This has been a protracted trial in which a number of witnesses were called and examined. Counsel spent enormous time in the preparation and presentation of this matter. It will accord with the fairness of this matter that costs should follow the results.

[243] Accordingly, the following order will issue:

1. The respondents are ordered to reinstate each of the five applicant employees who wish to be reinstated, with effect from the date of his dismissal, with no loss of earnings, or benefits. From these earnings must be deducted those earnings that an applicant employee received from the employment by another institution, after the date of dismissal by the respondents up to the effective date of this order.
2. Each such applicant employee as wishes to be reinstated has to report for duty at Pollsmoor Prison on17 May 2010 An applicant employee who wishes to be reinstated but is not within the Republic of South Africa on the date of this order, shall have 30

more days within which to report for duty, that is, on or before 18 June 2010.

3. The first respondent is directed to compensate each of the applicant employees who do not wish to be reinstated, in an amount of money equivalent to twenty (20) months of the salary earned by such employee as on the date of his dismissal, with a salary increase that the employee would have been entitled to at the time, but for the dismissal. Such payment is to be made on or before 17 May 2010, the date from which Interest at the regular percentage becomes payable for any outstanding amount.
4. The respondents are ordered to pay costs of this claim and are held jointly and severally liable.

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Cele J.

DATE OF HEARING : 18 DECEMBER 2009

DATE OF JUDGMENT : 11 MAY 2010

APPEARANCES

FOR APPLICANT	:	Adv Hilary Rabkin-Daicker
Instructed by	:	CHEADLE THOMPSON & HAYSOM INC.
FOR RESPONDENT	:	Adv Ashon Schippers SC (with Stanely O' Brien SC)
Instructed by	:	State Attorney