



Basic Education
Justice and Constitutional Development



NATIONAL SCHOOLS
Moot Court Competition



SOUTH AFRICAN NATIONAL SCHOOLS MOOT

2019 RESOURCE PACK

The following background material has been compiled to provide learners who are participating in the South African National Schools Moot with easy access to some of the legal material relevant to this year's moot problem, in case they want to refer to it in their essays. Learners are not required to have an in-depth understanding of all this material, it is merely provided to make it easier to find the material.

For the 2019 Moot problem and for further information on the Moot, see www.schoolsmoot.co.za.

I. THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996

Note: The Constitution is the supreme law of the land. Any other law that is inconsistent with the Constitution must be declared invalid and may, amongst other remedies, be amended.

“Preamble

We, the people of South Africa, Recognise the injustices of our past; Honour those who suffered for justice and freedom in our land; Respect those who have worked to build and develop our country; and Believe that South Africa belongs to all who live in it, united in our diversity.

... Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; Lay the foundations for a democratic and open society in which government is based on the will of

the people and every citizen is equally protected by law; Improve the quality of life of all citizens and free the potential of each person; and Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations...

Section 9: Equality

(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

...

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

Section 10: Human dignity

Everyone has inherent dignity and the right to have their dignity respected and protected.

Section 15: Freedom of religion, belief and opinion

(1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion.

Section 28: Children

(2) A child's best interests are of paramount importance in every matter concerning the child.

(3) In this section 'child' means a person under the age of 18 years.

Section 29: Education

(1) Everyone has the right

(a) to a basic education, including adult basic education;

Section 31: Cultural, religious and linguistic communities

(1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community—

- (a) to enjoy their culture, practise their religion and use their language; and
- (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

(2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

Section 36: Limitation of rights

(1) 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—

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.”

II. SOUTH AFRICAN SCHOOLS ACT 84 OF 1996

Note: Schools in South Africa are regulated in accordance with the Schools Act.

“Section 5: Admission to public schools

(1) A public school must admit learners and serve their educational requirements without unfairly discriminating in any way.

...

(5) Subject to this Act and any applicable provincial law, the admission policy of a

public school is determined by the governing body of such school

Section 7: Freedom of conscience and religion at public schools

Subject to the Constitution and any applicable provincial law, religious observances may be conducted at a public school under rules issued by the governing body if such observances are conducted on an equitable basis and attendance at them by learners and members of staff is free and voluntary.

Section 8: Code of conduct

(1) Subject to any applicable provincial law, a governing body of a public school must adopt a code of conduct for the learners after consultation with the learners, parents and educators of the school.

(2) A code of conduct referred to in subsection (1) must be aimed at establishing a disciplined and purposeful school environment, dedicated to the improvement and maintenance of the quality of the learning process.

....

(4) Nothing contained in this Act exempts a learner from the obligation to comply with the code of conduct of the schools attended by such learner.”

III. CASE LAW (JUDGMENTS HANDED DOWN BY THE COURTS)

Note: The following extracts are drawn from landmark judgments by South African courts. The underlying principles can be applied to the facts of the Moot.

MEC for Education, KwaZulu-Natal and Others v Pillay 2008 (1) SA 474 (CC): Constitutional Court

The applicant in this case was the MEC for Education of KwaZulu-Natal and others, and the respondent was Ms Pillay, the mother of the child in question. The judgement was given by the Constitutional Court of South Africa (CC) and it was reported in 2008.

This case deals with religious and cultural expression in public schools. In accordance with her culture, an Indian learner wore a nose stud to school. The learner's mother had signed the school's code of conduct which, by implication, did not allow for nose studs to be worn at the school. In a meeting held between the school's governing body and the learner, the governing body also indicated that it was unacceptable for learners to wear jewellery such as nose studs, and told the learner to remove the nose stud.

The learner's mother approached the courts for assistance and the matter continued all the way to the Constitutional Court. The evidence before the Court showed that the wearing of a nose stud was a voluntary practice that formed part of the learner's South Indian Tamil Hindu culture, which itself was inseparably intertwined with Hindu religion. The court emphasised that both obligatory and voluntary practices qualified for protection under the Equality Act. The school had therefore interfered with the learner's religion and culture. As that burden was not imposed on others, the school's interference amounted to discrimination. The Constitutional Court held that the rule prohibiting the wearing of jewellery had the potential for indirect discrimination because it allowed certain groups of learners to express their religious and cultural identity freely, while denying that right to others.

In paragraph 98 of the judgment, the Court stated as follows:

"Both discipline and education are legitimate goals. However, care must be taken not to state the School's interest too broadly."

Paragraph 100:

"Rules are important to education. Not only do they promote an important sense of discipline in children, they prepare them for the real world which contains even more rules than the schoolyard. Schools belong to the communities they serve and that ownership implies a responsibility not only to make rules that fit the community, but also to abide by those rules. Nothing in this judgment should be interpreted as encouraging or condoning the breaking of school rules."

Paragraph 108:

“It is common cause that the way in which Ms. Pillay dealt with the problem left much to be desired and the School has quite rightly complained about it. The School argued that this should count against Ms. Pillay in the determination of whether the conduct of the School was unfair. Ms. Pillay has accepted that it would have been preferable to approach the School before the nose stud was inserted, rather than to confront the School with the nose stud and demand that it should be accommodated.”

Paragraph 109:

“It is obviously preferable for these matters to be dealt with by approaching the relevant authority before the issue arises. It indicates an important degree of respect and a desire to resolve the matter amicably rather than through confrontation... While it is uncertain whether there would have been a different result, the process of negotiation is inherently valuable. It is part of a search for a reasonable accommodation that will suit both parties”

Accordingly, the Chief Justice concluded that the school’s discrimination against [the learner] was unfair.

Federation of Governing Bodies for South African Schools (FEDSAS) v Member of the Executive Council for Education, Gauteng and Another 2016 (4) SA 546 (CC): Constitutional Court

Here the Constitutional Court stated, in paragraph 3:

“[A]ccess to teaching and learning has not been freely and widely accessible to all people at all times. All forms of human oppression and exclusion are premised, in varying degrees, on a denial of access to education and training. The uneven power relations that marked slavery, colonialism, the industrial age and the information economy are girded, in great part, by inadequate access to quality teaching and learning. At the end of a long and glorious struggle against all forms of oppression and the beginning of a democratic and inclusive society, we, filled with rightful optimism, guaranteed universal access to basic education. We collectively said: “[e]veryone has the right to basic education, including adult basic education”.”

Paragraph 44:

“But public schools are not rarefied spaces only for the bright, well-mannered and financially well-heeled learners. They are public assets which must advance not only the parochial interest of its immediate learners but may, by law, also be required to help achieve universal and non-discriminatory access to education.”

Organisasie vir Godsdienste-Onderrig en Demokrasie v Laerskool Randhart and Others 2017 (6) SA 129 (GJ): High Court, Gauteng Local Division, Johannesburg, also referred to as the “OGOD Case”

Paragraph 89:

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

Paragraph 90:

“Neither the Constitution nor the Schools Act confers on a public school or SGB the right to adopt the ethos of one single religion to the exclusion of others.”

Antonie v Governing Body, Settlers High School 2002 (4) SA 738 (C), Western Cape High Court

In this case the applicant learner embraced principles of the Rastafarian religion, a part of which entailed that Rastafarians grow their hair into dreadlocks and that women cover their heads. The applicant approached the headmaster of the school on several occasions for permission to wear dreadlocks and a cap to school, this being in line with the expression of her religion. Permission was not granted. The learner proceeded to attend school with a black cap covering her dreadlocks. After having seen this, the headmaster informed the learner that her conduct was in conflict with the school’s code of conduct. Consequently, a disciplinary hearing against the learner was convened, with the School Governing Body finding the learner guilty of serious misconduct.

The question before the Court was whether the wearing of dreadlocks and a cap by the learner was in conflict with the school's code of conduct. If so, whether such contravention amounted to serious misconduct. The school's code of conduct made no reference to dreadlocks or anything similar, nor did it refer to headgear.

The Court held that constitutional values of freedom, human dignity and equality, needed to be adhered to. Furthermore, it established that the conduct was not in conflict with the provisions of the code of conduct. Even if misconduct could be established/proved, the question of seriousness would arise. The court observed that misconduct would be serious where it was something akin to immoral, promiscuous or shockingly inappropriate behavior. In this regard, it was held that categorizing the growing of dreadlocks or wearing of a cap as an act of serious misconduct amounted to absurdity.

The court set aside the decision of the SGB.

At paragraph 17 the Court stated:

"The question should be asked, in this regard, whether or not the prohibition is aimed at promoting positive discipline and whether or not noncompliance therewith justifies punishment or some other form of sanction. This requires a spirit of mutual respect, reconciliation and tolerance."

Minister of Home Affairs and Another v Fourie and Another [2005] ZACC 19: Constitutional Court

At paragraph 60:

"Equality means equal concern and respect across difference. It does not presuppose the elimination or suppression of difference. Respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a levelling or homogenisation of behaviour or extolling one form as supreme, and another as inferior, but an acknowledgment and acceptance of difference. At the very least, it affirms that difference should not be the basis for exclusion, marginalisation and stigma. At best, it

celebrates the vitality that difference brings to any society...At issue is a need to affirm the very character of our society as one based on tolerance and mutual respect. The test of tolerance is not how one finds space for people with whom, and practices with which, one feels comfortable, but how one accommodates the expression of what is discomfiting.”

**Christian Education South Africa v Minister of Education 2000 (4) SA 757 (CC):
Constitutional Court**

At paragraph 19:

“...freedom of religion includes both the right to have a belief and the right to express such belief in practice. It also brings out the fact that freedom of religion may be impaired by measures that coerce persons into acting or refraining from acting in a manner contrary to their beliefs.”

At paragraph 35:

“The underlying problem in any open and democratic society based on human dignity, equality and freedom in which conscientious and religious freedom has to be regarded with appropriate seriousness, is how far such democracy can and must go in allowing members of religious communities to define for themselves which laws they will obey and which not.”

At paragraph 36:

“There can be no doubt that the right to freedom of religion, belief and opinion in the open and democratic society contemplated by the Constitution is important. The right to believe or not to believe, and to act or not to act according to his or her beliefs or non-beliefs, is one of the key ingredients of any person’s dignity. Yet freedom of religion goes beyond protecting the inviolability of the individual conscience. For many believers, their relationship with God or creation is central to all their activities. It concerns their capacity to relate in an intensely meaningful fashion to their sense of themselves, their community and their universe. For millions in all walks of life, religion provides support and nurture and a framework for individual and social stability and growth.”

Prince v President of the Law Society of the Cape of Good Hope and Others 2001 (2) SA

388 (CC): Constitutional Court

The appellant was a practising Rastafari who used cannabis (dagga) for religious reasons. His initial challenge was directed at the Law Society's finding that he was not a fit and proper person to be admitted as an attorney because he had previous convictions for possessing dagga and said he would continue using it. The possession and use of cannabis was prohibited by law. However, he argued for a religious exemption, stating that the prohibition infringed his right to freedom of religion, amongst other rights.

The Court found that both sides had failed to produce sufficient evidence to determine whether a religious exemption was possible and to address the concern of the government on the abuse of drugs. The court needed to know the nature of the Rastafari religion and the various uses of dagga; how much was used by Rastafari; how it was obtained; and whether the religion regulated, restricted and supervised use by its members.

At paragraph 26:

“Rastafari community is not a powerful one. It is a vulnerable group. It deserves the protection of the law precisely because it is a vulnerable minority... Our Constitution recognises that minority groups may hold their own religious views and enjoins us to tolerate and protect such views. However, the right to freedom of religion is not absolute. While members of a religious community may not determine for themselves which laws they will obey and which they will not, the state should, where it is reasonably possible, seek to avoid putting the believers to a choice between their faith and respect for the law.”

IV. OTHER

Further judgments containing relevant and comparable legal principles can be found online at websites such as:

- www.centreforchildlaw.com
- www.communitylawcentre.org.za
- www.constitutionalcourt.org.za
- www.saflii.org

In the media:

<https://mg.co.za/article/2013-04-05-rasta-i-have-a-right-to-be-at-school>

<https://www.news24.com/SouthAfrica/Local/City-Vision/rastas-feel-irie-as-learners-back-20160210>

<https://www.iol.co.za/news/south-africa/western-cape/rasta-boy-misses-school-over-dreads-1972722>