

Balancing the bull: *Smit NO v His Majesty King Goodwill Zwelithini Kabhekuzulu* [2010] JOL 25699 (KZP)

Sarah Rutherford Smith*

There is only too great a tendency in the best beliefs and practices to degenerate into the mechanical; and unless there were a succession of persons whose ever-recurring originality prevents the grounds of those beliefs and practices from becoming merely traditional, such dead matter would not resist the smallest shock from anything really alive, and there would be no reason why civilization should not die out.

John Stuart Mill¹

1 Introduction

Smit v His Majesty King Goodwill Zwelithini Kabhekuzulu concerned the Zulu ceremony of *Ukweshwama*, which includes the slaughtering of a bull.² The controversy surrounding the ceremony arose because the applicants requested that the slaughter be interdicted. The applicant claimed that the slaughter was contrary to the Animal Protection Act³ and the Terrestrial Animal Health Code.⁴ Further, that it infringed their right to freedom of, *inter alia*, conscience and belief,⁵ and finally that interdicting the slaughter was in the public interest.⁶

The case was decided on the evidence provided. Van der Reyden J found that the applicants had not provided sufficient evidence to support their version of the

*LLB (Wits), LLM (Unisa), Senior Lecturer, Department of Jurisprudence, Unisa.

¹Mill *On Liberty* (1986) 74.

²*Smit v His Majesty King Goodwill Zwelithini Kabhekuzulu* 2010 JOL 25699 (KZP).

³Animal Protection Act 71 of 1962, hereafter referred to as the Animal Protection Act.

⁴World Organisation for Animal Health, Terrestrial Animal Health Code (2009) available at http://www.oie.int/eng/Normes/mcode/A_summry.htm (accessed 2010-06-21). The Code has been updated since the *Ukweshwama* case, however, so the references refer to the version of the code that was current at the time of the case

⁵See s 15(1) of the Constitution of the Republic of South Africa, 1996. Hereafter referred to as the Constitution.

⁶*Smit* (n 2) 2-8.

slaughter.⁷ Because of this lack of evidence Van der Reyden J did not need to engage with the rights-based arguments. However the Judge did recognise that the case affected the applicant's rights to freedom of, *inter alia*, conscience and belief,⁸ and the respondent's rights to freedom of religion and culture.⁹ Further that the central issue in the case, whether the *Ukweshwama* ceremony should continue to be performed, still needed to be resolved.¹⁰

This case note is an attempt to investigate whether the *Ukweshwama* ceremony should continue to be performed. What follows is a summary of the case and then a discussion on whether this ceremony should be allowed to continue. The discussion will focus on whether the limitation created by the Animal Protection Act is a justifiable limitation of Zulu religion and culture.

2 Case facts

The *Smit* case was heard in the High Court of South Africa, KwaZulu-Natal, Pietermaritzburg. The applicants, the Animal Rights Africa Trust, instituted motion proceedings on the 1st of December 2009 for the granting of an interim interdict. The applicants sought to prevent the respondent, King Goodwill Zwelethini, as a representative of the Zulu nation, from slaughtering a bull at the *Ukweshwama* ceremony celebrated by the Zulu nation.

2.1 Arguments

In their affidavit the applicants stated that during the *Ukweshwama* ceremony a bull is slaughtered by ripping out its eyes, genitals and tongue. Attempts are made to suffocate the bull and it is eventually trampled, kicked and beaten to death. This is all performed bare-handed by approximately forty young Zulu men. The applicant had no personal knowledge of the manner in which the bull is killed. To support their version of the slaughter the applicants referenced letters from a Member of the Indian parliament and People for the Ethical Treatment of Animals which were sent to the South African State President. The letters raised the concerns of the correspondents regarding the methods used to slaughter the bull. They also referred to a website run by Compassion in World Farming (South Africa) which depicted a similar version of the bull slaughter to the one presented in their affidavit.¹¹

The applicants presented four justifications for the granting of the interdict. The first justification was based on legislative grounds. The applicants maintained that the slaughtering of the bull would contravene the Animal Protection Act. Section

⁷*Id* 16.

⁸Section 15(1) of the Constitution.

⁹Sections 15(1), 30 and 31(1) of the Constitution.

¹⁰*Smit* (n 2) 17.

¹¹*Smit* (n 2) 5-6.

2(1)(a) of the Animal Protection Act states that, 'any person who ill-treats ..., infuriates, tortures or maims or cruelly beats, kicks, goads or terrifies any animal; shall be guilty of an offence'.¹²

Second, the applicants maintained, that as a signatory, South Africa is bound by the provisions of the Terrestrial Animal Health Code, as set down by the World Organization for Animal Health.¹³ The Code provides standards for the improvement of terrestrial animal health and welfare as well as veterinary public health. Article 7.1.2 of the Code requires that signatories ensure, 'the welfare of ... animals to the greatest extent possible'. Article 7.5.1(1) of the Code requires that animals which are slaughtered outside of a slaughterhouse be slaughtered without causing undue stress to the animals. Further article 7.1.2 of the Code recognises an ethical duty on those who use animals to ensure the welfare of such animals to the greatest feasible extent. The concept of animal welfare is present throughout the Code and it is informed by the ideas of freedom of the animal from, *inter alia*, fear and distress, physical discomfort, and pain and injury. The applicants aver that allowing the slaughter of the bull at the *Ukweshwama* ceremony to proceed would contradict South Africa's obligations in terms of the Code.¹⁴

Third, the applicants contended that their Constitutional right to freedom of, *inter alia*, conscience and belief would be infringed by the *Ukweshwama* slaughter.¹⁵ The applicants maintained that they hold a sincere belief in the promotion of non-violence towards all sentient beings. This belief entails having compassion towards all species, that animals should be recognised as possessing inherent value and therefore exist in their own right. The applicants held that these beliefs are integral to their sense of identity, self-worth and dignity. They contended that the slaughtering of the bull infringed these beliefs and consequently their Constitutional right to freedom of conscience and belief and therefore that the court should interdict the slaughter of the bull in order to protect their rights.¹⁶

The applicants recognised that the respondent has the right to participate in the cultural life of his choice and that the *Ukweshwama* ceremony forms part of Zulu culture; and therefore that the application may result in the balancing of one culture, namely the applicant's, against another, the respondents'. However the applicant held that the respondent cannot claim to be exempt from legislation

¹²Section 2(1)(a) of the Animal Protection Act.

¹³The World Organization for Animal Health is an intergovernmental organisation formed by the International Agreement of 1924-01-25, signed by 28 countries. There are currently 178 member countries and territories. See World Organization for Animal Health, Terrestrial Animal Health Code (n 4). South Africa is a signatory to the Code. The health measures set out in the Code are merely standards and recommendations. Other than the requirements for the import and export of terrestrial animals there is no enforcement procedure for the standards and recommendations. Although South Africa is a signatory, compliance with the Code is voluntary.

¹⁴*Smit* (n 2) 6.

¹⁵Section 15(1) of the Constitution.

¹⁶*Smit* (n 2) 7.

simply by averring that Zulu culture remains independent from the demands of other cultures. Whilst cultural diversity is recognised and supported in the Constitution there is also a duty to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental rights. This duty entails recognising that unity can only be ensured if participants are required to adhere to basic norms and standards.¹⁷ These basic norms and standards are set by legislation.¹⁸ Therefore the Zulu nation should be required to conform to the norms and standards of treatment towards animals, as set out by the legislation, even though they have a right to practice and enjoy their culture.

Finally the applicants declared that as the slaughtering of the bull has received great public condemnation it would be in the public interest to interdict the slaughter.¹⁹

The respondent countered that the applicants had delayed considerably in bringing the application. This delay had caused substantial prejudice as the respondents were unable to prepare a complete response for a matter which is of vital importance for the Zulu community. The respondent further argued that should the interdict be granted it would cause significant harm to the respondents as the performance of the ceremony is fundamental to the Zulu culture and the ceremony cannot be performed at a later date.²⁰

The respondent challenged the applicant's version of the ceremony. They held that the applicant's version of the slaughter was incorrect. They noted that the applicant's version of the slaughter was ill-informed speculation, based on hearsay from authors who are critical of the Zulu culture. The respondent argued that the applicants had also misconstrued the religious and cultural significance of the slaughter.²¹

The respondent provided eyewitness evidence of the slaughter in their affidavit. This included a version of the slaughter from historian Jabulani Maphalala. Maphalala's affidavit stated that during the *Ukweshwama* ceremony the bull is overpowered by closing its airways and then its neck is broken to ensure a quick and painless death. This is all performed bare handed by a group of young warriors. Maphalala stressed that the ceremony is not barbaric or inhumane and that no acts of cruelty are performed.²²

Maphalala emphasised the cultural and religious importance of the ceremony to the Zulu people. He stated that the *Ukweshwama* ceremony is a religious period before the Zulu people can harvest their new crops. The bull which is slaughtered during the ceremony has significant religious meaning. The bull symbolises the power of the King and the slaughter symbolises a rebirth of this

¹⁷ *Ibid.*

¹⁸ *Id* 7-8. This argument is similar to the stance taken by the Constitutional Court in *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC); 2000 10 BCLR 1050 (CC) para 35.

¹⁹ *Id* 8.

²⁰ *Id* 8-9.

²¹ *Id* 10.

²² *Id* 13-14.

power and the strength of the warriors symbolises the power the King holds over the Zulu people.²³

The respondent held that the applicant's uninformed version of the slaughter and their lack of understanding regarding the role of the slaughter in Zulu religion and culture presented an image of the Zulu nation as barbaric and inhumane towards animals. Further that the applicant's version ignores the intimate relationship between the Zulu people and their animals.²⁴

The respondent suggested that the motion was indicative of a lack of tolerance for different religions and culture. The respondent stated that the applicants had no right to obstruct their religious and cultural practices. The respondent considered the application for the interdict to be a demand for the Zulu nation to justify their religious beliefs and cultural practices.²⁵

Finally the respondent expressed concern regarding the final nature of the relief sought by the applicant. If the interim interdict were to be granted the respondents would have been unable to conclude the ceremony and the religious and cultural practices related thereto. The new crops could not be harvested and the strength of the Zulu king and nation would not be renewed. Symbolically the Zulu king would be disempowered and the Zulu nation left without a monarch. Granting an interim interdict would cause extreme prejudice to the respondent.²⁶

2.2 Decision

Van der Reyden J recognised that the application affected the rights of both the applicant and the respondent. However the Judge recognised that granting an interim interdict would have caused final prejudice to the respondent. The respondent would have been prevented from performing a ceremony which has important cultural and religious meaning to the Zulu nation.²⁷

As the nature of the relief sought would have final effect for the respondent it was not sufficient for the applicant to prove that they had a *prima facie* right to the relief sought. Rather the applicant needed to prove a clear right to the relief, as is required when granting a final interdict.²⁸

Van der Reyden J found the facts presented by the applicants and the respondent to be in dispute. The two versions of the slaughter presented by the applicants and the respondent differed considerably. The applicant's provided hearsay evidence which presented a view of the Zulu people as inhumane, brutal

²³ *Id* 11-4.

²⁴ *Id* 10.

²⁵ *Id* 15.

²⁶ *Id* 16.

²⁷ Cilliers *et al* *The civil practice of the High Courts and the Supreme Court of Appeal of South Africa* (2009) 1455.

²⁸ See *Setlogelo v Setlogelo* 1814 AD 221 in this regard. Also Prest *The law and practice of interdicts based on interlocutory interdicts* (1993) (2005) 34-41 and 42-43.

and cruel. The applicants did not support their version of the slaughter with any other evidence (other than hearsay). The respondent's provided eyewitness evidence that presented the Zulu people as devout, unified and committed to their culture.²⁹

When the facts of a motion proceeding are in dispute the court must follow the precedent set out in the case of *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*.³⁰ The *Plascon-Evans* rule requires that in the event of a dispute of facts the court should accept the facts set out in the respondent's affidavit. In order to avoid an application of the *Plascon-Evans* rule in the event of a dispute of facts, the applicant should support their version with considerable independent documented evidence.

In terms of the *Plascon-Evans* rule (due to the factual dispute between the parties) and due to the lack of evidence provided by the applicants to support their version of the slaughter Van der Reyden J accepted the facts as presented by the respondent. Therefore the application was dismissed with the result being that the *Ukweshwama* ceremony was allowed to go ahead.

3 Discussion

The *Smit* case was decided on the *Plascon-Evans* rule. There was no legal basis on which the court could grant the relief sought by the applicant.³¹ However Van der Reyden J recognised that the central issue in the case, whether the *Ukweshwama* ceremony should be allowed to continue was not answered.³² In other words, the conflict between the State's interest in setting norms and standards in regard to the treatment of animals (as set by the Animal Protection Act) and the Zulu people's right to practice their religion and culture was not resolved. In order to achieve this resolution the State's interest, in setting norms and standards in regard to the treatment of animals, needs to be carefully weighed against the interest of the Zulu nation in preserving this religious and cultural practice.

As previously stated, section 2(1)(a) of the Animal Protection Act states that, 'any person who ill-treats ..., infuriates, tortures or maims or cruelly beats, kicks, goads or terrifies any animal; shall be guilty of an offence'.³³ Although there is some debate as to how the bull is slaughtered in the *Ukweshwama* ceremony it can be accepted that, at the very least, the bull is ill-treated, infuriated and terrified. It can be ascertained from the evidence provided by the respondent, that the bull is wrestled to the ground by a number of strong men. It then seems likely

²⁹ *Smit* (n 2) 15-16.

³⁰ *Id* 17. When there is a factual dispute between parties, motion proceedings are not the suitable format for the granting of relief. Rather when there is a dispute of facts between the parties it is preferable that oral evidence be heard. *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 2 All SA 366 (A).

³¹ *Ibid*.

³² *Ibid*.

³³ Section 2(1)(a) of the Animal Protection Act.

from the evidence that the bull's neck is broken in some manner.³⁴ It would also seem likely that, at some point in bringing the animal to the ground, one or more of the animal's bones may be broken.³⁵ From the evidence it is clear that the slaughtering of the bull at the *Ukweshwama* ceremony is contrary to section 2(1)(a) of the Animal Protection Act.

The respondents cannot simply aver that their rights to religion and culture supersede this legislation in order to continue performing the ceremony. Laws such as the Animal Protection Act are designed to create norms and standards for a coherent society and cannot arbitrarily be disobeyed.³⁶ However, using the words of former Chief Justice Ngcobo's judgement in the *Prince* case, an application of the existing legislation would manifestly limit the rights of the Zulu people to practice their religion and culture.³⁷ Is this limitation reasonable and justifiable in an open and democratic society? Or should an exception be made for cultural and religious communities that participate in traditional animal slaughter?³⁸ As Sachs stated in the *Prince* case;

Intolerance may come in many forms. ... At its most benign it may operate through a set of rigid mainstream norms which do not permit the possibility of alternative forms of conduct.

In the *Ukweshwama* instance the right of the Zulu community to practice their culture will need to be weighed against the social interest of ensuring animal welfare as provided for by legislation.³⁹ The limitations clause in the Constitution allows for rights to be limited by a law of general application, provided that the limitation is reasonable and justifiable in an open and democratic society. The limitations clause provides guidelines for the balancing of competing interests and allows us to ascertain when a limitation is justifiable and when it is not. In order to determine

³⁴ *Smit* (n 2) 12-14. The respondent's version of the slaughter is supported by anthropological studies of the ceremony. See Bryant *The Zulu people as they were before the white man came* (1967) 511-515, Binns *The warrior people* (1974) 121-144, Krige *The social system of the Zulus* (1965) 249-260, The Zulu Nation 'Ukweshwama first fruits festival' available at <http://www.zuluroyals.com/zuluculture.htm> (accessed 2010-06-21), Hammond-Tooke *The roots of black South Africa* (1993) 81 and Nxumalo *et al King of goodwill* (2003) 139-141, for accounts of the *Ukweshwama* ceremony. Photographic evidence of the ceremony suggests that the slaughter is far more cruel, abusive and unorganised than is proposed by the respondents. See 'Courageous MP Lindiwe Mazibuko tackles the touchy subject of abuse in the name of culture' in *Animal voice* (2010) April 16-17.

³⁵ This aspect of the slaughter is read into the respondent's evidence and is supported by the anthropological evidence. See Bryant (n 34), Binns (n 34), Krige (n 34), The Zulu Nation (n 34), Hammond-Tooke (n 34) and Nxumalo (n 34).

³⁶ *Prince v President of the Law Society of the Cape of Good Hope* 2002 3 BCLR 231 (CC) para 115.

³⁷ *Id* para 44.

³⁸ *Id* para 115.

³⁹ Woolman and Botha 'Limitations: Shared constitutional interpretation, an appropriate normative framework and hard choices' in Woolman and Bishop (eds) *Constitutional conversations* 155-162. The Constitution s 36(1). See also Van der Schyff *Limitation of rights: A study of the European Convention and the South African Bill of Rights* (2005) 274 and 277-278.

whether the limitation is reasonable and justifiable factors including the nature of the right; the importance of the purpose of the right; the nature and extent of the limitation; the relation between the limitation and its purpose; and whether there are less restrictive means to achieve the purpose must be considered.⁴⁰

Therefore the right of the Zulu people to practice their religion and culture in the form of the *Ukweshwama* slaughter needs to be weighed against the limitation created by the Animal Protection Act. This will determine whether the limitation created by the Animal Protection Act is reasonable and justifiable in the open and democratic South Africa.

3.1 A section 36 limitations enquiry⁴¹

3.1.1 The nature of the rights

When determining the nature of the religious and cultural rights it must be considered how important the rights to freedom of religion and culture are in an open and democratic society.⁴² Many of the arguments used to stress the importance of the religious rights can be used to stress the importance of the cultural rights and vice versa. This is because there is a significant amount of overlap between religion and culture. Langa CJ has stated that:

there will often be a great deal of overlap between the two; religious practices are frequently informed not only by faith but also by custom, while cultural beliefs do not develop in a vacuum and may be based on the community's underlying religious or spiritual beliefs. Therefore, while it is possible for a belief or practice to be purely religious or purely cultural, it is equally possible for it to be both religious and cultural.⁴³

Further,

the borders between culture and religion are malleable and that religious belief informs cultural practice and cultural practice attains religious significance.⁴⁴

It is often suggested that freedom of religion is one of the most central human rights that people enjoy.⁴⁵ The importance of the right to freedom of religion was

⁴⁰Section 36(1) of the Constitution.

⁴¹It is trite that the animal protection legislation is a law of general application. For a discussion of the requirement for 'a law of general application' see Rautenbach and Malherbe *Constitutional law* (2009) 345-346.

⁴²*Id* 349.

⁴³*MEC for Education: KwaZulu-Natal, Thulani Cele: School Liaison Officer, Anne Martin: Principal of Durban Girls' High School, Fiona Knight: Chairperson of the Governing Body of Durban Girls' High School v Navaneethum Pillay, Governing Body Foundation, Natal Tamil Vedic Society Trust, Freedom of Expression Institute* 2008 2 BCLR 99 (CC) para 47, see also para 64.

⁴⁴*Id* para 60. Also see O' Regan J's discussion of religion and culture para 141-148.

⁴⁵*Christian Education* (n 18) para 36; and *Prince* (n 36) para 48. See also Dawkins *The God delusion* (2008) 41-45, for a discussion of the preferential treatment of religion and its supposed importance to society. Admittedly Dawkins wrote this excerpt to question the significance given to religion in

stated in the *Christian Education* case, wherein Sachs J recognised that the right forms an essential part of a person's dignity, self-worth and how individuals relate to and interact with society.⁴⁶ The *Prince* case also emphasised the role of religion in free and open societies and how protecting freedom of religion promotes and ensures the continuation of those societies.⁴⁷ There are many different religions followed in South Africa.⁴⁸ In order to ensure that South Africa is (and continues to be) amongst the free and open societies of the world, this diversity needs to be protected. As Sachs J pointed out in the *Prince* case, '[a] threat to the freedom of one would be seen as a threat to the freedom of all'.⁴⁹

It could be argued that the *Ukweshwama* practice does not form part of an identifiable religion and therefore that the ceremony has no religious significance. However, the Constitutional Court has recognised that it is important to respect a religion despite subjective questions regarding its stature, rationale or comprehensibility.⁵⁰ In *Christian Education* Sachs recognised that freedom of religion includes religious practices that express the religious belief, without questioning the relevance of the practice to the belief.⁵¹ In *Prince* the Court did not question whether the requirement to use cannabis was a significant Rastafarian religious practice.⁵² Rather, provided that the party professes a sincere belief, then the practice or belief should fall under the right to freedom of religion.⁵³

Although the courts have accepted that a practice falls within the ambit of religion if there is a sincere belief it is worthwhile to consider the role of the ceremony in Zulu religion.⁵⁴ As previously stated, there is a significant amount of overlap between religion and culture and what follows also justifies acceptance within the ambit of the cultural right.

The *Ukweshwama* practice has been part of Zulu life since before the time

society, nevertheless, it highlights the way in which religion has been treated as being important.

⁴⁶*Ibid.*

⁴⁷*Prince* (n 36) para 49. The weight of a right is determined not merely by its value to the development to the individual but also by its value to safeguarding and strengthening democracy. Van der Schyff (n 39) 280.

⁴⁸Christianity, Islam, Judaism, Buddhism and Rastafarianism are some of the many religions practiced in South Africa.

⁴⁹*Prince* (n 36) para 160.

⁵⁰Van der Schyff *The right to freedom of religion in South Africa* M-thesis RAU (Johannesburg) (2001) 39 and the footnotes therein.

⁵¹*Christian Education* (n 18) para 19. See also Kroeze 'God's kingdom in the law's republic: Religious freedom in South African constitutional jurisprudence' (2003) *SAJHR* 469 at 475-484.

⁵²*Prince* (n 37) para 42.

⁵³*Id* para 52.

⁵⁴It is a great pity that the Constitutional Court has not engaged in the process of qualifying a belief or practice as religious. What follows is a brief exploration of the religious significance of the *Ukweshwama* practice, although this is not required in terms of the precedent set by *Christian Education* and *Prince*. This is in no way a conclusive enquiry into whether the practice falls within the ambit of religion. Such an enquiry is beyond the scope of this article. Rather it is accepted that the respondents hold a sincere belief. However this enquiry is a subject worthy of future research.

of Shaka.⁵⁵ The ceremony is one aspect of the First Fruits Festival which was originally a period for thanksgiving and for appealing to the ancestral spirits for help and protection in the coming year.⁵⁶ The slaughter specifically provides an opportunity to communicate with the ancestors.⁵⁷ The ceremony also serves as a reminder about the conscious consumption of food and symbolically strengthens the Zulu king and the Zulu nation.⁵⁸

Although in modern times the festival has become largely symbolic it is still held by many of the Zulu tribes.⁵⁹ King Zwelithini has also taken a personal interest in revitalising the ceremony in an attempt to address the issues of poverty, starvation and unemployment amongst the Zulus.⁶⁰ The Zulu royal family recognises that the slaughtering of the bull still plays a major part of the ceremony. It is admitted that the bull is killed with bare hands as a test of the courage and bravery of the warriors. It is also still believed that the warriors will inherit the strength of the bull when it is killed and that this power is then transmitted to the king to protect and defend the Zulu nation.⁶¹

It has also been suggested that the performance of the ceremony creates a bond of trust between the Zulu men and that this trust and commitment is then transferred to their peers. The ceremony therefore creates and portrays an image of strong Zulu manhood.⁶²

Much like the situation in *Prince* Zulu religion and religious practices do not enjoy the *institutional character* that is associated with the major religions.⁶³ The ceremony obviously holds religious significance for the Zulu people. There is a sincere belief in the practice and therefore should be included within the ambit of religion rights.

It is important not to undervalue the rights to culture when compared to religion. Participating in a culture can create a sense of pride in that culture, a sense of belonging (and consequently a sense of pride in belonging to that culture) and solidarity. Being part of, and participating in, a culture can give life

⁵⁵Binns (n 34) 121.

⁵⁶*Ibid.*

⁵⁷Zulu 'Animal slaughter is a rite' (1991) Oct 23/6 13 at 13 available at <http://www.disa.ukzn.ac.za/webpages/DC/reoct91.9/reoct91.9.pdf> (accessed 22.06.2010) See also Mnguni *An investigation into the commercial and the Zulu traditional modes of slaughtering, butchering, culinary properties and service with special reference to sociocultural ritual behaviours in KwaZulu-Natal* MTech thesis DUT (Durban) 2006) 42-44, also 69-213 where Mnguni includes reports of ritual slaughter, and interviews with participants and 234-236.

⁵⁸Nxumalo (n 34) 141. Krige (n 34) 253-254. Bryant (n 34) 515.

⁵⁹The Zulu Nation (n 34).

⁶⁰*Ibid.*

⁶¹*Ibid.*

⁶²Khumalo 'African culture? Not in my name' (2009) Oct 10 *Times live* available at <http://www.timeslive.co.za/opinion/columnists/article145297.ece> (accessed 2010-06-15).

⁶³*Prince* (n 36) paras 101 and 130.

meaning and value.⁶⁴ The rights to culture recognise the members of a specific cultural group as, 'human beings of equal worth in our society whose community practices and associations must be treated with respect'.⁶⁵ The right to culture also emphasises our traditional African heritage as it recognises the 'communality and the inter-dependence of the members of a community'.⁶⁶

A large number of the public still consider themselves to be traditional and adhere to customary law and customary practices.⁶⁷ Individuals, as the bearers of human rights, practice their cultural rights within the framework of the families and communities to which they belong.⁶⁸ Therefore customary practices can have a real personal value to people, even if it is only symbolic.⁶⁹

It is clear that the practice has significant cultural importance for the Zulu people. But most importantly, the ceremony also embodies the Constitutional purpose of protecting cultural rights. The Constitution allows for the protection and preservation of cultures in sections 30 and 31. These sections have special significance for cultures which did not receive protection under the Apartheid government culture.⁷⁰ The ceremony allows people who were discriminated against under the Apartheid government to find a new sense of self. It allows groups who were marginalised during Apartheid, such as the Zulu people, a space in which they can form a new identity. Their identity can develop into respect and being proud of who they are as Zulu Africans. It creates a sense of belonging to the New South Africa, one in which they can be respected and honoured for who they are.⁷¹

Thus in considering the nature of the rights, it is certain the rights to freedom of religion and culture hold extreme importance in South Africa and carry substantial weight and should only be limited where the limitation is of great importance.⁷²

⁶⁴Neethling *The rainbow nation: Can we sing together?* (2001) 5. Mandela 'Task now is to repair fabric of our society' in *Looking forwards, looking backwards: Culture and Development Conference* (1995) 11-12. Buthelezi 'Culture conservation: The black perspective' in Coetzee and Van der Waal (eds) *Kultuurbewaring: Veranderende konteks en uitdagings / The conservation of culture: Changing context and challenges* (1988) 192-197.

⁶⁵*Pillay* (n 43) para 151.

⁶⁶*Bhe v Khayelitsha Magistrate* 2005 1 BCLR 1 (CC) para 163.

⁶⁷Bekker 'How compatible is African customary law with human rights? Some preliminary observations' (1994) *THRHR* 441 at 443 and 445.

⁶⁸*Id* 441.

⁶⁹*Id* 445.

⁷⁰De Waal *et al The Bill of Rights handbook* (2001) 622-623.

⁷¹Neethling (n 64) 8. Tomaselli and Ramgobin 'Culture and conservation: Whose interests?' in Coetzee and Van der Waal (eds) *Kultuurbewaring: Veranderende konteks en uitdagings / The Conservation of Culture: Changing context and challenges* (1988) 116. Sonn 'Rewriting the "White-is-Right" model: Towards an inclusive society' in Steyn and Motshabi (eds) *Cultural synergy in South Africa* (1996) 1-12 at 1. Mandela (n 64) 11-12. Buthelezi (n 64) 192-197. Bekker (n 67) 446. Metz 'Animal rights and the interpretation of South African Constitution' (2010) *SAPL* 301 at 306. Mnguni (n 57) 21.

⁷²De Waal (n 70) 178.

3.1.2 The importance and purpose of the limitation

Even the most fundamental religious or cultural practices can still be limited for the benefit of all.⁷³ But the reasons for limiting a right need to be very convincing because, 'those who are free and equal and command dignity cannot be expected to surrender their rights lightly'.⁷⁴ In instances where rights have been limited it is normally to ensure the safeguarding or promotion of particular public interests, such as state security, public order, morality, public health and the administration of justice, the prevention of crime, the integrity of the courts, effective tax collection and the interest of children.⁷⁵

The Constitutional Court has dealt with the limitation of religion and culture on a few occasions, notably in *Christian Education South Africa v Minister of Education*,⁷⁶ *Prince v President of the Law Society of the Cape of Good Hope*⁷⁷ and *KZN MEC of Education v Pillay*.⁷⁸

In the case of *Christian Education South Africa v Minister of Education* Justice Sachs recognised the right of individuals and communities to belong to and participate in the religious and cultural life of their choice. Justice Sachs acknowledged that people have the right to be different and to be excused from what Justice Sachs termed the 'general norm'.⁷⁹ However, Justice Sachs further stated that the rights to religion and culture cannot be used to protect religious and cultural practices which are an affront to the Bill of Rights.⁸⁰

However it is difficult to discuss the importance and purpose of the limitation created by the Animal Protection Act (and therefore the justification of the limitation) as some debate exists regarding the purpose of the legislation.⁸¹

In the case of *Rex v Moato* it was stated that the Prevention of Cruelty to Animals Act⁸² is intended to protect human interests as opposed to the interest of animals.

The intention of the legislation is not to elevate animals to the status of rights holders and this prohibition is not meant to confer protection on them. The intention was obviously to prohibit one rights holder from acting with such cruelty towards animals that the finer feelings and sentiments of his fellowmen are harmed.⁸³

⁷³ *Pillay* (n 43) para 95 and sources quoted therein.

⁷⁴ *Meyerson Rights limited* (1997) 39-40. Van der Schyff (n 39) 281.

⁷⁵ Els 'Die doel van 'n beperking van handvesreg' (2006) *TSAR* 253 267-273. See also Rautenbach and Malherbe (n 42) 350-351.

⁷⁶ *Christian Education* (n 18).

⁷⁷ *Prince* (n 36).

⁷⁸ *Pillay* (n 43).

⁷⁹ *Christian Education* (n 18) para 24.

⁸⁰ *Id* para 26.

⁸¹ See above under 3 Discussion.

⁸² The Prevention of Cruelty to Animals Act 8 of 1914 (replaced by the Animal Protection Act 71 of 1962).

⁸³ This is my translation of *Rex v Moato* 1947 All SA 262 (O) at 264.

According to *R v Moato* the legislation which manages human conduct towards animals is aimed at protecting human sentiments. Such intention may extend to include those who contravene the act even if such contravention is part of their religion and/or culture. If so, then the limitation is important. If this is the case – if the intention of the legislation is to protect all people regardless of their religion and culture – then even those who defy the law when they participate in cultural and religious practices are still guilty of an offence. But there is very little, to no, discussion on what these human sentiments are, or how they are harmed. It is submitted that the harm probably concerns an infringement to *inter alia*, human dignity, freedom and security of the person, and freedom of conscience, thought, belief and opinion.⁸⁴ If this is correct then the intention of the legislation is important.

The view of the courts regarding the purpose of the legislation was advanced somewhat in *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw*.⁸⁵ In the minority judgement Cameron JA agreed that the legislation does not confer rights on animals but it does recognise that animals are sentient beings capable of experiencing pain and suffering. Further, that the Act provides for the protection of animals from human cruelty and neglect.⁸⁶ The judgment in *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* has altered the intention of the legislation as set out in *Rex v Moato* because *Openshaw* suggests that the legislation is intended to protect animals, not human interests.

If the legislation is designed to protect animals, as stated in *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw*, it is necessary to consider whether the legislation is ignorant of African customs and traditions. The legislation ignores the honour accorded to animals within African religions and cultures, and the honour that is accorded to the animals that are used in ritual slaughter.⁸⁷ The legislation may reflect Western ideas and beliefs regarding the role and treatment of animals in society.⁸⁸

Also, if the legislation is intended to protect animals then the majority of people would argue that the purpose of the limitation, to protect animals, is not as important as the human interest in freedom of religion and culture. Parties such as the Animal Rights Africa Trust may argue that the interests of animals are at

⁸⁴Sections 10, 12 and 15(1) of the Constitution. This assumption will not be explored in this article.

⁸⁵*National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* 2008 JOL 21814 (SCA). See Bilchitz (n 85) 43-50 and the sources quoted therein in this regard.

⁸⁶*Id* para 38.

⁸⁷Metz (n 71) 306. Mnguni (n 57) 21. This does not suggest that all ritual slaughter contravenes the Animal Protection Act, or that African culture does not value animal welfare. It merely suggests that the current approach may not consider the different value accorded to animals by different religions and culture.

⁸⁸De Vos 'Kill the beasts – But only if they are not cute' in De Vos *Constitutionally speaking* (2009-11-25) available at <http://constitutionallyspeaking.co.za/kill-the-beasts-but-only-if-they-are-not-cute/> (accessed 2012-06-22) This article will not explore this issue.

least of equal concern as the interests of humans.⁸⁹ Indeed, there are many arguments for recognising animals as having value in themselves. These arguments extend to recognising animal rights, and including animals within the Constitution.⁹⁰ However it is unlikely that this view will hold enough weight to counteract the interests of parties such as the Zulu nation in instances like the *Ukweshwama* slaughter. The Constitutional Court has attached special importance to the protection of rights of marginalised groups.⁹¹ The Zulu people having been marginalised by colonialism and Apartheid are a group for whom the rights to freedom of religion and culture hold vital importance.

With this in mind it is somewhat irrelevant if the legislation is in fact intended to protect animals. The interests of humans will outweigh the interests of animals until animals are recognised as worthy of the same protection as humans. The stronger argument, where the animal is concerned, is therefore that the legislation is intended to protect human sentiments and this includes the sentiments of those who participate in practices such as the *Ukweshwama* ritual. For the purposes of this case note, this interpretation also allows for a more competitive debate between the competing interests.

Therefore the interpretation that the purpose of the Act is intended to protect human sentiments (and their relation to rights to human dignity, freedom and security of the person, and freedom of conscience, thought, belief and opinion) is the preferred interpretation,⁹² and protecting these human sentiments is an important purpose.

3.1.3 The nature and extent of the limitation

The nature and extent of the limitation considers the effect that the limitation has on the protected practice.⁹³ A serious infringement on a right requires compelling substantiation, whereas a milder infringement may be easier to justify.⁹⁴ The extent and importance of the limitation must be weighed against the importance of the rights at stake.⁹⁵

In this instance we are considering the effect of the Animal Protection Act on the Zulu *Ukweshwama* slaughter, which is protected by freedom of religion and

⁸⁹See Bilchitz 'Does transformative constitutionalism require recognition of animal rights?' (2010) *SAPL* 267 at 267-300 and the sources quoted therein as an example of motivations for recognising animal rights. Also Bilchitz (n 85) and the sources quoted therein.

⁹⁰See Bilchitz (n 85) 43-50 and the sources quoted therein in this regard.

⁹¹Such as children, see *Christian Education* (n 18) and minority religious groups. See also the minority judgement of Sachs J in *Prince* (n 36) para 145. See also Woolman and Botha (n 39) 184.

⁹²Sections 10, 12 and 15(1) of the Constitution. This finding is open to debate, and debate on this topic is encouraged to ensure a better understanding of the Animal Protection Act.

⁹³Rautenbach and Malherbe (n 42) 351.

⁹⁴*S v Lawrence S v Negal S v Solberg* 1997 10 BCLR 1348 (CC) para 168. See also Van der Schyff (n 39) 283.

⁹⁵Van der Schyff (n 39) 283. See also *S v Bhulwana*; *S v Gwadiso* 1995 12 BCLR 1579 (CC) para 18.

culture. The importance of the *Ukweshwama* slaughter in Zulu religion and culture was emphasised in the respondent's affidavit. The slaughter forms part of the greater First Fruits Festival⁹⁶ and stopping the slaughter will have consequences for the Zulu harvest period, the Zulu monarchy and the Zulu nation.⁹⁷

Limiting the performance of this religious and cultural practice will have a significant impact on the Zulu nation. It will prevent the Zulu people from communicating with the ancestors. The symbolic strengthening of the king and the Zulu nation will not occur. The crops cannot be harvested.

Therefore the nature and extent of the limitation is wide, with extreme consequences that reach far beyond the slaughter of a bull.

3.1.4 The relationship between the limitation and its purpose

This factor requires a consideration of whether the nature of the right and the severity of limitation outweigh the importance and purpose of the limitation.⁹⁸ In order to be a justifiable limitation the infringement of the right must be proportionate to the benefit;

[t]he limitation will not be proportionate if other means could be employed to achieve the same ends that will either not restrict rights at all, or will not restrict them to the same extent.⁹⁹

If, as proposed, the purpose of the limitation is to protect finer human sentiments, as suggested in *R v Moato*, then it is possible that preventing the *Ukweshwama* slaughter would achieve this. It is rationally conceivable that preventing the *Ukweshwama* slaughter would protect finer human sentiments and therefore protect the rights to *inter alia*, the protection of human dignity,¹⁰⁰ freedom and security of the person,¹⁰¹ and freedom of conscience, thought, belief and opinion.¹⁰² The limitation achieves its purpose.¹⁰³

But the extent to which the limitation achieves its purpose must also be taken into account.¹⁰⁴ If traditional animal slaughter forms part of your religion and culture then it is plausible that the slaughter of an animal does not harm the sentiments of the individuals involved. The limitation may be over-inclusive in this regard.¹⁰⁵ Rituals involving animal slaughter are a regular occurrence in traditional

⁹⁶ *Smit* (n 2) 8-9, 11-14 and 17.

⁹⁷ *Id* 16. See discussion above at 3.1.2 The nature of the rights.

⁹⁸ Rautenbach and Malherbe (n 42) 353.

⁹⁹ De Waal (n 70) 183-184.

¹⁰⁰ Section 10 of the Constitution.

¹⁰¹ Section 12 of the Constitution.

¹⁰² Section 15(1) of the Constitution. Rautenbach and Malherbe (n 42) 353. See also above under 3 Discussion.

¹⁰³ Van der Schyff (n 39) 283.

¹⁰⁴ Rautenbach and Malherbe (n 42) 353.

¹⁰⁵ *Coetzee v Government of the RSA, Matiso v Commanding Officer, Port Elizabeth Prison* 1995 10 BCLR 1382 (CC) paras 12 and 13.

culture. Traditional animal slaughter is a method through which the living communicate with their ancestors and is therefore performed at births, deaths, marriages, coming of age and puberty ceremonies, at groundbreaking and house warming ceremonies, cleansing ceremonies and as payment of a fine for the loss of virginity and for accidental death or injury amongst numerous other occasions.¹⁰⁶ When you live in a culture in which traditional animal slaughter is so pervasive it is unlikely that your sentiments will be harmed.

For arguments sake, if the legislation is intended to protect animals, as suggested in *Openshaw*, then the limitation may also achieve its purpose but still be over-broad. Whilst the limitation protects the animal from harm, the limitation considers the method of slaughter used in the *Ukweshwama* ritual as cruel (and thus an offence in terms of section 2(1)(a) of the Animal Protection Act).¹⁰⁷ However, many who practice traditional animal slaughter do not consider it to be cruel.¹⁰⁸ Rather traditional animal slaughter is seen as appropriate and harmonious within that society.¹⁰⁹ South Africa's animal protection legislation was based on laws from countries, such as the United Kingdom, which had homogeneous populations and cultures.¹¹⁰ The legislation was not drafted with a diverse society in mind, a society in which animals are valued in different ways.¹¹¹ The legislation does not account for different value systems held by the many different cultures in our country.¹¹² Our approach to animal protection needs to account for our different value systems regarding animal welfare, '[p]eople need to accept that there is no one unique truth which is fixed and found, but rather a diversity of valid, and even conflicting, versions of a world in the making'.¹¹³ Thus by including animal sacrifice within the ambit of the offence, considering animal sacrifice such as the *Ukweshwama* slaughter to be cruel, the legislation is an over-inclusive limitation.

The limitation created by the Animal Protection Act imposes considerable

¹⁰⁶Zulu (n 57). See also Mnguni (n 57) 42-44, also 69-213 where Mnguni includes reports of ritual slaughter, and interviews with participants.

¹⁰⁷Section 2(1)(a) of the Animal Protection Act.

¹⁰⁸*Smit* (n 2)12.

¹⁰⁹Zulu (n 57).

¹¹⁰Department: Agriculture *Republic of South Africa Draft Animal Care Policy for South Africa* available at http://www.capetown.gov.za/en/CityHealth/Documentation/Documents/Animal_Care_Policy_for_SA_Dept_of_Agriculture_Draft.pdf (accessed 2011-07-01).

¹¹¹This poses challenges to the application of the Animal Protection Act as is evidenced in *Smit*, where this piece of legislation had to be used to solve a dispute between two parties with differing views on the value of animals.

¹¹²*Smit* (n 2) 11.

¹¹³Venter 'Philosophy of education in a new South Africa' (1997) *South African Journal of Higher Education* 57 at 62. See also Horsthemke "'Indigenous knowledge' – conceptions and misconceptions" (2004) *Journal of Education* 431 at 431-448 and the sources quoted therein. As well as Hudson 'The political animal: Species-being and bare-life' 23/2 *Mediations Journal of the Marxist Literary Group*. History Subjectivity available at <http://www.mediationsjournal.org/articles/the-political-animal> (accessed 2011-06-20); Mnguni (n 57) 36.

costs which will have significant impact for the Zulu nation.¹¹⁴ The negative impact of the limitation is disproportionate to the (undefined) benefit of protecting human sentiments, as intended by the legislation.

The constitutional defect in the ... *statute* is that *it is* overbroad. *It is* not carefully tailored to constitute a minimal intrusion upon the right to freedom of religion [and culture] and is disproportionate to *its* purpose.¹¹⁵

3.1.5 Less restrictive means

Finally it must be considered whether there are less restrictive means that could be used to achieve the same purpose. Can the state achieve its purpose through an alternative method?¹¹⁶ What form of accommodation will protect the religious and cultural convictions and practices of this community?¹¹⁷ It is possible that the State could achieve the purpose of the limitation, whilst still protecting freedom of religion and culture.¹¹⁸

It is submitted that there are several alternatives that may be implemented to ensure that the limitation is not over-broad.¹¹⁹ Such as amending the legislation to exempt traditional animal slaughter from the offence when such slaughter is performed for religious and cultural reasons. This may include requiring that a representative of the National Society for the Prevention of Cruelty to Animals is present on occasions such as the *Ukweshwama* ceremony. Such an alternative would allow for a more even balance between the infringement of the right and the purpose of the legislation.

4 Conclusions

At this stage of the discussion surrounding traditional animal slaughter it is apparent that the importance of the rights to religion and culture and the extent of their infringement far outweigh the importance of the limitation. Considering that the Animal Protection Act was not designed with a diverse, open society in mind, and that it was drafted during the Apartheid era, it is appropriate that the legislature consider making an exception for communities, such as the Zulu nation, that practice traditional animal slaughter for religious and cultural reasons.

Alternatively the animal protection legislation needs to be redrafted to reconcile the conflicting values of different religions and cultures in regard to

¹¹⁴See above under 3.1.1 The nature of the rights and 3.1.3 The nature and extent of the limitation.

¹¹⁵Prince (n 36) para 83 with my own use of the singular and submission of [and culture].

¹¹⁶Rautenbach and Malherbe (n 42) 354.

¹¹⁷Prince (n 36) para 149.

¹¹⁸See the minority judgment of Sachs J in Prince (n 36) para [45] Also Van der Schyff (n 39) 287-289.

¹¹⁹Prince (n 36) paras 165 and 171.

animals.¹²⁰ This would allow for the rights of parties such as the Animal Rights Africa Trust to freedom of, *inter alia*, conscience and belief to be considered.¹²¹

Redrafting of the legislation would also require investigating the purpose of the Animal Protection Act. The understanding in *R v Moato* of protecting human sentiments is unclear. Further research needs to be performed to understand what these sentiments are and how they are harmed and whether they are worthy of protection. And if, as submitted, the rights to human dignity, freedom and security of the person, and freedom of conscience, thought, belief and opinion are affected.¹²² This will result in a more detailed understanding of the importance of the limitation and this might mean that the limitation would carry more weight in the balancing exercise.

In conclusion *Smit v His Majesty King Goodwill Zwelithini Kabhekuzulu* raises more questions than it answers. In the end the judgement follows the only path it can and does not resolve any of the issues the case raises. An enquiry into the nature and extent of the limitation created by the Animal Protection Act and the nature of the rights infringed shows that the result of *Smit* was correct. The greater impact of the case is that it allows us to reflect on our animal protection legislation and on how animals are valued in the new South Africa. Hopefully *Smit* is the first step towards reassessing our animal protection legislation, so that we develop legislation which is more appropriate to our diverse society yet still cognisant of our duty to protect animals.

¹²⁰*S v Manamela* 2000 5 BCLR 491 (CC) para 34.

¹²¹Section 15(1) of the Constitution.

¹²²The Constitution ss 10, 12 and 15(1). This assumption will not be explored in this article.