

The Tensions between *Ukuthwasa* and Labour Laws in South Africa: A Human Rights-Based Approach



Stewart Lee Kugara¹  & Melisa Mutsa Chawaremera² 

¹ Department of Cultural Studies and Political Studies, Faculty of Humanities, School of Social Sciences, University of Limpopo, Sovenga, South Africa.

² Faculty of Law, The Independent Institute of Education's IEMSA, Johannesburg, South Africa.

ABSTRACT

This paper appraises the tensions between the cultural practice of *ukuthwasa* and fundamental human rights in South Africa. This is particularly within the context of modern labour laws and workplace practices. A doctrinal research methodology is employed to analyse the human rights implications of allowing or denying employees the right to engage in the cultural practice of *ukuthwasa*. This approach enables an analysis and interpretation of relevant legislative provisions, case law and human rights frameworks governing workplace and cultural rights. The study reveals that there are multilayered tensions between the recognition of *ukuthwasa* and the enforcement of labour laws, which often overlook or conflict with the spiritual and cultural obligations of employees. A critical human rights-based analysis, reveals that the failure to balance cultural rights with workplace obligations can lead to significant human right violations, including unlawful dismissals or infringement of religious and cultural freedoms. This study highlights the need for a more sensitive and inclusive approach to managing cultural practices in corporate environments. Further, this study recommends an approach to addressing cultural rights and fundamental human rights within the workplace environment. Employers should be conscientised about the importance of cultural and religious rights, while employees must be aware of their responsibilities within the framework of labour law. Ideally, this will mitigate conflicts or dismissals. This study contributes to the ongoing dialogue on cultural rights and labour law. It also provides insights for employers on managing the delicate balance between cultural practices and legal obligations in the modern workplace.

Correspondence

Stewart Lee Kugara

Email:

stewart.kugara@ul.ac.za

Publication History

Received:

25th August, 2024

Accepted:

6th November, 2024

Published online:

20th December, 2024

Keywords: *Ukuthwasa, human rights, cultural practice, workplace, Constitution.*

INTRODUCTION

South Africa, often referred to as the “Rainbow Nation”, is characterised by its cultural diversity through the coexistence of numerous distinct cultural groups. This cultural plurality, while it has been celebrated, has occasionally resulted in conflicts between entrenched cultural practices and the legal framework of South Africa. A practice of note, that has given rise to legal and human rights concerns within the democratic Republic’s context is *ukuthwasa*. *Ukuthwasa* is understood as a spiritual calling, manifested through illness, in which an individual is summoned by their ancestors to undergo training to become a traditional health care practitioner. This can be through divination, herbalism, traditional birth attending or being a traditional surgeon. The aforementioned are established under the auspices of the Traditional

Health Practitioners' Act (from hereunder referred to as "The THPA").¹ The *ukuthwasa* process necessitates the individual's relocation from their home to a training site, where they remain until they successfully complete the training. This practice has been deeply rooted in South African society since time immemorial, with its followers attributing to its profound spiritual significance.

Sections 15, 30, and 31 of the South African Constitution allow every individual to partake in any cultural life that they subscribe to without violating the rights of others.² In this way, *ukuthwasa* is deeply entrenched within the social, historical and spiritual life of some ethnic groups of South Africa, thus it is protected by the above provisions. The individuals who undergo this training process become spiritual healers and mediators for their communities – render divination, dispense traditional medicine and other health care roles for wellbeing.³ The training itself is said to last for days, weeks, months or even years depending on an individual's ability to pass and graduate (this entails proving proficiency to be acknowledged as a competent traditional healthcare practitioner).⁴

The South African Constitution is hailed as the best document worldwide that enshrines individual people's rights.⁵ Cultural rights are not an exception when it comes to this protection. Even though *ukuthwasa* is given a central role in most South African indigenous communities, it is no secret that its existence has led to tensions in the protection of human rights and other laws. *Ukuthwasa*, at times, has been alleged to violate fundamental human rights that range from consent, bodily integrity, wellbeing and slavery.

Mothibe and Sibanda have noted that 80% of the population in South Africa rely on traditional medicine for their primary health care.⁶ This entails that the traditional healing phenomenon embraces many people despite their educational status and cultural background.⁷ Recent evidence shows that even educated people have left their jobs and trained as traditional health care practitioners, and to some extent, others keep their jobs and follow their calling.⁸ The THPA regulates the registration, training and practice of traditional health practitioners in South Africa. Against this backdrop, is the obligation placed upon all individuals to respect and tolerate other people's views, beliefs and cultural subscription.⁹ This is a true sign of celebrating diversity. By embracing this, it connotes that employers take cognisance of employees' cultural rights and respect them. However, the exercise of this cultural right (allowing an employee to take heed of their ancestral calling – *ukuthwasa*), is very delicate and shrouded with the following obscurities:

1. Is this viable for businesses to allow an employee to undergo *ukuthwasa* without knowing how long this would last?
2. Will granting one employee leave based on this practice not open floodgates of similar but diverse practices coming in?

¹ The Traditional Practitioners Act 22 of 2007.

² Section 15 of the Constitution states that, "Everyone has the right to freedom of conscience, religion, thought, belief and opinion", Section 30 states that "Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights." Section 31(1) further states that, "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."

³ Brianna Rose Bakow and Kathy Low, "A South African Experience: Cultural Determinants of Ukuthwasa," *Journal of Cross-Cultural Psychology* 49, no. 3 (2018): 432.

⁴ Bakow and Low, "A South African Experience: Cultural Determinants of Ukuthwasa," 436.

⁵ Catherine Albertyn and Rachel Adams, "Introduction: Special Issue on 'The Covid-19 Pandemic, Inequalities and Human Rights in South Africa', Part 1," *South African Journal on Human Rights* 37, no. 2 (April 3, 2021): 147–53, <https://doi.org/10.1080/02587203.2021.2022771>.

⁶ Mmamoshleledi E Mothibe and Mncengeli Sibanda, "African Traditional Medicine: South African Perspective," *Traditional and Complementary Medicine* 2019 (2019): 1–27, 3.

⁷ Mdhluli Tsetselelani Decide, Vhonani Olive Netshandama, and Pfarelo Eva Matshidze, "Factors That Influence the Uptake of Traditional Medicine for Primary Health Care in Allandale Village.," *African Journal of Development Studies* 13, no. 3 (2023).

⁸ Decide, Netshandama, and Matshidze, "Factors That Influence the Uptake of Traditional Medicine for Primary Health Care in Allandale Village," 6.

⁹ Section 9(3) of the Constitution states that, "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."

3. Noting the modernity that is embraced by traditional health practitioners in allowing employees (*ukuthwasa* trainees) to attend to work, will employers permit them to put on their compulsory initiate attire at work?

The research aims to elucidate the legal and constitutional challenges faced by employees who undergo *ukuthwasa* and to propose recommendations for better accommodation within the labour law framework. The foregoing analysis seeks to bridge the gap that exists between indigenous knowledge systems (IKSs) and the modern world. This is explored in the context of *ukuthwasa* and labour laws of South Africa. Furthermore, the write-up appraises the laws in which *ukuthwasa* functions vis-à-vis the key human rights values that are at play when such tension arises.

Understanding *Ukuthwasa*

Ukuthwasa is a traditional South African practice that is deeply embedded in the cultural and spiritual life of many African communities.¹⁰ The dominance of the practice mainly lies among the Zulu, Xhosa and Ndebele people.¹¹ It refers to the process of becoming a traditional healer, or *sangoma*, involving a rigorous and spiritually intense journey.¹² The aforementioned definition highlights the transformative nature of the practice.¹³ It illuminates that the practices do not merely entail acquiring healing skills. Rather, it also involves a profound spiritual calling and training. The candidates are known as initiates or *thwasas*. The process of *ukuthwasa* is initiated when an individual experiences a calling from the ancestors.¹⁴ It is manifested through dreams, visions, or physical ailments, which traditional belief attributes to ancestral spirits.¹⁵ It is described as a complex and multifaceted process that encompasses spiritual, psychological, and physical dimensions.¹⁶ The journey of *ukuthwasa* is described as a rite of passage that ensures the continuity of traditional knowledge and the healing arts within the community.

The *ukuthwasa* process involves several stages, beginning with the recognition of the ancestral calling.¹⁷ This is often followed by the *thwasa* (the initiate who has received the calling) undergoing a diagnostic phase.¹⁸ During this stage, a competent traditional health practitioner assesses the nature of the calling and the specific needs of the initiate.¹⁹ Following this, the initiate enters an apprenticeship phase, which includes learning herbal medicine, divination and spiritual practices under the guidance of a mentor or *gobela*.²⁰ A *gobela* is a senior traditional healer or spiritual mentor.²¹ They impart knowledge, skills and rituals necessary for the *thwasa* to successfully complete their training and fulfil their role as a healer within the community.²² The relationship between the *gobela* and their trainee, the *thwasa* is deeply respected and it is central to the preservation and the transmission of traditional healing practices.

The legislative context of traditional healing practices in South Africa is provided for by the Traditional Health Practitioners Act 22 of 2007. The Act acknowledges the role of traditional healers in the healthcare system and sets out to regulate their practice. It aims to ensure that traditional health practitioners meet the standards of training and ethical conduct permissible for their practice.²³ The South

¹⁰ Bakow and Low, "A South African Experience: Cultural Determinants of Ukuthwasa," 437.

¹¹ Bakow and Low, "A South African Experience: Cultural Determinants of Ukuthwasa," 437.

¹² Cynthia T Cook, "Sangomas: Problem or Solution for South Africa's Health Care System," *Journal of the National Medical Association* 101, no. 3 (2009): 261–65, 261.

¹³ Beauty Ntombizanele Booi, "Three Perspectives on Ukuthwasa: The View from Traditional Beliefs, Western Psychiatry and Transpersonal Psychology" (Rhodes University, 2004), 7.

¹⁴ L.E Mokgethi, "Defining Ukuthwasa as a Pedagogy: An Autoethnographic Exploration into the Knowledge Acquisition Process of Ukuthwasa at a Training School (Lefehlo) in Soweto, Johannesburg" (University of Witwatersrand, 2018), 4.

¹⁵ Mokgethi, "Defining Ukuthwasa as a Pedagogy: An Autoethnographic Exploration into the Knowledge Acquisition Process of Ukuthwasa at a Training School (Lefehlo) in Soweto, Johannesburg," 4.

¹⁶ Mokgethi, "Defining Ukuthwasa as a Pedagogy: An Autoethnographic Exploration into the Knowledge Acquisition Process of Ukuthwasa at a Training School (Lefehlo) in Soweto, Johannesburg," 4.

¹⁷ Booi, "Three Perspectives on Ukuthwasa: The View from Traditional Beliefs, Western Psychiatry and Transpersonal Psychology," 9.

¹⁸ Booi, "Three Perspectives on Ukuthwasa: The View from Traditional Beliefs, Western Psychiatry and Transpersonal Psychology," 9.

¹⁹ Booi, "Three Perspectives on Ukuthwasa: The View from Traditional Beliefs, Western Psychiatry and Transpersonal Psychology," 9.

²⁰ Booi, "Three Perspectives on Ukuthwasa: The View from Traditional Beliefs, Western Psychiatry and Transpersonal Psychology," 9.

²¹ Robert Thornton, "The Transmission of Knowledge in South African Traditional Healing," *Africa* 79, no. 1 (2009): 17–34, 27.

²² Thornton, "The Transmission of Knowledge in South African Traditional Healing," 28.

²³ Bakow and Low, "A South African Experience: Cultural Determinants of Ukuthwasa," 436.

African legal system has had to grapple with the recognition of traditional practices such as *ukuthwasa* within the broader framework of constitutional rights and modern medical practices. In a bid to bridge the gap, section 4 of the aforementioned Act establishes the Interim Traditional Health Practitioners Council of South Africa (from hereunder referred to as “The Council”). This Council is tasked with overseeing the registration and conduct of traditional healers.²⁴ The framework aims to protect both practitioners and the public, ensuring that traditional healing practices are carried out ethically and safely.²⁵ In July, 2024, the publication of the draft regulations to further regulate and guide traditional health practitioners was embraced by the Council.²⁶

The abovementioned integration of traditional healing within the national healthcare system reflects a broader recognition of its value to indigenous South Africans. The co-existence of traditional and modern medical practices highlights the country’s diverse cultural heritage and the ongoing relevance of traditional knowledge. However, objectively speaking, *ukuthwasa* also tends to face scepticism from several communities of persons with different cultural and religious values and systems.²⁷ The diversity that most communities form in terms of religious and cultural practices warrants that a difference of opinion and lack of recognition can be faced by those subscribed to African cultural practices.²⁸ It has been argued that the scepticism stems from the fear of potential exploitation of vulnerable individuals.²⁹ While the regulatory framework established seeks to address these challenges by ensuring that practitioners are sufficiently trained and that they adhere to the ethical standards mandated, insufficient regulation is rendered when it comes to navigating aspects of modern society such as the corporate environment. The judicial precedent discussion to follow will contextualise this assertion.

Ukuthwasa is a deeply significant cultural practice in South Africa, embodying the intersection of spirituality, healing and tradition. As South Africa continues to navigate the balance between tradition and modernity, *ukuthwasa* remains a fundamental testament to the enduring power of cultural heritage. It is therefore pertinent that this research examines the impact that the inclusivity of these cultural practices has on the South African corporate environment.

A Human Rights-based Approach

The South African Constitution is the Supreme Law of the land.³⁰ It provides comprehensive frameworks for the protection and promotion of fundamental human rights. Central to the Constitution is the Bill of Rights, which enshrines the rights of all persons. Three sections of the Constitution that are particularly relevant to the practice of *ukuthwasa* are Sections 15, 30 and 31. Section 15 guarantees freedom of religion, belief and opinion, while sections 30 and 31 provide for cultural religious and linguistic communities to enjoy their culture and practice of religion.

The provisions of Section 15 ensure that individuals and communities alike can freely engage in religious and spiritual practices, including *ukuthwasa*. The provisions of sections 30 and 31, further guarantee and endorses the rights of individuals to engage in cultural practices like *ukuthwasa*, thereby awarding constitutional recognition and confirmation of a valuing system of South Africa’s cultural diversity. It is imperative to note that, while the Constitution protects and promotes cultural practices, it also requires that these rights be balanced against fundamental rights and societal interests. Section 36 of the Constitution provides for the limitation of rights. It states that rights may be limited to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.³¹

²⁴ "Draft Regulations to Help Regulate Registering Traditional Health Practitioners," SAnews, accessed August 14, 2024, <https://www.sanews.gov.za/south-africa/draft-regulations-help-regulate-registering-traditional-health-practitioners>.

²⁵ "Draft Regulations to Help Regulate Registering Traditional Health Practitioners."

²⁶ "Draft Regulations to Help Regulate Registering Traditional Health Practitioners."

²⁷ J Sobiecki, "The Intersection of Culture and Science in South African Traditional Medicine," *Indo-Pacific Journal of Phenomenology* 14, no. 1 (2014), 17.

²⁸ Sobiecki, "The Intersection of Culture and Science in South African Traditional Medicine," 17.

²⁹ Sobiecki, "The Intersection of Culture and Science in South African Traditional Medicine," 19.

³⁰ The Constitution of the Republic of South Africa, Act 108 of 1994.

³¹ Sections 10 and 36 of The Constitution of the Republic of South Africa.

Section 23 of the Constitution guarantees the right to fair labour practices. This provision ensures that all workers have the right to fair treatment in the workplace, which includes protection against unfair dismissal, the right to join trade unions and the right to collective bargaining.³² The right to fair labour practices is closely linked to the dignity and equality of workers.³³ It aims to ensure that they are treated justly in all aspects of their employment.³⁴ Additionally, this right can intersect with the right to cultural practices, as enshrined in Section 31 of the Constitution, which protects the rights of individuals to enjoy their culture, practice their religion and use their language. In the context of labour practices, this means that the employee's cultural practices must be respected and accommodated where possible by ensuring that they are not unfairly discriminated against or dismissed based on their cultural beliefs and practices. A balance of these rights is essential to maintaining a workplace that respects individual dignity and cultural diversity.

Frictional aspects to consider are aspects such as the right to health and safety as assured in Section 27 of the Constitution.³⁵ The THPA regulates traditional health practices. The signs and symptoms of *ukuthwasa* have been confirmed to manifest into physical ailments that may need healing. The symptoms are described as appearing in various forms, including anxiety, fear, mental confusion, auditory and visual hallucinations, delusions, mood swings and social isolation.³⁶ Additionally, there is a pronounced tendency for aimless wandering; those affected often going missing for days.³⁷ The persons with symptoms of *ukuthwasa* neglect their personal grooming and hygiene, have poor eating habits, and often look and become physically ill.³⁸ Traditional health practices, including *ukuthwasa* would therefore be mandated to aim to ensure that they protect public health and ensure the safety and efficacy of traditional health practices. The legislative provisions of the THPA reflect the need to balance cultural rights with the rights to health and safety, as enshrined in Section 27 of the Constitution. Hinderances to traditional healing practices for persons with symptoms of *ukuthwasa* can be viewed as a contravention of section 27 of the Constitution as the THPA allows for compliant traditional healing practices.

Another critical area is the protection of vulnerable individuals. It is acknowledged that while *ukuthwasa* is a respected cultural practice, there are concerns about the potential exploitation and abuse of persons undergoing the process of *ukuthwasa*, if they are prohibited from undergoing the process. Human dignity is a core human right enshrined in the Constitution.³⁹ It states that all persons have inherent dignity, and they maintain the right to have their dignity respected and protected.⁴⁰ For many individuals undergoing *ukuthwasa*, this practice is central to their identity and sense of self-worth.⁴¹ Recognising and respecting the practice is thus essential to upholding the dignity of those who engage in it.⁴² In the context of *ukuthwasa*, respecting human dignity entails acknowledging the cultural and spiritual significance of the practice, ensuring that individuals can pursue their calling without undue hindrance or discrimination. This approach would align with the Constitutional vision of a diverse and inclusive society where all cultural practices are valued and respected.

METHODOLOGY

This research adopted a doctrinal methodology to explore the tensions between *ukuthwasa* and the legal framework, particularly focusing on conflicts with labour law and other constitutional rights. The doctrinal approach was employed to systematically analyse judicial interpretations, principles and other legal texts in order to understand how labour laws and constitutional rights intersect with traditional

³² Section 23 of The Constitution of the Republic of South Africa.

³³ M. Conradie, "The Constitutional Right to Fair Labour Practices: A Consideration of the Influence and Continued Importance of the Historical Regulation of (Un) Fair Labour Practices Pre-1977," *Fundamina* 22, no. 2 (2016): 163–204, 163.

³⁴ Tamara Cohen, "Understanding Fair Labour Practices-NEWU v CCMA: Notes and Comments," *South African Journal on Human Rights* 20, no. 3 (2004): 482–90, 482.

³⁵ Section 27 of the Constitution states that "Everyone has the right to have access to health care services."

³⁶ Booi, "Three Perspectives on Ukuthwasa: The View from Traditional Beliefs, Western Psychiatry and Transpersonal Psychology," 9.

³⁷ Booi, "Three Perspectives on Ukuthwasa: The View from Traditional Beliefs, Western Psychiatry and Transpersonal Psychology," 10.

³⁸ Booi, "Three Perspectives on Ukuthwasa: The View from Traditional Beliefs, Western Psychiatry and Transpersonal Psychology," 10.

³⁹ Section 10 of The Constitution of the Republic of South Africa.

⁴⁰ Section 10 of the Constitution of the Republic of South Africa.

⁴¹ Bakow and Low, "A South African Experience: Cultural Determinants of Ukuthwasa," 437.

⁴² Bakow and Low, "A South African Experience: Cultural Determinants of Ukuthwasa," 437.

practices such as *ukuthwasa*. The study was designed to scrutinise the legal challenges that arise when employees undergoing *ukuthwasa* seek to harmonise their traditional obligations with the demands of modern labour laws and other constitutional rights. This approach is centred on an analysis of statutory laws, case law and constitutional provisions to identify and understand areas of conflict as well as those areas that create the much-needed accommodations. The data for this research was gathered through the review of legislation, case law, constitutional provisions and legal scholarship. The analysis thereof incorporated the identification of principles at play, identification of conflict and judicial interpretation. The research aims to elucidate the legal and constitutional challenges faced by employees who undergo *ukuthwasa* and to propose recommendations for better accommodation within the labour law framework. The methodology abovementioned, provided a structured analysis of the interactions facilitating the development of solutions that respect both traditional practices and legal standards.

The Clash Between Culture and Other Rights

From the apartheid era, most African indigenous communities were disenfranchised by the apartheid system and policies. This included a prohibition from enjoying their cultural practices, some of which were sacrosanct to them. It is argued that the passing of the Witchcraft Suppression Act was a direct attack on the traditional healers (now traditional health practitioners) and their healing practices. The apartheid government, at some time, had to relocate some African indigenous peoples and place them far from their ancestral land and graves in a bid to farm.⁴³ This resulted in a separation of them from the areas conducive for their traditional practices.⁴⁴

The advent of the new dispensation that ushered in the 1994 and 1996 witnessed the mammoth task of the authors of the Constitution in trying to integrate the numerous diverse communities in South Africa. In other words, the tattered and fractured history of the South African communities had to be mended, including reviving their long forgotten, abandoned and banned traditional practices. Key to the writing up of the Constitution was the Bill of Rights which unveiled the political and civil rights of citizens as espoused in the international and regional instruments. Of note is the cultural rights to belief and practice enshrined in this Constitution.

The meaning of the word ‘culture’ in the context of South Africa still baffles many, especially after years of apartheid where another system dominated. Bennet succinctly gave the meaning and scope of culture to mean,

“High intellectual or artistic endeavour. ... [B]ut 'culture' may also denote a people's entire store of knowledge and artefacts, especially the languages, systems of belief, and laws, that give social groups their unique characters. This meaning would encompass a right to customary law, for customary law is peculiarly African, in contrast with the law of a European origin.”⁴⁵

Deducing from the quote by Bennet, this paper submits that the word ‘culture’ includes tradition and religion. Amongst most South Africans, culture is an indispensable component that is regarded as an anchor in indigenous people’s lives. Culture draws the status and interaction of men, women and children. What is worth noting is that South Africa is a multicultural nation that recognises and promotes diverse ethnic and religious groups through its Constitution and other domestic laws. In that rainbow nation, the state affords every ethnic group freedom and liberty to practice their cultural beliefs and practices without being interfered with by outsiders.

Despite these cultural rights being protected by the Constitution and some domestic laws, some of the cultural practices are no longer beneficial to individuals and societies as they are deemed harmful.⁴⁶

⁴³ Harvey M Feinberg, “The 1913 Natives Land Act in South Africa: Politics, Race, and Segregation in the Early 20th Century,” *The International Journal of African Historical Studies* 26, no. 1 (1993): 65–109, 68.

⁴⁴ Feinberg, “The 1913 Natives Land Act in South Africa: Politics, Race, and Segregation in the Early 20th Century,” 68.

⁴⁵ Francois Venter, “The Protection of Cultural, Linguistic and Religious Rights: The Framework Provided by the Constitution of the Republic of South Africa, 1996,” *SA Publikreg= SA Public Law* 13, no. 2 (1998): 438–59, 451.

⁴⁶ Mikateko Joyce Maluleke, “Culture, Tradition, Custom, Law and Gender Equality,” *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 15, no. 1 (2012):4.

Some of the cultural practices are harmful to the individual rights of men, women and children. This, therefore, dictates that no rights are absolute. Such a tension between cultural rights and other human rights enshrined in the Constitution forms the basis of this paper when it looks at *ukuthwasa*. However, prior to scrutinising *ukuthwasa* further in the context of labour laws, this paper seeks to acknowledge the thorny issue of reconciling the tension between cultural rights and other human rights.

Reconciling tension between cultural rights and other human rights

One leading challenge is trying to strike the balance between two conflicting rights. Wherein such a conflict arises, it is fundamental that it is made clear that customary practices must be interpreted and applied in full view of section 2 of the Constitution which postulates that the “Constitution is the supreme law of the Republic; law and conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.” As can be noted in some cases, the tension between some cultural practices and other rights in the Bill of Rights is inevitable. For instance, the male primogeniture principle is a known customary practice that indicates that, merely the elder son (supposedly the legitimate son) inherits the father’s estate. In the past, the Black Administration Act 38 of 1927 supported this principle. In the new dispensation, the male primogeniture was challenged for discriminating against the girl-child and illegitimate children.⁴⁷ Section 39(2) of the Constitution states that “when interpreting any legislation, and when developing any common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bills of Rights.” Consequently, the male primogeniture principle was found to be enigmatic. The *Bhe* case dealt with this primogeniture principle and declared it unconstitutional.⁴⁸ In this case, the applicant (who had two minor daughters) approached the court challenging the exclusion of her daughters from inheriting from their father’s estate.⁴⁹ This customary practice disqualified the wife of 12 years and the minor daughters and endorsed a more distant male relative of the deceased.⁵⁰ This cultural practice was argued to violate the constitutional rights enshrined in the Bill of Rights and other domestic laws such as discriminating illegitimate children,⁵¹ discriminating based on gender and age.⁵² This case made it clear that the Constitution recognises customary law as long it does not violate directly or indirectly against other rights enshrined in the Constitution. In this case, the male primogeniture principle discriminated against females and undermined the right to dignity and equality thus making it difficult for others to enjoy their constitutional rights.⁵³

In a similar case of *Shibi v Sithole*,⁵⁴ section 23 of the Black Administration of Estate Act⁵⁵ was ruled out to be unconstitutional. In *casu*, there were two children – a boy and a girl. The boy passed on leaving no children and no spouse. Because of the male primogeniture principle, the estate of the brother was now being given to a male relative. The applicant (sister to the deceased) challenged this cultural practice and cited that it discriminated against her based on gender and also infringed on her right to dignity.⁵⁶ The court agreed and declared section 23 to be unconstitutional. Furthermore, it is also argued that tensions between customary practices enshrined in customary law and the rights enshrined in the Bill of Rights at times are not only limited to the Constitution to resolve them. Firstly, the social implications of imposing a fundamental right on an indigenous community ought to be considered.⁵⁷ For instance, enforcing of male primogeniture will disadvantage females and make males superior.⁵⁸ Secondly, it is important to assess the genesis of some legal conflicts to determine which issues are of value compared

⁴⁷ *Bhe v Magistrate Khayelitsha* 2005(1) SA 580 (CC).

⁴⁸ *Bhe v Magistrate Khayelitsha* 2005(1) SA 580 (CC).

⁴⁹ *Bhe v Magistrate Khayelitsha* 2005(1) SA 580 (CC) para 1.

⁵⁰ *Bhe v Magistrate Khayelitsha* 2005(1) SA 580 (CC) para 1.

⁵¹ Section 2 of the Children’s Act 38 of 2005.

⁵² Section 9 of the Constitution of South Africa, 1996.

⁵³ *Bhe v Magistrate Khayelitsha* 2005(1) SA 580 (CC) para 29.

⁵⁴ *Shibi v Sithole* 2005 (1) SA 580 (CC).

⁵⁵ Black Administration of Estate Act 66 of 1965.

⁵⁶ *Shibi v Sithole* 2005 (1) SA 580 (CC) para4c.

⁵⁷ *Shibi v Sithole* 2005 (1) SA 580 (CC) para33.

⁵⁸ *Shibi v Sithole* 2005 (1) SA 580 (CC) para33.

to others. These two ways provided intelligent ways of resolving the standing conflict between cultural practices and rights against unfair discrimination.

***Ukuthwasa* and Labour Laws**

South Africa accommodates eleven (11) official languages, with diverse cultural groups that practice different cultural practices. Inevitably, such diversity is characterised by multiple beliefs, traditions and cultures. Again, inevitably, such diversity ignites pandemonium within a community, and the workplace environment is not excluded from this communal classification. Such a rich and diverse nation introduces thorny and unique challenges within the labour sector. Even though the South African Constitution promotes and protects diversity in all its senses, it is a mammoth task to align the labour laws with the multiple expectations of numerous cultural groups for the employees and employers. One cultural practice that has caused such conflicts and debates is *ukuthwasa*.

Employee seeking leave to undergo training as a traditional health practitioner

It is now common cause that in South Africa, most employees resort to consulting traditional health care practitioners whenever they encounter challenges and/or for their ailments.⁵⁹ This is respected as employees will be upholding their right to religion and culture as provided for in the Constitution. Unfortunately, consultation of traditional health care practitioners is not incorporated in the Basic Conditions of Employment Act (from hereunder referred to as “The BCEA”).⁶⁰ A delicate situation is created for employers to respect the cultural and religious rights vis-à-vis labour laws when one is expected to produce proof of medical report to obtain approval for sick leave. The paper will look at various case laws to see how the courts resolved such tensions.

***Kievits Kroon Country Estate (Pty) Ltd v Mmoledi and Others*⁶¹**

A challenge that can arise in the workplace is when an employee asks the employer to issue out leave days to enable him or her to undergo *ukuthwasa*. On one hand, the employee raises a genuine cultural practice that is highly essential to their wellbeing. On the other hand, the employer may deem this minor as they do not subscribe to the cultural practice. The leading case of *Kievets Kroon Country Estate (Pty) Ltd v Mmoledi and others*⁶² (from hereunder referred to as “The Kievits Kroon case”) provided context to this complex situation. In the matter, an employee applied for a month’s leave (not paid) to undergo *ukuthwasa*, from 6 June to 8 July 2007. In the application, the employee attached all relevant documents for this cause including a letter from the traditional health care practitioner. In addition, the employee submitted it to the employer that her failure to undergo this cultural practice would mean her ultimate death. This leave application was not approved but the employee proceeded to undergo the cultural practice without authorisation. It is because of this that a disciplinary hearing was held. Consequently, the employee faced charges of insubordination and was dismissed thereafter. Unhappy with the outcome, the South African Commercial and Catering Allied Workers Union supported the dismissed employee and approached the Commission for Conciliation, Mediation and Arbitration (from hereunder referred to as “the CCMA”).

Pursuant to the CCMA processions and unhappy with the CCMA outcome, the employer sought legal action. The issue brought before the court was whether the employee’s actions were justifiable. It is debatable on whether the courts are better equipped to address such a belief. South African courts and the legal system are based on and informed by Roman-Dutch laws that regard some beliefs like witchcraft as unreasonable.⁶³ In other words, this paper argues that western culture is more revered in South African laws than indigenous African culture. Thus, an objective decision would be to adjudicate on the reasonableness of the employee in question rather than focusing on the belief itself. In consideration of

⁵⁹ Mothibe and Sibanda, “African Traditional Medicine: South African Perspective,” 6.

⁶⁰ Act 75 of 1997.

⁶¹ *Kievets Kroon Country Estate (Pty) Ltd v Mmoledi and others* [2014] 1 All SA 636 (SCA).

⁶² *Kievets Kroon Country Estate (Pty) Ltd v Mmoledi and others* [2014] 1 All SA 636 (SCA).

⁶³ S. L. Kugara, P. E. Matshidze, and V.O. Netshandama, “A Critical Evaluation of Cultural Defence of Witchcraft in Zimbabwe and South Africa,” *Journal of Gender, Information and Development in Africa (JGIDA)* 7, no. 1 (2018): 105–24, 124.

the given facts relating to the belief and cultural subscription of the employee in question, the court ruled out that the actions of the employee and her belief were reasonable.

A clear look at the case shows that the employer placed more focus on the cultural practice with no due regard for the employee's rights. In the case of the *MEC for Education, Kwazulu-Natal and Others v. Pillay*,⁶⁴ the court noted that wherein employers are confronted by a cultural excuse from an employee, they ought to emulate diversity by gauging the authenticity of the alleged cultural practice.⁶⁵ By this, the employer should check if the employee is acting in good faith vis-à-vis the cultural practice they subscribe to.⁶⁶ In the Kievits Kroon case, the employer did not take into account the position and plight of the employee and let alone regard the authenticity of the cultural practice raised. In other words, the employer trivialised the reasons of the employee, including the risk of death, instead of considering carefully the employee's rights and accommodating her. In this way, this paper challenges and cautions the employers to adopt broader strategies when approaching the employees' wellbeing and health before declining requests for leave, especially where cultural practices that are regarded sacrosanct are concerned.

The questioning of the certificate by the traditional health care practitioner is not a central issue for now. However, if the practitioner in question is registered under the Act it gives some leverage.⁶⁷ The mere fact that we are in Africa, warrants it that employers ought not to be parochial to unique African indigenous knowledge systems. The latter does not entail that they should implement and accommodate any and all practices. However, it is imperative that there be a reasonable accommodation of the beliefs of African employees working in African-based organisations. The aforementioned criteria of gauging authenticity provided by the MEC case⁶⁸ would be able to inform the aspects of "reasonable accommodation". This paper argues that it would be reasonable for an African employee who believes and subscribes to the practice of *ukuthwasa* to consult a traditional health care practitioner and receive a letter (medical certificate) from them. In the Kievits Kroon case, the employer should have engaged with the employee if they deemed the medical certificate inappropriate but not harshly deny the leave as it violated her right to exercise her cultural practice and to seek medical care.

Building Construction & Allied Workers Union of Zondi and Kusile Civil Works Joint Venture.⁶⁹

Another similar case to the Kievits Kroon case is the above-mentioned case where an employee was dismissed for being absent for the purposes of attending to their calling to *thwasa*.⁷⁰ In this case, the arbitrator noted that it was justifiable and reasonable for the employee to have been absent from work for the purposes of visiting a traditional health care practitioner. Also, such a visit was taken crucial as it entailed the employee's cultural subscription. Rights to religion and culture were insisted on as fundamental constitutional rights and had to be respected.⁷¹ This judgment buttressed the view that South African courts promote and respect the employee's rights to religion and culture. On this basis, employers ought to learn from this judgment and value the cultural and religious views of their different employees. Moreover, they ought to ensure that workplace education vis-à-vis cultural practices is given to ensure that employees do not dishonestly use culture as a scapegoat thereby denting the employer-employee trust.

The Auto Tyres initiate dismissed for wearing beads and white paint to work

On 24 September, annually, different ethnic groups in South Africa celebrate Heritage Day. On or around this annual day, most employees and employers attend to work wearing their different cultural clothing remembering and celebrating their cultural identities and freedom. However, precedent has shown that the challenge comes to the fore when, on a normal working day, other than Heritage Day, an employee

⁶⁴ *MEC for Education, Kwazulu-Natal and Others v. Pillay* 2008 (1) SA 474 (CC).

⁶⁵ *MEC for Education, Kwazulu-Natal and Others v. Pillay* 2008 (1) SA 474 (CC) para 13.

⁶⁶ *MEC for Education, Kwazulu-Natal and Others v. Pillay* 2008 (1) SA 474 (CC) para 13.

⁶⁷ The Traditional Health Practitioners Act 22 of 2007.

⁶⁸ *MEC for Education, Kwazulu-Natal and Others v. Pillay* 2008 (1) SA 474 (CC) para 13.

⁶⁹ *Building Construction & Allied Workers Union of Zondi and Kusile Civil Works Joint Venture* (2013) 34 ILJ 2395 (BCA).

⁷⁰ *Building Construction & Allied Workers Union of Zondi and Kusile Civil Works Joint Venture* (2013) 34 ILJ 2395 (BCA) para1.

⁷¹ *Building Construction & Allied Workers Union of Zondi and Kusile Civil Works Joint Venture* (2013) 34 ILJ 2395 (BCA) para24c.

attends to work in their cultural clothing. A leading newspaper article trended in 2013 when a traditional health care practitioner initiate, a general worker at Auto Tyres, was asked to leave the premises of work (allegedly dismissed) for putting on a white head gear, and traditional beads and painting his face with white paint.⁷² The employee is believed to have been undergoing *ukuthwasa* after he had previously been unable to walk and suffered several asthma attacks. The manager at Auto Tyres, cited that the employee was not dismissed but was offered some time off to “sort out his image” since their company operates under strict guidelines to preserve their integrity. The manager also made the assertion that customers had raised concerns regarding this employee’s dress code.

The point of contention in such a case would be, whether such a denial to wear cultural clothing at work would be a violation of the employee’s rights to cultural practices and expression. In answering this, one would need to know the company policy regarding dress codes. Also, the key to the answer would be to verify whether the employee was aware of this policy. One would be interested to know that if in case the employee was aware of such a policy and did he at any moment seek permission from the employer to dress in that way citing his cultural belief.

The above are critical questions that need to be answered before one can say the alleged dismissal was a violation of the employee’s cultural rights. It should be made clear that employees and/or employers who fail to understand and strike a balance between the employee or employer’s right of culture and religion, and workplace obligations will always see themselves wanting when labour laws are presented before them. In some instances, some clothing is key as it serves as personal protective equipment (PPE) worn to diminish hazards that may make employees susceptible to injuries. Cases of this nature would not allow an employee to be on the work premises without such protective gear. This can cause the right to culture to be limited under section 36 of the Constitution.⁷³

Discussion Summary

This study has explored the course interplay between the African cultural practice of *ukuthwasa* and South African labour laws. It highlights the tensions that arise when employees seek to engage in this practice within the modern workplace. This spiritual calling to become a traditional healer, often requires extended leave for training, which may conflict with workplace obligations. Through the examination of the judicial precedent, the study illustrated how the right to practice one’s culture sometimes clashes with labour regulations, particularly when unique accommodations are sought by the employees. The study further revealed that while western religious and cultural practices have gained more recognition and accommodation within labour frameworks, *ukuthwasa* and other indigenous practices still face significant challenges in achieving similar acceptance. The argument emphasised on in this research is that there exists a diverging interplay of rights and interests. Employees’ cultural rights often stand at significant odds with the employers’ interests in maintaining workplace productivity. However, it is submitted that despite this, the accommodation of indigenous cultural practices, like *ukuthwasa*, must be considered. Critical thinking would have it that this accommodation is within the bounds of reasonableness and that the approved accommodations do not undermine the essential functions of the workplace.

⁷² TimesLIVE, “Sangoma Initiate Dismissed for Wearing Beads, White Paint at Work,” August 5, 2013, <https://www.timeslive.co.za/news/south-africa/2013-08-05-sangoma-initiate-dismissed-for-wearing-beads-white-paint-at-work/>.

⁷³ Section 36 of the Constitution of South Africa, 1996 stipulates that, “(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, considering 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.”*

RECOMMENDATIONS

In a bid to offer development and resolution to the tensions that have been established in this study, recommendations are rendered for consideration through following: (i) improving employer awareness, (ii) implementing tailored mediation mechanisms, and (iii) adopting a reasonableness standard to assess employee requests when they are submitted.

Employer awareness and training would mandate that employers should undergo training on the importance of cultural and religious rights. South Africa's diverse cultural landscape demands a high level of literacy and sensitivity to different practices. If employers understand the significance and process of cultural practices such as *ukuthwasa*, they can approach requests from employees with greater empathy and objectivity. This will in turn, allow for inclusive workplace culture that respects and promotes the rights of all employees, including indigenous people, who are not as well catered to by the westernised corporate practices.

The establishment of a tailored mediation mechanism within the workplace to handle disputes arising from cultural accommodation requests could provide a proactive solution. General mediation processes would not suffice in this instance given the westernised influence of the corporate landscape in South Africa. Rather, a specialised mediator, with the understandings of the cultural rights that are at play in the circumstances would be more appropriate to allow for a balancing of interests by a party who comprehends the clashing interests and rights better.

Lastly, employers should be encouraged to adopt a reasonableness standard when considering requests to be accommodated for cultural practices by employees. The above case discussion of the *Building Construction* matter illustrates the need for the contextually applied reasonableness for a decision that avoids unnecessary legal action that can be costly and time consuming. Within the relevant context, the employer has sufficient reason to allow the employee the necessary permissions to partake in their cultural practices. This would entail a flexible, case by case assessment of how much an employee's participation in *ukuthwasa* (or other cultural practices) impacts business operations. This would also take into account, the duration of leave required, the nature of the business of the employer's company and the employee's role in that company. This standard could considerably allow for accommodations where feasible, without disproportionately burdening the employer.

CONCLUSION

The tensions between *ukuthwasa* and South African labour laws highlight the broader challenges of integrating cultural rights within a modern legal framework. By conscientising the reader of the tensions that exist and dissecting some judicial precedent, this paper emphasises the need for a balanced approach where both employers and employees respect cultural practices while ensuring that these practices align with both fundamental human rights and labour laws. The post- imperial context of South Africa necessitates the restoration and respecting of African cultural practices like *ukuthwasa*. However, it is pertinent that this be done carefully to avoid undermining business operations or the fair treatment of employees. An essential developmental exercise by the employers will be the conscious implementation of pro-African policies that are reasonable and realistically reflect on South Africa's diverse cultural landscape. Employees, in turn, must be responsible in their practicing of cultural rights by ensuring that the practices do not disrupt workplace productivity for which they are mandated.

In conclusion, integrating cultural practices like *ukuthwasa* into the workplace is a complex but necessary endeavour. A human rights-based approach requires that these practices be given their due respect and that they be thoughtfully incorporated into the workplace environment. The path to fully embracing African cultural practices in the workplace is ongoing, requiring deliberate efforts to ensure dignity and fairness for all persons.

BIBLIOGRAPHY

Case Law and Legislation

Bhe v Magistrate Khayelitsha 2005(1) SA 580 (CC).

Building Construction & Allied Workers Union of Zondi and Kusile Civil Works Joint Venture (2013) 34 ILJ 2395 (BCA).

Doctors for Life International v Speaker of the National Assembly 2006 (12) BCLR 1399 (CC).
Kievets Kroon Country Estate (Pty) Ltd v Mmoledi and others [2014] 1 All SA 636 (SCA).
MEC for Education, Kwazulu-Natal and Others v. Pillay 2008 (1) SA 474 (CC).
The Basic Conditions of Employment Act 75 of 1997.
The Children's Act 38 of 2005.
The Constitution of the Republic of South Africa, Act 108 of 1996.
The Traditional Health Practitioners Act 22 of 2007.

Journal Articles, Theses and Online Sources

- Albertyn, Catherine, and Rachel Adams. "Introduction: Special Issue on 'The Covid-19 Pandemic, Inequalities and Human Rights in South Africa', Part 1." *South African Journal on Human Rights* 37, no. 2 (April 3, 2021): 147–53. <https://doi.org/10.1080/02587203.2021.2022771>.
- Bakow, Brianna Rose, and Kathy Low. "A South African Experience: Cultural Determinants of Ukuthwasa." *Journal of Cross-Cultural Psychology* 49, no. 3 (2018): 436–52.
- Booi, Beauty Ntombizanele. "Three Perspectives on Ukuthwasa: The View from Traditional Beliefs, Western Psychiatry and Transpersonal Psychology." Rhodes University, 2004.
- Cohen, Tamara. "Understanding Fair Labour Practices-NEWU v CCMA: Notes and Comments." *South African Journal on Human Rights* 20, no. 3 (2004): 482–90.
- Conradie, M. "The Constitutional Right to Fair Labour Practices: A Consideration of the Influence and Continued Importance of the Historical Regulation of (Un) Fair Labour Practices Pre-1977." *Fundamina* 22, no. 2 (2016): 163–204.
- Cook, Cynthia T. "Sangomas: Problem or Solution for South Africa's Health Care System." *Journal of the National Medical Association* 101, no. 3 (2009): 261–65.
- Decide, Mdhuli Tsetselelani, Vhonani Olive Netshandama, and Pfarelo Eva Matshidze. "Factors That Influence the Uptake of Traditional Medicine for Primary Health Care in Allandale Village." *African Journal of Development Studies* 13, no. 3 (2023).
- Feinberg, Harvey M. "The 1913 Natives Land Act in South Africa: Politics, Race, and Segregation in the Early 20th Century." *The International Journal of African Historical Studies* 26, no. 1 (1993): 65–109.
- Kugara, S L, P E Matshidze, and V O Netshandama. "A Critical Evaluation of Cultural Defence of Witchcraft in Zimbabwe and South Africa." *Journal of Gender, Information and Development in Africa (JGIDA)* 7, no. 1 (2018): 105–24.
- Maluleke, Mikateko Joyce. "Culture, Tradition, Custom, Law and Gender Equality." *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 15, no. 1 (2012).
- Mokgethi, L.E. "Defining Ukuthwasa as a Pedagogy: An Autoethnographic Exploration into the Knowledge Acquisition Process of Ukuthwasa at a Training School (Lefehlo) in Soweto, Johannesburg ." University of Witwatersrand, 2018.
- Mothibe, Mmamoshedi E, and Mncengeli Sibanda. "African Traditional Medicine: South African Perspective." *Traditional and Complementary Medicine* 2019 (2019): 1–27.
- Sobiecki, J. "The Intersection of Culture and Science in South African Traditional Medicine." *Indo-Pacific Journal of Phenomenology* 14, no. 1 (2014).
- Thornton, Robert. "The Transmission of Knowledge in South African Traditional Healing." *Africa* 79, no. 1 (2009): 17–34.
- TimesLIVE. "Sangoma Initiate Dismissed for Wearing Beads, White Paint at Work," August 5, 2013. <https://www.timeslive.co.za/news/south-africa/2013-08-05-sangoma-initiate-dismissed-for-wearing-beads-white-paint-at-work/>.
- Venter, Francois. "The Protection of Cultural, Linguistic and Religious Rights: The Framework Provided by the Constitution of the Republic of South Africa, 1996." *SA Publikereg= SA Public Law* 13, no. 2 (1998): 438–59.

ABOUT AUTHORS

Doctor (Advocate) Stewart Lee Kugara is a Y2 National Research Foundation (NRF) rated scholar – Law and Indigenous Knowledge Systems. He is a postdoctoral fellow at the University of Limpopo, former Senior Lecturer (African Studies and School of Law - UNIVEN) and former adjunct lecturer Monash University, South Africa (Now IIE MSA). He is a former Postdoctoral Fellow: University of Limpopo - DSI/NRF Innovation Postdoctoral Fellowship (2021-3) and The Department of Science and Technology (DST) - National Research Foundation (NRF) Centre in Indigenous Knowledge Systems (CIKS) – UNIVEN - 2020. He is an interdisciplinary, intradisciplinary and multidisciplinary author with academic publications straddling the following areas; African indigenous law, intellectual property, traditional leadership, African traditional health and beliefs, knowledge management, African conflicts management, cultural astronomy, human rights, indigenous customary law, poverty and development studies, African philosophy and cultural philosophy, heritage studies and medical anthropology. He possesses excellent experience in customary legal issues (indigenous knowledge systems), research, community engagement and teaching.

Melisa Chawaremera is the Head of Law at the Independent Institute of Education's IIEMSA campus. She brings a wealth of expertise in legal practice with special focus on Tax Law, Constitutional Law and Administrative Law. As a certified Commercial Forensic Practitioner with the Institute of Commercial Forensic Practitioners, she has made significant contributions to the field, including tax consultancy and pivotal research for a landmark case in a Southern African country in 2014. In 2017, Melisa transitioned from her role as a Forensics Manager with a consulting law firm to fully immerse herself in her passion for legal education. Melisa collaborates with multiple charitable organisations to support children and women in need, aiming to promote social justice. With nearly a decade of experience in *academia*, she is dedicated to educating future legal professionals. Melisa has academic publications in areas including legal research, aspects of teaching and learning, tax law, corporate law and social justice. She has been a delegate presenting at multiple conferences in South Africa and internationally. Melisa supervises and externally marks LL.M papers for the University of Johannesburg and the Johannesburg Business School, further demonstrating her commitment to legal education and research. She possesses an excellent grasp of aspects of social justice and endeavours to further critical discussions to uphold it through creating a deeper understanding of indigenous knowledge systems. She currently holds an LL.M and an LL. B Degree, both from the University of Johannesburg.