

A Critical Evaluation of the Interaction between Sport and Law in South Africa

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Dissertation presented for the degree of Doctor of Laws at
Stellenbosch University



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For conferral of the degree of LL.D in December 2010

Declaration

I, the undersigned, hereby declare that the work contained in this dissertation is my own original work and that I have not previously in its entirety or in part submitted it at any university for a degree.* **

Date:

..... 23/03/10

Note*:

This work was published in September 2009 as the monograph 'South Africa', Supplement 15 in the series Blanpain, R & Hendrickx, F (eds.) *International Encyclopaedia of Sports Law* Kluwer Law International (2009).

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Note**:

The three contributors to this work (whose contributions are clearly indicated where relevant in the text) contributed a total of 15 of the 512 pages of the work in its published form. All other content contained herein is the work of the author, unless indicated to the contrary.

ABSTRACT

This dissertation contains an evaluation of the interaction between law and sport in South Africa. The evaluation includes description of the main areas where laws (in the form of the common law, legislation and the relevant provisions of the Constitution of the Republic of South Africa, 1996) apply to sport, in the contexts of both amateur sport and the fast-developing professional sports industry. Apart from such descriptive content, the dissertation will also critically evaluate the appropriateness of the relevant laws and their application in the often atypical context of sport, as well as the courts' treatment of the relevant legal issues. In the process of providing such critical evaluation, and where relevant, the author includes a comparative analysis of the treatment of relevant legal issues in other jurisdictions (most notably the United Kingdom and European Union, which are especially relevant in light of the application of the 'European model' of sports governance and regulation, which applies to the major sporting codes in South Africa).

In particular, the author critically evaluates the following aspects of the South African jurisdiction's treatment of the application of law to sport:

- The South African system of public regulation of sport by the State (and, specifically, the issue of the race-based transformation of sport, which involves an apparent government-driven agenda and is unique to the South African jurisdiction);
- The courts' treatment to date of the susceptibility of the conduct of sports governing bodies to judicial scrutiny (and of the nature of such bodies as voluntary associations);

- Various aspects related to the application of employment laws to the employment of professional athletes in team sports;
- The application of common law remedies for breach of contract in the professional sports employment context;
- The potential application of the restraint of trade doctrine (in, as the author suggests, an extended form) in the context of the freedom of movement of professional athletes;
- The apparently unsatisfactory state of current South African law in respect of legal protection against commercial misappropriation of aspects of the persona of famous athletes (i.e. in the context of 'image' or 'publicity' rights as recognized in certain other jurisdictions); and
- An evaluation of the extensive protection (especially in the form of specific legislation in South Africa) against ambush marketing of major sporting events.

The author includes some concluding observations regarding the state of South African sports law as compared to other jurisdictions, as well as some comment on expectations for the future development and potential importance of the South African domestic jurisdiction in the application of law to sport.

OPSOMMING

Hierdie tesis bevat 'n kritiese blik op die toepassing van die Reg op sport in Suid-Afrika. Hierdie ondersoek sluit in beskrywing van die vernaamste areas waar die Reg (in die vorm van die gemenereg, spesifieke wetgewing en die relevante bepalinge van die Grondwet van die Republiek van Suid-Afrika, 1996) toepassing vind, in die konteks van beide amateursport sowel as die snel-ontwikkelende professionele sportbedryf. Benewens sodanige beskrywing bevat die tesis ook 'n kritiese ontleding van die gepastheid van die relevante regsbelegings en van hul toepassing tot die dikwels atipiese konteks van sport, sowel as die howe se benadering tot die betrokke regsaspekte. In die loop van sodanige kritiese ontleding, en waar relevant, verskaf die skrywer 'n regsvergelende blik op die benadering tot sodanige regskwessies in ander jurisdiksies (meestal die Verenigde Koningryk en die Europese Unie, welke stelsels veral relevant is in die lig van die toepassing van die 'Europese model' van sportregulering en -bestuur in die vernaamste sportkodes in Suid-Afrika).

In die besonder onderneem die skrywer 'n kritiese ontleding van die volgende aspekte van die Suid-Afrikaanse jurisdiksie se benadering tot toepassing van die Reg tot sport:

- *Die Suid-Afrikaanse stelsel van staatsregulering van sport (en, meer spesifiek, die kwessie van rasgebaseerde transformasie van sport, wat klaarblyklik 'n regerings-gedrewe agenda verteenwoordig en ook uniek is tot die Suid-Afrikaanse jurisdiksie);*
- *Die howe se klaarblyklike benadering tot die vatbaarheid van die optrede van sportbeheerliggame vir geregtelike hersiening (en*

aangaande die aard van sodanige organisasies as vrywillige assosiasies);

- *Verskeie aspekte van die toepassing van arbeidsreg op die professionele sportpersoon in spansporte;*
- *Die toepassing van gemeenregtelike remedies vir kontrakbreuk in die konteks van die diensverhouding in professionele spansporte;*
- *Die potensiele toepassing van die leerstuk van handelsbeperkinge (in, soos die skrywer voorstel, 'n uitgebreide gedaante) in die konteks van die handelsvryheid van professionele sportpersone;*
- *Die klaarblyklik onbevredigende aard van die huidige Suid-Afrikaanse Reg ten opsigte van beskerming teen ongemagtigde kommersiele uitbuiting van aspekte van die persona van bekende sportpersoonlikhede (d.w.s. in die konteks van publisiteitsregte soos erken in sekere ander jurisdiksies); en*
- *'n Ontleding van die omvattende beskerming (veral in die vorm van spesifieke wetgewing in Suid-Afrika) teen lokvalbemarking ten opsigte van groot sportbyeenkomste.*

Die skrywer sluit sekere gevolgtrekkinge in aangaande die huidige stand van Suid-Afrikaanse sportreg vergeleke met ander jurisdiksies, sowel as kommentaar op verwagtinge vir die toekomstige ontwikkeling en potensiele belang van die Suid-Afrikaanse jurisdiksie ten opsigte van die toepassing van die Reg op sport.

A Critical Evaluation of the Interaction between Sport and Law in South Africa

André M. Louw

[This work reflects the applicable law as at 1 May 2009]

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List of Abbreviations

ACB	Australian Cricket Board
ACP	African, Caribbean & Pacific countries (signatories to the Cotonou Agreement, 2000)
ADR	Alternative Dispute Resolution
ASA/ASASA	Advertising Standards Authority of South Africa
BCCI	Board of Control for Cricket in India
BCEA	Basic Conditions of Employment Act, 75 of 1997
CAF	Confederation of African Football
CAS	Court of Arbitration for Sport
CCMA	Commission for Conciliation, Mediation and Arbitration
CIPRO	Companies and Intellectual Property Registration Office
CSA	Cricket South Africa (Pty) Ltd
EC	European Commission
EC Act	Electronic Communications Act, 36 of 2005
EC Treaty	European Community Treaty
ECB	England & Wales Cricket Board
ECJ	European Court of Justice
EEA	Employment Equity Act, 55 of 1998 (depending on context)
EEA	European Economic Area (depending on context)
EU	European Union
FIA	Federation Internationale de l'Automobile
FICA	Federation of International Cricketers' Associations
FIFA	Federation Internationale de Football Association
GCC	Global Cricket Corporation
IAAF	International Association of Athletics Federations
ICASA	Independent Communications Authority of South Africa
ICC	International Cricket Council

ICL	Indian Cricket League
IOC	International Olympic Committee
IPL	Indian Premier League (franchise cricket tournament)
IRB	International Rugby Board
ISGB	International Sports Governing Body
JSE	Johannesburg Stock Exchange
LRA	Labour Relations Act, 66 of 1995
NFD	National First Division (association football professional league)
NOCSA	National Olympic Committee of South Africa (replaced by SASCO in 2004)
NZC	New Zealand Cricket
PAJA	Promotion of Administrative Justice Act, 3 of 2000
PCA	Professional Cricketers' Association (UK)
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000
PFA	Professional Footballers' Association (UK)
PSL	Premier Soccer League
RFU	Rugby Football Union (UK)
RWC	Rugby World Cup
SABC	South African Broadcasting Corporation
SACA	South African Cricketers' Association
SAFA	South African Football Association
SAFPU	South African Football Players' Union
SAIDS	South African Institute for Drug-free Sport
SAIIPL	South African Institute for Intellectual Property Law
SANZAR	South Africa New Zealand Australia Rugby Ltd
SAREO	South African Rugby Employers' Organisation
SARPA	South African Rugby Players' Association
SARU	South African Rugby Union (formerly South African Rugby Football Union)

SASC	South African Sports Commission (since replaced by SASCOG)
SASCOG	South African Sports Confederation and Olympic Committee (or the 'sports confederation')
SASRE	Safety at Sports and Recreational Events Bill, 2005
SLASA	Sports Law Association of South Africa (disbanded in 2008)
SRSA	Sport and Recreation South Africa (government department of sport)
UCBSA/UCB	United Cricket Board of South Africa
UK	United Kingdom
UNESCO	United Nations Educational Scientific and Cultural Organization
WADA	World Anti-doping Agency
Zadna	The .za Domain Names Authority (the organisation that oversees all South African .za top level domain (TLD) names on the internet)
ZAR	South African Rands (official currency – at the time of writing approximately ZAR 9 to the US\$ - source: South African Reserve Bank - http://www.reservebank.co.za , 15 April 2009)

In the footnotes:

All SA	All South African Law Reports
BALR	Butterworths Arbitration Law Reports
BCLR	Butterworths Constitutional Law Reports
BLLR	Butterworths Labour Law Reports
CC	Constitutional Court
ILJ	Industrial Law Journal
LAC	Labour Appeal Court
LC	Labour Court
SCA	Supreme Court of Appeal

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A Critical Evaluation of the Interaction between Sport and Law in South Africa

Andre M Louw

GENERAL BACKGROUND

§1 Law in South Africa

1 South Africa has a mixed or hybrid legal system, which consists of (and displays strong influences from) principles of Roman Dutch law, the English common law, and (to a lesser extent) African customary law. Law is un-codified, and common law principles are largely given substance through the means of statutory interpretation and a system of judicial precedent.

2 The supreme law of the country is embodied in the 1996 Constitution,¹ and any law or conduct inconsistent with its provisions is invalid.² This displays a marked departure from the system of parliamentary supremacy which characterized the South

¹ The Constitution of the Republic of South Africa, 1996, hereinafter referred to as 'the Constitution'. The text of the Constitution is available on the web site of the South African Constitutional Court, at <http://www.constitutionalcourt.org.za/site/theconstitution/thetext.htm>. The final Constitution was drafted by the Constitutional Assembly in accordance with Chapter 5 of the interim Constitution (Act 200 of 1993), which in turn was a product of the negotiations conducted by the Multi-Party Negotiation Process at the World Trade Centre in Johannesburg in 1993 (which prefaced South Africa's peaceful transition from the Apartheid state to a constitutional democracy). In what has been referred to as a 'jurisprudentially unique and comprehensive judgment' by the Constitutional Court of 6 September 1996, the text of the final Constitution was referred back to the Constitutional Assembly for reconsideration because it did not comply in every respect with the constitutional principles contained in Chapter 4 of the interim Constitution. The text was subsequently certified by the Constitutional Court on 10 December 1996 (see *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 BCLR 1 (CC)). For more on the Constitution, see Devenish, G E 'Constitutional Law' in Joubert et al *The Law of South Africa* 1st Reissue Vol. 5 Part 3; Woolman, S, Roux, T & Bishop, M (eds.) *Constitutional Law of South Africa* Juta Law electronic publication (CD-ROM/online) 2009.

² Constitution sec. 2

African legal landscape following the passing of the Statute of Westminster in 1931 (and which was such a central cog in the passing of abhorrent 'Apartheid' laws and the prolonged maintenance of this perverse system prior to the pre-1994 dispensation).

While a strong component of the checks and balances that are so central to the constitutional democracy is a strong and independent judiciary, a major concern in current political and legal discourse in South Africa at the time of writing relates to the role and function of the courts in respect of a number of high profile matters with political significance.³ Future developments in this regard will be watched with interest.

South Africa enjoys what is commonly considered to be one of the most progressive constitutions in the world, and specifically boasts a progressive and comprehensive Bill of Rights, which guarantees the fundamental rights of all South Africans and affirms the democratic values of human dignity, equality and freedom.⁴ The Bill of Rights⁵ applies to all law, and is binding on the legislature, the executive, the judiciary and all organs of state. It is also binding on natural and juristic persons if, and to the extent that, it is applicable, taking into account the nature of the right and any duty imposed by the right.⁶

³ These centre around the controversial arms deal saga regarding the process of acquisition of arms (primarily of new corvettes and submarines for the navy and new trainer and fighter jets for the air force) by the South African government in 1999 (and the related, high profile corruption trial of the president of the African National Congress and designated candidate for the presidency of the country following the 2009 general elections (held on 22 April 2009), which charges were controversially dropped by the National Prosecuting Authority on 6 April 2009 following representations by the accused's legal team which apparently pointed to undue political influence in the prosecution). The interested reader will find a succinct and factual overview of these developments (the effects of which are so central to the current South African political landscape and have impacted significantly on the constitutional order in the post-1994 democracy and, more specifically, the role of the judiciary), in Holden, P *The Arms Deal in Your Pocket* Jonathan Ball Publishers, Johannesburg & Cape Town 2008.

⁴ Constitution sec. 7(1)

⁵ As contained in chapter 2 of the Constitution. For detailed discussion of the rights contained in the Bill of Rights and case law regarding its interpretation and application, the reader is referred to more specialised texts on the subject - see Currie, I & de Waal, J *The Bill of Rights Handbook* 5th edition Juta & Co Ltd 2005; Cheadle, MH; Davis, DM & Haysom, NRL *South African Constitutional Law: The Bill of Rights* 2nd edition LexisNexis Butterworths 2005; Devenish, G *The South African Constitution* LexisNexis Butterworths 2005.

⁶ Constitution sections 8(1) and (2). Section 8 of the Bill of Rights provides as follows:

'8(1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.

8(2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

8(3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court -

- (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and
- (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1) [the limitation clause contained in the Bill of Rights] ...'

3 The fundamental rights as contained in the Bill of Rights may only be limited in terms of the provisions of the limitations clause contained in section 36 of the Bill of Rights, and any 'limitation' of a right which does not comply with the provisions of this section will constitute an unconstitutional and invalid infringement of the applicable right. Section 36, the limitations clause, provides as follows:

'S 36(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including:

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

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

Every court, tribunal or forum is enjoined to promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation, or when developing the common law or customary law.⁷ Courts are also obliged to consider international law, and may consider foreign law when interpreting the Bill of Rights.⁸ In the past decade following the coming into force of the Constitution in 1996, the courts have increasingly emphasized the need to develop different branches of the common law through the prism

⁷ Section 39(2) of the Bill of Rights provides a vehicle for the 'indirect' application of the Bill of Rights to disputes between private individuals or natural and juristic persons (e.g. contractual disputes), and states as follows:

'When interpreting any legislation, *and when developing the common law* or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights ...' [Emphasis provided]

⁸ Constitution sec. 39(1)

of the foundational values which underlie the Constitution and the Bill of Rights. Accordingly, various aspects of the common law (and especially more open-ended concepts that find application in different contexts, e.g. the concept of public policy or the legal convictions of the community, and the *boni mores* or good morals of society) have now been infused with the values of equality, freedom, dignity, non-racialism and non-sexism.⁹

4 Legal rules originating outside the domestic law of South Africa are mainly found in public international law and the obligations arising from treaties between sovereign states and international organisations such as the United Nations and the International Labour Organisation. On the other hand, the laws of foreign states may be applied in South Africa in certain circumstances – these cases resort under private international law (or the ‘conflict of laws’ doctrine). The basis for the application of public international law is to be found mainly in the provisions of sections 232 and 233 of the Constitution. Section 232 provides that customary international law is law in the Republic unless inconsistent with the Constitution or an Act of Parliament. Section 233 states the following:

‘When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.’

Section 39(1) deals with interpretation of the provisions of the Bill of Rights (which is contained in Chapter 2 of the Constitution), and provides as follows:

‘When interpreting the Bill of Rights, a court, tribunal or forum

a) ...

⁹ See, in respect of the common law of contract, *Brisley v Drotsky* 2002 (4) SA 1 (Supreme Court of Appeal); *Afrox Healthcare Ltd v Strydom* 2002 6 SA 21 (SCA); *Napier v Barkhuizen* 2006 (4) SA 1 (SCA) and *Barkhuizen v Napier* 2007 (5) SA 323 (CC); in respect of the law of delict (tort), see *Carmichele v Minister of Safety and Security & Another* 2001 (4) SA 938 (CC) at par 54; *NK v Minister of Safety and Security* (2005) 26 ILJ 1205 (CC) at 1213-1215

- b) must consider international law, and
- c) may consider foreign law.'

5 The Constitution vests judicial authority in the courts, which are independent and subject only to the Constitution and the law.¹⁰ The judiciary in South Africa is made up of the following courts:¹¹

- The Constitutional Court;
- The Supreme Court of Appeal (formerly the Appellate Division of the High Court);
- The various provincial and local divisions of the High Court (and any high court of appeal that may be established by Act of Parliament);
- Magistrates' courts; and
- Any other court established or recognized in terms of an Act of Parliament.¹²

The Constitutional Court (which consists of 11 judges and is situated on Constitutional Hill in Braamfontein, Johannesburg) is the supreme court in the country, and the only court that may adjudicate disputes between organs of state in the national or provincial sphere¹³ concerning the constitutional status, powers or functions of any of those organs of state or to decide on the constitutionality of any amendment to the Constitution or of any parliamentary or provincial Bill. It is also the court of final instance in deciding whether an Act of Parliament, a provincial Act or conduct of the President is constitutional.¹⁴ The Supreme Court of Appeal (which is situated in Bloemfontein in the Free State province, traditionally the judicial capital of South Africa) is the highest court

¹⁰ Constitution sec. 165

¹¹ Constitution chapter 8

¹² Such other courts that have been established include the different divisions of the Labour Court and the Labour Appeal Court, special income tax courts, the Land Claims Court, the Competitions Appeal Court, the Electoral Court, divorce courts, consumer courts, equality courts and military courts.

¹³ See the discussion in paragraph 30 below regarding the division of powers between national, provincial and local government.

¹⁴ Constitution sec. 167

in all other matters, and has jurisdiction to determine an appeal over any decision of a High Court.¹⁵ In terms of the principle of *stare decisis* (the system of legal precedent), the decisions of the Supreme Court of Appeal are binding on all courts of a lower order, and the decisions of High Courts are binding on all magistrates' courts within the respective areas of jurisdiction of the divisions. In the provincial divisions of the High Court, appeals from the judgment of a single judge may be heard by a full bench of judges, and judgments by a full bench are binding in subsequent matters before a single High Court judge.

6 At the time of writing, a number of important new legislative enactments and amendments to existing legislation, in the form of Bills currently before Parliament, are expected to be passed in the foreseeable future. Other Acts of Parliament were passed recently and have yet to be interpreted and reviewed by the courts in order to determine their reach and application. These Bills and Acts relate to various aspects of South African law and some, more specifically, relate to aspects of the socio-economic development and social transformation programmes, which form such an integral part of the post-1994 constitutional dispensation. Examples are the National Credit Act, 2005, the Consumer Protection Act, 2008,¹⁶ and the very substantial amendments to company and tax law as contained in the Companies Act Amendment Bill¹⁷ and proposed changes to the Income Tax Act respectively. In respect of sport, more specifically, the National Sport and Recreation Amendment Act, 2007 has significantly amended the key piece of sports legislation in South Africa (although these amendments have also not yet, at the time of writing, been the subject of court review). These legislative instruments will be examined or referred to where relevant in the discussion that follows, but it is hoped that future updates to this chapter will be able to examine their impact on South African sport more closely and meaningfully.

¹⁵ Constitution sec. 168

¹⁶ The Consumer Protection Act, 68 of 2008 was signed into law by the President of the Republic on 24 April 2009 and published in the *Government Gazette* on 29 April 2009. The Act will come into force on a date unknown during the course of 2009/10

¹⁷ The new Companies Act 71 of 2008 (*Government Gazette* 32121 of 9 April 2009) has been promulgated, and is to come into force within a period of 12 months (date to be announced in due course).

§2 Sport in South Africa

7 South Africa is often called a 'sports mad nation', which has a proud history of success on the international stage in a number of different sporting codes. This history is tainted, however, by a legacy of political intervention (both pre- and post-1994) and of sport reflecting the wider social milieu of inequalities that exist in the country. While South African teams tasted success in sports such as rugby union and cricket, where the 'Springboks' were consistently rated as amongst the best in the world during the first half of the twentieth century, these teams were predominantly (and often exclusively) made up of 'white' athletes,¹⁸ and largely reflected the racial segregation of South African society under the invidious apartheid policies of the erstwhile nationalist government. As a result, South African sport faced a vicious backlash from governments, federations and governing bodies¹⁹ and individuals²⁰ during the last half of the previous century, which resulted in a sports boycott and isolation on the world stage.²¹

8 The governance of sport, as so many facets of South African life, was essentially racially aligned in a proliferation of 'official' federations and governing bodies representing the interests of specific race groups. Sports bodies representing the interests of 'non-White' athletes had been forced, by the all-pervasive segregationist

¹⁸ While recognising the historical and contemporary difficulties surrounding the potential reification of 'race' as a social or political construct, its use is required in a discussion of the development of sport in South Africa, due to the historical legacy of the Apartheid system and continuing inequalities that exist between different groups (not only in sport but also in society more generally), as well as in light of the pursuit and implementation of policies of racial transformation which have been enforced in South African sport in the democratic order post 1994. The discussion in paras 69-111 below will focus in more detail on the race-based transformation policies that are currently pursued in South African sport (and which policies, rightly or wrongly, have been criticised as perpetuating race consciousness in contemporary South African society).

¹⁹ For example the International Olympic Committee and FIFA, which expelled South Africa in 1976 (following a number of suspensions of the then all-White Football Association of South Africa during the early 1960s – the Confederation of African Football had expelled this same body in 1960). The new, non-racial, SA Football Association (SAFA) was accepted back into FIFA on 3 July 1992.

²⁰ Rugby tours to countries such as Australia, New Zealand and England were disrupted by protest action, and organisations like HART (Halt All Racial Tours) and Campaign Against Race Discrimination in Sport were active in this regard.

²¹ The international condemnation of apartheid culminated in measures to exclude South African athletes (especially the traditional 'white teams' in the major sports of rugby union and cricket) from international competition. Specific measures included the Gleneagles Agreement (Commonwealth Agreement on Apartheid in Sport, 1977) and the International Convention against Apartheid in Sports (1985) – see the discussion by Valerie Collins *Recreation and the Law* E & F.N Spon 1984 at 3-4. For a brief history of the influence of politics in sport in South Africa, see Jarvie in Jarvie, G (ed) *Sport, Racism and Ethnicity* Falmer Press 1991 at 175 – 189; John Nauright *Sport, Cultures and Identities in South Africa* David Philip, Cape Town 1997 at 124 *et seq.*

²¹ For a discussion of developments in South African cricket, see Vahed, G "What do they know of cricket who only cricket know?' Transformation in South African cricket, 1990-2000' *International Review for the Sociology of Sport* 36/3 (2001) 319 at 320 *et seq.*

policies of the National Party government, to develop their own structures and cultures. These bodies were in an unenviable position in respect of their efforts to obtain recognition and to establish power bases in the milieu of South African domestic as well as international sport. Ironically, the very nature of international sports governing bodies in terms of the European model of sport, and one of the prime pillars of their governance structure (namely the principle of a monopolised national recognition system – only one sports federation is recognised per country), served to further exacerbate the problems experienced by 'non-white' athletes in South Africa during the apartheid era. While sports federations were hard at work formulating and enforcing a sports boycott against the 'apartheid teams', new black 'national federations' formed in the post war era could not obtain international status. International federations recognised only one affiliate per country, and recognition in the case of South Africa already belonged to the established 'white' controlling bodies.²² Throughout this period, sport and politics were inextricably intertwined.²³ Apart from international instruments and measures applied to boycott South African teams' participation outside its borders and the frequent political unrest and protests that accompanied its tours on foreign soil, the regime also used sport in the 1970's as a tool to try and regain respectability and reverse the trend towards isolation.²⁴

9 Following South Africa's re-entry into the fold of international sporting competition in late 1991,²⁵ and the first post-apartheid democratic elections in April 1994, the landscape of South African sports governance was predictably characterized by a process of rationalization and unification of the previously racially aligned sports bodies. There was increasing recognition of the need for 'nation-building' also in the context of sport,

²² See Bruce Murray & Christopher Merret *Caught Behind: Race and Politics in Springbok Cricket* Wits University Press 2004, at 67; for discussion on the sports boycott, generally, see 63 *et seq*; Nauright *op cit.* at 124 *et seq*.

²³ For more on the influence of politics in sport in South Africa, see Gouws, J *Sport Management: Theory and Practice* Knowledge Resources 1997 at 184-189; Jarvie in Jarvie, G (ed) *Sport, Racism and Ethnicity* Falmer Press 1991 at 175 – 189; Mpati 'Sport and Politics', in Basson & Loubser *Sport and the Law in South Africa* Butterworths (looseleaf) CH 2-1 *et seq*, John Nauright *Sport, Cultures and Identities in South Africa* David Philip, Cape Town 1997 at 124 *et seq*.

²⁴ John Gemmill *The Politics of South African Cricket* Routledge, London 2004, at 77.

²⁵ The International Olympic Committee readmitted South Africa on 9 July 1991, after the country had been expelled by the IOC in 1970 with a 35:28 vote (the IOC had earlier, in 1964, withdrawn South Africa's invitation to participate in the Tokyo Olympic Games); South African cricketers became the first team to play in official international competition in November 1991, with a hastily organised tour to India to replace the Pakistan team who had withdrawn from their Indian tour due to threats by anti-Muslims.

and of the urgent need to ensure the legitimisation of control over sport.²⁶ This process was especially evident for example in cricket, one of the major sports (and which had also been a specific flashpoint of international controversy during the apartheid years²⁷), where the early 1990s saw the establishment of a new, unified, national governing body, the United Cricket Board of South Africa (or UCBSA).

During this period of rebuilding after 1994, state regulation of sport assumed a more structured guise through the introduction of a White Paper on Sport and Recreation in 1998, which called for new legislation to solidify government's regulatory framework in sport. The establishment of a dedicated government sports Ministry and department illustrated the importance government attached to sport in respect of its social and cultural role in rebuilding a just society under the new democratic dispensation.²⁸ The legislation that followed was the National Sport and Recreation Act²⁹ and the South African Sports Commission Act,³⁰ both passed in 1998.

The discussion in this chapter will not focus on the history of apartheid sport in South Africa or other aspects of the historical legacy in this regard, although sections of the discussion will touch on related matters of relevance to the current state of sports law and the regulation of sport in the country.³¹

10 Up to date statistical information regarding sport in South Africa is not readily available; and some such information as has been compiled for purposes of the sports sponsorship market is not freely available for public consumption. According to figures available for 1999, an estimated total of 8.6 million adults and nearly 3.7 million juniors

²⁶ For a discussion of developments in this regard in SA cricket, see Vahed *op cit*.

²⁷ E.g. see the events concerning the aborted England cricket tour to South Africa in 1968, where the apartheid government objected to the inclusion of 'Coloured' expatriate player Basil D'Oliveira in the English team – see the discussion in Booth *The Race Game: Sport and Politics in South Africa* Frank Cass Publishers, London (1998) 95. The 1980s also saw a number of rebel tours by unofficial foreign teams, which led to a spate of disciplinary action by member boards of cricketing countries. The members of Graham Gooch's 'South African Breweries English XI' of 1982 were banned from Test cricket for three years. The Sri Lankan rebels of 1982/83 were suspended from domestic cricket in any form in their own country for 25 years. The West Indies team, who toured twice in the 1982/83 and 1983/84 seasons, were banned for life (although several players continued their careers in South Africa and England). See Murray & Merrett *Caught Behind* at 208-9.

²⁸ See, generally, Mpati in Basson & Loubser *Sport and the Law in South Africa op cit*.

²⁹ Act 110 of 1998 (discussed *infra*)

³⁰ Act 109 of 1998 (which has subsequently been repealed – see the discussion *infra*)

³¹ For example policies and measures in pursuit of transformation of South African sport post 1994, which are central to many of the facets of public regulation of sport as well as affecting the private governance functions of sports federations, aspects of the employment of athletes in professional sport, etc.

participated in sport in South Africa. At the time it was observed that around 130 different sporting codes are played in the country, and in light of the fact that people often participate in more than one sport, it was estimated that a cumulative total of more than 13 million adults and 7 million juniors participated in sport during that year.³²

A Sport and Recreation South Africa (SRSA) survey of 2005 on participation patterns in sport³³ found that approximately 25% of respondents participated in some form of sport or recreational activity, and that, as could be expected, the highest levels of participation were in the age group 16-25 years of age. Participation in sport was also to a certain extent dependent on living standard, with the highest proportion of participants among the highest living standard measure group.³⁴ From the sample group respondents, it appears that the most popular sports are soccer/football (11% of respondents played the sport, and 61% supported the sport), cricket (1% play, 19% support) and rugby (2% play, 18% support). Of the sample respondents 68% who participated in sport made use of facilities, mainly at schools (33%), municipal sports clubs (31%) and at private paid facilities. Predictably, the white population group (which has historically been a privileged group) showed the highest level of utilization of private paid facilities (44%, as compared to 9.5% amongst the African group).

In 1999 it was estimated that sports contributed around ZAR 15 913 million to the economy of South Africa, and provided jobs for 34 325 full-time, 6 140 part-time and about 8 000 volunteer workers.³⁵ Sport accounted for approximately 2% of the Gross

³² According to the report of the Sports Information and Science Agency (SISA) *A Summary of the Contribution of Sport to South African Society 2000*, at 4. According to the report (at 14) there were an estimated 138 national sports codes in South Africa in 1999, and over 1 000 provincial and/or regional controlling bodies in these sports. At the time of writing an updated study of the impact of sport is in progress (although information in this regard was not forthcoming).

South Africa had a total population of around 44.8 million people in 2001 (according to the report of the SA *Census 2001*, available on the web site of Statistics South Africa at <http://www.statssa.gov.za>). The SISA report contained a further breakdown of levels of sports participation among adults between the different population groups, as follows (classification of 'race' groups used purely for statistical and comparative purposes): Whites – 63% were active in sports; Indians – 41%; Coloureds – 29%; and Blacks – 27%. The report also identified a disparity in participation between adult males and females, namely 43% amongst men and 23% amongst females; and it was estimated that around 60% of children participated in sports.

³³ Sport and Recreation South Africa *Participation Patterns in Sport and Recreation in South Africa 2005*. This survey was undertaken with a sampling frame that consists of 1 000 census enumerator areas across all 9 provinces of the country, and the representative sample of 7 000 adults (16 and over with no upper age limit) was designed to be representative of the total adult population (when weighted, the sample represents 29 446 688 adults). I wish to thank Charl Durand of Sport and Recreation South Africa for providing me with a copy of the 2005 Survey.

³⁴ *Ibid.* at 4

³⁵ SISA *A Summary of the Contribution of Sport to South African Society 2000*, at 5. The horse racing industry is not included in these figures regarding the economic impact of sport.

Domestic-Product (or GDP) of South Africa, which was estimated as ZAR 795 billion for 1999.³⁶ The total contribution of sports controlling bodies to the economy of South Africa during the same year was ZAR 747 million in terms of expenditure and ZAR 260 million in terms of capital expenditure, at macro-sports, national and provincial levels.³⁷

11 As mentioned above, by far the biggest professional team sports are rugby union, association football (or 'soccer' as the game is popularly known in South Africa) and cricket, while the governing body of women's netball (Netball South Africa) recently announced that the sport is planning to turn professional. At the time of writing, the South African national men's rugby team (the 'Springboks') is the reigning 2007 IRB Rugby World Cup champions and is rated no. 2 in the world behind New Zealand in the International Rugby Board's world rankings.³⁸ The national men's cricket team (the 'Proteas') is rated no. 1 in the world in the International Cricket Council's One Day Internationals rankings and ranked no. 2 behind Australia in the Test match rankings.³⁹ The national men's football team ('Bafana Bafana') is rated a rather disappointing no. 72 in the world.⁴⁰ In one of the major sports, rugby union, South Africa boasts the second highest number of registered senior rugby players in the world as well as the largest rugby club in the world.⁴¹ There are approximately 700 professional rugby players in South Africa.⁴² According to the web site of the SA Rugby Players' Association (SARPA),⁴³ its membership has grown since its establishment in 1998 to around 470 professional rugby player members.⁴⁴ According to available information at the time of writing, there are a total of 110 fully professional cricketers in South Africa, of which 15 are contracted

³⁶ *Ibid.* If capital expenditure of ZAR852 million is included, the total contribution of sport to the SA economy in 1999 was ZAR16 765 million, or 2.1% of the Gross Domestic Product.

³⁷ *Ibid.* at 14

³⁸ IRB rankings as on 30 March 2009

³⁹ ICC rankings as on 19 March 2009

⁴⁰ FIFA world rankings as on 11 March 2009

⁴¹ The Stellenbosch University Rugby Club (in Stellenbosch, Western Cape), which boasts around 1 200 members (even though membership is compulsory for residents of the university residences, the club reportedly boasts the most playing members of any rugby club in the world).

⁴² See the article by Mark Keohane 'SA's professionalism promotes mediocrity' *Business Day*, 15 February 2006

⁴³ The registered trade union representing the interests of professional rugby players as employees.

⁴⁴ See the web site of SARPA at <http://www.sarpa.net>

to Cricket South Africa⁴⁵ for service in the national team and 95 are contracted to the franchises in the domestic first class league.⁴⁶ All professional cricketers were members of the SA Cricketers' Association (SACA)⁴⁷ at the time of writing.

According to available information at the time of writing, there are approximately 960 fully professional football players in South Africa (who play in the Premier Soccer League and the National First Division – the registration of 'semi-professional' players in the lower leagues is administered by the SA Football Association). Star players such as Benni McCarthy and Steven Pienaar play for English Premier League clubs while other South African footballers play professional football elsewhere in Europe and Africa.

South African athletes have also been highly successful in individual sports, and the country has produced world champions and top-level competitors in a number of disciplines in recent years. These include golf,⁴⁸ swimming,⁴⁹ athletics,⁵⁰ tennis,⁵¹ motor sport⁵² and other codes.⁵³

12 Income from commercial exploitation of sport is significant in the major professional sporting codes, with especially the sale of broadcasting rights being a major source of income for the relevant governing bodies in the major codes and being seen as critical to the development of such sports.⁵⁴ For example, by far the largest part of the SA Rugby Union's annual income during the last decade has derived from the sale of broadcasting rights in terms of the SANZAR agreement for the Super 14 and Tri-Nations

⁴⁵ The professional arm of the national governing body for the game, which is responsible for the management of the commercial aspects of the professional game.

⁴⁶ Source: e-mail communication from the CEO of the SA Cricketers' Association (SACA), 28 February 2008

⁴⁷ The professional players' association, which is a registered trade union in terms of the Labour Relations Act, 1995

⁴⁸ Where South African professional golfers such as Ernie Els, Retief Goosen, Trevor Immelman and Tim Clark have been multiple winners on the world's major professional tours

⁴⁹ South African male swimmers Ryk Neethling and Roland Schoeman (amongst others) and female swimmers (Penny Heyns and Natalie du Toit) have won multiple medals at international events and have been world record-holders on occasion

⁵⁰ E.g. Zola Budd, Elana Meyer and Oscar Pistorius

⁵¹ E.g. Kevin Curran in the 1980s and Amanda Coetzer, who was a successful female professional tennis player on the international tours during the 1990s

⁵² E.g. Jody Schecter, who was a successful Formula 1 driver in the 1970s and 1980s, and Giniel de Villiers, who won the 2009 Dakar race (which was held on the South American continent due to North African security concerns)

⁵³ South Africa's Sibusiso Vilane became the first black man to climb the seven highest peaks on seven continents (Denali in Alaska, Kilimanjaro in Africa, Aconcagua in South America, Elbroes in Europe, Kosciuszko in Australia, Everest in Asia and Vinson Masif in Antarctica) in May 2007, and the first black man to climb Everest

⁵⁴ See the position paper of the Independent Broadcasting Authority of South Africa (ICASA) on *Sports Broadcasting Rights*, 25 July 2003 (available on the web site of ICASA at <http://www.icasa.org.za>), at 28

competitions.⁵⁵ While sponsorship spend in South African sport in real terms is on a significantly smaller scale than in other jurisdictions such as Europe and the United States, large amounts of money are invested annually in this regard. Expectations are, however, that the current worldwide economic recession will impact negatively on the sports sponsorship market in the foreseeable future.

The 2010 FIFA World Cup South Africa™ and other major events

13 The 2010 football World Cup is scheduled to be played in South Africa from 11 June to 11 July 2010. The tournament will see matches played in 8 of the country's 9 provinces. The host cities for the tournament are Johannesburg, Cape Town, Durban, Bloemfontein, Port Elizabeth, Pretoria, Nelspruit, Polokwane and Rustenburg, and a total of 10 stadia will be used. Five new stadia are being purpose-built for the event,⁵⁶ while five other existing stadia are undergoing extensive upgrading.⁵⁷ According to the schedule for completion of stadia, the 2009 Confederations Cup venues⁵⁸ are to be finished between December 2008 and March 2009, while all 2010 stadia and infrastructure are to be completed by December 2009. At the time of writing, and according to available reports, most stadia are well on their way to timely completion, although some teething problems remain. For example, it was reported in February 2009 that contractors had dismissed 400 striking workers at the Mbombela Stadium in Nelspruit (Mpumalanga province), who, reportedly, were claiming bonus fees in the region of ZAR 70 000 each to return to work. At the time there were serious doubts

⁵⁵ The SANZAR agreement with Rupert Murdoch's News Ltd, which originally ran from 1995-2005 and was worth around US\$550 million for the union, was subsequently renewed for a further five years for US\$320 million. The current SANZAR agreement will expire in 2010, and at the time of writing there are reports that the SA Rugby Union is considering withdrawing from the Super 14 competition upon expiry of this agreement in order to send its teams to compete in the UK's Magners League (with expectations of increased broadcasting revenues as a result of the fact that home and away games for the South African teams would be played in the same time zone) – see the discussion elsewhere in this chapter.

⁵⁶ The Peter Mokaba Stadium in Polokwane (Northern Province), the Greenpoint Stadium in Cape Town (Western Cape), the Mbombela Stadium in Nelspruit (Mpumalanga province), the Nelson Mandela Bay Stadium in Port Elizabeth (Eastern Cape), and the Moses Mabhida Stadium in Durban (KwaZulu-Natal).

⁵⁷ Soccer City (a 94 000 seat stadium) and Ellis Park in Johannesburg (Gauteng province), Loftus Versfeld in Pretoria (Gauteng province), the Royal Bafokeng Stadium in Rustenburg (North West province), and Mangaung Stadium in Bloemfontein (Free State province).

⁵⁸ See the discussion below

about this stadium reaching its July 2009 deadline, as it was nine weeks behind schedule at the time (in part due also to a crane collapse in January 2009, which damaged part of the roof).⁵⁹ Doubts about South Africa's ability to host the event in 2010 have been widely expressed in the international and local media over the last couple of years, and included speculation of talks between FIFA and Brazil for a possible 'plan B' hosting of the event.⁶⁰ It appears, however, that at the time of writing (in early 2009) there is general confidence that preparations are well on track and that no major upheavals are expected. The costs for the staging of an event of this size are of course astronomical (not least being the cost of stadium and infrastructure development and upgrading). The South African government has set aside ZAR 17.4 billion of direct investment in the event over the period of 2006-2010, and it is expected to invest more than ZAR 400 billion in the country's infrastructure during this same period (not all spending related to the event).⁶¹ In addition, funding allocations for delivery of guarantees and programmes include a reported ZAR 1.2 billion for safety and security⁶² and ZAR 2.5 billion for information and communications technology (Johannesburg has been approved as the venue for the International Broadcasting Centre).⁶³ It has been estimated that the economic boost for the South African economy from the event will be in the region of ZAR 21 billion, and that more than 150 000 jobs will be created.

Apart from the large sums of money invested by the South African government and other stakeholders, it is estimated that the cost to FIFA will likely be of the same order of magnitude as the cost of the 2006 event in Germany (i.e. in the region of more than ZAR 5 billion).⁶⁴ It has also been reported that FIFA has set aside the amount of £ 20 million

⁵⁹ See the report entitled 'State of the stadiums' in the *Mail & Guardian*, 27 February 2009 (at 52)

⁶⁰ See e.g. also the report in *Sport and the Law Journal* Issue 2 Vol. 16 (March 2009), 'Sports Law Foreign Update' at 74

⁶¹ From the web site of the government department of Sport and Recreation SA (at www.srsa.gov.za - accessed 9 March 2009)

⁶² See the brief discussion in paras 420-427 below regarding security arrangements for the 2010 FIFA World Cup event

⁶³ *Ibid.*

⁶⁴ From the supporting affidavit by the Deputy Head of the Marketing Legal Department of FIFA (at par. 7.1), filed in support of its application in the matter of *Federation Internationale de Football Association (FIFA) v Metcash Trading Africa (Pty) Ltd* (Gauteng North Provincial Division, case number 53304/07) - see the discussion in par 577 *et seq* below

to be paid to clubs for the services of their national players who will be participating in the 2010 World Cup.⁶⁵

14 For environmental lawyers, it is interesting to note that the South African government's Department of Environmental Affairs and Tourism have embarked on a national carbon offsetting programme for the 2010 FIFA event. The 2010 World Cup is expected to have the largest carbon footprint of any major event, which is estimated will be more than 850 000 tonnes of carbon dioxide equivalent (tCO₂e), with an additional estimated 1.4 million tCO₂e to be contributed by air travel relating to the event. It is estimated that offsetting the domestic carbon footprint of the event (excluding the footprint of international travel) could cost between US\$ 6.8 million and US\$ 12 million. It has been observed that the event provides an opportunity to raise awareness of climate change and sustainability challenges.⁶⁶

15 It is expected that the football World Cup, which is the largest single sporting competition in the world, will provide an opportunity to function as a platform for significant development of sports law in South Africa, in light of the vast array of different legal aspects related to such tournament which have (and will continue to) come to the fore. Just some of these aspects are the following:

Management of broadcasting rights relating to the tournament:

Coverage of the 2006 tournament (held in Germany) reached 214 countries with a cumulative audience of 26.3 billion viewers, and in South Africa alone, the cumulative audience for the 2006 tournament was 104 873 000 viewers (with 988 programmes and a cumulative duration of 1 810 hours and 34 minutes);⁶⁷

⁶⁵ From a report in the *Sport and the Law Journal* Vol 16 Issue 1 (2008) Foreign Update, p 58 (available to subscribers on the web site of the British Association of Sport and the Law at <http://www.britishsportslaw.org>)

⁶⁶ Source: Department of Environmental Affairs and Tourism, Republic of South Africa

⁶⁷ From the supporting affidavit by the Deputy Head of the Marketing Legal Department of FIFA (at par. 6.3 and 6.4), filed in support of its application in the matter of *Federation Internationale de Football Association (FIFA) v Metcash Trading Africa (Pty) Ltd* (Gauteng North Provincial Division, case number 53304/07)

- Management of the licensing and other forms of commercial exploitation of intellectual property rights in respect of the tournament;
- Management of the protection of the rights and interests of the event organisers and official sponsors and other commercial partners to the event (e.g. combating ambush marketing in respect of the event); and
- Major event security arrangements (in light, especially, of the current global terrorism threat which has also touched sport).⁶⁸

No more will be said here regarding the 2010 football World Cup, and assorted legal issues relating to the event will be discussed where relevant throughout this chapter.

16 At the time of writing, South Africa is gearing up to host the 'dress rehearsal' for the 2010 event, the 2009 FIFA Confederations Cup, which is to be held in Johannesburg, Pretoria, Bloemfontein and Rustenburg from 14 to 28 June 2009. The stadia will also be used to host matches in the British and Irish Lions rugby tour to South Africa, which will be in progress during the tournament, with time for pitch recovery allocated between rugby and football matches. At the time of writing, media reports suggest that one of the main concerns regarding the hosting of the upcoming Confederations Cup (apart from the issue of stadium readiness in time for the event) relates to claims by the South African government (and, reportedly, FIFA) that the Local Organising Committee has not done enough to market the event (as well as the 2010 event). At the time of writing, roughly 60 days before the Confederations Cup kick-off, it is reported that ticket sales have thus far been conservative.

17 Other exciting developments regarding major events at the time of writing include the decision to host the 2009 ICC Champions Trophy cricket tournament in South Africa

⁶⁸ Compare the attack on the Sri Lankan national team in Lahore, Pakistan, on 3 March 2009

in September 2009, as well as the decision (announced on 25 March 2009) that the lucrative DLF Indian Premier League (IPL)'s 2009 competition (the second year of the tournament) is to be played in South Africa from 18 April 2009. The tournament will see 59 matches between the franchises being played at six venues throughout the country (with 16 matches scheduled for Durban, with its large ethnic Indian population). The decision to move the IPL outside India was taken following security concerns (as originally scheduled, the tournament would have coincided with the Indian general elections in April 2009, and it is assumed that the recent terrorist attacks on the Sri Lankan cricket team in Lahore, Pakistan and the Mumbai attacks of late 2008 have also been a significant consideration). English and South African cricket authorities were requested to undertake feasibility studies for the hosting of the event, and according to reports it appears that a deciding factor in South Africa's successful bid was the expected favourable weather in South Africa in the months of April and May, as well as the existing infrastructure to host matches and the interest of local fans in the 'Twenty20' format of the game. It was reported that Cricket South Africa is set to be paid in the region of between ZAR 70-90 million for hosting the tournament, and organisers have speculated that spin-offs from the event for the local economy (which are expected to include an estimated 30 000 room nights in local accommodation) will be very lucrative.

A less positive development, which relates to the 2010 FIFA World Cup South Africa™, was the announcement in the week of 23 March 2009 that the South African government had refused the Dalai Lama a visa to visit the country for a scheduled World Cup peace conference along with other Nobel Peace Prize laureates such as Archbishop Desmond Tutu, F.W. de Klerk and Michael Gorbachev. The decision (apparently only the second time ever that a government has refused the Dalai Lama entry to a country, apart from China) has been widely criticised. In what one observer has called a 'spectacular own goal' by the South African government in the run-up to the 2010 football event, the government has been criticised for succumbing to pressure from China relating to bilateral trade agreements between the two countries and for failing to live up to its claimed human rights credentials (especially in light of the fact that, as has been

reported, such credentials featured prominently in South Africa's bid for the 2010 World Cup). The peace conference was subsequently cancelled. It remains to be seen whether these developments will affect the 2010 event in any significant way.

It appears that other 'political' matters in sport in which South Africa (or South Africans) have been involved have also had international repercussions in recent times.⁶⁹

⁶⁹ E.g. it was reported that Malcolm Speed, the former Chief Executive of the International Cricket Council (ICC) had resigned his position because of a continuous dispute with the ICC President, South African Ray Mali, who has been a staunch ally of Zimbabwe Cricket's position in the ongoing developments regarding potential proscriptive action against the national body as a result of the political situation in Zimbabwe, and whose support had enabled Zimbabwe Cricket to maintain its ICC status – see *Journal of Sport and the Law* Issue 2 Vol. 16 (March 2009) at 29.

§3 Sport and the Law in South Africa

18 'Sports law' in South Africa is a relatively new phenomenon, which has only seen any real measure of development in the period following first democratic elections in 1994. This is attributable to a number of reasons, which include the following:

- Due to South Africa's politically inspired isolation from world sport during the 1970s and 1980s, the South African legal system was generally not exposed to the sources of this developing body of laws at international level; for example, disputes in sport arising from participation in international events and foreign leagues, which have been so formative and contributed so significantly to the development of sports law (or a *lex sportiva*) in other systems.
- The nature and characteristics of the major sports in South Africa have also played a significant role in this regard. The major sports (which are also the largest professional sports) are rugby union, football (or soccer) and cricket. While soccer has traditionally been most popular amongst the African section of the population, the sport enjoyed little support from government during the apartheid era. Cricket, a mainly 'white' sport, was a key focus in the backlash against apartheid and also featured prominently in the sporting boycott against South Africa. Rugby enjoyed the same status as cricket, while official recognition of professionalism in the sport is also a very new phenomenon (the International Rugby Board officially sanctioned professionalism only in 1995, shortly after the establishment of the new united national rugby governing body, the South African Rugby Football Union,⁷⁰ in 1992).

⁷⁰ Currently the SA Rugby Union (or SARU)

Accordingly, some of the most important contributing factors that have been so formative in other jurisdictions to the recognition of a branch of the law relating specifically to sport, namely professional leagues and competitions,⁷¹ the influx of large amounts of money from sponsors and other commercial partners (such as broadcasters), as well as exposure and interaction with international sports governing bodies, governments, events and teams, were largely absent from South African sport until the mid-1990s.

19 However, trends in the globalisation of sport, specifically during the last few decades, have also touched South African sport to a significant extent. No longer can a domestic system function in isolation and independent of international developments in the governance and regulation of sport. This is especially clear in light of the very nature of the governance of sport at international level, where international governing bodies such as FIFA exercise their monopoly powers of regulation in diverse territories, often to the attempted exclusion of the application of domestic laws or the interference of governments. Rightly or wrongly, at least one product of this system is that decisions, judgments and actions affecting those governing the sport in one jurisdiction inevitably impacts on the sport in other jurisdictions, to a greater or lesser extent.

20 Commercialisation and the commodification of sport have also necessitated recognition of South Africa's global citizenship on the world stage, especially in light of the continuing trend of new forms of international competition in pursuit of maximizing the 'entertainment dollar' to be earned from especially the sale of broadcasting rights (not only at the level of national teams but increasingly also at the level of provincial or

⁷¹ As mentioned, both rugby union and cricket only embraced professionalism relatively recently (professionalism in international cricket really only gained momentum following the 'Packer saga' in the 1970s, which involved a number of White South African cricketers who were at the time prevented from participating in the International Cricket Council's official Test matches due to the sports boycott – for discussion of events in world cricket at the time, especially in respect of Kerry Packer's 'World Series of Cricket' and its legacy for the professional game, see Simon Rae *It's Not Cricket* Faber & Faber 2001 chapter 14 ('Money Again: Packer and After'), at 243 *et seq*; G. Haigh *The Cricket War: The Inside Story of Kerry Packer's World Series Cricket* Text Publishing Co., Melbourne 1993; *Greig and Others v Insole and Others*; *World Series Cricket (Pty) Ltd v Insole and Others* [1978] 3 All ER 449).

Soccer in South Africa had flirted with professionalism throughout the dark days of Apartheid, but efforts at establishing professional leagues (for example the formation of an African professional league by the anti-apartheid South African Soccer Federation in 1961; the National Professional Soccer League's 'Keg League' sponsored by South African Breweries in 1971) were largely unsuccessful in the circumstances pertaining at the time. The current league, the National Soccer League (trading as the Premier Soccer League or PSL) was formed in 1996.

regional teams or professional franchises), and global corporate sponsorship of sport. Examples of international trends that are increasingly impacting on South African sport include the development of new international competitions (e.g. in rugby, with the Super 12 and Super 14 tournament⁷² and the Tri-Nations tournament involving South African, Australian and New Zealand teams, as well as the recent announcement of South Africa's hosting of the lucrative Indian Premier League franchise competition in 2009); the linking of local clubs and teams with clubs overseas, and increasing athlete migration in the relatively 'free' labour market of international professional sport (e.g. South African football, rugby and cricket players playing in England, Europe, Australia, Japan and elsewhere). Significantly also, South Africa is one of the ACP signatory countries to the Cotonou Agreement with the EU. Accordingly, South African athletes and players stand to benefit from the *Kolpak* ruling of the European Court of Justice. This has increasingly happened in recent years, with South African players especially gaining access to English domestic cricket and UK and European rugby union teams as 'Kolpak players' (although the discussion elsewhere in this chapter will refer to recent developments in these jurisdictions which appear to augur an increasingly restrictive approach to the application of *Kolpak* with a view to limiting the influx of foreign professionals to domestic leagues). By 2010, with the next FIFA World Cup, South Africa would have also hosted, since 1995, world cup tournaments in all three of its major professional sports,⁷³ and it is speculated that cities such as Cape Town may be gearing up to bid to host the remaining jewel in the crown of major international sporting events, the Olympic Games (in 2020).

⁷² The international rugby competition sponsored by Australian media magnate Rupert Murdoch's NewsCorp, and involving provincial or regional rugby teams from Australia, New Zealand and South Africa. The tournament (which commenced in 1995 as the 'Super 10') has been played as the 'Super 12' since 1996, and as the 'Super 14' from 2006, involving two extra teams (one each for Australia and South Africa). For more information on the tournament, visit <http://www.super14.com>.

⁷³ The South African national team (the Springboks)'s victory in the 1995 IRB Rugby World Cup is generally viewed to be one of the most significant 'nation-building' events in the country's post 1994 era, and is soon to be immortalized in the Clint Eastwood-directed film 'The Human Factor', to star Morgan Freeman as Nelson Mandela and Matt Damon as former Springbok captain Francois Pienaar. The production began filming in Cape Town in March 2009 and is scheduled for release in December 2009.

21 Specifically, developments in Europe and the UK in recent times also mirror developments in the globalisation and commodification⁷⁴ of sport elsewhere, and specifically in South Africa. An example of this from English football is comparable to developments in South African rugby. Commercial exploitation of English domestic football through the exploitation of television broadcasting rights to matches was the prime moving force behind the establishment of the FA Premiership league – the prospect of enhanced revenues from television contracts was ‘probably the single most important factor in persuading clubs in the old first division of the Football League to sign up to the new Premier League’⁷⁵. By the 1997/98 season earnings generated by television coverage accounted for approximately 26% of the total income of the Premiership.⁷⁶ In South African rugby, we have seen a similar development in the emergence of Super 12 (and more recently Super 14) rugby. South African rugby received an injection of new life in the 1990s with conclusion of the 10-year SANZAR⁷⁷ agreement with NewsCorp.⁷⁸ This contract, which was worth ZAR 280 million a year (plus an annual increase of 5%) and accounted for approximately 90% of the SA Rugby Union’s annual income,⁷⁹ contributed significantly to the landscape (and survival) of South African rugby in the first decade of professionalism. In South African football, SuperSport (sports content aggregator to major pay-tv broadcaster Multichoice) paid a record ZAR 1.4 billion for the broadcasting rights to the Premier Soccer League in 2007 (a deal which has had important implications, which are discussed elsewhere in this chapter).

22 South African sport has also been touched by a recent development in European professional sport, namely the changing relationship between top clubs and the lower

⁷⁴ On the reciprocal relationship between corporate sponsorships and sport, in the context of the continued internationalisation of sport, see Amis, J & Cornwell, B (eds.) *Global Sport Sponsorship* Berg Publishers, Oxford & New York 2005 at 303 *et seq.*

⁷⁵ Paul Spink and Philip Morris ‘The Battle for TV Rights in Professional Football’, in Caiger & Gardiner *Professional Sport in the EU* at 167.

⁷⁶ *Ibid.*

⁷⁷ South Africa New Zealand and Australia Rugby (Pty) Ltd

⁷⁸ Rupert Murdoch’s media giant and sponsor of the Super 14 and Tri-Nations rugby competitions in which South African, New Zealand and Australian teams are involved.

⁷⁹ As reported by Johan Volschenk *Struggle-Rugby: A Sport in Crisis* 2 ed Solidarity Research Institute (2002) at 18

divisions in football. A growing phenomenon, which is not unknown to baseball in the USA, is that lower division clubs are acting as training and farming (or 'nursery') clubs for the elite clubs that acquire them for this purpose. It is in these lower division clubs that promising players learn their trade, in order to move up to elite competition within this structure.⁸⁰ This also occurs at international level – compare the link between Dutch club Ajax and Ajax Cape Town⁸¹ and, more recently, the academy partnership between South African Premier Soccer League (PSL) club Bloemfontein Celtic and Sporting Club Portugal (which was announced in February 2009). At the time of writing there is speculation that similar developments may follow in respect of domestic cricket franchises (with possible links to be established with city-based franchises in the Indian Premier League, in light of the second season of the IPL which will be played in South Africa in April-May 2009). Proponents of the view that South African professional sport is lagging far behind the multi-billion dollar industries elsewhere should take heed of such developments, in considering the relevance of regulatory developments in other jurisdictions for our burgeoning professional sports industry.

23 There have also in recent times been very visible examples of how sport in South Africa has impacted on world sport and its regulation and governance in other jurisdictions. An unfortunate example relates to the corruption and match-fixing scandal in world cricket, which had its nadir in South African cricket in 2000.⁸² The backlash of

⁸⁰ See Gardiner et al *Sports Law* at 51

⁸¹ Ajax of Amsterdam entered into a franchise agreement, whereby two local Cape Town clubs (Cape Town Spurs and Seven Stars) have merged to form Ajax Cape Town. Ajax took a 51% share in the newly formed club, and will be able to claim first call on its promising young players. In return, the new club is now financially supported and identified by an internationally recognised brand name – see Simon Gardiner 'Quotas in Sport: Some Reflections from Europe', in Le Roux and Cornelius (eds.) *Sport: The Right to Participate and Other Legal Issues*, Selected papers from the Sports Law Conference held at the University of Cape Town, 6-7 February 2003, at 87-8. Manchester United FC is also involved in youth-player development in South Africa, through its representative club FC Fortune in Cape Town (owned by Quinton Fortune, Man. United player) – Ned Kelly (with Eric Rowan) *Manchester United: The Untold Story* Michael O'Mara Books Ltd., London 2003 at 76. Simon Gardiner ('Quotas in Sport' at 87) observes that this trend for European clubs to establish links elsewhere is similar to the established practice in American sports: e.g. the recruitment of players for major league basketball from the Caribbean, and of players for the professional ice hockey league from Canada and Scandinavia.

⁸² The scandal made international headlines following the proven involvement by South African national cricket captain, the late Hansie Cronje, in large-scale and repeated offences involving corruption and 'match fixing', which conduct was held (by the International Cricket Council and the UCB) to constitute conduct 'wholly inimical with the whole ethos of cricket'. For further reading on the 2000 match fixing scandal in cricket, see Deon Gouws '- and nothing but the truth?' Zebra Press, Cape Town 2000; Andre Oosthuizen & Gavin Tinkler *The Banjo Players: Cricket's Match Fixing Scandal* Riverside Publications, Hout Bay 2001; Gardiner et al *Sports Law* 2nd Edition 2001 at 365 et seq; Sir Paul Condon *Report on Corruption in International Cricket* (Report of the

this scandal led to the establishment of a Code of Conduct (Corruption) Commission by the International Cricket Council, and investigations, which involved players and individuals from other cricketing nations, have had a significant impact on the international regulation of the game.⁸³ On a more positive note, South Africa is currently playing a leading role in respect of the legal regulation of ambush marketing associated with sports events. Its legislative framework regarding this issue⁸⁴ is currently considered as world-leading, and other jurisdictions have followed this lead in preparation for major events, such as the ICC Cricket World Cup in the West Indies in 2007.⁸⁵

24 Even though sport in South Africa is part of the global sports system and is increasingly faced with issues regarding interdependency and integration, certain unique features and characteristics of the development of sport (especially professional and elite sports) do however serve to distinguish the South African experience and to call for specialized and context-sensitive treatment of issues that face those who are active in the developing body of sports law internationally. A prime example of such issues is the government-driven race-based transformation policies in sport, which also raise questions regarding a rather unique application of internationally-accepted standards relating to the autonomy of sports bodies and general condemnation in the sporting

ICC's Anti Corruption Unit, April 2001), available online as http://www.icc-cricket.com/corruption/condon_report.html; Judge Edwin L King *Final Report: Commission of Inquiry into Cricket Match Fixing and Related Matters* 2001, available online at <http://www.info.gov.za/otherdocs/2001/kingfinal.pdf>; Qayyum, Justice M.M. *Report of Judicial Commission, Pakistan Cricket Board, Lahore* 1998; Central Bureau of Investigation *Report on Cricket Match Fixing and Related Malpractices*, New Delhi 2000; Simon Rae *It's Not Cricket* Faber & Faber 2001 at 254 *et seq*; Castle, T 'Corruption in International Cricket', in Toomey (ed) *Keeping the Score: Essays in Law and Sport*, Centre for Commercial and Corporate Law, University of Canterbury, Christchurch, New Zealand (2005) at 145-155.

⁸³ An interesting recent development that arose from the ICC's steps to fight corruption, which is akin to eligibility rules in international sport but extend beyond the ambit of such rules in affecting eligibility for competition, is the International Cricket Council's 'Approved List of International Players'. This recent innovation, which amounts to a system of 'black-listing' of offending players, was introduced by the ICC in order to address a perceived regulatory lacuna that has arisen from the haphazard sanctions imposed by domestic judicial bodies in disciplinary actions against players who have contravened the ICC Code of Conduct (e.g. in respect of match fixing and corruption). Apparently, this instrument was felt to be necessary in order to maintain the ICC's control over the integrity of the game in the face of 'unsatisfactory' judicial sanctions (from discussion with senior executive members of the ICC, London, 12 October 2004).

⁸⁴ See par 562 *et seq* below, for discussion of the Merchandise Marks Amendment Act 61 of 2002, which was passed in the run-up to the ICC Cricket World Cup 2003. Further ambush marketing controls are contained in the Safety at Sports and Recreational Events Bill (see section 39; sections 19 and 22), which, at the time of writing, is still to be passed by Parliament. Further special measures are contemplated by means of designated legislation regarding the 2010 FIFA World Cup (e.g. see the 2010 FIFA World Cup South Africa Measures Act 12 of 2006).

⁸⁵ Compare section 25 (2) and (3) of the ICC Cricket World Cup West Indies 2007 Act, 28 of 2006, which was passed by the Parliament of the Republic of Trinidad & Tobago, 1 November 2006. The wording of the relevant sections of this Act is nearly identical to the South African ambush marketing provisions referred to.

community of state intervention in the governance of sport. These issues will, because of their uniqueness to the South African context, be examined in more detail elsewhere in this chapter.

25 - Special recognition of the development of the law relating to sport in South Africa is also important in light of the country's specific role and position on the African continent. South Africa remains an economic powerhouse in Africa and boasts infrastructure that is comparable to many developed countries, although large sections of the population still live in third world conditions. On the sporting front, the country boasts world-class stadia (including, especially, the newly-built and upgraded stadia for the 2010 FIFA World Cup South Africa™) and facilities such as high performance centers and academies; at the same time, the most basic of facilities are largely absent in many previously disadvantaged (especially rural) areas.⁸⁶ Sadly, it appears that South African sport has not yet sufficiently come to grips with the legacy of unequal development, and pervasive problems such as widespread poverty and poor service delivery (especially in rural areas) continue to hamper the quest to promote a culture of mass participation and healthy lifestyles among the masses as well as exploiting the potential for enlarging the pool of talent for sporting success at the higher levels.

Despite these and other problems,⁸⁷ South African sport promises to retain its potential to fulfill an important role in the wider context of regional and international sport. The three major sports are at the time of writing still important 'players' on the global stage in their respective disciplines, with two of the three fulfilling a key role in

⁸⁶ Although, at the time of writing, exciting developments are underway in respect of the development of facilities especially in previously disadvantaged rural areas (e.g. a joint programme between the 2010 FIFA World Cup Local Organising Committee and the national lottery agency to build artificial surface football pitches in all 52 of the SA Football Association (SAFA)'s regions).

⁸⁷ South African national teams in the three major sports enjoyed frequent success in the first decade after readmission. 'Bafana Bafana', the national football team, won the African Cup of Nations tournament in 1996, against some of the powerhouse teams of African football. South Africa not only managed to successfully host its first IRB Rugby World Cup in 1995, the Springboks, the national rugby team, won the tournament by beating the New Zealand All Blacks in the final. The SA national cricket team managed to reach the semi-finals of the ICC Cricket World Cup in 1992, immediately following South Africa's re-admission to world cricket late in 1991, and quickly established itself in the 1990's as one of the top teams in the world. Despite these successes, however, it appears that South African sports (especially at the elite levels) have in the past decade struggled to come to grips with problems in respect of administration off the field of play (see, for example, the discussion by Le Roux, R '2003: *Annus Horribilis* for South African Sport?' *International Sports Law Journal* 2004/1-2 47; and in respect of the problems faced in SA rugby, see 'Turning Buffalo into Businessmen', in Mark Keohane *Springbok Rugby Uncovered: The Inside Story of South Africa's Rugby Controversies* Zebra Press, Cape Town, 2004).

international competition especially in the southern hemisphere and the third (football) having an important potential developmental role on the African continent.

26 'Sports law' in South Africa refers mainly to an *ad hoc* and loosely described system of rules that relate to the application of general legal principles in sports-related cases. There is in fact no special branch of the law relating to sport; such rules that exist have developed on a casuistic basis and are more properly called the application of law to sport, rather than a distinct branch of 'sports laws'.⁸⁸

Accordingly, the fact that this chapter purports to deal with 'sports law in South Africa' is a misnomer to an extent. While dogmatically suspect, such a characterisation does however reflect the reality that sport in South Africa is increasingly becoming a frequent object of scrutiny by lawyers, academics, the judiciary, and (somewhat more controversially) politicians and the legislature. As the professional sports industry is growing in line with developments elsewhere, so the law is increasingly being thrown into the mix to address the plethora of disputes and issues that invariably arise with the influx of money. While amateur and recreational sport has often been the subject of legal action (e.g. over contractual issues,⁸⁹ but most often in respect of constitutional issues regarding the powers of voluntary associations, clubs, etc and in respect of disciplinary action involving participants),⁹⁰ in professional sport, more and more commercial, employment, governance and other disputes are reaching courts and other fora. It is especially in the period since 2000 that South African courts have delivered landmark

⁸⁸ The discussion in this chapter will not touch on the fundamental question of whether there exists a distinct and identifiable legal subject of 'sports law' or whether this merely encompasses the relationship between sport and the law, more generally. For discussion of the divergent views of Grayson, Gardiner *et al* and others, see Tebbutt in Basson & Loubser *Sport and the Law in South Africa* Butterworths (Looseleaf – Service Issue 5, July 2005) 2000 at Ch 3-10. See also Beloff, Kerr & Demetriou *Sports Law* Hart Publishing 1999, at 5; Ken Foster 'Is There a Global Sports Law?' *Entertainment Law* Vol. 2 No. 1, Spring 2003 (Frank Cass Publishers) 1-18.

⁸⁹ Compare the judgment in *Troskie v van der Walt* 1994 (3) SA 545 (O) (judgment reported in Afrikaans), which involved an application for an order of specific performance against an amateur rugby player to play for a specific club and to refrain from playing for any other (interestingly, on the facts it appears that this case involved an incident of 'shamateurism', where an amateur player was paid to play rugby at a time when rugby union was an amateur sport and the International Rugby Board had not yet sanctioned professionalism).

⁹⁰ Commissions of inquiry into the management of sports federations and allegations of corruption have also been appointed periodically; for example the Pickard Commission (which investigated the SA Football Association in 1996) and the Browde Commission (which investigated certain financial and administrative aspects of the SA Rugby Football Union – the appointment of this last commission led to judicial review and the subsequent judgments of the Transvaal Provincial Division of the High Court in *SARFU and Others v President of the Republic of South Africa and Others* 1998 (10) BCLR1256 (T) and the Constitutional Court in *President of the Republic of SA and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) dealt with a number of important issues of administrative law).

judgments in respect of a number of important issues concerning sport and the law (e.g. on the nature of sports governing bodies as associations and judicial review of their decisions,⁹¹ the powers of the President of the Republic to appoint a commission of enquiry to examine the administration of a national sports governing body,⁹² and even what can be described as South Africa's own 'Bosman' judgment⁹³ on transfer rules in professional football⁹⁴), while the Legislature has also increasingly become involved in the regulation of sport (e.g. in respect of racial transformation⁹⁵ and in terms of *ad hoc* measures to address commercial issues such as ambush marketing⁹⁶). Most large law firms have started to incorporate sports law departments (even though these often consist of individuals within the firm who have been involved in one or more sports-related matters, or who happen to have a client with sporting links). The Sports Law Association of South Africa (SLASA) was founded in 2002, but boasted a rather limited membership of academics and practitioners. The organization promised to play an increasingly visible role in respect of interventions in the 'industry' of sport (for example its marketing of an alternative dispute resolution forum for sports bodies made up of experts in the field, and plans to provide an introductory course on relevant legal issues (e.g. negotiating sports contracts, dealing with agents, etc) targeted at young athletes at

⁹¹ Compare *Cronje v United Cricket Board of SA* 2001 (4) SA 1361 (TPD), which is discussed in more detail *infra*.

⁹² *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2001 (1) SA 1 (CC)

⁹³ *ASBL Union Royale Belge des Societes de Football Association & Others v Jean-Marc Bosman* [1996] CMLR 645

⁹⁴ *Coetzee v Comitis and Others* 2001 (1) SA 1254 (C)

⁹⁵ See, generally, the discussion regarding the public regulation of sport, *infra*.

⁹⁶ The Merchandise Marks Amendment Act 61 of 2002 was passed in the run-up to the ICC Cricket World Cup 2003, as a response to the threat of ambush marketing and compliance by South Africa with its obligations (as host of the tournament) towards the International Cricket Council and major commercial partners of the event. This measure was deemed necessary as a response to what came to be known as the 'Cola wars', which took place during the ICC Cricket World Cup in the Asian subcontinent in 1996. While Coca-Cola was a sponsor of the event, hot air balloons were launched at cricket grounds bearing the branding of their rivals, Pepsi, while Pepsi also sponsored a number of participating players. Between that event and the 2003 World Cup, Pepsi had become one of cricket's 'Global Partners', the top bracket of sponsors, by signing a seven-year deal with Rupert Murdoch's Global Cricket Corporation. As Pepsi's conduct has been described – 'the poacher had turned gamekeeper' – and the organisers of the 2003 event were obliged to stamp out ambush marketing in favour of event sponsors such as Pepsi (see Rodney Hartman *Ali: The life of Ali Bacher* Viking 2004 at 417). A Johannesburg businessman felt the sting of measures enforced in terms of this new legislation during the tournament at the match between Australia and India on 15 February 2003, when he was evicted from Centurion stadium for drinking Coca-Cola and refusing a request by security personnel to surrender cans of the soft drink (he was, however, subsequently readmitted to the stadium).

The Australian government enacted similar legislation to deal with unfair ambush marketing in the run-up to the 2000 Olympics. The Sydney 2000 Games (Indicia and Images) Act 1996 outlawed any unauthorised visual or aural representation suggesting a connection with the event – see Gardiner et al *Sport Law* 2001 at 513. Portugal also enacted similar legislation prior to the Euro 2004 football championship.

For more on ambush marketing, see Janet Hoek 'Ambush Marketing' in Amis, J & Cornwell, B (eds.) *Global Sport Sponsorship*. Berg Publishers, Oxford & New York 2005 at 207 *et seq*; Wise & Meyer *International Sports Law and Business* Kluwer Law International (1997), Vol. 3 at 1965 *et seq*. and 2016 *et seq*.

secondary and tertiary education institutions). SLASA was disbanded in 2008 due to an apparent lack of interest from legal practitioners, although the time may be ripe for a similar organization with a more academic or research focus (in line with similar organizations in other jurisdictions) to be established. It is believed that research links with similar organizations in other jurisdictions would be mutually beneficial in the continuing development of international sports law.

27 'Sports law' as a subject of academic legal study has also started to gain a limited foothold in tertiary education – at the time of writing a handful of universities in South Africa has introduced sports law courses as part of postgraduate curricula, and only one university (the University of Pretoria) offers this subject as a distinct field of study at LL.M level. A number of sports law centers or institutes have also sprung up at some universities, although these have yet to produce the volume and quality of research output as their counterparts elsewhere.⁹⁷

28 At the time of writing, two specialist works in the field have been published to date, incorporating contributions from lawyers and academics who are active mostly in other fields of the law, and which deal with sports-related issues, although at a more general level.⁹⁸

⁹⁷ Such as the Asser International Sports Law Centre based in The Hague, and the Football Governance Research Centre of the University of London.

⁹⁸ Basson & Loubser *Sport and the Law in South Africa* Butterworths (Looseleaf) 2000; Cloete, R (ed.) *Introduction to Sports Law in South Africa* 1st Ed LexisNexis Butterworths 2005.

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Constitutional Court of the Republic of South Africa - <http://www.constitutionalcourt.org.za>

Cricket South Africa (Pty) Ltd - <http://www.cricket.co.za>

Department of Labour (government department); employment legislation etc - <http://www.labour.gov.za>

Department of Justice & Constitutional Development (government department); legislation, links to the web sites of the provincial divisions of the High Court of South Africa, etc - <http://www.doj.gov.za>

Department of Tourism & Environmental Affairs (government department) - <http://www.environment.gov.za>

Department of Trade & Industry (government department) – <http://www.dti.gov.za>

Federation Internationale de Football Association (FIFA) - <http://www.fifa.com>

International Cricket Council (ICC) – <http://icc-cricket.yahoo.net>

International Rugby Board (IRB) - <http://www.irb.com>

Local Organising Committee (LOC) for the 2010 FIFA World Cup South Africa™ - <http://www.sa2010.gov.za>

Online news reports (Independent Newspapers Online) - <http://www.iol.co.za>

Premier Soccer League (PSL) - <http://www.psl.co.za>

South African Cricketers' Association (SACA) - <http://www.saca.org.za>

South African Football Association (SAFA) - <http://www.safa.net>

South African Football Players' Union (SAFPU) - <http://www.cosatu.org.za/affiliates/affisafpu.htm> (affiliated to the Congress of South African Trade Unions (COSATU))

South African Institute for Drug-free Sport - <http://www.drugfreesport.org.za>

South African Institute for Intellectual Property Law (specifically SAIPL's alternative dispute resolution forum for .za domain name disputes) – <http://www.domaindisputes.co.za>

South African Revenue Service – <http://www.sars.gov.za> (contains general information on all the forms of taxation, both direct and indirect, that are applicable in South Africa)

South African Rugby Union (SARU) – <http://www.sarugby.net>

South African Rugby Players Association (SARPA) - <http://www.sarpa.net>

Southern African Legal Information Institute; recently reported judgments of the various courts - <http://www.saflii.org.za>

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Extel Industrial (Pty) Ltd v Crown Mills (Pty) Ltd 1999 (2) SA 719 (A) – civil consequences (in contract) of bribery/corruption

Federation Internationale de Football Association (FIFA) & Others v Bartlett & Others 1994 (4) SA 722 (TPD) – delictual claim for unlawful competition (passing off); recognition of the commercial practice of character merchandising

Federation Internationale de Football Association (FIFA) v Metcash Trading Africa (Pty) Ltd (Gauteng North Provincial Division, case number 53304/07) – ambush marketing in respect of the 2010 FIFA World Cup South Africa™ event; application of section 15A of the Merchandise Marks Act, 1941

Federation Internationale de Football Association (Fifa) v. X Yin (ZA2007-0007) – adjudication of domain name dispute regarding 2010 FIFA World Cup South Africa™ by a South African Institute for Intellectual Property Law (SAIIPL) adjudicator

Financial Mail (Pty) Ltd v Sage Holdings Ltd 1993 (2) SA 451 (A) – application of personality rights to a juristic person

Golden Lions Rugby Union & Another v First National Bank of SA Ltd 1999 (3) SA 576 (A) – contract expressly provided to endure in perpetuity or until termination by one party enforced by declaratory order against the other party which had purported to give notice of termination; stadium naming rights (right of publicity contained in a loan agreement in respect of the lease of a rugby stadium)

Golden Lions Rugby Union v Venter (Transvaal Provincial Division Case 2007/2001, 13 February 2000 - unreported) – claim for an order of specific performance against professional rugby player; renewal clause in favour of employing club in player’s contract found to be unenforceable based on the terms of such clause (club could not match e.g. training conditions as offered by a rival club)

Grütter v Lombard & Another [2007] SCA 2 (RSA) – the right of identity and a cause of action for misappropriation of the plaintiff’s name; potential relevance in respect of athletes’ image rights protection

Harmse v City of Cape Town (2003) 24 ILJ 1130 (LC) - application of affirmative action in terms of the Employment Equity Act, 1998

Hawker v Life Offices Association of South Africa 1987 (3) SA 777 (C) – recognition of subjective right to the earning capacity (potential basis for protection of image rights)

Haynes v Kingwilliamstown Municipality 1951 (2) SA 371 (A) – the judicial discretion to order or refuse specific performance as remedy for breach of contract

Highlands Park Football Club v Viljoen 1978 (3) SA 191 (W) – restraint of trade in professional football contract; restriction on competition *per se* illegitimate

Irvin & Johnson Ltd v Trawler & Line Fishing Union & Others [2003] 4 BLLR 379 (LC) – the scope for employer-initiated HIV testing in the workplace in terms of the provisions of the Employment Equity Act, 1998

Jacobs v Old Apostolic Church of Africa and Another 1992 (4) SA 172 (TK) - status of the constitution of a voluntary association

Jockey Club of South Africa v Forbes 1993 (1) SA 649 (A) – compliance with the disciplinary code and constitution of a voluntary association; review power of the High Court over decisions of domestic tribunals

Jockey Club of South Africa v Symons 1956 (4) SA 496 (A) – voluntary association has no power to discipline a non-member

Johannesburg Country Club v Stott 2004 (5) SA 511 (SCA) - status of the constitution of a club as voluntary association; exemption clauses and clubs' liability in tort

Khumalo v Holomisa 2002 (5) SA 401 (CC) – direct application of the Bill of Rights to the common law of delict ('tort'); evaluation of the meaning and content of the personality rights protected by means of the *actio iniuriarum* (or defamation action) in the context of the fundamental right to dignity contained in section 10 of the Bill of Rights

Laugh It Off Promotions CC v. SAB International (Finance) BV 2006 (1) SA 144 (CC) – trade mark infringement claim; satire

Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd (1998) 19 ILJ 285 (LC) – test for unfair discrimination in terms of the Employment Equity Act, 1998

Liberty Life Association of SA Ltd v Niselow (1996) 17 ILJ 673 (LAC) - dominant impression test to determine employment relationship

Lorimar Productions Inc & Others v Sterling Clothing Manufacturers (Pty) Ltd 1981 (3) SA 1129 (T) – court refuses to recognise public knowledge of the commercial practice of character merchandising in the context of determining lawfulness in a passing off claim

Magna Alloys & Research (SA)(Pty) (Ltd) v Ellis 1984 (4) SA 874 (A) – meaning of restraint of trade doctrine in South African law; onus and grounds for challenging the validity of a restraint of trade

Manong & Associates (Pty) Ltd v City Manager, City of Cape Town & Others 2009 (1) SA 644 (EqC) - a juristic person is capable of being unfairly discriminated against on the ground of race (in terms of the application of the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000)

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McCarthy v Sundowns Football Club [2003] 2 BLLR 193 (LC) – peculiarity of sports employment (football); application of labour laws to professional sport; club ordered to provide player with clearance certificate as option did not create obligations for player to enter into new employment contract upon expiry of current (previous) contract

Minister of Finance & Others v van Heerden 2004 (6) SA 121 (CC) – meaning of the substantive right of equality as guaranteed in the Bill of Rights; affirmative action

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Monei and Manning Rangers Football Club, National Soccer League Arbitration (DRC 075) (2006) 27 *Industrial Law Journal* 242 (ARB) – arbitration clause in football players' contract

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Motor Racing Enterprises (Pty) Ltd (in liquidation) v NPS Electronics Ltd 1996 (4) SA 950 (A) – application of the common law defence of the *exceptio non adimpleti contractus* as an excuse for non-performance by a party to a reciprocal contract where the other party to the contract claims performance but has not performed or tendered performance; ambush marketing on the facts

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Nationwide Airlines (Pty) Ltd v Roediger & Another 2008 (1) SA 293 (W) – judicial discretion to order or refuse specific performance of personal services against an employee

Niselow v Liberty Life Association of SA Ltd 1998 (4) SA 163 (SCA) - dominant impression test to determine employment relationship

O'Keeffe v Argus Printing and Publishing Co Ltd 1954 (3) SA 244 (C) – evaluation of the meaning and content of the personality rights protected by means of the *actio iniuriarum* (or defamation action)

PFG Building Glass (Pty) Ltd v CEPPAWU [2003] 5 BLLR 475 (LC) - the scope for employer-initiated HIV testing in the workplace in terms of the provisions of the Employment Equity Act, 1998

Premier Trading Company (Pty) Ltd and Others v Sportopia (Pty) Ltd (218/97) [1999] ZASCA 48 (1 June 1999) – passing off action relating to imported roller skates

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Reddy v Siemens Telecommunications (Pty) Ltd [2006] SCA 164 (SA) - the onus in restraint of trade cases in light of the operation of the Bill of Rights

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Roberts Construction Co Ltd v Verhoef 1952 (2) SA 300 (W) – negative injunction/order for specific performance in case of breach of contract for personal services (non-sports case)

SABC v McKenzie [1999] 1 BLLR 1 (LAC) – dominant impression test to determine employment relationship

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Van Marle v Netherlands (1986) 8 EHRR 483

Victoria Park Racing v Taylor (1937) C.L.R. 479

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PART I ORGANIZATION OF SPORTS

Chapter 1 Public Regulation of Sport

§1 Introduction

29 This section will focus on the public regulation of sport by the state in South Africa. It will proceed, by way of background information, to provide an overview of the system and spheres of government and the functioning of the legislature in South Africa, before the discussion will turn more specifically to sport and the bodies and entities that are active in its regulation and governance.⁹⁹ This section will continue to list the applicable sports-specific legislation which has emanated from the Parliament of the Republic, and to examine recent restructuring of the state's sports regulatory framework as well as recent, very significant, amendments to the most important sports legislation. Finally, the section will focus on detailed discussion of the issue of race-based sports transformation, which pervades nearly all aspects of sports regulation in South Africa and significantly affects the relevant governing bodies' private governance of their respective codes (and the related issue of the application of 'affirmative action' in (professional) sport, which phenomenon impacts significantly on the employment of athletes in professional sport and is unique to the South African jurisdiction, but may hold important implications for other systems).

30 Government in South Africa consists of national, provincial and local spheres, with separation of powers between the legislative, executive and judicial arms of government. Supreme legislative authority at national level resides in Parliament, which has the power

⁹⁹ For the purposes of the discussion in this chapter, I will follow Gardiner *et al*'s distinction between 'governance' and 'regulation' (which will carry the following meanings):

'A simple distinction can be made between sports regulation and governance. Although intertwined, regulation concerns outside supervision of some type, governance concerns the procedures and issues of power within the organisation or body itself.'

(Gardiner, S; James, M; O'Leary, J *et al Sports Law* 2nd Edition Cavendish Publishing, London 2001 at 42).

to make laws for the country in accordance with the Constitution.¹⁰⁰ Parliament consists of the National Assembly (the members elected through a system of proportional representation, for a term of five years) and the National Council of Provinces (consisting of delegates from the provinces, with the aim of representing provincial interests in the national sphere of government). In terms of law making, any Bill may be introduced in the National Assembly and must be referred to the National Council of Provinces for consideration after being passed by the Assembly.¹⁰¹ Bills affecting provinces may be introduced in the Council, and if passed must be referred to the Assembly for consideration. Executive power vests in the Cabinet, which consists of the President of the Republic, the Deputy President and ministers (who are appointed by the President from members of the National Assembly).

The National Assembly is elected by the people and represents the people in ensuring democratic governance in terms of the Constitution, which is the supreme law of the Republic. This function is performed by the Assembly through its powers to appoint the President, to provide a national forum for public consideration of issues, the passing of legislation, and scrutinizing and overseeing executive action (through means of portfolio committees).¹⁰²

The provinces each have their own legislature (which has the power to make provincial laws as well as to pass a provincial constitution, which must be in line with the national Constitution and must be certified as such by the Constitutional Court). According to the Constitution, the provinces may have legislative and executive powers concurrent with the national sphere over a number of areas,¹⁰³ and exclusive competency over a limited number¹⁰⁴ of other areas.¹⁰⁵

¹⁰⁰ The Constitution of the Republic of South Africa, 1996 (which was approved by the Constitutional Court on 4 December 1996 and came into force on 4 February 1997, and succeeded the interim Constitution, the Constitution of the Republic of South Africa Act, 200 of 1993).

¹⁰¹ For more information on the process of the passing of a Bill into law, see the web site of the South African parliament, at <http://www.parliament.gov.za>.

¹⁰² Source: South Africa Yearbook 2004/5, chapter 12: Government – available on the internet at <http://www.qcis.gov.za/docs/publications/yearbook/government.pdf> [last accessed 19 April 2006]

¹⁰³ As set out in Schedule 4 to the South African Constitution, 1996

¹⁰⁴ As set out in Schedule 5 to the South African Constitution, 1996 (and including provincial sport)

¹⁰⁵ Source: South Africa Yearbook 2004/5, chapter 12: Government – available on the internet at <http://www.qcis.gov.za/docs/publications/yearbook/government.pdf> [last accessed 19 April 2006]

Local government consists of 284 municipalities, which are classed as either metropolitan municipalities, local municipalities or district areas or municipalities. Local government focuses on growing local economies and extending the provision of services to previously neglected areas.¹⁰⁶

§2 Government regulation of sport

31 Sport and recreation in South Africa resorts under a Ministry of Sport, with a dedicated government department of sport and recreation (Sport and Recreation South Africa, or 'SRSA') exercising overarching executive power over sport at all levels of participation. Parliamentary oversight is vested in the parliamentary Portfolio Committee on Sport and Recreation, which provides a forum for monitoring the Executive's regulation of sport and recreation in line with government policy as well as exercising an advisory function to Parliament and the Minister in respect of sport and recreation legislation. Recently, the regulatory regime of South African sport was considerably restructured and supplemented by the establishment of a new, non-governmental, body charged with administering high performance sport, the South African Sports Confederation and Olympic Committee (SASCOC). The role and powers of these two regulatory agencies will be discussed below, after a brief examination of the current sports-specific legislation.

32 Lewis & Taylor, in their discussion of the regulation of sport in Europe and the UK, distinguish between 'interventionist' and 'non-interventionist' models of governmental regulation.¹⁰⁷ The authors cite France as an example of the former system (which is common in a number of southern and eastern European states), where sport is seen as a public good and a social service responsibility of the State, and sports organizations are

¹⁰⁶ *Ibid.*

¹⁰⁷ Adam Lewis & Jonathan Taylor *Sport: Law and Practice* Butterworths LexisNexis 2003 5-11. See also the Study on National Sports Legislation in Europe, 1999 (Council of Europe, Strasbourg), discussed below

created and exist by virtue of government license and funding in order to perform their governance functions as agents of the State.¹⁰⁸ In contrast to the interventionist system, the UK has been characterized by far less intervention from government. Historically, the UK government 'has left sport almost entirely alone not only to organize and manage itself, but also to regulate the entire conduct of the sport, including fundamental issues of public interest'.¹⁰⁹ No general 'law of sport' had been enacted (as in countries such as France), and legislation and intervention by government is countenanced only as a last resort in response to a pressing public interest requirement.¹¹⁰ In this latter system, therefore, the control and administration of sport remains essentially a private exercise undertaken by voluntary associations within the framework of the wider regional and global context of governance in a sporting code,¹¹¹ with minimal intervention and regulation from the State.

Recent developments in the European context point towards a recognition of the social function of sport, which is seen as being wider and more 'worthy of protection' than the economic aspects arising from the industry of professional sport. This view, as evidenced in the European Commission's *Helsinki Report on Sport*, has led to an approach for the Commission's function as one of promoting and safeguarding this social role of sport. Accompanied with this approach is the emergence of signs of another strand of policy, with the goals of harmonisation and co-ordination of sports policy among member states of the EU.¹¹²

In respect of such efforts at harmonisation, it is important to identify the different systems applicable in different countries, an exercise that was undertaken in the EU in 1999 through a study by the Council of Europe.¹¹³ Foster describes the study's division of countries as 'interventionist and non-interventionist' systems:

¹⁰⁸ Lewis & Taylor at 6

¹⁰⁹ Lewis & Taylor at 7

¹¹⁰ *Ibid.* Examples of such issues of pressing public interest are child protection, anti-doping, corruption, safety of spectators at events, addressing hooliganism, regulating broadcasting of events of national importance and prestige, etc.

¹¹¹ E.g. in terms of the 'European Model' of sport

¹¹² See Foster in Caiger, A & Gardiner, S (eds.) *Professional Sport in the EU: Regulation and Re-regulation* T.M.C. Asser Press (2000) at 62.

¹¹³ The Study on National Sports Legislation in Europe, 1999 (Council of Europe, Strasbourg)

"Interventionist" is ... a country that has "specific legislation on the structure and mandate of a significant part of the sports movement." The state has a central role ... It endows sports federations with their right to exercise regulatory and disciplinary functions. These are thus public powers that are only delegated to federations so long as they comply with criteria of independence, legality and democracy. The powers can be withdrawn if these criteria are not met or the powers are abused ... Where state intervention is reinforced with state funding, the threat of derecognition is a powerful regulatory tool for the state.

By comparison, non-interventionist states regulate sports federations under the general private law of associations. This allows them greater freedom from state interference but makes them less accountable ... The chief advantage of non-interventionism is said to be greater flexibility. Each sport can adapt its institutions and structures to its own particular needs. Non-interventionist models are more organic, protecting the grassroots of the game and adapting to circumstances rather than being controlled from above. They are said therefore to be more resistant to the state's demands to allocate resources in particular ways such as towards elite sport.¹¹⁴

It would seem that Italy and Belgium are specific examples of a rather interventionist approach to the regulation of sport, which is specifically evident if one examines the regulation of employment of athletes and players in professional sport. Italy adopted a professional sports law in 1981,¹¹⁵ which governs the employment of professional sportspersons. While sport in Belgium displays characteristics of organisation on a predominantly voluntary basis,¹¹⁶ a Professional Sports Contract Act was enacted in 1978 to specifically regulate professional sports employment.¹¹⁷ More recently, Austria passed

¹¹⁴ Foster *op cit.* at 62-63

¹¹⁵ Law 91 of 1981 (Official Gazette 27 March 1981)

¹¹⁶ See Luc Silance 'The Approach to Sports Policy in Belgium' in Caiger and Gardiner (eds.) *Professional Sport in the EU: Regulation and Re-regulation* T.M.C. Asser Press, The Hague 2000 at 268

¹¹⁷ See Valerie Collins *Recreation and the Law* E&FN Spon 1984 at 96. Other jurisdictions have seen similar developments, for example Greece (where the governance and development of professionalism in sport is regulated by Law 879/1979 as supplemented by Law 1958/1991). The Russian Federation has seen limited legislative involvement in professional sport (although the Federal Law on Physical Culture and Sports in the Russian Federation defines concepts such as a 'professional sportsman' (art. 2) and a 'contract on sports activities' (art. 25)), there has been a call for more direct legislative intervention in order to provide an appropriate legal basis for one of the fastest growing industries in the Russian economy – see Mikhail Loukine 'Organisation of Professional Sports in the Russian Federation' *International Sports Law Journal* 2005/1-2 at 21.

a Professional Athletes Bill (or 'Berufssportlergesetz'), in terms of which athletes would no longer be viewed as employees of clubs but rather as self-employed persons.¹¹⁸

33 It is indeed an interesting exercise to attempt to classify state regulation of sport in South Africa on these bases. It appears that South Africa displays a mixed system in respect of state intervention: We see, for instance, that legislation prescribes state funding to sports federations on the basis of criteria that relate *inter alia* to such federation's conduct and policies in respect of the development of disadvantaged groups.¹¹⁹ We also see that government, by way of the Minister of Sport and Recreation, is empowered to determine the general policy to be pursued with regard to sport and recreation (which is binding on all sport and recreation bodies), including such policy relating to

- Investing in the preparation of sport participants who are elected to represent the Republic in major competitions;
- Helping in cementing the sports unification process; and
- Instituting necessary affirmative action controls which will ensure that national teams reflect all parties involved in the process.¹²⁰

Apart from such express powers in respect of the formulation of policy, we have seen further moves by government of late in respect of intervention in the regulation of professional sport. We have, for instance, seen specific legislation enforcing transformation on sports federations (which legislation has, at the time of writing, not yet been the object of judicial scrutiny), the forging of a 'partnership' with sports federations regarding the formulation of transformation charters for each of the sporting codes, the establishment of a committee of enquiry in respect of the performance of the United

¹¹⁸ See the report available online on the web site of FIFPro at <http://www.fifpro.org/index.php?mod=one&id=12342> (visited 16 August 2005).

¹¹⁹ See section 10(3) of the National Sports and Recreation Act 110 of 1998 (discussed below)

¹²⁰ Section 4 of the Act

Cricket Board of South Africa in transformation of cricket,¹²¹ as well as intervention by SASCOC (the South African Sports Commission and Olympic Committee)¹²² in the day-to-day management of the SA Rugby Union.¹²³

34 : All these developments hint at increased, and substantial, government intervention in sport.¹²⁴ The passing of the National Sport and Recreation Amendment Act 2007 has now significantly cemented such intervention in legislation aimed at providing the basis for a much more active role for *inter alia* the Minister of Sport to intervene in matters such as the private governance of sporting codes, the employment of persons in sport, as well as the active enforcement of transformation of sport along racial lines. At the time of writing, significant draft regulations regarding the awarding of national colours and control over foreign sports persons have been circulated for comment by the federations (which will be discussed below). All these issues will be discussed in greater detail in the relevant following sections.

35 On the other hand, we have seen that the judiciary, in the case of *Cronje v United Cricket Board*,¹²⁵ has elected to follow what can only amount to an embodiment of a 'non-interventionist' model, electing to view the national governing body for cricket as a

¹²¹ The report of this committee (dated 16 October 2002) acknowledged that the committee had no statutory powers – it seems that the former Minister of Sport, Mr. Ngconde Balfour, appointed it in terms of a 'Performance Agreement' in respect of transformation concluded between the Minister and the UCBSA. The lack of statutory basis for such investigation, however, does not appear to be evident if one reads the recommendations contained in the report. For example (paragraph 7.4 of the report):

'It appears common cause amongst all role players that there is a lamentable lack of structured co-operation between the Government and sporting codes. The Government has already assumed responsibility for driving transformation in other spheres, such as commerce and mining. It is appropriate for Government to play a leading role in the transformation of all spheres of society. It is therefore recommended that Sport and Recreation South Africa sets in motion a consultative process which will result in a National Transformation Charter wherein the respective roles of Government and those of the various sporting codes will be clearly defined. This charter should also provide for the appointment of a National Transformation Committee by the Minister.'

¹²² See the discussion below on recent developments re regulatory structures and agencies in South African sport

¹²³ Compare the events following the controversial award of the fifth Super 14 rugby franchise in April 2005, which evoked condemnation by the Minister of Sport, Makhenkhesi Stofile, who had publicly supported the awarding of the franchise to the Eastern Cape region (in terms of the government's transformation agenda for rugby).

¹²⁴ It will be noted that most of the examples of increased and active government intervention in sport in South Africa relate to the issue of transformation and redress for past unfair discrimination in sport. This aspect of the landscape of SA sport will be discussed in more detail below.

¹²⁵ This judgment is discussed in more detail in par 224 below

'private' organisation which may thus be largely removed from judicial scrutiny as a result of the source of its powers.¹²⁶

36 By way of summary, it appears that South Africa is experiencing a gradual paradigm shift in respect of the role of the state in the public regulation of sport, which is significant also in respect of the role and powers of governing bodies and sports federations,¹²⁷ and is relevant to a review not only of the application of the law to sport in South Africa but also of the place and role of South African sport in the wider context of global sport and its regulation. These issues will be highlighted below where relevant.

§3 Legislation affecting sport

37 Sport as an activity, at all levels of participation, is generally not a highly regulated activity in respect of specifically-applicable legislation. Even though government regulation of sport is substantial, the last decade has seen relatively few statutes and other legislative instruments that specifically deal with sport. However, in light of the fact that prior to 1997 South Africa had only one statute specifically dealing with sport,¹²⁸ the legislative enactments in this sphere during the last decade point to a

¹²⁶ See the discussion in par 224 et seq below, and the criticism of the court's approach

¹²⁷ It should be noted that this observation should not be viewed as necessarily of general application in all facets and at all levels of South African sport. For example, in respect of the issue of government funding of private sports federations, it should be noted that at the level of elite and professional of participation in the three major sports, government funding plays a very limited role, while legislative control appears to be substantial (or at least potentially so). By way of illustration of the limited role of government funding and the special importance of the role of the commercial partners in this context: According to the United Cricket Board of SA (in a submission to the Independent Communications Authority of SA in 2003, on the listing of national events for the purposes of regulating exclusive broadcasting rights agreements), in the 2001/2 year 63% of its total income derived from the sale of broadcasting rights, while government grants accounted for approximately 0.1%. During this same period, the ZAR 161 million earned by SA Rugby from broadcasting rights accounted for 55% of its total revenue. The SA Football Association and the Premier Soccer League reported that they had received no government funding during this period. The SA Sports Confederation and Olympic Committee (see discussion below) has recently called for re-evaluation of the funding model for sport (in a discussion paper on their web site), specifically that lottery funding should be stepped up to a minimum of 20% (compared with the 12% or ZAR 372 million in 2004) and applied to high performance sport, with government's annual funding being allocated to the Department of Sport and Recreation (SRSA)'s mass participation programme.

¹²⁸ The Boxing and Wrestling Control Act 39 of 1954 (which has subsequently been amended substantially and partially repealed by the South African Boxing Act 11 of 2001)

commitment from government to increase its regulatory oversight in this regard.¹²⁹ At present, the following statutes are in force:

- The National Sport and Recreation Act, 1998;¹³⁰
- The South African Boxing Act, 2001,¹³¹ and
- The South African Institute for Drug-free Sport Act, 1999.¹³²

A number of potentially important and far-reaching sports-related Bills were tabled in Parliament (with some enacted into law) since 2005.¹³³

38 Apart from these sports-specific statutes, a number of other Acts of Parliament are of course relevant and applicable to the wide array of issues and aspects of sport that may arise at different levels of competition, participation, governance, etc. These include the following (as amended, where applicable):

- The Lotteries Act, 1997;
- The Income Tax Act, 1962;
- Taxation Laws Amendment Act, 2000;
- The Non-profit Organisations Act, 1997;
- The Fund-raising Act, 1978;
- The Trade Marks Act, 1993;
- The Corruption Act, 1992;
- The Prevention and Combating of Corrupt Activities Act, 2004;
- The Labour Relations Act, 1995;
- The Basic Conditions of Employment Act, 1997;

¹²⁹ See Kelly, M in Joubert et al *The Law of South Africa* Vol. 25 Part 1, First Reissue, Butterworths 2001 at par. 125.

¹³⁰ Act no. 110 of 1998, as amended in 2007 by means of the National Sport and Recreation Amendment Act, 18 of 2007 (discussed in more detail below).

¹³¹ Act no. 11 of 2001

¹³² Act no. 57 of 1999

¹³³ These include the Safety at Sports and Recreational Events Bill, the South African Combat Sports Bill, the National Sport and Recreation Amendment Bill (which was enacted into law – see the discussion below), the Institute for Drug-free Sport Amendment Bill (which was enacted into law – see the discussion below), and the 2010 FIFA World Cup Special Measures Acts

- The Employment Equity Act, 1998;
- The Promotion of Equality and Prevention of Unfair Discrimination Act, 2000;
- The Competition Act, 1998;
- The Merchandise Marks Amendment Act, 2003; and
- The 2010 FIFA World Cup South Africa Special Measures Acts.

The key provisions and relevance of these statutes will be examined or referred to in the discussion that follows, where applicable. The following is a brief exposition of the important sport-specific legislative instruments passed during the past decade, and their key provisions.

The *White Paper on Sport and Recreation* (1998)

39 Legislative and government regulation of sport in South Africa remained limited following the first democratic elections in 1994, until the first important policy document was published in 1998: the *White Paper*¹³⁴ on Sport and Recreation.¹³⁵ The *White Paper* had the theme of 'getting the nation to play', and dealt with sport in all its forms and levels of participation (namely mass participation, recreational sports and elite and professional sport). For the purposes of this policy document, the *White Paper* adopted the following definition of sport:

'Any activity that requires a significant level of physical involvement and in which participants engage in either a structured or unstructured environment, for the purpose of

¹³⁴ A document prepared and published in order to set out government policy on a matter, and to serve as foundation for the development of legislation specifically dealing with such matter.

¹³⁵ A draft of the White Paper had been published in 1995, but the document was only finalised for publication in 1998.

declaring a winner, though not solely so, or purely for relaxation, personal satisfaction, physical health, emotional growth and development.¹³⁶

The basic thrust of this policy document (in terms of the structures for governance and regulation of sport) was the following:

- Overall responsibility for policy, provision and delivery of sport resides with the Department of Sport and Recreation (or 'DSR', now Sport and Recreation South Africa);
- Parliament has the principal responsibility for defining government policy, legislation and budget allocations – this responsibility is exercised through the Minister of Sport and the DSR, with the Parliamentary Portfolio Committee on Sport and Recreation fulfilling a monitoring role in respect of the governance of sport in line with such government policy; and
- A number of 'lead agencies' were identified, with specified contractual obligations in respect of the delivery of sport and recreation in line with government policy – these were the National Sports Council (NSC), the National Olympic Committee (NOCSA), the SA Commonwealth Games Association (SACGA), and the national federations in the different sporting codes.¹³⁷

The *White Paper* further identified the lack of a specific empowering statute as a major factor hampering the DSR and the Ministry's authority to discharge its mandate, and was viewed as providing the framework for enabling legislation in order to achieve its goals relating to a number of key priorities. These priorities were identified as relating to development, transformation, funding for the upgrading of facilities in disadvantaged

¹³⁶ 'Recreation' is defined as 'a guided process of voluntary participation in any activity which contributes to the improvement of general health, well-being and the skills of both the individual and society'. See the White Paper 1998, and Kelly, M in Joubert et al *The Law of South Africa* Vol. 25 Part 1, First Reissue, Butterworths 2001 at par. 122.

¹³⁷ The national federations in the three major sports in South Africa are the SA Football Association (in football), the SA Rugby Union and the United Cricket Board of SA.

communities, encouraging mass participation in sport and recreation and the development of active lifestyles, and to develop a high performance programme geared towards the preparation of elite athletes for major competitions.

40 The two 1998 statutes¹³⁸ established the SA Sports Commission (SASC) as the prime overall coordinating body for sport and recreation. The SASC would be a juristic person, funded by Parliament by means of an annual budget, and charged with performing its role under the guidance of and in consultation with the Minister of Sport and Recreation. The SASC would consist of a General Assembly, made up of representatives of national federations and multi-coded sports organizations, a number of members elected by such General Assembly and a number of members appointed by the Minister.

The Minister of Sport was charged with the power to determine general sport and recreation policy, after consultation with the SASC or the National Olympic Committee of SA (in respect of the Olympic Games). Policy so developed by the Minister would be binding on all sport and recreation bodies in SA, including national federations.

The legislation further provided that national federations would be members of the SASC, if they met the Commission's recognition criteria.

Finally, the SASC was provided with wide powers (and duties) in respect of advising the Minister on issues relating to sports and recreation policy, as well as powers in respect of funding of federations and other sport and recreation bodies.

41 The system established in terms of these two Acts placed extensive powers relating to the development and promotion of government¹³⁹ sports policy in the hands of the Minister and the SASC. In respect of the national federations, this meant that they were now constrained in the performance of their private governance functions to align

¹³⁸ The National Sport and Recreation Act and the South African Sports Commission Act – see the discussion *supra*

¹³⁹ At national level - Provincial legislatures were empowered to formulate their own policies on sport and recreation. The Free State Province (previously the Orange Free State) was the first to do so, and published its Green Paper on Sport and Recreation: 'Getting Free State Active' in 1998 (*Free State Provincial Gazette* 42 Notice 7, 21 May 1998).

such governance with government policy. In fact, the legislation provided specific mechanisms to ensure compliance by federations, of which the following are examples:

- The SASC was empowered to determine recognition criteria for membership by national federations, and to withhold membership (sec 5, National Sport and Recreation Act);
- The lever of funding could be used by the SASC to encourage federations to toe the line, e.g. in respect of transformation (see section 10, National Sport and Recreation Act); and
- The SASC would, through its National Colours Board (established by regulation) control the awarding of national colours to representatives of national federations.

42 The main area where intervention in the autonomy of sports federations (especially by the Minister) came to the fore during the past few years has been in respect of the overarching policy objective of race-based transformation. Government policy on transformation runs like a golden thread through the provisions of the legislation, and has been the staging ground for the most visible form of active government intervention in private sports governance in recent years.¹⁴⁰

§4 Recent developments in the restructuring of sports regulation

43 Following South African athletes' poor performance at the Olympic Games in Sydney in 2000,¹⁴¹ the former Minister of Sport, Mr. Ngconde Balfour, appointed a Ministerial Task Team to investigate the state of high performance sport. The team's remit was to make recommendations to address factors that impact negatively on SA teams' and athletes' sporting performances in international competition.

¹⁴⁰ The role of race-based transformation in South African sport will be discussed in much more detail below

¹⁴¹ Athletes from Team South Africa managed to win only 2 silver and 3 bronze medals

The Task Team's report identified a number of fundamental problems, which related mainly to the dysfunctional fragmentation of governance structures in sport and recreation, and which contributed to duplication and replication of functions and wasteful expenditure. It was specifically recognized that the Department of Sport and Recreation was challenged in respect of its capacity to deliver, specifically on the mass participation mandate envisaged by the *White Paper* (e.g. in the provision of infrastructure and facilities, etc). The report recommended that sports governance structures should be rationalized, in line with the 1998 *White Paper's* first key priority.¹⁴²

44 Cabinet endorsed the report's recommendations on 25 June 2003, proposing the establishment of only two regulatory structures for sport and recreation, namely an expanded Department of Sport and Recreation (to be known as Sport and Recreation South Africa, or SRSA'), and a new non-governmental umbrella sports structure. A Steering Committee was appointed to implement the Cabinet decision. After wide consultation, it was recommended that the new structure be established in two General Assemblies. For this purpose, a co-operation agreement was signed on 19 August 2003 between the various existing overarching or 'macro-sports' bodies, including the SA Sports Commission (which acted in this regard as a representative body of its then members, the national sports federations). This process led to the establishment of the new umbrella body, the South African Sports Confederation and Olympic Committee (SASCOC).

45 SASCOC was established on 27 November 2004, to replace the SA Sports Commission. This process was accompanied by the passing of the SA Sports Commission Repeal Act, in 2005. Since 1 April 2005, SASCOC has assumed the role of the supreme sports governing body in the country. SASCOC and the government sport department (Sport and Recreation SA) have now each been allocated specific functions. The SRSA

¹⁴² Priority 1 of the White Paper (1998) provides as follows: 'To confirm roles and streamline the responsibilities of the various stakeholders in sport and recreation to ensure that coordination and economies of scale are realized'.

has taken responsibility primarily for grassroots, mass-based, community-oriented sport and recreation activities. SASCOC has taken responsibility for South Africa's high performance sports programme, taking over the functions performed in this regard by the previous DISSA¹⁴³, NOC¹⁴⁴, SACGA¹⁴⁵, USSASA¹⁴⁶, SASSU¹⁴⁷, SASC and Department of Sport and Recreation.

46 SASCOC was established as a section 21-company¹⁴⁸ (non-profit organization). It is proclaimed to be the 'supreme non-governmental macro sports body' in South Africa. The organization is publicly funded through the Ministry of Sport, as well as through national lottery awards and the sourcing of private sponsorships. The SA Sports Confederation's specific mandate relates to the promotion and development of high performance sport,¹⁴⁹ and includes responsibility for the preparation and delivery of Team South Africa to multi-sport international games such as the Olympics, Paralympics, Commonwealth Games, World Games and All Africa Games;¹⁵⁰ affiliation and/or recognition by the appropriate international, continental and regional sports organizations as the recognized entity for the Republic of South Africa;¹⁵¹ the establishment, monitoring, coordination and management of an academy system for sport;¹⁵² the selection (on recommendation from national federations) of multi-sport teams for

¹⁴³ Disability Sport South Africa

¹⁴⁴ The National Olympic Committee of SA (now incorporated in SASCOC)

¹⁴⁵ The SA Commonwealth Games Federation

¹⁴⁶ The United School Sports Association of SA

¹⁴⁷ The SA Students' Sports Association

¹⁴⁸ In terms of the Companies Act, 1973. The 'section 21 company' is a special type of privileged company limited by guarantee (a public company), which is incorporated not for commercial purposes but for the lawful promotion of religion, art, science, education, charity, recreation or for any other cultural or social activity, or communal or group interests. Such company is an 'association not for gain', and its profits must be applied to promote its main object. Dividends may not be paid to members. Upon its winding-up, deregistration or dissolution the assets of the association remaining after satisfaction of liabilities shall be transferred to some other association(s) or institution(s) with objects similar to its main objects. Such a company is required to have the phrase 'Association incorporated under section 21' as the last words of its name. See section 21 of Act 61 of 1973; Gibson *South African Mercantile and Company Law* 8th edition Juta & Co. Ltd 2003 at 264; Basson *op cit.* Ch 4-22.

¹⁴⁹ 'High performance sport' is defined in article 1.24 of SASCOC's Articles of Association (filed in terms of section 60(1) and regulation 18 of the Companies Act, 1973) as 'the high level participation in major, international sporting events including but not limited to world championships and other international multi-sport events such as Olympic Games, Commonwealth Games, Paralympic Games and All Africa Games'.

¹⁵⁰ See section 2 of SASCOC's Memorandum of Association (filed in terms of section 54(1) and regulation 17(3) of the Companies Act, 1973)

¹⁵¹ Section 4.2 of SASCOC's Memorandum of Association

¹⁵² SASCOC Memorandum sec. 6.3.2

international and representative competitions at all levels,¹⁵³ and overseeing the bidding for and hosting of major and international sporting events¹⁵⁴ (including the power to withhold approval to national sports federations or persons registered with such federations to participate in multi-sports events at national and international level¹⁵⁵). Amongst the quite significant powers of SASCOC *vis a vis* national sports federations in the execution of their private governance functions in their respective sporting codes, is the power (through the organisation's National Executive Board) to inquire into the administrative and/or financial affairs of member federations and, where necessary, to recommend corrective measures in this regard (and even to make recommendations to take over the administrative and/or financial affairs of a member until such affairs are put on a satisfactory footing); as well as the power to award national colours to federations and sports persons.¹⁵⁶ More will be said below regarding draft Regulations in respect of national colours, which are currently envisaged at the time of writing.

47 SASCOC has, since its establishment, introduced four commissions to address matters relating to its mandate. These are the National Colours Commission, the High Performance Commission, the Medical and Scientific Commission, and the Athletes Commission.¹⁵⁷ Despite SASCOC's already substantial powers in respect of the regulation of high performance sport, the organisation has had a rather chequered start to its activities. The main problems experienced in its first 18 months of operation related to staffing,¹⁵⁸ an apparent lack of funding and of clear lines of financial support from government and lottery funds,¹⁵⁹ problems in incorporating one of the main organisations it was intended to replace (Disability Sport SA) in its organisation,¹⁶⁰ and a highly publicised instance of proposed intervention in the affairs of one of the major national

¹⁵³ SASCOC Memorandum sec.6.3.3

¹⁵⁴ SASCOC Memorandum sec. 4.4

¹⁵⁵ Article 21 of SASCOC's Articles of Association

¹⁵⁶ SASCOC Memorandum sec. 6.3.1

¹⁵⁷ From the SASCOC CEO's report for the period 1 October – 19 November 2005, available on the organisation's web site at <http://www.sascoc.co.za>

¹⁵⁸ Especially the process of merging staff from the constituent organizations SACGA, DISSA, SASSU and NOCSA. See the SASCOC CEO's report for the period 1 April – 30 September 2005, which is available on the organisation's web site at <http://www.sascoc.co.za> (last visited 23 October 2006).

¹⁵⁹ *Ibid.*

¹⁶⁰ See the report by Mr. Moss Moshishi contained in the SASCOC President's Corner July 2006, available on the organisation's web site at <http://www.sascoc.co.za> (last visited 23 October 2006).

federations in terms of the powers contained in the organisation's articles of association.¹⁶¹ More recently, SASCOC received very vocal and wide-spread criticism following Team South Africa's disappointing performance at the 2008 Olympic Games in Beijing.

§5 The 2008 amendments to the National Sport and Recreation Act

48 Following the restructuring of the government regulatory system in the wake of the Ministerial Task Team report of 2002, referred to earlier, the general perception has been that both the agencies charged with regulating mass participation (the SRSA) and high performance sport (SASCOC) have failed rather dismally in delivering on expectations for real improvements to sport at the different levels. SRSA has been frequently criticised for the failure to contribute substantially to problems regarding the provision of infrastructure, development programmes and, generally, promotion of opportunities for access to sport at the lower levels. SASCOC has been hampered significantly by internal teething problems regarding staffing and the carry-over of functions, structures and personnel from the disbanded SA Sports Commission, while also having trouble in receiving recognition and acceptance of its role from a number of sports federations.

49 In the midst of all this, the first half of 2006 saw the drafting of significant new sports legislation, dealing *inter alia* with preparations for the 2010 FIFA World Cup South Africa™ and doping regulation. One of the most important and potentially far-reaching Acts that emanated from Parliament since 2006 is the National Sport and Recreation

¹⁶¹ This last was the appointment, in May 2005, of a three-member interim committee to manage the affairs of the SA Rugby Union following rifts in the administration of the Union (which process was averted when warring individuals within the Union declared a truce in order to resolve differences 'in the interests of South African rugby' (see the report by Zeena Isaacs entitled 'SASCOC never wanted to take over rugby – Moshishi', in *Business Day*, available on the web at <http://www.businessday.co.za/articles/specialreports.aspx?ID=BD4A50376> [posted 30 May 2005 – last visited 23 October 2006]). The appointment was made in terms of sec. 8.3.1.3 of SASCOC's articles of association.

Amendment Act, 18 of 2007. On 16 May 2007 the National Assembly passed the National Sport and Recreation Amendment Bill, amending the key piece of legislation regulating South African sport and its governance, namely the National Sport and Recreation Act 110 of 1998. The Amendment Act was subsequently accepted by the National Council of Provinces and was signed into law by the former President of the Republic of South Africa, Mr. Thabo Mbeki, in November 2007. The major amendments that have been effected to the 1998 Act will be considered briefly.

50 Chief amongst these amendments are the provisions aimed at substituting SASCOC for the now-defunct SA Sports Commission, a legislative development that has been long overdue and serves to fill a lacuna in respect of the processes for the establishment of the organisation over the last couple of years.¹⁶² The proposed role of SASCOC in the new two-tiered regulatory regime of SA sport permeates the whole of the amendments contained in the Act.

This discussion will only mention a few of these amendments, which are deemed to be most relevant to the powers of SASCOC and serve to point to the legislative vision for the future role of this organisation in regulating South African sport. In essence, the main amendments relate to the powers of SASCOC and those of the Minister for Sport and Recreation.

51 Section 2 of the Amendment Act deals with the demarcation of SASCOC's role in sports regulation, and provides as follows:

'Sec. 2 (1) SASCOC will be the only recognised national co-ordinating macro body for the promotion and development of high performance sport and recreation in the Republic;

¹⁶² Following the passing of the SA Sports Commission Repeal Act, 2005, and the establishment of SASCOC as supreme macro-sports body from 1 April 2005, the organisation has apparently been operating without legislative legitimacy. Prior to the passing of the amendments to the National Sport and Recreation Act SASCOC appears to have been operating in a state of limbo as a relative 'non-entity' in respect of its regulatory activities. See also Cloete (ed.) *Introduction to Sports Law in South Africa* Butterworths LexisNexis, Durban, 2005 at 8

(2) SASCOC may, from time to time, develop guidelines for the promotion and development of high performance sport and recreation;

(3)(a) ...

(3)(b) SASCOC may, in writing, require a government ministry, department, province or local authority to consult with it in relation to the activities referred to in paragraph (a);¹⁶³

(4) All sports and recreation bodies must consult and co-ordinate with SASCOC on any matter that has been prescribed by regulation.'

52 Section 6(2) of the Act provides that '[n]ational federations must actively participate in and support programmes and services of Sport and Recreation South Africa and of the Sports Confederation, in so far as high performance sport is concerned'.

Section 5(a) of the Amendment Act has substituted (in section 4 of the principal Act) SASCOC for the defunct Sports Commission in respect of its role in consultation with the Minister of Sport in determining general policy to be pursued in sport and recreation, and sec. 5(b) has substituted SASCOC for the SASC in the role of determining priorities for the allocation of funding by the Minister for the creation and upgrading of basic multi-purpose sport and recreation facilities. Section 12(1) of the Amendment Act has substituted SASCOC for the SASC in section 11 of the principal Act, with the responsibility to establish a national colours board which will consider all applications for the awarding of national colours.

53 It is submitted that a rather troubling aspect of the above amendments to the Act is that the measure of coercion in respect of membership of SASCOC has now received legislative sanction: Federations will now be forced through the provisions of the Act to obtain membership of the organization. This issue of involuntary membership was raised by the SA Rugby Union in its submission to Parliament regarding the Amendment Bill.

¹⁶³ Section 2(3)(a) of the Act provides that '[e]very government ministry, department, province or local authority may carry out sporting or recreational activities or activities relating to physical education, sport and recreation, including training programmes and development of leadership qualities.'

Specifically, SARU claimed that the proposed amendments would result in national federations being 'statutorily included as members of SASCOC'¹⁶⁴ and that, accordingly, such amendments are open to constitutional challenge in terms of section 18 of the Bill of Rights, the right to freedom of association.¹⁶⁵

The consequences of membership of SASCOC are of course far-reaching. Member sports federations or bodies will be subject to the organisation's constitution as contained in the articles of association, and will be bound by any rules, regulations or directives issued by SASCOC.¹⁶⁶ SASCOC's rules may furthermore regulate any matters relating to membership, including any amendments to a member federation's constitution.¹⁶⁷ In fact, and this is a power that might be very relevant to any federation that intends to restructure the commercial operations relating to the professional arm of its sporting code¹⁶⁸, SASCOC is also empowered to review any intended agreement between a member federation and a company that may change the status of the federation and its affiliation with SASCOC.¹⁶⁹

54 Another significant concern regarding SASCOC and its operations is found in the nature of proceedings at its general meetings (the supreme decision-making forum of the organization). Here one should consider the respective voting rights of the member federations. While it is clear to all that the three major professional and elite sports in South Africa are soccer, rugby union and cricket, the relative importance of the national federations in these disciplines as 'breadwinners' of SA sport does not appear to enjoy any recognition. According to a schedule to SASCOC's memorandum, which lists the voting rights of member federations, the SA Football Association and SA Rugby Union each has 3 votes at general meetings, while the United Cricket Board has 1 vote.¹⁷⁰ This

¹⁶⁴ See par. 4.8.2 of the SARU memorandum to its presentation to Parliament, 13 October 2006

¹⁶⁵ See par. 2.5 *et seq.* of the SARU memorandum

¹⁶⁶ See also the memorandum to the SARU submission to Parliament referred to *supra*, at par. 4.8.3

¹⁶⁷ Clause 7.1.6 of SASCOC's articles of association; par. 4.8 of the memorandum to the SARU submission *supra*.

¹⁶⁸ E.g. as was done in recent years in the three major professional sports of football, rugby and cricket

¹⁶⁹ Clause 7.5 of SASCOC's articles

¹⁷⁰ Voting rights are determined in accordance with the provisions of par 15 of the Articles of Association. While the size of the registered membership of a federation is one of the factors determining the allocation of additional votes, additional votes are also allocated (apparently also to relatively small federations) based on their participation in the Olympic Games, the Commonwealth Games and/or the All Africa Games.

raises questions when one considers the voting rights of some other, traditionally much smaller and (frankly) less important federations – compare the SA Hockey Association, SA Shooting Sport Federation, SA Weightlifting Federation and SA Wrestling Federation, each with four votes. In fact, it appears that the United Cricket Board has the same voting powers as the SA Drum Majorette Association, the SA National Scrabble Players' Association and the SA Sheep Shearing Federation.

55 Some of the most significant amendments to the National Sport and Recreation Act relate to section 13 of the principal Act, which deals with dispute resolution in sporting codes (and, accordingly, holds – apart from the funding allocation provisions and, possibly, the above amendments regarding membership of SASCOC – the most direct potential to affect the private governance of sporting codes). Apart from the substitution of references to the SASC with references to SASCOC, the most fundamental amendments were effected by means of section 13(d) of the Amendment Act, which provides for the addition of subsections (5) to (10) to section 13 of the Act, as follows:

- (5) Notwithstanding subsection (4),¹⁷¹ the Minister may intervene in any dispute or alleged mismanagement, or any other related matter in sport or recreation which is likely to bring a sport or recreational activity into disrepute.
- (6) Notwithstanding the provisions of subsection (5), the Minister may not intervene in matters relating to the selection of teams.
- (7) In intervening in terms of subsection (5), the Minister may –
 - (a) refer the matter for mediation; or
 - (b) issue a directive.

¹⁷¹ Section 13(4) of the principal Act in its previous form provided as follows:

'[SASCOC – as per amendment by section 13(c) of the Amendment Act, previously 'the SASC'] may, at any time, of its own accord, cause an investigation to be undertaken to ascertain the truth within a sport or recreation body, where allegations of –

- (a) any malpractice of any kind, including corruption, in the administration;
- (b) any serious or disruptive divisions between factions of the membership of the sports or recreation body; or
- (c) continuation or maintenance of any institutionalized system or practice of discrimination based on gender, race, religion or creed, or violation of the rights and freedoms of individuals or any law,

have been made, and may ask the Minister to approach the President of the Republic to appoint a commission of inquiry referred to in section 84(2) of the Constitution.'

- (8) Before issuing a directive under subsection (7)(b), the Minister must, by written notice served on the relevant parties –
 - (a) notify the relevant parties of the allegations and of his or her intention to issue a directive; and
 - (b) give the parties the opportunity to respond within 30 days.
- (9) SASCOC may, for the purposes of subsection (7), submit its recommendations for the resolution to the problem to the Minister.
- (10) Without derogating from the rights of the affected parties, a decision taken in terms of subsection (7) shall be binding on the parties.

By way of summary of the amendments in respect of dispute resolution as effected by section 13 of the Amendment Act:

- Every sport or recreation body must, in accordance with its internal procedures and remedies provided for in its constitution, resolve any dispute arising among its members or with its governing body (section 13(1)(a);
- Sport or recreation bodies are in terms of the amended s 13(1)(b) of the Act obliged to notify the Minister in writing of any dispute arising between its members or with its governing body, as soon as it becomes aware of such dispute;
- SASCOC (or 'the Sports Confederation', in terms of the wording of the Act) must notify the Minister in writing of any dispute referred to it by a sport or recreation body in terms of s 13(2)(a);
- The amended s 13(3) now provides that SASCOC ('the Sports Confederation') must in relation to any such dispute referred to it notify the relevant parties of the allegations, invite the parties to make representations to it, convene where necessary an inquiry into the dispute, and in accordance with the provisions of the Promotion of Administrative Justice Act (No. 3 of 2000) 'notify the parties of the decision';

- In respect of the insertion of ss (5) to (8) in s 13 of the Act, the Minister has now been clothed with quite far-reaching powers of intervention in disputes. These include the right to intervene 'in any dispute, alleged mismanagement, or any other related matter in sport or recreation that is likely to bring a sport or recreational activity into disrepute';
- The Minister is furthermore empowered to intervene in 'any non compliance with guidelines or policies issued in terms of s 13A¹⁷² or any measures taken to protect or advance persons or categories of persons, disadvantaged by unfair discrimination as contemplated in section 9(2) of the Constitution', by referring the matter for mediation or issuing a directive;
- The amended s 13(5)(b) provides that the Minister may not 'interfere in matters relating to the selection of teams, administration of sport and appointment of, or termination of the service of, the executive members of the sport or recreation body';
- If a national federation fails to adhere to the decision of a mediator or a directive issued by the Minister in terms of s 13(5), the Minister may direct Sport and Recreation SA to refrain from funding such federation and notify the federation in writing that it will not be recognised by Sport and Recreation SA (amended s 13(5)(c)); and
- Finally, the amended s 13(8) provides that, subject to the Promotion of Administrative Justice Act, 2000 and 'without derogating from the rights of the affected parties, a decision taken in terms of subsection (5) shall be binding on the parties'.

¹⁷² Section 13A as inserted in the Act provides that '[t]he Minister must issue guidelines or policies to promote equity, representivity and redress in sport or recreation'. This section will be discussed below.

The reader is referred to discussion elsewhere in this chapter (on dispute resolution in sport) for criticism of the extensive powers that have now been afforded to SASCOC and the Minister of Sport to intervene in private dispute resolution.¹⁷³

56 Finally, it should be noted that section 14 of the Amendment Act also provides significant powers to the Minister of Sport in respect of regulating important aspects of sport and its private governance. Section 14, which deals with the making of regulations, provides that the Minister may, after consultation with the Sports Confederation in so far as high performance sport is concerned, make regulations as to a number of aspects, *inter alia* hosting of and bidding for major international sports events, the awarding of national colours in a sport, the recognition of sport or recreation bodies, the control of foreign sports persons in South Africa, and, generally, 'any other matter in respect of which the Minister may deem it necessary or expedient to make regulations in order to achieve the objects of this Act'.

These powers are clearly very wide and empower the Minister to regulate virtually all aspects of sport and of its private governance. The discussion elsewhere in this chapter will examine draft Regulations that are, at the time of writing, apparently being envisaged in terms of these provisions.

§6 The nature of SASCOC as a regulatory entity

57 It remains to briefly consider another potential problematic issue, which relates to the nature of SASCOC as a regulatory entity. The SA Sports Confederation and Olympic Committee was established as a company without a share capital, in terms of section 21 of the Companies Act of 1973.¹⁷⁴ This type of company is an association not for gain (or non-profit organization); a company incorporated not for commercial purposes but having as its main object the lawful promotion of religion, art, science, education charity,

¹⁷³ See the discussion in par 195 *et seq* below

¹⁷⁴ Act 61 of 1973 (as amended)

recreation, or any other cultural or social activity or communal or group interests¹⁷⁵ (in this case relating to sport). In terms of South African law, a company is essentially a partnership of which the shareholders (or members) are partners, but with a very different juristic nature – through incorporation (and obligatory registration under the Companies Act) a corporation is not simply an association of individuals but a separate juristic person.¹⁷⁶

The basis for incorporation of a section 21-company is found in the agreement between its members, the memorandum of association registered in terms of the Companies Act. The memorandum is the charter of the company, which 'defines the limits beyond which the company cannot go and serves as public notice, on registration, of facts of primary importance about the company in which persons dealing with it are interested and such persons are deemed to have constructive notice of the contents'.¹⁷⁷ The memorandum states (*inter alia*) the purpose for which the company is incorporated and the main object it is to promote. Along with the memorandum, a company must also register its articles of association, which are the internal regulations of the company and subordinate to the memorandum.

From the above it is clear that the provenance of a company (also a section 21 company) remains essentially private in nature; companies are commercial or non-profit entities that function in civil society, distinct from the organs of the state. Apart from the requirements and benefits (in respect of separate legal personality) associated with legislatively prescribed registration of the entity, it remains based in the private agreement between the members.

This essentially private nature of SASCOC may prove to be problematic, as it appears to depart from the traditional concept of state regulation of sport (and of a separation of functions between the private and public spheres of power). The author has expressed the (cynical) view elsewhere that, in light of the frequent and vocal criticism of

¹⁷⁵ Companies Act section 21(1)(b)

¹⁷⁶ See *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530; *Webb & Co Ltd v Northern Rifles* 1908 TS 462; and Gibson *South African Mercantile and Company Law* 8th Edition Juta & Co Ltd (2003) at 259 *et seq.*; Bamford *The Law of Partnership and Voluntary Association in South Africa* 3rd Edition Juta & Co Ltd (1980) at 229 *et seq.*

¹⁷⁷ Gibson *op cit* 275

the government's regulation of and intervention in sport (also, specifically, in respect of the sports transformation agenda which is discussed elsewhere in this chapter), it is not inconceivable that SASCOC has been established largely to act as a buffer against such criticism, or to provide government with a semantic 'out' when accused in future of interfering in the governance of sport.¹⁷⁸ It is not within the scope of this chapter to examine possible concerns in this regard, although the author has done so elsewhere.¹⁷⁹

¹⁷⁸ Compare the following statement by the Minister of Sport, Mr Makhenkesi Stofile (as quoted in an article entitled "Brian sidesteps govt tackle" (2005-05-24), available online as http://www.news24.com/News24/Sport/Rugby/0,6119,2-9-838_1710265,00.html last accessed 2006-11-10): 'Challenged on government 'interference' in sport, [the Minister] said: "I think we must be careful what language we use. There is a difference between interference and intervention. Those are two different things... *That's not a government interference. It's a Sascoc intervention, and Sascoc is not government*". [Emphasis provided]

¹⁷⁹ Louw, A M 'Evaluating Recent Developments in the Governance and Regulation of South African Sport: Some Thoughts and Concerns for the Future' *International Sports Law Journal* 2006/1-2, May 2006; Louw, A M 'Why South African Sport Should Say No to a State-Sanctioned SASCOC Autocracy – Part 1: The background and nature of SASCOC' – (2007) Vol. 2 *De Jure* 257-276; Louw, A M 'Why South African Sport Should Say No to a State-Sanctioned SASCOC Autocracy – Part 2: Questioning the legitimacy of SASCOC' (2008) Vol. 1 *De Jure* 16-35

§7 Sports Regulation and Race-Based Transformation of South African Sport¹⁸⁰

I Introduction

58 In recent years, government intervention in South African sport (especially rugby and cricket, but also other codes) has been most visible and controversial in respect of the issue of racial transformation. Following the birth of the new democratic dispensation in 1994 and the subsequent rationalization and unification of our sports and sports structures,¹⁸¹ the institutionalization of efforts and measures aimed at ensuring sports teams that are representative of the wider South African population have touched on all aspects of sport in the country, including its governance and regulation. South Africa's history and legacy of social injustice has forced this issue on the country; this is something that has found unique application in the domestic context. Accordingly, for example, the consistent linking of government funding of sport to transformation issues constitutes a unique phenomenon in the wider context of global sports regulation; government's interventionist role in respect of issues that are traditionally viewed elsewhere as of 'sporting interest only' (e.g. team selection), poses unique challenges to sports governance in the wider context of international sports governing bodies and their governance interest in international competition.¹⁸²

¹⁸⁰ The material covered in this section on race-based transformation of South African sport is based substantially on the author's following series of articles:

Louw, A M "Should the Playing Fields be Levelled?" Revisiting Affirmative Action in Professional Sport - Part 1: The Background and the Context' *Stellenbosch Law Review* Vol. 15 No 1 (2004) 119-136; Louw, A M "Should the Playing Fields be Levelled?" Revisiting Affirmative Action in Professional Sport - Part 2: The Professional Sporting Context' *Stellenbosch Law Review* Vol. 15 No 2 (2004) 225-246; Louw, A M "Should the Playing Fields be Levelled?" Revisiting Affirmative Action in Professional Sport - Part 3: Testing the Legitimacy of Affirmative Action in Professional Sport' *Stellenbosch Law Review* Vol. 15 No 3 (2004) 409-428. The material is used here with the permission of the publishers, Juta & Co. The *Stellenbosch Law Review* may be accessed at http://www.jutalaw.co.za/catalogue/itemdisplay.jsp?item_id=3603

¹⁸¹ See the discussion in par 7 *et seq* above

¹⁸² Not to mention other role-players and stakeholders with significant interest in SA sport, including sponsors and commercial partners such as broadcasters

59 Justice Lex Mpati has outlined the role of the State in the regulation of sport as follows:

'The State's major role in sport is to regulate and facilitate sporting activities. It does so as the protector, and custodian of a country's social values. Sporting organisations, as mainly voluntary associations, are, in principle, independent from State intervention.'¹⁸³

In the South African context, and specifically its racially segregated legacy in all areas of society, and especially sport, this role of 'facilitation of sporting activities' assumes a unique character.¹⁸⁴ Due to the fact that the majority of South Africans were excluded from sport, at all levels, before the country's readmission to international sport in 1991,¹⁸⁵ the State's role and function in the regulation and facilitation of sport in the new democratic order has a distinctly political flavour, which displays an undercurrent of more pervasive issues of social and cultural ideals and realities. As in most other areas of modern South African society, the issue of transformation has assumed a central role in the regulation of sport at all levels, from the development of athletes from all races at school and junior level, to elite competition in professional sport.¹⁸⁶

60 In a sense, the 'transformation agenda' has significantly altered the character of state regulation of sport: Under the apartheid system, sport was clearly also politicised

¹⁸³ Mpati 'Sport, public policy and the role of the State', in Basson & Loubser *Sport and the Law in South Africa* Butterworths (Looseleaf) at Ch 2-9

¹⁸⁴ For more on the history of apartheid sport and the influence of politics in sport in South Africa, see Gouws, J *Sport Management: Theory and Practice* Knowledge Resources 1997 at 184-189; Jarvie in Jarvie, G (ed) *Sport, Racism and Ethnicity* Falmer Press 1991 at 175 - 189; Mpati 'Sport and Politics', in Basson & Loubser *Sport and the Law in South Africa* Butterworths (looseleaf) CH 2-1 *et seq.* John Nauright *Sport, Cultures and Identities in South Africa* David Philip, Cape Town 1997; Bruce Murray and Christopher Merrett *Caught Behind: Race and Politics in Springbok Cricket* Wits University Press 2004; Jarvie, G *Class, Race and Sport in South Africa's Political Economy* Routledge, London 1985; Lapchick, R.E. *The Politics of Race and International Sport: The Case of South Africa* Greenwood, Westport 1975; Osborne, P *Basil D'Oliveira - Cricket and Conspiracy: The Untold Story* Little Brown, London 2004; Rodney Hartman *Ali: The life of Ali Bacher* Viking 2004.

¹⁸⁵ The International Olympic Committee readmitted South Africa on 9 July 1991, after the country had been expelled by the IOC in 1970 with a 35:28 vote (the IOC had earlier, in 1964, withdrawn South Africa's invitation to participate in the Tokyo Olympic Games); South African cricketers became the first team to play in official international competition in November 1991, with a hastily organised tour to India to replace the Pakistan team who had withdrawn from their Indian tour due to threats by anti-Muslims.

¹⁸⁶ See also Louw, A M 'Should the Playing Fields be Levelled? Revisiting Affirmative Action in Professional Sport' 2004 *Stellenbosch Law Review* Vol 15 No 1 129, Vol 15 No 2 225, Vol 15 No 3 409; and Louw, A M

'Transforming South African Professional Sport: Some Observations on Recent Developments' *Law, Democracy & Development* Butterworths LexisNexis 2005 (2) Vol. 9 193

by the ruling elite, and developments such as the orchestrated and systematised isolation of South African sport by the outside world contributed to a situation where the State frequently intervened more significantly in the regulation of sport than would be expected in light of the traditional notion of sporting activity as a social phenomenon that has a fundamentally private and voluntary nature. However, sport in the new dispensation has been actively targeted as a social force for transforming wider society, for redressing the inequalities caused by apartheid and for building a unified, 'rainbow' nation. This could be characterised as a healing process:

'Since the country's transition to a democratic order, South African sport has been in a state of convalescence. The present government has taken it upon itself to work in partnership with stakeholders in sport ... for the upliftment of sport in general.'¹⁸⁷

Accordingly, State regulation of sport has experienced a fundamental shift, which appears to be contrary to developments in the regulation of sport in other jurisdictions. While the United Kingdom and the European Union have witnessed developments in increased governmental regulation of sports organisations and the formation of partnerships between government and governing bodies, in South Africa this 'partnership' has a significantly different character. In fact, we have seen indications that government has undertaken a number of initiatives to usurp the power of sports organisations; while such efforts have involved legislative action, it has also involved more direct and active intervention in governance of the professional sports industry. Coupled with these initiatives has been a fundamental restructuring of the organisational structures charged with the administration of sport. The often-expressed public perception (both in South Africa and elsewhere) of the widespread 'politicisation' of South African sport appears to be an accurate one. While one should remember that the active involvement of politicians and politics in sport is not a new phenomenon in this country,

¹⁸⁷ Mpati *op cit.* at Ch 2-4

¹⁸⁸ recent events have shown that such involvement, intervention and (one might even say) interference, are reaching new and worrisome dimensions.

61 A number of examples spring to mind, of which only a couple will be mentioned: We recently saw an embarrassing and very public incident regarding the award of the fifth Super 14¹⁸⁹ rugby franchise in 2005, when the Minister of Sport became involved following the SA Rugby Union Adjudication Panel's award (which had awarded the franchise to the Central Unions), on the basis of the imperative of transformation and the value of a suggested award to rugby development in the Southern and Eastern Cape region.¹⁹⁰ A compromise was reached with the award of a Super 14 berth for the Central Unions in 2006, and a relegation system whereby the bottom SA team on the log at the end of the 2006 season would make way for a Southern and Eastern Cape region team in 2007 and 2008, the 'Southern Spears' (now the 'Southern Kings'). Apart from the fact that this process seems to have been clouded with issues relating to poor internal management and decision-making by rugby's powers that be, it is interesting to note the practical effect of the events – while public debate and mud-slinging between various parties continued, it was reported that the then new Australian Super 14 team (Perth-based 'Western Force') was well advanced in preparations for the 2006 competition. These developments received widespread condemnation from local as well as international commentators. The matter received a fresh airing in the media during early 2006. According to reports, the 'Big Five' franchises insisted that the Southern Spears should play a relegation-qualification match against the weakest SA team at the end of the 2006 season, in order to qualify for entry to the tournament in 2007. The Southern Spears objected to this as being in flagrant contravention of the decision of SARU, and expressed a willingness to go to court to ensure their automatic qualification for Super 14

¹⁸⁸ See the discussion in par 7 *et seq* above

¹⁸⁹ The international rugby competition sponsored by Australian media magnate Rupert Murdoch's NewsCorp, and involving provincial or regional rugby teams from Australia, New Zealand and South Africa. The tournament has been played as the 'Super 12' since 1996, and as the 'Super 14' from 2006, involving two extra teams (one each for Australia and South Africa). For more information on the tournament, visit <http://www.super14.com>

¹⁹⁰ This latter region apparently having the largest provincial / regional complement of Black rugby players in South Africa

in 2007 and 2008.¹⁹¹ On 19 April 2006 the Board of Directors of SA Rugby (Pty) Ltd¹⁹² resolved to exclude the Spears from participating in the competition in 2007, a decision that was based on an examination of the viability of the team and a finding that it was not ready for participation at that time. The decision was accompanied by a commitment by SA Rugby to assist the franchise to develop and to find a sustainable solution to the problems facing rugby in the Eastern and Southern Cape provinces. At the time of writing the Spears (now the Southern Kings) have yet to enter the Super 14 competition (although negotiations are currently underway regarding expansion of the tournament, which might provide a vehicle in this regard).¹⁹³

Reports of statements by politicians regarding team selections (especially regarding the implementation of race-based quota systems in certain sports) are also common. In fact, such intervention even went as far as the appointment of a Ministerial Commission of Enquiry into Transformation in Cricket, which condemned the UCB's attempted scrapping of race-based quotas in 2002.¹⁹⁴

62 In light of the interconnected and internationalized nature of modern sports governance and regulation, it is troubling to see that the issue of transformation has provided a major source of division between government and private organizations involved in sport. It has proven to be the single biggest burning issue upon which sports administrators are often taken to task by the Minister of Sport and members of Parliament. This raises the question of how best to marry the needs and challenges regarding transformation with the structures of sport and the interests of stakeholders. Arguably, mass participation and development programmes, school sports and infrastructure delivery systems are the ideal vehicles for promoting such government policy goals – at elite and professional levels, the practical nature and characteristics of

¹⁹¹ See the report by Dale Granger 'Southern Spears tired of being "bullied" by "Big Five"' 3 February 2006 (available online at <http://www.iol.co.za> - last accessed 7 February 2006).

¹⁹² The commercial arm of the South African Rugby Union charged with administering the game of professional rugby and commercial aspects associated therewith.

¹⁹³ More is said elsewhere in this chapter regarding the current developments in respect of the future of the Super Rugby tournament

¹⁹⁴ See the report of the Ministerial Committee of Inquiry into Transformation in Cricket (convened by the then Minister of Sport and Recreation, Mr Ngconde Balfour), dated 16 October 2002.

international global sport requires that domestic policy should not unduly interfere with existing market forces. While the SA model of sports regulation largely adheres to international standards regarding recognition of the inherent autonomy of private organizations in sport,¹⁹⁵ recent years have (most visibly in the context of transformation, equity and the promotion of 'representativity' in sport) seen a number of instances of rather drastic government intervention in this sphere.

63 Accordingly, it might be advisable to propose that government policy in sport should also follow the clear and logical demarcation of functions and responsibilities in the new two-tiered regulatory system of the SRSA and SASCO. The ideal of transformation, equal access to opportunities for all and representativity in sport cannot be faulted – we have not yet reached a point where our 'playing fields' have been leveled. By way of example of the inequalities South African sport still faces in this regard: The report of the Ministerial Inquiry into Transformation in Cricket in 2002¹⁹⁶ mentioned that in the four largest townships in South Africa (Soweto, Mdantsane, Motherwell and Botshobelo), with a combined population 8 million people, there are 7 cricket clubs. In Johannesburg, which has a white population of 700 000, there are 106 cricket clubs. Clearly many inequalities still exist.

It is however less clear at present whether SASCO as a regulatory agency will prove to be the best driver for policies and measures aimed at transforming South African sport, especially in light of its key mandate of promoting excellence in high performance sport.¹⁹⁷

¹⁹⁵ Compare the judgment in *Cronje v United Cricket Board of SA* 2001 (4) SA 1361 (TPD), which is discussed in more detail *infra*. While the *Cronje* judgment appeared to express unqualified support for the notion that a sports governing body (national sports federation) is a private body, which does not exercise public powers and is accordingly not subject to the rules of natural justice, there have been conflicting judgments in recent years. See, for example, the dicta in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2001 (1) SA 1 (CC) (a case concerning the South African Rugby Union, then the SA Rugby Football Union), at par 182-183 of the judgment; and the unreported judgment of the Cape of Good Hope Provincial Division of the High Court in *Tirfu Raiders Rugby Club v SA Rugby Union & Others* Case No. 8363/2005. See, generally, the discussion in par 224 *et seq* below

¹⁹⁶ Discussed elsewhere in this chapter

¹⁹⁷ The author has previously posed a number of questions in this regard – see Louw, A M 'Evaluating Recent Developments in the Governance and Regulation of South African Sport: Some Thoughts and Concerns for the Future' *International Sports Law Journal* 2006/1-2, May 2006.

II The experience of post-1994 sports transformation

64 The author has elsewhere criticised the policies and measures in respect of race-based transformation which have been implemented (and driven by government) in the post-1994 dispensation. The following sections will briefly examine the possible legal grounds of criticism here, as the recent amendments to the National Sport and Recreation Act appear to perpetuate government policy in this regard and it is expected that the racial transformation agenda in sport will continue to be actively pursued for some time to come. Also, it is submitted that the phenomenon of government-driven race-based transformation policies in sport is unique in the international sporting context, and may provide not only an informative comparative perspective for sports lawyers from other jurisdictions (especially those who are active in the field of unfair discrimination in sport), but also promises to be a potential area of contention in South Africa's future involvement in the global sports arena.

65 The past decade has seen numerous examples of prescriptive conduct (or what some would term 'interference') by sports administrators in team selections on the basis of 'transformation', as well as the development of specific rules regarding the inclusion of 'players of colour' in high profile teams:

- An example of the first caused controversy in 2003, when there was public furore over the last-minute inclusion of Coloured cricketer Justin Ontong in the SA national team for their third test against Australia in Sydney, January 2002. Ontong's inclusion was ordered by the then President of the United Cricket Board of South Africa, the late Percy Sonn, and the player was preferred over White player Jacques Rudolph as a result of Sonn's view that the original team selection,

which included only one 'player of colour' (Hershelle Gibbs) constituted a 'breach of policy' in terms of the UCBSA's Transformation Charter.

- An example of the 'transformation' measures employed by federations under pressure from government, is the South African Rugby Union (SARFU)'s rules in respect of the domestic provincial ABSA Currie Cup competition (which have since been repealed but included the following provision):

'There shall be at least 3 black players in a team of 22 participating in the ... competition. There shall be at least two (2) black players in the starting line-up. A black player may be tactically replaced on condition that the quota is adhered to. A black player having to leave the field due to injury or a blood bin, need not be replaced by another black player...' (Rule 1.1.6).

- It was reported that Cricket South Africa's selection policy for the ICC Cricket World Cup West Indies 2007 required a minimum of 7 'players of colour' in the squad that travelled to the Caribbean, and that this policy also required that no less than 4 'players of colour' should be on the field of play during any match. This policy was a matter of common knowledge, and television commentators specifically commented on the 'breach' of such policy during the first-round match between South Africa and the Netherlands, when the team fielded only 3 'players of colour' due to injury.

South African hockey also experienced controversy in the run-up to the Olympic Games in Sydney, 2000, when the (then) National Olympic Committee of South Africa (or 'NOCSA') disqualified the men's national team from participating in the Games. The South African Hockey Federation unsuccessfully appealed to the Executive Board of the International Olympic Committee to have NOCSA's decision set aside. The NOCSA Selection Criteria for Sydney 2000 included a provision that read as follows:

'[Teams would be considered for participation in the Games] if the qualifying team, individuals or combination of athletes are made up of an acceptable portion of athletes from the historically disadvantaged sector of South African society.'

What had made the NOCSA decision to disqualify the men's national team even more controversial was the fact that such team was at the time the continental champions in the sport, having successfully defended its title as Continental champions at the All-Africa Games in 1999 – the qualifying competition for the Sydney Games. At the time, NOCSA's 'Guidelines for the Selection of the South African Olympic Team to Compete in the Sydney 2000 Olympic Games' (which had been adopted by NOCSA's membership in April 1998) contained the following regarding NOCSA's selection policy – a provision which may appear rather bizarre when viewed in light of the fundamental principles of sport as encompassed in documents such as the Olympic Charter:

'NOCSA's selection policy will comply with the letter and spirit of the IOC qualification criteria. NOCSA contends that it will not be fulfilling the IOC criteria if it utilises its continental qualification as entry for the Olympic Games by individuals and teams from the former establishment sector of the population. In fact, it would be dishonest if such individual athletes and teams used the continental qualification system to compete in the Games as this method of entry was established to encourage development of Olympic sports in the disadvantaged sector. *If we allow the advantaged sector to qualify via the continental system, South Africa would qualify with little or no effort in many sports because of the low development of many sports in the rest of Africa. In fact, South Africa would qualify automatically in several sports because of the non-existence of certain sports in the rest of Africa. For such sports, NOCSA will in general, consider entries from the disadvantaged sector. This selection policy will justifiably address the present concern about the demographic representation of South Africa in international sport.*'

[Emphasis provided]

Elsewhere in this chapter the reader will find more detailed discussion of the South African Sports Confederation and Olympic Committee (or SASCO), which has been established to regulate South African high performance sport in conjunction with the

government department Sport and Recreation South Africa. It is submitted that some readers might find it strange that the following statement should be attributed to a representative of a national Olympic committee:

SASCOC's manager of team preparation for international competition, Mr. Khaya Majeke, told the Parliamentary Sport Committee on 19 June 2007 that South African sports codes that do not have at least a 50-50 'Black-White ratio' of participants may not be allowed to send teams to the Beijing Olympics in 2008. Mr. Majeke was quoted¹⁹⁸ as saying in the following terms that SASCOC had conveyed a strong message to non-transforming sports federations:

'We told them that we would include their teams only if they have a 50-50 representation. Some of them said they did not have black players. Our reply was that we do not care; they should go find them in the streets of Alexandra [a black township near Johannesburg]. SASCOC shall ensure representative demographics.'

At this same meeting the First Vice-President of SASCOC, Ms. Hajera Kajee, stated that qualification by athletes for the Beijing Olympic Games in 2008 did not necessarily mean selection for a Games event. Kajee said that it was not about qualifying but about how someone qualified: 'An athlete could come from an advantaged family, with parents who have money, or from a disadvantaged one without it. Everything has to be weighed up.' These last sentiments appear rather ironic in light of Ms. Kajee (the *Chef de Mission* of Team South Africa to the 2008 Beijing Olympics)'s recently quoted statements in the media which blamed South Africa's medal drought at the event on 'too much political interference and too little support'.¹⁹⁹

At the same Parliamentary portfolio Committee meeting referred to above, the chairperson, Mr. Butana Komphela of the ANC – no stranger to controversy – was quoted as follows regarding the South African team which was at the time preparing for Beijing

¹⁹⁸ In a report available on the internet at www.superswimmer.co.za

¹⁹⁹ See the report entitled 'Stop meddling in sport: ANC blamed for Olympics failure', *Sunday Tribune*, 17 August 2008

2008 (from the minutes of the meeting available on the web site of the Parliamentary Monitoring Group, at www.pmg.org.za):

'[Mr. Komphela] was happy with the team preparations. He asked if the team would be as lily white as in the past. This would never happen again. This would be part of the National Sport and Recreation Amendment Act. There would be measures to punish any federation moving in the wrong direction. The government might not be able to confiscate passports as had been threatened.'

This last statement referred to a controversial incident in April 2007, when Komphela threatened that government would request the Department of Home Affairs to withdraw the passports of white rugby players in the national team who were scheduled to tour to France for the IRB Rugby World Cup 2007 (which the Springboks eventually won), if the team was not demographically representative enough and did not contain 'at least 6 black and/or coloured players'. This statement was widely criticised (also by the government Department of Home Affairs, who denied that this would be legitimate grounds for withdrawing a person's passport).

At a meeting of the Portfolio Committee with rugby administrators in June 2007, Mr. Komphela was reported as declaring that teams that failed to transform satisfactorily, and by doing so 'transgressed the law', would face financial fines, while 'those who co-operated would be compensated'. With reference to the National Sport and Recreation Amendment Act (discussed elsewhere in this document), Komphela was quoted as telling the President of the SA Rugby Union to '[g]o and read the law, this is exactly what is going to happen'.²⁰⁰

66 One of the most troubling aspects of the South African government's racial transformation agenda in sport, is that it is applied not only at the top level of

²⁰⁰ From a report by Coetzee, G 'Sides face fines for slow transformation', available online at <http://www.superrugby.co.za>

professional or elite sport, but also to young participants such as schoolchildren. The controversial racial quotas of participants in teams and events are also applied at such levels – rather ironically also to children born after the dissolution of the Apartheid state and in a democratic society which is (in the terms of the Constitution) professed to be based on the fundamental principles of freedom, the respect for human dignity and equality, as well as non-racialism and non-sexism.²⁰¹

The implementation of race-based quota policies appears to have been in effect at the level of school and youth sport as early as 1995.²⁰² The effects of such a system have sometimes engendered controversy and public outcry: The South African Games, held in Port Elizabeth in March 2004, were tainted by an incident where a young white tennis player, Adele van Niekerk, was stripped of her medal by tournament director David Kampele, apparently because her team did not meet the required '50% black' quota as prescribed. A month earlier, white athlete Erna Wedemeyer's team was disqualified from the South African Life Saving Championships because they did not comply with the prescribed racial quotas.²⁰³

It is submitted that the rather bizarre nature of 'transformation' taken to its irrational extreme is illustrated by the following media report regarding developments in women's netball, which report deserves to be quoted in full:²⁰⁴

²⁰¹ In a discussion document of the ANC's Commission on Social Transformation Service Delivery, entitled 'Policy Challenges for Social Transformation Towards the Next Millennium' (available on the web site of the African National Congress at <http://www.anc.org.za/ancdocs/history/conf/conference50/discomms2.html>), which was apparently tabled at the 50th National Conference of the ANC, Mafikeng, 16-20 December 1997, we find the following statements regarding racial transformation of sport, and of school sport:
'Par. 12.2 - One of the most important challenges in sport is to accelerate sports development, especially in rural areas. Affirmative action policies need to be put in place to ensure that sports reflects the demography of South Africa's population. Such policies should target disadvantaged groups including women, youth, disabled, and rural areas.'

'Par. 12.3 - Transformative policies in sport should also target school sports. It becomes imperative to come up with a policy which will give every single child in this country an opportunity to excel in sport. Our sports policies also need to enhance involvement of communities in sports.'

²⁰² A report in the *Financial Mail* Vol 136, Issue 6 (12 May 1995) at 45 observed as follows:

'Athletics SA president Leonard Chuene has said ... that race discrimination could be at the root of the recent case in which a 14-year-old white athlete tested positive for performance enhancing drugs. Chuene said racial discrimination was alive and well in junior athletics "not against blacks but against whites". Though he had no proof, he said some athletes are convinced they will never make teams simply because they are white. "These children do not understand the issues around discrimination. They know they have done well but see athletes who have finished up to five places worse than them being selected.'"

²⁰³ From a report in the *Dispatch*, 27 March 2004 – available online at <http://www.dispatch.co.za/2004/03/30/SouthAfrica/aabal.html>

²⁰⁴ Dated 7 August 2007 (and available online at http://www.news24.com/News24/Sport/More_Sport/0,,2-9-32_2159954,00.html)

'Rewards for racial quotas'

06/08/2007 17:43 – (SA)

Durban – Netball South Africa (NSA) announced on Monday that it had devised a new system to reward teams that comply with the required racial quotas.

NSA president Mimi Mthethwa said *it had been decided that instead of docking points from teams that do not meet the quota, any team that had the required five-two ratio on court at all times would receive an additional six goals.*

If they fielded a six-one ratio, they would receive three additional goals.

In close matches, this could mean the difference between winning and losing.

NSA regulations require teams to field a ratio of five to two on court at all times – either five white and two black players, or five black and two whites. In the past, teams such as Zululand and other rural areas, who have no white players, were consistently docked points, and in some cases, failed to win their section even after winning all their matches.

"We want to adopt a more positive approach," she said. *"In the past, some teams were docked so many points that they went into negative territory. This way, they will keep the goals they have scored, but their opposition will benefit if they stick to the quotas. We think it makes more sense to reward teams that meet the quotas than to penalise the ones that don't."*

[Emphasis provided]

67 The discussion that follows will attempt to scrutinize the legitimacy of these and other race-based transformation measures in light of the applicable fundamental rights and (in the professional sports context) employment legislation.

III The legal arguments against the application of race-based affirmative action in (professional) sport

68 The section that follows will briefly examine the legitimacy of these and other transformation measures in light of the South African legal framework relating to the pursuit of the fundamental right of equality and (in the professional sports context) of employment equity in the workplace.

A The test for justification of affirmative action in terms of the Constitution

69 South African courts, including the Constitutional Court, have consistently held that the right of equality as contained in section 9 of the Constitution²⁰⁵ embraces a substantive rather than a formal notion of equality. Formal equality subscribes to the 'traditional liberal notion of similarity of treatment', which entails that the law is seen as applying neutrally and symmetrically to everyone, ignoring group status and group-related social conditions. Accordingly, formal equality assumes that everyone is essentially similarly placed, and that the neutral application of the law best avoids preference or prejudice. Substantive equality acknowledges the importance of a contextual examination of any alleged discriminatory conduct, taking into account the circumstances of the parties and society in order to determine whether there has in fact been unfairly discriminatory conduct. In this way, courts are able to ignore the central criticism against the formal notion of equality, namely that it is blind to social and economic disparities between groups and individuals. Substantive equality focuses on the results or effects of a rule rather than its form.²⁰⁶ Accordingly, a substantive notion of equality attempts to recognise that the test for unfair discrimination in any given case

²⁰⁵ Section 9(2) provides for the application of affirmative action, as follows:

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

²⁰⁶ Dupper, O & Garbers, C 'Employment Discrimination: A Commentary' in Thompson & Benjamin *South African Labour Law* Juta Law (Looseleaf) Vol 1 at CC 1-14

cannot proceed in a vacuum. The South African society is not a utopian one, and one must accept and acknowledge the unjust nature of the social order in the pursuit of the achievement of true equality.

70 South African courts have embraced this notion of substantive equality. The Constitutional Court has, for example, held that a more realistic approach to equality, which takes cognisance of the unique nature and history of South African society, is required:

‘It is insufficient for the Constitution to merely ensure, through its Bill of Rights, that statutory provisions which have caused such unfair discrimination in the past are eliminated. Past unfair discrimination frequently has ongoing negative consequences, the continuation of which is not halted immediately when the initial causes thereof are eliminated, and unless remedied, may continue for a substantial time and even indefinitely. Like justice, equality delayed is equality denied.’²⁰⁷

The right to equality, which is also, significantly, reflected in one of the three core values embraced by the Constitution (along with freedom and dignity),²⁰⁸ is thus interpreted as an important foundation stone in the ‘historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice’, and a democratic future.²⁰⁹

71 The notion of substantive equality can be termed the mother of affirmative action. This notion recognises that “past patterns of discrimination have left their scars upon the present”, and that “[t]reating all persons in a formally equal way now is not going to

²⁰⁷ *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 12 BCLR 1517 (CC) at 1546G. See also *City Council of Pretoria v Walker* 1998 3 BCLR 257 (CC).

²⁰⁸ Equality is one of the overarching goals laid down in the first article of the Constitution. Section 1(a) provides that ‘[t]he Republic of South Africa is one sovereign democratic state founded on the ... values ... [of] human dignity, the achievement of equality and the advancement of human rights and freedoms’. The right to equality is, within the Bill of Rights, listed as the first of the substantive rights, and it influences the interpretation and application of all the other fundamental rights.

²⁰⁹ The Afterword of the interim Constitution, Act 200 of 1993

change the patterns of the past, for that inequality needs to be addressed and not simply removed".²¹⁰ In the words of Moseneke J in the Constitutional Court:

'[O]ur Constitution heralds not only equal protection of the law and non-discrimination but also the start of a credible and abiding process of reparation for past exclusion, dispossession, and indignity within the discipline of our constitutional framework ... [A] major constitutional object is the creation of a non-racial and non-sexist egalitarian society underpinned by human dignity, the rule of law, a democratic ethos and human rights. From there emerges a conception of equality that goes beyond mere formal equality and mere non-discrimination which requires identical treatment, whatever the starting point or impact.'²¹¹

Accordingly, this means that persons deprived of resources in the past are entitled to 'an "unequal" share of resources at present'.²¹² In this we find the crux of affirmative action and also the first shades of the criticism it engenders: Affirmative action programmes have as their object, means and purpose the unequal treatment of persons, in order to redress past unequal treatment against groups or individuals. As such, it constitutes a seeming aberration, and (at least for its critics) begs the question of whether two wrongs can make a right.

72 This controversial nature of affirmative action has necessitated South African courts, though recognising its legitimacy, to impose a framework for the constitutional imperative of actions, policies and measures implemented in the name of affirmative action. When a complainant in the constitutional testing of an unfair discrimination claim succeeds in showing that unfair discrimination has occurred, the respondent would need to show that such conduct is justifiable in terms of the limitation clause of the Bill of

²¹⁰ Janet Kentridge as quoted in Dupper & Garbers at CC 1-14. See also the Explanatory Memorandum to the Employment Equity Bill, General Notice 1840 of 1997, 1 December 1997, Government Gazette 18481, at 5.

²¹¹ *Minister of Finance & Others v van Heerden* 2004 (6) SA 121 (CC) at par 25-26. See also *Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs and Tourism & Others* 2004 (7) BCLR 687 (CC)

²¹² Dupper & Garbers at CC 1-14

Rights. Section 36(1) requires that, in order to succeed, the respondent must show that the distinction in treatment is 'reasonable and justifiable in an open and democratic society based on freedom and equality and does not negate the essential content of the right of equality.'²¹³ In this enquiry, the court will take all relevant factors into account, including the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose, and less restrictive means to achieve this purpose. The core of this test is therefore to determine whether the limitation serves a legitimate social purpose in a way that is proportionate to the end that it seeks to achieve.²¹⁴ This test is remarkably similar to the 'collapsed one-stage enquiry' into fairness under the discrimination provisions of the Employment Equity Act,²¹⁵ which was formulated as follows in the case of *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd*:²¹⁶

'Discrimination is unfair if it is reprehensible in terms of the society's prevailing norms. Whether or not society will tolerate the discrimination depends on what the object is of the discrimination and the means used to achieve it. The object must be legitimate and the means proportional and rational.'

However, as has been mentioned, South African courts have acknowledged the substantive nature of the equality right. Specifically, it is recognized that affirmative action or other restorative measures which, at first blush, might appear to be an exception to equal treatment and thus would appear to violate the right of equality, are in fact part and parcel of such right. Accordingly, in *van Heerden*, the Constitutional Court rejected the American 'strict scrutiny' approach which regards affirmative action measures as a suspect category.²¹⁷ Our constitutional understanding of equality includes 'remedial or restitutionary equality': 'Such measures are not in themselves a deviation

²¹³ Dupper & Garbers at CC 1-31

²¹⁴ Kentridge, as quoted by Dupper & Garbers at CC 1-31

²¹⁵ Act 55 of 1998, discussed *infra*

²¹⁶ (1998) 19 ILJ 285 (LC) at 295H

²¹⁷ *Minister of Finance v van Heerden* op cit. par 29

from, or invasive of, the right to equality ... They are not "reverse discrimination" or "positive discrimination".²¹⁸

73 This reading of restitutionary measures such as affirmative action does, however, not isolate them from judicial scrutiny. Even though such measures that properly fall within the requirements of sec. 9(2) are not presumptively unfair, they will only be warranted provided they are shown to conform to the internal test set in sec. 9(2).²¹⁹

This test was succinctly explained as follows:

'When a measure is challenged as violating the equality provision, its defender may meet the claim by showing that the measure is contemplated by section 9(2) in that it promotes the achievement of equality and is designed to protect and advance persons disadvantaged by unfair discrimination. [T]o determine whether a measure falls within section 9(2) the enquiry is threefold. The first yardstick relates to whether the measure targets persons or categories of persons who have been disadvantaged by unfair discrimination; the second is whether the measure is designed to protect or advance such persons or categories of persons; and the third requirement is whether the measure promotes the achievement of equality.'²²⁰

Accordingly, in evaluating whether an affirmative action policy, programme or measure will pass muster as a legitimate and justifiable limitation of the right of equality, it will need to satisfy the above test which stresses the importance of the rationality of the measure (in respect of its being designed to protect or advance persons who were disadvantaged by unfair discrimination), as well as the importance of its effect (being the actual promotion of the achievement of equality). While such measures may therefore not require 'strict scrutiny', the threshold for legitimacy still requires rationality and the

²¹⁸ *Ibid.* par 30

²¹⁹ *Ibid.* par 32

²²⁰ *van Heerden supra par 37*

actual promotion of equality,²²¹ and affirmative action should not be applied in an arbitrary and unfair manner.²²² It should also be noted in passing that, in the employment context (and in terms of the provisions of the Employment Equity Act²²³), it has been held that employees do not enjoy a 'right to affirmative action'.²²⁴

74 Against this background, in practice, affirmative action can be classified as taking one of two forms: The 'weak' form of affirmative action refers to measures whereby the preference given to members of a certain group is allowed to influence decisions between candidates who are otherwise equally qualified for the particular position.²²⁵ 'Strong

²²¹ The lower level of scrutiny of such measures, in light of *van Heerden's* judgment, was affirmed as follows in *Alexandre v Provincial Administration of the Western Cape Department of Health* (2005) *Industrial Law Journal* 768 (LC) at par 6):

'[Affirmative action] measures are not required to be strictly necessary to achieve a compelling policy objective. It is enough that they be a rational means of advancing the legitimate aims of affirmative action.'

²²² *Independent Municipal & Allied Workers' Union v Greater Louis Trichardt Transitional Local Council* (2000) 21 *Industrial Law Journal* 1119 (LC); *Baxter v National Commissioner: Correctional Services & Another* (2006) 27 *Industrial Law Journal* 1833 (LC). In the context of the application of affirmative action in terms of the Employment Equity Act 55 of 1998, the Labour Court (by way of Nel J) reiterated the importance of fairness in the determination of the legitimacy of affirmative action measures, when it observed the following in *Willemse V Patelia NO & Others* (2007) 28 *Industrial Law Journal* 428 (LC) at par 34 – where it was argued that the application of affirmative action would not be rational and fair where the employer does not have an employment equity plan (in terms of section 20 of the EEA) in place:

'In view of the potential discriminatory nature of affirmative action measures, it is of course important, when one has to assess whether such discrimination as may have been perpetrated by an employer in pursuit of affirmative action goals, was fair or not, for a reviewing court to see exactly how and in terms of what the employer exercised its discretion. In this process one of the issues to be determined will be whether the employer had interpreted its own employment equity policies and plans properly. Affirmative action measures should not be applied in an arbitrary or unfair manner. Where an employer, like in the present instance, fails and/or refuses to promote an employee by reason of promoting representativity levels from designated groups, then, if that employer had no employment equity plan whatsoever, it may be very difficult to determine whether such discrimination as it may have perpetrated in its refusal to promote an employee constituted unfair discrimination or not. Whilst the [employer] did not have a formal employment equity plan at the time the acting director-general refused the recommendation to promote [applicant], the evidence before the arbitrator did disclose that the [employer] was operating within a framework of policy statements as well as targets with reference to its employment equity goals and objectives. The [employer] had an employment equity policy statement and race, gender and disability profiles for the department. It also had compiled a progress report in respect of the transformation process and it had been submitting annual report data to the Department of Labour as required by law. There accordingly was a determined or determinable framework within which the [employer] was to operate, and against which one can assess whether the conduct of the [employer] herein was fair and whether it constituted an unfair labour practice or not.'

²²³ Act 55 of 1998

²²⁴ *Dudley v City of Cape Town* (2004) 25 *ILJ* 305 (LC) (contra *Harmse v City of Cape Town* (2003) 24 *ILJ* 1130 (LC)); *Cupido v GlaxoSmithkline SA (Pty) Ltd* [2005] *JOL* 14271 (LC); *PSA obo Karriem v SA Police Services & Another* [2007] 4 *Butterworths Labour Law Reports* 308 (LC). In the recent judgment of the Labour Court in *Thekiso v IBM* [2006] *JOL* 18447 (LC), the court (by way of Freund AJ) approved and followed *Dudley* and determined as follows regarding the affirmative action provisions contained in the EEA (specifically section 15(2)(d)(ii)) – at par 46 of the judgment:

'[O]n a proper construction [of the Employment Equity Act], there is no legal obligation on an employer when taking any particular appointment or dismissal decision to give preference to suitably qualified employees from a designated group. In my view, section 15(2)(d)(ii) does not impose an obligation on an employer contemplating retrenchments to retain black employees in preference to white employees it believes better meets its needs. Whilst Chapter III of the EEA (including section 15(2)(d)(ii)) plainly imposes legal obligations, those obligations are, in the language of Tip AJ [in *Dudley*], "programmatic and systematic". They require consultation on, and the implementation of, an employment equity plan but they do not confer legal rights to preferential treatment on individuals in respect of particular appointment or dismissal decisions.'

²²⁵ Dupper 'In Defence of Affirmative Action in South Africa' *South African Law Journal* 2004 states that weak affirmative action 'merely involves efforts to ensure equal opportunity for members of groups that have thus

affirmative action' goes beyond this, and involves the selection of candidates from designated groups over other candidates who are better qualified for the position.²²⁶ As is discussed elsewhere in this chapter, the use of race-based quotas in team selection is an example of this latter form of affirmative action, and it characterises the current controversial transformation measures in South African sport.²²⁷

B 'Demographic representivity' as the objective of sports transformation

75 The fundamental problem (in respect of constitutional legitimacy) with the South African government's prescribed policy of transformation (in the meaning of the application of 'affirmative action') as applied by sports federations, is that these measures do not appear – at least not as they have been articulated to date – to be aimed primarily at protecting and advancing persons previously disadvantaged by unfair discrimination, in the meaning of the equality clause in the Bill of Rights. It is eminently clear, from the experience of the application of such measures in practice as well as from the explicit wording of the sports legislation as referred to earlier, that the stated

been subject to discrimination', and cites as examples of such efforts the active recruitment of applicants from formerly excluded groups, special training programmes to help them meet the standards for appointment, as well as measures to ensure that they are fairly considered in the selection process. Kekes 'The Injustice of Affirmative Action Involving Preferential Treatment', in Steven M. Cahn (Ed.) *The Affirmative Action Debate* Routledge (1995) 193, distinguishes (in the form of affirmative action policies) between 'impartiality' and 'preferential treatment', as follows:

'The aim of impartiality is to assure open access to the initial pool from which people are selected and selection in accordance with procedural rules which apply to everyone equally. The aim of preferential treatment is to alter the procedural rules so as to favor some people in order to increase the likelihood that they rather than others will achieve the desired position.'

²²⁶ Dupper 10-11. See also the discussion of different types of affirmative action measures in Pretorius et al *Employment Equity Law* Ch 9-23 to 9-24.

²²⁷ Such as the quota system enforced in rugby and cricket in respect of players, and 'aggressive' empowerment measures such as the SA Rugby Union's erstwhile 'Transformation Incentive Scheme'. In terms of this scheme, which was implemented in 2001, the SARFU (as it then was) undertook to pay financial incentives to provincial rugby unions for the appointment of 'Black persons' in certain categories, including players, coaches, administrative staff and executives (which were characterised as categories 'worthy of reward'). For example, the appointment of a Black coach could earn a provincial union R25 000, the appointment of a Black CEO R18 000. This scheme included a troublesome provision. It stated that one of the categories of appointment of Black persons for which SARFU undertook to financially reward provincial unions, was that of "employing above employment equity requirements". A union could qualify for an amount of R5 000 for every 5% employment above such requirements. In effect the SARFU scheme offered financial incentives to provincial rugby union employers to pursue affirmative action policies that go beyond the statutorily prescribed requirements. This raises the question whether such appointments would not constitute unfair discrimination, as not being sanctioned or protected under the provisions of Chapter III of the EEA, and apparently constituting attempts at "racial balancing". If "equitable representation" is the purpose of transformation measures in sport, this provision went further than this stated purpose, in rewarding representation that goes beyond that envisioned or pursued in terms of the EEA.

objective of such measures is to ensure the 'demographic representivity' of sports teams and participants.

The meaning attributed to this term appears to be, simply put, that government has at the level of policy formulation opted to pursue the achievement of a goal where sports teams are composed of athletes from the different race groups in the same ratio as such persons are represented in the South African population; i.e. where approximately 80% of the South African population is comprised of the black African group, a rugby or cricket team should also be made up of 80% black African players.

It should be noted that the equality clause in the Constitution, as quoted earlier, contains no reference to 'demographic representivity' as a yardstick or indicator of equality.

76 It is here that (it is submitted) the premise of such policies suffers a fatal misapprehension, and that they appear to cross the boundary between legitimate remedial action and unfair race discrimination. The following discussion will show that there is in fact no rational or moral justification for the use of 'demographic representivity' as an indicator of the achievement of substantive equality. The 'affirmative action' policies in South African sport appear to follow the lead of the Employment Equity Act, 1998 (or the 'EEA', which Act was passed in furtherance of the provisions of section 9(2) of the Constitution, and which is also referred to elsewhere in this chapter), even though the EEA has never been expressly invoked by government or any sports federation as constituting the legislative basis for race-based transformation measures. The EEA was introduced in order to prohibit unfair discrimination in workplaces, and also to sanction (and, in fact, prescribe) the implementation by employers of affirmative action in instances where it is determined that persons from previously disadvantaged groups in society are not 'equitably represented' in the workplace.

While, as was remarked above, no reference to the yardstick of 'demographic representivity' is to be found in the Constitution's equality provisions, the EEA has (in

section 42 of the Act) introduced this as a factor in determining whether persons from the 'designated groups' are equitably represented in the workplace of an employer. While such 'representivity' or diversity of the workforce is just one (albeit the first) of the factors listed in sec. 42 in determining the equitable representation of groups (and the consequent need for affirmative action measures), in practice, and in implementing the EEA, many employers have proceeded to view such 'representivity' as a guiding principle or deciding factor in determining the extent to which they will employ affirmative measures in order to change the face of the workforce.

Government has followed this same route in respect of its transformation agenda in sport, and 'demographic representivity' has been raised to the level of the key objective of all policies and measures aimed at 'transforming' South African sport.

77 Which brings one to the question of the relationship, if any, between the Constitutional imperative for justifiable affirmative action, namely the redress of past unfair disadvantage, and the purely statistical yardstick of the demographic make-up of the South African population *vis a vis* the racial make-up of a sports team. Here one must consider the following questions:

- In what way can it be affirmed that the current transformation policies in sport are addressing past disadvantage of the previously disadvantaged groups?
- Can the value of 'representivity' be equated with the traditionally accepted view that affirmative action is justified in the pursuit of substantive equality *because* its objectives are to redress past disadvantage caused by unfair discrimination?
- Or has the ideal of 'representivity' been selected as a proxy for equality?

These questions necessitate an examination of the meaning of 'representivity' and its place in the transformation debate.

78 Commentators have warned that one should not, in assessing inequality in South African society, lose sight of the fact that the invidious apartheid policies are not the sole causes for existing inequalities.²²⁸ In the process of assessing past disadvantage, a comparison is drawn between groups in order to ascertain whether they are at the same level. If they are not, it must be determined whether they would have been but for the discriminatory conduct. But there are two underlying suppositions to this approach: the first is that the groups would be the same but for some conduct by the one in relation to the other; the second is that this conduct (if found to exist) is unjustifiable.²²⁹ In this regard the following has been observed:

'If we are to be conscientious in evaluating the degree of illegitimate oppression ... we must look at the period [of contact between black and white people in South Africa] as a whole and compile our balance sheet accordingly. We must ask to what extent the material deprivation of blacks is the consequence of their own conduct on the one hand and the product of unjustified white oppression on the other. In the process we are compelled, unpalatable though the task is, to judge the historical experience of blacks and the behaviour towards them of whites. We have to look at the starting points of each, trace their developments, follow the decisions each group made along the way, and weight the results in the scales.'²³⁰

It is by no means the intention to deny the abhorrent nature and effects of apartheid policies in the development of South African sport. However, it is submitted that one should not deny the role of cultural choices and historic legacies in this regard. None of the major sports in South Africa were indigenous to the African population; football, rugby and cricket were all imported from Europe (and specifically England). Football is currently (and has been for a number of years) the major sport of choice of the African majority of the population. But can it be said that the status of rugby and cricket (the high profile targets of the South African government's transformation agenda) as the

²²⁸ Brassey, M 'The Employment Equity Act: Bad for Employment and Bad for Equity' 1998 *Industrial Law Journal* Vol 19 Part 6 1359 at 1362

²²⁹ Brassey 1362

²³⁰ Brassey 1362

'preserve of the white minority' is due solely to apartheid? Was there not a measure of choice by the majority group in participation and involvement, a 'selective ownership' in respect of these sports? Internationally it is shown that cultural choice features strongly in determining the sporting identity of nations and peoples. When we think soccer we think Brazil, when we think baseball we think the USA, table tennis the Chinese; and there are numerous similar examples of nations or peoples adopting a game and making it their own.²³¹

Sociologists²³² have observed that the human socialization process is influenced by the subculture in which individuals are socialized. In respect of sport, the following has been stated (in the American context):

'[I]f one is a member of a particular ethnic, religious or racial group they are often faced with norms and values which differ from those of mainstream society. These differences may have an impact on the socialization process, including the learning of sport roles. For example, [it has been] argued that involvement in specific sport roles by blacks is self-induced rather than due to overt or subtle discrimination by white leaders within the sport system ... [T]he opportunity set, the value orientations, and the type of role models present early in life may account for involvement in a particular sport by members of a minority group ... In summary, the process whereby primary and secondary sport roles are learned seems to vary by sport, by specific roles within a sport, by nation, by sex, and by stage in the life-cycle. Moreover, the process is influenced by both macro and micro system parameters, including ascribed attributes of the socializee. In short, the learning of specific sport roles is a complex phenomenon which is not adequately understood at this point in time.'²³³

While not attempting to deny or undervalue the role of apartheid policies in the development and involvement of designated groups in South African sport, it is submitted that a simplistic view of the issue should be avoided. The role of other factors

²³¹ Stone 'Sport as a Community Representation', in Luschen & Sage (eds.) *Handbook of Social Science of Sport* Stipes Publishing (1981) 214, at 221.

²³² McPherson 'Socialization into and through Sport Involvement', in Luschen & Sage 246.

²³³ McPherson 262-3

should enjoy proper consideration. And, in the interests of fairness and objectivity, the proponents of affirmative action in sport should consider these other sources of disadvantage or (maybe mere) differences between racial groups and their impact on the current state of our sport. If affirmative action measures are aimed at redressing past injustices, it should be admitted that not all differences between the groups compared in the debate are attributable to unfair discrimination by one group against another. These and other reasons (including but not limited to the role of unjust white conduct towards black persons in the past) have all contributed to the racial and social differentiation between the different sports. Any specific racial group's ownership of a sport is not due solely to what took place under the Apartheid system.

79 It appears that the government's view of sport in South Africa, in the justification and promotion of transformation, does not recognise this. This is illustrated by the report of the Ministerial Committee of Inquiry into Transformation in Cricket (published October 2002, and referred to elsewhere in this chapter), which contains the following observation:

'Transformation with regard to the composition of teams in the national competitions from its current approximate demographic profile of

Asian	Coloured	White	African
9	9	73	9

to the estimated national demographic profile of

Asian	Coloured	White	African
2	8	11	79

is a major challenge. To underestimate the complexities of balancing the need for demographic representivity and world class performances, is a strategic mistake.²³⁴

Even though this view expressly recognises the complexities of balancing the interests in this context, the apparent blind adherence to the attainment of an unqualified target of general 'demographic representivity' is troubling. One must question whether any workplace in any sector or industry can ever be totally representative of the whole population; this applies equally to those employed in professional sport as well as amateur sportsmen and -women who choose to participate in the sporting codes of their choice. In the specific context of sport, it should be self-evident that not all persons - regardless of their race - are equally talented, inclined or otherwise suited to participation in any particular sporting code; this is especially true of top-level, elite sport.

80 It is clear that government has opted to select 'representivity' as a proxy for equality: This yardstick is not found in the constitutionally guaranteed equality right, but has been elevated to the status of the objective of measures which *should* be aimed at the redressing of past disadvantage and the upliftment of those most in need of such affirmative measures - not at the achievement of 'rainbow' sports teams.

Accordingly, one must ask whether 'representivity' can possibly function, legitimately and rationally, as an indicator of the achievement of racial equality. If supporters of affirmative action in the composition of sports teams argue that teams representative of the general demographic composition of the South African society are warranted in terms of the equality provisions of the Constitution, one must determine what this 'representivity' means. This argument seems to assume that, in any workplace or context where one selects a number of persons for a particular purpose (e.g. a sports team), and the group selected contains members from each of the racial groups in the same proportion as such groups are represented in society, this would equate to all such

²³⁴ At 29 of the Report

persons (as well as those who were not selected) having been treated equally, and thus fairly, in terms of section 9 of the Constitution.

But it is submitted that this is a rather absurd proposition. Such an inference cannot follow naturally merely from the racial make-up of the group. In theory, a number of persons not selected may have been excluded because of discriminatory selection practices. Does the fact that the demographic make-up of the eventual group is 'representative' of society then negate or justify such discriminatory selection? Of course it can't.

81 Also, one surely cannot rationally expect all occupations and workplaces to mirror the demographic make-up of our population – traditionally, women are more likely to pursue careers in the fashion industry, and not all persons aspire to be bankers or engineers. The following is surely correct, and also relevant in respect of participation in sport:

'[T]here is no prima-facie reason to suppose that members of different racial and ethnic minorities would be equally likely to want to go into [a specific profession] and, on the contrary, many reasons to expect that they would not. To the extent that ethnic and racial groups form at least partially self-contained communities (and they do), members of one community will value different sorts of character traits, encourage the acquisition of different skills, and have different ideas about what sorts of jobs carry the most prestige. Most arguments in favour of affirmative action in fact suppose that racial and ethnic groups differ in these sorts of ways; if they did not then bringing in a wider variety of such groups would not contribute to diversity.'²³⁵

The 'representivity' of the group can never be viewed as proof or consequence of equal, non-discriminatory treatment. And that is precisely the problem with the use of race-based quotas. Such a policy elevates the group above the individual in the assessment of selection criteria for participation. As such, it holds no guarantees for the promotion of

²³⁵ Celia Wolf-Devine 'Proportional Representation of Women and Minorities' in Steven M. Cahn (ed.) *The Affirmative Action Debate* Routledge 1995 at 136

equality and the eradication of unfair discrimination, and serves merely to ensure, reminiscent of tokenism, that the group eventually selected is 'representative'.

82 It is accordingly submitted that the use of 'affirmative action' measures and policies as part of the racial transformation agenda of the South African government, especially as such measures are aimed at the achievement of 'demographically representative' sports teams, is not in line with the Constitution of the Republic and the right of equality guaranteed to all in its Bill of Rights. Such measures and policies may in fact constitute infringement of such right of equality for a large number of athletes and participants at various levels of sporting participation.

C The 'quotas and targets' debate

83 At this point it is useful to refer in passing to a related objection, which is aimed at the actual measures used in pursuit of the transformation policies in South African sport, which serve to highlight another conceptual shortcoming of such policies' objective of demographically representative sports teams. This objection relates to the 'quotas vs. targets' debate. Race-based quotas in sports transformation have been one of the most controversial features of the process. First, some observations regarding the difference between quotas and numerical goals or targets.

84 A 'quota' has been defined (in the American context) as 'a number or percentage ... of people, constituting a required or targeted minimum; e.g. a system of quotas for hiring minority applicants'.²³⁶ The US Supreme Court²³⁷ has distinguished as follows between quotas and goals in the context of affirmative action:

²³⁶ *The American Heritage Dictionary of the English Language*, 4th Edition, 2000

²³⁷ *In Local 28, Sheet Metal Workers' International Association v EEOC* 478 US 421 at 495

'A quota would impose a fixed number or percentage which must be attained, or which cannot be exceeded, and would do so regardless of the number of potential applicants who meet necessary qualifications ... By contrast, a goal is a numerical objective, fixed realistically in terms of the number of vacancies expected, and the number of qualified applicants available in the relevant job.'

Pretorius *et al* have observed the following:

"Quotas" refer to all preferential techniques that have the effect of reserving all or a fixed percentage of job opportunities for designated groups. This may be achieved through the setting aside of a specific number of positions for designated groups or by making designated group status the only or dominant criterion for eligibility for employment opportunities.²³⁸

On the other hand, numerical targets involve guidelines determined by employers with reference to the circumstances of the specific workplace and in consultation with employees. In short, it can be said that '[n]umerical goals or targets are flexible, whereas quotas are rigid, inflexible and are generally prescribed by an outside agency'.²³⁹

The purpose of numerical goals is described as follows in the *Code of Good Practice: Preparation, Implementation and Monitoring of Employment Equity Plans* published by the Department of Labour:²⁴⁰

'Numerical goals should be developed for the appointment and promotion of people from designated groups. The purpose of these goals would be to increase the representation of people from designated groups in each occupational category and level in the employer's workforce, where underrepresentation has been identified and to make the workforce reflective of the relevant demographics as provided for in form EEA8.'

²³⁸ *Employment Equity Law* Butterworths 2000 at Ch 9-50

²³⁹ Bhoola 'Affirmative Action: A Commentary' in Thompson & Benjamin *South African Labour Law* Juta Law (looseleaf service issue 43, 2002) Vol 1 at CC-1-B6

²⁴⁰ Government Notice No. R. 1394, 23 November 1999, in section 8.4.1

In practice, and in contrast to quotas, such guidelines are not mandatory. Thus, the two main differences between goals and quotas are the following: First, quotas are mandatory and represent a fixed number to be achieved, apparently, at any cost. Second, as will be argued below, the setting and application of quotas are generally divorced from reality and the circumstances of the specific situation in which they are applied.

85 A central criticism of the nature of quotas is that it is reminiscent of tokenism, or the achievement of 'representivity for its own sake'. The basic distinction in the selection of persons for employment in this context is that between merit selection and selection upon other grounds (or where such other grounds are the deciding criteria in selection). The 'merits' of an appointee will be used here to mean the skills, attributes and characteristics of such appointee that are determinative of his or her suitability and ability to perform the specific job in a satisfactory manner. The merits of an appointee are determined as a combination of such appointee's personal attributes and the inherent requirements of the job. The role of merit in the employment context is central to the difference between targets and quotas. As has been observed:²⁴¹

'[T]argets are aspirational in nature and do not predetermine the outcome of any given selection decision – the merit principle is thereby retained; quotas, on the one hand, may require the hiring of a less qualified individual. The preferred approach depends substantially on how far one accepts that jobs both are and should be allocated on the basis of merit.'

When it is prescribed that a predetermined number of employees are to represent a certain group (e.g. black Africans), it is inherent in such prescription that, even though merit might be relevant and considered in the selection process, the deciding factor will necessarily be whether the particular candidate is in fact African. This requirement or

²⁴¹ Townshend-Smith, R *Discrimination Law: Text, Cases and Materials* Cavendish Publishing Ltd, London (1998) at 562

characteristic of the applicant is a *sine qua non* for appointment. Such a policy in fact adds a new 'inherent requirement of the job', which is specific only to the particular appointee or person filling the position under such policy. While it might not be an inherent job requirement that the applicant be African, an appointee must in fact be African in order to be appointed to perform the job in terms of the policy, as non-membership of the particular group constitutes an absolute bar to appointment. And any policy or measure where the job-related merits of an appointee are secondary to that of group membership naturally implies tokenism, as the criteria of group membership, race or ethnic origin are elevated above the interests of the job requirements with an objective of ensuring greater representivity or the promotion of 'diversity', for its own sake.

86 The use of non-job related criteria in numerical targets should not attract the same criticism, if targets function as non-enforceable guidelines as opposed to mandatory quotas. An important point to emphasise is that the EEA requires that numerical targets and the timetable imposed for their achievement should be justifiable on a rational basis. This process involves an evaluation of the effect of such targets on non-designated groups and the employing institution, in respect of their fairness and proportionality,²⁴² also bearing in mind issues such as the efficiency of the organisation in performing its economic function. In this process, some of the relevant factors to be considered are those set out in section 42, which are quoted below. This evaluation of rationality, fairness and proportionality is absent in the use of quotas. When a policy states that three employees in a department must be African, the importance of the non-job related characteristic (race) is elevated to the primary role of deciding factor in the selection of an appointee. Accordingly, such a policy rigidly imposes a target from above, without concerning itself with the circumstances and conditions of the specific workplace, and specifically the interests of non-designated persons as well as the employer.²⁴³ It is one-sided and evinces a preoccupation with the objective which is sought to be attained

²⁴² See Pretorius et al, *supra*, at Ch 9-46

²⁴³ See *Public Servants Association v Minister of Justice* 1997 5 BCLR 577 (T) at 641 C-D

(greater representivity or diversity) to the exclusion of all other considerations, which brings the very fairness of such conduct into question. Accordingly, the logical conclusion is that an appointee in terms of a quota would equate to 'one that represents a group, as an employee whose presence is used to deflect from the employer criticism or accusations of discrimination', the definition of a 'token'.²⁴⁴ While this definition assumes an intention or state of mind in respect of the appointment of persons from designated groups, it is submitted that this is a logical inference in the absence of selection on the basis of merit. By definition, selection based on a statutory or prescribed obligation on the employer to fill a certain position with a candidate from a certain group precludes merit selection.

87 In order to examine the Employment Equity Act's specific treatment of quotas, one must refer to the provisions of section 15. Section 15(2)(d) reads as follows:

'Affirmative action measures implemented by a designated employer must include ... subject to subsection (3), measures to ... ensure the equitable representation of suitably qualified people from designated groups in all occupational categories and levels in the workforce ...'

Section 15(3) states that 'the measures in subsection (2)(d) include preferential treatment and numerical goals, but exclude quotas'. While section 15(4) states that '[n]othing in this section requires a designated employer to take any decision concerning an employment policy or practice that would establish an absolute barrier to the prospective or continued employment or advancement of people who are not from designated groups', it is submitted that the wording of section 15(3) is not merely negatively permissive but constitute an express prohibition on the use of quotas as an affirmative action measure. A possible interpretation of section 15(3) read with 15(2)(d) is that the legislature has simply indicated that the measures prescribed in order to achieve the goal (of ensuring equitable representation of suitably qualified people from

²⁴⁴ *The American Heritage Dictionary* 4th ed. *supra*

designated groups) do not include quotas, although quotas are still permissible as long as they are designed to achieve this goal. However, it is submitted that the preferable interpretation is the following: Section 15(2)(d) states that measures to ensure this goal of equitable representation must be taken, and this includes any and all possible measures designed to this end. However, this prescription is *subject to section 15(3)*, which explicitly states that *the measures referred to* in 15(2)(d) (therefore all possible measures to achieve the goal) exclude quotas. Therefore, the two subsections read together constitute an express prohibition on quotas. This would seem to be in line with the condemnation of quotas in other jurisdictions, notably the USA, where measures such as guaranteeing a certain percentage of jobs or university admissions to a racial or gender group have been called 'racial or gender balancing', which practise has been consistently rejected as a legitimate affirmative action goal.

88 So, if one accepts that the legislature has expressly prohibited quotas in the EEA, what is the real difference between such quotas and the legitimate measure of numerical goals? Section 19 of the Act places an obligation on designated employers to undertake an organisational analysis in order to, *inter alia*, determine the degree of under-representation of people from designated groups. Section 20, which deals with the formulation and implementation of an organisational employment equity plan, states that such plan must include numerical goals to achieve the equitable representation of suitably qualified people from designated groups, where such under-representation has been identified. The plan must also contain a timetable in terms of which these goals are to be achieved, as well as indicating the strategies intended to achieve such goals.

As will be shown below, the determination of under-representation of designated groups is central to the formulation of numerical goals – the yardstick of 'equitable representation' is the primary determinant of not only the extent of such goals but also whether their existence is in fact justified at all. Section 42 of the EEA lists a number of indicators to be used in assessing an employer's compliance with the Act, and specifically

the determination of whether designated groups are equitably represented in a specific workplace and the legitimacy of targets set. These include the following:

- The demographic profile of the national and regional economically active population;
- The pool of suitably qualified persons from designated groups from which the employer may reasonably be expected to promote or appoint employees;
- Economic and financial factors relevant to the sector in which the employer operates;
- Present and anticipated economic and financial circumstances of the employer; and
- The number of present and planned vacancies that exist in the various categories and levels, and the employer's labour turnover.²⁴⁵

When an employer has identified that a certain designated group or groups are underrepresented in the workplace, with reference to such factors, it is legitimate to set numerical goals for the increased representation of such groups over a period of time.

When an employer sets and pursues such goals *in light of these and other relevant factors*, affirmative action measures designed to achieve such goals would be legitimate in terms of section 15. Otherwise, such goals would operate no differently than quotas.

89 Quotas, in contrast to numerical goals, can be characterised as lacking a realistic basis in the surrounding circumstances of the workplace and labour market. It is in this characteristic that the central criticism against quotas is to be found: when a goal for representation of any given group is determined without reference to the types of factors mentioned in section 42, such goal can not be viewed as being realistic, and hence not as

²⁴⁵ In respect of the factors to be taken into account in setting numerical goals, see also the Code of Good Practice, *supra*, at section 8.4.2

reasonable, rational or indeed morally justifiable. The tokenism inherent in the use of quotas can have no rational basis, as the mere appointment of persons on the grounds of their race as deciding factor can hold no possible economic or social benefit. While race may be relevant in certain cases, for instance in the case of candidates for a police force that needs to patrol in a certain area-where persons of that race reside, in all other instances mere race-based hiring would not only be unproductive but possibly counter-productive. Such hiring practices would be reminiscent of job reservation systems employed in our recent past. And, accordingly, the pursuit of such quota at the cost of persons from non-designated groups would not constitute a legitimate exception to the prohibition of unfair discrimination in section 5 of the EEA. In other words, while affirmative action is expressly identified as a justifiable form of differentiation between employees (section 6(2)(a) of the Act), such action that lacks a reasonable and justifiable basis would fall short of qualifying as affirmative action 'consistent with the purpose of the Act'. Here, one would cross the line between employment equity and employment discrimination.

90 The central concept in the EEA's prescriptions regarding affirmative action measures is that of equitable representation of designated groups across all categories and levels in the workplace. Only once it is determined that a group or groups are not equitably represented does the need for affirmative action measures arise. Accordingly, an employer may only legitimately set a goal for such group's representation, to be achieved through affirmative action measures, once this determination has been made. The concept of equitable representation is not defined in the Act, and one must assume that the words should bear their usual meaning. 'Equitable' is defined by the *American Heritage Dictionary of the English Language*²⁴⁶ as 'marked by or having equity, just and impartial'. 'Equity', in turn, is defined as 'the state, quality or ideal of being just, impartial and fair'. Accordingly, the meaning envisaged by the EEA for the concept of equitable representation of designated groups appears, at first glance, to be rather clear,

²⁴⁶ 4th Edition, 2000

unambiguous and uncontroversial, based as it appears to be on recognition of the fundamental constitutional values of equality and fairness.

However, the wording of the Act leaves some room for debate in gauging the exact meaning of equity in the context of its provisions. Specifically, there is no express indication of whether 'equity' should be read in light of a formal or substantive interpretation of equality. As a barometer of the legislature's understanding of this concept, one should look at the objective of the Act's affirmative action chapter. Are we dealing, in the implementation of affirmative action measures, with the traditional notions of equality of treatment or of outcomes, and how relevant is the choice between these two possible avenues for the determination of whether a group is equitably represented? The answers to these questions are central to the interpretation of the Act and the legitimacy, morally and otherwise, of the measures it prescribes in the pursuit of equity. The devil lies in the difference between the two approaches – while the former implies only equal treatment, the latter, in practice, requires preferential treatment of certain individuals as a means to eliminate existing disadvantage, which strictly runs counter to the very content of the principle of equality. Equality of treatment would fit most closely under a formal concept of equality, namely that all persons should be treated equally in respect of opportunities for employment and advancement in employment. This ideal would primarily be attained by the elimination of existing unfair discrimination, as the Act aims to do in Chapter II. Equality of outcomes, on the other hand, embodies a substantive reading of the concept of equality, and opens the door to measures and policies for the advancement of designated groups that may in fact infringe or impact negatively on the equality rights of other persons, notably physically able white males (the only non-designated group in terms of the EEA).

91 Numerical goals and even quotas are only relevant in the pursuit of an objective of equality of outcomes. Where the objective is simply to treat all persons equally, fairly and impartially, there is no place for a goal or target for the representation of such persons in the workplace – surely the application of fair procedures and criteria in

recruitment, appointments, promotions and the like would automatically mark a group's level of representation to be 'equitable'. Notwithstanding any existing differences in the starting positions of individuals, the eventual outcome of their fair treatment must be considered to be equitable as far as the employer is concerned (in line with the traditionally European notion of equality of opportunities, where individual merit remains paramount in evaluating the equity of outcomes – the very antithesis of preferential treatment). The fairness and impartiality required of an employer would preclude any preconceived notion or plan of what the level of representation of any group should be at some future date. Therefore, we must conclude that the EEA, in sanctioning the setting of numerical goals and the application of affirmative action measures, including the preferential treatment of certain persons, in fact leans conclusively towards an objective of equality of outcomes.²⁴⁷ As mentioned, this is in line with the Constitutional concept of substantive equality, which finds its substance in section 9(1)'s definition of equality as including the 'full and equal enjoyment' of rights and freedoms, as well as the provision in section 9(2) that allows for measures designed to advance previously disadvantaged persons. *

92 This entails that one should distinguish in the determination of the meaning of 'equitable representation' between an objective, static and clear-cut fact (in the case of equality of treatment – whether all persons were in fact treated equally, fairly and impartially) on the one hand, and a dynamic value judgement of what is equitable on the grounds of certain other facts and factors, on the other hand. In the former case, the very fact of equal and fair treatment and opportunities would label the representation of all groups as being equitable. In the latter case, this determination can only be made with reference to other facts, for example the representation of such group in larger society, the availability of members of such group who are suited for employment in the specific workplace, etc. A numerical goal for the equitable representation of such group is

²⁴⁷ See *Dudley v City of Cape Town* (2004) 25 ILJ 305 (LC) at par. 71

therefore a value judgement as to what is equitable (namely what such level *should* be); a product of a balancing exercise in respect of such other facts.

93 How does the EEA's implicit support for the objective of equality of outcomes influence the actual assessment of whether a group is equitably represented? It is submitted that such an objective in fact colours the determination of what is equitable – if we decide that mere equal and fair treatment of all persons is not sufficient to ensure equity, we have already made a value judgement as to what equity means, *in anticipando*. We have in fact decided that equality of treatment is not enough; something more is needed. We have already decided that, in order to address the existing inequalities through a substantive view of equality, we must for example treat Africans preferentially in order to ensure an outcome for them in the workplace that is 'equal' to that enjoyed by white males. Therefore, we have succeeded in removing the determination of equitableness from the specific workplace and the (reasons for) existing representation of each of the groups, and have decided to rather base our judgement on an external standard, which is coloured by a value judgement as to which facts are relevant and should enjoy preference in this evaluation of what is equitable.

94 In this light, even though we have seen a preference for numerical goals as opposed to rigid quotas, such goals are themselves not immune from scrutiny. They are not mandatory, but appear to be guidelines based on a preconceived notion of what would be 'equitable'. In this we find a paradox: Surely this goal is no longer a guideline and must in fact function as a mandatory quota if we have already determined it to be the be all and end all of equity. Any failure to achieve this target will fall short of achieving equitable representation of the group in question. Also, we saw that goals are distinguished from quotas as being grounded in reality and the due consideration of objectively verifiable facts that influence the meaning of what is equitable *in the circumstances of any given case*. But how can this be when such meaning has in fact been predetermined in motivation of the very target-setting exercise, as a product of a

value judgement based on the objective of equality of outcomes? In reality, and on this reading of the objective of chapter III of the EEA, there may not be much difference between numerical goals and quotas.

95 . By way of summary, therefore, a possible objection to numerical goals is the following:

- (1) . . . Employers may only legitimately apply affirmative action in cases where a group is not equitably represented in the workplace;
- (2) . . . This determination must be made on some reasonable and rational basis – what is the basis for a finding that the existing representation of such group is not equitable?;
- (3) . . . Only once inequitable representation is established may steps be taken to address this, which should proceed from the basis of the setting of a goal for the representation of such group that would in fact be equitable;
- (4) . . . As such goal must itself be equitable in order to address the existing inequality, the setting of the goal must itself also involve a rational and reasonable exercise;
- (5) . . . This can only be achieved by considering objectively verifiable facts, as opposed to a value judgement;
- (6) . . . The EEA's preference for an objective of equality of outcomes imposes exactly such a value judgement as to which facts should sway the scales, at the very outset in the target-setting exercise.

96 . . . As observed above, the EEA's pursuit of an objective of equality of outcomes removes the determination of what is equitable from the reasons for existing representation of different groups in the specific workplace, substituting a value

judgement as to which external factors are relevant and should enjoy preference in the evaluation of 'equity'. These factors are those listed in section 42. The EEA's failure to explain the interaction between them is surprising, as they are not similar in nature: the first (in section 42(a)(i) - the demographic representation of different groups) is entirely divorced from the circumstances of the workplace, while all the other factors mentioned relate to either the pool of candidates qualified for employment in the workplace or the circumstances surrounding such workplace. This failure of the Act highlights the conflict between the terms 'under-representation' and 'equitable representation' employed in Chapter III. Under-representation of a designated group as a result of one or more of the job- or workplace-related factors (e.g. limited pool, low labour turnover) can surely not be marked as inequitable, if the reason for such under-representation is not due to inequitable treatment or discrimination by an employer. And why should under-representation in terms of the first of the factors mentioned in section 41(a)(i) (the national or regional demographics) necessarily be viewed as inequitable? Surely we cannot rationally expect all occupations and workplaces to mirror the demographic make-up of our population. The following remarks, which were made before the EEA came into force, should provide some pause in the assessment of the real value of target setting based on demographics:

[M]any politicians and trade unions seem to argue that the workforce composition of an employer will be equitable only once it reflects or approaches the proportions found in the general population. The reasoning is straightforward: but for apartheid, the constituent parts of our population would have had equal absorption rates into the labour market ... The historical justification is of course a counterfactual hypothesis and there is no way of testing its historical accuracy, in the sense that one could accurately estimate, after having factored out historical discrimination, "equitable proportions" ... This is not to deny the pernicious effects of historical discrimination - it only serves to point out that the counterfactual historical construction is not the full story, and that proportionality may not be the appropriate or best employment equity standard (or that it should be adjusted to take into account other factors that could have caused disproportionate representation in

society even if our society had been characterized from its inception by the absence of discrimination) ... [H]ead count analysis assumes that one factor, and one factor only, namely past discrimination, explains the disproportional representation in the present labour force. However, perhaps other factors, such as certain demographic characteristics of a particular group, should also be included as explanatory variables, while acknowledging that past discrimination in all likelihood plays the dominant part in our present situation ... [W]e should question the unreflective assumption that a head count analysis is unchallengeably the only way to justify the crucial task of promoting greater social justice.²⁴⁸

97 By way of summary, therefore, it is contended that the use of 'affirmative action' in (professional) sport is illegitimate as not being justified by the equality provisions contained in section 9(2) of the Constitution. When one examines such policies and measures in light of the test formulated in *van Heerden's* case, it is clear that, even though such measures target persons or categories of persons who have been disadvantaged by unfair discrimination, their objective of 'demographic representivity' appears to be irreconcilable with such measures as being 'designed to protect' such persons and also (as argued above) does not 'promote the achievement of equality'. It is especially the question of the dubious rationality of such measures which needs to be underscored. The highest courts in South Africa have, in other contexts, in recent years emphasized the need for all branches of the law to be developed in line with the foundational values which underpin the Constitution and the Bill of Rights. For example, in the fields of delict²⁴⁹ and contract law²⁵⁰ it has been affirmed that the common law must be developed in line with the values of freedom, equality and human dignity. It is

²⁴⁸ Van Wyk & Hofmeyer 'Affirmative Action Target Setting: More than just a Head Count' *South African Journal of Labour Relations* 3/4 (21) 1997 5 at 6

²⁴⁹ *Carmichele v Minister of Safety & Security* 2001 (4) SA 938 (CC)

²⁵⁰ *Brisley v Drotzky* 2002 4 SA 1 (SCA); *Afrox Healthcare Ltd v Strydom* 2002 6 SA 21 (SCA); *Napier v Barkhuizen* 2006 (4) SA 1 (SCA); *Barkhuizen v Napier* 2007 (5) SA 323 (CC). See also Lubbe, G 'Taking fundamental rights seriously: The Bill of Rights and its implications for the development of contract law' (2004) 121 *SA Law Journal* 395; Bhana, D & Pieterse, M 'Towards a reconciliation of contract law and constitutional values: *Brisley and Aprox revisited*' (2007) 124 *South African Law Journal* 865; Bhana, D 'The law of contract and the Constitution: *Napier v Barkhuizen* (SCA)' (2007) 124 *SA Law Journal* 269; Woolman, S 'Category mistakes and the waiver of constitutional rights: A response to Deeksha Bhana on *Barkhuizen*' (2008) 125 *South African Law Journal* 10

submitted that, apart from the substantive meaning ascribed to the self-standing right of equality as contained in section 9 of the Bill of Rights, an irrational application of 'affirmative action' measures can never be consonant with the promotion of the foundational value of dignity; not for the beneficiaries of such measures and even less so for those disadvantaged by them.

98 Furthermore, as illustrated above, these policies and measures also highlight some conceptual problems arising from the Employment Equity Act's apparent pre-occupation with demographics and the inherent tensions in respect of numerical goals and racial quotas. This pre-occupation with demographics, as well as the fact that the Employment Equity Act's provisions regarding affirmative action go further than those contained in section 9(2) of the Constitution, have led to a situation whereby transformation is pursued 'for transformation's sake'.

Section 2 of the EEA defines affirmative action measures as being aimed at redressing the disadvantages experienced in employment by designated groups, *as well as* ensuring their equitable representation in the workplace. One wonders whether this last part of the provision would not have been better left out of the Act, which might have gone some way towards avoiding the problems associated with goals and quotas. It has been attempted above to show that there is not necessarily any correlation between the reasons for a specific group's under-representation and equity. So, if affirmative action is a remedial measure for past disadvantage, the level of representation of a group should not be the deciding factor of whether equity has been achieved. While the Constitution does not prescribe a balance for the representation of different groups in the workforce,²⁵¹ it appears that the EEA does. The Act goes beyond the requirements for achievement of equality included in section 9(2) of the Bill of Rights, by incorporating a

²⁵¹ Compare the condemnation of 'racial balancing' in other jurisdiction, e.g. the USA, where the US Supreme Court (by way of Powell J) observed the following in *Local 28, Sheet Metal Workers' International Association*, 478 US 421 (at 487):

'The requirement of ... flexibility with respect to the imposition of a numerical goal reflects a recognition that neither the Constitution nor Title VII requires a particular racial balance in the workforce. Indeed, the Constitution forbids such a requirement if imposed for its own sake ... Thus, a court may not choose a remedy for the purpose of attaining a particular racial balance; rather, remedies properly are confined to the elimination of proven discrimination.'

controversial standard for the determination of equity in employment, which, it is submitted, is not sufficiently justified by the Act.

99 A dangerous result of this legislatively couched license to promote certain groups under the guise of affirmative action in line with the constitutional equality provisions is, it is submitted, increasingly being evidenced in employment practice as well as the judgments of South African courts. This relates to the apparent recognition of transformation (in the meaning of the advancement of certain individuals and/or groups on the basis of demographic representativity) as an end in itself. In the judgment by the Labour Court in *Alexandre v Provincial Administration of the Western Cape Department of Health*,²⁵² Murphy AJ accepted the substantive concept of equality as embodied in the constitution and the EEA and explained by Moseneke J in *van Heerden*.²⁵³ Murphy AJ continued to evaluate an amendment to an institutional employment equity policy, which provided as follows:²⁵⁴

'Once the selection procedure has been completed, consideration may be given to the representativity profile of the organization/component. What this means is that while numerical targets have not been reached, affirmative action measures may be made applicable to the selection process in accordance with the requirements of the applicable affirmative action programme as stated in the departmental and regional employment equity plan as well as those developed at institutional level. In the event that the numerical targets in respect of representativity has been reached, or where no candidates from the designated group have applied or have been shortlisted, the candidate shall be assessed exclusively in terms of the core competencies/functional terrain of the job.'

The judge continued to remark as follows:²⁵⁵

²⁵² (2005) 26 ILJ 765 (LC)

²⁵³ See the discussion above

²⁵⁴ As quoted at 777D-E of the judgment in *Alexandre*

²⁵⁵ At 777F-H of the judgment

'The difference between the [employment equity policy applicable in *Alexandre's* case and the subsequently amended policy as quoted above] is that the earlier policy would allow consideration of employment equity issues, even where the numerical targets in respect of representativity have been reached. Whereas under the new policy it would be impermissible to do so and decisions would have to be based exclusively on merit. *One doubts whether such a policy advances the spirit and purpose of employment equity and the notion of substantive equality as endorsed by our legislative and constitutional framework.* However, because the earlier policy applied in this matter, there is no need to adjudge the implications of the new policy falling short of the constitutional and legislative framework.'

[Emphasis added]

It is submitted, with respect, that this approach fails to appreciate the legislative framework within which the EEA operates to promote affirmative action to achieve the 'equitable representation' of designated groups. Surely, once targets that were set for this purpose have been reached, there is no more room for affirmative measures. If groups are equitably represented in accordance with rational and fair targets, the application of affirmative action beyond such point starts to smack of unfair discrimination against other groups or individuals. In such a case, one would be justified in considering this apparently sacrosanct 'spirit of employment equity' a tad more critically. Surely, even if one subscribes to a substantive notion of equality as the basis for affirmative action measures, equality can still only be pursued by means of measures that are rational and justifiable in terms of the EEA and the Bill of Rights. Where such measures take the form of a target-setting exercise under the EEA in order to ensure the representivity of the workforce, the continued application of measures and consideration of 'employment equity issues' after such targets have been reached makes a mockery of equity as well as of the target-setting exercise employed.

It appears that this last was expressly recognized in the recent judgment by Ndlovu AJ in *Reynhardt v University of South Africa*.²⁵⁶ The use of 'targets' based on demographic representivity in respect of the selection of professional sports teams, however, are in this observer's view open to clear criticism in terms of the above.²⁵⁷

D Evaluating the legitimacy of affirmative action measures in the context of (professional) sport

100 When one considers the issue of the application of 'affirmative action' to sport, a number of questions abound. This is especially clear if one considers the place of such measures at the top level of elite and international sporting competition, which is in modern sport largely a professional industry made up of professional athletes as participants. The discussion that follows will, for this reason, concentrate mainly on the position in professional sports. The following questions need to be considered:

²⁵⁶ (2008) 29 *Industrial Law Journal* 725 (LC). After finding that the relevant employment equity targets had been achieved in terms of the university's applicable employment equity policy, Ndlovu AJ held that 'the [continued] application of the respondent's employment equity policy, plan and guidelines in the present instance was not only a contravention of s 15(4) of the EEA but also a violation of the respondent's own employment equity measures.' [At par 129 of the judgment]. See also the court's approach in *Willemse v Patelia NO & Another* (2007) 28 *Industrial Law Journal* 428 (LC)

²⁵⁷ The author provided an example of the paradoxical nature of such targets elsewhere (see Louw, A M 'Extrapolating "equality" from the letter of the law: The limits of affirmative action under the Employment Equity Act' (2006) 18 *South African Mercantile Law Journal* 336 at 353-4): During the Proteas tour of New Zealand in early 2003, convener of selectors Omar Henry was embroiled in a controversy surrounding racial quotas (following the United Cricket Board's very public condemnation of quotas earlier). According to reports in the media during the tour, Henry had confirmed the UCB's abolishment of quotas in the national team, but had gone further to say that the UCB continues to pursue numerical goals for the representation of players of colour. These statements were made in the wake of the news that (reminiscent of the controversial axing of Jacques Rudolph on the eve of the third test against Australia in Sydney in January 2002) the selectors had at the last minute substituted 'coloured' spin bowler Robin Peterson for Nicky Boje for the first one day international match against New Zealand in Christchurch. The basis for the decision was said to be a policy that 'coloured' players of more or less the same quality as white members of the team would in future enjoy preference in selection. It is in the very way in which Mr. Henry explained the working of these goals, that we find food for thought. A Western Cape newspaper (Christo Buchner and Johann de Jager 'Kwotas spook by Proteas', *Die Burger*, 16 February 2004) quoted Henry as stating the following: 'Let me make it clear once and for all. Transformation is an integral part of the selection process, whether people like it or not. There are however no numbers that must be complied with. We do pursue targets. If there are two coloured players in the team, we strive for three; and if three make the team we try to use four.' (Own translation from the Afrikaans article)

It is submitted that Mr. Henry should have given some more thought to this statement. Surely what he describes is no less than a quota. The constant striving to increase the representation of coloured players, in terms of a 'target' that entails that their representation will apparently never be viewed as being satisfactory, points to a preconceived notion of the 'equitable representation' of such players that smacks of tokenism, or the equation of 'diversity' or representivity with equity. Reminiscent of the reasoning of Murphy AJ in the *Alexandre* case above, this approach appears to reify transformation for transformation's sake.

- Is the use of measures aimed at achieving equality of participation consistent with the nature of sporting competition, and the natural inclination of any competitive team to field its strongest line-up in order to maximise its chances of success?
- Does the idea of affirmative action also not ignore the individual performance nature of sport, where the value of a team member to the whole is determined not only by the position played but also the individual athlete's talent, form and unique characteristics?

It is hoped that this discussion will serve to address the following specific questions raised by the application of affirmative action in this context:

- (i) Whether "artificial", externally prescribed methods and criteria of team selection are consistent with the natural and inherent competitive object and nature of sport?;
- (ii) Whether the application of affirmative action tends to ignore the unique personal attributes of athletes and their role in competition?; and
- (iii) Whether the application of affirmative action in this context is acceptable in the light of its significant impact on the professional nature and status of the professional athlete, and the right and ability to earn a living from the pursuit of a chosen calling?

101 It is clear that the competitive nature of sport is an inherent element and central determinant of the very activity of sport.²⁵⁸ In the context of elite and professional sport,

²⁵⁸ Compare the statement by the European Commissioner for Education and Culture (Statement to the European Parliament, "Commission's Investigation into FIFA's Transfer Rules", Strasbourg, 7 September 2000 – Speech/00/290), as quoted in the 5th Report of the European Committee of the Scottish Parliament at par 57). Szymansky "Income Inequality, Competitive Balance and the Attractiveness of Team Sports: Some Evidence and a Natural Experiment from English Soccer" March 2000 (available on the Net as <http://mscmga.ms.ic.ac.uk/stefan/EJCB.pdf>) at 1, states the following regarding the importance of the competitive nature of sport:

and the enterprises undertaking the business of sport at the higher levels, the competitive nature and quality of the sporting event as an entertainment spectacle is the primary determinant of the financial success of the undertaking. It is submitted that there is sufficient difference between professional sport and "ordinary" businesses in other sectors or industries to necessitate a distinction in the application of affirmative action measures in terms of, for example, the Employment Equity Act. The argument extends to all the affirmative action measures prescribed by the EEA, inclusive of both its explicit prohibition on the use of racial quotas as well as the Act's support for measures aimed at preferential treatment of persons from designated groups. This becomes apparent when one considers the practicalities of professional sports employment, including the nature of the professional athlete and the activity performed on the field of play, the specific cost of affirmative action in this context, and the professional nature of professional sport. It will be contended that, specifically in respect of the role and application of affirmative action, professional sport as an industry is unique. The gist of this view is as follows:

- Professional sport is an entertainment industry - the economic value of the sporting event lies in its interest to spectators.
- Spectators are interested in the uncertain outcome of the event - if the outcome was scripted or it was known beforehand that the match was fixed, spectators would not be interested.
- The uncertainty of the outcome revolves around the competitive nature of sport - because more than one team or competitor is involved, the spectator is interested in seeing not only how the game is played, but also who will win. And the competitive strengths of the participants are determined by their respective skills, abilities and form.

'It is widely accepted that a degree of competitive balance is an essential feature of attractive team sports. Sporting competition is a process that establishes a hierarchy among the participants- winners and losers. Competitive balance refers to the rational expectations of fans about who will be the winners. In a perfectly balanced contest, each participant starts with an equal chance of winning, so that the outcome will be completely uncertain. If there is no competitive balance then the exact outcome can be predicted with probability one. Without at least a degree of competitive balance, fans will lose interest in a competition.'

- The sporting merits of participants are therefore central to the competitive value of the match and the resultant financial success or failure of the business involved. Ultimately, because of the role of individual players as entertainers, merit not only determines the outcome of matches but also the entertainment value of the game.

Accordingly, the importance of the merits of participants will be emphasised in light of the rationale for and practical way in which (especially strong) affirmative action measures function. And it will be shown that a policy or measure which prescribes the preferment of one participant over another on the basis of attributes unrelated to the sporting merits of such player, constitutes an unacceptable denial of the importance of merit which runs counter to the very core values and characteristics of sport, and of the success of professional sport as an industry.

102 In determining the place of affirmative action in sport, we must first ask: What does the concept of equity in sport involve? The following definition, which is taken from guidelines published by Sport England that were aimed at making sport in England more inclusive, appears to reflect the meaning attributed to equity in sport elsewhere:

“Sports equity” is about fairness in sport, equality of access, recognizing inequalities and taking steps to address them. It is about changing the culture and structure of sport to ensure that it becomes equally accessible to all members of society, whatever their age, ability, gender, race, ethnicity, sexuality or socio-economic status.²⁵⁹

The core of this definition is the equal access to sport of all members of society. But upon reflection, this consideration, viewed in such general terms, can surely only apply to amateur sports. Professional sport is an industry that performs an economic function and

²⁵⁹ ‘Making English Sport Inclusive: Equity Guidelines for Governing Bodies’, available on the Net as www.sportengland.org/resources/pdfs/people/equity.pdf (emphasis added).

is based on economic foundations. With the involvement of money comes the inevitable, capitalist, consideration of competition. The inherent competitive element of sport is enhanced by the 'dog eat dog' nature of economic competition. Accordingly, professional sport has a different frame of reference in the determination of the access of athletes. It is doubtful whether the *ability* of an athlete is similarly weighted in determining the access of participants who fulfill an economic, profit-generating function. Even the central element of fairness in this definition has a different meaning when applied to professional sport. Although fairness between players on the playing field is an essential element of successful sports competitions, this fairness should not be read to include the right to participate being granted to all comers. While it is important to grant each and every boy and girl in a kindergarten class an equal opportunity to play, professional competitive sport as an industry and a public entertainment spectacle cannot afford to go this far. Accordingly, no person can be said to have a 'right to play' at the top level of a sport.

103 The importance of the merits of an appointee in any business is self-evident, but the respective merits and demerits of professional athletes must be considered on a different level. The focus should be on the nature of the activity pursued and performed by the employee, as well as the environment where such activity takes place. When appointing a clerk or manager in an insurance company, bank or retail store, the experience, qualifications and abilities of the appointee are undoubtedly important to the undertaking for business reasons. It is possible that a previously disadvantaged appointee could have largely equivalent merits to those of a comparator. Due to the scope of the appointee's potential duties of service, however, differences may be less important in the actual performance of the job. In a sense it may be said that the risks inherent in appointing a less qualified or less suitable candidate is spread or absorbed through the enterprise. When, however, an unknown is preferred over a professional athlete with unique talents, different elements come into play. The athlete's unique abilities in playing the specific sport, as well as attributes such as a personal drawing power and psychological impact on opponents undoubtedly distinguish these situations.

104 An important overarching consideration here is that of the entertainment nature of the professional sports industry. The point was made earlier that the quality of competition is the major determinant of success for businesses managing professional sport. Competitive sport is a spectacle, and revenues are earned through consumer interest in what the team has to 'sell'. While South African equity legislation such as the Employment Equity Act states that an affirmative action appointee may be 'suitably qualified' for a position, by having the capacity to acquire the ability to do the job, it is doubtful whether this requirement is reconcilable with the nature of professional sport as an enterprise. Employees in other businesses can learn to perform the job requirements "behind the scenes", and avoid endangering the operational requirements of the undertaking in the process. But where millions of consumers are watching, can professional sports teams afford to use professional competitions as a learning curve for those not best qualified for the position? By way of analogy, it would be similarly doubtful whether an unknown actor selected for a film role in terms of an affirmative action policy would be able to replace a famous star without justified concerns over box office success. The emphasis is on the highly personalised nature of the services rendered: While no right-thinking person would promote the application of affirmative action in other entertainment industries at the cost of uniquely gifted artists, this is prescribed in South African professional sport, where the value of personal characteristics and talents of individuals are often as significant. Even in team sports, the value and characteristics of the individual participant are paramount.

105 When a national team is involved in international competition, such team is not composed of a 'neutral' or amorphous group of 'workers', in the sense that it is of no consequence to the public and supporters who the individuals are that take to the field. Each and every player in the team, whether in the starting line-up or on the bench, has unique value for the team as a whole and brings unique talents and ability to the game.

One must factor in the role and value of a number of 'intangibles',²⁶⁰ in determining the potential value of each individual player. Different elements feature here: the player's skills on the field, his experience in big matches and pressure situations, his psychological impact on the opposition, his fitness, stamina and form, as well as his level of support from the fans. These factors distinguish the professional athlete from other workers, and it is submitted that this predominantly personal nature and value of the professional athlete, which stems from the actual physical activity of sport and the culture of the game, is a significant consideration in the evaluation of the role of affirmative action.

106 In light of the key role of 'sporting merit' within this context, it is submitted that any preferential selection policy which is based on the consideration of non-sporting attributes (i.e. race) as a determining factor are highly suspect, and also not in line with the rationality requirement for affirmative action in terms of the Constitution. In the context of the application of the Promotion of Equality and Prevention of Unfair Discrimination Act (or 'PEPUDA')²⁶¹ to a dispute regarding the application of affirmative action in the appointment of regional magistrates, the court in *Du Preez v Minister of Justice and Constitutional Development & Others*²⁶² had to consider the legitimacy of selection criteria (in the form of a score sheet) which placed disproportionate weight on the race and gender of applicants as opposed to their experience as magistrates. The court (by way of Erasmus J) found that the relevant selection policy constituted an absolute barrier to the appointment of a white male to the relevant position, and held that '[t]here is patent disproportionality in a selection policy based on race and gender to the absolute exclusion of all the other qualities required for a position as responsible and important as that of regional magistrate ... [s]uch a policy is irrational within its own

²⁶⁰ A number of factors and personal attributes combine to determine the athlete's proficiency. Brown *Sports Talent* Human Kinetics (2001) 45, in discussing the role of so-called 'intangibles', states the following: 'However elusive, intangibles are as much a part of sports performance as running, jumping, catching, hitting or throwing. They are the qualities an athlete possesses that cannot be measured by numbers ... At the highest levels of competition, everyone is talented. There, intangibles can mean the difference between winning and losing. Intangibles offer a window of opportunity for athletic success to athletes who might not make it on sheer physical talent. Nevertheless, some great athletes possess physical skills, emotional skills, and the intangibles that make for the complete athletic package.'

²⁶¹ Act 4 of 2000

²⁶² [2006] JOL 17157 (SE)

terms and objectives.' With reference to the view expressed by Pretorius *et al*²⁶³, the court observed the following:

'[The authors] describe as "the most drastic form of preferential treatment" those employment policies or programmes which afford absolute preference to members of designated groups who meet the minimum job requirements. "The effect of such an approach is", they say, "that selection is done irrespective of how the preferred designated group candidate compares with competitors from non-designated groups and sometimes irrespective of how the decision affects the excluded non-designated group members personally, as well as the specific operational needs of the employer or the special requirements of the job". The learned authors express the view that "such measures would not be compatible with the variety of factors that need to be taken into account for an employment decision to meet the constitutional requirements of fairness and proportionality". "Fairness", as they put it, "depends on the cumulative effect of all relevant concerns, including the extent of the impact of the measure on the rights and interests of the complainant". "Proportionality", they say, "requires, by definition, the balance of competing interests". "Affording automatic preferences for designated group members eliminates the possibility of affirmative action from being tested in respect of its fairness and proportionality and elevates the affirmative action objective to the position of sole requirement for validity".²⁶⁴

Even though the court in *Du Preez* undertook its evaluation of the applicable affirmative action policy in terms of the provisions of PEPUDA and did not refer specifically to the internal compliance test in respect of section 9(2) of the Constitution as laid down in the Constitutional Court's judgment in the *van Heerden* matter, it is submitted that the judgment reflects proper acknowledgement of the important role of 'merit-based' considerations in the selection process during the application of affirmative action, which is in line also with Moseneke J's affirmation of the rationality requirement as set out in

²⁶³ Pretorius, Klinck & Ngwena *Employment Equity Law* supra at Ch 9-59

²⁶⁴ *Du Preez* supra at par 40

van Heerden. One should consider the observation in this last-mentioned case that, in the assessment of fairness in scrutinizing equality claims, a 'flexible but "situation-sensitive" approach is indispensable because of shifting patterns of hurtful discrimination and stereotypical response in our evolving democratic society'.²⁶⁵ Surely such a 'situation-sensitive' analysis, in order to interrogate not only the fairness but also the rationality of an affirmative action policy (in terms of the internal test in respect of section 9(2)), must also give due weight to the peculiar characteristics of the industry or context where such policy is applied, must give due weight to 'efficiency' arguments regarding the consequences of preferential selection measures which by definition ignore merit, and must in the process give due weight to the relevance and specific importance of merit-based criteria *in the specific context of their application*. This is in line also with divergent views regarding the role of efficiency (i.e. where the importance of 'efficiency arguments' have been downplayed and it has been held that efficiency is not completely separate and antagonistic to representivity).²⁶⁶ The importance of the nature and characteristics of the context within which affirmative action measures are applied was acknowledged by Pillay J in *Gordon v Department of Health, KwaZulu-Natal*²⁶⁷ (in consideration during selection of the role of candidates' experience, within the context of transformation of the public service):

'If experience is a compelling consideration transformation of the public service could be held to ransom. That is not to say that experience is not a relevant criterion. How important a criterion it is *depends on the nature of the job, the risks attendant on it and whether the candidate has the potential for acquiring the experience in a reasonable time*.'²⁶⁸

²⁶⁵ Moseneke J in *van Heerden* supra par 27

²⁶⁶ Compare the views of van der Westhuizen J in *Stoman v Minister of Safety & Security & Others* 2002 (3) SA 468 (T), as approved in *Gordon v Department of Health, KwaZulu-Natal* (2004) 25 *Industrial Law Journal* 1431 (LC) at par 64

²⁶⁷ *Ibid.*

²⁶⁸ *Gordon* op cit. at par 66 [emphasis provided]. See also *Willemse v Patelia NO & Another* (2007) 28 *Industrial Law Journal* 428 (LC), where the court observed (in the public service context) as follows (at par 87 of the judgment):

'When applying affirmative action, employers should consider a variety of factors, of which past disadvantage is only one. Retention of skill and the efficient operation, particularly of state organs, clearly also require consideration.'

107 Apart from the 'inherent requirements of the job' defence to unfair discrimination claims as contained in section 6(2) of the Employment Equity Act, it is clearly not irrational *per se* for an employer to weigh up its operational requirements (which may include the necessity for a candidate to be able to immediately take up a position with the requisite skills and experience, rather than such candidate being suitably qualified in the meaning of section 20(3) and being able to acquire such skills within a reasonable time) against its employment equity requirements. Where, after due consideration of these interests, operational requirements outweigh equity considerations regarding the target-setting exercise, the appointment of the more suitable candidate (on merit) would not be arbitrary, but based on a 'very relevant and acceptable criterion.'²⁶⁹

In taking a practical view of the effects and consequences of applying strong affirmative action in the sporting context, one must ask whether it is justifiable to replace superior talent and/or experience (if that is indeed the case) with a candidate whose abilities constitute a threat to the competitive strength of the team. With full acknowledgement of the risks inherent in making an assumption that players preferred in terms of an affirmative action policy are less likely to successfully compete, it is argued that in professional sport, as a consumer-based *entertainment* industry, even the perception of this assumption being correct or even just representing a likely result, serves to expose such policy to scrutiny regarding its rational and moral justification. In emphasizing the central role of competition in professional sport, it has been observed that this competition element has a sporting and an economic component. If 'quota players' truly are 'weak links' in a team, their participation on the field of play will obviously be detrimental to the team's competitive strength. But, even if such a player is in fact not less able than his white counterparts, it is submitted that the public perception of such players as being weak links will have as detrimental an effect on the economic component of this competition element. It is questionable whether this perception can be

²⁶⁹ *PSA obo Karriem v SA Police Services & Another* [2007] 4 Butterworths Labour Law Reports 308 (LC)

faulted, if one considers that it is based on the inherent implication that merit selection is absent from a system employing race-based quotas. Either way, therefore, quotas will be bad for sport. The necessities of professional sporting competition require that such measures be labelled as contrary to the object purported to be pursued – and possibly counterproductive in the long term. It is indeed strange that so much lip-service has been paid to ‘demographic representivity’, which we have seen is just one of the factors listed in section 42 of the EEA to serve as a yardstick for the determination of ‘equitable representation’. Nowhere has there been reference to one of the other factors listed in this same section, namely the ‘[e]conomic and financial factors relevant to the sector in which the employer operates.’

108 It is therefore submitted that even ‘legitimate’ affirmative action measures (in the meaning of measures that are truly aimed at redressing past unfair disadvantage against certain groups) can have no place in sport, and specifically professional, top-level sport. The use of measures that by their very definition are based on the application of preferential selection which demands the denial of the sporting merit and sporting attributes of individual participants runs counter to the core principles and characteristics of (professional) sport.

E The dearth of jurisprudential justification for the application of ‘affirmative action’ in professional sport (and the role of the rules and regulations of international sports bodies)

109 The South African government’s application and enforcement of race-based policies regarding participation in sport, which includes racial quotas and other measures that are purported to constitute ‘affirmative action’, is unique in world sport. Nowhere

else does one find similar measures and policies in sport; in fact, the closest parallel is found, ironically, in the experience of segregated sport under the control of the Apartheid state. While true affirmative action, in the meaning of measures and policies designed to redress past unfair discrimination against disadvantaged groups, has been accepted as legitimate in South Africa and elsewhere, the existing legal precedent and jurisprudence in this regard all deal with other sectors, industries or activities – e.g. employment in industries other than professional sport, employment in the public service, etc. As it has been defined by an American commentator:²⁷⁰

'Affirmative action is a term that originated in the United States that refers to a range of programmes directed towards targeted groups in order to redress inequalities due to discriminatory practices. Broadly it takes two forms: policies to alter the composition of the labour force, and policies to increase the representativeness of public committees, political parties, and educational institutions.'

It is submitted that there is no legal precedent or jurisprudence, either in domestic national laws or in international law, in respect of the justification of 'affirmative action' in sport. This is further underscored by the conceptual objections to the place of affirmative action in an activity of the nature of sport, which was discussed above.

110 As has been shown, the South African government's transformation agenda with its primary and overarching objective of achieving 'demographic representivity' of sports participants does in any event not constitute legitimate affirmative action in the accepted meaning of the term. It has been argued that such measures and policies constitute nothing more than attempts at what has come to be known as 'racial balancing', which

²⁷⁰ Bacchi *The Politics of Affirmative Action* Sage Publication (1996) 15. Section 15(1) of the Employment Equity Act defines affirmative action measures as 'measures to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer.' Gutto *Equality and Non-discrimination in South Africa* New Africa Education 2001, at 127, remarks that 'affirmative action' as used in other jurisdictions is a concept with a narrower meaning than the concept of 'corrective action' used in the South African interim and final constitutions. See also Bhoola 'Affirmative Action: A Commentary' in Thompson & Benjamin *South African Labour Law* Juta Law (Looseleaf) Vol 1 at CC1-B1 *et seq.*

has been consistently rejected as illegitimate in other jurisdictions.²⁷¹ What is more, it appears that these policies (and the South African government's intervention in their prescription and implementation) are contrary to fundamental principles of international sport and the rules of the international sports federations, which unambiguously and unequivocally prohibit *any* form of discrimination on the basis of race. Discussion of this issue is beyond the scope of this chapter, but the reader is referred to the following documents in this regard: The Olympic Charter,²⁷² the Constitution of the International Association of Athletics Federations (or 'IAAF'),²⁷³ the Regulations and By-Laws of the International Rugby Board (or 'IRB'),²⁷⁴ the Anti-racism Code of the International Cricket

²⁷¹ For example, the US Supreme Court (by way of Powell J) observed the following in *Local 28, Sheet Metal Workers' International Association v Equal Employment Opportunities Commission* 478 US 421 [1986] (at 487): 'The requirement of ... flexibility with respect to the imposition of a numerical goal reflects a recognition that neither the Constitution nor Title VII requires a particular racial balance in the workforce. Indeed, the Constitution forbids such a requirement if imposed for its own sake ... Thus, a court may not choose a remedy for the purpose of attaining a particular racial balance; rather, remedies properly are confined to the elimination of proven discrimination.'

²⁷² E.g. compare Principle 4 of the Fundamental Principles of Olympism, which provides as follows: '*The practice of sport is a human right. Every individual must have the possibility of practising sport, without discrimination of any kind and in the Olympic spirit, which requires mutual understanding with a spirit of friendship, solidarity and fair play. The organisation, administration and management of sport must be controlled by independent sports organisations.*' [Emphasis provided].

Principle 5 provides as follows:

'Any form of discrimination with regard to a country or a person on grounds of race, religion, politics, gender or otherwise is incompatible with belonging to the Olympic Movement.' [Emphasis provided].

Rule 2 of the Charter deals with the mission of the International Olympic Committee, and provides that the IOC must 'act against *any form of discrimination* affecting the Olympic Movement' (Rule 2.6), must 'oppose *any political or commercial abuse of sport and athletes*', and must 'encourage and support the development of *sport for all*.'

In respect of national Olympic committees (such as SASCOC in South Africa), Rule 28.2.5 provides that such NOCs must 'take action against *any form of discrimination* and violence in sport', and Rule 28.5 provides as follows:

'In order to fulfil their mission, the NOCs may cooperate with governmental bodies, with which they shall achieve harmonious relations. However, they shall not associate themselves with any activity which would be in contradiction with the Olympic Charter. The NOCs may also cooperate with non-governmental bodies.'

[Emphasis provided].

²⁷³ See specifically Article 3.4, which describes the objects of the organisation as including the following:

'To strive to ensure that no gender, race, religious, political or other kind of unfair discrimination exists, continues to exist, or is allowed to develop in athletics in any form, and that all may participate in athletics regardless of their gender, race, religious or political views or any other irrelevant factor.'

²⁷⁴ Regulation 20 ('Code of Conduct') of the IRB's Regulations provides that all Unions, Associations, Rugby Bodies, Clubs and Persons (as defined in terms of the Regulations) 'shall not do anything which is likely to intimidate, offend, insult, humiliate or discriminate against any other Person on the ground of their religion, race, colour or national or ethnic origin'. Bye-Law 3 of the IRB ('Objectives and Functions of the Board') provides that the IRB's functions and objectives include '[t]o prevent any discrimination against Unions or Persons on the grounds of race, sex, religious or political affiliations'.

Council (or 'ICC'),²⁷⁵ and the Statutes of the *Federation Internationale de Football Association* (or 'FIFA').²⁷⁶

111 Furthermore, it is submitted that the issue of team selection (and/or of access to participation at certain levels) in the different sporting codes is in essence an issue that resorts exclusively within the competence of the private sports federations, and is expressly excluded from the sphere of any government's intervention through the regulation of sport. Courts in a number of jurisdictions have excluded certain decisions and rules of sports governing bodies from judicial review on the basis that the subject matter of disputes were viewed as resorting under 'laws of the game' or as constituting issues of 'purely sporting interest' (a prime example being 'nationality quotas' enforced by organisations such as FIFA and UEFA in respect of the make-up of national teams in international competition). There is a growing body of international judicial precedent for this view, as illustrated in e.g. the European Union by cases such as *Walrave and Koch* (1974),²⁷⁷ *Dona v Mantero* (1976),²⁷⁸ *Bosman* (1995),²⁷⁹ *Lehtonen* (2000),²⁸⁰ *Deliege* (2000),²⁸¹ *Kolpak* (2003)²⁸² and *Meca-Medina & Majcen* (2006).²⁸³

While the above cases (and others, such as the decision of the international Court of Arbitration for Sport in *Mendy v IABA* (1996) re the non-reviewability of purely technical sporting decisions) have limited application, i.e. as involving the application of the EU Treaty and specifically also the distinction between purely sporting matters and

²⁷⁵ Which provides as follows:

'As the international governing body for the sport of cricket the ICC is responsible for ensuring that the highest standards of moral and ethical behaviour are applied and upheld throughout the sport at every level.

(a) ICC and all of its *Members shall promote and encourage participation at all levels regardless of race, colour, religion, national or ethnic origin.*

(b) ICC and all of its Members shall ensure that there is no discrimination in any form against any person because of race, colour, religion, national or ethnic origin.'

²⁷⁶ Of which Article 3 declares as follows regarding non-discrimination and FIFA's stance against racism:

'Discrimination of any kind against a country, private person or groups of people on account of ethnic origin, gender, language, religion, politics or any other reason is strictly prohibited and punishable by suspension or expulsion.'

²⁷⁷ *Walrave and Koch v Association Union Cycliste Internationale* [1974] ECR 1405; [1975] 1 CMLR 320

²⁷⁸ *Dona v Mantero* [1976] 2 CMLR 578; [1976] ECR 1333

²⁷⁹ *ASBL Union Royale Belge des Societes de Football Association & Others v Jean-Marc Bosman* [1996] CMLR 645 ECJ

²⁸⁰ *Lehtonen (Jyri) & Castors Canada Dry Namur-Braine v Federation Royale Belge des Societes de Basketball ASBL* (Case C-176/96); judgment of 13 April 2000

²⁸¹ *Deliege v Liege Ligue Francophone de Judo et Disciplines Associees ASBL* [2002] ECR I-2549

²⁸² *Deutscher Handballbund eV v Maros Kolpak* C-438/00, 8 May 2003

²⁸³ *David Meca-Medina and Igor Majcen v Commission of the European Communities* (Case C-519/04 P; judgment delivered 18 July 2006)

decisions and conduct by sports bodies of an economic nature or import, and furthermore involving the question of the susceptibility of such conduct to judicial review, it is submitted that the principle is relevant also in respect of the proper scope of state regulation of sport (and of 'transformation' measures which are of such dubious legitimacy).

IV Race-based transformation as ensconced in the recent amendments to the National Sport and Recreation Act

112 In 2007 South African sport saw the introduction of a potential basis for major upheaval in respect of its regulation. The passing of far-reaching amendments to the key sports-specific statute, the National Sport and Recreation Act 110 of 1998, were critically received by many observers. The National Sport and Recreation Amendment Act, 2007 was passed in the National Assembly on 16 May 2007 and signed into law in November 2007. The provisions of the Act that hold the most potential to impact on the system of South African sports regulation and the private governance of different codes, relate to new-found powers accorded to the Minister of Sport and the South African Sports Confederation and Olympic Committee (SASCOC). These powers include *inter alia* the power to intervene in disputes in sport, and the Minister's power to issue directives to sports federations regarding a range of issues, which directives shall have binding force.²⁸⁴ Most controversially, the Minister has now been empowered to also issue directives regarding the thorny issue of sports transformation.

113 A new section 13A has now been inserted into the Act, which provides that '[t]he Minister must issue guidelines or policies to promote equity, representivity and redress in sport and recreation'. The new sections 13B and 13C require every sport or recreation body to submit, annually, statistics on its membership and also to report progress on the

²⁸⁴ These amendments to the Act are discussed elsewhere in this chapter (see par 48 et seq)

issues referred to in s 13A. The new s 13(5)(a)(ii) empowers the Minister to intervene 'in any non compliance with guidelines or policies issued in terms of section 13A or any measures taken to protect or advance persons or categories of persons, disadvantaged by unfair discrimination as contemplated in section 9(2) of the Constitution', by e.g. issuing a 'directive' which is binding on the parties to a dispute (or, specifically, a sport body in such cases). It is clear that these provisions have now afforded the Minister very substantial powers to enforce the 'transformation agenda' that has characterised South African sport post 1994. During early 2008, opponents of the Amendment Act were reported to be considering challenging these powers by means of representations to the relevant international sports federations (e.g. the International Olympic Committee, FIFA, the IAAF, the International Rugby Board and the International Cricket Council). It was also reported that opponents of the amendments were considering approaching the CAS for an advisory opinion on the legitimacy of such governmental powers in light of the international *lex sportiva*, accepted principles and practices regarding state regulation of sport, and the rules and regulations of said international federations.²⁸⁵

²⁸⁵ Rule 60 of the CAS Code of Sports-Related Arbitration provides that '[t]he IOC, the [International Federations], the [National Olympic Committees], the associations recognised by the IOC, the [Olympic Games organising committees], may request an advisory opinion from the CAS about any legal issue with respect to the practice or development of sports or any activity related to sports ...'

It was reported that an initiative was being considered whereby one or more of the appropriate international federations would be requested to approach the CAS for such an advisory opinion regarding the legitimacy of said amendments as state action regarding the regulation of sport, which was argued to constitute illegitimate political interference.

§8 The 2009 draft regulations in terms of the National Sport and Recreation Act, 1998 (as amended)

114 At the time of writing, a stand-off between major federations and the South African government appears to be on the cards, following controversial draft regulations in terms of the above provisions of the National Sport and Recreation Amendment Act, which are apparently currently under consideration. Sport and Recreation SA sent correspondence to federations on 31 October 2008 (with a deadline for comments of 30 November 2008) regarding draft regulations on 'The Control of Foreign Sports Persons in South Africa'. Correspondence was sent to federations on 17 December 2008 (with a deadline for comments of 20 January 2009) regarding 'Draft National Colours Regulations'. These regulations would be gazetted for public comment following submissions by sporting federations. The SA Rugby Union responded by referring these draft regulations to their legal advisors, and SARU has reportedly approached the two other major national federations, Cricket South Africa and the SA Football Association, with a view to a concerted challenge of government's alleged unlawful interference in sport as encompassed in the draft regulations.

115 The following discussion of these draft regulations is speculative, as it is expected that any future incarnations of such regulations may differ significantly from the versions which were sent to federations. Also, according to media reports following the correspondence sent by the Ministry of Sport to federations, it was (rather inexplicably and embarrassingly) claimed that neither the Minister nor Deputy-Minister had in fact seen the draft regulations. It is submitted that, at the very least, it appears that regulations along the lines of these draft regulations are currently envisaged in very similar form, and that, obviously, a lot of effort has apparently gone into the drafting thereof (even though these draft regulations are, generally, rather poorly drafted).

116 The draft regulations on the Control of Foreign Sports Persons shall apply to all instances where a foreign sports person²⁸⁶ is recruited and contracted by a person, a sports body or any other body in South Africa to participate in a sports team in any sport inside the geographical boundaries of the country. According to draft Regulation 4, any sports body that recruits and contracts a foreign sports person or sports team to participate in South Africa in any sport, shall be required to contribute an amount as determined from time to time by the Minister towards a development fund for the sport, which fund shall be administered by Sport and Recreation SA. Draft Regulation 5 furthermore provides for stringent requirements in the recruitment of foreign sports persons. A national federation must, in terms of section 6(3) of the Act, before recruiting a foreign sports person to participate in sport in South Africa, satisfy itself that 'there are no other persons in the Republic suitable to participate in such sport'. If there is such other person in the country, such a person 'must be given preference above (*sic*) a foreign sports person'.²⁸⁷ A national federation must advise the Minister of Sport of the full names and country of origin of a recruited foreign sports person and of the purpose and reason for recruiting such person, and must confirm that there is 'no other person in the Republic suitable to participate in such a sport.' This last requirement (at least in respect of the wording of the draft regulations which were circulated to federations) appears to be rather nonsensical; criteria to determine a person's suitability to participate in a sport would surely need to be much more clearly and definitively circumscribed.

A failure to comply with these requirements would entitle the Minister to withdraw the recognition of a national federation by notifying it that it will not be recognised by Sport and Recreation SA with immediate effect, or to withdraw funding allocated to the national federation. Federations would furthermore be obliged to ensure that the recruitment of a foreign sports person 'conforms to the guidelines issued by the Minister in terms of section 13A of the Act. As discussed elsewhere in this chapter, section 13A provides that

²⁸⁶ A 'foreign sports person' is defined in the definitions section of the draft regulations as 'as any person recruited in terms of section 6(3) of the National Sport and Recreation Act, 1998 (Act 110 of 1998 as amended)'. See the text above regarding the provisions of section 6(3) of the Act

²⁸⁷ Regulation 5(2)

'[t]he Minister must issue guidelines or policies to promote equity, representivity and redress in sport and recreation'. Section 13(5)(a)(ii) empowers the Minister to intervene 'in any non compliance with guidelines or policies issued in terms of section 13A or any measures taken to protect or advance persons or categories of persons, disadvantaged by unfair discrimination as contemplated in section 9(2) of the Constitution', by e.g. issuing a 'directive' which is binding on the parties to a dispute (or, specifically, a sport body in such cases).' Accordingly, while the potential application of these sections and of the draft regulations is at the time of writing still speculative, it appears that the Minister of Sport would be empowered to intervene in the appointment of foreign sportspersons (presumably players, coaches as well as managers or other administrative staff) and may veto any recruitment by sports federations *inter alia* on the basis of the race of such persons (i.e. if such persons are not from previously disadvantaged or designated²⁸⁸ groups). It is submitted that this apparently rather bizarre form of 'affirmative action' would most probably not pass muster in the event of legal or constitutional challenge, and that it specifically appears to provide for very substantial government intervention in respect of commercial decisions of private entities involved in the administration of sport as well as potentially severely limiting the freedom of trade of foreign sports persons (in the light of international developments in e.g. football in the post-*Bosman* era, and recent calls for restraint of trade challenges in the context of ICL cricketers).²⁸⁹ While, as will be pointed out in the discussion below,²⁹⁰ the fundamental freedom to choose a trade, occupation or profession as guaranteed in section 22 of the Bill of Rights does not apply to non-South African citizens,²⁹¹ it is submitted that a limitation such as contained in these regulations may be open to challenge under the (extended²⁹²) restraint of trade doctrine. It also flies in the face of the practical reality in most major professional sports,

²⁸⁸ In terms of the Employment Equity Act 55 of 1998, the 'designated groups' who are to be advantaged by means of affirmative action measures and policies in employment are defined as Black persons (including, Africans, Coloured and Indian persons), women and persons with disabilities.

²⁸⁹ See the discussion elsewhere in this chapter

²⁹⁰ See the discussion in par 370 *et seq* below

²⁹¹ Currie & de Waal *The Bill of Rights Handbook* Juta (2005) point out that even though it has been held that in terms of section 38 of the Bill of Rights ('Enforcement of rights'), for an applicant to show sufficient interest in the outcome of constitutional litigation the enquiry is objective (it is sufficient to show that a right in the Bill of Rights has been violated by a law or conduct and it is not necessary to show that the rights of the applicant has been violated), section 22 could not be used to challenge laws that prohibit the employment of non-citizens – at 490 note 38.

²⁹² See the discussion of the restraint of trade doctrine in South African law in par 353 *et seq* below

namely the widespread practice of recruiting foreign high profile coaching staff on the basis of their expertise and experience.

117 The (in the opinion of this observer) rather bizarre nature of these draft regulations is further illustrated by the requirements contained in draft Regulation 8, which a foreign sports person must comply with before s/he may be considered by a national federation to participate in a sports team in any sport in South Africa. These requirements include, *inter alia*, that a foreign sports person must have officially played for his or her country 'in at least 65% of competitive "A" team matches²⁹³ at senior level²⁹⁴ for which he or she was available for selection, during a period of at least two years preceding the date of his or her recruitment' to participate in South Africa. Amongst other requirements for a foreign coach or manager, s/he must 'have coached or managed a national team for a period of at least five years' and may also be required to write 'an admission examination as determined from time to time by the relevant national federation', whatever this may entail. The wording of this draft regulation does not appear to be qualified, and it is difficult to divine the rationale behind a requirement that even a potential applicant for a coaching or manager's position in a Premier Soccer League club, a rugby Super 14 franchise or provincial team would apparently be required to have coached or managed a national team. A failure by a foreign sports person to comply with these requirements would entitle the Minister to disapprove of his or her participation in a sport in South Africa and 'to make recommendations to the Minister of Home Affairs to declare such a foreign sports person as an illegal immigrant.'

It is expected that the effect of such a regulation would be very significant in a number of sporting codes. A number of Premier Soccer League clubs, for example, employ players from elsewhere in Africa, and other sports employers (such a number of domestic rugby and cricket franchises) would also be affected in terms of their foreign players.

²⁹³ Which is defined as 'an international sports match or event organised by an international recognised body'.

²⁹⁴ Or 75% of competitive 'A' team matches at junior level

Finally, the draft regulations on the control of foreign sports persons provides that recruiting a foreign sports person or directly or indirectly assisting in such recruitment without complying with the regulation would constitute an offence, and such offender would be liable to a fine or imprisonment of a minimum of five years and a maximum of ten years (or both such fine and imprisonment).

118 The draft National Colours Regulations are aimed at regulating the awarding (and aspects relating thereto) of 'national colours', which are defined in the draft regulations as including the name, title or designation King Protea,²⁹⁵ and the colours green, gold and white. Draft Regulation 2 provides that '[t]he Sports Confederation hereby establishes the [National Colours Board] to administer the awarding of the national colours and to advise the Sports Confederation and the Minister on any matter related thereto' [emphasis provided]. This provision is rather surprising: The discussion elsewhere in this chapter has referred to the strange and anomalous nature of the Sports Confederation (or SASCOC), which is a private section 21 company (i.e. an entity of civil society) which has apparently been clothed with governmental sports regulatory functions. It is questionable whether such an entity is clothed with the power to issue regulations in terms of the National Sport and Recreation Act, a power which is expressly reserved for the Minister of Sport.²⁹⁶

²⁹⁵ The King Protea is the national flower of the Republic of South Africa, and the symbol adopted for post-1994 national sports teams such as the national cricket team (colloquially known as 'the Proteas') and the national football team (colloquially known as 'Bafana Bafana' or 'our boys'). In 2008 a row developed between the Minister of Sport and the SA Rugby Union regarding the continued use of the symbol of the Springbok on the national rugby team jersey. This much-publicised dispute caused great public controversy, with the sports Minister and the ANC's chair of the parliamentary portfolio committee on sport, Mr Buthana Komphela (amongst others), claiming that the Springbok was a divisive symbol of apartheid sport (one observer likened the symbol to Nazi Germany's swastika). The dispute involved claims by the sports Minister that Sport and Recreation SA (the government sports department) owns the intellectual property rights in the Springbok. Rather embarrassingly for the Minister, who had provided a number of trade mark registration numbers in support of this contention, it was shown through a trade marks registry search by one of the top intellectual property law firms that all these alleged registrations were invalid (and that SRSA had, in any event, failed to pay registration fees in respect of alleged registered marks), and that the Springbok emblem was in fact a registered trade mark of the SA Rugby Union. The dispute was settled when SARU agreed to move the Springbok symbol to the right breast of the national team jersey, and to place the King Protea symbol in pride of place on the left breast.

²⁹⁶ Section 14 of the Act confers the power to make regulations in terms of the Act on the Minister (after consultation with SASCOC in certain matters)

119 The National Colours Board is to be made up of members of SASCOC, including a chairperson appointed by the Board of SASCOC, a secretary (who shall be the CEO of SASCOC or his or her nominee), and four to seven members, who may include non-elected members appointed by the Board of SASCOC, based on their expertise and knowledge of sport.²⁹⁷ The functions of the Board are described as including, *inter alia*, the power to 'award national colours to an athlete of a member²⁹⁸ who complies with all the requirements of [the draft] regulations'; to 'act as an advisory body of (*sic?*) the Sports Confederation and the Minister with regard to all matters affecting national colours, including but not limited to the awarding, control and use thereof, and to make rules in regard thereto'; to 'prevent any abuse or misuse of national colours and to protect same against any infringement or limitation'; to 'determine whether any application for national colours received by it from a member, warrants the award of national colours'; and to recommend disciplinary or legal action against any athlete, person, member or organisation as a result of any conduct, action or statement which, in the opinion of the Board, is considered to be in breach of the regulations or to constitute an abuse or misuse of the national colours, or constitute bringing the national colours into disrepute.²⁹⁹ Draft Regulation 4(2) provides that the Minister may, subject to the provisions of section 13 of the Act,³⁰⁰ revoke any ratification, refusal or withdrawal of an award of national colours to an athlete of a member by the Board.

120 Draft Regulation 8 prescribes the procedure for the awarding of national colours. An application must be made by a member (national federation) on behalf of an athlete, which must be submitted within thirty days of the event for which national colours are applied for. Such application must be accompanied by documentary proof of the status of the international sports event in question and confirming the invitation by the host country/organisation.³⁰¹ The Board must within fourteen days inform the applicant (with

²⁹⁷ Draft Regulation 5(2)

²⁹⁸ A 'member' is defined in the draft regulations as a national federation as per the Articles of Association of the SA Sports Confederation and Olympic Committee (SASCOC) – see the discussion in par 44 et seq above.

²⁹⁹ Draft Regulation 4(1)

³⁰⁰ See the discussion above

³⁰¹ Draft Regulation 10

written reasons) of its decision, and such applicant may within fourteen days lodge a written appeal with the Minister. Until any appeal has been decided by the Minister, the decision of the Board must be regarded to have been validly made or given.³⁰²

121 Draft Regulation 12(1) provides that national colours may only be awarded to an athlete of a member (i.e. a national federation which is a member of SASCOC).

Reference has been made elsewhere in this chapter to the controversial nature of SASCOC as a representative body of different sporting codes and, specifically, to the apparently coercive nature of membership of the organisation. This last draft regulation seems to support such a view: While membership of SASCOC by national federations is ostensibly voluntary, it is clear that federations may owe a contractual duty to its member athletes to join SASCOC, in order for such athletes to be eligible for national colours in the sport. This is problematic not only in light of the anomalous, quasi-governmental, nature of SASCOC (which has been referred to), but especially also in light of the fundamental right to freedom of association as guaranteed in section 18 of the Bill of Rights.³⁰³

122 The award of national colours shall only apply to an athlete who represents South Africa in an international competition 'of the required nature and standard as recommended by the relevant member [federation] against fully representative teams of individuals from another country or countries', and such recommendation must be approved by the Board in writing and must be consistent with SASCOC's 'High Performance System and any applicable policy of SRSA'.³⁰⁴ It is further provided that, for the purposes of awarding national colours, a selection process of a national team shall only be deemed fair if national trials with an approved selection process were held or conducted by the relevant member federation in order to select such national team(s) and if 'reasonable, fair and equal opportunities were provided for every eligible athlete

³⁰² Draft Regulation 8

³⁰³ See the discussion in par 366 *et seq* below

³⁰⁴ Draft Regulation 12(2)

that qualified to participate in such trials'.³⁰⁵ A selection process shall be deemed to be unfair and inequitable if an eligible athlete is excluded from such national team on the basis of them not being able to finance their participation in the national trials and/or team.³⁰⁶ It is specifically provided that this last provision shall not be construed as creating a financial obligation on the part of SASCOC to 'finance or find funding for any team, any trials, any member of any team or national federation'. In light of the preceding provision regarding the fairness of the selection process, it is submitted that these provisions may be interpreted to create a financial obligation on the relevant federation to finance the participation of such athletes, which raises interesting questions regarding the legitimacy (and practical viability) of the regulations.

Draft Regulation 13(2) further provides that the selection process would be deemed to be unfair and inequitable if an eligible athlete is 'excluded from such national team(s) because of negative discrimination, which grounds for discrimination may include religious (*sic*), gender, colour, sexual orientation or creed'. It is submitted that this last provision raises interesting questions regarding potential intervention by the proposed National Colours Board, SASCOC or the Minister, in light of the sports transformation provisions as contained in the Act. This provision might provide grounds for intervention in national team selections on the basis of a perceived lack of 'players of colour'. While the draft regulations provide that the proposed National Colours Board 'may not intervene in the selection of national teams', the Board 'must at all times require proof of the standard and nature of the particular international competition, details about the selection panel, and the method employed regarding the selection process'.³⁰⁷ Clearly (in this author's opinion), the scene would be set for intervention in team selection on the basis of alleged 'negative discrimination' by selectors on the basis of e.g. race. The draft regulations do not contain any provisions regarding the burden of proof of such discrimination, and one may speculate that a perceived lack of 'representativeness' of a national team may invite the ire of the Board, SASCOC or the Minister. In this regard it

³⁰⁵ Draft Regulation 13(1)

³⁰⁶ Draft Regulation 13(2)

³⁰⁷ Draft Regulation 14

should be noted that draft Regulation 30(2) provides that '[t]he award of national colours for purposes of these regulations, are done in the public interest in line with the nation's commitment to nation building', which, it is submitted, is open to interpretation favouring such intervention in the awarding of national colours in the pursuit of 'sports transformation':

123 A further rather controversial provision of the draft regulations is that '[n]ational colours may only be considered for an athlete who can submit proof that he or she is a South African national, i.e. they must be in possession of a valid South African passport' (and an athlete with a South African resident permit only is not eligible for national colours).³⁰⁸ The SA Rugby Union has stated that these provisions are much more onerous than the eligibility rules of the International Rugby Board, and would exclude current star Springbok players such as Zimbabwean citizens Tendai Mtawarira, Brian Mujati and Tonderai Chavanga. It is interesting to speculate as to the legitimacy of this regulation in light of the much more lenient national eligibility standards of international sports governing bodies, also in other sporting codes, and it is submitted that such regulation may be open to legal challenge on such grounds.

124 Apart from the issues referred to above, the draft regulations on national colours contain a number of other provisions which seem rather problematic (if only as a result of what appears to be rather sloppy drafting). For example, draft Regulation 25(3) provides that 'a national federation from whom the national colours in respect of an athlete or other individual have been withdrawn by the Board, shall under no circumstances make use of the national colours in relation to any sporting contest in which the country is represented, and the contravention of this sub-regulation shall constitute an offence'. The meaning of this provision is unclear. Would the SA Rugby Union and other national team players, for example, be barred from using the team colours and the King Protea symbol in an international match in the event that the

³⁰⁸ Draft Regulation 20

national colours of an individual player have been withdrawn? Such a provision would not make sense. Furthermore, draft Regulation 26(1) provides that a member federation shall be entitled to use 'its own colours, emblems and insignia that it awards and uses in its sole discretion', provided that member colours should be used in, *inter alia*, 'test matches'. 'Member colours' are nowhere further defined in the regulations, which raises questions regarding the use of colours in sports such as rugby and cricket, where official international competition involves national teams which compete in 'test matches'. The regulations further provide that a member federation 'shall not be allowed to use the national colours as its member colours'.

Draft Regulation 27 provides that a member federation and SASCOC 'shall adhere strictly to the approved colour combinations, being predominantly green and gold for home games, and predominantly white for away games insofar as national teams are concerned', but provides that a deviation may be allowed in exceptional cases. A member federation may deviate from the approved colour combinations 'only in cases where, in a code of sport, a specific colour uniform is mandatory (e.g. test cricket ...) and then only with the written approval from the Board.' It appears nonsensical to acknowledge that e.g. test cricket requires a specific colour uniform (namely white clothing), and yet require Cricket SA to apply for written approval in this regard.

125 Draft Regulations 29 and 30 relate to licensing and merchandising of national colours and the ownership of intellectual property in national colours. Draft Regulation 30(1) provides that the national colours 'remain the intellectual property of the State' (which may or may not reflect the true position currently³⁰⁹). The draft regulations provide that Sport and Recreation SA may appoint a licensing agent to handle all aspects relating to the licensing and merchandising of the national colours. No member federation, person or organisation is entitled to use the national colours in whatever form for merchandising purposes without the written approval of Sport and Recreation SA, and

³⁰⁹ See discussion elsewhere in this chapter regarding the recent dispute between the sports Minister and the SA Rugby Union over ownership of the 'Springbok' trade mark. It is unclear at the time of writing whether or to what extent intellectual property rights to the King Protea device and the colours of green, gold and white in terms of copyright and/or under the Trade Marks Act, 1993, vests in Sport and Recreation SA.

such use shall be subject to terms and conditions as agreed upon and to the payment of royalties in terms of certain terms and conditions as determined by the Minister by proclamation in the *Government Gazette* from time to time.³¹⁰ It is uncertain at the time of writing to what extent, if any, these provisions may potentially infringe on existing intellectual property rights which may vest in federations (and may even constitute illegitimate deprivation of property – if not expropriation - in contravention of the fundamental right to property as contained in section 25 of the Bill of Rights).

126 The draft regulations provide for offences relating to national colours. An athlete, person, member federation or organisation which –

- without the necessary authority from and agreement in writing with Sport and Recreation SA, uses the national colours for commercial purposes;
- is awarded national colours without complying with the terms and conditions and fees or royalties and arrangements with Sport and Recreation SA;
- uses the national colours or any colours confusingly or deceptively similar thereto in the course of trade or otherwise;
- project himself or herself or itself as representing South Africa in an official capacity in a sporting activity without the written consent of SASCOC or Sport and Recreation SA;
- unlawfully and without the written authority of the National Colours Board, misrepresents that s/he is entitled to wear national colours;
- commits any act, directly or indirectly, which brings the national colours into disrepute;
- contravenes any of the provisions of the draft regulations;

³¹⁰ Draft Regulation 29(4)

is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 10 years or to both such fine and imprisonment.³¹¹

Finally, draft Regulation 32 provides for punitive measures by the National Colours Board, which may cause an investigation into non-compliance with the regulations on the written recommendation of SASCOC or at the written request of the Minister. The Board must, after consultation with SASCOC or the Minister, identify any non-compliant athlete, person, member federation or organisation, and may recommend (*inter alia*) –

- that the Minister considers withdrawing or reducing government funding of a member federation or organisation;
- that the Minister considers withdrawing the recognition of such a member or organisation;
- that the Minister considers debarring such an athlete, person, member federation or organisation from participating in his/her/its sport in South Africa, or from administering such sport in South Africa;
- disciplinary or legal action to be taken against such athlete, person, member federation or organisation by a disciplinary committee or by the appropriate controlling body; or
- that SASCOC institute criminal charges against an athlete, person, member federation or organisation.

These criminal and disciplinary provisions as contained in the draft regulations are of course very far-reaching (and may also open the draft regulations to scrutiny on the basis of accepted notions of criminal law in respect of the imposition of criminal sanctions). Developments in respect of these controversial draft regulations (for which the deadline for submission of comments by sports federations was extended to 11 February 2009) will be watched with interest, and may lead to legal challenge in the near future.

³¹¹ Draft Regulation 31

§9 DOPING REGULATION³¹²

I The South African Institute for Drug-Free Sport

127 The national anti-doping agency is an important body in the regulatory context of SA sport; it was established by legislation and with a regulatory mandate that covers all sports federations. The South African Institute for Drug-Free Sport (or 'SAIDS')³¹³ was established in terms of the South African Institute for Drug-Free Sport Act, 14 of 1997 (hereinafter the 'SAIDS Act'). The SAIDS Act came into force on 23 May 1997. SAIDS fulfills an independent testing, education and research function relating to drugs and doping in sport.

128 The South African government made a formal commitment to the World Anti-Doping Agency (or 'WADA') Anti-Doping Code and formally recognized the role of WADA through the Copenhagen Declaration on Anti-Doping in Sport in 2003, and SAIDS is the statutory body with the responsibility to promote and support the elimination of doping in sport in South Africa.³¹⁴ In 2006, the SAIDS Act was amended in order to give effect to the Copenhagen Declaration, and the South African Institute for Drug-free Sport Amendment Act, 2006³¹⁵ provides for the adoption of matters contained in the World Anti-Doping Code and establishes a doping control programme in compliance with the Code.³¹⁶ This followed earlier criticism that the 1997 Act did not specifically refer to or incorporate the provisions of the World Anti-Doping Code.³¹⁷ Section 11(2)(a) of the Act (as amended) expressly provides that SAIDS 'shall adopt and implement anti-doping

³¹² My sincere thanks go to Mr. Fahmy Galant, Doping Control Manager of the SA Institute for Drug-Free Sport, for kindly providing me with updated statistical and other information regarding the activities of the Institute. My sincere thanks also to Ms. Fikile Portia Ndlovu (Faculty of Law, University of KwaZulu-Natal, Durban) for permission to reproduce here sections of her article entitled 'Anti-doping law in South Africa – The challenges of the World Anti-Doping Code', as published in 2006/1-2 *International Sports Law Journal* 60-63.

³¹³ The organisation's web site, including helpful information and contact details, can be found at www.drugfreesport.org.za

³¹⁴ From the Introduction to the SAIDS Anti-Doping Rules, Version 2 (2009)

³¹⁵ No. 25 of 2006

³¹⁶ The 2009 version of the World Anti-Doping Code became effective on 1 January 2009, and replaces the 2003 version of the Code

³¹⁷ See Ndlovu *supra*; Le Roux, R 'The World-Anti Doping Code: A South African Perspective' *South African Journal for Research in Sport, Physical Education and Recreation* (2004) Volume 26 (1) 67

rules and policies which conform with the [WADA Code] including the WADA Prohibited List’.

129 An express goal of the SAIDS Act is to promote participation in sports, free from the use of prohibited substances or methods intended to artificially enhance performance. Doping is defined in s 1 of the Act as the occurrence of one or more of the anti-doping rule violations as described in the Act.³¹⁸ Section 10 of the SAIDS Act sets out various objectives aimed at discouraging the use of drugs in sport. These objectives include, *inter alia*, the encouragement of development programmes aimed at more specifically educating the sporting communities about the dangers of doping in sport (s 10(1)(b)). While it is clear from a reading of the Act that its main aim is to eradicate the use of prohibited substances in sport, these legislative objectives need to be accompanied by practical education for sportspersons against doping, because the reality for many athletes is that they use banned substances because they believe it is necessary for achieving world-class performances. This mindset in many athletes places their health in danger as well as affecting the legitimacy of competitions and of sporting achievements.

130 As mentioned, SAIDS is a statutory body, and all sports organizations and federations are obliged to recognize its authority and comply with its directives.³¹⁹ Section 10(1)(e) of the Act (as amended) provides that one of the objectives of the SAIDS is to ‘ensure that national sports federations and other sports organizations adopt and implement anti-doping policies and rules which conform with [the WADA Code] and with the requirements set out in the anti-doping policy and rules of the Institute’. The Board of the Institute reports to the Minister of Sport, and SAIDS is funded by the national government department for sport (Sport and Recreation SA or ‘SRSA’). The Institute’s mission and activities include the development of national strategy on doping in sport, providing an independent drug-testing programme across the major sporting

³¹⁸ For the definition of ‘anti-doping rule violations’, see the footnotes to par 131 below

³¹⁹ See discussion of the provisions of Article 1 of the SAIDS Anti-Doping Rules below

codes, the provision of information and education to athletes and federations regarding prohibited substances, and ensuring international harmonization of standards and practices in anti-doping.

131 In terms of s 10(1)(d) of the Act (as amended), the Institute intends to promote and ensure the adoption of a centralised doping control programme, which 'may subject any athlete to testing, with or without advance notice, both in and out of competition'. SAIDS carries out in excess of 2 000 tests on elite athletes each year, at provincial, national and international events.³²⁰ According to available figures at the time of writing, the number of tests conducted annually by SAIDS has steadily increased since its inception (with the Institute consistently exceeding 2 000 tests per annum since the 2002/3 reporting period). In the 2007/8 period, a total of 2 541 tests were conducted over 52 different sports disciplines (of which 1 615 tests were in-competition). A total of 23 anti-doping rule violations³²¹ were found in this period (amounting to 0.91% of tests). Since the inception of SAIDS testing, the percentage of anti-doping rule violations has consistently been under 2% of tests performed (with the exception of the 1998/9 and 1999/2000 periods, when violations were 2.52% and 2.95% respectively). On average, around 65% of tests performed during each reporting period have been in-competition testing (with the exception of the 1998/9 and 1999/2000 reporting periods, when in-competition testing constituted 86% and 82% of tests respectively). In the period

³²⁰ See Cloete (ed.) *Introduction to Sports Law in South Africa* LexisNexis Butterworths (2005) at 187

³²¹ 'Anti-doping rule violations' are defined in section 1 of the 2006 Amendment Act (these definitions correspond with the anti-doping rule violations as contained in Article 2 of the World Anti-Doping Code) as including any of the following:

- (i) the presence of a prohibited substance or its metabolites or markers in an athlete's bodily specimen;
- (ii) the use or attempted use of a prohibited substance or method;
- (iii) the refusal or failure, without compelling justification, to submit to sample collection after notification as authorised in terms of applicable anti-doping rules or otherwise evading sample collection;
- (iv) the violation of applicable requirements regarding athlete availability for out of competition testing, including failure to provide required whereabouts information and missed tests which are declared based on reasonable rules;
- (v) the tampering, or attempting to tamper, with any part of doping control;
- (vi) the possession of prohibited substances and methods;
- (vii) the trafficking in any prohibited substance or method; or
- (viii) the administration or attempted administration of a prohibited substance or method to any athlete, or assisting, encouraging, aiding, abetting, covering up or any other type of complicity involving an anti-doping rule violation or any attempted violation.

between the 1997/8 and 2007/8 reporting periods, a total of 304 anti-doping rule violations were reported.

132 SAIDS develops sample collection and testing procedures (by virtue of international standards), and it is mandatory for the Institute's testing procedures to be adopted by all national sports federations and organizations. They are to achieve this by adopting uniform independent and internationally acceptable sample collection and testing procedures. Further, in terms of s 10(1)(f) of the Act (as amended), SAIDS must ensure, as far as reasonably possible, the establishment and maintenance of a WADA-accredited laboratory in South Africa. At the time of writing, SAIDS is one of only a small number of anti-doping agencies worldwide with ISO 9001:2000 certification in compliance with International Standards for Doping Control.³²²

It is important to mention that in applying the local laws on practical testing processes due regard must be had to the World Anti-Doping Agency's tools for testing ethics, namely, an awareness of the rules regarding Laboratory Accreditation, Prohibited List and Therapeutic Use and Exemptions and Testing Standards as well as the Models for Best Practice, especially when securing attendance of athletes for unannounced, out-of-competition testing.³²³ At the time of writing, the first version of the SAIDS Anti-Doping Rules (which was issued in 2007) has just undergone revision, and the 2009 revised version has been published.³²⁴ The Anti-Doping Rules are modeled on the WADA Code and expressly incorporate the policies and minimum standards set forth in the Code (following formal acceptance of the Code by the SAIDS Board on 25 November 2005). A workshop was held with national federations on 28 February 2009 to disseminate the 2009 anti-doping rules and the 2009 World Anti-Doping Code, as well as the requirements for all national federations to accept such rules.

The Institute offers a range of other services, including maintaining a comprehensive database of banned and permitted products, the distribution of

³²² From the web site of the Institute at <http://www.drugfreesport.org.za>

³²³ Le Roux, R 'The World-Anti Doping Code: A South African Perspective' *South African Journal for Research in Sport, Physical Education and Recreation* (2004) Volume 26 (1) 67

³²⁴ At the time of writing, the SAIDS Anti-Doping Policy is available online at the Institute's website, at <http://www.drugfreesport.org.za>

information guides to athletes and others, and the facilitation of 'Drugs in Sport' workshops for training purposes targeted at educators, schools, coaches and community workers.³²⁵ Through SRSA funding, SAIDS also maintains the South African Doping Control Laboratory at the University of the Free State in Bloemfontein, which is one of 34 WADA accredited laboratories in the world.³²⁶

133 To date South African efforts in achieving the objectives of the 1997 Act are laudable as many doping offences have been dealt with publicly and with proper sanction. It also appears that knowledge amongst athletes regarding the activities of the SAIDS and its advocacy, education and doping control programmes has steadily increased during the last decade.³²⁷ Furthermore, the stakeholders in South African codes have reacted positively to the need for drug-free sport. This attitude is in line with international legal trends on anti-doping. On the international circuit the efforts of WADA and the International Olympic Committee should be recognized as they have managed to punish various doping offenders through the annulment of illegally obtained performances.

II Doping regulation: Miscellaneous matters

A The functions and duties of the Institute

134 Section 11(2) of the SAIDS Act (as amended³²⁸) provides for the following duties of the Institute:

³²⁵ A telephonic Drug-Free Information Hotline, which was previously offered by SAIDS, has since been discontinued

³²⁶ <http://www.drugfreesport.org.za>

³²⁷ E.g compare the results of the study conducted by Coopoo, Y & Manjra, S I 'Knowledge and perceptions of elite South African athletes on doping and doping control, 1998 v. 2002' *South African Journal of Sports Medicine* Vol. 16 Issue 3 (2004) 14

³²⁸ Section 11 of the Act amended by section 6(b) of the 2006 Amendment Act

- a. To adopt and implement anti-doping rules and policies which conform with the [World Anti-Doping Code] including the WADA Prohibited List;
- b. To establish and maintain a Register of Notifiable Events;³²⁹
- c. To notify relevant persons and organisations of entries into the Register of Notifiable Events;-
- d. To disseminate information relating to the sanctions likely to be imposed if athletes violate anti-doping rules;
- e. To select athletes for doping control according to a test distribution plan;
- f. To collect samples from athletes and secure the safe and tamper-free transit of samples to WADA-accredited laboratories in accordance with the Code's International Standard for Testing;
- g. To develop and implement educational programmes to discourage the practice of doping in sport;
- h. To consult with, assist, co-operate with and provide relevant information to governmental and non-governmental anti-doping organisations and other persons within South Africa and internationally, where appropriate;
- i. To take steps aimed at ensuring that South Africa complies with the Code, the UNESCO Convention³³⁰ and any other anti-doping agreements or arrangements to which South Africa is a party;
- j. To undertake research or co-ordinate and arrange for research to be undertaken in the field of performance-enhancing substances and methods;
- k. To encourage the pursuit of optimal sports performances in an environment free from doping;

³²⁹ A 'notifiable event' is defined in the Amendment Act as meaning 'any sports competition or event under the auspices of the South African Sports Confederation and Olympic Committee (SASCOC) or any national sports federation anywhere within or outside the Republic, with reference to which doping control is to be carried out, as determined by the Institute'.

³³⁰ See the discussion in par 139 below

- l. To establish and maintain a Registered Testing Pool³³¹ of top level athletes who shall be subject to both in competition and out of competition testing;
- m. To require that athletes who have been included in the testing pool provide accurate information on their current whereabouts which shall be made available to WADA and to other Anti-Doping Organisations having authority to test the athletes; and
- n. To ensure that a process for all athletes with documented medical conditions requiring the use of a prohibited substance or method may request a therapeutic use exemption: Provided that such requests shall be evaluated by a therapeutic use exemption committee in accordance with the International Standard for Therapeutic Use: Provided further that the Institute shall promptly report in writing to the WADA such granting of therapeutic use exemptions.

B Duty to publish information on testing procedures

135 Section 11(1)(g) of the SAIDS Act provides that the Institute may develop, maintain, distribute and publish information on procedures for, and developments concerning, the collection of testing samples. In terms of s 11(2)(a) of the 1997 Act, the Institute must adopt and implement rules and policies which conform with the WADA 'Prohibited List', which is regulated in terms of Article 4 of the WADA Code.³³² Article 4.1 of the SAIDS Anti-Doping Rules expressly incorporates the WADA Prohibited List as

³³¹ Section 1 of the Amendment Act defines a registered testing pool as 'the pool of top level athletes, established by the Institute, who are subject to both in competition and out of competition testing as part of the Institute's test distribution plan'. The Introduction to the SAIDS Anti-Doping Policy (version 1, 2007, currently in force) provides that [a]ny person who is not a member of a South African national federation and who fulfills the requirements to be part of the SAIDS registered testing pool, must become a member of the person's national federation, and shall make himself or herself available for testing, at least twelve (12) months before participating in international events or events of his or her national federation'.

³³² <http://www.wada-ama.org>

published and revised from time to time, and provides that SAIDS will make the List available to national federations who in turn shall ensure that the current List is available to its members and constituents. The annual updating of the WADA List suggests that the ongoing research and scientific developments that are taking place in the science of doping methods will continue to be reflected.

In terms of s 11(2)(d) of the SAIDS Act, the Institute has a duty to disseminate information relating to sanctions that are likely to be imposed if athletes violate anti-doping rules. A negative inference is drawn against any athlete who refuses to provide a sample for testing. With regard to who may be tested, s 11(2)(e) and (f) of the 1997 Act (as amended) provides that it is within the powers of the Institute to select the athletes to be tested in terms of a test distribution plan, and to collect samples from such athletes while securing a tamper-free transit of such samples to approved laboratories in terms of the International Standards for Testing. Therefore, where the legislative measures of testing have been properly adhered to it is likely that the results from the testing are true and correct, which would serve to counter the frequent arguments of offending athletes who may claim to be victims of incorrect testing procedures.

Section 11A of the Act³³³ contains a detailed description of a 'doping control programme',³³⁴ while section 11B contains provisions regarding the failure by an athlete to comply with a request to provide a sample.³³⁵

³³³ As inserted by section 7 of the 2006 SAIDS Amendment Act

³³⁴ A doping control programme is a programme that -

- (a) applies to all athletes;
- (b) adopts and implements the applicable mandatory International Standards, including the Prohibited List, the Therapeutic Use Exemptions Standard and the International Standard for Testing in compliance with the Code;
- (c) authorises the Institute to request an athlete to provide a sample for the purpose of doping control;
- (d) requires the Institute to establish and maintain a doping register for the programme;
- (e) requires the Institute to enter the name of an athlete or other person in the doping register when the athlete or other person is found guilty of violating an anti-doping rule as defined in section 1;
- (f) requires the Institute to give written notice of the making and particulars of an entry in the doping register to -

- (i) each relevant sports federation in relation to the athlete concerned; and
- (ii) each relevant sports federation in relation to any athlete whose interests may have been affected by the anti-doping rule violation referred to in paragraph (e): Provided that such notice of information of an entry in the doping register shall be subject to the provisions of the Promotion of Access to Information Act and may include any or all of the following:

- (aa) Failure by an athlete to provide a sample;
- (bb) failure by an athlete to complete or sign any form or to perform any action during sample collection as required by the doping control programme;
- (cc) any attempt, whether successful or not, by an athlete or any other person to tamper with the doping control process;
- (dd) any other interference with the doping control process;
- (ee) the results of laboratory analysis;

C Anti-Doping Violations and the Burden of Proof

136 The SAIDS Anti-Doping Rules³³⁶ provides for the following anti-doping violations, which correspond with the anti-doping violations as contained in Article 2 of the WADA Code:

- The presence of a prohibited substance or its metabolites or markers in an athlete's bodily specimen;
- Use or attempted use of a prohibited substance or a prohibited method;
- Refusing, or failing without compelling justification, to submit to sample collection after notification as authorized in the Anti-Doping Rules, or otherwise evading sample collection;
- Violation of the requirements regarding athlete availability for out of competition testing including failure to provide required whereabouts information;
- Tampering, or attempting to tamper, with any part of doping control;

(ff) any failure by an athlete to provide information on his or her whereabouts for out of competition testing; and

(gg) any information relating to an athlete's adverse analytical finding or the failure by an athlete to comply with a request by the Institute to provide a sample;

(g) authorises the Institute, subject to the Promotion of Access to Information Act, to disclose information -

(i) to the South African Police Service and the South African Customs Service on any of the following:

(aa) the use by a person of a prohibited substance or method;

(bb) the possession by a person of a prohibited substance or method;

(cc) trafficking by a person in a prohibited substance or method;

(dd) the administration by a person of a prohibited substance or method;

(ee) a person attempting to engage in any conduct referred to in paragraphs (aa) to (cc); and
(ff) a person aiding, abetting, covering up or being involved in any other type of complicity relating to any conduct referred to in paragraphs (aa) to (dd);

(ii) relating to the return by an athlete of an adverse or negative analytical finding, or to an anti-doping rule violation by an athlete or any other person, to the public;

(h) requires the South African Police Service and the South African Customs Service to co-operate with the Institute -

(i) with any investigation pertaining to information disclosed in terms of paragraph (g);

(ii) with regard to any illegal activities resulting from anti-doping rule violations; or

(iii) in any other manner as may be required; or

(i) may make provision for the application, adoption or incorporation, with or without modification, of any other instrument made by a sports administration body.

³³⁵ For the purposes of the Act, an athlete fails to comply with a request by the Institute to provide a sample if -

(a) he or she refuses or fails to submit to sample collection as required by the doping control programme;

(b) he or she fails to complete or sign any form required by the doping control programme to be completed or signed by the athlete; or

(c) after providing the sample, he or she fails to comply with the required additional sample collection requirements.

³³⁶ Version 2, 2009

- Possession of prohibited substances or methods;
- Trafficking in any prohibited substance or prohibited method; and
- Administration or attempted administration of a prohibited substance or prohibited method to an athlete, or assisting, encouraging, adding, abetting, covering up or any other type of complicity involving an anti-doping rule violation or an attempted violation.³³⁷

Article 3 corresponds with the similar provision in the WADA Code, and provides that SAIDS has the burden to prove that a doping violation has occurred, and that SAIDS shall have the standard of proof of establishing a doping violation 'to the comfortable satisfaction of the hearing body bearing in mind the seriousness of the allegation that is made.' This standard of proof is greater than a mere balance of probability but less than proof beyond a reasonable doubt.³³⁸ It is further provided that, where the SAIDS Anti-Doping Rules place the burden of proof on an athlete or other person alleged to have committed an anti-doping rule violation, to rebut a presumption or to establish specified facts or circumstances, the standard of proof shall be by a balance of probability.³³⁹ Article 3.2 of the Rules sets out the applicable rules of proof in doping cases in order to establish facts and presumptions, as per the corresponding provisions of the WADA Code.

D The Anti-Doping Appeal Board

137 The Institute's Anti-Doping Appeal Board, which is responsible for hearing and deciding on doping disputes, was established in terms of section 17 of the SAIDS Act³⁴⁰ (as amended) In terms of s 17(2)(a), the Appeal Board has express power to hear and

³³⁷ Articles 2.1 to 2.8 of the SAIDS Anti-Doping Rules (version 2, 2009)

³³⁸ Article 3.1 of the Rules

³³⁹ *Ibid.*

³⁴⁰ South African Institute for Drug-Free Sport Act 14 of 1997

decide on any dispute relating to doping. The Appeal Board consists of a panel of nine persons, appointed by the Minister of Sport, possessing special knowledge and expertise relevant to doping. The Minister is empowered, on the recommendation of the Institute and SASCOC, to appoint at least three members from the panel to constitute an appeal tribunal to hear and decide upon appeals against decisions made in terms of Article 13 of the Code. At least two members so appointed by the Minister shall be admitted and practicing attorneys or advocates with at least three years experience in their relevant fields of expertise.³⁴¹ The Appeal Board may hear appeals involving national level athletes arising from decisions regarding -

- (i) sanctions for anti-doping rule violations, including disqualification, provisional suspension or period of ineligibility;
- (ii) the granting or denying of a Therapeutic Use Exemption,³⁴² or
- (iii) any other dispute relating to doping in sport.

Appeals involving international level athletes shall be heard by the Court of Arbitration for Sport (CAS).³⁴³

The Appeal Board may confirm or set aside any sanction imposed by a sports administration body in respect of doping, and may in the place of any sanction so set aside, impose any sanction which in its opinion is appropriate.³⁴⁴ In terms of s 17(8) of the 1997 Act (as amended), any sanctions imposed on persons found guilty of anti-doping rule violations shall be in accordance with the sanctions laid down in the constitutions of the respective sports federations.

³⁴¹ Section 17(2) (as amended)

³⁴² Article 4.4 of the SAIDS Anti-Doping Policy (version 2, 2009, currently in force) incorporates the WADA International Standard for Therapeutic Use Exemptions

³⁴³ Section 17(4)(a) (as amended)

³⁴⁴ Section 17(4)(b) (as amended)

E The SA Institute for Drug-Free Sport and the World Anti-Doping Code

138 The World Anti-Doping Agency (WADA) has reacted to the problem of doping in world-wide sport by creating an international code in the form of the World Anti-Doping Code, to which South Africa is a signatory.³⁴⁵ At the heart of the Code is the response by the international community to harmonize the rules relating to anti-doping in order to preserve fair play and prevent harm to the health of sports people.³⁴⁶

The creation of the World Anti-Doping Code was a reaction to the reality of doping in sport, which is a legal difficulty that is unique to sport. As has been observed:

'A large part of sporting jurisprudence deals with disciplinary proceedings, many of them pertaining to doping cases. It is in this context that the Court of Arbitration for Sport (CAS) has developed principles, which it has applied consistently These principles were developed in an effort to fight doping in sport effectively and must be viewed against the backdrop of the increasing difficulty to be ahead of developments in laboratories.'³⁴⁷

The World Anti-Doping Code deals aggressively with doping in the international sporting community. This was confirmed, for example, in the case of *World Anti-Doping Agency (WADA) v United States Anti-Doping Agency (USADA); United States Bobsled & Skeleton Federation (USBSF); Zachery Lund and Fédération Internationale de Bobsleigh et de Tobogganing (FIBT)* (as 'Interested Party')(2 February 2006),³⁴⁸ an appeal by WADA against the decision of USADA in respect of a doping violation by Mr Zachery Lund. USADA had made a decision not to treat Lund as 'a cheat' because he had been using the banned substance for medical purposes. The CAS rejected the submissions by USADA

³⁴⁵ Le Roux, R 'The World-Anti Doping Code: A South African Perspective' *South African Journal for Research in Sport, Physical Education and Recreation* (2004) Volume 26 (1) 65. (See paper for clarity on various specific aspects of the Code.)

³⁴⁶ *Ibid.*

³⁴⁷ Le Roux, R 'Under Starter's Orders: Law, Labour Law and Sport' (2002) 23 *Industrial Law Journal* 1206

³⁴⁸ Case: Court of Arbitration for Sport (CAS) Ad hoc Division – XX Olympic Winter Games in Turin CAS arbitration No CAS OG 06/001 (<http://www.tas-cas.org/en/code/frmco.htm>)

and allowed the appeal by WADA which was calling for an appropriate sentence of a two year ban on the athlete.³⁴⁹

While the 1997 SAIDS Act did not contain any reference to the World Anti-Doping Code, the 2006 Amendment Act has specifically incorporated the provisions of the Code into South African anti-doping law. The Preamble to the Amendment Act specifically states that its purpose includes the adoption of matters contained in the Code and the establishment of a doping control programme in compliance with the Code. Section 11(2)(a) of the Act (as amended) expressly provides that SAIDS 'shall adopt and implement anti-doping rules and policies which conform with the [WADA Code] including the WADA Prohibited List'. As mentioned, the SAIDS Anti-Doping Rules are very closely modeled on the Code.

F The International Convention against Doping In Sport

139 One should note the distinction between The World Anti-Doping Code and the United Nations Educational Scientific and Cultural Organization (UNESCO) Convention against Doping in Sport.³⁵⁰ There is no legal obligation for countries to adopt the WADA Anti-Doping Code into law. The UNESCO Convention against Doping in Sport, however, does create an obligation on the ratifying countries to pass legislation that is consistent with it. South Africa ratified the Convention against Doping in Sport in 2006.³⁵¹ It is clear from the preamble of the UNESCO Convention that it is an instrument that is in line with South African as well as international law on doping. This preamble assures all ratifying States that it is in the agenda of UNESCO to create the necessary legal instruments to eliminate practices that are contrary to the ethics of sport. This will encourage all those in the sporting community to behave with integrity.

³⁴⁹ The decision of the CAS was handed down on 10 February 2006, and is indicative of vigorous endeavours by the World-Anti Doping Agency in ensuring that the laws relating to anti-doping are observed by the international community.

³⁵⁰ Paris, 19 October 2005

³⁵¹ <http://portal.unesco.org/la/convention.asp?KO=31037&language=E&order=alpha#1>

G The World Anti-Doping Code and the South African Constitution

140 The World Anti-Doping Code, similar to the UNESCO Convention against Doping in Sports³⁵² is based on constitutional principles and human rights.³⁵³ It is thus unlikely (but not impossible) that the legality of the rules of the Code may fail legal challenge based upon the provisions of the South African Constitution (although it should be noted that no such challenge has been brought to date). The Code itself appears to include no rules that may patently operate against public policy, and could be characterized as constituting international 'best practice' in respect of doping regulation. While the SAIDS Act is, of course, part of the domestic law, the WADA Code and decisions by courts and tribunals elsewhere regarding its application may be taken into account in any constitutional challenges to doping control. Section 232 of the Constitution provides that customary international law is law in the Republic unless inconsistent with the Constitution or an Act of Parliament. Section 233 provides the following:

'When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.'

Section 39(1) deals with interpretation of the provisions of the Bill of Rights (which is contained in Chapter 2 of the Constitution), and provides as follows:

'When interpreting the Bill of Rights, a court, tribunal or forum

- d) ...
- e) must consider international law, and
- f) may consider foreign law.'

³⁵² See the Preamble of the Convention against Doping in Sports, Paris 19 October 2005.

³⁵³ Le Roux, R 'The World-Anti Doping Code: A South African Perspective' *South African Journal for Research in Sport, Physical Education and Recreation* (2004) Volume 26 (1) 65 at 73

The Code can be characterized as an instrument that is based primarily on the promotion of human rights and which seeks to promote such rights through the eradication of immoral practices in sports.³⁵⁴ However, such a view is not universally accepted and others have observed that the WADA Code represents an imbalanced approach to the need to eradicate doping in sport at the cost of the rights and interests of individual athletes:

It is difficult to understand why it appears that only "fundamental rights" are at issue. Why shouldn't a broader raft of rights, such as the right to be treated reasonably, fairly and equitably, be considered? Certainly, in its preamble WADA does not attempt to promote the Code as a document protecting athletes' rights. Indeed, the only "fundamental right" that the Code acknowledges athletes deserve is "to participate in doping-free sport and thus promote health, fairness and equality for athletes worldwide". There is a danger that WADA's utilitarian approach to athletes' rights, exemplified by the Code, and justified by that most nebulous of concepts, "the spirit of sport", has resulted in an imbalance between sport and the rights of its most precious commodity.³⁵⁵

141 Apart from possible constitutional questions regarding the privacy rights of athletes and testing, the main issues of contention regarding the constitutionality of the applicable doping provisions relate to the fairness of disciplinary hearings following anti-doping rules violations and the sanctions that are imposed. The punitive action taken against an athlete who is found guilty of a doping violation may, of course, fall foul of the relevant provisions of the Bill of Rights or of other common law or statutory rules.³⁵⁶ The

³⁵⁴ In support of this approach, see the findings of the legal opinion by Gabrielle Kaufmann-Kohler, Antonio Rigozzi & Giorgio Malinverni, *Legal Opinion on the Conformity of Certain Provisions of the Draft World Anti-Doping Code with Commonly Accepted Principles of International Law*, Feb. 26, 2003, at 30, available at <http://www.wada-ama.org/rtecontent/document/kaufmann-kohler-full.pdf>

³⁵⁵ Gardiner et al *Sports Law* 3rd ed Cavendish Publishing (2006) at 297

³⁵⁶ It should be noted that the Introduction to the SAIDS Anti-Doping Policy (Version 2, 2009, currently in force) follows the wording of the introduction to the WADA Code in providing that [t]hese anti-doping rules are not intended to be subject to, or limited by, the requirements and legal standards applicable to criminal proceedings or employment matters.' It is doubtful whether these rules may validly be excluded in this way from the ambit of the rules of criminal procedure or employment laws (or that the powers of the courts to

World Anti-Doping Code's standard of strict liability, which provides that a violation occurs if a prohibited substance is found in an athlete's sample, irrespective of whether such athlete intentionally or unintentionally used the substance,³⁵⁷ is apparently accepted as legitimate elsewhere on the utilitarian basis that, without such a standard, it would be impossible to enforce doping rules.³⁵⁸ In the leading English judgment, for example, it was held that the International Association of Athletics Federations (IAAF)'s strict liability rules were not in unreasonable restraint of trade on the basis that a less stringent rule would render the organisation's efforts to prevent drug-taking by athletes futile.³⁵⁹ It has been observed, however, that this utilitarian argument does not provide a sufficiently principled response to the concern regarding saddling athletes with the prejudicial effects (including moral stigma) of an offence for which they may not be morally to blame.³⁶⁰ The SAIDS Rules also adopt the WADA Code's strict liability standard.³⁶¹ Such strict liability standard is relatively unproblematic in respect of the proof of a violation, the first phase of determining the existence of a doping offence.³⁶² Strict liability in the second phase, where a sanction such as a ban or fine is imposed, would however not be in accordance with an athlete's constitutional rights (and the accepted principle of *nulla poena sine culpa*). Sanctions can only be imposed on the basis of culpability, taking into account the extent of fault in accordance with generally accepted principles of law, and an automatic sanction would not be proportional and, thus, could be unconstitutional.³⁶³ It should also be noted that the WADA Code's provisions regarding athlete bans have been criticized as having been drafted with the intention of ensuring consistency of

adjudicate disputes in this regard may validly be ousted) and, more specifically, the Bill of Rights applies to all law in South Africa and may not be validly excluded in this way.

³⁵⁷ Rule 2.1 of the WADA Code contains the strict liability standard that is applied to positive tests, in terms of which the mere 'presence of a prohibited substance or its metabolites or markers in an athlete's bodily specimen' is sufficient to establish a doping violation, and intent, fault, negligence, or knowing use need not be demonstrated.

³⁵⁸ See Gardiner et al *supra* at 274-5; *Quigley v UIT CAS 94/129*

³⁵⁹ *Gasser v Stinson* (High Court, Chancery Division, 15 June 1988 - unreported); see Lewis, A & Taylor, J *Sport: Law and Practice* Butterworths LexisNexis 2003 at 945

³⁶⁰ See Lewis & Taylor *supra* at 946 *et seq.*

³⁶¹ See Article 2.1.1 of the Rules

³⁶² For criticism of the WADA Code's strict liability standard, see Jessica K. Foschi 'A Constant Battle: The Evolving Challenges in the International Fight against Doping in Sport' *Duke Journal of Comparative and International Law* Vol. 16 (2006) 457

³⁶³ See Cloete *supra* 189. See also the matters referred to by Lewis & Taylor *supra* at par. E4.118 note 3, where strict liability was held to be contrary to fundamental principles of law (*In the Matter of Arbitration between Jessica Foschi and US Swimming Inc*, AAA Case No. 77190003696 - 1 April 1996; *Baumann v DLV, OLG Frankfurt/Main 13W29/00* - 18 May 2000), and the CAS matters mentioned by the authors where certain parameters were set in respect of the strict liability rules of different federations (at 950 *et seq.*), as well as the views of the panel in *Aanes v FILA CAS 2001/A/317* (9 July 2001) (see Lewis & Taylor at 953-4).

duration, but not consistency of sanction across different sporting codes.³⁶⁴ This might be a factor to be taken into account in the event of a challenge to the rationality of the sanction for a doping-rule violation.

H The Responsibility to Apply the Code: Sporting Bodies in South Africa

142 Mention has been made elsewhere in this chapter of the recent restructuring of the regulation of sport in South Africa, and specifically of the establishment of the South African Sports Confederation and Olympic Committee (SASCOC).³⁶⁵ As has been observed, SASCOC now has far-reaching powers in respect of the regulation of a wide range of aspects of 'high performance sport'. With regard to anti-doping law, SASCOC's Articles of Association provide in Article 26 that all members are to comply with and be bound by and procure that their members comply with the WADA Code presently in force and adopted by South Africa and the International Olympic Committee (IOC). Article 1.1 of the SAIDS Anti-Doping Rules³⁶⁶ provides that national sports federations shall accept the SAIDS Anti-Doping Rules and incorporate them either directly or by reference into their governing documents, constitutions and/or rules that are part of the rights and obligations governing their members and participants. The application of the Rules is based on the membership obligations that exist between national federations and their members or participants through those individuals' agreement to participate in the sport according to the rules.³⁶⁷ It is further provided that, as a condition of receiving financial or other assistance from government and/or SAIDS, national federations shall accept and abide by the spirit and terms of the SAIDS Anti-Doping Programme and the Rules, including the application of its sanctions to individuals, and shall respect the authority of, and co-operate with, SAIDS and the hearing bodies in all doping matters that are not governed by the relevant international federation's rules in accordance with

³⁶⁴ See Gardiner et al *supra* at 292

³⁶⁵ See the discussion in par 44 *et seq* above. For more information on SASCOC, visit the organisation's web site at <http://www.sascoc.co.za>

³⁶⁶ Version 2, 2009

³⁶⁷ Article 1.1.2 of the SAIDS Anti-Doping Policy (2009)

the World Anti-Doping Code.³⁶⁸ It is provided that, by adopting the Rules and incorporating same in its governing documents, national federations formally submit such federation and all athletes under its jurisdiction or control or subject to its governing documents or the rules of the sport to the Rules, and agree to abide by decisions made pursuant to such Rules.³⁶⁹ Section 17A of the Act³⁷⁰ provides for punitive measures against national federations by Sport and Recreation SA in respect of non-compliance with the provisions of the Act.³⁷¹

143 The SAIDS Anti-Doping Rules apply to all persons who –

- are members of a South African national federation regardless of where they reside or are situated;
- are members of a national federation's affiliated members, clubs, teams, associations or leagues;
- participate in any capacity in any activity organized, held, convened or authorized by a national federation or its affiliated members, clubs, teams, associations or leagues; and
- participate in any capacity in any activity organized, held, convened or authorized by a national event organisation, or a national league not affiliated with a national federation.³⁷²

Participants (including minors) are deemed to accept, submit to and abide by the Rules by virtue of their participation in the sport.³⁷³

³⁶⁸ *Ibid.*, Article 1.1.3

³⁶⁹ *Ibid.*, Article 1.1.5

³⁷⁰ As inserted by section 11 of the 2006 SAIDS Amendment Act

³⁷¹ Section 17A provides as follows:

'S 17A. (1) SRSA, on the written recommendations of SASCOC, may cause an investigation to be conducted as it deems fit to ascertain whether all national sports federations have complied with the provisions contained in this Act.

(2) SRSA must, after consultation with the Institute and SASCOC, identify any non-compliant national sports federations whereafter it may, amongst others -

(a) withdraw or reduce its or the Government's funding of any such federation;

(b) bar any such federation from administering its sport in the Republic; or

(c) recommend that SASCOC refuse to award national colours to the members of any such federation.

(3) SRSA may only act against a federation in terms of subsection (2) after it has given that federation an opportunity to make oral or written representations with regard to any proposed action.'

³⁷² *Ibid.*, Article 1.2

It is clear that the ostensible basis for the authority of the SAIDS Anti-Doping Rules over federations and individual participants is incorporation by reference of such Rules in the governing documents of federations, and the contractual nexus of membership of such federations.³⁷⁴

The Rules place certain obligations on athletes (e.g. to be knowledgeable of and comply with all anti-doping policies and rules adopted pursuant to the World Anti-Doping Code, and to be available for sample collection in the event of testing).³⁷⁵

Finally, it should be noted that athletes in international competition are also subject to the applicable anti-doping rules of the relevant international governing body in the sport, for example the International Cricket Council (or ICC)'s Anti-Doping Code.³⁷⁶

144 In conclusion, it is important to remember that, in order to preserve the legitimacy of South African sporting achievements from the scourge of drug use, significant investment has been made to date in the form of legislation and scientific research. It is also evident in the creation of the UNESCO Convention against Doping in Sports and World Anti-Doping Agency's efforts, resulting in the creation of a World Anti-Doping Code, that doping in sport is of significant international concern, as it represents a practice that has the potential to undermine the integrity of fair play. We live in a global village where sport plays an important role in international relations, and harmonization and uniformity of laws relating to sport is clearly desirable. The establishment of SAIDS is an example of the increasingly international nature of sports regulation – international practice requires that South Africa should have an effective specialist body to deal with a specific problem area in modern sport. This obligation arises from international agreement as well as contractual obligations towards sports governing bodies. It is submitted that South Africa is currently compliant in respect of its obligations in this regard, as evidenced by the establishment and activities of the SA

³⁷³ *Ibid.*, Article 1.2.2

³⁷⁴ This assumption is of course not unproblematic – see the Court of Appeal judgment in *Modahl v British Athletics Federation Ltd* 2001 WL 1135166; Gardiner et al *supra* at 269 *et seq.*

³⁷⁵ *Ibid.*, Article 1.2.3

³⁷⁶ The 2009 version of the ICC's Anti-Doping Code is currently in force (effective from 1 January 2009). Article 17.2 of the ICC Code provides that '[i]t shall be a condition of membership of the ICC that all national cricket federations shall comply with the ICC Code'.

Institute for Drug-Free Sport. It remains to be seen, however, whether such international rules as enforced through the SAIDS anti-doping rules might be open to constitutional challenge in terms of the South African Bill of Rights.

In any event, South Africa may play an important role in future international doping regulation, especially on the African continent. The current Minister of Sport, Makhenkesi Stofile, is a member of the WADA Foundation Board and Executive Committee, and South Africa is a member of the International Doping Arrangement (IADA) and of the Executive Committee of the Association of National Anti-Doping Organisations (ANADO). The WADA Africa Regional Office was established in 2004 in Cape Town, to co-ordinate the agency's anti-doping activities throughout Africa.³⁷⁷

³⁷⁷ From the web site of the government department Sport and Recreation SA (at www.srsa.gov.za – accessed 9 march 2009)

§10 SPORT AND TAX: The taxation of sportspersons

(Chris Schembri)

I Introduction

145 Liability for taxation in South Africa is determined in terms of various statutes, the main one of which is the Income Tax Act.³⁷⁸ There is no common law liability to pay tax in South Africa. Other pieces of fiscal legislation include the Value-Added Tax Act,³⁷⁹ the Estate Duty Act,³⁸⁰ and the Transfer Duty Act.³⁸¹ There are also a host of indirect taxes, such as levies on fuel sales, and levies or duties on luxury goods, such as tobacco products and alcohol.³⁸² All of these taxes, levies and duties are administered by the South African Revenue Service.³⁸³

146 A sportsperson active in South Africa would find himself contributing to the fiscus in a number of ways, both direct and indirect. The most obvious contribution would be in the form of 'normal tax'³⁸⁴ levied in terms of the Income Tax Act, on all income generated by the sportsperson that fell within the provisions of this Act.³⁸⁵ Not only does the Income Tax Act set out the grounds for liability for normal tax³⁸⁶ but it also makes provision for the determination of the amount of tax payable,³⁸⁷ as well as provisions for

³⁷⁸ Income Tax Act 58 of 1962, as amended, hereafter referred to as the Income Tax Act.

³⁷⁹ Value-Added Tax Act 89 of 1991, as amended, hereafter referred to as the Value-Added (or VAT) Act.

³⁸⁰ Estate Duty Act 45 of 1955, as amended, hereafter referred to as the Estate Duty Act.

³⁸¹ Transfer Duty Act 40 of 1949, as amended, hereafter referred to as the Transfer Duty Act.

³⁸² An examination of all of these taxes and levies falls outside of the ambit of this work. A more comprehensive (but not complete) list of taxes, duties and levies would include the following: Taxes: income tax (described in the Income Tax Act as normal tax), donations tax, capital gains tax. Duties: estate duty, transfer duty, customs duty and excise duty. Levies: unemployment insurance contributions, workmen's compensation.

³⁸³ Hereafter referred to as 'SARS'. This is an autonomous body created in terms of the South African Revenue Service Act 34 of 1997, as amended, to oversee the administration of fiscal legislation and the collection of tax on behalf of the South African government. The website www.sars.gov.za contains general information on all the forms of taxation, both direct and indirect, that are applicable in South Africa.

³⁸⁴ It is ironic that the term 'income tax' appears in the title of the Income Tax Act only, and nowhere else in the Act. The 'tax on income' that the Act deals with is defined by the Act, in section 5, as 'normal tax'.

³⁸⁵ This form of taxation will form the focus of this work.

³⁸⁶ In this regard see in general section 1, definition of 'gross' income'.

³⁸⁷ In this regard, see section 5 of the Income Tax Act, especially section 5(2). This sub-section provides for the rates of tax chargeable to be fixed annually by Parliament. These rates are then published annually as 'tax tables', which are available on the SARS website, www.sars.gov.za

the administration of the Income Tax Act.³⁸⁸ The Income Tax Act also deals with any donations that may be made by the sportsperson,³⁸⁹ as well as the 'capital gains' that he may make by, for example, disposing of certain immovable property.³⁹⁰

In addition to the taxes on income levied in terms of the Income Tax Act, there are taxes that are levied on transactions, as and when the transaction takes place. For example, the sportsperson would be liable for Value-Added Tax (or 'VAT') on all goods and services that qualified as 'vatable' in terms of the Value-Added Tax Act,³⁹¹ when he purchased or made use of such goods or services. Should the sportsperson purchase or dispose of 'property'³⁹² he would be liable for transfer duty, calculated as a percentage of the value of the property purchased or sold, in terms of the Transfer Duty Act.³⁹³ This is another example of a transaction-based tax. In addition, if the sportsperson were to purchase any of the goods covered by customs or excise duties, such as alcohol or tobacco products, he would pay the relevant duty, which is included in the price paid over the counter for such goods.³⁹⁴ Finally, certain taxes or duties are triggered by death or the happening of an event. An example of the former is estate duty. If the sportsperson were to die and leave assets accumulated during his lifetime, these assets would form an 'estate'³⁹⁵ which may be subject to estate duty,³⁹⁶ in terms of the Estate Duty Act. An example of the latter would be donations tax, which would be triggered in the event of the sportsperson disposing of all or part of his assets for a minimal or no consideration.³⁹⁷

A complete and detailed study of all of the above taxes, levies and duties is not possible in a work of this nature. Accordingly, only the most common tax, namely 'normal tax', in

³⁸⁸ In this regard see Chapter III of the Income Tax Act.

³⁸⁹ In this regard see Chapter II Part V of the Income Tax Act.

³⁹⁰ In this regard see the Eighth Schedule of the Income Tax Act.

³⁹¹ In this regard, see in general section 7 of the VAT Act.

³⁹² As defined in section 1 of the Transfer Duty Act.

³⁹³ In this regard, see section 2(1) of the Transfer Duty Act. This transaction may also attract capital gains tax, in terms of the Eighth Schedule to the Income Tax Act.

³⁹⁴ In this regard see the Customs and Excise Act 91 of 1964, as amended.

³⁹⁵ In this regard see section 3 of the Estate Duty Act.

³⁹⁶ In this regard see section 2 of the Estate Duty Act.

³⁹⁷ In this regard see Chapter II Part V of the Income Tax Act.

terms of the Income Tax Act³⁹⁸ and its effect on a sportsperson will be examined in some detail, but the reader is cautioned that this is but a single example only.

II 'Normal tax' in terms of the Income Tax Act

147 A crucial date in South African tax law is 1 January 2001. Prior to this date, taxpayers were liable for normal tax on a 'source' basis only.³⁹⁹ This meant that all 'receipts and accruals'⁴⁰⁰ or income, howsoever derived, would only be considered for normal tax if they were derived from a source within the Republic of South Africa.⁴⁰¹ This meant that the income had to be generated by an activity that took place within the geographical borders of South Africa.⁴⁰² All non-South African source income, or foreign income, was disregarded for the purposes of determining a taxpayer's liability for normal tax within South Africa. The non-South African source income would still attract liability for tax in the jurisdictions where it was generated, according to the laws of those jurisdictions. The 'source' principle was applied irrespective of the status of the taxpayer, so foreign taxpayers who generated income within the borders of South Africa were obliged to pay normal tax on their South African source income.

On the 1st of January 2001, South Africa moved from a 'source-based' to a 'residence-based' means of determining which taxpayers were liable for normal tax in South Africa.⁴⁰³ The Income Tax Act was amended in several respects to effect this change,⁴⁰⁴ and thereafter, any taxpayer who qualified as a 'resident'⁴⁰⁵ would be liable for normal tax on his worldwide earnings, irrespective of the source of those earnings. Taxpayers who did not qualify in terms of the definition of 'resident' but who continued to generate

³⁹⁸ Two comprehensive references to which the reader may make reference in respect of Income Tax are de Koker AP et al, *Silke on South African Income Tax* LexisNexis 2008, hereafter referred to as 'Silke', and Zulman RH et al, *Income Tax Practice Manual* LexisNexis 2008, hereafter referred to as 'the Manual'.

³⁹⁹ As to the operation of the 'source' system, see in general *CIR v Lever Bros & Unilever* 1946 AD 441, Silke para. 8.4, The Manual para A:S33.

⁴⁰⁰ Silke para 4.12, The Manual para. A:A4

⁴⁰¹ Hereafter referred to as 'South Africa'.

⁴⁰² As to the meaning of 'in the Republic' see Silke para 8.2.

⁴⁰³ This was effected by the Revenue Laws Amendment Act 59 of 2000.

⁴⁰⁴ The Revenue Laws Amendment Act 59 of 2000 amended the definition of 'gross income' in section 1 of the Income Tax Act to provide for 'resident' and 'non-resident' taxpayers, and inserted a comprehensive definition of the term 'resident' in the Income Tax Act. Various other amendments were effected to update the Act to one based on 'residence'.

⁴⁰⁵ See section 1 of the Income Tax Act.

income from within the geographic borders of South Africa would henceforth be labelled as 'non-resident'⁴⁰⁶ and would continue to be taxed on a 'source' basis.

Based on this information, it is possible to sketch three scenarios, which will illustrate the operation of the provisions of the Income Tax Act in respect of a sportsperson. These are:

- A local sportsperson, earning income from sporting activities conducted locally;
- A local sportsperson, earning income from sporting activities conducted in a foreign jurisdiction; and
- A foreign sportsperson, earning income from sporting activities conducted locally (in South Africa).

In each of the above scenarios, it is assumed that the sportsperson is a natural person.

This is significant, because the definition of 'resident' in the Income Tax Act differentiates between natural and 'juristic' or 'artificial' persons.⁴⁰⁷ The definition provides two tests for residence, as a result of which a natural person may qualify for residence under circumstances where an artificial person may not, and *vice versa*.⁴⁰⁸ This in turn would affect the income that the taxpayer is expected to bring into account in his South African assessment to normal tax. However, this difference aside, the consequences for both natural and juristic taxpayers would be broadly similar. Each scenario will be examined in turn.

⁴⁰⁶ The term 'non-resident' is used for convenience only. It is not defined in the Income Tax Act, which only contains a definition of 'resident'. For the purposes of calculating normal tax, one first has to determine 'gross income'. 'Gross income' is defined in section 1 of the Income Tax Act, and speaks of a 'resident', and 'any person other than a resident'.

⁴⁰⁷ In this regard see the definition of 'resident' in section 1 of the Income Tax Act.

⁴⁰⁸ Compare parts (a) [natural person] with part (b) [person other than a natural person, i.e. a juristic or artificial person] of the definition of 'resident' in section 1 of the Income Tax Act.

A Local sportsperson, local income

148 This scenario assumes that the sportsperson qualifies as a 'resident' in South Africa in terms of the definition of 'resident',⁴⁰⁹ and that the income in question is generated from a local source, i.e. one that could be regarded as being 'within the Republic of South Africa'.⁴¹⁰ The fact that the income is from a 'local source' removes any consideration of 'double taxation'⁴¹¹ and means that the sportsperson's tax liability falls to be determined solely in terms of the provisions of the Income Tax Act. The Income Tax Act defines a 'resident' as a natural person who is 'ordinarily resident'⁴¹² in the Republic, or one who satisfies a 'physical presence'⁴¹³ test. The concept of 'ordinary residence' has not been defined in the Income Tax Act, but has been dealt with by the South African courts.⁴¹⁴

[H]is ordinary residence would be the country to which he would naturally and as a matter of course return from his wanderings; as contrasted with other lands it might be called his usual or principal residence and it would be described more aptly than other countries as his real home.⁴¹⁵

149 The concept of 'physical presence' applies a time-based test to determine residence, and is only applied if a person is not 'ordinarily resident'. The test is spelled out in some detail in the definition of 'residence', as follows: the person must be physically present in South Africa for a period or periods exceeding 91 days in aggregate⁴¹⁶ during the year of assessment⁴¹⁷ under consideration, and for a period or periods exceeding 91 days in aggregate in each of the 5 years of assessment preceding

⁴⁰⁹ Definition of 'resident' – section 1 of the Income Tax Act.

⁴¹⁰ See the discussion above as to what constitutes 'in the Republic'.

⁴¹¹ The concept of 'double taxation' will be discussed further below.

⁴¹² In this regard see part (a)(i) of the definition of 'resident' in the Income Tax Act.

⁴¹³ In this regard see part (a)(ii) of the definition of 'resident' in the Income Tax Act.

⁴¹⁴ *Robinson v COT* 1917 TPD 542, *Cohen v CIR* 1946 AD 174, *CIR v Kuttel* 1992(3) SA 242 (A)

⁴¹⁵ *Cohen v CIR* (above) at 185, quoted with approval in *CIR v Kuttel* (above) at 250; Silke para. 8.3.1

⁴¹⁶ The phrase 'in aggregate' means that continuous physical presence is not required: the time period may be broken up into several smaller periods of shorter duration, as long as these short periods total 91 days.

⁴¹⁷ A person's liability to tax is determined annually in South Africa, hence a 'year of assessment'. Silke para 4.8.

the present year of assessment, and for a period or periods exceeding 915 days in aggregate during those previous 5 years of assessment.⁴¹⁸ Should the local sports person satisfy either of the above two tests, he will be regarded as a 'resident'. The next consideration would be whether he has any amount that qualifies as 'gross income'⁴¹⁹ as defined in the Income Tax Act. This definition can be divided up into the following requirements:

- (i) An amount in cash or otherwise,⁴²⁰
- (ii) Not of a capital nature;⁴²¹
- (iii) Received by or accrued to⁴²² or in favour of.⁴²³

The requirement of 'an amount in cash or otherwise' contemplates the inclusion of all benefits received by or accrued to the sports person in the year of assessment. This would include cash payments,⁴²⁴ as well as payments 'in kind' that are capable of being valued in cash terms.⁴²⁵ This could include, for example, items such as sponsored goods, and free or cheap services.

⁴¹⁸ In other words, in addition to the 91 days in each of the preceding 5 years, the person must accumulate additional days at any time during the preceding 5 years to bring the total up from 455 days (being 91 days per year X 5 years) to the 915 days required by the definition; Silke para. 8.3.1

⁴¹⁹ In this regard, see the definition of 'gross income' in section 1 of the Income Tax Act. This is a crucial definition in the Income Tax Act, the relevant portion of which reads as follows:

"gross income" in relation to any year or period of assessment, means –

- (i) in the case of any resident, the total amount, in cash or otherwise, received by or accrued to or in favour of such resident; or
- (ii) in the case of any person other than a resident, the total amount, in cash or otherwise, received by or accrued to or in favour of such person from a source within or deemed to be within the Republic, during such year or period of assessment, excluding receipts or accruals of a capital nature, but including...

See also Silke para. 4.2, The Manual A:A4.

⁴²⁰ Silke para. 4.10 and 4.11.

⁴²¹ Silke para. 4.2.

⁴²² Silke para. 4.12.

⁴²³ Silke para.4.13

⁴²⁴ *Lace Proprietary Mines Ltd v CIR* 1938 AD 267

⁴²⁵ *A J Stander v CIR* 59 SATC 212, *Commissioner, South African Revenue Service v Brummeria Renaissance (Pty) Ltd and Others* 2007(6) SA 601 (SCA)

'Not of a capital nature' means that the amount must not relate to a capital asset of the taxpayer,⁴²⁶ and must be of a revenue nature. Payments for services rendered, match fees as well as awards⁴²⁷ would all be regarded as being of a revenue nature.

'Received by' contemplates an actual receipt of money or some other benefit that can be valued in money, for one's own benefit, and not on behalf of someone else.⁴²⁸ 'Accrued to or in favour of' contemplates that while one has not received the physical proceeds, one has acquired an unconditional right to receive these proceeds at some date in the future.⁴²⁹ However, notwithstanding the non-receipt of the physical asset, this right must be valued and included in a taxpayer's gross income, in the tax year in which the right accrued.⁴³⁰ The taxpayer will not be taxed twice on the same amount however.⁴³¹ Once a figure has been calculated for 'gross income', any exempt income⁴³² is then deducted from this figure, leaving an amount known as 'income'.⁴³³ Any 'deductions'⁴³⁴ and 'allowances'⁴³⁵ are then deducted from this amount, leaving an amount known as 'taxable income'.⁴³⁶

150 Deductions and allowances are determined in terms of a 'general deduction formula',⁴³⁷ as well as in terms of special provisions of the Income Tax Act.⁴³⁸ The Income Tax Act also prohibits certain deductions.⁴³⁹ Essentially, these sections permit the deduction of certain expenses that the sportsperson may have incurred in the

⁴²⁶ The Manual para. A:C1, Silke paras 5.1-5.3.

⁴²⁷ *ITC 976 24 SATC 812*, The Manual para. A:P22.

⁴²⁸ *CIR v Geldenhuys 1947(3) SA 256 (C)*, *COT v G 1981(4) SA 167 (ZA)*

⁴²⁹ *Lategan v CIR 1926 CPD 203*, *CIR v People's Stores (Walvis Bay) (Pty) Ltd 1990(2) SA 353 (A)*

⁴³⁰ Silke paras. 4.12-4.13.

⁴³¹ In other words, if an amount first accrues to a taxpayer, and then he later receives it, SARS will not tax the taxpayer at the time of receipt and then again at the time of accrual. The taxpayer will be taxed only once on the same amount [*CIR v Delfos 1933 AD 242*] and it is the practice of SARS to tax an amount at the earliest possible date.

⁴³² In this regard refer to section 10 of the Income Tax Act. Silke Chapter 9. A common exemption relating to interest and dividends is contained in section 10(1)(i)(xv), which permits a capped exemption in respect of interest and dividends earned by a taxpayer during the year of assessment. Silke para. 9.21.

⁴³³ In this regard refer to section 1 of the Income Tax Act, definition of 'income'.

⁴³⁴ In this regard refer to section 11(a) of the Income Tax Act. Silke Chapter 10.

⁴³⁵ In this regard refer for example to section 11(c) of the Income Tax Act, which permits a deduction for legal expenses under certain circumstances, Silke para. 11.2, and section 11(d) of the Income Tax Act, which permits a deduction for repairs of equipment used for the purposes of the taxpayer's trade, Silke para. 11.4.4.

⁴³⁶ In this regard refer to section 1 of the Income tax Act, definition of 'taxable income'.

⁴³⁷ In this regard, see section 11(a) of the Income Tax Act, which is read with section 23(g) of the same Act, to make up the 'general deduction formula'; *Port Elizabeth Electric Tramway Co Ltd v CIR 1936 CPD 241*; Silke para. 10.2.

⁴³⁸ In this regard, see sections 11(b) – 22A of the Income Tax Act, Silke Chapter 11.

⁴³⁹ In this regard, see section 23 of the Income Tax Act, Silke para.10.4.

production of income.⁴⁴⁰ In order for the sportsperson to prove that any such expenses qualify as a deduction, s/he will have to establish that these meet the requirements of the 'general deduction formula' or of any specific allowance claimed. In respect of any expense claimed in terms of the 'general deduction formula' the sportsperson will have to satisfy the following criteria:⁴⁴¹

- (i) An expenditure or loss;
- (ii) Actually incurred;
- (iii) In the production of the income;
- (iv) Not of a capital nature;
- (v) Resulting from the carrying on of a trade.

In addition, the sportsperson will have to establish a 'negative test', namely that expenditure in question was not laid out for a purpose other than trade.⁴⁴² This would include all expenses that the sportsperson would normally incur that relate to the conduct of his sport, for the purpose of producing income. This would include expenses such as equipment, professional fees, travelling expenses and the like.⁴⁴³

⁴⁴⁰ For the purpose of this example, it is assumed that the sportsperson will be able to convince SARS that he satisfies the requirements of the 'general deduction formula' and that his participation in a sport qualifies as a 'carrying on of a trade in the production of income'.

⁴⁴¹ These requirements are drawn from the opening passage of section 11, and section 11(a) of the Income Tax Act, which reads as follows:

'For the purpose of determining the taxable income derived by any person from carrying on any trade, there shall be allowed as deductions from the income of such person so derived –

(a) expenditure and losses actually incurred in the production of the income, provided such expenditure and losses are not of a capital nature;'

⁴⁴² This is contained in section 23(g) of the Income Tax Act, which reads as follows:

'No deductions shall in any case be made in respect of the following matters, namely –

(g) any moneys, claimed as a deduction from income derived from trade, to the extent to which such monies were not laid out for the purposes of trade;'

⁴⁴³ This assumes that the sportsperson is carrying out the sporting activity as a trade, or in other words, as a means to generate income to earn a living. A sportsperson who is carrying out their activity for pleasure or recreation only, would not satisfy the requirement of 'carrying on a trade' in section 11.

The final figure of 'taxable income' is then cross-referenced to the tax tables⁴⁴⁴ for that tax year, to produce the sportsperson's final liability for normal tax for that tax year.

This amount would then have to be paid over to SARS within a specified time period.⁴⁴⁵

B Local sportsperson, foreign income

151 In respect of a local sportsperson who generates foreign income, the issue of double taxation⁴⁴⁶ becomes a problem. Since the local sportsperson qualifies as a taxpayer in South Africa⁴⁴⁷ he will be taxed on his worldwide earnings, irrespective of the source thereof. In this situation, double taxation occurs because the sportsperson may also be liable to pay tax on the foreign income in the jurisdiction where the foreign income was earned. This liability will depend entirely upon the national laws of the foreign jurisdiction.

152 The process for determining the taxable income and the resultant liability for normal tax for this sportsperson in South Africa will be the same as that followed in the previous section. If the application of this process and of the laws of the foreign jurisdiction leads to a double taxation problem, there are numerous provisions that can assist in relieving the sportsperson in this position from the burden of double taxation. The first form of relief that must be considered is that which is contained in a Double Taxation Agreement.⁴⁴⁸ South Africa has recognised the problem of double taxation, and as a result has concluded numerous double taxation agreements with various

⁴⁴⁴ Discussed above

⁴⁴⁵ This moves into the area of the administration of the Income Tax Act. Essentially any person who becomes liable for normal tax is obliged to register as a taxpayer in terms of section 67 of the Income Tax Act. This liability arises once one has earned taxable income above a certain threshold. Each taxpayer is then required to submit an income tax return annually in terms of section 65 of the Income Tax Act. Based on the information contained in the taxpayer's income tax return, SARS will assess the taxpayer's liability to normal tax, and issue an assessment indicating this liability in terms of section 77 of the Income Tax Act. This assessment will indicate the date by when any outstanding tax is to be paid. The assessment may also reveal that the taxpayer is entitled to a refund from SARS. More detail on the thresholds for registration as a taxpayer, as well as the process, is available on the SARS website, www.sars.gov.za.

⁴⁴⁶ The Manual A:D47

⁴⁴⁷ This assumes that they meet the 'residence' requirement as detailed in the previous section.

⁴⁴⁸ Silke Chapter 30, The Manual A:D48

countries.⁴⁴⁹ These double tax agreements contain provisions that may eliminate the problem of double taxation by indicating that one of the countries to the double tax agreement shall have full taxing rights in respect of the income in question. Another form of partial relief that these agreements contain is an agreement in terms of which the countries split the tax due on a sum of money, thereby lessening the burden on the taxpayer. The exact relief available can only be determined by reference to each double tax agreement, on a case-by-case basis.

153 The second form of relief that a sportsperson in this position may have recourse to is the Income Tax Act itself. The Income Tax Act contains provisions⁴⁵⁰ that provide unilateral relief from double taxation under certain circumstances. In terms of section 6quat⁴⁵¹ a resident taxpayer will be granted a rebate in respect of any foreign tax paid in respect of any income⁴⁵² included in that taxpayer's taxable income in South Africa, according to a formula contained in the section.⁴⁵³ Additionally, certain foreign amounts enjoy exemption in terms of section 10 of the Income Tax Act. An example⁴⁵⁴ is in respect of remuneration earned by an employee of a South African employer, where the service is rendered outside South Africa and the employee is outside South Africa for a period exceeding 183 days for any period of 12 months. If the sportsperson qualifies in respect of this exemption, any remuneration that falls into this category may be excluded from taxable income by virtue of section 10.

⁴⁴⁹ A full list of the double tax agreements can be found on the SARS website www.sars.gov.za as well as in Silke para. 30.2 (comprehensive agreements) and para. 30.3 (restricted agreements). The texts of the double tax agreements are available in Volume 2 of Silke.

⁴⁵⁰ In this regard, refer to section 6quat and section 10(1)(o)(ii) of the Income Tax Act.

⁴⁵¹ Income Tax Act

⁴⁵² Section 6quat(1) of the Income Tax Act.

⁴⁵³ See in this regard, for example, section 6quat(1A) of the Income tax Act.

⁴⁵⁴ Section 10(1)(o)(ii) of the Income Tax Act.

C Foreign sportsperson, local income

154 Finally, a foreign sportsperson generating income locally will be liable to tax in South Africa on a 'source' basis.⁴⁵⁵ Like their South African counterpart generating foreign income, their liability for double tax depends upon the national laws of their home country, as well as the existence of a double tax agreement between South Africa and their home country. In this regard, the avenues of investigation in respect of the foreign sportsperson's liability to tax would be the same as for the South African sportsperson generating foreign income.

155 The national law of South Africa does, however, contain a provision⁴⁵⁶ that assists foreign sportspersons generating income from sporting activities in South Africa. This provision deals with the taxation of foreign sportspersons and entertainers, and provides that such persons are to be taxed⁴⁵⁷ at a flat rate of 15%,⁴⁵⁸ provided that such persons do not qualify as a resident of South Africa,⁴⁵⁹ and that they are taking part in a 'specified activity',⁴⁶⁰ which is a 'personal activity...to be exercised by a person as a ... sportsperson, whether alone or with any other person or persons'.⁴⁶¹ To the extent that s/he qualifies in terms of this section, a foreign sportsperson's income derived from sporting activities within South Africa would then be subject to a flat rate tax, with no exemptions, deductions or allowances. This section would not apply to any other income derived by any other means by the sportsperson from a South African source, for example, rental on property owned locally. This income would be dealt with in terms of the procedure for non-residents described above.

⁴⁵⁵ Discussed above in respect of the discussion of 'gross income'.

⁴⁵⁶ In this regard, see sections 47A – 47H of the Income Tax Act, Silke para. 18.5.

⁴⁵⁷ Section 47B(1) of the Income Tax Act.

⁴⁵⁸ Section 47B(2) of the Income Tax Act.

⁴⁵⁹ Section 47B(1) of the Income Tax Act.

⁴⁶⁰ Section 47A(b) of the Income Tax Act.

⁴⁶¹ *Ibid.*

III Conclusion

156 The above information presents an overview of the taxation of sportspersons in accordance with South African law. Hopefully it demonstrates the complexity of such taxation, and the fact that the applicable taxes, levies and duties, and the appropriate relief from taxation, varies according to the nationality and situation of each individual sportsperson. This underscores the need to seek further advice from the relevant taxing authorities and practitioners who are familiar with the jurisdictions in which the sportsperson will operate. In respect of the taxation of sporting organisations (and, specifically, in respect of the different forms of associations), the reader is also referred to specialist texts on the subject and/or expert legal or other advice.

§11 SPORT AND GAMBLING LAW

(Marita Carnelley)

I Introduction

157 In terms of the Constitution of the Republic of South Africa, 1996 a dual regulatory system has been introduced to administer the gambling industry within the country.⁴⁶² Lotteries and sports pools are regulated exclusively through national legislation, the Lotteries Act,⁴⁶³ under the supervision of the National Lotteries Board. Casinos, gambling, racing and wagering (betting on both horse races and sporting events),⁴⁶⁴ are regulated in terms of the National Gambling Act⁴⁶⁵ and nine provincial statutes⁴⁶⁶, under the auspices of the National Gambling Board and the supervision of the nine provincial boards. In this regard the Constitution granted concurrent legislative powers to both the provincial and national legislatures with regard to these forms of gambling. Gambling on sporting events thus fall within both these regulatory categories - each with its own set of rules.

158 The basic premise of all these statutes is however similar: organised gambling is prohibited and criminal unless specifically legalised and regulated in terms of legislation. The regulatory principles in all instances specifically include limited legalisation; comprehensive governmental regulation; a competitive licensing process; strict probity of proposed licensees; protection of vulnerable persons such as minors and problem

⁴⁶² Ss 44(3) and 104(1)(b)(i) of the Constitution as read with schedule 4 part A of the Constitution.

⁴⁶³ Act 51 of 1997.

⁴⁶⁴ Ss 44(3) and 104(1)(b)(i) of the Constitution as read with schedule 4 part A of the Constitution.

⁴⁶⁵ 7 of 2004. The aim of this Act is to establish certain uniform norms and standards applicable to national and provincial regulation and licensing of certain gambling activities and to provide for the creation of additional uniform norms and standards applicable throughout the Republic that underpin the South African gambling industry as a whole (preamble).

⁴⁶⁶ Eastern Cape Gambling and Betting Act 5 of 1997; Free State Gambling and Racing Act 6 of 1996; Gauteng Gambling Act 4 of 1995; KwaZulu-Natal Gambling Act 10 of 1996; Mpumalanga Casino and Gaming Act 5 of 1995; Northern Cape Gambling and Racing Act 5 of 1996; Northern Province Casino and Gaming Act 4 of 1996; North West Gambling Act 2 of 2001 and the Western Cape Casino and Racing Law 4 of 1996.

gamblers; and stringent policing to enforce the legislation to eradicate illegal operators.⁴⁶⁷ Certain forms of gambling remain illegal and cannot be licensed, such as the wagering on dog racing.⁴⁶⁸

II Legalized gambling opportunities on sports events

The various legalized gambling opportunities on sporting events are the following:

A Sports pools

159 In terms of the Lotteries Act a sports pool licence may be awarded to authorise the licensee to conduct a national sports pool.⁴⁶⁹ *Gidani (Pty) Ltd*, the licensee, also referred to as the National Lottery Operator, has been licensed to run such a sports pool, *Sportstake*, which involves the prediction of the outcome of twelve football matches drawn from South Africa, English and other identified professional soccer fixtures.⁴⁷⁰ Any other sports pools run within the country would be in contravention of the statute as the Lotteries Act does not make provision for the licensing of any other sports pools. Any person conducting, participating in or advertising a sports pool in contravention of the provisions of the Act would be committing a criminal offence.⁴⁷¹ In a prosecution arising from anything done or not done in the country in connection with a sports pool, it will not be a defence merely to prove that the management, conduct or business of or concerning the sports pool in question is or was wholly or in part carried on at a place outside the Republic of South Africa.⁴⁷²

⁴⁶⁷ National Gambling Act (Preamble).

⁴⁶⁸ *United Greyhound Racing and Breeders Society (UGRABS) v Vrystaat Dobbel en Wedrenraad* 2003 (2) SA 269 (O). See discussion by Carnelley 2004 (1) SACJ 79. In early 2008, the Department of Trade and Industry revived the discussion on dog races by initiating research into the feasibility of legalising greyhound racing in South Africa, although this report is still being prepared.

⁴⁶⁹ Provided that the licence shall specify the sports pools, or descriptions of sports pools, the conduct of which it authorises. A "sports pool" is defined to exclude horse racing (s 1).

⁴⁷⁰ See website of the National Lottery: <http://www.nationallottery.co.za/sport> (last visited 26 April 2009).

⁴⁷¹ S 57-58 of the Lotteries Act.

⁴⁷² S 59 of the Lotteries Act. This section has not yet been tested in the courts.

It should be noted that 22% of the National Lottery Distribution Trust Fund, funded by the national lottery, is allocated to Sports and Recreation.⁴⁷³ From 1 April 2007 to 31 March 2008 alone an amount of ZAR 422,4 million was allocated for this purpose.⁴⁷⁴

B Wagering on horse racing and sporting events

160 The National Gambling Act *inter alia* provides national guidelines regarding the regulation of wagering. The licensing of wagering operations and operators is done by the provincial gambling boards. Various boards, such as the Western Cape Gambling and Racing Board and the Gauteng Gambling Board, have awarded licenses to bookmakers and a totalisator operator running betting and wagering operations.⁴⁷⁵ Some of these operators, in terms of their licenses, are allowed to also take bets interactively.⁴⁷⁶ Again, any person who provides or accepts wagers on horse racing or sporting events outside the various statutes and without a license commits a criminal offence.⁴⁷⁷ A further prohibition is placed on a person who is in any way concerned with the management, supervision, control or administration of a gambling business or any gambling conducted at such business from participating in gambling at such business or at any other gambling business operated by the same licence holder.⁴⁷⁸

With regard to the taxing of betting on sporting events, the 2008 *Annual Report* of the Gauteng Gambling Board noted that:

'With the advent of the Soccer World Cup due to be held in South Africa in 2010, South African Gambling Regulators have resolved to eliminate the punter tax on betting on sport

⁴⁷³ GN 1469 published in *Government Gazette* 27118 dated 15 December 2004.

⁴⁷⁴ National Lotteries Board *Annual Report* (2008) 15. This money was distributed amongst 613 approved beneficiaries.

⁴⁷⁵ For a comprehensive list of the licensees in the Western Cape, see the board website: <http://www.wcgrb.co.za/docs/Licensees.htm> (last visited 26 April 2009); for those in Gauteng, see <http://www.ggb.org.za/index.php> (last visited 26 April 2009); and for those in the Eastern Cape, see <http://www.ecgbb.co.za> (last visited 26 April 2009). For tote betting, see <http://news.tabonline.co.za> (last visited 26 April 2009) that caters for wagering on horse racing events as well as soccer and rugby.

⁴⁷⁶ See E-bets (Pty) Ltd at <http://www.exoticbets.co.za/content.asp?id=125>.

⁴⁷⁷ See as example chapter VI of the Western Cape legislation. The holding of unauthorised horse race meetings are also prohibited (s 66).

⁴⁷⁸ S 71 of the Western Cape legislation.

and other events/contingencies in favour of a gross profit tax on bookmakers. The advantages of this move include: (1) the removal of the tax burden from the punter to the bookmaker; (2) to enable South Africa to compete on an equal footing with foreign jurisdictions; and (3) to stimulate and grow betting on sporting events. In the light of the above, the [Gauteng Gambling] Board recommended to the MEC for Finance and Economic Development ... to amend legislation to provide for the removal of the tax burden on the punter. With effect from 1 July 2008, punters in Gauteng will no longer pay gambling tax on sporting events excluding horse-racing.⁴⁷⁹

C Interactive wagering

161 As mentioned above, interactive gambling is prohibited unless licensed by statute.⁴⁸⁰ The legalisation and regulation of interactive gambling operators is expected within the near future in terms of the National Gambling Amendment Act⁴⁸¹ once the regulations have been finalized.⁴⁸² However, the proposed Interactive Gambling Regulations specifically exclude electronic betting and wagering on horse racing and sports as a form of electronic communication for purposes of the regulation.⁴⁸³ Wagering on horse racing and sporting events are thus excluded from the new developments and it is submitted that none of the interactive licenses would relate to wagering operations. It should be reiterated that these developments were never aimed at regulating interactive sports pools in terms of the Lotteries Act. Also in this regard the *status quo* remains.

⁴⁷⁹ With regard to pool betting, the Annual Report noted that totalisator turnover increased by 11,93% during the current year to a total of R1,88 billion (2007 : R1,68 billion) and totalisator taxation amounted to R29,66 million (2007 : R27,44 million). Regarding fixed odds betting the taxes collected from Gauteng bookmakers amounted to R38,70 million during 2008, compared to R33,97 million in 2007.

⁴⁸⁰ Section 11 and 11A(a) of the National Gambling Act. See also *Casino Enterprises (Pty) Ltd (Swaziland) v Gauteng Gambling Board (TPD)* 2006-11-27 unreported case number 28704/2004.

⁴⁸¹ 10 of 2008.

⁴⁸² The draft Interactive gambling regulations have been published for comment (GN 211 in GG 31956 dated 27 February 2009). See discussion *infra*.

⁴⁸³ Draft regulation 3(3).

III Conclusion

162 Although the law with regard to wagering is clear, the enforcement of illegal operators, especially interactive operators that provide wagering opportunities to South Africans remains problematic in light of the issues of criminal jurisdiction and state sovereignty where the operators are not within the borders of the country.⁴⁸⁴

⁴⁸⁴ See in general Carnelley 'Interactive Gambling. A South African Comparative Perspective. Part I – Universal Legal Challenges' 2001 (2) *Obiter* 273 – 299 as well as the Media Release by the Gauteng Gambling Board "On-line gambling transactions are outlawed in South Africa" sourced electronically at <http://www.ggb.org.za/index.php?>.

CHAPTER 2 PRIVATE GOVERNANCE OF SPORT⁴⁸⁵

§1 The private organization of sport

163 The private governance of sport in South Africa is based, at its foundational level, on the local club or sporting association, which is a voluntary association.⁴⁸⁶ Apart from school sports, all other forms of amateur and professional sport are organized in the form of the following hierarchy of organization and control:

- At the base level, one finds the club, as an association of individuals (participants and those who have an interest in organizing competitions at club level and administering the affairs of the club and its members);
- These clubs may also organize collectively in terms of their geographical location or territorial affiliation, to form provincial or regional unions of clubs;
- These provincial or regional unions in turn collectively make up national unions in the specific sporting discipline (or multiple disciplines where such disciplines are connected in respect of competition or for the purposes of organization).⁴⁸⁷

The hierarchy of control over sport is based on association and, therefore, on contract.

While the core club is made up of members who have concluded a contract of

⁴⁸⁵ Reference is made in parts of the following discussion to the incorporation of associations in terms of the Companies Act 61 of 1973 (as amended). It should be noted that the Companies Act is at the time of writing in the process of very substantial amendment - the new Companies Act 71 of 2008 (*Government Gazette* 32121 of 9 April 2009) has been promulgated, and is to come into force within a period of 12 months (date to be announced in due course).

⁴⁸⁶ Basson (and Swart) in Basson & Loubser (Eds.) *Sport and the Law in South Africa* Butterworths (Looseleaf - service issue 1) 2000 (at Ch 4-1) define the voluntary association as follows:

'Voluntary associations can be defined as legal relationships that arise from an agreement between three or more persons to achieve a common object, primarily other than the making and division of profits. As such, voluntary associations are for the most part bodies of persons who combine to further some common end or interest that may be social, sporting, political, scientific, religious, artistic or humanitarian in nature, or that otherwise stands apart from private gain and material advantage.'

See also Bamford *The Law of Partnership and Voluntary Association in South Africa* 3rd edition, Juta & Co. Ltd, Cape Town 1982 at 117; *Cameron v Hogan* (1934) 51 CLR 358 at 370

⁴⁸⁷ See, generally, the discussion by Basson (and Swart) in Basson & Loubser (Eds.) *Sport and the Law in South Africa* Butterworths (Looseleaf - service issue 1) 2000 at Ch 4-1

membership (embodied in and subject to the constitution of the association), clubs as associations also contract *inter se* in order to submit to the regulatory or governance authority of other associations higher up on the ladder – e.g. the provincial union and the national union in the specific sports code or the multi-coded sports organization. This contractual submission to authority finds its application for example in the rules of competitions and leagues.⁴⁸⁸ The legal principles applicable to voluntary associations (discussed below) are applicable *mutatis mutandis* to such unions of clubs.⁴⁸⁹

164 The majority of South African sports follow the European model of sports governance, and in the three major sports (which also have the best-developed and most substantial professional leagues) the domestic bodies fit neatly in the international governance system with its international federations based in England and Europe.⁴⁹⁰ In this model, the role of international governing bodies as 'trustees' of their sport, in terms of a mandate provided by representative groupings from national member states on the basis of a monopoly, has proved to be 'the most successful model of organization and diffusion of a sports discipline'.⁴⁹¹ In the case of FIFA, as a leading exemplar of governance in the world's most popular sport, this system has developed into a model that has consolidated other organisational layers and is known today as the 'Pyramid of Football'. This structure is recognised as a prime example of the general European model of sport, whereby sport is organised in a hierarchical pyramid with international

⁴⁸⁸ E.g. the ABSA Cup provincial rugby tournament. The hierarchy of national (and international) control over football was described as follows in the Cape Provincial Division judgment of *Coetzee v Comitiss and Others* 2001 (1) SA 1254 (C) (at 1259F):

'It is common cause between the parties that professional football in South Africa is regulated and controlled by the NSL. Any club or footballer wishing to play professional football must be registered with the NSL. If a player is not registered he cannot play for any club that is affiliated to the NSL. The NSL is an association which has as its primary purpose the control and management of professional football in South Africa. All professional football clubs in South Africa are affiliated to the NSL, which in turn is affiliated to [the South African Football Association]. SAFA is in turn affiliated to [the Confederation of African Football Associations] and FIFA, the world body of professional football. The hierarchy is therefore: NSL; SAFA; CAF; FIFA.'

⁴⁸⁹ Basson op cit. at Ch 4-19

⁴⁹⁰ This has contributed to the influence of developments in 'sports law' from other jurisdictions on South African law. As has been remarked (Simon Boyes 'Globalisation, Europe and the Re-regulation of Sport', in Caiger & Gardiner *Professional Sport in the EU: Regulation and Re-regulation* TMC Asser Press, The Hague (2000) at 79):

'The economic growth associated with media refinancing of sport has provided European law with a gateway into the sporting world and resulted in a significant re-regulation within Europe. Furthermore, the pivotal position which Europe holds in the power dynamics of the world sports system has resulted in European law exerting an influence beyond its own jurisdictional boundaries.'

⁴⁹¹ Ducrey, P; Ferreira, C; Huerta, G & Marston, K 'UEFA and Football Governance: A New Model' *International Sports Law Journal* 2004/1-2

(European) sports federations at the top, having as their members national federations (one per country) which in turn have as members regional federations and, finally, clubs.⁴⁹² Outside the European context, this structure is also found in most sporting disciplines, where the relevant international governing body is found at the top of the pyramid.⁴⁹³

165 As mentioned above, most South African sports follow the organisational characteristics of the European model of sport, which also serves to distinguish sport from other businesses,⁴⁹⁴ and consist mainly of the following key elements:⁴⁹⁵

i) The 'Ein Platz Prinzip' (or 'one place principle')

This principle means that only one association has exclusive competence for each sports discipline in each country.⁴⁹⁶ The national associations are bound by the statutes, regulations and resolutions of the international

⁴⁹² *European Model of Sport*, Consultation Document of Directorate-General X of the European Commission (1998), at 2-3. Roger Blanpain *The Legal Status of Sportsmen and Sportswomen under International, European and Belgian National and Regional Law* Kluwer Law International, The Hague 2003 at 2, also distinguishes between the East European and West European models of sport that existed between the end of World War II and the mid-1980s, where the former was ideologically-oriented and sport constituted a part of the propaganda machine.

⁴⁹³ For example, Chapter 1 section 1 (read with section 3) of the International Sporting Code of the FIA describes its role and powers as follows:

'The [FIA] shall be the sole international sporting authority entitled to make and enforce regulations for the encouragement and control of automobile competitions and records, and to organise FIA International Championships and shall be the final international court of appeal for the settlement of disputes arising therefrom ... Each National Club or Federation belonging to the FIA, shall be presumed to acquiesce in and be bound by this Code. Subject to such acquiescence and restraint, one single Club or one single Federation per country ... shall be recognised by the FIA as sole international sporting power for the enforcement of the present Code and control of motor sport throughout the territories placed under the authority of its own country.'

FIA International Sporting Code (as amended – 11 April 2005), available online at http://www.fia.com/resources/documents/1158037540_International_Sport_Code_a.pdf

⁴⁹⁴ Even though the sports market shows increasing similarities with 'ordinary businesses' – see in general Tom Mortimer & Ian Pearl 'The Effectiveness of the Corporate Form as a Regulatory Tool in European Sport: Real or Illusory?' in Caiger & Gardiner *Professional Sport in the EU* at 217 *et seq*; and 'The Business of Football' in Gardiner *et al Sports Law* at 46 *et seq*.

⁴⁹⁵ From the final report of the Sports Directorate of the Netherlands Ministry of Health, Welfare and Sport, entitled *The Balance Between the Game and the Money* (2000). See also Roger Blanpain *The Legal Status of Sportsmen and Sportswomen under International, European and Belgian National and Regional Law* Kluwer Law International, The Hague 2003 at 2 *et seq*.

⁴⁹⁶ A former competition commissioner (Karel Van Miert) of the European Commission has stated that 'it is generally acknowledged that the most effective institutional structure for promoting sport is the creation of a single federation in each Member State and a single international federation for each sport.' [1996] OJ C217/87, 12 April 1996.

(global or continental/regional) federations.⁴⁹⁷ The monopoly position of the international federations is guaranteed because they prohibit (in their statutes) their members from joining other, competing international sports associations or membership of such an association is made dependent on their approval. National associations are also prohibited from allowing clubs to play matches against clubs of national federations that are not members of the international federation, without such federation's approval.⁴⁹⁸

ii) A system of promotion and relegation

Operation of the European model is characterised by a pyramid structure. Regional champions compete against each other for a national title; amateur clubs can be promoted and compete in cup tournaments; winners of national competitions can compete in European competitions. This 'open competition', where clubs can be promoted or relegated, differs significantly from the more closed American system.

iii) Horizontal and vertical solidarity

Horizontal solidarity is pursued in the interests of limiting the differences between competitors within a competition. An example is the redistribution of income from the sales of television broadcasting rights within leagues. Vertical solidarity involves supporting the base of the pyramid (mass sports participation) with income from the top of the pyramid (elite competitions).

⁴⁹⁷ In the South African National Sport and Recreation Act 110 of 1998 a 'national federation' is defined as follows (section 1 of the Act):

'A national governing body of a code of sport in the Republic recognised by the relevant international controlling body as the only authority for the administration and control of the relative code of sport in the Republic'. The SA Sports Confederation and Olympic Committee (SASCOC)'s Articles of Association require national federations (for purposes of membership of SASCOC) to be the undisputed national federation for a specific sport and to be recognised as such by the relevant international federation (Article 5.1.2); and also that an international federation will only be recognised if it is affiliated to or recognised by the International Olympic Committee, the International Paralympic Committee, the Commonwealth Games Federation, the International World Games Federation, the All Africa Games, or if it is approved by a resolution of the members of SASCOC (SASCOC Rule).

⁴⁹⁸ E.g. article 9(4)(e) and article 7(4) of the FIFA Statutes

The reason for this is mainly the interdependence of the different levels – top class sport is dependent on new talent from amateur sport.⁴⁹⁹

166 As mentioned above, the most basic level of organization in South African sports is found at the local level in clubs, which are voluntary associations. Apart from the traditional unincorporated or incorporated voluntary association, South African law furthermore allows for sporting associations to be constituted in the form of companies in certain circumstances. Companies are incorporated associations registered in terms of the Companies Act,⁵⁰⁰ and can be divided (loosely, for present purposes⁵⁰¹) into corporations for gain⁵⁰² or corporations not for gain.⁵⁰³ In South Africa there is no legal requirement that sporting bodies or associations should follow a specific form of association; there is no special requirement that distinguishes sports associations or requires them to organize in a different way from other (e.g. social or humanitarian) organizations.⁵⁰⁴ Of course, legal incorporation in the form of a company,⁵⁰⁵ for instance,

⁴⁹⁹ It is interesting to note that this system of top class sport's dependence on the lower tiers as a feeder system for talented athletes, may also play a determinative role in respect of important aspects of the employment of professional players at the top level. Preston, I; Ross, S & Szymanski, S *Seizing the Moment: A Blueprint for Reform of World Cricket* November 2000 (revised June 2001), in providing suggestions for reforming world cricket in order to eradicate corruption, discuss the very nature of the organisation of world cricket in this respect as a major factor in the relatively low remuneration earned by international professional cricketers. The authors examine the English cricket scene and state that the central contracts offered to international players by the England and Wales Cricket Board (the ECB) leave the English squad with less than 10% of the final take (in respect of the ECB's annual income and revenues generated for television rights) through contracted payments. The authors state that the principal reason for this very low percentage of trickle-down revenue for the international stars is the need for the ECB to subsidise county cricket, which is the feeder for top class professionals (see Szymanski *et al* at 5).

⁵⁰⁰ Act 61 of 1973, as amended. It should be noted that the Companies Act is at the time of writing in the process of very substantial amendment. The new Companies Act 71 of 2008 (*Government Gazette* 32121 of 9 April 2009) has been promulgated, and is to come into force within a period of 12 months (date to be announced in due course).

⁵⁰¹ The Companies Act 61 of 1973 distinguishes between two basic types of company, namely a (public or private) company with a share capital, and a company limited by guarantee (see section 19 of the Act).

⁵⁰² See Companies Act (1973) section 31, as discussed below

⁵⁰³ Or companies incorporated in terms of section 21 of the Companies Act. The 'section 21 company' is a special type of privileged company limited by guarantee (a public company), which is incorporated not for commercial purposes but for the lawful promotion of religion, art, science, education, charity, recreation or for any other cultural or social activity, or communal or group interests. Such company is an 'association not for gain', and its profits must be applied to promote its main object. Dividends may not be paid to members. Upon its winding-up, deregistration or dissolution the assets of the association remaining after satisfaction of liabilities shall be transferred to some other association(s) or institution(s) with objects similar to its main objects. Such a company is required to have the phrase 'Association incorporated under section 21' as the last words of its name. See section 21 of Act 61 of 1973; Gibson *South African Mercantile and Company Law* 8th edition Juta & Co. Ltd 2003 at 264; Basson *op cit.* Ch 4-22.

The main consideration for sports bodies to form a section 21 company are found in the tax exemption provisions of the Income Tax Act, 58 of 1962.

⁵⁰⁴ The discussion below will examine the trend to split the activities of sports bodies into amateur and professional entities, mainly for tax reasons. This trend is widespread and now constitutes a specific form for

may have important consequences and benefits in respect of the rights and obligations of such an association,⁵⁰⁶ but it is generally not a requirement in terms of statute or the common law. The main distinction between sports bodies as voluntary associations is whether they are incorporated or unincorporated.⁵⁰⁷

167 There is no obligation upon an unincorporated association to perform a formal act of registration or other act in order to obtain legal personality. South African law recognizes, in terms of a combination of Roman-Dutch principles and English law relating to clubs, the unincorporated association with legal personality, or *universitas*.⁵⁰⁸ The determining factor is not incorporation under statute or otherwise, but rather the nature of the association, its constitution, and its objects and activities, as inferred from its rules.⁵⁰⁹ The following are the main common law characteristics of a *universitas*:

- Perpetual succession; namely that the association continues to exist notwithstanding changes in its membership;
- The association holds property separate from its members;
- Plurality of members; and
- A lawful object.⁵¹⁰

the amateur and professional activities and structures of such bodies, but is not specifically required by legislation and rather constitutes developing commercial practice or custom.

⁵⁰⁵ In terms of the provisions of the Companies Act, 1973 (it should be noted that substantial amendments to the Companies Act are at the time of writing in progress and are expected to come into force sometime in 2010)

⁵⁰⁶ E.g. in respect of taxation

⁵⁰⁷ Basson *op cit.*; *Ahmadiyya Anjuman Ishaati-Islam Lahore (South Africa) and Another v Muslim Judicial Council (Cape) and Others* 1983 (4 SA 855 (C))

⁵⁰⁸ Bamford *The Law of Partnership and Voluntary Association in South Africa* 3rd edition, Juta & Co. Ltd, Cape Town 1982 at 127. The *universitas* has been defined as 'an artificial or juristic person constituting a legal entity apart from the natural persons (members) composing it, having the capacity to acquire rights and incur obligations and to own property apart from its members and to sue and be sued, and having perpetual succession' – see *African National Congress and Another v Lombo* 1997 (3) SA 187 (A) at 195; *Magnum Financial Holdings (Pty) Ltd (In Liquidation) v Summerly and Another NNO* 1984 (1) SA 160 (W); *Lawclaims (Pty) Ltd v Rea Shipping Co. SA; Schiffskommerz Aussenhandelsbetrieb der VVB Schiffbau Intervening* 1979 (4) SA 745 (N); *Malebjoe v Bantu Methodist Church of South Africa* 1957 (4) SA 465 (W)

⁵⁰⁹ Basson *op cit.* Ch 4-2. It was held in the *African National Congress* case *op cit.* that, to determine whether an association is a *universitas*, it must in the first instance be looked at its constitution. Where its status cannot be determined from the express terms of the constitution or its implication, one must consider the nature of the association and its objects.

⁵¹⁰ Basson *op cit.* at Ch 4-3; *Webb & Co Ltd v Northern Rifles* 1908 TS 462; *Nelson Mandela Metropolitan Municipality and Others v Greyvenouw CC and Others* 2004 (2) SA 81 (SE) at 101; Gibson *op cit.* 259

Most sports clubs and unions of clubs in South Africa comply with the requirements for *universitates* and are recognized as separate legal entities.⁵¹¹ The main characteristics of such an association under South African law are that it exists as an entity with rights and obligations independent from the individual members' rights, and that it has perpetual succession.⁵¹²

168 A voluntary association must be established for a purpose primarily other than the making and division of profits,⁵¹³ although it may conduct subsidiary activities to make profit as long as the main objective of the association is not the acquisition of gain.⁵¹⁴ An association formed with its object the acquisition of gain⁵¹⁵ must be incorporated as a company in terms of the Companies Act in order to be a body corporate.⁵¹⁶ An unregistered association that consists of more than twenty persons and was formed for the purpose of carrying on a business with the purpose of gain is an illegal association in terms of the Companies Act, and has no legal existence.⁵¹⁷ It may therefore not sue in its own name or be sued and no legal effect will be given to its constitution or any contracts purported to be entered into by it.⁵¹⁸

169 While there was earlier uncertainty regarding whether a *universitas* could possess personality rights,⁵¹⁹ it is now recognized that such an association, either as a trading or a non-trading corporation, does indeed possess personality rights. These rights include a right to privacy,⁵²⁰ while it has also been held a juristic person can be defamed.⁵²¹ These

⁵¹¹ Basson Ch 4-5

⁵¹² Pienaar, G J 'Associations' in *The Law of South Africa* 2nd edition Volume 1, LexisNexis Butterworths 2003, at par. 618

⁵¹³ Bamford *op cit.* 117

⁵¹⁴ *Huey Extreme Club v McDonald t/a Sport Helicopters* [2004] JOL 12875 (C) par. 20

⁵¹⁵ It is a question of fact whether an association's object is that of gain, and gain in this context has been held to mean 'a commercial or material benefit or advantage, not necessarily a pecuniary profit, in contradistinction to the kind of benefit or result which a charitable, benevolent, humanitarian, philanthropic, literary, scientific, political cultural, religious, social, recreational or sporting organisation, for instance, seeks to achieve' – *Mitchells Plain Town Centre Merchants Association v McLeod and Another* 1996 (4) SA 159 (A) at 169-170 (as quoted in Basson *op cit* Ch 4-4).

⁵¹⁶ Companies Act (1973) section 31; see Basson *op cit.* Ch 4-4

⁵¹⁷ *R v Twala* 1952 (2) SA 599 (AD)

⁵¹⁸ Basson *op cit.* Ch 4-4 to 4-5

⁵¹⁹ See *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1979 (1) SA 441 (A)

⁵²⁰ *Financial Mail (Pty) Ltd v Sage Holdings Ltd* 1993 (2) SA 451 (A)

⁵²¹ *Dhlomo NO v Natal Newspapers (Pty) Ltd & Another* 1989 (1) SA 945 (A); *Argus Printing & Publishing Co. Ltd v Inkatha Freedom Party* 1992 (3) SA 479 (A)

rights can be protected in the usual manner by means of interdict, the Aquilian action for damages (the general delictual action, or action in tort) or the *actio iniuriarum* for general damages.⁵²²

170 A *universitas* may furthermore hold property, and the property will vest in the association as a legal person. This distinguishes the *universitas* from the unincorporated association, where the members are limited co-owners of the property due to the fact that the association has no separate legal personality.⁵²³ The constitution of the association (or an Act of Parliament) may determine that movable or immovable property of the *universitas* will vest in a trustee, other bodies or persons acting as the representatives of the association.⁵²⁴

171 The basic foundation of the sports club is therefore the mutual agreement between its members and the members and the *universitas*.⁵²⁵ Unlike the position under English law,⁵²⁶ where the club generally has no separate legal personality and is based solely on the horizontal matrix of contracts that binds each member to the other members, there is a vertical matrix of contracts between the club and its members.⁵²⁷ This contract between club and member(s) is embodied in the club's constitution (together with its rules and regulations).⁵²⁸ The constitution manifests the members'

⁵²² See Pienaar, G J 'Associations' in *The Law of South Africa* 2nd edition Volume 1, LexisNexis Butterworths 2003, at par. 618. For more on the Aquilian action and the protection of personality rights under the South African law of delict (tort), see Neethling, J; Potgieter J M & Scott, T J *Case Book on the Law of Delict* 4th edition Juta Law 2007; Visser PJ; Potgieter JM; Steynberg L & Floyd, TB *Law of Damages* Juta Law 2003; Burchell, JM *Principles of Delict* Juta Law 1993; Burchell, JM *Personality Rights and Freedom of Expression: The Modern Actio Iniuriarum* Juta Law 1998.

⁵²³ See Pienaar *op cit.* at par. 623

⁵²⁴ *Ibid.*

⁵²⁵ Pienaar ('Associations', in *The Law of South Africa* 2nd edition Volume 1, LexisNexis Butterworths 2003, at par. 617) observes that nowhere in the Roman-Dutch sources is it mentioned that the *universitas personarum* is based on contract. This latter view originated from a combination of Roman-Dutch principles and English club law. See, generally, Pienaar *supra* and the authorities cited there.

⁵²⁶ In the English context, unincorporated associations have been described as 'essentially groups of individuals coming together to carry out a mutual purpose other than to distribute profit':

'They are members' organisations and have no legal personality distinct from the individuals who comprise their membership. The rules regulate the relationship between the members and will usually give authority to a committee to run the affairs of the unincorporated association. The relationship between the members is a contractual one based on the provisions of the rules.'

Lewis, A & Taylor, J *Sport: Law and Practice* Butterworths LexisNexis 2003 at 457-458. See also Beloff, Kerr and Demetriou *Sports Law* Hart Publishing 1999 at 19-20.

⁵²⁷ Basson Ch 4-3

⁵²⁸ *Ex parte United Party Club* 1930 WLD 277; *Turner v Jockey Club of SA* 1974 (3) SA 633; *Natal Rugby Union v Gould* [1998] All SA 258 (SCA); 1999 (1) SA 432 (SCA) at 440

agreement as to the essential characteristics and objects of the association, and constitutes a contract concluded by offer and acceptance and the intention to associate.⁵²⁹ In accordance with the principle of privity of contract, the constitution, rules and regulations of a sports club or federation are not binding on non-members, even if such constitution, rules and regulations refer to non-members.⁵³⁰ This contract determines the nature and scope of the association's existence and activities, while also prescribing and demarcating the powers of the executive committee, secretary and general meeting, and expressing the rights of members.⁵³¹ In the field of sports, where matters of common concern are often organized in associations on a national, regional or provincial basis, the status, *locus standi* and interaction between the constituent associations or bodies are determined by the provisions of their respective constitutions or of the central association's (national body) constitution.⁵³²

The fact that the normal rules of contract apply to the constitution of a sports club, that the constitution and the rules and regulations of the club determine all questions regarding the association,⁵³³ and the fact that the normal rules of interpretation of contract apply,⁵³⁴ is important in respect of the position of members of such a club. Courts will usually not depart from the clear meaning of the terms of the constitution in order to give it a meaning it considers to be more reasonable in the circumstances.⁵³⁵

⁵²⁹ Basson Ch 4-5. For practical purposes it is advisable to have a written constitution, although this is not essential – see the authorities quoted by Pienaar, G J 'Associations' in *The Law of South Africa* 2nd edition Volume 1, LexisNexis Butterworths 2003, at par. 619 fn 4 and 5.

For discussion of the most important aspects of a club or sporting body's constitution, and suggestions for what should be included in such document, see Basson Ch 4-5 to Ch 4-20, and Ch 4-33 to Ch 4-35 (in respect of requirements in terms of amendments of the Income Tax Act 58 of 1962 regarding exemption from income tax in certain cases).

⁵³⁰ *Rowles v Jockey Club of South Africa* 1954 (1) SA 363 (A); *Johannesburg Country Club v Stott* 2004 (5) SA 511 (SCA)

⁵³¹ Pienaar *op cit.* at par. 620

⁵³² Pienaar *op cit.* par. 624

⁵³³ *Rowles v Jockey Club of SA* 1954 (1) SA 363 (AD); Bamford *op cit.* at 132. As to the supremacy of the constitution of a voluntary association in this regard and the fact that the rights and obligations that arise between a voluntary association and its members are private in nature, see *Cronje v United Cricket Board of South Africa* 2001 (4) SA 1361 (TPD) (as discussed below).

⁵³⁴ *Constantinides v Jockey Club of SA* 1954 (3) SA 35 (C) and the authorities quoted in Basson *op cit.* Ch 4-6 note 4

⁵³⁵ *Constantinides supra* at 44; Basson Ch 4-6. See also, on the interpretation and amendment of a constitution, Pienaar *op cit.* at par. 621-622.

172 While the basis for the voluntary association is therefore contract,⁵³⁶ and it is subject to the normal rules of contract,⁵³⁷ it is important to note that certain statutory provisions may limit the traditional notion of voluntary associations by in essence limiting freedom of contract; e.g. in respect of the freedom of the association to refuse membership to certain individuals or groups. A prime example is found in section 29 of the Promotion of Equality and Prevention of Unfair Discrimination Act (Act 4 of 2000), which contains an illustrative list of unfair practices in terms of the Act and includes the following (in section 29(10), entitled 'Clubs, sport and associations'):

- '(a) Unfairly refusing to consider a person's application for membership of the association or club on any of the prohibited grounds;
- (b) Unfairly denying a member access to or limiting a member's access to any benefit provided by the association or club; or
- (c) Failure to promote diversity in selection of representative teams.'

The prohibited grounds are defined in section 1 of the Act as including

- '(a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth; or
- (b) any other ground where discrimination based on that other ground-
 - (i) causes or perpetuates systemic disadvantage;
 - (ii) undermines human dignity; or

⁵³⁶ It has been said that 'in many respects the relationship of a [*universitas*] to its members resembles that of principal and agent though in other respects it is a contractual relationship which ... [arises from] a contract *sui generis*' – *Lewis & Co. (Pty) Ltd v Pietersburg Co-op BV and Others* 1936 AD 344 at 353, as quoted by Bamford *The Law of Partnership and Voluntary Association in South Africa* 3rd edition, Juta & Co. Ltd, Cape Town 1982 126 note 3.

⁵³⁷ Compare *Jacobs v Old Apostolic Church of Africa and Another* 1992 (4) SA 172 (TK) at 173 (per Hancke J): '... [A] voluntary association, is founded on a contractual basis. The constitution of an association, together with all its rules or regulations, collectively constitutes the contract which is entered into by its members... The contract under which a voluntary association functions determines the nature and scope of the association's existence and activities, prescribes the powers to those who are charged with its affairs and demarcates and regulates the rights of members... As far as the interpretation of [such an association's] constitution is concerned, the same principles of construction should be applied as in the construction of any written contract.' Compare, however, *In re Cape of Good Hope Permanent Building Society* (1898) 15 SC 323 at 336, where it was observed that voluntary association is a 'contract *sui generis* which does not fall within any of the well-defined classes of contracts known to our law' – see Bamford *The Law of Partnership and Voluntary Association in South Africa* 3rd edition, Juta & Co. Ltd, Cape Town 1982 at 117 note 1.

(iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a)'.

These provisions would clearly outlaw e.g. excluding a person from membership of a sports club or organization on the basis of their race or gender.

173 Apart from such considerations,⁵³⁸ voluntary associations normally have an absolute discretion as to whether or not it admits a person to membership.⁵³⁹ In light of this discretion, and long established precedent⁵⁴⁰ regarding the powers of voluntary associations *vis a vis* applicants for membership, a refusal of membership will not, *per se*, involve (or entitle the unsuccessful applicant to rely on) *mala fides* or non-compliance with the rules of natural justice.⁵⁴¹ Furthermore, the courts have on a number of occasions recognized that the fundamental right to freedom of association as contained in section 18 of the Bill of Rights includes the right of an organization such as a sports governing body not to associate with an individual (e.g. where no contractual relationship exists between the association and such individual).⁵⁴²

174 South African courts, in the absence of express provisions to that effect, will not lightly infer a right to membership.⁵⁴³ As the disciplinary powers of the voluntary association are based in the constitution, rules and regulations, such a body cannot discipline a non-member who has no contractual relationship with the association. The courts have furthermore held that a sports organisation's right to expel a member (i.e. as a form of disciplinary action against such member) must be stated expressly or by

⁵³⁸ Compare also, more generally, the provisions of the Bill of Rights of the Constitution of the Republic of South Africa, 1996 (chapter 2), which protects every person's fundamental rights of equality (section 9), human dignity (section 10), the freedom to pursue an occupation (section 22), etc. These rights may affect the association's freedom to exclude persons in certain circumstances (and depending on the extent to which the relevant right(s) may be subject to direct application to natural and/or juristic persons in terms of section 8 of the Constitution).

⁵³⁹ See Bamford at 139 *et seq.*, and the authorities referred to.

⁵⁴⁰ Compare the cases referred to by Bamford at 139

⁵⁴¹ Bamford 139

⁵⁴² Compare *Cronje v United Cricket Board of SA* 2001 (4) SA 1361 (TPD) (discussed in par 224 *et seq* below)

⁵⁴³ *Ngwenya v Motholo* 1953 2 PH M24 (N); Pienaar *op cit.* par. 626

necessary implication in the constitution, rules or regulations of such organization.⁵⁴⁴ The association has no inherent right to expel a member, and accordingly any such implied power must be clear and unambiguous. In cases of serious or repeated transgressions, the association may exercise its right at common law to cancel the contract with the member on the basis of the latter's breach.⁵⁴⁵

175 Of course, in the sports context, eligibility for membership to sports associations is not purely regulated at the domestic level in terms of the rules as contained in the constitutions of domestic associations. Eligibility rules (and also disciplinary rules and rules relating to ethical principles in a sport) are a specific example of the application of the often-intricate 'web of contracts' that affects athletes, in both amateur and professional sport. Eligibility rules are found in the rules of all international sports governing bodies, and these same rules are incorporated, by means of contract or otherwise,⁵⁴⁶ into an association's constitution (as well as other contracts with participants, e.g. employment contracts). The international element of such rules, and the role of the international associations, should at all times be borne in mind when interpreting or applying the constitution of a domestic sports association.

176 Finally, in respect of the activities of bodies such as sports clubs in their interaction with their members, it should be noted that the Consumer Protection Act, 2008⁵⁴⁷ contains quite far-reaching provisions regarding the rights of consumers who are involved in transactions under the Bill. Section 1 of the Bill defines a 'transaction' as including the following:

'[A] "transaction" means—

⁵⁴⁴ See *Conrad v Farrel* 1974 (2) SA 200 (C)

⁵⁴⁵ See Cloete et al *Introduction to Sports Law in South Africa* (2005) *supra* at 102

⁵⁴⁶ See the discussion by Lewis & Taylor *Sport: Law and Practice* Butterworths LexisNexis 2003 at 51 (par. A2.16) *et seq.*

⁵⁴⁷ The Consumer Protection Act, 68 of 2008 was signed into law by the President of the Republic on 24 April 2009 and published in the *Government Gazette* on 29 April 2009. The Act will come into force on a date unknown during the course of 2009/10

(a) in respect of a person acting in the ordinary course of business—

- (i) an agreement between or among that person and one or more other persons for the supply or potential supply of any goods or services in exchange for consideration; or
- (ii) the supply by that person of any goods to or at the direction of a consumer for consideration; or
- (iii) the performance by, or at the direction of, that person of any services for or at the direction of a consumer for consideration; or

(b) an interaction contemplated in section 5(6), irrespective of whether it falls within paragraph (a)'

Section 5(6) of the Bill, which deals with its application, provides as follows (specifically in section 5(6)(a)) in respect of clubs and associations:

'Sec. 5(6) For greater certainty, the following arrangements must be regarded as a transaction between a supplier and consumer, within the meaning of this Act:

- (a) The supply of any goods or services in the ordinary course of business to any of its members by a club, trade union, association, society or other collectivity, whether corporate or unincorporated, of persons voluntarily associated and organised for a common purpose or purposes, whether for fair value consideration or otherwise, irrespective of whether there is a charge or economic contribution demanded or expected in order to become or remain a member of that entity;'

The Consumer Protection Act clearly has wide application and also provides for far-reaching consumer protection measures, discussion of which is beyond the scope of this chapter.

§2 The organization of competitions in the major South African professional sports

177 The three major professional sports have seen exciting developments in the past decade, with especially the establishment of international regional tournaments in rugby and cricket contributing significantly to the growth of the sports as well the coffers of the respective governing bodies and their commercial arms. The following provides a brief overview of the organization of major competitions in football, rugby and cricket.

Football

178 The Premier Soccer League (or 'PSL', which was established in 1996) is the trading name of the National Soccer League (NSL), which is made up of the Premier Division and the National First Division.⁵⁴⁸ It is an Affiliate Member of the South African Football Association (SAFA) and the administrator of professional football in the Republic of South Africa. The league was reduced from 18 to 16 teams after the end of the 2001/2002 season to avoid fixture congestion, causing two teams, Ria Stars and Free State Stars, to be disbanded at the time.⁵⁴⁹

The Nedbank Cup (which has been called the South African version of the English FA Cup) sees teams from SAFA's regional leagues compete and play up to ten matches before entering the main draw. 32 teams enter the main draw, including 16 Premier League clubs, 8 National First Division clubs and 8 from SAFA's regional leagues.

The Telkom Knockout is a lucrative tournament which features all 16 premier league clubs and is played in the first half of the season.

⁵⁴⁸ Rule 1.2 of the National Soccer League's Rules (as amended 17 June 2008)

⁵⁴⁹ From the web site of the Premier Soccer League. The rules and regulations and constitution of the PSL is available on the web site at <http://www.psl.co.za>

The MTN 8 tournament features the top 8 teams from the previous season's league, and is played at the start of the new season, with a ZAR 8 million winner takes all prize.

The Telkom Charity Cup is the traditional season opener for the PSL, and this unique one day event sees fans of the 16 Premier League clubs vote for their favourite team, either via phone or by sms (text messages). All proceeds from the votes go towards charity.

The tournament is a firm favourite amongst fans as they get to see three matches in one day and also view the newest and latest signings on offer.

179 SAFA was established in 1991, following a unifying process which culminated in a single national football association (as opposed to the racially divided structures which had existed previously), and the organization has been a member of world governing body FIFA since June 1992. SAFA is closely involved with FIFA and the Local Organising Committee in organizing the 2010 FIFA World Cup South Africa™.

SAFA has 52 regions and comprises a number of Associate Members (including the PSL), Regional Members (arranged along provincial lines) and its League. The League is made up of the National First Division (previously the 'Mvela League'), the 2nd Division (the 'Vodacom League') and the 3rd Division (the 'SAB League').⁵⁵⁰ Rule 3 of the NSL's Rules regulates promotion and relegation in respect of the Premier and First divisions.⁵⁵¹

The National First Division (or NFD) is the second-highest league of South African professional club football after the Premier Soccer League's Absa Premiership. From 2004 until 2007 it was sponsored by the Mvelaphanda Group and known as the Mvela Golden League. The restructured NFD is divided into two streams, one inland and another coastal - each of which consists of 8 teams.⁵⁵² The winners of the two streams play against each other in a final at the end of the season - the victor of which is promoted to the PSL. The loser of the final plays in a mini-tournament/play-offs against the two second-placed teams in each stream and the 15th-placed team on the PSL log. The winner of this tournament is also automatically promoted to the Premiership. The Premier League and

⁵⁵⁰ From the organisation's web site at <http://www.safa.net>

⁵⁵¹ National Soccer League Rules (as amended 17 June 2008)

⁵⁵² In terms of Rule 15 of the National Soccer League Rules (as amended 17 June 2008)

the National First Division are the only two leagues comprised of fully professional players (on average around 30 players contracted per club), and semi-professional players (whose registration is administered by SAFA) participate in the lower, 'amateur' leagues.

The Vodacom Promotional League (the feeder league to the NFD) is contested by 16 clubs in each of the 9 provinces of South Africa. The winner of each Provincial League qualifies for the annual Vodacom Promotional Play-offs where the winners of two streams (made up of 4 and 5 clubs respectively) qualify automatically for the National First Division. Winners from the SAB Regional League qualify for promotion to the Vodacom Promotional League after a series of play-offs.

The SAB Regional League (formerly the Castle Regional League), comprising 832 clubs and over 20 000 registered players, is the largest senior league administered by SAFA. This club competition has been expanded from 25 to 52 SAFA regions (from the 2006/07 season). Two regional winners (from each of the 9 provinces) are promoted annually to the Vodacom Promotional League after a series of play-offs in their respective provinces.⁵⁵³ From the 2009 season this league is operated as the SAB Regional under-21 League, the first under-21 league of its kind in the country, with the object of serving as a feeder league to the Vodacom League. The competition is to be phased in over a three-year period, with a quota of under-21 players to be applied (i.e. 5 u-21 players per team in 2009; 8 u-21 players per team in 2010; full complement of 11 u-21 players per team in 2011). It is hoped that this new league will serve as a vehicle to provide opportunities to players who have not been scouted by professional clubs before reaching the ages of 19-21.

⁵⁵³ From the web site of the SA Football Association at <http://www.safa.net>

Rugby union

180 The national rugby team (the Springboks) is the current (2007) IRB Rugby World Cup champions (the Springboks also won the tournament in 1995, when it was staged in South Africa).⁵⁵⁴ Apart from the international touring programme, the Springboks also compete in the Tri-Nations tournament against Australia and the New Zealand All Blacks. The Tri-Nations is an annual competition which was first played in 1996, which takes place in July and August, that decides the top international team in the southern hemisphere.

The Super 14 competition features 14 regional teams from South Africa, New Zealand and Australia, with South Africa providing five teams (professional franchises), New Zealand five and Australia four. The forerunner of the competition was the Super 10, contested by provincial teams from the three countries as well as Samoa in 1993 and 1994 and Tonga in 1995. In 1996, the competition became the Super 12, featuring provincial and regional teams from South Africa, New Zealand and Australia, with the Tongans and Samoans dropping out. Two more teams were added in 2006 and it became the Super 14.

The Super 14 is an early season competition, starting in mid-February and finishing by mid-May.

181 At the time of writing there is a measure of speculation regarding the restructuring of the Super 14 tournament for the 2011 season. There has been some debate regarding the length of the season, with South Africa preferring a maximum 17-match programme while Australia and New Zealand want a 21-match schedule. All three partners to the SANZAR agreement have agreed on expanding the competition to 15 teams in 2011, extending the play-offs with a quarter-final round for teams placed third to sixth and to adopt a three-conference system to ensure teams in each nation play

⁵⁵⁴ The Springboks' victory in the 1995 IRB Rugby World Cup is generally viewed to be one of the most significant 'nation-building' events in the country's post 1994 era, and is soon to be immortalized in the Clint Eastwood-directed film 'The Human Factor', to star Morgan Freeman as Nelson Mandela and Matt Damon as former Springbok captain Francois Pienaar. The production began filming in Cape Town in March 2009 and is scheduled for release in December 2009.

their countrymen home and away every season..South Africa's concerns regarding the number of matches in the season relate to the ABSA Currie Cup tournament (an extended Super Rugby tournament would, as a result of the scheduling of the Tri-Nations tournament, result in the Springbok players being removed from the Currie Cup).

The new franchise is to be identified through a tendering process, although SA Rugby has indicated that it will aggressively support a sixth South African franchise in the form of an Eastern Cape province-based team.⁵⁵⁵ It has been reported that SA Rugby has been adamant in stating that it will not let future developments in respect of the Super 14 tournament devalue the provincial Currie Cup tournament (for which broadcasting rights for the period 2011 to 2015 have already been sold). South African sports broadcaster SuperSport contributes 65% of the revenues in terms of the SANZAR agreement, and this strengthens SA Rugby's bargaining power in respect of negotiations on the Super Rugby tournament (although this has not stopped SA Rugby from threatening to leave the Super 14 in order to send its teams to participate in the UK's Magners League).⁵⁵⁶

182 The Currie Cup, the premier provincial rugby competition in South Africa, was first contested in 1892. The format of the Currie Cup varied from year to year, and finals were held intermittently until 1968, after which the final became an annual event. The Currie Cup takes place roughly between July and October. The format divides 14 teams into eight Premier Division and six First Division teams.

The Vodacom Cup takes place at the same time as the Super 14 competition - starting in late February and finishing in mid-May - and creates a platform for talented young players who might otherwise not get a chance to make their mark. It has also been a fertile breeding ground for strong players from previously disadvantaged backgrounds, thanks to the enforcement of racial quotas. The Vodacom Cup is divided into two sections

⁵⁵⁵ See the discussion elsewhere in this chapter regarding the misadventures of the 'Southern Spears' (now the 'Southern Kings') franchise during the last five years

⁵⁵⁶ See the report entitled 'SA Rugby refuse to budge', 15 March 2009 (available online at http://www.iol.co.za/index.php?set_id=6&click_id=582&art_id=nw20090315184456194C394357 - accessed 9 April 2009)

(North and South) with the top two teams advancing to the semi-finals and playing cross-section matches of one-versus-two for a place in the final.

Since early 2008 major bank First National Bank has sponsored an inter-university rugby tournament. The FNB Varsity Cup was launched in Johannesburg on 31 January 2008.

The league was contested by the top eight universities in South Africa, which kicked off with an inaugural televised match on SuperSport between the University of Stellenbosch and the University of Pretoria on 18 February 2008. It is expected that this tournament will serve as a further feeder system for the top-level competitions in future.

Cricket

183 The national cricket team, the 'Proteas', are at the time of writing ranked 1st in the world in the One Day International format, and ranked 2nd after Australia in the Test match format. South Africa hosted the ICC Cricket World Cup in 2003, but this title has eluded the national team since its re-admission to international cricket in 1992.

The General Council of the United Cricket Board of South Africa (the 'UCB') voted in September 2003 to drastically cut the then existing 11 professional teams, which made up the domestic first class and limited overs competitions, to six franchises.⁵⁵⁷ This decision was implemented in the 2004/5 season. The reasons given for the decision were both economic and sporting in nature: the substantial losses incurred by professional cricket competitions, due to the fact that revenue generated by gate money and sponsorship proved to be insufficient to cover the costs of such competitions; and also, it was believed that the competitive value of the competitions needed to be enhanced as the existing system created too large a step up between provincial and international

⁵⁵⁷ It is interesting to note that this development seems to run counter to developments elsewhere – compare the Pakistan Cricket Board's development of a new domestic cricket system in the 2001-2002 season, whereby more players were provided with an opportunity to compete at the higher levels of the game in domestic competitions.

professional cricket.⁵⁵⁸ This decision was accompanied by the formation of Cricket SA (Pty) Ltd, a company formed to function as the commercial arm of the UCB (similar to SA Rugby (Pty) Ltd, the commercial arm of the South African Rugby Union). Cricket South Africa has recently converted to a section 21-company (an association not for gain) in terms of the Companies Act, 1973. Under the new system, domestic cricket in the Supersport and Standard Bank sponsored competitions are played by six teams from six franchises.⁵⁵⁹ The provincial affiliates (or partnerships between such affiliates) were entitled to tender for such franchises, on the basis of criteria set by the board of Cricket SA (Pty) Ltd and ratified by the UCB.⁵⁶⁰ While this new system has limited the number of teams in professional competitions, the decision has been accompanied by a restructuring of amateur cricket, to increase the number of teams competing at amateur level from 11 to 16. The rationale for this is said to be the continued development of the game in order to provide an improved feeder system for players from the amateur to the professional levels. More is said about the restructuring of the domestic cricket competition in par 308 *et seq* below.

⁵⁵⁸ As explained by the Vice-President of the UCB, Robbie Kurz – see 'Kurz praises new vision for SA cricket', *The Daily News*, 8 September 2003, at 14.

⁵⁵⁹ The new franchises commenced competition with the introduction of the new format of Standard Bank Pro20 Cricket, in April 2004.

⁵⁶⁰ The deadline for tenders for franchises was set as 23 January 2004, and the announcement of franchises awarded was made on 31 January 2004. The franchises are as follows: Western Province/Boland; Dolphins (KwaZulu-Natal); Eastern Cape (Border and Eastern Province); Eagles (Free State); Highveld Lions (Gauteng and North West); and Titans (Northens and Easterns).

§3 Recent experience in the governance of elite and professional sport in South Africa

184 Recent years, especially since 2000, saw both minor tremors and major upheavals in the landscape of private governance of sport in South Africa. Promising performances throughout the 1990s by the national teams in the major sports of football,⁵⁶¹ rugby⁵⁶² and cricket,⁵⁶³ immediately following the country's re-admission to international sport, failed to provide a platform for the growth and development of a sustained culture of success in SA sport. This was especially evident as it became clear that those governing and participating at the top levels were struggling to get to grips with the changing face of world sport, where developments included the increased influx of big money and the widespread and increasing moves towards professionalism.⁵⁶⁴ Accompanying the international corruption scandal that rocked South African cricket in 2000, were increasing and very public examples of mismanagement and poor governance in South African sport,⁵⁶⁵ which, sadly, are still prevalent from time to time at the time of writing. In fact, these wide-spread misadventures have on occasion received express judicial recognition.⁵⁶⁶

185 The SA Rugby Union was embroiled in an ongoing and very public saga of sporadic 'palace revolutions' among the higher echelons of the organization. The casualties of these developments were a number of senior officials of the Union, who

⁵⁶¹ 'Bafana Bafana', the national football team, won the African Cup of Nations tournament in 1996, against some of the powerhouse teams of African football.

⁵⁶² South Africa not only managed to successfully host its first IRB Rugby World Cup in 1995, the Springboks, the national rugby team, won the tournament by beating the New Zealand All Blacks in the final.

⁵⁶³ The SA national cricket team managed to reach the semi-finals of the ICC Cricket World Cup in 1992, immediately following South Africa's re-admission to world cricket late in 1991, and quickly established itself in the 1990's as one of the top teams in the world.

⁵⁶⁴ E.g. in rugby union, which only officially embraced professionalism in 1996. For an interesting discussion of the problems faced in SA rugby, see 'Turning Buffalo into Businessmen', in Mark Keohane *Springbok Rugby Uncovered: The Inside Story of South Africa's Rugby Controversies* Zebra Press, Cape Town 2004 (at 19 et seq)

⁵⁶⁵ See, for example, the discussion by Le Roux, R '2003: Annus Horribilis for South African Sport?'

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⁵⁶⁶ Froneman J observed as follows in his judgment in *Yako v Border Rugby Football Union & Others* [2006] JOL 16944 (E) (Case number 3177/2005; judgment rendered on 20 January 2006):

'For avid supporters of South African rugby the administration of the sport on national and provincial level has become an embarrassment. The perception, of which I think I may legitimately take judicial notice, is that many involved in the administration of the game are more concerned with their own personal interests than with the good of the sport in general. This application will do nothing to dispel that perception. Fortunately, however, the players and the sport still thrives, despite (and not necessarily because of) these kind of disputes at the higher levels of the administration of the sport.'

resigned for a variety of reasons related to allegations of mismanagement, double-dealing and poor governance of the affairs of rugby. In April 2005, the then president of the then newly established SA Sports Confederation (SASCOC),⁵⁶⁷ Moss Moshishi, threatened to appoint a three-man team to take over the reins at SARU. Matters came to a head in August 2005 with the publication of a damning 338-page report by SARU's in-house lawyers (the 'Heunis/ Brand report'), which focused its findings on alleged mismanagement by the Union's then president, Brian van Rooyen, as well as other instances of breakdown in the decision making structures of SARU.⁵⁶⁸ In October 2005 it was announced that former SA cricket supremo, Dr. Ali Bacher, had been appointed to the Board of the SA Rugby Union by the major sponsors of rugby, in order to oversee their substantial commercial interest in the game and to contribute towards rationalizing the governance of the Union. According to reports at the time, Bacher's intervention included the brokering of a deal with then SARU president van Rooyen, whereby van Rooyen had allegedly undertaken to withdraw from the race for the presidency during elections held in February 2006, in return for the Union abandoning its investigation into irregularities based on the Heunis / Brand report.⁵⁶⁹ Following these events there were calls for a Ministerial Committee of Inquiry into the affairs of SARU or a judicial inquiry with presidential approval.

186 South African cricket was also embroiled in persistent rumours surrounding the poor financial position of the United Cricket Board. This followed a commission of enquiry instituted by the General Council of the UCBSA, which investigated and ultimately cleared UCB CEO Gerald Majola of alleged misconduct connected with misappropriation of funds by the previous General Manager: Finance and Administration. It appeared from this enquiry that the organization had for a significant amount of time been operating with very little in the way of written policies and procedures relating to the financial affairs of

⁵⁶⁷ See the discussion elsewhere in this chapter

⁵⁶⁸ The Heunis/Brand report, entitled 'Report on the Investigation into Complaints Lodged with the South African Rugby Union', dated 16 August 2005, is available online on the SA Rugby Union's web site at <http://images.supersport.co.za/SARUReportFinalAugust2005.doc> (last accessed 2 November 2005).

⁵⁶⁹ Although it appears that van Rooyen subsequently denied these reports. Brian van Rooyen was voted out at the February 2006 elections, when the current SARU president, Mr Oregan Hoskins, was elected to the position. Dr. Bacher has since been replaced on the Board of SARU by another representative of the major sponsors.

the Board, while it also appeared that there were a number of instances of senior officials holding financial interests in companies that provided goods or services to the UCB.⁵⁷⁰

187 In football, it appears that the period from 2000 to the present has not seen much improvement over the troubles experienced by those governing the sport in the late 1990s. In 1999 the former Minister of Sport, Mr. Ngconde Balfour, had given the SA Football Association an ultimatum to get its house in order or face intervention by government to run the sport. This followed a period of media reports of prolonged irregularities in SAFA's governance, especially in respect of the Premier Soccer League – this included reports of personality clashes between top officials in the League, allegations of kidnapping and death threats, and of financial irregularities.⁵⁷¹ This led to various commentators expressing doubts about expectations for SAFA's successful hosting of the 2010 FIFA World Cup, especially following the SA national team's dismal performance in the 2006 African Cup of Nations tournament.⁵⁷²

188 Apart from the above examples, there have been countless reports of management problems in many South African sporting codes. While it appears that at times the executives in control of the major sports have experienced an attrition rate comparable to that among national team coaches,⁵⁷³ the general perception of apparently systemic incompetence, corruption and widespread dissatisfaction with those at the top has proved to be a hard pill to swallow for a sports-mad nation. Calls have been made for

⁵⁷⁰ See the report of a UCBSA media release available online at <http://www.vivacriquet.co.za/html/news2074.shtml> (last accessed 3 November 2005)

⁵⁷¹ E.g. see the report entitled 'Balfour lays down law to soccer bosses', *Dispatch Online*, 27 November 1999 - available online at <http://www.dispatch.co.za/1999/11/27/sport/AABALFOU.HTM> (last accessed 3 November 2005)

⁵⁷² The SA team lost all 3 its group matches in the tournament and failed to score a single goal, prompting the coach (Ted Dimutru, who was subsequently axed) to remark that the team failed to meet even the lowest expectations of the SA footballing public. It also failed earlier to qualify for the FIFA World Cup 2006 in Germany.

⁵⁷³ The national football team, 'Bafana Bafana', at one time had 12 coaches in a 13 year-period (dubbed the 'Dirty Dozen' by some – see the report entitled 'SAFA's record speaks for itself: Phillips', available online on the web site of the South African Broadcasting Corporation at <http://www.sabcnews.com/sport/soccer/0,2172,120907,00.html> [last accessed 10 February 2006]). The position of national rugby coach post 1994 has also not been synonymous with job security.

sports administrators to adhere to good governance principles and practices as set out in the King (I, II and III) Reports on Corporate Governance.⁵⁷⁴

§4 The trend of splitting the functions of sports bodies

189 Sports bodies in South Africa have in recent years increasingly started to follow developments elsewhere in respect of the separation of functions between those that relate to 'the game' and those that relate to its commercialisation. This is in line with developments at the top level of the international organisation of sport as well as in the domestic governance of sport in jurisdictions elsewhere. These developments have mostly touched sports that have a significant professional component. As a combination of developments in respect of the emergence of professionalism in sport and the accompanying recognition of the role of good governance principles and promotion of the public interest-element of sports regulation, recent years have seen widespread calls for a separation of the economic/commercial and 'sporting' functions of international sports governing bodies. It has generally been recognised that governing bodies nowadays are more and more involved in administering not only the 'rules of the game' (namely those rules, regulations and aspects of the sport that are necessary for the very playing of the game – the traditional function of such bodies at the time of their establishment and early development), but also rules relating to the commercial spin-offs of the playing of the game. Examples of the latter are rules regarding the licensing of broadcasting rights to matches and events, rules regarding the sharing of the spoils from such sources between leagues and between clubs and teams within leagues, exploitation of intellectual property rights (for example in respect of logos and trade marks associated with events), rules regarding the exploitation by players (and others, e.g. merchandisers) of

⁵⁷⁴ See, generally, the discussion in Cloete et al *Introduction to Sports Law in South Africa* (2005) chapter 4. The first *King Report on Corporate Governance* was released by the Institute of Directors in 1994, to set guidelines for good corporate governance to companies and directors. The 2nd King Report ('King II' was released in 2002, as a non-legislative code which is applicable to companies listed on the Johannesburg Stock Exchange (the JSE). The 3rd King Report ('King III') was released in early 2009.

commercial opportunities arising from participation in competitions (e.g. sponsorships), etc.⁵⁷⁵

190 Not only has the development of this sphere of economic activity prompted the need for special knowledge and skills on the part of those governing sport, it has also opened the door to new conflicts of interest between the interests of governing bodies and others (e.g. players, merchandisers, sponsors, broadcasters and the media, and supporters⁵⁷⁶). Accordingly, recent years have seen more and more international sports governing bodies implement a separation of sporting and commercial functions, primarily by means of the establishment of separate entities (who often operate as businesses) to undertake the latter role. A prime example is that of the FIA,⁵⁷⁷ the world governing body for motor sport: While the FIA continues to promulgate the rules of the sport and sanctions international competition, the entities of Formula One Administration Ltd and Formula One Management Ltd (in the case of the FIA Formula One World Championship) stage the events and exploit the commercial rights, under sanction of the FIA.⁵⁷⁸ This is also true in other sports such as football and rugby union.⁵⁷⁹

191 It seems that the increased commercial nature of the activities of sports leagues in the modern era has exposed the inherent contradictions in their governance. As we

⁵⁷⁵ Rodney Hartman (*Ali: The life of Ali Bacher* Viking 2004, at 406) discusses the unique nature of the ICC Cricket World Cup 2003 in South Africa. This event was the first cricket World Cup, since the inception of the competition in 1975, which involved three major role-players in its organisation. These were the International Cricket Council (who owned the property rights in the event and its commercial rights), Rupert Murdoch's Global Cricket Corporation (who had bought the sponsorship and television rights as part of a 7-year package at a cost of \$550 million), and the United Cricket Board of South Africa, through its Cricket World Cup 2003 organising committee.

⁵⁷⁶ As has been observed above, a key element in the development of professional sport to the major international phenomenon it has become has been the fans' interest and support for representative teams and/or individual athletes on the domestic and international stages. It is interesting to note the substantial commercialisation of sport in recent times, which is illustrated by the extreme example from American professional sport where 'fans' interests are so subservient to the profit motive that teams can leave town and move hundreds of miles because the economic grass is greener' – see Ken Foster in Caiger, A & Gardiner, S (eds.) *Professional Sport in the EU: Regulation and Re-regulation* T.M.C. Asser Press (2000) at 60.

⁵⁷⁷ Federation Internationale de l'Automobile

⁵⁷⁸ The separation of the functions of the FIA resulted from the intervention of the European Commission following a complaint in 1999 that the FIA had abused its *de facto* regulatory monopoly by refusing to authorise a rival championship in order to ensure that FIA-organised events continued to be a commercial success. For discussion of this complaint, see Lewis & Taylor at 370-371; Gardiner et al *Sport Law* 2nd Edition 2001 at 410-415. The authors remark that the FIA's response to the Commission's objections to the complaint, which involved the assignment of commercially valuable commercial rights to the FIA Formula One world championship for a 100-year period to a company controlled by a vice-president of the FIA, Mr. Bernie Ecclestone, would normally have been an issue that would 'arouse the suspicion of the competition authorities'; this assignment however appeared to be part of the solution suggested by the Commission.

⁵⁷⁹ See the discussion in Lewis & Taylor at 87 (A3.3) note 1

have seen, the very core function of governing bodies has traditionally been viewed to be the trusteeship of a public interest in the sport. Ironically, the development of commercial exploitation of the substantial entertainment value of sports (an important element of the public interest in such activity) has served to spawn an ever-widening chasm between the teams as commercial enterprises and their multi-millionaire players, on the one hand, and their fans and supporters, on the other hand.⁵⁸⁰ Commercialisation, which has largely been a product of the activities of these same governing bodies, appears to be making a mockery of this 'sacred trust'.⁵⁸¹

192 A prime reason for the emerging conflicts and the problems associated therewith is the monopolistic nature of sports governing bodies. As Gardiner *et al* observe:

'In recent years sport governance has fallen into disrepute primarily because of the involvement of sports federations not only in the rules of the game but also in wide ranging commercial activities. Because of the monopolistic position of virtually all sports federations, this distinction which appeared so clear in the past when governing sport for the 'good of the game' has become blurred by commercial activities.'⁵⁸²

⁵⁸⁰ See, in general, Tom Mortimer & Ian Pearl 'The Effectiveness of the Corporate Form as a Regulatory Tool in European Sport: Real or Illusory?' in Caiger & Gardiner *Professional Sport in the EU* at 217 *et seq*; Adrian Budd 'Sport and Capitalism' in Levermore and Budd (eds.) *Sport and International Relations: An Emerging Relationship* Routledge, London and New York 2004 at 36.

⁵⁸¹ It is interesting to note what (it is submitted) amounts to a rather blatant recent example of the way in which the pursuit of profit has assumed a dominant role over the promotion of sport for the greater good: The South African organisers of the 2010 FIFA World Cup have apparently experienced difficulty in negotiations with FIFA regarding ticket prices for the event. While the organisers (and other forums across Africa) have insisted that tickets should be affordable to the masses, FIFA have apparently pegged the prices, insisting on the maximisation of profits in order to finance their own activities for the four years before the next World Cup. Apparently, FIFA have emphasised the fact that the event is a FIFA event and that South Africa has little bargaining power in this respect – even to the point of stating that the organisation could take away the World Cup if they chose (from a briefing to the parliamentary Portfolio Committee on Sport and Recreation, Cape Town, 14 June 2005).

Another interesting development is that the interaction between commercialisation of sports and traditional notions of participation have also on occasion been utilised by those involved in the governance of sport in order to promote its global appeal. For example: FIBA, the world governing body for basketball that had made professional players eligible for the 1992 Barcelona Olympic Games, had voted against sending the world famous American professionals (players like Michael Jordan, Magic Johnson and Larry Bird – members of the 'Dream Team'). However, the representatives of the sport from other countries 'wanted the basketball explosion on an international level to continue, and they were more than willing to sacrifice their own teams if the American superstars who appeared in [Nike] commercials would be willing to play' – Donald Katz *Just Do It: The Nike Spirit in the Corporate World* Adams Publishing, Massachusetts 1994 at 19.

⁵⁸² Gardiner *et al*. *Sports Law* 2nd edition, Cavendish Publishing Ltd 2001, at 168.

Developments in the law relating to competition, coupled with developments in the actual nature and socio-economic characteristics of sport, have therefore also occasioned a shift in the balance between the traditional virtues of governing bodies (we have seen that the monopolistic nature of the 'FIFA model' of sports governance is one of its prime components) and their continued legitimacy in terms of regulatory functions and powers. Interestingly, the increased commercial role and activities of sports governing bodies have also exposed them to increased scrutiny from the law. In the European Union, for example, regulatory functions that were traditionally viewed as outside the scope of the lawmakers have now started to fall within the purview of legal regulation. As Boyes has observed:

[T]he economic activity prompted by the commodification of sport has provided EU law with an entrée into sporting regulation in relation to the competency to ensure effective competition.⁵⁸³

And, as judgments such as *Bosman* in the European Union have shown, such intervention may have quite far-reaching consequences.⁵⁸⁴ This is indeed a major challenge for international as well as domestic sports governing bodies in the modern era of world sport.

⁵⁸³ Simon Boyes 'Globalisation, Europe and the Re-regulation of Sport', in Caiger & Gardiner *Professional Sport in the EU* at 73. In respect of EC competition law's stance towards 'sporting' vs. 'economic' competition, and the role for legal intervention in this regard, see Klaus Vieweg 'The Legal Autonomy of Sport Organisations and the Restrictions of European Law', in Caiger & Gardiner *Professional Sport in the EU* at 100 *et seq.*

⁵⁸⁴ *ASBL Union Royale Belge des Societes de Football Association & Others v Jean-Marc Bosman* [1996] CMLR 645 ECJ. See the discussion of the judgment in Le Roux 'Under Starter's Orders: Law, Labour Law and Sport' (2002) 23 *ILJ* 1195 at 1201 *et seq.*

It is interesting to note the aftermath of the ECJ's finding in *Bosman's* case that Article 48 of the EC Treaty (now Article 39) precludes the application of rules laid down by sporting associations under which, in matches in competitions which they organise, football clubs may field only a limited number of professional players who are members of other Member States of the EU. In the wake of this judgment, on 19 January 1996, the European Commission officially informed FIFA and the UEFA that the so-called '3+2 rule' restricting the number of foreign players in national and international club competitions could not be exempted from the EC Treaty provisions. UEFA and FIFA were given six weeks to inform the Commission on what steps had been taken to comply with the court ruling, and this rule was subsequently abolished. [See paragraph 39-40 of the 5th Report of the European Committee of the Scottish Parliament ('Report on the Inquiry into Football Transfer Fees and the Position of the European Commission') 2000 – available on the Net at www.scottish.parliament.uk/official_report/cttee/europe-00/eur00-05-02.htm. The '3+2 rule' does however still apply to non-EU nationals].

Continuing uncertainty surrounding the effects of the *Bosman* decision on FIFA's transfer rules resulted in a compromise, which was reached between FIFA, UEFA and the European Commission in March 2001. In July 2001 FIFA adopted the Regulations for the Status and Transfer of Players, which came into effect on 1 September 2001.

193 A significant number of sports associations, unions and federations in South Africa have in recent times followed this trend of splitting the commercial functions associated with professional sport from the traditional; rule-making and administrative functions of the amateur bodies. As mentioned earlier, there is no specific legislative or other prescription to sports associations regarding the form in which they must organise. The two main reasons for the development described above, are the tax benefits involved and the benefits of limited liability for those administering the sporting activity that are found in incorporation into the corporate form.

194 One major problem, however, in the splitting of functions and entities involved in the 'amateur' and 'professional' aspects of sports such as rugby and cricket in South Africa, has been the trend for existing administrators and functionaries to 'wear two hats'. For example, until January 2007 the vice-president of the SA Rugby Union was also the CEO of SA Rugby (Pty) Ltd, the company responsible for administering the commercial arm of the game. This has contributed to a limit on the *de facto* separation of powers and functions of such different bodies and organisations. Indications are that there is a growing realisation of the problems inherent in this, and that more and more specialist corporate functionaries are appointed who can bring a measure of business acumen to the commercial entities involved in the major professional sports.

At the time of writing the commercial arms of the national governing bodies in two of the major professional sports (namely rugby union and cricket), have been reported to be considering conversion from private companies to section 21 companies (or non-profit organisations) in terms of the Companies Act.

§5 Dispute resolution in sport

195 The section that follows will attempt to provide a brief overview of dispute resolution in sport in South Africa. The discussion should not be read in isolation, and will contain numerous cross-references to other sections that follow, as and where they are relevant in this regard. For example, the issue of disciplinary proceedings within sports associations will be discussed here, as an important manifestation or form of disputes that occur frequently in the sporting context. This section will focus on the disciplinary powers of sports associations *vis a vis* their members, the rules regarding such proceedings as well as the recourse of members to the courts. In respect of athletes, as members of such associations, the discussion will deal primarily with the position in amateur sporting codes. In respect of professional athletes and players in professional team sports, the chapter below on employment in professional sport will specifically address the disciplinary powers of sports associations as employers, in terms of labour legislation and the common law or collective bargaining agreements, where applicable.

I Introduction: Sports disputes and ADR

196 The main avenues for dispute resolution in South African sport are litigation, arbitration and alternative dispute resolution (or ADR, including e.g. mediation, conciliation and 'med-arb' proceedings). Nothing will be said here regarding litigation, and in the rest of this chapter numerous examples are provided of matters which resulted in judgments or awards by the various divisions of the High Court, the Supreme Court of Appeal and (in the context of employment disputes) the Commission for Conciliation, Mediation and Arbitration (or CCMA) and the Labour Court.

Alternative dispute resolution methods, such as arbitration, of course hold various benefits over the more traditional route of litigation, not least being the potential for more speedy (and less costly) resolution of disputes. The choice of such dispute

resolution procedures in respect of certain types of matters has in certain instances led to streamlined and generally welcomed commercial expediency (compare the internet domain dispute mechanism that is currently in place, and which uses adjudicators from the SA Institute for Intellectual Property Law to resolve disputes in a speedy fashion).⁵⁸⁵ Various sports-related contracts (including players' contracts and sponsorship agreements) in professional sport frequently contain arbitration provisions, which provide for private arbitration of disputes that may arise in terms of such agreements as an alternative to the more time-consuming and expensive avenue of litigation.

197 Both the South African common law and the Constitution prohibit ouster clauses or similar provisions which have the effect of ousting the jurisdiction of the civil courts. Sports governing bodies may not validly seek to oust the jurisdiction of courts (which would generally be held to be against the public interest and public policy, as contractual provisions which are injurious to the administration of justice⁵⁸⁶), except by means of a valid agreement to arbitrate a dispute. An arbitration clause, however, can also not oust the jurisdiction of a South African court, which retains discretion as to whether it should itself determine the dispute or whether to stay the proceedings.⁵⁸⁷ Section 34 of the Bill of Rights provides for the fundamental right of access to courts, and reads as follows:

'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'

⁵⁸⁵ See the discussion in par 599 *et seq* below

⁵⁸⁶ See section 34 of the Bill of Rights, which guarantees the right of access to court; *Zondi v MEC for Traditional and Local Government Affairs & Others* 2005 (3) SA 589 (CC); *Barkhuizen v Napier* 2007 (5) SA 323 (CC) (in respect of the application of sec. 24 in respect of a 'time-bar' or time limitation clause in a contract). In respect of the common law right of access to court, see *Schierhout v Minister of Justice* 1925 AD 417; *Jones v Jones* 1963 (2) SA 193 (SR); *Astra Furnishers (Pty) Ltd v Arend* 1973 (1) SA 446 (C); *Standard Bank of SA (Ltd) v Essop* 1997 (4) SA 569 (D)

⁵⁸⁷ See *Minister of Law and Order and Others v Hurley and Another* 1986 (3) SA 568 (A). Arbitration clauses have long been held not to oust the jurisdiction of the courts, but to delay their interposition (see *Davies v South British Insurance Co* (1885) 3 SC 416). An arbitration clause may, however, not purport to deprive the court of its power to set aside or to enforce the arbitrator's award.

The rationale behind this provision was, predominantly, in order to safeguard against the ousting of the jurisdiction of the courts by means of ouster clauses in legislation (a practice that was prevalent in the old apartheid legal order).⁵⁸⁸ It does, however, provide a fundamental guarantee to have justiciable disputes resolved by means of recourse to alternative tribunals or fora (such as arbitration). Apart from the issue of ousting the jurisdiction of the courts, private arbitration may raise other, constitutional, issues (e.g. in respect of the privacy of an arbitration hearing).⁵⁸⁹

198 A league such as the Premier Soccer League (or PSL, which is the professional league of the National Soccer League, or NSL), for example, offers a Dispute Resolution Chamber in order to resolve disputes arising from the league's activities.⁵⁹⁰ The Chamber hears disputes on a variety of matters, including player transfers; contractual issues and player signings⁵⁹¹ (at the time of writing, a dispute is in progress between PSL clubs Orlando Pirates and Supersport United over the signing of national team mid-fielder Lance Davids for Supersport United).⁵⁹² The National Soccer League Rules⁵⁹³ contains the following in Rule 4.2 (regarding 'participation and entry') in respect of the application of disciplinary rules and proceedings:

'On entering the League's competitions, clubs undertake to observe these rules and those of particular competitions, and to accept that all administrative, disciplinary and refereeing

⁵⁸⁸ For example, certain provisions in the much maligned Internal Security Act 74 of 1982 – see Currie & de Waal *Bill of Rights Handbook* (2006) at 708 note 20; *Bernstein v Bester NO* 1996 (2) SA 751 (CC)

⁵⁸⁹ See *Total Support Management (Pty) Ltd v Diversified Health Systems (SA) (Pty) Ltd* 2002 4 SA 661 (SCA) at 674C-H, where the court left open the question whether the words 'another independent and impartial tribunal or forum' in the context of the section 34 right applied to arbitration proceedings pursuant to an agreement (as opposed to statutory arbitrations). It was remarked that in a private arbitration the parties may, by agreement, exclude any form of public hearing, as the need for secrecy may underlie the decision to resort to arbitration. See Butler, D W 'Development and Practice of Arbitration and ADR in South Africa' (Paper prepared for presentation at the 2nd International Workshop on Arbitration & ADR in Africa, Johannesburg, 14 June 2006 – copy on file with the author) at 13 *et seq.*

⁵⁹⁰ For discussion of a contractual clause pertaining to the Dispute Resolution Chamber of the National Soccer League, see *Monei and Manning Rangers Football Club, National Soccer League Arbitration (DRC 075)* (2006) 27 *Industrial Law Journal* 242 (ARB).

⁵⁹¹ Rule 23.3 of the National Soccer League Rules (as amended 17 June 2008) provides as follows: '23.3.1 [T]he Dispute Resolution Chamber will, in cases of dispute, determine the status of any player registered with a club falling within its jurisdiction. 23.3.2 Any dispute regarding the status of a player involved in an international transfer will be settled by the FIFA Player's Status Committee.'

⁵⁹² The matter was postponed to 19 February 2009, with the PSL's chief prosecutor, Zola Majavu, refusing to disclose any information regarding the dispute prior to its resolution

⁵⁹³ As amended 17 June 2008

decisions connected with the competitions will be dealt with in terms of these rules, and where the rules are silent, by the decisions of the Executive Committee and the Board of Governors and thereafter the peremptory regulations of SAFA, CAF and FIFA will apply.'

Rule 38 of the National Soccer League Rules provides as follows regarding the powers of the Dispute Resolution Chamber:

38.1 The Dispute Resolution Chamber may impose any sanctions in respect of a matter determined by it which may include but is not limited to an order for the payment of damages or compensation, payment of a transfer fee, specific performance, a declaratory order or a cost award.

38.2 The Dispute Resolution Chamber may vary or rescind any award or ruling made by it provided this is done before the time allowed for an appeal to SAFA has expired.'

199 The Standard Rugby Players' Contract 2008 (which is, at the time of writing, in place between the professional players' association, SARPA, and the organisation of provincial union employers, SAREO) provides for the referral of any disputes between the parties to final and binding arbitration.⁵⁹⁴

200 In the context of labour law, the Commission for Conciliation, Mediation and Arbitration (CCMA) has on more than one occasion bowed to the 'supremacy' of players' contracts in respect of dispute resolution provisions, usually on the basis of the specialised nature of sport as an activity and the need for specialised knowledge on the

⁵⁹⁴ Clause 55 of the Standard Players' Contract (which is included as a schedule to the applicable collective bargaining agreement) provides as follows:

'Any dispute between you and the Province involving the interpretation, application or implementation of this Schedule, or any employment law, or any other dispute arising out of your employment by the Province including the termination of your employment shall, unless otherwise resolved between you and the Province, be referred to and determined by final and binding arbitration in terms of clauses 21 to 23 of the 2008 Collective Agreement signed between SAREO and SARPA.'

part of arbitrators.⁵⁹⁵ Arbitrators have also on occasion apparently applied 'sports-specific' principles to such disputes.⁵⁹⁶

201 South Africa does not possess a specialist sports dispute resolution body such as the UK Sports Dispute Resolution Panel.⁵⁹⁷ The former Sports Law Association of South Africa (or SLASA), which was disbanded at the beginning of 2008, had earlier championed a private initiative relating to sports dispute resolution. SLASA established a panel of sports law experts to serve as adjudicators of sports-related disputes, on an *ad hoc* basis, in order to bring impartiality as well as expertise and experience in relevant sports-related legal issues to such disputes. A number of governing bodies and federations in different sporting codes (including Cricket South Africa) elected to incorporate provisions relating to the referral of disputes to the SLASA ADR panel. At the time of writing it appears that this panel has disbanded following the disbandment of SLASA. It is submitted that a similar initiative should be considered, as the advisability of specific expertise in sports-related matters in ADR proceedings is generally acknowledged, also in other jurisdictions.

202 Finally, it should be noted that the South African Sports Confederation and Olympic Committee (or SASCO) ⁵⁹⁸ and the Minister of Sport have certain very significant powers in terms of intervention in sports disputes, in terms of the provisions of the National Sport and Recreation Act, 1998 (as amended by means of the National Sport and Recreation Act, 18 of 2007). The amendments to Section 13 of the Act provide as follows:

⁵⁹⁵ Compare *Augustine and Ajax Football Club* (2002) 23 ILJ 405 (CCMA); *Treswill Overmeyer and Jono Cosmos Football Club* WE 39134; *Vaisili Sofiadellis & Others and Amazulu Football Club* KN51728.

⁵⁹⁶ Compare the reference to 'sporting justice' in the *Monei and Manning Rangers* matter *supra*, which concept was unfortunately not explained further (although it was probably derived from the concept of 'sporting just cause' as contained in article 21(1)(a) of FIFA'S Regulations for the Status and Transfer of Players - the concept of 'sporting just cause' is also included in the regulations of the South African National Soccer League; see *McCarthy v Sundowns Football Club* [2003] 2 BLLR 193 (LC) at 195D of the judgment).

⁵⁹⁷ For more on the UK Sports Dispute Resolution Panel, see Gardiner et al *Sports Law* 3rd ed Cavendish Publishing (2006) at 245 *et seq.*

⁵⁹⁸ See the discussion on SASCO in the section above on state regulation of South African sport

- Every sport or recreation body must, in accordance with its internal procedures and remedies provided for in its constitution, resolve any dispute arising among its members or with its governing body;⁵⁹⁹
- Sport or recreation bodies are in terms of the amended s 13(1)(b) of the Act obliged to notify the Minister in writing of any dispute arising between its members or with its governing body, as soon as it becomes aware of such dispute;
- SASCOC (or 'the Sports Confederation', in terms of the wording of the Act) must notify the Minister in writing of any dispute referred to it by a sport or recreation body in terms of s 13(2)(a);
- The amended s 13(3) now provides that SASCOC ('the Sports Confederation') must in relation to any such dispute referred to it notify the relevant parties of the allegations, invite the parties to make representations to it, convene where necessary an inquiry into the dispute, and in accordance with the provisions of the Promotion of Administrative Justice Act (No. 3 of 2000) 'notify the parties of the decision';
- In respect of the insertion of ss (5) to (8) in s 13 of the Act, the Minister has now been clothed with quite far-reaching powers of intervention in disputes. These include the right to intervene 'in any dispute, alleged mismanagement, or any other related matter in sport or recreation that is likely to bring a sport or recreational activity into disrepute';
- The Minister is furthermore empowered to intervene in 'any non compliance with guidelines or policies issued in terms of s 13A⁶⁰⁰ or any measures taken to protect or advance persons or categories of persons, disadvantaged by

⁵⁹⁹ Section 13(1)(a)

⁶⁰⁰ S 13A as inserted in the Act provides that '[t]he Minister must issue guidelines or policies to promote equity, representivity and redress in sport or recreation'.

unfair discrimination as contemplated in section 9(2) of the Constitution',⁶⁰¹ by referring the matter for mediation or issuing a directive;

The amended s 13(5)(b) provides that the Minister may not 'interfere in matters relating to the selection of teams, administration of sport and appointment of, or termination of the service of, the executive members of the sport or recreation body';

If a national federation fails to adhere to the decision of a mediator or a directive issued by the Minister in terms of s 13(5), the Minister may direct Sport and Recreation SA to refrain from funding such federation and notify the federation in writing that it will not be recognised by Sport and Recreation SA (amended s 13(5)(c)); and

Finally, the amended s 13(8) provides that, subject to the Promotion of Administrative Justice Act, 2000 and 'without derogating from the rights of the affected parties, a decision taken in terms of subsection (5) shall be binding on the parties'.

It is clear that the amended s 13 of the Act now clothes the Minister (and to a significant extent, SASCOC) with very far-reaching powers in respect of intervention in dispute resolution within a sport or within sporting federations. The terms 'any dispute' and 'any other related matter' in the new s 13(5)(a) are of course very wide; on the wording the only type of matter which would be expressly excluded is a dispute relating to team selection, 'administration of sport' and appointment or termination of executive members of sports federations (which is excluded in the new s 13(5)(b)). The question of whether a dispute is likely to 'bring a sport ... into disrepute' could conceivably cover a very wide spectrum of matters, and is reminiscent of the use of this same concept in the disciplinary codes of many (international) sports governing bodies. The types of disputes

⁶⁰¹ The provisions in the fundamental right of equality (in section 9 of the Bill of Rights) which deal with positive measures to address past unfair discrimination (e.g. affirmative action measures) – see the discussion elsewhere in this chapter

that could fall under these wide provisions are legion – these could include employment disputes between federations or franchises and athletes and/or their trade unions and players' associations, disputes regarding commercial issues with sponsors or broadcasters, disciplinary conduct against athletes or officials, disputes between such sports federations and international governing bodies, etc.

203 It is interesting also to note SASCOC's proposed powers in terms of the amended s 13(3) and (7) of the Act, namely to convene an inquiry in respect of a dispute and to notify the parties of a decision (Note: according to the final form of the amended Act as passed into law this decision does no longer have to be one 'that best serves the interests of the sports or recreation body in question', as per the original wording of the Amendment Bill in its initial form – in fact, it appears that such decision may be one that best serves the interests of SASCOC and/or the Minister, for that matter), and also the power to submit 'recommendations for the resolution of the problem' to the Minister. These powers, as also SASCOC's power in terms of the amended s 13(4) to *mero motu* 'cause an investigation', are not qualified in the Act, and one can only speculate as to what its ambit would be. For example, it is unclear on the wording whether SASCOC now has the power to make such recommendations or decisions in respect of a dispute involving a sports federation that is not a member of the organization. Mention was made above of the provisions regarding membership of SASCOC as contained in the organisation's founding documents and the National Sport and Recreation Amendment Act. A sports federation which is not recognized by SASCOC or which does not apply for membership of the organisation would not qualify for membership (and would apparently occupy a no-man's land of non-recognition, also by Sport and Recreation SA). It appears that the amended s 13 now empowers SASCOC to make recommendations to the Minister for the resolution of disputes within or involving even such a non-member sports body.

204 It could be argued that these amendments, as far as they empower the Minister of Sport and SASCOC to intervene in nominally private disputes within a sport or its governing body, infringe on the constitutional guarantee of access to the courts. Section 34 of the Constitution of the Republic of South Africa 1996 provides as follows:

'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'

It has been held that the forerunner to this right, as contained in section 22 of the interim Constitution,⁶⁰² had the purpose to

'emphasise and protect generally ... the separation of powers, particularly the separation of the judiciary from the other arms of the State ... It is a provision fundamental to the upholding of the rule of law, the constitutional state, the "*regstaatidee*", for it prevents legislatures, at whatever level, from turning themselves by acts of legerdemain, into 'courts'.⁶⁰³

It is contended that the amendments to section 13 of the Act now empower the Minister and/or SASCOC to remove private disputes from the domestic courts, as well as from any other relevant dispute resolution forum as may be prescribed by an International Sports Federation (e.g. the Court of Arbitration for Sport – compare, for example, Articles 60-61 of the FIFA Statutes). It is contended that the purport of these provisions is that the parties to such a dispute could be denied their constitutional right to refer such a dispute to a court or independent and impartial forum. While the new s 13(8) provides that the binding nature of directives issued by the Minister will, subject to the Promotion of Administrative Justice Act of 2000, not derogate from the parties' rights (e.g. the

⁶⁰² Act 200 of 1993.

⁶⁰³ *Bernstein and Others v Bester NO and Others* 1996 4 BCLR 449 (CC) par 105 (per Ackermann J).

constitutional right of access to the courts),⁶⁰⁴ it is submitted that the wording of the new s 13(5) might have precisely this effect. It is conceivable that any subsequent referral of a dispute to a court following a directive by the Minister could in the specific circumstances of a given case be viewed by the Minister as 'likely to bring the sport into disrepute'; in such a case the Minister would effectively be able to exclude such referral by means of a directive, within his or her (apparently largely unfettered) discretion. These provisions surely raise the spectre of an over-stepping of the bounds of Ministerial power in respect of private disputes.

205 It was argued at the time of parliamentary debate on the then proposed amendments to s 13 that they 'intrude upon the ordinary private law functions of the national federations, which are private and not public law bodies, and the provisions will be *ultra vires* as a result'.⁶⁰⁵ It was also argued that the amendments regarding SASCOC's power to make recommendations to the Minister do not provide for a procedure that is reasonable and procedurally fair, and are accordingly in contravention of the constitutional right to fair and administrative action as contained in section 33(1) of the Bill of Rights.⁶⁰⁶

II Disciplinary proceedings in sport

206 Mention has been made above to the role of the law of contract in the organisation of sport (and, specifically, of the constitution, rules and regulations of a

⁶⁰⁴ The SRSA's senior legal adviser was quoted as follows in the minutes of the portfolio committee deliberations of 7 October 2006 (available at <http://www.pmg.org.za>): 'The Minister would receive recommendations resulting from the dispute resolution process so that he or she could make a decision. This decision could either be the issue of a directive, or referring the matter to arbitration. SARU had said that there was no definition of a directive in the Bill. They had asked if such a directive would be binding. Once the Minister had made a decision it would become binding. However, parties could still appeal in court or approach the international sports mediation forum (CAS).'

⁶⁰⁵ From the Memorandum to the SA Rugby Union's submission to the portfolio committee in the session on 13 October 2006 (par. 2.8).

⁶⁰⁶ The SARU Memorandum par. 2.9.

sports association as a contract between the members and the voluntary association and between members *inter se*). Accordingly, a sports body may not take steps to discipline a non-member of the association (e.g. by means of an enquiry before a disciplinary tribunal), as such conduct would not be in line with the doctrine of privity of contract.⁶⁰⁷ The association is, however, not without remedy in such cases. In terms of the common law principle of freedom of contract, which is one of the cornerstones of South African contract law, the association can freely resolve not to deal with the individual in future. Furthermore, it has been held that a sports association may exercise its right to freedom of association⁶⁰⁸ as provided for in section 18 of the Bill of Rights, to resolve not to associate with an individual.⁶⁰⁹

207 A sports association may only discipline a member within the scope of its constitution, rules and regulations, and a failure to comply with the constitution, rules and regulations (or, more specifically, with any disciplinary code contained therein), is a fatal flaw in disciplinary proceedings and would invalidate any decision taken by a disciplinary tribunal.⁶¹⁰

208 Disciplinary proceedings are subject to two principles of the rules of natural justice that are recognised by South African law, namely that the parties to proceedings be given adequate notice and the opportunity to be heard (*audi alteram partem*), and that the adjudicator must be disinterested and unbiased (*nemo iudex in sua causa*).⁶¹¹ Accordingly, it has been held that a disciplinary tribunal must observe certain standards in the exercise of disciplinary powers:

- To act in accordance with its rules and constitution;
- To discharge its duties honestly and impartially;

⁶⁰⁷ *Jockey Club of South Africa v Symons* 1956 (4) SA 496 (A)

⁶⁰⁸ For more on this fundamental right, see the discussion in the section on Sport and Employment below

⁶⁰⁹ *Cronje v United Cricket Board of South Africa* 2001 (4) SA 1361 (T) – discussed below

⁶¹⁰ *Jockey Club of South Africa v Forbes* 1993 (1) SA 649 (A); *Constantinides v Jockey Club of South Africa* 1954 (3) SA 35 (C); Cloete et al *Introduction to Sports Law in South Africa* (2005) *supra* at 97

⁶¹¹ See Cloete et al *supra* 98

- To afford all persons charged a proper hearing and the opportunity to adduce evidence and to contradict or correct adverse statements or allegations;
- To listen fairly to both sides and observe the principles of fair play and natural justice;
- To make fair and honest findings based on the facts; and
- To conduct an active investigation into the truth of any allegations made against the person charged.⁶¹²

The rules of natural justice have been subsumed in section 33 of the Bill of Rights, which deals with the right to procedural fairness in the event of administrative action. Section 33 provides as follows:

'S 33 (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

(3) National legislation must be enacted to give effect to these rights, and must –

(a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;

(b) ...

(c) ...'

The legislation which has been enacted in furtherance of the provisions of section 33 (3) (a) is the Promotion of Administrative Justice Act, 2000 (or 'PAJA').⁶¹³ Detailed discussion of the complicated interaction between the application of PAJA and of the section 33-right

⁶¹² Cloete et al *supra* 98; *Turner v Jockey Club of South Africa* 1974 (3) SA 633 (A); *Jockey Club of SA v Forbes* *supra*

⁶¹³ Act 3 of 2000

is beyond the scope of this chapter, and the reader is referred to more specialised texts in this regard.⁶¹⁴ Suffice it to say that, following the enactment of PAJA, there are now three 'regimes' in place in respect of the judicial review of administrative action. Common law review of administrative action is still applicable to the conduct of private entities when not exercising statutory or public powers, in circumstances where such entities are required to observe principles of administrative law (e.g. where private associations such as sports bodies exercise disciplinary powers over their members).⁶¹⁵ Everything else is 'administrative action', and subject (in most instances) to PAJA or, in certain limited instances, to section 33 of the Bill of Rights.⁶¹⁶ It is expected, however, that increasing congruence between these systems is to be expected in light of the provisions of section 39(2) of the Bill of Rights.⁶¹⁷

209 It has been observed that, while courts have held that the constitution or disciplinary code of a sports organisation may exempt a tribunal from the application of the principles of natural justice,⁶¹⁸ such a provision would now most likely fail to pass muster in terms of the constitutional entrenchment of the right to administrative justice in section 33.⁶¹⁹ It is also accepted that the fundamental right of access to the courts as contained in section 34 of the Bill of Rights⁶²⁰ contains a guarantee of impartiality and independence on the part of courts, tribunals and forums, as well as a 'due process' guarantee, requiring the legal disputes to which it applies to be decided in a fair and public hearing.⁶²¹

210 The denial of fair procedure through violation of the principles of natural justice constitutes a fatal irregularity, which will lead to a court on review overturning the

⁶¹⁴ E.g. Currie, I & de Waal, J *The Bill of Rights Handbook* 5th ed Juta & Co Ltd (2005) chapter 29

⁶¹⁵ See *Ismail v New National Party in the Western Cape* [2001] JOL 8206 (C)

⁶¹⁶ Currie & de Waal *The Bill of Rights Handbook* (2005) *supra* at 645-6

⁶¹⁷ Which section requires the courts to develop the common law in light of constitutional values; see Currie & de Waal *supra*

⁶¹⁸ *Jockey Club of South Africa v Transvaal Racing Club* 1959 (1) SA 441 (A)

⁶¹⁹ Cloete et al *supra* at 99

⁶²⁰ Section 34 provides as follows:

'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'

⁶²¹ See Currie & de Waal *The Bill of Rights Handbook* (2005) *supra* at 704

decision (even if the same decision would have been arrived at if the tribunal had followed a fair procedure).⁶²² Application of the principles of natural justice demands that certain specific requirements in respect of the disciplinary process should be observed. These include that the party (e.g. member of a sports association) must be properly informed of the case against them, that the party must be provided an opportunity to be heard, that the party must be allowed representation of some sort,⁶²³ and that the hearing must be conducted impartially.⁶²⁴

211 The relevant provisions of the 2008 Standard Players' Contract currently in force in rugby union (in terms of the collective bargaining agreement between SARPA and SAREO in respect of provincial professional rugby players), which are contained in Schedule VI to the collective agreement, provides as follows in respect of disciplinary proceedings:

'A disciplinary hearing should comply with the following principles -

- i. The Chairperson of the hearing must be unbiased. If practicable, the Chairperson should be a person who was not directly involved in the incident. However, there is no duty upon the Province to use an outside Chairperson.
- ii. A Player must be notified in writing of the alleged offence, and the date, time and venue of the hearing. Written notification must be given to the Player at least three working days before the date of the hearing. Should the Player require additional time, he must request a postponement in good time, setting out why the time is insufficient and how much time he needs. The request must be directed to the CEO of the Province.
- iii. At the hearing a Player may be represented by an official of SARPA or a fellow Player, the Player's registered agent or manager, or a fellow player. For the purposes of this clause, a fellow Player means a Player who is employed by the same Province.
- iv. Should the hearing be conducted in a language with which the Player is not fully conversant, the Player shall be entitled to an interpreter.
- v. The Player shall be entitled to call witnesses of his own, and will be given an opportunity to cross-examine any witnesses that the Province calls.

⁶²² Cloete et al *supra* at 99

⁶²³ The question of whether a right to representation includes a right to legal representation depends on the facts of the case. Where the constitution or rules of an association make provision for such representation it can be claimed. Otherwise, tribunals have a discretion whether to allow the party legal representation, and the facts to be considered in exercising such discretion include the seriousness of the case or potential penalty, whether points of law are likely to arise, procedural difficulties and the need for fairness. While the rules of natural justice therefore do not require that a party should be allowed legal representation, the denial of legal representation in especially complex cases may lead to the conclusion that a party has not been afforded an opportunity to be heard – see Cloete et al *supra* at 100-101

⁶²⁴ See the discussion in Cloete et al *supra* at 99-102

After the hearing the Province must communicate the Chairperson's decision to the Player in writing.'

212 It should also be noted, of course, that the rules of participation in specific tournaments may include specific rules regarding disciplinary proceedings, sanctions for disciplinary offences, appeals processes and the like. As an example (from rugby union), the disciplinary rules of the SANZAR organisation in respect of the South African, Australian and New Zealand franchises and players participating in the Super 14 tournament and the Tri-Nations tournament are based on (and incorporate the provisions of) the International Rugby Board's Regulation 17 (which was adopted by SANZAR). Each of the three SANZAR Unions is responsible for appointing a Disciplinary Committee for each Super 14 match played in their country. A Disciplinary Committee consists of three members and is chaired by a senior legal practitioner experienced in rugby disciplinary hearings. The make-up of the Disciplinary Committee is determined in advance of matches, and decisions of the Disciplinary Committee are made in private and based on simple majority (members cannot abstain). A hearing is to be convened before a Disciplinary Committee if a player is red-carded by the match referee, cited by the Citing Commissioner or receives three yellow cards in the Super 14 competition. Players are entitled to attend hearings (which are generally held in the country where the match was played, although consideration may be given to have the hearing in another country taking into account e.g. procedural fairness, player travel schedules, etc). Players are entitled to legal representation and are provided with sufficient opportunity to consider the available evidence prior to the hearing. SANZAR is bound by IRB's Regulation 17 which sets out a schedule of penalties. Players have the right of appeal to an independent SANZAR Appeal Committee. The Appeal Committee for the Super 14 competition comprises one appointee from each of Australia, New Zealand, and South Africa. Except in cases where the Appeal Committee decides exceptional circumstances exist to warrant conducting a fresh hearing, the player has the

burden of proving the decision being challenged should be overturned or varied. The Appeal Committee has the power to dismiss, quash, or vary the Disciplinary Committee's decision and/or penalty. It also has the power to take what steps it deems necessary to deal justly with the appeal.⁶²⁵

In other tournaments (and codes) special attention should be paid to any relevant and applicable disciplinary rules and procedures. For example, the National Soccer League's Rules⁶²⁶ contain specific provisions regarding protests⁶²⁷ and complaints⁶²⁸ and disciplinary proceedings.⁶²⁹

III The Court of Arbitration for Sport (CAS): An eligibility dispute - *Pistorius v IAAF* (the 'Blade-runner case')

213 Sports disputes can, of course, where applicable, be referred to the international Court of Arbitration for Sport (or CAS) in Lausanne. This chapter will not include discussion of CAS as a dispute resolution body in world sport, and the reader is referred to more specialised texts on the subject.⁶³⁰ The discussion that follows will focus on a recent high profile matter involving a South African professional athlete.

South African disabled athlete Oscar Pistorius was recently involved in a dispute with the International Association of Athletics Federations (or 'IAAF') which culminated in an arbitral award by a panel of the Court of Arbitration for Sport (CAS)⁶³¹ in which the President of the panel, Prof. Martin Hunter, described the history of the dispute as 'remarkable' and 'possibly without precedent'. Elsewhere it has been observed that this dispute 'confronts the sports lawyer with issues of discrimination, equality of opportunity

⁶²⁵ Based on information published by the South African Rugby Union in respect of the 2006 Super 14 tournament.

⁶²⁶ As amended 17 June 2008

⁶²⁷ Rule 47

⁶²⁸ Rule 48

⁶²⁹ Chapter 5 of the NSL Rules (which deals with dismissals, cautions and misconduct on the field of play)

⁶³⁰ See Blackshaw, I *Mediating Sports Disputes: National and International Perspectives* TMC Asser Press 2002; Blackshaw, I; Siekmann, RCR; Soek, J (eds.) *The Court of Arbitration for Sport, 1984-2004* Asser International Sports Law Centre 2006; Gardiner et al *Sports Law* 3rd ed (2006) supra at 232 *et seq*; Cloete et al *Introduction to Sports Law in South Africa* (2005) chapter 12

⁶³¹ CAS 2008/A/1480 *Pistorius v/IAAF* (award delivered 16 May 2008)

on the one hand, and competitive advantage as well as endangering the safety of other competitors on the other hand.⁶³²

A The facts

214 The facts of the matter were as follows:⁶³³

Pistorius is a South African athlete who was born without fibula bones in his legs, and at the age of 11 months his legs had been amputated below the knees. While he had used prosthetic lower limbs all his life, Pistorius has led an active sporting life. He started running competitively in January 2004 when, after seriously injuring his knee on the rugby field, he took up sprinting as part of a rehabilitation programme. Pistorius uses a prosthesis known as the 'Cheetah Flex-Foot' for participation in sporting activities. This device is designed for single and double transtibial (below-the-knee) and transfemoral (above-the-knee) amputees who intend to run at recreational and/or competitive levels. As a result of Pistorius's use of this device he has been dubbed the 'Bladerunner' by the media.

In 2004, Pistorius competed in the Athens Paralympics, where he won the Gold Medal in the 200-metre event and the Bronze Medal in the 100-metre event. At the time of the arbitration proceedings before the CAS in May 2008 he was the paralympic world record-holder in the 100, 200 and 400 metres disciplines. In 2004 Pistorius also started to compete in IAAF-sanctioned events in South Africa alongside able-bodied athletes, and he managed to win a 100-metre open competition and, in 2005, finished sixth in a 400-metre event. In March 2007 he finished in 2nd place in the South African Championships 400-metre event.

On 26 March 2007 the IAAF Council met in Mombassa, Kenya and introduced an amendment to IAAF Rule 144.2 in order to regulate the use of technical devices in

⁶³² *Sport and the Law Journal* Issue 2 Vol. 16 (March 2009) 'Sports Law Foreign Update' at 28

⁶³³ Taken from the report of the CAS arbitral award

sanctioned competitions. The new rule prohibits the use of any 'technical device that incorporates springs, wheels or any other element that provides the user with an advantage over another athlete not using such device'.

Following the withdrawal of an invitation to Pistorius to run in the 2007 Norwich Union Glasgow Grand Prix as a result of IAAF intervention, the IAAF president declared that Pistorius was eligible to compete against other athletes but would be excluded if the IAAF received scientific evidence demonstrating that his prosthetic gave him an advantage. Pistorius ran in a specially-staged 'B' race in Rome on 13 July 2007. The IAAF had arranged for this race (in which Pistorius finished 2nd) to be video-taped by an Italian sports laboratory, and the initial scientific analysis of the videotapes indicated that neither Pistorius's stride-length nor the length of time that his prosthesis was in contact with the ground was significantly different from those of the other runners. During November 2007, Prof. Peter Bruggemann of the Institute for Biomechanics and Orthopaedics at the German Sport University in Cologne conducted a biomechanical study of Pistorius at the request of the IAAF. The testing protocol used was designed to evaluate Pistorius's sprint movement using an inverse dynamic approach and to study the athlete's oxygen intake and blood lactate metabolism over a 400-metre race simulation. The report of these tests was issued on 15 December 2007 by Prof Bruggemann (along with colleagues Messrs Arampatzis and Emrich), and concluded as follows:

'The joint kinetics of the ankle joints of the sound legs [of control athletes of similar sprinting ability to Pistorius who had participated with the athlete in a number of test sprints on an outdoor track and in the laboratory] and the "artificial ankle joint" of the prosthesis were found to be significantly different. Energy return was clearly higher in the prostheses than in the human ankle joints ... In total the double transtibial amputee received significant biomechanical advantages by the prosthesis in comparison to sprinting with natural human legs ... Finally it was shown that fast running with the dedicated

Cheetah prosthesis is a different kind of locomotion than sprinting with natural human legs. The “bouncing” locomotion is related to lower metabolic cost.⁶³⁴

215 Based on this report (the ‘Cologne Report’), the IAAF issued a Decision (IAAF Council Decision 2008/01) on 14 January 2008, which included the following findings regarding use of the Cheetah Flex-Foot prosthetics:

- (a) That running with the device requires a less-important vertical movement associated with a lesser mechanical effort to raise the body, and
- (b) That the energy loss resulting from the use of the device is significantly lower than that resulting from a human ankle joint at a maximal sprint speed.

Accordingly, the IAAF ruled that the Cheetah prosthesis was a technical device within the meaning of amended IAAF Rule 144.2(e), and Pistorius was declared ineligible to compete in IAAF-sanctioned events with immediate effect. Pistorius appealed the IAAF ruling to the CAS, and requested that the IAAF Decision be vacated and that he be allowed to participate in competitions held under the IAAF Rules using the Cheetah prosthetic limbs. The issues in terms of the appeal were categorised by the President of the panel under four general headings.⁶³⁵

- i) Did the IAAF Council exceed its jurisdiction in taking the IAAF Decision?
- ii) Was the process leading to the IAAF Decision procedurally unsound?
- iii) Was the IAAF Decision unlawfully discriminatory?

⁶³⁴ From the findings of the ‘Cologne Report’ as summarised in par. 50 of the CAS award

⁶³⁵ From par. 53 of the CAS report of the arbitral award

- iv) Was the IAAF Decision wrong in determining that Pistorius's use of the Cheetah Flex-Foot device contravenes Rule 144.2(e)?

The jurisdictional objection (issue (i)) was subsequently abandoned by Pistorius's counsel during the hearing of the matter, which took place during April 2008.

B The CAS Arbitration Panel's analysis of the issues

- 1 *Was the process leading to the IAAF Council Decision 2008/01 procedurally unsound?*

216 The Panel held that it was likely that the IAAF Council's adoption of the new Rule 144.2(e) in March 2007 was introduced specifically with Pistorius in mind, and found evidence led on behalf of the IAAF, to the effect that the Rule had been introduced in order to counter the use of spring technology in running shoes, to be unconvincing. The Panel found further that the process of scientific testing began to 'go off the rails' in respect of the biomechanical and metabolic tests carried out at the Cologne Institute.⁶³⁶ The Panel held that the IAAF's instructions to Prof. Bruggemann (in effect to only test the phase when Pistorius was running in a straight line after the acceleration phase, which was shown to be the part of the race in which the athlete usually ran at his fastest) created a distorted view of Pistorius's advantages and/or disadvantages by not considering the effect of the device on the athlete's performance during the entire race. This factor (along with Prof. Bruggemann's testimony at the hearing that he did not believe his mandate for the Cologne tests was to determine all of the advantages or disadvantages of the Cheetah prosthesis) was held to call into question the validity and relevance of the test results upon which the Cologne Report was based. The Panel held that other elements of the process which had been followed by the IAAF also gave rise to

⁶³⁶ In par. 60 of the report of the arbitral award

concern (e.g. the fact that Pistorius had been given less than a month to respond to the findings of the Cologne Report following his receipt of same, as well as the voting procedure and method of the subsequent announcement of the IAAF Council's decision to ban Pistorius from competition).⁶³⁷ The Panel held that the process created an impression of prejudgment of the issue of Pistorius's eligibility, and held that, all in all, the manner in which the IAAF handled the situation 'fell short of the high standards that the international sporting community is entitled to expect from a federation such as the IAAF'.⁶³⁸ However, the Panel conceded that these findings made no difference to the outcome of the appeal, which was a *de novo* process.

2 *Was the IAAF Council's Decision unlawfully discriminatory?*

217 Pistorius claimed that the IAAF Decision was in breach of the federation's obligation of non-discrimination, because it did not search for an appropriate accommodation as required by law. It was argued on behalf of the appellant that, in finding Pistorius ineligible in all IAAF-sanctioned events without attempting to seek an alternative solution, modification or adjustment that might permit him to participate in such events on an equal basis with able-bodied athletes, the IAAF had denied Pistorius his fundamental rights, including equal access to Olympic principles and values.⁶³⁹ This argument was based on the parties' agreement that the law applicable to substantive issues was the law of Monaco (as the law governing the IAAF Constitution pursuant to its Article 16), and a further argument that the UN Convention on the Rights of Persons with Disabilities⁶⁴⁰ applied. The Panel rejected this argument, finding that the principality of Monaco had not ratified the Convention and it had not been enacted in its law. The Panel held further that the Convention could not apply to the dispute, as its objective was (in the sporting context, and with reference to Article 30.5 of the Convention) to promote

⁶³⁷ Para 64-69 of the report of the arbitral award

⁶³⁸ Par 70 of the arbitral award

⁶³⁹ Par 72 of the report of the arbitral award

⁶⁴⁰ Adopted on 13 December 2006; in force from 3 May 2008

equal participation between disabled and able-bodied persons in mainstream sporting activities. The issue to be decided by the panel was whether Pistorius is competing on an equal basis with other athletes not using the Cheetah prosthetic device; if it were to be held that the athlete gained an advantage through the use of the device, the Convention could not assist his case.⁶⁴¹ The submission based on unlawful discrimination was accordingly rejected.

3 *Was the IAAF Council's Decision wrong in determining that Pistorius's use of the Cheetah Flex-Foot device contravenes IAAF Rule 144.2(e)(as amended)?*

218 The Panel considered the wording of the amended IAAF Rule 144.2(e) and observed that the provision is a 'masterpiece of ambiguity'. The critical question, which the Panel identified, related to the meaning of the words 'an advantage ... over another athlete'. The IAAF's counsel argued that the ordinary and natural meaning of these words must be followed, and that the prohibition must be read to include any device which provides an athlete with any advantage, however small, in any part of a competition. The Panel rejected this interpretation and held that there should be convincing scientific proof that a device such as the Cheetah prosthesis provides an athlete with an overall net advantage over other athletes; anything less 'would fly in the face of both legal principle and common sense'. If the use of such a device provides more disadvantages than advantages, then it cannot reasonably be said to provide an advantage over other athletes, because the athlete is actually at a disadvantage.⁶⁴² On the basis of this finding regarding the interpretation of the IAAF Rule, and the Panel's earlier finding regarding the limited nature of the testing undertaken at the Cologne Institute (as referred to above), the Panel held that the Cologne Report did not address the central question in the appeal.

⁶⁴¹ *Ibid.* par 77

⁶⁴² *Ibid.* par 83

219 After briefly examining the issue of proof and finding that the IAAF had the burden of proving on a balance of probability that the Cheetah device contravened Rule 144.2(e), the Panel proceeded to assess the evidence. Such evidence will not be canvassed here; suffice it to say that the Panel found that the IAAF had failed to meet its burden of proof, based on the following reasons:

- i) As the Panel had found, the testing protocol for the Cologne tests was not designed to provide a scientific opinion as to whether the Cheetah device provided Pistorius with an overall net advantage over other athletes not using such a device;
- ii) The Panel was not persuaded that there was sufficient evidence to find any metabolic advantage in favour of a double amputee using the Cheetah device;
- iii) The Panel held that the IAAF had not proven that the biomechanical effects of using the Cheetah device gave Pistorius an advantage over other athletes not using that device. In light of the available scientific evidence and the current state of scientific knowledge. The Panel observed that the finding that Pistorius uses less vertical force and runs in a flatter manner than able-bodied athletes may be a disadvantage rather than an advantage. Accordingly, and based on current scientific knowledge, the Panel held that it appeared to be 'impracticable to assess definitively whether the Cheetah Flex-Foot prosthesis acts as more than, or less than, the human ankle and lower leg, in terms of "spring-like" quality'.⁶⁴³

The Panel observed that it was re-enforced in its conclusion by the fact that the Cheetah device had been in use for a decade, and that no other runner using them had run times fast enough to compete effectively against able-bodied runners until Pistorius had done

⁶⁴³ Par 96 of the report of the arbitral award

so; accordingly, even if the device provided an advantage, such advantage may be quite limited.

220 Accordingly, the Panel upheld the appeal and ruled that the IAAF Council's Decision of 14 January 2008 be revoked with immediate effect and that Pistorius be eligible for participation in IAAF-sanctioned events by using the Cheetah device. The Panel did stress, however, that the scope of the application of its ruling was limited to the eligibility of Pistorius only, and only to his use of the specific prosthesis in issue in the appeal. Furthermore, it also held that the ruling has no application to the eligibility of any other amputee athletes or to any other model of prosthetic limb, and that it is the IAAF's responsibility to review the circumstances in any similar case on a case-by-case basis, impartially, in the context of up-to-date scientific knowledge at the time of such review.

221 While the ruling in Pistorius's appeal to the CAS is thus of limited relevance in respect of the use of prosthetic devices by amputee athletes in IAAF-sanctioned events, it is submitted that this appeal has at least been an historic one in respect of its importance for the rights of Pistorius as an individual disabled athlete as well as in terms of its implications regarding the nature of the required scientific evidence to establish whether the use of a device such as the Cheetah Flex-Foot is consonant with the rules of the IAAF and with the principle of fair competition.

Pistorius was unsuccessful in late round qualifying for the 2008 Beijing Olympics, but the athlete has been reported as expressing confidence that the CAS ruling has opened the way for him to participate in the 2012 London Olympics. It remains to be seen whether Pistorius will remain eligible for participation in IAAF-sanctioned events in future, in light of both the limited scope of application of the CAS ruling in this matter (as referred to) as well as possible future developments in respect of scientific knowledge regarding the issues which confronted the Panel in the appeal.

IV Judicial review of the decisions of sports bodies in terms of South African law

222 Once a domestic tribunal has rendered its decision it is *functus officio*, and it would thus be irregular for such tribunal to revisit the matter (even if the parties agree to resubmit the matter to the same tribunal).⁶⁴⁴ If the constitution, rules or regulations of the association allow for avenues of appeal against the decision of the tribunal, the procedural requirements re lodging of such an appeal must be followed, and a party may only approach a High Court to review the tribunal's decision once all internal appeal proceedings have been exhausted (unless it is clear that it would be futile to pursue the internal proceedings).⁶⁴⁵

223 The High Court, in terms of the common law as well as section 173 of the Constitution, has an inherent power of review of the decisions of domestic tribunals. Administrative action can thus be challenged on the basis of the common law grounds (e.g. failure to observe the principles of natural justice). A court can review the decision of a tribunal on two grounds, namely –

- where there has been a failure to comply with the association's rules or the rules applicable to the disciplinary tribunal; and
- where there has been a violation of the principles of natural justice.⁶⁴⁶

Review by the court is limited to a determination of whether a proper procedure has been followed and will not include consideration of the merits of the matter, unless there is a clear disparity between the tribunal's finding and the evidence that was before it (which

⁶⁴⁴ *Middelburg Rugbyklub v Suid-Oos Transvaalse Rugby-Unie* 1978 (1) SA 484 (T); Cloete *et al* 102-3

⁶⁴⁵ *Ibid.*

⁶⁴⁶ Cloete *et al* at 103; *Constantinides v Jockey Club of South Africa* 1954 (3) SA 35 (C)

may, in itself, point towards a gross procedural irregularity).⁶⁴⁷ A court will only in extraordinary circumstances substitute its decision for that of the tribunal (e.g. where it would be a waste of time to order the tribunal to reconsider the matter⁶⁴⁸, where further delay would cause unjustifiable prejudice⁶⁴⁹, where the court is in as good a position to make the decision itself⁶⁵⁰, and where the original tribunal (or decision-maker or functionary) has exhibited bias or incompetence to such a degree that it would be unfair to revert the matter to the tribunal⁶⁵¹).⁶⁵²

224 In the case of *Cronje v United Cricket Board of South Africa*,⁶⁵³ the High Court affirmed the supremacy of the constitution of a voluntary association on the basis of the private, contractual, basis and nature of this type of entity. This case is important in respect of the very nature of sports governing bodies in the evaluation of the traditional notion of a 'voluntary association', which notion has played a key role in determining the extent to which the conduct of such bodies is open to review by courts of law.

The *Cronje* case involved an application by the late Hansie Cronje, former national cricket captain, for an order reviewing and setting aside a resolution by the United Cricket Board of South Africa (the 'UCB', the national governing body for the game of cricket in South Africa)⁶⁵⁴. The resolution by the UCB was issued following the international scandal that arose from Cronje's proven involvement in large-scale and repeated offences involving corruption and 'match fixing', which conduct was held (by the International Cricket Council and the UCB) to constitute conduct 'wholly inimical with the whole ethos of cricket'.⁶⁵⁵ Following the public scandal, Cronje was replaced as captain of the national

⁶⁴⁷ *Ibid.*

⁶⁴⁸ *Hartman v Chairman, Board of Religious Objection* 1987 (1) SA 992 (O)

⁶⁴⁹ *SA Freight Consolidators v National Transport Commission* 1988 (3) SA 485 (W)

⁶⁵⁰ *Theron v Ring van Wellington van die NG Sendingkerk van Suid-Afrika* 1976 (2) SA 1 (A)

⁶⁵¹ *Oskil Properties v Chairman of the Rent Control Board* 1985 (2) SA 234 (SE)

⁶⁵² Cloete *et al* at 103

⁶⁵³ 2001 (4) SA 1361 (TPD)

⁶⁵⁴ The UCBSA is the national governing body for cricket in South Africa

⁶⁵⁵ Then President of the UCB, the late Mr. Percy Sonn, as quoted at 1368J of the judgment.

For further reading on the 2000 match fixing scandal in cricket, see Deon Gouws 'and nothing but the truth?' Zebra Press, Cape Town 2000; Andre Oosthuizen & Gavin Tinkler *The Banjo Players: Cricket's Match Fixing Scandal* Riverside Publications, Hout Bay 2001; Gardiner *et al Sports Law* 2nd Edition 2001 at 365 *et seq*; Sir Paul Condon *Report on Corruption in International Cricket* (Report of the ICC's Anti Corruption Unit, April 2001), available online as http://www.icc-cricket.com/corruption/condon_report.html; Judge Edwin L King *Final Report: Commission of Inquiry into Cricket Match Fixing and Related Matters* 2001, available online at <http://www.info.gov.za/otherdocs/2001/kingfinal.pdf>; Qayyum, Justice M.M. *Report of Judicial Commission*,

team and he subsequently withdrew from the team; when his contract with the UCB expired shortly thereafter, the UCB did not renew it. After Cronje decided to quit representative cricket and his association with the UCB, the Board passed a resolution banning him for life from all its activities and those of its affiliates.⁶⁵⁶ Cronje challenged this resolution, *inter alia* on the grounds that it constituted an infringement of his right to fair administrative action as contained in section 33 of the Constitution,⁶⁵⁷ and that he had been denied the right to a fair hearing as guaranteed in terms of the rules of natural justice.

225 The court, by way of Kirk-Cohen J, dismissed Cronje's application and held that the UCB's resolution had not amounted to disciplinary action. Also, the court emphasised the fact that the only powers the UCB had were those derived from its constitution, which was a contract between the Board and its members. At the time of issuing of the resolution, Cronje was not a member of the UCB, as there was no contract of membership or employment in place between the applicant and respondent. The court accordingly found that the UCB had been entitled to pass the resolution as a means of exercising its right of non-association against Cronje, as guaranteed in section 18 of the Constitution – in fact, the court held that the organisation had not only been entitled but also 'correct' in doing so.

On the issue of whether the rules of natural justice applied to this resolution, the Judge held that these rules come into play 'whenever a statute empowers a public official or body to do an act or give a decision prejudicially affecting an individual in his liberty or property or existing rights'.⁶⁵⁸ Kirk-Cohen J continued to state that this did not apply to the UCB, by remarking as follows:

Pakistan Cricket Board, Lahore 1998; Central Bureau of Investigation *Report on Cricket Match Fixing and Related Malpractices*, New Delhi 2000; Simon Rae *It's Not Cricket* Faber & Faber 2001 at 254 *et seq.*

⁶⁵⁶ The facts appear from the judgment (at 1365-1370). For a brief summary of the case, see Basson in Basson & Loubser *Sport and the Law in South Africa* Butterworths (Looseleaf – service issue 3) at Ch 4-12 to Ch 4-12(2); Ch 6-4 *et seq.*

⁶⁵⁷ Act 108 of 1996

⁶⁵⁸ With reference to the Appellate Division judgment in *South African Roads Board v Johannesburg City Council* 1991 (4) SA 1 (A), as quoted at 1375 C-D of the *Cronje* case.

'The [UCB] is not a public body. It is a voluntary association wholly unconnected to the State. It has its origin in contract and not in statute. Its powers are contractual and not statutory. Its functions are private and not public. It is privately and not publicly funded ... The conduct of private bodies ... is ordinarily governed by private law and not public law. It does not exercise public power and its conduct is accordingly not subject to the public law rules of natural justice ... The respondent is not vested with any statutory powers, nor is it subject to any statutory duties ...'⁶⁵⁹

The court in *Cronje* held that the United Cricket Board had recourse to the same right as guaranteed to natural persons in terms of section 18 of the Constitution, namely the right to associate and the right *not* to associate.⁶⁶⁰

226 The *Cronje* judgment has been the subject of criticism, especially as it relates to an association that is squarely involved in the commercial exploitation of aspects of the game of cricket.⁶⁶¹ It is unclear whether the courts will in future follow its apparently supreme devotion to the essentially private nature of sports associations, especially as it appears that the judgment ignores developments elsewhere in recognition of the changing face of sports governance; specifically the challenges posed by the continued commercialisation of sport and its governance,⁶⁶² as well as case law in respect of other sports governing bodies.⁶⁶³

⁶⁵⁹ At 1375D – 1376C of the judgment

⁶⁶⁰ See also Woolman, S ('Association'), in Currie, I & de Waal, J *The Bill of Rights Handbook* 5th ed. Juta & Co. Ltd, Cape Town (2005) (and at 442-3 specifically)

⁶⁶¹ Andrew Caiger 'Sports Contracts, Governance and the Image as Asset' Unpublished paper delivered at the Sports Law Conference held at the University of Cape Town, 6-7 February 2003 (copy on file with the author), at 10-11, in characterising the judgment as 'a case that causes or should cause concern', has expressed his reservations about the correctness of Kirk-Cohen J's reasoning in rather strongly worded terms: '[T]he court insisted on maintaining the public/private dichotomy which severely militates against a realistic approach in sports law and is tinged with a sense of unreality ... It is this type of thinking which will do nothing for the development of sports law. It is this attitude which is almost anti-diluvian, which refuses to acknowledge the public dimension of private acts.'

⁶⁶² See discussion of the trend 'towards a conflation of public and private law in respect of disciplinary proceedings as a form of administrative action affecting individuals' – Basson 'Disciplinary Proceedings in Sport', in Basson & Loubser *Sport and the Law in South Africa* Butterworths (looseleaf) at Ch 6-37 to Ch-45.

⁶⁶³ Compare the judgment of the Constitutional Court in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* (which involved the national governing body for rugby union, and where the court referred to the New Zealand case of *Finnegan v New Zealand Rugby Football Union Inc* [1985] 2 NZLR 175 (CA)) 2001 (1) SA 1 (CC); *Coetzee v Comitis and Others* 2001 (1) SA 1254 (compare the court's remarks at 1264 of the judgment on the nature of the National Soccer League, in determining the

227 It should be noted that in the subsequent decision of the Cape High Court in the *Tirfu Raiders* case⁶⁶⁴ the court (in the course of reviewing the powers of the South African Rugby Union, the national governing body for rugby) chose to follow a different route from the reasoning in *Cronje*, which held that the UCBSA's actions did not constitute the exercise of public power in the meaning of the Promotion of Administrative Justice Act. Cronje had relied on the provisions of this Act⁶⁶⁵ to aver that the UCB's actions did not constitute just administrative action, and that he was entitled to relief on that basis. Kirk-Cohen J held that, on the basis of his finding that the United Cricket Board constituted a private body, its conduct did not involve the exercise of public power and thus did not qualify as 'administrative action' in terms of the Act.⁶⁶⁶ In *Tirfu*, the court (by way of Yekiso J) examined the nature of the powers exercised by the SA Rugby Union, the fact that it had jurisdiction over the game of rugby throughout the Republic, the hierarchical authority exercised over provincial rugby unions in terms of its constitution, as well as the public interest in the game and its administration, which 'cannot be overemphasised'.⁶⁶⁷ The court held that SARU's conduct was sufficiently public in nature to warrant application of the Promotion of Administrative Justice Act.⁶⁶⁸

228 It is submitted that this approach is more in line with recent developments in Europe and elsewhere, regarding the justiciability of the conduct and decisions of sports

question of the applicant player's standing) and *Tirfu Raiders Rugby Club v SA Rugby Union & Others* (Unreported, Case No. 8363/2005).

⁶⁶⁴ *Ibid.* The *Tirfu* case involved an application by a rugby club to review a resolution by the President's Council of the SA Rugby Union (SARU) to change rules of fixtures of club championship games, instituting play-off games for clubs to qualify for promotion to the Supersport Club Championship tournament instead of the existing system of automatic progression for certain clubs based on log standings.

⁶⁶⁵ Act 3 of 2000

⁶⁶⁶ *Cronje* at 1382G and 1383A-B of the judgment. 'Administrative action' is defined in section 1 of the Act as follows:

'[A]ny decision taken, or any failure to take a decision, by-

(a) an organ of state, when-

(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation; or

(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision,

which adversely affects the rights of any person and which has a direct, external legal effect ...'

⁶⁶⁷ At paragraphs 27-30 of the judgment

⁶⁶⁸ Or 'PAJA' – see discussion above

governing bodies.⁶⁶⁹ At least, it is suggested that courts should examine the nature of such bodies and of the powers exercised on the facts and circumstances of each case, and not with blind adherence to the traditional notions⁶⁷⁰ of the private nature of voluntary associations engaged in the governance of sport. The view expounded in *Cronje's* case is not in line with earlier case law in South Africa regarding the public/private divide of the courts' powers of review, specifically the earlier judgment of the Appellate Division in *Jockey Club of South Africa v Forbes*.⁶⁷¹

229 The Promotion of Administrative Justice Act (or 'PAJA')⁶⁷² does not confine the definition of administrative action to decisions by organs of state or public bodies. Section 1(b) of the Act defines 'administrative action' as including 'any decision taken, or any failure to take a decision, by ... a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect ...' An 'empowering provision' is defined in the Act as including 'a law, a rule of common law, customary law, or an agreement, instrument or other document in terms of which an administrative action was purportedly taken'. This would clearly include the constitution, rules or regulations of a sports association.

Currie & de Waal⁶⁷³ observe that PAJA clearly envisages the public nature of the power exercised rather than the person or entity exercising it to be the determining factor regarding the applicability of the Act. The authors state that, in determining whether the

⁶⁶⁹ See the New Zealand and Australian cases referred to in *Beloff et al* at 228-230

⁶⁷⁰ What *Beloff et al* describe (as to the position in English law) as 'the tail of procedure wagging the dog of substance' (at 230).

⁶⁷¹ 1993 (1) SA 649 (A). The *Forbes* case involved a trainer who had been found guilty of contravening the Jockey Club's rules regarding the doping of horses, and had been fined. The trainer brought an application challenging the disciplinary decision under Rule 6 of the Uniform Rules of Court, requesting that the imposition of the fine be voided and that an order for repayment be made. The Jockey Club argued that such application had taken the wrong form, and that the application should have been made under Rule 53 for a review of the disciplinary proceedings. The Court (by way of Kriegler AJA), while acknowledging that the Jockey Club was a voluntary association and that the relationship between the parties was contractual, proceeded to accept ('albeit with some reservations') that the relief requested constituted relief 'tantamount to that afforded by a superior Court in the exercise of its so-called review jurisdiction'. The Judge continued:

'It can further be assumed, once again with reservations ... that Rule 53 extends to decisions of domestic tribunals and does not apply only to breaches by officials of duties imposed on them by public law.' [At 659 of the judgment]. While these remarks do not display unqualified support for the view that a body such as the Jockey Club exercises public functions, the judgment does display a willingness to accept that the (disciplinary) decisions of such a body are not purely private and relating only to contract, and may have consequences that are more akin to those of public bodies. See also *Beloff et al* 229-230

⁶⁷² Act 3 of 2000 – see the discussion above

⁶⁷³ Currie, I & de Waal, J *The Bill of Rights Handbook* 5th ed Juta & Co (2005) at 658

exercise of a particular power constitutes public power, the overriding consideration is that 'the power, whether exercised by a public or private body, must have "regulatory" or "compulsory" characteristics corresponding to the traditional relationship between the state and its subjects, between the government and the governed.'⁶⁷⁴

230 Other aspects related to acceptance of the traditional notion of the supremacy of contract in respect of voluntary associations, e.g. the freedom to determine or refuse membership,⁶⁷⁵ may need to be reviewed in light of such developments regarding the justiciability of the conduct of sports associations.⁶⁷⁶ Even though the trend is for sports governing bodies (e.g. national or provincial unions and federations) to establish a separate commercial arm, usually in the form of a commercial company, to deal with aspects of the governance and commercial exploitation of professional sport,⁶⁷⁷ it is trite that the regulatory conduct of the existing, 'amateur' governing bodies often have substantial impact on commercial aspects and the rights and interests of a variety of persons and stakeholders in sport. Judicial evaluation of the nature of the powers exercised by such latter bodies should duly acknowledge these grey areas.⁶⁷⁸

⁶⁷⁴ *Ibid.* 659

⁶⁷⁵ See the discussion above

⁶⁷⁶ For example, it could be argued that the traditional adherence to the absolute freedom of voluntary associations to refuse membership may need to be reviewed in light of the nature of organisation of the governance of modern sport. Where such governance is based on a monopoly of control (e.g. one supreme national governing body for the sport, exercising control over provincial or regional unions and clubs) it might be argued that the freedom of associations to limit access to membership should be curtailed, and at least be based on reviewable and just administrative action. This is especially relevant in the context of professional sport, where potential participants' rights of access relate also to constitutional guarantees regarding the freedom to pursue an occupation or engage in economic activity. Similar considerations apply in respect of disciplinary action by such associations and the imposition of sanctions on members. The potential role of the restraint of trade doctrine (and, especially, in its extended form – i.e. its application where there is no contract in force between the parties) is discussed in more detail elsewhere in this chapter.

⁶⁷⁷ See the discussion above

⁶⁷⁸ One of the significant elements that is part of this grey area is that of the technical 'rules of the game' and rules relating to the ethical principles of a sport. In this regard, see the discussion by Ken Foster 'Is There a Global Sports Law?' *Entertainment Law* Vol. 2 No. 1, Spring 2003, pp. 1-18. An example can be found in the CAS arbitral award in the matter of *Yang Tae Young and the FIG* (CAS 2004/A/704), where the arbitration panel examined the extent to which a court can intervene in respect of the decision of an official in sporting competition. The panel remarked that an absolute refusal to recognise such a decision as justiciable and to designate the field of play as 'a domain into which the King's writ does not seek to run' (in the words of Lord Atkin in the case of *Balfour v Balfour* 1919 2KB at 919) would have a defensible purpose and philosophy. However, the panel continued to state that sports law does not have a policy of complete abstention. It referred to the award in *Mendy and the AIBA* (CAS OG 96/06), where it was remarked as follows regarding the jurisdiction of a CAS ad hoc panel over a game rule:

'The Panel is competent. However, exercising this competence must, in our view, be tempered by the respect due to the particularities of each sport as defined by the rules established by the sports federations... The above-mentioned restraint must be limited to purely technical decisions or standards; it does not apply when such decisions are taken in violation of the law, social rules or general principles of law...' (*Mendy* at par. 12-13, as quoted in *Yang Tae Young* at par. 3.14).

Another example of 'rules of the game' issues, or issues which are generally considered to be 'sporting interest only' is that of athlete eligibility rules – in this regard, see developments in case law in the European Union in recent times.

These and other issues are often encountered in the decisions, rules and regulatory conduct of amateur voluntary associations in sport, and it is submitted that the law needs to sufficiently acknowledge the potential problems and the ways in which they are being addressed in other jurisdictions.

PART II SPORT AND EMPLOYMENT

(André Louw with Benita Witcher)

§1 Introduction

231 South African employment law finds its main sources, and the substance of its regulation of the rights and obligations of the different parties to the employment relationship, in the common law of contract, labour legislation and, more generally, the overarching guarantees contained in the Constitution⁶⁷⁹ and its Bill of Rights.⁶⁸⁰ The past approximately forty years have seen a major shift in the regulation of employment in South Africa in respect of the legislative and judicial processes of giving substance to the rights and duties of the parties and the demarcation of the employment relationship between them. Most central to such developments has been the shift from the primacy of the employment contract under the common law to that of equity or fairness under the applicable legislation and in terms of constitutional guarantees.

232 In line with developments elsewhere, and in parallel with more general developments in South African society and its new constitutional order in the movement towards democracy, freedom and respect for human rights, South African employment law saw the development of a more rights-based approach to the employment relationship in a bid to counter the traditionally strong employer-biased relationship occasioned by the nature of the common law contract of employment. While the common law contract often left employers largely to their own devices in denying employees the right to challenge unfair conduct in terms of the contract, the 'unfair labour practice' doctrine was introduced into labour legislation in 1979 and led to the development of

⁶⁷⁹ Act 108 of 1996

⁶⁸⁰ Contained in Chapter 2 of the Constitution of the Republic of South Africa, 1996

equity jurisprudence by the erstwhile industrial court.⁶⁸¹ Such developments were in line with wider societal developments in the negotiation and formulation of a democratic constitutional order, and today equity and respect for fundamental human rights infuse South African labour legislation as well as the jurisprudence of the Labour Court. Central to these developments also has been the recognition of the modern role and importance of collective bargaining to the employment relationship. Accordingly, today the main sources for the content of the employment relationship are the common law contract of employment, labour legislation, collective bargaining agreements and ministerial sectoral determinations, and the Constitution.

233 The most important statutes that deal specifically with and impact most directly on the employment relationship are the Labour Relations Act,⁶⁸² the Basic Conditions of Employment Act,⁶⁸³ the Employment Equity Act,⁶⁸⁴ the Unemployment Insurance Act,⁶⁸⁵ the Occupational Health and Safety Act,⁶⁸⁶ the Compensation for Occupational Injuries and Diseases Act⁶⁸⁷ and the Skills Development Act.⁶⁸⁸ The Bill of Rights in the South African Constitution contains a right to fair labour practices in section 23,⁶⁸⁹ which forms the foundational standard for the employment legislation and also infuses the jurisprudence of the dispute resolution forums established under the Labour Relations Act

⁶⁸¹ See Cloete (ed.) *Introduction to Sports Law in South Africa* LexisNexis Butterworths 2005 at 69; Du Toit, D; Bosch, D; Woolfrey, D et al *Labour Relations Law* 4th Ed. LexisNexis Butterworths 2003 at 459. As to shortcomings of the common law contract of employment, see John Grogan *Workplace Law* 8th edition Juta Law 2005 at 4-5.

⁶⁸² Act 66 of 1995

⁶⁸³ Act 75 of 1997

⁶⁸⁴ Act 55 of 1998 (see also the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, which sometimes applies to certain employment relationships such as the contracts of independent contractors, who are not covered under the EEA).

⁶⁸⁵ Act 63 of 2001

⁶⁸⁶ Act 85 of 1993

⁶⁸⁷ Act 130 of 1993

⁶⁸⁸ Act 97 of 1998

⁶⁸⁹ Sections 23 (1) – (3) provide as follows:

'(1) Everyone has the right to fair labour practices.

(2) Every worker has the right-

(a) to form and join a trade union;
(b) to participate in the activities and programmes of a trade union; and
(c) to strike.

(3) Every employer has the right-

(a) to form and join an employers' organisation; and
(b) to participate in the activities and programmes of an employers' organisation.

(4) Every trade union and every employers' organisation has the right-

(a) to determine its own administration, programmes and activities;
(b) to organise; and
(c) to form and join a federation.'

(or 'LRA'), namely the labour courts and the Commission for Conciliation, Mediation and Arbitration (or CCMA).⁶⁹⁰ The Labour Relations Act also contains a statutory definition of an 'unfair labour practice', which is wide and may constitute a very important source for relief against employers (also in the professional sports context).⁶⁹¹

The common law encompasses all non-statutory legal rules, including general principles of law deriving from Roman-Dutch and English law as well as new principles developed by the superior courts.⁶⁹²

234 In matters concerning employment disputes in sport (e.g. professional sports, athlete-management disputes), the options for dispute resolution are one or more of the following:

- The use of private dispute resolution methods (e.g. private arbitration);
- Application for conciliation (and/or arbitration) of the dispute through the CCMA;
- Application for adjudication of the dispute by the Labour Court; or

⁶⁹⁰ South African labour legislation and the Constitution encourage the promotion of voluntary and orderly collective bargaining between labour and management in the interests of reaching collective agreements, as well as democratisation of the workplace. However, the regulatory system acknowledges the inevitability of disputes between these parties, and the jurisdictional framework for such disputes as contained in the legislation generally distinguishes between 'disputes of right' and 'disputes of interest' between the parties to the employment relationship in determining which forum should be used for the purposes of dispute resolution. The Labour Relations Act generally requires that industrial action (e.g. strikes and lockouts) should only be taken in respect of disputes of interest (i.e. disputes that involve frustrated wants or perceived needs to which the grievants are not legally entitled – e.g. disputes as to pay increases). Where a legal right or entitlement forms the basis for a dispute (a dispute of right), the preferred avenue is arbitration or adjudication. See Grogan *Workplace Law op cit.* chapter 21; Du Toit *et al* 11-12.

The Commission for Conciliation, Mediation and Arbitration (CCMA) is an independent, state-funded body with jurisdiction throughout the Republic, with its main function being to resolve disputes that are not handled by private procedures or by bargaining councils by means of conciliation and arbitration – see, generally, Grogan *op cit.* 382 *et seq.* Generally, most disputes are referred to the CCMA for conciliation; if conciliation fails, the dispute is then referred for arbitration by the CCMA or adjudication by the Labour Court. Labour Court judgments can be taken on appeal to the Labour Appeal Court (or LAC). LAC judgments may be taken further on appeal to the Supreme Court of Appeal (the appellate division of the High Court), while the Constitutional Court may also hear appeals from the LAC on constitutional matters (if certain requirements are met).

⁶⁹¹ Section 186(2) of the LRA provides that an 'unfair labour practice' means (*inter alia*) any unfair act or omission that arises between an employer and employee involving unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for reasons relating to probation) or training of an employee or relating to the provision of benefits to an employee, or the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee.

This section is relevant to professional athletes (especially players in the professional team sports) who are not given sufficient match time on the field of play or are not chosen to play in certain matches etc, thus affecting their promotion prospects and the provision of benefits. The section is also relevant to players who may be able to challenge (through the CCMA) disciplinary sanctions short of dismissal, such as suspensions and warnings.

⁶⁹² See Jordaan 'Sport and the Law of Employment' in Basson & Loubser *Sport and the Law in South Africa* Butterworths 2000 (loose-leaf) at Ch 8-10

- Application for adjudication of the dispute by the High Court (the civil courts have concurrent jurisdiction with the Labour Court in respect of any matter concerning a contract of employment⁶⁹³ - although it should be noted that the extent of such concurrent jurisdiction has in recent years been a matter of contention⁶⁹⁴).

The Commission for Conciliation, Mediation and Arbitration is a statutory body established by the Labour Relations Act, with the primary function of resolving disputes arising within the context of the Act by means of conciliation and arbitration. Conciliation refers to any process (including mediation) which is aimed at achieving agreement between the disputing parties. The commissioner (who is appointed by the CCMA from a panel of full-time or part-time commissioners) has no power to impose a settlement on the parties or to make a binding award; his or her role is purely to lead the parties to an agreed settlement of the dispute, if possible. The commissioner may provide a non-binding 'advisory' award, which the parties may or may not accept. If the parties reach agreement during conciliation the dispute is at an end. Unresolved disputes may be

⁶⁹³ See the cases quoted for authority of this proposition by Le Roux in Cloete et al *Introduction to Sports Law in SA* at 70

⁶⁹⁴ In *Fedlife Assurance Ltd v Wolfaardt* (2001) 12 BLLR 1301 (SCA) the court held that an employee may sue for damages in the High Court provided the challenge is based on unlawfulness rather than the fairness of the termination (see also *Denel (Pty) Ltd v Vorster* (2005) 4 BLLR 313 (SCA); *Old Mutual Life Assurance Co SA Ltd v Gumbi* (2007) 8 BLLR 699 (SCA) and *Boxer Superstores Mthathwa & Another v Mbenya* (2007) 8 BLLR 693 (SCA); In *Buthlezi v Municipal Demarcation Board* (2004) 25 ILJ 2317 (LAC) it was suggested that if the relief sought by the claimant is not provided for by the LRA or other labour legislation (e.g. damages for the premature cancellation of a fixed term contract), then the claimant may approach the High Court and proceed in terms of the common law contract remedies (e.g. a claim for damages). In *Media 24 Ltd & Another v Grobler* (2005) 26 ILJ 1007 (SCA) the court (relying on *Fedlife*) found that the High Court retained its jurisdiction to consider delictual claims (claims in tort; in that case relating to sexual harassment) that arise in an employment context.

However, a number of recent Constitutional Court decisions may change this aspect regarding the jurisdiction of the High Court and the concurrency of the common law and the LRA in respect of disputes which are essentially employment disputes. *SANDU v Minister of Defence & Others* (2007) 9 BLLR 785 (CC) held that in instances where parliament has enacted legislation regulating a particular aspect, it is not appropriate to bypass that legislation. In *Sidumo and another v Rustenburg Platinum Mines Ltd and Others* (2007) 12 BLLR 1097 (CC) the court held that the LRA regulates a specific relationship, namely the employer-employee relationship, and that the LRA supersedes any other law that may be in conflict with its provisions. In the United Kingdom, the House of Lords has refrained from extending common law remedies in instances where labour legislation established remedies for a relevant labour dispute. In *Chirwa v Transnet Ltd and Others* (2008) 2 BLLR 97 (CC) the court held that if a dispute is an employment dispute contemplated by the LRA/labour legislation and/or initiated under the LRA, then the Labour Court and other relevant labour dispute resolution forums (e.g. the CCMA & bargaining councils) have exclusive jurisdiction, not the High Court (accordingly, the parties cannot 'forum shop'); the dispute may only be referred to the High Court if the party relied directly on the Bill of Rights – the High Court should not usurp the remedial functions of the institutions established under the LRA. But in terms of earlier case law (which *Chirwa* did not seem to overrule), if the CCMA has jurisdiction over the dispute the party may refer the matter to the High Court because the CCMA/a bargaining council is not a High Court and thus one cannot oust the jurisdiction of a High Court.

referred either to arbitration or to the Labour Court (if such disputes are 'rights disputes') or may be the subject of industrial action such as a strike or lock-out⁶⁹⁵ (if such dispute is an 'interest dispute').⁶⁹⁶

It should be noted that (in respect of unfair dismissal disputes) in terms of section 191(4) of the Labour Relations Act, an unfair dismissal dispute which is referred to the CCMA or a bargaining council for conciliation must be referred within 30 days of the date of dismissal. In a CCMA arbitration a commissioner resolves a dispute by making a final and binding award, which is not open to appeal but may be subject to a limited right of review.⁶⁹⁷

235 The Labour Relations Act also encourages parties to resolve disputes, by agreement, through private dispute resolution structures. In the event of a matter referred to the CCMA where a private dispute resolution forum has been agreed to, section 147(6) of the Act confers a discretion on a CCMA commissioner to proceed with the matter or to refer it for resolution through the private structure. On this basis, the CCMA preferred the private dispute resolution route in the matter of *Augustine and Ajax Football Club*⁶⁹⁸ (a dispute between a professional footballer and his club based on unfair dismissal), where it was held that one of the reasons for preferring this method of resolution was the possibility of utilizing the services of an arbitrator with specialist skills and knowledge in the field.⁶⁹⁹

236 In light of the array of sources of rights and obligations in the employment context, the hierarchy in respect of determining what law applies in employment-related disputes has been explained as follows:

⁶⁹⁵ See the discussion regarding collective bargaining in sport in par 374 *et seq* below

⁶⁹⁶ A rights dispute is any dispute which the Labour Relations Act requires to be referred for resolution to arbitration or the Labour Court (e.g. a dispute regarding interpretation of the Act, a dispute regarding an alleged unfair dismissal, and a dispute regarding an unfair labour practice). All other disputes are deemed to be interest disputes, which are, typically, economic disputes (e.g. on an increase in wages or a demand for changes to existing terms and conditions of employment) – see Jordaan in Basson & Loubser *Sport and the Law in South Africa* supra at Ch 8-12 n2, and the section on collective bargaining in the text below

⁶⁹⁷ Section 145 of the Labour Relations Act; Jordaan in Basson & Loubser *Sport and the Law in South Africa* supra at Ch 8-11 to Ch 8-12

⁶⁹⁸ (2002) 23 Industrial Law Journal 405 (CCMA)

⁶⁹⁹ See Le Roux, L 'Labour law in South African sport: A season of expectations?' in 2006/1-2 *International Sports Law Journal* 56 at 57

The starting point is the individual contract of service. If the contract contains terms or conditions that are more favourable to the employee than a sectoral determination under the Basic Conditions of Employment Act, if any, or the provisions of the Act itself, they must be applied. If, however, the employee is a member of a union that is party to a binding collective agreement, that agreement takes precedence over the individual contract as far as it regulates any term or condition not dealt with in the contract. Where there is no collective agreement, a sectoral determination promulgated by the Minister [of Labour] under the Basic Conditions of Employment Act takes precedence over individual agreements, to the extent that they contain provisions less favourable to the employee. Beyond that, the rights conferred by the Basic Conditions of Employment Act and the Labour Relations Act come into play. One must note that certain rights conferred by these Acts cannot be waived by individual or collective agreement. If neither the individual contract, collective agreement, a sectoral determination, nor the statute regulates the issue, one turns to custom and practice in the industry or trade concerned and the common law, interpreted ... in the light of the Constitution, to the extent that it permits one to read implied terms and conditions into the contract.⁷⁰⁰

§2 The common law contract of employment

237 The rules of the common law employment contract are especially important in respect of the employment of players in professional team sports, specifically as a result of the prevalence of fixed-term (standard form) players' contracts. The discussion in the rest of this section will (in parts) focus specifically on the labour law provisions regarding the termination of fixed-term contracts (and unfair dismissal of the employee in this context), as well as the common law remedies for breach of the employment contract.

⁷⁰⁰ Grogan, J (*Workplace Law* 4th Ed. Juta & Co. 1999) as quoted by Jordaan in Basson & Loubser *Sport and the Law in South Africa* supra at Ch 8-11

238 The South African law of contract encompasses both the Roman-Dutch and English law concepts of the requirements for and consequences of a legally enforceable contract. For example, while it is generally accepted that the enforceability of a contract is based on the subjective consensual theory (which requires a meeting of the minds of the parties, or *consensus ad idem* on the material terms of such contract, the parties thereto and the intention to create legally enforceable obligations, or *animus contrahendi*), this premise is tempered by application of the reliance theory (or doctrine of quasi-mutual assent) which had its roots in English law and was so famously explained by Blackburn J in the English judgment of *Smith v Hughes*.^{701 702} Similarly, a number of principles of the English law of contract find application also in South Africa (for example the doctrine of privity of contract, application of the parol evidence rule in the interpretation of written contracts, and use of the test of the 'officious bystander' in reading a tacit term into a contract⁷⁰³), while others have been expressly denounced by South African courts as not in line with Roman-Dutch law (e.g. the doctrine of valuable consideration as requirement for a valid and enforceable contract⁷⁰⁴).

239 In recent years, the South African common law of contract (along with other branches of the common law) has been increasingly exposed to a 'constitutional colonization'⁷⁰⁵ in light of the influence of the Constitution and, specifically, its Bill of Rights.⁷⁰⁶ Probably the single most important issue currently facing the courts is the role of the specific fundamental rights as well as the foundational values which underpin the Constitution (most notably freedom, equality, dignity, non-racialism and non-sexism) on

⁷⁰¹ (1871) LR 6 QB 597, where Blackburn J stated the following:

'If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.'

The reliance theory is accepted in South African law as a basis for the validity of a contract in circumstances where there may be no real consensus between the parties to a contract as a result of a mistake by one of the parties – see *National and Overseas Distributors v Potato Board* 1958 (2) SA 473 (A); *George v Fairmead* 1958 (2) SA 465 (A); *Du Toit v Atkinson's Motors* 1985 (2) SA 893 (A); *Steyn v LSA Motors Ltd* 1994 (1) SA 49 (A); *Fourie NO v Hanson and Another* 2001 (2) SA 823 (W).

⁷⁰² See, generally, the discussion in Christie, R H *The Law of Contract in South Africa* 5th Ed. LexisNexis Butterworths, Durban 2006 22 *et seq.*

⁷⁰³ *Reigate v Union Manufacturing Co* (1918) 1 KB 592 (CA)

⁷⁰⁴ See the judgment of the then Appellate Division in *Conradie v Rossouw* 1919 AD 279

⁷⁰⁵ Bhana, D & Pieterse, M 'Towards a reconciliation of contract law and constitutional values: *Brisley and Afrox* revisited' (2005) 122 *South African Law Journal* 865 at 893

⁷⁰⁶ Contained in Chapter 2 of the Constitution of the Republic of South Africa, 1996

the development of the common law of contract. More specifically, the courts have in recent years been required on a number of occasions to interrogate the bases for challenging the validity and/or unenforceability of contracts or contractual terms in this regard.

240 Recent judgments by the Supreme Court of Appeal and the Constitutional Court have been criticized for their unwillingness to directly apply the Bill of Rights as contained in the Constitution to contractual disputes and/or the common law of contract.⁷⁰⁷ What has emerged in terms of the case law is that the courts appear to have preferred the more open-ended mechanism of the grounds for common law illegality of contracts which are deemed to be against public policy (as well as the role of the principle of *bona fides* or good faith in contracting⁷⁰⁸) for challenging contracts or contract terms that are tainted by issues such as inequality of bargaining power or the pernicious effects of the wide-spread use of standard-form contracts and imposed contractual terms.⁷⁰⁹ In *Brisley v Drotzky*⁷¹⁰ the Supreme Court of Appeal (by way of Cameron AJ) observed the following in respect of the proper content of public policy in this regard:

'Public policy ... nullifies agreements offensive in themselves – a doctrine of considerable antiquity. In its modern guise, 'public policy' is now rooted in our Constitution and the fundamental values it enshrines. These include human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism. It is not difficult to envisage situations in which contracts that offend these fundamentals of our new social compact will be struck down as offensive to public policy. They will be struck down because the Constitution requires it, and the values it enshrines will guide the courts

⁷⁰⁷ See Bhana, D & Pieterse, M 'Towards a reconciliation of contract law and constitutional values: *Brisley* and *Afrox* revisited' (2005) 122 *South African Law Journal* 865; Bhana, D 'The law of contract and the Constitution: *Napiër v Barkhuizen* (SCA)' (2007) 124 *South African Law Journal* 269; Woolman, S 'Category mistakes and the waiver of constitutional rights: A response to Deeksha Bhana on *Barkhuizen*' (2008) 125 *South African Law Journal* 10; Lubbe, G 'Taking fundamental rights seriously: The Bill of Rights and its implications for the development of contract law' (2004) 121 *South African Law Journal* 395; Woolman, S 'The amazing, vanishing Bill of Rights' (2007) 124 *South African Law Journal* 762

⁷⁰⁸ See *First National Bank of South Africa v Saayman* 1997 4 SA 302 (A); compare, however, *Brisley v Drotzky* 2002 4 SA 1 (Supreme Court of Appeal) and *South African Forestry Co Ltd v York Timbers Ltd* 2005 3 SA 323 (SCA)

⁷⁰⁹ For development of the doctrine regarding contracts against public policy, see *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A); *Botha (now Griessel) v Finanscredit (Pty) Ltd* 1989 (3) SA 773 (A)

⁷¹⁰ 2002 (4) SA 1 (Supreme Court of Appeal)

in doing so ... What is evident is that neither the Constitution nor the value system it embodies give the courts a general jurisdiction to invalidate contracts on the basis of judicially perceived notions of unjustness or to determine their enforceability on the basis of imprecise notions of good faith ... On the contrary, the Constitution's values of dignity and equality and freedom require that the courts approach their task of striking down contracts or declining to enforce them with perceptive restraint. One of the reasons ... is that contractual autonomy is part of freedom. Shorn of its obscene excesses, contractual autonomy informs also the constitutional value of dignity.⁷¹¹

Such application of the testing of contracts against public policy, as informed by the foundational values underlying the Bill of Rights and its more specific substantive rights, appears to reflect a leaning by the courts towards indirect application of the Bill of Rights as opposed to its direct application. While the Bill of Rights makes provision for the direct (or horizontal) application of rights to private individuals, specifically in terms of section 8(2),⁷¹² and the Constitutional Court appears to have sanctioned such direct application to rules of the common law,⁷¹³ recent judgments⁷¹⁴ appear to have shied away from such direct application in favour of indirect application of the values underlying the Bill of Rights (through the means of the common law doctrine of testing the validity of contracts against public policy) in terms of section 39(2) of the Constitution.⁷¹⁵

⁷¹¹ At par 91-94 of the judgment. See also *Afrox Healthcare Ltd v Strydom* 2002 6 SA 21 (SCA); *Napier v Barkhuizen* 2006 (4) SA 1 (SCA) and *Barkhuizen v Napier* 2007 (5) SA 323 (CC)

⁷¹² Section 8 of the Bill of Rights provides as follows:

'8(1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.

8(2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

8(3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court –

- (c) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and
- (d) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1) [the limitation clause contained in the Bill of Rights] ...'

⁷¹³ As to direct application of the Bill of Rights to the common law of delict (or 'tort'), see the judgment of the Constitutional Court in *Khumalo v Holomisa* 2002 (5) SA 401 (CC)

⁷¹⁴ See the judgment of the majority of the Constitutional Court (by way of Ngcobo J) in *Barkhuizen v Napier* 2007 (5) SA 323 (CC)

⁷¹⁵ Section 39(2) of the Bill of Rights provides a vehicle for the 'indirect' application of the Bill of Rights to disputes between private individuals or natural and juristic persons (e.g. contractual disputes), and states as follows:

'When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights ...' [Emphasis provided]

241 In light of these judgments and academic commentary (which has criticized this apparent reluctance to directly apply the fundamental rights to contractual disputes, which judicial conservatism has been attributed to an unjustifiable adherence to the traditional principles of freedom of contract and sanctity of contract in the interests of promoting certainty in the law of contracting⁷¹⁶), it appears that there is currently a measure of uncertainty in South African contract law regarding, specifically, the following:

- The extent to which the Bill of Rights (and the fundamental rights which it guarantees) are directly applicable to contractual disputes and/or the development of the common law of contract;
- The extent to which the common law of contract will deal with the commonly perceived problems of wide-spread inequality of bargaining power and of the use of standard-form contracts as 'contracts of adhesion'; and
- The future role of the principle of 'good faith' in contracting as a touchstone for determination of the validity of contracts or contractual terms or to challenge manifestly unfair, unreasonable or oppressive contracts.⁷¹⁷

It remains to be seen to what extent, if any, the courts will opt in future for more direct application of the fundamental rights in the context of contractual disputes between private actors. Although these issues may all be relevant in a contractual (employment or otherwise) dispute involving athletes and sports governing bodies, clubs, sponsors, etc,

⁷¹⁶ See Bhana & Pieterse *supra*; Bhana *supra* and Woolman *supra*

⁷¹⁷ The South African Law Commission, in its Report on *Unreasonable Stipulations in Contracts and the Rectification of Contracts* (Project 47, April 1998) made certain recommendations regarding the passing of specific legislation to deal with unfair contract terms and related matters (in line with legislative regulation of such matters in other jurisdictions). To date these recommendations have not been specifically implemented, although certain recent legislation or proposed legislation incorporate provisions relating to unfair contract terms (compare the Consumer Protection Act, 68 of 2008, which is not at the time of writing in force but is expected to come into force during the course of 2009/10, and the provisions of certain sector-specific legislation such as the National Credit Act 34 of 2005 and the Rental Housing Act 50 of 1999). See also Naude, T 'Unfair contract terms legislation: The implications of why we need it for its formulation and application' (2006) Vol. 3 *Stellenbosch Law Review* 361

no more will be said about the matter here. For more detailed discussion of these issues in South African contract law, the reader is referred to expert works on the subject.⁷¹⁸

242 The employment contract in South African law has been defined as 'a contract whereby one party (the employee), in return for payment of remuneration by the other (the employer), puts his personal services at the disposal of the employer in such a way that the employer is entitled to define his duties and, at least to some extent, to control the manner in which he discharges them'.⁷¹⁹ Distinguishing features of the contract are the rendering of personal services, remuneration and a measure of subordination. The legislative definition of an 'employee' as contained in the Basic Conditions of Employment Act 197 (the 'BCEA') and the Labour Relations Act 1995 (the 'LRA')⁷²⁰ contains an extended definition, and accordingly a person may qualify as an employee in circumstances where no legally enforceable contract of employment may exist in terms of the above definition.⁷²¹

243 The employment of players and athletes in professional team sports in South Africa is not regulated by specific sports employment legislation, as is the case in other countries (such as Italy, with its Law 91 of 1981).⁷²² Accordingly, the employment relationship of such persons is to be evaluated in terms of the more generally applicable labour legislation referred to. Professional sportsmen and -women in team sports are nowhere excluded from the relevant statutory definitions and are thus generally deemed

⁷¹⁸ See e.g. Christie, R H *The Law of Contract in South Africa* 5th ed LexisNexis Butterworths 2006; Kerr, A J *The Principles of the Law of Contract* 6th ed LexisNexis 2002; and the articles referred to in the footnotes to paras 239-241 above

⁷¹⁹ Sharrock, R *Business Transactions Law* 7th Ed. Juta & Co. Ltd, Cape Town 2007 at 387. See also Thompson & Benjamin *South African Labour Law* Vol 2 Juta Law (Looseleaf), at E1-1, who define the employment contract as follows:

'A contract of employment is established where two persons agree that one, the employee, will make his or her personal services available and be subordinate to the other, the employer, for a fixed and indefinite period in return for remuneration. The distinguishing features of the contract, therefore, are the rendering of personal services, remuneration and subordination.'

⁷²⁰ Which definition is similarly applicable to the application of other employment legislation, such as the Employment Equity Act 55 of 1998

⁷²¹ *Ibid.* 389. The legislative definition of an 'employee' as contained in these statutes defines an employee as (a) any person, excluding an independent contractor, who works for another person or for the state and who receives, or is entitled to receive, remuneration; and (b) any other person who in any manner assists in carrying on or conducting the business of an employer.' Certain persons (apart from independent contractors) are excluded from such definition by other provisions of the applicable legislation, notably members of the South African National Intelligence Agency, the SA Secret Service and the SA National Defence Force.

⁷²² See discussion of this statute in Colluci, M 'Italy', in *International Encyclopaedia of Sports Law* Kluwer Law International (Supplement 1, August 2004) 61 *et seq.*

to be employees whose relationship with their employing clubs, franchises or unions are subject to the labour legislation. The courts and the Commission for Conciliation, Mediation and Arbitration (established under the LRA to determine certain classes of employment disputes) have confirmed this on a number of occasions.⁷²³ It should also be noted that the courts have held that the right to fair labour practices contained in section 23(1) of the Constitution applies to all employees, also those excluded from the application of legislation such as the Labour Relations Act, 1995.⁷²⁴ The protection of workers has been held to extend even to non-South African citizens who are engaged in employment within South Africa without the required work permit, as the employer's duty of care and duty to respect statutory employment rights have been held to apply even to such illegal workers.⁷²⁵

244 As has been mentioned above, it is generally accepted that professional athletes in team sports are employees for purposes of application of the relevant labour legislation referred to. It should however be noted that such status is a question of fact in any given case, and a professional athlete (also in a team sport context) could on the facts of a given case be deemed to be an independent contractor operating under a contract for the rendering of services.⁷²⁶ In such case the relationship between the

⁷²³ It is generally accepted that professional players in team sports qualify as 'employees' for the purposes of the Labour Relations Act 66 of 1995, and accordingly the employment relationship between such players and their employers (sports federations, governing bodies and the team management) fall under the provisions of this Act. For recognition of the employment status of players, see generally Le Roux 'Under Starters Orders: Law, Labour Law and Sport' (2002) 23 *ILJ* 1195; Jordaan in Basson & Loubser *Sport and the Law in South Africa* Butterworths (2000) Ch 8-1; Prinsloo 'Enkele Opmerkinge oor Spelerskontrakte in Professionele Spansport' 2000 (1) TSAR 229 at 229-30; Van Niekerk, A 'Labour Law in Sport: a Few Curved Balls' in *Contemporary Labour Law* Vol 6 No 11 June 1997 at 91; Smailes, S 'Sports law and Labour Law in the Age of (Rugby) Professionalism: Collective Power, Collective Strength' (2007) 28 *Industrial Law Journal* 57; and in the case law *McCarthy v Sundowns Football Club & Others* [2003] 2 BLLR 193 (LC); *Augustine and Ajax Football Club* (2002) 23 *ILJ* 405 (CCMA) (where the CCMA assumed jurisdiction over an unfair dismissal dispute between a professional footballer and his club, although preferring to refer such dispute to private arbitration as agreed between the parties in the employment contract); *Smith v United Cricket Board* [2003] 5 BALR 605 (CCMA); *SARPA obo Bands & Others/SA Rugby (Pty) Ltd* [2005] 2 BALR 209 (CCMA); *SA Rugby (Pty) Ltd v CCMA* [2006] 1 BLLR 27 (LC); *Botha v The Blue Bulls Co & Another* (Case JR1965/2005, unreported – judgment handed down 27 June 2008).

⁷²⁴ See the (at the time of writing unreported) judgment of the Supreme Court of Appeal in *Murray v The Minister of Defence* (Case number 383/2006; handed down on 31 March 2008), where the SCA held that the constitutional guarantee of fair labour practices applied to an employee of the South African National Defence Force (whose employees are expressly excluded from the ambit of the Labour Relations Act, 1995) in the context of a claim of constructive dismissal.

⁷²⁵ See the (at the time of writing unreported) judgment of the Labour Court in *Discovery Health v The CCMA & Another* (judgment handed down 28 March 2008)

⁷²⁶ It should be noted that professional athletes outside the team sports context (e.g. professional golfers or tennis players) are usually self-employed, and no contract of employment or for the rendering of services would exist.

parties would not fall within the ambit of the labour legislation, which expressly exclude independent contractors, and the relationship would be almost exclusively governed by the terms of the parties' contract.⁷²⁷ Other important reasons to distinguish the contract of employment from the contract for the rendering of services are that the doctrine of vicarious liability⁷²⁸ does not apply in the case of an independent contractor, that independent contractors do not enjoy social security benefits (e.g. unemployment insurance), that different tax regimes apply to employees and independent contractors, and that employees have a preferential claim in terms of the Insolvency Act 24 of 1936 (as amended) against the insolvent estate of their employer for arrear wages.⁷²⁹ Furthermore, it should be noted that a professional athlete (e.g. a rugby player) may be an employee of more than one organisation or may even be an employee of one or more organisation and an independent contractor in relation to another (e.g. a provincial union and a Super 14 franchise⁷³⁰).

§3 Employment of players in the major professional sports

245 What follows is a very brief overview of the nature of the employment nexus of professional athletes or players in the three major South African professional sports.

Football (or 'soccer')

246 Professional footballers are contracted by professional soccer clubs. These clubs are affiliated to the National Soccer League (the NSL), which trades as the Premier Soccer League (the PSL). The NSL promotes, organizes, controls and administers

⁷²⁷ See Jordaan 'Sport and the Law of Employment' in Basson & Loubser *Sport and the Law in South Africa* Butterworths 2000 (loose-leaf) at Ch 8-1. It should be remembered that it has been held that the right to fair labour practices as contained in section 23(1) of the Bill of Rights in the South African Constitution is applicable to 'everyone', and not only to employees – see the discussion elsewhere in this chapter.

⁷²⁸ In terms of which a person (an employer) can be held delictually liable (i.e. liable in tort) for damages caused by someone under his or her control (an employee)

⁷²⁹ Jordaan in Basson & Loubser *Sport and the Law in South Africa* op cit Ch 8-13 to Ch 8-14

⁷³⁰ See discussion elsewhere in this chapter of the regional Super 14 rugby union tournament, which is played (currently) between 14 regionally representative teams from South Africa, Australia and New Zealand

professional soccer in South Africa (in the Premier and National First Division leagues). All professional players therefore resort under the NSL's rules and regulations. Any club or footballer wishing to play professional football in South Africa must be registered with the NSL. If a player is not registered he cannot play for an affiliated club. All professional clubs are affiliated to the NSL, which is affiliated to SAFA (the South African Football Association), which in turn is affiliated to CAF and FIFA.⁷³¹

Rule 23 of the National Soccer League Rules⁷³² provides for Players' Status, as follows:

- '23.1.1 Players under the jurisdiction of the League are classified as either amateur or professional.
- 23.1.2 Amateur players are players who have never received any remuneration other than reimbursement of their actual expenses incurred during the course of their participation in any activity connected with association football.
- 23.1.3 Travel and hotel expenses incurred through involvement in a match and the costs of a player's equipment, insurance and training may be reimbursed without jeopardising a player's amateur status.
- 23.1.4 Any player who is not an amateur player is classified as a professional player.'

Par. 1.8 (of the definitions section) of the NSL Rules provides that a 'contracted player' is a professional player who has entered in a written contract of employment with a club. Rule 35.1 provides that '[e]very club employing a professional player must have a written contract with the player.' The 2002 version of the rules provided that '[t]he minimum wage for players under contract shall be determined by the [NSL] Executive Committee in accordance with the Labour Relations Act.⁷³³ The current (June 2008) version of the Rules contains no provisions regarding minimum remuneration in respect of players' contracts.

⁷³¹ See *Coetzee v Comitit & Others* 2001 (1) SA 1254 CPD at 1257

⁷³² As amended 17 June 2008

⁷³³ Rule 5.2.7

Rugby union

247 Professional rugby in South Africa is played under the auspices of the SA Rugby Union (SARU), and its commercial arm SA Rugby (Pty) Ltd. In terms of a substantive collective agreement concluded between the SA Rugby Players' Association (SARPA)⁷³⁴ and the provincial unions, all professional rugby players are employed by the unions in terms of a standard players' contract, the standard terms and conditions of which are negotiated periodically by SARPA and the unions.⁷³⁵ The collective agreement currently in place obliges provincial unions, who are classified in three categories, to employ a minimum number of their professional players in terms of the standard players' contract, with a minimum monthly remuneration determined in accordance with the province's classification as category A, B or C province (such remuneration to increase significantly where such player is contracted to a Super 14 franchise during the currency of the contract with the provincial union).⁷³⁶ A category A province must contract at least 34 players, a category B province at least 20 players, and a category C province at least 10 (12) players for a minimum uninterrupted period of 12 months. Additional players may be contracted for shorter periods. The collective bargaining agreement provides that all professional players employed in terms of the standard players' contract must be members of a medical aid scheme nominated by SARPA, as well as an income replacement insurance scheme.⁷³⁷ It is also provided that, from 1 November 2008, all provinces shall oblige their players to join SARPA's retirement fund.⁷³⁸ The collective agreement furthermore provides, in respect of Super 14 players, minimum match fee and win-bonuses for both the overseas and South African legs of the competition.⁷³⁹

⁷³⁴ The provincial unions have recognised SARPA as the sole collective bargaining agent of professional players, as it represents the majority of players.

⁷³⁵ At the time of writing, the employment of professional players is regulated in terms of the collective agreement between SARPA and the unions dated 5 June 2008.

⁷³⁶ Clause 6 of the collective agreement

⁷³⁷ Clause 13 of the collective agreement differentiates between the different unions in respect of the duration for which players shall be entitled to payment of their full monthly remuneration during the period such player is unable to play due to injury

⁷³⁸ Clause 19 of the collective agreement

⁷³⁹ Clauses 9 and 10 of the collective agreement

Cricket

248 Professional cricket players are contracted as employees of their respective unions or clubs, which are affiliated to the United Cricket Board of South Africa. At national level, these players are also viewed as employees of Cricket South Africa (the commercial arm of the UCBSA):

'[The UCB] contracts players to play international cricket.⁷⁴⁰ The relationship with the contracted players is a direct employer-employee relationship and is governed by the terms of their contracts of employment. National players are also members of clubs and play provincial cricket for the affiliates ... Players who are not selected for international cricket, but who play regular provincial cricket are contracted by the affiliates. The players' contracts bind them to the UCB and ICC codes of conduct. However, even players who are not contracted to an affiliate or to the UCB are bound by the code of conduct as participants.⁷⁴¹

In terms of the Memorandum of Understanding (collective agreement) currently in place between the SA Cricketers' Association (SACA), Cricket South Africa (Pty) Ltd and the domestic franchises, provision is made for a standard national player contract (for players categorized from A+ to C), a standard national match/tour contract, and a standard franchise player contract. More is said regarding the content of this collective agreement in the section on collective bargaining in professional sport below.

249 As mentioned above, it is important to note the distinction between employees and independent contractors. Only employees and their employers are subject to labour legislation, while the conditions of 'employment', rights and obligations of independent

⁷⁴⁰ It should be noted that Cricket South Africa, the commercial arm of the United Cricket Board of SA, was since established, and that cricketers in the national team are now contracted to CSA

⁷⁴¹ *Cronje v United Cricket Board of South Africa* 2001 (4) SA 1361 (T) at 1367

contractors are solely regulated by the contract for the rendering of services as agreed upon between the parties involved.⁷⁴²

In determining the exact nature of the professional player's contract, one can resort to the various tests developed by our courts, which seem to mirror developments in English law in this regard. While the various tests, the 'control' test, the 'organization' or 'integration' test, and the 'dominant impression' test, have all been criticized as rather simplistic or vague and nebulous,⁷⁴³ our courts have in recent years appeared to favour the last-mentioned of these tests in such cases where the specific relationship between the parties is difficult to pin down.⁷⁴⁴ This test seeks to ensure that, in the determination, no single factor is isolated – the method is to weigh up the *indicia* tending to show the existence of a contract of employment against those indicating a contract for services.⁷⁴⁵ Of course, this test is not necessarily appropriate in the context of statutes such as the Labour Relations Act and the Basic Conditions of Employment Act: due to the very wide definitions of 'employees' contained in these Acts, their operation does not depend on the existence of an employment contract, but rather on the fact of employment as such.⁷⁴⁶ Finally; it should be noted that the nature of the relationship between a player and e.g. a club or professional franchise is not dependent upon the label the parties to such

⁷⁴² Thompson & Benjamin *South African Labour Law* Vol 2 Juta Law (Looseleaf), at E1-1 and E1-7, note that the existence of a contract of employment automatically renders the parties to it subject to labour legislation. However, as the authors point out, the converse is not true: due to the wide definitions contained in these statutes, they may also apply to persons who do not fall under the common law definition of employer and employee.

⁷⁴³ See Thompson & Benjamin at E1-5

⁷⁴⁴ The Supreme Court of Appeal and the Labour Court have embraced the dominant impression test as the most suited to provide answers to the multitude of questions that may arise regarding a worker's status in the context of modern workplaces – see *Liberty Life Association of SA Ltd v Niselow* (1996) 17 ILJ 673 (LAC); *Niselow v Liberty Life Association of SA Ltd* 1998 (4) SA 163 (SCA); *SABC v McKenzie* [1999] 1 BLLR 1 (LAC). This approach is in line with developments elsewhere, e.g. in English law, where the following has been stated regarding the application of this 'test':

'There is no one test which is conclusive for determining whether services are performed by an employee under a contract of service or by a person carrying on business on his own account: There are a number of badges of one or other of the relationships and those badges, depending on the context, may carry greater or lesser weight, an overall view must be formed.'

(*Barnett v Brabyn (HM. Insp. Of Taxes)* 1996 STC 716, 69 TC 133 at 134). See Du Toit et al *Labour Relations Law* 68-72; *Grogan Workplace Law* 19 et seq.

⁷⁴⁵ Thompson & Benjamin E1-5

⁷⁴⁶ Thompson & Benjamin at E1-7. For a general discussion of the application of the dominant impression and other tests, as well as a useful analysis of the practical problems and intricacies involved in determining the true nature of a specific relationship in this context, see South African Revenue Service (SARS) Circular Minute No 22/1999, entitled 'Employees' Tax: Independent Contractors' (available on the internet as http://www.sars.gov.za/it/general/independent_contractors.pdf). This circular contains a handy 'common law dominant impression test grid' (as Annexure A to the circular), which summarises a number of relevant indicators in the determination of 'employee' and 'independent contractor' status. See also Brassey, M 'The Nature of Employment' (1990) 11 *Industrial Law Journal* 889; Mureinik, E 'The Contract of Service: An Easy Test for Hard Cases' (1980) 97 *South African Law Journal* 246.

relationship have placed on it; while the wording and provisions of the parties' contract are important elements to be considered in classifying the relationship as either one of employment or as a contract for the rendering of services by an independent contractor, what matters is the substance of the relationship rather than the name which the parties have chosen to call it.⁷⁴⁷

It was reported in May 2008 that the SA Rugby Union is considering abolishing the use of one-year standard players' contracts in order to retain the services of players in the national team, in favour of simply contracting players upon remuneration on a match-by-match basis. The outcome of such proposal is unknown to the author at the time of writing.

§4 Necessary elements of the employment contract

250 There are no formalities (such as e.g. writing⁷⁴⁸) prescribed at South African common law for the validity of a contract of employment, and such contract will come into being as soon as the parties have reached agreement either expressly or tacitly (through the parties' non-verbal conduct) on the necessary elements of the contract. Generally, the following elements must be present to constitute an employment contract:

- The employee undertakes to provide personal services to the employer (and the parties must have reached agreement on the type of work to be performed in terms of the contract);
- In return for the personal services provided by the employee, the employer is to pay remuneration to the employee (such remuneration may be in money, in goods or partly in money and partly in goods; the amount of

⁷⁴⁷ Jordaan in Basson & Loubser *Sport and the Law in South Africa* supra Ch 8-14

⁷⁴⁸ Note however that section 29(1) of the Basic Conditions of Employment Act, 1997 obliges the employer to provide the employee, upon the commencement of his or her employment, with a written statement containing particulars of such employment (e.g. working hours, remuneration and other benefits, type of work, termination and the relevant notice periods, etc).

remuneration need not be fixed but must be ascertainable by reference to some objective standard); and

The employee's services must be defined and controlled by the employer (this does not require complete control, depending on how specialized the services are; the greater the measure of control exercised by the employer the more likely the contract is to be deemed to be one of employment).⁷⁴⁹

Of course, such contract must also satisfy the more general requirements for a valid and enforceable contract (e.g. legality, certainty and possibility of performance).⁷⁵⁰ In terms of the 'dominant impression test' referred to *supra*, the degree of control that the employer exercises over the services of the employee is an important factor in distinguishing the contract of employment⁷⁵¹ from that of the contract for services⁷⁵² of an independent contractor (which is generally not subject to labour legislation).

251 Professional athletes in the three major sports undoubtedly qualify as employees for the purpose of this distinction, if one notes the following characteristics of the relationship of these persons to the unions or governing bodies to whom athletic or sporting services are rendered:⁷⁵³

- (i) The standard players' contracts all provide for an obligation on the part of the player to perform personal sporting services to the other party;
- (ii) These athletic services are rendered subject to the control and direction of such other party – although the measure of such control may differ from that found with other employees, the inherent element of control is always

⁷⁴⁹ Sharrock *Business Transactions Law* op cit. 389; *South African Broadcasting Corporation v McKenzie* (1999) 20 *Industrial Law Journal* 585 (Labour Appeal Court)

⁷⁵⁰ Christie, R H *The Law of Contract in South Africa* 5th Ed. LexisNexis Butterworths, Durban 2006; Grogan *Workplace Law* chapter 3

⁷⁵¹ Or *locatio conductio operarum*

⁷⁵² Or *locatio conductio operis*

⁷⁵³ See also Smalles, S 'Sports law and Labour Law in the Age of (Rugby) Professionalism: Collective Power, Collective Strength' (2007) 28 *Industrial Law Journal* 57

present and especially evident in for instance the practice of selection of players for matches;

- (iii) These agreements all provide for the absorption of the player's labour power in respect of the rendering of athletic services, either to the exclusion or semi-exclusion of other employers;⁷⁵⁴
- (iv) The remuneration payable as a reciprocal obligation in return for services rendered contains traditional elements found in the employment of other employees, e.g. medical aid and retirement contributions paid by the employer;
- (v) These agreements provide for powers on the part of the employer to discipline and dismiss players for misconduct or poor work performance, which in some cases exceed the measure of control (as found in 'ordinary' employment contracts) over the autonomy of the employee in respect of their physical integrity and the pursuit of outside or personal interests and activities;⁷⁵⁵
- (vi) The wording of the players' contracts in all these cases explicitly refer to the relationship as one of 'employment', and to the parties as 'employer' and 'employee';⁷⁵⁶
- (vii) The relationship between the parties falls squarely within the legislative definition of employment, and such players are nowhere expressly excluded from the ambit of such legislation;
- (viii) The 'dominant impression' of the nature of the relationship between the parties is that of employment, in light of the factors mentioned above.

An amendment of the Labour Relations Act ⁷⁵⁷ inserted a rebuttable presumption that a person will be deemed to be an employee, if any one of a number of factors is present.⁷⁵⁸

⁷⁵⁴ In the latter case where players are allowed to be contracted by national governing bodies for selection to representative teams – see the discussion below.

⁷⁵⁵ See for instance clauses 9, 10 and 17 of the SARPA Standard Players' Contract 2008

⁷⁵⁶ See for instance the SARPA Standard Players' Contract 2008

⁷⁵⁷ Inserting section 200A, by means of the Labour Relations Amendment Act No 12 of 2002

⁷⁵⁸ These factors include the following:

It does however seem clear that this presumption will in most instances favour the view that a professional athlete is an 'employee'.⁷⁵⁹

§5 Requirements for the formation of the player's employment contract

I Contracts with minors

252 The basic requirement for formation of a valid contract of employment is that the player should have the necessary capacity to contract. A minor (an unmarried natural person of either sex under the age of 18 who has not been declared a major by the High Court⁷⁶⁰) has limited capacity to enter into a valid contract. Such minor may enter into a contract in his or her name only with the assistance of his or her legal guardian, which assistance may be given before or at the time of contracting or may take the form of ratification after the fact. In professional football, Rule 35.7 of the National Soccer League's Rules⁷⁶¹ specifically provides as follows:

'No club may enter into an employment contract with a player who is a minor unless such player is duly and lawfully assisted by a parent or legal guardian. Such assistance will be evidenced by the countersignature on the contract of the parent or legal guardian, in the absence of which countersignature the contract will be invalid.'

- whether the manner in which the person works is subject to the control or direction of another person;
 - whether the person's hours of work are subject to the control or direction of another person;
 - whether a person who works for an organisation forms part of that organisation;
 - whether that person works for and renders services only to that other person; and
 - whether that person is economically dependent on the other person for whom he or she works or renders services. This Amendment Act also enjoins the National Economic Development and Labour Council (NEDLAC) to issue a Code of Good Practice setting out guidelines for determining whether persons are 'employees'. The Act also empowers the Commission for Conciliation, Mediation and Arbitration (the CCMA) to make advisory awards in certain instances, as to whether persons involved in an arrangement are 'employees'.

⁷⁵⁹ Van Niekerk, A 'Labour law in sport: A few curve balls' (1997) 15(6) *Contemporary Labour Law* 1. Note however that the application of this legislative presumption in any given case is subject to the level of remuneration earned by the 'employee', and the presumption may not be applicable in cases concerning highly paid professional athletes. Notwithstanding the applicability of the presumption, these athletes may of course still qualify as employees in terms of the common law dominant impression test referred to *supra*.

⁷⁶⁰ The age of majority was reduced from 21 to 18 by section 17 of the Children's Act, Act 38 of 2005 (which came into operation on 1 July 2007)

⁷⁶¹ As amended 17 June 2008

253 A minor may also be emancipated by his or her guardian, in which case such minor's contractual capacity is not limited and s/he can validly enter into a contract without the guardian's assistance. Such emancipation can also be effected tacitly. The courts have held that the test to determine tacit emancipation requires that the guardian must have been completely discharged from parental authority; namely that as far as the guardian is concerned the minor has 'complete freedom of action with regard to his mode of living and earning his livelihood'.⁷⁶² Separate residence and financial independence are only factors to be taken into account in determining whether a minor has been tacitly emancipated;⁷⁶³ and it must be shown that the guardian has actually consented to the release of the minor from his or her authority.⁷⁶⁴ It has also been accepted that if a guardian consents to the minor carrying on his or her own business or enter the employment of his or her choice, the minor has capacity to make contracts unassisted in connection with that business or employment.⁷⁶⁵

254 When a minor enters into a contract with the assistance of his or her guardian, the minor is bound by the contract and the guardian does not incur any liability. If the contract later becomes patently prejudicial to the minor, s/he may (with the assistance of his or her guardian or a *curator ad litem*, before the minor reaches the age of majority or, once the minor has reached the age of majority, the minor him- or herself) may approach a court to order *restitutio in integrum* (rescission of the contract and mutual restitution of performances), whereby the contract is retrospectively declared void, the obligations are forthwith unenforceable and the parties are obliged to return any performances received there-under.⁷⁶⁶

⁷⁶² *Dickens v Daly* 1956 (2) SA 11 (N) at 16; see also Sharrock *Business Transactions Law* op cit. 41-42

⁷⁶³ *Dickens v Daly* supra

⁷⁶⁴ *Grand Prix Motors WP (Pty) Ltd v Swart* 1976 (3) SA 221 (C)

⁷⁶⁵ Sharrock supra 43; *Ahmed v Coovadia* 1944 TPD 364

⁷⁶⁶ This last duty to return performances received is subject to the courts' discretion to relax the obligation in certain instances where the inability to return the performance (or a performance of the same value as received in terms of the contract) is not due to the fault of such party – see *Feinstein v Niggli* 1981 (2) SA 684 (A); *Extel Industrial (Pty) Ltd v Crown Mills (Pty) Ltd* 1999 (2) SA 719 (A)

When a minor enters into a contract without the assistance of his or her guardian, s/he is not bound to such contract (even if the contract is as a whole to the benefit of such minor) and is entitled to return of any performances or payments made. The contract is not deemed to be void, however, and will be binding on the other party to the extent that the minor performs any of his or her reciprocal obligations.⁷⁶⁷

255 Finally, it should be noted that section 43 of the Basic Conditions of Employment Act, 1997 provides that it is a criminal offence for a person to employ a child who is under 15 years of age (or under the minimum school-leaving age in terms of any law, if this is 15 or older). No-one may employ such a child for work that is 'inappropriate' or that places at risk such child's 'well-being, education, physical or mental health, or spiritual, moral or social development'.⁷⁶⁸ According to section 55(6)(b) of the Act, the employment of children in certain activities such as sports and advertising may be permitted by sectoral agreements. Rule 35.8 of the NSL Rules specifically provides as follows:

'No club may enter into an employment contract with a player who has not yet attained his fifteenth birthday. It will be misconduct to enter into a contract with a player's parents where the purpose of such contract is to circumvent this rule.'

Rule 40 of the NSL Rules provides as follows in respect of minors who are not South African citizens:

40.1 Unless [the SA Football Association], on application of the parent or legal guardian of the minor concerned rules otherwise,

40.1.1 international transfers of players under the age of eighteen (18) will only be permitted when the family of the player moves to South Africa for reasons that are not linked to football, and

⁷⁶⁷ Sharrock *supra* 45

⁷⁶⁸ BCEA section 43; see Grogan *Workplace Law* 39

40.1.2 no player under the age of eighteen (18) who is not a South African national will be registered as a professional player for the first time with a club falling under the jurisdiction of SAFA unless he and his parent or legal guardian are lawfully resident in South Africa.'

II Employment contracts of non-South African citizens

256 Apart from the contractual capacity of the athlete in terms of his or her age at the time of entering into a contract of employment, it is important to briefly examine the position of persons who are not South African citizens or who otherwise require work permits to legally take up employment in South Africa.

The South African Immigration Act, 2002⁷⁶⁹ and applicable Regulations provide for 13 types of temporary residence permits and four types of work permits for foreign visitors to South Africa.⁷⁷⁰ No decision on an application for a permit is left to the discretion of an official and there is provision for an applicant to lodge an appeal against any decision which may adversely affect such applicant.⁷⁷¹ The main objective of the Act is to ensure that South African citizens and permanent residents are not disadvantaged in access to employment by the employment of foreign workers. Accordingly, the Department of Home Affairs will consider an application for a general work permit on submission of proof of a conditional offer of employment in a confirmed position from a recognized organization as well as documentary proof that such South African employer has fully endeavoured to recruit South African citizens or residents. Foreigners who have been in

⁷⁶⁹ Act 13 of 2002, implemented 7 April 2003

⁷⁷⁰ The four types of work permits are a quota work permit issued to applicants for employment in certain identified scarce skills categories (as determined by the Minister of Home Affairs in consultation with the Ministers of Labour and Trade and Industry), a general work permit, an exceptional skills work permit and an intra-company transfer work permit.

⁷⁷¹ South African Department of Home Affairs web site – accessed 4 April 2008

possession of a general work permit for a period of five years may apply for a permanent residence permit.

It should here be specifically noted that the absence of a valid work permit may not necessarily serve to deny an illegal alien protection under the labour legislation (or, more specifically, in terms of the right to fair labour practices contained in section 23 of the Bill of Rights), in the event that it can be shown by such person that there was a *de facto* employment relationship between him or her and a South African employer.⁷⁷²

257 It should further be noted that specific provisions and requirements may be set for access of foreign athletes or players in specific sports, through the rules and regulations of the relevant domestic governing bodies or through collective agreements with representative players' associations. In football, Rule 25.5.8 of the National Soccer League Rules⁷⁷³ requires, in the event that a player was previously registered for a club in another country, an International Transfer Certificate requested by the SA Football Association (SAFA) from the national association of the player's previous club. Rule 35.14 provides further that [c]lubs may not lodge a contract [with the League] which causes the club to exceed five foreign players, and a work permit will have to be lodged with a foreign player's contract.'

In professional cricket, the Memorandum of Understanding that is currently in force between Cricket South Africa, the six domestic franchises and the professional players' association (SACA)⁷⁷⁴ provides that a distinction is made between 'Foreign Overseas Players' and 'Kolpak Overseas Players'. A Foreign Overseas Player is a player who is a non-South African citizen or non-permanent resident (except if such player has Kolpak rights in South Africa and has not played international or first class cricket for or in another country in the past 12 months). A Kolpak Overseas Player is a player who is contracted in the EU under *Kolpak* but who is not seeking to qualify to play for another country. A franchise may contract a maximum of 1 Foreign Overseas Player during a

⁷⁷² Cf. the (at the time of writing unreported) judgment of the Labour Court in *Discovery Health v The CCMA & Another* (judgment handed down 28 March 2008)

⁷⁷³ As amended 17 June 2008

⁷⁷⁴ This Memorandum of Understanding is in force from 1 May 2007 to 30 April 2010, subject to the current structure of 6 franchises remaining in place for such period.

season (and maximum 2 Overseas Players). Prior to contracting an Overseas Player the franchise must obtain the consent of Cricket South Africa (in the case of a Foreign Overseas Player through means of a written motivation regarding the value that such player is expected to add to the franchise and to South African domestic cricket, and CSA is obliged to consider such motivations in granting or refusing consent). In addition, a franchise must show that it has a sponsor to pay at least 50% of the amount payable to the Foreign Overseas Player (the other 50% to be paid by the franchise from its budget). Franchises are obliged to contract a minimum of 13 and a maximum of 16 players on 12 or 24 month contracts. Kolpak Overseas Players shall be included in the number of franchise contracted players, while Foreign Overseas Players are viewed to be in addition to such contract numbers.⁷⁷⁵

258 With a view specifically to the 2010 FIFA World Cup South Africa, it should be noted that section 4(2)(a) of the 2010 FIFA World Cup South Africa Special Measures Act, No. 12 of 2006, provides that '[a]ny person, including team members, intending to conduct work in the Republic in connection with and for the duration of the 2010 FIFA World Cup South Africa must, in support of an application for authorization in terms of section 11(2) of the Immigration Act, submit a letter to the Minister of Home Affairs from FIFA approving the work to be conducted'. Section 4(3) of the Act deals with the position of dignitaries attending the 2010 World Cup event, and provides that '[t]he Minister of Home Affairs may allow dignitaries identified as such by FIFA to be admitted to and sojourn in the Republic for the duration of the 2010 FIFA World Cup South Africa in terms of section 3 1(2)(a) of the Immigration Act if a list containing the personal particulars of the dignitaries prepared by FIFA is received by the Minister of Home Affairs at least 30 days before the dignitaries intend to depart for the Republic'.

Section 4(4) of the Act furthermore provides as follows:

'(a) If any person intends to conduct work, or establish or invest in a business, in

⁷⁷⁵ Par. 3.2 of the Memorandum of Understanding

the Republic for a period exceeding six months in connection with the 2010 FIFA World Cup South Africa, such person must, when applying for a work permit or a business permit in terms of the Immigration Act, provide the Director-General of Home Affairs with-

- (i) proof of accreditation with FIFA in support of the application at least 30 days
- (ii) a description of the activities that will be undertaken in the Republic; and
- (iii) the duration of the intended stay

prior to proceeding to the Republic;

(b) If a person contemplated in paragraph *(a)* wishes to be exempted from having to comply with any of the requirements for a work permit or business permit prescribed in the Regulations made under section 7 of the Immigration Act, that person must ensure that the Minister of Home Affairs receives an application in terms of section 31(2)(c) of the Immigration Act for the waiver of those requirements at least 60 days prior to that person proceeding to the Republic.

(c) The application referred to in paragraph *(b)* must be approved by the Minister of Home Affairs before the Director-General of Home Affairs may consider the application for a work permit or business permit contemplated in paragraph *(a)*.

259 The National Sport and Recreation Amendment Act, 2007 includes a provision with potentially far-reaching implications regarding the employment of foreign sports persons in South Africa. Section 6(3) provides that national federations must 'before recruiting a foreign sport person to participate in sport in the Republic, satisfy themselves that there are no other persons in the Republic suitable to participate in such a sport' (s 6(3)(a)). Section 6(3)(d) provides that national federations must 'ensure that [such] recruitment conforms to the guidelines issued by the Minister in terms of s 13A. Section 13A provides that '[t]he Minister must issue guidelines or policies to promote equity, representivity and redress in sport and recreation'. The new sections 13B and 13C require every sport or recreation body to submit, annually, statistics on its membership and also to report progress on the issues referred to in s 13A. The new s 13(5)(a)(ii) empowers the Minister to intervene 'in any non compliance with guidelines or policies issued in terms of section

13A or any measures taken to protect or advance persons or categories of persons, disadvantaged by unfair discrimination as contemplated in section 9(2) of the Constitution', by e.g. issuing a 'directive' which is binding on the parties to a dispute (or, specifically, a sport body in such cases).⁷⁷⁶ Accordingly, while the potential application of these sections is at the time of writing still speculative, it appears that the Minister of Sport is empowered to intervene in the appointment of foreign sportspersons (presumably players, coaches as well as managers or other administrative staff) and may veto any recruitment by sports federations *inter alia* on the basis of the race of such persons (i.e. if such persons are not from previously disadvantaged or designated⁷⁷⁷ groups).⁷⁷⁷

At the time of writing, these (what are submitted to be) rather controversial provisions have not been the subject of legal challenge. It is however doubtful that these provisions would withstand any potential constitutional testing, especially in light of accepted standards in other jurisdictions (e.g. the protection of freedom of movement of sportspersons in the European Union in the wake of judgments such as *Bosman* and *Kolpak*, referred to elsewhere) and, possibly, the application of the restraint of trade doctrine and the provisions of the Competition Act 89 of 1998⁷⁷⁸ (although the section 22 right of freedom to choose one's trade, occupation or profession would not apply to foreign sportspersons⁷⁷⁹).

⁷⁷⁶ In terms of the Employment Equity Act 55 of 1998, the 'designated groups' who are to be advantaged by means of affirmative action measures and policies in employment are defined as Black persons (including, Africans, Coloured and Indian persons), women and persons with disabilities.

⁷⁷⁷ The application of the Employment Equity Act 55 of 1998 (which provides for the application of affirmative action in the workplaces of designated employers) is discussed in more detail elsewhere in this section as well as in the section on race-based transformation of sport elsewhere in this chapter. For present purposes (in respect of discussion in the text above), the following should just be noted regarding enforcement of the application of affirmative action: The designated employer has obligations in terms of the EEA to transform within certain time frames and to draw up equity plans in this regard, and the Director-General of the Department of Labour can bring legal proceedings against recalcitrant employers. But, because the plan is based on figures, targets and time periods, it does not allow for the Director-General, an individual employee or a union to dictate on the application of affirmative action in a particular case or in respect of a particular individual employee (e.g. to demand that an employee should be appointed or promoted on the basis of affirmative action). Arguably, it follows that the Minister of Sport will not be able to do so either (in terms of the EEA, which only permits the Director-General to bring action against the employer for failing to meet targets within certain timeframes) - see *Dudley v City of Cape Town* (2004) 5 BLLR 413 (LC); *Thekiso v IBM South Africa* (2007) 3 BLLR 253 (LC); *Cupido v Glaxosmithkline SA (Pty) Ltd* (2005) 26 ILJ 868 (LC); *PSA obo Karriem v South African Police Services & Another* (2007) 4 BLLR 308 (LC).

⁷⁷⁸ See the discussion in par 457 *et seq* below

⁷⁷⁹ The section 22 right is only available to South African citizens (compare the wording of the section, and the Constitutional Court's finding in *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* (2nd Certification decision) 1997 (2) SA 97 (CC) that the right of occupational choice could not be

260 The discussion elsewhere in this chapter has referred to the draft Regulations in terms of the Act which were circulated to sports federations for comment at the beginning of 2009. As mentioned, these draft Regulations include specific regulations dealing with the Control of Foreign Sports Persons in South Africa, which regulations appear to envisage quite substantial control over the foreign athletes as well as South African sporting bodies. It remains to be seen in what form such regulations may be published in due course (if at all), but it has been suggested that the draft regulations in their current form are open to potential legal challenge on a number of grounds. The reader is referred to the discussion in par 114 *et seq* above.

III South African athletes and employment abroad

261 South Africa is a signatory to the Cotonou Agreement between the European Union and 77 African, Caribbean and Pacific Islands (or 'ACP') states, of June 2000. The Agreement's purpose is to expedite the economic, cultural and social development of the ACP states, with a view to contributing to peace and security and to promoting a stable and democratic political environment.⁷⁸⁰ Article 13(3) of the Agreement provides as follows:

'[T]he treatment accorded by member States to workers from ACP countries legally employed in its territory, shall be free from any discrimination based on nationality, as regards working conditions, remuneration and dismissal, relative to its own nationals. Further in this regard, each ACP State shall accord comparable non-discriminatory treatment to workers who are nationals of a Member State.'

considered a universally accepted human right – see Currie, I & de Waal, J *The Bill of Rights Handbook* 5th ed Juta & Co 2005 at 489)

⁷⁸⁰ Article 1(1) of the Agreement

South African citizens are thereby entitled to enter employment within the European Union as so-called 'Kolpak players', who, as non-EU nationals who are lawfully employed within a Member State of the EU, are protected from discrimination on the basis of their nationality⁷⁸¹ and would thus qualify as domestic players. To date, the impact of *Kolpak's* ruling has mostly assisted South African cricketers to gain access to employment in English county cricket (subject to the relevant UK work permit directives and the eligibility criteria of the England & Wales Cricket Board) and for South African rugby players to gain access to employment with UK and European rugby union and rugby league teams.⁷⁸² Between August 2003 and February 2005 young persons from Commonwealth countries were allowed to work in professional sports (especially cricket and rugby union) in the UK on the Working Holiday Maker Scheme (a special visa to young persons which allowed them to work legally in Britain for two years whilst traveling). Following lobbying by the Professional Cricketers' Association and others this relaxation of the requirements for entry into employment in professional sports was scrapped, and potential *Kolpak* players from South Africa currently require a work permit just as other overseas professionals do. The work permit requirements are more stringent than those of the working holiday visa.⁷⁸³

262 At the time of writing it appears that the European Commission is set to give rugby and cricket authorities within EU member states the right to deny access to their leagues to non-European players who have used the *Kolpak* ruling to gain entry, which could potentially impact significantly on the access of South African athletes to employment in these states. Such action appears to be a reaction against the opening of the floodgates to foreign players in terms of *Kolpak*. According to reports, English county cricket had in 12 months seen an increase from 30 players who are not qualified to play

⁷⁸¹ In terms of the judgment of the European Court of Justice in *Deutscher Handballbund eV v Maros Kolpak C-438/00*, 8 May 2003

⁷⁸² Eligibility requirements for participation in domestic leagues may differ (e.g. to qualify for a 1st Division/Premiership rugby club in England a player must have played for South Africa or another national team during the previous 18 months; this is not a requirement for French and Italian clubs – source: The web site of the SA Rugby Players' Association (SARPA): <http://www.sarpa.net> – accessed 3 April 2009)

⁷⁸³ From a report available on the web site of the Professional Cricketers' Association at <http://www.thepca.co.uk> [accessed 4 April 2008]

for the England team to 60, and that there are approximately 150 South Africans who are playing top-level rugby union for clubs in France. It has been reported that Michal Krejca, head of the EC's sports unit, told the congress of UK sports bodies (at a congress organized by the Central Council of Physical Recreation in June 2008) that the decision to admit Cotonou players is the decision of individual member states and not that of the EU. It has been speculated that this will mean that the Home Office in Britain will come under pressure from sports bodies to treat every application on its merits rather than on the nationality of the applicant (although those athletes with valid EU work permits will continue to benefit from the free movement provisions).⁷⁸⁴

263 Tier 2 of the United Kingdom's Points Based Managed Migration system (which has replaced the previously applicable work permit scheme) was implemented on 27 November 2008, and it offers an entry route into the UK for skilled workers who are citizens of countries outside the European Economic Area. Tier 2 contains a specific category in respect of 'Sports People', for elite sports persons and coaches whose employment will make a significant contribution to the development of their sport at the highest level in the-UK. Sports persons on temporary assignment should apply for entry as temporary workers under Tier 5 (this is applicable, for example, to non-First Class cricket clubs who recruit players).

A requirement for qualification under Tier 2 is a job offer from a UK employer, and the applicant must intend to base themselves in the UK and must be established at the highest level of their particular sport. In respect of county cricket, for example, this requires that an applicant player must have –

- played 1 Test match in the last 2 years; or
- played 15 One Day International/T20 international matches in the last 2 years; or

⁷⁸⁴ From a report by Matt Scott 'Sports given go-ahead to block overseas players', *The Guardian*, 12 June 2008

- played in the latest Test/One Day International team or be contracted to his home (national) Board; or
- played 5 Tests in the last 5 years and he is still eligible, or
- been granted a work permit in 2008.

For club cricket, a player must have played 5 first class matches in the last 2 years or a coach must have a level 2 coaching qualification.⁷⁸⁵

The employer who wishes to appoint a sports person in terms of the Tier 2 category must register with the UK Border Agency and obtain a Sponsorship License, obtain an endorsement for the applicant player from the sport's governing body,⁷⁸⁶ and issue a job offer and a Certificate of Sponsorship to the applicant player. In respect of professional cricket, for example, the governing body endorsement must be obtained from the England & Wales Cricket Board for both the sponsor license and for individual players and coaches who are recruited (and the application for the endorsement must be made prior to the application to the UK Border Agency for a Sponsorship License). The applicant player must satisfy the Tier 2 Points Test (i.e. such applicant must acquire a full 70 points, of which 10 points are awarded for the Maintenance Requirement,⁷⁸⁷ 10 points are awarded for the English Language Requirement, and 50 points are awarded for possession of a valid Certificate of Sponsorship).

It is clear that the Tier 2 system has now made it significantly harder for South African athletes to enter the UK for work purposes, and it is believed that these more stringent requirements will serve to address some of the problems which have been reported regarding the influx of players under the *Kolpak* regime (while, of course, limiting the potential employment opportunities abroad of e.g. South African professional cricketers and rugby players).

⁷⁸⁵ Source: The web site of the SA Cricketers' Association (available at <http://www.saca.org.za> – last accessed on 6 April 2009)

⁷⁸⁶ The endorsement by the appropriate governing body must confirm that the player or coach is internationally established at the highest level, that s/he will make a significant contribution to the development of his or her sport at the highest level in the UK, and that the post cannot be filled by a suitable settled worker.

⁷⁸⁷ The applicant must be able to show personal savings equivalent to £ 800 at the time the application is made, or the applicant must have written confirmation from their sponsor that the sponsor will maintain and accommodate them until the end of their first month in the UK. From March 2009 the amount of savings must have been held at all times during the preceding 3 month period.

264 Clause 3 of the Memorandum of Understanding (collective agreement) currently in place between SACA, Cricket South Africa (Pty) Ltd (or 'CSA') and the domestic professional franchises,⁷⁸⁸ provides as follows regarding South African professional cricketers playing overseas:

'Playing Overseas

- 3.3 Any Player who is contracted by CSA or a Franchise who wishes to play overseas during his contract must first obtain a written release from CSA (National Players) or the Franchise concerned (Franchise Players).
- 3.4 A standard form release application will be used by the Player and when applying for a release the Player must state the duration of the overseas contract.
- 3.5 A National Contracted Player must ensure that the Overseas Contract contains a carve-out clause to ensure that the Player is able to fulfil any official training or playing commitments he may have to the National Team during the overseas period.
- 3.6 If the carve out is to include any commercial obligation for which the National Player must return during the period of the Overseas Contract then this shall be stipulated by CSA at the time that it grants the release and CSA shall pay the cost of a return economy class air-ticket to enable the return of the Player for such commercial obligation.
- 3.6 CSA or the Franchise may impose conditions to any release granted by it provided these are lawful and relate to cricket playing matters. The release and any conditions must be in writing and a copy provided to SACA.
- 3.7 Where a Player is released to play county cricket in the UK as a Kolpak Player then the Franchise may reduce his Franchise retainer amount by up to thirty-five percent (35%) of such retainer for the period that he is away on contract to the county. This shall not however affect any other remuneration benefits such as contributions to medical aid. The Player must be notified of any such reduction at the time of the granting of the release.'

⁷⁸⁸ The current MOU is in place for a three year-period from 1 May 2007 until 30 April 2010

265 At the time of writing, the impact of the 'rebel' Indian Cricket League (or 'ICL')⁷⁸⁹ and the resultant, officially sanctioned and phenomenally successful new Indian Premier League (or 'IPL') has, not unexpectedly, also been felt by a number of South African professional cricketers under contract abroad. In April 2008 the Professional Cricketers' Association (PCA) in the UK filed an appeal against the refusal by the England & Wales Cricket Board (ECB) to register three South African ICL players to play county cricket. The PCA was reported as threatening a High Court action in the event of its appeal being denied. The three ex-SA national team players, Justin Kemp (contracted with Kent county), Andrew Hall and Johan van der Wath (both contracted with Northamptonshire), had been refused registration by the ECB in terms of Regulation 2.1(b) (Regulations Governing the Qualification and Registration of Cricketers) as a result of their participation in the unsanctioned ICL during 2007 (which is not recognized by the ECB as official first class cricket).⁷⁹⁰ The refusal to register these players (even though they had already been contracted as *Kolpak* players) was as a result of Cricket South Africa's refusal to issue the required No Objections Certificates⁷⁹¹ to the players as a result of their ICL affiliation. Hall had reportedly also been refused permission by CSA to play for the Lions franchise in the 2008 domestic Pro20 competition. Following reports that other ex-international cricketers⁷⁹² had also been refused entry to county cricket on the same grounds, the ICL was in 2008 reportedly in the process of instructing their legal representatives for purposes of legal action against the ECB.⁷⁹³ The appeal (heard on 30 April 2008) of the three South African players against the ECB ruling (which Hall's

⁷⁸⁹ The 'Indian Cricket League' (or 'ICL') was established to operate a Twenty20 tournament between (initially) six teams or clubs on a home-and-away basis, playing over a period of about three weeks for an ultimate winners' purse of US\$1 million. Each team would consist of two Indian players registered with the BCCI, four foreign players and eight budding players sourced through talent scouts. It was planned that the ICL would develop over a three-year period to a 50-over a side (or One Day International format) tournament, which would be better suited to develop talented young players for the rigours of international cricket, while the number of teams competing would increase from six to sixteen. The inaugural ICL competition was held in November and December 2007.

⁷⁹⁰ See the short article entitled 'PCA to appeal to High Court if appeal against player bans fails' *World Sports Law Report*, May 2008 Cecile Park Publishing Ltd

⁷⁹¹ A certificate of clearance by the players' domestic cricket board, required for entry into the English country cricket scene by the rules of the ECB

⁷⁹² Namely the West Indies' Wavell Hind and New Zealand's Hamish Marshall

⁷⁹³ From an article in *Rapport*, 23 March 2008

barrister characterised as an 'unlawful, unreasonable, capricious and discriminatory' ban) was ultimately successful.⁷⁹⁴

266 The ECB's response to the three South African professional cricketers is just one example of the response to the ICL by domestic governing bodies in a number of cricketing nations, which followed the massive exodus of star cricketers to this lucrative new competition. Throughout the first season of the ICL it was reported that a number of top-class international cricketers from across the spectrum of test-playing nations, both current and retired players, had signed up for the ICL. It was reported that, apart from well-known names such as Pakistan's Inzamam Ul-Haq, former West Indies star batsman Brian Lara, New Zealand's Craig McMillan, Chris Cairns and Nathan Astle (to name just a few), a number of ex-South African stars such as Andrew Hall, Lance Klusener, Nicky Boje, Dale Benkenstein and Mornantau Hayward (and current player Johan van der Wath), had all signed up to earn the big money on offer in the ICL. It was reported that these players were contracted to earn in the region of ZAR2.5 million each for a few weeks' work. The BCCI in India condemned the ICL from the outset, and made it clear in media statements that players who signed up to play would jeopardise their international careers and prospects for selection to represent India in officially sanctioned matches. Other domestic boards followed suit. New Zealand cricket (or the 'NZC'), which has probably been hardest hit by the exodus of players to the ICL, appears to have heeded a call by the ICC to domestic boards not to recognise 'rebel' players participating in the ICL for national selection. It has been reported that countries like New Zealand and Pakistan are affected most, as their players are generally not as well paid as those of countries like England and Australia (e.g. it was reported that regular England internationals could earn as much as £400 000 in a season, while a New Zealand player might earn 10% of that, and can reap as much in one month of ICL participation). While one possible solution for the NZC's dilemma would be raising the pay of their contracted players, the board was reported as having responded by threatening to exclude players who joined

⁷⁹⁴ From a report entitled 'Trio successful in county appeals', 30 April 2008, available online at <http://news.bbc.co.uk> (last accessed 7 May 2008)

the ICL. It was reported that New Zealand's star fast bowler, Shane Bond, had signed a three-year contract with the ICL for US\$ 3.1 million, even though while still under retainer with the NZC until 1 June 2008 for more than US\$ 120 000. The outcome of the Shane Bond matter, which has been referred to as an expected 'test case in an expensive legal battle that will leave all Test nations nervously awaiting the outcome', is at the time of writing unknown to the author.

Developments in this regard are also being watched closely in South Africa, with the potential for legal challenges against Cricket South Africa (Pty) Ltd's sanctions against 'rebel' ICL players (and even, in one rather interesting instance, an ex-player cricket commentator⁷⁹⁵), which, it is submitted, may be open to scrutiny on the basis of unlawful restraint of trade and/or as infringement of such players' constitutional rights.⁷⁹⁶ The ICC Board agreed on regulations regarding 'disapproved' cricket in January 2009 (which are due to be implemented from 1 June 2009), which appear to place the power to determine sanctions against disapproved competitions in the hands of domestic boards.

267 Finally, it should be noted that, in respect of employment disputes in terms of the South African labour legislation involving South African athletes competing abroad, the locality of an employee's undertaking or workplace is relevant to the jurisdiction of the Labour Court. The Labour Appeal Court⁷⁹⁷ has confirmed that the South African labour courts have jurisdiction and the Labour Relations Act applies if, in terms of the contract of employment, the locality of the employee's undertaking (workplace) is in South Africa.

⁷⁹⁵ In December 2007 it was reported that Cricket South Africa had withdrawn former national player Daryll Cullinan's media accreditation as television commentator for local pay-TV broadcaster Supersport during the West Indies tour to SA, as a result of his involvement in the ICL as coach of the 'Kolkata Tigers' team. At the time of writing it appears that the matter regarding termination of Cullinan's contract has not yet been settled by way of legal action or otherwise.

⁷⁹⁶ Specifically, the guarantee of freedom to choose an occupation or profession as contained in section 22 of the Bill of Rights - see the discussion in par 370 *et seq* below.

⁷⁹⁷ *Astral Operations Ltd v Parry* (LAC) 2008 CA8/05. This case involved the retrenchment of an employee (a South African citizen) while he was working in Malawi. The employee returned home to South Africa and brought an action against the employer for breach of contract in the Labour Court. The court had to consider whether the Labour Court has jurisdiction to hear a dispute arising from an international employment contract. The employer's argument was that the dispute arose at the workplace in Malawi and therefore the Malawian courts had jurisdiction over the contractual dispute. The employee argued that it was clear from the contract that the parties had implicitly elected South African law as the governing law and thus only South African courts had jurisdiction to hear the dispute. The LAC held that the question of jurisdiction and of which law applied were two distinct questions. While South African law governed the contract, the South African courts did not have jurisdiction. Jurisdiction was governed by the locality of the employee's workplace and where he performed the work.

This may be of particular importance to South African athletes employed abroad, as they will not be able to sue their overseas employers in South Africa under the LRA if their workplace is not situated within the Republic.

§6 The rights and duties of the respective parties to the employment contract

268 The common law and applicable employment statutes provide for certain basic rights and duties for both the employer and employee to an employment contract. While the parties may of course expressly agree to (or exclude) certain terms in this regard, the following are rights and duties implied by the common law and/or by the provisions of the labour legislation.

I The employer

A The duty to receive and retain the employee in service

269 The employer is first and foremost obliged to receive the employee into employment and to retain his services. An employer's refusal to accept the employee's tender of service would constitute a serious breach of contract.⁷⁹⁸ While the employment contract commences at the moment when the parties reach agreement on its essential terms, it was only recently settled that a repudiation of the contract by the employer prior to the date when the employee is to commence service constitutes a dismissal in terms of the definition of a dismissal as contained in the Labour Relations Act.⁷⁹⁹ Once an employee has been

⁷⁹⁸ *Kinemas Ltd v Berman* 1932 AD 246

⁷⁹⁹ The Labour Appeal Court, in *Wyeth SA (Pty) Ltd v Manqele & others* (2005) 6 BLLR 523 (LAC), settled the question and held that such a repudiation does constitute a dismissal. The earlier case of *Whitehead v*

appointed to a certain position, any unilateral change of the employee's position without his consent (even if at the same level of remuneration) would constitute a repudiation of the employment contract by the employer and would entitle the employee to pursue the normal remedies for breach of contract⁸⁰⁰ (and may even constitute constructive dismissal in terms of section 186(1)(e) of the Labour Relations Act). Due to the personal nature of the employment contract and of the services rendered by the employee, the employer cannot validly assign the contract to another party without the employee's consent.⁸⁰¹

270 This obligation of the employer to receive the employee into service does not normally include a duty to provide the employee with work,⁸⁰² although there are certain exceptions:.

Woolworths (Pty) Ltd (1999) 20 ILJ 2133 (LC) held that individuals only become employees (and can therefore only be dismissed) when they are actually working or entitled to receive remuneration from an employer. Accordingly, it was held that the claimant's only remedy in that case was a civil damages claim in the ordinary civil courts. Later Labour Court judgments held *Woolworths* was wrongly decided. In *Jack v Director-General Department of Environmental Affairs* (2003) 1 BLLR 28 (LC) the court held that it has jurisdiction to entertain a claim for relief under the Basic Conditions of Employment Act by a person who has concluded a contract of employment with his future employer, but has not yet commenced working. The employer had cancelled the contract before the employee could commence working, claiming that he had been offered the position because of an 'administrative error'. The employee sought enforcement of the contract. The court held that, although the statutory definition of 'employee' requires a person to actually work for an employer, the legislature could not have intended to exclude from the protection of the Act (the BCEA) persons who had concluded contracts with employers, but had not yet commenced working. The employer was accordingly ordered to accept the employee into employment. In a later case decided under the Labour Relations Act (*Wyeth SA (Pty) Ltd v Manqele & others* (2003) 7 BLLR 734 (LC)); the court expressly held that the *Woolworths* judgment was wrong. Manqele was appointed as a sales representative in terms of a written contract of employment with Wyeth. Just before he was due to start work the company informed him that it was no longer prepared to employ him. Manqele referred a dispute to the CCMA concerning an alleged unfair dismissal. Relying on *Woolworths*, the company took the point that he was not an employee. On appeal to the Labour Court, it was held that the approach in *Woolworths* was wrong. The court reasoned that confining the reference to the word 'work' in the statutory definition of 'employee' to work that is actually performed is not justified by the wording of the definition or the statutory attempt to protect work security. The statutory definition of 'dismissal' makes no reference to an employee, but simply requires (*inter alia*) the termination of a contract of employment by an employer. To restrict the definition of 'employee' to exclude those who have concluded a contract of employment but have not yet commenced work would be to place persons like Manqele into a 'jurisprudential limbo'. According to *Wyeth* a less than literal interpretation of the definition of employee is supported by the Constitution, which affords everyone the right to a fair labour practice. The Labour Appeal Court in *Wyeth* rejected *Woolworths* and confirmed the Labour Court (*a quo*)'s reasoning and held that, taking cognizance of section 23 of the Constitution (which provides that 'everyone' has a right to fair labour practices), the court is entitled to depart from such literal and ordinary construction and to extend the definition (of an 'employee') as including a person who has concluded a contract of employment which is to commence at a future date.

⁸⁰⁰ Sharrock 417. See the discussion of common law remedies for breach of contract in par 323 *et seq* below

⁸⁰¹ As to the application of section 197 (as amended) of the Labour Relations Act, 1995 to the position regarding the transfer of a business as a going concern, see Du Toit *et al* *Labour Relations Law* 427 *et seq*.

⁸⁰² *Turner v Sawdon* [1901] 2 KB 653; *Toerien v Stellenbosch University* (1996) 17 Industrial Law Journal 56 (C); Grogan *op cit.* 62

- Where one of the purposes of the appointment is the training of the employee;
- Where the employee's remuneration is dependent on the volume of work performed;⁸⁰³ or
- Where the employee's professional reputation would be adversely affected by not working (e.g. such as the position of a professional actor⁸⁰⁴).⁸⁰⁵

As Lewis & Taylor have argued (in the sporting context), it is unclear whether or to what extent such a duty to provide work might translate to a duty on the part of the employer to select the professional athlete employee for first team matches, although the position might be different in respect of reserve matches if the failure to allow the player time on the field might adversely affect such player's skills and match fitness.⁸⁰⁶ As the authors point out, the employer's failure to provide game time to this limited extent may give such player 'sporting just cause' to terminate his employment.⁸⁰⁷ Here it might be argued that the player employee in this position might – within very narrow limits as determined by the circumstances of the case - be able to sue for constructive dismissal in terms of section 186(1)(e) of the Labour Relations Act. This section provides that 'dismissal means that an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee'. The case law has interpreted this section to mean that the onus is

⁸⁰³ *Faberlan v McKay & Fraser* 1920 WLD 24

⁸⁰⁴ Compare also *Herbert Clayton and Jack Waller Ltd v Oliver* [1930] AC 209, HC and, in respect of the position of skilled workers, *Langston v Amalgamated Union of Engineering Workers* [1974] IRLR 15 – see Lewis & Taylor *Sport: Law and Practice* Butterworths LexisNexis 2003 at 814-815

⁸⁰⁵ *Stewart Wrightson (Pty) Ltd v Thorpe* 1977 (2) SA 943 (A); *Muzondo v University of Zimbabwe* 1981 (4) SA 755 (Z); *Sharrock supra* 417

⁸⁰⁶ Lewis & Taylor *Sport: Law and Practice supra* 815

⁸⁰⁷ *Ibid.* E.g. in football, Article 21(1)(a) of the FIFA Regulations for the Status and Transfer of Players provides for the application of sanctions and payment of compensation in cases of a unilateral breach of contract without just cause or "sporting just cause". An indication of the meaning of this term is found in the regulations, which provide that a player is entitled to terminate his contract if he can show at the end of a season that he was fielded in less than 10% of the official matches played by his club. See the discussion in Le Roux, R 'Under Starters Orders: Law, Labour Law and Sport' (2002) 23 *Industrial Law Journal* 1195 at 1203. The concept of 'sporting just cause' is also included in the regulations of the South African National Soccer League – see *McCarthy v Sundowns Football Club supra* at 195D of the judgment.

on the employee to show that the employer has committed some serious breach or grossly unfair act which goes to the heart of the employment and trust relationship between the parties, and that the circumstances are such that the employee cannot reasonably be expected to remain in the employer's employ in the circumstances. Depending on the circumstances, the employee will have to show that, before he resigned, he did attempt to resolve the problem and that the employer failed to deal with the matter at all or not reasonably – in other words, the employee had no option but to resign in order to protect his interests.

271 This last raises one particular area of interest in the South African professional sports context, namely the role of sports transformation policies in respect of an athlete's 'right to play'. Even though, as indicated, there may at best be a very limited right in this regard available to player employees, one must question the position where a player who has been contracted as part of a touring squad is excluded in selection for touring and replaced by another player on the basis of the enforcement of a racial quota or target for the representation of 'players of colour'.⁸⁰⁸ This might raise questions regarding the fairness of such conduct and/or policies by the employer (e.g. which might open the door to an unfair discrimination claim against the employer under the Employment Equity Act,⁸⁰⁹ or an 'unfair labour practice' claim under the Labour Relations Act if the dispute concerns and detrimentally affects the player in respect of 'training', the provision of benefits and/or promotion, or amounts to an unfair 'demotion').⁸¹⁰

⁸⁰⁸ Compare the events of March 2008 when South African national cricket team fast bowler Andre Nel was selected for the team's tour to India and subsequently replaced by medium fast bowler Charl Langeveldt, on the basis of Cricket South Africa's Transformation Charter which (at the time) required 7 'players of colour' in a touring squad of 14. Even though the Employment Equity Act 55 of 1998, which applies to designated employers (such as Cricket South Africa), places a duty on such employers to implement affirmative action measures for persons from designated groups (section 13(1) of the Act) – and such duty constitutes an implied term in the players' employment contract – it is unclear whether such conduct would justify any alleged infringement of a player's 'right' to selection when fit and in form. This is especially pertinent as the author has argued elsewhere that the use of demographically-based 'targets' for representation of players of colour in sports teams is in essence and in practice indistinguishable from the use of race-based quotas, which last are specifically prohibited by section 15(3) of the Employment Equity Act (see the discussion in par 83 *et seq* above).

⁸⁰⁹ See the discussion elsewhere in this section regarding the unfair discrimination provisions of the EEA

⁸¹⁰ Section 186(2) of the Labour Relations Act

Furthermore (although this issue will not be elaborated on here), one might need to consider the possible relevance of the freedom of trade, occupation and profession as contained in section 22 of the Constitution.⁸¹¹ As has been observed, this section does not only protect the right to choose one's trade, but also affords a degree of protection for the freedom to *practice* a chosen occupation.⁸¹²

B. The duty to remunerate the employee

272 At common law the employer is obliged to pay the employee remuneration at a reasonable rate, in the absence of agreement on the actual remuneration to be paid. The parties are generally free to negotiate the remuneration payable to the employee for making his or her services available to the employer, in the absence of a minimum wage prescribed in terms of a collective agreement or a sectoral or wage determination under the labour legislation. Under the common law the employment contract is viewed as a reciprocal agreement whereby the employee's duty to make his or her services available to the employer and the employer's duty to pay remuneration are reciprocal obligations, which are to be performed in exchange for one another. Accordingly, a failure by the employee to make his services available to the employer for the whole period of service in question can be met by the defence of the *exceptio non adimpleti contractus*.⁸¹³

An employee who has tendered their services to the employer is accordingly also

⁸¹¹ See the discussion in par 370 *et seq* below

⁸¹² Currie, I & de Waal, J *The Bill of Rights Handbook* 5th ed Juta & Co 2005 (at 492) observe as follows: 'It would not make sense to allow people the freedom to choose a trade, but not allow them to practice it once the choice is made and the necessary training, preparation and legal requirements have been complied with. As the German Constitutional Court has emphasised, choice and practice of an occupation "constitute poles of a continuum". The freedom to be occupationally active and to pursue a livelihood therefore involves more than the freedom to choose a trade, occupation or profession.'

⁸¹³ This defence under the common law acts as an excuse for non-performance by a party to a reciprocal contract where the other party to the contract claims performance but has not performed or tendered performance (see *Motor Racing Enterprises (Pty) Ltd (in liquidation) v NPS Electronics Ltd* 1996 (4) SA 950 (A) – the exception was successfully raised by a party to a sponsorship contract for a Formula 1 Grand Prix motor racing event at Kyalami on the basis of the event organisers' failure to perform reciprocal obligations regarding use of the sponsor's brand name, logo, circuit advertising and signage, etc). The exception does not always function as a complete defence and its working may be relaxed by the court e.g. when there has been substantial performance by the other party of their obligations under the contract and the application of the exception as an excuse for non-performance by the other party would lead to such other party being unjustly enriched as a result – see *BK Tooling (Pty) Ltd v Scope Precision Engineering (Pty) Ltd* 1979 (1) SA 391 (A).

entitled to payment of remuneration even in circumstances where the employer had no work available for the employee to perform during the period.⁸¹⁴ Also, workers who refuse to work if their employer fails to pay them are not deemed to be on strike or otherwise in breach of the contract.⁸¹⁵

The Basic Conditions of Employment Act, 1997 provides for payment of remuneration to employees in respect of a number of specific categories of remuneration, which are more or less applicable to professional athletes as the case may be (as a result of the peculiar characteristics of such employment). These include payment for overtime, meal intervals, work on Sundays, work on public holidays, annual leave, sick leave, maternity leave and family responsibility leave.⁸¹⁶ Section 34 of the BCEA also imposes restrictions on the employer's power to make deductions from the employee's remuneration. These provisions will not be discussed here. Such aspects of the employment of professional athletes are usually regulated exhaustively in the standard players' contracts which are prevalent in the major professional sports.

C *The duty to provide safe working conditions*

273 Under the common law the employer owes a duty to the employee to take reasonable care for his or her safety in the workplace. This duty has been significantly supplemented by the provisions of the Occupational Health and Safety Act, 1993 (or 'OHS Act'), which is complemented by the applicable regulations issued in terms of the Act. The fundamental duty of the employer is to provide and maintain, as far as is reasonably practicable, a working environment that is safe and without risk to the health of the employee.⁸¹⁷ The Act furthermore lists certain steps to be taken by employers to provide for the safety of

⁸¹⁴ Sharrock *op cit.* 412-413

⁸¹⁵ Grogan *op cit.* 63

⁸¹⁶ Sections 10, 14, 16, 18, 21, 22, 25 and 27 of the Act. See Sharrock *op cit.* 413-417

⁸¹⁷ Section 8(1) of the Act

employees⁸¹⁸, provides for the appointment of employee safety representatives in certain workplaces and circumstances⁸¹⁹, provides for the reporting to inspectors appointed in terms of the Act of work-related incidents involving death, serious injury or illness⁸²⁰, and provides for employees' entitlement to obtain an interdict to prevent the employer from maintaining unsafe or unhealthy workplace practices or for breaching any of its duties in terms of the Act. An employee who is covered under the Compensation for Occupational Injuries and Diseases Act, 1993 (or 'COIDA') cannot recover any damages in delict (tort) against the employer for an occupational injury or disease resulting in disablement or death. Such employee is limited to obtaining compensation under and as provided for in COIDA.⁸²¹ The employer is required to register with and make regular prescribed payments to the Compensation Fund under the provisions of COIDA.⁸²² The application of such provisions and, in fact, of the applicable common law duties, is of course not straightforward in the professional sports context. The peculiarities of sports employment require context-specific determination of the extent to which the employer's obligations should apply; e.g. in contact sports such as rugby union as opposed to the less clear-cut although potentially hazardous situations one might encounter in cricket.

D The duty not to discriminate unfairly against the employee (and the duty to implement affirmative action measures)

274 The Employment Equity Act, 1998⁸²³ aims to promote equity in employment in two primary ways, which are described in section 2 as constituting the purpose of the Act. The Act, in sections 5 and 6, commences with a

⁸¹⁸ Section 8(2) of the Act

⁸¹⁹ Section 17

⁸²⁰ Section 24

⁸²¹ Section 35 of COIDA

⁸²² See Sharrock *op cit.* 419-420

⁸²³ Act 55 of 1998

prohibition of unfair discrimination, and lists a number of specific grounds upon which discriminatory employment policies and practices will be deemed to be unfair. Section 6(1) provides that no person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age disability, religion HIV status, conscience, belief, political opinion, culture, language and birth.

275 The Act goes further, by also obligating designated employers⁸²⁴ to implement affirmative action measures to redress the disadvantages in employment experienced by designated groups⁸²⁵, in order to ensure their equitable representation in all occupational categories and levels in the workforce. It should be noted that, while the Act places a duty on designated employers to implement affirmative action measures, no employee has a 'right to affirmative action'.⁸²⁶

The EEA constitutes an embodiment of the legislature's and Constitutional Court's embracing of the concept of substantive equality, as a specific legislative measure 'designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination', in the meaning of section 9(2) of the Constitution.

Section 6(2)(b) of the EEA provides that it is not unfair to 'distinguish, exclude or prefer any person on the basis of an inherent requirement of a job'. As Grogan points out, the legislature has left it to the labour courts to fashion a test for establishing when the various 'arbitrary grounds' of prohibited unfair

⁸²⁴ A 'designated employer' in terms of section 1 of the Act is

- an employer who employs 50 or more employees or who has a total annual turnover that equals or exceeds a stipulated amount (as laid down in Schedule 4 of the Act in respect of different types of businesses);
- a municipality;
- an organ of state (excluding local spheres of government, the National Defence Force, the National Intelligence Agency and the South African Secret Service); and
- an employer bound by a collective agreement which appoints it as a designated employer.

⁸²⁵ 'Designated groups' in terms of section 1 of the Act means 'black people (i.e. Africans, Coloureds and Indians), women and people with disabilities'.

⁸²⁶ The contrary view expressed by Waglay J in *Harmse v City of Cape Town* [2003] Butterworths Labour Law Reports 557 (Labour Court) was subsequently rejected in *Dudley v City of Cape Town* (2004) 25 Industrial Law Journal 305 (Labour Court); see also Grogan *Workplace Law* 295-298.

discrimination as contained in section 6(1) of the Act can be said to be related to an inherent requirement of the job.⁸²⁷ As has been observed in the sporting context, differentiating between professional players on any of the listed grounds contained in section 6 of the Act may be justified if such differentiation relates to qualities that are peculiar to the nature of the sport and the inherent requirements for participation in it (e.g. fitness, particular physical attributes or even gender).⁸²⁸

Chapter III of the EEA, which deals with affirmative action measures, places a duty on designated employers to do a number of things, which include consultation with employees regarding equity issues (section 16), conducting an organisational analysis of the representation of designated groups in the workplace and the compliance of employment policies and practices (section 19), preparing an employment equity plan (section 20), and reporting to the Director-General of the Department of Labour annually on the implementation of such plan (section 21).

276 Section 15 of the Act deals specifically with the concept of affirmative action. Section 15(1), however, is rather vague in its definition of what this entails. It states that affirmative action measures are measures 'designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer'. The determination of under-representation of designated groups is central to the formulation of numerical goals – the yardstick of 'equitable representation' is the primary determinant of not only the extent of such goals but also whether their existence is in fact justified at all. Section 42 of the EEA lists a number of indicators to be used in assessing an employer's compliance with the Act, and specifically the determination of whether designated groups are equitably

⁸²⁷ See, generally, Grogan *Workplace Law* 298-300

⁸²⁸ Jordaan in Basson & Loubser *Sport and the Law in South Africa* supra Ch 8-8

represented in a specific workplace and the legitimacy of targets set. These include the following:

- The demographic profile of the national and regional economically active population;
- The pool of suitably qualified persons from designated groups from which the employer may reasonably be expected to promote or appoint employees;
- Economic and financial factors relevant to the sector in which the employer operates;
- Present and anticipated economic and financial circumstances of the employer; and
- The number of present and planned vacancies that exist in the various categories and levels, and the employer's labour turnover.

Sections 15(2) and (3) continue to state, more specifically, what affirmative action measures must include. Chapter III of the Act, therefore, prescribes an institutional analysis of the relative representation of different racial and gender groups within the organization of a designated employer, the identification of underrepresented groups, the setting of goals for the improvement of such groups' representation, and the implementation of affirmative action measures to achieve such goals.

277 The Employment Equity Act, 1998 has not been universally welcomed, and has been the subject of criticism regarding its somewhat dubious introduction of a statistical measure such as 'demographic representativity' as yardstick for the achievement of equality in the workplace.⁸²⁹ Others have criticized this piece of

⁸²⁹ Brassey 'The Employment Equity Act: Bad for employment and bad for equity' 1998 *Industrial Law Journal* Vol 19 Part 6 1359; Louw, A M 'Extrapolating "equality" from the letter of the law: The limits of affirmative action under the Employment Equity Act' (2006) 18 *South African Mercantile Law Journal* 336; Louw, A M

legislation, the first post-1994 statute in South Africa to contain reference to and in fact to promote racial classification of persons, as inimical to the new, non-racial, democratic order. Be that as it may, the Act applies to the federations in the major South African professional sports (as well as other employers such as the Premier Soccer League clubs, Super 14 rugby and domestic cricket franchises) as designated employers in the meaning of section 1 of the Act. The reporting and other requirements regarding the drafting of 'equity plans' accordingly apply to such employers. What is less clear is to what extent sports transformation measures that have been implemented by sports federations to date are consonant with the Act's provisions – the reader is referred to the more detailed discussion of the race-based transformation of South African (professional) sport elsewhere in this chapter. While race-based quotas have frequently been employed in top level rugby and cricket teams, it appears that the Employment Equity Act itself prohibits the use of quotas as opposed to numerical targets or goals regarding the representation of designated groups in the workplace.⁸³⁰ It should also be noted that the application of affirmative action in terms of the EEA is different to a 'straight quota system', in that the EEA refers to the application of affirmative action measures in respect of 'suitably qualified' persons from the designated groups. This means that race is not the sole determining factor (the affirmative action candidate must be suitably qualified), so appointing a person just because s/he is 'black' or female alone is not permitted. The employer must

'Should the Playing Fields be Levelled? Revisiting Affirmative Action in Professional Sport' 2004 *Stellenbosch Law Review* Vol. 15 No 1 119, Vol. 15 No 2 225, Vol. 15 No 3 409

⁸³⁰ Section 15(2)(d) reads as follows: 'Affirmative action measures implemented by a designated employer must include ... subject to subsection (3), measures to ... ensure the equitable representation of suitably qualified people from designated groups in all occupational categories and levels in the workforce ...'

Section 15(3) states that 'the measures in subsection (2)(d) include preferential treatment and numerical goals, but exclude quotas'.

While section 15(4) states that '[n]othing in this section requires a designated employer to take any decision concerning an employment policy or practice that would establish an absolute barrier to the prospective or continued employment or advancement of people who are not from designated groups', it is submitted that the wording of section 15(3) is not merely negatively permissive but constitute an express prohibition on the use of quotas as an affirmative action measure. A possible interpretation of section 15(3) read with 15(2)(d) is that the legislature has simply indicated that the measures prescribed in order to achieve the goal (of ensuring equitable representation of suitably qualified people from designated groups) do not include quotas, although quotas are still permissible as long as they are designed to achieve this goal. However, it is submitted that the preferable interpretation is the following: Section 15(2)(d) states that measures to ensure this goal of equitable representation must be taken, and this includes any and all possible measures designed to this end. However, this prescription is *subject to section 15(3)*, which explicitly states that *the measures referred to* in 15(2)(d) (therefore all possible measures to achieve the goal) exclude quotas. Therefore, the two subsections read together constitute an express prohibition on quotas.

also show that the person is 'suitably qualified' to do the job and that the affirmative action decision does not jeopardize the efficient and effective running of the undertaking, especially if it is a public enterprise.⁸³¹ The cases show that the courts will balance considerations of efficiency and important operational needs of an enterprise with those of representivity. If there is a tension between the two ideals, the court will attempt to strike a balance between these interests.⁸³² It is submitted that an analogy can be drawn in respect of the application of affirmative action in sport (as argued elsewhere in this chapter). Very little analysis has been done of the role and place of the Employment Equity Act in professional sport, and no more will be said here in this regard. The reader is referred to the relevant sections of this chapter which deal with the key issue of race-based sports transformation in South Africa post 1994. It should also be noted, however, that another piece of legislation, the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 ('PEPUDA' or 'the equality Act')⁸³³ is an important equality statute which was published to further the provisions of the fundamental right of equality as contained in section 9 of the Bill of Rights. PEPUDA also contains anti-discrimination provisions linked with prohibited grounds of unfair discrimination, and applies in all situations where the Employment Equity Act does not apply (i.e. PEPUDA may also be invoked by persons not protected under the EEA, e.g. independent contractors and others). The application of the

⁸³¹ See the preamble to the EEA, which refers to the promotion of economic development and efficiency in the workforce. See also *Coetzer & Others v Minister of Safety and Security & Another* (2003) 24 ILJ 163 (LC), which held that the state's obligation is not merely to improve representivity of black persons in the public service, but also to ensure that other constitutional imperatives, such as maintenance of an efficient public service, are complied with. The individual applicants in *Coetzer* were all highly trained (white) bomb squad unit employees in the South African Police Services (or SAPS). They applied for promotion posts in the unit but were not considered despite the fact that some of the posts were vacant, because there were no suitable candidates from the designated groups. It was common cause that the SAPS's refusal to appoint them was based purely on the need for promoting representivity in the service. The applicants were therefore excluded on the basis of their race. The court held that the employer must also show that its affirmative action measures/decisions are in harmony with its other obligations (in this case the state's constitutional imperative to provide an efficient service). A balance must therefore be struck between these imperatives. No evidence was led that the employer had considered the efficiency imperative at all. Accordingly the court held that the employer had failed to show that its decision not to appoint the applicants met the requirements for a successful reliance on the affirmative action defence. See also *PSA obo Karriem v SAPS & Another* (2007) 4 BLLR 308 (LC), where the needs of the enterprise required the appointment of an employee who was immediately skilled, while the relevant affirmative action candidate would have needed 16 to 36 months to fully acquire the skills for the post.

⁸³² See also *Stoman v Minister of Safety and Security* (2002) 23 ILJ 1020 (T)

⁸³³ Act 4 of 2000

Act is wide; for example, the Cape Town equality court⁸³⁴ was recently confronted with a claim by a juristic person that it was unfairly discriminated against on the basis of race in not being awarded civil engineering contracts. The court held that a juristic person is capable of being unfairly discriminated against on the ground of race (and that its racial profile is determined by the racial profile of its controlling shareholders).⁸³⁵

278 Furthermore, regarding the ambit of the Employment Equity Act and the protections which it affords to employees, it should be noted that the Act also regulates medical and psychological testing in the workplace.⁸³⁶ Section 7 of the EEA provides as follows:

's7(1) Medical testing of an employee is prohibited unless

- (c) legislation permits or requires the testing; or
- (d) it is justifiable in the light of medical facts, employment conditions, social policy, the fair distribution of employee benefits or the inherent requirements of a job.'

It is submitted that mandatory drug testing and other counter-doping measures do not violate the provisions of section 7 of the EEA.⁸³⁷ It should also be noted that specific provisions may be included in the rules of professional sports leagues in respect of subjecting the validity of players' employment contracts to medical testing (compare the following provisions of the National Soccer League Rules):⁸³⁸

'35.10 The validity of an employment contract between a player and a club cannot be made conditional upon the positive results of a medical

⁸³⁴ A number of equality courts have been set up in order to hear disputes (e.g. claims of unfair discrimination) in terms of the Act

⁸³⁵ *Manong & Associates (Pty) Ltd v City Manager, City of Cape Town & Others* 2009 (1) SA 644 (EqC)

⁸³⁶ Sections 7 and 8 of the Act

⁸³⁷ For more on drug testing and doping control in South African sport, see par 127 *et seq* above.

⁸³⁸ As amended 17 June 2008

examination or upon the acquisition of a work permit. The player's prospective new club will accordingly be required to make any necessary investigations, studies, tests and/or medical examinations or to take any appropriate action before concluding the contract.

35.11 After the signing of an employment contract, no club may avoid liability to pay the full amount of the salary due on the basis of facts revealed by any investigations of the sort contemplated by rule 35.10 above.'

Finally, section 7(2) of the Act deals specifically with testing for HIV and AIDS and states that testing of an employee in order to determine their HIV status is prohibited unless such testing is determined to be justifiable by the Labour Court in terms of section 50(4) of the Act. By way of summary, and in terms of these provisions of the Employment Equity Act as read with the *Code of Good Practice on Key Aspects of HIV/AIDS and Employment* (2000),⁸³⁹ the position regarding HIV testing in the workplace is as follows:

In certain situations the employer must obtain prior Labour Court approval for such testing, namely in the event of:

- Pre-employment testing;
- Testing as a condition for employment;
- During procedures related to termination of employment;
- As an eligibility requirement for training or staff development programmes; or
- As an access requirement to obtain employee benefits.⁸⁴⁰

⁸³⁹ As issued by the South African Department of Labour in terms of section 54 of the Employment Equity Act 55 of 1998

⁸⁴⁰ Par 7.1.4 of the *Code of Good Practice* supra

In certain situations the employer may test if such testing is justifiable, i.e. the Labour Court must give prior approval of such testing or otherwise condone such testing upon application after the fact. The factors to be taken into account by the Labour Court include the following (note that these are not a closed list):

- Medical facts (e.g. how invasive is the test?)
- The inherent requirements of the job
- Pre- and post-test counselling
- The categories of jobs / workers to be tested
- Confidentiality of results

In certain cases the employer may test without Labour Court approval:

- At the request of the employee, e.g. as part of health care service in the workplace or in case of an occupational accident.⁸⁴¹ In both such instances such testing must follow the South African Department of Health's *National Policy on Testing for HIV*;⁸⁴²
- Where there is informed consent - this would constitute either a waiver of the protection of sec 7(2) of the Employment Equity Act or a waiver of the fundamental right to bodily and psychological integrity as guaranteed in sec 12(2) of the Constitution;
- Where testing is both voluntary and anonymous.⁸⁴³

⁸⁴¹ See Par 7.1.5 of the *Code of Good Practice* supra

⁸⁴² SA Department of Health *National Policy on Testing for HIV* (issued in terms of the National Policy for Health Act 116 of 1990)

⁸⁴³ See, generally, *Joy Mining Machinery v NUMSA & Others* (2002) 23 ILJ 391 (LC); *Irvin & Johnson Ltd v Trawler & Line Fishing Union & Others* [2003] 4 BLLR 379 (LC); *PFG Building Glass (Pty) Ltd v CEPPAWU* [2003] 5 BLLR 475 (LC); SA Department of Labour *HIV/AIDS Technical Assistance Guidelines* Chapter 2 par. 2.2; Basson, A in (Strydom, ed.) *Essential Employment Discrimination Law* Juta 2004 at 203-216

II The employee

A *The duty to enter into and remain in service*

279 The employee's main obligation under the common law contract of employment is to place their personal services at the disposal of the employer, and in light of the reciprocal nature of the contract as referred to *supra*, the tender of such services is a pre-requisite to the employee's right to claim remuneration from the employer.⁸⁴⁴ Failure of the employee to render services entitles the employer to deduct from the employee's wages an amount proportional to the absence. It is less clear-cut whether absence from work entitles the employer to cancel the contract on the basis of breach of contract, and determination of this question depends on the facts of each case. No universal test can be derived from disparate decisions in cases of this nature, although the courts tend to consider the following factors in order to determine whether an employee's absence constitutes a breach of a vital term of the contract:⁸⁴⁵

- The nature of the employee's work (i.e. dismissal might be justified where the employee's work is of especial strategic importance);
- Whether the employee's absence disrupted the normal course of the employer's business;
- The length of the employee's service;
- The reason for the employee's absence (i.e. whether such absence was willful or due to circumstances beyond the employee's control);
- The duration and frequency of the employee's absences; and
- The provisions of any applicable disciplinary code in the workplace.

⁸⁴⁴ *Smit v Workmen's Compensation Commissioner* 1979 (1) SA 51 (A); *Grogan Workplace Law* 52

⁸⁴⁵ *Grogan Workplace Law* 52-53

Under the Labour Relations Act, absence from work may be treated as either a form of misconduct or as incapacity; depending on the reason for such absence.⁸⁴⁶

Under the common law, the employee's absence due to ill health or incapacity is treated as due to *vis maior* and provides the employer with a choice to elect to terminate the contract on the basis of supervening impossibility of performance in appropriate circumstances.⁸⁴⁷ It should be noted that the (un)fairness of an employee's dismissal should be considered in light of the guidelines provided in the *Code of Good Practice: Dismissal* issued in terms of the Labour Relations Act, 1995 and, specifically, that dismissals for misconduct and incapacity are to be treated differently. Dismissals for incapacity are treated as 'no fault'-dismissals, which are due not to the fault of the employee. Accordingly, a special procedure is prescribed by the Code for such cases (which includes *inter alia* an obligation on the part of the employer to consider alternatives to dismissal and to attempt to accommodate the employee in another job or capacity within the workplace).⁸⁴⁸

280 . Players' employment contracts will usually contain provisions which exhaustively regulate the rights of the parties to the contract in the event of injury or other form of incapacity. Such provisions would usually be coupled with income replacement or protection insurance schemes in order to provide injured players with a source of income for the duration of their injury or incapacity, as well as regulating payment of monthly contributions to such scheme by the employer.

For example, the 2008 Standard Players' Contract in rugby in force between provincial unions and players (as negotiated between SARPA⁸⁴⁹ and SAREO⁸⁵⁰) provides that the contract of employment is conditional upon the player passing a

⁸⁴⁶ Grogan *op cit* 53

⁸⁴⁷ *Ibid.*

⁸⁴⁸ For more on the provisions of the Code in respect of dismissal for incapacity or ill health, see Grogan *Workplace Law* 216 et seq.

⁸⁴⁹ South African Rugby Players' Association, the registered trade union which represents the majority of professional rugby players and which is the recognised collective bargaining agent for professional rugby players in terms of the provisions of the Labour Relations Act 66 of 1995

⁸⁵⁰ South African Rugby Employers' Organisation, the registered employers' organisation which represents the 14 provincial rugby unions which employ professional rugby players and which is the recognised collective bargaining agent rugby employers in terms of the provisions of the Labour Relations Act 66 of 1995

medical and fitness examination prescribed by the province,⁸⁵¹ and the player warrants that he has no illness or injury that could affect his performance under the contract (other than any condition disclosed to the employing province in terms of the agreement).⁸⁵² The player is furthermore obliged⁸⁵³ to participate in an income replacement insurance scheme, medical scheme and retirement benefits as set out in the collective agreement between the players' association and the employers' organization.⁸⁵⁴

B The duty to exercise reasonable skill and diligence

281 In terms of the common law an employee is deemed to impliedly guarantee that s/he can perform the tasks s/he has agreed to perform, and that such tasks will be carried out with reasonable efficiency.⁸⁵⁵ Employees may be held bound by any representations made prior to employment to the employer regarding their abilities, and the standard of competence that an employer is entitled to expect is that of persons comparable with the employee having regard to training, experience and any special claims the employee may have made regarding their competence.⁸⁵⁶ While the reasons for an employee's incompetence appear to be irrelevant at common law⁸⁵⁷, it should be noted that the labour legislation prescribe certain procedures to be followed before an employee can be dismissed for poor work performance.⁸⁵⁸ Such dismissal may proceed on the basis

⁸⁵¹ Clause 9

⁸⁵² Clause 10

⁸⁵³ In terms of clauses 19 and 20 of the 2008 Standard Players' Contract

⁸⁵⁴ The 2008 Collective Agreement between SARPA and SAREO (to which the Standard Players' Contract is annexed as a First Schedule)

⁸⁵⁵ Grogan *Workplace Law* 54 and the authorities cited there

⁸⁵⁶ *Ibid.*

⁸⁵⁷ Grogan *op cit.* at 55

⁸⁵⁸ According to the *Code of Good Practice: Dismissal*, issued in terms of the Labour Relations Act, 1995, any person who considers whether a dismissal for poor work performance was unfair must consider

'(a) whether or not the employee failed to meet a performance standard; and

(b) if the employee did not meet a required performance standard whether or not –

(i) the employee was aware, or could reasonably have been expected to have been aware, of the required performance standard;

(ii) the employee was given a fair opportunity to meet the required performance standard; and

(iii) dismissal was an appropriate sanction for not meeting the required performance standard.'

of section 188(1)(a)(i) of the Labour Relations Act, which allows an employer to dismiss an employee for a fair reason related to the employee's capacity. The Code of Good Practice: Dismissal, issued in terms of the Labour Relations Act distinguishes in cases of incapacity between incapacity due to ill health and injury and incapacity due to poor work performance.⁸⁵⁹ More will be said on this in the section on dismissal below (specifically also of the relevance of the different forms of incapacity in respect of players in professional team sports).

Furthermore it should be noted that players' employment contracts may include performance clauses dealing specifically with the required performance standards set for such players and/or which may make the level of remuneration of the employee dependent on the standard of on-field performance (e.g. also in respect of match or win bonuses).

C *The duty to serve the employer in good faith*

282 The employee's duty to serve the employer in good faith includes a number of facets:

- The employee must devote all his working hours to furthering the employer's interests, and may not work against those interests (e.g. by conducting unauthorized business during working hours or working for a competitor of the employer). This includes a duty not to become involved in spare-time activities that prevent him from carrying out his duties in the workplace.⁸⁶⁰ As referred to elsewhere, this specific aspect of the employee's duties towards the employer is often regulated extensively by means of specific provisions in players' contracts in respect of prohibited

⁸⁵⁹ Although incapacity can of course also be due to reasons other than these two mentioned categories, e.g. incompatibility (i.e. an inability on the part of an employee to work in harmony either within the 'corporate culture' of the business or with fellow employees – see Du Toit et al *Labour Relations Law* supra 402).

⁸⁶⁰ Sharrock *supra* 409

free-time activities (such as participation in extreme sports) that carry a risk of injury to the player;⁸⁶¹ also, there may be a measure of overlap in respect of the employee's duties to the employer and such player employee's duties to other parties such as sponsors in respect of e.g. endorsement contracts, where other activities (e.g. that relate to public drunkenness, recreational drug use or sexual impropriety) may be prohibited in light of the value of maintenance of the player's good reputation for endorsement purposes.

It is interesting to speculate as to the role of the common law duty of good faith in respect of players' participation, while under contract with a club, franchise or union, in other leagues or competitions. While player contracts may contain express terms which attempt to prevent such players from playing in particular circumstances during the term of the contract or which attempt to curtail their freedom after the contract has come to an end, such provisions may be open to testing in terms of the doctrine of restraint of trade or on other grounds.⁸⁶² As has been observed, however, the employee's duty of loyalty to his or her employer may leave little room for a complaint of restraint of trade in respect of such provisions during the term of the agreement.⁸⁶³ Elsewhere in this chapter there is discussion of the (at the time of writing) current issues surrounding Cricket South Africa's apparent banning of cricketers who have participated in the 'rebel' Indian Cricket League from participation in the domestic professional competition in South Africa or from eligibility for selection to the national side (such 'ban' apparently based on the relevant domestic franchises' refusal to release the players under their contracts for participation in the

⁸⁶¹ Compare clause 17.10 of the 2008 Standard Players' Contract in rugby currently in force between provincial unions and players, which places a duty on players to refrain from 'participating in any hobby or sport which would ordinarily be regarded as highly dangerous or which involves a significant risk of personal injury. Examples of such hobbies or sports include, without limitation, rock-climbing, bungee jumping, sky-diving, water skiing, white water rafting, skateboarding, hang-gliding, quad-biking and motor-racing.'

⁸⁶² E.g. in the South African context, on the basis of the freedom of trade, occupation and profession as contained in section 22 of the Bill of Rights – see the discussion elsewhere in this chapter

⁸⁶³ See Lewis & Taylor *Sport: Law and Practice* supra 812

ICL). It is interesting to speculate as to the legitimacy of such player restrictions in light of the nature of international cricket, and especially whether such restrictive practices are legitimate in light of the short duration of a competition such as the ICL and, especially, where such participation is in overseas competitions which may be viewed as being out-of-season in terms of the domestic game. It is submitted that this exercise would require weighing up the employers' interests against the nature of the professional cricket labour market and players' rights to pursue employment elsewhere (where such alternative employment does not directly infringe on the rights or interests of the employer);

- The employee may not appropriate the employer's property to himself or make unauthorized use of it for a private enterprise;⁸⁶⁴
- The employee may not use confidential information acquired during the course of his employment for his own benefit, or disclose such information to competitors (also following termination of the employee's employment). This prohibition does not relate to the employee's own knowledge or skills (even if acquired during employment with the employer) or to information that is generally known in the trade.⁸⁶⁵ The information must be confidential, although this is a wide category of information and there are various types of information which have been held by the courts to constitute confidential information.⁸⁶⁶ In the sports context, this duty may be less applicable to players in most cases, although coaches and team managers may often be in possession of confidential information regarding team strategies, game plans, and even information regarding the fitness levels of or injuries to players at any given time. It is submitted that e.g. the disclosure of such confidential information to competitors or others (e.g. bookmakers in a cricket match-fixing scenario) may constitute breach

⁸⁶⁴ *Ibid.*

⁸⁶⁵ *Ibid.*

⁸⁶⁶ *Meter Systems Holdings Ltd v Venter & Another* 1993 (1) SA 409 (W)

of the common law duty of an employee. This is especially poignant if one notes that another facet of the employee's duty of good faith relates to employees who are in a fiduciary position *vis a vis* their employer (i.e. in a position of trust and confidence). Such an employee may not place himself in a position where his own interests conflict with those of his employer, where he receives a secret profit at the expense of the employer or where he receives a bribe or commission from a third party by reason of his employment with the employer.⁸⁶⁷ The existence of a fiduciary relationship is a question of fact and such a relationship is not limited to managerial employees but may include others with a measure of discretionary power.⁸⁶⁸

D : The duty to obey the employer's instructions

283 The employee is under a common law duty to obey the reasonable and lawful instructions of the employer, and to behave in a respectful manner to the employer or other superiors. The refusal to obey a reasonable and lawful command may constitute insubordination, which at common law would justify summary dismissal of the employee if the refusal to obey the instruction or request is willful and serious. Persistent insolence (i.e. mere disrespect of the employer) may justify summary dismissal, as may an isolated instance which is of a very aggravated nature.⁸⁶⁹

It is submitted that, while instances of insubordination may occur in the professional sporting context, it is debatable to what extent the willful refusal by a

⁸⁶⁷ Sharrock *supra* 410

⁸⁶⁸ *Ibid.* In *Phillips v Fieldstone Africa (Pty) Ltd & Another* 2004 (3) SA 465 (SCA) the court held that the following factors are relevant to determining whether a relationship is a fiduciary one:

- 1) Whether the employee had scope for the exercise of some discretion or power;
- 2) Whether that discretion or power can be used unilaterally to affect the beneficiary's legal or practical interests; and
- 3) Whether there existed a peculiar vulnerability to the exercise of that discretion or power.

⁸⁶⁹ Sharrock *supra* 411

player to obey the instructions of coaching staff on the field of play during a match would justify dismissal. The exigencies and characteristics of dynamic on-field performances may make it very difficult to prove that the player's conduct constituted a willful refusal to perform in terms of e.g. a game plan or strategy of play. It is less clear whether blatantly unlawful conduct by a player on the field of play (e.g. attacking a spectator or certain instances of brawling with opponents) may constitute grounds for inferring a refusal to obey an implied instruction by the employer to refrain from unlawful play, thus constituting grounds for summary dismissal on the basis of breach of the common law duty. This would depend on the circumstances of any given case.

E *The duty to refrain from misconduct*

284 There is a general duty on the employee to refrain from misconduct (over and above the specific duties discussed above), which includes drunkenness, idleness or sleeping on the job, and lying to the employer. Negligent conduct by the employee may suffice to constitute misconduct. Misconduct need also not be directed at the employer himself (e.g. sexual harassment of a co-employee would constitute misconduct).⁸⁷⁰

The employer's remedies for the employee's misconduct may vary according to the provisions of the contract of employment as well as the degree of seriousness of the misconduct, between disciplinary action short of dismissal (e.g. a warning) or dismissal. It should be noted that the Labour Relations Act allows for an employee to be fairly dismissed on the basis of misconduct. The reader is referred to par 286 *et seq* below for discussion of the requirements in this regard.

Apart from the applicable implied common law duty to refrain from misconduct as contained in the employment contract, it is important to note also that the rules of

⁸⁷⁰ Sharrock *supra* 411-412

sports organisations often (invariably) also place a duty on professional athletes to refrain from 'bringing the sport into disrepute', what has been described as often functioning as a 'catch all' provision designed to cover misconduct which is not specifically provided for in more focused rules (and often including misconduct off the field of play and strictly speaking outside the player employee's direct employment).⁸⁷¹ As has been observed, there may be different standards for different sports and even that a different level of behaviour may be expected from players in different positions; accordingly, it is important that such a rule should be applied consistently by a disciplinary committee.⁸⁷²

285 Furthermore, the employment contract may of course also contain specific provisions regarding misconduct as well as sanctions for such misconduct. By way of example, the 2008 Standard Players' Contract in rugby in force between provincial unions and players (as negotiated between SARPA⁸⁷³ and SAREO⁸⁷⁴) contains the following Annexure ('Annexure VI: Disciplinary Code and Procedure'):

DISCIPLINARY CODE AND PROCEDURE

1. Purpose

- 1.1. The purpose of this code is to inform Players of the standards of conduct required of them, and to assist administrators to apply discipline in a fair manner.
- 1.2. The Code will not be applied in an inflexible manner. In particular, the merits of each case will be considered.

⁸⁷¹ See Lewis, A & Taylor, J *Sport: Law and Practice* Butterworths LexisNexis 2003 at 61-62

⁸⁷² *Ibid.*

⁸⁷³ South African Rugby Players' Association, the registered trade union which represents the majority of professional rugby players and which is the recognised collective bargaining agent for professional rugby players in terms of the provisions of the Labour Relations Act 66 of 1995

⁸⁷⁴ South African Rugby Employers' Organisation, the registered employers' organisation which represents the 14 provincial rugby unions which employ professional rugby players and which is the recognised collective bargaining agent rugby employers in terms of the provisions of the Labour Relations Act 66 of 1995

2. Principles

2.1.1. Players have rights and responsibilities. They are entitled to be treated fairly, and the Province is entitled to expect satisfactory conduct and performance.

2.1.2. The Provinces endorse the corrective approach to discipline. They will seek to address unacceptable conduct through counseling and warnings, and will only impose disciplinary suspension or dismissal where Players are guilty of serious misconduct have not responded to corrective disciplinary measures.

3. Misconduct and Action to be Taken

3.1. Counseling

The purpose of counseling is to advise the Player that his conduct is unacceptable and to secure his undertaking to address it. Unless the situation demands otherwise, the Province will always consider the use of informal counseling prior to other disciplinary action.

3.2. Warnings

Depending on the seriousness of the offence, and taking all circumstances into consideration, the Province may issue a verbal warning, a written warning or a final written warning. The Province shall ask the Player for his side of the story before issuing a warning.

The person issuing the disciplinary warning must decide the period for which the warning will be valid. The following will be used as a guideline: verbal and written warnings will remain valid for up to 6 months, and final written warnings for up to 12 months. An expired warning may be taken into account

as an aggravating factor where a pattern of misconduct has been established, and in cases of serious misconduct.

3.3. Termination of Service

A Player's services may be terminated where the Player is found guilty of misconduct justifying dismissal under the Code of Good Practice: Schedule 8 Labour Relations Act 66 of 1995.

Save in exceptional circumstances, a disciplinary hearing must precede termination of services. The purpose of a disciplinary hearing is to enable the Province to: establish the facts; reach a fair decision regarding the players' guilt; and decide on an applicable sanction.

A disciplinary hearing should comply with the following principles –

- i) The Chairperson of the hearing must be unbiased. If practicable, the Chairperson should be a person who was not directly involved in the incident. However, there is no duty upon the Province to use an outside Chairperson.
- ii) A Player must be notified in writing of the alleged offence, and the date, time and venue of the hearing. Written notification must be given to the Player at least three working days before the date of the hearing. Should the Player require additional time, he must request a postponement in good time, setting out why the time is insufficient and how much time he needs. The request must be directed to the CEO of the Province.
- iii) At the hearing a Player may be represented by an official of SARPA or a fellow Player, the Player's registered agent or manager, or a fellow player. For the purposes of this clause, a fellow Player means a Player who is employed by the same Province.⁸⁷⁵

⁸⁷⁵ It should be noted that even if a disciplinary code does not expressly permit legal representation, or its wording, as here, implies no legal representation, a disciplinary chairperson must still entertain applications to be represented by a legal representative and permit it if it would be unfair not to permit it. The chairperson,

- iv) Should the hearing be conducted in a language with which the Player is not fully conversant, the Player shall be entitled to an interpreter.
- v) The Player shall be entitled to call witnesses of his own, and will be given an opportunity to cross-examine any witnesses that the Province calls.
- vi) After the hearing the Province must communicate the Chairperson's decision to the Player in writing.

3.4. Sanctions

Before imposing a sanction for misconduct the Province will take into consideration the guidelines set below.

GUIDELINES FOR IMPOSITION OF SANCTIONS

NATURE OF MISCONDUCT	SANCTION
<p>1. VERY SERIOUS OFFENCES INCLUDE OFFENCES SUCH AS:</p> <p>1.1. Dishonesty of any nature, for example, theft, bribery, fraud, falsification, forgery.</p> <p>1.2. Misrepresentation or false declaration of any nature.</p> <p>1.3. Use or disclosure of confidential information relating to the Province or another Player.</p>	<p>Dismissal</p> <p>Dismissal</p> <p>Dismissal</p>

when considering the application, may take into account relevant issues, including whether the matter will deal with complicated issues of fact or law, the relative abilities of the parties etc – see *Hamata and Another v Chairperson, Peninsula Technikon Internal Disciplinary Committee and Others* 2002(7) BCLR 756 (SCA).

<p>1.4. Assault, intimidation, harassment of, or threats to, employees of the Province, supporters etc.</p>	<p>Dismissal</p>
<p>1.5. Bringing or attempting to bring the name of the Province into disrepute.</p>	<p>Dismissal</p>
<p>1.6. Refusal without good reason to obey lawful and reasonable instructions.</p>	<p>Dismissal</p>
<p>1.7. Absence from work without permission and/or not advising the Province for a period of 5 or more consecutive working days without good reason.</p>	<p>Dismissal</p>
<p>1.8. Willful or malicious damage to property of the Province and/or of fellow Players.</p>	<p>Dismissal</p>
<p>1.9. Willful non-performance.</p>	<p>Dismissal</p>
<p>2. SERIOUS OFFENCES INCLUDE OFFENCES SUCH AS:</p>	
<p>2.1. Being under the influence of drugs or intoxicating liquor (excluding drugs prescribed by a medical practitioner to remedy a medical condition).</p>	<p>Final warning</p>
<p>2.2. Being rude, abusive or unapproachable and exhibiting other disruptive behavior that affects the relationship with colleagues and the Province.</p>	<p>Final warning</p>

<p>2.3. Failure to adhere to the Province's laid-down procedures, policies, rules and regulations that apply from time to time.</p>	<p>Final warning</p>
<p>3. LESS SERIOUS OFFENCES INCLUDE OFFENCES SUCH AS:</p> <p>3.1. Failure to use the Grievance Procedure and instead, discussing grievances with third parties / non-involved Players.</p> <p>3.2. Extended breaks, late arrival / early departure.</p> <p>3.3. Short absences from work without a valid reason or permission.</p>	<p>Written warning</p> <p>Written warning</p> <p>Written warning</p>

§7 Termination of the contract

I Termination by the employer

286 At common law a contract can be lawfully terminated in whatever way the contract provides (e.g. the giving of the requisite notice where such notice is provided for in the contract would not amount to breach). Acceptance of repudiation of his or her obligations by the other party to the contract would also bring the contract to an end. In terms of the common law contract of

employment, the employer would also be entitled to summarily dismiss the employee in cases of serious breach of such employee's duties (e.g. for willful and serious insubordination). These common law rights in respect of termination of the employment contract must however be read in light of the requirement of fairness deriving from the labour legislation and which infuses the relationship. In terms of the Labour Relations Act the dismissal of an employee must be both for a fair reason and in terms of a fair procedure. A fair reason in terms of the Act entails a reason related to the employee's conduct or capacity or the operational requirements of the business.

287 'Dismissal' is defined in the LRA⁸⁷⁶ as including the following situations:

- Where an employer has terminated a contract of employment with or without notice;
- Where an employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it;⁸⁷⁷
- Where an employer refused to allow an employee to resume work after she took maternity leave in terms of any law, collective agreement or her contract of employment;
- Where an employer who dismissed a number of employees for the same or similar reasons has offered to re-employ one or more of them but has refused to re-employ another; or

⁸⁷⁶ Section 186

⁸⁷⁷ As has been observed, the origin of this ground for unfair dismissal in the Labour Relations Act is found in the previous unfair labour practice as developed by the erstwhile industrial courts. Under the common law, the failure or refusal to renew a fixed-term contract was not open to challenge by the employee, even if there were indications that the contract would be renewed, provided the employer had provided the required notice. This practice was open to abuse by employers. With the introduction in 1979 of the unfair labour practice doctrine in the then Labour Relations Act of 1956, the courts started to require the employer to provide a good reason for the non-renewal of the contract, and this concept of fairness in the context of this type of dismissal was eventually incorporated in the right to fair labour practices contained in section 23 of the Bill of Rights as well as the Labour Relations Act 66 of 1995 – Le Roux 2006/1-2 *International Sports Law Journal* 56 at 57. This form of dismissal, which is especially relevant in the context of professional sport (and the prevalence of fixed-term player contracts), will be examined in more detail below

- Where an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee (so-called 'constructive dismissal').

- **288** The employee bears the onus of proving that a dismissal within the above meaning of section 186 of the LRA has taken place, and once such a dismissal has been established, the employer bears the onus of establishing that such dismissal was both substantively (i.e. for a reason related to the employee's conduct, capacity or the operational requirements of the business) and procedurally fair. Section 187 marks certain forms of dismissal to be automatically unfair. These include a dismissal based on the employee's participation in protected strike action,⁸⁷⁸ a dismissal aimed at compelling an employee to accept the employer's demand in respect of any matter of mutual interest between the employer and the employee,⁸⁷⁹ a dismissal based on the employee's taking action or indicating an intention to take action against the employer by exercising any right conferred by the LRA or for participating in any proceedings in terms of the LRA,⁸⁸⁰ a dismissal based on an employee's pregnancy, intended pregnancy or any reason related to her pregnancy,⁸⁸¹ and a dismissal where the reason for such dismissal is that the employer unfairly discriminated against the employee, directly or indirectly, on any arbitrary ground (including, but not limited to, race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility).⁸⁸² In terms of this last, section 187(2) provides that a dismissal may be fair if the reason for such dismissal is based on an inherent requirement of the particular job, and that a dismissal based on age is fair if the employee has reached the normal or agreed retirement age for persons employed in that capacity.

⁸⁷⁸ Section 187(1)(a)

⁸⁷⁹ Section 187(1)(c)

⁸⁸⁰ Section 187(1)(d)

⁸⁸¹ Section 187(1)(e)

⁸⁸² Section 187(1)(f)

In a case where the employer is unable to show that dismissal was substantively fair, the employee is in principle entitled to reinstatement or, alternatively, compensation not exceeding twelve months' remuneration⁸⁸³ (or a maximum of 24 months' remuneration where the dismissal was an automatically unfair dismissal⁸⁸⁴). If the dismissal was found to have been only procedurally unfair, the employee is only entitled to compensation (also subject to a maximum of twelve months' remuneration) and not to reinstatement.⁸⁸⁵

289 By way of summary in respect of the difference between the common law rules relating to termination of the contract and those as established in terms of the labour legislation, the following should be noted. At common law an indefinite contract can be terminated by either party by giving the agreed notice and in most cases it can be given in the absence of any reason to terminate. The statutory position is that the dismissal must be fair and the requirements for a fair dismissal are the existence of a fair reason and the following of fair pre-dismissal procedures (e.g. in dismissals relating to conduct, even if there is a breach of contract, dismissal will only be warranted if the breach is serious or repeated and the sanction of dismissal is appropriate). Also, the statutory right not to be unfairly dismissed (in terms of section 185 of the Labour Relations Act) trumps an employer's common law entitlement to terminate a contract of employment by giving the required notice or by terminating the contract without notice where summary dismissal is warranted. Moreover it has been held⁸⁸⁶ that the common law rules relating to the contract of employment, developed in accordance with section 39(2) and section 23(1) of the Bill of Rights, incorporate the right not to be unfairly dismissed as an implied contractual term. The statutory concept of dismissal is wider than the common law concept of a termination of employment and includes a number of situations that would not ordinarily be thought of as

⁸⁸³ Section 194(1)

⁸⁸⁴ Section 194(3)

⁸⁸⁵ See Jordaan in Basson & Loubser *Sport and the Law in South Africa* supra at Ch 8-27

⁸⁸⁶ *Old Mutual Life Assurance Co SA Ltd v Gumbi* (2007) 8 BLLR 699 (SCA); *Boxer Superstores Mthathwa & Another v Mbenya* (2007) 8 BLLR 693 (SCA)

dismissal (e.g. a failure to renew a fixed-term contract or a resignation may constitute a dismissal in certain circumstances,⁸⁸⁷ and not every termination of employment is a dismissal – e.g. the expiry of a fixed term contract of employment).

A Dismissal through non-renewal of fixed-term contracts in sport

290 In the context of professional sport, and specifically in light of the prevalence of fixed-term player contracts, the form of unfair dismissal as provided for in section 186 of the LRA is of special importance. Section 186(1)(b) provides that it is a dismissal where 'an employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it.' Le Roux⁸⁸⁸ has pointed out that, in order to prove this type of dismissal, the employee must show that s/he harboured a reasonable expectation that the contract would be renewed on the same or similar terms:

'Employees either have a reasonable expectation of renewal or they do not. They have a reasonable expectation of renewal if the objective facts ... show that the employee reasonably expected the contract to be renewed.'⁸⁸⁹

The factors to be taken into account in making this determination regarding a reasonable expectation include assurances given by the employer, the reason for entering into a fixed-term contract in the first place, and the number of times (if any) that the contract has been renewed.⁸⁹⁰ Once the fact of the dismissal has been shown by the employee (in the light of the existence of a reasonable

⁸⁸⁷ See the discussion in the section that follows

⁸⁸⁸ Le Roux 2006/1-2 *International Sports Law Journal* 56 at 58

⁸⁸⁹ Grogan, J ('Great expectations' (1999) 15(6) *Employment Law* 10 at 11), as quoted in Le Roux 2006/1-2 *International Sports Law Journal* 56 at 58

⁸⁹⁰ Le Roux 2006/1-2 *International Sports Law Journal* supra 58 and the authority quoted there in note 30

expectation), such dismissal will be presumed to be unfair, and the employer will bear the onus (in terms of section 192 of the LRA) to prove that such dismissal was both substantively and procedurally fair in the circumstances.⁸⁹¹

291 Professional athletes in the major sports have in recent years increasingly been faced with the situation of non-renewal of contracts and section 186(1)(b) has been invoked on a number of occasions where players have claimed a reasonable expectation of renewal and consequent unfair dismissal. Former star national cricket batsman, Lance Klusener, reached a reportedly lucrative out-of-court settlement with the United Cricket Board in 2003 after referring an unfair dismissal claim to the CCMA following the non-renewal of his contract to play for the national team.⁸⁹² Cricket coach Hylton Ackerman also succeeded in the CCMA with an unfair dismissal claim against the United Cricket Board on the basis of non-renewal of his contract.⁸⁹³ The following discussion will focus on a case study of the application of section 186(1)(b) in the sports context.

Case study – SARPA on behalf of Bands & Others v SA Rugby (Pty) Ltd

292 In a high profile matter involving three national team ('Springbok') rugby players, the CCMA made a ruling of unfair dismissal in terms of section 186(1)(b) in the 2005 case of *SA Rugby Players Association (SARPA) on behalf of Bands & Others / SA Rugby (Pty) Ltd*.⁸⁹⁴ Le Roux has succinctly summarized the facts and the reasons for the CCMA's finding:⁸⁹⁵

⁸⁹¹ *Ibid.*

⁸⁹² Le Roux 2006/1-2 *International Sports Law Journal* supra 57

⁸⁹³ *Ackerman & Another and United Cricket Board* (2004) 25 *Industrial Law Journal* 353 (CCMA); Le Roux *supra* 57

⁸⁹⁴ [2005] 2 *Butterworths Arbitration Law Reports* 209 (CCMA)

⁸⁹⁵ Le Roux 2006/1-2 *International Sports Law Journal* supra 58-9

This arbitration award deals with the contractual position of three rugby players,

[Victor] Matfield, [Christo] Bezuidenhout and [Richard] Bands ... At the time, once a

player was selected for the national team he would normally be contracted by SA

Rugby (Pty) Ltd (the employer in this matter), either on a match-by-match basis or

for a period. All 3 players were given contracts for the 2003 [IRB Rugby World

Cup]. These contracts were for three months and commenced in September 2003

and terminated at the end of November 2003. In addition to this, Matfield already

had a twelve month contract to play for the national team during 2003. The

contract terminated in December 2003. He had had a twelve month contract with

the employer since 2000, which had been renewed in 2001, 2002 and 2003. Since

2003 the players had no direct dealings with SA Rugby. All the national players

negotiated their contracts directly with [the national team coach at the time, Rudolf

Straeuli] and he in turn liaised with the CEO of SA Rugby (Pty) Ltd.

Despite the team's poor performance all three players performed well at the 2003

[Rugby World Cup] and were generally complimented by the coach (Straeuli) and

the media. After the 2003 RWC all three received letters from the coach which they

interpreted as suggesting that they formed part of his future plans. Subsequently

all three were told in person by Straeuli that they formed part of his future plans.

Straeuli resigned during December 2003 when new management took over the

affairs of SA Rugby and the three players' contracts were not renewed for 2004.

The South African Rugby Players Association (SARPA) referred an unfair dismissal

dispute to the CCMA on behalf of the players, relying on section 186(1)(b) of the

LRA: The arbitrator had little difficulty in finding that the players had a reasonable

expectation that their contracts would be renewed and that they were thus dismissed.

[The arbitrator made the following observations regarding SA Rugby's argument

that there was no objective basis for the players' reasonable expectation as a result

of the team's poor performance, the coach's subsequent resignation and its change

of management:]

The evidence before me (from both parties) indicates that the professional rugby environment is insecure and uncertain, characterised by a frequent

change in coaches (each of whom have a different approach as to how contracts should be awarded and structured) and change in management, with no clear policies or guidelines in respect of how contracts should be awarded or structured. Such an environment can result in unfair treatment and employees need to be protected. Despite a change in management, the legal entity remains the same. Players are therefore entitled to rely on the word of a coach who has implied authority and creates an expectation that they will be given contracts. Furthermore, I have already found that despite the fact the team did not perform well in the World Cup the performance of the applicants during the World Cup was outstanding, and it was evident that the coach wanted to keep and develop the talents of the tight five after the World Cup.

The employer also relied on the players' contracts that clearly stated that none of the individual players might entertain any expectation that the contract would be renewed upon expiry. This argument did not impress the arbitrator since it is a well established principle that, while the wording of the contract is important, conduct subsequent to the conclusion of the contract (as was found to be the case in this matter) may give rise to a reasonable expectation.

[The arbitrator further rejected the employer's argument that the coach had no authority to give undertakings to the players, and thus was not in a position to make promises or create expectations. On the evidence of the players they only dealt with the coach when contracts were negotiated, and the coach was thus held to have had implied authority to promise and negotiate contracts.]'

The CCMA held that the players had shown the non-renewal of their contracts to constitute dismissal, and that the employer had failed to show (in terms of section 192(2) of the LRA) that such dismissals were for a fair reason and in accordance with a fair procedure. Compensation in terms of section 194 of the LRA was awarded to all three players: Matfield was awarded the amount of ZAR 400 000

(the amount of the annual retainer he had been paid in terms of his 2003 contract, and which amount he expected to be paid in 2004), while Bezuidenhout and Bands were each awarded ZAR 300 000 (the amount of the minimum retainers paid in terms of the 2003 annual contracts).⁸⁹⁶

293 Le Roux has suggested that there are two aspects of the CCMA's award that may be worth revisiting.⁸⁹⁷ The author argues that it is doubtful that the players' expectation of renewal of their contracts was reasonable in the circumstances; in light of the highly-publicised in South African rugby at the time, the fact that it was also commonly known that the coach's resignation or dismissal was imminent at the time, and also that players know very well that different coaches prefer different playing styles and that a player who is the first choice in one coach's team may very well be a non-starter in another coach's team.⁸⁹⁸ The author expressed the hope that the Labour Court would provide clarity regarding the role of surrounding circumstances in the determination of whether a player's expectation of renewal is reasonable (circumstances outside the player-employer/coach relationship). It is submitted that this is especially relevant in light of the arbitrator's express recognition in *Bands* that the professional rugby environment (as other professional sports) is an insecure and uncertain environment.

294 Le Roux also expressed doubt as to whether the position of Victor Matfield was comparable to that of Bezuidenhout and Bands. While Matfield had had successive annual contracts with SA Rugby since 2000 in addition to the 2003 Rugby World Cup contract, the other two players only had the three month RWC

⁸⁹⁶ The CCMA rejected Bands' further claim for ZAR 1,5m based on his having, on the strength of the reasonable expectation of renewal created by the coach, declined an offer to play for a British club for this amount in 2004. It was held that the compensation for unfair dismissal is subject to a statutory maximum, and also that the purpose of section 194 of the LRA was to place the employee in the position s/he would have been if the dismissal had not taken place (i.e. in which event Bands would not have been entitled to anything more than the ZAR 300 000 retainer from SA Rugby (Pty) Ltd). See Le Roux 2006/1-2 *International Sports Law Journal* supra 58-9

⁸⁹⁷ Le Roux *supra* 59

⁸⁹⁸ *Ibid.*

contract. It is doubtful that a reasonable expectation in terms of section 186(1)(b) would include an expectation of a contract different in nature and substance to the existing contract (i.e. the 2003 RWC contract). Le Roux argued that the failure by SA Rugby to offer a twelve month contract to Bezuidenhout and Bands did not constitute a dismissal within the meaning of the section.⁸⁹⁹

295 The author pointed out that the reality is that sports governing bodies in South Africa will always be prone to claims of the nature of the claim in the *Bands* case, in light of the fact that players' careers are short, that contracts are usually fixed term or short term, that South African team sports have a history of high turnover of coaches (each favouring different players), and team composition is not only dependent on matters such as the form of players and strategy but also on capricious factors such as injuries and transformation.⁹⁰⁰ Le Roux argued that collective bargaining may play a role in addressing the problems faced by both professional athletes and their employers in this regard:

'Collective bargaining in South African sport is still very immature, but the sports arena may be an area where collective bargaining can be employed to the benefit of both the sports governing bodies and the players. One of the reasons advanced in the SARPA case for players to have security of income (in the form of retainers) is that income protection insurance (in the case of injuries) can only be obtained if a player has a fixed income (as opposed to being paid on a match-by-match basis only). In South Africa a high premium is placed on collective bargaining. If the right to rely on section 186(1)(b) of the LRA is excluded in a collective bargaining agreement in exchange for proper income protection schemes, perhaps partly funded by the employer/governing body, it is difficult to imagine that a court will not enforce it. While such an arrangement will probably force the parties to manage the

⁸⁹⁹ *Ibid.*

⁹⁰⁰ *Ibid.*

negotiation of contracts differently, it will provide more security to all concerned in an industry that is inherently insecure.⁹⁰¹

While it is submitted that there is merit in this suggestion, it may not be unproblematic for the simple reason that there may (and are bound to) be cases where, on the circumstances surrounding the non-renewal of a player's fixed term contract, a clear and reasonable expectation within the meaning of section 186(1)(b) is found to exist. Denial of the remedy for unfair dismissal as provided for in the section by means of a collective agreement may deprive such player from benefits (by means of the compensation payable in terms of the LRA) that exceed the benefits from such collectively agreed income protection schemes in circumstances where equity and fairness demand otherwise.

296 On review of the CCMA's award in the *SARPA obo Bands & Others* matter, the Labour Court (by way of Gerring AJ)⁹⁰² held that the CCMA commissioner's reasoning and conclusion in respect of Matfield's contract was justified and dismissed the review application, and held that it had not been shown that Bezuidenhout and Bands had a reasonable expectation that their fixed-term contracts would be renewed by SA Rugby on the same or similar terms, and that the commissioner's finding to the contrary was not supported on an objective and rational basis.

SARPA (the professional players' association) subsequently appealed the part of the Labour Court's judgment which upheld the review application by SA Rugby in respect of Bands and Bezuidenhout, and SA Rugby cross-appealed against that part of the judgment of the Labour Court which dismissed the review application in respect of Matfield. In the Labour Appeal Court's judgment (at the time of writing unreported⁹⁰³), Tlaletsi AJA held⁹⁰⁴ that the central question for

⁹⁰¹ *Ibid.*

⁹⁰² *SA Rugby (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration & Others* (2006) 27 Industrial Law Journal 1041 (LC)

⁹⁰³ Case No. CA 10/2005, delivered 12 May 2008

determination was whether there was in fact a dismissal, and if it was found that there was no dismissal of the players on the facts that the CCMA lacked jurisdiction to hear the dispute in terms of section 191 of the Labour Relations Act. The court disagreed with the approach of the Labour Court in the earlier review proceedings:⁹⁰⁵

‘The question before the court *a quo* [the Labour Court in the review proceedings] was whether on the facts of the case a dismissal had taken place. The question was not whether the finding of the commissioner [of the CCMA] that there had been a dismissal of the three players was justifiable, rational or reasonable. The issue was simply whether objectively speaking, the facts which would give the CCMA jurisdiction to entertain the dispute existed. If such facts did not exist the CCMA had no jurisdiction irrespective of its finding to the contrary.’

In respect of determination of whether there had been a dismissal of the three players, the court held that section 186(1)(b) requires not only a reasonable expectation of renewal on the part of the employee and a failure to renew a fixed-term contract or a renewal of such contract on less favourable terms by the employer, but also that such contract should be capable of renewal.⁹⁰⁶ The court confirmed that the test in terms of the section is an objective one, and that the enquiry is whether a reasonable employee would, in the circumstances prevailing at the time, have expected the employer to renew the fixed-term contract on the same or similar terms. The court considered the players’ evidence in support of their contention that such a reasonable expectation existed, namely their outstanding performances at the 2003 Rugby World Cup and the remarks made to them by the then coach, Straueli, and, in Matfield’s case, the meeting in November 2003 where the coach had told Matfield that he was one of the senior players and that he (Straueli) wanted him as part of his plans for the 2004

⁹⁰⁴ Zondo JP and Waglay JA concurring

⁹⁰⁵ At par. 41 of the judgment

⁹⁰⁶ At par. 43 of the judgment

season. The court held, however, that this evidence needed to be considered in light of other circumstances, specifically the provisions of the existing fixed-term contracts. In particular, the court stressed the importance of the following provision (clause 3.2), which was contained in all three of the Rugby World Cup contracts (the short contracts which were to exist only for the purposes of the tournament and would run from 1 September 2003 to 30 November 2003):

'As this is a fixed term contract, it shall automatically terminate on [30 November 2003] and the player acknowledges that he has no expectation that this contract will be renewed on the terms herein contained, or on any other terms.'⁹⁰⁷

The court held that this provision was of 'critical importance', and that it would be expected of the players to place more credible facts before the court to make their expectation reasonable in the face of clause 3.2.⁹⁰⁸ The court continued to hold that the RWC 2003 contracts were for a specific event that came and went, and that by its nature such a contract could not be renewed after the event, whether on the same or similar terms. Accordingly, it was held that Bezuidenhout and Bands could not have justifiably formed a reasonable expectation that their RWC 2003 contracts would be renewed. The evidence showed that their alleged expectation related to being given standard players' contracts for a period of one year (for the 2004 season), and the court held that such contracts would differ materially from the RWC 2003 contracts as they would be for a different purpose. Accordingly, in respect of Bezuidenhout and Bands, the players had failed to show a dismissal in terms of section 186(1)(b).

In respect of Matfield, whose position throughout had been viewed as different from the other two players in light of the facts and his prior contracts to play for the national team since 2001, the court held that the player's expectation of

⁹⁰⁷ The court also referred to a number of exclusion and other provisions contained in clause 9 of this contract (e.g. that no representations had been made, that the agreement constituted the entire agreement between the parties and that any variation of the terms of the agreement shall be of no force or effect unless reduced to writing and signed by the parties).

⁹⁰⁸ At par. 46 of the judgment

renewal of his standard players' contract was not a reasonable one. The reasons included the fact that the contract itself did not make room for renewal, Matfield's concession in evidence that it was not the coach (Straueli) that decided on the substance of the contract but negotiations that would take place between the players' association SARPA and SA Rugby, and that it should have been clear to the players upon the termination of Straueli's employment with SA Rugby in December 2003 that they could not be guaranteed a place in the national team when a new coach was appointed. The court stated that the CCMA commissioner's criticism that the professional rugby environment is insecure, uncertain and characterized by frequent changes in managers (which the commissioner held constituted grounds for protecting players against prejudice) was not entirely valid, and that the employer (SA Rugby) must be responsive to changing conditions. The court held specifically that it would be absurd to allow an outgoing coach to decide on the players his successor should include in his team.⁹⁰⁹ Finally, the court held that as the players' claims were based mainly on the promises made to them by the coach, they should perhaps have pursued other contractual remedies and not have relied on the dismissal provisions of section 186(1)(b); as there was no automatic renewal of contracts, but re-engagement on negotiated terms between the employer and players.

297 Accordingly, the court found that none of the three players had managed to show that there had been a dismissal in the meaning of section 186(1)(b) of the LRA, and that the CCMA had not had jurisdiction to hear the dispute. Accordingly, the court dismissed the players' association's appeal against the finding of the Labour Court which upheld SA Rugby's review application in respect of Bezuidenhout and Bands, and the Labour Appeal Court upheld SA Rugby's cross-appeal against the part of the Labour Court's judgment which dismissed the review application in respect of Matfield.

⁹⁰⁹ At par. 52 of the judgment

298 It is submitted that the importance of this protracted matter in respect of the application of section 186(1)(b) of the Labour Relations Act (in the sporting context in respect of the non-renewal of fixed-term contracts), lies in the Labour Appeal Court's recognition of the insecure and uncertain environment in professional rugby (and other sports): It would be a difficult onus for a player to discharge in order to prove a reasonable expectation of renewal of a fixed term contract which is for a limited duration, specifically, for a number of practical reasons. However, each case must be considered on its own merits, and circumstances may arise where sufficient and cogent evidence in this regard is available. However, it is submitted that there is merit in Le Roux's observations as discussed earlier, regarding the potential role of the collective bargaining process in regulating players' reliance on this form of dismissal and the employers' interest in maintaining the necessary flexibility in the face of the uncertainties that surround the professional sports labour market.

Other forms of dismissal in terms of the Labour Relations Act

B Dismissal for misconduct

299 'Misconduct' refers to situations where the employee through his or her own fault fails or refuses to carry out the duties for which he or she has been hired, or contravenes a rule relating to the way in which employees are required to conduct themselves.⁹¹⁰ Generally, dismissal should only follow if the misconduct is so serious that it makes a continued employment relationship intolerable. Misconduct which is not sufficiently serious to justify dismissal (e.g. lateness or absenteeism) may justify dismissal if the employee does not respond to a series

⁹¹⁰ Jordaan *supra* Ch 8-27

of warnings.⁹¹¹ For less serious forms of misconduct the employer should follow progressive disciplinary sanctions that might range from verbal reprimands to final written warnings or suspension without pay.⁹¹²

300 Schedule 8 of the Labour Relations Act contains a *Code of Good Practice: Dismissal*, which provides guidelines in order to determine whether an employee is guilty of misconduct and also as to appropriate sanctions. The Code enjoins any person considering whether a dismissal for misconduct is unfair to consider –

- whether or not the employee contravened a rule or standard regulating conduct in the workplace; and
- if a rule or standard was contravened; whether or not –
 - o the rule was a valid or reasonable rule or standard;
 - o the employee was aware, or could reasonably be expected to have been aware, of the rule or standard;
 - o the rule or standard has been consistently applied by the employer; and
 - o dismissal was an appropriate sanction for the contravention of the rule or standard.

The LRA does not prescribe a particular procedure to be followed for a disciplinary enquiry, but the *Code of Good Practice: Dismissal* provides certain guidelines in this regard.⁹¹³

⁹¹¹ *Ibid.*

⁹¹² *Ibid.*

⁹¹³ In Item 4 of the Code, which includes the following:

- The employer should normally conduct an investigation to determine whether there are grounds for dismissal. The employee should be notified of the allegations forming the basis of the enquiry, s/he should be afforded a reasonable opportunity to state a case in response to such allegations (and reasonable opportunity to prepare such response), and s/he should be entitled to the assistance of a trade union representative or fellow employee. Following a decision, such decision should be communicated to the employee, preferably in the form of written notification of such decision;
- If the employee is dismissed, s/he should be given the reason for such dismissal and reminded of any rights to refer the matter to a council with jurisdiction or to the CCMA;
- In exceptional circumstances, if the employer cannot be reasonably expected to comply with these guidelines, the employer may dispense with pre-dismissal procedures.

301 In the professional sporting context, the fairness of any dismissal for alleged misconduct by a professional athlete would of course have to be determined also in light of the applicable terms of the employment contract. Players' contracts will often exhaustively cover forms of conduct that are outlawed; as referred to elsewhere, these often include forms of conduct that are strictly speaking outside the sphere of on-field performance of the athlete's sporting services and relate to the private life of the athlete. Examples of such provisions abound in professional sports in most jurisdictions, and range from provisions prohibiting 'tapping up'⁹¹⁴ to provisions regarding players' participation in potentially hazardous recreational activities.⁹¹⁵ Where such provisions apply,

See Jordaan *supra* Ch 8-28

⁹¹⁴ An independent commission of inquiry of the FA Premier League imposed substantial fines on Chelsea Football Club (£300 000), Chelsea manager Jose Mourinho (£200 000) and Arsenal player Ashley Cole (£100 000), for their involvement in a 'tapping up' scandal. The commission found that Cole and Mourinho had been guilty of attending a clandestine meeting with Chelsea FC at a London restaurant on 27 January 2005, in order to conduct negotiations for a transfer by Cole to the club. Cole, who was still under contract with Arsenal, was held to have contravened Premier League Rule K5, which governs approaches by contracted players to clubs and prohibits players from making such an approach without the permission of their employing club. Chelsea were found to be in breach of Rule K3, which contains a similar prohibition on clubs approaching contracted players, and Mourinho of breaching Rule Q regarding managers' conduct. The commission declined to also order compensation to be paid to Arsenal FC, as had been requested. Two players' agents, who were also alleged to have been involved in the transaction, were not sanctioned, as they did not resort under the jurisdiction of the League. The League indicated, however, that they would pass on the commission's findings to the Football Association, which, in turn, would pass it on to FIFA.

⁹¹⁵ Players' contracts often contain a clause regulating the personal conduct of players in respect of activities that may hold the potential for physical injury – for example, clause 8.5 of the Australian Cricket Board's standard Match/Tour Contract 2001:

- '(a) During the Term, the Player will not, without the prior consent of the [Australian Cricket Board]:
- (i) engage in any dangerous or hazardous activity;
 - (ii) put his own or other players' safety at risk; nor
 - (iii) engage in any activity that in the reasonable opinion of the ACB may cause the Player injury or otherwise affect the Player's ability to perform his obligations under this Contract.
- (b) The Player acknowledges that activities that fall within the scope of paragraph (a) include, without limitation, the following:
- (i) flying in an aeroplane, helicopter or other airborne machine or device unless it is being operated by a major domestic or international airline or any of its subsidiaries ...;
 - (ii) participating in so-called "extreme sports";
 - (iii) any form of rugby, rugby league, gridiron, soccer or Australian Rules football ...; and
 - (iv) indoor or outdoor rock climbing, hang gliding, parachuting or bungee jumping.'

Wise & Meyer *International Sports Law and Business* Kluwer Law International 1998 Vol.1 at 702 provide an extract from clause 8 of the World League of American Football standard players' contract:

'Without prior written consent of League, Player will not engage in any activity other than football which may involve a significant risk of personal injury. Player represents that he has special, exceptional and unique knowledge, skill, ability and experience as a football player, the loss of which cannot be estimated with any certainty and cannot be fairly or adequately compensated by money damages.'

See also Prinsloo 'Enkele Opmerkinge oor Spelerskontrakte in Professionele Spansport' ['Some observations on players' contracts in professional team sports'] 2000 (1) *Journal of South African Law* 229 at 232.

Clause 9.1.6 of the South African rugby standard player's contract (Provincial) 2003 provided as follows:

'During the Player's period of employment, the Player must not engage in any other sports or pastimes, including but not limited to absailing (*sic*), polo, steeple chasing, parachuting, ice-hockey, wrestling, boxing, martial arts, hang-gliding, paragliding and speed or durations tests or racing (other than on foot or in a yacht).' For more on the regulation of players' 'extracurricular conduct' by way of contract, see Griffith-Jones, D & Barr-Smith, A (eds.) *Law and the Business of Sport* Butterworths, London, Edinburgh & Dublin 1997 at 176 *et seq.*

the athlete's conduct may of course constitute a direct breach of contract, which would entitle the employer to terminate the agreement for cause.⁹¹⁶

C Dismissal for incapacity (ill health or injury, or poor work performance)

(i) *Incapacity due to ill health or injury*

302 An employer who wishes to terminate an employee's services on the basis of ill health or injury should do so with circumspection, as it should be borne in mind that such dismissal would normally be a so-called 'no-fault dismissal' (which is not due to the fault of the employee as in the case of e.g. misconduct). Accordingly, the employer is required to investigate the extent of the injury or ill health, and also to consider alternatives short of dismissal in cases where the employee is likely to be absent for a time that is unreasonably long in the circumstances. Relevant factors in such consideration of alternatives are the nature of the job, the period of absence, the seriousness of the injury or illness and the possibility of securing a temporary replacement for the employee. Where the incapacity is of a permanent nature, the employer should ascertain the possibility of securing alternative employment for the employee, or adapting the

The players' contract often regulates players' conduct in respect of issues such as communication with the media, and sometimes such contracts even regulate where the player should live. E.g. clause 11(a) of the English FA Premier League and Football League standard players' contract, whereby the player agrees 'not to live anywhere the club deems unsuitable for the performance of his duties'. Lewis & Taylor (*Sport: Law and Practice* 2003, at 811 E1.19 note 5) mention the example of a residence clause that was considered in the judgment of *Macari v Celtic Football and Athletic Co Ltd* [1999] IRLR 787 – football manager Lou Macari had agreed to comply with an obligation to reside within a 45-mile radius of George Square, Glasgow. His failure to do so was one of the reasons for his dismissal, which the Scottish Court of Session held to be lawful. Sometimes such measures are taken to the extreme: The 2nd King Commission Interim Report, following the cricket match fixing scandal in 2000, suggested a wide range of measures to combat corruption – these included suggestions for random lie detector testing of players, room and luggage searches, a right for the United Cricket Board of SA to monitor players' phone calls and e-mail communications, that only mobile phones provided to players by the UCBSA should be allowed and even that the possession of an unauthorised mobile phone should be a punishable offence (Judge E.L. King 2nd Interim Report: *Commission of Inquiry into Cricket Match Fixing and Related Matters*, Cape Town, December 2000).

⁹¹⁶ See, for example, the Disciplinary Code and Procedure (Annexure VI of the 2008 Standard Players' Contract between players and provincial rugby unions) as reproduced in par 285 in the text above

duties or work circumstances of the employee in order to accommodate their disability.⁹¹⁷

The employee should be afforded an opportunity to state a case in response during such investigation and also to be assisted by a trade union representative or a fellow employee.⁹¹⁸

The degree of incapacity is relevant to the fairness of a dismissal, as well as the cause of the incapacity. E.g. in the case of alcoholism or drug abuse, counseling or rehabilitation may be appropriate steps for an employer to consider.⁹¹⁹

The Code furthermore also provides guidelines in cases of dismissal arising from ill health or injury.⁹²⁰

(ii) *Incapacity due to poor work performance*

303 It should be noted that poor work performance may also be due to factors beyond the control of the employee (e.g. lack of skill or training), which might constitute dismissal for such incapacity as a 'no-fault dismissal'. Accordingly, dismissal for poor work performance will generally be fair if it can be shown by the employer that it took reasonable steps to address the employee's under-performance; but without success.⁹²¹

⁹¹⁷ *Code of Good Practice: Dismissal* Item 10(1); Jordaan *supra* Ch 8-30

⁹¹⁸ *Code of Good Practice: Dismissal* Item 10(2)

⁹¹⁹ *Code of Good Practice: Dismissal* Item 10(3)

⁹²⁰ *Code of Good Practice: Dismissal* Item 11:

'Any person determining whether a dismissal arising from ill health or injury is unfair should consider –

(a) whether or not the employee is capable of performing the work; and

(b) if the employee is not capable –

(i) the extent to which the employee is able to perform the work;

(ii) the extent to which the employee's work circumstances might be adapted to accommodate disability, or, where this is not possible, the extent to which the employee's duties might be adapted; and

(iii) the availability of any suitable alternative work.'

The Code also provides that the duty on the employer to accommodate the employee is more onerous where the ill health or injury is work-related. See Jordaan *supra* Ch 8-30

⁹²¹ Jordaan *supra* Ch 8-28

Apart from guidelines for the dismissal of employees who were placed on probation upon appointment,⁹²² the *Code of Good Practice: Dismissal* provides the following guidelines in cases of dismissal for poor work performance:

Any person considering whether a dismissal for poor work performance is unfair should consider –

- (a) whether or not the employee failed to meet a performance standard; and
- (b) if the employee did not meet a required performance standard whether or not –
 - (i) the employee was aware, or could reasonably be expected to have been aware, of the required performance standard;
 - (ii) the employee was given a fair opportunity to meet the required performance standard; and
 - (iii) dismissal was an appropriate sanction for not meeting the required performance standard.⁹²³

304 In the context of the employment of athletes in professional sport, these guidelines must of course be read in the light of any applicable performance clauses contained in such athlete's employment contract. By way of example, the 2008 Standard Players' Contract between players and the provincial rugby unions contains an annexure relating to a performance review procedure, which provides as follows:

⁹²² *Code of Good Practice: Dismissal* Item 8

⁹²³ *Code of Good Practice: Dismissal* Item 9

PERFORMANCE REVIEW PROCEDURE

1. Purpose

The purpose of this procedure is to guide the Province when it has to deal with a poor performing player.

The underlying approach is that the Province should take all reasonable steps to address under-performance before terminating a Player's contract for poor performance.

2. Identification of performance standards and criteria

At the beginning of the Player's contract the Province will, in consultation with the Player, identify the performance standards that the Player is required to meet, and the criteria for determining whether the Player has met such standards.

3. Continuous review of performance

3.1 The Province will monitor the Player's performance and provide him with feedback on a continuous basis. If the Player's performance is not meeting the required standard, the Province will meet with the Player to identify –

3.1.1 the area / areas in which the Player is under-performing;

3.1.2 the possible causes thereof;

3.1.3 measures to address the under-performance, including reasonable assistance from the Province;

3.1.4 the timetable in which the Player must meet the required standard, which shall be reasonable in the circumstances.

3.2 Should the Player not meet the required standard within such timetable the Province will either –

- 3.2.1 grant the Player a further period of time in which to meet the required standard; or
- 3.2.2 convene a performance hearing.

4 Performance hearing :

- 4.1 The Province may convene a performance hearing on at least 72 hours written notice to the Player.
- 4.2 The Province will conduct the hearing in the presence of the Player and his representative. The player's representative may include a SARPA official or office-bearer, the player's registered agent or manager, or a fellow player.
- 4.3 During the hearing the Province will advise the Player why it is considering terminating the Player's contract.
- 4.4 The Player and / or his representative will have the opportunity to show cause why the Province should not terminate the contract.
- 4.5 After considering the Player's representations, the Province will make its decision and give brief reasons for the decision. In giving its decisions, the Province will respond briefly to the representations made by the Player and/or his representative.

305 As regards the matter of loss of form, it is submitted that poor performance for this reason, which is usually of a temporary nature, is to be expected in the normal course of events, and that there may be room for implying a tacit term in such contract to the effect that such temporary poor performance due to loss of form might constitute a justifiable reason for non-selection but not for a fair dismissal (depending, of course, on the circumstances and specifically the duration of such poor form).

The athlete's loss of form will usually not be attributable to ill health. While injury is usually specifically addressed in the express terms of the sports employment

contract and also by means of insurance cover (e.g. income replacement schemes), the loss of form relates to a situation where the player's level of performance is recurrently inhibited by any of a range of factors (including, often, a temporary loss of confidence). Sporting form, which is an ethereal concept at the best of times, may however also be attributable to the athlete's level of fitness or other factors (e.g. quality of training). Accordingly, while it is difficult to classify the reason for the loss of form, and such reason must be determined on the facts of any given case, such loss will usually equate to a straightforward failure or inability on the part of the athlete to render his or her services to the required performance standard.

Therefore, most cases of loss of form fall to be examined in terms of what may amount to temporary breach of contract by the player. However, where there are medical reasons for the loss of form, it may resort under incapacity. Also, where the loss of form derives from a failure by the athlete to comply with fitness levels (either expressly determined in the contract of employment or implied with reference to accepted minimum standards required in the light of the nature of the physical activity on the field of play), such loss could relate to misconduct on the part of the player employee.

306 It is clear that a dismissal based on loss of form, the extreme remedy for the sports employer, may have to be carefully considered in order to ensure that justification for such dismissal is in accordance with the relevant reason for dismissal. However, it would seem that few athletes are dismissed from employment solely on the basis of a loss of form, which by its nature is temporary. The usual, and relatively uncontroversial, remedy for the sports employer is found in the widespread practice in professional sport of short, fixed-term employment contracts. Where the athlete becomes a liability for the team it is safer (and relatively less expensive) to simply let the contract run its course and not renew it. While the issue of an athlete's dismissal from employment due

to loss of form is therefore a relatively straightforward exercise, in light of the specific labour law provisions regarding dismissal mentioned above, such athlete's *non-selection* on the same grounds (which falls short of dismissal) may be more problematic. The practice of selection as applied in professional sport is virtually unknown in employment in other sectors. Thus, a context-specific and context-sensitive approach is required in evaluating the rights and interests of the respective parties. The following should be noted:

- The non-selection of an athlete who remains under contract does not, per se, constitute a 'dismissal' in terms of the Labour Relations Act;
- Accordingly, the provisions of Schedule 8 to the LRA relating to dismissal for incapacity (Item 8 of the schedule) or poor performance (Item 9 of the schedule) do not apply directly to the non-selection decision;
- The practice of selection could relate to or constitute demotion or promotion in terms of the LRA (and relate to and affect the provision of benefits to the player), and non-selection could conceivably therefore also form the subject of an unfair labour practice claim under section 186(2)(a);
- The selection decision, if shown to be based on discrimination against the athlete in the meaning of section 6 of the Employment Equity Act,⁹²⁴ would be open to scrutiny in terms of the prohibition of unfair discrimination contained in Chapter II of the Act as relating to an 'employment policy or practice';
- Due to the nature of professional sport (specifically the fundamental cornerstone of the industry and its labour market, namely the promotion and maintenance of competition), the practice of merit-based selection will in all cases constitute either an express or implied term of the player's contract of employment;

⁹²⁴ Act 55 of 1998

- The issue of a player's performance may be expressly regulated in the contract by means of a performance clause, in which case the performance standards and criteria set may be relevant not only to a decision to dismiss the player but also to the issue of non-selection;
- The selector or selection panel would normally form part of the employing union or governing body's management structure, with their functions and powers being subject to the relevant organisation's constitution; and
- While non-selection may in many cases have no direct financial consequences for a player (who would still receive his or her salary regardless of participation in matches), in many instances such non-selection will affect the player directly (e.g. through loss of match fees and win bonuses) as well as indirectly (in the 'secondary market' of sponsorship and other forms of commercial exploitation of the player's celebrity or sporting reputation and drawing power) – again, this raises the possibility of an unfair labour practice claim in terms of section 186(2) of the LRA relating to the provision of benefits.

307 While the above remarks regarding the possible abuse or general potential for unfair treatment inherent in the right of selection hold true, it is important to note that the practice of selection is a key element and characteristic of (professional) team sports. And, despite the central role of labour legislation, South African courts have consistently emphasized the continued significance of the common law contract of employment, to the extent that 'the legal relationship between the parties must be gathered primarily from a construction of the contract which they concluded'.⁹²⁵ Even though our courts have also recognized the unique nature and peculiar characteristics of the employment of players in

⁹²⁵ *SA Broadcasting Corporation v McKenzie* (1999) 20 Industrial Law Journal 585 (LAC) at 591E

professional team sports,⁹²⁶ it is important to note that the natural and fundamental importance of the selection process in sport constitutes a material term, either express or implied, of the contract of employment in this context. Clearly, any person entering employment in professional team sport would be deemed to be aware of the fact that the very nature of competition requires, in the normal course of events, that the strongest team should be picked to participate on the field of play at any given time. This necessitates a selection process, whereby the relative merits and demerits of different participants are evaluated and, along with other factors, taken into account in determining the strongest squad to take the field on match day. While the selection decision is often (or may often be perceived to be) subjective, participants are justified in demanding that the selection decision must at least be based on rational grounds and not completely arbitrary.

It can thus be argued that any professional team player by implication submits to this system of selection, and that incorporation of such a system also forms an important term, implied if not express, of the employment contract.

The role of selection, as well as the possible remedies for aggrieved players, if any, must be evaluated in this light, with due regard for the fact that it is questionable whether the athlete has a 'right to work' which might translate to a right to be selected to play in any given case.⁹²⁷ Also, it should be noted that the employer has the right to set its own standards, and the courts are generally reluctant interfere with such standards unless grossly unfair or unreasonable. In this light, however, it worth considering the following in respect of non-selection in the professional rugby context. It has been observed that the incentive provided to players by the current match fee system⁹²⁸ is problematic in respect of the collective bargaining process, and '[s]hould SA Rugby decide to "punish" a player for enforcing his legal rights, the player can merely be dropped

⁹²⁶ E.g. compare *McCarthy v Sundowns Football Club* (2003) 24 Industrial Law Journal 197 (LC) – discussed in par 401 below

⁹²⁷ See the discussion in section above

⁹²⁸ See the discussion below in the section on collective bargaining in professional sports

from the team and thus suffer a substantial financial loss.⁹²⁹ In this regard, non-selection could relate to or constitute demotion in terms of the LRA (and relate to and affect the provision of benefits to the player), and non-selection could conceivably therefore form the subject of an unfair labour practice claim under section 186(2)(a).

D Dismissal for operational requirements

308 This form of dismissal is less relevant in the professional sports employment context, although cases of redundancy of player employees due to the operational requirements of the employer may present themselves in practice. An interesting case study in this regard recently presented in South African domestic professional cricket (while a similar scenario presented in 2002 in football, when the South African Football Association bought out two clubs, Ria Stars and Free State Stars, in order to reduce the number of clubs in the Premier League from 18 to 16). In the following discussion this example from domestic cricket will be examined merely with a view to illustrating the potential role of, specifically, the provisions of the Labour Relations Act which deal with dismissal of employees for operational requirements.⁹³⁰

309 The General Council of the United Cricket Board of South Africa (the 'UCB') voted in September 2003 to drastically cut the then existing 11 professional teams, which made up the domestic first class and limited overs competitions, to

⁹²⁹ Smailes, S 'Sports Law and Labour Law in the Age of (Rugby) Professionalism: Collective Power, Collective Strength' (2007) 28 *Industrial Law Journal* 57 at 80

⁹³⁰ In respect of the effect on the employment relations between the employer and its employee(s) of a transfer of the business of the employer, see sections 197 and 197A of the Labour Relations Act 66 of 1995; Sharrock *supra* at 399-402.

six franchises.⁹³¹ This decision was implemented in the 2004/5 season. The reasons given for the decision were both economic and sporting in nature: the substantial losses incurred by professional cricket competitions, due to the fact that revenue generated by gate money and sponsorship proved to be insufficient to cover the costs of such competitions; and also, it was believed that the competitive value of the competitions needed to be enhanced as the existing system created too large a step up between provincial and international professional cricket.⁹³²

This decision was accompanied by the formation of Cricket SA (Pty) Ltd, a company formed to function as the commercial arm of the UCB (similar to SA Rugby (Pty) Ltd, the commercial arm of the South African Rugby Union). Under the new system, domestic cricket in the SuperSport and Standard Bank sponsored competitions would be played by six teams from six professional franchises.⁹³³

The provincial affiliates (or partnerships between such affiliates) were entitled to tender for such franchises, on the basis of criteria set by the board of Cricket SA (Pty) Ltd and ratified by the UCB.⁹³⁴ While this new system has limited the number of teams in professional competitions, the decision was accompanied by a restructuring of amateur cricket, to increase the number of teams competing at amateur level from 11 to 16. The rationale for this is said to be the continued development of the game in order to provide an improved feeder system for players from the amateur to the professional levels.

The tendering process for franchises was marked by a measure of controversy, which included legal action by the Griquas union following the awarding of the central region franchise to Free State.

⁹³¹ It is interesting to note that this development seems to run counter to developments elsewhere – compare the Pakistan Cricket Board's development of a new domestic cricket system in the 2001-2002 season, whereby more players were provided with an opportunity to compete at the higher levels of the game in domestic competitions.

⁹³² As explained by the then Vice-President of the UCB, Robbie Kurz – see 'Kurz praises new vision for SA cricket', *The Daily News*, 8 September 2003, at 14.

⁹³³ The new franchises commenced competition with the introduction of the new format of Standard Bank-sponsored Pro20 cricket, in April 2004.

⁹³⁴ The deadline for tenders for franchises was set as 23 January 2004, and the announcement of franchises awarded was made on 31 January 2004. The franchises are as follows: Western Province/Boland; Dolphins (KwaZulu-Natal); Eastern Cape (Border and Eastern Province); Eagles (Free State); Highveld Lions (Gauteng and North West); and Titans (Northens and Easterns).

The UCB decision led to a drastic reduction in the number of cricketers who are able to pursue their chosen occupation by playing professional cricket in South Africa. The franchises established under the new system do not operate on the basis of the previous system of provincial teams – in certain geographical areas and regions the franchise team is selected from a combined base of candidates, with the number of contracts available for players per franchise set at 18 (including one international player). In the Western Cape, for instance, the previous Western Province and Boland players are now forced to compete for positions in a single franchise team (the Cape Cobras). As a result, in this region alone, the pool of candidates for employment as contracted players has increased significantly, while the number of available contracts has been halved.

To the labour lawyer, this development immediately raises questions regarding the retrenchment of employees; and one is faced with the question whether the UCB decision equated to a dismissal of employees due to operational requirements as referred to in the Labour Relations Act. If so, one must ask whether this decision and its implementation was pursued in accordance with the Act's requirements for such dismissals.⁹³⁵ A related question is whether, or to what extent, the restructuring decision has impacted on the supply and demand for services in the new franchise teams and, consequently, on the bargaining power of players and their terms and conditions of employment.

An evaluation of the consequences of the UCB decision

310 As observed earlier, the professional cricketers affected by the UCB's decision are to be viewed as employees for the purpose of the applicable labour legislation. They were employees of the provincial cricket unions (affiliates of the UCB) and, where such players were also contracted by the UCB to represent the country in the national team, employees of the UCB for the purposes of such

⁹³⁵ See, generally, section 189 of the LRA relating to consultation, the payment of severance pay and the selection of workers to be retrenched, discussed below.

representation. The following was stated specifically in respect of the employment of professional cricketers, in the case of *Cronje v United Cricket Board of South Africa*:⁹³⁶

'[The UCB] contracts players to play international cricket. The relationship with the contracted players is a direct employer-employee relationship and is governed by the terms of their contracts of employment. National players are also members of clubs and play provincial cricket for the affiliates ... Players who are not selected for international cricket, but who play regular provincial cricket are contracted by the affiliates. The players' contracts bind them to the UCB and ICC codes of conduct. However, even players who are not contracted to an affiliate or to the UCB are bound by the code of conduct as participants.'

Accordingly, the provisions of the Labour Relations Act (the 'LRA') apply to such players and their employers.

Section 188 of the LRA provides that a dismissal that is not 'automatically unfair'⁹³⁷ is unfair if the employer fails to prove that the reason for dismissal is a fair reason (*inter alia*) based on the employer's operational requirements.⁹³⁸

Section 189 lists the employer's duties in the event of a dismissal for operational or economic reasons, which include a duty to consult with employees and/or their representatives, a duty to disclose relevant information in such consultation, that matters such as the criteria for selection must be determined through such consultation (or alternatively must be fair and objective), consultation on alternatives to dismissal as well as the payment of severance pay to dismissed employees.

311 In order to determine whether the UCB's decision equated to a dismissal of players for operational reasons, one must first of all determine whether it in fact

⁹³⁶ 2001 (4) SA 1361 (T) at 1367

⁹³⁷ In terms of section 187 of the Act

⁹³⁸ Section 188(1)(a)(ii)

constitutes dismissal for the purposes of the Act. 'Dismissal' is defined by the LRA⁹³⁹ as including the termination of a contract of employment by an employer, with or without notice; or a case where an employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it at all.⁹⁴⁰

The cricketers most directly affected by the UCB decision⁹⁴¹ were all appointed in terms of fixed-term contracts, the standard practice in professional sports. The main reason for the limited duration of such contracts is that one of the major criteria in the decision to contract players is that of form – is the player fit and in form, and therefore expected to make a positive contribution to the team's performance in the specific season? The general rule as applied in South African labour law is that the failure to renew a fixed-term contract would only constitute a 'dismissal' in the event that the employee had a reasonable expectation that such contract would in fact be renewed – the employee must prove that he had a basis for reasonably expecting renewal (see section 186 (1) (b) of the LRA above).⁹⁴² For those players midway through existing contracts, the termination of such contract in pursuit of the UCB decision could constitute a dismissal. But also, while cricket unions are free to contract with whomever they wish and are also free to base this decision on factors such as a player's form, the reduction of the number of potential employment opportunities⁹⁴³ through a restructuring of the league would arguably constitute a downsizing exercise in its ordinary meaning.⁹⁴⁴ While the players concerned would not necessarily be able to prove a reasonable expectation of renewal, bearing in mind the vagaries of selection for employment as contracted players, the very denial of the opportunity to be selected for

⁹³⁹ Section 186

⁹⁴⁰ Section 186 (1) (a) and (b)

⁹⁴¹ Existing contracted players under the previous system

⁹⁴² Also Grogan *Workplace Law* 4th Edition Juta & Co 1999 at 103

⁹⁴³ Especially in such a limited and restrictive field of employment as professional cricket – see the discussion below

⁹⁴⁴ Compare the following statement on the restructuring decision by Ray Mali, UCBSA president:

'We needed to make a tough business decision to ensure the survival of the game we love and to ensure that we can develop that game and ensure excellence.'

(As quoted in 'Major Changes to SA Domestic Cricket Competitions', *The Mercury*, 1 September 2003)

continued employment as a result of such restructuring might be viewed as tantamount to such a dismissal due to a business restructuring in the meaning of section 189.⁹⁴⁵

312 It is submitted that here one should not lose sight of the role of fairness and equity in application of the test to determine whether such players harboured a reasonable expectation of renewal. In the recent case of *SARPA obo Bands & Others/SA Rugby (Pty) Ltd*⁹⁴⁶ (which was discussed earlier in this chapter⁹⁴⁷), the CCMA was asked to review a situation where national rugby players' fixed term contracts of employment had not been renewed. The players brought claims of unfair dismissal in terms of section 186 (1) (b) of the LRA, alleging that the employer had failed to renew their fixed term contracts in circumstances where a reasonable expectation of renewal existed. The Commission (by way of Commissioner Pather) remarked as follows:

'In my view principles of fairness and equity should apply equally to professional rugby players and factory workers alike. In both environments employees are still susceptible to unfair treatment by employers ... Employees do not have to be destitute or impoverished to be treated fairly. What professional rugby players are paid must be seen in perspective to their short employment lifespan and the high risk of injury ... I am of the view that this is a statutory claim in terms of the [Labour Relations Act], which is based on fairness and equity, and not a contractual claim. The respondent cannot rely on the terms of the contract alone. In the interests of fairness and equity, the surrounding circumstances of the case have to be considered and the respondent must justify the dismissal.'

⁹⁴⁵ This issue raises the question of the meaning of the term 'reasonable expectation' in the context of professional sport, and whether the specific nature of employment and selection for employment as professional players would necessitate a different interpretation of this concept (see the discussion elsewhere in this chapter)

⁹⁴⁶ [2005] 2 Butterworths Arbitration Law Reports 209 (CCMA)

⁹⁴⁷ See par 290 *et seq* above

Even though the CCMA's award in this matter was eventually overturned by the Labour Appeal Court,⁹⁴⁸ it is submitted that there is merit in these observations regarding the role of fairness. Accordingly, it might be necessary to consider the surrounding circumstances and not simply the nature and form of the relevant player's contract. A decision to limit the number of available contracts in a league might very well fall foul of the provisions of section 186 (1) (b) and constitute unfair dismissal of players, when viewed in the light of considerations of fairness and equity (bearing in mind of course the Labour Appeal Court's observations in the appeal in the *SARPA obo Band & Others v SA Rugby (Pty) Ltd* matter,⁹⁴⁹ regarding the uncertainty and insecurity which characterises the professional sports labour market and the onus of proof on players to prove a dismissal through proof of a reasonable expectation of renewal of a fixed-term contract). So, if the UCB's decision and subsequent action can be viewed as a dismissal of players due to operational requirements, did the UCB and its provincial affiliates comply with the provisions of section 189? In other words, can the UCB's decision be marked as a fair dismissal of players on the grounds of its operational requirements?

The retrenchment exercise and fairness

313 The above discussion has mentioned some of the main requirements of section 189 of the Labour Relations Act that an employer must comply with in a downsizing or retrenchment exercise. Of these, the central requirement is that such a move must be done in consultation with affected employees or their representatives, with a view to negotiating the terms and form of such downsizing. While this remains a business decision, which falls squarely within the

⁹⁴⁸ See the discussion in par 290 *et seq* above

⁹⁴⁹ *Ibid.*

managerial prerogative, the Labour Relations Act aims to protect the interests of affected employees in order to ensure fairness.

The Act's provisions relate to the procedure to be followed by an employer in implementing an existing decision to retrench. However, it appears that the Labour Court favours a view that the 'consultation' process involved means something more than mere consultation, and rather that the terms and form of such retrenchments should be negotiated between the parties. This process has been described as 'an exhaustive joint problem-solving or consensus-seeking process between the employer and the consulted parties'.⁹⁵⁰ Accordingly, an employer would not be able to escape its obligations under section 189 simply because the retrenchment decision has already been made on the grounds of pressing economic or other justifiable need. This emphasis on the fairness of the employer's conduct flows from the fact that retrenchments are classified as 'no fault' dismissals, which are not due to any fault, incapacity or misconduct on the part of the employee.

This implies that the requirement of fairness is inherent in both the procedure followed as well as the substantive reason for the decision to retrench. Du Toit *et al*⁹⁵¹ state that the chief source of clarification of what would constitute a 'fair reason' for dismissal for operational requirements remains the voluminous jurisprudence formulated by the labour courts in this regard. By way of summary, the authors observe the following regarding the proper role of the courts:

'Between the extremes of "second-guessing" the employer's decisions and adopting a "hands-off" attitude, it is submitted, the fundamental responsibility of the court is to ensure that the provisions of the [LRA] are complied with. Section 192(2) requires the employer to prove that any dismissal is fair. "Fair" in this context means that a reason for dismissal based on the employer's operational

⁹⁵⁰ *National Union of Metalworkers of SA & Others v Comark Holdings (Pty) Ltd* [1997] 5 BLLR 589 (LC)

⁹⁵¹ Du Toit *et al Labour Relations Law: A Comprehensive Guide* LexisNexis 2003, at 406

requirements (as defined in section 213) must be present. This places an onus on the employer to present at least *prima facie* evidence of such a reason.⁹⁵²

As to what would constitute such a reason, the *Code of Good Practice: Dismissal based on Operational Requirements*⁹⁵³ provides the following guidelines to the interpretation of the definition contained in section 213 of the LRA:

'As a general rule, economic reasons are those that relate to the financial management of the enterprise. Technological reasons refer to the introduction of new technology that affects work relationships either by making existing jobs redundant or by requiring employees to adapt to the new technology or a consequential restructuring of the workplace. Structural reasons relate to the redundancy of posts consequent to a restructuring of the employer's enterprise.'⁹⁵⁴

As Du Toit *et al* have observed, the LRA seems to restrict the meaning of 'similar means' to grounds akin to economic, technological and structural restructuring of the workplace – e.g. a male employee cannot be dismissed on operational grounds in order to promote gender diversity in the workforce.⁹⁵⁵

314 One must ask whether the reasons provided for the UCB's decision comply with these requirements. The financial losses experienced through poor attendance of cricket matches would, at first glance, appear to qualify as just such an economic reason related to the financial administration of the enterprise of the UCB and its affiliates. The sporting element in the justification of the decision (namely to enhance the competitive quality of the competitions in order to bring the quality of domestic competitions in line with that of international cricket)

⁹⁵² *Ibid* at 408

⁹⁵³ GN 1517 *Government Gazette* No 20254 (16 July 1999), Item 1

⁹⁵⁴ The expansive definition of 'operational requirements' has permitted the courts to include under operational requirements a refusal to accept changed conditions of employment consequent upon the need to reorganise work and to become even more competitive and more profitable – *Mazista Tiles (Pty) Ltd v NUM & Others* (2005) 3 BLLR 219 (LAC)

⁹⁵⁵ *Ibid* at 405

might not qualify as a fair reason. It will be assumed that the first of these reasons would indeed satisfy the requirements of the Act and the Labour Court jurisprudence.

As regards this second reason provided for the decision, one should look more closely at the meaning attributed to the term 'operational requirements' by the Legislature and its application in other industries. The Labour Relations Amendment Act of 2002⁹⁵⁶ has inserted section 189A in the LRA, which introduced a right to strike in disputes about the fairness of the reason for dismissals based on operational requirements, and a right for the employer to lock out in such disputes. This section applies to employers who employ more than 50 employees, when such employer contemplates dismissing (*inter alia*) at least 10 employees (if the employer employs up to 200 employees).⁹⁵⁷ Apart from the procedural requirements set in this section, section 189A(1) now contains the following:

'In any dispute referred to the Labour Court in terms of section 191(5)(b)(ii) that concerns the dismissal of the number of employees specified in [section 189A(1)], the Labour Court must find that the employee was dismissed for a fair reason if-

- (a) the dismissal was to give effect to a requirement based on the employer's economic, technological, structural or similar needs;
- (b) the dismissal was operationally justifiable on rational grounds;
- (c) there was a proper consideration of alternatives; and
- (d) selection criteria were fair and objective.'

This provision (especially the part contained under (b)) was apparently introduced to address the perceived ineffectiveness of the Labour Court in protecting employees against dismissal for operational requirements by scrutinizing the employer's rationale for such action.⁹⁵⁸ However, it is questionable whether this

⁹⁵⁶ Act 12 of 2002

⁹⁵⁷ Section 189A(1)

⁹⁵⁸ Du Toit *et al* at 425

provision will make a noticeable difference, as it largely constitutes a codification of the existing law in this regard.⁹⁵⁹

The crux of the test seems to be that such dismissals should be operationally justifiable on rational grounds relating to for instance the employer's technological 'or similar' needs. Would the stated reason of enhancing the competitive element of domestic cricket in favour of the national team's competitive strength on the international stage satisfy this test? In effect the UCB has stated that, in order for the national team to be more competitive in international competitions with teams from other countries, the standard of players graduating to the national team must be enhanced. And the restructuring exercise is aimed at bringing this about by ensuring a more competitive 'strength vs. strength' first class cricket league, where the 'dead wood' is removed and there remain only berths for the best players. This reminds one of arguments raised by employers in other industries, relating to globalisation and the ability to compete effectively and successfully with international or foreign businesses.⁹⁶⁰

315 Growing globalisation has led to decreased job security in many sectors. Employers have responded to this phenomenon in a number of ways, for example by the outsourcing of non-core aspects of their businesses; by increasing the use of casual labour in order to reduce the costs of social benefits such as pension and medical benefits; investments towards capital intensive and technologically advanced methods of production to reduce the cost of labour; and the acceleration of mergers and acquisitions with a resultant increase in

⁹⁵⁹ *Ibid.* *SATAWU v Old Mutual Life Assurance Co SA Ltd* (2005) 4 BLLR 378 (LC) held that the section confirms the principle of proportionality or the rationality basis test that contemplates a degree of deference to managerial prerogative. It held the enquiry is directed at an investigation of the proportionality or rationality of the process by which the commercial objectives are to be achieved. Thus there should be a rational connection between the employer's scheme and its commercial objective, and through the consideration of alternatives an attempt should be made to find the alternative which least harms the rights of the employees in order to be fair to them. The alternative eventually applied need not be the best means, or the least drastic alternative. Rather it should fall within the range of reasonable options available in the circumstances. However, the Labour Appeal Court in *CWIU & Others v Algorax (Pty) Ltd* (2003) 24 ILJ 1917 (LAC) suggested the following test for substantive unfairness: Not only should the court guard against merely accepting the say so of the employer in regard to the need to retrench, but retrenchment must be a 'measure of last resort' – in other words, it places more emphasis on scrutinizing the alternatives to dismissal.

⁹⁶⁰ Compare also *Frys Metals (Pty) Ltd v NUMSA & Others* (2003) 24 ILJ 133 (LAC)

retrenchments.⁹⁶¹ But it appears that the effects of measures aimed at addressing globalisation in other industries is not similar to the position of the UCB in this case study – what one is dealing with is not the operational need to compete with foreign businesses through reduced production costs, but rather the need to improve the quality of the product delivered by the employer. The nature and characteristics of international competitive cricket is such that it is felt that the local product must be enhanced in order to facilitate a smooth transition of players, who can perform satisfactorily, to the highest level. Can such a rationale be viewed as being akin to technological restructuring in other industries? One must not lose sight of the nature of professional sport as an entertainment industry. The players in professional team sports are, due to the nature of professional sport and the important role of personal attributes and characteristics of such players, sometimes more akin to assets of the team management than employees.⁹⁶² It might be argued that the effects of the UCB decision more closely resembles a pruning exercise by a business undertaking that decides to cut dead wood from its stock or other investment portfolio. Does the shrinking of the league constitute an attempt to eliminate less successful players with a view to retain a core of the 'best of the best'? If so, this decision and its implementation raise interesting questions regarding the role of selection criteria for dismissal in terms of section 189 of the LRA. In fact, one might even be faced with a situation where the traditional 'no fault' nature of dismissal for economic reasons becomes questionable in this context: Are we then not rather dealing with straightforward dismissal for incapacity or failure to satisfy performance standards in the performance of the job?

⁹⁶¹ See the report of the Commission on Globalisation, Unemployment and Decent Work, NEDLAC Annual Summit 2001, available at <http://www.nedlac.org.za/summit/2001/comm2.htm>.

⁹⁶² A view that is strengthened by the phenomenon of the mobility of players between teams – players are often bought and sold, apparently in a similar fashion to goods

The procedural requirements of section 189

316 There remain the procedural requirements of section 189. Did the UCB and/or its affiliates consult with players or their representatives? Did the players affected receive severance pay? These questions are difficult to answer on the available information regarding the implementation of the restructuring process. According to reports dated as early as August 2002, the South African Cricketers Association (SACA) was meeting with the UCB in order to discuss the restructuring of domestic competitions in order to ensure a 'strength vs. strength' format.⁹⁶³ SACA is a registered trade union, representing South African professional cricketers. The association, which was formed in June 2002 by Cape Town lawyer Tony Irish (former legal representative of a number of professional cricketers), was modeled on the Australian cricketers' association.⁹⁶⁴ According to one such early report, it was recognized that the proposed restructuring could lead to a reduction in the number of professional cricketers (from the approximate number of 180 in 2002), but it was observed that the upside would be better benefits for the remaining players.⁹⁶⁵

317 An interesting question is also raised by the LRA's requirement that one of the issues to be consulted upon is that of the selection criteria for employees to be dismissed in terms of the retrenchment exercise. The UCB decision was apparently not accompanied by prescriptions to the then existing provincial team managers or the new franchises regarding the selection of players to be contracted. Accordingly, one must assume that this process would have proceeded in the traditional way – franchises will contract the best available players, on the basis of factors such as form, experience, past performances, fitness, stature and other sporting factors, as well as the level of remuneration

⁹⁶³ Colin Brydon 'Cricketers' Eyes on the Piggy Bank', *Sunday Times*, 25 August 2002

⁹⁶⁴ More is said about SACA and its activities elsewhere in this chapter

⁹⁶⁵ Brydon *supra*

claimed. Case law on dismissal for operational requirements has accepted that selection criteria may be based on the need to retain special skills, especially where these are necessary for the competitive and efficient operation of the enterprise and on past performance as a measure of establishing whether employees have the special skills that need to be retained.⁹⁶⁶

The potential Constitutional implications

318 Apart from the implications of the UCB decision in terms of the LRA and other labour statutes, it is also necessary to consider the impact of the decision in light of the provisions of Chapter II of the Constitution (the Bill of Rights). Section 22 of the Bill of Rights provides that every citizen has the right to freely choose his or her trade, occupation or profession freely, subject to the proviso that the practice of a trade, occupation or profession may be regulated by law.⁹⁶⁷

The courts have recognised the fact that participation as players in professional sport is a rather rigidly regulated exercise. In the major professional sports, football, rugby and cricket, players are forced to participate under the auspices and in accordance with the rules of the relevant national (and international) governing bodies.⁹⁶⁸ These persons are not entitled to participate in these sports on the professional level if not affiliated to such governing bodies as the UCB, the National Soccer League and the SA Rugby Union. We therefore see an inherent (although undoubtedly justifiable) restriction of the right afforded in section 22, which is automatic and serves to limit the player's options in deciding in what manner he wishes to pursue the chosen trade.

⁹⁶⁶ See *NUM & Others v Anglo American Research Laboratories (Pty) Ltd* (2005) 2 BLR 148 (LC) – on the facts the court did not accept that the selected employee could have acquired the skills possessed by his fellow retained employees in a short period of time; but in a later case (*CEPPAWU v Republican Press (Pty) Ltd* (2006) 6 BLLR 537 (LC)) the Labour Court found that the criterion 'retention of special skills' introduces a subjective variable into the selection procedure.

⁹⁶⁷ More detailed discussion of the section 22 right can be found elsewhere in this chapter

⁹⁶⁸ Compare the remarks of Traverso J in *Coetzee v Comitis* 2001 (1) SA 1254 (CPD), and Waglay J in *McCarthy v Sundowns Football Club & Others* [2003] 2 BLLR 193 (LC) (both cases concerning professional soccer).

319 The UCB decision under discussion has now added a further restriction of the freedom of professional cricketers to pursue their chosen occupation within South Africa. For those players qualified to compete in domestic competition at the professional level, the restructuring of these competitions has significantly limited the choice of participation in first class cricket as a career. If one accepts the approximate figure of 180 professional cricketers in 2002, the restructuring exercise meant that 72 professional cricketers have effectively been denied an opportunity to participate professionally in South Africa (or potentially 108 players if one takes into account that each of the new franchises may contract one international player as part of their complement of 18 contracted players). These players have apparently now been left out in the cold, with no other options for participation at professional level within South Africa's borders.

Such a view may cast some doubt on the reasonableness of the UCB decision.

While these athletes' constitutional rights in terms of section 22 may be regulated by law or otherwise, in a reasonable manner, the effect of the decision appears to negate this right as far as a large proportion of these players are concerned. An added element is the fact that the restructuring of domestic competitions also impacts on such players' prospects for employment in the representative national team. Players not participating in domestic competitions are virtually guaranteed not to be considered for selection to the Proteas (the national team).

320 Finally, in light of what has been said above regarding the termination of fixed-term contracts, it remains to include a brief note on retrenchment prior to the expiry of a fixed-term contract. In *Buthlezi v Municipal Demarcation Board*⁹⁶⁹ the Labour Appeal Court held that a dismissal of a fixed-term contract employee based on operational requirements would be unfair even where the employer might have good reason to retrench and where it follows a fair retrenchment

⁹⁶⁹ (2004) 25 ILJ 2317 (LAC)

procedure. Fixed-term contract employees may not be dismissed before the expiry of their contract unless it is a case of a material breach of the contract by such employee (or where the contract expressly allows for early termination). The court reaffirmed this common law principle and justified the rule by pointing out that this is simply because the employer is free not to enter into a fixed-term contract but to conclude a contract for an indefinite period if he thinks that there is a risk that he might have to dispense with the employee's services before the expiry of the term. If the employer chooses to enter into a fixed-term contract, he takes the risk that he might have a need to dismiss the employee mid-term, but is prepared to take that risk. If he has elected to take such a risk, he cannot be heard to complain when the risk materializes. The employee also assumes the risk that during the term of the contract he could be offered a more lucrative job elsewhere, while he has an obligation to complete the term of the contract. Both parties make a choice and there is no unfairness in the exercise of that choice. The consequence of this decision is that employers will have to expressly include in fixed-term contracts a right to prematurely terminate the contract for operational requirements (although it should be noted that this case has been criticized).

321 As was mentioned earlier, the above examination of the restructuring of the domestic professional cricket league is meant purely as an illustration of the possible impact of labour legislation provisions regarding dismissal of employees for operational requirements. The UCB's restructuring exercise did not lead to significant legal challenges and, by all accounts, the current restructured competition is functioning well. It appears that professional cricketers who may have been negatively affected have, mostly, been able to successfully explore

employment elsewhere (especially in the UK, following the effects of the *Kolpak* judgment).⁹⁷⁰

II Termination by the employee

322 In respect of termination of the employment contract by the (player) employee, the reader is referred to the discussion in the section that follows regarding the common law remedies for breach of the employment contract (and, specifically, the important issue of the availability of the employer's remedy of a claim for an order for specific performance of the contract). It should furthermore be noted that the following may be relevant in cases of termination by the employee:

The Labour Relations Act⁹⁷¹ makes provision for cases of constructive dismissal in certain instances where the employee terminates the contract, which constructive dismissal may be challenged on the basis of the Act's provisions regarding unfair dismissal. Such cases would be where the employee terminates his contract (with or without notice) because the employer has made continued employment intolerable for him⁹⁷² or the employer, after a transfer of the business in terms of section 197 or 197A of the Act, has provided the employee with conditions or circumstances at work that are substantially less favourable to the employee than those provided by the old employer.⁹⁷³ The test to determine whether employment was made intolerable by the employer is whether the

⁹⁷⁰ *Deutscher Handballbund eV v Maros Kolpak* C-438/00, 8 May 2003 (see the discussion elsewhere in this chapter)

⁹⁷¹ Act 66 of 1995, as amended (see the discussion in the text above)

⁹⁷² Section 186(e) of the Act

⁹⁷³ Section 186(f) of the Act

employer's overall conduct, judged reasonably and sensibly, was such that the employee could not have been expected to put up with it;⁹⁷⁴ and The concept of 'sporting just cause' may play a role in assessment of the player employee's right to terminate the contract of employment. In football, Article 21(1)(a) of the FIFA Regulations for the Status and Transfer of Players provides for the application of sanctions and payment of compensation in cases of a unilateral breach of contract without just cause or 'sporting just cause'. An indication of the meaning of this term is found in the regulations, which provide that a player is entitled to terminate his contract if he can show at the end of a season that he was fielded in less than 10% of the official matches played by his club.⁹⁷⁵ Rule 36 of the National Soccer League Rules⁹⁷⁶ deals with sporting just cause and provides as follows:

36.1 Within three weeks of the end of any season a player may apply to the [PSL'S] Dispute Resolution Chamber to be released from his contract of employment with a club for sporting just cause if the player participated in less than 10% of the official matches of his club in that season;

36.2 Sporting just cause will be established on a case-by-case basis by the Dispute Resolution Chamber in the interests of fairness and equity having regard to all relevant factors including:

36.2.1 injury;

36.2.2 suspension;

36.2.3 the player's field position;

36.2.4 the player's age, and

⁹⁷⁴ See Sharrock *supra* at 427

⁹⁷⁵ See the discussion in Le Roux, R 'Under Starters Orders: Law, Labour Law and Sport' (2002) 23 *Industrial Law Journal* 1195 at 1203. The concept of 'sporting just cause' is also included in the regulations of the South African National Soccer League – see *McCarthy v Sundowns Football Club* *supra* at 195D of the judgment, and the text that follows.

⁹⁷⁶ As amended 17 June 2008

- 36.2.5 the number of matches in which the player played for the club in the previous season.
- 36.3 Any dispute over sporting just cause will be considered by the Dispute Resolution Chamber.
- 36.4 If the Dispute Resolution Chamber holds that a player is entitled to be released from his contract for sporting just cause it will simultaneously determine whether a transfer fee or compensation is payable in terms of these rules and, if so to which clubs and in what amount.'

The reader is referred to discussion of this concept elsewhere, but it is suggested here that cases which may constitute sporting just cause for termination on the part of a player employee may, conceivably, also relate to termination by the employee which might constitute a constructive dismissal in terms of section 186 of the Labour Relations Act.

§8 Common law remedies for breach of contract in the professional sports context

323 Under South African law a party to a contract which has been breached by another party has three main remedies to his or her disposal, namely a claim for an order for specific performance (*in forma specifica*), cancellation of the contract, or a claim for damages for breach. The claim for damages can generally be brought along with cancellation or an order for specific performance, but the order for specific performance and a claim of cancellation can of course not be brought together as they are mutually exclusive in respect of their effect on the continuation of the obligations under the contract.

324 In South African law, unlike the position in e.g. English law, the claim for specific performance is the normal or natural remedy for the innocent party in case of breach of contract and, accordingly, the innocent party is viewed to be entitled to such relief in case of breach of contract (although an order for specific performance is always within the discretion of the court – see the discussion below). Cancellation of the contract, on the other hand, is viewed to be an extraordinary remedy (as it seeks to bring the contract and its obligations to an end, and is thus contrary to the parties' original intention in contracting and the courts' adherence to the principle of sanctity of contract), and is available only where the breach is deemed to be sufficiently serious to justify cancellation or, otherwise, if the contract between the parties contains a cancellation clause (or *lex commissoria*).

The discussion that follows will briefly examine these three distinct remedies in the South African law of contract.

I The order for specific performance

325 As mentioned in the discussion above, in terms of the South African law of contract (and unlike the position in English law), the order for specific performance of a contract in the event of breach is viewed as the normal or natural remedy for the aggrieved party.⁹⁷⁷ Accordingly, the aggrieved party is entitled to claim specific performance of the other party's obligations in terms of the contract (which may include an order to perform a specified act in pursuance of a contractual obligation – an order *ad factum praestandum* – or an order to pay money – an order *ad pecuniam solvendam*), subject only to the court's discretion to refuse an award of specific performance. This judicial discretion has been the subject of much debate and a long line of cases in which the content of the discretion has been developed in order to bring certainty in respect of the extent to which the aggrieved party's 'right' to an order for specific performance is to be determined in light of such discretion.

326 While the courts had over the years developed a number of general principles in respect of the exercising of such judicial discretion (e.g. that specific performance would not be ordered where it would be impossible for the defendant to comply with the order, and that there are many cases in which justice between the parties can be fully and conveniently done by an award of damages⁹⁷⁸), the (then) Appellate Division in the case of *Haynes v Kingwilliamstown Municipality*⁹⁷⁹ observed the following:

'The discretion which a court enjoys, although it must be exercised judicially, is not confined to specific types of cases, nor is it circumscribed by rigid rules. Each case must be judged in the light of its own circumstances.'

⁹⁷⁷ *Farmers' Co-Op Society (Reg) v Berry* 1912 AD 343; Christie, R H *The Law of Contract in South Africa* 5th ed Lexisnexis Butterworths 2006 at 523

⁹⁷⁸ *Farmers' Co-Op Society (Reg) v Berry* supra

⁹⁷⁹ 1951 (2) SA 371 (A) at 378

However, the court continued to formulate a number of classes of cases where specific performance would normally not be granted, including impossibility of performance⁹⁸⁰ on the part of the defendant, undue hardship to the defendant or to third parties⁹⁸¹, cases of imprecise obligations and in contracts for personal services.⁹⁸²

327 It appears that the courts in subsequent judgments seemed to apply these 'classes' of cases as referred to in *Haynes* in a rather rigid manner, and that the warning against the application of 'rigid rules' was largely unheeded. This prompted the (then) Appellate Division, in *Benson v SA Mutual Life Assurance Society*⁹⁸³ to observe the following:

'[I]t seems clear, both logically and as a matter of principle, that any curtailment of the Court's discretion inevitably entails an erosion of the plaintiff's right to performance and that there can be no rule, whether it be flexible or inflexible, as to the way in which the discretion is to be exercised, which does not affect the plaintiff's right in some way or another ... This does not mean that the discretion is in all respects completely unfettered. It remains, after all, a judicial discretion and from its very nature arises the requirement that it is not to be exercised capriciously, nor upon a wrong principle ... [T]he basic principle thus is that the order which the Court makes should not produce an unjust result which will be the case, e.g., if, in the particular circumstances, the order will operate unduly harshly on the defendant. Another principle is that the remedy of specific performance should always be granted or withheld in accordance with legal and public policy ... Furthermore, the Court will not decree specific performance where performance has become impossible.'⁹⁸⁴

⁹⁸⁰ To be distinguished from cases where supervening impossibility of performance after conclusion of the contract serves to distinguish the obligations (and a failure by the debtor to perform does not constitute a breach of the contract)

⁹⁸¹ This last was the overriding consideration in *Haynes's* case, which involved a claim for an order of specific performance in order to compel a local authority to supply water to the plaintiff, during a time of severe drought

⁹⁸² In respect of contracts for personal services, however, see the discussion below

⁹⁸³ 1986 (1) SA 776 (A)

⁹⁸⁴ See also *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A)

328 Accordingly, South African law acknowledges an order for specific performance as a natural remedy which the aggrieved party in the case of breach is entitled to, in terms of its election (and not that of the defendant to e.g. pay damages rather than perform its obligations⁹⁸⁵), subject only to the judicial exercise of a discretion by the court to refuse the order where such an award would not be in line with legal and public policy.

In the sports context, the importance of the availability of an order for specific performance is of course paramount in the context of players' employment contracts⁹⁸⁶ and the wide-spread practice of 'contract-jumping', which necessitates a brief review of South African courts' treatment of the order for specific performance in the context of contracts for personal services.

329 Gardiner & Welch⁹⁸⁷ have examined the issue of English contract law's treatment of contract-jumping by professional footballers. The authors refer to Caiger & O'Leary's earlier discussion⁹⁸⁸ of the 'Anelka doctrine' and the argument that a player should have the right to terminate his contract providing he is prepared to pay compensation to his club by reference to the normal contractual principles for calculating damages (in which case a club would be obliged to release the player's registration so that he can join and play for the club of his choice). Gardiner & Welch observe that the practical reality of clubs searching for star players often lead to clubs making business decisions that would not be viewed as rational decisions in other areas of business:

'[I]t is this essentially commercial factor that suggests that, even were the transfer system abolished tomorrow, the buying and selling of players under contract with agents acting as the middle-men would continue. The issue then becomes one that is resolved by

⁹⁸⁵ The courts have on occasion, through the exercise of such discretion, refused to award specific performance in cases where the an order for damages would be less expensive than an order obliging the defendant to make a counter-performance where the defendant no longer needed the plaintiff's performance – see *SA Harness Works v SA Publishers Ltd* 1915 CPD 43; *Unibank Savings and Loans Ltd v ABSA Bank Ltd* 2000 (4) SA 191 (W).

⁹⁸⁶ And other contracts for services, e.g. between clubs and coaching staff – see discussion of *Santos Professional Football Club (Pty) Ltd v Igesund & Another* 2003 (5) SA 73 (C) below

⁹⁸⁷ Gardiner, S & Welch, R 'The contractual dynamics of team stability versus player mobility: Who rules "The beautiful game?"' *Entertainment and Sports Law Journal* Vol. 5 No. 1 (August 2007)

⁹⁸⁸ Caiger, A & O'Leary, J 'The end of the affair; the Anelka doctrine – The problem of contract stability in English professional football', in Caiger, A and Gardiner, S (eds) *Professional Sport in the EU: Regulation and Re-regulation* T.M.C. Asser Press, The Hague (2000)

commercial considerations that replace notions of legally enforceable contracts. In short, is a potential new club prepared to pay whatever sum of damages is likely to be awarded by a court to secure a player that his existing club is not prepared to release?⁹⁸⁹

The basis of these remarks regarding the position in English football is of course the treatment by the English law of contract of breach and, more specifically, the view that courts will not order performance of contracts for personal services and the club or other sports employer is limited to a claim for damages. Another commentator has also noted that this inability to claim specific performance leads, in the sporting context, to 'an informal regime that generally works without legal interference', and which (one might even argue) leads to market forces and practices being the ultimate arbiter of the lawfulness of players' conduct in breaching their contracts:

'The whole picture is that of obligations that may be difficult to deliver, without any fault on behalf of the performer and without any prospect of enforcement by the employer.'⁹⁹⁰

330 It appears that the position may be different in South African law. South African courts have traditionally refused an order for specific performance in circumstances which involved employment contracts and, specifically, contracts for personal services.⁹⁹¹ Apart from the fact that such contracts often involve imprecise obligations, the courts have reasoned that where a contract calls for the performance of personal services of a continuing nature and because of the personal relationship involved, there would be a constant danger of disputes arising over whether the contract was being properly performed, and the courts are not equipped to provide the constant supervision which

⁹⁸⁹ Gardiner & Welch *op cit.* par 12

⁹⁹⁰ Greenfield, S 'The ties that bind: Charting contemporary sporting contractual relations', in Greenfield, S & Osborn, G (eds) *Law and Sport in Contemporary Society* Frank Cass Publishers, Portland, OR (2000) 149

⁹⁹¹ *Ingle Colonial Broom Co Ltd v Hocking* 1914 CPD 495; *Schierhout v Minister of Justice* 1926 AD 99; *Bramdaw v Union Government* 1931 NPD 57; *Roberts Construction Co Ltd v Verhoef* 1952 (2) SA 300 (W); *Myers v Abramson* 1952 (3) SA 121 (C); *Khubeka v Imextra (Pty) Ltd* 1975 (4) SA 484 (W); *Troskie & Another v van der Walt* 1994 (3) SA 545 (O)

would be necessary to prevent such disputes arising or to adjudicate on them as they arose.⁹⁹² In the early case of *Schierhout v Minister of Justice*,⁹⁹³ the (then) Appellate Division, with reference to the position regarding the breach of contracts for personal services in English law, explained the unavailability of an order for specific performance on the basis of 'the inadvisability of compelling one person to employ another whom he does not trust in a position which imports a close relationship; and the absence of mutuality, for no Court could by its order compel a servant to perform his work faithfully and diligently'. It should, however, be noted that this does not constitute any hard-and-fast rule; in line with the courts' views regarding the judicial discretion to order specific performance, any rule which rigidly denies specific performance in all cases of contracts for personal services would unduly fetter the aggrieved party's entitlement to the order, subject only to the court's discretion. This is true also of employment contracts,⁹⁹⁴ and it has been held that the reasons for courts' refusal to order specific performance in the earlier cases⁹⁹⁵ were based on practical considerations and not a rule of law:

'As a general rule a party to a contract which has been wrongfully rescinded by the other party can hold the other party to the contract if he so elects: There is ... no reason why this general rule should not be applicable to contracts of employment.'⁹⁹⁶

331 In the case of *Troskie & Another v van der Walt*,⁹⁹⁷ a Full Bench of the Free State Provincial Division was faced with a matter involving alleged breach of contract by an amateur⁹⁹⁸ rugby player, who had left his existing club to join another club. The applicant club claimed an order compelling the respondent to play for the applicant club during the 1991 season, as well as an order prohibiting the respondent from playing for any other

⁹⁹² Christie *The Law of Contract in South Africa* supra 528

⁹⁹³ 1926 AD 99, at 107

⁹⁹⁴ *Myers v Abramson* 1952 (3) SA 121 (C) at 123E-H

⁹⁹⁵ See the cases referred to in par 326 above (and especially the judgment of the (then) Appellate Division in *Schierhout v Minister of Justice* 1926 AD 99)

⁹⁹⁶ *National Union of Textile Workers v Stag Packings (Pty) Ltd* 1982 (4) SA 151 (TPD) at 156H

⁹⁹⁷ 1994 (3) SA 545 (O)

⁹⁹⁸ It should be noted that this matter arose at the time when rugby union was still an amateur sport (although it came out in the evidence that there was a 'pay for play' arrangement in place with the respondent player)

club during that season. The court, after acknowledging an applicant's entitlement to an order for specific performance, focused on the highly personal nature of the services which were to be rendered in terms of the contract for playing services. The court emphasized that, in the exercise of the court's jurisdiction, each such case must be considered on its merits. In considering the merits, the court observed that the rendering of the player's services are dependent on such player's personal enthusiasm, willingness and endurance, and that the services required a significant element of skill and ability of a personal nature, which are dependent on the player's personality and his relationship with the club.⁹⁹⁹ The court accordingly upheld the court *a quo*'s refusal to order specific performance against the player.

A second aspect of the *Troskie* judgment which deserves attention relates to the second basis of the claim, namely for an order (an interdict) prohibiting the player to play for any other club. The court examined the question of whether such an order should be given where there was no express negative covenant included in the contract (as was the position on the facts), but the applicant claimed that such a covenant against playing for any other club during the term of the agreement should be implied as a tacit term. The court was not willing to decide the issue, but in the course of its reasoning in rejecting the appeal against the court *a quo*'s refusal to order specific performance of the player's positive obligations as well as an interdict to enforce such an implied negative obligation, the court observed the following:

- That a court would be much less inclined to enforce such an implied (tacit) negative covenant by means of specific performance, as opposed to an express negative covenant; and
- That the following view reflects the preferred way forward for South African courts in considering applications for an interdict to enforce negative covenants in cases of this nature: 'The problem of the deserting employee would be better handled by asking simply whether he is in breach of his

⁹⁹⁹ At 552H-J of the judgment (from the Afrikaans)

contract and whether an interdict to forbid that breach would transgress the principles preventing an order of specific performance of the contract of service.¹⁰⁰⁰

The courts have in the past been willing to grant such an interdict where the contract contained an express covenant whereby the employee undertook not to be employed by any employer or undertaking other than that of the employer during the term of the contract; and where it was held that damages would not be an adequate remedy for the employer.¹⁰⁰¹

332 The first case in South Africa where a court ordered specific performance of a contract for personal services against an employee was a 'sports case'. In the matter of *Santos Professional Football Club (Pty) Ltd v Igesund*¹⁰⁰² the Cape Provincial Division was faced with a claim by the applicant football club to enforce its employment contract with the respondent football coach. Igesund, who is one of the top football coaches in the country (and who had formerly coached the national team), had entered into a two-year contract to coach Santos's team. Half-way through the contract, he approached the club and informed them that he intended leaving to coach another Cape Town-based club, Ajax Cape Town FC (of which Ajax Amsterdam is a 51% shareholder). The contract with Santos contained no provision for a notice period, and Igesund gave two weeks notice of his intention to leave the club (although he offered to assist for a reasonable period until Santos had employed a new coach). The reasons cited by Igesund for his decision to leave were personal concerns and family obligations (although these were not considered to be significant), as well as financial considerations. He was offered a three-year contract with sizeable signing-on fee by Ajax and would be paid a monthly salary of more than double the salary earned at Santos. Santos approached the court for an order that

¹⁰⁰⁰ Wright J in *Troskie*, quoting Christie *supra* 2nd ed (at 556B of the judgment)

¹⁰⁰¹ See *Roberts Construction Co Ltd v Verhoef* 1952 (2) SA 300 (W)

¹⁰⁰² 2003 (5) SA 73 (C)

Igesund continue to serve as head coach at the club for the remainder of his employment contract.¹⁰⁰³

333 The court *a quo*,¹⁰⁰⁴ by way of Desai J, rejected the claim for specific performance.

The court held that the performance of the service rendered by Igesund was dependent upon his personal ability, efficiency and skill, and that a coach performing his functions under a court order would do so with diminished enthusiasm and commitment, and that the court was unsure how a dispute about the coach's performance of his duties would be resolved under such circumstances. The court further referred to certain policy considerations (which it was held resonated strongly in the constitutionally enshrined rights to freedom of movement,¹⁰⁰⁵ freedom to choose a profession¹⁰⁰⁶ and the right to dignity¹⁰⁰⁷), which included a disapproval of forced labour, the fact that damages were a sufficient remedy for the employer, and a reluctance to interfere with an employee's right to freely to exercise his skills or profession. The court referred to the previous view as expressed in the case law that the reasons militating against an award for specific performance of a contract of employment were so compelling that they were generally regarded as a rule of law, and that specific performance would never be granted in such cases. The court continued to hold that, even though there was no longer such an inflexible rule of law, the 'compelling considerations why such an order should not be granted remain weighty.'¹⁰⁰⁸ The court continued to hold that, in the judicial exercise of its discretion to order or refuse the order for specific performance, it was restrained in the circumstances of the case from granting the order by a number of practical considerations. These practical considerations were the fact that the highly personal nature of the services would make it virtually impossible to gauge Igesund's performance, that such an order might compromise Igesund's dignity, and that the

¹⁰⁰³ Santos also sought an order against second respondent, Ajax, restraining it from taking any action designed to induce Igesund to breach his contract with Santos. This claim was rejected on the evidence, as both the court *a quo* and the Full Bench on appeal held that there was no evidence of inducement to breach or of interference with another's contractual undertaking by Ajax – see the discussion in par 347 below.

¹⁰⁰⁴ *Santos Professional Football Club (Pty) Ltd v Igesund & Another* 2002 (5) SA 697 (C)

¹⁰⁰⁵ Section 21 of the Bill of Rights

¹⁰⁰⁶ Section 22 of the Bill of Rights – see discussion elsewhere in this chapter

¹⁰⁰⁷ Section 10 of the Bill of Rights

¹⁰⁰⁸ *Santos a quo* at 701C

existing discord between the parties might be exacerbated to such an extent that it would be impossible to restore a working relationship between both Igesund and the club and Igesund and the team.¹⁰⁰⁹

334 The Full Bench, on appeal, rejected the reasoning of the court *a quo* and ordered specific performance against Igesund. The court, by way of Foxcroft J, based its decision on a number of factors relating to the contract between Igesund and the club as well as the nature of the employment relationship between the parties. Firstly, the court referred to the fact that the employment contract between Santos and Igesund specifically provided that, in the event of a breach by either of the parties, the aggrieved party would be entitled to cancel the contract or to claim specific performance of the other party's obligations in terms of the agreement.¹⁰¹⁰ Furthermore, the court stressed the importance of the fact that (as it stated) this was not an ordinary contract of employment.¹⁰¹¹ The court referred to the signing-on fee which was paid to Igesund and to his job description. The court referred to the fact that the employment contract contained a clause which specifically provided that the club may not interfere in any way whatsoever in the coaching, selection or substitutions of the team, and that Igesund would have full control and responsibility in this regard.¹⁰¹² The court continued, in examining the earlier case law in respect of the discretion to order specific performance in contracts for personal services, distinguished between cases of wrongfully dismissed servants and cases of employees unlawfully resiling from a contract.¹⁰¹³ The court, by way of summary, remarked as follows regarding the nature of the employment relationship between the parties:

'[Igesund] is certainly no ordinary servant, but a contracting party, contracting on equal terms with [Santos], and being able to command a high sum of money in doing so. He is also given *carte blanche* in the exercise of his duties. The present matter is also not one

¹⁰⁰⁹ Santos *a quo* at 701

¹⁰¹⁰ In clauses 9.1 and 9.2 of the contract – see Santos (appeal) at 76

¹⁰¹¹ Santos (appeal) at 76D

¹⁰¹² In clause 5.3 of the agreement – Santos (appeal) at 78A-C

¹⁰¹³ Santos (appeal) at 78J

where the Court is asked to order specific performance against an employer. The Court was asked to declare that a contract was binding and to allow [Santos] to proceed to enforce [its] contract against an unwilling employee who wished to earn more money in a new position ... I would point out immediately that the present case is not concerned with compelling one person to employ another against his will either as a confidential servant or anything else. On the contrary, this is an application to compel a contracting party to hold to his contract.¹⁰¹⁴

The court agreed with Desai J's view in the court *a quo* that Igesund's principal reason for leaving Santos was a commercial one – the coach had simply been made a better offer.¹⁰¹⁵ The court stated that it is the injured plaintiff's right to elect whether to hold a defendant to his contract and claim performance by him of precisely what he has bound himself to do, or to claim damages for the breach. The defendant has no right to prescribe how the plaintiff will make this election which is provided by law (i.e. to insist that the plaintiff should rather claim damages for the breach).¹⁰¹⁶

The court continued to reject the court *a quo*'s view regarding the personal nature of the services to be rendered as constituting a reason to refuse specific performance and also distinguished the judgment in *Troskie*¹⁰¹⁷ on the facts, and held further that ordering Igesund to return to work at Santos could not be seen as compelling someone to do something against their will. The court further rejected the arguments based on the difficulty of supervision of the court's order, and concluded as follows:

'On the present facts, there does not seem to be any inequity in obliging [Igesund] to adhere to his contract. The only party who will be prejudiced if he does not perform properly is [Santos]. [Santos] has chosen to take that risk by bringing the application which it brought, seeking to hold [Igesund] to his contract. If [Igesund] refuses to return despite a court order, or refuses to carry out his work to the satisfaction of [Santos],

¹⁰¹⁴ *Ibid.* at 79D-I

¹⁰¹⁵ *Ibid.* at 77G

¹⁰¹⁶ *Ibid.* at 81F-I

¹⁰¹⁷ See the discussion *supra*

[Santos] has various remedies available. The most obvious would be to stop paying him his salary or to bring an application for cancellation of the contract.¹⁰¹⁸

The court furthermore made short shrift of the court *a quo*'s argument that an order compelling Igesund to work for Santos for a further nine months would compromise his dignity, and observed that '[i]t must be remembered that we are dealing with a contract which [Igesund] entered into freely and voluntarily and in terms of which he agreed to an order for specific performance being made'.¹⁰¹⁹ Finally, the court reiterated the importance of sanctity of contract (or *pacta sunt servanda*) in South African law and referred to the fact that courts should exercise 'perceptive restraint' in striking down contracts freely made,¹⁰²⁰ and held that the court *a quo* had erred in not sufficiently taking into account the primacy of the plaintiff's remedy of an order for specific performance and the election involved.

335 Naude¹⁰²¹ has observed that the Full Bench on appeal in *Santos v Igesund* failed to deal specifically with the court *a quo*'s argument that one of the compelling reasons not to enforce specific performance against an employee is the disapproval of forced labour, with reference to the prohibition of forced labour in section 13 of the Bill of Rights.¹⁰²² The author is of the view that there may be merit in this claim, and observes that section 13 might justify a presumption against specific performance of an employment contract and that section 13 and 'the policy behind s 22¹⁰²³ of protecting personal freedom should ... make courts very wary of granting specific performance against an employee'.¹⁰²⁴

It is, however, debatable to what extent, if any, these last two constitutional provisions have a role to play in cases on similar facts to *Santos v Igesund* (and, specifically, cases

¹⁰¹⁸ *Santos* (appeal) at 85H-I

¹⁰¹⁹ *Ibid.* at 86E

¹⁰²⁰ With reference to *Brisley v Drotsky* 2002 (4) SA 1 (SCA) at 35

¹⁰²¹ Naude, T 'Specific performance against an employee – *Santos Professional Football Club (Pty) Ltd v Igesund*' (2003) 120 *SA Law Journal* 269

¹⁰²² *Ibid.* at 280

¹⁰²³ Section 22 of the Bill of Rights, which guarantees the freedom to choose one's occupation, trade or profession – see the discussion elsewhere in this chapter

¹⁰²⁴ Naude *op cit.* 281

of contract-jumping by professional athletes). Le Roux¹⁰²⁵ has remarked that the Transvaal Provincial Division, in the case of *Golden Lions Rugby Union v A J Venter*,¹⁰²⁶ appeared to reject an argument that a right of first refusal against a professional rugby player had the effect of compelling such player to accept unemployment or to accept employment with somebody he did not wish to be employed by and is as such contrary to public policy and to sections 13 and 22 of the Bill of Rights.¹⁰²⁷ Le Roux refers¹⁰²⁸ to the case of *Knox D'Arcy Ltd & Another v Shaw & Another*¹⁰²⁹ (a restraint of trade case), where it was held that 'if an individual freely undertakes to surrender a particular right, that decision is not a violation of the right but a consequence of the covenantor's freedom',¹⁰³⁰ and the author states that it is doubtful whether the interests and policy which underlie the section 13 and 22 rights ever had any relevance or application to the facts in *Santos*.

Le Roux remarks the following in respect of the application of these constitutional considerations to the facts of the case (and which, it is submitted, is of wider relevance to the issue of contract-jumping by professional athletes):

'It is difficult to see how a contract of relatively short duration, such as the one entered into by Igesund, could undermine his rights in terms of section 22. [It has been remarked]¹⁰³¹ that section 22 operated to ensure that the choice of trade, profession or occupation is open to all ... There is nothing to suggest that this choice of profession would have been compromised if [Igesund] were required to honour his contract with Santos ... [I] find it hard to comprehend how the enforcement of a contract that a party was originally happy to conclude and happy to honour until a better offer came along can

¹⁰²⁵ Le Roux 'How Divine is my Contract? Reflecting on the Enforceability of Player or Athlete Contracts in Sport' (2003) 15 *SA Mercantile LJ* 116

¹⁰²⁶ Case 2007/2001, 13 February 2000 (unreported). This case involved an unsuccessful claim by the Golden Lions union to enforce a right of first refusal in its contract with its player, A J Venter, to prohibit him from moving to rival team the Natal Sharks, based in Durban. See the discussion in the text below

¹⁰²⁷ Le Roux *op cit.* 123; Naude *op cit.* 277

¹⁰²⁸ At 123

¹⁰²⁹ 1996 (2) SA 651 (W) at 660A-B of the judgment

¹⁰³⁰ It appears that a similar sentiment was expressed by Ngcobo J in the Constitutional Court judgment of *Barkhuizen v Napier* 2007 (5) SA 323 (CC) in respect of the meaning and content of the principles of freedom and sanctity of contract. See, however, for criticism regarding the waiver of constitutional rights, Woolman, S 'Category mistakes and the waiver of constitutional rights: A response to Deeksha Bhana on *Barkhuizen*' (2008) 125 *South African Law Journal* 10

¹⁰³¹ With reference to the cases of *JR1013 Investments CC & Others v Minister of Safety and Security & Others* [1997] BCLR 925 (E) and *Van Rensburg v South African Post Office Ltd* [1998] 10 BCLR 1307 (E)

amount to forced labour. I suggest that forced labour involves much more hardship than simply losing out on a good deal.¹⁰³²

It is submitted, in respect of the role of section 22 in this context, that a court's award of an order for specific performance against a player, through the due exercise of its judicial discretion, should be distinguished from the scenario of the operation of the very rigid and arbitrary rules of the National Soccer League which were held to be unconstitutional and in unlawful restraint of trade in the case of *Coetzee v Comitis*.¹⁰³³

336 The trend in respect of judicial willingness to award an order for specific performance as established in the *Santos* Full Bench appeal was subsequently followed, in the sports context, in the Cape High Court judgment in *Roberts & Another v Martin*.¹⁰³⁴ This case involved a sponsorship agreement whereby the respondent had agreed to sponsor the applicant, a promising young tennis player. When the player was injured, the respondent repudiated the contract and refused to make further payments. The court ordered specific performance against the sponsor.¹⁰³⁵

337 The *Santos* Full Bench judgment was subsequently followed by the Witwatersrand Local Division in the more recent case of *Nationwide Airlines (Pty) Ltd v Roediger & Another*.¹⁰³⁶ This case, which was not a sports case, involved a claim for an order for specific performance by an airline against one of its pilots, who wished to terminate a contract with the airline in light of a better financial offer to fly for another airline. The court examined the existing case law in the development of the judicial discretion to grant or refuse specific performance (and specifically in respect of contracts for personal services), and reiterated that it is a misconception to say without qualification that

¹⁰³² Le Roux *op cit.* 127-8; see also Cloete et al *Introduction to Sports Law in South Africa* LexisNexis Butterworths (2005) at 28-29

¹⁰³³ 2001 (1) SA 1254 (C), discussed elsewhere in this chapter

¹⁰³⁴ 2005 (4) SA 163 (C)

¹⁰³⁵ For further discussion of the case, see Cloete et al *Introduction to Sports Law in South Africa* LexisNexis Butterworths (2005) at 29

¹⁰³⁶ 2008 (1) SA 293 (W)

specific performance of an employment agreement will never be permitted. The court stressed that there are numerous situations where specific performance may be ordered, where various factors may play a role in coming to such decision. These factors are the following:¹⁰³⁷

- The particular relationship between the employer and the employee;
- The nature of the employment contract;
- The nature of the service or work which is to be performed in terms of the contract;
- The prejudice or hardship to be suffered by the innocent party should specific performance not be ordered, compared to the prejudice that will be suffered by the employee, should it be granted.

The court reiterated that 'the general rule should still be that where a party wrongfully breaches a contract it should entitle the innocent party to enforce the contract, and that should no less be so even in employment contracts.'¹⁰³⁸ The court continued to refer to the *Santos* Full Bench judgment and held that the facts in *Roediger's* case were akin to the facts in the *Santos* case; and held as follows:

'It is probably true to say that the first respondent's position [as a professional airline pilot] *vis a vis* the applicant is somewhat unique. It is not the normal master and servant contract of employment that we are dealing with here. In this sense the position of the first respondent in respect of his relationship with the applicant is very much the same as was the case with the respondent in the *Santos* matter.'¹⁰³⁹

The court considered the fact that the respondent employee had freely and voluntarily entered into the contract, as well as the potential harm that the applicant airline may suffer if the order were refused (e.g. the significant cost of cancellation of flights due to a

¹⁰³⁷ *Ibid.* at 297H-I

¹⁰³⁸ *Ibid.* at 297J

¹⁰³⁹ *Ibid.* at 298F-H

lack of trained and experienced pilots on the relevant routes), and ordered that the respondent should continue to serve as captain of the applicant's Boeing 767 aircraft subject to certain relevant civil aviation regulations.

338 It appears therefore that the current state of South African law is that the sports employer may in certain circumstances be able to successfully claim an order for specific performance against a player employee who attempts to desert to pursue greener grass elsewhere. The question has not been examined specifically in respect of the position regarding players' contracts; although the above considerations from the *Santos* and *Roediger* cases, it is submitted, could open the practice of contract-jumping to such a course of action.

339 A recent matter promised judicial consideration of the question, although this did not come to pass. Prominent Super 14 Blue Bulls franchise and Springbok rugby lock forward, P.J. 'Bakkies' Botha, was embroiled in a high profile case before the Labour Court early in 2008, in an attempt to escape from his five-year Bulls contract in order to take up more lucrative employment with French club Toulon. Botha's application to the Johannesburg Labour Court came amidst reports that the player had signed a lucrative contract with French club Toulon, that he was reportedly required to report for duty at the club on 1 April 2008, and that warnings had been issued that he would be sued for breach of contract. In what was reported as a 144-page set of affidavits, Botha claimed that the relationship between himself and the Bulls had broken down irretrievably over the past year. Botha's application reportedly cited seven reasons why his contract with the Blue Bulls Company should be declared null and void, and the player claimed an order to force the respondent to provide him with a clearance certificate to take up employment at Toulon. Amongst the reasons that were reportedly cited for Botha's application to have the contract declared null and void were the following:

- An allegation that the contract had not been finalised due to an outstanding agreement to discuss the player's image rights (even though such an agreement would reportedly be contrary to the Special Players Agreement (a collective agreement in force between the parties as negotiated by the SA Rugby Players Association (SARPA));
- An allegation that the contract was concluded under wrongful influence due to the fact that the player agent who negotiated the contract on Botha's behalf was not a registered agent with SA Rugby; and
- Allegations by Botha that he had never been granted leave by the respondent in terms of the contract. According to reports Botha was owed 125 days leave by the respondent and, despite being given ten days to comply with the player's leave requirements or, alternatively, to compensate him for such leave, the respondent had failed to respond. Botha reportedly argued that this constituted breach of contract on the part of the company which entitled him to cancel the contract.

Botha abandoned a number of his claims during the course of the application, and ultimately persisted only in seeking the following relief:

- A declaratory order in terms of section 158(1)(a)(iv) of the Labour Relations Act, 1995, to the effect that the contract entered into between Botha and the Blue Bulls on 18 September 2006 (a five year contract) be declared void *ab initio*; alternatively
- An order declaring that Botha is a free agent and is entitled to cancel the contract entered into with the Blue Bulls on 18 September 2006 on written notice; and
- That the respondents be ordered to furnish Botha with a clearance which conforms with the requirements for the issuance thereof in accordance

with Appendix 1 of Regulation 4 of the International Rugby Board Regulations.

The Johannesburg Labour Court (by way of Nel AJ) rejected Botha's claims, *inter alia* on the basis that a 2007 collective agreement was in force between the parties and that the Labour Court lacked jurisdiction to pronounce on a dispute regarding the interpretation of such agreement (in terms of section 24 of the Labour Relations Act).¹⁰⁴⁰

This matter may have provided the ideal opportunity to consider the issue of the extent to which a club can hold a player to his contract in such circumstances. At the time of writing it is unknown whether Botha might persist in any future action in respect of the abandoned claims, although it was reported that the employment offer from Toulon was subsequently withdrawn.

340 Finally, it remains to briefly examine the availability of an alternative remedy in the case of a player contract breach, namely what is known in English law as the 'negative injunction', i.e. a request for a court order during the term of the contract to prohibit the player from taking up employment elsewhere. English law in this regard has developed over the years since *Lumley v Wagner*¹⁰⁴¹ to distinguish between enforcement by means of an injunction of an express negative covenant in the contract as opposed to an implied covenant to that effect, where such injunction will generally only be granted in the former case. This approach was incorporated into South African law in earlier cases,¹⁰⁴² but it has been suggested that there is no place in South African law for this approach. While the court in *Troskie v van der Walt*¹⁰⁴³ failed to go this far, and held that a court would be more reluctant to enforce a purely implied negative covenant by means of an order for specific performance (i.e. granting an interdict to prohibit the party in breach from transgressing the negative obligation), this view has been criticized on the

¹⁰⁴⁰ *Botha v Blue Bulls Co (Pty) Ltd & Another* Case No JR1965/2005 (judgment of 27 June 2008, unreported)

¹⁰⁴¹ 1852 (1) de G., M. & G. 604

¹⁰⁴² *Roberts Construction Co Ltd v Verhoef* 1952 (2) SA 300 (W); *Tension Envelope Corporation (SA) (Pty) Ltd v Zeller & Another* 1970 (2) SA 333 (W)

¹⁰⁴³ 1994 (3) SA 545 (O) – discussed *supra*

basis that South African law recognizes no difference in efficacy between tacit and express terms in a contract:

'The problem of the deserting employee would be better handled by asking simply whether he is in breach of his contract and whether an interdict to forbid that breach would transgress the principles preventing an order for specific performance of the contract of service.'¹⁰⁴⁴

And:

'A plaintiff who asks for an interdict to prohibit [breach of an express or implied prohibition in the contract] is in reality asking for specific performance in the negative form of non-performance of the forbidden or inconsistent act to ensure performance of the contract. His entitlement to an interdict, subject only to the court's discretion, is therefore as unquestionable as in the case of a plaintiff who seeks specific performance in the positive form.'¹⁰⁴⁵

341 It appears, therefore, that players who breach employment contracts with their employers may in principle be subject to either an order for specific performance of the positive obligations in terms of the agreement, or, alternatively, to an interdict restraining them from taking up employment elsewhere during the currency of the agreement. Such claims must be considered on the merits of every given case, and will generally be refused where one or more of the factors that would militate against an order for specific performance are present (e.g. undue hardship for the respondent player or third parties, impossibility of performance, where the potential harm that would arise from the granting of the order outweighs the potential harm that would arise for the

¹⁰⁴⁴ Christie *The Law of Contract in South Africa* supra at 534

¹⁰⁴⁵ *Ibid.* at 532

employer from the refusal of such an order, etc.).¹⁰⁴⁶ As mentioned above, it is doubtful whether a constitutional challenge to an order of specific performance as promoting 'forced labour' or constituting an unjustifiable limitation of the player's right to freedom of trade, occupation or profession would be likely to succeed (depending on the circumstances of the case, including the length of the applicable contract of service and factors such as the consideration paid and the relative degrees of harm which the granting/refusal of the order would occasion for the respective parties).

II Cancellation of the contract

342 As has been observed above, cancellation of a contract on the basis of breach (as opposed to a claim for specific performance) is viewed in South African law as an extraordinary remedy (as it envisages termination of the obligations undertaken by the parties and thus runs counter to their intention at the time of contracting). Accordingly, the 'innocent' party in the event of breach is normally only entitled to cancel the contract if such breach is material, i.e. of a sufficiently serious nature to justify cancellation. In the case of delay in performance (or *mora*) by the other party (either as debtor or creditor in respect of such performance), the injured party may only cancel the contract if time is of the essence in respect of such performance (which will usually be the case in respect of sports contracts which function on fixed schedules).¹⁰⁴⁷ Where time is not of the essence, cancellation for breach will only be justified once the injured party has notified the party in breach of such breach and has provided such party with an opportunity to remedy the breach, failing which the injured party would acquire a right to cancel the contract.

¹⁰⁴⁶ See the preceding discussion regarding the availability of the order for specific performance in contracts for personal services and the content/meaning of the courts' judicial discretion to refuse such an order

¹⁰⁴⁷ See Cloete et al *Introduction to Sports Law in South Africa* (2005) at 30

343 The other forms of breach of contract also require that such breach must be of a sufficiently serious nature in order to justify cancellation. In the event of positive malperformance, the injured party would only be entitled to cancel the contract if the performance is so defective that one cannot reasonably expect of the prejudiced party to accept the defective performance and be satisfied with a reduction of the counter-performance or damages.¹⁰⁴⁸ In the event of repudiation of the obligations, the injured party will normally only be entitled to cancel the contract if the repudiating party gives a clear indication that s/he will no longer fulfill any of the obligations in terms of the contract (partial repudiation will only justify cancellation if it results in substantial rejection of the obligations in terms of the contract).¹⁰⁴⁹

344 Alternatively, if the contract makes provision for cancellation in the event of breach (by means of a cancellation clause or *lex commissoria*), the injured party will be permitted to immediately (or upon the terms such clause) cancel the contract even on the basis of an insignificant breach. For more detailed discussion of the remedies for breach of contract and, specifically, cancellation, the reader is referred to specialized texts in this regard.¹⁰⁵⁰

III The contractual claim for damages for breach of contract

345 In terms of the South African common law of contract, the injured party in the event of breach of contract will have a claim for damages, irrespective of whether the contract is maintained (enforced) or cancelled as a result of such breach. The measure of damages for breach of contract is that of the injured party's positive *interesse* (i.e. to

¹⁰⁴⁸ *Ibid.*

¹⁰⁴⁹ *Ibid.*

¹⁰⁵⁰ See Christie, R H *The Law of Contract in South Africa* 5th ed LexisNexis Butterworths, Durban (2006) at 538 *et seq.*; Kerr, A J *The Principles of the Law of Contract* 6th ed LexisNexis, Durban (2002) at 703 *et seq.* See also *Spheris v Flamingo Sweet (Pty) Ltd & Another* [2008] 1 All SA 304 (W) at 309-311 in respect of the consequences of cancellation, and in respect of cancellation based on delay in performance (or *mora*) see *Nel v Cloete* 1972 (2) SA 150 (A); *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1977 (4) SA 310 (T).

place the injured party in the economic position they would have been in if the contract had been fulfilled (i.e. if there had been no breach). The injured party is entitled to claim its patrimonial loss, and damages cannot be awarded for emotional factors such as pain and suffering or humiliation.¹⁰⁵¹ The injured party would have to show that there was a causal connection between the breach and the loss and also that such loss was not too remote. Generally, the defaulting party will only be liable for losses that were reasonably foreseeable at the time of contracting, and the injured party can claim general damages (for losses which arise naturally from the breach) as well as special damages (if such losses may be reasonably supposed to have been within the contemplation of the parties as likely to arise from the breach).¹⁰⁵² Beneficial side-effects to the breach are taken into consideration. The injured party is also expected to take reasonable steps to mitigate its loss.¹⁰⁵³

There is some authority in the case law for an award of the injured party's negative *interesse*¹⁰⁵⁴ (i.e. damages to place the party in the position they would have been in if the contract not been concluded), or 'restitutionary damages'.¹⁰⁵⁵

346 In order to avoid the often problematic exercise of proving one's damages in the event of breach of contract, the parties to a contract will often include penalty clauses (which provide that a party who commits breach will be liable to pay or forfeit an amount of money to the other party). Penalty clauses are regulated by the Conventional Penalties Act, 1962,¹⁰⁵⁶ which provides that such clauses are valid but that a court may reduce the amount of the penalty if it is out of proportion to the prejudice suffered as a result of the

¹⁰⁵¹ See *Jockie v Meyer* 1945 AD 354; *Administrator, Natal v Edouard* 1990 (3) SA 581 (A); *Tweedie & Another v Park Travel Agency (Pty) Ltd t/a Park Tours* 1998 (4) SA 802 (W)

¹⁰⁵² See, generally, *Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1; *AA Alloy Foundry (Pty) Ltd v Titaco Projects (Pty) Ltd* 2000 (1) SA 639 (SCA); *Transnet Ltd t/a National Ports Authority v Owner of MV Snow Crystal* 2008 (4) SA 111 (SCA)

¹⁰⁵³ See, for example, *Soar t/a Rebuilds for Africa v J C Motors (Pty) Ltd* 1992 (4) SA 27 (A)

¹⁰⁵⁴ This is the normal measure of damages for claims in delict (or tort) – see the discussion elsewhere in this chapter

¹⁰⁵⁵ See *Probert v Baker* 1983 (3) SA 229 (D); *Svorinic & Others v Biggs* 1985 (2) SA 573 (W); *Mainline Carriers (Pty) Ltd v JAAD Investments CC & Another* 1998 (2) SA 468 (C); *Tweedie & Another v Park Travel Agency (Pty) Ltd t/a Park Tours* 1998 (4) SA 802 (W)

¹⁰⁵⁶ Act 15 of 1962

breach.¹⁰⁵⁷ Such prejudice includes both patrimonial and non-patrimonial loss. The amount in terms of a penalty clause may be claimed in the alternative to a claim for damages (and not in addition to such damages).¹⁰⁵⁸

For more detailed discussion of the remedies for breach of contract and, specifically, damages, the reader is referred to specialized texts in this regard.¹⁰⁵⁹

IV Unlawful interference with another's contractual relationship

347 It should be noted that the remedies for breach of contract are not limited solely to the contractual remedies which are available to the other party or parties to the contract. Similar to the position in other jurisdictions, a civil law remedy (in 'tort') is available against a person who procures a breach of a contract.¹⁰⁶⁰ It is accepted in South African law that '[a] delictual remedy is available to a party to a contract who complains that a third party has intentionally and without lawful justification induced another party to the contract to commit a breach thereof.'¹⁰⁶¹ The courts generally require the defendant's actions or conduct in interfering with the contractual rights of the plaintiff to be *intentional* (therefore with the clear intention to interfere with the parties' contractual rights and cause the plaintiff damage) in order to found liability under this delictual action.¹⁰⁶² Just some examples of specific forms of conduct that may found liability under this delict are the intentional inducement, enticement or instigation of a contracting party to breach the agreement, bribing an employee of a competitor to sell trade secrets, or enticing employees of a competitor to leave its service. In the case of

¹⁰⁵⁷ Section 3 of the Act. See *Plumbago Financial Services (Pty) Ltd t/a Toshiba Rentals v Janap Joseph t/a Project Finance* 2008 (3) SA 47 (C); *Gounder v Top Spec Investments (Pty) Ltd* 2008 (5) SA 151 (SCA)

¹⁰⁵⁸ See Cloete et al *Introduction to Sports Law in South Africa* supra at 31

¹⁰⁵⁹ See Christie *The Law of Contract in South Africa* (2006) supra at 542 et seq.; Kerr *The Principles of the Law of Contract* (2002) supra at 737 et seq.

¹⁰⁶⁰ For discussion of the similar remedy in English law, see Lewis & Taylor *Sport: Law and Practice* Cavendish Publishing 2003 at 832-833 (par E1.75 et seq.). See also the treatment of such a claim based on procuring a breach of contract in the judgment in the well-known boxing case of *Warren v Mendy* [1989] 1 WLR 853

¹⁰⁶¹ *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1981 (2) SA 173 (T) at 202. See also *Dun and Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau (Cape) (Pty) Ltd* 1968 (1) SA 209 (C).

¹⁰⁶² *Union Government v Ocean Accident and Guarantee Corporation Ltd* 1956 (1) SA 577 (A)

Santos Professional Football Club (Pty) Ltd v Igesund,¹⁰⁶³ Santos FC instituted a claim of unlawful inducement to breach a contract of service against Ajax Cape Town FC, after Ajax had offered Santos coach Gordon Igesund (who was one year into a two-year contract with Santos) a lucrative contract as Ajax manager. Igesund repudiated his contract with Santos. The court dismissed the claim based on unlawful interference with a contractual relationship, on the basis that Ajax's mere offer to Igesund was insufficient to found liability for the club in the absence of proof of active unlawful inducement to breach the contract.¹⁰⁶⁴

¹⁰⁶³ 2003 (5) SA 73 (C). For more detailed discussion of *Igesund's* case, see par 325 *et seq* (on termination of the contract by the employee and the order for specific performance) above

¹⁰⁶⁴ See Cloete et al *Introduction to Sports Law in South Africa* LexisNexis Butterworths 2005 at 114

§9 Players' agents

348 The relationship between professional athletes and their agents and the other contracting party (e.g. team owners) is governed by the law of principal and agent. If the agent acts within the scope of the mandate provided by the principal (the athlete), the athlete will be bound to any contract entered into by such agent on the athlete's behalf. This is also true of an employment contract.¹⁰⁶⁵

349 Apart from the legal regulation imposed by the normal rules derived from the common law of agency,¹⁰⁶⁶ the activities of players' agents are regulated to a limited extent in South African professional sport. Little will be said here regarding the specific regulations and codes of conduct that may be applicable, and the reader is referred to the various governing bodies for more comprehensive information in this regard.

350 In football, the SAFA issued regulations in 1999 (in force from 1 November 1999) governing agents who undertake transfers of players between clubs within South Africa.¹⁰⁶⁷ An agent must be in possession of a license from SAFA for all domestic transfers or a license from FIFA for international transfers. Players and clubs are not permitted to employ an unlicensed agent (except where such agent is a close relative of a player or a registered attorney in the Republic).¹⁰⁶⁸ Where an applicant for a license is a foreign national, s/he must have been resident in South Africa for a period of five years, and only natural persons may apply for a license.¹⁰⁶⁹ If, following an interview process, there are no objections to a license being granted, the applicant is required to furnish a bank guarantee to cover possible claims for damages by players or clubs in respect of the

¹⁰⁶⁵ Jordaan in Basson & Loubser *Sport and the Law in South Africa* supra at Ch 8-16

¹⁰⁶⁶ See, generally, Kerr, A J *The Law of Agency* 4th ed LexisNexis Butterworths, Durban (2006)

¹⁰⁶⁷ Promulgated on 8 October 1999 in compliance with Chapters I, III, IV and V of the FIFA Regulations Governing Players' Agents and Art. 17, par. 2 of the Regulations governing the Application of the FIFA Statutes.

¹⁰⁶⁸ SAFA Player Agent Regulations Articles 1.2 and 1.3

¹⁰⁶⁹ SAFA Player Agent Regulations Article 2

conduct of such persons which may be in contravention of SAFA's regulations.¹⁰⁷⁰ Article 12 of the SAFA Player Agent Regulations provides for the following rights of a registered player agent:

- (a) To contact any player who is not or is no longer under contract with a club (cf Art. 12 and 13 of the FIFA Regulations Governing the Status and Transfer of Players);
- (b) To represent any player or club requesting him to negotiate and/or conclude a contract on his/their behalf;
- (c) To manage the affairs of any player who requests him to do so; and
- (d) To manage the affairs of any club which requests him to do so.

Article 14 deals with the duties of licensed players' agents, and provides that such agents are obligated:

- (a) To comply with the statutes and regulations of SAFA, CAF and FIFA at all times;
- (b) To ensure that every transaction to which he/she is a party conforms with the abovementioned statutes and regulations;
- (c) Never to approach a player who is under contract with a club so as to persuade him to break his contract or not to adhere to the rights and duties contained in the contract; and
- (d) To represent the interests of only one party in the same transfer.

In terms of Article 15 the sanctions against licensed players' agents for contravention of their duties include a reprimand, censure or caution; a fine; suspension of the license or withdrawal of the license. Article 17 provides that, in the event that a player uses the

¹⁰⁷⁰ SAFA Player Agent Regulations Article 9. According to the version of the Player Agent Regulations as available on the web site of SAFA at the time of writing (April 2009) the amount of such bank guarantee is ZAR 300 000.

services of an unlicensed player agent, SAFA may take this into account in considering the player's position in any subsequent contractual dispute, or may sanction the player by means of a reprimand, censure or caution; a fine not exceeding ZAR 100 000; or a disciplinary suspension not exceeding 12 months.

In terms of Article 18 a club wishing to procure the services of a player shall only negotiate directly with the player or with a SAFA-licensed agent acting on behalf of the player. Any club which pays another club compensation for a player's training or development shall be obliged to transfer the amount directly to the club in question and shall be strictly prohibited from transferring any or all of the amount, even as remuneration, to a player's agent. Contravention of these provisions is liable to sanction by SAFA, which may include –

- (a) a reprimand, censure or caution;
- (b) suspension of all or part of its management bodies;
- (c) a fine of up to ZAR100 000;
- (d) interdiction to carry out national and/or international transfers; or
- (e) a ban on all national and/or international footballing activity.

Disputes between players and their agents may be referred to the PSL's Dispute Resolution Chamber. At the time of writing, the SAFA web site lists only 5 individuals as agents currently accredited by SAFA.¹⁰⁷¹ At the time of writing, the professional footballers' union, SAFPU, are reported as having warned their members against concluding contracts with a certain FIFA-accredited agent, on the basis of alleged greed (and contravention of the FIFA Regulations regarding monthly payments by players) and other issues.¹⁰⁷²

¹⁰⁷¹ As on 9 April 2009

¹⁰⁷² See the report by Nkareng Matshe 'Players' union slams greedy agent Makaab', 21 January 2009 (available online at <http://www.iol.co.za> – last accessed 9 February 2009) The agent in question has denied the allegations (see the article by Mcelwa Nchabeleng 'I'm not ripping players off: Makaab', *The Sowetan*, 21 January 2009

351 In professional cricket, the Memorandum of Understanding currently in force¹⁰⁷³ between players' union SACA and Cricket SA provides for the establishment of a Cricket SA Player Agent Accreditation Programme, to clarify the role played by players' agents and to avoid conflict in respect of commercial and financial aspects of the game.

352 In rugby union, SARU's Player Agent Code of Conduct is applicable to agents, and breaches are subject to the disciplinary provisions of SARU's Regulations pertaining to Illegal and Foul Play and Misconduct. SARU also implements a Player Agent Accreditation Scheme, which is subject to SARU's Player Agent Regulations, and the Union is to maintain and publish a register of accredited agents. Any agent who intends to represent, advise, counsel or assist players in contract negotiations with any international rugby club, national union or rugby body, or any agent who requires the consent of a rugby body for the use of a player's image rights pursuant to the Standard Players Contract, must apply for accreditation with SARU. Provincial unions are prohibited from negotiating with a non-accredited agent. According to the Regulations, an agent is required to have a written Standard Player Agent Agreement with the player s/he represents. An agent's fees are to be negotiated between such agent and the player, and neither SARU, SARPA nor SAREO prescribe the fees payable for an agent's services.

¹⁰⁷³ In force until 2010

§10 Professional athletes' employment and the role of the restraint of trade doctrine

353 The essence of the restraint of trade doctrine under English law was described by Lord MacNaghten in *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co*¹⁰⁷⁴ as follows:

'The public have an interest in every person's carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, *if there is nothing more*, are contrary to public policy ...' [Emphasis provided]

Public policy leans against the use of restraint of trade clauses or covenants for the purpose of the limitation of competition *per se*. In South African law it has been observed that, in determining whether a restriction on a party's freedom to trade or to practice a profession is enforceable, a court will have regard to two main considerations. The first is that the public interest requires that parties should comply with their contractual obligations even where these are unreasonable or unfair (the principle of sanctity of contract, or *pacta sunt servanda*). The second consideration is that all persons should, in the interests of society, be permitted as far as possible to engage in commerce or the professions or, expressed differently, that it is detrimental to society if an unreasonable fetter is placed on the person's freedom of trade or to pursue a profession. It will be contrary to the public interest to enforce an unreasonable restriction on a person's freedom to trade.¹⁰⁷⁵

¹⁰⁷⁴ [1894] AC 535

¹⁰⁷⁵ *Sunshine Records (Pty) Ltd v Frohling & Others* 1990 (4) SA 782 (A); see also *Magna Alloys & Research (SA)(Pty) (Ltd) v Ellis* 1984 (4) SA 874 (A), the *locus classicus* in respect of South African law relating to restraints of trade (while this judgment was rendered prior to the 1996 Constitution, subsequent case law has confirmed that *Magna Alloys* remains good law – see the discussion below)

354 Some interest worthy of protection (and which is protected by such restraint in a reasonable manner) is usually required in order to mark such restraint as being in line with public policy.¹⁰⁷⁶ Similarly, in South African law, the following has been observed:

'A contract is against public policy if it restricts a party's freedom of economic activity in a manner or to an extent that is unreasonable judged against the broad interests of the community and the interests of the contracting parties.'¹⁰⁷⁷

It has also been observed (elsewhere) that the basis for the restraint of trade doctrine is 'that as a matter of public policy a person should not be restricted in his or her ability to earn a living by an obligation that goes beyond what is necessary to achieve some legitimate and desirable aim.'¹⁰⁷⁸ This 'protectable interest' on the part of the restraining party has consistently been identified as a requirement in the test for the reasonableness of a contract in restraint of trade, e.g. in the well-known majority judgment of Nienaber JA in the Appellate Division judgment of *Basson v Chilwan*.¹⁰⁷⁹ In the sporting context, it has been observed in respect of such protectable interest that 'the principle which has emerged is that the bodies responsible for the management of each sport can legitimately have regard to the orderly management of the sport.'¹⁰⁸⁰

355 The test in English law to determine the justification for a restraint (namely whether it is reasonable and justified in the interests of the parties) is also incorporated in the South African test of whether the restraint is contrary to public policy:

Reasonableness and justification depends on whether the restraint pursues a legitimate

¹⁰⁷⁶ See Kamerling, A & Osman, *C Restrictive Covenants under Common and Competition Law* 4th ed Sweet & Maxwell, London 2004 at 2 (with reference to the English case of *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688)

¹⁰⁷⁷ From 'Contract' in Joubert et al *The Law of South Africa* 2nd edition Vol. 5 par 168. See also the landmark judgment of the (then) Appellate Division in *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A); *J Louw and Co (Pty) Ltd v Richter* 1987 (2) SA 237 (N) at 243B-D.

¹⁰⁷⁸ In English law – see Lewis & Taylor *Sport: Law and Practice* Butterworths LexisNexis 2003 at 173. Apart from the fact that the location of the burden of proof differs in restraint cases between South African and English law (in English law restraints are *prima facie* void unless justified, and accordingly the burden of proof re justification is on the party who wants to enforce the restraint), much of the English common law regarding restraints are as relevant here.

¹⁰⁷⁹ 1993 (3) SA 742 (A) at 767E-I

¹⁰⁸⁰ Kamerling, A & Osman, *C Restrictive Covenants under Common and Competition Law* 4th ed Sweet & Maxwell, London 2004 at 267; *Eastham v Newcastle United FC* [1964] Ch. 413; *Greig & Others v Insole* [1978] All E.R. 449

aim that is worthy of protection and does so in a reasonable and proportionate manner (i.e. in order to be proportionate the restraint must not only be necessary to protect the restraining party's interest, it must also go no further than is reasonably necessary for that purpose.¹⁰⁸¹

356 According to South African law, the onus of proof in restraint cases is on the party alleging that a restraint is contrary to public policy (the opposite position to that followed in English law).¹⁰⁸² Recent case law appears to have left open the question whether, in light of the impact of section 22 of the Constitution (the freedom to choose one's trade, occupation or profession¹⁰⁸³), the onus to prove the constitutionality of a restraint provision may need be shifted to the party seeking to enforce such a restrictive provision.¹⁰⁸⁴

The content of this onus (i.e. what the party who tries to escape the strictures of a restraint needs to prove) was summarized as follows in the case of *Canon Office Automation v Booth*:¹⁰⁸⁵

'The restraint of trade clause in the contract constitutes a limitation on first respondent's fundamental right to freedom of trade, occupation and profession ... [I]t seems to me that applicant needs to do more than to invoke the provisions of the contract and prove the breach. In addition, and in terms of section 36 of the Constitution, it has to show that the restraint is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom ... Insofar as a restraint is a limitation of the right to freedom of trade, occupation and profession, entrenched in section 22 of the Constitution, the common law as developed by the Courts complies with the requirements laid down in section 36(1) [the limitation clause] ... as to the limitation of such a right. The common law in regard to restraints of trade is of general application and such restraints are only

¹⁰⁸¹ See the English case of *Esso Petroleum v Harper's Garage* [1968] AC 269, HL, and *Basson v Chilwan* supra

¹⁰⁸² See *Magna Alloys & Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A)

¹⁰⁸³ Discussed below

¹⁰⁸⁴ *Fidelity Guards Holdings (Pty) Ltd t/a Fidelity Guards v Pearmain* [1997] 4 All SA 650 (SE); *Canon KZN (Pty) Ltd t/a Canon Office Automation v Booth* 2005 (3) SA 205 (D); *Reddy v Siemens* [2006] SCA 164 (SA); M Tait 'Who should bear the onus in restraint of trade disputes' 2004 25 *Obiter* 488. See, however, Neethling, J 'The Constitutional impact on the burden of proof in restraint of trade covenants: A need for exercising restraint' 2008 (1) *South African Mercantile Law Journal* 89

¹⁰⁸⁵ *Canon KZN (Pty) Ltd t/a Canon Office Automation v Booth* 2005 (3) SA 205 (D), at 209E-J

enforceable if they are not in conflict with public policy. *A restraint would be adverse to public policy if its enforcement would be contrary to the public interest. It would most likely be contrary to the public interest if it is unreasonable. It would be unreasonable if and to the extent that it does not seek to protect a legitimate interest of the one party; or if it does purport to protect an interest, such interest is eclipsed by the interest of the other party not to be so restrained.* [Emphasis provided]

The Supreme Court of Appeal, in *Reddy v Siemens Telecommunications (Pty) Ltd*,¹⁰⁸⁶ while declining to express a view on whether the position of the onus of proof in restraint cases should shift to the covenantee in light of the section 22-right,¹⁰⁸⁷ has confirmed that the common law test as set down in earlier cases¹⁰⁸⁸ to balance or reconcile the concurring interest of the different parties to a restraint gives effect to the precepts of the limitations clause in the Bill of Rights.

357 Importantly, it should be noted that one of the factors that the courts take into account in determining the reasonableness of a contractual restraint of trade is that of the equality (or inequality) of bargaining strength of the parties to such contract.¹⁰⁸⁹ More will be said below on the relevance of this in the context of the employment milieu of professional athletes.

358 As has been observed, the restraint doctrine may affect the enforceability of contracts restricting competition in the field of sport; where an employment contract restricts the rights of a professional athlete to play for another club or union, or imposes certain regulations for the transfer of players from one club to another, such restriction

¹⁰⁸⁶ 2007 (2) SA 486 (SCA)

¹⁰⁸⁷ See the discussion above. It is unclear what the stance of the Supreme Court of Appeal will be in respect of the issue of the incidence of the onus in future restraint cases – see *Digicore Fleet Management (Pty) Ltd v Steyn & Another* (722/2007) [2008] ZASCA 105 (22 September 2008), where the court did not examine the issue of the onus and observed, simply, that 'it is now trite that provisions in restraint of trade are enforceable unless shown by the person wishing to escape an undertaking to be unreasonable and hence contrary to public policy'.

¹⁰⁸⁸ *Magna Alloys supra*; *Basson v Chilwan supra*

¹⁰⁸⁹ See *Basson v Chilwan supra* at 768C-D; Christie, R H *The Law of Contract in South Africa* 5th ed. LexisNexis Butterworths 2006 at 368-9

or regulations may be considered an unenforceable restraint of trade.¹⁰⁹⁰ In addition, such restrictions may in the circumstances also constitute unjustified infringement of such athlete's constitutional right to freedom of trade, occupation or profession as contained in section 22 of the Bill of Rights.¹⁰⁹¹ Also, it should be noted that such restrictions may also fall foul of one or more of the restrictive acts which are prohibited by sections 4(1) and 8 of the South African Competition Act 89 of 1998.¹⁰⁹²

359 It is, however, important to note that elsewhere restraints of trade do not function solely in the context of restrictive provisions contained in contracts (e.g. an employment contract or a contract for the sale of a business, two of the traditional forms most encountered in practice). In the sporting context, the following has been observed:

*'Although in the normal course the restraint of trade doctrine is applied to render specific contractual clauses unenforceable, the doctrine does have wider applicability. Even where there is no contractual relationship, a specific rule of a body with power to affect the ability of a person to trade can be declared incompatible with the doctrine ... [T]he obligation, or the restraint, [does not] have to arise out of a sports governing body's rules. It may arise out of a particular decision of the sports governing body to apply in an unjustifiably restrictive way rules that in themselves are valid.'*¹⁰⁹³ [Emphasis provided]

In English law the courts have on a number of occasions evaluated the actions and rules of sports governing bodies in the light of the restraint of trade doctrine, e.g. as regards football transfer and retention rules,¹⁰⁹⁴ the granting of trainers' licenses in horse racing,¹⁰⁹⁵ the rules of eligibility for participation in cricket Test matches and county

¹⁰⁹⁰ Loubser in Basson & Loubser *Sport and the Law in South Africa* Butterworths 2000 (loose-leaf) Ch 8-35; *Highlands Park Football Club v Viljoen* 1978 (3) SA 191 (W); *Coetzee v Comitis* 2001 (1) SA 1254 (C)

¹⁰⁹¹ See the discussion in par 370 *et seq* below

¹⁰⁹² See the discussion in par 457 *et seq* below

¹⁰⁹³ Lewis & Taylor *op cit.* at 179

¹⁰⁹⁴ E.g. *Eastham v Newcastle United Football Club & the FA* [1964] Ch 413

¹⁰⁹⁵ *Nagle v Feilden* [1966] 2 QB 633

cricket,¹⁰⁹⁶ doping rules,¹⁰⁹⁷ decisions on the allocation of racing dates to racecourses,¹⁰⁹⁸ entry criteria for a football club to gain promotion to a league,¹⁰⁹⁹ etc. The prevalence of restraint of trade challenges in the sporting world (which has been characterised as 'a field for the growth of the law of restraint of trade as applied to association) has been ascribed to the fact that sports governing bodies cannot usually rely upon the statutory provisions which protect employers' associations and trade unions to exempt them from the consequences of the restraint doctrine.¹¹⁰⁰

Compare also the judgment of the Federal Court of Australia in *Hughes v Western Australian Cricket Association (Inc)*,¹¹⁰¹ where it was held by Toohey J that a resolution of the respondent association to amend its rules (specifically to make provision for the automatic disqualification of players who participated in the rebel tour to South Africa in 1985 from participation in matches recognised by the domestic cricket board and the regional association) was in unreasonable restraint of trade as against such players. The court came to this conclusion even after finding that the relevant resolution did not constitute a contract giving rise to legally enforceable rights and obligations.¹¹⁰² With reference to earlier judgments regarding (professional) athletes in England and elsewhere¹¹⁰³ the court held that it is 'not necessary for an applicant to show that rules which he seeks to impugn constitute a contract between him and the association in question', and that 'where the rules of an association place an unjustifiable restraint on the income earning activities of a person, a court is not precluded from granting appropriate relief merely because that person is not a member of the association.'

¹⁰⁹⁶ *Greig v Insole* [1978] 1 WLR 302, discussed *supra*

¹⁰⁹⁷ *Gasser v Stinson*, 1988 (see Lewis & Taylor at 180)

¹⁰⁹⁸ *R v Jockey Club, ex parte RAM Racecourses* [1993] 2 All ER 225, DC

¹⁰⁹⁹ *Stevenage Borough Football Club v Football League Ltd*, 1996 (see Lewis & Taylor at 183)

¹¹⁰⁰ Kamerling, A & Osman, *C Restrictive Covenants under Common and Competition Law* 4th ed Sweet & Maxwell, London 2004 at 267

¹¹⁰¹ (1986) 69 ALR 660

¹¹⁰² It should be noted that this finding was made in determination of whether the relevant provisions of the Trade Practices Act 1974, upon which a part of the applicant's claim (that of a restrictive trade practice in terms of section 45 of the Act) was founded, applied to the resolution in question.

¹¹⁰³ *Eastham v Newcastle United Football Club Ltd* [1964] Ch 413 at 441-2; *Buckley v Tutty* (1971) 125 CLR 353 at 375; *Greig v Insole* [1978] 1 WLR 302 at 345; *Foschini v VFL and South Melbourne Club Ltd* (unreported judgment of Supreme Court of Victoria delivered 15 April 1983); *Nagle v Feilden* [1966] 2 QB 633 at 644, 650.

360 Gardiner *et al* have observed the following in respect of the relatively favourable application of the restraint of trade doctrine in English law and the scope of the doctrine for providing relief to those prejudiced by the exercise of often substantial powers by those governing sport:¹¹⁰⁴

'The restraint of trade route has clearly been the most fruitful for those seeking to call sports governing bodies to account ... The doctrine itself is highly accessible; its invocation is not limited to those who are parties to the challenged agreement, and it can be utilised by a stranger to an agreement who is unreasonably restrained by its operation. The source of the restraint is not seen as being of particular significance; it is the effect that brings the doctrine into play. This has the effect that the doctrine is not hindered by the procedural pitfalls found particularly in the context of judicial review.'

The only South African judgment where the restraint of trade doctrine has been applied in respect of the rules of a sports governing body, was that of Traverso J in the Cape High Court in *Coetzee v Comitis*¹¹⁰⁵ (where the court held¹¹⁰⁶ that the rules relating to transfers of players as enforced by the relevant professional governing body constituted an unconstitutional and invalid restraint of trade against players). The court examined the transfer system applicable in that case and held that '[t]he situation which arises when a player's contract comes to an end and he is by virtue of a compensation dispute prevented from joining a new club is akin to a restraint of trade provision in a normal commercial employment contract.'¹¹⁰⁷ The court employed the method of referring to the incorporation of the applicable regulations in the player's employment contract, and held that '[i]f ... the regulations ... are contrary to public policy, it is self-evident that the [player's contract], which incorporates the ... regulations, is contrary to public policy and that, accordingly, the "restraint of trade" should not be enforced.'¹¹⁰⁸

¹¹⁰⁴ Gardiner *et al* *Sports Law* 3rd ed Cavendish Publishing 2006 at 216

¹¹⁰⁵ 2001 (1) SA 1254. See par 400 below for discussion of the *Comitis* case in the context of player transfers in South African football.

¹¹⁰⁶ At par 41 of the judgment

¹¹⁰⁷ At par 29 of the judgment

¹¹⁰⁸ At par 32 of the judgment

361 It is submitted that South African courts would, in any future litigation when confronted by conduct by a sports governing body that is alleged to be in restraint of trade, be justified to follow the lead of English and other courts in recent years and to consider the circumstances of the governing body and of the plaintiff; specifically the peculiar position of this type of association in respect of its governance role of a sporting code and its imposed authority over participants:

'[I]n an appropriate case where a body enjoys a monopoly position such that it can prevent a person from earning his living by not admitting him or from conducting a legitimate business, in restraint of trade, it will be amenable to a declaratory judgment in an action begun by writ, if it has acted in an arbitrary and capricious way in refusing to permit the applicant's activities.'¹¹⁰⁹

The author has referred elsewhere to the characteristics, and consequences, of the monopolistic nature of sports governance in terms of the 'European model' which we encounter in the major South African professional sports such as cricket and rugby.¹¹¹⁰ In recent years, the very reason for being of the organisations that govern these codes has been the establishment of a monopoly of control over the professional arm of the sport and exploitation of its commercial spin-offs, and to fulfill a regulatory function of maintaining monopolies of control also at national level.¹¹¹¹ They are monopoly regulators with inherent market dominance.¹¹¹² This monopoly function, when considered

¹¹⁰⁹ Stuart-Smith LJ in *R v Jockey Club, ex parte RAM Racecourses* [1993] 2 All ER 225, DC at 243f

¹¹¹⁰ Louw, A M 'An Anomaly Tolerated by the Law: Examining the Nature and Legal Significance of International Sports Governing Bodies' (2007) 1 *South African Public Law* 211-255

¹¹¹¹ As has been stated in respect of the establishment of FIFA:

'The main idea behind [the meeting in 1904 of the founding members of the organisation] was to create a body with legitimacy to arbitrate over conflicts among national football associations and later to assure the presence of one national association per country and the development of football across all member nations. This legitimacy came with time, when an ever-growing number of affiliations pleaded their affiliation to FIFA, and with the monopolistic characteristic that the body impressed at all levels of football governance: Only one association per country would be officially recognised as sovereign responsible for the control and the development of the sport within its boundaries.'

Ducrey, P; Ferreira, C; Huerta, G & Marston, K 'UEFA and Football Governance: A New Model' *International Sports Law Journal* 2004/1-2 at 81

¹¹¹² See Ken Foster 'Can Sport be Regulated by Europe? An Analysis of Alternative Models', in Caiger & Gardiner *Professional Sport in the EU* at 59.

In respect of the economic characteristics of professional team sports, it has been noted that the most valued product of a sports league is the world or national championship contest, which only a monopoly can supply.

together with certain other characteristics of these organisations, must certainly subject their exercise of regulatory powers to scrutiny in the public interest. For sake of convenience, mention will only be made here of a few of these other characteristics of such organisations:

- (i) The degree of autonomy that (international) sports governing bodies possess in determining the regulatory regime within which the specific sport functions – to an extent international sports governing bodies may be seen as possessing a qualified 'untouchable' status in respect of the legal regulation of their activities and decisions at international level;¹¹¹³
- (ii) The dispute resolution procedures and codes that are prescribed by these organisations, sometimes to a large extent ousting¹¹¹⁴ the powers of national courts to intervene in disputes between its members and athletes or attempting to postpone recourse to such courts;¹¹¹⁵

See Neale, W.C. (1964) 'The Peculiar Economics of Professional Sport' *Quarterly Journal of Economics* 78, 1:1-14, as discussed in Paul Döwnard and Alistair Dawson *The Economics of Professional Team Sports* Routledge, London & New York 2000 at 21.

¹¹¹³ Compare the position in the European Union: At the March 1996 intergovernmental conference for the framing of the new Treaty of Amsterdam, the European Commission declined to accept calls that there should be legally binding provisions in the Treaty applicable to sport. Instead, a non-binding declaration was attached to the Treaty in these terms:

'The conference emphasises the social significance of sport, in particular its role in forging identity and bringing people together. The conference therefore calls on the bodies of the European Union to listen to sports associations when important questions affecting sport are at issue. In this connection, special consideration should be given to the particular characteristics of amateur sport.'

See Beloff *et al* at 108.

¹¹¹⁴ Sports governing bodies may of course not validly seek to oust the jurisdiction of courts (which would generally be held to be against the public interest), except by means of a valid agreement to arbitrate a dispute. An arbitration clause, however, can also not oust the jurisdiction of a South African court, which retains a discretion as to whether it should itself determine the dispute or whether to stay the proceedings – see *Minister of Law and Order and Others v Hurley and Another* 1986 (3) SA 568 (A). This has not stopped international sports governing bodies from attempting such exclusions in the past – see the discussion in Lewis & Taylor at 119 (A3.52).

For an example from South African football, see the contractual clause pertaining to the Dispute Resolution Chamber of the National Soccer League, as discussed in *Monei and Manning Rangers Football Club, National Soccer League Arbitration (DRC 075)* (2006) 27 Industrial Law Journal 242 (ARB).

¹¹¹⁵ In the context of South African labour law, the Commission for Conciliation, Mediation and Arbitration (CCMA) has on more than one occasion bowed to the 'supremacy' of players' contracts in respect of dispute resolution provisions, usually on the basis of the specialised nature of sport as an activity and the need for specialised knowledge on the part of arbitrators – compare *Augustine and Ajax Football Club* (2002) 23 ILJ 405 (CCMA); *Treswill Overmeyer and Jono Cosmos Football Club* WE 39134; *Vaisili Sofiadellis & Others and Amazulu Football Club* KN51728.

Arbitrators have also on occasion apparently applied 'sports-specific' principles to such disputes – compare the reference to 'sporting justice' in the *Monei and Manning Rangers* matter *supra*, which concept was unfortunately not explained further (although it was probably derived from the concept of 'sporting just cause' as contained in article 21(1)(a) of FIFA'S Regulations for the Status and Transfer of Players – the concept of 'sporting just cause' is also included in the regulations of the South African National Soccer League; see *McCarthy v Sundowns Football Club* [2003] 2 BLLR 193 (LC) at 195D of the judgment).

- (iii) The non-governmental nature in the composition and operations of such bodies, although they tend to display 'quasi-public' functions and powers; and
- (iv) The 'extra-national' nature of their activities, in the sense that these organisations are something outside the structures recognised in public international law (neither sovereign states nor international organisations made up of sovereign states) – these bodies do not represent states, but rather interests within states that organise collectively in order to pursue a common purpose (namely the regulation of the specific sport, by means of measures that are non-governmental in origin and form).

It is submitted that the monopolistic governance function of sports governing bodies serves as a special feature which should subject the conduct of a domestic governing body to more stringent scrutiny under the restraint of trade doctrine. One could argue that, for example, a professional cricketer is in the position of an applicant for entry to officially sanctioned international competition organized under the auspices of a body such as the ICC or a domestic board; that no such player has an enforceable right to work (in the sense of a right to eligibility and selection for international competition); and finally that in light of this there exists no legal relationship between such player and the ICC or domestic board upon which to challenge a rule or regulatory conduct aimed at excluding such player in the event of participation in a 'rebel' league (such as the Indian Cricket League).¹¹¹⁶ It is submitted, however, that in light of the governance function and nature of the sports governing body concerned one should avoid such a simplistic view of the issue.

¹¹¹⁶ Even though there would normally of course be an employment nexus, where a player is contracted to the domestic board for participation in the national team for international competition, our law does not recognize a right to work (and specifically not a right to selection) on the part of such player.

362 In the English case of *Stevenage Borough FC Ltd v The Football League Ltd*¹¹¹⁷ the applicant football club finished top of their league (the GM Vauxhall Conference), which entitled them to promotion to the 3rd Division of the Football League. The League's rules stipulated that such promotion would be dependent on the club satisfying certain ground capacity and safety requirements. Stevenage FC failed to meet the league's deadline in this regard, but would have done so by the start of the next season. The League refused Stevenage entry into the competition on this basis. Stevenage challenged the League's decision to refuse them entry on the basis that such decision constituted an unreasonable restraint of trade.¹¹¹⁸

Carnwath J rejected the argument that the League was under no obligation to justify the restraint in question as there was no legal relationship between the club and the League upon which a challenge could be based, and that, in effect, the club on these facts was in the position of an applicant to the competition organized by the League, with no enforceable right to entry. The court held that a broader approach could be justified on the following basis (as discussed by Gardiner *et al*):¹¹¹⁹

'[T]he Football League could be seen to be operating as a part of the complicated system of control operating for the organization of professional football, in the interests of participants and the general public. The fact of the Football League's operation in the public interest was seen as a reasonable basis upon which to extend the ambit of the restraint of trade doctrine.'

Even though the court failed to find that the League's conduct constituted an unreasonable restraint on the facts (*inter alia* based on the fact that Stevenage FC should have objected to the relevant rules at the beginning of the season, and that the delay in challenging the League's conduct was potentially prejudicial to the rights of third parties),

¹¹¹⁷ Chancery Division, unreported, 1996 (see the case report as published in the *International Sports Law Review*, 3 August 2006 at p 128-147 (© Sweet & Maxwell Ltd))

¹¹¹⁸ For more comprehensive discussion of the facts and judgment of the *Stevenage* case, see Gardiner *et al Sports Law* 3rd ed. Cavendish Publishing, London (2006) at 215-6

¹¹¹⁹ *Ibid.*

it is submitted that the court's reasoning regarding the application of the restraint doctrine in light of the nature of the organization and function of the sports governing body is in line with both common sense and equity. Furthermore, even a view of a sports governing body as a 'custodian of the public interest'¹¹²⁰ in respect of the administration of the sport in question will not justify conduct by such body which is aimed primarily at the prevention of competition for its own sake.¹¹²¹ When considering this custodian function of sports governing bodies, the following should be noted:

'The main aims of sports governing bodies are to draw up rules for the sport, to promote it, to widen its popularity and to represent the sport and those involved in it. Governing bodies will, in part, achieve this through good governance and by ensuring that the principles of democracy, fairness, solidarity and transparency are respected. Governing bodies acknowledge that they hold the power to govern their sport as trustees. The power to govern is fundamentally vested in their members and exercised by them directly or indirectly through a system of representation. Governing bodies shall provide a clear statement of their role and the functions they perform to support their members and other groups with a legitimate interest in their activities.'¹¹²²

363 It can validly be argued that the basis for the authority of governing bodies derives, ultimately and fundamentally, from the interests of their members, including (professional) participants. When one encounters a situation of player restrictions such as that experienced at the time of writing in respect of the Indian Cricket League, it is debatable to what an extent an organisation such as the ICC's or domestic cricket boards' response to 'rebel' players is aimed at merely restricting competition (in respect of the breakaway league) or is aimed primarily at protecting a worthy interest, e.g. the

¹¹²⁰ See *Greig & Others v Insole* supra and the judgment of Wilberforce J in *Eastham v Newcastle United Football Association, Ltd* supra

¹¹²¹ *Greig v Insole* supra at 496d-e

¹¹²² From the 'Statement of Good Governance Principles for Sports Governing Bodies' - Draft statement prepared by the Governance in Sport Committee for discussion at a conference on the same subject in Brussels, 26-27 February 2001, at 2

maintenance of the elite status of (officially sanctioned) international competitions or the revenues generated by international competitions for purposes of trickle-down funding of domestic competitions and the development of the game.¹¹²³ The reasonableness of the restraint, in light of the interest which is sought to be protected, remains paramount.¹¹²⁴

364 It may be necessary here to briefly just mention an additional reason for South African courts to consider extending the application of the restraint doctrine outside the contractual context. While it might be argued that such extension is strictly speaking unnecessary in light of the potential application of the section 22 right (e.g. to restrictive regulatory conduct by a sports governing body), it is submitted that the internal limitations inherent in the section 22 right may serve to exclude access to such right in circumstances where the extended restraint doctrine would provide grounds for relief. Section 22 applies only to South African citizens,¹¹²⁵ and it may therefore happen that a non-South African domestic cricket franchise player (e.g. the Nashua Dolphins' star Sri Lankan player, Sanath Jayasuriya) could be the subject of a Cricket SA/franchise ban or other regulatory restriction based on participation in a competition such as the ICL and yet be denied recourse to a section 22-based challenge. Application of the extended restraint doctrine would not be excluded in such cases. It should, however, also be noted that the very eligibility of non-South African players to compete in the domestic competitions (and at national level) in South Africa is currently under a significant threat from government (which threat, ironically, might also be open to challenge in terms of the extended restraint doctrine).¹¹²⁶

¹¹²³ Compare the arguments raised at the time by the TCCB in *Greig v Insole* supra. The 'protectable interest(s)' of sports governing bodies in the current context will be examined more closely below.

¹¹²⁴ *Eastham v Newcastle United FC* supra; *Greig v Insole* supra; *Buckley v Tutty* [1971] 125 C.L.R. 353; *Adamson v Wife* [1979] 27 A.L.R. 475; *Barnard v Australia Soccer Federation* [1988] A.L.R. 81

¹¹²⁵ Currie & de Waal *The Bill of Rights Handbook* Juta (2005) point out that even though it has been held that in terms of section 38 of the Bill of Rights ('Enforcement of rights'), for an applicant to show sufficient interest in the outcome of constitutional litigation the enquiry is objective (it is sufficient to show that a right in the Bill of Rights has been violated by a law or conduct and it is not necessary to show that the rights of the applicant has been violated), section 22 could not be used to challenge laws that prohibit the employment of non-citizens – at 490 note 38.

¹¹²⁶ At the time of writing, a stand-off between major federations and the South African government appears to be on the cards, following controversial draft regulations in terms of the National Sport and Recreation Amendment Act, which are apparently currently under consideration. These regulations are expected to be gazetted for public comment following submissions by sporting federations (for further discussion of these draft regulations, see the discussion in par 114 *et seq* above). The draft regulations on the Control of Foreign Sports Persons shall apply to all instances where a foreign sports person is recruited and contracted by a person, a

§11 Relevant Constitutional guarantees of the fundamental rights of professional athletes¹¹²⁷

I The right to fair labour practices

365 Section 23 of the Constitution guarantees the right to fair labour practices.¹¹²⁸

While there has been debate on whether the use of the wording of section 23(1) has

sports body or any other body in South Africa to participate in a sports team in any sport inside the geographical boundaries of the country (a 'foreign sports person' is defined in the definitions section of the draft regulations as any person recruited in terms of section 6(3) of the National Sport and Recreation Act, 1998, 110 of 1998 (as amended)). Draft Regulation 5 provides for stringent requirements in the recruitment of foreign sports persons: A national federation must, in terms of section 6(3) of the Act, before recruiting a foreign sports person to participate in sport in South Africa, satisfy itself that 'there are no other persons in the Republic suitable to participate in such sport'. If there is such other person in the country, such a person 'must be given preference above (*sic*) a foreign sports person'. A national federation must advise the Minister of Sport of the full names and country of origin of a recruited foreign sports person and of the purpose and reason for recruiting such person, and must confirm that there is 'no other person in the Republic suitable to participate in such a sport.' This last requirement (at least in respect of the wording of the draft regulations which were circulated to federations) appears to be rather nonsensical; criteria to determine a person's suitability to participate in a sport would surely need to be much more clearly and definitively circumscribed. A failure to comply with these requirements would entitle the Minister to withdraw the recognition of a national federation by notifying it that it will not be recognised by Sport and Recreation SA with immediate effect, or to withdraw funding allocated to the national federation. The (in the opinion of this observer) rather bizarre nature of these draft regulations is further illustrated by the requirements contained in draft Regulation 8, which a foreign sports person must comply with before s/he may be considered by a national federation to participate in a sports team in any sport in South Africa. These requirements include, *inter alia*, that a foreign sports person must have officially played for his or her country 'in at least 65% of competitive "A" team matches at senior level for which he or she was available for selection, during a period of at least two years preceding the date of his or her recruitment' to participate in South Africa. Amongst other requirements for a foreign coach or manager, s/he must 'have coached or managed a national team for a period of at least five years' and may also be required to write 'an admission examination as determined from time to time by the relevant national federation', whatever this may entail. The wording of this draft regulation does not appear to be qualified, and it is difficult to divine the rationale behind a requirement that even a potential applicant for a coaching or manager's position in a Premier Soccer League club, a rugby Super 14 franchise or provincial team would apparently be required to have coached or managed a national team. A failure by a foreign sports person to comply with these requirements would entitle the Minister to disapprove of his or her participation in a sport in South Africa and 'to make recommendations to the Minister of Home Affairs to declare such a foreign sports person as an illegal immigrant.' It is expected that the effect of such a regulation could be very significant in a number of sporting codes. A number of Premier Soccer League clubs, for example, employ players from elsewhere in Africa, and other sports employers (such a number of domestic rugby and cricket franchises) would also be affected in terms of their foreign players.

¹¹²⁷ It should be noted that other relevant constitutional guarantees, which are not expressly mentioned in this section, are applicable to the relationship between employees and employers (and trade unions, where applicable). The guarantees, which include the Constitutional right to equality (section 9), the right to privacy (section 14), rights to freedom of assembly (section 17) and freedom of expression (section 16), are discussed or referred to where relevant elsewhere in this chapter.

¹¹²⁸ Sections 23 (1) – (3) provide as follows:

'(1) Everyone has the right to fair labour practices.

(2) Every worker has the right-

- (a) to form and join a trade union;
- (b) to participate in the activities and programmes of a trade union; and
- (c) to strike.

(3) Every employer has the right-

- (a) to form and join an employers' organisation; and
- (b) to participate in the activities and programmes of an employers' organisation.

(4) Every trade union and every employers' organisation has the right-

- (a) to determine its own administration, programmes and activities;
- (b) to organise; and

broadened the scope of application of this right beyond the traditional employer/employee relationship¹¹²⁹, the right has been recognized as applying to employees who are excluded from the definition of an employee as contained in the Labour Relations Act, 1995.¹¹³⁰

It has been observed that, in the context of the traditional purpose of rights guaranteed in Bills of Rights (namely to regulate legislation and public power), it is strange to find such a constitutionalisation of an entitlement to fair conduct which regulates the conduct of employers, and that such a right is unique to the South African Bill of Rights.¹¹³¹ For present purposes the exact content and interpretation of this right will not be considered, and the reader is referred to expert discourses on the topic available elsewhere.¹¹³² It is important simply to note that section 23 introduces Constitutional guarantees that are applicable to the employment of professional athletes and extends beyond the individual employment relationship to include collective bargaining, strike action,¹¹³³ and organizational rights and freedoms of players' associations which are recognized trade unions (as well as employers' organisations¹¹³⁴).

II Freedom of Association

366 Section 18 of the South African Constitution¹¹³⁵ provides that '[e]veryone has the right to freedom of association'. The word 'association' has been defined as a group of people joined together for some purpose, and 'freedom of association' includes 'freedom

(c) to form and join a federation.'

¹¹²⁹ See Currie, I & de Waal, J *Bill of Rights Handbook* 5th Ed. Juta Law 2006 at 499

¹¹³⁰ See the (at the time of writing unreported) judgment of the Supreme Court of Appeal in *Murray v The Minister of Defence* (Case number 383/2006; handed down on 31 March 2008), where the SCA held that the constitutional guarantee of fair labour practices applied to an employee of the South African National Defence Force (whose employees are expressly excluded from the ambit of the Labour Relations Act, 1995) in the context of a claim of constructive dismissal.

¹¹³¹ Currie, I & de Waal, J *Bill of Rights Handbook* supra 502 (and the authority referred to there)

¹¹³² Cf. Currie, I & de Waal, J *Bill of Rights Handbook* supra Chapter 23 (at 498 *et seq.*)

¹¹³³ While section 23(2) contains a right to strike, the reference to the employer's right of lock-out (which was contained in the Interim Constitution (Act 200 of 1993) was not incorporated in the final Constitution. The Labour Relations Act 66 of 1995 provides a statutory right to lock-out for employers.

¹¹³⁴ E.g. the SA Rugby Employers' organisation (or SAREO), which is the collective bargaining unit of the 14 provincial rugby unions

¹¹³⁵ The Constitution of the Republic of South Africa, 1996

to establish, belong to and maintain an association'.¹¹³⁶ As has been observed, association relates to a means of expression, and freedom of association is intrinsic to a democratic society and 'obviously is of singular importance for a deeply divided heterogenous country like South Africa'.¹¹³⁷ The right of freedom of association enjoys protection as a distinguishable and independent right rather than one derived from any other fundamental freedom. It has been characterized as a correlative right, which 'buttresses ... the promise of a variety of other rights'.¹¹³⁸ The right also includes the freedom of dissociation.¹¹³⁹ As has been observed:

'The right involves not only a positive aspect, but also a negative one. Therefore by virtue of this right no-one should be compelled to establish an association, or to belong to an association ... [A]s far as the general principle is concerned, it is unconstitutional to force a person to subscribe to a belief against his or her will, and it is also wrong to artificially inflate the strength of certain ideas and beliefs by compelling persons to support them.'¹¹⁴⁰

It has been observed that this right is recognized internationally as protecting 'a general capacity for citizens to join ... in associations in order to attain various ends'.¹¹⁴¹

Associations are voluntary groupings formed to achieve a common goal. The South African formulation of the right does not limit the objectives to which the freedom to associate is attached;¹¹⁴² and it appears to be accepted that the objectives or goals of the association and its nature do not effect the hurdle regarding justification of a limitation of the right – the 'importance' of the goals of the association should therefore not affect the

¹¹³⁶ Devenish, G *The South African Constitution* LexisNexis Butterworths 2005 at 109-110

¹¹³⁷ *Ibid.* Haysom in Cheadle, MH; Davis, DM & Haysom, NRL *South African Constitutional Law: The Bill of Rights* 2nd edition LexisNexis Butterworths 2005 (at Ch 13-3) observes that the right to freedom of association is deeply implicated in other fundamental rights that also serve to protect this freedom – for example the freedom of expression (section 16 of the Constitution) and political rights (section 19), which are concerned with 'protecting those fundamental aspects of associational freedom relating to the articulation of opinions and viewpoints, both within and outside the political realm'.

¹¹³⁸ Stuart Woolman, writing on 'Association' in Currie, I & de Waal, J *The Bill of Rights Handbook* 5th ed Juta 2005 at 420

¹¹³⁹ Devenish *op cit.* at 110-111; Du Plessis & Corder *Understanding South Africa's Transitional Bill of Rights* (1994) at 160

¹¹⁴⁰ Devenish *op cit.* 111; *Law Society of the Transvaal v Tloubatla* [1999] 4 All SA 59 (T)

¹¹⁴¹ Sieghart, as quoted by Haysom in Cheadle *et al* at Ch 13-4

¹¹⁴² Haysom in Cheadle *et al* at Ch 13-4; Ch 13-6

level of scrutiny. Plainly put, it appears that an alleged infringement or limitation of the right to freedom of association would not be more easily justified merely because the context relates to sporting activity.

It is accepted that there is nothing in the nature of the right of freedom of association or the duties imposed by it that prevents its horizontal application (therefore not only in the relations between individuals and the state but also between individuals *inter se*).¹¹⁴³ The effect of horizontal application is most likely to find legal effect in the development of our common law of contract.¹¹⁴⁴ While courts elsewhere have condoned a voluntary waiver, by means of contract, of an individual's freedom of association,¹¹⁴⁵ it appears to be accepted that voluntary waivers of fundamental rights would not find favour in the South African context.¹¹⁴⁶

367 The right to freedom of association does not apply only to individual natural persons, but may also be invoked by associations. As has been mentioned elsewhere in this chapter, the court in *Cronje v United Cricket Board of South Africa*¹¹⁴⁷ held that the governing body for the game of cricket in South Africa is a voluntary association which is private in nature, and derives its powers and authority not from statute but from contract. The court accordingly found that the UCBSA had been entitled to pass a resolution (to ban an individual from the game for life) as a means of exercising its right of non-association against the applicant, as guaranteed in section 18 (and, in fact, the court held that the organisation had not only been entitled but also 'correct' in doing so).¹¹⁴⁸ There had been no contract of membership in place between the applicant and the respondent sports body.

¹¹⁴³ Haysom at Ch 13-8 and the authority quoted there

¹¹⁴⁴ *Ibid.* For more on recent developments regarding what has on occasion been referred to as the 'constitutional colonization of contract law', see discussion elsewhere in this chapter (specifically, the introduction to the section on sport and employment).

¹¹⁴⁵ See Haysom at Ch 13-9

¹¹⁴⁶ *Ibid.* See also, specifically, the arguments by Stuart Woolman ('Category mistakes and the waiver of constitutional rights: A response to Deeksha Bhana on *Barkhuizen*' (2008) 125 *South African Law Journal* 10), who appears to argue that one cannot validly waive a constitutional right.

¹¹⁴⁷ 2001 (4) SA 1361 (T)

¹¹⁴⁸ Aspects of the *Cronje* judgment, specifically relating to the 'private' nature of the organisation, are subject to criticism – see the discussion elsewhere in this chapter (specifically the section on judicial review of the decisions of sports governing bodies)

368 The Indian Cricket League, and the response by organizations such as the ICC and domestic cricket governing bodies (e.g. also Cricket South Africa), as referred to elsewhere in this chapter, raises definite questions regarding professional cricketers' rights to freedom of association, in two main ways. First, it appears that the banning of rebel players from participating in officially sanctioned international cricket infringes the rights of such players to freely associate at the highest level of officially sanctioned competitions within their chosen profession. Also, the inherently coercive (and punitive) nature of the player bans would appear to infringe the right of such players to associate with the promoters, organisers and other players who choose to participate in a private league or competition such as the ICL, which is positioned outside the officially sanctioned competitions. Second, it appears that the 'official' cricket bodies' bans of such players also infringe their freedom *not* to associate with such bodies and the official competitions organised under their auspices.

369 It is submitted that a case can be made for a finding that these bodies' conduct under discussion constitutes an unjustified infringement of the right to freedom of association of the affected players. It is submitted that such infringement is unjustified in light of the fact that the player bans do not have a rational connection with the protection by the cricketing associations of a legitimate interest in the regulation of the sport and also are not proportional to any such interest. With reference to one instance of a player ban referred to elsewhere in this chapter, namely the case of Andrew Hall, it is hard to find any possible legitimate basis for the conduct of Cricket South Africa in refusing the player permission not only to participate in the South African domestic competition but also in the English country cricket championship in 2008. While maintenance of the interests of stakeholders in the SA domestic league might justifiably require exclusion of players perceived to be 'rebels', it is less easy to find any rational basis for the restriction of such player's freedom to associate with another, officially sanctioned, league. The draconian nature of such restriction appears to militate against a finding of such conduct being reasonable in light of the interests sought (or ostensibly sought) to be protected by

the domestic governing body. This is especially poignant in light of the effect of such regulatory conduct in effectively sterilizing the player's potential to earn a living in any professional form of the game.

Accordingly, it is submitted that Cricket South Africa's banning of players from eligibility for future selection to the national team is unconstitutional and accordingly liable to be struck down as an infringement of the rights conveyed in terms of section 18, and invalid.

III Freedom of Trade, Occupation and Profession

370 Section 22 of the South African Constitution provides as follows:

'Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.'¹¹⁴⁹

The right contained in section 22 mirrors the concept of freedom to trade which is found in South African common law, although this right is of a more limited ambit than its earlier counterpart in the interim Constitution of 1993.¹¹⁵⁰ This concept of freedom of trade has usually been expressed as a public policy consideration which must be taken into account when deliberating on claims to enforce restraints of trade or to prevent unlawful competition.¹¹⁵¹ One dimension of this concept is that a free and competitive market requires that 'personal skills and expertise can be freely bartered';¹¹⁵² a

¹¹⁴⁹ The section 22 right is only available to South African citizens (compare the wording of the section, and the Constitutional Court's finding in *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996 (2nd Certification decision)* 1997 (2) SA 97 (CC) that the right of occupational choice could not be considered a universally accepted human right – see Currie, I & de Waal, J *The Bill of Rights Handbook* 5th ed Juta & Co 2005 at 489)

¹¹⁵⁰ Section 26(1) of the Interim Constitution (Act 200 of 1993) provided that '[e]very person shall have the right freely to engage in economic activity and to pursue a livelihood anywhere in the national territory'. See Currie, I & de Waal, J *The Bill of Rights Handbook* 5th ed Juta & Co 2005 at 484 *et seq.*

¹¹⁵¹ See Lagrange in Cheadle, MH; Davis, DM & Haysom, NRL *South African Constitutional Law: The Bill of Rights* 2nd edition LexisNexis Butterworths 2005 at Ch 17-1 note 2

¹¹⁵² *Atlas Organic Fertilizers v Pikkewyn Ghwano & Others* 1981 (2) SA 173 (T) at 192F-193E, as quoted in Cheadle *et al* at Ch 17-1 note 2

complementary dimension is that persons are entitled to trade without wrongful interference from others.^{1153 1154}

The proviso in section 22 allows limitation of the freedom to practice a trade by 'law'. It is in this proviso that constitutional testing of alleged infringements of the right to freely choose a trade will usually find its substance – namely an evaluation of the legitimacy of any restriction of the right in question.

371 It is important to note that South African courts have not yet been faced with a case where the regulatory powers of a sports governing body in respect of eligibility for participation in (a form of) the sport were at issue as constituting alleged infringement of the section 22 right. We must therefore find guidance as to the courts' probable course of action in evaluating such restrictions in the existing case law.

In this regard, the Constitutional Court¹¹⁵⁵ has held that an emphasis on freedom of participation in the economy did not implicitly include the right of unqualified persons to practice in professions requiring such qualifications nor did it entitle 'persons to ignore legislation aimed at regulating the manner in which particular activities are to be conducted, provided always that such regulations are not arbitrary.'^{1156 1157}

Regarding restriction of the right contained in section 22, Traverso J declared as follows in the case of *Coetzee v Comitis*:¹¹⁵⁸

'I accept that any profession must be regulated to a certain extent - these regulations can be internal or imposed by statute. Whatever the case may be, *a profession can only be regulated in a manner which is reasonable and in a manner which does not violate the constitutional rights of individuals.*' [Emphasis provided]

¹¹⁵³ E.g. see *Patz v Green & Co.* 1907 TS 427 at 436-7; *Matthews v Young* 1922 AD 492; see also the discussion of the common law action for unlawful competition in par 491 *et seq* below

¹¹⁵⁴ *Cheadle et al* at Ch 17-1 note 2

¹¹⁵⁵ In *S v Lawrence*; *S v Negal*; *S v Solberg* 1997 (10) BCLR 1348 (CC)

¹¹⁵⁶ *Ibid*, at par. 33 of the judgment

¹¹⁵⁷ *Cheadle et al* at Ch 17-4

¹¹⁵⁸ *Coetzee v Comitis and Others* 2001 (1) SA 1254 (C), at par. 27 of the judgment

It is clear that any alleged infringement of a person's choice to engage in economic activity in terms of section 22, which would constitute a limitation of such right, would have to satisfy the proportionality test under section 36 of the Bill of Rights. Any restriction falling short of such a limitation (in terms of the proviso to the right, namely a restriction regulating the manner of participation in such economic activity) must satisfy the 'rationality test', which, at least, demands that such restriction must not be arbitrary and that there must be a rational basis for the restriction. Where the restriction on the manner of participation also affects the choice to participate, the limitation test must be satisfied.¹¹⁵⁹ Such an analysis raises the importance of the policy issues underlying a regulatory measure, and specifically also the purpose of such measure.¹¹⁶⁰

Any conduct or actions of a sports governing body which constitute a limitation of individual players' (and even retired players') freedom of choice in terms of section 22 must be justified as a reasonable limitation in light of public policy and the provisions of section 36 of the Bill of Rights¹¹⁶¹ or, otherwise, would constitute an illegitimate infringement of such right.

372 When evaluating the justification for restrictive measures, rules or conduct in respect of eligibility for participation in a sport by its governing body, it is submitted that a fruitful analogy may be drawn with the approach to legislative regulation of vocational activity under the German Constitution of 1949 (which in article 12(1) contains a provision that is strikingly similar to section 22¹¹⁶²). While such regulation is in terms of the conduct of private bodies and not in terms of legislation (deriving from state action), the analogy is apt in light of the nature and effects of such conduct (see the discussion

¹¹⁵⁹ See Cheadle *et al* at Ch 17-4

¹¹⁶⁰ Cheadle *et al* at Ch 17-5

¹¹⁶¹ Section 36, the limitations clause, provides as follows:

'1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including:

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

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

¹¹⁶² See Cheadle *et al* at Ch 17-1 note 2

above relating to the extremely exclusionary nature of the system of governance and of eligibility for participation in the sport). As has been observed, the fact that one is dealing with the application of the section 22 right in the relations between private individuals or private actors (as opposed to the individual vs. the state) has not stopped the courts from direct application of the right to private entities.¹¹⁶³ And an added element to consider is the power wielded by the perpetrator of an alleged infringement of the right:

In principle, the ability to argue the applicability of the right would seem to depend more on the market power wielded by the actor whose conduct is impugned rather than the status of that actor: *the more the power wielded enables that actor to control access to an entire market, the more vulnerable that power will be to constitutional attack*. This approach might well guide the courts when deciding the appropriateness of applying the right horizontally.¹¹⁶⁴ [Emphasis provided]

The approach regarding the regulation of vocational activity under the German Constitution has been summarised as follows:

The general principles governing the regulation of vocational activity may be summarised as follows: The practice of an occupation may be restricted by reasonable regulations predicated on considerations of the common good. The freedom to choose an occupation, however, may be restricted only for the sake of compelling public interest; that is, if after careful consideration the legislature determines that a common interest must be protected, then it may impose restrictions to protect that interest – but only to the extent that the protection cannot be accomplished by a lesser restriction on freedom of choice. In the event that an encroachment of freedom of occupational choice is unavoidable, lawmakers must always employ the regulative means least restrictive to the basic right.¹¹⁶⁵

¹¹⁶³ See Cheadle *et al* at Ch 17-19 to Ch 17-20

¹¹⁶⁴ *Ibid.*

¹¹⁶⁵ Kommers *The Constitutional Jurisprudence of the Federal Republic of Germany* 1997 at 287-8, as quoted in Cheadle *et al* at Ch 17-10 (note 38)

It is submitted that the 'public interest' referred to should be applied, *mutatis mutandis*, in the context of sport to refer to the 'public interest' in free participation in such activity; possibly more so where such participation is in the professional form of the sport and by professional athletes, and constitutes the pinnacle of elite or international competition in the code (which is also the top tier of the entertainment product provided to the masses of fans). A related element to such public interest in this regard is the interest of the public (as supporters of teams and athletes within the relevant sporting code) in having access to the performances of such players at the highest level of competition.¹¹⁶⁶ This approach aims to limit the regulatory infringement of the individual's freedom of choice through scrutiny of both the *purpose* of the limitation as well as the *proportionality* of the means chosen to effect such limitation. In this sense it is in line with the section 36 test under the South African Bill of Rights.

In assessing both the rationality and proportionality of the private regulatory conduct of a sports governing body, it is important to note that such regulation (and the rules of the sport) is not in and of itself an illegitimate restriction on participation and individuals' rights. It is commonly accepted, due to the nature, history, traditions and characteristics of sports that a well-developed normative rules structure is of key importance to the very activity engaged in.¹¹⁶⁷

373 In the context of a section 22-review it is also important to note that the presence of economic freedom does not mean that there can be no legitimate constraints on the exercise of economic activity – the section 22 right permits persons to be active in the economic domain with all its inherent constraints.¹¹⁶⁸ Such constraints and the bases for their existence must satisfy the thresholds for constitutional review. As has been observed:

¹¹⁶⁶ See also *Greig v Insole* supra 503b-c

¹¹⁶⁷ See, generally, the discussion in Louw, A M 'An Anomaly Tolerated by the Law: Examining the Nature and Legal Significance of International Sports Governing Bodies' (2007) 1 *South African Public Law* 211.

¹¹⁶⁸ See Devenish *op cit.* at 139

'There are a host of constraints imposed by the kind of society that the constitution has brought into being, premised as it is on social democratic principles.'¹¹⁶⁹

However, the exercise of constitutional testing of the rules and conduct under discussion here should take account of the reality that the rules of a sport, as laid down by an international body and applied and enforced at domestic level by a nominally private association such as a governing body, are not necessarily premised on these same principles. Their legitimacy in their domestic application must be determined with reference to the applicable constitutional values.

Furthermore, reference should be had to the relevant competition law provisions that are prescribed by relevant legislation (e.g. the Competition Act 89 of 1998).¹¹⁷⁰

¹¹⁶⁹ *Ibid.*

¹¹⁷⁰ See discussion of the application of the South African Competition Act, 89 of 1998, and the restrictive practices prescribed in terms of its provisions, in par 457 *et seq* below

§12 Collective bargaining in South African professional sport

I Introduction

374 As in other industries, collective bargaining has assumed a central role in the determination of terms and conditions of employment of professional athletes.¹¹⁷¹ This phenomenon has been accompanied by the increased unionization of players in many sports, both at international and domestic levels. The development of professional sport in different jurisdictions globally has always been characterized by a strong sense of collectivism among employers – due to the peculiar economics of professional team sports,¹¹⁷² team owners have traditionally been active in enforcing mechanisms and systems aimed at preserving competitive balance within sports leagues.¹¹⁷³ This same balance had however largely been lacking in respect of collective action by the players in pursuit of equity and the enforcement of their employment rights. The emergence of ‘players’ associations’,¹¹⁷⁴ and the development of such associations into fully fledged

¹¹⁷¹ It should be noted that the term ‘collective bargaining’ in the professional sporting context does not relate solely to the traditional notion of bargaining between employer(s) and employees in the employment context (which will be the topic under discussion in this chapter). Sports leagues the world over have also been active in concluding collective agreements with outside agencies for other purposes. For example, the English Premier League in football saw collective agreements concluded between the Premier League clubs as a collective with sports broadcasters (e.g. the BskyB and BBC agreement, which the Restrictive Practices Court ruled in 1999 did not constitute an anti-competitive arrangement and was in fact in the best interests of the development of the game of football and the interests of smaller clubs in the League). See also the interesting paper by Falconieri, Palomino & Sakovics ‘Collective vs. Individual Sale of TV Rights in League Sports’, August 2002, available online at http://www.econ.ed.ac.uk/papers/Collective_vs_Individual_Sale_of_TV_Rights_in_League_Sports.pdf; and the article by Findlay, Holohan & Oughton ‘A Game of Two Halves? The Business of Football’, available on the web site of the Football Governance Research Centre, Birkbeck, University of London (available online at <http://www.football-research.org/gof2h/Gof2H-chap6.htm>).

On the collective (or ‘central’) selling of broadcasting rights within sports leagues, generally, see Lewis & Taylor *Sport: Law and Practice* Butterworths LexisNexis 2003 par B2.249 (at 403) *et seq*; Gardiner et al *Sports Law* 2nd Ed Cavendish Publishing Ltd 2001 at 424 *et seq*.

¹¹⁷² See the discussion elsewhere in this chapter

¹¹⁷³ *Ibid*. One of the main features of the economics of professional team sports that is relevant here is the monopsonist position of teams (employers) as the sole ‘buyers’ of the product of player labour in the input market of athlete employment – see, generally, Braham Dabscheck ‘Industrial Relations in Australasian Professional Team Sports’ *The Otemon Journal of Australian Studies* Vol. 30 (2004) 3-22. Dabscheck quotes Lord Wilberforce’s description of the erstwhile retain and transfer system in English football (*Eastham v Newcastle United Football Club* [1964] Ch 413, at 438), an example of a collective mechanism devised by monopsonist clubs within a league in order to determine employment rules and the manner in which they will negotiate with individual players:

‘[The retain and transfer system is] an employer’s system, set up in an industry where the employer has succeeded in establishing a monolithic front all over the world, and where it is clear that for the purposes of negotiation the employers are more strongly organised than the employees. No doubt the employers all over the world consider the system a good system.’

¹¹⁷⁴ Modern world sport has seen the emergence of both domestic players’ associations and international associations (e.g. FICA, the Federation of International Cricketers’ Associations (established 1998), and FIFPro, the worldwide representative organisation for all professional football players, established in 1965).

trade unions, has marked an important step forward for professional athletes in strengthening their bargaining power in an industry that has, by definition, been characterized by generally strong employers and employers' organizations and a wide gap between the respective powers of the parties to employment-related negotiation at the bargaining table.¹¹⁷⁵

375 A major factor in the disparity of bargaining power in professional sport is the frequent use of standard players' contracts, which are contracts of adhesion and have, traditionally, left little room for negotiation and were offered on a 'take it or leave it' basis to the majority of professional athletes or potential professional athletes. This, coupled with the generally strict eligibility criteria and relatively small number of opportunities for entry into professional sports league, has contributed to professional sports being characterized as displaying a highly regulated labour market. This system was of course eminently open to exploitation by the employing parties to this relationship, and the equitableness of the professional player's contract was generally viewed with derision.¹¹⁷⁶

A common misconception exists regarding the bargaining power of professional athletes in respect of their employment. In light of frequent reports of athletes earning millions in the major professional sports, many believe that these stars are overpaid and should not be afforded the protections afforded 'ordinary' working people.¹¹⁷⁷ It is, however, trite that most professional athletes are not in so fortunate a position – they ply their trade in

For discussion of major developments in the emergence of players' associations in different professional sporting codes in Australia in recent times, see Braham Dabscheck 'Australian Professional Team Sports in a State of Flux' *The Otomon Journal of Australian Studies* vol. 29 [2003] 3-19; Braham Dabscheck 'Industrial Relations in Australasian Professional Team Sports' *The Otomon Journal of Australian Studies* vol. 30 [2004] 3-22.

¹¹⁷⁵ This characteristic of the significant disparity in bargaining power between employers and players is symptomatic of the classical doctrine of labour law:

'The main object of labour law has always been, and we venture to say will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship.'

Davies, P & Freedland, M *Kahn-Freund's Labour and the Law* 3ed Stevens & Sons, London 1983 at 18.

¹¹⁷⁶ Robert Murphy, baseball commentator and member of the National Baseball Hall of Fame, once declared:

'The validity of the baseball contract makes me laugh. A baseball owner can do as he wants with a player on 10 day-notice.'

¹¹⁷⁷ I have referred elsewhere to the vast salaries of a few star athletes in international professional sport – compare Alex Smith (Utah quarterback in the NFL), who in July 2005 signed a 6-year contract with the San Francisco 49ers worth \$49.25 million, with the potential to increase with incentives to \$57 million; and David Beckham, who was reported in 2005 as earning around \$32 million a year from his salary at Real Madrid and endorsement deals (source: BBC News, 3 May 2005, available online at <http://news.bbc.co.uk/1/hi/uk/4510115.stm>).

the minor leagues of professional sport where they often earn what amounts to a minimum wage, while also being confronted by a relatively short career with an uncertain duration and the potential of sporadic interruptions due to injury, non-selection, etc.¹¹⁷⁸

376 A prime example of the typically draconian limitations on the employment rights of professional athletes that arose from their negligible individual bargaining power is the erstwhile reserve clause system that was enforced in Major League Baseball in the USA. This system in essence provided team owners with a perpetual option to renew a player's contract and established supreme control over such player's employment prospects. Players bound by a reserve clause would, upon expiry of their contract, be forced to either negotiate to re-sign with the team or request a release. Teams realized that freedom of movement would cause a rise in salaries, and were generally reluctant to consent to such releases. Players who preferred not to re-sign were therefore forced to hold out by refusing to play, and receiving no pay. The reserve clause system undoubtedly ended many a player's career prematurely and caused much misery.¹¹⁷⁹ The system was eventually abolished, which stemmed from (unsuccessful but groundbreaking) legal action by St. Louis Cardinals outfielder Curt Flood. Flood, who during the 1969 season had coincidentally heard that he had been traded to the Philadelphia Phillies (he was not informed by the team management but heard a report in a radio broadcast while driving in his car), eventually ruined his career by taking on the establishment in Major League Baseball.¹¹⁸⁰

¹¹⁷⁸ Compare again the remarks of Waglay J in *McCarthy v Sundowns Football Club* [2003] 2 BLLR 193 (LC) regarding the peculiarity of professional sport (football, *in casu*) employment - see the discussion elsewhere in this chapter

¹¹⁷⁹ Compare the similarities between the reserve clause system in baseball and the transfer and registration system in South African professional football, which was declared to be an invalid, unconstitutional and unreasonable restraint of trade in *Coetzee v Comitis and Others* 2001 (1) SA 1254 (as discussed elsewhere in this chapter).

¹¹⁸⁰ Flood was unsuccessful in having the reserve clause scrapped through his legal action (*Flood v Kuhn* 407 US 258, where the Supreme Court ruled to follow the decision in the landmark 1922 case of *Federal Baseball Club v National League* 259 U.S. 200, which exempted major league baseball from federal anti-trust legislation), but the system was eventually abolished in an arbitration award in 1975 (the Andy Messersmith / Dave McNally matter), which established the right of free agency for players. It was subsequently realised that reserve clauses are a subject to be negotiated in terms of collective bargaining (e.g. while free agency was to be allowed in baseball, a collective bargaining agreement limited recourse thereto to players only after 6 years under contract).

Flood is of course also associated with the 'Curt Flood Act' of 1998 (which amended the Clayton Act 15 U.S.C. section 12 *et seq*), which has subjected the employment of professional baseball players in the major leagues

377 In addition to the 'straitjacket' of often one-sided contracts, a major factor in evaluating the relative bargaining power of the parties to this relationship is found in the economic nature of sports leagues, and specifically the strength of employers based on their monopolistic position within the market.¹¹⁸¹ As has been observed elsewhere, the traditionally weak bargaining position of professional athletes on issues affecting their employment¹¹⁸² can also be traced to the role and functions of (international) sports governing bodies in the governance of the different professional sporting codes.¹¹⁸³ In essence, the employment context of players in professional team sports involves a highly regulated contractual nexus, where players are bound by means of contracts of adhesion to their employers, and by means of a 'chain of subjugation'¹¹⁸⁴ to (international) governing bodies in the particular sporting code. These bodies, which are strictly speaking positioned somewhere outside the athlete's employment relationship, in fact form part of what can be called the 'composite employer' in professional team sports. On

to anti-trust scrutiny, and has thus limited baseball's traditional non-statutory anti-trust exemption in terms of the *Federal Baseball* judgment *supra*.

¹¹⁸¹ Compare the following description of professional sports leagues in the USA:

'Sports leagues are not merely joint ventures; they are cartels that exist to allocate and control the production and distribution markets and to eliminate within the cartel competition over producers (players) and consumers (fans). Clubs compete today but largely in areas forced on them through legal and political sanctions ... [C]lubs acting collectively through a league still can maximise income and profits, so long as they proceed in accordance with the law. Today, as a cartel, a sports league allocates territorial markets and attempts to eliminate within the league competition for the sport consumer's dollar. At the same time, while spreading itself across an expansive geographical complex, it becomes a natural monopoly and effectively discourages the establishment of rival leagues. As a league enters prime markets and establishes viable properties, it gains substantial advantages, while the opportunities for new leagues to form and to succeed are diminished.'

Berry, R; Gould, W & Staudohar, P *Labor Relations in Professional Sport* Auburn House Publishing Co., Dover, Massachusetts 1986 at 5-6.

¹¹⁸² It should be noted that these issues affecting the employment of professional athletes have a very wide reach, often significantly more so than is the case with 'ordinary' employees in other industries. As discussed elsewhere, the employment contracts of professional athletes (and other parties such as coaches) often regulate issues such as where the player should live, what the player should eat (e.g. clauses regarding fitness standards), what extra-curricular activities the athlete may or may not participate in (e.g. standard clauses re conduct that holds the potential for physical injury), what the athlete should wear (clothing advertising regulations), what the athlete should say (clauses re communication with the media), etc.

¹¹⁸³ See Louw, A M 'An Anomaly Tolerated by the Law: Examining the Nature and Legal Significance of International Sports Governing Bodies' (2007) 1 *South African Public Law* 211. As an example of the role and powers of an international sports governing body, compare the dispute between the South African Rugby Players' Association (SARPA) and the SA Rugby Union (SARU) regarding a proposed benefit match between the Springboks and the Barbarians, which had been planned for 3 December 2005 at Twickenham and was to generate funding for SARPA and SARU. This match was subsequently abandoned, even though a collective agreement had been reached between SARPA and SARU, when the International Rugby Board refused to give its approval for the game and also refused to provide reasons for this decision. SARPA declared a dispute against SARU on the basis of the latter's apparent refusal to obtain the IRB's consent for the match or, alternatively, to request written reasons for the refusal. See the report entitled 'Players union declare dispute with SARU', 4 August 2005, available online at http://www.european-rugby.com/News/story_45192.shtml [last accessed 27 February 2006].

¹¹⁸⁴ Discussed in Louw, A M 'Employment Based on a Fiction: Evaluating the Legitimacy of Traditional Notions of Contract in their Application to an Atypical Employment Relationship' *Obiter* Vol. 2 (2007) 187

the edifice of contract¹¹⁸⁵ a number of controversial and far-reaching practices have developed within this industry, which always have the potential to impact on the rights and freedoms of professional athletes.

378 While the mechanism of collective bargaining has therefore increasingly assumed a role of countering the potential abuses inherent in such a strictly regulated and singular employment nexus, a more contentious but natural extension of the unionization of players and the emergence of systematised collective bargaining in professional sport has been the accompanying threat and occasional use of industrial action as an element of such bargaining. The strike and the lock-out have arrived on the scene in professional sport, and recourse thereto has on rather frequent occasions caused havoc in especially North American professional sports leagues.

II Collective Bargaining: The South African Model

379 One of the cornerstones of the law relating to employment is found in the mechanism of collective bargaining, whereby workers organize collectively in order to exercise a bargaining power in negotiations with employers that would otherwise be absent from the individual employment relationship.¹¹⁸⁶ In fact, modern labour law is

¹¹⁸⁵ Namely an amalgamation of the employment contract as well as the contract of membership of governing bodies (in terms of the traditionally accepted notion of such bodies as voluntary associations – see the discussion elsewhere in this chapter).

¹¹⁸⁶ As it has been expressed:

'The phenomenon of strikes and lock-outs comprises one of the crucial problems of contemporary industrial relations. The concept of concerted activity concerns issues that lie at the heart of the ideological conflict of labour relations, related to the core of the legal regulation of industrial conflict. Strikes and lock-outs are basic to the distribution of power between capital and labour, as well part of the problem of autonomy of groups and their relationship to the State.'

Ruth Ben-Israel 'Introduction to Strikes and Lock-outs: A Comparative Perspective', in Blanpain, R (ed) 'Strikes and Lock-outs in Industrialized Market Economies' *Bulletin of Comparative Labour Relations* 29 – 1994 Kluwer Law, at 1.

Malcolm Wallis succinctly described the need for collective bargaining when discussing some shortfalls of a purely contractual analysis of employment:

'The law of contract does not provide an adequate vehicle for ensuring fairness in dismissal. Certain matters that we regard as basic to all employment such as annual leave and sick leave and limitations on hours of work in the interests of the health of workers, and the establishment of a basic floor of fair employment conditions, are simply not achievable by an individualised process of forming employment contracts ... To suggest that the common law alone should govern labour relations is manifestly an untenable proposition.'

founded on the premise that the relationship between an employer and an individual employee is an unequal relationship of power. The main object of labour law is to provide the mechanism to counteract this inequality, although the law cannot do so on its own:

'Law is ill-suited for the delicate task of regulating the dynamic interaction between employers and employees in detail. Economic efficiency and political democracy alike require a significant degree of local autonomy and devolution of decision-making within a framework of public policy. In this context, it has come to be widely accepted that the natural counterbalance to employer power resides in the power of workers acting collectively ... In other words, the function of labour law is not only to extend certain basic protections to employees (for example, by prohibiting excessive hours of work) but, more fundamentally, to create a framework for collective bargaining between organised labour and employers.'¹¹⁸⁷

A significant component of the terms and conditions of employment of workers, where unions are active, derives as a product of such collective action. In fact, a collective bargaining agreement concluded in terms of the Labour Relations Act, 1995 (or the 'LRA') may depart from the provisions of the most basic protection provided to employees under the Basic Conditions of Employment Act (or 'BCEA'),¹¹⁸⁸ and will supersede an individual employment contract in existence or that comes into existence between parties who are bound by such collective agreement.¹¹⁸⁹

380 The Labour Relations Act does not provide for obligatory collective bargaining.

Instead of obligating employers and trade unions to bargain collectively, the legislature

Wallis, M 'The LRA and the Common Law' *Law, Democracy and Development* 2005 (2) Vol. 9 181 at 181-2. See also Spiros Simitis 'The Rediscovery of the Individual in Labour Law', in Rogowski, R & Wilthagen, T (eds.) *Reflexive Labour Law* Kluwer Law 1994 at 185.

¹¹⁸⁷ Du Toit, D 'Labour and the Bill of Rights' *The Bill of Rights Compendium* LexisNexis Butterworths (1996) par 4B10

¹¹⁸⁸ Act 75 of 1997

¹¹⁸⁹ See section 199 of the Labour Relations Act. Of course, the terms of such collective agreement must be more favourable to the employees than the basic protections found under the Basic Conditions of Employment Act (or BCEA). This status of collective agreements *vis a vis* the BCEA gives expression to important principles of South African labour law, which include 'the primacy of collective bargaining and dispute resolution by consensus' (see the Labour Court judgment in *University of the Western Cape Academic Staff Union v University of the Western Cape* Case No. C801/2001).

chose to facilitate collective bargaining in a number of ways, by encouraging the process rather than imposing an enforceable duty to bargain on any of the parties.¹¹⁹⁰ In the event of a dispute about a refusal to bargain, a party may only proceed to industrial action after an advisory award has been obtained from the CCMA or a bargaining council,¹¹⁹¹ but there is no penalty if a party refuses to bargain.

381 In order to facilitate collective bargaining and to give effect to the fundamental right to fair labour practices as contained in section 23 of the Constitution,¹¹⁹² the LRA provides for a number of organizational rights that trade unions may obtain *vis a vis* the employer or an employers' organization. These include the following:

- A right of trade union access to the workplace;¹¹⁹³
- A right to demand deduction of trade union subscriptions or levies by means of stop-order facilities;¹¹⁹⁴
- The right to appoint trade union representatives;¹¹⁹⁵
- Leave for office bearers for union activities;¹¹⁹⁶ and
- Rights to disclosure of information relevant to collective bargaining by the employer.¹¹⁹⁷

Of course, fundamental to collective bargaining is the provision in section 4(1) of the LRA, which states that every employee has the right to participate in forming a trade union or federation of trade unions, and to join a trade union subject to its constitution.

¹¹⁹⁰ See, generally, Cheadle, H 'Collective Bargaining and the LRA' *Law Democracy and Development* 2005 (2) Vol. 9 147 at 148 - 153

¹¹⁹¹ Section 64(2) of the Labour Relations Act

¹¹⁹² Act 108 of 1996. Section 23(5) provides that [e]very trade union, employers' organisation and employer has the right to engage in collective bargaining.' This right may only be limited in terms of national legislation (the LRA), where such limitation complies with the limitation clause contained in section 36(1) of the Bill of Rights.

¹¹⁹³ See section 12 of the LRA

¹¹⁹⁴ See section 13 of the LRA

¹¹⁹⁵ See section 14 of the LRA

¹¹⁹⁶ See section 15 of the LRA

¹¹⁹⁷ See section 16 of the LRA

It has been held that dismissing an employee for participating in trade union activities is an example of automatically unfair dismissal.¹¹⁹⁸

382. Section 213 defines a trade union as 'an association of employees whose principal purpose is to regulate relations between employees and employers, including any employers' organisation', and the main role of unions is to engage in collective bargaining with members' employers and to represent such members in grievance and disciplinary matters. The above organizational rights are only available to a trade union registered under the LRA. The application for registration is a simple procedure.¹¹⁹⁹ While unions are not obliged to register under the Act (e.g. in order to embark on protected strike action), registration is a prerequisite for the availability of the organizational rights provided by Chapter III.¹²⁰⁰ Only a registered trade union can enter into collective agreements; if unregistered, any collective agreement entered into by such union will fall outside the scope of the LRA. When an employee expressly or impliedly consents to a collective agreement, it is deemed at common law that the terms and conditions of such agreement are incorporated by reference in the individual employee's employment contract.

383 Section 213 of the LRA defines a collective agreement as a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions and one or more employers (or registered employers' organization(s)). Section 23 gives statutory force to all collective agreements, irrespective of the individual's consent. Where employees are subject to a collective agreement, its terms are treated as implied terms of their contracts of employment. Such a collective agreement also binds any employee who becomes a

¹¹⁹⁸ *Kroukamp v SA Airlink (Pty) Ltd* (2005) 26 ILJ 2153 (LAC). For the consequences of an automatically unfair dismissal, see the discussion earlier in this section on sport and employment

¹¹⁹⁹ See section 95 of the LRA

¹²⁰⁰ It is also a prerequisite for the conclusion of collective agreements as defined under the LRA, for a union to obtain separate legal personality distinct from its members, for a union to apply for the establishment of a bargaining council or a statutory council, to apply for the establishment of a workplace forum, to authorise a picket by its members, and to represent members at CCMA proceedings – see, generally, Basson et al *Essential Labour Law* 4th Edition Labour Law Publications 2005 at 240 *et seq.*

member of the union after conclusion of the agreement, and will continue to bind them whether or not they remain members of the union.¹²⁰¹ A trade union has a duty to avoid violations of its members' constitutional rights, and unlawful or unfairly discriminatory terms in a collective agreement are unenforceable. The courts have held that a union has a duty of fair representation towards its members, which requires the union to obtain a mandate from the majority of its members before concluding a collective agreement, and that union negotiators should employ the test of whether the agreement is in the interest of its members. Where a union acts in breach of this duty to negotiate within the mandate and authority of its members, aggrieved members can resign from the union or seek an interdict from the Labour Court in terms of section 158(1) of the LRA to prevent the union from signing an agreement which is against the interests of the members. The right to form and join trade unions is significantly bolstered by the fundamental right, contained in section 18 of the Bill of Rights, of freedom of association.¹²⁰²

384 An important weapon in the arsenal of employees who bargain collectively with employers, is the right to resort to industrial action and, more specifically, to strike. Section 23(2)(c) of the Constitution and section 64 of the LRA provide that every worker has the right to strike.

It is important to distinguish between rights disputes and interest disputes. A rights dispute arises where an existing right is breached or an existing advantage is sought, and the dispute can be resolved by application and interpretation of existing norms (e.g. an unfair dismissal dispute, which can be resolved by the CCMA or Labour Court, or a dispute arising out of a breach of a collective agreement which can be resolved through interpretation of the terms of the agreement).

An interest dispute arises where a party seeks a new benefit or standard to which such party has no legal entitlement (e.g. a wage increase or improved working conditions).

¹²⁰¹ See Smiles, S 'Sports and Labour Law in the Age of (Rugby) Professionalism: Collective Power, Collective Strength' (2007) 28 *Industrial Law Journal* 57 at 62-3

¹²⁰² Which right is examined more closely elsewhere in this chapter

As the Labour Relations Act reserves determination of rights disputes to the CCMA through arbitration or the Labour Court by adjudication, the Act prohibits industrial action over rights disputes.¹²⁰³ Interest disputes must be resolved through collective bargaining and, if unsuccessful, through industrial action. In respect of determining the distinction between rights and interest disputes the reader is referred to expert texts. Industrial action (e.g. a strike) over a rights dispute would generally be unprotected, and the consequences of engaging in an unprotected strike are serious (e.g. an employer may fairly dismiss such striking workers).¹²⁰⁴ Even though disputes over the organizational rights of unions are designated as rights disputes, section 65(2)(a) of the Act expressly permits employees to strike and employers to lock-out in order to enforce their demands in respect of the implementation of organizational rights (in the event of a representative union). Generally, though, a strike over a rights dispute would be unprotected.

385 A strike is defined in section 213 of the LRA as 'the partial or complete refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee, and every reference to work in this definition includes overtime work, whether it is voluntary or compulsory'. The procedural requirements for a protected strike in terms of the Act are set out in section 64, and will not be discussed here. It is, however, important to briefly highlight the following substantive points regarding a protected strike (as per the above definition) which may be relevant in the event of strike action in the professional sports context:

- The dispute must concern workplace issues, i.e. terms and conditions of employment or other issues which impact on the employment relationship;
- The dispute must be between an employer and employees (or a union); and

¹²⁰³ Section 65(1) provides that employees may not strike if the issue in dispute is one that may be referred to arbitration or adjudication. Examples of such rights disputes are an unfair dismissal dispute and an unfair labour practice dispute.

¹²⁰⁴ Section 68(5), subject to compliance with Item 6 of the Code of Good Practice: Dismissal (a Schedule to the Act)

The Act allows for secondary or 'sympathy' strikes (section 66).

386 Further discussion of collective labour law and industrial action, generally, is beyond the scope of this chapter, and the reader is referred to specialized texts in this regard.

III Industrial action in professional sport

387 On 22 May 1999, New Zealand's Otago Highlanders faced the Western Province Stormers at Newlands in Cape Town to determine a place in the semi-final of the (then) Super 12¹²⁰⁵ tournament. The Stormers were beaten convincingly, with a final score-line of 33-18, ensuring an all-New Zealand semi-final between the Highlanders and the Canterbury Crusaders. While the result of the match on 22 May was unspectacular - neither the first nor last time a South African side would fail to make the semi-finals of the Super 12 (or the subsequent Super 14 tournament) or lose to a New Zealand team - the date will live on to be remembered by many as a day of infamy and controversy in SA rugby history. The match was preceded by a threatened players' strike by the Stormers squad, with demands for a doubling of the match fee and an increased win bonus against threats of refusing to play. For about an hour, while the prospects for the match proceeding were hanging in the balance, South African rugby fans were for the first time confronted by the very visible spectre of strike action and labour unrest in professional sport. This was not well received by the public.

388 The words 'sport' and 'strike' immediately conjure up visions of American professional sport in the major leagues. Indicative of the closer similarities between sports leagues and teams in the US major leagues with businesses with the prime

¹²⁰⁵ As it was then called. From 2006 the tournament has been revamped as the 'Super 14', and including two extra teams (one each from South Africa and Australia).

objective of maximizing profits, as found in other, more archaic industries, the traditional weapons of employers and employees in the collective bargaining context have also been quite prevalent. Sports such as baseball and hockey have in recent times been characterized by long and costly strike actions by players and lock-outs by team owners. Major League baseball saw a players' strike that lasted for 232 days from August 1994 to April 1995, and which has been called the longest and most costly strike in sports history.¹²⁰⁶ More recently, the National Hockey League (NHL) saw a lockout of players, which commenced on 16 September 2004, and was initiated in support of owners' demands for a restructuring of the pay scale for players in light of claims that the existing system was threatening the economic survival of the League.¹²⁰⁷ On 16 February 2005 NHL commissioner, Gary Bettman, made history by canceling the NHL season and playoffs, the first North American sports league to lose a year to a labour dispute. A collective agreement was eventually reached to ensure hockey in the 2005/6 season.¹²⁰⁸ It appears that frequent (and sometimes imaginative) industrial action is an entrenched and inherent part of the American professional sports landscape.¹²⁰⁹

389 The feature of industrial action (and especially players' strikes) in professional sport is not confined to the USA. In the latter part of 1997, the Australian Cricketers' Association (ACA) threatened strike action in one-day international matches in order to gain recognition from the Australian Cricket Board and to negotiate a collective agreement with the ACB. Recognition was granted, and a collective deal was concluded in September 1998. This use of industrial action in cricket was nothing new, as it built on a history that saw the first players' strike in England in 1859 (when Surrey players informed the Oval authorities that they would not play without a pay increase), and even

¹²⁰⁶ See Paul Weiler *Leveling the Playing Field* Harvard University Press, 2000 at 112

¹²⁰⁷ See the discussion by Paul Hendrick in the North Carolina Bar Association's newsletter *Sport and Entertainment* Vol. 5 No. 1 January 2005. The NHL had also experienced a lockout in the 1994-5 season, which lasted 103 days, wiped out 468 games and cost roughly US\$5 million for a typical team in the league.

¹²⁰⁸ See the report entitled 'Back on the ice', 22 July 2005, available online at <http://www.cbc.ca/sports/indepth/cba>

¹²⁰⁹ For example, since 1972, negotiations between Major League Baseball players and team owners have led to eight work stoppages. This is in line with the perception of a 'litigation frenzy' in American professional sport – see Weiler *Leveling the Playing Field* Harvard University Press 2000 at 1.

the use of 'scab labour' in the form of replacement players during a strike in a match against a touring Australian side in 1878.¹²¹⁰

The threat of industrial strike action has also on occasion been utilised successfully in English football. For example, the Professional Footballers' Association (PFA) used this threat in 2001 during a dispute over the union's share of a broadcasting deal with the governing bodies.¹²¹¹ The PFA, which was only offered what amounted to 1.5% of the TV monies in 2001 (significantly less than what the union had been receiving since the mid-1950s), visited 92 Premier League and Football League clubs to discuss the situation with members. When put to a member vote, 99% of the members who voted were in favour of strike action – this enabled the PFA to negotiate a deal worth £17.5 million per year for a prospective 10 years, dependent on future TV deals.¹²¹²

In English rugby union in 2000, players went on strike from international representation after they rejected a proposal from the Rugby Football Union (RFU) regarding remuneration. The players claimed increased match fees and objected to the RFU retaining intellectual property rights regarding the use of players' likenesses. The strike action was called off when the matter was settled.¹²¹³

More recently, a number of Zimbabwean cricketers went on strike in response to the Zimbabwe Cricket Union's failure to pay match fees for tours to India and New Zealand and apparent widespread dissatisfaction among players over the way the sport is run by administrators.

¹²¹⁰ See the discussion of these events by Simon Rae *It's Not Cricket* Faber & Faber 2001 at 71, 76-77.

¹²¹¹ A similar dispute brewed between the South African Football Players' Union (SAFPU) and the Premier Soccer League in 2006. Amid allegations that the PSL had failed to involve players or obtain their consent in respect of the use of players' image rights when negotiating a (rumoured) ZAR500 million broadcasting rights deal with the South African Broadcasting Corporation in 2001, SAFPU claimed 10% of the proceeds of this deal from the PSL (from a report in *Business Day*, reproduced (dated 25 January 2006) on the web site of the SA Rugby Players' Association at <http://www.sarpa.net> - last visited 23 February 2006). The outcome of this dispute is unknown to the author at the time of writing.

The threatened strike action of the Australian Cricketers' Association in 1997 resulted in a collective agreement with the Australian Cricket Board in September 1998 that also dealt extensively with the issue of revenue-sharing. Under this agreement, players received 20% of the ACB's cricket revenues up to AUS\$60 million, and 25% of any income over this amount (see Braham Dabsceck 'Industrial Relations in Australasian Professional Team Sports' *The Otemon Journal of Australian Studies* vol. 30 [2004] 3 at 17).

A collective agreement between the New Zealand Rugby Players' Association and the New Zealand Rugby Union, in place from 1 January 2006 to 31 December 2008, reportedly contained a revenue-sharing scheme whereby 32.4% of all player-generated revenues (including all New Zealand Rugby Union broadcasting revenue, sponsorship and match-day revenue) was allocated to an annual player payment pool to be used for player payments and initiatives.

¹²¹² See Geoff Walters *The Professional Footballers' Association: A Case Study of Trade Union Growth* Football Governance Research Centre, Birkbeck, University of London 2004 at 11-12. See also Lewis & Taylor *op cit.* par E1.92 (at 838).

¹²¹³ See Lewis & Taylor *op cit.* at par E1.94 (at 839)

390 The major South African sports have to date not seen actual strike action or employer lock-outs, although threats of such action have been made on occasion. In professional football, the players' union SAFPU has frequently complained about unfair treatment of players by clubs in the Premier League and the National First Division competition. In November 2007 SAFPU threatened a strike unless player demands regarding a minimum wage, medical aid and player representation on the PSL Board were met. This followed unhappiness regarding an announcement that had been made about an amount of ZAR 70 million that had been set aside to pay bonuses to a small number of administrators for their procurement of a lucrative ZAR 500 million PSL sponsorship from major bank ABSA as well as the lucrative ZAR 1.4 billion PSL broadcasting rights deal with SuperSport.¹²¹⁴ The union was very upset at the fact that this money was apparently to be used to enrich a few administrators (which caused public outcry at the time, following earlier reports that 5 high-ranking PSL officials and 3 club owners were to each pocket ZAR 30 million in commission from the PSL broadcasting rights deal), and that player would see none of the financial benefits involved. Further unhappiness related to discrepancies in salaries paid to players by different clubs (SAFPU alleged in August 2007 that only 6 of the 16 PSL clubs were paying decent salaries; that, depending on a player's club, PSL players could be earning anything between ZAR 2 000 and ZAR 80 000 per month; and that things were even worse in the First Division, where some players were earning a pauper's wage of less than ZAR 1 000 per month). More recently, SAFPU has also taken clubs to task about alleged deceptive practices with players' contracts, and the alleged exploitation of illiterate and ignorant young players.

¹²¹⁴ See discussion elsewhere in this chapter regarding the dispute between public broadcaster SABC and the PSL which followed on this broadcasting rights deal with pay-TV content aggregator SuperSport

391 In professional rugby, the SA Rugby Players' Association (SARPA) is the registered players' trade union,¹²¹⁵ which periodically negotiates the collective agreement between SARPA and the SA Rugby Union and SA Rugby (Pty) Ltd (in respect of minimum conditions of employment of the national team players), and a substantive collective agreement between SARPA and the collective referred to as the provincial unions (SAREO, or the SA Rugby Employers' Organisation) regarding provincial player contracts. The first collective agreement with SARU (then SARFU) and SA Rugby (Pty) Ltd was concluded on 1 November 2004 following a dispute regarding player representation on the SARU executive committee and the board of SA Rugby (Pty) Ltd, which was eventually resolved by the CCMA in July 2004 (it was determined that SA Rugby (Pty) Ltd agreed to alter its articles of association to incorporate one player representative to serve as director on the board of directors of the company for the duration of the collective agreement with SARPA).¹²¹⁶

SARPA have, in terms of the collective agreements in place, negotiated two types of standard player contracts, namely the standard contract between national players and SA Rugby (Pty) Ltd in respect of playing for the Springboks, and the standard contracts between provincial players and the provincial union. SARPA plays a more active role in negotiation of the national contracts than is the case with provincial contracts (largely due to capacity constraints in servicing approximately 470 professional players around the country).¹²¹⁷ Gains made by SARPA through collective bargaining relate mainly to remuneration (in terms of the national collective agreement, national players are graded in terms of an evaluation made by the national coach in consultation with the national team manager, the CEO of SA Rugby (Pty) Ltd and the management committee; in respect of professional provincial players, the provincial unions are themselves graded as category 'A', 'B' or 'C' provinces, and the substantive collective agreement makes provision for minimum levels of remuneration for players in respect of each of these categories of provinces), medical aid benefits, an income replacement insurance scheme,

¹²¹⁵ For more on the activities of SARPA, see the article by Smailes, S 'Sports Law and Labour Law in the Age of (Rugby) Professionalism: Collective Power, Collective Strength' (2007) 28 *Industrial Law Journal* 57

¹²¹⁶ See Smailes *supra* at 64-66

¹²¹⁷ Smailes 74

and a SARPA retirement fund.¹²¹⁸ It has been observed that the inequality of bargaining power between players and employers in rugby is evident in negotiation of the player contracts (both provincial and national); there is little room for negotiation by SARPA beyond conditions of service, minimum standards for players, budget and player categories.¹²¹⁹ The contracts offer players a match fee, a win bonus and an annual retainer (and the only difference between contracts is the amount of the annual retainer, which is payable monthly in 12 equal instalments).¹²²⁰ It was reported in May 2008 that the SA Rugby Union is considering abolishing the use of one-year standard players' contracts in order to retain the services of players in the national team, in favour of simply contracting players upon remuneration on a match-by-match basis. The outcome of such proposal is unknown to the author at the time of writing. It has been observed, however, that the incentive provided to players by the current match fee system is problematic in respect of the collective bargaining process, and '[s]hould SA Rugby decide to "punish" a player for enforcing his legal rights, the player can merely be dropped from the team and thus suffer a substantial financial loss.¹²²¹

A major concern regarding collective bargaining in professional rugby is that fact that it appears that SARPA has signed away its members' right to strike. Smailes,¹²²² in her discussion of the 2004 collective agreement between SARPA and SA Rugby, has observed the following:

'In clause 7.2 of the collective agreement, which sets out further undertakings by SARPA to SA Rugby, SARPA undertakes not to participate in or encourage industrial action. This indicates that SARPA has signed away its right to strike in direct contradiction to its own constitution. Further evidence of this contradiction can be seen in clause 17, the "peace obligation" clause, which mirrors SARPA's undertaking not to enter into or encourage any

¹²¹⁸ Professional rugby players are the only employees in South Africa who can retire from age 32 with no penalties. Players are allowed to make contributions to the SARPA fund until the age of 40, after which they must retire from the fund – see Smailes *supra* 71

¹²¹⁹ Smailes 75

¹²²⁰ *Ibid.*

¹²²¹ Smailes *supra* 80. It should be noted, however, that such a practice may be open to challenge as constituting demotion in terms of the Labour Relations Act (and relate to and affect the provision of benefits to the player), and non-selection could conceivably therefore form the subject of an unfair labour practice claim under section 186(2)(a). See the discussion elsewhere in this chapter.

¹²²² Smailes, S 'Sports Law and Labour Law in the Age of (Rugby) Professionalism: Collective Power, Collective Strength' (2007) 28 *Industrial Law Journal* 57 at 67-68

industrial action and holds that all disputes must go to private arbitration. Clause 17 also makes provisions for instances where players do participate in industrial action. In these instances SARPA has undertaken immediately to intervene and attempt to stop all such participation ... A possible reason for such a dramatic move by SARPA might be because it is a young trade union and the trust relationship with SA Rugby has not been sufficiently tested as yet. The most probable answer, however, lies in the uniqueness of sport.

[SARPA's CEO has stated] that, "in the era of professional sport and in line with international trends new structures like final binding arbitration is (*sic*) more appropriate than power play'. SARPA states that strikes and lock-outs have in the past been damaging to professional sports worldwide. This is, however, debatable. With the inherent inequality that exists in such a relationship, to relinquish one's most important weapon is not necessarily the best move.'

Clause 21 of the 2008 collective agreement between SARPA and SAREO¹²²³ in respect of the contracts of provincial players similarly provides for final and binding arbitration of disputes:

'Any dispute between the parties to this agreement arising out of the interpretation, application or implementation of this agreement, or any dispute between a Province and a player arising out of the employment of the player by the province, including the termination of such employment, shall be referred to and determined by final and binding arbitration.'

392 In professional cricket, the SA Cricketers' Association (SACA) appears to have been extremely successful in its activities undertaken on behalf of members. At the time of writing a Memorandum of Understanding (collective agreement) is in place between SACA, Cricket South Africa (Pty) Ltd and the domestic professional franchises,¹²²⁴ which deals with issues such as the contracting of players by Cricket SA in the national team,

¹²²³ Of 5 June 2008 (copy on file with the author)

¹²²⁴ The current MOU is in place for a three year-period from 1 May 2007 until 30 April 2010

minimum numbers of players to be contracted to the six domestic franchises (as well as standard 'Play for Pay' contracts to be used by all franchises for non-contracted players drafted in per match as a contingency), revenue share for players in terms of a player payment pool, regulations relating to provincial and club cricket, players and playing overseas (in terms of *Kolpak*),¹²²⁵ race-based transformation policy, ICC event arrangements, match scheduling in terms of guidelines provided by FICA, and player agent accreditation.

An area of particular success in professional cricket relates to a commercial rights arrangement currently in place between Cricket South Africa, the six domestic franchises and SACA. This arrangement regulates commercial rights relating to the use of player attributes (image rights) and player appearances (in terms of contractual obligations with the official sponsors of the CSA and the franchises), by means of two players' trusts that have been established to act as vehicles for the granting of rights to the CSA and the distribution of revenue from such commercial rights to players.¹²²⁶

393 No more will be said here regarding the players' unions in the three major professional sports and, aside from references elsewhere in this chapter, the reader is referred to their respective web sites for more information on their functions and activities.¹²²⁷

IV Collective Bargaining and the Peculiarities of the Professional Sports

Context

394 It is useful at this stage to identify, very briefly, some of the peculiarities of the processes and rules of collective bargaining under South African labour law as applied to

¹²²⁵ *Deutscher Handballbund eV v Maros Kolpak* C-438/00, 8 May 2003 – see the discussion elsewhere in this chapter

¹²²⁶ For more on this arrangement, see the discussion in the section on athletes' image rights elsewhere in this chapter

¹²²⁷ South African Football Players' Union (SAFPU) - <http://www.cosatu.org.za/affiliates/affisafpu.htm> (affiliated to the Congress of South African Trade Unions (COSATU)); South African Cricketers' Association (SACA) - <http://www.saca.org.za>; South African Rugby Players Association (SARPA) - <http://www.sarpa.net>

the specific context of professional sport. Undoubtedly, the application of normal principles and provisions of legislation such as the Labour Relations Act (or 'LRA')¹²²⁸ as well as the common law gives rise to a number of issues that are of special interest to the student of the employment of professional athletes. The following are examples:

- The specific application of the right of freedom of association in the context of professional sport, with a particular focus on players' unions as atypical manifestations of the concept of the 'closed shop';¹²²⁹
- The issue of organizational rights of trade unions as provided for in Chapter III of the LRA, specifically rights relating to access to the workplace and disclosure of information by the employer;
- The meaning and content of 'issues of mutual interest'¹²³⁰ between employers and employees in this context;
- Identification of the various parties involved in collective bargaining and industrial action in professional sport, and some interesting questions regarding the accommodation of disputes between such parties under the 'traditional' law relating to collective bargaining in terms of the Labour Relations Act;¹²³¹

¹²²⁸ Act 66 of 1995, as amended

¹²²⁹ The term 'closed shop' is used here in a different meaning than that usually associated with a trade union where membership is compulsory and refusal to join would serve to deny the particular employee access to employment. It has been contended elsewhere that the very nature of employment in professional sport, due to the specific characteristics of the limitations on rights of access to this occupation, functions as a 'closed shop', in the sense that all potential candidates for employment as players in professional sport are in fact forced to conclude employment contracts in line with the system of rules and regulations existing in the particular sporting code. One is faced with a situation where players are forced to enter employment in a specified manner and on specified terms. It is debatable whether this situation in turn forces players to join players' unions as a necessary step to counter the inherent potential abuses of power by employers and governing bodies in the employment relationship. Walters *The Professional Footballers' Association: A Case Study of Trade Union Growth* Football Governance Research Centre, Birkbeck, University of London 2004 (at 10) observes that the Professional Footballers' Association (PFA) in England has a union density of 100%, which indicates that membership of the union appears to be the social norm amongst professional footballers. The author states that the PFA does not operate a closed shop, but represents a 'closed union'. This is different from a closed shop in that membership is only available to a concentrated group of workers; the union can regulate its intake.

¹²³⁰ In the meaning of section 1(c)(i) of the Labour Relations Act – for example the identification of issues of mutual interest that are strictly removed from the direct employment relationship although relating to elements such as the remuneration of players (e.g. revenue-sharing in the selling of broadcasting rights within leagues or by individual clubs or teams, an issue that has often prompted (threatened) strike action by players' unions in other jurisdictions).

¹²³¹ Mention has been made elsewhere in this chapter to the apparently frequent disputes regarding revenue-sharing within sports leagues in respect of the sale of broadcasting rights. Gardiner *et al (op cit.* at 533) discuss an example from England: The Professional Footballers' Association (PFA) balloted its members employed by clubs in the Football League on strike action in 1996, following the League's decision to terminate a 30 year

- The parties' respective rights and duties in respect of strikes and lock-outs,¹²³²
- Dispute resolution in the context of collective bargaining,¹²³³ and
- Peculiar aspects of (the economics of) professional sports leagues as they feature in respect of the relations between employer(s) and union,¹²³⁴ as well as in shaping the contents of collective agreements between players' unions and employer bodies.¹²³⁵

Specifically, the issue of the role of the common law in legislatively regulated collective bargaining also comes to the fore – here it is interesting to note the peculiar nature of the employment of professional athletes in team sports as 'free agents'¹²³⁶ within the

agreement under which the PFA received 10% of the income from television rights (which money is used by the PFA for the welfare of its members). The dispute was ultimately resolved by agreement.

The authors ask the interesting question whether any proposed strike would have run foul of the legal controls aimed at 'traditional' trade unions, namely the statutory immunity against the tort of inducing breach of contracts of employment by the members of such trade union, afforded to lawful strikes in terms of section 219 of the Trade Union and Labour Relations (Consolidation) Act 1992 (compare similar provisions in chapter IV of the Labour Relations Act 66 of 1995; *Afrox Ltd v SA Chemical Workers Union & Others (2)* (1997) 18 Industrial Law Journal 406 (LC); *Fidelity Guard Holdings (Pty) Ltd v PTWU & Others* [1997] BLLR 1125 (LAC)). The reason for this is that the dispute might properly have been determined to be between the PFA and the Football League, and not between employees and their employer as required by law for such protection.

¹²³² See Chapter IV of the LRA

¹²³³ See chapter VII of the LRA

¹²³⁴ Interestingly, it appears that trade unions of professional athletes have a significant interest in promoting and maintaining the success of the sports league, which is arguably more prevalent in this industry than in others and undoubtedly colours the nature of relations between such unions and employers. Walters (*op cit.* at 10), for example, refers to the Professional Footballers' Association in England, of which the industrial relations arm has a dual focus – on the needs of individual players as well as on protecting the industry, which as a consequence directly benefits members.

¹²³⁵ For example the imposition of a salary cap to teams or franchises at provincial level – compare the collective agreement between the New Zealand Rugby Players' Association and the New Zealand Rugby Union, which came into force on 1 January 2006 (report entitled 'NZ rugby players deal reached', 1 November 2005, available online at <http://tvnz.co.nz/view/page/413551/623651> [last accessed on 27 February 2006]).

An interesting (and unique) feature of the players' union in professional sport relates to the financing of such organisations' activities: Apart from special sources of income for players' associations such as specially negotiated benefit matches, the role of revenue-sharing in respect of broadcasting income in most cases means that such unions' income from members' subscription fees often constitute only a fraction of the unions' income (e.g. see Walters *op cit.* 18 in respect of the English PFA).

¹²³⁶ It is important to note here that the discussion in the text does not refer to the practice of free agency as known in professional sports in the USA, whereby athletes are in certain circumstances (and in the absence of reserve clauses or other mechanisms that serve to limit mobility in employment) entitled to sign with another team at their whim, either in terms of certain restrictions or unrestricted.

I refer here to the position of athletes, even in team sports, as largely independent actors within the collective bargaining context. In the American professional sports market, players' unions follow an atypical model of bargaining agents, quite distinct from their trade union counterparts in other industries. They function as exclusive bargaining agents for the employees they represent in respect of terms and conditions of employment, and collective bargaining takes place in an environment of standard players' contracts. However, these unions consciously promote competition by allowing individual athletes to independently negotiate certain terms of their employment, most notably remuneration and the duration of contracts. The player therefore, within a collective labour arrangement, enjoys a high degree of autonomy. See Wise & Meyer *International Sports Law and Business* Kluwer Law International 1997 Vol. 1 at 90 *et seq.*

collective bargaining scenario. While the LRA (e.g. in section 23(1)) provides a framework for the application of collective agreements concluded in terms of the Act, and to a large extent excludes the ordinary rules of the common law as they would otherwise have applied to such a contract, the mixed nature of collective bargaining in professional sport demands that the common law should retain its role in respect of regulating certain important aspects of the process. This is especially relevant in the context of the greater role for the common law rules regarding employment contracts in professional sport (as opposed to 'ordinary' employment contexts), in light of the prevalence of fixed-term contracts of employment. In this context, the process of collective bargaining retains a significantly individualistic element in respect of certain issues and in certain cases, which characteristic serves as another example of the distinction between the employment of players in professional sport from the 'normal' employment scenario as found in other industries.¹²³⁷ The main reason for this distinction is found in the entertainment nature of the professional sports industry.¹²³⁸

Another example of this is found in Swedish ice hockey. The first collective labour agreement concluded between the Salaried Employees' Union (representing 250 professional ice hockey players) and the Employers' Alliance (representing clubs) in October 1999, specifically provided that employers and players were to reach individual agreement on salaries and other remuneration. All players' salaries are individual and differentiated, with young players often receiving less than the top salaries commanded by top players. See the report available online at <http://www.eiro.eurofound.eu.int/2000/02/feature/se0002126f.html>.

In South African professional sport, as also elsewhere, this is also a feature of collective bargaining where 'star players' are involved.

An added feature, which connects with this, is the nature of the employment of professional players as facilitating the exploitation of commercial opportunities (sponsorships, the licensing of image rights, etc) by individual players. Often such rights may come into conflict with the rights of employers and others as regulated by collective bargaining, in which event more individualised bargaining is required.

¹²³⁷ Wise & Meyer Vol. 1 *op cit* (at 90) declare that (in the American professional sports context) sports unions are 'not necessarily consistent with the overall policy considerations behind unions – that employees are better off being represented as a group [rather] than by negotiating terms and conditions of employment on an individual basis'. The authors state that sports unions have dealt with this tension by reaching an accommodation between the interests of the group and of the individual:

[O]verall working guidelines are negotiated by the union, including standard players contracts, minimum salaries, overall salary maximums (in some cases), benefits and restrictions on movement. However, broad latitude is reserved for players in the areas of compensation and duration of contract.' (Wise & Meyer Vol. 1 at 90-91.

Another unique feature of collective bargaining in this context is that sports leagues are not typical of most multi-employer bargaining units. They have widely-varied constituencies in respect of the size and economic position of teams or franchises (Wise & Meyer 91), as well as having to grapple with peculiar issues such as the maintenance of competitive balance within leagues.

¹²³⁸ Paul Staudohar observed (in the American context) that there are similarities between the labour force of the (wider) entertainment industry and that of its sports component:

'Management is highly dependent on the work force – live entertainment cannot go on without it. In general, workers are well educated and know how to use their economic power to greatest advantage. Both are subject to the "star system", in which exceptionally talented people dominate the worker hierarchy. Whether actors, rock musicians, or athletic superstars, these elite persons command vastly disproportionate influence on their professions and substantial incomes from outside sources. Although exceptionally talented performers will always be able to derive exceptional incomes, one of the important reasons that unions have arisen in sports and other segments of the entertainment industry is the need to further the economic interests of workers farther down in the hierarchy – marginal players, equipment operators and stagehands – whose talents are more easily replaced.'

While this postulate is in line with a view of the role of the common law as being supplementary to other sources of law in the employment context such as collective agreements and legislation,¹²³⁹ it is submitted that the professional sports employment context necessitates recognition of a more prominent role for the common law rules of contract than is the norm elsewhere.

This is also in line with the supreme role of contract as the often-cited basis for the incorporation of the rules and regulatory conduct of (international) sports governing bodies as a significant source of the terms and conditions of employment contained in the individual player's contract.

395 In evaluating the peculiarities of collective bargaining in the professional sports context, it is necessary to briefly consider the characteristics that distinguish this industry from others. Mention has been made elsewhere of the peculiar economics of professional team sports, which relate to a range of issues that include the economics of the output market of the entertainment product of sports, as well as the specific rules and practices that have developed in regulating the input market of labour. It is this last that is most relevant to the discussion at hand, which focuses on the employment of players in professional team sports.

Berry *et al* declared as follows, in their evaluation of labour relations in American professional sports:

'The sports industries are not typical. Their product is ephemeral, seen in a moment, perhaps remembered, but generally not used by the hand or physically consumed. The product is entertainment, but of a special variety. A victor is declared, and a loser identified, but these are in many respects illusions, since all participants may well be winners where it counts: in the pocketbook.'¹²⁴⁰

Staudohar, P *The Sports Industry and Collective Bargaining* 2nd Ed ILR Press, Cornell University, New York 1989 at 7.

¹²³⁹ Rather than an 'either/or' approach to such other sources of the terms and conditions of employment – see the discussion by Wallis *op cit* at 186.

¹²⁴⁰ Berry, R; Gould, W & Staudohar, P *Labor Relations in Professional Sport* Auburn House Publishing Co., Dover, Massachusetts 1986 at 2

Numerous factors influence the creation and operation of sports leagues.¹²⁴¹ These include the bases leading to their creation, the nature of a sport, its potential appeal to spectators, the number of teams per league, the number of players per team, the marketability of the sport to a national versus a regional following, the number of games in a season, and the adaptability of the game to media such as television.¹²⁴² Sports leagues are individual entities that should not be regarded as having identical interests or necessarily common problems – ‘while commonalities exist, they are not as pervasive as are the differences’.¹²⁴³

Berry *et al* describe the five main interests that comprise the infrastructure of the professional sports league, and their alignment on both sides of the divide between employers and employees. On the one hand one finds the league¹²⁴⁴ and the clubs. On the other, one finds players, unions and agents/attorneys acting on behalf of individual players.¹²⁴⁵

396 In evaluating the peculiarities of collective bargaining in the professional sports context, one should also take note, more pragmatically, of trends in the development of bargaining in respect of the issues involved. When one considers the history of collective bargaining in sport in the USA, Europe, the UK and elsewhere, it appears that the following general trends have emerged:

¹²⁴¹ While the professional ‘sports league’ has a specific meaning in the American context, which is largely unique to the North American model of sport, it is contended that the remarks reproduced here are pertinent to an analysis of the professional sports industry in South Africa. While the major SA professional sports have in recent years also seen the introduction of business entities similar to the American model of franchises within professional leagues, it is submitted that much of what is said about professional sport in the USA are equally applicable *mutatis mutandis* to the SA industry, the different sports codes and the league and competition structures that function at the higher (professional) levels within such codes.

¹²⁴² Berry *et al op cit.* 3

¹²⁴³ *Ibid.*

¹²⁴⁴ While the league functions as a business entity in the American model of professional sport, it is contended that the competition or league as managed by the relevant governing body and/or corporate body in South African sport is the equivalent – compare the Super 14 rugby tournament, the Premier Soccer League in football and the domestic franchise cricket league as administered by Cricket SA (Pty) Ltd.

¹²⁴⁵ Berry *et al* at 4

- The early instances of player organization and bargaining involved acquiring recognition and enforcing bargaining: due to the traditional nature of employment in professional sport and the significant imbalance between strong owners and leagues *vis a vis* individual players, team owners initially simply refused to bargain with players over issues of importance.¹²⁴⁶
- The early instances of collective bargaining with recognized players' unions largely resembled the traditional role of unions in other industries in respect of the issues for bargaining – namely pensions, benefits and job security.¹²⁴⁷
- During the 1970s and 1980s bargaining revolved mostly around player freedom of movement and free agency;¹²⁴⁸
- In the 1990s bargaining focused on disputes over salary caps, taxes and other devices aimed at controlling the increases in salaries resulting from free agency.¹²⁴⁹
- It appears that, at present, a significant focus of collective bargaining in professional sport is the sharing of revenue (from sources such as the lucrative sale of television rights) between players and their employers. Compare calls for greater player participation in the governance (and share-holding) of the new cricket Twenty20 tournaments.

Interestingly, it appears that the professional sports industry has generally experienced a trend towards the progressive recognition of the role of players as constituting more than a mere element of the cost of production, but rather as contributing significantly to the value of the product rendered. This has led to at least nominal recognition of players as

¹²⁴⁶ E.g. Wise & Meyer (Vol. 1 *op cit.* 91) refer to the example of the National Football League Players' Association in the NFL in the USA – while this union was formed in 1956 and recognised in 1958, it did not conclude its first collective bargaining agreement until 1968.

¹²⁴⁷ Wise & Meyer *op cit.* 91

¹²⁴⁸ *Ibid.*

¹²⁴⁹ *Ibid.*

stakeholders in the industry, although the interests of such players are still often affected negatively by the conduct of employers.

397 By way of illustration of the elements and factors that affect the bargaining power of professional athletes, compare the position of the labour market in English professional football in recent times. Walters¹²⁵⁰ argues that the insider-outsider theory of employment and unemployment, which focuses on the individual worker's ability to influence wage negotiation and determination (rather than determination through employer influence) as a result of the worker being viewed as profitable, is applicable to the English professional football labour market in the 1990s. The author argues that the three main reasons for this increased labour power are the introduction of the Premier League in 1992, the advent of pay to view television sold on the basis of live football coverage, and the resultant increase in industry revenue.

Three factors illustrate the extent of this labour power: The first was the substantial increase in player wages (a 700% growth rate in the Premier League), which significantly exceeded the national average. The second was a rise in employment numbers as teams contracted larger playing squads in the pursuit of increased competitiveness on the field of play. The third factor was the increase in long-term contracts for individual players as a result of the *Bosman* judgment in 1995.¹²⁵¹

Three more factors contributed to the increased individual bargaining power of players, especially in respect of player appropriation of the increased revenues that entered the industry during this time: The first is the scarcity value of players. Football players possess a particular level of talent that other individuals do not and cannot obtain, not even through training. The supply of labour is relatively inelastic and there is a limit on the normal substitutions of other inputs for labour.¹²⁵² The second factor is the role of players' agents. Because the football union does not, as in other industries, bargain

¹²⁵⁰ Geoff Walters *The Professional Footballers' Association: A Case Study of Trade Union Growth* Football Governance Research Centre, Birkbeck, University of London 2004 at 18-22

¹²⁵¹ Walters states that clubs became aware of the danger of losing players for nothing at the end of their contract (as clubs could no longer restrict the movement of players), therefore offering longer-term contracts (Walters 19).

¹²⁵² Walters 20

collectively for member salaries and the duration of contracts, wage negotiation takes place at the individual player level. This was a key factor in the development of the agent as mediator.¹²⁵³ Thirdly, the trend towards longer-term contracts following *Bosman* also contributed to a shift in bargaining power from employer to player.¹²⁵⁴

Clearly, some of these trends are as relevant elsewhere, specifically also in the major South African professional sports. Here this is especially true in respect of rugby, which only saw the emergence of professionalism in the late 1990s but where such development coincided with new and very lucrative competitions (e.g. the Super 14 competition in rugby).

398 What is most interesting in respect of these developments is the following: While the professional sports industry has been rather unique in comparison to other industries in that the emergence of collective bargaining has had much more substantial impact in strengthening the bargaining power of the individual 'worker', it is submitted that the actual value of collective bargaining has been largely illusory. The very fundamental (and peculiar) characteristic of the important role of individual bargaining (in respect of e.g. remuneration and the duration of contracts) has meant that those who have gained from these developments are mostly the fortunate few, the star players at the very pinnacle of their game. For the majority of professional players, even within a system of strong collective bargaining, the gains have been and promise to continue to be limited. And in this we find irony. While one would assume that collective bargaining would find a special niche in professional sport, as a mechanism to ensure significant bargaining power for players (because of the inelastic nature of the supply of players as well as their fundamental role and value in the 'production' of the entertainment product of the industry), these very peculiarities regarding the nature of the product and the entertainment value of individual players have caused the end value of collective bargaining to be reduced. While one would assume that collective bargaining would be

¹²⁵³ Walters 20

¹²⁵⁴ Walters 21. The author points out, however, that these developments towards increased bargaining power for individual players has changed due to the financial crisis that affected the Premier League in the late 1990s – individual bargaining power now only tends to be appropriate for the minority of 'star' players at the highest level (Walters 22).

much more prevalent and also that players would usually prevail in disputes through the threat of industrial action, it appears that collective action has limited value for these and other reasons.¹²⁵⁵ This appears to be borne out by the observations referred to above regarding the role of strike action in South African rugby in light of the collective agreements currently in place.

¹²⁵⁵ These other reasons include the following:

- The role and powers of (international) sports governing bodies as constituting external sources of the terms and conditions of employment. While these bodies are usually not the targets of collective action by players, as being strictly removed from the employment relationship between a player and a club or team, their actions and decisions significantly affect the employment contract as well as the collective bargaining process.
- In respect of industrial action as an element of collective bargaining, it should be noted that professional athletes differ significantly from 'strikers' in other industries. While frequent strike action has led to much dissatisfaction amongst fans and supporters in American sports, it appears that there is generally significant public interest in the actions of players. For example, if a national cricket team undertakes strike action against an ICC Member Board in respect of contractual issues affecting private sponsorships of individual players, the fans of that team would generally be quite vocal in respect of such strike action affecting the team's participation in events. It is submitted that the public's role in this respect generally discourages resort to industrial action, due to the wider social value and significance of sport. As has been observed, sports clubs have 'two souls', the 'top-level money-spinning business activity and a long standing recreational activity deeply rooted in almost every social and geographic context' – see Domenico Di Pietro 'The Dual Nature of Football Clubs and the Need for Special Legislation' *International Sports Law Journal* 2003/2 at 24. Similarly, players in professional team sports are also faced with the duality of representing the public or the fans in their activities, also when engaging in industrial action.

§13 Player transfer rules, freedom of movement and player restrictions

399 The first South African case to deal with player transfer rules (in football) was the 1978 judgment of the Witwatersrand Local Division of the High Court in *Highlands Park Football Club v Viljoen*.¹²⁵⁶ The applicant football club, whose first team was one of the leading teams in the country and had won the (then) National Football League's competition a number of times, brought an application to enforce a restraint of trade clause contained in its contract with the respondent player. The applicant's only assets consisted in contractual rights which bound its players to play football for the applicant, which rights were commonly regarded as capable of being ceded or sold between clubs. It was common practice for clubs to sell and purchase the obligations of players to play for a certain club. If either the player or the club was dissatisfied with the contractual arrangements, the player was placed on a 'open to transfer' list, and offers would then be invited from other clubs to transfer the player to such clubs subject to negotiation of a suitable transfer fee.¹²⁵⁷

Following the player's signing with another club at the end of the 1977 season, the applicant club brought an application for an interdict restraining the player from playing for any other club, in terms of the restraint of trade clause in the player's contract which read as follows:

'The player agrees, undertakes and binds himself that on the expiry of the agreement and unless and until he is formally transferred by the Club to another club, he will not for a period of three years after the date of such expiry play professional football in the Republic of South Africa, save with the prior written permission of the club.'

The Court held that the restraint of trade was not enforceable, on the basis of the following principle:

¹²⁵⁶ 1978 (3) SA 191 (W)

¹²⁵⁷ Loubser in Basson & Loubser *Sport and the Law in South Africa* supra Ch 8-38

[T]he employer of a sports professional is not entitled, by virtue of a restraint clause in the employment contract with the player, to prevent the player from playing for a competing club or union after termination of the employment contract. This is because the employer does not retain a proprietary interest, akin to the interest in a trade secret or client list, in the services of a player after termination of the player's contract. Contract clauses purporting to restrict a player from freely offering his services in the employment market after termination of an employment contract are therefore regarded as unreasonable, contrary to public interest and unenforceable.¹²⁵⁸

The court held that that an employer may not prevent a player employee from using his skills in his profession after termination of the employment contract, even where such skills were at least partly acquired by the training, teaching and know-how which the employer had invested in the player during his contract of employment. The employer's initial financial outlay in acquiring the services of the player as well as subsequent training was held not to constitute the kind of proprietary interest which could be legitimately protected by a restraint of trade clause.¹²⁵⁹

400 In 2001 South Africa saw its own 'Bosman' case in respect of judicial testing of the transfer rules which were applicable in professional football (or 'soccer', as the game is most commonly referred to), in the judgment of the Cape Provincial Division of the High Court in *Coetzee v Comitis and Others*.¹²⁶⁰ In this matter, the court was confronted with an application by a professional soccer player to declare the National Soccer League (NSL)'s constitution, rules and regulations relating to the transfer of professional soccer players whose contracts had terminated, to be contrary to public policy and unlawful and/or inconsistent with the provisions of the Constitution¹²⁶¹ and therefore invalid.¹²⁶² In evaluating the lawfulness of the rules and regulations concerned, Traverso J recognised

¹²⁵⁸ As summarised by Loubser in Basson & Loubser *Sport and the Law in South Africa* supra Ch 8-39

¹²⁵⁹ *Ibid.*

¹²⁶⁰ 2001 (1) SA 1254 (C)

¹²⁶¹ Especially section 10 (right to dignity) and section 22 (right to freely choose and pursue an occupation).

¹²⁶² The facts appear from the judgment at 1256F-1259C

the 'chain of subjugation'¹²⁶³ under which professional athletes contract with their employers and the hierarchy of links in this chain, which is applicable to professional soccer players in South Africa:

'It is common cause between the parties that professional football in South Africa is regulated and controlled by the NSL. Any club or footballer wishing to play professional football must be registered with the NSL. If a player is not registered he cannot play for any club that is affiliated to the NSL. The NSL is an association which has as its primary purpose the control and management of professional football in South Africa. All professional football clubs in South Africa are affiliated to the NSL, which in turn is affiliated to [the South African Football Association]. SAFA is in turn affiliated to [the Confederation of African Football Associations] and FIFA, the world body of professional football. The hierarchy is therefore: NSL; SAFA; CAF; FIFA.'¹²⁶⁴

The court continued to set out the then-applicable regulations of the NSL that were relevant to the dispute, including the following:

'13.1 Every player designated as a professional shall have a written contract with the club employing him.

14.1 Only a player who is currently registered by the League shall be permitted to participate in official matches of the League.'¹²⁶⁵

¹²⁶³ Louw, A M 'Employment Based on a Fiction: Evaluating the Legitimacy of Traditional Notions of Contract in their Application to an Atypical Employment Relationship' *Obiter* Vol. 2 (2007) 187

¹²⁶⁴ At 1257C of the judgment. The judge continued to describe the position of clubs in this hierarchy as follows (at 1265J-1266B):

'The individual clubs are all compelled to be members of the NSL. The NSL, in terms of clause 2 of its constitution, is a body corporate, capable of suing and being sued in its own name. The NSL is the *only* professional soccer body recognised by SAFA. All members of the NSL are subject and bound to the NSL constitution and its rules and regulations, as well as the rules and regulations relating to various league and club competitions. The NSL is the body which represents *all* the affiliated clubs and *all* the affiliated clubs are represented on the board of governors of the NSL. Each club therefore has direct representation on the board of governors, and the NSL is therefore the representative body of all the clubs.'

See also the remarks by Waglay J in *McCarthy v Sundowns Football Club* [2003] 2 BLLR 193 (LC) at 194B of the judgment.

¹²⁶⁵ At 1259F of the judgment

Traverso J, in coming to the conclusion that the relevant provisions of the NSL's constitution and rules and regulations enforced by it amounted to an unreasonable restraint of trade¹²⁶⁶ which was against public policy and therefore unlawful and inconsistent with the Constitution, made the following remarks which are germane to the issue under discussion:

[The effects of the regulations of the NSL] are: All professional players must belong to a club which is affiliated to the NSL. All members of the NSL are bound by its constitution, rules and regulations. Every player who receives remuneration in excess of travel and hotel expenses shall be regarded as a professional player. The result is that every player who earns an income (however meager) from soccer will be regarded as a professional soccer player, and is obliged to enter into a written agreement with the club that employs him.¹²⁶⁷

'It is no answer to say ... that "there is no obligation on a any footballer to play professional football". This contention is frivolous and shows a scurrilous disregard for a person's (and in particular the applicant's) right to choose his profession freely. Of course, I accept that any profession must be regulated to a certain extent – these regulations can be internal or imposed by statute. Whatever the case may be, a profession can only be regulated in a manner which does not violate the constitutional rights of individuals ... If we should find that the regulations violate one or more of the applicant's or other football players' fundamental rights, then it follows as a matter of logic that the only choice with which a professional football player is faced is to enter into a contract which violates these rights, thereby offending public policy, or not to play football at all. This is no choice.'¹²⁶⁸

'[A] player, in terms of the NSL rules, is helpless. He can give no input in respect of the transfer fee, and, if all else fails, he is at the mercy of an arbitrator who determines the compensation payable according to a formula for which there is no rational basis. The

¹²⁶⁶ The judge remarked that the applicable rules were 'akin to' a restraint of trade which one might find in an ordinary commercial contract (although the case did not strictly speaking involve an action based on the restraint of trade doctrine – see the discussion elsewhere in this chapter)

¹²⁶⁷ At 1267B-C. See also the remarks by Waglay J in *McCarthy v Sundowns Football Club* [2003] 2 BLLR 193 (LC) at 194F-G of the judgment.

¹²⁶⁸ At 1269H-1279A

player would then be treated just like an object. His figures will be fed into the formula and an amount will pop up! Not very different from the manner in which the book value of a motor vehicle is determined! ... In my view, this procedure strips the player of his human dignity as enshrined in the Constitution.¹²⁶⁹

[T]he applicant, or any person who wants to play professional soccer, is subject to the rules and regulations which I have set out above. In my view, these rules are akin to treating players as goods and chattels who are at the mercy of their employer once their contract has expired. In my view, these rules violate the most basic values underlying our Constitution: *If entering into a contract which incorporates these rules is the only option open to a person who wants to pursue a career of professional football, it can hardly be said that he agreed to these terms out of his own free will.*¹²⁷⁰

401 In *McCarthy v Sundowns Football Club & Others*¹²⁷¹ the Labour Court was confronted with a challenge to an option for the renewal of a professional footballer's contract. The applicant, a 25-year-old professional football player, had entered into a standard fixed-term National Soccer League (NSL) contract with Sundowns Football Club, to play for them for two years from 26 September 2000 to 30 September 2002. A provision in the contract provided that Sundowns had an irrevocable option to renew the contract on expiry for a further two years. From April 2002 the applicant and Sundowns attempted to negotiate the terms on which he would remain at Sundowns. However, these negotiations failed and the applicant's contract came to an end by effluxion of time on 30 September 2002. In urgent proceedings before the Labour Court the applicant contended that he was a free agent and entitled to enter into a contract with another

¹²⁶⁹ At 1271C. The learned judge examined the functioning of the NSL transfer fee system at 1268-1269 of the judgement. In coming to conclusion quoted in the text, the court referred (at 1270J-1271B) to the judgment of Wilberforce J in the English case of *Eastham v Newcastle United Football Club* supra, where the following was said:

'The transfer system has been stigmatised by the plaintiff's counsel as a relic from the Middle Ages, involving the buying and selling of human beings as chattels; and, indeed, to anyone not hardened to acceptance of the practice it would seem inhuman, and incongruous to the spirit of a national sport.'

¹²⁷⁰ At 1273C-D (emphasis provided)

¹²⁷¹ (2003) 24 Industrial Law Journal 197 (LC)

football club. He complained that Sundowns had, however, refused to provide him with a clearance certificate, without which he could not register as a player for any football club. The applicant sought a declarator that his contract had in fact terminated and that he was a free agent and also requested that the court order Sundowns to issue him with a clearance certificate.

The court (by way of Waglay J) explained the transfer regime in terms of the then applicable NSL rules, as follows:¹²⁷²

'If a player wants to leave a club, even after his contract has expired and join another club, he must obtain a clearance from the club he is leaving as his new club will not be able to register him with the NSL and he will not be able to play unless and until his club is able to lodge a clearance certificate with the NSL. The requirement of the clearance certificate prior to registration is found in the NSL regulations which require that the only players eligible to play will be players who are properly registered with the NSL, who will register the player on submission of the relevant documents including a clearance certificate or club transfer certificate as defined in the rules. If a player is under contract with a club, a clearance certificate will not be provided as players must remain with and play for their clubs while the contract subsists. Players are signed on fixed-term contracts, and this is a requirement of the NSL, and may not leave their clubs and join other clubs while they are in contract save in special circumstances. What these special circumstances are, are not relevant for present purposes.

Regulation 17.14 of the current NSL Regulations provide:

"A contracted player who has reached the age of 23 and whose contract has expired, is entitled to a clearance certificate without a transfer fee or compensation being payable."

The reference to a transfer fee is a reference to the fact that a player who is in contract can only be transferred to another club by agreement between the clubs, including if that is part of the agreement, the payment of a transfer fee. The issue of compensation is only

¹²⁷² At p 200E – 201C of the judgment

relevant in relation to players who are under the age of 23 where in terms of the FIFA and NSL Regulations training and compensation fees may be payable to clubs who contributed to the training of a player prior to the age of 23. Players who have reached the age of 23 and whose contracts are terminated are free agents in terms of the NSL Regulations. In other words, they are free to conclude contracts with new clubs and to further their occupation as professional footballers with new clubs, free of any restraint by clubs that they had been contracted to. The term 'free agent' is defined in the NSL Regulations to mean:

"A player who is registered with the national soccer league and whose contract has expired and who has reached 23 years of age or a player whose contract has been terminated by mutual agreement or for just cause or sporting just cause as contemplated in regulation 20."

The court had to consider whether the matter was urgent, and in the process remarked on the nature of employment in professional sport (football):¹²⁷³

'The employment contract of professional footballers differs substantially from the contracts which one finds with other employees. In particular, a professional footballer cannot resign during the period of his contract of employment and take up employment with another club without agreement of his old club. If a professional footballer leaves a club after the period of his contract of employment, he cannot simply begin playing for another club unless and until he is provided with a clearance certificate by the club that he leaves as the NSL would not register the player without a clearance certificate. A professional footballer is required to sign a standard NSL players contract and also a registration form requiring him to bind himself, like his club, to the NSL constitution and regulations. The NSL contract clearly is intended to be for a predetermined fixed-term period. It is in fact a fixed-term contract and therefore has to specifically set out the period for which that agreement will subsist ...

When the footballing rules and regulations are read in their entirety, it is clear that the

¹²⁷³ At p 201E- 202A of the judgment

predetermined fixed-term contracts of employment would terminate unless new agreements have been entered into, signed and the player is registered afresh.¹²⁷⁴

The court continued to hold that it was willing to hear the matter as an urgent one in light of the fact that the player had secured another club who was willing to sign him (and on the basis of certain peculiarities of the employment of professional football players, which, it is submitted, has wider verity also in other professional sports contexts):¹²⁷⁴

'This court must ... be mindful of the fact that, unlike any other employees, professional footballers only have a relatively short period within which to practice their profession, a profession which is inherently risky as they may suffer injuries which may ruin their careers; they are subjected to the vagaries of selection not faced by other employees; they are required to earn sufficient to sustain themselves and their families in a relatively short period and cannot simply, like any other employee, decide to move from one employer to another. Here we have a class of employees who face restrictions in carrying out the trade which restrictions can have an effect on their earnings that cannot be calculated with any degree of certainty. The fact that Sundowns continues to pay the applicant his salary is not what this court in the present matter considers to be adequate because as a professional footballer what the applicant should be allowed to do is to play and for this reason I am prepared to entertain this matter as being an urgent one.'

The court then turned to the principal issue, i.e. whether or not a contract had been concluded between the parties (as alleged by the club). In light of the fact that the NSL would not register a player unless there was a written contract between the player and the club, the court held that insofar as Sundowns had alleged that there was an oral agreement between it and the applicant, such oral agreement did not give it the right

¹²⁷⁴ At p 204A-D of the judgment

even to field the applicant as part of its team in a match. Accordingly, as the applicant was over the age of 23, he was considered a free agent in terms of the NSL's rules.¹²⁷⁵ *The court continued to find that the option clause in the contract did no more than to give the club the right to negotiate a contract with the applicant. This irrevocable option meant nothing more than the right to negotiate and, if possible, conclude an agreement.*¹²⁷⁶

Accordingly, the court issued a declaratory order that there was no binding contract as envisaged by the NSL between the applicant and the club, an order that the applicant was a free agent and therefore free to join the professional club of his choice, as well as an order compelling the club to issue to the applicant a clearance certificate for purposes of applicant being registered with the NSL.

402 Rule 37 of the National Soccer League Rules¹²⁷⁷ deals with free agency and Rule 37.1 provides as follows:

37.1 A player may apply to the [PSL's] Dispute Resolution Chamber to be declared a free agent within thirty (30) days of any of the following occurring:

37.1.1 his club has repudiated his contract of employment;

37.1.2 his club has unfairly dismissed him;

37.1.3 his club has ceased to exist as a club falling under the jurisdiction of the [National Soccer League];

37.1.4 his club has been placed under final liquidation by Order of the Court;

37.1.5 his club refuses or fails to issue a clearance certificate to which the player is entitled; or

37.1.6 it is in the interest of fairness and equity.'

¹²⁷⁵ The court expressly remarked that it did not make any comment on whether or not the oral agreement, if indeed concluded, created any rights and obligations between Sundowns FC and the applicant. It was satisfied with its finding that there was in fact no contract between Sundowns and the applicant which was binding insofar as the applicant playing for Sundowns as a professional soccer player or footballer was concerned.

¹²⁷⁶ At p 204

¹²⁷⁷ As amended 17 June 2008

403 In the matter of *Golden Lions Rugby Union v A J Venter*¹²⁷⁸ the Johannesburg High Court had to deal with a unilateral option of renewal clause (which amounted to a right of first refusal) in a rugby player's contract with a provincial Union. The player's contract provided that the Union could renew his fixed-term contract upon expiry provided that they offered no less favourable terms than those offered by another union. Following a lucrative offer for the player's services by the Natal Rugby Union for the 2000 season, which the player accepted, the Golden Lions offered the player the same financial terms and claimed that he was obliged to play for them. The player challenged the renewal clause as constituting a restraint of trade clause which was unreasonable, as the Union had no interest to protect, and which offended public policy as well as sections 13 and 22 of the Bill of Rights.¹²⁷⁹ The court found in favour of the player on the basis that the matching offer which was required in terms of the clause did not refer to financial terms only, but to general terms. The Golden Lions were unable to offer the same conditions in respect of living, training and coaching staff (e.g. it was held that the coastal Natal Union could provide the player with training on the beach and swimming in the sea) and, accordingly, the player was not obliged to accept the Lions offer and was free to join the Natal Union.¹²⁸⁰

404 In respect of limitations on the freedom of movement of professional athletes and player restrictions in respect of eligibility for participation e.g. at national representative level, events in two of South Africa's major professional sports, namely rugby and cricket, recently made headlines and serve to highlight the inherent conflicts in the relationship between those governing these codes, the professional athletes and the

¹²⁷⁸ Johannesburg High Court Case 2007/2000, unreported (the author has not been successful in sourcing a copy of this judgment – discussion in the text is sourced from Cloete et al *Introduction to Sports Law in SA* (2006) at 161-2)

¹²⁷⁹ The right not to be subjected to forced labour and the freedom to choose one's occupation, trade or profession – see the discussion elsewhere in this chapter regarding the restraint of trade doctrine in South African law and the availability of the order for specific performance against the (player) employee.

¹²⁸⁰ See Cloete et al 162 and discussion of the *Venter* case in Le Roux 'How Divine is my Contract? Reflecting on the Enforceability of Player or Athlete Contracts in Sport' (2003) 15 *SA Mercantile Law Journal* 116

supporting public (the consumers of the sports entertainment industry). In July 2007 the President's Council of the South African Rugby Union (SARU) announced a controversial resolution in the run-up to the national team's preparations for the IRB Rugby World Cup 2007 in France. SARU announced that it had been decided that players under contract with overseas clubs would, following the World Cup, no longer be eligible for selection to the national side. The decision was followed by reports of a number of key and experienced current Springbok players who would be hit by the resolution and would potentially be lost to South African rugby. These events followed earlier reports regarding the substantial amounts of money offered to local players by overseas clubs, and the apparent inability of local provincial unions and Super 14 franchises to compete for the services of such players in light of the economic realities of rich European clubs and the strong euro and pound sterling. A prominent rugby Super 14 Blue Bulls franchise and Springbok lock forward, P.J. 'Bakkies' Botha, was recently embroiled in a high profile case before the Labour Court, attempting to escape from his five-year Bulls contract in order to take up more lucrative employment with French club Toulon.¹²⁸¹

In August 2007 it was reported that a very lucrative new break-away cricket league in India (the Indian Cricket League, or ICL) was drawing interest from a number of current and former South African national players, who were considering signing to play in this league at the risk of being excluded from future eligibility to represent South Africa in international competition.

405 From the sports lawyer's perspective, these developments have underlined the issue of sports governing bodies' powers to regulate the freedom of movement and employment of domestic professional players who are drawn by lucrative offers to seek out the greener grass abroad. Reminiscent of similar developments elsewhere in the recent past – namely Kerry Packer's attempts to take over control of international cricket with his 'World Series Cricket' in the 1970s, and Rupert Murdoch's similar attempts in respect of Australian Rugby League in the 1990s – it has also highlighted more

¹²⁸¹ See the discussion in par 339 above

fundamental questions regarding the governance of international sport - specifically, the ability of international and domestic sports governing bodies to maintain their monopoly powers of control and inherent market dominance of sports codes and competitive leagues, which characteristics are so central to the functioning of the European model of sport which applies to all the major South African professional codes. The discussion that follows will briefly consider the relevance of developments in cricket, specifically in respect of the freedom of South African players to pursue employment in overseas leagues and competitions:

Case study – The Indian Cricket League (or 'ICL') and South African players

406 Following the 'Packer Circus' in international cricket in the 1970s, breakaway cricket leagues appear to be a boom industry the world over in recent times, although attempts to establish such alternatives to the structure of officially sanctioned competitions resorting under the domestic cricket boards that are members of the International Cricket Council have not all been successful.¹²⁸²

In early April 2007 it was first reported that India's largest listed media company, sports broadcaster Zee Telefilms Group, had announced the launch of a rival tournament to the Indian domestic cricket tournaments operated under the auspices of the Board of Control for Cricket in India (or 'BCCI'). This broadcaster-driven initiative, the Indian Cricket League (or 'ICL'), eerily mirrors developments in the Packer saga; according to reports Zee's establishment of the ICL arose from the broadcaster's failure to secure the rights to broadcast Indian cricket in a series of failed bids, ultimately being outbid for the BCCI's broadcasting rights until 2011 by Nimbus.

¹²⁸² Compare the Pro Cricket League, which was started with eight teams in the USA in July 2004 and failed to survive its first year. More recently, billionaire Sir Allan Stanford formed the Stanford 20/20 competition in the West Indies in 2006.

407 The new Indian Cricket League was established to operate a Twenty20 tournament between (initially) six city-based teams or clubs on a home-and-away basis, playing over a period of about three weeks for an ultimate winners' purse of US\$1 million. Each team would consist of two Indian players registered with the BCCI, four foreign players and eight budding players sourced through talent scouts. It was planned that the ICL would develop over a three-year period to a 50-over a side (or One Day International format) tournament, which would be better suited to develop talented young players for the rigours of international cricket, while the number of teams competing would increase from six to sixteen. From the outset, the organisers of the ICL appeared to rather pointedly stress the developmental aspirations of the new league. One of the main justifications for the ICL's establishment has been that the poor level of funding and infrastructure of India's regional cricket teams – reportedly due to the BCCI's failure to properly manage the game outside its national team structure – has been a contributing factor to the Indian national team's poor performances over the last few seasons, as well as its lack of depth on the bench. Suggestions for development of young players within the ICL included that each team would have a mentor, media manager, psychologist and physiotherapist, and also that residential academies with state-of-the-art facilities would be set up all over India. An early step in planning for the new league involved a letter from Zee Group chairman, Subhash Chandra, to the president of the BCCI, Sharad Pawar, officially seeking permission to start the ICL. Chandra was quoted in the media at the time as being confident of BCCI approval:

'[The proposed ICL] is not in conflict with the BCCI, but is complimentary to it. We have sent a proposal to the BCCI and I don't think they will reject it. I even don't want to assume that BCCI will reject it.'¹²⁸³

¹²⁸³ From a report available on the official web site of the ICL at <http://www.indiancricketleague.in> [last visited 28 January 2008]

Events in the months following would serve to dash this early optimism about the response to the ICL by the powers that be in Indian and world cricket. Throughout the first season of the ICL it was reported that a number of top-class international cricketers from across the spectrum of test-playing nations, both current and retired players, had signed up for the very lucrative series. It was reported that, apart from well-known names such as Pakistan's Inzamam Ul-Haq, former West Indies star batsman Brian Lara, New Zealand's Craig McMillan, Chris Cairns and Nathan Astle (to name just a few), a number of ex-South African stars such as Andrew Hall, Lance Klusener, Nicky Boje, Dale Benkenstein and Mornantau Hayward (and current player Johan van der Wath), had all signed up to earn the big money on offer in the ICL. It was reported that these players were contracted to earn in the region of R2.5 million each for a few weeks' work. The attraction of this financial incentive is probably best illustrated in Nicky Boje's case – following Boje's widely reported reluctance to tour India in the years following the cricket match-fixing scandal in 2000, allegedly for fear of possible prosecution by the Indian anti-corruption officials and police, it appears that the ICL paycheque was too good to pass up.

408 The inaugural ICL competition was held in November and December 2007. For present purposes, what is truly interesting is the response to the ICL by cricketing authorities, both the sport's international governing body the ICC as well as individual domestic cricket boards. The BCCI in India condemned the ICL from the outset, and made it clear in media statements that players who signed up to play would jeopardise their international careers and prospects for selection to represent India in officially sanctioned matches. Other domestic boards followed suit. New Zealand cricket (or the 'NZC'), which has probably been hardest hit by the exodus of players to the ICL, appears to have heeded a call by the ICC to domestic boards not to recognise 'rebel' players participating in the ICL for national selection. It has been reported that countries like New Zealand and Pakistan are affected most, as their players are generally not as well paid as those of countries like England and Australia (e.g. it was reported that regular

England internationals could earn as much as £400 000 in a season, while a New Zealand player might earn 10% of that, and can reap as much in one month of ICL participation).

While one possible solution for the NZC's dilemma would be raising the pay of their contracted players, the board was reported as having responded by threatening to exclude players who joined the ICL (such as Sharie Bond).

While it appears that some domestic boards have recognised, in their response to their players leaving to join the ICL, the potential dangers of being found to act in restraint of trade if such players were to be banned from future international competition, some boards (specifically the NZC and the English Cricket Board) have reportedly decided to avoid an outright (and official) ban on players in favour of an ostensibly more low-key approach: These boards have reportedly decided to follow the route of placing rebel players in unwritten disfavour, by 'encouraging' national selectors to select other players for international competition in future. This last has however, in this author's view correctly, been criticised as not necessarily avoiding the potential of restraint of trade-based challenge. More will be said on this later.

409 The ICC was reported in August 2007 as having issued a statement through its chief executive officer, Malcolm Speed, to the effect that the ICC would not recognise the ICL until such time as the BCCI has officially recognised the league.¹²⁸⁴ In January 2009 the ICC Board agreed to new regulations regarding domestic cricket in the territory of member boards and so-called 'approved/disapproved' events. According to these regulations, which followed recommendations from a working party (made up of the former president of Cricket South Africa; the chairman of the Board of the England & Wales Cricket Board, the President and Vice-President of the Board of Control for Cricket in India, and the ICC's Head of Legal Affairs), a host member board can determine if a match or tournament within its territory is approved or disapproved, and no member

¹²⁸⁴ From an article posted on www.cricinfo.com, 28 August 2007 (available online at <http://content-www.cricinfo.com/icl/content/story/308716.html> - last accessed 6 February 2008). In another article of 22 August 2007, an ICC spokesperson was quoted as having stated that 'the ICC Executive Board has taken a policy decision that the BCCI was the only competent authority to deal with the issue. It is up to the BCCI to decide whether to recognise the ICL or not' - <http://content-www.cricinfo.com/icl/content/story/307880.html> (last accessed 6 February 2008).

boards, members' players, coaches or officials may participate in disapproved cricket (and no foreign player may take part in domestic cricket within the territory of a member unless such player obtains a no objection certificate from his home board). These regulations will be implemented from 1 June 2009. The regulations are controversial, as it has placed the power to sanction the ICL in the hands of the BCCI, which, of course, may have a rather significant conflict of interest through its commercial interests in the Indian Premier League tournament. (and the fact that the BCCI's Vice-President, Lalit Modi, is also the IPL Commissioner).

410 While it appears from reports in the media that Cricket South Africa (the 'CSA') followed a similar hard line regarding barring of future participation for rebel players – according to reports during 2007 and 2008 the board had banned all six of the SA players who had signed up with the ICL – the South African situation saw an even more interesting (or, frankly, bizarre) development. In December 2007 it was reported that Cricket South Africa had withdrawn former national player Daryll Cullinan's media accreditation as television commentator for local pay-TV broadcaster Supersport during the West Indies tour to SA, as a result of his involvement in the ICL as coach of the 'Kolkata Tigers' team. At the time of writing it appears that the matter regarding termination of Cullinan's contract has not yet been settled by way of legal action or otherwise.

411 The impact of the 'rebel' ICL has, not unexpectedly, also been felt by a number of South African professional cricketers under contract abroad elsewhere. In April 2008 the Professional Cricketers' Association (PCA) in the UK was awaiting an appeal against the refusal by the England & Wales Cricket Board (ECB) to register three South African ICL players to play county cricket. The PCA was reported as threatening a High Court action in the event of its appeal being denied. The three ex-SA national team players, Justin Kemp (contracted with Kent county), Andrew Hall and Johan van der Wath (both contracted with Northamptonshire), had been refused registration by the ECB in terms of

Regulation 2.1(b) (Regulations Governing the Qualification and Registration of Cricketers) as a result of their participation in the unsanctioned ICL during 2007 (which is not recognized by the ECB as official first class cricket).¹²⁸⁵ The refusal to register these players (even though they had already been contracted as *Kolpak* players) was as a result of Cricket South Africa's refusal to issue the required No Objections Certificates¹²⁸⁶ to the players as a result of their ICL affiliation. Hall had reportedly also been refused permission by CSA to play for the Lions franchise in the 2008 domestic Pro20 competition. Following reports that other ex-international cricketers¹²⁸⁷ had also been refused entry to county cricket on the same grounds, the ICL was during late 2008 reportedly in the process of instructing their legal representatives for purposes of legal action against the ECB.¹²⁸⁸ The appeal (heard on 30 April 2008) of the three South African players against the ECB ruling (which Hall's barrister characterised as an 'unlawful, unreasonable, capricious and discriminatory' ban) was successful¹²⁸⁹, although at the time of writing it appears that Cricket South Africa had not relented in respect of Hall's domestic ban.

412 The Indian Cricket League was the subject of legal action in the High Court of Delhi during August 2007, when the ICL filed a petition against the BCCI requesting an order that BCCI be restrained from interfering in the ICL's signing of players as well as alleged conduct by the BCCI in 'out-hiring' cricket stadiums in India that are owned and managed by state governments, in an attempt to prevent the ICL from staging events. The Delhi High Court granted an interim order in favour of ICL on 27 August 2007. No further information regarding these developments was available to the author at the time of writing. The implications of player bans by Cricket South Africa are considered in more

¹²⁸⁵ See the short article entitled 'PCA to appeal to High Court if appeal against player bans fails' *World Sports Law Report*, May 2008 Cecile Park Publishing Ltd

¹²⁸⁶ A certificate of clearance by the players' domestic cricket board, required for entry into the English country cricket scene by the rules of the ECB

¹²⁸⁷ Namely the West Indies' Wavell Hind and New Zealand's Hamish Marshall

¹²⁸⁸ From a report in *Rapport*, 23 March 2008

¹²⁸⁹ From a report entitled 'Trio successful in county appeals', 30 April 2008, available online at <http://news.bbc.co.uk> (last accessed 7 May 2008)

detail elsewhere in this chapter. The reader is further referred to discussion of the potential application of the Competition Act 89 of 1998 in par 457 *et seq* below.

PART III Liability for sports (and sports-related) injuries

Chapter 1 Criminal law

§1 Introduction

413 The founder of the modern Olympic Games, Baron Pierre de Coubertin, was once quoted as stating that sport is 'a volunteer cult of intensive muscular effort, supported by a desire of progress, and being able to go as far as risk permits.'¹²⁹⁰

Sport often involves contact between participants and/or the use of potentially dangerous equipment, and the vigour and competitive nature with which it is practiced holds the potential for significant injury to participants, officials, spectators or others. In those instances where participants go beyond what 'risk permits', the law seeks to provide liability for sports-related injuries under criminal law or the private law (liability in tort, or the law of delict under South African law). The discussion in the section that follows will firstly focus on criminal liability for injuries related to sport, and then on civil liability under the law of delict.

§2 Criminal liability for sports injuries

414 The role of the criminal law is limited in the context of sports injuries. As Loubser has observed, the criminal law 'applies to acts of violence on the sports-field in the same manner as it applies to other forms of violence, thereby serving to protect participants in sport from unlawful harm, to uphold the values of society, and to punish perpetrators in

¹²⁹⁰ As quoted by Alexandru-Virgil Voicu 'Civil liability arising from breaches of sports regulations' (Romania), in 2005/1-2 *International Sports Law Journal* 22

a way which will deter them and others from following a similar course of conduct in the future.¹²⁹¹

An act of violence on the sports field may constitute the common law offence of assault. The requirements for conduct to constitute assault are the unlawful and intentional (i) application of force to the person of another, or (ii) inspiring of a belief in another person that force is immediately to be applied to him or her.¹²⁹²

415 In combat and contact sports the use of force is generally considered lawful, to the extent that conduct that would otherwise (in other activities) be considered unlawful are legitimized through occurring in the sporting context. The law tolerates the use of physical force in sport on the basis of consensual participation. Such consent of course presupposes that the attacker should have acted within the rules of the sport; a participant who performs a forceful or violent act (e.g. a late or dangerous tackle in football or rugby) in contravention of the rules with the intent to injure or with knowledge of the likelihood of injury would be committing assault.¹²⁹³ Accordingly, conduct that would otherwise constitute assault is deemed to be lawful if full and informed consent is present within the context of a lawful sport and where the injury occurs within the normal course of such sport.¹²⁹⁴ As to the role of the rules of a sport and its relation to the consensual assumption of risk in this regard, the following has been observed:

'Sports activities are susceptible to a series of risks, which are previously known to the participants and which they must all accept ... Only when all mandatory rules have been respected by participants, sportsmen, coaches, referees, spectators and organizers alike, can liability [for injuries resulting from the playing of the sport] be removed. This means that offenders who have failed to comply with the rules and have committed an act which resulted in the personal injury of another party, cannot successfully invoke consent [as a defence to such liability]... Similar to legal rules, the rules of play in a particular sport serve

¹²⁹¹ Loubser "Sports Injuries – Liability" in Basson & Loubser *Sport and the Law in South Africa* Butterworths 2000 (loose-leaf) Ch 5-3

¹²⁹² *Ibid.*

¹²⁹³ Loubser *supra* Ch 5-3

¹²⁹⁴ Loubser *supra* Ch 5-4

the need of protecting the subjective rights of the participants and perhaps more importantly of ensuring that the activities in question will not go against social norms and principles ... The rules of play in a particular sport can ... be regarded as an official declaration of [the members of a community's] consent. Rules that have been established in this way are at the same time a declaration of the authorities of a sporting community concerning the conditions to which the community's members have consented and a guarantee providing legal certainty that all the rights of the participants in the sports activities will be ensured. Conversely, through their consent, all parties involved are also obliged to comply with the rules of play.¹²⁹⁵

416 There is no definitive definition of a lawful sport, and not all contact sports are lawful. While sports such as boxing and wrestling are lawful sports within the ambit of applicable legislation (regulated in South Africa in terms of the South African Boxing Act, 2001¹²⁹⁶) and the participants are immune from civil or criminal legal action even in cases of serious injury, certain forms of boxing (e.g. prize-fighting or bare-knuckle bouts) are considered unlawful.¹²⁹⁷ Even where a fight is deemed to be a lawful boxing match, liability may follow where an injury occurs outside the normal course of the contest and outside the rules (e.g. as a result of a foul such as head-butting which leads to serious injury, which would constitute an assault).¹²⁹⁸ Other combat sports such as martial arts may be more dangerous than boxing, but they are generally practiced and legally tolerated in many countries. As Loubser points out, if such combat sports are properly and openly organized and regulated, and as long as the dominant object is competition and not the inflicting of injury, and provided the sporting conduct does not involve a breach of the peace, the courts are likely to regard the sport as lawful (and injuries occurring in the course of such a sport and within its rules will be justifiable on the basis

¹²⁹⁵ Alexandru-Virgil Voicu *supra* at 22-3

¹²⁹⁶ Act 11 of 2001, which replaced the earlier Boxing and Wrestling Control Act, Act 39 of 1954

¹²⁹⁷ *Austin v Morrall* (1905) 22 SC 67; *S v Couper* (1894) 1 Off Rep 186; *Clarke v Bruning* 1905 TS 295; Loubser *supra* Ch 5-4 to 5-5

¹²⁹⁸ Loubser *supra* Ch 5-5

of the consent of the participants).¹²⁹⁹ It should also be noted that the Minister of Sport is expressly empowered to make regulations regarding any form of combat sport or 'to minimize the chances of injury in any sport or recreational activity other than boxing, kickboxing, karate, wrestling, taekwando, judo and any other form of combat sport'.¹³⁰⁰

417 The main defences or grounds of justification in the context of lawful sporting contests are consent and self-defence. Consent by a participant in a contact sport who knowingly accepts the violence and possible resulting injury that such participation may involve, justifies an injury that would otherwise be unlawful. Consent is a unilateral legal act which may be given expressly (e.g. by means of a written or oral declaration) or by implication (participation with the knowledge of the risks of injury). Participants will generally not be held to have consented to force which goes beyond that which is normally expected in the sport (even if such force is a regular occurrence in the sport involved), and the defence of consent to injury or assumption of risk will only be upheld when the act complained of falls within the ambit of the assumed risk.¹³⁰¹ The exact extent of such assumed risk may depend on the nature of the sport involved, e.g. robust tackling in a rugby match¹³⁰² or the risk of being hit by the other player's racket in a game of squash.¹³⁰³

Consent which is contrary to public policy (or *contra bonos mores*) is invalid and would not serve to justify otherwise unlawful conduct. Participants in sporting activities must themselves consent to the risk of injury, but a parent or guardian of a minor child may give consent on behalf of the child.¹³⁰⁴

418 Self-defence (or the defence of private defence) would justify the use of reasonable force by a participant in a sporting event to repel an attack or a threatened

¹²⁹⁹ Loubser *supra* Ch 5-6

¹³⁰⁰ Paragraphs (jA) and (jB) of section 14 of the National Sport and Recreation Amendment Act, 18 of 2007

¹³⁰¹ Loubser *supra* Ch 5-6 to 5-7

¹³⁰² *Mandelbaum v Bekker* 1927 CPD 375

¹³⁰³ *Boshoff v Boshoff* 1987 (2) SA 694 (O) – see Loubser *supra* Ch 5-7

¹³⁰⁴ *Ibid.* Ch 5-7

attack by another participant which constitutes unlawful violence.¹³⁰⁵ Such defence is also available to a fellow participant who has acted in defence of a fellow participant who was the victim of an attack. The force used by the defender must be reasonable and necessary in the circumstances. The requirements to be satisfied before a plea of private defence would be upheld are as follows:¹³⁰⁶

- The attack must have been unlawful (i.e. unlawfully caused or threatened to cause injury);
- The attack must be directed against legally recognized interest such as bodily integrity;
- The attack must have commenced or be threatening – the defence will not justify the use of force in anticipation (except where an attack is imminently threatened) or in retaliation once the attack has ceased;
- As the defence justifies the warding off of unlawfully caused harm, irregardless of fault on the part of the attacker), private defence may justify the use of reasonable force against an attacker who is not at fault (e.g. a deranged person on the field of play);
- The defence must be directed against the attacker, and private defence does not justify harm caused to a person other than the attacker; and
- The means of defence must be reasonable and necessary to ward off the attack (i.e. the defence will not succeed where the threat could have been avoided in some harmless or less harmful way).

As Loubser points out, the question of proportionality between defence and attack is often the most difficult facet of the inquiry into private defence. An objective test is used to determine the proportionality of the harm threatened and the means used to avoid it, although the courts have in a number of cases followed what amounts to a qualified objective test (i.e. by taking into account what the person who acted in private defence

¹³⁰⁵ *Ibid.*

¹³⁰⁶ *Ntsomi v Minister of Law and Order* 1990 (1) SA 512 (C) at 526-7, as discussed by Loubser *supra* Ch 5-8

could reasonably have known or how he could reasonably be expected to react in the heat of the moment, instead of taking into account all the facts of the situation as known after the event).¹³⁰⁷

419 Finally, it should be noted that it has been observed that the role of the criminal law in respect of sports-related violence is a limited one. Loubser has pointed out that, for a variety of reasons, injuries caused by violence on the sports field will usually be viewed as most appropriately addressed by means of disciplinary procedures in terms of the laws of the game and rules of the relevant governing body. Also, for practical reasons it might be difficult to establish criminal liability (e.g. to establish intent to cause harm on the part of a participant in a situation where s/he could have been attempting to play within the rules). Also, it appears that criminal prosecution in such cases might be inappropriate, as a player who causes injury on the field of play arguably poses little threat to society.¹³⁰⁸

§3 Regulation of safety at stadia and venues

420 Criminal liability for injuries related to sports events is of course not limited to injuries to participants inflicted by other participants and in the course of play. Spectators may also be injured in the course of play or in respect of the situation surrounding an event, in circumstances which may lead to criminal or civil liability.¹³⁰⁹ A prime example is that of stadium disasters, such as the tragic death of 95 spectators at the FA Cup semi-final match between Liverpool FC and Nottingham Forest FC in the Hillsborough

¹³⁰⁷ Loubser *supra* Ch 5-9

¹³⁰⁸ Loubser *supra* Ch 5-10

¹³⁰⁹ For examples of such claims by spectators against event organisers in other jurisdictions, see *Evans v Waitemata District Pony Club* [1972] NZLR 773 (New Zealand); *Wooldridge v Sumner* [1963] 2 QB 43 (England); *Hall v Brooklands Auto-Racing Club* [1933] 1 KB 205 (England); *Wilkes v Cheltenham Home Guard Motor Cycle and Light Car Club* [1971] 3 All ER 369 (CA) (England); *Alcock v Chief Constable of South Yorkshire* [1992] 1 AC 310 (England); *Payne and Payne v Maple Leaf* (1949) 1 DLR 369 (Canada). See, generally, discussion of these and other cases in Loubser *supra* Ch 5-32 to 5-36.

disaster on 15 April 1989.¹³¹⁰ Regulation of safety at stadiums and events has assumed particular importance, including the imposition of criminal liability in respect of certain conduct related to e.g. poor crowd control or the endangerment of spectators or members of the public on the part of event organizers or officials.

421 South Africa's worst stadium disaster to date occurred on 11 April 2001, when two of the top local soccer teams, Kaizer Chiefs and Orlando Pirates, played a local 'Soweto derby' at the Ellis Park (now Coca Cola Park) stadium in Johannesburg. According to reports, the stadium was already filled to its 60 000 capacity when a further 30 000 fans attempted to enter, and in the resultant stampede 43 fans were tragically crushed to death and more than 100 fans were injured. This was not the first disaster of this kind involving a match between these two teams; in 1991 a match played in Orkney in Gauteng saw a stampede in which 41 fans were killed, and in another match between the two teams at the Ellis Park Stadium (in October 1998) members of the SA Police Services were forced to use rubber bullets against unruly and violent fans who were allegedly damaging property.

A commission of inquiry chaired by the then Judge President of the Transvaal Provincial Division of the High Court, Justice Bernard Ngoepe, was instituted to examine the causes of the 2001 disaster.¹³¹¹ The Commission's Final Report of 130 pages (released 26 September 2002) identified a number of causes for the tragedy, including gross underestimation of possible crowd attendance by the organizers, failure to sufficiently coordinate the roles of the four private security companies whose staff were on duty at the event, a lack of equipment (such as closed circuit television cameras) to monitor crowd behaviour, as well as the fact that the use of teargas by security personnel had been a major cause of the crowd stampede. Amongst the recommendations contained in the report was the proposed introduction of special legislation to regulate the game of soccer in the interests of spectators' safety (e.g. to identify those responsible for the safety of

¹³¹⁰ As to the highly-publicised litigation which arose from this disaster, see *Alcock v Chief Constable of South Yorkshire* [1992] 1 AC 310 (England) and *Hicks v Chief Constable of South Yorkshire* [1992] 2 All ER 65

¹³¹¹ The Commission was instituted and conducted in terms of the provisions of the Commissions Act No. 8 of 1947 and the Regulations published in terms of the Act; Terms of Reference published in *Government Gazette* No. 22246, 20 April 2001, *Regulation Gazette* No. 7053

spectators at events, to outline criteria for the certification of stadiums, to identify an authority charged with inspecting stadiums, to make it compulsory for stadiums to have *certain minimum* security enforcement facilities, and to regulate the employment of security personnel at events).

422 The issue of stadium safety again came to the fore recently in respect of South Africa's preparations for the 2010 FIFA World Cup South Africa™, following the spectator crush which killed 19 and injured 132 persons at a match in Cote d'Ivoire in late March 2009. This has highlighted the need for the 2010 Local Organising Committee to intensify efforts to raise awareness amongst the South African football-supporting public that all tickets for the 2010 event must be purchased in advance, and that fans will be restricted from approaching venues without tickets.

423 The Safety at Sports and Recreational Events Bill, 2005 (the 'SASRE Bill') was first tabled in Parliament in March 2005. Despite enquiries, the author is at the time of writing unaware of the status of this Bill in the legislative process (aside from the fact that the Bill has definitely not yet been passed into law). A revised version of the Bill was available on the internet in early 2009, although it is unclear whether such 2009 version has been published for comment at the time of writing. A comprehensive discussion of this ambitious and far-reaching piece of proposed legislation (the 2005 version of which ran to 95 pages), which was drafted by Patrick Ronan, the author of the safety and security section of South Africa's Bid Book for the 2010 FIFA World Cup, is beyond the scope of this chapter. It should be mentioned, however, that the Bill has been subjected to criticism, for example that it provides a minefield for sponsors regarding the liabilities and obligations which are proposed to be created, that possibly only larger sports federations would be able to comply with costly safety and event planning exercises in terms of its proposed provisions, and regarding its expected impact on small sports bodies and federations. The apparently watered-down nature of the 2009 version of the Bill may be attributable to such criticism.

The discussion that follows will provide a brief overview of the proposed scope of the 2005 version of the Bill (in light of uncertainty regarding the current status of the 2009 version, which is available on the internet at the time of writing, this section will in passing refer to apparent changes as incorporated in this latest version).

424 The Preamble of the Bill describes its main aims as being the following:

- To provide for the safety and security of all persons who attend sports or recreational events held at stadia and other venues in the Republic;
- To provide for the risk categorization and the designation of sports and recreational events as well as the issuing of general safety and design certificates for existing and planned stadia and venues;
- To provide for the issuing of special safety certificates and prohibition notices;
- To provide for the powers and functions of a National Events Inspectorate;¹³¹²
- To provide for safety and security planning and measures for sports and recreational events held at stadia and other venues;
- To provide for events ticketing and accreditation requirements;
- To provide for spectator access and vehicular control at stadia and other venues;
- To provide for alcohol, tobacco, environmental, corporate hospitality and vendor control at stadia and other venues;
- To provide for proper accredited training of stadium and venue personnel;
- To provide for proper stadium and venue safety and security communication policies, structures and procedures;
- To provide for the role of volunteers at stadia and other venues;
- To provide for measures to counter-act ambush marketing;¹³¹³

¹³¹² It appears that the provisions regarding a National Events Inspectorate have been excluded in the 2009 version of the Bill

- To provide for spectator exclusion orders;
- To provide for the securing of public liability insurance at stadiums and other venues; and
- To provide for appeals and offences in respect of such matters.

Section 17 of the Bill proposes the establishment of a National Event Inspectorate, to resort under the government department of Sport and Recreation South Africa, the primary function of which shall be to enhance the provision of safety and security, to the general public, within the precincts of stadia and venues in the Republic and to effectively enforce the provisions of the Bill. It appears that the provisions regarding a National Events Inspectorate have been excluded from the 2009 version of the Bill, and that related functions are to be performed by the National Commissioner of the South African Police Services.

In respect of event safety planning, section 19(5) of the Bill specifically provides for the preparation of a comprehensive disaster management contingency and operational plan for an event, prepared by the relevant Disaster Management Centre as contemplated in the Disaster Management Act, 2002,¹³¹⁴ including protocols for mass spectator stress, mass spectator evacuation, power and water outages, sewerage spills and biological agent and chemical contamination and bomb threats.

425 The proposed ambit and effect of the SASRE Bill is wide. While the 2005 version of the Bill did not expressly exclude any events from the application of the Bill, the 2009 version (in section 2) excludes gatherings as defined in the Regulation of Gatherings Act,

¹³¹³ It appears that the provisions regarding ambush marketing have been excluded in the 2009 version of the Bill. For more on ambush marketing protection in South Africa, see the discussion in par 562 *et seq* below. Measures aimed at countering ambush marketing in respect of, specifically, the 2010 FIFA World Cup South Africa event (and contained in the legislation specifically passed for this event – as discussed below and elsewhere in this chapter) have been controversial and have generated criticism from certain quarters, in light of the sometimes perceived as draconian requirements set by FIFA for the event and the rather harsh limitations in respect of the economic freedom of commercial enterprises (e.g. also regarding the use of such enterprises' own intellectual property such as trade marks).

¹³¹⁴ Act 57 of 2002

1993 (Act No. 205 of 1993) and any form of water sport. The wide ambit of the Bill is evidenced by the provisions of section 45, which deals with offences and penalties:¹³¹⁵

45. Offences and penalties

- (1) Any person who contravenes any provision of this Act is guilty of an offence and, on conviction, liable to a fine or to imprisonment not exceeding 10 years or both such fine and such imprisonment;
- (2) The following acts and behaviour, in particular, shall constitute an offence in terms of this Act:
 - (i) the entering-onto or into, by a person, of a restricted, secured or barricaded area inside a stadium or venue or its precinct, including amongst others, a field of play, a stage, a [venue operations center],¹³¹⁶ media area, dressing rooms and event official area, without prior written permission of the relevant authorized official of the controlling body, event organizer and stadium or venue owner;
 - (ii) the touting of event tickets as contemplated in section 27 of the [Bill],¹³¹⁷

¹³¹⁵ Although it should be noted that the relevant section on offences and penalties as contained in section 30 of the 2009 version of the Bill has been significantly amended (and appears to be less extensive).

¹³¹⁶ A venue operations center is defined in the Bill as 'a temporary or permanent facility, located inside a stadium or a venue, which houses an on-site operational control center from where the entire safety and security operation at a stadium or a venue and its precincts, for the purposes of an event'.

¹³¹⁷ Section 27 of the Bill contains rather far-reaching provisions in respect of event ticketing, which includes the following:

- Where applicable, event tickets shall be made available to the public via a timeous, accessible and efficient event ticketing distribution system, which system shall be controlled;
- Where applicable, there must be pre-sales of event tickets;
- Where applicable, and in respect of a sporting event, the provision for a proper rival sports fan spectator separation policy as far as the sales of event tickets are concerned;
- The total number of tickets made available to spectators for an event in terms of the Bill must not exceed the safe spectator capacity of a stadium or venue hosting an event, or any of its designated spectator viewing areas, as determined in terms of the Bill;
- Where applicable, no event tickets shall be sold on the day of the event;
- Where applicable, no event tickets shall be sold at a stadium or venue on the day of an event provided that where such sales of event tickets are conducted on the day of an event, such sales must be conducted at least 1 kilometre from a stadium or venue;
- Where applicable, a no spectator standing rule shall be applied to a spectator viewing area inside a stadium or venue on the day of an event;
- A reserved seating only policy shall be implemented at a stadium or venue for any high or medium risk event, provided that in the event that a stadium or venue is comprised, in whole or in part, of man-made embankment seating areas this policy shall not apply; and
- Any form of touting shall be prohibited in terms of the Bill.

- (iii) the intentional breach of an event ticket condition, the intentional breach of written and visible conditions of entry into a stadium or venue and the possession of a prohibited or restricted item within a stadium as contemplated in [the Bill];
- (iv) the intentional contravention of the provisions of section 39 of the [Bill];¹³¹⁸
- (v) a contravention of the terms and conditions of an exclusion notice as contemplated in section 40 (3)(o) of the [Bill];¹³¹⁹
- (vii) a non-compliance with the provisions of section 42 of the [Bill];¹³²⁰
- (viii) a failure to comply with a lawful request or directive of any person authorized in terms of this [Bill] to ensure compliance with the provisions of this [Bill];
- (ix) the un-authorized throwing, kicking, knocking or hitting by a person, of any object within a stadium or venue or its precinct;
- (x) the un-authorized destruction or damage to any movable or immovable property inside a stadium or venue or its precinct;
- (xi) delinquent and/or anti-social behaviour by a person inside a stadium or venue or its precinct, including amongst others, racist, vulgar, inflammatory, intimidatory or obscene behaviour.

426 It should be noted that special legislation has been passed to deal with the 2010 FIFA World Cup South Africa, which legislation also serves to regulate certain aspects related to stadiums and venues for the FIFA event. The 2010 FIFA World Cup South Africa Special Measures Act No. 12 of 2006, for example, deals with issues such as the declaration by the Minister (by way of publication in the *Government Gazette*) of stadia and venues which have been identified and selected to host one or more matches,¹³²¹ a prohibition on the prevention by any person of the playing of a national anthem or the

¹³¹⁸ Section 39 deals with ambush marketing – see the discussion in par 562 *et seq* below

¹³¹⁹ Regarding the provisions of the Bill which relate to spectator exclusion notices, see the discussion on spectator violence and hooliganism in par 428 *et seq* below

¹³²⁰ Section 42 of the Bill deals with mandatory public liability insurance for event organisers, stadium and venue owners

¹³²¹ Section 2 of the Act

flying of a national flag of any country represented by a team at any match or otherwise officially connected with the event,¹³²² access control measures and the possession of accreditation cards for access to designated areas for matches,¹³²³ traffic-free zones¹³²⁴ and provisions regarding search and seizure of persons and vehicles.¹³²⁵ In terms of section 9(3) of the Act, any regulation issued by the Minister of Sport and Recreation under the Act¹³²⁶ may declare a contravention thereof or failure to comply therewith to be an offence and that a person convicted of such an offence may be sentenced to a fine or to imprisonment for a period not exceeding 12 months or to both a fine and such imprisonment.

427 The South African government has also announced that special courts will be in place during the World Cup event (as well as during the 2009 FIFA Confederations Cup) in order to deal with offences relating to the event. According to reports, the police services are expecting in the region of 350 000 foreign visitors (and more than 28 000 journalists) to the 2010 event, and offences committed by visitors will be speedily resolved by such special courts before their departure from the country. Along with these special courts, special units of the police services are also in the process of being set up to do duty as part of the collective security structure (or 'JOINTS') during the 2010 event. It has been reported that ZAR 645 million has been budgeted for the recruitment of 55 000 additional police officials, while ZAR 665 million has been budgeted for additional police equipment. Specific focus areas of the security response include the following:

- Preparations for possible terrorist attacks: While South Africa is not currently threatened by terrorism, it is expected that some countries participating in the event may draw interest from terrorists (such fears have been heightened by recent events at the time of writing, specifically

¹³²² Section 3 of the Act

¹³²³ Sections 5 and 6 of the Act

¹³²⁴ Section 7 of the Act

¹³²⁵ Section 8 of the Act

¹³²⁶ In terms of section 9(2) of the Act

the terrorist attack on the Sri Lankan cricket team which took place in Lahore on 3 March 2009, and prompted the ICC to move the 2009 ICC Champions Trophy tournament, which had been scheduled to be played in Pakistan, to South Africa for September 2009);

Certain sectors have been identified as potential flashpoints for unrest during or around the dates of the event (including organized labour and the transport industry); and

Hooliganism: Members of foreign police services will co-operate with the local police services and are expected to be of special value if deployed at matches involving their countries' teams. The National Intelligence service and delegates from foreign security services would assist in identifying undesirable persons and potential trouble-makers.

The reader is further referred to specialist texts on risk management in sport.¹³²⁷

§4 Hooliganism and other forms of spectator violence

428 South African sport has, fortunately, not been blighted by the problems experienced elsewhere in respect of wide-spread and organized spectator violence. Crowd hooliganism (in football, specifically) has been experienced as a problem of significant proportions in other jurisdictions.¹³²⁸ In the UK, specific legislation¹³²⁹ has been passed to provide for measures such as e.g. spectator banning orders.¹³³⁰ In the European Union, it appears that only a limited number of binding measures have been

¹³²⁷ See Cloete et al *Introduction to Sports Law in South Africa* LexisNexis Butterworths 2005 Chapter 8 ('Risk Management in Sport')

¹³²⁸ For discussion of recent developments in this regard, see *Sport and the Law Journal* Vol. 15 Issue 3 (2007) p 44 *et seq.*

¹³²⁹ E.g. the Football Spectators Act (1989), the Football Offences Act (1991), the Football (Offences and Disorder) Act (1999), and the Football (Disorder) Act (2000).

¹³³⁰ See the discussion by Blackshaw, I 'The "English Disease" – tackling football hooliganism in England' 2005/1-2 *International Sports Law Journal* 90

taken at EU level in the fight against football hooliganism, and that in certain areas of action only 'soft law' exists in the form of resolutions and recommendations of the European Parliament and the Council.¹³³¹

While hooliganism has not been experienced to any significant extent in South Africa and, as such, has not necessitated the introduction of specific statutory measures, legal measures exist in the form of the more general provisions of the criminal law (common law crimes such as assault and malicious damage to property) as well as more specific provisions contained in the Safety at Sports and Recreational Events Bill, 2005 (the 'SASRE Bill').¹³³²

429 Section 40 of the SASRE Bill (the status of which in the legislative process is at the time of writing unknown to the author) provides for spectator exclusion notices.¹³³³

This section provides that, in circumstances where information is brought to or comes to the attention of a safety and security role-player (as defined in the Bill; and including amongst others a controlling body, an event organizer, a stadium or venue owner, a venue operations center commander or any other person having a substantial, material or real interest in the safety and security of an event to be hosted at a stadium or venue), regarding the undesirability of any person as far as such person's attendance at an event is concerned, then the spectator exclusion notice procedures in the Bill shall be put into operation.¹³³⁴ In the event that these circumstances arise, then any of the safety and security role-players shall within 30 days of such information having come to their attention, apply, in writing to the National Safety and Security Officer, for a spectator exclusion notice to be issued in respect of any such undesirable person (which the National Safety and Security Officer must issue within 30 days, if s/he decides to issues

¹³³¹ See the discussion by Mojet, H 'The European Union and football hooliganism' 2005/1-2 *International Sports Law Journal* 69

¹³³² See also the brief discussion in par 427 above regarding special security arrangements for the 2010 FIFA World Cup event. It should be noted that a revised version of the Bill was available on the internet in early 2009, although it is unclear whether such 2009 version has been published for comment at the time of writing. As the status of this 2009 version is unknown to the author, it will not be discussed here.

¹³³³ As contained in section 22 of the 2009 version of the SASRE Bill

¹³³⁴ Section 40(1) of the Bill

such an order).¹³³⁵ The terms and conditions which the National Safety and Security Officer may include in a spectator exclusion notice issued against a person deemed to be *undesirable*, include the prohibition on the entry of such a person into any stadium or within its precinct, in the Republic, in perpetuity or for such lesser period as the National Safety and Security Officer may deem fit.¹³³⁶ A person upon whom a spectator exclusion notice has been served can appeal against the decision to issue such a notice against him or her, to the National Safety and Security Officer.¹³³⁷ Section 41 of the Bill makes provision for court reviews and appeals against spectator exclusion notices. Any person found to contravene the terms and conditions of such a spectator exclusion notice shall be guilty of an offence in terms of section 45 of the Bill, and, on conviction, shall be liable to a fine or to imprisonment not exceeding 10 years or both such fine and such imprisonment.

As mentioned above, it is unknown at the time of writing whether the above provisions of the Bill will eventually pass into law (in light also of the fact that a significantly revised 2009 version of the Bill is apparently in circulation at the time of writing).

§5 Corruption and match-fixing

430 Mention has been made elsewhere of the match-fixing and corruption scandal which rocked international, and especially South African, cricket in 2000. The scandal erupted after news of match-fixing and collusion with book-makers by the then South African national team captain, the late Hansie Cronje, came to light. No more will be said here about these events,¹³³⁸ apart from noting that corruption in sport promises to

¹³³⁵ Section 40(2)

¹³³⁶ Section 40(3)(o)

¹³³⁷ Section 40(3)(p)

¹³³⁸ For further reading on the 2000 match fixing scandal in cricket, see Deon Gouws '*and nothing but the truth?*' Zebra Press, Cape Town 2000; Andre Oosthuizen & Gavin Tinkler *The Banjo Players: Cricket's Match Fixing Scandal* Riverside Publications, Hout Bay 2001; Gardiner et al *Sports Law* 2nd Edition 2001 at 365 *et seq*; Sir Paul Condon *Report on Corruption in International Cricket* (Report of the ICC's Anti Corruption Unit, April 2001), available online as http://www.icc-cricket.com/corruption/condon_report.html; Judge Edwin L King *Final*

remain a problem which will face officials and administrators in a number of sporting disciplines (as evidenced also by the 'Operation Dribble' police investigation into corruption in Premier League Soccer, which uncovered wide-spread corruption and match-fixing in football and led to the arrest of a large number of premier league football referees and some team officials).¹³³⁹ The problem is of course not unique to South Africa, and many countries and sporting disciplines have been tainted by sports corruption (which is more often than not closely connected to sports gambling activities). Compare the match-fixing scandal in the German football league in 2005 (which saw the League, the DFB, claiming damages against referee Robert Hoyzer, who was convicted of deliberately manipulating matches), and the recent establishment of an Integrity Unit by world tennis authorities following a spate of allegations regarding possible match-fixing and offers of bribes to top players to lose matches.¹³⁴⁰

431 The South African legislature enacted legislation which has the potential to have a significant impact on the fight against corruption in sport in future. The Prevention and Combating of Corrupt Activities Act¹³⁴¹ was enacted mainly in order to provide for the strengthening of measures to prevent and combat corruption, and to provide for a statutory offence of corruption and offences relating to corrupt activities. This legislation was a reaction to the perceived wide-spread corruption in South African government and civil society, and was accordingly not enacted solely with sport in mind. The Act has a very wide area of application, which deals *inter alia* with corrupt activities relating to public officials, agents, members of the legislative authority, judicial officers and members of the prosecuting authority.¹³⁴² Part 4 of the Act contains specific provisions in

Report: *Commission of Inquiry into Cricket Match Fixing and Related Matters* 2001, available online at <http://www.info.gov.za/otherdocs/2001/kingfinal.pdf>; Qayyum, Justice M.M. *Report of Judicial Commission*, Pakistan Cricket Board, Lahore 1998; Central Bureau of Investigation *Report on Cricket Match Fixing*.

¹³³⁹ See Cloete et al *Introduction to Sports Law in South Africa* (2005) *supra* at 11

¹³⁴⁰ For more on recent developments in corruption in international sport, see the Sports Law Foreign Update ('Criminal Law') in *Sport and the Law Journal* Vol. 15 Issue 3 (2007) p 35 *et seq.* For more information on the specific measures taken by the International Cricket Council following the earlier match fixing scandal in cricket, see Gardiner, S & Naidoo, U 'On the front foot against corruption' *Sport and the Law Journal* Issue 2 Vol. 15 (2007) 16-27

¹³⁴¹ Act 12 of 2004

¹³⁴² Part 2 of the Act

respect of corrupt activities relating to sporting events¹³⁴³ and to gambling games or games of chance.¹³⁴⁴

432 Section 15 of the Act is far-reaching, and provides as follows:

Offences in respect of corrupt activities relating to sporting events

15. Any person who, directly or indirectly-

- (a) accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of that other person or of another person; or
- (b) gives or agrees or offers to give to any other person any gratification, whether for the benefit of that other person or for the benefit of another person-

(i) in return for-

- (aa) engaging in any act which constitutes a threat to or undermines the integrity of any sporting event, including, in any way, influencing the run of play or the outcome of a sporting event; or
- (bb) not reporting the act contemplated in this section to the managing director, chief executive officer or to any other

¹³⁴³ Section 15

¹³⁴⁴ Section 16 of the Act provides as follows:

Offences in respect of corrupt activities relating to gambling games or games of chance

16. Any person who, directly or indirectly -

- (a) accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of that other person or of another person; or
 - (b) gives or agrees or offers to give to any other person any gratification, whether for the benefit of that other person or for the benefit of another person -
 - (i) in return for engaging in any conduct which constitutes a threat to or undermines the integrity of any gambling game or a game of chance including, in any way, influencing the outcome of a gambling game or game of chance; or
 - (ii) as a reward for acting as contemplated in subparagraph (i); or
 - (c) carries into effect any scheme which constitutes a threat to or undermines the integrity of any gambling game or a game of chance, including, in any way, influencing the outcome of a gambling game or a game of chance,
- is guilty of the offence of corrupt activities relating to gambling games or games of chance.'

person holding a similar post in the sporting body or regulatory authority concerned or at his or her nearest police station; or

(ii) as a reward for acting as contemplated in subparagraph (i): or

(c) carries into effect any scheme which constitutes a threat to or undermines the integrity of any sporting event, including, in any way, influencing the run of play or the outcome of a sporting event,

is guilty of the offence of corrupt activities relating to sporting events.'

'Sporting events' are defined in the Act as 'any event or contest in any sport between individuals or teams or in which an animal competes, and which is usually attended by the public and is governed by rules which include the constitution, rules or code of conduct of any sporting body which stages any sporting event or of any regulatory body under whose constitution, rules or code of conduct the sporting event is conducted.'¹³⁴⁵

As has been observed, this definition is very wide, and would include all organized sport, including sports such as horse racing, show jumping, polo-crosse, pigeon racing and dog contests.¹³⁴⁶ The term 'gratification' is also given a wide meaning in the Act.¹³⁴⁷

¹³⁴⁵ Section 1 (xxv) of the Act

¹³⁴⁶ See Cloete et al *supra* at 11

¹³⁴⁷ In terms of section 1(ix) ('Definitions'), 'gratification' is defined as including:

'(a) money, whether in cash or otherwise;

(b) any donation, gift, loan, fee, reward, valuable security, property or interest in property of any description, whether movable or immovable, or any other similar advantage;

(c) the avoidance of a loss, liability, penalty, forfeiture, punishment or other disadvantage;

(d) any office, status, honour, employment, contract of employment or services, any agreement to give employment or render services in any capacity, and residential or holiday accommodation;

(e) any payment, release, discharge or liquidation of any loan, obligation or other liability, whether in whole or in part;

(f) any forbearance to demand any money or money's worth or valuable thing;

(g) any other service or favour or advantage of any description, including protection from any penalty or disability incurred or apprehended or from any action or proceedings of a disciplinary, civil or criminal nature, whether or not already instituted, and includes the exercise or the forbearance from the exercise of any right or any official power or duty;

(h) any right or privilege;

(i) any real or pretended aid, vote, consent, influence or abstention from voting; or

(j) any valuable consideration or benefit of any kind, including any discount, commission, rebate, bonus, deduction or percentage.'

433 While the Act does not define the meaning of 'corrupt activities', the general offence of corruption is explained as encompassing the following as contained in section 3 of the Act:

'General offence of corruption

3. Any person who, directly or indirectly -

(a) accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person; or

(b) gives or agrees or offers to give to any other person any gratification, whether for the benefit of that other person or for the benefit of another person,

in order to act personally or by influencing another person so to act, in a manner -

(i) that amounts to the-

(aa) illegal, dishonest, unauthorized, incomplete or biased, or

(bb) misuse or selling of information or material acquired in the course of the exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;

(ii) that amounts to -

(aa) the abuse of a position of authority;

(bb) a breach of trust; or

(cc) the violation of a legal duty or a set of rules;

(iii) designed to achieve an unjustified result; or

(iv) that amounts to any other unauthorised or improper inducement to do or not to do anything,

is guilty of the offence of corruption.'

434 It is important to note that the Act contains specific provisions regarding its interpretation, which relate to the instances where it is alleged that a person knew of corrupt activities or is deemed to have known of such activities (i.e. the imputation of knowledge to a person). Section 2 provides as follows in this regard:

2. (1) For purposes of this Act a person is regarded as having knowledge of a fact if -

(a) that person has actual knowledge of the fact; or

(b) the court is satisfied that -

(i) the person believes that there is a reasonable possibility of the existence of that fact; and

(ii) the person has failed to obtain information to confirm the existence of that fact,

and "knowing" shall be construed accordingly.

(2) For the purposes of this Act a person ought reasonably to have known or suspected a fact if the conclusions that he or she ought to have reached are those which would have been reached by a reasonably diligent and vigilant person having both -

(a) the general knowledge, skill, training and experience that may reasonably be expected of a person in his or her position; and

(b) the general knowledge, skill, training and experience that he or she in fact has.'

It is clear that such imputation of knowledge of conduct or of an act that constitutes a threat to or undermines the integrity of a sporting event, for purposes of the requirement

of reporting such act to the officials of a sports body in terms of section 15 of the Act, might significantly affect a wide range of persons involved in such sporting event (i.e. fellow players or athletes, officials, stadium or venue staff, etc who become aware of or would be deemed to have been aware of illicit contact or communication between e.g. a player and a book-maker or other persons).

Furthermore, it is interesting to speculate as to what types of information may be relevant to the undermining of the integrity of an event (e.g. whether the communication by a coach, captain or player in a team of an 'injury list' or of a team strategy to a book-maker or punter would constitute prohibited activity). In light of the wide ambit of the provisions of the Act, would the communication of such information to a journalist for consideration constitute a 'corrupt activity' for purposes of section 15? While the Act does not provide clarity on the point, the communication of information of a newsworthy nature or in the public interest would surely not contravene these provisions (although the person providing such information may of course be subject to civil sanctions, e.g. for breach of a confidentiality clause in an employment contract or for contravention of the employee's duty of good faith towards the employer and the employer's business undertaking).

435 Section 21 provides that an attempt, conspiracy or inducement of another to commit any of the prohibited acts as contained in the Act constitutes an offence, liable to the same punishment as laid down (in section 26(1) of the Act)¹³⁴⁸ for the commission of the offence which such person attempted, conspired or induced another to commit.

Section 25 of the Act deals with defences, and provides as follows:

'Defences

25. Whenever an accused person is charged with an offence under Part ... 4 ... or section ... 21 (in so far as it relates to the aforementioned offences), it is not a valid defence for that accused person to contend that he or she -

¹³⁴⁸ See the text below

- (a) did not have the power, right or opportunity to perform or not to perform the act in relation to which the gratification was given, accepted or offered;
- (b) accepted or agreed or offered to accept, or gave or agreed or offered to give the gratification without intending to perform or not to perform the act in relation to which the gratification was given, accepted or offered; or
- (c) failed to perform or not to perform the act in relation to which the gratification was given, accepted or offered.'

During the King Commission enquiry into the cricket match fixing scandal in 2000, South African national team batsman Herschelle Gibbs was implicated in an episode of match-fixing involving an agreement between the national team captain and a book-maker. Gibbs testified that he had agreed prior to a match (at the instigation of captain Cronje, in return for a promised payment by the book-maker) to bat in such a way as to lose his wicket early and thus achieve a low score, but that he subsequently changed his mind and went on to score a half century. Clearly such conduct would not constitute a defence in terms of section 25 of the Act; the initial agreement would be sufficient to found criminal liability in terms of the Act.

436 The Act makes provision in section 26 for very substantial penalties in the case of conviction for an offence in terms of section 15 (which is contained in Part 4 of the Act):

Penalties

26. (1) Any person who is convicted of an offence referred to in -

(a) Part ... 4 ... is liable -

- (i) in the case of a sentence to be imposed by a High Court, to a fine or to imprisonment up to a period of imprisonment for life;

- (ii) in the case of a sentence to be imposed by a regional court, to a fine or to imprisonment for a period not exceeding 18 years; or
- (iii) in the case of a sentence to be imposed by a magistrate's court, to a fine or to imprisonment for a period not exceeding five years;

(2) ...

(3) In addition to any fine a court may impose in terms of subsection (1) or (2), the court may impose a fine equal to five times the value of the gratification involved in the offence.

437 In terms of the civil consequences of an agreement to commit a corrupt activity, it should be noted that the South African common law of contract provides that a contract induced by the bribery of an agent of a contracting party is voidable at the instance of the innocent party (the principal). Bribery, along with misrepresentation at contracting, duress and the exercising of an undue influence by a party to a contract lead to improperly obtained consensus, and the innocent party is entitled to claim rescission of the contract (*restitutio in integrum*) and delictual damages (or damages in tort, where the requirements for such liability are present and can be proved).¹³⁴⁹ The contract of bribery (between the briber and the agent) is not enforceable at the instance of the briber, as the contract is *contra bonos mores* (against public policy), and the maxim *ex turpi causa non oritur actio* applies.¹³⁵⁰

¹³⁴⁹ See *Extel Industrial (Pty) Ltd v Crown Mills (Pty) Ltd* 1999 (2) SA 719 (A)

¹³⁵⁰ I.e. from an unlawful cause no action arises - see, generally, Christie, R H *The Law of Contract in South Africa* 5th ed LexisNexis Butterworths Durban 2006 (Chapter 10)

Chapter 2 Delictual liability (liability in tort) for sports injuries

§1 Introduction

438 At this point the reader should note that, while the following section will focus on liability in tort (or delict) for injuries suffered by players, athletes, participants, spectators, officials and other persons during the course of play,¹³⁵¹ the South African law of delict also provides grounds for other remedies related to patrimonial loss caused through the unlawful and culpable infringement of recognized subjective rights. In South African private law, the law of delict is, apart from contract, the primary source of obligations (i.e. in the case of delict, the obligation on the part of a wrongdoer to compensate the plaintiff for such unlawful infringement of his or her subjective rights). Under the umbrella of the more general delictual action, the *actio legis Aquiliae*,¹³⁵² liability in delict can be found in a number of specific instances of wrongful conduct which cause patrimonial loss. Examples of these, which may all occur in the context of sport and of its organization and commercialization, are the delict of unlawful competition (including passing off)¹³⁵³ and interference with another's contractual relationship.¹³⁵⁴ For

¹³⁵¹ I.e. for wrongful and culpable conduct which causes injury or harm to the bodily or physical integrity of persons

¹³⁵² See the discussion in the text below

¹³⁵³ See, generally, van Heerden, HJO & Neethling, *J Unlawful Competition* Butterworths (1995); Cloete et al *Introduction to Sports Law in South Africa* LexisNexis Butterworths (2005) 114-115. See also the discussion elsewhere in this chapter

¹³⁵⁴ It is accepted in South African law that '[a] delictual remedy is available to a party to a contract who complains that a third party has intentionally and without lawful justification induced another party to the contract to commit a breach thereof' (*Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1981 (2) SA 173 (T) at 202. See also *Dun and Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau (Cape) (Pty) Ltd* 1968 (1) SA 209 (C)). The courts generally require the defendant's actions or conduct in interfering with the contractual rights of the plaintiff to be *intentional* (therefore with the clear intention to interfere with the parties' contractual rights and cause the plaintiff damage) in order to found liability under this delictual action (*Union Government v Ocean Accident and Guarantee Corporation Ltd* 1956 (1) SA 577 (A)). Just some examples of specific forms of conduct that may found liability under this delict are the intentional inducement, enticement or instigation of a contracting party to breach the agreement, bribing an employee of a competitor to sell trade secrets, or enticing employees of a competitor to leave its service. In the case of *Santos Professional Football Club (Pty) Ltd v Igesund* 2003 (5) SA 73 (C), Santos FC instituted a claim of unlawful inducement to breach a contract of service against Ajax Cape Town FC, after Ajax had offered Santos coach Gordon Igesund (who was one year into a two-year contract with Santos) a lucrative contract as Ajax manager. Igesund repudiated his contract with Santos. The court dismissed the claim based on unlawful interference with a contractual relationship, on the basis that Ajax's mere offer to Igesund was insufficient to found liability for the club in the absence of proof of active unlawful inducement to breach the contract – see Cloete et al *supra* 114.

more information on these and other possible causes of action in delict, the reader is referred to specialist works on the subject.¹³⁵⁵

439 As was observed in the above discussion of the role of the criminal law on the sports field, it is a reality and (often in the highly competitive environment of modern professional sport) an increasingly predictable certainty that participants in sports activities will get hurt. As was pointed out, liability for injury caused by an opponent or participant may follow where such participant's conduct went outside the rules of the game. In fact, one of the functions and objectives of sporting rules is to counter the natural consequence of the competitive spirit being taken too far, and to protect those who take part in sport from injury. Much has changed in the centuries since the 'hazy' rules of the 'wrestling, boxing and all-in fighting known as *pankration*' of the ancient Olympic Games:

'One clear infringement was whacking an opponent once the contest was over, a tactic that brought a stern rebuke for Apollonius of Egypt. Deliberately breaking your opponent's fingers may also have been made illegal, since only Leontiscus of Messana is known to have won the Olympic title this way.'¹³⁵⁶

As rules in sport have developed, so have the law's treatment of transgressions by participants that cause injury to others. The law of torts in common law systems has been characterised as 'the best way to deter violent conduct among athletes and provide them with an adequate remedy for their injuries ... Tort law imposes financial liability on the athlete ... and this will hit him where it hurts the most – his pocket.'¹³⁵⁷ This sentiment is especially true in the modern context of professional sport: In English

¹³⁵⁵ Boberg, P Q R *The Law of Delict: Vol. 1 Aquilian Liability* (1984); Burchell, J M *Principles of Delict* (1993); Neethling, J; Potgieter, JM & Visser, P J *Law of Delict* (2006)

¹³⁵⁶ From Tim Harris's humorous exposition on the subject of rules in sport ('Nice guys finish seventh') in *Sport: Almost Everything You Ever Wanted to Know* Yellow Jersey Press, London 2007 at 198

¹³⁵⁷ Jahn, G 'Civil liability: An alternative to violence in sporting events' (1988) 15 *Ohio Northern University Law Review* 243 at 253 (as quoted by Anderson, J 'Spear-tackles and sporting conspiracies: Recent developments in tort liability for foul play' 2006/1-2 *International Sports Law Journal* 41

Premier League football, Manchester United trainee Ben Collett was recently awarded a record settlement of £4.3 million following a challenge by Gary Smith of Middlesbrough in a match in 2003 which broke Collett's leg in two places (both Middlesbrough and Smith had admitted liability for the injury). While some commentators have expressed surprise at the award in light of the uncertainty involved in determining the future career prospects of a player in Collett's position, it has been observed that the award has set a precedent which might affect clubs' insurance premiums.¹³⁵⁸ Other jurisdictions also appear to show willingness in respect of awarding compensation in a wide range of matters (including, even, a case of psychological trauma to a race horse¹³⁵⁹).

440 Anderson¹³⁶⁰ observes that the law of tort is armed with two weapons in dealing with liability for sports injuries, namely assault and battery (trespass to the person) and negligence, which were distinguished as follows by Lord Denning in *Letang v Cooper*:¹³⁶¹

'If [the defendant] does not inflict injury intentionally, but only unintentionally, the plaintiff has no cause of action today in trespass. His only cause of action is in negligence, and then only on proof of want of reasonable care. If the plaintiff cannot prove want of reasonable care, he may have no cause of action at all.'

As Anderson points out, a plaintiff injured during the course of a contact sport will rarely sue in assault and battery, because of the difficult onus of proving on a balance of probabilities that the injury was inflicted intentionally and deliberately. Courts would have to take into account factors such as the spontaneous and robust environment of contact

¹³⁵⁸ See the article by Leroux, M entitled 'Man United trainee Ben Collett awarded record £4.5 million over injury', *Times Online*, 12 August 2008 (available online at http://www.timesonline.co.uk/tol/sport/football/premier_league/manchester_united/article4504210.ece [last accessed 21 August 2008])

¹³⁵⁹ See the decision of the Court of Appeal of Orléans of 2 April 2007, *JCP-La Semaine Juridique* of 21/5/2008 (as referred to in the *Sport and the Law Journal Foreign Survey* Vol. 16 Issue 2 at 64)

¹³⁶⁰ Anderson, J 'Spear-tackles and sporting conspiracies: Recent developments in tort liability for foul play' 2006/1-2 *International Sports Law Journal* 41

¹³⁶¹ (1965) 1 QB 232 at 239-240

sport, that players act and react in the heat of the moment and that players must be assumed to have acted consensually in a sporting contest.¹³⁶²

The resultant importance of the tort of negligence in this context - and specifically the applicable standard of 'reasonable care' - highlights the importance of determining whether the conduct which caused the injury in question was performed within the rules of the game. As was observed in the context of injury to a spectator by a participant in a horse riding event:

'[P]rovided the competition or game is being performed within the rules and the requirements of the sport and by a person of adequate skill and competence, the spectator does not expect his safety to be regarded by the participant. If the conduct is deliberately intended to injure someone whose presence is known or is reckless and in disregard to all safety of others so that it is a departure from the standard that might be reasonably be expected in anyone pursuing the competition or game, then the performer might well be liable for any injury his act caused.'¹³⁶³

§2 The South African system of delict

441 South African law does not follow the system of torts as found in common law jurisdictions, and liability for injuries caused in the context of sport are based in the law of delict. The law of delict forms part of the law of obligations, within the private law, which recognizes and protects individual interests and is aimed at harmonizing conflicts between the interests of different individuals.¹³⁶⁴ It functions as follows:

'The law of delict recognizes and protects certain individual interests against unlawful infringement and provides for compensation or damages in the event of such infringement.'

¹³⁶² Anderson 2006/1-2 *International Sports Law Journal* supra 41

¹³⁶³ *Wooldridge v Sumner* [1962] 2 All ER 978 at 983; Anderson supra 41-2

¹³⁶⁴ Loubser ('Sports Injuries - Liability') in Basson & Loubser *Sport and the Law in South Africa* Butterworths (loose-leaf) 2000 at Ch 5-10

The person responsible for the unlawful infringement is liable to compensate for the damage caused by the infringement; and the person who suffered harm or damage has the corresponding right to claim compensation. Delictual liability therefore implies an obligation, which encompasses both a right and a correlative liability or duty.¹³⁶⁵

A delict occurs when the act of one person unlawfully and culpably causes damage to another, and the elements of a delict and requirements for liability are the following:

- An act or conduct;
- Causation;
- Damage;
- Unlawfulness; and
- Fault.

As Loubser observes, the law of delict is based on the general principles that developed around these five elements of delictual liability, and this generalizing approach gives the system flexibility and enables the law of delict to deal with a variety of situations and to afford protection to a whole spectrum of individual interests, including the risk of injury in sport.¹³⁶⁶ The law of delict is thus less limited in its scope, and avoids the common law system of torts' *numerus clausus* of specific and separate torts (such as assault and battery and negligence as referred to above).

The law of delict is, broadly, divided into two main categories, namely delicts which involve patrimonial damage (*damnum inuria datum*) and those involving injury to personality rights (*iniuria*). Claims under the first of these categories (for patrimonial loss caused intentionally or negligently) resort under the *actio legis Aquiliae* (which derives from the Roman law *Lex Aquilia*, an Act of 287 BC). Claims under the second category

¹³⁶⁵ *Ibid.* See also, for more detailed discussion of delictual liability for sports injuries, Cloete et al *Introduction to Sports Law in South Africa* LexisNexis Butterworths (2005) at 105-118

¹³⁶⁶ *Ibid.*

deal with intentional damage to personality rights and resort under the *actio iniuriarum*.¹³⁶⁷

§3 The delictual remedies

442 The following remedies are available to the injured party in cases where delictual liability has been proved:¹³⁶⁸

(1) *An application for an interdict against the wrongdoer*

This is a preventative measure aimed at obtaining a court order against the wrongdoer where there is a threat of an imminent wrongful act. While the court has a discretion to grant or refuse to order an interdict (e.g. where the wrong can be redressed by another remedy or the interdict would cause undue hardship to another person), there are generally three requirements which the applicant would need to prove in order to succeed in obtaining an interdict:

- The applicant must have a clear right (e.g. in the case of a threatened assault, the right to physical or bodily integrity);
- There must be an actual or threatened act or omission on the part of the wrongdoer which is unlawful (i.e. it poses an impending infringement of the applicant's clear right, or poses an impending failure to comply with a legal duty); and
- There must be no other suitable remedy at the disposal of the applicant to avert the impending harm.

¹³⁶⁷ *Ibid.*; Van Heerden, H J O & Neethling, J *Unlawful Competition* Butterworths 1995 at 54-57

¹³⁶⁸ See Cloete et al *Introduction to Sports Law in South Africa* 118

(2) *The Aquilian action (actio legis Aquiliae)*

This is the general delictual action for damages to remedy patrimonial loss suffered as a result of the wrongdoer's unlawful conduct.

(3) *The actio iniuriarum*

This action is used to claim compensation for intentional impairment of the physical or psychological integrity of a person.

(4) *The action for pain and suffering*

Where the impairment of a person's physical or psychological integrity occurred in a negligent way, damages can be claimed under the action for pain and suffering.

(5) *Damage by animals*

Where damage is caused by a domestic animal, the plaintiff may claim compensation from its owner by means of the *actio de pauperie*. This is a form of strict liability which does not require fault on the part of such owner.

§4 The requirements for delictual liability

443 As mentioned above, there are five general requirements for delictual liability to arise. These are conduct by the wrongdoer, fault, unlawfulness, causation and loss. These requirements will very briefly be considered below.

I Conduct

444 The conduct of a wrongdoer can be both conduct by way of a physical act (such as punching or kicking a person), which is voluntary¹³⁶⁹, or by way of an omission or failure to act in certain circumstances. Liability for conduct by way of omission will arise, for example, where a person has created a potentially dangerous situation and fails to take reasonable steps to prevent harm to others arising from such situation; where a person fails to exercise proper control over a dangerous object; where legislation requires positive action and a person fails to act; or where a duty of care is established through a particular relationship between parties.¹³⁷⁰ Different factual situations may occur in sport which may place a duty of care on participants to take positive steps in order to guard against inflicting harm against others (e.g. a golfer who may be under a duty to warn other players against potential harm following a misdirected shot).¹³⁷¹ It is accepted that a juristic person (such as a company) may act through its organs (directors, officials or servants) and may thus also be held delictually liable for such conduct. Also, any person who assists, aids or abets the wrongdoer may be held liable in delict.¹³⁷² South African law furthermore recognizes that a person may be held liable in delict for the wrongful actions or conduct of another person,

¹³⁶⁹ E.g. where a person acts by means of convulsions during an epileptic fit, such action will be deemed to be involuntary and no delictual liability will arise

¹³⁷⁰ Cloete et al *Introduction to Sports Law in South Africa* 107-108

¹³⁷¹ In Australia, the Queensland Court of Appeal recently held that such a duty did not exist in a situation where a golfer had not aimed in the direction of the claimant, and the court took into account the golfer's level of skill in finding that he could reasonably expect the ball to go in the direction in which he had aimed (see *Pollard v Trude* [2008] QCA 421).

¹³⁷² *McKenzie v van der Merwe* 1917 AD 41

on the basis of vicarious liability. Usually, where a certain relationship exists between the parties, the one person may be held vicariously liable for a delict committed by such other person. The most common example of this is found in the employment relationship. The employer will be held vicariously liable if it can be shown that an employment relationship existed, that a delict was committed by the employee, and that the employee was acting within the course and scope of his or her employment when committing the delict.¹³⁷³

II Unlawfulness

445 The unlawfulness requirement in delict relates to the general duty, in terms of the legal convictions of the community (or *boni mores*), which rests on every person not to infringe the legally recognized subjective rights of others. The *boni mores* test is an objective one, which is based on the criterion of reasonableness.¹³⁷⁴ The basic question is whether, according to the legal convictions of the community and in the light of all the circumstances of the case, the defendant infringed the interests of the plaintiff in a reasonable or unreasonable manner. This entails an *ex post facto* weighing-up or balancing of the interests which the defendant actually promoted with his act or conduct, and the interests which he actually infringed. The court must weigh these interests in the light of all the circumstances, including the public interest, in order to determine whether the defendant's conduct was reasonable or unreasonable.¹³⁷⁵ This standard of reasonableness (or the *boni mores*) must be determined in the specific context of any given case; importantly, this means that (in the sporting context) the *boni mores* must be determined in light of the legal convictions

¹³⁷³ Loubser *supra* Ch 5-11

¹³⁷⁴ *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1977 (4) SA 376 (T); *Minister van Polisie v Ewels* 1975 (3) SA 590 (A); *Hawker v Life Offices Association of South Africa* 1987 (3) SA 777 (C)

¹³⁷⁵ Van Heerden, HJO & Neethling, *J Unlawful Competition* Butterworths (1995) at 123

prevailing in the community with regard to the sport in question and its rules and conventions.¹³⁷⁶

Because the test for unlawfulness in delict involves such a balancing exercise in respect of the rights and interests of the respective parties, various instances where the infringement of a person's rights is not deemed to be unlawful have evolved. These are referred to as 'grounds of justification', and include the following (some of which may be more or less relevant in the sporting context):¹³⁷⁷

- *Self-defence*

Whenever there is an imminent (or commenced but not yet completed) threat to the lawful interests of a person (or of a third party), that person may lawfully fend off such attack. Fault on the part of the attacker is not a requirement for the lawfulness of the defence. The defensive action must be directed at the attacker, it must be necessary to fend off the attack and avoid the threatened harm, and it must be proportionate to the attack (i.e. not more severe than what might be required to avert the harm). If these requirements for self-defence are met, the defender's conduct will not found delictual liability:

- *Emergency*

When a person is placed in a precarious situation as a result of circumstances (such as *force majeure*) where their lawful interests are threatened, s/he may lawfully protect their interests even if such conduct infringes on the interests of third parties. There must be an imminent or commenced threat (even though this does not originate

¹³⁷⁶ Loubser *supra* Ch 5-11

¹³⁷⁷ See Cloete et al *Introduction to Sports Law in South Africa* 109-110

from an attacker), and the infringement of the rights or interests of third parties must be proportionate to the interest which is threatened.

- o *Consent to injury and assumption of risk*

In South African law, the Roman and Roman-Dutch law maxim *volenti non fit iniuria* encompasses both cases of voluntary consent to the intentional causing of specific harm for a lawful purpose (e.g. consent to a medical operation) as well as cases of voluntary acceptance of a risk of harm that may be negligently caused in the course of a dangerous activity (e.g. a contact sport), which last is referred to as voluntary assumption of risk.¹³⁷⁸ Such consent or voluntary assumption of risk is a ground of justification for conduct which would otherwise be deemed unlawful; by consenting to the harm or assuming the risk the subsequent causing of injury is deemed to be reasonable in light of the *boni mores*, and it cannot be said that a legal duty not to cause harm exists where such harm has been voluntarily consented to.¹³⁷⁹

Consent involves unilateral conduct, which can be express or tacit (e.g. participation in a dangerous or potentially dangerous sport), and no agreement or contract between participants is required for such consent to be valid. The person who so consents must have legal capacity to do so and must do so freely, having understood the nature of the risk, reconciled himself therewith and actually agreed to accept such risk.¹³⁸⁰ Majority is not a requirement for valid consent, but the required legal capacity entails that such person must have the mental ability to appreciate the implications of his actions; to distinguish

¹³⁷⁸ *Netherlands Insurance Company of SA Ltd v Van der Vyver* 1968 (1) SA 412 (A); Loubser *supra* Ch 5-36

¹³⁷⁹ *Ibid.*

¹³⁸⁰ *Clark v Welsh* 1975 (4) SA 469 (W); Cloete et al *supra* 109

between right and wrong and to act accordingly.¹³⁸¹ And, as has been observed, being aware of the risk in an activity does not mean consent to it; real consent requires full knowledge and appreciation of the specific form and nature of the injuries.¹³⁸² Such consent may also at any time be revoked.¹³⁸³

A parent or guardian can lawfully consent to a minor child's participation in a sport. Such parent or guardian's consent must be reasonable and in the interests of the child (where consent is given for participation in a patently dangerous activity that is of no value of benefit to the child will be unreasonable and invalid).¹³⁸⁴ Such consent will also only be valid where it involves reasonable risks arising from normal sporting activities, and consent which purports to exclude delictual liability for injury arising from assault by a fellow participant will be contrary to public policy and invalid.¹³⁸⁵

The defence of assumption of risk entails that if a person takes part in an activity which may reasonably be expected to hold a measure of risk to the participants, that person cannot complain if the risk is realized and he suffers loss or injury,¹³⁸⁶ if such risk could reasonably have been foreseen by such person.¹³⁸⁷ As has been observed, this means that sports participants assume the risk of harm of loss occurring in the run of play from acts or omissions which are in accordance with the rules of the sport. But it could also mean that participants, within reasonable limits, assume the risk of loss or harm resulting in the run of play from acts or omissions which are in contravention of the rules of the sport, if such conduct could reasonably be expected to occur from time to time

¹³⁸¹ *S v Marx* 1962 (1) SA 848 (N); Loubser *supra* Ch 5-37

¹³⁸² See J M T Labuschagne & J M Skea 'The liability of a coach for a sport participant's injury' *Stellenbosch Law Review* 1999 (2) 158 at 182

¹³⁸³ *Jooste v National Media Ltd* 1994 (2) SA 634 (C); Cloete et al *supra* 109

¹³⁸⁴ Loubser *supra* Ch 5-38

¹³⁸⁵ *S v Collett* 1978 (3) SA 206 (RA); Loubser *supra* Ch 5-38

¹³⁸⁶ *Boshoff v Boshoff* 1987 (20 SA 694 (O); Cloete et al *supra* 110

¹³⁸⁷ *Broom v Administrator, Natal* 1966 (3) SA 505 (D)

in the particular sport (e.g. a rugby player who is exposed to the occasional high tackle or a boxer to a punch below the belt).¹³⁸⁸

Accordingly, the defence of assumption of risk should also be available in such cases.¹³⁸⁹

In respect of consent to risk by other persons (e.g. spectators), it should be noted that tickets for the attendance of sporting events more often than not include exemption of liability clauses, which purport to exclude liability for the event organizers in respect of damage to the property or person of spectators. The South African law of contract requires that contractual terms that are imposed by means of tickets (or notices at the event) will, generally, be binding on a contracting party (e.g. a spectator) if the other party to the contract (e.g. the event organizer) took reasonable steps to bring such terms to the attention of the first party. The test to determine whether such imposed terms are binding is as follows:

- Was the first party aware that the ticket contained writing?
- If so, was the party aware that such writing constituted or contained contractual terms?
- Did the other party take reasonably sufficient steps to bring such terms to the attention of the first party?

Generally, if the answer to either of the first two questions is in the affirmative, the party will be held bound by such terms on the basis of actual consent (i.e. by continuing to contract as s/he did, s/he created a reasonable reliance on the part of the other party that s/he intended to be bound to such terms, even if s/he did not read them).

¹³⁸⁸ Cloete et al *supra* 110

¹³⁸⁹ *Ibid.*

If the answer to either of the first two questions is in the negative, the first party will be bound if the other party took reasonably sufficient steps to bring the existence of contractual terms (e.g. an exemption or exclusion of liability clause) to the attention of such party. What constitutes reasonable steps depends on the facts of any given case.¹³⁹⁰

In respect of exemption clauses on tickets to sporting events, it may be argued that such clauses are reasonably to be expected in most standard form contracts nowadays.¹³⁹¹ Accordingly, event organizers may be excused for taking fewer or less onerous steps in order to bring such clauses to the attention of spectators.

In respect of exemption clauses more generally, the courts tend to interpret them restrictively (or narrowly), and in the case of ambiguity such clauses will be interpreted *contra proferentem*.¹³⁹² It is accepted in South African law that a contracting party may not validly exclude liability for fraud; such a provision would be against public policy.¹³⁹³ A party may validly employ an exemption clause in order to exclude liability for their negligence (or that of their employees).¹³⁹⁴ It has not been decided whether it would be against public policy for a party to exempt their liability for negligently causing the death of another.¹³⁹⁵

Finally, it should be noted that section 51 of the Consumer Protection Act 2008 (at the time of writing not yet in force)¹³⁹⁶ prohibits an agreement or terms and conditions of an agreement

¹³⁹⁰ See *King's Car Hire v Wakeling* 1970 (4) SA 640 (N); *Bok Clothing Manufacturers (Pty) Ltd v Lady Land Ltd* 1982 (2) SA 565 (C); *Durban's Water Wonderland (Pty) Ltd v Botha* 1999 (1) SA 982 (A)

¹³⁹¹ See *Afrox Healthcare Ltd v Strydom* 2002 (6) SA 21 (SCA) at 42

¹³⁹² See *Durban's Water Wonderland (Pty) Ltd* supra at 989

¹³⁹³ *Wells v SA Alumenite Co* 1927 AD 69

¹³⁹⁴ *Central SAR v Adlington & Co* 1906 TS 964; *Essa v Divaris* 1947 (1) SA 753 (A); *SA Railways & Harbours v Lyle Shipping Co Ltd* 1958 (3) SA 416 (A)

¹³⁹⁵ The question was left undecided in *Johannesburg Country Club v Stott* 2004 (5) SA 511 (SCA) – for more on this case, see the discussion below

¹³⁹⁶ The Consumer Protection Act, 68 of 2008 was signed into law by the President of the Republic on 24 April 2009 and published in the *Government Gazette* on 29 April 2009. The Act will come into force on a date unknown during the course of 2009/10

which purport to limit or exempt a supplier of goods or services from liability for any loss directly or indirectly attributable to the gross negligence of the supplier or any person acting for or controlled by the supplier (or which purports to constitute an assumption of risk or liability by the consumer for such loss).¹³⁹⁷

III Fault

446 It is a requirement for delictual liability that the wrongdoer must have acted with fault, i.e. that his or her conduct, apart from being wrongful in terms of the *boni mores*, was also blameworthy. Such person must have the mental capacity to realize the difference between right and wrong and to act in accordance with such realization, before their conduct will be deemed to be blameworthy for the purposes of establishing liability.

Children under the age of 7 are deemed to be unaccountable irrespective of their actual mental capacity (or *doli incapax*). While a rebuttable presumption of unaccountability exists in respect of children between the ages of 7 and 12 (i.e. they will be held accountable if it can be proven that they did in fact possess the necessary mental capacity to distinguish between right and wrong and to act accordingly), persons over the age of 12 are presumed to be accountable unless a lack of the required mental capacity can be proven (e.g. also as a result of temporary impairment caused by intoxication by alcohol or other drugs).¹³⁹⁸

If a wrongdoer is accountable, the law of delict requires fault on their part to found liability. Such fault can be in any of the recognized forms of intent, where such person has directed his will at a certain result while being conscious of the wrongfulness of his conduct, or otherwise by negligence. Intent can take the form

¹³⁹⁷ Section 51(1)(c)(i) read with sec. 51(1)(c)(ii)

¹³⁹⁸ Cloete et al *supra* 110-111

of direct intent (or *dolus directus*),¹³⁹⁹ indirect intent (*dolus indirectus*)¹⁴⁰⁰ or intent with regard to foreseeabilities (*dolus eventualis*).¹⁴⁰¹ Negligence is present where a person has acted in circumstances where a reasonable person (or *bonus paterfamilias*) would have foreseen that his conduct would cause damage or loss to another person and such reasonable person would have taken steps to avoid the damage or loss, and where such person failed to take such steps.¹⁴⁰² The test for negligence requires that both the occurrence of the event and the resultant loss or damage must have been reasonably foreseeable.¹⁴⁰³

In the context of determining liability for injuries in sport, the courts appear to incorporate both the test for unlawfulness and for negligence in an enquiry into the reasonableness of the defendant's conduct. Reasonableness is determined with reference to the rules and conventions of the sport, the standards of care and skill that can be expected of a participant in the sport, and the circumstances of the incident from which the loss or injury resulted.¹⁴⁰⁴ The court in *Clark & Another v Welsh*¹⁴⁰⁵ (a golf case) formulated the approach as follows:

'The ordinary principles of the law of negligence as it exists in our law are to be applied having due regard to the circumstances of the game in which the plaintiff and defendant were engaged, one of those circumstances being the inferences which can fairly be drawn by the defendant from the fact that the plaintiff participated voluntarily in the game with her.'¹⁴⁰⁶

¹³⁹⁹ Where a person desires to achieve a certain result and directs his conduct towards achieving that result

¹⁴⁰⁰ Where a person desires to achieve a certain result but knows that, inevitably, another, secondary, consequence will follow – such person has indirect intent in respect of such secondary consequence

¹⁴⁰¹ This is where a person foresees that a certain consequence may follow from certain conduct, but nevertheless persists in such conduct so that the foreseen consequence actually realises. It is often said that such person has acted 'recklessly' towards the occurrence of such foreseen consequence, but this form of intentional conduct should not be confused with negligent conduct.

¹⁴⁰² Cloete et al *supra* 111; *Broom v Administrator, Natal* *supra*; *Kruger v Coetzee* *supra*; *Mukheiber v Raath & Another* 1999 (3) SA 1065 (SCA); *Sea Harvest Corporation (Pty) Ltd & Another v Duncan Dock Cold Storage (Pty) Ltd & Another* 2000 (1) SA 827 (SCA)

¹⁴⁰³ Cloete et al 111; *Bolton v Stone* (1951) All ER 1078 (HL)

¹⁴⁰⁴ Loubser *supra* Ch 5-13 to Ch 5-14

¹⁴⁰⁵ 1975 (4) SA 469 (W) at 477H (as quoted by Loubser *supra* Ch 5-14)

¹⁴⁰⁶ See also the extracts from the judgment of the High Court of Australia in *Rootes v Shelton* [1968] ALR 33 as quoted by Loubser *supra* Ch 5-14

Accordingly, the playing culture of a sport as constituted by its rules, conventions or customs, may assist a court in determining the unlawfulness or negligence of the defendant participant's conduct. The playing culture will determine what conduct players may expect from their fellow participants, which will normally include participation within the rules of that sport, as well as the acceptance of minor infractions of such rules as part of playing the game. The playing culture may assist a court in determining the limits of lawful conduct in the sport and the extent to which consent (as a ground of justification of otherwise unlawful conduct) may justify certain common infractions of the rules of the sport.¹⁴⁰⁷ As Loubser points out, the surrounding circumstances will of course also play an important role in this regard, including factors such as the following: the nature of the sport (contact or non-contact), the extent of the risk that the act involved, possible precautions that could have reasonably been taken, the nature and seriousness of the possible injury, whether the incident occurred in the heat of the moment or in a quiet passage of play, deliberate or reckless disregard of the possibility of injury, and previous warnings against similar conduct.¹⁴⁰⁸

Finally, in respect of the requirement of fault, it must be noted that under the South African law of delict the plaintiff's own conduct may also play a role in terms of the calculation of damages for which a wrongdoer may be liable. Where both the wrongdoer (defendant) and the plaintiff have acted negligently in the circumstances, as the plaintiff's damages are to an extent attributable to his or her contributory negligence (which contributed to the loss arising) the damages or compensation that the plaintiff may recover from the wrongdoer will be adjusted in terms of the Apportionment of Damages Act, 1956.¹⁴⁰⁹ A court will determine the measure to which each party's negligence had contributed to the loss or damage which occurred, and will proportionately reduce the amount of damages awarded to the prejudiced party. Contributory negligence does not constitute a

¹⁴⁰⁷ Loubser supra Ch 5-15

¹⁴⁰⁸ *Ibid.*

¹⁴⁰⁹ Act 34 of 1956

defence for the wrongdoer who intentionally caused the harm or loss of the plaintiff.¹⁴¹⁰

IV Causation

447 The requirement of causation entails two separate enquiries; the first relates to factual causation and the second to legal causation. Factual causation involves the question of whether the act or conduct of the defendant has actually caused the relevant consequence; in other words, whether the damage or loss flowed from the defendant's act or conduct. One must ask whether the loss would still have followed if the wrongful act had not been committed (i.e. was the wrongful act a condition *sine qua non* for the loss arising?). If the answer is in the affirmative, the wrongdoer will not be held delictually liable for such loss.¹⁴¹¹ Legal causation involves the question of determining which harmful consequences of a defendant's wrongful and culpable conduct s/he should be held liable for. South African courts have to date followed a flexible approach in this regard:

'The crucial question is whether there is a sufficiently close nexus between the wrongdoer's act and the harmful consequences that the consequences may be imputed to him – taking into account "policy considerations" on the grounds of "reasonableness, equity (fairness) and justice".¹⁴¹²

Accordingly, for delictual liability to follow from a wrongdoer's unlawful and culpable conduct, s/he must not only have factually caused the harm or loss of the plaintiff but such harm or loss must also not be too far removed or remote (legally, on the basis of policy considerations) in order to found liability.

¹⁴¹⁰ Cloete et al *supra* 112

¹⁴¹¹ See Cloete et al 117

¹⁴¹² Van Heerden & Neethling *Unlawful Competition* *supra* at 71, with reference to *S v Mokgethi* 1990 (1) SA 32 (A); *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A)

VI Harm, loss or damage

448 The law of delict concerns itself only with wrongful conduct which causes some form of loss; where no loss results no delictual liability will lie against the wrongdoer. As to the forms of loss which may found a cause of action in delict, the law distinguishes between patrimonial and non-patrimonial loss. Patrimonial loss involves loss or damage to a plaintiff's financial interests or material possessions (i.e. a claim sounding in money, which has a monetary value and can be calculated as such). Such form of loss is calculated as the plaintiff's *negative interesse* (the form of patrimonial damages which can be claimed in a delictual action), and are calculated by comparing the plaintiff's patrimonial position immediately before the wrongful act was committed with his or her patrimonial position after the commission of the wrongful act; any reduction in such patrimonial position constitutes patrimonial damages. Patrimonial loss may take many forms, including loss of maintenance (a claim brought by the dependants of a person whose death or injury has led to a loss of maintenance where a duty of maintenance exists in law), a claim for medical expenses following from injury, or a claim for 'pure' economic loss (i.e. economic loss which does not result from damage to property or injury to the person or impairment of the personality of the plaintiff).¹⁴¹³

Non-patrimonial loss occurs when a person's physical or psychological integrity is impaired by the wrongful conduct of the wrongdoer. Such loss may include impairment of the reputation, dignity or honour of a person, for which the law of delict provides liability under the action for defamation in terms of the *actio iniuriarum*,¹⁴¹⁴ as well as relief for invasions of privacy or infringement of the

¹⁴¹³ See the discussion in Cloete et al 112-113. On Aquilian liability for pure economic loss, see van Heerden & Neethling *Unlawful Competition* supra at 59-61, and the authorities referred to there

¹⁴¹⁴ See the discussion in the text above

plaintiff's right of identity.¹⁴¹⁵ These causes of action are beyond the scope of this chapter, and the reader is referred to more specialised texts on these issues.

§5 Related issues

449 Finally, a note on two specific issues regarding delictual liability in sport, namely the special position of coaches, and the use of exemption clauses to exclude liability:

450 In respect of coaches of athletes and sports teams, it should be noted that a duty to exercise reasonable care exists and that coaches are expected to prevent foreseeable risks of harm to participants. Even though there is a dearth of case law on the subject in South Africa, this duty of care is in line with the general approach of the law of delict.¹⁴¹⁶ This duty to minimize the risk of injury to all participants includes the following specific duties:

- Supervision;
- Training and instruction (i.e. providing an athlete with the necessary skills to play the sport in a safe and correct way);
- Proper use of facilities and equipment;
- Providing prompt and proper medical care;
- Knowledge of participants (i.e. thorough knowledge of participants' existing injuries or weaknesses);
- Matching and equating participants (or the duty not to 'mismatch' participants of unequal size, weight, skill, experience, etc); and

¹⁴¹⁵ See Cloete et al 115-116

¹⁴¹⁶ Compare e.g. *Minister van Polisie v Ewels* 1975 (3) SA 590 (A)

Warning of latent dangers (i.e. making risks that are unknown to participants and inherent to the activity known).¹⁴¹⁷

It should also be noted that, apart from the possible duty of care of coaching staff, it remains interesting to consider whether liability may also lie against governing bodies in respect of the implementation of rules which may pose a risk of harm to players (e.g. the 2008 Experimental Law Variations of the International Rugby Board).¹⁴¹⁸

451 In respect of the use of exemption clauses to exclude delictual liability arising from participation in a sporting activity, the reader is referred to the case of *Johannesburg Country Club v Stott & Another*.¹⁴¹⁹ The facts of this matter were as follows:¹⁴²⁰ The respondent and her husband (the deceased) were both members of the appellant golf club. The deceased had played a round of golf on the appellant's course, during which round a thunder storm with resultant rain developed over the course. A siren warning of the threat of lightning was sounded and the deceased took cover from the storm under a shelter on the course. The shelter was struck by lightning and the deceased suffered severe injuries to which he eventually succumbed three weeks later. The respondent instituted a claim for loss of maintenance against the club. The appellant raised the special plea that the respondent and the deceased had, at all relevant times,

¹⁴¹⁷ For more detailed discussion of these individual duties of coaches (with reference mainly to American case law), see J M T Labuschagne & J M Skea 'The liability of a coach for a sport participant's injury' *Stellenbosch Law Review* 1999 (2) 158

¹⁴¹⁸ See, for example, O'Connor, T., "Bringing it down on their own heads: negligence and changes to the laws of rugby" [2008] *Irish Law Times* 191. The Australian High Court heard a matter in *Agar v Hyde and Agar v Worsley* [2000] HCA 41 (3 August 2000) where two Australian rugby players had suffered serious spinal injuries due to the result of the impact of scrums. The players sued a number of people, but the focus of the High Court judgement was whether the International Rugby Board, as the body responsible for making the Laws of the Game of rugby union, owed a duty of care to players to ensure that they were not exposed to an unnecessary risk of serious injury (the players alleged that each member of the Board owed such a duty, and that the rules of scrimmaging applicable at the time exposed them to such a risk). The Court held that no such duty of care could be established for each individual member of the Board, as no individual member had the power to make the rules of the game; and also as there were several layers of authority responsible for interpretation and implementation of the rules that existed between the IRB and the players, including the state, national or international associations and match officials. A further factor was the fact that the IRB members did not have the power to control the conduct of players (in this case the injuries had resulted from breaches of the laws of the game by forwards from the opposing team). The court also held that the dispute could give rise to an indeterminate number of claims by an indeterminate number of people throughout the world, which factor also argued against the recognition of a duty of care.

¹⁴¹⁹ 2004 (5) SA 511 (SCA)

¹⁴²⁰ Taken from a case note by Cornelius, S 'Golf: Validity and enforceability of exemption clauses in South African law' *International Sports Law Journal* 2006 (available online at <http://www.articlearchives.com/law-legal-system/trial-procedure-appeals/1492351-1.html>)

both been members of the appellant club and, as such, were both contractually bound to the constitution and rules of the club. The rules contained a clause which provided that the club 'shall in no circumstances whatsoever be liable for any loss of or damage to the property of any member or guests brought onto the premises of the club whether occasioned by theft or otherwise, nor shall the club be held responsible or in any way liable for personal injury or harm however caused to members or their children or their guests on the Club premises and/or grounds'. The court *a quo* considered the special plea and dismissed it, and the appellant took the matter on appeal to the Supreme Court of Appeal.

452 The court, by way of Harms JA, confirmed that South African law requires that any exemption from common law liability would be binding on a person only if it is clear that such person consented thereto, and that the nature and extent of such exemption must be clear. Exemption clauses are viewed with suspicion and generally interpreted restrictively. The special defence relied on the interpretation which the court would assign to the second part of the exemption clause (which dealt with injury or harm to persons and not property). The court interpreted the clause and concluded that it only provides for exemption against liability for 'personal injury or harm' and not against claims of dependents. The ordinary meaning of the expression 'personal harm' generally does not include loss of maintenance, neither does it cover funeral expenses. And due to the drastic nature thereof, a clause can only exempt a party from civil liability for negligence in the death of another, if at all possible, where the parties have expressly agreed to such exemption. In this case, the clause did not provide for such exemption and the appeal was dismissed.¹⁴²¹ The court left open the question whether contractual clauses which exempt parties against civil liability for negligently causing the death of another are in line with public policy, in light of the importance which the common law

¹⁴²¹ *Ibid.*

and the Constitution attaches to the sanctity of life.¹⁴²² This question has not been authoritatively decided to date.

453 Cornelius has observed that *Stott's* case emphasises the importance of ensuring that a contract is properly drafted, and confirms the role of the rules and presumptions in the drafting and interpretation of contractual terms. The author warns that a failure to take note of the rules and presumptions of interpretation during the drafting of a contract, could lead to unwanted and unexpected consequences, especially in respect of often far-reaching exemption clauses.¹⁴²³ Sports governing bodies, clubs, event organisers and others who are involved in sport (which often has at least some degree of risk of potential injury to persons) need to take heed of such warning in order to guard against potential liability. Also, in light of the courts' approach to interpreting and enforcing exemption clauses,¹⁴²⁴ it might be preferable to consider obtaining comprehensive insurance as an alternative to placing too much trust in contractual exemptions of liability.

§6 The role of the law of nuisance

454 In conclusion it should be noted that other forms of liability (related to the law of delict) may exist in respect of potential damage to property or physical injury related to sporting activity. A case concerning the law of nuisance recently confronted the Western Cape Provincial Division of the High Court and the Supreme Court of Appeal.

The South African law of nuisance has developed over the years in a casuistic process, in which the courts have applied Roman and Roman Dutch property law as well as English law principles of nuisance. It has become accepted law¹⁴²⁵ that courts should not follow

¹⁴²² See par 12 of the judgment (and the minority judgment of Marais JA at par 14 *et seq*)

¹⁴²³ See Cornelius (footnotes to par 452 above)

¹⁴²⁴ For a helpful exposition of the current position regarding exemption clauses in contract law, see Stoop, P N 'The Current Status of the Enforceability of Contractual Exemption Clauses for the Exclusion of Liability in the South African Law of Contract' (2008) 20 *SA Mercantile Law Journal* 496

¹⁴²⁵ *Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (A)

the English tort of nuisance, and that South African law recognizes a general basis for liability based on aquilian liability.¹⁴²⁶

455 In the case of *Allaclas Investments (Pty) Ltd & Another v Milnerton Golf Club*¹⁴²⁷ the court was confronted with a claim based on nuisance brought by the owners of a property which borders on a Cape Town golf course. The applicants claimed that an excessive number of golf balls were entering their property and that several balls had caused or were likely to cause further damage to their homes and, possibly, personal injury. In response to the complaint the respondent golf club had taken certain precautionary measures (including planting trees and causing the sixth hole to be played as a par 4 on all days except Wednesdays and Saturdays), but without admitting liability to do so. The club denied that the applicants had made out a case that the conduct of the golf course constituted nuisance.

The court (by way of Traverso DJP) held that a dispute between neighbours entailed a determination of whether there had been an abuse of a right, which was to be determined on the particular facts, and with reference to considerations of reasonableness and fairness. An interference was unreasonable if it was not 'expected in the circumstances', and what was reasonable had to be assessed objectively and with regard to the circumstances of each particular case. In assessing the reasonableness of the club's actions the court considered the following facts:

- That, at the time that the property was purchased, and at all relevant times, the applicants had known and understood that golf would be played immediately adjacent to their property, which would probably be struck by golf balls, causing damage; and
- That the respondent had gone to great lengths in an attempt to remedy the applicants' complaint.

¹⁴²⁶ See discussion above of the general delictual action (action in tort) based on the *Actio Legis Aquiliae*

¹⁴²⁷ 2007 (2) SA 40 (C)

It was held (*inter alia* with reference to foreign case law¹⁴²⁸) that the applicants failed to show that the club's conduct was unreasonable in the sense that the number of golf balls striking their property and the damage caused exceeded what they could reasonably have expected in the normal course of residing in a property situated on a golf course:

'[T]he [club] has shown its willingness to take reasonable measures to minimise the risk of damage by golf balls to the applicants' property. The applicants, on the other hand, seem to adopt the attitude that this responsibility lies with the respondent alone ... Living next to a golf course brings certain benefits in relation to the environment in which one lives. However, it also entails a real danger that the properties so situated will be susceptible to being hit by golf balls. That is a risk that any reasonable person will accept.'

The court further held (with reference to the possibility of the applicants erecting additional netting to stop golf balls) that as a matter of fairness the applicants could not refuse to take relatively inexpensive measures themselves to protect their property, but then expect the respondent to take unreasonable action to avoid damage thereto. Accordingly, the applicants' claim was rejected upon the court's finding that the club had not unreasonably interfered with their rights of ownership.

456 The matter was taken on appeal to the Supreme Court of Appeal.¹⁴²⁹ Farlam JA reversed the decision of the court *a quo* and held that the number of balls which had entered the premises of the applicants between December 2003 and March 2007 (a total of 875 balls according to the evidence) was clearly excessive and, that while the club's use of the land for purposes of a golf course was reasonable, it had failed to sufficiently guard against a nuisance which exceeded the bounds of what was normally expected in terms of the law relating to good neighbourly conduct.¹⁴³⁰ Amongst the factors taken into

¹⁴²⁸ *Campbelltown Golf Club Ltd v Winton and Another* [1998] NSWSC 257 (unreported, NSWCA Case No 40056 of 1996, 23 June 1998)

¹⁴²⁹ *Allaclas Investments (Pty) Ltd & Another v Milnerton Golf Club & Others* 2008 (3) SA 134 (SCA)

¹⁴³⁰ *Sport and the Law Journal* Issue 2 Vol. 16 'Sports Law Foreign Update' at 66

account by the court, interestingly, were the length of the 6th hole (a relatively short par 5 of approximately 400 metres, which appeared to tempt a significant number of golfers to 'go big' with the driver in order to reach the green in two strokes), the fact that most golfers tend to slice the ball out to the right (i.e. in the direction of the applicants' property), and also that technological advances in respect of golf balls and clubs had increased the danger (i.e. players tend to hit the ball both further and higher). The court held that, on the evidence of the number of golf balls which have entered the property and their frequency, what the applicants had to endure 'clearly goes substantially further than what a neighbour is obliged to put up with on the application of the principle of "give and take, live and let live", which forms the basis of [South African] law on this point.¹⁴³¹ The court continued to reject the club's argument that the course had been in existence since 1925 and that the applicants had known at the time of the purchase of the property of the adjacent land's use as a golf course and, accordingly, that it was susceptible to being hit by golf balls (the 'coming to the nuisance' defence). The court held that 'it is clear that the [applicants] did not know that the hole was badly designed and gave rise to ... safety concerns.'¹⁴³²

The court accordingly granted an interdict in favour of the applicants, which prohibits the club from using the 6th hole on the course until such time as it implements a system of barriers near the tee off position (the interdict was suspended for one month in order to enable the club to implement such system).

¹⁴³¹ At par. 21 of the Supreme Court of Appeal judgment

¹⁴³² *Ibid.*

SPORT AND COMPETITION LAW

§1 Introduction

457 It has been observed that the common law doctrine of restraint of trade (which operates mainly within the employment context of professional athletes) and the Competition Act (89 of 1998) are the most important sources of law in respect of potentially anti-competitive agreements or practices in South African sport.¹⁴³³ It should be noted that at the time of writing, South African law has to date not yet been faced with competition law challenges to conduct related to sport or its commercial operations.¹⁴³⁴ Accordingly, the following section will only provide a very brief overview of the relevant legal framework, and for more detailed discussion of sport and competition law (in other jurisdictions) the reader is referred to more specialized texts on the subject. The working and role of the restraint of trade doctrine has been discussed elsewhere in this chapter¹⁴³⁵ and will not be further examined here, aside from reiterating that South African courts have to date not yet expressly pronounced on whether the doctrine may find application outside the contractual context (e.g. in respect of challenges to the rules or decisions of sports governing bodies outside of the provisions of a contract), as is the position in other jurisdictions. It has been suggested that the doctrine may fruitfully be employed in this manner, and that such an extension of the doctrine would be consistent not only with developments in other jurisdictions but also with the development of the common law in line with the foundational values of the South African Bill of Rights and

¹⁴³³ Loubser 'Sport and Competition Law' in Basson & Loubser *Sport and the Law in South Africa* Butterworths (loose-leaf) 2000 at Ch 8-50. Brassey, M (ed.) *Competition Law* Juta Law (2003) explains the interaction between the common law doctrine of restraint of trade and legislative regulation of competition as follows (at 61):

'[T]he limitation at common law on contracts in restraint of trade as being contrary to public policy only operates in relation to contracts in restraint of trade and not in relation to restrictions that are necessary or ancillary to day-to-day trading operations. For this reason the Legislature has recognised the need to go further than the ordinary restraint of trade doctrine at common law and to intervene in the ordinary contractual arena. It is recognised that firms may become powerful through business methods that are lawful and contractually valid, but which, if left unchecked, may assist those firms to reach a position in a market where the normal forces of competition are unable to restrain the exercise by those firms of market power. This may ultimately lead to excessive prices being charged and a stranglehold on the supply of a certain product or service, resulting in prejudice to trade and to consumers.'

¹⁴³⁴ The reader is referred, however, to the discussion of sports broadcasting regulation in par 579 *et seq* below, in respect of expected developments in the near future regarding the countering of anti-competitive practices in this industry (and, specifically, the relevance of Chapter 10 of the Electronic Communications Act, 36 of 2005)

¹⁴³⁵ See par 353 *et seq* above

the courts' obligation to promote such values in the development and application of rules of the common law.¹⁴³⁶

§2 The Competition Act (89 of 1998) and sport

458 The Competition Act (hereinafter 'the Act')¹⁴³⁷ has the purpose to promote and maintain competition, and it provides for the control and elimination of restrictive horizontal and vertical trade practices, of abuse of dominance, and of harmful concentration of economic power. The Act applies to 'all economic activity within, or having an effect within, the Republic',¹⁴³⁸ and it has been held that a claimant does not have to show that such economic activity has had an adverse effect.¹⁴³⁹ The various facets of the organization, operation and commercialization of sport are not excluded from the ambit of the Act, and it thus applies to sport as it does to other commercial activities (as far as sport constitutes an economic activity).¹⁴⁴⁰

459 The Act does contain two important exemptions in respect of its application (which may serve to exclude a sports matter from the ambit of its purview). Collective bargaining in the employment context, within the meaning of the right to fair labour practices as contained in section 23 of the Constitution¹⁴⁴¹ and in terms of the Labour Relations Act¹⁴⁴² is excluded from the application of the Act.¹⁴⁴³ The Act also does not apply to 'concerted conduct designed to achieve a non-commercial socio-economic

¹⁴³⁶ See the discussion in the section on restraints of trade in South African law as contained in par 353 *et seq* above

¹⁴³⁷ The 1998 Act (which came into effect on 1 September 1999) replaced the Maintenance and Promotion of Competition Act 96 of 1979, which had established an administrative body (the Competition Board) to investigate competition matters. The 1979 Act covered three areas or categories of conduct, namely acquisitions, restrictive practices and monopoly situations - see Brassey, M (ed.) *Competition Law* Juta Law (2003) at 74 *et seq*.

¹⁴³⁸ Section 3(1) of the Act

¹⁴³⁹ *American Natural Soda Ash & Others v Competition Commission of SA & Others* Supreme Court of Appeal Case No. SCA 554/03 (judgment delivered 13 May 2005)

¹⁴⁴⁰ Loubser in Basson & Loubser *Sport and the Law in South Africa* Ch 8-46

¹⁴⁴¹ The Constitution of the Republic of South Africa, 1996

¹⁴⁴² Act 66 of 1995

¹⁴⁴³ Section 3(1)(b) of the Competition Act 89 of 1998

objective or similar purpose.¹⁴⁴⁴ Section 10(4)¹⁴⁴⁵ of the Act reflects recognition by the Legislature of the social value of intellectual property rights and the need for the Competition Commission¹⁴⁴⁶ to be able to exempt certain prohibited practices from the application of the prohibited conduct contained in chapter 2 of the Act.¹⁴⁴⁷

460 The Competition Act has set up certain bodies to deal with the prohibited practices which are identified in the Act, which bodies have different functions. These are the following:

The Competition Commission:

The Commission has administrative and quasi-judicial functions involving the investigation and evaluation of alleged contraventions of the Act as well as control of mergers. The Commission has extensive powers of investigation in terms of the provisions of sections 45 – 49 of the Act;

The Competition Tribunal:

The tribunal adjudicates on alleged contraventions of the Act as well as mergers. The Tribunal, along with the Competition Appeal Court enjoys exclusive jurisdiction in respect of issues that arise in civil actions regarding the provisions of the Act.¹⁴⁴⁸ The Tribunal may order interim

¹⁴⁴⁴ Section 3(1)(e)

¹⁴⁴⁵ Section 10(4) provides that '[a] firm may apply to the Competition Commission to exempt from the provisions of this Chapter an agreement or practice, or category of agreements or practices, that relates to the exercise of intellectual property rights, including a right acquired or protected in terms of the Performers' Protection Act, 1967 (Act 11 of 1967), the Plant Breeders' Rights Act, 1976 (Act 15 of 1976), the Patents Act, 1978 (Act 57 of 1978), the Copyright Act, 1978 (Act 98 of 1978), the Trade Marks Act, 1993 (Act 194 of 1993), and the Designs Act, 1993 (Act 195 of 1993).'

¹⁴⁴⁶ See the discussion in the text below

¹⁴⁴⁷ See Wilson, J in *Brassey Competition Law* Juta Law (2003) *supra* at 316

¹⁴⁴⁸ Sec 65 of the Act, and see the discussion of the Competition Appeal Court in the text below

relief or interdict prohibited practices, or impose an administrative penalty or fine;¹⁴⁴⁹

The Competition Appeal Court:

The Competition Appeal Court has the status of a division of the High Court of South Africa. It considers appeals from, or the review of, decisions of the Competition Tribunal. Section 65 of the Act confers exclusive jurisdiction on the Competition Tribunal and the Competition Appeal Court in respect of issues that arise in civil actions regarding the provisions of the Act. According to this section, a provision of an agreement that is prohibited in terms of the Act or which may be declared void in terms of the Act can only be declared void by the Tribunal or the Competition Appeal Court, and any issue concerning prohibited conduct under the Act which arises in any action in a civil court (a Magistrates Court or High Court) must be referred to the Tribunal to be considered on its merits, with the possibility of appeal to the Competition Appeal Court.¹⁴⁵⁰ As Loubser has pointed out, this ousting of the jurisdiction of the divisions of the High Court over matters concerning issues arising under the Act may entail considerable additional delay and costs in cases where e.g. a restraint or restrictive provision in a sports-related contract is questioned in terms of the provisions of the Act.¹⁴⁵¹

Decisions of the Competition Appeal Court may be taken on appeal to the Supreme Court of Appeal, although a party wishing to appeal a decision of the Competition Appeal Court in circumstances where the Competition Act does not allow for such an appeal must apply for and obtain 'special leave' from the Supreme Court of Appeal (i.e. that, in addition to a reasonable

¹⁴⁴⁹ Sections 59-61 of the Act

¹⁴⁵⁰ Sec. 65(1) and (2) of the Act; Loubser *op cit.* Ch 8-45 to Ch 8-46

¹⁴⁵¹ Loubser Ch 8-46

prospect that the appeal will succeed, there are special circumstances that warrant a further appeal).¹⁴⁵²

461 The Competition Tribunal has in recent years shown itself to be a regulatory body with real teeth, and the Tribunal has issued substantial fines to firms who were found to be involved in a price-fixing in a number of high-profile matters. It should be noted that in terms of the Act, contrary to the position in jurisdictions such as the United States, the competition authorities are not empowered by the Act to order criminal penalties or the payment of civil penalties to injured parties. The available remedies in the terms of the Act¹⁴⁵³ are for the competition authorities to interdict the further occurrence of anti-competitive conduct, to impose positive behavioural and structural conditions on corporate conduct, and to impose penalties on respondent firms.¹⁴⁵⁴ In terms of section 59 of the Act, the Tribunal may impose administrative penalties both for prohibited practices and for contraventions of the merger control provisions¹⁴⁵⁵ in the Act. An administrative penalty may not exceed 10% of the respondent firm's annual turnover in the Republic (and its exports from the Republic) during the preceding financial year.¹⁴⁵⁶ It has been observed that the administrative penalties provided for in the Act, while taking into account considerations of damage and unjust enrichment, are primarily penal in nature.¹⁴⁵⁷ The factors that the Tribunal is required to consider when determining an appropriate penalty are the following:

- The nature, duration, gravity and extent of the contravention;
- Any loss or damage suffered as a result of the contravention;
- The behaviour of the respondent firm;
- The market circumstances in which the contravention took place;

¹⁴⁵² *American Natural Soda Ash & Others v Competition Commission of SA & Others* Supreme Court of Appeal Case No. SCA 554/03 (judgment delivered 13 May 2005)

¹⁴⁵³ Part D of chapter 5 of the Act

¹⁴⁵⁴ See Wilson, J in Brassey (ed.) *Competition Law* Juta Law (2003) *supra* at 317 *et seq.*

¹⁴⁵⁵ Chapter 3 of the Act

¹⁴⁵⁶ Section 59(2) of the Act

¹⁴⁵⁷ See Wilson, J in Brassey (ed.) *Competition Law* Juta Law (2003) *supra* at 325

- The level of profit derived from the contravention;
- The degree to which the respondent firm has co-operated with the Commission or Tribunal; and
- Whether the respondent firm has previously been found in contravention of the Act.¹⁴⁵⁸

In line with the enforcement provisions found in competition laws elsewhere (e.g. in respect of Article 82 of the EC Treaty which deals with abuse of dominance, and in terms of which the European Competition Commission may impose substantial fines of up to 10% of the offending undertaking's turnover), the South African Competition Commission has in recent years issued substantial fines to firms engaged in a variety of activities, ranging from a major local bread manufacturer to a critical health care provider. At the time of writing, proposed amendments to the Competition Act have been criticized as being unconstitutional and ambitious (including e.g. controversial proposals that directors and managers of companies may be imprisoned for up to 10 years or fined up to ZAR 500 000 for being involved in prohibited activities or even just for possessing knowledge of such activities).

462 In the sporting context, various activities regarding the organization and commercialization of sport may come into conflict with the prohibited practices covered by the Act. These include, foremost, practices and policies regarding the restriction of movement of players through the provisions of employment contracts and regulations, merchandising arrangements and the collective selling of broadcasting rights.¹⁴⁵⁹ Other potential conflicts may also arise, regarding such diverse issues as common ownership of

¹⁴⁵⁸ Section 59(3) of the Act

¹⁴⁵⁹ E.g. see discussion of UEFA's marketing of broadcasting rights for the Champions League competition, in Gardiner et al *Sports Law* 3rd ed Cavendish Publishing 2006 at 391 *et seq.* See also the interesting paper by Falconieri, Palomino & Sakovics 'Collective vs. Individual Sale of TV Rights in League Sports', August 2002, available online at http://www.econ.ed.ac.uk/papers/Collective_vs_Individual_Sale_of_TV_Rights_in_League_Sports.pdf; and the article by Findlay, Holohan & Oughton 'A Game of Two Halves? The Business of Football', available on the web site of the Football Governance Research Centre, Birkbeck, University of London (available online at <http://www.football-research.org/qof2h/Gof2H-chap6.htm>).

competing clubs in a league, player-agent regulations and ticketing arrangements for events.¹⁴⁶⁰

463 It should also be borne in mind that the application of competition law in the sporting context must proceed with due regard for the special characteristics and exigencies of this form of activity. In the European Union the 'sporting exception' to competition rules has often been invoked; namely that the practice of sport is subject to European Community law to the extent that it constitutes an economic activity.¹⁴⁶¹ However, as has been observed, this principle is 'easy to state but less easy to apply in practice', mainly due to the fact that many rules that are characterized as mere 'rules of sporting conduct' have undeniable and often fairly direct economic effects.¹⁴⁶² Furthermore, it must be remembered that the peculiarities of the sporting context also relate, specifically, to the role of competition in sport and in the organization of sports. Sport depends on the existence of competition and it is usually not in the interest of a sports body or participant to eliminate competitors from the market, as this would make the sport less attractive for spectators, sponsors and advertisers.¹⁴⁶³ Accordingly, the

¹⁴⁶⁰ In respect of ticketing arrangements, compare the decision of the European Competition Commission in the France 1998 World Cup case regarding abuse of dominance in terms of Article 82 of the EC Treaty – Case IV/36.888 1998 *Football World Cup* (see Gardiner et al *Sports Law* 3rd ed Cavendish Publishing 2006 at 360-362).

¹⁴⁶¹ Cf. *Walrave and Koch v Union Cycliste Internationale* [1974] ECR 1405; *Dona v Mantero* [1976] 1333; *Bosman's case* [1996] 1 CMLR 645; *Deliege* [2000] ECR I-2549. E.g. in the *Dona* case, the following was said in the context of eligibility rules based on athletes' nationality: '[The European Union freedom of movement provisions] do not prevent the adoption of rules or of a practice of excluding foreign players from participation in certain matches for reasons which are not of an economic nature, which relate to the particular nature and context of such matches and are thus of sporting interest only, such as, for example, matches between national teams from different countries.'

See, in respect of the justiciability of 'rules of the game' and 'ethical principles of sport' in respect of their economic consequences, Ken Foster 'Is There a Global Sports Law?' *Entertainment and Sports Law Journal* Vol. 2 No. 1, Frank Cass Publishers, Spring 2003 1 at 5; 16.

A recent judgement on this issue (by the European Court of First Instance) in the appeal of *David Meca-Medina and Igor Majcen v Commission of the European Communities* (Case C-519/04 P; judgment delivered 18 July 2006) has seen a review of the earlier cases mentioned above, and a finding that 'the mere fact that a rule is purely sporting in nature does not have the effect of removing from the scope of the Treaty the person engaging in the activity governed by that rule or the body which has laid it down' (at par 27 of the judgment).

¹⁴⁶² Lewis & Taylor *Sport: Law and Practice* 2003 at 347-8

¹⁴⁶³ Loubser *supra* at Ch 8-46, quoting Beloff, Kerr & Demetriou *Sports Law* Hart Publishing 1999 at 6.33. In the context of professional sport, and the enterprises undertaking the business of sport at the higher levels, the competitive nature and quality of the sporting event as an entertainment spectacle is the primary determinant of the financial success of the undertaking. Competition therefore features both on the field of play ('sporting' competition) and off it ('economic' competition), within leagues and similar competitive structures. Wise & Meyer distinguished the sports industry from others in the American context, as follows:

'The economics of team sports requires that franchises compete on the field but co-operate to some extent as businesses. To attract fan interest, owners argue that competition on the field must be balanced – opposing teams must have a roughly equal chance of winning each game and league champions must rotate. Unlike Ford and General Motors, however, the Celtics do not want the Knicks to go out of business.'

'rule of reason' approach has developed in the EU, which was explained in the well-known *Bosman* case as follows:

'If a rule which at first sight appears to contain a restriction of competition is necessary in order to make that competition possible in the first place, it must indeed be assumed that such a rule does not infringe [competition law restrictions of anti-competitive practices]'.¹⁴⁶⁴

This principle appears to be of a pragmatic nature, and to have particular resonance in the sporting sector, where it is accepted that 'certain forms of co-ordination or restraint between "competitors" are necessary for the sporting "product" to be created in the first place'.¹⁴⁶⁵ As has been observed:

'[S]ports teams are not engaged in a series of individual business ventures. Rather, the venture is necessarily a collective one: they must agree among themselves on a host of issues in order to create and define the product itself. Put more simply, competition on the field is dependent on co-operation off it. Such restraints on off-field competition are essential in order for the product (the athletic contest) to exist at all'.¹⁴⁶⁶

(Wise & Meyer *International Sports Law and Business* (2 vols.), Kluwer Law International 1998, Vol. 1 11). The competition nature of sport is an inherent element and central determinant of the very activity of sport – see Szymanski 'Income Inequality, Competitive Balance and the Attractiveness of Team Sports: Some Evidence and a Natural Experiment from English Soccer' March 2000 (available on the Net as <http://mscmga.ms.ic.ac.uk/stefan/EJCB.pdf>).

This 'crisis of personality' is best described as follows:

'The conventional textbook firm in economic theory has an interest in increasing its market power and ultimately it maximizes its own interest (and profit) when it achieves maximum market power as a monopolist. In professional team sport once a team became a monopolist, revenue would disappear altogether; output would be zero since it would be impossible to stage a match. One major function of the league is to ensure that no team achieves too much market power, or excessive dominance. The league therefore aims to restrict competition.'

(Gratton & Taylor *Economics of Sport and Recreation* E&FN Spon 2000 193-194). See also A. Daly & A. Kawaguchi 'Competitive Balance in Australian and Japanese Sport' *The Otemon Journal of Australian Studies* Vol. 30 (2004) 23-36; Downward, P. and Dawson, A. *The Economics of Professional Team Sports* Routledge, London & New York 2000, at 44.

¹⁴⁶⁴ From the opinion of Advocate General Lenz in *Union Royale Belge des Societes de Football Association ASBL v Bosman* [1996] 1 CMLR 645 at par 265, as quoted by Lewis & Taylor *supra* 350

¹⁴⁶⁵ Lewis & Taylor *supra* 350-351

¹⁴⁶⁶ *Ibid.* 351

Conversely, one could argue that the peculiar characteristics of the organization of sport (and, particularly, the monopoly position and powers enjoyed by sports governing bodies in terms of the European model of governance) may tend to facilitate unlawful or unfair competitive practices.¹⁴⁶⁷

464 It should be noted that it has been observed that the European Court of Justice has rejected the existence of a rule of reason approach under Article 81 of the Treaty (or at least rejected such a label for its flexible approach to the application of the provision).¹⁴⁶⁸ While it has been observed that recent statements and decisions of the European Commission suggest that the sporting exception has been considerably expanded from its narrow 'rules of the game' origin in order to take into account the commercial realities of the sports industry, it appears that judicial authority for the exact scope of this doctrine remains scanty.¹⁴⁶⁹ Mash has observed that the judgment of the ECJ in *Wouters v. Algemene Raad van de Nedèrlàndse Orde van Advocaten ('NOVA')*¹⁴⁷⁰ provides welcome clarification in this regard:

'The Court's reasoning promotes a case-by-case analysis of rules of self-governing bodies (or associations of undertakings), taking into account the context in which the rules operate. On this basis, and in the light of the Commission's recent approach to UEFA's broadcasting regulations and rules on common ownership, the sporting exception doctrine could arguably be re-defined as covering any rules which in the subjective opinion of the sporting association, are necessary for the proper conduct or overall functioning of a particular sport ... [The *Wouters* decision] does support the proposition that the European Court is ready to recognize a context-sensitive approach as part of its Article 81(1) analysis in relation to rules made and enforced by a self-regulating statutory body. The sports sector must now wait for an authoritative statement from the European Court as to

¹⁴⁶⁷ See the discussion in the text below regarding abuse of dominance and the relevance of the governance structure employed in professional sports

¹⁴⁶⁸ See Mash, J 'The illusive nature of the European Commission's 'sporting exception' *Sport and the Law Journal* Issue 2 Vol. 13 (2005) 25-32 at 30

¹⁴⁶⁹ *Ibid.* 32

¹⁴⁷⁰ European Court of Justice opinion, Case C-309/99 (where the ECJ was asked to consider the compatibility with Article 81 of a Dutch rule prohibiting the formation of multi-disciplinary partnerships involving barristers and accountants)

whether this approach will extend to rules of non-statutory sports governing bodies, that steer an increasingly blurred path between sporting regulation and commercial governance.¹⁴⁷¹

It is submitted that, in respect of considering whether sports-related conduct or practices fall foul of the provisions of the South African Competition Act, all the relevant circumstances of the specific context of the sport as well as the need to promote competition through sometimes *prima facie* restrictive practices in order to promote or maintain the viability of the sport, must all be considered with proper weighting of the interests of the various stakeholders.¹⁴⁷²

465 The application of the Competition Act in the sporting context has to date not been tested by the courts, and one would have to wait and see how these specific considerations in respect of sport will be applied when such opportunity arises. It is hoped, however, that the courts as well as the Competition Commission and Tribunal will, where applicable, show an insight and sensitivity into the special nature of sport, as the European Competition Commission has done in recent times.¹⁴⁷³

466 In respect of the potential role of competition law relating to sports broadcasting rights, it should be noted that the national regulator's¹⁴⁷⁴ current Discussion Paper on Sports Broadcasting Rights Regulation¹⁴⁷⁵ has specifically highlighted the importance of guarding against anti-competitive behaviour by subscription broadcasting services, in light of complaints by new, recently-licensed entrants to the subscription service industry regarding the role in the market of Multichoice, the largest subscription broadcaster (with its sports broadcasting subsidiary, Supersport International).¹⁴⁷⁶ It is also expected that

¹⁴⁷¹ *Ibid.*

¹⁴⁷² See also Gardiner et al *Sports Law* 3rd ed Cavendish Publishing 2006 at 365-367

¹⁴⁷³ Gardiner et al *supra* at 397

¹⁴⁷⁴ The Independent Communications Authority of South Africa (ICASA)

¹⁴⁷⁵ 'Review of Sports Broadcasting Rights Regulations – Discussion Document, September 2008' - published in General Notice 1238 of 2008, Government Gazette No. 31483, 2 October 2008

¹⁴⁷⁶ For current developments regarding the regulation of the sports broadcasting industry in South Africa, see the discussion in par 585 *et seq* below

the implementation of Chapter 10 of the Electronic Communications Act,¹⁴⁷⁷ which deals with the introduction of pro-competitive measures in anti-competitive markets, will play an important role in this regard.¹⁴⁷⁸

§3 The practices prohibited in terms of the Competition Act 89 of 1998

I Restrictive horizontal practices

467 Restrictive horizontal practices are prohibited by section 4(1) of the Act, which provides as follows:

An agreement between, or concerted practice by, firms, or a decision by an association of firms, is prohibited if –

- (e) it is between parties in a horizontal relationship and it has the effect of substantially preventing or lessening competition in a market, unless a party to the agreement, concerted practice or decision can prove that any technological, efficiency or other pro-competitive gain resulting from it outweighs that effect; or
- (f) it involves any of the following restrictive horizontal practices:
 - (i) directly or indirectly fixing a purchase or selling price or any other trading condition;
 - (ii) dividing markets by allocating customers, suppliers, territories, or specific types of goods or services; or
 - (iii) collusive tendering.

¹⁴⁷⁷ Act 36 of 2005

¹⁴⁷⁸ See the discussion in par 590 *et seq* below

The object of the prohibition in section 4(1) is threefold, namely an agreement between firms, a concerted practice by firms or a decision by an association of firms.¹⁴⁷⁹ An 'agreement' includes a contract, arrangement or understanding, whether or not it is legally enforceable. A 'concerted practice' by firms means co-operative or co-ordinated conduct between firms, achieved through direct or indirect contact, that replaces their independent action, but which does not amount to an agreement. 'Firms' are defined in the Act as including a person, partnership or trust, and clubs and other sports bodies would undoubtedly qualify as firms for purposes of the Act.¹⁴⁸⁰ It should also be noted that the meaning of 'firm' is not limited to its common law meaning. The word 'person' (in the above definition) includes any company or body of persons whether incorporated or unincorporated¹⁴⁸¹, and the provision thus applies to companies.¹⁴⁸² A 'horizontal relationship' is defined as a relationship between competitors.

The exemption regarding the proof of technological efficiency or a pro-competitive gain which outweighs the anti-competitive effect of an agreement or concerted practice is similar to the provisions of Article 81(3) of the EC Treaty.

Sections 4(2) to 4(4) of the Act contain a presumption of the existence of an agreement to engage in a restrictive horizontal practice between two or more firms, if there is cross-shareholding between firms or where they have at least one director or substantial shareholder in common.¹⁴⁸³ As Loubser has pointed out, media companies often have substantial shareholding in competing sports bodies, and the presumption of contravention of section 4 may arise in instances where these bodies engage in conduct that might be viewed as a restrictive horizontal practice (e.g. where they appear to divide geographical markets in

¹⁴⁷⁹ See Campbell, J in Brassey *Competition Law* (2003) at 129

¹⁴⁸⁰ Loubser *supra* at Ch 8-46(1)

¹⁴⁸¹ In terms of section 2 of the Interpretation Act 33 of 1957

¹⁴⁸² See Campbell, J in Brassey *Competition Law* (2003) *supra* at 129 note 1

¹⁴⁸³ In terms of sec 4(5) of the Act, the provisions of sec 4(1) do not apply to an agreement between or a concerted practice engaged in by a company, its wholly owned subsidiary, a wholly owned subsidiary of that subsidiary or any combination of them, or between the constituent firms within a single economic entity similar in structure as a company and its wholly owned subsidiaries.

respect of the employment of players, or enter into exclusive broadcasting agreements with media companies).¹⁴⁸⁴

468 It is important to determine the relevant market for purposes of application of the prohibitions contained in the Act. The relevant market is usually determined primarily in respect of the product or service market and the geographical market.¹⁴⁸⁵ The market in which sports bodies or participants operate may be local, regional, national or international, depending on the nature of the activity or restriction concerned.¹⁴⁸⁶ Accordingly, competition policy in respect of sports broadcasting rights raises difficult questions in determining the relevant market for the sport concerned.¹⁴⁸⁷ As has been observed in respect of the prohibitive effect of the competition provisions contained in the EC Treaty (i.e. Article 81¹⁴⁸⁸), it is necessary to show not simply that the rule or practice is restrictive but also that the rule or practice has an appreciable effect on a relevant market. Therefore, a key element in any competition law analysis is defining the relevant market: a broad definition of the relevant market may lead to the conclusion that the rule or practice under scrutiny has no appreciable impact on competition¹⁴⁸⁹ (similarly a broad definition of the relevant market may lead to a conclusion that the undertaking under scrutiny does not enjoy a dominant position in the market – Article 82 of the EC Treaty; section 8 of the Competition Act 89 of 1998 – discussed below).¹⁴⁹⁰

¹⁴⁸⁴ In respect of broadcasting rights regulation, see par 585 *et seq* below

¹⁴⁸⁵ Loubser *supra* Ch 8-46(1); Beloff, Kerr & Demetriou *Sports Law* 1999 at 6.43

¹⁴⁸⁶ *Ibid.*

¹⁴⁸⁷ E.g. whether there should be a distinction drawn between pay-television and non-subscription television, whether there are separate markets for live and recorded sports, and what the relevant geographical market is in respect of sports broadcasting – see Loubser *supra* Ch 8-46(3). In the report of the UK Competition Commissioner in the *Vivendi/BSkyB* merger (April 2000), the Commission was of the opinion that pay-TV and free-to-air TV can be regarded as separate markets. This view appears to have also been followed in other jurisdictions (e.g. in Italy and Germany) – see Lewis & Taylor *Sport: Law and Practice* (2003) at 400-401

¹⁴⁸⁸ Article 81 prohibits 'all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market ...'

¹⁴⁸⁹ Or of not 'substantially preventing or lessening competition in a market', in the wording of sec 4(1) of the Competition Act 89 of 1998 (as quoted above).

¹⁴⁹⁰ Lewis & Taylor *supra* at 354; see also Simkins, C in Brassey *Competition Law* (2003) *supra* at 109-110

469 In light of the fact that these prohibitive provisions of the Competition Act 89 of 1998 have to date not yet been tested or applied specifically in the sporting context (unlike the position in e.g. the European Union, where many sports-related competition cases have in recent years confronted the relevant competition authorities as well as the courts), it may be necessary to include some disclaimers with regard to the expected application of the Act to sports bodies. It should be noted that courts and competition authorities elsewhere have increasingly recognized the peculiarity of the sporting context when considering restrictive practices which would fall foul of competition laws in other industries. Reference has been made above to both the potential application and scope of the 'sporting exception' and the 'rule of reason' principle as applied in the European context. Lewis & Taylor have gone so far as to state that the effect of the 'rule of reason' principle as well as the peculiar nature of competition in sport (especially the required co-operation and restriction of free and unfettered competition off the field of play) imply that 'the fundamental economic principle that the public interest is best served by unrestrained competition in a completely free market environment simply *does not apply* in the sports sector.'¹⁴⁹¹

One should therefore consider whether a horizontal 'restrictive' practice, which is necessary to preserve competitive balance between clubs or other sports bodies and is proportionate to such purpose, may over-all be determined to be pro-competitive.¹⁴⁹²

470 Furthermore, in light of the above discussion of the peculiarity of the professional sports industry and the necessity of restricting competition between e.g. teams in a league, heed may also need to be taken of the collective nature of the business venture; in this light a sport's rules, practices and decisions should not be viewed in the same way as agreements among horizontal business

¹⁴⁹¹ Lewis & Taylor *supra* at 352, with reference to Kinsella and Daly 'European Competition Law and Sports' (2001) 4(6) *Sports Law Bulletin* 7 (emphasis provided in the original)

¹⁴⁹² Lewis & Taylor 352 (par B2.72)

competitors in a traditionally structured industry.¹⁴⁹³ The 'firm' in the meaning of the Competition Act may therefore need to be considered as the league or competition organizer, as the collective entity encompassing the teams, clubs or franchises as a whole.¹⁴⁹⁴

II Restrictive vertical practices

471 Section 5 of the Competition Act 89 of 1998 prohibits restrictive vertical practices, and provides as follows:

- (1) A restriction between parties in a vertical relationship is prohibited if it has the effect of substantially preventing or lessening competition in a market, unless a party to the agreement can prove that any technological, efficiency or other pro-competitive gain resulting from that agreement outweighs that effect.
- (2) The practice of minimum retail price maintenance is prohibited.
- (3) Despite subsection (2), a supplier or producer may recommend a minimum resale price to the reseller of a good or service provided –
 - (a) the supplier or producer makes it clear to the reseller that the recommendation is not binding; and
 - (b) if the product has its price stated on it, the words 'recommended price' appear next to the stated price.'

A 'vertical relationship' is defined in the Act as the relationship between a firm and its suppliers, its customers or both. As Loubser has pointed out, this provision may

¹⁴⁹³ Lewis & Taylor 351 (par B2.68)

¹⁴⁹⁴ *Ibid.* Note, however, the authors' reference to criticism of this 'single entity' theory in the United States and among European competition regulators (Lewis & Taylor 351-352), and the apparent rejection of this 'single entity' theory in Australia in *News Ltd v Australian Rugby League Ltd* (1996) ATPR 41-466 (as discussed by Gardiner et al *Sports Law* 3rd ed Cavendish Publishing 2006 at 390-391).

apply to various types of agreements within the sporting context, including exclusive dealing agreements between sports bodies or clubs and their suppliers, agreements whereby sports bodies supply team-branded products to retailers on an exclusive dealing basis, and even a transfer fee system which can have vertical restrictive implications for the relationship between players and their employers where the former are regarded as suppliers of services to their employers.¹⁴⁹⁵ The Act does not define the meaning of a 'supplier', and it is submitted that common sense would lean towards players being deemed to be suppliers of services for purposes of the application of these provisions. Accordingly, any employment or related practice which 'has the effect of substantially preventing or lessening competition in a market' would require competition law scrutiny or be open to challenge in terms of section 5(1) of the Act.

III Abuse of dominance

472 The Competition Act, in its Part B,¹⁴⁹⁶ prohibits the abuse of dominance in a market, which has been explained succinctly as follows:

'A firm that dominates a market may not exploit its power in order to gain an anti-competitive advantage over its competitors, customers or suppliers. It may not charge its customers excessive prices, improperly discriminate between customers

¹⁴⁹⁵ Loubser *supra* at Ch 8-48. In the context of American professional sports, it has been observed that the industry constitutes a textbook example of a bilateral cartel, made up of club or team owners and unionised players. The club owners exercise monopoly power in the product market (in respect of the entertainment product provided through games and events), and monopsony power in the input market (the input of labour by players/athletes) - they constitute the only 'buyer' for the product of player labour. Accordingly, these cartels confront each other in a love/hate, cooperation/conflict relationship, with neither being strong enough to exercise total dominance over the other - Adams, Walter & Brooke, James W. 'Monopoly, Monopsony, and Vertical Collusion: Antitrust Policy and Professional Sports' *Antitrust Bulletin* 42 (3), (1997) 721-747.

For an interesting exposition of developments in Australasian professional sport from monopsony to a bilateral monopoly (mainly through individual players' legal challenges to labour market controls imposed by teams and through the advent of players' associations and collective bargaining), see Braham Dabscheck 'Industrial Relations in Australasian Professional Team Sports' *The Otemon Journal of Australian Studies* Vol. 30 (2004) 3-22.

¹⁴⁹⁶ Sections 6-9 of the Act

in the prices it quotes them or improperly dictate the way its suppliers, competitors or customers deal with others.¹⁴⁹⁷

Sections 7, 8 and 9 of the Act deal with abuse of a dominant position. Section 7 deals with the circumstances in which a firm is deemed to be dominant in a market, section 8 determines the standards against which a dominant firm is judged to have abused its dominance, and section 9 prohibits price discrimination by a dominant firm.¹⁴⁹⁸

473 Sports governing bodies (and their 'commercial arms' tasked with regulating the commercial aspects of a sport) will always be exposed to potential claims of abuse of dominance, especially in light of the monopolistic nature of such governing bodies in terms of the European system of sports governance which characterizes the governance of the three major South African professional sports. These bodies, and especially national governing bodies (and their commercial arms which control the professional competitions etc), can by their very nature and the nature of their authority in regulating most aspects of the sport at all levels of participation be characterized as monopoly regulators with inherent market dominance.¹⁴⁹⁹ Their very reason for being is the establishment of a monopoly of control of professional sport and exploitation of its commercial spin-offs, and to fulfill a regulatory function of maintaining monopolies of control also at national level.¹⁵⁰⁰ For example, in respect of the economic characteristics of professional team sports, it has been noted that the most valued product of a

¹⁴⁹⁷ David Unterhalter, writing in Brassey (ed.) *Competition Law* (2003) *supra* at 180

¹⁴⁹⁸ *Ibid.*

¹⁴⁹⁹ See Ken Foster 'Can Sport be Regulated by Europe? An Analysis of Alternative Models', in Caiger & Gardiner *Professional Sport in the EU* at 59.

¹⁵⁰⁰ As has been stated in respect of the establishment of FIFA:

'The main idea behind [the meeting in 1904 of the founding members of the organisation] was to create a body with legitimacy to arbitrate over conflicts among national football associations and later to assure the presence of one national association per country and the development of football across all member nations. This legitimacy came with time, when an ever-growing number of affiliations pleaded their affiliation to FIFA, and with the monopolistic characteristic that the body impressed at all levels of football governance: Only one association per country would be officially recognised as sovereign responsible for the control and the development of the sport within its boundaries.'

Ducrey, P; Ferreira, C; Huerta, G & Marston, K 'UEFA and Football Governance: A New Model' *International Sports Law Journal* 2004/1-2 at 81

sports league is the world or national championship contest, which only a monopoly can supply.¹⁵⁰¹ Accordingly, aspects of the conduct of such bodies are open to scrutiny in terms of competition law. This was recently confirmed in respect of the application of Article 82 of the EC Treaty¹⁵⁰² in the decision of the Grand Chamber of the ECJ in the case of *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio*.¹⁵⁰³ It was held that the abuse of a dominant position by a sports regulatory body (*in casu*, in motorcycling) in respect of sanctioning new events is subject to the prohibition contained in Article 82. As one commentator has observed, the ECJ's view in this regard is not surprising, but in line with a long line of earlier decisions whose effect has been summarized as follows:

'Case law [of the ECJ] demonstrates the Court's consistent view that sport, in so far as it constitutes an economic activity, falls within the scope of application of the EC Treaty, albeit that it is open to sport to explain and justify its practices in so far as they are necessary for its proper organisation. In short, EC law accepts that sport is 'special' – it has features, such as the need for balanced competition and uncertainty as to outcome, which are not found in typical industries – but it is not so 'special' that it can be granted a blanket exemption from the rules of the EC Treaty.¹⁵⁰⁴

474 It should be remembered that the mere position of power of a sports governing body may not, *per se*, lead to a finding of abuse of a dominant position. As has been observed in respect of the abuse of dominance in terms of Article 82

¹⁵⁰¹ See Neale, W.C. (1964) 'The Peculiar Economics of Professional Sport' *Quarterly Journal of Economics* 78, 1:1-14, as discussed in Paul Downward and Alistair Dawson *The Economics of Professional Team Sports* Routledge, London & New York 2000 at 21.

¹⁵⁰² See the discussion in the text below

¹⁵⁰³ Case C49/07 (judgment delivered 1 July 2008)

¹⁵⁰⁴ See the discussion by Stephen Weatherill ('Article 82 and sporting "conflict of interest": The judgment in *MOTOE*') in the *Sport and the Law Journal* Issue 2 Vol. 16 (March 2009) 10

of the EC Treaty,¹⁵⁰⁵ it is not having a dominant position that is problematic, but rather the abuse of such a dominant position: '[I]t is not the power to regulate a given sporting activity as such which might constitute an abuse but rather the way in which a given sporting organisation exercises such power.'¹⁵⁰⁶

Section 8 of the Competition Act 89 of 1998, which shows marked resemblance to Article 82 of the EC Treaty, prohibits certain instances of abuse of dominance in a relevant market. Section 7 first defines the concept of dominance, as follows:

'A firm is dominant in a market if –

- (a) it has at least 45% of that market;
- (b) it has at least 35%, but less than 45%, of that market, unless it can show that it does not have market power; or
- (c) it has less than 35% of that market, but has market power.'¹⁵⁰⁷

It should be noted that, even if a firm satisfies any of the above requirements, the provisions of the Act relating to abuse of dominance may not be applicable to it. In terms of section 6(1) of the Act, the Minister of Trade and Industry has set a *de minimis* threshold; i.e. the prohibition relating to abuse of dominance does not apply in respect of a firm which has an annual turnover in, into or from South

¹⁵⁰⁵ Which prohibits any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it, which is prohibited as incompatible with such common market in so far as it may affect trade between Member States. Art. 82 provides that such abuse may in particular consist of the following:

- (a) directly or indirectly imposing unfair purchase or selling prices or unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by other parties of supplementary obligations, which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

¹⁵⁰⁶ 'Commission debates application of competition rules to sport', European Commission press release dated 24 February 1999, IP/99/133 (as quoted in Lewis & Taylor *supra* B2.32)

¹⁵⁰⁷ Lewis & Taylor (*supra*, at B2.77 on 355) have pointed out that under UK competition law, restrictions on competition are generally considered *de minimis* where the parties' combined share of the relevant market does not exceed 25%.

Africa of below ZAR 5 million or assets in South Africa of a value below ZAR 5 million.¹⁵⁰⁸

475 In the determination of whether a firm in fact enjoys a dominant position in a market (also in terms of the above guidelines as set down in section 7), it must of course first be determined what market is involved. Unterhalter has explained this exercise as follows:

'The market is determined neither anecdotally nor impressionistically ... but according to an economic conception that treats the market as a group of products, sold (or potentially sold) in a defined area, by firms that constrain one another in a competitive process by offering products in that area that are, according to the preferences of consumers, substitutes for one another ... The definition of a market is the definition of boundaries. Those boundaries are defined across a number of dimensions. There are boundaries between products, between territorial spaces and in time.'¹⁵⁰⁹

For further discussion of the considerations that may affect the determination of the relevant market, the reader is referred to more specialized texts in this regard.¹⁵¹⁰

In the context of Article 82 of the EC Treaty, the issue of dominance was considered in the case of *Hoffman-La Roche & Co AG v Commission*:¹⁵¹¹

'The dominant position ... relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave in an appreciable extent independently of its competitors, its customers and ultimately of its consumers. Such a position does not preclude some competition, which it does where there is a

¹⁵⁰⁸ Section 6(1); Unterhalter, D in *Brassey Competition Law* (2003) *supra* at 181

¹⁵⁰⁹ Unterhalter, D in *Brassey Competition Law* (2003) *supra* at 183

¹⁵¹⁰ E.g. see the discussion by Unterhalter in *Brassey Competition Law* (2003) *supra* at 183 *et seq.*

¹⁵¹¹ [1979] ECR 461

monopoly or quasi-monopoly, but enables the undertaking which profits by it, if not to determine, at least to have an appreciable influence on the conditions under which that competition will develop, and in any case to act largely in disregard of it so long as such conduct does not operate to its detriment.¹⁵¹²

The concept of abuse of such dominant market power is an objective one, and relates to conduct by such firm where, as a result of its presence in the market, competition is diminished and the maintenance of the degree of competition still existing is hindered.¹⁵¹³

476 Section 8 of the Act prohibits certain specific instances of abuse of a dominant position:

It is prohibited for a dominant firm to –

- (a) charge an excessive price to the detriment of consumers;
- (b) refuse to give a competitor access to an essential facility when it is economically feasible to do so;
- (c) engage in an exclusionary act, other than an act listed in paragraph (d), if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive gain; or
- (d) engage in any of the following exclusionary acts, unless the firm concerned can show technological, efficiency or other pro-competitive gains which outweigh the anti-competitive effect of its act:

¹⁵¹² See Gardiner et al *Sports Law* 3rd ed Cavendish Publishing 2006 at 360

¹⁵¹³ Loubser *supra* Ch 8-48, with reference to Beloff, Kerr & Demetriou *Sports Law* Hart Publishing 1999 at 6.45. In *Hoffman-La Roche & Co AG v Commission* [1979] ECR 461 the concept of abuse was described as follows (again in the context of the provisions of Art. 82 of the EC Treaty):

'The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of the market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which through recourse to methods different from those which condition normal competition in products or services on the basis of transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.'

- (i) requiring or inducing a supplier or customer to not deal with a competitor;
- (ii) refusing to supply scarce goods to a competitor when supplying those goods is economically feasible;
- (iii) selling goods or services on condition that the buyer purchases separate goods or services unrelated to the object of a contract, or forcing a buyer to accept a condition unrelated to the object of a contract;
- (iv) selling goods or services below their marginal or average variable cost; or
- (v) buying-up a scarce supply of intermediate goods or resources required by a competitor.¹⁵¹⁴

As Loubser has pointed out, potentially abusive conduct includes the collective selling of broadcasting rights, the application of non-objective entry criteria to leagues or competitions, charging excessive prices for sport-related merchandise, and selling goods or services on condition that the buyer purchases certain separate goods or services.¹⁵¹⁴

477 It is submitted that events in the 'rebel' Indian Cricket League¹⁵¹⁵ which had its inaugural competition in 2007, which is (at the time of writing) unsanctioned by the Board of Control for Cricket in India and has led to player bans for participating players and the imposition of other sanctions by cricket governing bodies in various jurisdictions, provides some good examples of the types of conduct by a sports body which might constitute abuse of a dominant position in the sporting context. Apart from the player bans that have apparently been imposed on cricketers who signed up for the ICL, by the

¹⁵¹⁴ Loubser *supra* Ch 8-50

¹⁵¹⁵ See further discussion of the Indian Cricket League and its legal implications elsewhere in this chapter

BCCI as well as other domestic cricket boards, and the BCCI's refusal to sanction the ICL, it was reported in late 2007 that the ICL was the subject of legal action in India. Zee Telefilms, the organizer and financial backer of the ICL, filed a petition against the BCCI in the Delhi High Court in August 2007 requesting an order that the BCCI be restrained from interfering in the ICL's signing of players as well as alleged conduct by the BCCI in 'out-hiring' cricket stadiums in India that are owned and managed by state governments, in an attempt to prevent the ICL from staging events. The Delhi High Court granted an interim order in favour of Zee on 27 August 2007. It appears from reports that following the BCCI's banning of ICL players (which means that such players would not be able to play club cricket), there were fears that public sector undertakings such as Air India and IndianOil Corporation would dismiss their player employees who were employed for the sole purpose of playing club cricket. The Delhi High Court reportedly requested such public sector undertakings not to dismiss players.

It was also reported that India's Monopolies and Restrictive Trade Practices Commission (MRTPC) was investigating the BCCI's refusal to share infrastructure (specifically access to stadia) with the ICL. At the time of writing, no further information regarding the outcome of this investigation is available. It appears that this last, however, is the type of conduct which would constitute abuse of a dominant position within the meaning of the above section 8 (b) of the South African Competition Act.

§4 Competition provisions in respect of (sports) broadcasting

478 As has been observed in the European context, it is probably in the area of television broadcasting that the competition authorities have most frequently been involved in the business of sport.¹⁵¹⁶ It is expected that, apart from possible competition law challenges to e.g. player bans by domestic governing bodies (such as the position in

¹⁵¹⁶ Lewis & Taylor *Sport: Law and Practice* (2003) at 399

South African cricket, which is discussed elsewhere in this chapter), the sports broadcasting market in South Africa also holds the most potential for competition law challenges in future. This is especially probable in light of the recent entry of new licensed subscription broadcasters to what has, to date, been a relatively small sports broadcasting market.

479 Concerns regarding vertical restrictive practices in respect of the sports broadcasting market were raised by the Competition Commission and Tribunal in a matter that fell within their function of control over mergers. The Tribunal issued an unconditional Merger Clearance Certificate on 1 March 2005 approving a merger between Venfin Media Investments (Pty) Ltd and SAIL Group Ltd (or 'SAIL').¹⁵¹⁷ SAIL is a public company which controls a number of other firms. SAIL Group provides various professional services to the sport and entertainment industries. SAIL assists franchises that own sport brands to commercialise and correctly manage their brands. It also provides management advice to promote financial sustainability and return on investment for shareholders so that brands can attract and retain suitable commercial partners. It creates, strategically manages and executes sponsorships and events for corporate clients with a view to building their brands and maximising their return on investment.

Two of the primary acquiring firms in the merger owned a 33% and 66% (respectively) stake in free-to-air broadcaster e.tv. The Tribunal was concerned that the merger raised potential vertical concerns, because these two acquiring firms, who through their wholly owned subsidiaries could exercise control over SAIL, were also in a position to exercise control over e-tv, and may have had an incentive to use SAIL to foreclose broadcasting rivals of e-tv in relation to sports broadcasting rights or be able to use that control or influence to direct sports broadcasting rights away from rival sports broadcasters to e-tv.¹⁵¹⁸ The concern stemmed from the fact of SAIL's ownership of various sporting

¹⁵¹⁷ *Venfin Media Investments (Pty) Ltd/SAIL Group Ltd* Decision of the Competition Tribunal of the Republic of South Africa (Case No. 67/LM/Sep04), 1 March 2005

¹⁵¹⁸ For discussion of the sports broadcasting industry in South Africa, see par 583 *et seq* below

companies, *inter alia*, rugby affiliated companies (SAIL holds interests in various provincial rugby Unions and, at the time, a controlling interest in the Blue Bulls Co (Pty) Ltd franchise).

The Tribunal was satisfied that the merger did not raise vertical competition concerns on the basis of the practice of collective selling of broadcasting rights in the major sports by the governing bodies concerned. It explained its findings as follows:

[W]itnesses for the merging parties testified at the hearing that sporting companies do not make the decisions in relation to sporting broadcasting rights. In the case of rugby, we were advised that broadcasting decisions are made by SANZAR or the South African Rugby Board (*sic*). The various rugby companies that SAIL owns equity in have no say over the allocation of broadcasting rights. The second concern was that SAIL also advises sporting bodies and negotiates on their behalf. We were specifically concerned about their relationships with the Premier Soccer League ("PSL"). The PSL is the body responsible for awarding broadcasting rights in respect of soccer. We were advised at the hearing that SAIL - in its capacity as an agent to the PSL - would not be able to prescribe to the PSL to which television stations they should assign or sell their broadcasting rights. [Testimony on behalf of SAIL pointed out] that the PSL itself through its board of governors negotiates for its broadcasting rights ... [SAIL does not have] a non-exclusive relationship with the PSL, but [has] appointed two other companies to find sponsorships for it. The third potential concern was that because of VenFin's relationship with Vodacom [major sports sponsor], it may be able to use the latter's influence as a sponsor to direct broadcasting rights to e-tv. We were advised that this would not be possible for two reasons. Firstly, the parties advised us that the sponsor is not able to influence the choice of broadcaster - that is the decision of the governing body of sport. Secondly, VenFin's interest in the Vodacom Group is only 15%, which is insufficient an interest to give it any influence over group sponsorship decisions. As part of its investigations, the Commission canvassed the views of both Supersport and SABC - e-tv's rivals in the domestic market for sports broadcast rights. According to the Commission neither of these parties raised any concerns with the merger.'

The discussion elsewhere in this chapter refers to recent developments in light of current (at the time of writing) proposals to re-vamp the sports broadcasting regulation framework.¹⁵¹⁹

480 The Electronic Communications Act, 2005 (hereafter 'the EC Act')¹⁵²⁰ deals with the licensing of electronic communications services¹⁵²¹ by the Independent Communications Authority of South Africa (or 'ICASA').¹⁵²² In terms of chapter 3 of the EC Act, ICASA may grant licences (for a period not exceeding twenty years, or for a shorter period if requested by the applicant or determined by ICASA)¹⁵²³ for electronic communications network services, broadcasting services, and electronic communications services.¹⁵²⁴ Section 6 of the Act provides for license exemptions in relation to certain types of services. Section 8 of the Act provides for standard terms and conditions for licenses, which may take into account –

- (a) whether the service is intended for the public generally or a limited group, such as the provision of electronic communications network services or electronic communications services to other licensees contemplated under the Act;
- (b) the licence area of the authorised service;

¹⁵¹⁹ See the discussion in par 585 *et seq* below

¹⁵²⁰ Act 36 of 2005

¹⁵²¹ Which are defined in section 1 of the Act as meaning 'the emission, transmission or reception of information, including without limitation, voice, sound, data, text, video, animation, visual images, moving images and pictures, signals or a combination thereof by means of magnetism, radio or other electromagnetic waves, optical, electro-magnetic systems or any agency of a like nature, whether with or without the aid of tangible conduct, but does not include content service'.

¹⁵²² Established in terms of section 3 of the Independent Communications Authority of South Africa Act, 13 of 2000. For further discussion of the activities of ICASA in regulating sports broadcasting, see par 586 *et seq* below

¹⁵²³ Section 5(10)(a) of the EC Act

¹⁵²⁴ Section 5(2) of the EC Act. Section 5(3) provides that 'electronic communications network services, broadcasting services and electronic communications services that require an individual licence, include, but are not limited to -

- (a) electronic communications networks of provincial and national scope operated for commercial purposes;
- (b) commercial broadcasting and public broadcasting of national and regional scope whether provided free-to-air or by subscription;
- (c) electronic communications services consisting of voice telephony utilizing numbers from the national numbering plan;
- (d) any electronic communications network service, broadcasting service or electronic communications service where a state entity (directly or indirectly) holds an ownership interest of greater than twenty-five (25%) percent of the share capital of the person providing such service; and
- (e) such other services as may be prescribed that [ICASA] finds have significant impact on socio-economic development.'

- (c) the duration of the licence;
- (d) the protection of the interests of the subscribers and end-users, including, but not limited to-
 - (i) the handling and resolution of complaints and disputes;
 - (ii) the provision of appropriate remedies and redress in respect of such complaints and disputes;
 - (iii) the transparency of information about services, tariffs and the rights of subscribers; and
 - (iv) any other matter ICASA determines to be necessary in order to achieve the effective protection of subscribers;
- (e) the public interest in ensuring service interoperability, non-discrimination and open access, interconnection and facilities leasing;
- (f) the public interest in securing the efficient functioning of electronic communications networks including but not limited to preventing or restricting harmful interference within the radio frequency spectrum;
- (g) any universal access and universal service obligations;
- (h) the public interest in the provision, availability and use, in the event of a disaster, of electronic communications networks and electronic communications services;
- (i) the public interest in ensuring the protection of public health for the prevention or avoidance of the exposure of natural persons to electromagnetic fields created in connection with the operation of electronic communications networks and the provision of broadcasting and electronic communications services;
- (j) the international obligations of the Republic, including compliance with relevant international standards adopted by the Republic;
- (k) the public interest in ensuring the distribution of broadcasting services;

- (l) the public interest in facilitating the dissemination and development of a diverse range of sound and television broadcasting services on a national, regional and local level, that cater for all language and cultural groups and provide entertainment, education, news and information;
- (m) the public interest in facilitating and maintaining a competitive electronic communications environment and in regulating and controlling anti-competitive practices; and
- (n) the efficient use of the radio frequency spectrum and migration to digital use of such radio frequency spectrum.¹⁵²⁵

481 Chapter 9 of the EC Act deals with broadcasting services. Section 51 regulates commercial broadcasting services licenses, and section 66 deals with limitations on cross-media control of commercial broadcasting services. Section 60 provides for restrictions on subscription broadcasting services relating to sports broadcasting rights. Section 60 provides as follows:¹⁵²⁶

'S 60 (1) Subscription broadcasting services may not acquire exclusive rights that prevent or hinder the free-to-air broadcasting of national sporting events,¹⁵²⁷ as identified in the public interest from time to time, by the Authority, after consultation with the Minister and the Minister of Sport and in accordance with the regulations prescribed by the Authority.

(2) In the event of a dispute arising concerning subsection (1), any party may notify the Authority of the dispute in writing and such dispute must be resolved on an expedited basis by the Authority in accordance with the regulations prescribed by the Authority.

¹⁵²⁵ Section 8(2) of the EC Act

¹⁵²⁶ See also the discussion regarding currently (at the time of writing) proposed changes to the regulation of sports broadcasting in par 590 *et seq* below

¹⁵²⁷ The reader is referred to the discussion in par 590 *et seq* below on current (at the time of writing) proposals for changes to the regulatory framework regarding sports broadcasting (and, specifically, ICASA's proposals to move away from the currently-applicable system of listing of events in the national interest to implementation of the competition provisions contained in Chapter 10 of the EC Act)

(3) The Authority must prescribe regulations regarding the extent to which subscription broadcast services must carry, subject to commercially negotiable terms, the television programmes provided by a public broadcast service licensee.

(4) Subscription broadcasting services may draw their revenues from subscriptions, advertising and sponsorships, however, in no event may advertising or sponsorship, or a combination thereof, be the largest source of annual revenue.'

482 Chapter 10 of the EC Act deals with 'competition matters'. It provides that the Competition Act, 1998¹⁵²⁸ applies to competition matters in the electronic communications industry, subject to the EC Act.¹⁵²⁹ ICASA is a regulatory authority for the purposes of the Competition Act, and it is provided that ICASA and the Competition Commission may request and receive assistance and advice from one another regarding relevant proceedings.¹⁵³⁰

Where ICASA determines that the holder of a licence under the EC Act or a person providing a service pursuant to a licence exemption has engaged in an act or intends to engage in any act that is likely to substantially prevent or lessen competition by, among other things -

- (a) giving an undue preference to; or
- (b) causing undue discrimination against,

any other licensee or person providing a service pursuant to a licence exemption, ICASA may direct the licensee, by written notice, to cease or refrain from engaging in such act.¹⁵³¹ ICASA is to prescribe, in terms of regulations, the actions which would constitute such conduct which is likely to prevent or lessen competition, as well as detailing

¹⁵²⁸ Act 89 of 1998

¹⁵²⁹ EC Act section 67(9)

¹⁵³⁰ EC Act sections 67(11) and (12)

¹⁵³¹ EC Act section 67(1)

procedures for complaints and the monitoring and investigation of such conduct as well as penalties that may be imposed for failure to comply with a written notice to cease or refrain.¹⁵³²

483 Section 67(4) of the EC Act provides that ICASA must prescribe regulations defining the relevant markets and market segments, as applicable, in order that pro-competitive conditions may be imposed upon licensees having significant market power where ICASA determines such markets or market segments as having ineffective competition. The regulations must, *inter alia* –

- (a) define and identify the retail or wholesale markets or market segments in which it intends to impose pro-competitive measures in cases where such markets are found to have ineffective competition;
- (b) set out the methodology to be used to determine the effectiveness of competition in such markets or market segments, taking into account subsection (8);¹⁵³³
- (c) set out the pro-competitive measures the Authority may impose in order to remedy the perceived market failure in the markets or market segments found to have ineffective competition taking into account subsection (7);¹⁵³⁴

¹⁵³² Section 67(2)

¹⁵³³ Section 67(8) provides for the review of pro-competitive conditions:

'(a) Where the Authority undertakes a review of the pro-competitive conditions imposed upon one or more licensees under this subsection, the Authority must –

- (i) review the market determinations made on the basis of earlier analysis; and
- (ii) decide whether to modify the pro-competitive conditions set by reference to a market determination;

(b) Where, on the basis of a review under this subsection, the Authority determines that a licensee to whom any pro-competitive conditions apply is no longer a licensee possessing significant market power in that market or market segment, the Authority must revoke the applicable pro-competitive conditions applied to that licensee by reference to the previous market determination based on earlier analysis;

(c) Where, on the basis of such review, the Authority determines that the licensee to whom pro-competitive conditions apply continues to possess significant market power in that market or market segment, but due to changes in the competitive nature of such market or market segment the pro-competitive conditions are no longer proportional in accordance with subsection (7), the Authority must modify the applicable pro-competitive conditions applied to that licensee to ensure proportionality.'

¹⁵³⁴ Section 67(7) provides that pro-competitive terms and conditions may include but are not limited to –

- (a) an obligation to act fairly and reasonably in the way in which the licensee responds to requests for access, provisioning of services, interconnection and facilities leasing;
- (b) a requirement that the obligations contained in the licence terms and pro-competitive conditions must be complied with within the periods and at the times required by or under such terms and conditions, failing which a penalty may be imposed;
- (c) a prohibition against discriminating in relation to matters connected with access, provisioning of services, interconnection and facilities leasing;
- (d) an obligation requiring the licensee to publish, in such manner as the Authority may direct, all such information for the purpose of ensuring transparency in relation to –
 - (i) access, interconnection and facilities leasing; or

- (d) declare licensees in the relevant market or market segments, as applicable, that have significant market power, as determined in accordance with subsection (6),¹⁵³⁵ and the pro-competitive conditions applicable to each such licensee;
- (e) set out a schedule in terms of which the Authority will undertake periodic review of the markets and market segments, taking into account subsection (9)¹⁵³⁶ and the determination in respect of the effectiveness of competition and application of pro-competitive measures in those markets; and

- (ii) the provision of electronic communications network services, electronic communications services or any other service offered by the licensee applicable to the relevant market or market segments at issue;
- (e) an obligation to publish, in such manner as the Authority may direct, the terms and conditions for -
 - (i) access, interconnection and facilities leasing; or
 - (ii) the provision of electronic communications network services, electronic communications services or any other service offered by the licensee applicable to the relevant market or market segments at issue which may take the form of a reference offer;
- (f) an obligation to maintain a separation for accounting purposes between different matters relating to -
 - (i) access, interconnection and facilities leasing;
 - (ii) the provision of electronic communications network services, electronic communications services or any other service offered by the licensee applicable to the relevant market or market segments at issue; and
 - (iii) retail and wholesale prices;
- (g) a requirement relating to the accounting methods to be used in maintaining the separation of accounts referred to in paragraph (f);
- (h) such price controls, including requirements relating to the provision of wholesale and retail prices in relation to matters connected with the provision of -
 - (i) access, interconnection and facilities leasing; or
 - (ii) electronic communications network services, electronic communications services or any other service offered by the licensee applicable to the relevant market or market segments at issue;
- (i) matters relating to the recovery of costs and cost orientation and with regard to broadcasting services, the appropriate amount of South African programming, including-
 - (i) music content;
 - (ii) news and information programmes; and
 - (iii) where appropriate, programming of local or regional significance;
- (j) matters relating to the accounts, records and other documents to be kept and made available for inspection by the Authority.

¹⁵³⁵ Section 67(6) provides that the methodology to be used in determining the effectiveness of competition in markets or market segments must include (but is not limited to) an assessment of the following:

(a) When defining the relevant market or market segments the Authority must consider the non-transitory (structural, legal, or regulatory) entry barriers to the applicable markets or market segments and the dynamic character and functioning of the subject markets or market segments;

(b) When conducting an analysis of the effectiveness of competition in the relevant markets or market segments the Authority must take the following factors, among others, into account:

- (i) An assessment of relative market share of the various licensees in the defined markets or market segments; and
- (ii) A forward looking assessment of the market power of each of the market participants over a reasonable period in terms of, amongst others:
 - (aa) actual and potential existence of competitors;
 - (bb) the level, trends of concentration, and history of collusion, in the market;
 - (cc) the overall size of each of the market participants;
 - (dd) control of essential facilities;
 - (ee) technological advantages or superiority of a given market participant;
 - (ff) the degree of countervailing power in the market;
 - (gg) easy or privileged access to capital markets and financial resources;
 - (hh) the dynamic characteristics of the market, including growth, innovation, and products and services diversification;
 - (ii) economies of scale and scope;
 - (jj) the nature and extent of vertical integration;
 - (kk) the ease of entry into the market, including market and regulatory barriers to entry.

¹⁵³⁶ Section 67(9) provides that '[s]ubject to the provisions of this Act, the Competition Act applies to competition matters in the electronic communications industry.'

- (f) provide for monitoring and investigation of anti-competitive behaviour in the relevant market and market segments.¹⁵³⁷

484 Section 67(5) of the EC Act provides that a licensee has significant market power with regard to the relevant market or market segment where ICASA finds that the particular individual licensee or class licensee -

- (a) is dominant;¹⁵³⁸
- (b) has control of essential facilities; or
- (c) has a vertical relationship that [ICASA] determines could harm competition in the market or market segments applicable to the particular category of licence.'

As mentioned elsewhere in this chapter, an ICASA 2008 Discussion Paper with a view to new regulations regarding sports broadcasting rights regulations has mooted a re-vamping of the South African sports broadcasting regulatory framework, in favour of increased implementation of the above competition provisions of Chapter 10 of the Electronic Communications Act with a view to countering a perceived potential for anti-competitive behaviour in the subscription broadcasting market.¹⁵³⁹ Developments in respect of the expected regulations will be watched with interest.

¹⁵³⁷ Section 67(4)

¹⁵³⁸ The term 'dominant' is defined in section 1 of the EC Act as having the same meaning as given to the term in section 7 of the Competition Act 89 of 1998 – see the discussion on abuse of dominance in terms of the Competition Act in the text above

¹⁵³⁹ See the discussion in par 590 *et seq* below

§5 Competition law and new competitions and leagues

485 Finally, in light of the above observations regarding the role of the nature of the governance and organization of sport in respect of the applicability of the various forms of prohibited practices and conduct in terms of the Competition Act, it is germane to briefly examine developments in respect of alternative structuring of sporting competitions in various new sports leagues, which have seen the introduction of structures more akin to the 'North American' model of sports governance in sports that have traditionally followed the European model. The discussion will do so with reference to an example from cricket, namely the Indian Premier League, which is a sanctioned league which was (at least in part) developed as a response to the 'rebel' Indian Cricket League.

486 The 'Indian Premier League' (or IPL), which is sanctioned by the International Cricket Council and commenced its inaugural competition in April 2008, follows a revolutionary model based on the English Premier League Football, the National Football League (NFL) and Major League Baseball (MLB) in the USA. The IPL is set to be the first steps towards domestic Twenty20 leagues in Australia, South Africa, England and India, aimed at producing eight teams (winner plus runner-up per domestic competition) to participate in an ICC-organised Champions League Twenty20 competition (along the lines of the UEFA Champions League in European football), the inaugural edition of which was scheduled to be played in October 2008 (the competition was re-scheduled and is to be played in South Africa in late 2009).

487 The IPL is a franchise model in which corporations and sponsors are able to purchase and manage teams along the lines of the North American professional sports leagues, including the possibility that franchisees' initial limited revenue sources of collecting gate monies and income from in-stadia advertisements could later be supplemented by the listing of teams on stock exchanges for purposes of trading.

According to reports, no salary caps will operate in respect of designated (foreign) players and association football-type player buy-outs between teams will be allowed.¹⁵⁴⁰

The IPL has reportedly already succeeded in its first season in breaking all kinds of records in respect of the amounts of money generated: A consortium of India's Sony Television and Singapore-based World Sports Group secured the broadcasting rights to the league for a ten-year period at a record cost of US\$ 1.026 billion. The winning bids for the eight franchises that would operate within the league were announced recently - following rumours that amongst the bidders were such luminaries as Hollywood film star Russell Crowe and iconic ex-Indian batsman Sachin Tendulkar - and the IPL earned a total of US\$ 723 million (with the most expensive franchise, Mumbai, fetching US\$ 111.9). At the time of writing it has been reported that a number of current South African national cricketers had been confirmed as signing up to the IPL, for undisclosed amounts.¹⁵⁴¹

These developments pose the question of whether the IPL and, especially, its organisational structure, might be the future of the game of cricket on the international stage. As has been observed, the IPL has 'generated an unprecedented level of commercial and sporting interest for a "new" sports property and is arguably the biggest new sporting concept since the re-branding and re-structuring of the top tier of European club football into the "UEFA Champions League' during the 1990s'.¹⁵⁴²

488 Chris Walsh¹⁵⁴³ has examined the IPL as a prime example of a modern development in the organisation of professional sports leagues in the form of sports franchises, reminiscent of the North American model of sports organisation in the major professional leagues. While 'English' sports such as cricket and rugby union have

¹⁵⁴⁰ From an article in the Indian newspaper *The Hindu*, 14 September 2007, available online at <http://www.hindu.com/2007/09/14/stories/2007091461922300.htm> - last accessed on 31 January 2008

¹⁵⁴¹ The following players have been reported as having signed with the IPL: Mark Boucher, Loots Bosman, Herschelle Gibbs, Jacques Kallis, Justin Kemp, Albie Morkel, Shaun Pollock, Ashwell Prince, Makhaya Ntini, AB de Villiers and Graeme Smith.

¹⁵⁴² Chris Walsh (a solicitor with London-based firm OnSide Law - <http://www.onsidelaw.co.uk>), writing in a *World Sports Law Report* online report, Volume 6 Issue 4 (April 2008)

¹⁵⁴³ *Ibid.*

traditionally been organised in terms of the European model¹⁵⁴⁴ and competitions have followed the promotion and relegation system in terms of this model, the IPL has now introduced the franchise model (of a fixed number of franchisees who enjoy a geographical monopoly within a 'closed' professional league, where competitive balance is normally maintained through measures such as salary caps and draft picks of players, as is the norm in the NFL, NBA, NHL and Major League Baseball in the USA). This franchise model has now not only been incorporated into cricket (through the IPL), but already characterises the Super 14 rugby competition played in South Africa, New Zealand and Australia, as well as the officially sanctioned (by the FIA¹⁵⁴⁵) A1 Grand Prix 'World Cup of Motor Sport' Series (which recently saw the completion of its third season and, with the reported involvement of super-manufacturer Ferrari from 2009, is set to reach new heights in terms of its support and interest for motor racing fans).

Walsh observes that there is no limit to the IPL's ambitions, quoting IPL chairman and commissioner Lalit Modi as declaring that 'without a doubt our objective is to be bigger than the English Premier League [football]' (which is the world's single most watched sporting league.¹⁵⁴⁶ While the English Premier League (currently the Barclays Premier League) is a corporation with the twenty competing clubs as shareholders, the IPL's franchise system consists of individual franchisees whose expectation is that the capital value of each franchise will grow as the league matures, revenues increase and the brand develops, which will eventually enable the franchisees to trade their franchise on terms agreed with the franchisor (the IPL) in order to realise its capital growth.¹⁵⁴⁷ As Walsh indicates, under the IPL's financial model, each franchisee will benefit from a share of the central revenues and will have the opportunity to develop, exploit and retain local revenues. The revenue streams are split into central (media, sponsorship and official suppliers) and local (gate, title sponsorship, shirt sponsorship, licensing, merchandising

¹⁵⁴⁴ See discussion of this model of organisation elsewhere, in Louw, A M 'An Anomaly Tolerated by the Law: Examining the Nature and Legal Significance of International Sports Governing Bodies' (2007) 1 *South African Public Law* 211, and the references cited there

¹⁵⁴⁵ *Federation Internationale de l'Automobile*, world governing body for motor sport

¹⁵⁴⁶ It was reported more than half a decade ago that at that time the EPL was broadcast to more than 152 countries and matches were regularly watched by more than half a billion people (or by 1 in 12 people on the planet) – see Dennis Campbell 'United (versus Liverpool) Nations' *The Observer*, 6 January 2002

¹⁵⁴⁷ Walsh *supra*

and match-day promotions) streams, while there are also marketing and other collateral benefits for the franchisees.¹⁵⁴⁸ The prospects for significant return on franchisees' investment appear to be excellent if viewed against the backdrop of the American professional leagues and trends in respect of the value of franchises: The average National Football League (NFL) and National Basketball Association (NBA) franchise values have almost doubled since 2002 to approximately US\$1 billion and approximately US\$350 million respectively.¹⁵⁴⁹

Of course, while the franchise model has certain advantages for franchisees (e.g. the fact that there is no system of relegation and, accordingly, more financial stability and relatively low risk to the investment), there are also disadvantages. Importantly, as Walsh points out, the IPL (as a league with brand new franchises) has faced accusations of greed and lack of tradition, and critics question whether the IPL can be genuinely competitive when players have been auctioned as 'hired guns' to represent cities they may never have even visited.¹⁵⁵⁰ It appears that the success of the IPL as a sporting product will depend to a large extent on whether fans will develop a loyalty to teams that were set up on such an artificial basis¹⁵⁵¹; this is especially true for spectators outside India who have little or no geographical or cultural affiliation to the city-based teams. For these spectators, at least, it appears that the attraction of having the opportunity to watch top international players compete (and sometimes in interesting new permutations, e.g. team-mates in international teams who are now pitted against each other in the IPL matches) would have to trump more traditional factors in respect of the generation of fan loyalty.

489 It was announced on 25 March 2009 that the second season of the DLF-sponsored Indian Premier League (the 2009 competition) is to be played in South Africa from 18 April 2009. The tournament will see 59 matches between the franchises being played at six venues throughout the country. The decision to move the IPL outside India was taken

¹⁵⁴⁸ *Ibid.*

¹⁵⁴⁹ *Ibid.*

¹⁵⁵⁰ *Ibid.*

¹⁵⁵¹ Walsh, *supra*

following security concerns (as originally scheduled, the tournament would have coincided with the Indian general elections in April 2009, and it is assumed that the recent terrorist attacks on the Sri Lankan cricket team in Lahore, Pakistan and the Mumbai attacks of late 2008 have also been a consideration). English and South African cricket authorities were requested to undertake feasibility studies for the hosting of the event, and according to reports it appears that a deciding factor in South Africa's successful bid was the expected weather in South Africa in the months of April and May, as well as the existing infrastructure to host matches and the interest of local fans in the 'Twenty20' form of the game. It was reported that Cricket South Africa is set to be paid in the region of between ZAR 70-90 million for hosting the tournament, and organisers have speculated that spin-offs from the event for the local economy (which are expected to include an estimated 30 000 room nights in local accommodation) will be very lucrative.

Lalit Modi, the IPL commissioner, was quoted as stating that it was expected that the cost of moving the tournament to South Africa would in all likelihood lead to a financial loss for the 2009 leg, but that broadcasting and sponsorship obligations (in the context of the long-term contracts that are in place) precluded cancelling the tournament in its second season.¹⁵⁵²

490 Apart from the implications for individual cricketers of the 'rebel' ICL tournament (discussed elsewhere in this chapter) and the waves created in its wake, it appears likely that the alphabet soup of new professional cricket leagues like the ICL and the IPL – and especially the new role of the franchise model of professional leagues – have the potential to significantly change the game of cricket and its future governance (and, quite possibly, its stature as an entertainment product in the global sports market) – even more so than the effects of Kerry Packer's machinations in the 1970s. Of course, such change is not necessarily unproblematic, as it has (for example) been observed that a tournament such

¹⁵⁵² From a report in *The Mercury*, 25 March 2009

as the IPL poses a significant threat in respect of the potential for match-fixing and corruption.¹⁵⁵³

At the time of writing it has been reported that the domestic cricket authorities in South Africa, Australia and New Zealand were apparently engaged in discussions regarding the establishment of a Twenty20 cricket league (the proposed 'Southern Premier League') between franchises from the three countries, along the lines of the IPL and ICC Champions' League structures. The potential role of competition law in such developments will merit close scrutiny.

¹⁵⁵³ It was reported that before the commencement of the inaugural IPL tournament, Lord Condon, the chairman of the ICC's Anti-Corruption Unit (ACU), had warned a board meeting of the ICC that the IPL raised the greatest fear of corruption within the game since the previous scandals in recent years (referring to the 2000 cricket match-fixing scandal) – see *Sport and the Law Journal* Issue 2. Vol. 16, 'Sports Law Foreign Update' at 40. In April 2009 it was reported that the name of the Commissioner of the Indian Premier League, Lait Modi, was found on a 'hit list' (of targets for assassination) of alleged Indian crime boss Chhota Shakeel. It was reported that it was rumoured that Modi had failed to respond to a demand for money, and that notorious Indian gambling syndicates were involved – from a report by Andrew Donaldson 'Indian cricket league boss found on gangster's hit list', *The Sunday Times*, 5 April 2009.

§6 The common law action for unlawful competition

491 Apart from the specific legislative protection provided by means of the Competition Act, the common law provides protection for unlawful competition under the rubric of the general Aquilian action for delict (*the actio legis Aquiliae*).¹⁵⁵⁴ As has been observed elsewhere in this chapter, the South African law of delict (or 'tort') does not contain a closed list of specific torts; rather, in terms of the Aquilian action, a wide variety of different forms of conduct which unlawfully infringe on subjective rights are actionable. In the context of unlawful competition, such conduct must be connected in some way with competition between business entities. Van Heerden & Neethling¹⁵⁵⁵ have described the concept of unlawful competition as 'nothing more than a collective term for dissimilar acts (such as damage to property, defamation, misuse of a patent, interference with a contractual relationship, passing off, injurious falsehood, boycott and breach of a statutory duty) which, to an extent at least, infringe different interests, with the common qualifications that they are all wrongful and in some way connected with the competitive struggle.'

492 This general action for unlawful competition has enjoyed recognition in South African law since as early as 1922, when the following was observed in the case of *Matthews v Young*:¹⁵⁵⁶

'In the absence of special legal restrictions a person is without doubt entitled to the free exercise of his trade, profession or calling ... But he cannot claim an absolute right to do so without interference from another. Competition often brings about interference in one way or another about which rivals cannot legitimately complain. But the competition ... must itself remain within lawful bounds. All a person can, therefore, claim is the right to exercise his calling without unlawful interference from others. Such an interference would constitute an *iniuria* for which an action under the *lex Aquilia* lies if it has directly resulted in loss.'

¹⁵⁵⁴ See the discussion in par 491 *et seq* above

¹⁵⁵⁵ Van Heerden & Neethling *Unlawful Competition* Butterworths 1995 at 4

¹⁵⁵⁶ 1922 AD 492 at 507

In light of the court's recognition in *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd*¹⁵⁵⁷ that 'the law of South Africa recognizes and grants a general action in the case of unlawful competition, based on the principles of the *lex Aquiliae*', the courts have applied the general principles of Aquilian liability¹⁵⁵⁸ to a number of forms of unlawful competition, including passing off, misrepresentation as to a rival's own performance, acquisition and use of a competitor's trade secrets, copying and adoption of a rival's performance, competition in conflict with statutory provisions and boycott.¹⁵⁵⁹ No more will be said here regarding the common law action for unlawful competition, and the reader is referred to specialized texts on the subject.

493 The common law action for passing-off,¹⁵⁶⁰ which resorts under the Aquilian action for unlawful competition, is best illustrated in the sporting context by discussion of the 1994 judgment of the Transvaal Provincial Division of the High Court in the case of *Federation Internationale de Football Association (FIFA) & Others v Bartlett & Others*.¹⁵⁶¹ In this matter FIFA, world controlling body for football, along with a number of foreign companies involved in the licensing of trade marks, emblems and other intellectual property associated with the World Cup, sought relief against the respondent, Bartlett, who had designed a trade mark in 1965 which consisted of the words 'world cup' superimposed on a map of the world device. In 1969, Bartlett had registered the trade mark in the South African trade marks registry, in class 25 (for use in respect of 'men's clothing and footwear') and in class 28 (in respect of 'soccer equipment'). In 1989

¹⁵⁵⁷ 1981 (2) SA 173 (T), at 186. See also *Schultz v Butt* 1986 (3) SA 667 (A); *Dun and Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau (Cape) (Pty) Ltd* 1968 (1) SA 209 (C); *William Grant and Sons Ltd v Cape Wine and Distillers Ltd* 1990 (3) SA 897 (C); *Aetiology Today CC t/a Somerset Schools v van Aswegen* 1992 (1) SA 807 (W)

¹⁵⁵⁸ See the discussion of the requirements for the Aquilian action in the section on liability for sports injuries in par 438 *et seq* above

¹⁵⁵⁹ Van Heerden & Neethling *supra* at 63 (and the cases quoted there)

¹⁵⁶⁰ See also the discussion of the protection of athletes' image rights in par 523 *et seq* below. Another sports-related passing off action was heard by the Supreme Court of Appeal in the case of *Premier Trading Company (Pty) Ltd and Others v Sportopia (Pty) Ltd* (218/97) [1999] ZASCA 48 (1 June 1999), which involved a claim relating to imported roller skates.

¹⁵⁶¹ 1994 (4) SA 722 (TPD). See also discussion in par. 575 *et seq* below of the currently pending (at the time of writing) matter of *FIFA v Metcash Trading Africa (Pty) Ltd*, Transvaal Provincial Division of the High Court, Case No. 53304/07

Bartlett assigned the trade marks with goodwill to a company of which he was a director, and also afforded the right to exploit the trade marks between June 1993 and December 1994 to a sportswear marketing and manufacturing company.

The applicants alleged that Bartlett and the other respondents had embarked on a campaign of unlawful conduct in South Africa which was calculated to cause serious irreparable damage to them. It was alleged that the respondents were, by their conduct and in certain correspondence, making misrepresentations to the effect that they held the licensing rights in South Africa in respect of World Cup USA 1994, and that Bartlett was attempting to extract commission and royalty payments from the applicants' sponsors and sub-licensees. The applicants sought (*inter alia*) the following relief:

- (ii) An interdict based on passing-off and unlawful competition;
- (iii) An order in terms of section 18 of the (then applicable) Trade Marks Act¹⁵⁶² to the effect that the words 'world cup' contain 'matter common to the trade or otherwise of a non-distinctive character'. The applicants sought an order to the effect that an amendment be made of the registered trade marks by adding a disclaimer stating that '[r]egistration of the trade mark shall give no right to the exclusive use of the words "world cup" separately and apart from the mark'; and
- (iv) (in the alternative), an order for the expungement of the Bartlett trade marks from the trade marks register on the grounds of non-use in terms of the (then applicable) section 36(1)(b) of the Trade Marks Act.

494 The court, in evaluating the evidence in respect of the claim based on unlawful competition, evaluated the state of South African law at the time with regard to the

¹⁵⁶² Act 62 of 1963. This Act was replaced by the Trade Marks Act 194 of 1993

practice of character merchandising. The same court had in 1981, in the case of *Lorimar Productions Inc & Others v Sterling Clothing Manufacturers (Pty) Ltd*,¹⁵⁶³ held that character merchandising was not so well known in South Africa that the court could 'without proper evidence in this regard assume that the man in the street will have any knowledge thereof'. In *Bartlett*, the court by way of Joffe J held that markets may have changed in the years since *Lorimar*, and that a mass of evidence was available to conclude that character merchandising had taken hold in South Africa and that the man in the street would have knowledge thereof and would make the link between the merchandising property and the events or circumstances which made it famous (and that such link is established by licensing or a license).¹⁵⁶⁴ The court described the practice of character merchandising as follows:

'Character merchandising is defined as being the business of merchandising popular names, characters and insignia in order to enhance the sales of consumer products in relation to which such names and characters are used ... The association of a famous person or character with a consumer product can boost that product's sales considerably. The fame and popularity of the name or character in question enhances the desirability of the product from the consumer's point of view. The association between the name or character, which can be referred to as the 'merchandising property', and the consumer product is usually created by depicting the merchandising product prominently on the product. A typical merchandising product is the well-known cartoon character Mickey Mouse. As the proprietor of the merchandising property has already invested substantial time and money in developing and popularizing such character, and it is the fame and desirability of the merchandising property which will promote the sale of the goods to which it is applied, the proprietor of the merchandising property charges a royalty of license fee for the use of his merchandising property. The royalty is payable in terms of a license agreement under which the owner of the merchandising property authorizes the licensee to utilize the merchandising property in relation to his goods ... It appears that the

¹⁵⁶³ 1981 (3) SA 1129 (T)

¹⁵⁶⁴ At 738B of the *Bartlett* judgment

consumer makes a connection and an association between the character and its creator or owner and the products featuring the character.¹⁵⁶⁵

The court continued to hold as follows:

'Although not constituting character merchandising in the strict sense, licensing the use of properties such as the Barcelona Olympic Games logo, the Olympic rings device, the Davis Cup tennis logo and logos associated with other major international sporting events, such as the World Cup soccer tournament, can be regarded as character merchandising in the broad sense. [W]hen an event like the World Cup soccer tournament is in the public eye, use of the insignia symbolizing such an event in relation to clothing and similar goods will cause the public to believe that such goods have a trade connection with the events symbolized by the insignia. A link is established between the goods featuring the merchandising property and the person who or entity which is the original source of the material which launched the merchandising property on its path to fame and fortune.'¹⁵⁶⁶

On this basis, the court found that the respondents' character merchandising conduct *in casu* constituted the delict of passing off, with reference to the definition of passing off as formulated in the earlier case of *Capital Estate and General Agencies (Pty) Ltd & Others v Holiday Inns Inc & Others*:¹⁵⁶⁷

'The wrong known as passing-off consists in a representation by one person that his business (or merchandise, as the case may be) is that of another, or that it is associated with that of another, and, in order to determine whether a representation amounts to a passing-off, one enquires whether there is a reasonable likelihood that members of the public may be confused into believing that the business of the one is, or is connected with, that of another.'

¹⁵⁶⁵ At 736E-J of the *Bartlett* judgment

¹⁵⁶⁶ At 737B-D of the judgment

¹⁵⁶⁷ 1977 (2) SA 916 (A) at 929C

The court reiterated that the unlawfulness of passing off, as a form of wrongful competition, is to be found in the fact that 'it results, or is calculated to result, in the improper filching of another's trade and an improper infringement of his goodwill and/or because it may cause injury to the other's trade reputation.'¹⁵⁶⁸ On the basis of this the court held that the respondents were guilty of passing off and unlawful competition, sufficient to grant the order claimed by the applicants.¹⁵⁶⁹

'The evidence clearly established that the applicants and their licensees have a reputation and goodwill in South Africa. This is established by the fact that various prominent retailers ... are anxious to obtain and pay for licenses from the applicants for the purpose of manufacturing and marketing clothing bearing the World Cup insignia. Furthermore, by reason of the fact that applicants are engaged in character merchandising, it is sufficient to create in the public's mind a link between the merchandising product and the applicants. As a result of the conduct of [respondents] the applicants are likely to suffer injury or damage. Firstly, the applicants and their licensees are likely to lose revenue and, secondly, because of the uncertainty created by their conduct, potential licensees are refraining from entering into licensing agreements with the applicants, thereby depriving the applicants of income.'

Accordingly, the court made an order prohibiting the respondents from using the words 'world cup' together with the words '1994' and/or '94' and/or 'America' and/or 'USA'. The court's further findings regarding the respondents' use of the registered trade marks and of copyright infringement will not be discussed here.

¹⁵⁶⁸ With reference to *Brian Boswell Circus (Pty) Ltd & Another v Boswell Wilkie Circus (Pty) Ltd* 1985 (4) SA 466 (A)

¹⁵⁶⁹ At 739I – 740B of the judgment

PART IV. SPORT AND COMMERCE

§1 Introduction: The Role of Intellectual Property Rights in Sport

495 The protection of intellectual property has been inextricably interwoven with the development of professional sport as an industry in all jurisdictions. Probably the single biggest driving force behind the growth of a global sports industry was the development of television as a vehicle to bring matches and events to the masses. The sports broadcasting and advertising industries have poured vast amounts of money into sport in different parts of the world, and this phenomenon characterized development of the industry everywhere from the middle of the 20th century. From humble beginnings (such as the annual fee of US\$2 500 the Mutual Broadcasting System paid to the National Football League in the USA in 1939 for the right to show its championship and broadcast commercials¹⁵⁷⁰) this industry simply exploded to the point of the astronomical amounts that make up today's sports broadcasting market. A couple of examples from football and cricket: In English football, the entry of BSkyB into the market of broadcasting Premier League matches (in 1992) has facilitated a phenomenal increase in the TV rights fees. In the 15 year period between 1986 and 2001, the rights fee increased from £6.3 million for a two year period to £1.1 billion over three years (or from £3.1 million to £367 million per year).¹⁵⁷¹ It was announced on 1 March 2006 that Indian sports and media agency Nimbus Communications Limited had concluded a deal with the Board of Control for Cricket in India to acquire the global media rights to all international and domestic cricket played in India until 2010. This agreement is the biggest commercial deal in the history

¹⁵⁷⁰ Compare this figure to the NFL's 8-year national television contract signed in 1998 worth \$17.6 billion – see John Wolohan in Blackshaw & Siekmann (eds.) *Sports Image Rights in Europe* T.M.C. Asser Press 2005 at 347

¹⁵⁷¹ See Geoff Walters *The Professional Footballers' Association: A Case Study of Trade Union Growth* Football Governance Research Centre, Birkbeck, University of London 2004 at 17.

According to recent reports (see *The Observer*, 12 February 2007), at the time of writing BSkyB and Setanta Sports are reportedly paying £ 1.7 billion to hold the exclusive rights to screen live matches of the English Premiership in Britain for the next 3 years. Broadcasters in 208 other countries have reportedly recently doubled their payments to secure English Premiership rights, to a combined £ 625 million – my sincere thanks to Ben Challis for providing this information.

of cricket: Nimbus prevailed over media giants such as ESPN Star Sports and Sony Entertainment Television, and paid US\$ 612 million for the media rights.¹⁵⁷²

496 Rather ironically, recent years have seen the media branching out into the role of participants, as broadcasting corporations and networks have purchased clubs and teams.¹⁵⁷³ Not to be outdone, sports teams have entered the broadcasting industry to corner an even bigger slice of the economic pie.¹⁵⁷⁴ It is now cliché to remark that sport has become big business.¹⁵⁷⁵ The global sports industry is alive and kicking largely due to television.

497 One of the clearest (and earliest) examples of the interweaving of intellectual property rights and the development of professional sport as an entertainment industry, which dates from the middle of the 20th century, involves the development of protection for the individual's likeness and aspects of the persona in the laws of the United States of America. Significantly, the development of a 'right of publicity' had its origin in the 1953 case of *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*,¹⁵⁷⁶ where the term was coined by Judge Jerome Frank. The *Topps* case involved exploitation of the commercial value of the likenesses of baseball players in the then burgeoning baseball card industry. A distinct right of publicity is now recognized (either in terms of statute or under the

¹⁵⁷² See the report available online on the web site of the Asser Sports Law Centre at <http://www.sportslaw.nl> (last visited 8 March 2006).

¹⁵⁷³ Rupert Murdoch (Fox, Sky and Star TV networks) has holdings in British and German football clubs, major league baseball teams in the United States and rugby league clubs in Australia. The Italian television magnate Silvio Berlusconi is the principal owner of AC Milan football club, and he has a major stake in Sportal, the Internet sport company. Canal Plus, the French television station, owns the Paris St. Germain football club. See Mark Marqusee 'Sport as Apocalypse', available online at <http://www.frontlineonnet.com/fl1716/17161100.htm>. See also Downward, P. and Dawson, A. *The Economics of Professional Team Sports* Routledge, London & New York 2000, at 37.

¹⁵⁷⁴ E.g. Manchester United football club and the New York Yankees baseball franchise, both of which have entered the Internet and broadcasting business. See, in general, section 2.5 of the final report of the Sports Directorate of the Netherlands Ministry of Health, Welfare and Sport, entitled *The Balance Between the Game and the Money* (2000).

¹⁵⁷⁵ Philip Knight, founder of the Nike Corporation, characterised sport in the mid-1990s as 'the dominant entertainment in the world'. Chris Gratton & Peter Taylor *Economics of Sport and Recreation* E&FN Spon 2000, at 3) remarked the following in 2000:

'Sport is now recognised as an important sector of economic activity, part of the increasingly important leisure industry which accounts for over a quarter of all consumer spending and over 10 per cent of total employment in the UK, and brings in over £20 billion per annum in foreign exchange. Sport is not the largest sector of the leisure industry, but it is among the fastest growing.'

In respect of commercialisation of sporting competition, Downward and Dawson (*The Economics of Professional Team Sports* Routledge, London & New York 2000, at 36-37) identify sports leagues' main sources of revenue (historically) as gate receipts, merchandising, sponsorship, the sale of TV rights, transfer fees and the sale of match schedules to the gaming industry.

¹⁵⁷⁶ 202 F.2d 866 (2d. Cir.)

common law) in more than 30 U.S. states. Other countries and jurisdictions have been less forthcoming in providing similarly strong forms of protection against unauthorized exploitation of the likeness, name, etc of celebrities or sports stars, with the result that the protection that exists is often to be found through application of other, more general, principles of law. More will be said on this in the section on image rights below.

498 The phenomenal worldwide growth of professional sport as an entertainment industry has increasingly emphasized a need for the protection offered by intellectual property statutes and common law rights. In South Africa intellectual property protection is mainly based in statute. The most important statutory instruments for current purposes are the Trade Marks Act 194 of 1993 and the Copyright Act 98 of 1978.¹⁵⁷⁷ The common law plays a residual role in this regard, for example by means of the common law action based on unlawful competition (e.g. 'passing off', misrepresentation, leaning on, etc.). A combination of actions is possible.¹⁵⁷⁸

499 Professional sport, as part of the wider entertainment industry, of course generates a variety of intellectual property that is worthy (and often in constant need) of protection by the relevant rights holders. Such property, being commercially valuable, is often exploited for commercial gain by unscrupulous persons or commercial enterprises. In order to counter such practices, it is important for South African law to provide efficient legal relief and protection in this regard. In fact, South Africa is currently considered to possess a world-leading body of legislative protection that was developed especially due to the exigencies of the professional sports industry. The best example is the Merchandise Marks Amendment Act 61 of 2002, which was passed to deal with the

¹⁵⁷⁷ Other specifically-applicable statutory instruments that may play a role in the protection of intellectual property are the Patents Act 57 of 1978 and the Designs Act 57 of 1967

¹⁵⁷⁸ Compare, however, the judgment of Schutz JA in *Payen Components SA Ltd v Bovic Gaskets CC & Others* 1995 (4) SA 441 (A), where the court warned against the use of actions based in unlawful competition as 'catch-all' remedy in cases that should rather resort under the specific headings of actions based in the protection afforded to intellectual property by the relevant statute (at 454):

'In my opinion a Court should be wary of allowing the sharp outlines of these two established branches of the law of unlawful competition, evolved through long experience, to be fudged by allowing a vague penumbra around the outline. Unlawful competition should not be added as a ragbag and often forlorn final alternative to every trade mark, copyright, design or passing off action. In most such cases it is one of the established categories or nothing.'

practice of ambush marketing in the run-up to the ICC Cricket World Cup 2003.¹⁵⁷⁹ More will be said later specifically about ambush marketing.¹⁵⁸⁰

Predictably, the very popularity of professional sport as an entertainment industry has contributed to the value of the intellectual property generated by it. As one author has explained in the context of the image rights of athletes:

'Commercial entities continue to view sports stars as compatible with their goods, services or products and pay handsomely for these individuals to be associated with them ... This is attributable to the prominent position of sport in today's society and the largely unreplicated loyalty that sports fans display towards particular sports and teams. Consequently, investment in the industry is a particularly attractive proposition for commercial entities seeking to acquire a financial and marketing advantage over their competitors.'¹⁵⁸¹

Sports broadcasts are, next to films, the most popular programmes on television, and exclusive rights to sports broadcasts have proven to be the ideal tool to commit consumers to either pay-TV or public broadcasting channels.¹⁵⁸² In the case of free-to-air television, access to sports broadcasts plays an important role in increasing advertising revenues. The potential commercial value of such property has ensured that not only have traditional forms of intellectual property protection become more and more relevant, but that issues of public interest are also increasingly coming under scrutiny. In the context of sports broadcasting, examples are the issue of public access to events (e.g. the listing of events of national interest and restrictions in respect of limitation of access by broadcasters through the sale of rights of exclusivity)¹⁵⁸³ and competition law

¹⁵⁷⁹ Further ambush marketing controls are contained in the Safety at Sports and Recreational Events Bill (see section 39; sections 19 and 22), which, at the time of writing, is still being debated in Parliament. Further special measures are contemplated by means of designated legislation regarding the 2010 FIFA World Cup (e.g. see the 2010 FIFA World Cup South Africa Measures Act 12 of 2006).

¹⁵⁸⁰ See par 562 *et seq* below

¹⁵⁸¹ Gelder, P 'Image is Everything: An Analysis of the Legal Protection of the Image of Sports Athletes' *International Sports Law Journal* 2005/1-2 25

¹⁵⁸² See van der Wolk, A 'Sports Broadcasting: Fair Play from a EU Competition Perspective' *International Sports Law Journal* 2006/1-2 84

¹⁵⁸³ In respect of broadcasting rights regulation in South Africa, see par 585 *et seq* below

scrutiny of the practice of the collective selling of broadcasting rights by teams and franchises within sports leagues. Just as the advent of television in the latter half of the 20th century has probably been the most important driving force behind the phenomenal growth of the modern global sports industry, the influx of money associated with the involvement of television and the broadcasting industry has exposed this activity to increased scrutiny by public regulators and the law.

500 Commercially valuable intellectual property generated by the professional sports industry includes a plethora of different forms, including television, satellite and internet (and more recently mobile phone) broadcasts of games and events, recordings of highlights packages of games and events, commercially exploitable photographs and images of players and teams, trade mark and copyright in players' or teams' kit, logos and emblems, brand names in sporting franchises, athlete or team domain names, the content of fixture lists and betting sheets, compilations of player statistics, supporters' merchandise, stadium naming rights, etc.

The following discussion will focus briefly on a few selected issues of relevance regarding the commercialization of sport in South Africa and specifically also the exploitation of intellectual property in the sports context, with a view to providing an overview of the legal protections available in this jurisdiction to rights holders and interested parties.

§2 Intellectual property protection in South Africa: The applicable legislation¹⁵⁸⁴

I Copyright

501 Copyright is a creature of statute in South Africa, as all copyright is regulated by the Copyright Act 98 of 1978 (as amended).¹⁵⁸⁵ Once the requirements for a copyright as laid down in the Act are met, the copyright subsists automatically and no formal procedures are required for registration. In order to qualify for copyright protection, a work must first be one that is mentioned in the Act. For this purpose the Act recognises certain categories or subjects of copyright. The work itself must then qualify in a number of respects, namely propriety, originality, it must be in material form and the author must be a qualified person. All these requirements are dealt with in the Act, and the reader is referred to the Act and specialised works on the subject.¹⁵⁸⁶

502 South African copyright legislation borrowed heavily from the English law statutes to assist in its development. Prior to the first copyright Act being passed in South Africa, the Roman-Dutch law was relied upon. This common law base was repealed by the 1916 Copyright Act, which was modeled on the equivalent English legislation. The 1916 Act provided, simply, that the British Act applied in South Africa. When the British legislation was amended and updated by means of the 1956 Copyright Act, South Africa again followed suit by repealing the South African 1916 Act by means of the 1965 Copyright Act (which was again largely based on the 1956 English Act). The 1965 Act was repealed by the current Copyright Act of 1978. The 1978 Act drew on the 1965 Act to a fair degree, but is also different in some substantial respects, and thus it reflects a new independent course for South African intellectual property law. The 1978 Act has since been subsequently amended to reflect changes in South African copyright law (most

¹⁵⁸⁴ I wish to thank Chris Schembri and Tanya Woker for kindly allowing me to reproduce sections of student notes compiled by them for purposes of providing an overview of the applicable intellectual property law regimes in terms of the legislation (for this section)

¹⁵⁸⁵ See section 41(4) of the Act

¹⁵⁸⁶ E.g. Dean, O H *The Handbook of South African Copyright Law* Juta & Co (looseleaf)

significantly by means of the Copyright Amendment Act 125 of 1992, which introduced concepts such as computer programmes and programme-carrying signals as independent copyright-protected works).

503 The applicable copyright regime in terms of the Act will not be discussed here, and the reader is referred to specific provisions of the Act for more information on aspects such as first ownership of copyright,¹⁵⁸⁷ assignment and licensing of copyright,¹⁵⁸⁸ the direct and indirect forms of infringement of copyright,¹⁵⁸⁹ remedies for infringement¹⁵⁹⁰ (including the author's moral rights¹⁵⁹¹) and exemptions to infringement¹⁵⁹² (and specifically the 'fair dealing' provisions).¹⁵⁹³

II Patents

504 Similarly to copyright, the law regarding patents is also a creature of statute. It is currently regulated by the Patents Act 57 of 1978. Prior to this, patents were regulated by the Patents Act 37 of 1952, This Act was repealed by the 1978 Act, but the 1978 Act stipulated that all patents granted under the 1952 Act would still fall to be determined by that Act, thus the 1952 Act still has limited application.

No more will be said here regarding patent law, as this form of intellectual property has limited application to sport, and the reader is referred to specialised works on the subject.

¹⁵⁸⁷ Section 21 of the Act

¹⁵⁸⁸ Section 22

¹⁵⁸⁹ Section 23 of the Act

¹⁵⁹⁰ Section 24

¹⁵⁹¹ Section 20

¹⁵⁹² Sections 12-19B of the Act

¹⁵⁹³ Section 12

III Trade marks

505 Two Acts apply to trade marks: the Trade Marks Act 62 of 1963, and the Trade Marks Act 194 of 1993. Section 3 of the 1993 Act states that the 1963 Act will apply to all applications and proceedings commenced before the new Act came into force. The existing law will be used to determine the validity of an entry in the Register of Trademarks, where such entry existed at the date of commencement of the new Act (1 May 1995). The new Act applies in all other respects after this date.

The purpose of the new Act was to bring South African trademark law into line with EC law and UK law because these jurisdictions are important trading partners of South Africa. Changes were thus effected using GATT (the General Agreement on Trade and Tariffs) and other internationally accepted trademark provisions.

506 A trade mark is defined in the 1963 Act as being a device, band, heading, label, signature, word, letter, numeral, or any combination thereof. A device is further defined as being any visual representation or illustration capable of reproduction on a surface, whether by printing, embossing, or any other means (and containers are also registerable as trademarks). The 1993 Act contains a definition which is to the same effect, but is also wider, as it includes a configuration, pattern, ornamentation, colour etc.

The definition of a trade mark in terms of its function under the 1963 Act was that it is used to indicate a connection in the course of trade between goods and services and someone having the right to use the mark, and it distinguishes goods and services from the same kind of goods and services associated with other people. This means that a trademark is registerable in respect of both goods and services, and that a trademark must actually be used in the course of trade. If a trademark is not used for a period of at least five years (in terms of Section 36 of the old Act, and Section 27 of the new Act) an aggrieved person may make application for the rectification of the Register, which means that the trademark will be removed from the Register. Further, if a trademark is registered with no intention on the part of the applicant to use the mark in relation to

goods and services for which it is registered, and no such use has taken place, such trademark may be removed from the Register by rectification.

Under the 1993 Act, a trademark is defined as a mark used by a person in relation to goods and services for the purpose of distinguishing the goods and services from the same kind of goods and services connected in the course of trade. The 1993 Act thus defines a trademark in terms of its distinguishing function only, i.e. a trademark must have the ability to distinguish. The origination function, where a trademark is used to identify the maker of goods or the supplier of services, has fallen away. Practically, however, the effect of the two sections will be the same.

507 The trade marks registry resorts under the Companies and Intellectual Property Registration Office (CIPRO) which, in turn, resorts under the government Department of Trade & Industry. All applications for trademarks, all trademarks and the names and addresses of the proprietors and registered users, with the date of registration and the date of expiry, must appear in the Register. The Register is a public document which is open to public inspection.

Under the 1963 Act the Register was divided into Parts A and B. Part B allowed for the registration of marks that did not qualify for registration in Part A of the Register, because they were not distinctive, but through use, they would acquire the necessary distinctiveness for registration in Part A. Part B would afford limited protection to the mark until it was capable of registration in Part A, whereafter it would acquire full protection. Section 10 of the 1963 Act defined the conditions for registration in Part A (i.e. that a trademark must contain or consist of a distinctive mark; a mark that is reasonably required for use in the trade is not registerable; and the name of a company, individual or firm which is not represented in a special manner is not registerable unless proven to be distinctive). Section 11 of the 1963 Act laid down the requirements for a Part B registration, i.e. that the trademark shall be capable of becoming registered in Part A, through use.

508 The basic requirement for registration is thus that the trademark must be distinctive, but this term bears a special meaning in terms of the Act. The 1963 Act implied that the mark itself must have some inherent ability to distinguish (e.g. an invented word which is unusual has an inherent ability to distinguish, because it is unique, and thus would be registerable).

A mark may also acquire distinctiveness through use (i.e. if it has less inherent ability to distinguish, but still has a small amount of ability to distinguish, this small inherent ability to distinguish may be supplemented by distinctiveness acquired by use). If the mark has no inherent ability to distinguish, however, no amount of distinctiveness acquired by use would make it registerable under the 1963 Act. Thus for registration under the 1963 Act, a trademark must either have an inherent ability to distinguish, in which case it qualifies for registration in Part A of the Register, or it must have a small inherent ability to distinguish, and an ability to acquire distinctiveness by use, in which case it would qualify for registration in either Part A or Part B, depending on the level of distinctiveness already obtained by use.

509 Under the 1993 Act, the Trade Marks Register is now combined into one and there is no division into Parts A and B. Accordingly, there is one set of requirements for registrability, which are set out in Section 9 of the Act. Section 9 provides that a trademark may be registered if it is capable of distinguishing the goods and services of a proprietor from the goods and services of another. A trademark is capable of distinguishing if it is inherently capable of distinguishing or if it is capable of distinguishing because of prior use of the mark.

510 The new Act has removed the requirement of the mark always having some inherent ability to distinguish and simply considers whether the mark is distinctive in fact. A mark that has no inherent ability to distinguish, but has become distinctive by use will now thus qualify for registration. Because there is no longer a Part B to the Register, marks which have not yet been used in trade must have an inherent ability to

distinguish, otherwise they cannot be registered. It is thus no longer possible to register an indistinctive mark on the basis that it may become distinctive through use.

511 In respect of infringement of a trade mark, only the provisions of the 1993 Act are relevant since this is the Act that will, after 1 May 1995 (the commencement date of the new Act) determine all infringement proceedings. Infringement is regulated by Sections 33 and 34 of the 1993 Act.

Section 33 provides that no trademark infringement action may be brought under Section 34 if the trademark is not registered under the Act (this would include registration under the 1963 Act as well). For the infringement of such trademarks one can still bring an action at common law ie passing off. In terms of Section 33, the fact that a trademark is registered does not mean that one cannot commit the delict of passing off by its use, and one can still bring an action for passing off against a registered trademark.

512 Sections 34(1)(a),(b) and (c) spell out the three types of infringing situations:

Section 34(1)(a) covers the traditional situation where someone without authorization uses an established trademark for his own goods and services. The elements that have to be established are:

- unauthorized use;
- in the course of trade;
- in relation to goods and services in respect of which the trademark is registered;
- of an identical mark, or
- of a mark so nearly resembling it that it is likely to deceive or cause confusion.

This applies only where the goods and services are the same, but no actual deception or confusion is required: the court will engage in a notional enquiry as to whether the marks are confusingly or deceptively similar.

Section 34(1)(b) goes further than the provisions of the 1963 Act; it prohibits the use of a mark which is identical to or similar to a trademark in respect of goods and services which are so similar to the goods covered by the registered trademark that there is a likelihood of deception or confusion. The 1963 Act limited the protection to the same goods and services, and in cases involving different categories of goods and services, only an action in common law was available (passing off).

The interpretation of 'similar' is that the marks must be similar in use, so the court will look at conditions in the marketplace and surrounding circumstances in the trade etc,

Section 34(1)(c) deals with trade mark dilution, which has its origins in the common law delict of passing off (in terms of which one cannot filch someone's trade by imitating a mark which that person uses to identify his goods). This common law right has been incorporated into the 1993 Act, in Section 10(17), which prevents the registration of a trademark which would cause dilution of an already registered trademark (while S34(1)(c) makes the use of such a mark an infringement). The elements are as follows:

- the marks must be used in respect of goods and services, but these do not have to be the same or similar, use on any goods or services will suffice;
- the two marks need only be similar, not identical;
- the registered trademark must be well-known in the Republic;
- the use of the offending mark must be likely to take unfair advantage of, or be detrimental to the distinctive character or repute of the registered trademark;
- the use must be in the course of trade; and
- confusion or deception is not essential.

If a trademark is used too often in relation to too many goods and services it becomes 'diluted' and loses its ability to distinguish the original product. The dilution may also taint the mark if it is associated with inferior products.

Section 34(2) of the 1993 Act covers all the situations where the use of a registered trademark without permission does not amount to infringement (i.e. exclusions to the infringement provisions).

513 The remedies for infringement are contained in section 34(3), and are as follows:

- (1) an interdict;
- (2) an order for the removal of the infringing mark, or for the delivery up of the goods to which the trademark is attached, if the trademark is inseparable from these goods;
- (3) damages;
- (4) in lieu of damages; an award of reasonable royalties. This provision was inserted because of the difficulties in proving damages in trademark infringement cases. Here the court asks what amount would have been payable by a notional licensee exercising the rights that the infringer exercised. This amount then becomes payable to the plaintiff. Such reasonable royalties thus differ from the reasonable royalties found in the Copyright Act,¹⁵⁹⁴ where reasonable royalties provide a means of calculating damages only, and is not the final amount actually payable;
- (5) the court may also set up a special enquiry to assess damages and may determine the terms of reference of this enquiry.

¹⁵⁹⁴ Section 24(1A) of the Copyright Act 98 of 1978

514 Finally, some remarks on the protection of well-known foreign trademarks, which are unregistered in South Africa. The 1963 Act provided no protection for such marks.¹⁵⁹⁵ With respect to registrability of these marks under the 1963 Act, there were contrary indications. The Registrar exercised his discretion and refused to register the American 'Burger King' trademark in South Africa, while in another case the Registrar allowed the registration of the foreign 'Victoria's Secret' mark.

This position was remedied by section 35 of the 1993 Act, which has brought South African law into line with the requirements of the Paris Convention. According to section 35, the trademark must be well-known in the Republic; it must be the mark of a national of a Convention country, or of a person who is domiciled in a Convention country, or who has a real / effective commercial or industrial establishment in a Convention country; the trademark need not be registered in South Africa, and the proprietor need not carry on business or have any goodwill in South Africa.

In terms of section 35(3) the proprietor of such a trademark may restrain the use in the Republic of a trademark which constitutes (or an essential part of which constitutes) a reproduction, imitation or translation of the well-known trademark in respect of goods and services which are identical or similar to the goods and services for which the trademark is well-known, and such use is likely to cause deception or confusion.

515 For further information regarding trade mark protection in South Africa the reader is referred to expert works on the subject.¹⁵⁹⁶

¹⁵⁹⁵ *Tie Rack plc v Tie Rack Stores (Pty) Ltd* 1989(4) SA 427 (T). In this case, Tie Rack shops were established widely in the UK and the trademark had reputation and goodwill there. The trademark also had recognition and a reputation in South Africa. The overseas proprietor had never actually traded in South Africa or established goodwill here. The Court held that if a mark is not registered in South Africa, is not used here and has no trading goodwill, then it can be used in South Africa by someone else other than the overseas proprietor. The conclusion was that the overseas proprietor had no protectable rights in South Africa.

¹⁵⁹⁶ For example, Webster, C E & Morley, *G E Webster and Page: South African Law of Trade Marks, Unlawful Competition, Company Names and Trading Styles* 1997 (looseleaf)

IV The Counterfeit Goods Act, 1997

516 Counterfeit goods (often referred to as pirate merchandise) are of course a major source of concern for intellectual property rights holders, specifically in the sports industry. Major events, especially, often function like a magnet to those who import and trade in goods (specifically counterfeit sports kit and memorabilia) related to well-known teams and athletes. This problem is especially prevalent also in South Africa, which has its fair share of counterfeit goods that are manufactured in the country or imported from elsewhere (e.g. Asia), and upcoming major events such as the 2009 FIFA Confederations Cup, the 2009 DLF Indian Premier League Cricket tournament and the 2010 FIFA World Cup South Africa™ promise to pose significant challenges in this regard.

517 Protection for intellectual property rights holders in respect of counterfeit goods comes in a variety of forms (which will only be mentioned here), and include the following:

- Copyright infringement claims in terms of the Copyright Act 98 of 1978 (section 27 of this Act deals with criminal liability for copyright infringement);
- Trade mark infringement claims in terms of the Trade Marks Act 194 of 1993;
- Common law action in terms of passing off; and
- Possible procedures in terms of customs and excise legislation (i.e. whereby intellectual property rights holders can record their rights with customs officials for the purpose of detaining of suspect goods upon importation).

Specific protection is to be found in the Counterfeit Goods Act 37 of 1997 (as amended), which provides that dealing in counterfeit goods is unlawful (provided that the goods give

rise to copyright or trade mark infringement). The Act provides wider protection than the Copyright and Trade Marks Acts: It penalises a wider range of conduct than these other statutes; it makes the dealing in counterfeit goods a criminal offence subject to investigation and prosecution by the South African Police Services and the criminal justice system; it provides wide-ranging search and seizure powers to the police services and designated inspectors acting under search and seizure warrants; and, apart from severe penalties, the Act also makes provision for the delivery-up of offending goods even in cases where there is no criminal conviction.

518 The Act protects copyright and trade mark rights holders, as well as 'interested persons' (i.e. who have an interest in goods bearing or embodying such rights, referred to as 'protected goods'). The Act also provides protection for the holder of rights to use a specific mark in terms of a notice issued in terms of section 15 of the Merchandise Marks Act,¹⁵⁹⁷ which others are prohibited from using. The 'interested persons' who are protected (and granted remedies) in terms of the Act include the owners or licensees of trade marks or copyrighted works in respect of protected goods; importers, exporters or distributors of protected goods; and the duly authorised agents of such interested persons.

519 'Counterfeit goods' are defined in the Act as goods -

- which are manufactured, in the Republic or elsewhere, without the authority of the owner of an intellectual property right subsisting in protected goods in the Republic, where the protected goods are imitated to such an extent that the manufactured goods are substantially identical copies of the protected goods; and
- to which a trade mark or copyright which subsists in protected goods in the Republic (or colourable imitation thereof) is applied, with the intention of

¹⁵⁹⁷ For more information on this section, see the discussion of ambush marketing protection in par 562 *et seq* below

causing confusion between the manufactured goods and the protected goods.

The Act also provides rather wide protection relating to the prohibited acts in respect of counterfeit goods. These acts, which amount to 'dealing in' counterfeit goods, include the following:

- Possession or controlling such goods in the course of business;
- Manufacturing such goods for use, other than private or domestic use;
- Selling, hiring out, bartering or exchanging of such goods or offering or exposing them for sale;
- Exhibiting such goods in public for the purposes of trade;
- Distributing such goods for the purposes of trade or any other purpose with the result that the intellectual property right owner suffers prejudice;
- Importing or exporting such goods, except for private or domestic use; and
- Disposing of such goods in any other manner in the course of trade.

Criminal penalties include, in the case of a first conviction, a fine not exceeding R5 000 per article or item, or imprisonment for a period not exceeding three years, or both; or in the case of a second conviction, a fine not exceeding R10 000 may be imposed per article or item, or imprisonment for a period not exceeding five years, or both.

520 The procedure and remedies provided for in the Act include a criminal complaint procedure and civil remedies. Any person with an interest in the protected goods who reasonably suspects that a counterfeiting offence is being, has been or is likely to be committed, may lay a complaint with a designated 'inspector' (i.e. an official appointed by the Minister of Trade and Industry, a police official holding the rank of sergeant or higher, or the Commissioner for Customs and Excise). If sufficient information is furnished to such inspector that a prohibited act is being performed or is likely to be

performed (and that the complainant is entitled to lodge the complaint, that an intellectual property right subsists in protected goods and that the suspicion on which the complaint is founded, is reasonable), the inspector may take appropriate steps in respect of such counterfeiting activity. The inspector must obtain a warrant from a judge of the High Court or a magistrate in chambers (although, in certain prescribed circumstances, an inspector may proceed without a warrant). An inspector acting under a warrant may enter any place, premises or vehicle to -

- seize, detain and/or remove any counterfeit goods;
- collect evidence relating to the counterfeiting activities;
- conduct any searches reasonably necessary;
- seal off any place, premises or vehicle where counterfeiting activities have taken or are taking place;
- seize, detain, and/or remove any tools used in the counterfeiting activities;
- question persons and take down statements;
- procure relevant books, documents and materials; and
- take reasonable steps to terminate the counterfeiting activities.

Seized goods are, where possible, removed to a counterfeit depot, which is a place designated as such by the Minister, and such goods shall be subject to return in certain circumstances. The inspector or complainant must apply to court for the confirmation of any seizure, detention and removal of counterfeit goods and any other steps taken in relation thereto by the inspector within 10 days, failing which the seizure, detention, removal or steps will cease to have any effect. A court in any criminal or civil proceedings may order that the seized goods be delivered up to the owner of the intellectual property right or to the complainant and that the identity be disclosed of any persons involved in the manufacture, importation or distribution of the counterfeit goods. In certain

circumstances, goods which have been delivered up may not be released again into commerce or exported.

521 Where counterfeiting activities are suspected on reasonable grounds, an *ex parte* application may be brought before a judge in chambers for an order directing the sheriff or another designated person to enter any place or premises, to search, seize and remove documents, records and alleged counterfeit goods (i.e. an *Anton Piller*-type order). The order may also direct the disclosure by the respondent of any documents, information and material. Before an *ex parte* order will be granted, there must be a *prima facie* case of infringement of an intellectual property right and the judge must be satisfied that the usual procedure for the discovery of evidence is likely to be frustrated because of the concealment or destruction of evidence. Safeguards against abuse of the procedure include the right of the respondent to have his or her attorney present during the execution of the order; the compulsory preparation of an inventory of any documents, records or goods seized or removed; and the filing of a statement under oath with the court by the applicant's attorney, reporting the search.

522 As mentioned above, it is expected that the upcoming major sporting events in South Africa will pose significant challenges in respect of control over the dealing in counterfeit goods. This issue also poses questions relating to the socio-economic conditions of the majority of the South African public (and e.g. the role of informal street traders and their ability to gain tangible benefit from such major events). The Counterfeit Goods Act, along with the relevant ambush marketing protections (discussed elsewhere in this chapter) promise to provide effective tools for protecting the commercial interests of rights holders and stakeholders in such major events, but enforcement of the provisions of such legislation may pose other (and possibly constitutional) challenges in respect of the rights and interests of members of the public.

Aside from the specific prelevance of dealing in counterfeit goods surrounding specific events, it should be noted that this is an ongoing problem which may pose a significant

threat for certain sectors and industries connected with high level sport. In March 2009 three subsidiaries of a major local clothing manufacturer, House of Monatic, were liquidated in the Western Cape High Court after the South African Revenue Service earlier uncovered irregularities at the companies. The three companies included surfwear label O'Neill SA and Canterbury, the national rugby team (Springboks) uniform manufacturer. A director of the holding company claimed that Canterbury's trade was damaged by counterfeit goods flooding the sports market.

§3 Athletes' image rights (and unauthorised 'celebrity/personality merchandising' in terms of South African law)¹⁵⁹⁸

523 The subject and purpose of image rights have been defined, succinctly, as follows:

'[T]he ability of an individual to exclusively control the commercial use of his name, physical/pictorial image, reputation, identity, voice, personality, signature, initials or nickname in advertisements, marketing and all other forms of media ... The sportsperson ... often earns a substantial license fee or royalty that is paid for the privilege of allowing his name to be used for promotional purposes.'¹⁵⁹⁹

The main sources of income for players and athletes in exploitation of their image rights are sponsorship, merchandising or licensing and endorsements. Gelder¹⁶⁰⁰ explains the difference between these as follows:

- Sponsorship involves an investment by an individual or corporation in a particular activity, whereby the sponsorship agreement may offer the sponsor an environment free of competition;¹⁶⁰¹
- Merchandising (and licensing) involves the exploitation of 'images, themes or articles which have become famous', and this commonly refers to the use of the name, logo, trade marks and other properties relating to a sports star, club or organization and which is unconnected to the main

¹⁵⁹⁸ The material covered in this section is based substantially on the author's article 'Suggestions for the Protection of Star Athletes and Other Famous Persons against Unauthorised Celebrity Merchandising in South Africa', which appeared in (2007) 19 *South African Mercantile Law Journal* 272-301. The material is used here with the permission of the publishers, Juta & Co. The *South African Mercantile Law Journal* may be accessed at http://www.jutalaw.co.za/catalogue/itemdisplay.jsp?item_id=3602.

¹⁵⁹⁹ Cloete (ed.) *Introduction to Sports Law in South Africa* LexisNexis Butterworths, Durban (2005) 176. Blackshaw & Siekmann (eds.) *Sports Image Rights in Europe* T.M.C. Asser Press 2005 (at 7) quote a typical grant of rights-clause in a sports image licensing agreement as defining sports image rights broadly as follows: 'Access to the services of the personality for the purpose of filming, television (both live and recorded), broadcasting, (both live and recorded), audio recording, motion pictures, video and electronic pictures (including but not limited to the production of computer-generated images), still photographs, personal appearances, product endorsement and advertising in all media; as well as the right to use the personality's name, likeness, autograph, story and accomplishments (including copyright and other intellectual property rights), for promotional or commercial purposes including, but without limitation, the personality's actual or simulated likeness, voice, photograph, performances, personal characteristics and other personal identification.'

¹⁶⁰⁰ Gelder, P 'Image is Everything: An Analysis of the Legal Protection of the Image of Sports Athletes' *International Sports Law Journal* 2005/1-2 25

¹⁶⁰¹ Compare, however, the dangers of ambush marketing and those associated with cross-sponsorship of events – see the discussion below

business (namely playing of the game or hosting games or events)¹⁶⁰² – therefore the placing of sports trade marks, logos, etc on corporate products¹⁶⁰³; and

Endorsement relates to the communication to 'the relevant public that [the sports star or athlete] approves of the product or service or is happy to be associated with it ... he adds his name as an encouragement to members of the relevant public to buy or use the service or product.'¹⁶⁰⁴

The important role of athlete's images for use in the above commercial activities is clear.

A number of famous athletes in other jurisdictions have succeeded in actions based on infringement of their image rights through unauthorized use, including Brazilian striker Romario¹⁶⁰⁵ and German goalkeeper Oliver Kahn,¹⁶⁰⁶ British racing driver Eddie Irvine¹⁶⁰⁷ and China and Houston Rockets basketball superstar Yao Ming.¹⁶⁰⁸

524 Athletes' image rights enjoy varying degrees of protection in different jurisdictions. While in Europe there are certain countries that provide strong protection by means of specific publicity and privacy statutes or constitutional provisions (e.g. France, the Netherlands, Italy and Germany), other systems provide less clear-cut protection to players (although this has not necessarily hampered the commercial use and value of such 'rights'). An example is the UK, where image rights as such do not

¹⁶⁰² Gelder supra at 25, quoting from *Irvine v Talksport Ltd* [2002] 2 All ER 414 (Ch D)

¹⁶⁰³ See Cloete (ed.) *Introduction to Sports Law in South Africa* LexisNexis Butterworths, Durban (2005) 175

¹⁶⁰⁴ *Ibid.*

¹⁶⁰⁵ Following legal action, Romario was reportedly awarded nearly £2.7 million in lost wages and compensation for unauthorised use of his image rights in advertising by former club Flamengo

¹⁶⁰⁶ Kahn famously obtained a court order against videogame manufacturer Electronic Arts (EA) for their unauthorized use of the player's name and likeness in their FIFA 2002 game. A Hamburg regional court ruled in April 2003 that even though EA had apparently obtained the permission of world football players' association FifPro for such use, the failure to obtain the individual player's permission constituted infringement of Khan's image rights. EA was ordered to remove the game from shops. At the time of writing it is unknown whether Kahn succeeded in his £500 000 claim for damages against EA. For more on the Kahn case, see Michael Gerlinger 'Germany', in Blackshaw & Siekmann (eds.) *Sports Image Rights in Europe* T.M.C. Asser Press 2005 (Chapter VIII).

¹⁶⁰⁷ *Irvine v Talksport Ltd* [2002] 2 All ER 414 (Ch D), referred to below

¹⁶⁰⁸ It was reported in 2003 that Coca Cola had removed images of Yao Ming from their product in China and apologized to the player for their unauthorized use of his image, after the Pepsi-sponsored player instituted action against Coke claiming nominal compensation of 1 yuan (or roughly 12 US cents) and an open apology from the soft-drink manufacturer.

exist under English law.¹⁶⁰⁹ As will be shown below, protection of the athlete's image and its commercial exploitation in England is found primarily in the law of passing off as an action that is available in cases of 'false endorsement' (i.e. where the athlete's action is based on a misrepresentation by a defendant that the athlete has endorsed a product or service).¹⁶¹⁰ Irrespective of the absence of a specific proprietary right to the image of the athlete, these 'rights' are valuable and a thriving trade in the licensing of image rights is well established. 'Image rights' in the UK are also considered to be capital assets for tax purposes.¹⁶¹¹

525 The normal position is that the employment contract of players will include provision for control of image rights; this is often expressly regulated in standard players' contracts and is also an issue that is often subject to collective bargaining between clubs and management and players' unions. It is however possible that these rights can be excluded in order to provide the athlete with more power in respect of their exploitation, and this is mostly the case with star athletes (who understandably have more bargaining power to negotiate such right). One example of an exception to the rule involves David Beckham's move from Manchester United to Real Madrid. Man. United had allowed Beckham to retain control over his image rights and reportedly paid him an amount of £33 300 per week while under contract for the use of his image on club merchandise.¹⁶¹² It appears that Real Madrid agreed to respect existing contracts and that Beckham was allowed to continue exploiting his image outside the control of the club. Another example of an exception from English Premier League football is that of Arsenal players Dennis Bergkamp and David Platt, who negotiated separate contracts regarding exploitation of their image rights between their marketing firm and the club (thereby removing

¹⁶⁰⁹ The recognition of a 'character right' of this nature was expressly rejected by the Court of Appeal in the case of *Elvis Presley Enterprises Inc v Sid Shaw Elvisly Yours* [1999] RPC 567 at 597-598 (following the well-known earlier passing off case of *McCullough v Lewis A May Ltd* [1947] 2 All ER 845 (Ch. D))

¹⁶¹⁰ Compare the *Irvine v TalkSport* judgment, discussed below. Other forms of protection are found in copyright and trade mark law, the law of libel, the tort of malicious falsehood and the Trade Descriptions Act of 1968.

¹⁶¹¹ See the short article by Andrew Braithwaite and Sonya Pennington 'Image Rights: Do they exist and who should own them?', available online at <http://www.sportandtechnology.com/page/0035.html> [last accessed 27 February 2007]

¹⁶¹² *Ibid.*

compensation paid for the use of such image rights from the ambit of remuneration payable in terms of their employment contracts).¹⁶¹³

526 Contractual provisions regarding the licensing or assignment of image rights of athletes (whether contained in players' contracts or other, ancillary, commercial agreements – e.g. a contract for promotional services), usually contain a raft of supporting provisions in order to facilitate the exploitation of such rights by the relevant rights holder. These may commonly include the following:

- An undertaking by the licensor athlete to perform promotional services (e.g. public appearances; photographic shoots, etc);
- An undertaking by the licensee to provide assistance to the licensor in preventing infringement of the rights by third parties;
- An undertaking by the licensor to refrain from licensing identical or similar rights to third parties; and
- An undertaking by the licensor athlete to refrain from certain behaviour that may affect the value of the rights granted (e.g. public drunkenness, sexual impropriety, etc).¹⁶¹⁴

This last, the so-called 'morality clause', can be very important in protecting sponsors and rights holders. For example, Nike signed a five-year US\$45 million endorsement agreement with NBA player Kobe Bryant just days before he was arrested in 2003 for alleged sexual assault. While McDonalds and Nutella both dropped the athlete from their

¹⁶¹³ In the matter of *Sports Club, Evelyn and Jocelyn v Inspector of Taxes* SpC00253 (SC Brice and Everett, 8 June 2000), *Simons Tax Cases* [2000] STC (SCD) 443, the Special Commissioners of the Inland Revenue held that that payment for these two players' 'promotional services' were not salary payments disguised in order to avoid income tax, but were genuine commercial transactions for the acquisition of rights that had independent value over and above the value of the players' services as rendered in terms of the employment contracts – see Lewis, A & Taylor, *J Sport: Law and Practice* Butterworths (2003) at D3.4; Blackshaw & Siekmann (eds.) *Sports Image Rights in Europe* T.M.C. Asser Press 2005 at 316-317

¹⁶¹⁴ Dan Harrington and Nick White ('United Kingdom'), in Blackshaw & Siekmann (eds.) *Sports Image Rights in Europe* T.M.C. Asser Press 2005 at 335; for some provisions usually included in an athlete endorsement contract in the USA, see Yasser et al *Sports Law: Cases and Materials* 5th ed. Anderson Publishing Co. 2003 at 598-600

roster of celebrity endorsers following the arrest, Nike resumed promotional use of photographs of Bryant after the charges were dropped in September 2004.

527 The practice of commercial exploitation of athletes' image rights is a very recent development in South Africa. Following in the footsteps of their counterparts elsewhere (think of Thierry Henry and cars, David Beckham and cologne), increasing numbers of well-known local footballers, cricketers and rugby players have in recent years appeared in television, print and radio advertisements for products or services ranging from potato crisps and soft drinks to medical insurance. According to information available at the time of writing, top local players (mainly in the 'big 3' professional sports of football, cricket and rugby) can routinely command between ZAR1 - 2 million per year in terms of endorsement contracts with individual player sponsors for use of their images in advertising. It appears that it has also happened frequently in recent years that advertisers have made use of the images of well-known athletes without their consent; according to one source it is frequently necessary for athlete management companies to resort to threats of litigation to prohibit such conduct.¹⁶¹⁵ Despite the growing market and these trends, however, South African courts have to date (maybe surprisingly) not been faced with any matter specifically relating to the unlawful or unauthorized appropriation of the image rights of an athlete. This does not mean that such action should not be expected before long, however, and the following discussion will briefly examine the grounds upon which protection in such cases could be based in any future litigation.

528 The conclusion to this section will make reference to the fact that, in the absence of specific statutory protection or of recognized proprietary protection for image rights under the common law, image rights are currently mainly regulated contractually by means of specific provisions in standard players' contracts in the major professional

¹⁶¹⁵ I would like to thank Peter Schultz of Prosport International (one of the premier South African sports management companies – on the web at <http://www.prosportinternational.com>) for discussing these issues with me

sports. Accordingly, and similar to the position in certain other jurisdictions (e.g. England), while South African law does not currently recognize 'image rights' as commercially exploitable and legally protectable property, the reality is that they are recognised in commercial practice and regulated accordingly by means of contract.

529 South African law does not expressly recognize a 'right of publicity' as is the case in parts of the United States. There is also no specific legislative protection available to individuals in such cases, apart from the possibility of trade mark or copyright protection under the relevant statutes.¹⁶¹⁶ Accordingly, the basis for protection is mainly to be found in the common law (as in other common law systems such as the UK and Australia) - e.g. in the law relating to unfair competition - or in constitutional protection of the right of privacy.¹⁶¹⁷ It is submitted that this situation is unsatisfactory, and that more specially tailored protection should be available in cases of unauthorized commercial exploitation of image rights. More will be said on this below.

530 South African law recognizes that every person possesses a number of personality rights. Protection for infringement of such rights is available in terms of the common law right to privacy and the law of defamation. Protection is found mainly in the law of delict (or tort, although it should be borne in mind that South African law does not know a closed group of torts but rather follows the Roman law approach of a general action for damages caused by the unlawful action or omission of the perpetrator in terms of the *Actio Legis Aquiliae*, or 'Aquilian action'¹⁶¹⁸). While delictual liability may lie against a

¹⁶¹⁶ For example, while the Performers' Protection Act 11 of 1967 makes provision for protection of the performances of certain persons (such as actors, singers, musicians and dancers), this Act relates only to performances of literary and artistic works and does not relate to e.g. the on-field performance of athletes engaged in sport.

¹⁶¹⁷ As contained in section 14 of the Constitution of the Republic of South Africa, 1996, and which right also enjoys protection under the common law (e.g. see *Jansen van Vuuren v Kruger* 1993 (4) SA 842 (A))

¹⁶¹⁸ See the discussion of the South African law of delict in par 438 *et seq* above. A plaintiff claiming with the Aquilian action must prove the elements of a delict, namely *conduct* on the part of the defendant (a commission or an omission in cases where there was a legal duty to act) which violated the plaintiff's subjective right(s) and which was *unlawful* (in light of the *boni mores* or legal convictions of the community); was committed with *fault* (in the form of intent or negligence) on the part of the defendant; that there was sufficient *causation* (namely that the defendant's conduct in fact caused the plaintiff's damages and also that the requirements for legal causation were satisfied - namely that the consequences of the defendant's wrongful act should legally be imputed to him and are not too remote); and that *damage* ensued for the plaintiff - see the discussion of the elements of the Aquilian action in Van Heerden & Neethling *Unlawful Competition* Butterworths, Durban (1995) 66 *et seq*.

defendant for patrimonial damages caused unlawfully and with the necessary fault on his or her part, South African law also protects the plaintiff who has suffered non-patrimonial damages, i.e. when there has been interference with the recognized personality interests of the plaintiff even though his or her economic or patrimonial position has not been affected. It is trite in South African law that such interference is actionable as an *iniuria*, where liability is based on

'a wrongful act designedly done in contempt of another, which infringes his dignity, his person or his reputation. If we look at the essentials of *iniuria* we find ... that they are three. The act complained of must be wrongful; it must be intentional; and it must violate one or other of those real rights, those rights in *rem*, related to personality, which every free man is entitled to enjoy.'¹⁶¹⁹

For present purposes, it is important to note that both the *fama* (or 'good name') and the *dignitas* enjoy protection. Unlawful infringement of the *fama* is protected through the means of the law of defamation, namely the unlawful, intentional publication of words or conduct about a person which have the effect of prejudicing such person's good name or reputation. The meaning of *dignitas* has been held to be wider than simply the 'dignity' of a person, and includes the whole of the legally protected personality apart from the *corpus* (or the person of the plaintiff) and the *fama*; the concept of the *dignitas* which is protected by means of the *actio iniuriarum* therefore encompasses a collection of interests relating to the personality.¹⁶²⁰

531 From this very brief exposition of the protection of personality rights in terms of South African law it is clear that athletes will usually enjoy protection for an alleged infringement of their personality rights caused by unauthorized or unlawful commercial exploitation of their image rights. This will be the case where such conduct by a defendant has in fact infringed one or more of the above personality rights, e.g. where

¹⁶¹⁹ As per Innes, J in *R v Umfaan* 1908 TS 62 at 66

¹⁶²⁰ See *O'Keeffe v Argus Printing and Publishing Co Ltd* 1954 (3) SA 244 (C)

such use has the effect of lowering the reputation of the athlete in the eyes of others a defamation action would be available;¹⁶²¹ where such use infringes the privacy of the athlete an action for breach of privacy would be available either under the common law right or the constitutional protection afforded to the right of privacy in the Bill of Rights.¹⁶²² This is relatively uncontroversial and straightforward, as long as the necessary elements of the *iniuria* or infringement can be proven. In March 2007 the Pretoria High Court ruled that the proposed commercial distribution of a DVD entitled *Kamp Staalraad: The Real Story* (featuring visuals of the infamous 2003 Springbok rugby training camp) would violate the privacy and dignity of the players concerned. Following an urgent interim interdict obtained by five Springbok players¹⁶²³ in September 2006 to stop distribution of the DVD by former security consultants to the team, the court interdicted the producers from publishing or distributing it in any way, as the depiction of the naked, dirty and tired players would not only infringe their privacy and dignity but would also infringe copyright in the material (which the court held is vested in SA Rugby (Pty) Ltd).¹⁶²⁴

532 The Supreme Court of Appeal, in the 2007 case of *Grütter v Lombard & Another*,¹⁶²⁵ had occasion to evaluate the law in South Africa in respect of protection of aspects of the identity and, specifically, was faced with a claim of appropriation of the name of another for personal advantage. This matter involved an application by an attorney (Grütter, who had practiced from shared premises with another attorney, Lombard, in terms of an agreement which had subsequently been terminated) for an order prohibiting Lombard from continuing to use the name 'Grütter & Lombard' for

¹⁶²¹ For examples from the UK of cases where implied 'shamateurism' on the part of an amateur golfer and of an amateur Welsh international rugby player were held to constitute defamation, see (the *locus classicus* of) *Tolley v Fry* [1931] All ER 131 and *Williams v Reason* [1988] All ER 262 respectively. It is of course doubtful whether, in modern day sport and society, the inference that an amateur player has agreed to endorse a product for financial gain would constitute a defamation, although it would of course depend on the circumstances of any case.

¹⁶²² Section 14 of The Constitution of the Republic of South Africa, 1996

¹⁶²³ Corne Bands, Victor Matfield, Werner Greeff, Richard Bands and Schalk Burger

¹⁶²⁴ Following the interim interdict, 19 more players joined the application along with SA Rugby (Pty) Ltd, who claimed that the proposed distribution of the film would infringe copyright vesting in the company. Rabie J ruled on the application for the final interdict on 9 March 2007.

¹⁶²⁵ [2007] SCA 2 (RSA), judgment delivered on 20 February 2007

purposes of trade. The Pretoria High Court had dismissed the application but granted Grütter leave to appeal.

The Supreme Court of Appeal (by way of Nugent JA) clearly stated that the respondents¹⁶²⁶ conduct in continuing to use the appellant's name in the course of trade of the law practice did not constitute the common law wrong of passing-off,¹⁶²⁷ nor did the appellant claim an exclusive right to use the name 'Grütter' (which right the court held the appellant 'clearly does not have'). The learned judge summarized the appellant's case as simply being that 'he is known to be the person named in the description of the practice and that he does not wish to be identified with the practice now that his association with it has come to an end.'¹⁶²⁸ The respondents claimed that the parties had practiced previously in partnership, and that the name of the practice was the property of such partnership (and that, consequently, that upon dissolution of the partnership each of the former partners became entitled to continue using the name of the former partnership, provided it did not place the other former partner at risk of incurring liability). The Court rejected this argument and found that there had never been a partnership between the parties, and that their agreement had simply been one to share premises, administrative facilities and certain of the overhead expenses that these entailed. This agreement having come to an end, it remained for the court to determine whether Lombard was entitled to use Grütter's name in the description of his (Lombard's) practice without consent.

The Court proceeded by pointing out that the extent to which the features of a person's identity – for example his or her name or likeness – constitute interests that are capable of legal protection has received little attention from South African courts. The Court referred extensively to generally accepted academic opinion that features of personal identity are capable (and deserving) of legal protection.¹⁶²⁹ After reiterating the accepted

¹⁶²⁶ Second respondent was another attorney, Oosthuizen, who continued practicing with Lombard under the name 'Grütter & Lombard', and had been joined to the proceedings for purposes of the relief sought (an order prohibiting the use of the appellant's name in respect of the respondents' law practice).

¹⁶²⁷ See discussion below

¹⁶²⁸ At par. 3 of the judgment

¹⁶²⁹ At par. 8-*et seq.* of the judgment

elements of an *iniuria* in South African law for purposes of delictual liability,¹⁶³⁰ the Court referred to *O'Keefe v Argus Printing and Publishing Co Ltd*¹⁶³¹ where it was held that the *actio iniuriarum* was capable of protecting a person against unauthorized publication of his or her name and likeness in an advertisement (which it was held in that case could constitute an impairment of such person's dignity). The Court continued to refer to the judgment of O'Regan J in the Constitutional Court in *Khumalo v Holomisa*,¹⁶³² where it was held that privacy is but one of 'a variety of personal rights' that are included in the concept of *dignitas* in the context of the *actio iniuriarum*, and observed that the interest that a person has in preserving his or her identity against unauthorized exploitation seems to be qualitatively indistinguishable and equally encompassed by that protectable 'variety of personal rights'.¹⁶³³ The Court found further support for this view in the protection that is afforded to human dignity by section 10 of the Bill of Rights¹⁶³⁴ as contained in the Constitution.¹⁶³⁵ Nugent JA continued to hold as follows:¹⁶³⁶

'But as appears from the formulation of the elements of an *iniuria* ... not every intrusion upon those protectable rights of personality will necessarily constitute an *iniuria*. Whether a particular act constitutes a wrongful (or unlawful) violation, and thus an *iniuria*, must necessarily be determined by considerations of legal policy as in the case of any civil wrong. For an individual who chooses to live in a community cannot expect always to be shrouded in anonymity. One can envisage various circumstances in which considerations of public policy will justify conduct that impinges upon features of a person's identity. But it is not necessary to consider what those circumstances might be because I can see no such

¹⁶³⁰ With reference to *R v Umfaan* 1908 TS 62

¹⁶³¹ 1954 (3) SA 244 (C)

¹⁶³² 2002 (5) SA 401 (CC)

¹⁶³³ *Grütter v Lombard* at par. 12 of the judgment

¹⁶³⁴ Section 10 provides that '[e]veryone has inherent dignity and the right to have their dignity respected and protected'

¹⁶³⁵ With reference to *Khumalo v Holomisa* supra, where the following was held (as quoted in *Grütter* par.12): 'In our new constitutional order, no sharp line can be drawn between these injuries to personality rights. The value of human dignity in our Constitution is not only concerned with an individual's sense of self-worth, but constitutes an affirmation of the worth of human beings in our society. It includes the intrinsic worth of human beings shared by all people as well as the individual reputation of each person built upon his or her own individual achievements. The value of human dignity in our Constitution therefore values both the personal sense of self-worth as well as the public's estimation of the worth or value of an individual. It should be noted that there is a close link between human dignity and privacy in our constitutional order. The right to privacy entrenched in section 14 of the Constitution, recognises that human beings have a right to a sphere of intimacy and autonomy that should be protected from invasion. This right serves to foster human dignity. No sharp lines then can be drawn between reputation, *dignitas*, and privacy in giving effect to the value of human dignity in our Constitution.'

¹⁶³⁶ At par. 13 of the judgment

considerations that justify the unauthorized use by the respondents of Grütter's name for their own commercial advantage. What is conveyed to the outside world by the use of Grütter's name is that he is in some way professionally associated with the respondents, or at least that he is willing to have himself portrayed as being associated with them, which ... is a misrepresentation of the true state of affairs for which there can be no justification. It was submitted on behalf of the respondents that in fact the respondents do not intend to mislead and have ensured that all enquiries that are made in relation to Grütter are always re-directed to him. That does not seem to me to meet the objection. In my view Grütter is entitled to insist that there should be no potential for error in the first place and was entitled to the order that he claimed.'

The Court accordingly upheld the appeal and made an order that the respondents were prohibited from using the name 'Grütter' in the description of their practice or respective practices, and were prohibited from representing in any way that the applicant is associated with their practice or respective practices.

While it is submitted that the judgment in *Grütter's* case has limited application in respect of cases of unauthorized celebrity merchandising (or, more specifically, cases related to the alleged infringement of athletes' image rights) – namely in respect of its relevance in determining whether such conduct has infringed a claimant's personality rights – it may be of more importance (in respect of Nugent JA's observations in the last-quoted section above) in respect of those instances where the alleged unauthorised conduct creates an impression of endorsement of the defendant's product by the celebrity or athlete.¹⁶³⁷

533 In addition to above-mentioned protection against unauthorized use of the name, likeness etc of the celebrity or sports star which is to be found in the protection of personality rights, the Advertising Code of the Advertising Standards Authority of South Africa (or ASA) also provides specifically for protection of privacy of individuals. The Code provides that an advertisement should not portray or refer to, by whatever means, any

¹⁶³⁷ I.e. to point to delictual liability for an *inuria* in such 'endorsement' cases. See also discussion of the action for passing-off and the English *Irvine v Talksport* case in the section that follows

living persons, unless their express prior permission has been obtained.¹⁶³⁸ The prohibition does not apply in certain circumstances.¹⁶³⁹

534 Apart from the issue of potential infringement of personality rights, a more complicated (and usually more pertinent) question is whether or to what extent the athlete enjoys protection for patrimonial damages suffered as a consequence of such unlawful conduct by the defendant; therefore whether South African law recognizes a proprietary interest and property rights that may be infringed in such cases. In light of the fact that it is a worldwide trend that star athletes earn the majority of their income from the commercial exploitation of image rights rather than from actual winnings or income derived from on-field performance, it is of utmost importance to determine whether such patrimonial interests enjoy direct protection as 'property' of the athlete. As mentioned, South African law does not currently recognize any specific proprietary interest in the image, likeness, voice or other aspects of the persona of persons such as famous athletes. Protection for the patrimonial value of such aspects must be found in other areas of the law. Specifically, it is possible for an athlete to claim for infringement of copyright (where copyright exists in respect of the athlete's likeness, name, etc) or for infringement of a trade mark. The problem, however, is that copyright protection requires the likeness, name, etc to have been reduced to a material form and for the unauthorized conduct by the defendant to constitute a reproduction in material form of a substantial part of such an original work.¹⁶⁴⁰ Furthermore, for a work to qualify for copyright protection it must be original (in the meaning that its creation included

¹⁶³⁸ Par. 11.1 of the Code

¹⁶³⁹ E.g. in respect of crowd or background shots (provided the portrayal and the content in which it appears is not defamatory, offensive or humiliating); advertisements for books, films, radio or television programmes, press features and the like, in which there appear portrayals of or references to individuals who form part of their subject matter; police or other official notices; and where, in the opinion of the Advertising Standards Authority, the reference or portrayal is not inconsistent with the individual's right to a reasonable degree of privacy and does not constitute an unjustifiable commercial exploitation of the individual's fame or reputation – Par 11.2 of the Code.

¹⁶⁴⁰ See the Copyright Act 98 of 1978. Compare the position in Austria, where a specific provision (section 78) in the Austrian Copyright Act (Urheberrechtsgesetz) provides that an image of a person must not be published or made accessible by the public if the legitimate interest of the person is infringed. This right, which is known as the 'right in one's own image' is however not understood as a form of copyright. See Blackshaw & Siekmann (eds.) *Sports Image Rights in Europe* T.M.C. Asser Press 2005 at 32

sufficient independent skill, effort and labour on the part of the creator¹⁶⁴¹) and substantial enough to warrant protection. It is doubtful whether an athlete's name would qualify in these respects: Copyright in a photograph of the athlete would usually (absent an assignment) vest in the person who is responsible for the composition of the photograph or who has commissioned the taking of the photograph.¹⁶⁴² Protection under the Trade Marks Act¹⁶⁴³ requires that a trade mark be registered, with the intention of the trade-mark holder to use the mark for trading purposes. While there is evidence that more and more athletes have started to resort to registering their likenesses, names, autographs, etc as trade marks,¹⁶⁴⁴ in the absence of such specific precautionary conduct by the athlete he or she will be limited in their options for recourse against unscrupulous celebrity merchandisers to a common law claim for unlawful competition (which could e.g. be based on passing off).¹⁶⁴⁵ Other possible problems with trade mark protection are that the use of an athlete's image on goods (for example) would usually only be descriptive of the nature of the goods and not intended to denote trade origin; it could also be difficult to prove a likelihood of confusion amongst the public as to the origin of such goods where in celebrity merchandising cases the consumer often buys the goods simply because they contain the likeness of the celebrity (and not because such use of the likeness indicates an association with the production of the goods).¹⁶⁴⁶

Another statutory basis for intellectual property protection is the Performers' Protection Act,¹⁶⁴⁷ which makes provision for protection of the performances of certain persons (such as actors, singers, musicians and dancers). This Act, however, relates only to performances of literary and artistic works and does not relate to e.g. the on-field or in-competition performances of athletes engaged in sport.

¹⁶⁴¹ See *Kalamazoo Division (Pty) Ltd v Gay* 1978 (2) 184 (C); *Klep Valves (Pty) Ltd v Saunders Valve Co Ltd* 1987 (2) SA 1 (A); *Waylite Diaries CC v First National Bank Ltd* 1993 (2) SA 128 (W)

¹⁶⁴² See the definition of the 'author' of a photograph in sec 1(1); and sec 21(1)(c) of the Copyright Act 98 of 1978. See also Blackshaw & Siekmann (eds.) *Sports Image Rights in Europe* T.M.C. Asser Press 2005 at 324-325

¹⁶⁴³ Act 194 of 1993

¹⁶⁴⁴ Cloete (ed.) *Introduction to Sports Law in South Africa* LexisNexis Butterworths, Durban (2005) 177

¹⁶⁴⁵ Cloete *op cit.* 177. See also the facts of the English case of *Irvine v TalkSport Ltd* [2002] 2 All ER 414 (Ch D), discussed below

¹⁶⁴⁶ See Lewis, A & Taylor, J *Sport: Law and Practice* Butterworths (2003) at D3.44 to D3.46; Blackshaw & Siekmann (eds.) *Sports Image Rights in Europe* T.M.C. Asser Press 2005 at 318-321

¹⁶⁴⁷ Act 11 of 1967

535 So, it appears that the current state of South African law demands that the victims of unauthorized celebrity merchandising should seek their relief within the confines of one of the above claims based on infringement of intellectual property rights, unlawful competition (which will be discussed below) or in infringement of the right of privacy or of one or more of the personality rights. It is submitted, in the light of what follows, that the correctness of this situation is questionable.

It remains problematic to base protection for the possible patrimonial damages caused by unauthorized 'personality merchandising'¹⁶⁴⁸ on the infringement of personality rights (in the absence of recognizing a personality right with monetary components). For this reason the author cannot agree with the following dictum of Stegmann J in *Moroka Swallows Football Club Ltd v The Birds Football Club and Others*,¹⁶⁴⁹ which was accepted and relied upon by Harms JA in the *Stanton Woodrush* case:¹⁶⁵⁰

'The mere fact that a person has made a name famous does not give him a right of property in the name. He cannot stop other entrepreneurs from making such use of the famous name in the marketing of their goods and services as they may be able to make without either defaming any person or causing a likelihood of confusion as to the origin of the goods or services. Provided that he does not commit the delicts of defamation or passing off or offend against any specific statutory prohibition, there is no reason why an entrepreneur should not take the benefit of such advantage as he may be able to gain in the marketing of his goods and services by associating them with names that have become famous.'

It is widely accepted nowadays that unauthorised commercial exploitation of aspects of the famous persona (including the name) may cause patrimonial damages (e.g. loss of licensing fees or royalties, dilution of the value of such aspects for marketing purposes or a 'closing of the market' for the rights holder, etc). It is submitted that it is no longer in

¹⁶⁴⁸ As it was called in the *Stanton Woodrush* case *supra*

¹⁶⁴⁹ 1987 (2) SA 511 (W), at 531E – G

¹⁶⁵⁰ *South African Football Association v Stanton Woodrush (Pty) Ltd t/a Stan Smidt & Sons & Another* 2003 (3) SA 313 (SCA)

step with modern commercial practice and realities to insist that the only available protection is to be found in e.g. the law of defamation (which deals specifically with compensation in cases of *iniuria*, and not for patrimonial damages). It is the very patrimonial nature of the damages occasioned by this commercial practice which needs to be addressed. It is submitted, with respect, that our courts will 'drop the ball' if any future actions arising from such practices are approached on this 'traditional' basis, just as they did earlier with the failure to recognise the commercial practice of unauthorised character merchandising¹⁶⁵¹ as a wider genus of unlawful action that causes harm to rights holders.

536 Following the initial reluctance of South African courts to recognise this commercial practice and its legal implications, in the case of *Lorimar Productions Inc v Sterling Clothing Manufacturers (Pty) Ltd and Others* (the 'Dallas' case¹⁶⁵² - where the court held in the course of proceedings for passing off that the practice of character merchandising was not sufficiently well-known in South Africa to assume that the 'man in the street' would have any knowledge thereof¹⁶⁵³), and ignoring earlier calls for such recognition,¹⁶⁵⁴ the same court finally recognised and indeed described the practice of character merchandising in the 1994 case of *FIFA v Bartlett*.¹⁶⁵⁵ However, such

¹⁶⁵¹ Character merchandising was described as 'the business of merchandising popular names, characters and insignia in order to enhance the sale of consumer products in relation to which such names and characters are used' - see *Federation Internationale de Football Association v Bartlett* 1994 (4) SA 722 (T) at 736 (discussed elsewhere in this chapter). In Australia this practice (in its proper or traditional form) has been described as the use of 'the reputation of a well-known fictitious character like Mickey Mouse or Superman to give name to and add to the popularity of goods not otherwise connected with the character' (*Children's Television Workshop Inc v Woolworth's (NSW) Ltd* (1981) 1 NSWLR 273 at 275).

¹⁶⁵² 1981 (3) SA 1129 (T)

¹⁶⁵³ At 1152E-G of the judgment

¹⁶⁵⁴ As early as 1978, Lionel Bowman had expressed the need for South African law to provide a remedy in character merchandising cases, pointing out that no statutory protection existed in such cases where no trade mark or copyright was involved (which is still the case today). Bowman observed that both 'modern conditions' and the nature of the Aquilian action in South African law warrant the development of such a remedy. See Bowman, L 'Character merchandising in South Africa' *Australian Intellectual Property Law Journal* (1978) 395 at 404

¹⁶⁵⁵ 1994 (4) SA 722 (TPD). At p736F-J of the *FIFA* judgment, Joffe J described the way that character merchandising functions in commerce as follows:

'The association of a famous person or character with a consumer product can boost that product's sales considerably. The fame and popularity of the name or character in question enhances the desirability of the product from the consumer's point of view. The association between the name or character, which can be referred to as the "merchandising property", and the consumer product is usually created by depicting the merchandising product prominently on the product. A typical merchandising product is the well-known cartoon character Mickey Mouse. As the proprietor of the merchandising property has already invested substantial time and money in developing and popularizing such character, and it is the fame and desirability of the merchandising property which will promote the sale of the goods to which it is applied, the proprietor of the merchandising property charges a royalty or license fee for the use of his merchandising property. The royalty

recognition of the practice has not provided a distinct remedy based on a distinct and legally recognised property right in the case of celebrity merchandising. Our courts continue to view cases of character merchandising (and will, supposedly, treat cases of celebrity merchandising in a similar fashion, if and when such cases confront the judiciary in future) as resorting under the delict of unlawful competition or (more specifically) passing off.

537 The generally accepted definition of the delict of passing off was formulated as follows by the (then) Appellate Division in the case of *Capital Estate and General Agencies (Pty) Ltd v Holiday Inns Inc.*¹⁶⁵⁶

'The wrong known as passing off consists in a representation by one person that his business (or merchandise, as the case may be) is that of another, or that it is associated with that of another, and, in order to determine whether a representation amounts to a passing off, one enquires whether there is a reasonable likelihood that members of the public may be confused into believing that the business the one is, or is connected with, that of another ... Whether there is a reasonable likelihood of such confusion arising is, of course, a question of fact which will have to be determined in the light of the circumstances of each case.'

The requirements to show passing off have on occasion been described, succinctly, as 'the classical trinity of reputation (or goodwill), misrepresentation and damage'.¹⁶⁵⁷

An action for passing off would be available to an athlete in cases where another has unlawfully made use of the image, etc of the athlete and thereby represented that the athlete has endorsed the goods or services in question or that these goods or services

is payable in terms of a license agreement under which the owner of the merchandising property authorizes the licensee to utilise the merchandising property in relation to his goods. Generally a licensor exercises a measure of supervision over the use of the merchandising property which is the subject of the license and such supervision is commonly exercised by a licensing agent ... It appears that the consumer makes a connection and an association between the character and its creator or owner and the products featuring the character.'

¹⁶⁵⁶ 1977 (2) SA 916 (A) at 929. See also *Premier Trading Co (Pty) Ltd v Sporttopia (Pty) Ltd* 2000 (3) SA 259 (SCA)

¹⁶⁵⁷ Harms JA in *Caterham Car Sales and Coach Works Ltd v Birkin Cars (Pty) Ltd* 1998 (3) SA 938 (SCA)

are connected to the athlete (e.g. by representing that use of the athlete's image was licensed by him or her in respect of the marketing of such goods or services). Our courts have followed developments elsewhere and departed from the earlier requirement in cases of passing off in English law, which has been tempered in recent years¹⁶⁵⁸, namely the presence of a 'common field of activity' between the commercial undertakings of plaintiff and defendant. In the *Capital Estate* case, Rabie JA stated that the question as to the reasonable likelihood of confusion between the products or businesses of the parties to a passing off action is one of fact. Once this likelihood has been established on the evidence 'even if the parties concerned cannot be said to be carrying on their activities in a common field, it is difficult to see how the absence of such a common field can nevertheless constitute a ground for denying relief to an aggrieved party.'¹⁶⁵⁹ The absence of a common field is nothing more than a factor in determining the likelihood of confusion. While apparently sound in equity, this approach is however less sound dogmatically. Passing off is a species of the broader Aquilian action of unlawful competition; as such it should only be present in cases of genuine competition. As was stated in the *Lorimar* case:¹⁶⁶⁰

'Competition is normally the *casus belli* [in cases of passing off]. In general terms competition involves the idea of a struggle between rivals endeavouring to obtain the same end. It may be said to exist whenever there is a potential diversion of trade from one to another. For competition to exist the articles or services of the competitors should be related to the same purpose or must satisfy the same need.'

Where a common field of activity is absent – and this will more often than not be the case in respect of the activities of athletes or other celebrities *vis a vis* the professional celebrity merchandiser – one can strictly speaking not refer to such an action as based

¹⁶⁵⁸ Compare the judgment in *Annabel's (Berkeley Square) Ltd v G Shock (t/a Annabel's Escort Agency)* 1972 R.P.C. 838; *Treasure Cot Co Ltd v Hamley Bros. Ltd* (1950) 67 R.P.C. 89. Similar development of the requirements for an action of passing off has also taken place in Australian law.

¹⁶⁵⁹ The *Capital Estate* case at 929E-F

¹⁶⁶⁰ 1981 (3) SA 1129 (T) at 1141 of the judgment

on passing off or unlawful competition.¹⁶⁶¹ While the name of a remedy is of course less important than its availability, it is submitted that it is in most celebrity merchandising cases dogmatically incorrect to speak of unlawful competition.¹⁶⁶²

538 The main objections to the use of passing off (or unlawful competition) in cases of celebrity merchandising are the following:

- 1) When one applies the traditional form of this action the celebrity will be denied a remedy through the absence of a common field of activity in most cases;
- 2) Even when one applies the extended form of this action (e.g. on the basis of the *Capital Estate* case's rejection of the sacrosanct nature of the common field of activity-requirement) the celebrity would have to prove a misrepresentation by the defendant which has caused damage to his trading or promotional goodwill (the requirement of an association in the public mind). The plaintiff celebrity may have a hard time proving such deception or confusion as to an association in cases where the parties' fields of activity are very different;¹⁶⁶³
- 3) The most fundamental problem facing the celebrity is that the proprietary interest which the action for passing off seeks to protect is that of the goodwill of a business or undertaking. As has been observed, the plaintiff celebrity will

¹⁶⁶¹ Van Heerden & Neethling *Unlawful Competition* Butterworths (1995), at 208-209 and 193, have argued that such cases where there is an absence of competition involve another form of unfair trade practice, namely 'misrepresentation as to the source, origin or business connection of a non-competitive performance'.

¹⁶⁶² See also the criticism expressed by Mostert, F W *Grondslae van die Reg op die Reklamebeeld* ['Bases for the Right to the Advertising Image'] Unpublished doctoral thesis, Rand Afrikaans University (1985) at 33 note 61

¹⁶⁶³ See Mostert *op cit.* at 328-330; 336-337

not necessarily be involved in any undertaking or business, or such business will not necessarily be his own.¹⁶⁶⁴

As has been observed elsewhere, the real point in unlicensed celebrity merchandising cases is 'whether a person's right of property in his name or likeness [or other aspects of the persona or personality] is entitled to protection'; a passing off action provides no property right in the *indicium* protected, but only 'a right to prevent its use by others to indicate a connection with the plaintiff'.¹⁶⁶⁵ The essential complaint in these types of cases is not misrepresentation, but rather misappropriation: The plaintiff 'has lost a commercial opportunity for exploiting his character or reputation'.¹⁶⁶⁶

It is submitted that the practical dangers inherent in basing a claim on passing off (or more generally on unlawful competition) in these types of cases are well illustrated by the facts of a judgment in another jurisdiction which dealt with unauthorized commercial exploitation of aspects of a famous athlete's persona: In one of the series of cases in Canada which recognized the common-law tort of misappropriation of personality (which is in essence identical to the American right of publicity), *Athans v Canadian Adventure Camps Ltd*,¹⁶⁶⁷ the court was faced with a claim by a professional water skier who was actively engaged in the commercial exploitation of his image, expertise and personality through endorsements. The defendant, which operated a summer camp for children, published a brochure in order to advertise its water-skiing program, and included a graphical representation of a figure which was identifiable as the athlete and apparently reproduced from a photograph of him. Athans claimed damages for passing off and for wrongful appropriation of his personality.

The court held that no case of passing off had been made out on the facts, as the use of the drawings in the brochure were on a balance of probability not likely to give rise to confusion between the plaintiff's and the defendant's businesses. It was highly

¹⁶⁶⁴ Mostert *op cit.* 33 note 61

¹⁶⁶⁵ Andrew Terry 'Exploiting celebrity: Character merchandising and unfair trading' *University of New South Wales Law Journal* Vol. 12 (1989) 204, at 229

¹⁶⁶⁶ Terry *op cit.* at 236

¹⁶⁶⁷ (1977) 80 D.L.R. (3d) 583, Ont. HC

improbable that the segment of the public who would have read the brochure would have associated the defendant's business with the plaintiff.

It is submitted that this is a likely finding on similar facts in any such case that should come before a South African court.¹⁶⁶⁸ However, the Canadian court had access to a more satisfactory remedy in order to ensure the availability of equitable relief to the athlete. The court held that the defendants had used the plaintiff's image for their commercial advantage, while the plaintiff had the exclusive right to use the indicia of his image in the marketing of his personality. Accordingly, commercial use of his representational image by the defendant, without his consent, constituted an invasion and *pro tanto* an impairment of his exclusive right to market his personality. More important than the \$500 in damages which was awarded to Mr. Athans was the recognition of direct protection in cases such as this.

539 The current state of South African law in this respect is simply unsatisfactory. Athletes are limited in their rights of recourse in the protection of the patrimonial aspects of their images to the above limited although diverse bases for protection, which are not ideally suited to protect such athletes in the context of modern sports business and in light of the ever-increasing activity of sports commodification and commercialization in practice. Challis has observed the following in respect of this 'traditional' approach to the protection of image rights in other jurisdictions, which, as we have seen, also resonates in South Africa:

¹⁶⁶⁸ It is submitted that it is likely that the absence of a common field of activity will remain a potential hurdle especially in celebrity merchandising cases, for as long as protection is sought on the basis of passing off. Here one can refer to the judgment of Corbett CJ in the case of *Royal Beech-Nut (Pty) Ltd t/a Manhattan Confectioners v United Tobacco Co Ltd t/a Willards Foods* 1992 (4) SA 118 (A). In this case the court approved of the decision in the *Capital Estate* case that the absence of a common field of activity should not preclude a finding of passing off. But Corbett CJ continued to state the following (at 123G-H):

'In my view, the court will not readily conclude that in the case of disparate goods the defendant's product will be regarded as another horse from the plaintiff's stable. There must be cogent grounds to justify this conclusion. And it must be borne in mind that what has to be gauged is the likely reaction of ordinary members of the purchasing public, not that of lawyers or traders or persons engaged in the kinds of business conducted by the parties.'

Clearly such an approach would constitute a hurdle for the celebrity in proving passing off in cases where he or she has no common field of activity with the merchandiser and indeed does not necessarily even produce or endorse any product. Compare also the court's approach in the *Lorimar* case supra at 1154-1155, and the criticism by Hertzog 'Ongeliseniseerde karakterkommersialisering of "character merchandising" as daad van onregmatige mededinging in die Suid-Afrikaanse Reg' 1982 *De Jure* 77

'In jurisdictions where image rights do subsist, the development of the law usually follows one (or both) of two paths. The first is the development of an actionable right to privacy (or a 'dignitarian' right) and the second is the development of an economic right whereby a celebrity's image or personality can be exploited economically. These privacy and publicity rights are usually set in the context of existing regimes of copyright law, performer's rights, trade mark law, trades description legislation, data protection provisions and the laws of defamation, which can also, to an extent, protect creative works, performances, trade and personal information.¹⁶⁶⁹

Challis has argued that three recent court decisions in the United Kingdom, namely *Irvine v TalkSport*,¹⁶⁷⁰ *Arsenal Football Club Plc v Reed*¹⁶⁷¹ and *Niema Ash v Loreena McKennit*¹⁶⁷² have 'taken these "privacy" and "personality" strands and have, through the use of the law of passing off, a re-interpretation of trade mark law and recent moves to embrace a new "law of privacy", developed what might possibly be called a "fledgling" image right'.¹⁶⁷³ The author observes, however, that the situation as it stands in the UK is not conducive to legal certainty regarding the protection of aspects of the persona by means of a free-standing economic right to the exploitation of the image or persona. In fact, he observes that '[copyright, trade description legislation, data protection regulations and defamation laws], along with passing off, trade mark law and privacy seem to provide for a hotch-potch of image right protection – but not a clear self standing image or personality right'.¹⁶⁷⁴

There appears to have been little change from the incidental nature of protection afforded to aspects of the persona in English law since Cornish remarked in 1989 that it is considered improper to use a person's name or likeness without his consent for

¹⁶⁶⁹ Ben Challis 'United Kingdom: The right image? Does the UK need a stand alone image right for the new millennium?', available on the web site of <http://www.musiclawupdates.com> [last accessed 21 February 2007]

¹⁶⁷⁰ See the discussion in the text below

¹⁶⁷¹ Court of Appeal [2003] EWCA Civ 96

¹⁶⁷² Court of Appeal [2006] EWCA Civ 1714

¹⁶⁷³ Challis *op cit.*

¹⁶⁷⁴ *Ibid.*

advertising purposes, but 'however unethical it may be, it is not settled how far it is actionable.'¹⁶⁷⁵

540 It is submitted that the same is true in South Africa, and that what our law needs is something along the lines of such a 'stand alone image right', as is the case in certain other jurisdictions referred to. But while Challis has called for legislative reform in this regard in the UK, I believe the basis for such a right already exists in the South African common law. It is submitted that there has been judicial recognition of an eminently suitable niche for such protection. In the case of *Hawker v Life Offices Association*,¹⁶⁷⁶ which case involved an application by an insurance agent who had been blacklisted by the industry's controlling body and was thus prevented from earning a living as such; Howie J held (with reference to the earlier case of *Matthews and Others v Young*¹⁶⁷⁷) as follows:

'In the absence of legal and contractual restrictions, applicant has the subjective right to exercise his chosen calling without unlawful interference from others ... That right does not solely relate to factors of personality. It has a monetary component ... Although ... unlawful interference with an employee's liberty to earn his livelihood in his chosen sphere is not juridically the same as unlawful interference with a trader's right to goodwill, the two situations are, in my opinion, so closely analogous, especially as regards the instigation of a boycott, that the law [relating to boycotts of a trader's undertaking] must constitute important guidelines in the present case.'¹⁶⁷⁸

It is submitted that this 'right to the earning capacity', as it has been called, provides a suitable niche for protection in cases of unlicensed or unauthorized celebrity

¹⁶⁷⁵ Cornish, W R *Intellectual Property* 2nd ed. (1989) at 420. Andrew Terry shared the same sentiments in respect of the position in Australian law, in an article published in 1989 ('Exploiting celebrity: Character merchandising and unfair trading' *University of New South Wales Law Journal* Vol. 12 (1989) 204, at 210), when he stated that the key to successful character merchandising lies in the possession of a property right in the intangible values sought to be protected. The author observed that the intellectual property regime (trade mark, copyright and design protection) which confers these property rights is insufficient to protect the Australian character merchandiser in every case.

¹⁶⁷⁶ 1987 (3) SA 777 (C)

¹⁶⁷⁷ 1922 AD 492 at 507

¹⁶⁷⁸ *Hawker's* case at 780

merchandising (or infringement of athletes' image rights). The subject of this right, which Neethling has characterised as 'personal immaterial property',¹⁶⁷⁹ shows characteristics of both aspects of the personality as well as patrimonial interests (and infringement of such right causes patrimonial damage). Recognition of this right as constituting the proper basis for patrimonial protection would also be in line with earlier calls for law reform in this respect,¹⁶⁸⁰ which have also criticized copyright and trade mark law as providing limited protection in these types of cases.¹⁶⁸¹

It is acknowledged that South African law needs to recognise a form of direct protection in such cases by means of recognition of a proprietary interest and corresponding property right in the aspects of the persona of celebrities (including athletes) that are commercially valuable and vulnerable to unauthorized exploitation by others.¹⁶⁸² Such an approach would bring South African law in line with developments elsewhere, e.g. the American right of publicity (mentioned above) and the Canadian tort of misappropriation of personality,¹⁶⁸³ and, it is submitted, be more in line with modern commercial (sports) practice.

¹⁶⁷⁹ Neethling, *J Van Heerden-Neethling's Unlawful Competition 2nd* ed LexisNexis, Durban (2008) at 115 *et seq.*

¹⁶⁸⁰ Mostert, F 'The Right to the Advertising Image' 1982 *South African Law Journal* 413 had earlier argued for the recognition of a distinctive and autonomous intellectual property right, namely the right to the 'advertising image', which the author defined as follows:

'Under the advertising image is understood every name, mark, symbol or character that is identified with a particular product, business or person, and that harbours potential advertising value and possible goodwill for products or businesses of other entities in various other unrelated fields of commerce.' (At 424)

Mostert further argued that:

'The unauthorized appropriation of an advertising image for promotion purposes would result in the infringement of the right to the advertising image and constitute unlawful conduct. The damages claimed would consist of the possible royalty money or remuneration the holder of the right to the advertising image would have been entitled to claim for its use.' Apart from this, Mostert argued that such infringement would in most cases also bring about infringement of the holder of the advertising image's goodwill, by the fact that the defendant would have foreclosed on the plaintiff's opportunities to license others in the same line of business or by robbing existing licenses of their exclusivity (Mostert at 425).

As to classification of this right to the advertising image, see Mostert at 426 *et seq.*

¹⁶⁸¹ See Mostert *op cit.* at 427-428. It is important to note that Mostert's proposed 'right to the advertising image' was subsequently criticised – see Coetser, P P J *Die Reg op Identiteit* ['The Right to Identity'] (1986), who proposed that South African law should recognize an immaterial property right to the individual merchandising power (which would only be available to natural persons for protection of the patrimonial interest inherent in the individual's persona, and would not for example be available in cases of alleged infringement of rights in respect of fictional characters).

¹⁶⁸² Louw, A M *Character Merchandising and the Celebrity in South African Law* Unpublished LL.M dissertation, University of Stellenbosch (1996)

¹⁶⁸³ The last established in *Krouse v Chrysler Canada Ltd* (1973) 40 D.L.R. (3d) 15, Ont. CA and confirmed in *Athans v Canadian Adventure Camps Ltd* (1977) 80 D.L.R. (3d) 583, Ont. HC. The content of the protection afforded by this common law tort (which is also known as the common law right of publicity, reminiscent of the terminology of the similar remedy available in American law) has been described as follows:

'The tort of misappropriation of personality is legal recognition of a person's exclusive right to use or exploit his or her persona. The tort can be invoked when:

- there is an element of commercial exploitation of a person's personality (this could be that person's figure, profile, face, name, voice, or stance – anything that is recognizable to the viewing public);
- the person is clearly identifiable in the medium used;

541 When the Americans speak of a property right to the publicity value of aspects of the celebrity's persona, the objective is to recognize a subjective right to an interest which has commercial value and the infringement of which causes patrimonial damage (even though these aspects of the persona are bound to the personality itself).¹⁶⁸⁴ The incorporeal nature of such a subjective right would make it an immaterial property right.¹⁶⁸⁵

When one considers another immaterial property right, the right to the goodwill of a business or undertaking, one sees that it bears a marked resemblance to the subject of the celebrity's right of publicity in American law. The goodwill of an undertaking is comprised of certain components of the undertaking, *inter alia* the personality of the entrepreneur, the locality of the business, the value of trade names and trade marks, etc. The undertaking has a greater value than the sum of all these components and the surplus value is immaterial property (the goodwill, which has been defined as 'the attractive force that brings in custom'¹⁶⁸⁶).

The celebrity's persona is also made up of certain components (such as the name, likeness, voice, sporting skill, etc), but it has a greater value than the sum of these components. This surplus value is constituted by the celebrity's fame. In the context of celebrity merchandising, such fame is the attractive force that brings in custom, as is shown by the phenomenal sales of celebrity-endorsed merchandise and memorabilia. It

The person does not consent to this use; and -damages are proven.'

From a short article entitled 'Whose public persona? – The common law right of publicity', *Coaches Report*, Spring 1999, Vol. 5 No. 4 (available online on the web site of the Centre for Sport and Law Inc. at <http://www.sportlaw.ca> [last accessed 21 February 2007]).

¹⁶⁸⁴ For cases that recognized the nature of the right of publicity as an intangible property right, see *Waits v Frito-Lay, Inc.* 978 F.2d 1093 (9th Cir., 1992)(California); *Herman Miller, Inc. v Palazetti Imports and Exports, Inc.* 270 F.3d 298 (Michigan); *Prima v Darden Restaurants, Inc.* 78 F. Supp 2d 337 (D.N.J. 2000)(New Jersey); *Cardtoons L.C. v Major League Baseball Players' Association* 95 F.3d 959 (10th Cir. 1996)(Oklahoma); *Joplin Enterprises v Allen* 795 F. Supp 349, 350 (W.D. Wash. 1992)(Washington).

¹⁶⁸⁵ The American state right of publicity has been described and distinguished from the right of privacy as follows:

'The right of publicity is a property right in the commercial use of one's persona. Approximately half of the states recognize it. Some of these make it descendible and assignable; in others it expires with death. Although publicity rights are conceptually related to privacy rights, an area of tort law, the publicity right itself is a property right in the elements of personal identity. Privacy is a more limited right, which usually protects names and likenesses only. Privacy is a personal right that cannot be sold or given away, and lasts only through a person's lifetime. Publicity, in contrast, is alienable, may survive death, and has been expanded to protect a person's voice, gestures and mannerisms.'

Rodrigues, U 'Race to the stars: A federalism argument for leaving the right of publicity in the hands of the states' *Virginia Law Review* Vol. 87 No. 6 (2001) 1201-1227 at 1202

¹⁶⁸⁶ See *The Commissioners of Inland Revenue v Muller & Co.'s Margarine (Ltd)* 1901 AC 217 at 224

is submitted that one can actually speak of a 'personal goodwill' of the celebrity in this regard.

The problem of course is in finding a basis in law for the recognition of this 'personal goodwill', and it is submitted that there has been judicial recognition of an eminently suitable niche for this purpose in *Hawker's* judgment *supra*.

542 Recognition of protection for the image rights of athletes (and other famous personalities) on this basis would be a significant step forward for South African law towards providing the level of protection afforded in other jurisdictions. While, as has been shown, such protection in the UK is largely limited to the tort of unlawful competition and passing off,¹⁶⁸⁷ this is not unproblematic, and there have indeed been calls for legislative reform in order to establish a self-standing image right for celebrities.¹⁶⁸⁸

In illustrating the benefits of the recognition of this basis for protection over the more traditional notion of the application of passing off in such cases, one can refer to the *TalkSport* case referred to earlier which involved English racing driver Eddie Irvine. In the judgment of the Chancery Division, Laddie J held that in 'endorsement cases' (i.e. where the unauthorized celebrity merchandiser has falsely created an impression of endorsement by the athlete - compare the facts of the case¹⁶⁸⁹) it is not necessary for a plaintiff to prove a common field of activity in trade as in other passing off cases.

However, such plaintiff would have to prove two, interrelated, facts, namely

- that at the time of the acts complained of the plaintiff had a significant reputation or goodwill; and

¹⁶⁸⁷ Compare the *Irvine v TalkSport Ltd* case referred to earlier; see also Challis *op cit*.

¹⁶⁸⁸ See the interesting article by Ben Challis entitled 'United Kingdom: The right image? Does the UK need a stand alone image right for the new millennium?', available on the web site of <http://www.musiclawupdates.com> [last accessed 21 February 2007]

¹⁶⁸⁹ The defendant in *Irvine* had used a legally-obtained photograph of the plaintiff racing driver in an advertisement for its radio station. The photograph, which showed the driver talking on a mobile phone, had been manipulated by removal of the phone and the substitution of a radio (with the name of the station emblazoned on it), without plaintiff's consent. The plaintiff claimed that this conduct amounted to a misrepresentation as to endorsement by the plaintiff of the defendant's radio station.

that the actions of the defendant 'gave rise to a false message which would be understood by a not insignificant section of his market that his goods have been endorsed, recommended or are approved of by the claimant'.

Recognition in South Africa of the right to the earning capacity of an athlete, which earning capacity can be substantial in any given case as a result of the efforts of such athlete in establishing a commercially valuable reputation and is a worthy object for protection against unauthorized exploitation by others, would eliminate the need to resort to (what is submitted to be) an artificial exercise in trying to fit the requirements for passing off to the facts of these types of cases. A plaintiff's proof of the value of the earning capacity would be a question to be determined on the facts of each case, and would be similar to the first step referred to by Laddie J in *TalkSport*, namely proof of a significant reputation or goodwill. However, a court's recognition of the right to the earning capacity might, it is submitted, give rise to a presumption of such a 'significant goodwill' – surely the defendant merchandiser's appropriation of the plaintiff's persona would establish this? Once the value of this patrimonial interest has been established, though, it would be sufficient to found liability on the part of the defendant to show that he or she had acted in such a way as to unlawfully infringe said right to the detriment of the plaintiff athlete.¹⁶⁹⁰ Gone would be the need to refer to areas of activity and whether the merchandiser has operated in a related field to that of the celebrity athlete; gone also the requirement of misrepresentation or of confusion as in trade mark cases¹⁶⁹¹ and the question whether or to what extent the athlete has a history of endorsement and the commercial exploitation of aspects of his or her persona.¹⁶⁹² Significantly also, the

¹⁶⁹⁰ Compare the judgment in *Dippenaar v Shield Insurance Co Ltd* 1979 (2) SA 904 (A), where it was stated (at 724) that '[t]he capacity to earn money is considered to be part of a person's estate and the loss or impairment of that capacity constitutes a loss, if such loss diminishes the estate'. It is submitted that the same is true in cases of unauthorized celebrity merchandising, where the 'loss or impairment' is found in the dilution of the commercial value of the persona, or the closing of the market occasioned by such unlawful conduct on the part of the merchandiser.

¹⁶⁹¹ See Alberts, W 'Character merchandising in South Africa' *Journal of Business Law* Vol. 3 Part 2 (1995) 77 at 78-9

¹⁶⁹² E.g. compare the facts of the *Irvine v TalkSport* case discussed earlier, where the plaintiff was able to show such a history of previous endorsements, evidencing his goodwill. Dan Harrington and Nick White (in Blackshaw & Siekmann (eds.) *Sports Image Rights in Europe* T.M.C. Asser Press 2005 at 323) have observed that, under UK law, unauthorized commercial use of indicia (merchandising cases) which fall short of endorsement may still entitle the celebrity or athlete to apply for relief in terms of passing off, although the 'chances of success are

celebrity would not be unsuited or denied protection merely because of the level of his or her fame, as has happened elsewhere.¹⁶⁹³ Mere unauthorized use of the protected aspect of the persona or image would constitute infringement of the property right, the unlawfulness of which is to be determined with reference to the *boni mores* and sense of justice of the community.

543 As mentioned, the athlete's earning capacity (as in fact the earning capacity of any individual) operates in a sense as a personal goodwill analogous to the goodwill of a business undertaking (although one must distinguish goodwill and earning capacity). Van Heerden & Neethling¹⁶⁹⁴ explain the earning capacity as an intangible creation of the human mind and endeavour in the field of economics, as follows:

'Although in exceptional circumstances a person may already have an earning capacity at birth, as a rule she gradually develops this intangible asset through her energy, effort, initiative, studies, experience, financial expenses, and so forth until it reaches its full growth and potential. This creation is definitely comparable with other creations in the economic sphere, especially the goodwill of an undertaking. However, unlike the goodwill and other creations of the human mind in the field of economics, culture or technology, earning capacity cannot ... exist or continue to exist independently of its creator.'

It is submitted that the athlete (or other celebrity with a commercially viable and marketable persona¹⁶⁹⁵) indeed possesses an earning capacity which is greatly enhanced by his or her fame. This fame constitutes an important part of the goodwill of such athlete. Here one can also refer to the following, which was observed in the American context:

likely to be slim' (the successful applicant would have to show that the defendant's misrepresentation caused confusion with the public as to a connection between the individual or rights holder and the product or service). The authors express reservations about the correctness of this situation in light of modern commercial practice.
¹⁶⁹³ In the English case of *Re Elvis Presley Trade Marks* [1997] RPC 543 (Chancery 18/3/97) it was held that the name 'Elvis' could not be registered as a trade mark as, ironically, it had lost its distinctiveness (the ability to distinguish the proprietor of such mark's goods from those of others) as a result of its well-known nature.

¹⁶⁹⁴ *Unlawful Competition* Butterworths, Durban (1995) at 114

¹⁶⁹⁵ It should be noted that the right to the earning capacity is not exclusive to those who have achieved fame; every individual with an earning capacity possesses this right, although the value (also for purposes of the calculation of damages) would depend on the attributes (e.g. fame in the case of a rock star or extraordinary beauty in the case of a model) that are relevant to such person's ability and capacity to earn.

'A celebrity must be considered to have invested his years of practice and competition in a public personality which eventually may reach marketable status. That identity, embodied in his name, likeness, statistics and other personal characteristics is the fruit of his labors and is a type of property.'¹⁶⁹⁶

When aspects of the persona are used for promoting products or services without the celebrity's consent, he or she will be deprived of the ability or capacity to earn revenues through the licensing of the use of such aspects for the merchandising of that particular (or a similar) product or service. Accordingly, such unlicensed celebrity merchandising will constitute an infringement¹⁶⁹⁷ of the celebrity's right to the earning capacity, and his loss will lie in the loss of revenues he would have received in terms of a licensing agreement.¹⁶⁹⁸ When such an infringement is also *contra bonos mores*, it would give rise to Aquilian liability for the celebrity's patrimonial damage.¹⁶⁹⁹

¹⁶⁹⁶ Berkman 43 *Brooklyn Law Review* (1976) 539. See, generally, Van Heerden & Neethling *Unlawful Competition* supra at 112-116.

¹⁶⁹⁷ See Neethling & Le Roux supra at 727, where it is stated that an infringement of the right to the earning capacity is not only caused by the loss of such capacity, but also by 'enige belemmering van die reghebbende se beskikking daaroor of genot daarvan' ['any interference with the rights holder's disposition or enjoyment thereof'].

¹⁶⁹⁸ Which is analogous to or could be modeled on the statutory alternative to conventional damages provided for in section 24(1A) of the Copyright Act 98 of 1978, which provides for a notional, reasonable royalty which would have been payable by a licensee – see discussion in Dean, O H *Handbook of South African Copyright Law* Juta & Co. (looseleaf – service revision 13, 2006) 1-74 to 1-75.

The possible forms of damage in these cases have also been described as follows:

'The damage caused by unauthorized manipulation or appropriation of a person's image for commercial purposes comes in two forms, the first being the invasion of the subject's privacy and the related loss of control or autonomy over the use of his or her image and the second being the loss of control inherent in the defendant's reaping an economic benefit from another person's image and the reputation and goodwill associated with it ... with the resultant reduction in the scope of future potential licensing opportunities in the market sector.' Jones 'Manipulating the law against misleading imagery: Photo montage and appropriation of well-known personality' (1999) 1 *European Intellectual Property Review* 28.

As for discussion of the Oliver Kahn case (see the discussion supra) as an interesting example of the problems inherent in determining the fair market value of a 'lost license fee', see Michael Gerlinger in Blackshaw & Siekmann (eds.) *Sports Image Rights in Europe* T.M.C. Asser Press 2005 at 126-128. For discussion of the four most common types of actions or conduct where the right of publicity arises in American case law (namely (1) appropriation of one's name or likeness for advertising or endorsement; (2) unauthorized use of one's name or likeness on commercial products; (3) appropriation of one's unique style or characteristics; and (4) appropriation of one's performance) and the forms of harm caused by such exploitation), see Spahn, Kenneth E. 'The right of publicity: A matter of privacy, property or public domain?' 19 *Nova Law Review* (Spring, 1995) 1013.

¹⁶⁹⁹ Another possible form of damage can also be identified here. The unlicensed merchandising use of the celebrity's persona could dilute or erode the value of such persona in this secondary market (the merchandising market), if wide-spread use of this persona causes it to lose its uniqueness as a merchandising tool (and thus its commercial appeal). The unlicensed use of the persona in connection with a disreputable product or service could also serve to damage the reputation of the celebrity, which might (apart from possible infringement of personality rights) cause patrimonial damage of the right to the earning capacity in the celebrity's primary

Similar to the level of protection offered by the right of publicity in the United States and the Canadian tort of misappropriation of personality, athletes would have access to a remedy aimed at directly protecting against patrimonial damages caused by infringement of a proprietary interest (by means of an application for an interdict or an action for damages). It should be noted, however, that exceptions to a finding of infringement similar to those recognized elsewhere may exist also in the case of protection by means of this right (e.g. where use is made of aspects of the athlete's persona not for direct commercial purposes but rather for informational purposes¹⁷⁰⁰ this might not necessarily be marked as unlawful).¹⁷⁰¹

544 To date there has been no judicial acceptance of such a basis for protection of athletes' image rights by South African courts, even though the right to the earning capacity as subjective right does enjoy widespread judicial acceptance.¹⁷⁰² It is hoped that this issue will come before the courts in the near future, that recognition of this basis for protection will be sought and the availability of the most suitable remedy finally resolved. In the meantime, the existing protection afforded by other branches of intellectual property law (e.g. copyright and trade mark protection) and the common law (e.g. the general action for unlawful competition, passing off, etc) remain available to claimants, subject to the possible problems referred to earlier.

market (e.g. the activity of sporting competition in which a famous athlete is involved – i.e. he or she may lose team placings).

¹⁷⁰⁰ E.g. compare the judgment of the Tribunal de Commerce de Liege in the case of *Real Madrid v Unibet* (24 November 2006, French version available online at http://www.droit-technologie.org/jurisprudences/commerce/liege_241106.pdf); compare also the case of *CBC Distribution & Marketing Inc v Major League Baseball Advanced Media LP* (a judgment of a federal magistrate in the Eastern District of Missouri, 8 August 2006 - this judgment was subsequently affirmed in *C.B.C. Distrib. and Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, Nos. 06-3357/3358 (8th Cir, Oct. 10, 2007), although it appears on different grounds), where it was held that the use of player statistics in fantasy games on the internet did not infringe the state publicity rights of players as their names were used only in association with their statistics and did not imply an endorsement or sponsorship nor provided the unauthorised defendant with a commercial advantage. In this matter it was also held that the defendant's First Amendment rights to freedom of speech outweighed the players' rights of publicity. See further, on treatment of the issue of the public interest in information in the German context, Michael Gerlinger ('Germany') in Blackshaw & Siekmann (eds.) *Sports Image Rights in Europe* T.M.C. Asser Press 2005 at 112 *et seq.*

¹⁷⁰¹ E.g. compare the conflict between rights of privacy and other constitutionally protected rights such as freedom of expression and freedom of the press that have often been at loggerheads in other jurisdictions' treatment of such cases – compare the discussion by Challis *supra*.

¹⁷⁰² See the *Hawker* case *supra*; *Santam Versekeringsmaatskappy Bpk v Byleveldt* 1973 (2) SA 146 (A); *Dippenaar v Shield Insurance Co Ltd* 1979 (2) SA 904 (A); *Southern Insurance Association Ltd v Bailey* 1984 (1) SA 98 (A); *President Insurance Co Ltd v Mathews* 1992 (1) SA 1 (A); *Ferguson v Santam Insurance Ltd* 1985 (1) SA 207 (C); *Lebona v President Versekeringsmaatskappy Bpk* 1991 (3) SA 395 (W)

545 The reader will note that the discussion throughout has assumed that the type of protection argued for (namely direct protection of the celebrity's persona against unauthorized commercial exploitation) should in fact be available. It has not touched on the arguments of others elsewhere, on the more philosophical issues surrounding the question of whether celebrity *should* be protected in this way.¹⁷⁰³ While, for example, proponents of the American right of publicity have advanced a number of arguments in favour of this right (e.g. that the labour and effort involved in achieving celebrity and a marketable persona should be protected, that unjust enrichment through misappropriation should be prevented, that protection by means of the right acts as an incentive to others to produce performances that appeal to the public and encourages creativity), others have argued that such protection is unduly restrictive (e.g. of the interests of consumers, as it raises the prices of celebrity merchandise and advertising and shifts wealth from the masses to a small group of the generally already wealthy) and especially that it threatens values such as freedom of speech and of economic activity.¹⁷⁰⁴ There are those in the United Kingdom, for example, who argue that such a strong form of protection of the persona should not be imported into that jurisdiction, and that the existing legal protections (e.g. the passing off action) should be sufficient to safeguard the interests of the celebrity while avoiding the negative aspects of a publicity

¹⁷⁰³ For probably the most exhaustive critical evaluation of the American right of publicity, see Michael Madow 'Private ownership of public image: Popular culture and publicity rights' *California Law Review* Vol. 81 No. 1 (January 1993) 125-240; for critical evaluation of an interesting example from English law, see Story, A. 'Owning Diana: From people's princess to private property' *Web Journal of Current Legal Issues* (1998) – available online at <http://webjcli.ncl.ac.uk/1998/issue5/story5.html> (last accessed 9 March 2007).

¹⁷⁰⁴ For example, the following has been observed specifically in the context of the interplay between the American right of publicity and the First Amendment freedom of speech guarantee: 'Perhaps ironically, one root of the problems with these cases lies in the very elusiveness of a theoretical justification for the right of publicity. When the government can clearly identify a purpose in limiting speech, courts have some basis on which to evaluate whether the speech limitation lives up to that purpose. But because the right of publicity rests upon a slough of sometimes sloppy rationalizations, courts have little way of determining whether a particular speech limitation is necessary or even appropriate in order to serve the law's normative goals. Instead, they appear to assume that the sum of a set of inadequate justifications equals far more than its parts, and allow right of publicity claims to run roughshod over the speech interests of the public.' Stacey L. Dogan & Mark A. Lemley 'What the right of publicity can learn from trademark law' 58 *Stanford Law Review* 1161 (2006). For further discussion of the competing interests and implications of the 'property model' of the American publicity right, see Marks, K. S. 'An assessment of the copyright model in right of publicity cases' *California Law Review* Vol. 70 No. 3 (May 1982) 786-815; see also Felcher, P.L. & Rubin, E.L. 'Privacy, publicity, and the portrayal of real people by the media' *Yale Law Journal* Vol. 88 No. 8 (July 1979) 1577-1622; Volokh, E. 'Freedom of speech and information privacy: The troubling implications of a right to stop others from speaking about you' *Stanford Law Review* Vol. 52 No. 5 (Symposium: *Cyberspace and Privacy: A new legal paradigm?*) (May 2000) 1049-1124 (at 1069 *et seq*).

For some recent American examples where the issue of freedom of speech and limitations on the right of publicity have come to the fore, see the California cases of *Comedy III Productions, Inc v Gary Saderup, Inc* 25 Cal. 4th 387 (Cal. 2001) [case concerning unauthorised portrayal of images of the Three Stooges on t-shirts] and *Winter v DC Comics* 99 Cal. App. 4th 458 (Cal. Ct. App. 2002) [blues musician brothers Johnny and Edgar Winters' claim based on an unauthorised portrayal of characters reminiscent of them in a comic book].

or 'personality' right. On balance, though, it is submitted that it is generally accepted that the current state of the law in the UK in this regard (as in South Africa) is not satisfactory, and that some form of change is needed.

The reason why these arguments for and against the recognition of a patrimonial right to aspects of the persona have not been addressed is simply that South African law in its current state falls short of the level of protection it should provide to those whose fame is exploited by means of misappropriation of aspects of the persona for commercial gain.¹⁷⁰⁵ As it stands, the South African legal system constitutes a 'soft' jurisdiction; one with welcoming ports for the new wave of pirates who ply their trade in the modern celebrity merchandising market. It is both the lack of precedent in cases of this nature as well as the unsatisfactory state of the available remedies (as highlighted above) that make the celebrity or athlete especially vulnerable in the face of a potential 'wrong without a remedy'.¹⁷⁰⁶ It is for this reason that a change in approach is suggested, in the interests of both equity and legal certainty.

546 Development of the common law along the lines advocated here would also be consistent with the objective normative value system underpinning the Constitution, and the courts' duty to develop the common law in light of the Bill of Rights and these very values.¹⁷⁰⁷ Recognition of a satisfactory remedy for celebrities in these cases would be in line with the promotion of dignity and also with the demands of equity; recognition of the patrimonial interest involved and the requisite property right would be in line with other provisions of our Constitution.¹⁷⁰⁸ Not to mention the increased importance of the influence of foreign and international law in our modern jurisprudence.¹⁷⁰⁹

¹⁷⁰⁵ I tend to agree with the views expressed by Haemmerli regarding the inherent justification for the type of protection afforded by a right such as the American right of publicity, and that those whose personas are used for commercial purposes should, in principle, have access to a suitable remedy – see Haemmerli, A 'Whose who? The case for a Kantian right of publicity' 49 *Duke Law Journal* 383 (1999). Compare also the view expressed in the American right of publicity case of *Hirsch v S.C. Johnson & Son, Inc* 280 N.W. 2d 129 (Wis. 1979), where it was remarked that 'it is a form of commercial immorality to "reap where another has sown"'.
¹⁷⁰⁶ Haemmerli *op cit.* at 401

¹⁷⁰⁷ See section 39(2) of Act 108 of 1996; *Carmichele v Minister of Safety and Security & Another* 2001 (4) SA 938 (CC) at par 54; *NK v Minister of Safety and Security* (2005) 26 ILJ 1205 (CC) at 1213-1215

¹⁷⁰⁸ E.g. the right to freedom of trade, occupation and profession contained in section 22 of Act 108 of 1996

¹⁷⁰⁹ Interestingly, in the UK context, Lewis & Taylor *Sport: Law and Practice* Butterworths (2003) (at D3.62) have argued that Art. 1 of Protocol 1 to the Human Rights Act 1998 might be applicable in celebrity merchandising cases in a very similar manner as that of the South African common law right to the earning

547 In conclusion, therefore, it is hoped that South African courts will be able to review the current position in the near future, to bring a measure of certainty to those who are targets of the unconscionable and blatant marketing tactics that so often characterize commercial aspects of the sports industry. While we have seen that the legislature has intervened to provide measures to effectively combat ambush marketing around sports events, the individual athlete remains exposed to similar dangers in respect of the merciless pirating of commercially valuable property.¹⁷¹⁰ In light of the commercial realities, it is time for the courts to recognize the truism that what is worth copying is worth protecting: When unscrupulous merchandisers misappropriate aspects of the celebrity's persona precisely because they recognize its commercial value, a court should not add insult to injury by ignoring such value in the process of applying ill-suited grounds for relief, which will often provide no real relief at all. Why should the celebrity necessarily need to show that the public may be confused as to an association between him or her and the product of the merchandiser, as is the case in passing off and trade mark cases? Does the mere fact of misappropriation not, *res ipsa loquitur*, testify to the fact that the celebrity's persona has value as a marketing tool and is in fact worthy of protection?

capacity (as argued above) – although not as the basis for a directly available property right but rather in terms of the obligation on courts to develop the common law in line with the European Convention. Article 1 provides that '[e]very natural or legal person is entitled to the peaceful enjoyment of his possessions', and is primarily applicable vertically (as against the state, to restrain arbitrary interference with the individual's enjoyment of his or her property). The authors refer to the earlier case of the European Court in *Van Marle v Netherlands* (1986) 8 EHRR 483, where the court had (notwithstanding the fact that Netherlands law does not recognise a property right to goodwill) held that the applicant accountants had built up a clientele which had the nature of a private right and could be viewed as an asset and likened to a 'possession' within the meaning of Article 1. Although admitting that there is authority that Art 1 does not apply to matters that are essentially ones of private law, Lewis & Taylor argue (at D3.64) for the possible application of this provision in cases of unauthorised celebrity merchandising as follows:

'To the extent that image rights are not protected by [UK] law, celebrities lose the ability to agree to, and charge for, the use of their image and thereby suffer loss of income. This clearly constitutes an interference with peaceful enjoyment of their goodwill, and such unauthorised commercial exploitation would appear to offer little in the way of justification in the public interest. The courts are under an obligation, as a public body, to develop and apply the law in a way that respects Convention rights.'

¹⁷¹⁰ Technological advances are also creating more and more opportunities for the unscrupulous celebrity merchandiser; compare the practice of unauthorised registering of the names of celebrities as domain names – see Ezer, D.J. 'Celebrity names as web site addresses: Extending the domain of publicity rights to the internet' *University of Chicago Law Review* Vol. 67 No. 4 (2000) 1291-1315 (where it is argued that the American right of publicity is preferable to trade mark and copyright law to combat such practices). It is submitted that the use of the right to the earning capacity in South African law (as advocated here) could provide as effective a remedy in such cases.

Unlike the position 25 years ago, the practice of celebrity merchandising is now a well-known one. As has been argued the suitable basis for relief of those prejudiced by this practice is also already established. It is hoped that the courts will make this connection, and provide long-overdue recognition of the property right at stake. While critics have increasingly observed that the American publicity right is expanding to worrying degrees and threatening to become unmanageable, it is believed that the courts can administer the necessary controls to avoid such dangers. Judicial conservatism can serve to limit the scope of the right, but should not serve to deny its existence and availability as a general premise.

548 As mentioned earlier, even though South African law does not currently recognize 'image rights' as commercially exploitable and legally protectable property (similar to the position in certain other jurisdictions, e.g. England), the reality is that such 'rights' are recognised in commercial practice and regulated accordingly by means of contract in the major professional sports. By way of example, the 2008 Standard Players' Contract in professional rugby, which is at the time of writing in force between provincial unions and players (as negotiated between SARPA¹⁷¹¹ and SAREO¹⁷¹²), contains the following provisions relating to the use of players' images¹⁷¹³ (in clauses 32-42):

'Use of your image by the Province

32. For the duration of this agreement the Province may, subject to clause 34, use, and may permit its sponsors to use, your image to promote –

32.1. the Game of Rugby;

¹⁷¹¹ South African Rugby Players' Association, the registered trade union which represents the majority of professional rugby players and which is the recognised collective bargaining agent for professional rugby players in terms of the provisions of the Labour Relations Act 66 of 1995

¹⁷¹² South African Rugby Employers' Organisation, the registered employers' organisation which represents the 14 provincial rugby unions which employ professional rugby players and which is the recognised collective bargaining agent rugby employers in terms of the provisions of the Labour Relations Act 66 of 1995

¹⁷¹³ The player's 'image' is defined as follows in the interpretation clause of the 2008 Collective Agreement between SARPA and SAREO (to which the 2008 Standard Players' Contract is annexed as a First Schedule): "Image" means a player's name, nickname, shirt number, signature, voice, picture, photograph, likeness and/or biographical information'.

32.2. the Province;

32.3. the Province's teams or squads;

32.4. any competition or tournament in which the Province's teams participate;

32.5. the Province's sponsors, and / or their business undertakings, products or services.

33. The Province may use your image beyond the period of this agreement for the purposes of promoting the Game of Rugby and the Province teams, for example in match programs, yearbooks and magazines, but not for commercial purposes.

34. Despite clause 32 –

34.1. the Province's sponsors may only use your image in association with the image of at least three other players, and in a manner that creates and furthers the sponsors' association with the Province, and / or its teams and squads, rather than with you personally;

34.2. the Province and its sponsors shall ensure that whenever they use your image you are attired in provincial apparel;

34.3. the Province and its sponsors may not use your image in a manner that harms your good name or offends your moral or religious sensibilities. Whenever the Province is of the view that the use of your image may cause such harm or offence it will give you notice in writing of its intention, or the intention of its sponsor, to use your image. You must then notify the Province of your objection in writing within 48 hours, and state the ground(s) on which you object. If you fail without reasonable cause to object within the 48 hour period, you will be deemed to have waived your right to object. The Province will then advise you, within a further 72 hours of receiving your objection, whether despite such objection it, or its sponsor, intends using your image. Thereafter, you may refer a dispute to expedited arbitration in terms of clause 55 of this agreement.

34.4. the Province will use its best efforts to ensure that its sponsors do not use your image disproportionately more often than they use the image of other players in the team;

35. Any marketing, advertising and / or promotional material created by the Province and / or its sponsors as contemplated in clauses 32 and 33 which incorporates your image, shall

belong exclusively to the Province and / or such sponsor but may only be used as contemplated in this agreement.

Your own use of your image

36. For the duration of this Agreement you will not, without the prior written consent of the Province, enter into or make any agreement or arrangement, whether legally binding or not, concerning the use of your image, or otherwise engage in any promotional activity, or communicate with the media, or write for the media, or be involved in a radio or television broadcast, or enter into any agreement relating to the internet.

37. Should you wish to obtain the Province's consent as contemplated in clause 36 you must address a written request to the Province in the form of Annexure IV. The Province will respond in writing within 3 working days of receiving the request and shall either grant or deny the request. Should the Province deny your request it shall provide brief reasons for such denial.

38. If the Province fails to respond within the time period contemplated in clause 38 the Province shall be deemed to have granted the request.

39. The Province may not withhold the consent contemplated in clause 36 unless the agreement or arrangement, or promotional activity, or communication with the media, or writing or broadcast or agreement relating to the internet, as the case may be –

39.1. relates to products or services competitive with those of the Province and / or its Nominated Sponsors¹⁷¹⁴;

39.2. involves the disclosure of confidential information, or is prejudicial to the interests of the Province, SA Rugby, the IRB or the Game of Rugby;

¹⁷¹⁴ A 'nominated sponsor' is defined in the interpretation clause of the 2008 collective agreement between SARPA and SAREO as follows:

(a) Any one of a maximum of 7 sponsors nominated by the provinces annually and communicated to SARPA in writing; and
(b) the official title sponsors of the Super 14, Currie Cup, Vodacom Cup, Under 21 and Under 19 competitions.

39.3. tends to bring the Game of Rugby into disrepute; or

39.4. is otherwise in conflict with your obligations under this agreement.

40. When participating in any promotional activity after having obtained the Province's consent you may not, without the prior written consent of the Province, appear in the Provincial jersey, or appear in, or make use of, any marks, words, names and the like which create an association with the Province. However, you and the Province may, subject to an agreed revenue sharing arrangement, enter into a joint-venture promotional activity agreement in terms of which the Province agrees that you may appear in the Provincial jersey, or appear in or make use of any marks, words, names and the like contemplated in this clause.

41. You may not, without the prior consent of the Province¹⁷¹⁵ –

41.1. apply your signature, name, nickname or other visual representation of your identity to any team or match jersey (whether a home or away or practice jersey) or to any team shorts or socks. This prohibition shall apply notwithstanding that the trade marks of the Province or any of its sponsors have been removed from such items;

41.2. sign photographs depicting scenes in the stadium during, preceding or after a match in which you have participated;¹⁷¹⁶

41.3. take pictures of yourself wearing the Province's jersey, shorts or socks ('colors'), or otherwise displaying any of the Province's trade marks or those of its sponsors, or allow such pictures of yourself to be taken, or have sketches yourself wearing such colors or trade marks drawn or otherwise reproduced on any surface whether by printing, embossing or other means.

42. Notwithstanding anything to the contrary in this agreement, if an existing agreement¹⁷¹⁷

between you and a third party concerning any matter set out in clause 36 and relating to

¹⁷¹⁵ A footnote to the Standard Players' Contract notes that '[i]t is recorded that the provisions of this clause have been included to protect the player and the province from unauthorised commercial exploitation of the player's image or the province's trade marks by private entrepreneurs who, for example, induce players to sign jerseys or match-winning photographs and then sell the items to members of the public at exorbitant rates.'

¹⁷¹⁶ A footnote to the Standard Players' Contract notes that '[t]his includes but is not limited to scenes from the dressing room, or of pre- or post-match interviews or award ceremonies.'

products or services competitive with those of the Province, or one or more of its Nominated Sponsors, terminates during the term of this agreement, the Nominated Sponsors whose rights are affected shall have the first option of entering into an agreement with you on at least similar terms to those offered by such third party. Should the Nominated Sponsor elect not to exercise the option you shall be entitled to renew the agreement with the third party.¹⁷¹⁸

It was reported in January 2009 that the SA Rugby Union has recently resolved to partially release its hold on players' control over their image rights, in an attempt to address the exodus of top players to European clubs on lucrative contracts.¹⁷¹⁹ It is expected that the ability to license the use of their images will bring in millions of rands for a number of top players, who will be able to earn more from such activity than from their existing players' contracts. It is hoped that such players will decide to stay in South Africa rather than seek employment with clubs abroad.

549 In professional cricket there is currently a commercial rights arrangement in place between Cricket South Africa (or the 'CSA', which contracts 18 players for service in the national side), the six domestic franchises (which contract approximately 90 players) and the SA Cricketers' Association (the professional players' association, which is at the time of writing fully representative of all professional cricketers in South Africa). This arrangement regulates commercial rights relating to the use of player attributes (image rights) and player appearances (in terms of contractual obligations with the official sponsors of the CSA and the franchises).

In terms of this arrangement, two players' trusts have been established to act as vehicles for the granting of rights to the CSA and the distribution of revenue from such commercial rights to players. The National Players' Trust has as its beneficiaries the professional cricketers who play for the national team, while the Franchise Players' Trust

¹⁷¹⁷ A footnote to the Standard Players' Contract notes that an 'existing agreement' is one that is in existence at the time of conclusion of the player's contract with the Province.

¹⁷¹⁸ The 2008 Standard Players' Contract contains further special provisions relating to footwear and protective and technical gear (in clause 43 *et seq.*)

¹⁷¹⁹ See the report by Harmse and Borchardt 'Boks set to earn millions', 25 January 2009 (available online at <http://www.sport24.co.za> - last accessed 18 February 2009)

(or 'All Players Trust')¹⁷²⁰ serves the same function in respect of players in the domestic franchise system. SACA serves as trustee on both these trusts. At the time of writing, a five year grant of rights agreement is in force between each of these trusts respectively and Cricket SA.¹⁷²¹

SACA facilitates the granting of commercial rights (e.g. to use of the attributes of players) to CSA, who then license the use of such rights to its official sponsors, merchandisers, licensees and the International Cricket Council (for purposes of official ICC events such as the ICC Champions Trophy, the ICC Cricket World Cup and the World Twenty20 championship).¹⁷²² Within the trusts, the players determine how revenue from the granting of rights are to be shared between players, based on criteria such as the number of years that a player has been contracted and 'match points' relating to the number of games which a player has played. Revenues related to participation in ICC events for players in the national team are shared based on the contractual category of such players (i.e. in terms of the A+, A, B and C categories into which nationally contracted players are divided). Retired players are eligible to share in revenues for a period of 6 months after retirement.

It appears that the system of players' trusts is currently viewed as a highly successful vehicle for the management of commercial rights in professional cricket. The players' association (SACA) has in recent years succeeded in negotiating more favourable terms for players in respect of the exploitation of their image rights. For example, while a previous licensing agreement between SACA (on behalf of the National Players' Trust) with videogame manufacturer Electronic Arts (EA Games) for the use of players' attributes in their *EA Cricket* game had earned the players revenues in the region of ZAR 60 000 per annum, SACA has managed to negotiate a more lucrative deal collectively (with players' associations in e.g. England and Australia), which has entitled South African players to benefit from royalties based on international sales of the game

¹⁷²⁰ As referred to in the Executive Summary (par. 13.1) of SACA's proposals for the Memorandum of Understanding with Cricket South Africa (see the discussion elsewhere in this chapter)

¹⁷²¹ *Ibid.*

¹⁷²² For these official ICC events, which are now (with the exception of the ICC Cricket World Cup) held on an annual basis, a participation fee is paid by the ICC to each member board, as well as a dividend (which is shared between Cricket South Africa and SACA, on behalf of the players).

(especially in the large Indian market), and currently such players' share of revenues is approximately ZAR 900 000 per annum.¹⁷²³

¹⁷²³ From a briefing by Tony Irish, CEO of the SA Cricketers' Association, at the SARPA/SAREO workshop on players' image rights, held in Cape Town, 23 June 2008

§4 Sports Sponsorship¹⁷²⁴

550 The late great Edward Grayson observed that the practice of 'sponsorship' has no traditional legal status; and that '[I]ike sport itself, it leans more to description than delineation'.¹⁷²⁵ The practice of sponsorship may take many forms, although the following serves as a succinct definition encompassing the basic elements, namely 'the advancement of money by a commercial company to an individual, agent, or association in return for media exposure of the sponsor's product, name, trademark or logo'.¹⁷²⁶ In the context of sport, a sponsorship contract could involve such financial assistance to teams, individual athletes or players, sports governing bodies, event organizers, groups of supporters, etc,¹⁷²⁷ while other forms of sponsorship involvement include the growing market in corporate naming rights to stadia and sporting venues¹⁷²⁸ and the related activity of athlete endorsements,¹⁷²⁹ vending rights, venue suite sales, etc.

551 A major area of sponsorship activity is that of broadcast sponsorship, where a sponsor's financial outlay is utilized in respect of the costs of a television or other broadcast. Between the different sporting codes the value or suitability of competitions and events for broadcasting purposes differs. It has for example been observed that

¹⁷²⁴ I wish to express my sincere thanks to David Sidenberg of BMI Sport Info, an independent market research company which specialises in the sports sponsorship industry, for kindly providing the very helpful statistical and other information regarding the South African sports sponsorship market as contained herein

¹⁷²⁵ Edward Grayson *Sport and the Law* 3rd ed. Butterworths, London 2000 446

¹⁷²⁶ See Grayson *op cit.* 451. Sports sponsorship has also been defined as 'the support of a sport, sports event, sports organisation or competition by an outside body or person for the mutual benefit of both parties' – From the 'Howell Report', report of the *Committee of Enquiry into Sports Sponsorship*, Central Council for Physical Recreation, London (1983). Lewis and Taylor describe sponsorship as 'an investment in cash or kind in an activity, in return for access to the exploitable commercial and marketing potential associated with that activity' (Lewis & Taylor *Sport: Law and Practice* 2003 at 706); see also Gardiner et al *Sports Law* 2nd Edition 2001 at 507. Gratton & Taylor *Economics of Sport and Recreation* E&FN Spon 2000, remarked that sports sponsorship had hardly existed as an economic activity in the United Kingdom before 1970, yet had grown by 1999 to have an estimated worth of £350 million. The authors also remarked that, globally, sports sponsorship as an industry was estimated in 1999 to have a worth of approximately \$20 billion, having grown in value by over 300 per cent in the 1990s alone (Gratton & Taylor 163).

For some more detailed discussion of major developments in this international industry, see Amis, J & Cornwell, B (eds.) *Global Sport Sponsorship* Berg Publishers, Oxford & New York 2005.

¹⁷²⁷ The South African Supreme Court of Appeal had occasion in *South African Football Association v Stanton Woodrush (Pty) Ltd t/a Stan Smidt & Sons & Another* 2003 (3) SA 313 (SCA) (at p322) to discuss the distinction between sponsorship and the practice of trade mark licensing, in the context of the placing of a brand name on playing kit.

¹⁷²⁸ See Cloete et al *Introduction to Sports Law in South Africa* 174-5. See also the discussion in par 596 *et seq* below

¹⁷²⁹ See the discussion on athletes' image rights and the practice of celebrity merchandising in par 523-549 above

cricket is the ideal vehicle for television broadcasts and broadcast advertising: One Day International matches usually last in the region of eight hours,¹⁷³⁰ the sporting spectacle is confined to a relatively small enclosed area (and therefore easily captured on camera), and the breaks between overs provide ideal opportunity for commercials. Other sports (e.g. motor sport events, marathon running and yachting) provide more challenges in respect of the logistics and costs of coverage. It is important in cases of broadcast sponsor involvement to note that conflicts may arise between the rights and interests of e.g. event sponsors and such broadcast sponsors, especially in respect of the exclusivity of rights obtained by each. This should be carefully considered by sponsors at the time of negotiation of agreements.¹⁷³¹

552 American commentator Kim Skildum-Reid wrote in 2003 that sponsorship was entering its 'last generation', where sponsors are starting to realize that success in this activity is about nurturing a brand's connection with a target market by putting that market's needs first; it is about how a sponsor can 'use the most emotional and personally relevant of all marketing media to improve [a] brand's relationship with a target market and, more importantly, their relationship to [a] brand'.¹⁷³² According to the author, this has led to a very different model of sponsorship. While in the past sponsors attempted to create bonds with an event, the trend now is to create bonds with target markets, through a variety of means.¹⁷³³

553 Sponsorship is a 'below the line' form of advertising, which is not carried by the traditional media. Accordingly, the value of sponsorship for the sponsor lies not in paid brand advertising in the media but rather in indirect reference to its name, brand,

¹⁷³⁰ This is even more applicable to the newest (and much shorter) format of the game, the Pro20 or Twenty20 format (20 overs a side), and might be one of the reasons for the phenomenal amounts paid for the broadcasting rights to the recently-established Indian Premier League (or IPL) tournament – see the discussion of the IPL elsewhere in this chapter.

¹⁷³¹ For more on the dangers inherent in cross-sponsorship of sports events, see par 559 below

¹⁷³² See Kim Skildum-Reid 'Last Generation Sponsorship', available on the web site of <http://www.powersponsorship.com> [last accessed 16 February 2007]

¹⁷³³ *Ibid.*

product or service (i.e. by mention in an event title or on athletes' clothing).¹⁷³⁴ In South Africa, as elsewhere, the practice of licensing event and stadium naming rights, for example, has also become a mainstream source of revenue for sports bodies.

554 Section 3.1 of the Advertising Standards Authority of South Africa (ASA)'s *Sponsorship Code* (a code of conduct for those engaged in sponsorship in *inter alia* sport)¹⁷³⁵ defines 'sponsorship' as follows:

'Sponsorship is a form of marketing communication whereby a sponsor contractually provides financial and/or other support to an organization, individual, team, activity, event and/or broadcast in return for rights to use the sponsor's name and logo in connection with a sponsored event, activity, team, individual, organization or broadcast.

The objective of investing in sponsorship is to create a positive association between a sponsor's image, product or brand and a sponsored event or activity, team, individual, organization or broadcast, within the sponsor's target market in order to attain marketing and corporate objectives.'

The ASA is an independent body established and funded by the advertising industry 'to ensure that its system of self-regulation works in the interests of the public'. The ASA runs a Sponsorship Dispute Resolution Committee and a Sponsorship Appeals Committee, which consists of member of the signatories to the Code within the advertising industry, and rulings are made by peers. While the Code is not legally enforceable, the ASA may advise persons of their rights and obligations. Rulings by the ASA or a Committee may include orders for the withdrawal of advertising as well as other sanctions to members of the industry (e.g. withholding advertising space or referral to a disciplinary hearing).¹⁷³⁶ While this code of conduct is therefore not a primary weapon in the arsenal of sponsors, who will need to enforce their rights through the applicable

¹⁷³⁴ Lewis & Taylor *Sport: Law and Practice* Cavendish Publishing 2003 at 706

¹⁷³⁵ The Code is available on the ASASA web site at <http://www.asasa.org.za>

¹⁷³⁶ See, generally, the provisions of the Code

branch of intellectual property law (e.g. copyright or trade mark protection), common law actions (e.g. in cases of passing off) or actions for breach of contract, it does provide a possible avenue for action against persons or organizations within the advertising industry in cases of questionable practices relating to sports sponsorship. This may include cases of unauthorized celebrity merchandising (e.g. infringement or misappropriation of an athlete's image rights in advertising and promotional services).¹⁷³⁷ The ASA hears an average of 4 000 complaints per year, of which approximately 96% are brought by members of the public, and 4% from competitors of business undertakings. Roughly 47% of such complaints relate to instances of alleged misleading claims in advertising.

555 At the time of writing, it appears that the ASA has to date had only a single complaint related to (sports) sponsorship (in terms of its Sponsorship Code). The dispute arose out of an advertisement by mobile phone network MTN, which ran a newspaper advertisement during 2007 with the bold heading 'Turning Young Men into Bafana Bafana'.¹⁷³⁸ Rival mobile telephone network Vodacom, the official national team sponsor, brought a complaint against MTN, claiming that the advertisement infringed Vodacom's sponsorship rights which it had obtained from the SA Football Association (SAFA). It was also alleged that SAFA had registered the word 'Bafana Bafana' as a trade mark for mobile phone services and that Vodacom had been given the right to use the mark in advertising, and that MTN's advertisement constituted infringement of such trade mark. The ASA ruled against MTN (which was not an official football sponsor associated with the national team), and the ruling was taken on appeal to the ASA's Sponsorship Appeals Committee. The Appeals Committee upheld the ruling in May 2008, finding that MTN's conduct implied a joint sponsorship of the national football team by MTN and Vodacom, and as such constituted ambush marketing.¹⁷³⁹ The Committee held that MTN was in breach of the Sponsorship Code's provision regarding 'Imitation and Confusion', which

¹⁷³⁷ See the discussion of athletes' image rights in par 523 *et seq* above

¹⁷³⁸ Referring to the popular nickname of the national football team (and translated, roughly, as 'our boys')

¹⁷³⁹ From a briefing by Ms Lillian Mlambo, ASA Communications Manager, Cape Town, 23 June 2008

provides that 'imitation of the representation of other sponsorships should be avoided if this misleads or generates confusion, even when applied to non-competitive products, companies or events'.

The Committee's ruling has been criticized as being confusing; e.g. the Committee's finding that Vodacom could not claim an exclusive right to the use of the words 'Bafana Bafana', but that a competitor in the same industry was not entitled to use those words to promote its own event.¹⁷⁴⁰ It also appears that the Committee ruled that sponsorship is under no statutory control, but solely under the control of the ASA Sponsorship Code, which ignores the role of the relevant ambush marketing legislation.¹⁷⁴¹

It is debatable to what extent the ASA Sponsorship Code may serve to address instances of illegitimate sports sponsorship activities in future and, specifically, to what extent its available processes for lodging complaints will serve as a satisfactory avenue for redress for those whose commercial or other interests are affected by such sponsorship conduct or activities.

556 The ASA's Sponsorship Code dates from 1999 and it appears that it is at the time of writing in the process of review by the Marketing Association of South Africa (MASA) in consultation with FIFA, with a view specifically to the FIFA 2010 World Cup.¹⁷⁴²

557 The South African sports sponsorship market is rather limited in terms of size in comparison with markets elsewhere (e.g. in North America, the UK and Europe). By way of comparison, sponsorship spend in South Africa in 2007 amounted to approximately US\$ 0.8 billion, whereas sponsorship spend in North America and Europe in the same year was in the region of US\$ 14.9 billion and US\$ 10.6 billion respectively.¹⁷⁴³ A major impetus for the impressive growth of direct sponsorship spend in the industry from a base of ZAR 65 million in 1985 to ZAR 3 064 million in 2007 (including leverage spend,

¹⁷⁴⁰ From a report available on *Marketingweb*, 5 June 2008

¹⁷⁴¹ Such as the Merchandise Marks Act, 1941 (as amended), which is discussed in the section on ambush marketing in par 562 *et seq* below

¹⁷⁴² From the briefing by the ASA's Communications Manager, Cape Town, 23 June 2008, referred to above.

¹⁷⁴³ Figures adapted from the 2007 IEG Sport Sponsorship Report and the 2007 BMI Adult SportTrack report – courtesy of David Sidenberg, BMI Sport Info

more than ZAR 5.5 billion), was South Africa's readmission to international sport following the boycott of apartheid sport. The market experienced unprecedented growth of more than 58% from 1990 to 1992.¹⁷⁴⁴ The local sports sponsorship market's average annual compound growth rate of around 19.4% compares very favourably with growth rates in all other markets.¹⁷⁴⁵ Expectations are that future major events, specifically the upcoming 2010 FIFA World Cup South Africa™, will serve to continue this very positive growth trend (with due regard, of course, for the expected effects of the current worldwide economic recession at the time of writing).

According to available information more than 1 000 companies are currently involved in sponsorship, with the top 10 companies accounting for more than 50% of direct sponsorship spend.¹⁷⁴⁶ Within the top ten, the telecommunications companies, banks, South African Breweries (primarily through their flagship brand Castle Lager), South African Airways and oil and petroleum manufacturer Sasol are the dominant sponsors.¹⁷⁴⁷ It appears that the sport which is leading the way in terms of sponsorship is soccer (football), which has shown the following trends:

- Media returns for all soccer sponsors increased from ZAR 1.5 billion in 2006 to more than ZAR 2.7 billion in 2007;
- In 2007, sponsors of soccer spent over ZAR 1 billion on their sponsorship rights (excluding leverage), representing more than 30% of total direct spend in the overall SA sponsorship market; and
- Whereas year-on-year spend on soccer increased by almost 60% in 2007, all other sports combined increased by less than 10%.¹⁷⁴⁸

According to available information, more than 80 different sporting codes receive at least some sponsorship money each year (while money is also, in addition, channeled into

¹⁷⁴⁴ Source: BMI Sport Info

¹⁷⁴⁵ *Ibid.*

¹⁷⁴⁶ See the report by Ingrid Salgado 'Sport no longer a playground for sponsors', *Business Report*, 9 October 2005 [available online at <http://www.busrep.co.za> - last accessed 15 February 2007].

¹⁷⁴⁷ Source: BMI Sport Info

¹⁷⁴⁸ Source: BMI Sport Info

schools, universities and macro-sport codes as well as sponsorship backing for high-profile individual sports personalities). The top 5 sporting codes are soccer (football), rugby union, cricket, motor racing and golf, which five codes together account for approximately 67% of total sponsorship spend. This is not surprising if one considers that these 5 codes enjoy a disproportionate share of broadcast coverage of sport (e.g. with more than 50% of the total hours of television coverage allotted to these codes).¹⁷⁴⁹ At the time of writing, reports are filtering in regarding the impact of the current 'credit crunch' and world-wide economic recession on sports sponsorship. It is expected that, similar to developments in other jurisdictions, the South African sports sponsorship market may be significantly affected in the foreseeable future.

558 The commercial activity of sports sponsorship is of course open to an array of possible disputes between different parties. One such type of dispute in respect of major international events is that involving conflicting sponsors, and the authority of international governing bodies to regulate event sponsorship to the exclusion also of existing rights holders in respect of the sponsorship of individual athletes. This issue has been especially prevalent in international cricket. The ICC Cricket World Cup in 2003 saw such a situation where the International Cricket Council required participating cricketers to sign agreements limiting the rights of existing player sponsors in order to ensure exclusivity for official sponsors of the tournament. This led to a dispute between sub-continent players (notably Indian cricketers) and the ICC. A similar dispute developed prior to the 2007 ICC Cricket World Cup between Cricket Australia and the ICC, when the ICC refused the participation of Australian team sponsor Travelex, as such sponsor would have conflicted with the official event sponsors who had been appointed by the Global Cricket Corporation, the media rights partner for the event. Cricket Australia referred the

¹⁷⁴⁹ *Ibid.* For more on television broadcast coverage of the different sporting codes in South Africa, see par 583-584 below

matter to the ICC's Disputes Resolution Committee, which found that the ICC's decision was correct in the circumstances.¹⁷⁵⁰

559 By way of illustration of the type of contractual dispute that may be encountered in respect of sports sponsorship, a matter is at the time of writing pending in the Cape High Court between sports clothing manufacturer Puma and Premier Soccer League club Ajax Cape Town. In this matter, Puma has applied for summary judgment in the amount of ZAR 1.8 m against Ajax on the basis of alleged breach of a clothing sponsorship contract. In terms of the contract, which was in force from 2005 to mid-2008, Ajax was obliged *inter alia* to purchase supporters' clothing to a minimum value of ZAR 200 000 per year. Puma claims that Ajax failed to adhere to this and other obligations of the agreement. This application follows litigation in 2008 regarding Ajax's termination of said contract. Ajax terminated the agreement and concluded a new sponsorship agreement with Puma's competitor, Adidas, which agreement is to be in force for 11 years and is to the value of ZAR 60 m. Puma unsuccessfully attempted to prevent the conclusion of the Adidas contract by means of an urgent application, in which Puma averred that it was entitled to be granted an opportunity to renew the previous contract on the basis that it could provide similar benefits as Adidas.

Apart from this type of situation and the possible disputes arising from sponsorship contracts between sponsors and rights holders (e.g. governing bodies, event organizers, teams or athletes), the practice of cross-sponsoring of events may also generate disputes regarding the demarcation of rights and issues of exclusivity.

560 Other issues of relevance to sports lawyers include public regulation of sports sponsorship, e.g. by means of banning of tobacco sponsorship of sports events. In March 1999 the South African Parliament passed the Tobacco Products Control Amendment Act, which came into effect on 1 October 2000.¹⁷⁵¹ Section 4 of this Act prohibits all tobacco

¹⁷⁵⁰ The report of this matter is available as *Cricket Australia v ICC Development (International) Ltd*, in *International Sports Law Review* 2007, 2 (May), SLR 61-75, Sweet & Maxwell (2007)

¹⁷⁵¹ Act 12 of 1999, which amended the Tobacco Products Control Act, 83 of 1993

advertising, sponsorships and promotions. Since April 2001 no advertisement may contain trade marks, brand names, logos or company names used on tobacco products, and no such marks may be used in connection with *inter alia* sporting activities or events. Contravention of this prohibition constitutes an offence and is punishable by a fine or imprisonment.¹⁷⁵²

561 The following section will consider ambush marketing protection in South African law, which, of course, is of significant potential relevance to sponsors and their legal advisors.

¹⁷⁵² Section 9 of Act 12 of 1999

§5 Ambush Marketing

562 This section will not discuss the origins and history of ambush marketing practices and the legal responses thereto in other jurisdictions, which responses have included significant new laws in a number of countries in recent years in order to protect major sporting events from ambush marketing. The reader is referred to more specialized texts for this purpose.¹⁷⁵³ This section will briefly examine the available legal protection in South Africa and, more specifically, the special regulation of sponsors' and event organisers' commercial interests, marks etc regarding the 2010 FIFA World Cup South Africa™.

I Legal protection against ambush marketing

563 Section 3.7 of the Advertising Standards Authority of South Africa (ASA)'s *Sponsorship Code* (a code of conduct for those engaged in sponsorship in *inter alia* sport)¹⁷⁵⁴ defines 'ambush marketing' as follows:

'The attempt of an organization, product or brand to create the impression of being an official sponsor of an event or activity by affiliating itself with that event or activity without having paid the sponsorship rights-fee or being a party to the sponsorship contract.'¹⁷⁵⁵

¹⁷⁵³ E.g. Johnson, P *Ambush Marketing: A Practical Guide to Protecting the Brand of a Sporting Event* Sweet & Maxwell, London (2008)

¹⁷⁵⁴ The Code is available on the ASA web site at <http://www.asasa.org.za>. See also the discussion on sports sponsorship in South Africa, contained in par 550-561 above

¹⁷⁵⁵ Ambush marketing is also sometimes referred to as 'parasitic' or 'guerrilla' marketing – see Townley, S; Harrington, D; Couchman, N 'The legal and Practical Prevention of Ambush Marketing in Sports' *Psychology & Marketing* Vol. 15(4) 1998 at p333:

'Ambush marketing, or parasitic marketing, consists, in the sports context, of the unauthorized association by businesses of their names, brands, products, or services with a sports event or competition through any one or more of a wide range of marketing activities. The association is unauthorized in the sense that the controller of the commercial rights of such an event, usually the relevant governing body, has neither sanctioned nor licensed it, either itself or through its commercial agents. The term *ambush* has been applied because of the tendency for such activities to be devised by competitors of official sponsors or suppliers of sports events and to take place during the build up to or during the event itself; thus maximum commercial impact is achieved. The activity is often carefully planned to take advantage of inadequacies in an event's commercial program and real or apparent loopholes in the legal protection available to event owners and sponsors.'

'Ambush marketing' is defined as follows in the Safety at Sports and Recreational Events Bill:¹⁷⁵⁶

'[A]n intentional act or an attempt on the part of a person which utilizes or attempts to utilize the commercialization, publicity or public interest in an event arranged, organized or sponsored by others to obtain an unauthorized and unpaid for commercial benefit from, or association with, an event, without any official involvement or connection with such event.'

A further definition is found in par 1.1.6 of the City of Johannesburg's 2010 FIFA World Cup South Africa™ By-Laws (in draft form at the time of writing):

"Ambush Marketing" means marketing, promotional, advertising or public relations activity in words, sound or any other form, directly or indirectly relating to the Competition, and which claims or implies an association with the Competition and/or capitalises or is intended to capitalise on an association with, or gains or is intended to gain a promotional benefit from it to the prejudice of any sponsor of, the Competition, but which is undertaken by a person which has not been granted the right to promote an association with the Competition by FIFA and whose aforesaid activity has not been authorised by FIFA'

564 As Cloete *et al* have observed,¹⁷⁵⁷ the justification for legal measures to combat ambush marketing – i.e. to protect the exclusivity of official sponsors' rights and the often very substantial commercial outlay in associating with sporting events – is well illustrated with reference to the facts of the case of *Motor Racing Enterprises (Pty) Ltd (in liquidation) v NPS (Electronics) Ltd*.¹⁷⁵⁸ The appellant was the organizer of the South African leg of the FIA's Formula 1 Grand Prix, and the respondent had agreed to sponsor

¹⁷⁵⁶ In section 1(iii). For more on the SASRE Bill, which was first published for comment in March 2005 and appears to be in the process of revision at the time of writing, see the discussion elsewhere in this chapter.

¹⁷⁵⁷ Cloete *et al* *Introduction to Sports Law in South Africa* LexisNexis Butterworths (2005) at 179

¹⁷⁵⁸ 1996 (4) SA 950 (A)

the event at a cost of ZAR 22 million (payable in installments, which extended well beyond the date upon which the event was to take place). The respondent obtained naming rights, the exclusive right to be official sponsor of the race, and that all public references to the race were to indicate the respondent's sponsorship. The appellant, however, took no steps to ensure that public reference to the race referred to the respondent's sponsorship, and also allowed another sponsor to erect advertisements around the track that gave the impression that such sponsor was the official sponsor of the event. The appellant claimed an order for specific performance against the respondent for payment of the outstanding installments, and the respondent raised the defence of the *exceptio non adimpleti contractus*.¹⁷⁵⁹ The court upheld this defence on a finding that the parties' obligations in terms of the sponsorship contract were reciprocal. As Cloete *et al* observe, the end result was that the appellant was liquidated and South African motor sport suffered irreparable harm¹⁷⁶⁰ (the country has to date never again hosted a Formula 1 race, although it appears at the time of writing that negotiations have been initiated by a motor sport development company, which was recently established under the auspices of the Gauteng provincial government, to re-introduce the South African Formula 1 Grand Prix at the Kyalami race-track in Johannesburg in the near future).

565 Ambush marketing takes mainly two forms, namely the 'association' and the 'intrusion' cases. In cases of ambush marketing by association, the ambush marketer's conduct is aimed at or has the effect of creating the impression in the minds of the public that the ambush marketer or his product or brand is in some way associated with the sporting event, most commonly an impression that it is an official sponsor of the event.

566 In the intrusion cases, which do not necessarily involve any association or perceived association with official event sponsors, the ambush marketer attempts to ride

¹⁷⁵⁹ See the discussion of this contractual defence against a claim for performance in the section on Sport and Employment in par 272 above (with reference to the employer's duty to remunerate the employee)

¹⁷⁶⁰ Cloete *et al supra* at 179

on the coattails, as it were, of the event and the interest it generates. This can be done in a myriad ways; e.g. through in-store promotions, advertising in the different media, competitions offered to consumers, etc. One example that is often cited is that of the unauthorized use of airspace at an event by for example using a branded blimp to 'intrude' in such airspace and advertise a product or brand which has no official connection with the event or other sponsors.

In the South African context, the 2006 FIFA World Cup in Germany saw a complaint by FIFA to the Advertising Standards Authority against electronics giant LG Electronics (Pty) Ltd, which had run a competition in terms of which the winners could win a trip to the final of the FIFA World Cup in Germany. The competition was advertised with extensive use of allusions to the event, even though LG was not an official event sponsor; this was found to amount to unlawful ambush marketing and LG was ordered to refrain from such conduct.

567 Ambush marketing first came to prominence in South Africa during the 2003 ICC Cricket World Cup,¹⁷⁶¹ which was officially sponsored by *inter alia* Pepsi. The event saw much-publicized instances of anti-ambush marketing measures aimed at protecting official event sponsors, which included the controversial instance of a spectator being escorted from a match at the Centurion Park stadium for opening a can of Coca Cola.¹⁷⁶² Ironically, the situation in 2003 was diametrically opposite to what had happened at the 1996 Cricket World Cup, where Coca-Cola was an official event sponsor and Pepsi launched a massive advertising campaign (with extensive use of the slogan 'Nothing official about it'), which included concluding sponsorship agreements with individual players who took part in the event (e.g. top Indian batsman Sachin Tendulkar). Events at the 1996 ICC World Cup came to be known as the 'Cola wars'. While Coca-Cola was a sponsor of the event, hot air balloons were launched at cricket grounds bearing the

¹⁷⁶¹ Although the first reported instance of attempted ambush marketing took place during the 1996 Comrades Marathon. The event's official sponsor was a local financial institution. A competitor pledged to pay athletes who would finish the race with a sticker on their face bearing such competitor's logo.

¹⁷⁶² A Johannesburg businessman felt the sting of measures enforced in terms of the new legislation during the tournament at the match between Australia and India on 15 February 2003, when he was evicted from Centurion stadium in Pretoria for drinking Coca-Cola and refusing a request by security personnel to surrender cans of the soft drink (he was, however, subsequently readmitted to the stadium).

branding of their rivals, Pepsi. Between that event and the 2003 World Cup, Pepsi had become one of cricket's 'Global Partners', the top bracket of sponsors, by signing a seven-year deal with Rupert Murdoch's Global Cricket Corporation.¹⁷⁶³ As Pepsi's conduct has been described – 'the poacher had turned gamekeeper' – and the organisers of the 2003 event were obliged to stamp out ambush marketing in favour of event sponsors such as Pepsi.¹⁷⁶⁴

568 The run-up to the 2003 cricket event, and pressure from event rights holders the International Cricket Council, led to the passing of new legislation in South Africa to specifically address the threat of ambush marketing.¹⁷⁶⁵ This legislative response was two-fold:

- The Trade Practices Amendment Act 26 of 2001 inserted a new section 9(d) into the Trade Practices Act,¹⁷⁶⁶ which provision prohibits a person from making, publishing or displaying false or misleading statements, communications or advertisements which suggest or imply a contractual or other connection with a sponsored event or the person sponsoring such event.¹⁷⁶⁷ The application of this provision is wide, as is illustrated by section 1 of the Act, which defines an 'advertisement' to mean the following:

'Any written, illustrated, visual or other descriptive material or oral statement, communication or representation or reference distributed to

¹⁷⁶³ The GCC had bought the sponsorship and television rights to ICC events as part of a seven-year deal at a reported cost of US\$550 million.

¹⁷⁶⁴ See Rodney Hartman *Ali: The life of Ali Bacher* Viking 2004 at 417.

¹⁷⁶⁵ The Australian government enacted similar legislation to deal with unfair ambush marketing in the run-up to the 2000 Olympics. The Sydney 2000 Games (Indicia and Images) Act 1996 outlawed any unauthorised visual or aural representation suggesting a connection with the event – see Gardiner et al *Sport Law* 2001 at 513. Portugal also enacted similar legislation prior to the Euro 2004 football championship. For more on ambush marketing in general, see Janet Hoek 'Ambush Marketing' in Amis, J & Cornwell, B (eds.) *Global Sport Sponsorship* Berg Publishers, Oxford & New York 2005 at 207 *et seq*; Wise & Meyer *International Sports Law and Business* Kluwer Law International (1997), Vol. 3 at 1965 *et seq.* and 2016 *et seq.*

¹⁷⁶⁶ Act 76 of 1976

¹⁷⁶⁷ Contravention of section 9(d) constitutes a criminal offence and is subject to hefty fines or imprisonment (i.e. two years' imprisonment for a first offence, five years for a second offence), although it has been observed that it is unlikely that prosecuting ambush marketers would be a high priority for the South African police and prosecuting authorities – Johnson, P *Ambush Marketing: A Practical Guide* (2008) *supra* at 140

members of the public or brought to their notice in any manner whatsoever and which is intended to –

- (a) promote the sale or leasing of goods or encourage the use thereof or draw attention to the nature, properties, advantages or uses of goods or to the manner in, condition on or prices at which goods may be purchased, leased or otherwise acquired; or
- (b) promote or encourage the use of any service or draw attention to the nature, properties, advantages or uses of any service or the manner in, conditions on or prices at which any services is rendered or provided.'

The Merchandise Marks Amendment Act 61 of 2002 was promulgated in

order to increase the powers of the Minister of Trade and Industry to regulate the use of trade marks in respect of *inter alia* sporting events.

This amendment followed from (and incorporated) draft legislation which was formulated by the Association of Marketers and submitted to the Department of Sport and Recreation and the Department of Trade and Industry. The main thrust of the Amendment Act was to amend the definition of an 'event', which is defined to include the following:¹⁷⁶⁸

'[A]ny exhibition, show or competition of a sporting, recreational or entertainment nature which is -

- (a) held or to be held in public;
- (b) likely to attract the attention of the public or to be newsworthy; and
- (c) financed or subsidized by commercial sponsorship,

and includes any broadcast of such exhibition, show or competition'

¹⁷⁶⁸ Section 1(a) of the Amendment Act. Section 1(b) of the Amendment Act provides for the insertion of the definition of a 'protected event' (namely an event designated as such by the Minister in terms of section 15A).

The Amendment Act has inserted section 15A in the Merchandise Marks Act 17 of 1941, and provides as follows:

'Abuse of trade mark in relation to event:

- 15A (1)(a) The Minister may, after investigation and proper consultation and subject to such conditions as may be appropriate in the circumstances, by notice in the Gazette designate an event as a protected event and in that notice stipulate the date –
- (i) with effect from which the protection commences; and
 - (ii) on which the protection ends, which date may not be later than one month after the completion or termination of the event.
- (b) The Minister may not designate an event as a protected event unless the staging of the event is in the public interest and the Minister is satisfied that the organisers have created sufficient opportunities for small businesses and in particular for those of the previously disadvantaged communities.
- (2) For the period during which an event is protected, no person may use a trade mark in relation to such event in a manner which is calculated to achieve publicity for that trade mark and thereby to derive special promotional benefit from the event, without the prior authority of the organiser of such event.
- (3) For the purposes of subsection (2), the use of a trade mark includes –
- (a) any visual representation upon or in relation to goods or in relation to the rendering of services;
 - (b) any audible reproduction of the trade mark in relation to goods or to the rendering of services; or
 - (c) the use of the trade mark in promotional activities, which in any way, directly or indirectly, is intended to be brought into association with or to allude to an event.¹⁷⁶⁹

¹⁷⁶⁹ It should be noted that the Minister's powers in respect of this section were extended specifically for purposes of the FIFA World Cup 2010, by means of the 2010 FIFA World Cup South Africa Second Special Measures Act 12 of 2006, section 2, which provides as follows:

Section 15A (4) provides that any contravention of subsection (2) is a criminal offence, which offence is punishable by a fine of ZAR60 000 or up to three years imprisonment for a first offence or a fine of ZAR100 000 or up to five years imprisonment for a subsequent offence.¹⁷⁷⁰

569 It is clear that this section is quite far-reaching, making provision as it does *inter alia* for prohibition of the use ('abuse') of a marketer's own trade mark. It also clearly provides quite substantial protection against ambush marketing, and its real value lies in the fact that it covers both the so-called 'association' cases as well as 'intrusion' cases (compare the wording of section 15A (2) as quoted above). This has assuaged earlier criticism of the shortcomings of the previously available grounds to combat ambush marketing (such as action under the Trade Marks Act, the Copyright Act, unlawful competition and passing off, etc) as well as of other suggested legislative amendments at the time.¹⁷⁷¹ The template of this far-reaching legislative mechanism has been followed elsewhere¹⁷⁷² while other jurisdictions have introduced apparently ever-increasing protection by means of statute,¹⁷⁷³ although it should be noted that such legislative protection in South Africa and elsewhere is not immune to criticism regarding the reach and scope of the measures imposed and their possible effects on the rights of persons and parties other than event sponsors.¹⁷⁷⁴ In particular, it should be noted that the

'If the Minister of Trade and Industry declares the 2010 FIFA World Cup South Africa a protected event in terms of section 15A (1) of the Merchandise Marks Act, 1941 ... he or she may, notwithstanding section 15A (1) (a)(ii) of that Act, stipulate by notice in the *Gazette* a date later than one month but not later than six months after the completion or termination of the final competition as the date on which the protection afforded by such a declaration ends.'

¹⁷⁷⁰ A court finding a person guilty of this offence may also order confiscation of goods in respect of which the offence was committed (e.g. promotional material).

¹⁷⁷¹ See the article by Owen Dean, 'Legal aspects of ambush marketing', published on the web site *Legal City*, 11 February 2000 [available online at <http://www.legalcity.net> - last accessed 15 February 2007].

¹⁷⁷² Compare the nearly identical wording of section 25 (2) and (3) of the ICC Cricket World Cup West Indies 2007 Act, 28 of 2006, which was passed by the Parliament of the Republic of Trinidad & Tobago, 1 November 2006

¹⁷⁷³ E.g. compare the London Olympic Games and Paralympic Games Act 2006 and New Zealand's Major Events Management Act (No. 35 of 2007), and, more generally, see Johnson, P *Ambush Marketing: A Practical Guide to Protecting the Brand of a Sporting Event* Sweet & Maxwell, London (2008) chapter 5

¹⁷⁷⁴ E.g. see the discussion of what Phillip Johnson calls horizontal and vertical 'creep' in respect of the adoption of new legislation on ambush marketing based on developments in other jurisdictions, in Johnson, P 'Look out! It's an ambush' *International Sports Law Review* 2008, 2/3, p24-29

current South African legislative protection in respect of the 2010 FIFA World Cup South Africa™, for example, might be open to constitutional challenge in respect of the effect of restrictions imposed on the rights of others (e.g. in respect of the right of freedom of expression, freedom of trade and occupation, and the right of property, as guaranteed in the Bill of Rights¹⁷⁷⁵). This is especially poignant in the context of South Africa's developmental state with its high levels of poverty, and the urgent need to encourage alternatives to formal employment (e.g. encouraging opportunities for street vendors surrounding major tournaments, although the prevalence of illegal importation of counterfeit goods such as sporting apparel remains problematic). More will be said below regarding anti-ambush marketing protection specifically in respect of the 2010 football World Cup.

570 The other (common law and intellectual property legislation) protections are of course still available, subject to possible practical limitations (e.g. whether an interdict to prohibit ambush marketing conduct after the event has any value, and e.g. the problems of quantifying damages *ex post facto* in an unlawful competition or passing off claim relating to an intrusion ambush).

571 It should furthermore be noted that the Consumer Protection Act, 2008 (which is at the time of writing not yet in force¹⁷⁷⁶) contains provisions regarding the marketing of goods or services, which also prohibits ambush marketing by association with an event. Section 29 of the Bill, which is found in Part E (which deals with consumers' 'right to fair and responsible marketing'), provides as follows:

'S29. A producer, importer, distributor, retailer or service provider must not market any goods or services-

¹⁷⁷⁵ In sections 16, 22 and 25, respectively, of the Constitution of the Republic of South Africa, 1996. See the discussion below

¹⁷⁷⁶ The Consumer Protection Act, 68 of 2008 was signed into law by the President of the Republic on 24 April 2009 and published in the *Government Gazette* on 29 April 2009. The Act will come into force on a date unknown during the course of 2009/10

- (a) in a manner that is reasonably likely to imply a false or misleading representation concerning those goods or services ...; or
- (b) in a manner that is misleading, fraudulent or deceptive in any way, including in respect of ... the sponsoring of any event;'

572 Finally, section 39 of the Safety at Sports and Recreational Events Bill, 2005 (the 'SASRE Bill', which to the knowledge of the author has at the time of writing not yet been passed into law), provides further provisions regarding ambush marketing of sports events. Sections 19 and 22 of the Bill provide for safety and security planning for events and security measures, amongst which are contained certain provisions relating to ambush marketing (e.g. regarding a prohibited and restricted item policy in respect of access points, a spectator and vehicle search policy, and the enforcement of an ambush marketing policy within a stadium or venue and its precinct, which is designed to protect, amongst others, the proprietary and commercial interests of an event organizer and an accredited event sponsor). Section 39 of the Bill provides as follows:¹⁷⁷⁷

'If relevant and in addition to the anti-ambush marketing provisions as contemplated in section 19 and 22 [of the Bill], it shall be mandatory for a proper anti-ambush marketing strategy to be implemented at a stadium or venue and, where applicable, within its precinct, prior to, during and after an event hosted at a stadium or venue, by either the controlling body, the event organizer, the stadium or venue owner, or an event organizer appointed stadium or venue anti-ambush marketing body or any collective combination of such persons in terms of this Act and in consultation with the National Event Inspectorate and/or any special purpose committee established by the [South African Police Services] for the co-ordination of State security operations for an event, by way of

¹⁷⁷⁷ It should be noted that, at the time of writing, a significantly revised 2009 version of the SASRE Bill appears to be in circulation, although the author has no further information regarding the status of such Bill and expectations for its passing into law. The 2009 version of the Bill does not contain anti-ambush marketing provisions.

anti-ambush marketing control measures, which include, amongst others, the following measures which may be prescribed from time to time:

- (a) where applicable, the development, prior to an event, of a comprehensive written stadium or venue anti-ambush marketing policy and plan, which policy plan shall be designed to integrate fully into the overall safety and security plan as contemplated in section 19 [of the Bill];
- (b) the plan referred to in paragraph (a) shall comply in all respects to the provisions of this [Bill] ...;
- (c) the implementation and active enforcement of the plan as contemplated in paragraph (a);
- (d) where applicable, the design and incorporation of a written media public information and education component into the plan contemplated in paragraph (a), which, amongst others, must provide for the timely implementation of a public information and education media campaign, prior to an event, that provides public information, on, amongst others, the requirements and measures which have been put in place to protect the proprietary immaterial and related commercial property rights of controlling bodies, event organizers and official sponsors and merchandisers of events;
- (e) the enforcement, by the [South African Police Services] in consultation with a stadium owner or an event organizer, at a stadium or venue and within its precinct, during an event, of all applicable legislation which provides for the protection of proprietary immaterial and related commercial property rights of an organizer and an official sponsor and merchandiser of an event, including, amongst others, the:
 - i. Copyright Act, 1978 (Act No.98 of 1978);
 - ii. Intellectual Property Laws Amendment Act, 1997 (Act No.38 of 1997);
 - iii. Counterfeit Goods Act, 1997 (Act No. 37 of 1997);
 - iv. Merchandise Marks Act, 1941 (Act No. 17 of 1941, as amended);

- v. Trade Marks Act, 1993 (Act No.194 of 1993, as amended);
 - vi. Trade Practices Act, 1978 (Act No.78 of 1978, as amended);
- (f) For the purpose of this section, a stadium or venue precinct shall, extend to a maximum distance of 2 kilometers around the entire outer perimeter of a stadium or venue.'

573 Effective combating of ambush marketing cannot necessarily only be achieved through legislation such as that adopted in South Africa. There are commentators who argue that efficient sponsorship practices may eventually close the field to ambush marketers by making such practices ineffective.¹⁷⁷⁸ Furthermore, it is also possible to regulate ambush marketing by means of contractual provisions in respect of certain persons (e.g. spectators, by means of ticket terms and conditions¹⁷⁷⁹). The reader is referred to specialised texts on ambush marketing in respect of the possible ways of protecting an event against ambushers, which are largely similar in South African law to other jurisdictions.¹⁷⁸⁰ By way of summary, the following possible bases for protection are available to sponsors and event organisers:

The use of contractual regulation (by means of the matrix of sponsorship and event management contracts surrounding an event, and the practice of 'saturation sponsorship');¹⁷⁸¹

¹⁷⁷⁸ See Kim Skildum-Reid 'Last Generation Sponsorship', available on the web site of <http://www.powersponsorship.com> [last accessed 16 February 2007]

¹⁷⁷⁹ E.g. compare the terms and conditions applicable to tickets offered by The Cricket Tour Company, official travel agent of the ICC Cricket World Cup West Indies 2007, which provides as follows: 'The Holder shall not engage in any form of Ambush Marketing and shall not conduct any activity that conflicts with, impairs, infringes or denigrates the rights of Tournament Partners. The Holder shall not be entitled in or around the Venue to conduct, carry out or cause to be conducted or carried out (i) unauthorised promotions; (ii) any advertising or marketing; or (iii) any unauthorised commercial activity.'

¹⁷⁸⁰ See, generally, Johnson, P *Ambush Marketing: A Practical Guide to Protecting the Brand of a Sporting Event* Sweet & Maxwell, London (2008)

¹⁷⁸¹ Compare the contractual arrangements that were in place for the 2007 ICC Cricket World Cup, and which are explained in the report of the ruling of the International Cricket Council's Dispute Resolution Committee in

- Protection of relevant intellectual property rights associated with the event¹⁷⁸² (compare FIFA's protected marks for its 2010 World Cup, as discussed below);
- Ticketing terms and conditions;¹⁷⁸³
- Venue security and media accreditation;
- Common law passing off and unfair competition actions;¹⁷⁸⁴
- Advertising and sponsorship codes of practice;¹⁷⁸⁵
- Specific legislation (and 'sui generis protection');¹⁷⁸⁶ and
- Planning laws (and e.g. municipal by-laws).¹⁷⁸⁷

574 It should be noted that ambush marketing in the strict sense of the term as described above is not the only potentially controversial commercial practice related to the sponsorship of sports events. In 2005 South African motor sport saw an incident of cross-sponsoring, which led to unhappiness on the part of one of the major sponsors of the sport. A fuel company, which has been involved with SA motor sport for a number of years, was deprived of title rights to a motor rally on the basis of a subsequent agreement between the event organizers, Motorsport SA, and another fuel company,

Cricket Australia v ICC Development (International) Ltd, 2007 (*International Sports Law Review*, 2007, 2 (May) Sweet & Maxwell 2007) – the Cricket Australia/Travellex dispute

¹⁷⁸² See Johnson, P *Ambush Marketing: A Practical Guide* (2008) *supra* chapters 2-3 (and discussion of the statutory protection of intellectual property in South Africa in terms of (primarily) the Copyright Act 98 of 1978 and the Trade Marks Act 194 of 1993)

¹⁷⁸³ Special rules have been formulated in South African law to deal with cases of the imposition of contract terms by means of tickets and notices – see the discussion elsewhere in this chapter in par 445 above

¹⁷⁸⁴ See the discussion elsewhere in this chapter in par 491 *et seq*

¹⁷⁸⁵ E.g. the Advertising Standards Authority's sponsorship and advertising codes of practice, referred to in the text *supra*

¹⁷⁸⁶ Event-specific legislation has frequently been passed in recent years to provide protection for specific events. Such legislation may be supplementary to existing legislative protection against ambush marketing (e.g. the FIFA 2010 Special Measures Acts – referred to below), or may be special legislation aimed at establishing *sui generis* protection for an event (compare the 'London 2012 Olympics association right', created by the London Olympic Games and Paralympic Games Act, 2006 – see the discussion by Johnson, P *Ambush Marketing: A Practical Guide* (2008) *supra* chapter 5). Other examples of such event-specific legislation are the Sydney 2000 Games (Indicia and Images) Protection Act, 1996 (Australia); Law Decree 86/2004 of April 17, 2004 (on the protection of the insignia of 'EURO 2004') (Portugal); Law of August 17, 2005 No.167 (Measures for the protection of the Olympic symbol in relation to the Turin 2006 Olympics) (Italy); ICC Cricket World Cup West Indies 2007 Act, 28 of 2006 (Parliament of the Republic of Trinidad & Tobago, 1 November 2006).

For criticism of the trend in the development of such event-specific legislation in various jurisdictions in recent years (what the author refers to as vertical and horizontal 'creep'), see Johnson, P 'Look Out! It's an Ambush' *International Sports Law Review* Sweet & Maxwell, 2008, 2/3, p24-29

¹⁷⁸⁷ Compare the municipal by-laws which have been proposed for the various host cities for the FIFA 2010 event (see the discussion below regarding the proposed municipal by-laws for the city of Johannesburg).

which agreement provided that no naming rights to a championship event could be provided to a competitor of the latter. This incident highlighted the possible risks inherent in cross-sponsoring, where, even though official event sponsors could not be guilty of ambush marketing, a measure of hijacking of the sponsorship value derived by other sponsors can occur. Proper planning of cross-sponsorship agreements to events should include clear guidelines and information to potential sponsors of the areas of exclusivity their sponsorship dollar is buying. Avoiding or resolving such disputes will likely be an area where sports lawyers will be called upon in future to be more active, and would involve proper understanding of the relevant principles of contract law as well as thorough knowledge of sponsorship practices and the valuation of rights.¹⁷⁸⁸

II Ambush marketing protection for the 2010 FIFA World Cup South Africa™

575 Mention was made above of the specific South African legislation that are aimed at protecting major events against unlawful ambush marketing, specifically section 9(d) of the Trade Practices Act 76 of 1976 (as amended) and section 15 of the Merchandise Marks Act 17 of 1941 (as amended).

The 2010 FIFA World Cup South Africa™ was designated as a protected event by the Minister of Trade and Industry (in terms of section 15A (1) (a) of the Merchandise Marks Act) by means of a notice in the *Government Gazette* of 25 May 2006.¹⁷⁸⁹ The Minister's powers in respect of section 15A were furthermore extended specifically for purposes of the FIFA World Cup 2010, by means of the 2010 FIFA World Cup South Africa Second Special Measures Act 12 of 2006,¹⁷⁹⁰ in terms of which the duration of protection for the

¹⁷⁸⁸ For more information on this incident regarding a rally championship, see the report by Ingrid Salgado 'Sport no longer a playground for sponsors', *Business Report*, 9 October 2005 [available online at <http://www.busrep.co.za> – last accessed 15 February 2007].

¹⁷⁸⁹ Notice 683 of 2006 (Government Gazette No. 28877, 25 May 2006)

¹⁷⁹⁰ In terms of section 2 of this Act, which provides as follows:

'If the Minister of Trade and Industry declares the 2010 FIFA World Cup South Africa a protected event in terms of section 15A (1) of the Merchandise Marks Act, 1941 ... he or she may, notwithstanding section 15A (1) (a)(ii) of that Act, stipulate by notice in the *Gazette* a date later than one month but not later than six months after the completion or termination of the final competition as the date on which the protection afforded by such a declaration ends.'

event was extended from the one month period provided for in section 15A (1) (a) (ii) to a period of six months following the end of the event.¹⁷⁹¹

The Minister has also declared the use of certain words and emblems relating to the event to be prohibited in terms of the Merchandise Marks Act.¹⁷⁹² The phrases that have been prohibited include '2010 FIFA World Cup South Africa', 'Football World Cup', 'FIFA World Cup', '2010 FIFA World Cup' and 'Soccer World Cup', and such prohibition relates to use of such phrases in connection with the 2010 event and only applies to 'activities connected to 2010 FIFA World Cup South Africa in the area of Football or Soccer 2010 FIFA World Cup'.¹⁷⁹³ Furthermore, the prohibition does not apply to the media, provided the reportage is fair and not imbued with unscrupulous business enterprising.¹⁷⁹⁴

It should also be noted here that the Counterfeit Goods Act 37 of 1997 provides additional protection, which may also be relevant in combating ambush marketing,¹⁷⁹⁵ while the 2010 event's designation as a 'protected event' in terms of the Merchandise Marks Act might also mean that no person may register any domain name or have content on their web site which is likely to be associated with the event without obtaining authorisation from the event organisers.¹⁷⁹⁶

Finally, it was announced in the week ending 24 April 2009 that regulations prohibiting the unauthorised promotion and resale of tickets for the 2010 FIFA World Cup had been proclaimed.

576 Ambush marketing protection for the 2010 FIFA event has been criticised from various angles, primarily because of the apparently far-reaching and intrusive nature of many such measures in respect of the rights of the public and (especially) small enterprises and the informal business sector. While this discussion will not evaluate the merit in such criticism, it is informative to briefly focus on the City of Johannesburg's

¹⁷⁹¹ The 2010 FIFA World Cup is scheduled to be played from 11 June to 11 July 2010

¹⁷⁹² Notice 1791 of 2007 (*Government Gazette* No. 30595, 14 December 2007)

¹⁷⁹³ *Ibid.*

¹⁷⁹⁴ *Ibid.*

¹⁷⁹⁵ See the discussion in par 516 *et seq* above

¹⁷⁹⁶ See the article by Glazier, D 'FIFA threatens World Cup domain owner', 5 October 2006 (available on the web site of <http://www.itweb.co.za> – accessed 8 April 2009). See also the discussion of domain name rights in par 599 *et seq* below

draft Municipal By-Laws in respect of the 2010 FIFA World Cup South Africa™ to illustrate the extent of proposed protection.¹⁷⁹⁷

The purpose of the draft Johannesburg Municipal By-Laws is described as including the following for the term of the tournament:

- The regulation of advertising within its jurisdiction;
- The effective administration of Controlled Access Sites;¹⁷⁹⁸
- The regulation of Special Events and the administration, management, maintenance and the general enhancement of neatness of Public Open Spaces;
- Appropriate traffic, guidance, management and control measures; and
- The regulation of street trading.

Chapter 2 of the draft By-Laws deals with advertising (including provisions on safety, design and construction and maintenance of advertising structures), and includes extensive prohibitions on advertising (which are quoted in full here):

2.1. General Prohibitions

- 2.1.1. No Person may, in any place owned, leased, administered by or under the Control of the Municipality, engage in Ambush Marketing for the Term.
- 2.1.2. No Person shall, except with the prior Approval of the Municipality granted specifically with regard to the Competition, conduct any Advertising activity

¹⁷⁹⁷ The status of the draft By-Laws (of which a copy is on file with the author) is, at the time of writing, unknown

¹⁷⁹⁸ In terms of par. 1.1.21 a 'Controlled Access Site' is defined to mean –

1.1.21.1. the locations of the Matches including without limitation, the Stadium;

1.1.21.2. the locations of the Official Events;

1.1.21.3. any other areas in respect of which admission is regulated by Accreditation;

1.1.21.4. Accreditation centres;

1.1.21.5. [International Broadcast Centre];

1.1.21.6. Official Training Sites;

1.1.21.7. Team Hotels;

1.1.21.8. the official hotels for the FIFA Delegation;

1.1.21.9. FIFA Fan Parks; and

1.1.21.10. any other area within the area of jurisdiction of the Municipality, designated or demarcated by the Municipality as a Controlled Access Site and shall include private property located therein.'

on any Public Advertising Media –

2.1.2.1.during the Final Draw and for a period of one week immediately prior to
and one week immediately following the Final Draw;

2.1.2.2.during the period of the Competition and for a period of two weeks
immediately prior to the first Match and two weeks immediately following
the final Match, in the following areas, including on private property falling
therein –

2.1.2.3. at any Controlled Access Site, or

2.1.2.4. within a one kilometre radius of the venue of the Final
Draw, or of a Stadium or as demarcated by the
Municipality;

2.1.2.5. within a 100 (one hundred) metre radius of a FIFA Fan Park
or as demarcated by the Municipality; and

2.1.2.6. at any place visible from the principal public road(s), as
designated by the Municipality by means of appropriate
signage, leading to the venue of the Final Draw or to a
Stadium, and within two kilometers from the perimeter of
the Final Draw venue or Stadium, as the case may be or as
demarcated by the Municipality.

2.1.3. No Person shall, except with the prior Approval of the Municipality granted
specifically with regard to the Competition, and to the extent applicable and
within the Municipality's jurisdiction, conduct any Advertising activity on
any Public Advertising Media –

2.1.3.1. during the Final Draw and for a period of two weeks
immediately prior to the Final Draw;

2.1.3.2. during the period of the Competition and for a period of 2
weeks immediately prior to the first Match and 2 weeks

immediately following the final Match, in the following areas:

- 2.1.3.3. immediately outside or surrounding airports;
- 2.1.3.4. in or immediately outside or surrounding main train stations; and
- 2.1.3.5. within a 1 kilometre radius of the central business district of the area of jurisdiction of the Municipality or as demarcated by the Municipality; and
- 2.1.3.6. to the extent the Municipality has jurisdiction, on the principal routes from the airport and main train stations to the central business district of the area of jurisdiction of the Municipality and to the Stadium.

- 2.1.4. No Person shall, during the Term erect, maintain, distribute or display a Sign or a Billboard at a Controlled Access Site or within an Exclusion Zone, without the prior written Approval of the Municipality granted specifically with regard to the Competition.'

'Advertising' is defined in the By-Laws as 'the act or process of notifying, warning, informing, displaying, making known or any other act of transferring information in a visual or oral manner', and 'advertisement' is defined as 'a visual representation including but not limited to a sign, illustration, object, mark, symbol or device of any kind which is visible to the public from, including but not limited to, any street or any public place or any other vantage point or which is under or over-hanging from any bridge, building or other structure, including sky writing, used for advertising activity; or any combination of such elements with the object of transferring information'.

The provisions contained in Chapter 6 of the draft By-Laws regarding street trading are similarly extensive. These provisions include (*inter alia*) a prohibition on street traders

leaving property or goods overnight on a public amenity or verge; a prohibition on attaching any object to a tree, parking meter, lamp-pole, electricity pole, telephone pole, etc; a prohibition on sleeping overnight at the place of the street trading business; and a prohibition on erecting any structure for the purpose of providing shelter at the place of the street trading business. Street traders are also prohibited from conducting business in certain areas (including a garden or park to which the public has a right of access, and a verge contiguous to an auto teller bank machine). Street traders are also expressly prohibited from conducting ambush marketing.¹⁷⁹⁹

Chapter 7 of the draft By-Laws contain similarly extensive 'miscellaneous provisions', which include powers of entry to inspect premises for authorised officials, and powers to remove and impound signs, billboards, advertising structures and advertisements. An authorised official may instruct any person to leave a public open space if the authorised official reasonably believes that the person is contravening any provision of the By-laws and such person fails to immediately terminate such contravention upon the instruction of that authorised official (and failure to adhere to such an instruction shall constitute an offence under the By-laws).¹⁸⁰⁰

Paragraph 7.5 of the draft By-laws deals with search and seizure powers of the Municipality on public roads and in respect of contraventions of street trading, and provides (*inter alia*) as follows:

7.5.1 Subject to any applicable legislation including without limitation the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000) and the Road Traffic Act 1989 (Act No 29 of 1989), an Authorised Official may search, remove and/or impound any Goods, Property, container, structure, materials, substance, shelter, tent vehicle of any nature whatsoever, whether or not unattended:-

7.5.1.1. which he/she reasonably suspects of being used or are intended to be used or have already been used in or in connection with the business of Street Trading or a contravention of these By-laws;

¹⁷⁹⁹ Par. 6.1.1.15 of the draft By-Laws

¹⁸⁰⁰ Par. 7.4 of the draft By-Laws

- 7.5.1.2. left or parked at any unauthorised parking area;
- 7.5.1.3. which he/she finds in park or on a public road or public place and which in their opinion constitutes an infringement of these By-laws, whether or not such Goods, Property, container, structure, materials, substance, shelter, tent or vehicle which is in the possession of or under the control of any person at the time of such impoundment or removal.'

Similar proposed By-Laws for the host city Cape Town were reported in 2008 as having experienced obstacles in the process of their passing (and were viewed by some as being unconstitutional in respect of the Municipality appearing to attempt to usurp governmental powers that are properly within the sphere of the national government). The constitutionality of such measures, more generally, may be open to potential judicial scrutiny.

577 At the time of writing, a potentially important test case regarding the ambit and interpretation of the 2010 FIFA World Cup anti-ambush marketing protection measures is currently awaiting judgment in the Gauteng North (formerly Pretoria) High Court.¹⁸⁰¹ This matter involves an application by FIFA against South African retail group Metcash Trading Africa for an order prohibiting the use of a mark, 'Astor 2010 Pops', on lollipops.¹⁸⁰² The mark is a registered trade mark and depicts the South African national flag in the zero numerals contained in '2010', and the get-up of the lollipops further contains soccer balls depicted on the background to the device. Metcash claims to have used the 'Astor' trade mark since 1985 in respect of the marketing of its goods, which mark is claimed to enjoy

¹⁸⁰¹ The matter was heard on 12 December 2008, with judgment reserved. On 6 April 2009 judgment was still outstanding.

¹⁸⁰² *Federation Internationale de Football Association (FIFA) v Metcash Trading Africa (Pty) Ltd* Gauteng North High Court case number 53304/07. My thanks to Deon Bouwer of Bouwers Inc, attorneys for the Respondent, for kindly providing me with copies of the parties' heads of argument and supporting documentation in this matter.

a substantial reputation in the market place.¹⁸⁰³ FIFA have applied for the following orders:

- To restrain the Respondent from infringing its registered trade mark (to the 'South Africa 2010 Bid & Device')¹⁸⁰⁴ by making unauthorized use, in the course of trade, of the mark '2010 Pops' and/or '2010' in conjunction with depictions of the South African flag and/or depictions of soccer balls in relation to the product;
- To restrain the Respondent from passing its product off as being those of FIFA or as being products made under license, or as being connected or associated with FIFA or with the 2010 World Cup; and
- To restrain the Respondent from competing unlawfully with FIFA by contravening section 15A of the Merchandise Marks Act, 1941, and/or section 9(d) of the Trade Practices Act, 1976.

FIFA's claims therefore relate to whether the Respondent's conduct constitutes a statutory trade mark infringement in terms of section 34(1) of the Trade Marks Act, 1993,¹⁸⁰⁵ whether such conduct constitutes passing off, or whether it constitutes unlawful competition in contravention of the Merchandise Marks and Trade Practices Acts.

FIFA claims that its World Cup tournaments have received significant publicity and public interest in South Africa and that, as a result of an enormous repute and goodwill in the 2010 event, there are 'strong common law rights in that event', which vest in FIFA.¹⁸⁰⁶ As a result, FIFA claims that the Respondent's use of its trade mark and packaging would cause the general public to believe that there is some association between the Respondent's product and FIFA as the organizer of the 2010 event (i.e. 'passing off').¹⁸⁰⁷

In respect of determination of the likelihood of deception or confusion with the public, FIFA argues that such confusion or deception can exist in members of the public believing

¹⁸⁰³ Par. 1 of the Respondent's heads of argument

¹⁸⁰⁴ Registered trade mark number 2003/04015

¹⁸⁰⁵ Act 194 of 1993. Section 34 of the Act is referred to elsewhere in par 512 above

¹⁸⁰⁶ At par. 11.1 of the Applicant's heads of argument

¹⁸⁰⁷ Par. 15.2 of the Applicant's heads of argument

that the Respondent's goods are endorsed by FIFA (i.e. such as in cases of character merchandising).¹⁸⁰⁸

Metcash has denied that its conduct constitutes passing off, mainly on the basis, firstly, that FIFA does not market lollipops and, secondly, that the law relating to passing off provides that one may use offending marks if you clearly distinguish your goods from that of another. In this last respect, Metcash claims that the 'Astor' trade mark clearly distinguishes its product from those of FIFA. FIFA, for its part, has argued that the use of the 'Astor' mark has no bearing on its contention that an impression of endorsement has been created (as it is only logical to assume that all licensees or sponsors of a sports tournament would use their own trade marks on the licensed products, as payment of the license fee is done for the expected promotional gain to one's own marks), and that Metcash's first contention is irrelevant in light of the fact that a common field of activity is not required to prove passing off.¹⁸⁰⁹

In respect of the section 15A prohibition as contained in the Merchandise Marks Act, Metcash has argued that proper recognition should be given to the difference in scope between the protection afforded by section 15(1) and section 15A of the Act. It contends that section 15A merely restricts use of a trade mark in respect of a protected event where such use is made in relation to the event, and to derive special promotional benefit from the event. According to its argument, this protection is less than that provided for in section 15(1), which allows the Minister of Trade and Industry to prohibit, either absolutely or conditionally, the use of the South African national flag or of any mark, word, letter or figure or any arrangement or combination thereof in connection with an event.¹⁸¹⁰ Metcash has referred to the fact that FIFA had earlier applied to the Minister for a blanket prohibition in terms of section 15(1)(b) of the Act of any use of 'South Africa 2010' or of the depiction of a football 'for any purpose and in any context other than use by [FIFA] or its mandatories', but that the Minister had refused to grant such a prohibition and instead restricted the terms of the prohibition so as to exclude the

¹⁸⁰⁸ Par. 17 of the Applicant's heads of argument

¹⁸⁰⁹ *Capital Estates and General Agencies (Pty) Ltd & Others v Holiday Inns Inc* 1977 (2) SA 916 (A)

¹⁸¹⁰ Par. 26 *et seq.* of the Respondent's heads of argument

'South Africa 2010' emblem, the picture of a football and the word marks 'South Africa 2010' and 'SA 2010'.¹⁸¹¹ The prohibition which was published by the Minister was also qualified, in that it restricted the use of such marks only to 'activities connected to the 2010 FIFA WORLD CUP SOUTH AFRICA in the area of FOOTBALL or SOCCER 2010 FIFA WORLD CUP'.¹⁸¹² Accordingly, the Respondent's argument goes that FIFA is seeking to rely on section 15A of the Act, which provides a lesser form of protection, to afford it protection which extends beyond the scope of the protection which it sought but failed to obtain in terms of section 15(1) of the Act.

Metcash has denied claims that the mark connotes a formal connection with the 2010 FIFA World Cup event and constitutes ambush marketing. It argues that the football connotation of the 'Astor' mark relates to a football development programme for under-privileged youths, which it had launched in 2005 at the same time as its '2010 Pops' confectionery (and that the '2010' reference was included to refer to the year when such initiative is planned to terminate).¹⁸¹³ FIFA denies such alleged significance of the reference to the year 2010, as it claims that this was not publicized in Metcash's promotional material.

In a similar vein, Metcash argued that its conduct does not fall foul of section 9(d) of the Trade Practices Act, as its lollipops are marketed with reliance on its well-known 'Astor' mark in a market place within which its association with football is well known, and accordingly its usage of the mark cannot be said to imply or suggest a contractual or other connection or association with the 2010 event. Metcash further argued that FIFA's assertion that any reference to 'South Africa' and the year 2010 creates a connotation of the sort proscribed in section 9(d) is not backed up with any evidence.

Metcash has further argued that section 15A of the Merchandise Marks Act must be read in light of the Constitution, and that the restriction on the use of their trade mark (which was registered in 2004, prior to the date that the 2010 event was declared a protected

¹⁸¹¹ *Ibid.* par. 34

¹⁸¹² *Ibid.* par. 35

¹⁸¹³ At par. 2 *et seq.* of the Respondent's heads of argument

event) violates Metcash's right of property¹⁸¹⁴ in respect of its trade mark as well as its freedom of expression.¹⁸¹⁵ With reference to the courts' method of statutory interpretation in light of the Constitution¹⁸¹⁶ (which requires that, in the event of competing interpretations, a court must read down a statute so as to ensure an interpretation consistent with the Constitution), Metcash argues that a proper interpretation of section 15A as only prohibiting use of a trade mark which is unfair and likely to result in material harm to FIFA's marks would constitute a justifiable limitation of its rights under section 36 of the Bill of Rights.¹⁸¹⁷ However, Metcash contends that FIFA's 'broad and limitless' interpretation of the section's prohibition limits its rights 'in an extremely invasive manner which could not ... be justified on any limitations exercise'.¹⁸¹⁸ In terms of the provisions of the Bill of Rights, FIFA bears the onus to prove justification of any limitation of Metcash's fundamental rights, which Metcash contends it has failed to do.

578 The outcome of the *Metcash* matter will be watched with interest, as it constitutes a test case for the rights and interests of numerous small traders and businesses (also in the informal sector) who may not be financially able to challenge FIFA's alleged 'monopolisation' of the 2010 event. From FIFA's perspective it provides an opportunity to assess the efficacy and extent of the existing legal protection against ambush marketing for purposes of the 2010 event, as other such cases are bound to follow. In April 2009 it was reported that FIFA had obtained a court order against a tavern in Pretoria, which is situated close to the Loftus Versfeld stadium (a 2010 match venue), to remove World

¹⁸¹⁴ In terms of section 25 of the Bill of Rights

¹⁸¹⁵ In terms of section 16 of the Bill of Rights

¹⁸¹⁶ With reference to *Govender v Minister of Safety and Security* 2001 (4) SA 273 (SCA) and *S v Coetzee* 1997 (3) SA 527 (CC)

¹⁸¹⁷ The limitation clause, which provides as follows:

'S 36(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including:

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

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

¹⁸¹⁸ At par. 45 of Respondent's heads of argument

Cup-related signage. The tavern had placed the words 'World Cup 2010' beneath the main sign on its roof, and had erected banners featuring the flags of prominent football-playing nations with the numeral '2010' and the words 'Twenty Ten South Africa' on them. An application was launched in the Gauteng North High Court claiming interdicts against the tavern owners on the grounds of infringing FIFA's registered trade marks ('WORLD CUP 2010', 'SOUTH AFRICA 2010' and 'TWENTY TEN SOUTH AFRICA'), for passing off under the common law, and unlawful competition through the violation of section 15A of the Merchandise Marks Act and Section 9(d) of the Trade Practices Act. The court granted all the relief claimed.¹⁸¹⁹

It remains to be seen how many more such legal challenges will be brought in the run-up to (and during) the event in 2010.

¹⁸¹⁹ See the report available online at http://www.themarketingsite.com/live/content.php?Item_ID=8980 (accessed 23 April 2009)

§6 Sports Broadcasting¹⁸²⁰

I Sports broadcasting rights

579 Similar to the position in other jurisdictions (notably the UK and Australia¹⁸²¹), South African law does not recognize a proprietary right to a sports event. While such a right to a sports event which is worthy and capable of protection against misappropriation appears to enjoy recognition in the United States of America,¹⁸²² in South Africa the rights to broadcast a sporting event or to disseminate news regarding the results and action on the field of play must be protected by means of other mechanisms and/or through a combination of other, recognized, legal rights. As has been explained in the context of English law, the development of a valuable and viable commercial programme around a sports event necessitates a foundational matrix of different rights, as follows:¹⁸²³

- (i) Access rights to the venue: The event organizer must have the right to exclusive possession of the venue (either through rights of ownership or through an agreement of lease or other basis), and must be able to control access to the venue, and to stop unauthorized persons entering the venue and exploiting the commercial value of the event. This includes the imposition of terms and conditions of entry (usually imposed by means of contractual provisions incorporated on tickets or by means of prominent notices at the venue) which may be utilized to prevent those who enter the venue from commercially exploiting e.g. footage of action on the field of play obtained through the use of private recording or broadcasting

¹⁸²⁰ I wish to sincerely thank Brandon Foot (legal counsel for local sports broadcast content aggregator SuperSport) for his very helpful comments on a draft of this section

¹⁸²¹ Compare *Victoria Park Racing v Taylor* (1937) C.L.R. 479; *Australian Broadcasting Corp v Lenah* (2001) 208 C.L.R. 199

¹⁸²² On the basis of *International News Service v Associated Press* 248 US 215, 63 L Ed 211, 39 S Ct 68 (1918); *Pittsburgh Athletic Co v KQV Broadcasting Co* 24 F Supp 490 (WD Pa 1937); Lewis & Taylor *Sport: Law and Practice* Cavendish Publishing 2003 at 405, 583 and 679; Johnson, P *Ambush Marketing: A Practical Guide to Protecting the Brand of a Sporting Event* Sweet & Maxwell, London (2008) at 2-3

¹⁸²³ See Lewis & Taylor *op cit.* 584

equipment (and also, increasingly, to prohibit ambush marketing, as was the case in respect of ticket terms for the ICC Cricket World Cup 2007).¹⁸²⁴

Such control of access rights to the venue may include accreditation of members of the media or of e.g. sports photographers;

(ii) Contractual restrictions on participants and official event sponsors:

Restrictions on participants are aimed mainly at ensuring that the commercial value of the event is not diluted by athletes' personal sponsorship or endorsement deals, while restrictions on official partners are aimed at ensuring that they do not overstep their own contractual rights nor inadvertently assist others in hijacking the goodwill in the event (e.g. through ambush marketing); and

(iii) The creation, protection and enforcement of copyright, trade mark and other intellectual property rights that may subsist in the elements that go to make up a sports event.

580 In respect of ownership of the copyright in content relating to a sports broadcast, the following table sets out the qualifying criteria necessary for copyright to subsist in each of the elements of such a broadcast, in terms of the provisions of the Copyright Act 98 of 1978.¹⁸²⁵

¹⁸²⁴ See the discussion on liability in delict (or tort) for sports injuries above, for discussion (specifically in respect of exemption of liability clauses) of the law regarding imposition of contract terms on event tickets

¹⁸²⁵ I have followed the method of presenting this information as employed in Lewis & Taylor *Sport: Law and Practice* Butterworths LexisNexis (2003) at 682 (par. D4.22)

Copyright protected element	Qualifying criteria required to obtain copyright protection	First owner of copyright	Term of protection
Cinematograph film ¹⁸²⁶	Must be represented in digital data or signals or otherwise reduced to material form ¹⁸²⁷	Person by whom the arrangements for making of the film were made (producer) ¹⁸²⁸ /the broadcaster ¹⁸²⁹	50 years from the year in which the work is made ¹⁸³⁰
Sound recording	Must be represented in digital data or signals or otherwise reduced to material form	Person by whom the arrangements for making of the sound recording were made (producer)/the broadcaster ¹⁸³¹	50 years from the end of the year in which first published ¹⁸³²
Broadcast	Must be broadcast ¹⁸³³	The first broadcaster (broadcaster)	50 years from the end of the year in

¹⁸²⁶ Defined in the Act as 'any fixation or storage by any means whatsoever on film or any other material of data, signals or a sequence of images capable, when used in conjunction with any other mechanical, electronic or other device, of being seen as a moving picture and of reproduction, and includes the sounds embodied in a sound-track associated with the film'.

¹⁸²⁷ Section 2(2) of the Act

¹⁸²⁸ The author of a cinematograph film (read with section 21(1)(a) of the Act

¹⁸²⁹ Where the making of the work was commissioned or made in the course of employment of the author (section 21(1)(c) or (d))

¹⁸³⁰ Or 50 years from the end of the year in which the work is made available to the public/first published - Section 3(2)(b)

¹⁸³¹ Where the making of the work was commissioned or made in the course of employment of the author (section 21(1)(c) or (d))

¹⁸³² Section 3(2)(c)

¹⁸³³ Section 2(2A)

			which the first broadcast takes place ¹⁸³⁴
Programme-carrying signal ¹⁸³⁵	Must be transmitted by a satellite ¹⁸³⁶	The first person emitting the signal to a satellite (broadcaster)	50 years from the end of the year in which the signals are emitted to a satellite ¹⁸³⁷
Broadcasting script ¹⁸³⁸	Must be written down, recorded, represented in digital data or signals or otherwise reduced to material form ¹⁸³⁹	Person who first creates the work (producer) or broadcaster ¹⁸⁴⁰	Life of the author plus 50 years
Broadcast graphics as artistic works/literary works)	Must be written down, recorded, represented in digital data or signals or otherwise reduced to material	Person who first makes or creates the work (producer) or broadcaster	Life of the author plus 50 years

¹⁸³⁴ Section 3(2)(d)

¹⁸³⁵ A 'programme-carrying signal' is defined in section 1 of the Act as 'a signal embodying a programme which is emitted and passes through a satellite'. A 'programme' is defined, in relation to a programme-carrying signal' as 'a body of live or recorded material consisting of images or sounds or both, embodied in a signal'.

¹⁸³⁶ Section 2(2A)

¹⁸³⁷ Section 3(2)(e)

¹⁸³⁸ Par. (b) of the definition of a 'literary work', section 1 of the Act

¹⁸³⁹ Section 2(2)

¹⁸⁴⁰ Definition of the 'author' of a literary work (section 1), read with section 21(1)(c) and (d) (where work was commissioned or created in the course of employment)

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581 Provided that the arrangement with any non-employee production crew/commentators contains appropriate copyright assignments,¹⁸⁴¹ the broadcaster will normally be the first owner of the copyright in the broadcast (and accordingly the rights holder in respect of broadcasting of the live event footage and of highlights or clips). The event owner could obtain an assignment of the copyright arising from the broadcaster's production of match footage (which would be contained in the broadcasting rights contract), in return for the granting of a limited license to broadcast the event footage.¹⁸⁴²

582 In respect of copyright to sports broadcasts, it should be noted that the Copyright Act, 1978 makes special provision (in section 19(2)) in respect of exceptions to infringement (i.e. 'fair dealing' or fair use) in respect of a copyrighted sports broadcast.¹⁸⁴³ Section 19 provides for general exceptions from protection of programme-carrying signals,¹⁸⁴⁴ and provides as follows:

'S 19(1) The copyright in programme-carrying signals shall not be infringed by the distribution of short excerpts of the programme so carried –

- (a) that consists of reports of current events; or
- (b) as are compatible with fair practice,

¹⁸⁴¹ In terms of section 21(1)(e)

¹⁸⁴² See Lewis & Taylor *supra* at 683. Such an assignment of copyright is the norm in broadcast rights license agreements, and copyright normally subsists in the relevant sports federation

¹⁸⁴³ The exemptions to copyright infringement in terms of the Copyright Act 98 of 1978 are contained in sections 12 to 19B of the Act. Section 12(1) deals specifically with 'fair dealing' with a copyrighted literary and musical work (which provisions apply *mutatis mutandis* to broadcasts as copyrighted works – section 18 of the Act).

¹⁸⁴⁴ The Act protects (*inter alia*) 'broadcasts' and 'programme-carrying signals' in terms of copyright. A programme-carrying signal is defined in the Act as 'a signal embodying a programme which is emitted and passes through a satellite'. A 'programme' is defined, in relation to a programme-carrying signal, as 'a body of live or recorded material consisting of images or sounds or both, embodied in a signal'. Satellite broadcasts are, of course, covered in this respect.

and to the extent justified by the informatory purpose of such excerpts.

(2) The provisions of this section shall not apply with reference to a programme carried by programme-carrying signals representing a sporting event.'

II The broadcasting industry

583 The South African sports broadcasting industry is a relatively small one compared to the broadcasting landscape in e.g. the European Union. There are currently only three broadcasters active in the television market, namely the public free-to-air broadcaster, the South African Broadcasting Corporation (or 'SABC'), private commercial free-to-air broadcaster etv (which entered the market in 1998), and subscription pay-TV broadcaster Multichoice (which runs its digital satellite television or 'DSTV' service, and has as its subsidiary SuperSport International, which aggregates sports content for it).¹⁸⁴⁵ Four additional pay-TV operators (e.sat, On Digital Media, Walking on Water and Telkom Media) were recently licensed to enter the market, although it has been observed that options for available sports content for these new operators are very limited in light of Multichoice's virtual monopoly of high interest events in the major sports.¹⁸⁴⁶ Apart from its rights in respect of the major domestic cricket tournaments as well as the DLF Indian Premier League, in terms of an agreement concluded in early 2008, SuperSport has secured broadcasting rights to South African rugby up to 2015 (other than the Vodacom Tri-Nations and Vodacom Super 14 tournaments,¹⁸⁴⁷ which it holds until 2010 in terms of the current SANZAR contract). SuperSport is currently also the rights holder in respect of Premier Soccer League matches (in terms of the controversial 5-year/ZAR

¹⁸⁴⁵ SuperSport does not hold a broadcasting license, but provides content to license holders M-Net and Multichoice

¹⁸⁴⁶ From a report by Lloyd Gedye ('No sporting chance for new pay-TV players') in the *Mail & Guardian*, 30 September 2007 (available online at <http://www.journalism.co.za> – last accessed 26 January 2009)

¹⁸⁴⁷ At the time of writing it has been reported that SA Rugby is considering withdrawing from the Super 14 tournament at the end of the 2009 season, with a view to a possible move to sign domestic franchises up with the UK's Magners League in the next season

1.4 billion contract which sparked the 2007 dispute with the SABC which eventually culminated in a settlement providing for both concurrent screening and exclusive access to certain matches for the public broadcaster).¹⁸⁴⁸

Complaints by the recent new entrants to the subscription television market, to the effect that Multichoice's current long-term contracts in respect of the most popular sports (specifically rugby and cricket, as well as the rights to the next two Olympic Games) may lead to anti-competitive behaviour if left unchecked, have contributed to the Independent Communications Authority of South Africa (ICASA)'s current proposals for regulatory reform of the sports broadcasting rights market.¹⁸⁴⁹

584 It was observed in 2002 that the South African broadcasting market has comparatively low pay-TV penetration,¹⁸⁵⁰ and that subscription fees are relatively high compared to other markets. At the time, pay-TV accounted for only 18% of total television households (compared to 45% in the UK at the time).¹⁸⁵¹ Due to historical inequalities and widespread poverty amongst the majority of the population, radio remains the most accessible medium for many people.

As was mentioned in the preceding discussion of sports sponsorship, the top 5 sporting codes in South Africa (soccer or football, rugby union, cricket, motor racing and golf) account for approximately 55% of the total hours of television coverage. In 2007, the breakdown of the percentage of total sports television hours between these codes was as follows: soccer, 21.0%; rugby union, 11.2%; cricket, 9.7%; golf, 7.6%; and motor racing (track, off-road, rallies and cycle events), 6.0%.¹⁸⁵² It appears that broadcast coverage in respect of the different sports and the different broadcasters follows broader socio-economic patterns. While the predominantly 'black sport' of soccer consistently remains the top-ranking code in terms of hours of coverage on the national free-to-air

¹⁸⁴⁸ See the discussion elsewhere in this section

¹⁸⁴⁹ See the discussion in the text that follows (and, specifically, par 4.3.5 – 4.3.7 of the ICASA Discussion Paper, September 2008 – see par 590 *et seq* below)

¹⁸⁵⁰ Although 3 additional pay-TV operators were recently licensed to enter the market – see the discussion above

¹⁸⁵¹ Independent Communications Authority of South Africa *Discussion Paper on Sports Broadcasting Rights 8* August 2002 (published for public discussion by means of Notice 1356 of 2002, Government Gazette No. 23713, 8 August 2002) at 24

¹⁸⁵² Source: BMI Sport Info

broadcaster, the SABC (which is also the official broadcaster of the 2010 FIFA World Cup South Africa™), pay-TV digital broadcaster SuperSport, which enjoys its market penetration mainly in the privileged (and still predominantly white) households,¹⁸⁵³ broadcast a staggering 98% of all rugby coverage in 2007.¹⁸⁵⁴ It also appears that the traditionally 'white sport' of rugby enjoys significantly more support amongst black adults than may be commonly believed; according to available information there are now more black male spectators (2 349 000) than white male spectators (1 793 000),¹⁸⁵⁵ albeit of a much higher base in terms of population numbers. It also appears that support amongst black adults for rugby is very closely linked to trends in respect of the extent of coverage of the sport by the national public broadcaster, the SABC.¹⁸⁵⁶

III Sports broadcasting rights regulation

585 An important issue regarding television sports broadcasting is that of events which are deemed to be of special public importance and the rights of access of the public thereto (free from the requirement of subscribing to pay-TV services). This is an issue which has attracted the attention of law-makers in a number of jurisdictions. For example, in the European context, compare article 3 (a) of EC Directive 97/36 (the 'Television without Frontiers' directive):

'Each Member State can take whatever measures it wishes, compatible with Community law, in order to ensure that television broadcasters subjected to its legislation do not broadcast in an exclusive manner events which the Member State considers of particular significance to society, in such a way as to deprive a large section of the Member State's public from viewing such events, either live or broadcast later, on freely accessible

¹⁸⁵³ This is apparently rapidly changing, due to the Premier Soccer League rights arrangement as well as the introduction (by Multichoice) of cheaper bouquets of channel content (such as the 'Compact' bouquet) which are more affordable and attractive to lower-income subscribers

¹⁸⁵⁴ *Ibid.*

¹⁸⁵⁵ Sports sponsorship information indicates that this is also due to the 'shrinking' number of white members of the population

¹⁸⁵⁶ *Ibid.*

channels. In this case, the Member State involved shall draw up a list of national and international events that it considers of particular significance for society. Furthermore, the Member State shall determine whether these events shall be broadcast live in their entirety or in part or, alternatively, where necessity or suitability in the public interest arises, later in their entirety or in part.¹⁸⁵⁷

South Africa has also opted for such an approach in recognition of the public's rights of access to certain events of special significance (although, as the discussion below will show, there are at the time of writing indications of a significant revamping of the sports broadcasting regulatory framework to, apparently, place more emphasis on potential competition matters). Section 30(7) of the Broadcasting Act 4 of 1999 provides as follows:

'Subscription broadcasting services may not acquire exclusive rights for the broadcast of national sporting events, as identified in the public interest from time to time by the [Independent Communications Authority of South Africa (or ICASA)] in consultation with the Minister and the Minister of Sport and in accordance with the regulations determined by [ICASA] through a public process.'¹⁸⁵⁸

586 The Independent Communications Authority of SA (or 'ICASA') is the regulator of telecommunications and the broadcasting sector in South Africa. ICASA was established in 2000 in terms of the Independent Communications Authority Act 13 of 2000 and derives its mandate and powers from this and other statutes.¹⁸⁵⁹ ICASA's mandate is to regulate the telecommunications and broadcasting industry in the public interest, and to

¹⁸⁵⁷ Compare also the working of the 'anti-siphoning' provisions of the Australian Broadcasting Services Act, 1992 (as referred to in the ICASA Discussion Paper (September 2008)) – see the discussion that follows in the text

¹⁸⁵⁸ The meaning of 'national sporting event' is not defined in the Act, and will apparently depend on the determination of ICASA in terms of this section

¹⁸⁵⁹ These other statutes are the Independent Broadcasting Act of 1993, the Broadcasting Act of 1999, the Telecommunications Authority Act of 1996 and the Electronic Communications Act of 2005. For further information on ICASA see their web site at <http://www.icasa.org.za>

act as consumer watchdog of the industry.¹⁸⁶⁰ ICASA's regulation of the sports broadcasting market is mainly in terms of the Broadcasting Act, 1999 and the Electronic Communications Act, 2005.

587 In terms of the above section 30(7) of the Broadcasting Act, ICASA conducted an inquiry into sports broadcasting rights in 2002. The organization published a discussion paper in August 2002,¹⁸⁶¹ inviting public comment on the issue of identifying 'national sporting events', and to generate discussion on the appropriate framework for regulating the acquisition of sports rights by South African free-to-air and subscription broadcasting licensees.¹⁸⁶² After the receipt of a number of submissions from stakeholders and public hearings conducted in Johannesburg and Cape Town at the end of 2002, a draft position paper and regulations were sent to the Ministers of Sport and Recreation and Telecommunications. ICASA released its position paper and regulations on 'Sports Broadcasting Rights' on 25 July 2003.¹⁸⁶³

588 The regulations set out the criteria for listing events as 'national sporting events',¹⁸⁶⁴ which events (currently¹⁸⁶⁵) are the following:¹⁸⁶⁶

- The Summer Olympic Games;
- Commonwealth Games;

¹⁸⁶⁰ For more specific information regarding ICASA's functions and activities, see their web site at <http://www.icasa.org.za>

¹⁸⁶¹ 'Inquiry into Sports Broadcasting Rights', *Government Gazette* 23713, Notice 1356, 8 August 2002

¹⁸⁶² See the *ICASA Annual Report 2003: Broadcasting*, at 7-8 – available at <http://www.icasa.org.za>

¹⁸⁶³ Notice 2029, *Government Gazette* No. 25249, 25 July 2003.

¹⁸⁶⁴ See par. 3.1 of the Regulations. The reader is invited to compare the position in Italy, where an event is considered to be of special significance for purposes of the prohibition on exclusive broadcasting if it satisfies two of the following criteria:

- 1) The event and its outcome enjoy special and widespread popularity in Italy and are of interest to others besides those who would normally view it;
- 2) The event enjoys a generalized consensus on the part of the population, it has special cultural characteristics and it enhances Italian cultural identity;
- 3) The event involves the national team of one or another sport in an important international tournament;
- 4) The event is traditionally broadcast on non-pay television and has gathered a wide public of viewers in Italy.

See Colucci, M 'Italy' in *International Encyclopedia of Sports Law* Kluwer Law International (Suppl. 1 – August 2004) at par. 255 and par. 256 as to a list of such special events.

¹⁸⁶⁵ At the time of writing, ICASA is in the process of conducting hearings with a view to the publication of updated sports broadcasting rights regulations (which are expected to be published in March 2009) – see the discussion below

¹⁸⁶⁶ Par. 4 of the Regulations

- All Africa Games;
- In respect of the FIFA World Cup, the African Cup of Nations, the IRB Rugby World Cup and the ICC Cricket World Cup:
 - (i) All South African team matches;
 - (ii) The opening match;
 - (iii) 2 quarter finals;
 - (iv) 1 semi-final;
 - (v) 3rd and 4th position play-off (if South Africa is involved);
 - (vi) Final match; and
 - (vii) Opening and closing ceremonies.
- The finals of the following national knock-out competitions:
 - (i) ABSA Cup (football);
 - (ii) Coca-Cola Cup (football);
 - (iii) SAA Super Eight Cup (football);
 - (iv) Currie Cup (rugby); and
 - (v) Standard Bank Cup (cricket).
- Finals of the following international knock-out competitions (if a South African team is involved):
 - (i) CAF Champions League (football);
 - (ii) CAF Cup Winners Cup (football); and
 - (iii) The Super 14 (rugby).¹⁸⁶⁷
- International events:
 - (i) In football, rugby and netball: All international matches played in South Africa involving the senior South African national team;

¹⁸⁶⁷ Previously the Super 12 tournament

- (ii) In cricket: All one day international matches played in South Africa involving the senior national team.¹⁸⁶⁸

Athletics:

- (i) The Comrades Marathon;¹⁸⁶⁹ and
- (ii) The Two Oceans Marathon.

The process of listing events of national interest did however not proceed without concerns being expressed by the major sports codes, which are significantly dependent on revenues from the sale of broadcasting rights.¹⁸⁷⁰

589 Following the passing of these regulations, South African football saw a highly-publicized broadcasting rights dispute, the first high profile matter of its kind in South Africa. In 2007 a significant legal dispute developed between the SA Broadcasting Corporation (SABC), the public broadcaster, and the Premier Soccer League (PSL), regarding broadcasting rights to domestic Premier Soccer League matches. Broadcasting rights are collectively sold by the PSL.¹⁸⁷¹ The PSL announced in June 2007 that SuperSport (a sports content aggregator subsidiary of Multichoice, the biggest subscription broadcaster operating in the market) had been awarded a more than ZAR 1 billion contract¹⁸⁷² to broadcast PSL matches for the next five years, which caused widespread and heated responses (also in Parliament) regarding the public's free-to-air access to the domestic competitions. It was subsequently reported that the SABC had

¹⁸⁶⁸ This does notably not include Test (or 5-day) matches played in South Africa

¹⁸⁶⁹ This annual event, which is run between the cities of Pietermaritzburg and Durban in the KwaZulu-Natal province, is the world's longest ultra-marathon

¹⁸⁷⁰ For a useful exposition of these developments in respect of the listing of events, see the short article entitled 'Broadcasters and fans await stance on sports' in the *Business Day* 'Business Law Review', January 2003, compiled by the corporate law firm of Edward Nathan & Friedland

¹⁸⁷¹ The National Soccer League Rules (as emended 17 June 2008) provides as follows regarding broadcasting rights:

'Television and radio rights for all matches of the League will belong to the League, and no matches may be televised or filmed without the consent of the League ... It will be misconduct for a club to enter into a contractual agreement with a broadcaster, whether television, radio or via any other media or format, without the written permission of the League.' [Rules 16.3 and 16.4]

¹⁸⁷² Elsewhere reported as a ZAR 1.6 billion deal

only previously paid ZAR 350 million¹⁸⁷³ for the rights (amid reports that the public broadcaster had been accused of bad faith negotiation and of taking the PSL rights for granted in light of the previous broadcasting contract). The SABC applied to the Johannesburg High Court for an interdict to restrain the PSL from negotiating with other broadcasters for the sale of rights on the free market at the end of the season. The SABC, the then Premier League broadcaster, alleged an earlier verbal agreement with the PSL to the effect that, on expiry of the current contract, the PSL would be obliged to first re-offer the rights to the SABC and would only be allowed to approach other broadcasters upon a refusal or failure to take up such offer by the SABC. Following the granting of an interim interdict to the SABC, the PSL was joined as respondent by free-to-air channel e-tv. The SABC subsequently withdrew from the application, following a deal in July 2007 with the other parties involved to settle the matter. According to the agreement¹⁸⁷⁴ between the parties, the SABC acquired exclusive screening rights to 110 matches, and 33 matches were to be screened concurrently with SuperSport (which had sold the rights to these matches to the SABC), while SuperSport acquired exclusive screening rights to more than 100 matches. The deal with SuperSport had, according to PSL chairperson Irvin Khoza, reportedly catapulted the PSL into the top 10 ranked leagues in the world in regard to commercial broadcast deals. In fact, the state of the PSL following the rights dispute appears to be quite healthy: Khoza¹⁸⁷⁵ reported that the annual income of the League in 2008 was in the region of ZAR 500 million (compared to ZAR 86 million in 2002), and that each club in the League currently receives a monthly grant of ZAR 1 million (compared to ZAR 250 000 in 2002). Banking group ABSA also recently signed a ZAR 500 million/5-year deal as title sponsors of the League.¹⁸⁷⁶

590 The aftermath of the 2007 rights dispute may be significant for the local sports broadcasting industry. To date, South Africa has not seen scrutiny of the types of issues that have occupied regulators elsewhere (e.g. in the European Union). There have, for

¹⁸⁷³ The SABC apparently refused to take part in the tender

¹⁸⁷⁴ A 'tripartite' agreement, and not a classic sub-license agreement

¹⁸⁷⁵ In a speech at the event of the biennial General Meeting of the Premier Soccer League, 8 November 2008

¹⁸⁷⁶ *Ibid.*

example, been no competition cases involving the collective selling of rights within sports leagues. The 2008 Discussion Paper on sports broadcasting regulation¹⁸⁷⁷ has expressly hinted at the need for more active regulation of the selling of sports broadcasting rights (and for implementation of the competition provisions of the relevant legislation) in light of the experience of the PSL rights dispute.

In light of the responses to the PSL rights dispute in Parliament and other quarters at the time, it should be noted here that government may in future, more generally, intervene in the event of any similar (proposed) deal which might be viewed to undermine the public interest in respect of access to free-to-air sports coverage. The discussion in par 202 *et seq* above has referred to the extensive powers in respect of dispute resolution and the issuing of binding directives which have been granted to the Minister of Sport (and/or SASCO) in terms of the 2008 amendments to the National Sport and Recreation Act. It remains to be seen how these regulatory powers will be exercised in future.

591 At the time of writing, ICASA is currently considering proposed reviews to the existing regulations on sports broadcasting rights,¹⁸⁷⁸ which are expected to be published in March 2009.¹⁸⁷⁹ In October 2008, ICASA gave notice by means of the publication of a Discussion Paper¹⁸⁸⁰ that it was planning to publish regulations in terms of sections 60(1) and (2) of the Electronic Communications Act, 2005 (the 'EC Act'¹⁸⁸¹). Section 60(1) of the EC Act provides as follows:

'Subscription broadcasting services may not acquire exclusive rights that prevent or hinder the free-to-air broadcasting of national sporting events, as identified in the public interest from time to time, by the Authority [ICASA], after consultation with the Minister [of

¹⁸⁷⁷ See the discussion that follows in the text

¹⁸⁷⁸ A call for submissions to ICASA on amendments to the existing sports broadcasting regulations was published on 22 September 2008

¹⁸⁷⁹ It appears at the time of writing that this process has been postponed until after the 2009 general elections (which were held on 22 April 2009), as ICASA is required to consult with the Ministers of Communications and Sport respectively (anticipating a Cabinet re-shuffle following the elections)

¹⁸⁸⁰ By means of General Notice 1238 of 2008, Government Gazette No. 31483, 2 October 2008 ('Review of Sports Broadcasting Rights Regulations – Discussion Document, September 2008')

¹⁸⁸¹ Act 36 of 2005

Telecommunications] and the Minister of Sport and in accordance with the regulations prescribed by the Authority.'

Section 60(2) of the EC Act deals with disputes, and provides as follows:

'In the event of a dispute arising concerning subsection (1), any party may notify the Authority of the dispute in writing and such dispute must be resolved on an expedited basis by the Authority in accordance with the regulations prescribed by the Authority.'

The aims of the discussion document which was published for comment appear to show a strong developmental focus, which also refers to the role of sports broadcasting in respect of the transformation of South African sport:

'This review ... seeks to ensure that sport is as accessible as possible to the people of South Africa, while at the same time, it continues to drive competition in the fast changing technological and market contexts. The Authority believes that exposure to more sporting codes by historically disadvantaged individuals and communities will accelerate the transformation of the sporting codes themselves. In particular, the changing market environment driven by digitization and the liberalization necessitates a complete relook at sport broadcasting rights as a tool to facilitate competition thus enhancing the growth of the broadcasting market. And, as mentioned above, the quest to create a competitive environment should not negate the equally important task of ensuring accessibility of sport, especially to the urban and rural poor. In this undertaking, the Authority will endeavor to meet the needs of all stakeholders, especially consumers, subscription television services, free-to-air television services and, equally important, the needs of the sporting codes, especially commercial sport.'¹⁸⁸²

¹⁸⁸² Transformation appears to resonate strongly in ICASA's objects behind the currently-applicable list of listed events as well as the new proposals:

'This list sought to create exposure to most sporting codes by all South Africans, including those from historically disadvantaged communities. The Authority opted for this approach to ensure that access to sport is not delineated along racial lines, but that all South Africans have access to variety of sporting codes, irrespective of their historical exposure. It is important to note that the transformation of the different sports codes depend on the extent to which they are accessible to most South Africans. With regard to soccer, the

The Discussion Paper expressly provides that it is expected that the recent licensing of additional subscription television services (as well as the advent of digital migration) are expected to accentuate the contesting of sports broadcasting rights, which are also expected to enhance the commercialization of sport as new and existing players in the market will compete for lucrative content.¹⁸⁸³ The document refers to trends elsewhere in the world for regulators to opt for an approach that favours competition between broadcasters, with little or no exclusivity, but continues to state that '[i]n a developing country context, the disparities between the rich and the poor necessitates the introduction of regulatory regimes that set aside certain sporting codes to be broadcast on both the subscription television and free-to-air broadcasting services.'¹⁸⁸⁴

592 The 2008 ICASA Discussion Paper highlights the fact that current sports broadcasting regulation in South Africa, which is limited to the listed events and the provisions of the Electronic Communications Act which provide for a prohibition on the acquisition of exclusive rights to sport of national importance by a subscription broadcasting service (which service, if it acquires exclusive rights in respect of such events must sub-license rights to the free-to-air services¹⁸⁸⁵), has limitations because 'it is open to abuse by broadcasting service licensees with financial leverage to conclude long-term contracts, in the long run, limiting the competitiveness of the broadcasting sector.'¹⁸⁸⁶ It is also noted that the European model of sports broadcasting regulation places emphasis on all sporting events, while the current South African model only relates to listed events.

Authority opted to strike a balance between the needs of people from historically disadvantaged communities as well as those of the sport.' [Par 3.2.7 – 3.2.8]

¹⁸⁸³ In par 3.1.4 – 3.1.5

¹⁸⁸⁴ At par 3.1.6

¹⁸⁸⁵ Such sub-licensing was provided for in the 2003 Position Paper, but was not made a regulatory requirement in terms of the Regulations

¹⁸⁸⁶ Par 4.2.7 of the Discussion Paper

According to the Discussion Paper, the 2007 rights dispute in respect of the Premier Soccer League has highlighted the need for watertight regulation, specifically in respect of issues of sub-licensing and dispute resolution mechanisms.¹⁸⁸⁷ It appears that the current long-term contracts between Multichoice and rights owners has specifically been targeted in respect of its potential foreclosure effect on the market, and it has been suggested that '[a] sub-licensing system should be seen as a prerequisite in the sport broadcasting rights market, especially with the increase in the number of broadcasting service licensees in the market, without leading to the over-regulation of the market.'¹⁸⁸⁸ It has also been observed that the absence of empowering legislative provisions to address the conditions that determine fair and transparent sub-licensing conditions poses a regulatory challenge to ICASA.¹⁸⁸⁹

The reader is referred to the discussion in par 482 *et seq* above regarding the provisions of Chapter 10 of the Electronic Communications Act, 2005 (which deal with competition matters in respect of broadcasting).

593 In submissions following the publication of the Discussion Paper, the national free-to-air broadcaster, the SABC, has requested ICASA to extend the broadcaster's access to a number of sporting events which it views to be in the national interest. In oral representations to ICASA on 22 January 2009, the SABC argued for inclusion in the list of events of national interest of the ICC Twenty20 Cricket World Cup (which was watched by 880 000 viewers on one of the SABC's channels for the inaugural tournament in 2007), as well as certain matches in the Absa Premiership (football) and Absa Currie Cup and Vodacom Super 14 (rugby union) tournaments. This request has been opposed by the Premier Soccer League (PSL), who have argued that they need to bring in more revenue from the sale of broadcasting rights to develop the game of football.¹⁸⁹⁰

According to a submission by the South African Football Association (SAFA), the existing listing of national football team matches and the resultant exclusivity of the SABC's rights

¹⁸⁸⁷ Par 4.3.9

¹⁸⁸⁸ At par 4.3.10 of the Discussion Paper

¹⁸⁸⁹ Par 4.3.11

¹⁸⁹⁰ From a report entitled 'PSL digs in heels over SABC's demands', *Business Day*, 23 January 2009 (available online at www.businessday.co.za - last accessed 23 January 2009)

in respect of such matches are seriously hampering the association's generation of revenues from international matches: SAFA claims that it costs between ZAR 6.5 million and ZAR 7 million to stage a national team match, and that the SABC pays ZAR 2 million to SAFA per match (and charges up to ZAR 950 000 per match for production costs). The SABC has apparently also been criticized by SAFA and Cricket SA for not honouring its contractual obligations in respect of sports broadcasting. Subscription services have apparently also criticized the SABC for failing to broadcast certain listed events as a result of its capacity limits.¹⁸⁹¹

594 Following the high profile sports broadcasting rights dispute in 2007 between the SABC and the PSL involving Premier Soccer League matches, the recent submissions to ICASA have also included calls by the local broadcasters for the regulatory body to play an active role in respect of the resolution of rights disputes through the provision of independent mediation and/or arbitration services. It is unknown to what extent if any the proposed new sports broadcasting regulations will empower ICASA in respect of dispute resolution concerning the acquisition of broadcasting rights, beyond noting that section 60(2) of the Electronic Communications Act requires ICASA to develop regulations regarding dispute resolution. ICASA has welcomed submissions by interested parties in respect of the preferred mechanism for dispute resolution (with reference to the possible avenues of regulatory or non-regulatory (ADR) dispute resolution). ICASA has (in the 2008 Discussion Paper) expressed a preference for employing its Complaints and Compliance Committee¹⁸⁹² to perform such dispute resolution functions, but is awaiting comments from interested parties in this regard. Developments will be watched closely.

¹⁸⁹¹ This apparently relates to five matches in the 2006-7 Pro20 Cricket Series for which rights were obtained by the SABC, but where only highlights were shown, as well as exclusive rights which were available for what translated to 180 days of broadcasting in respect of soccer matches, of which only 18 hours worth was screened (the ICASA Discussion Paper, September 2008 – par 3.2.10).

¹⁸⁹² Established in terms of section 17A of the Independent Communications Authority of South Africa Act 13 of 2000

595 Finally, it should also be noted that broadcasting rights disputes elsewhere may also affect South African sports broadcasters as well as the commercial interests of sporting codes which are involved in high profile and in-demand events from the perspective of broadcasters. Developments in world cricket, and specifically the phenomenally successful new Indian Premier League, have been discussed elsewhere in this chapter where relevant. For present purposes it is important to note a broadcasting rights dispute which is related to such developments and which appears to be brewing currently. The relevant issues have been summarized as follows in a report in the *Sport and the Law Journal* in early 2009:¹⁸⁹³

'Major Asian TV operator threatens to sue ICC over Twenty20 (India)

The world of cricket has recently been revolutionised by the new types of competition, in particular the Twenty20 limited overs events. It is obvious that the media rights to such competitions will command vast sums of money, and therefore almost automatically give rise to legal action. Thus in early August 2008, ESPNStar, the famous broadcaster, served notice on the International Cricket Council (ICC) (the world governing body in cricket) that it intended to prepare a lawsuit worth £42 million against it if the latter authorised the Champions Twenty20 league, which was being launched in the Indian city of Mumbai around that time. The Asian television operator is the ICC's broadcasting partner, and was committed to paying \$1.2 billion for an eight-year deal to cover all ICC events. However, in an email circulated to all 10 member boards, the ICC Chief Executive, Haroon Lorgat, expressed the ESPN-Star's opinion that the Twenty20 League was a threat to its interests. Although Cricket South Africa and Cricket Australia are its founder members and shareholders, the Champion league's equity arrangement is believed to be weighted so much in favour of the Indian cricket authority BCCI as to have effectively made it a subsidiary of the Indian Premier League. The IPL has a separate broadcasting partner in Sony, leaving ESPNStar holding a contract to broadcast tournaments in which there is diminishing public interest. More particularly, the widely acknowledged failure of the 2007 World Cup, the expensive logistics of broadcasting the 2011 tournament from India,

¹⁸⁹³ *Sport and the Law Journal* Issue 2 Vol. 16 (March 2009), 'Sports Law Foreign Update' at 57

Pakistan, Sri Lanka and Bangladesh have combined with the success of the Twenty20 League to erode the value of ESPN-Star's contract with the ICC (*The Guardian* of 1/8/2008, p. 52).

At a certain point, it became a certainty that the Champions League would not be included in the ICC's portfolio. When the [Champions League] proposal was made public in September 2007, the ICC President, Ray Mali, was a key figure in the announcement. However, when the revised competition was launched, there was no mention of the ICC. Indeed, Gerald Majola, the Chief (*sic*) Executive of Cricket South Africa, informed a leading British newspaper that the ICC was unable to declare the new League unofficial because, unlike the rebel Indian Cricket league, it was a club competition organised by ICC member boards. It is this interpretation which, at the time of writing, was set to be tested in court. It was precisely this threatened litigation which caused the England and Wales Cricket Board (ECB) to be cautious over committing itself to the new competition – even though the invitation to send the Middlesex county club was accepted.'

§7 Other forms of commercialization of sport and the commercial exploitation of marketable rights to sports events

I Stadium Naming Rights

596 The practice of selling naming rights to event venues is often packaged separately from team sponsorships, as they comprise different types of marketing platforms for a sponsor. Stadium naming rights have also taken hold in South Africa, with iconic stadia (such as the Newlands cricket stadium in Cape Town – currently Sahara Park Newlands, and the King's Park rugby stadium in Durban – currently the ABSA Stadium) having carried corporate sponsors' names since the 1990s. It was reported in June 2008 that the most lucrative such deal to date had been concluded (apparently following two years of negotiation) in respect of the historic Ellis Park rugby stadium in Johannesburg, which is

now known as the Coca Cola Park stadium. Coca Cola International had apparently paid ZAR 45 million for the naming rights in a four year deal. The deal does not include the 2010 FIFA World Cup South Africa™, as FIFA has prohibited the use of corporate names for stadia during the event (corporate use will be interrupted during the Exclusive Use Period when FIFA regulations require a 'clean' stadium free of non-FIFA sponsor advertising and marketing rights in terms of the agreement between FIFA and the South African bid committee, and corporate sponsors will not be compensated by FIFA in this regard).¹⁸⁹⁴

597 The practice of granting publicity rights in respect of stadia is of course not new. The Supreme Court of Appeal was in 1999 faced with a dispute regarding the Ellis Park stadium in the matter of *Golden Lions Rugby Union & Another v First National Bank of Southern Africa Ltd.*¹⁸⁹⁵ In this matter, the rugby union had entered into a loan agreement with the respondent bank for purposes of financing the lease of the facility. The relevant provisions of the loan agreement, which related to the granting of certain publicity rights to the bank, provided as follows:

'Clause 9: Promotion of the bank's association with the stadium:

9.1 The [rugby union] agrees ... that the name of First National Bank of Southern Africa Limited shall be used and will feature prominently in all publicity campaigns and on all programmes, tickets or other documentation of whatsoever nature and in any way relating to the stadium or the sporting or other activities to be carried on therein as the bank deems appropriate and in such a manner as to convey the bank's close association with and support of the stadium and [the union].

9.2 [The union] shall ensure and procure that this promotion of the bank's name in close association with the stadium shall endure in perpetuity or until terminated by the bank;

9.3 Furthermore, the parties shall procure that the area immediately above the TV screen in the stadium, and the entrances to and exits from the stadium as well as all other areas

¹⁸⁹⁴ See the report by Moholola, R 'Blow to corporate stadium names', *The Sowetan*, 7 March 2007

¹⁸⁹⁵ 1999 (3) SA 576 (A)

of the stadium and the grounds, as the bank may reasonably determine shall; if not already contracted out, all carry such free advertising of the bank's name as the bank might reasonably require, provided that the cost of erecting signs or billboards or advertising material shall be for the bank's account.'

At issue was whether the rights that were granted were to operate in perpetuity as per the express wording of the agreement, while the Golden Lions union contended that such rights were not intended to survive the ceasing of a 'close association' between the parties (which it claimed had occurred) . The court found in favour of the bank and issued a declaratory order in this regard.

598 At the time of writing, the City of Cape Town is undergoing a tender process in respect of the newly built (currently in progress) Green Point stadium, which is a designated venue for the 2010 FIFA World Cup South Africa™ (the 68 000-seater venue is set to host 9 matches during the tournament – the most of any venues for the event - including a semi-final). The city on 15 January 2008 invited tenders for the operation of the stadium (it was hoped that appointment of the operator would be finalized by June 2008, depending on negotiation) as well as the naming rights to the venue (which will be available prior to the date of construction handover – construction is scheduled to be completed in December 2009 - but will be interrupted during the Exclusive Use Period in respect of the FIFA World Cup, which period is to be adjusted in time with a matching compensatory period added to the end of the scheduled agreement date.

II Internet domain name rights

599 Domain name disputes (in respect of the .za domain names)¹⁸⁹⁶ relating to 'cyber-piracy' or 'cyber-squatting' in South Africa are adjudicated in terms of the provisions of the Electronic Communications and Transactions Act 25 of 2002, and the Alternate Dispute Resolution Regulations published in terms of the Act.¹⁸⁹⁷ The South African Institute for Intellectual Property Law (or SAIPL) and the Arbitration Foundation of South Africa (AFSA) are currently the only two accredited dispute resolution service providers to the Department of Communications.¹⁸⁹⁸

600 The ADR procedure entitles any party to lodge a complaint against a .za domain if the domain name 'takes unfair advantage of the rights' of that party or 'is contrary to law or likely to give offence to any class of persons'. Complaints can be filed against domain names which incorporate registered trade marks or even trade marks which are not registered but which are well known. Complaints can also be filed against domain names which amount to hate speech or racism or any other such names which are contrary to public policy. This procedure provides a cost efficient and expeditious resolution of domain name disputes, and disputes filed with SAIPL are normally concluded within two to three months, using on-line procedures, whereas court litigation would take significantly longer (and be more costly).¹⁸⁹⁹

601 The remedies available through the ADR procedure to complainants in domain disputes are limited to the adjudication panel refusing the dispute or transferring the domain name to the complainant. In the case of offensive registration disputes, the remedies are limited to refusing a dispute or deleting and prohibiting the domain name

¹⁸⁹⁶ The .za Domain Names Authority ('.za DNA' or 'Zadna') is the organisation that oversees all South African .za top level domain (TLDs) names on the internet. It was established as a section-21 company by section 59 of the Electronic Communications and Transactions Act, 2002. 2nd level domains are administered by other bodies (i.e. the .co.za domain is administered by UniForum)

¹⁸⁹⁷ The Regulations were published in Government Notice R11666 in *Government Gazette* No. 29405 of November 20, 2006 (effective 1 April 2007). For more on the Uniform Domain Name Dispute Resolution Policy as administered by the Arbitration and Mediation Centre of the World Intellectual Property Organisation (WIPO), see the short article by Blackshaw, I 'Settling sports domain name disputes' in *Sport and the Law Journal* Issue 2 Vol. 13 (2005) 6-9

¹⁸⁹⁸ See Van der Merwe, A & Snail, S 'A Brief Excursus on the South African Online Alternative Dispute Resolution' (available online at <http://www.domaindisputes.co.za/news.php?newsID=30> - accessed 8 April 2009), previously published in the February 2008 edition of *Without Prejudice* under the title "Alternative Dispute Resolution", Vol. 8 No.1

¹⁸⁹⁹ Information provided by the SAIPL on its web site <http://www.domaindisputes.co.za>

from future registration.¹⁹⁰⁰ In both cases, the adjudicator may also refuse the dispute where it constitutes reverse domain name hijacking (an attempt to use the Regulations to prevent a registrant from using a domain name).¹⁹⁰¹

Apart from the above remedies in the ADR process, a matter may also be referred to the High Court, where a complainant can claim in terms of the normal common law remedies (including for passing off and unlawful competition) or for trade mark infringement in terms of the Trade Marks Act, 1993.

602 Detailed discussion of South African domain name disputes and the applicable legal framework (more generally) is beyond the scope of this chapter, and the reader is referred to the relevant web site¹⁹⁰² and other available texts.¹⁹⁰³

603 In respect of sports-related matters, football world governing body FIFA has apparently been involved in some disputes regarding South African-registered domains. In 2006 the organisation was forced to admonish a local businessman who had registered five 2010 World Cup-related .co.za domains for an online travel and accommodation reservation, booking and information service.¹⁹⁰⁴ It appeared at the time that there was a lack of clarity regarding the legal position, as it appeared that FIFA's name and brand were not used, although FIFA's legal representatives were of the opinion that the domains were in contravention of the ambush marketing provisions of section 15A of the Merchandise Marks Act, in light of the 'protected event' status of the 2010 World Cup.¹⁹⁰⁵ The eventual outcome of this dispute is unknown to the author at the time of writing. FIFA was again involved in a domain name dispute which was adjudicated by means of ADR by a SAIPL adjudicator in November 2007. In the matter of *Federation*

¹⁹⁰⁰ Van der Merwe & Snail *supra* par 4, with reference to the adjudication in the matter of *Gateway, Inc v High Traffic Pro-Life Domains* (D2003 – 0261)

¹⁹⁰¹ *Ibid.* Van der Merwe & Snail *supra* refer to the matter of *Telkom SA (Ltd) and TDA Directory Operations (Pty) Ltd v The Internet Corporation* (ZA2007 – 0005), which was the first ruling on 'reverse domain name hijacking'

¹⁹⁰² <http://www.domaindisputes.co.za>

¹⁹⁰³ See also Pistorius, T., '.za Alternative Dispute Resolution Regulations: The First Few SAIPL Decisions', 2008(2) *Journal of Information, Law & Technology (JILT)*, <http://go.warwick.ac.uk/jilt/2008_2/pistorius1> [also available on the <http://www.domaindisputes.co.za> web site]

¹⁹⁰⁴ See the article by Glazier, D 'FIFA threatens World Cup domain owner', 5 October 2006 (available on the web site of <http://www.itweb.co.za> – accessed 8 April 2009)

¹⁹⁰⁵ See the discussion on ambush marketing in par 562 *et seq* above

*Internationale de Football Association (Fifa) v. X Yin*¹⁹⁰⁶ the domain name *fifa.co.za* was in dispute, and had to be adjudicated against the background of Regulation 4(1) (b),¹⁹⁰⁷ which provides as follows:

'A registration may ... be deemed to be abusive where circumstances indicate that the registrant is using, or has registered, the domain name in a way that leads people or businesses to believe that the domain name is registered to, operated or authorised by, or otherwise connected with the complainant.'

The registrant's domain name was previously linked to a commercial website which bore many of FIFA's trade marks, including FIFA, 2010 FIFA WORLD CUP SOUTH AFRICA and 2010 WORLD CUP SOUTH AFRICA. The web site published discussion about FIFA and the 2010 World Cup in South Africa, which, as the adjudicator held, lent 'an air to the site of (also) a general information source'. Hyper links on the site showed its underlying commercial nature, and there were also a number of references to computer games of a 'WORLD CUP nature', including at least one such licensed game produced by Electronic Arts. A legend on the site claimed that the site was 'a private, non-affiliated website ... we hold no affiliations to FIFA, [the South African Football Association] or the 2010 [Local Organising Committee], or to any other related body, company or organisation.'

The adjudicator came to the conclusion that the *fifa.co.za* domain was an abusive registration, as the registration was likely to take advantage of, or be detrimental to FIFA's rights (particularly as one of the funders of the 2010 World Cup tournament in South Africa). It was held that the issue in this regard is not the extent to which the registration will prejudice such licensing and franchising efforts, but the potential for it to do so. On the question of whether the domain name registration has the requisite quality of 'unfairness', it was held that the same considerations that the Constitutional Court

¹⁹⁰⁶ (ZA2007-0007) – report available on the internet as <http://www.domaindisputes.co.za/downloads/decisions/ZA2007-0007.pdf>

¹⁹⁰⁷ Alternate Dispute Resolution Regulations, published in terms of the Electronic Communications and Transactions Act, 25 of 2002, Government Notice R11666 in *Government Gazette* No. 29405 of November 20, 2006

applied in *Laugh It Off Promotions CC v. SAB International (Finance) BV*¹⁹⁰⁸ would not necessarily apply to domain names.¹⁹⁰⁹ The adjudicator was of the opinion that given the infinite proportions of access to the web site in question, and the possibilities of its use (and abuse), a likelihood of substantial economic detriment cannot be the sole standard for assessing unfairness in the context of domain name disputes. Evidence had also been put forward of an intention on the part of the registrant to continue to avail himself of the benefit and advantage of the use of the mark 'FIFA' in a domain name, which was deemed to be unfair. Accordingly, while the website would only have an insubstantial consequence for FIFA, the domain name *fifa.co.za* was judged to be an abusive registration.¹⁹¹⁰

¹⁹⁰⁸ 2006 (1) SA 144 (CC)

¹⁹⁰⁹ The court in the *Laugh it Off* case had held as follows regarding alleged tarnishment of a trade mark: 'The section does not limit use that takes fair advantage of the mark or that does not threaten substantial harm to the repute of the mark, or indeed that may lead to harm but in a fair manner. What is fair will have to be assessed case by case with due regard to the factual matrix and other context of the case.' (at par. 49 of the judgment)

¹⁹¹⁰ From the discussion of this matter in Pistorius, T. 'za Alternative Dispute Resolution Regulations: The First Few SAIPL Decisions', 2008(2) *Journal of Information, Law & Technology (JILT)*, <http://go.warwick.ac.uk/jilt/2008_2/pistorius1> [also available on the <http://www.domaindisputes.co.za> web site]

CONCLUSION

604 As I have tried to show in this chapter, various aspects of the South African law relating to sport have developed in the recent past in line with similar developments in other jurisdictions. However, South African sports law has to a significant extent developed in an isolated manner, due to a variety of reasons (connected *inter alia* with the country's segregated past and politically imposed isolation from international sport in the latter part of the last century).

605 One of the main aspects of South African sport which promises to contribute to the development of a uniquely nuanced system of regulation and governance as well as the application of sports-related laws, is the issue of race-based sports transformation (which, as sections of this chapter have shown, continues to run like a golden thread through all aspects of the private governance and state regulation of South African sport post 1994 and to date). As discussed, such policies and practices (and, more recently, prescriptive legislative provisions) affect not only the individual rights of sports participants (especially in the context of the professional sports industry), but there are also indications of potential future challenges to the authority and powers of the state in regulating sport and specifically of intervening in the authority of the organizations involved in the private governance of sport along such lines. Such developments, especially in respect of recent, controversial, legislative provisions as contained in the National Sport and Recreation Amendment Act, 2007, and the widespread perception of the politicization of sport, promise to lead to future legal challenges which may constitute landmark jurisprudence in international sports law in light of the peculiarity of these issues as experienced in the South African context.

606 While the point was made in the introductory section of this chapter that developments in respect of the interweaving of laws with sport have been recent in South Africa (specifically as a result of the international boycott of apartheid sport under the old

dispensation, as well as the recent emergence of professionalism and commercialization in some of the major South African professional sports), it is expected that South Africa is poised to play a more significant role in the future development of the law relating to sport than one might otherwise expect in light of the country's rather isolated geographical position *vis a vis* other important jurisdictions (e.g. Europe). This is due mainly to the major professional sports' important role in respect of international competition in such codes.

Mention was also made of the important role of developments in the South African jurisdiction for other systems on the African continent; in football, specifically, developments in South African law relating to e.g. the free movement of players and treatment of issues such as the often-criticized apparent 'slave trade' of young players to European clubs) promise to serve as a basis for future developments in protecting the rights of individuals elsewhere on the continent.

While other systems, especially in respect of the private governance of sport, have been characterized by the continued debate over and interaction between the twin pillars of autonomy and specificity of sport, it is expected that future developments (and the increased main-streaming of legal issues in the sporting context) will also raise the importance of these issues on the South African legal landscape.

607 Recent high profile international sports events have focused attention on the role of international sports governing bodies in the commercial exploitation of sporting codes, and the significant risks for the public and fans related to the commercialization of sport. The ICC Cricket World Cup (West Indies) 2007 is a good example: The tournament was marked, from the outset, by poor attendance reportedly attributable to excessive ticket pricing. The run-up to the event was also characterized by disputes between the ICC and team sponsors; while it appears that disputes regarding player sponsors (which characterized the 1999 event) were largely avoided, teams such as Australia were forced to jettison existing sponsors who would potentially conflict with the Global Cricket Corporation's own event sponsors.

The 2007 IRB Rugby World Cup also generated criticism regarding restrictions on press freedoms imposed by the governing body. It was reported in April 2007 that the IRB had imposed restrictions on the international media regarding the extent of coverage of the event.¹⁹¹¹ Such restrictions incurred the criticism of the World Press Freedom Association, and raised questions regarding the public's interest in events of this nature and the rights of supporters and others of access to events and information relating to teams and matches.

South Africa's preparations for the 2010 FIFA World Cup event have also been touched by similar concerns. In 2005 it was reported that the Parliamentary Portfolio Committee on Sport and Recreation had taken FIFA to task about apparent excessive price-fixing of tickets for the event. Various parties had criticized FIFA's alleged rigid stance on ticket-pricing, which, it was claimed, was contrary to the organisers' objective to make the event accessible to the masses. Similarly, proposed municipal by-laws for some of the 2010 host cities (notably Cape Town) have also come under fire from various quarters for their (what is argued to be) excessive curtailment of the rights of traders and business entities (especially the large numbers of informal street traders from the previously disadvantaged groups). There have also been calls for constitutional challenge to the existing ambush marketing legislation, in light of its potential impact on the rights and commercial interests of individuals and business undertakings.

608 It seems that the increased commercial nature of the activities of sports organisations in the modern era has exposed the inherent contradictions in their governance. The very core function of governing bodies has traditionally been viewed to be the trusteeship of a public interest in the sport; ironically, the development of commercial exploitation of the substantial entertainment value of sports (an important element of the public interest in such activity) has served to spawn an ever-widening chasm between the governing bodies and teams as commercial enterprises and their

¹⁹¹¹ E.g. by limiting the number of photographs that journalists would be allowed to take during a match, and by the imposition of rather strenuous conditions for the use of photographs in newspapers in reportage of the event

multi-millionaire players, on the one hand, and the fans and supporters, on the other hand.¹⁹¹² Commercialisation, which has largely been a product of the activities of these same governing bodies, appears to be making a mockery of this 'sacred trust'.¹⁹¹³ And big money has also contributed significantly to the increased scrutiny of the activities of such organisations by the media and others; allegations of greed and corruption have been levelled at those at the very top in the largest and most elite of these bodies.¹⁹¹⁴ A prime reason for the emerging conflicts and the problems associated therewith is the monopolistic nature of sports governing bodies.¹⁹¹⁵ Developments in the law relating to competition, coupled with developments in the actual nature and socio-economic characteristics of sport, have therefore also occasioned a shift in the balance between the traditional virtues of governing bodies (we have seen that the monopolistic nature of the 'FIFA model' of sports governance is one of its prime components) and their continued legitimacy in terms of regulatory functions and powers. Interestingly, the increased commercial role and activities of sports governing bodies have also exposed them to increased scrutiny from the law. In the European Union, for example, regulatory functions that were traditionally viewed as outside the scope of the lawmakers have now started to fall within the purview of legal regulation.¹⁹¹⁶ And, as judgments such as *Bosman* have shown, such intervention may have quite far-reaching consequences.¹⁹¹⁷

¹⁹¹² See, in general, Tom Mortimer & Ian Pearl 'The Effectiveness of the Corporate Form as a Regulatory Tool in European Sport: Real or Illusory?' in Caiger & Gardiner *Professional Sport in the EU* at 217 *et seq*; Adrian Budd 'Sport and Capitalism' in Levermore and Budd (eds.) *Sport and International Relations: An Emerging Relationship* Routledge, London and New York 2004 at 36.

¹⁹¹³ It is interesting to note what (it is submitted) may amount to a rather blatant recent example of the way in which the pursuit of profit has assumed a dominant role over the promotion of sport for the greater good: The South African organisers of the 2010 FIFA World Cup have apparently experienced difficulty in negotiations with FIFA regarding ticket prices for the event. While the organisers (and other forums across Africa) have insisted that tickets should be affordable to the masses, FIFA have apparently pegged the prices, insisting on the maximisation of profits in order to finance their own activities for the four years before the next World Cup. Apparently, FIFA have emphasised the fact that the event is a FIFA event and that South Africa has little bargaining power in this respect – even to the point of stating that the organisation could take away the World Cup if they chose (from a briefing to the parliamentary Portfolio Committee on Sport and Recreation, Cape Town, 14 June 2005).

¹⁹¹⁴ Compare the latest in a number of critical exposes, British investigative journalist Andrew Jennings's *Foul! The Secret World of FIFA: Bribes, Vote Rigging and Ticket Scandals*, Harper Sport, London, 2006.

¹⁹¹⁵ Gardiner et al. *Sports Law* 3rd edition, Cavendish Publishing Ltd 2001, at 179.

¹⁹¹⁶ See Simon Boyes 'Globalisation, Europe and the Re-regulation of Sport', in Caiger & Gardiner *Professional Sport in the EU* at 73. In respect of EC competition law's stance towards 'sporting' vs. 'economic' competition, and the role for legal intervention in this regard, see Klaus Vieweg 'The Legal Autonomy of Sport Organisations and the Restrictions of European Law', in Caiger & Gardiner *Professional Sport in the EU* at 100 *et seq*.

¹⁹¹⁷ *ASBL Union Royale Belge des Societes de Football Association & Others v Jean-Marc Bosman* [1996] CMLR 645 ECJ. See the discussion of the judgment in Le Roux 'Under Starter's Orders: Law, Labour Law and Sport' (2002) 23 *Industrial Law Journal* 1195 at 1201 *et seq*.

This is indeed also a major challenge for international sports governing bodies in the modern era of world sport.

609 It is submitted that these issues are especially relevant in the South African sporting context. As a developing nation and, more importantly, a key developmental player on the African continent, it is expected that such conflicts of interest between the commercial aspirations of (international) sports governing bodies and the needs of the masses of sports fans will continue to provide fertile soil for disputes. This is especially likely in light of the South African government's apparently active policy of intervention in private sporting matters, as evidenced most recently by the 2007 amendments to the National Sport and Recreation Act as discussed in this chapter. It is not fanciful to speculate that the South African government might very actively intervene in sport in future, in the event that commercial decisions by those governing a sporting code are viewed to impinge on the rights of individuals and groups of sports supporters to have access to affordable and accessible entertainment provided by high-profile sporting events. A prime example, which has been referred to, is the current process of restructuring of sports broadcasting rights regulation to prevent anti-competitive conduct and to place restrictions on the acquisition of exclusive rights by subscription broadcasters. Of course, where such expected government intervention (especially in furtherance of the race-based transformation policies in sport, which have been discussed) impacts on the commercial activities of international federations or other external stakeholders, there is a likelihood of significant disputes that may serve to isolate South Africa on the global sporting stage.

610 Finally, in respect of the commercial side of sport, it is expected that the current worldwide economic crisis which was caused by 2008's 'credit crunch' will, potentially, affect sport as it will most other industries. Commercialization of the globalized nature of modern international competitions and leagues is a double-edged sword; while the substantial financial injections in other jurisdictions have also fueled investment in South

African sport, it is expected that sponsorship investment and other sources of revenue in professional sport may show declining trends in the foreseeable future.

611 In the short term, the major specific future impetus for development of sports law-related issues and responses by the legislature and the judiciary in this regard is expected to be the hosting by South Africa of the world's biggest sporting event, FIFA's football World Cup in 2010. It is expected that developments such as the ever-increasingly ingenious methods of ambush marketing and the often opportunistic (and sometimes underhanded) commercial practices of sponsors or others may serve to provide an opportunity for South African courts to consider legal issues which to date may not have been prioritized, including the protection of athletes' image rights. Apart from the 2010 tournament, the participation and stature of South African players and teams on the international stage in the other two major South African professional sports, rugby union and cricket, promise to focus international attention on the treatment of legal issues regarding such players (e.g. in respect of freedom of movement, player restrictions, restraint of trade and competition law issues) within the South African jurisdiction and elsewhere (e.g. in the European Union). This is especially true also in respect of cricket, in light of South Africa's hosting of the DFL Indian Premier League tournament in April and May 2009.

612 While this chapter has highlighted certain areas of South African law which display the potential to provide a more flexible approach to the resolution of sports disputes than encountered elsewhere (e.g. the general Aquilian action in the law of delict, and its flexible application in a number of instances where the more limited, closed system of torts employed in common law systems appears less than perfect), other areas of the law (e.g. judicial conservatism regarding the issue of judicial review of the decisions and regulatory conduct of sports governing bodies, and the surprisingly slow development of meaningful protection of athletes' image rights) may potentially serve to keep South African sports law on a path of catching up to developments elsewhere. However, it is

hoped that the Constitution and, specifically, its progressive Bill of Rights, will promise to provide the platform for significant judicial innovation in the area of sports-related legal issues.

613 Similarities between the legal systems of South Africa and of other countries which are involved in the three major professional sports (especially the UK and Australia and, possibly increasingly, India) promise to underline the important potential role of the South African legal system in providing jurisprudence and precedent in resolving the potential disputes that are sure to arise along with the increased globalization and commercialization of such sporting codes in the 21st century context. In this regard, it is predicted that one very significant aspect of South African law – namely its ever-growing Bill of Rights jurisprudence and (what has on occasion been referred to as) the ‘constitutional colonization’ of the various disciplines of the common law – may serve to shape sports law in South Africa as a relative hotbed for future developments in certain areas and respects that might serve to lead developments elsewhere. For example, reference was made in the section on sport and employment to recent case law regarding the availability of the order for specific performance and/or a ‘negative injunction’ against professional athletes in cases of contract-jumping. Developments in this regard may serve to inform the treatment of the issue in other jurisdictions (such as English law, in which the courts have, traditionally, been more conservative in this regard).

614 Finally, the impact of a changing world order might also be felt, on a more practical level, in South African sport. Issues such as threats to the security of major sporting events and participants in the post 9/11 era might serve to counteract the recent trends in the increased expansion of commercially driven professional sports competitions and leagues. The abhorrent attack on the Sri Lankan national cricket team in Lahore on 3 March 2009, which left eight people dead and a number of cricketers wounded, has again focused the world’s attention on international terrorism and, more specifically, the apparent potential of high profile sport to provide an unfortunate target

for unscrupulous opportunists with a political or other agenda. One can only hope that upcoming events such as the 2009 Confederations Cup, the 2010 FIFA World Cup and the 2012 London Olympics will be remembered in years to come for the sporting prowess of participants and the spirit in which sport is played, rather than for cowardly attacks on those who love sport and practice it at the highest level.

It is expected that a significant concern for the organizers of major events will in future be the safety and security of participants, officials and spectators (as has already been evident in respect of the impact of recent events on the international cricket tour programme). Sports lawyers would be advised to take a more active interest in the legal aspects and implications in this regard.

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