

HUMAN RIGHTS IN SPORT

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ABSTRACT

Advocates of South African sport often emphasize the unification and nation-building value of sport. Yet certain sectors of the population criticise, oppose and even violate the application of certain fundamental values to sport, such as equality and human dignity through, inter alia the use of affirmative action to bring about equality in a substantive sense, as provided for in the 1993 and 1996 Constitutions of the Republic of South Africa. Sport administrators also often exercise decision-making powers in such a way as to suggest that they have the final authority to determine what is right, legal and justifiable. The purpose of this paper is to provide for those who are involved on a daily basis in the world of sport, an awareness and literacy of the chief constitutional provisions which apply to sport.

Key words: Constitution; Human Rights; Fundamental Rights;
Interpretation; Application; Limitations.

INTRODUCTION

South African society is experiencing the impact of the second phase of democracy following the national general elections of 4 June 1999. The Constitution of the Republic of South Africa (Act 200 of 1993), (“Interim Constitution”), and the new governmental dispensation which came into effect on 27 April 1994, radically transformed South African society and its political and legal systems. According to De Waal *et al.* (1999), while the general effect was revolutionary, it brought about three fundamental changes:

1. For the first time in the country’s history, the franchise and related political rights were accorded to all citizens without racial qualification.
2. The doctrine of parliamentary supremacy was replaced by the doctrine of constitutional supremacy.
3. The strong central government of the past was replaced by a state with federal elements.

This new dispensation was further extended by the Constitution of the Republic of South Africa (Act 108 of 1996), (1996 Constitution). As a result of the sudden and radical transformation, society had to quickly come to grips with the Constitution and with the Bill of Rights which was introduced to safeguard human rights.

The extent to which the general public and the sporting public have really grasped the various provisions of the Constitution is unknown. Courts have the duty to oversee the observance of constitutional provisions, but it is the responsibility of citizens to ensure the success of the Bill of Rights by exercising and protecting their rights (Rautenbach & Malherbe, 1994).

Admittedly, this can only be achieved through a thorough understanding and knowledge of the Constitution. However, how these rights are interpreted and applied to the various sectors of the recreation and sport industry is not clearly understood and needs analysis, explanation and comment.

PURPOSE AND SCOPE

This position paper aims to investigate the manner and extent to which constitutional provisions, primarily those dealing with human rights, impact on sport in South Africa. Although the investigation will focus on human rights in sport, affirmative action, and discrimination based on race and sex, it must be stated that these are not the only issues to be affected by the Constitution. The Bill of Rights deals with many fundamental rights in a general manner. Many of these have the potential to be invoked and applied to sport.

METHODOLOGY

The primary sources of information were the Constitution, relevant legislation, reference works on constitutional law, and case law. Secondary sources were literature and commentaries from the fields of comparative constitutional law, sport law and human rights laws. Case studies and international law are referred to wherever undeveloped in South African law as the Constitution has served to enhance the importance of international law in South African legal practice. Section 233 of the 1996 Constitution provides that courts interpreting legislation must always prefer any reasonable interpretation that is consistent with international law over an interpretation that is inconsistent with international law.

The literature was analysed and interpreted and information from several sources were compared and contrasted to ensure validity. The aims and effectiveness of the different regulations and their interaction with each other were analysed. The various provisions of the Constitution have been interpreted as a whole and in relation to each other. Discrepancies and injustices of current systems were highlighted and possible remedies for the future have been discussed.

HUMAN RIGHTS

Human rights refer to certain basic rights that a person possesses by virtue of being born a human. The function of good government is to keep the rights of all its citizens in a collective "trust". To enable the government to work towards the common good, citizens are required to 'hand over' certain rights. The state sometimes infringes upon individual rights when there are clashes of individual interest. However, fundamental rights, such as the right to life, freedom and property can only be encroached upon in exceptional cases (Viljoen, 1991b; De Waal *et al.*, 1999).

FOUNDING PROVISIONS

In most democracies, the constitution is the highest law of the land. In this regard, section 2 of the 1996 Constitution provides that:

“This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.”

The addition of this clause marked an epochal break from the constitutional experiences since 1910. Parliament, together with its executive was -and is- no longer sovereign. This fundamental principle marked a radical shift from the earlier discredited constitutional and political dispensation, which had been established as a version of the Westminster tradition, but distorted by institutionalised racism (Devenish, 1998). Applied to sport, section 2 implies that any conduct, whether in the form of on-field play-behaviour, enforcement of rules and regulations or commercial activity has to occur within the broad guidelines of the constitution, otherwise it would be invalid. It also places various obligations on sport that must be fulfilled, for instance the duty to provide a special standard of care to minors, imposed by section 28 of the 1996 Constitution.

Further, the 1996 Constitution and its provisions apply equally to all people. Section 3(2) of the 1996 Constitution reads as follows:

“All citizens are a) equally entitled to the rights, privileges and benefits of citizenship; b) equally subject to the duties and responsibilities of citizenship.”

The interpretation of this section in relation to sport implies that all parties involved should be accorded equal opportunities as citizens, along with corresponding responsibilities and duties toward sport and toward the state, as outlined above.

THE BILL OF RIGHTS

In South Africa, human rights are written down as the Bill of Rights, which forms chapter two of the Constitution. Courts are expected to interpret the Constitutional provisions according to guiding principles contained in it. Acts of Parliament or the actions of government which fail to conform to these principles can be declared unconstitutional, and may be revoked or nullified (Chaskalson *et al.*, 1999; De Waal *et al.*, 1999).

Rights

Section 7 of the 1996 Constitution reads as follows:

1. “This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.”
2. “The state must respect, promote and fulfil the rights in the Bill of Rights.”

Noteworthy is the fact that the state is obliged to “respect, protect and fulfil” these rights. This provision has considerable operational significance because it is clear that the Bill is not

merely a negative enforcement mechanism protecting citizens against the abuse of governmental power. It also imposes a positive duty on the state to protect, promote and fulfil these entrenched rights. This gives the South African Bill of Rights a positive dimension which has a considerable significance for the process of transformation required in South Africa from exclusive white privilege to the economic and social rehabilitation of disadvantaged communities (Devenish, 1998).

These paragraphs are relevant in a sport context because sport has to conduct its affairs with due regard for human dignity, the equality of all persons in the eyes of the law and the basic freedoms of choice, expression and association granted to individuals. These principles, amongst others, will be elaborated on in due course.

Application

A debateable issue concerned whom the benefits of rights in the 1993 Constitution flowed to and upon whom the burdens of those rights fell. In other words, did they apply directly to matters between the state and individuals only (vertical application) or also between one person and another (horizontal application), as in the case of most private sport contracts. The question was partly dealt with by the Constitutional Court in *Du Plessis v De Klerk*, 1996 (5) BCLR 658 (CC), where vertical application was confirmed. Chaskalson *et al.* (1999) are of the view that the court should have looked twice before ending its enquiry, because the theory underlying it and the practice supporting it were untenable. They endorse the horizontal approach because “good theory, good practice and good sense appear to favour it” (Chaskalson *et al.*, 1999:1-5). The 1996 Constitution altered the position to an extent, by opening up the possibility of horizontal application of rights. In this regard section 8(2) provides that:

- (2) A provision of the Bill of Rights binds a natural or 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.

As a result, the possibility now exists that a fundamental right may be enforced in private disputes between individuals. This means that a person who in the past had no right or remedy against another person or private institution like a sports club or church, may now enjoy a remedy by virtue of the above provision (Devenish, 1998; Cornelius, 2000).

Limitation of Rights

Section 36 (1) of the 1996 Constitution provides that:

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

It is widely accepted in most states and in international law that only certain rights are absolute. These include freedom from torture, and the abuse and exploitation of children. The overwhelming majority of rights and liberties are of necessity limited by their corresponding duties, which should be seen as the inseparable counterpart of a corresponding right, to respect

the rights of others. For instance, the right to freedom of speech and expression does not allow one to shout “bomb” in a full sport stadium when there is no bomb; neither does it permit one to “streak” naked across the field of play (Devenish, 1998).

The word limitation would thus imply ‘infringement’ or perhaps, ‘justifiable infringement’. A law which limits a right infringes that right. However, the infringement will not be unconstitutional if it takes place for a reason that is recognised in law as justification for infringing rights in an open and democratic society. In other words, not all infringements of fundamental rights are unconstitutional. Where an infringement can be justified in accordance with the criteria in section 36 it will be constitutionally valid (De Waal *et al.*, 1999).

Equality

Section 9 (1) of the 1996 Constitution states that:

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

Thus, direct or indirect discrimination is prohibited. Since section 8(2) proscribes “unfair discrimination”, it implies that “fair discrimination” is permissible. Specifically, in section 1 discrimination is prohibited on the basis of race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, or language. The Commission on Gender Equality makes recommendations to parliament or any other legislature on gender equality and the status of women. The state may also prohibit unfair discrimination by and between private persons and institutions. This right also requires the state to treat people equally. Each time the state treats people unequally, such discrimination must comply with the general requirements for the limitation of rights.

This paragraph safeguards the right of people participating in sport to be protected by the law, and for that protection to be extended equally to all. At a fundamental level, it signifies that sports people cannot claim to be above the law, because sport is a microcosm of society, and law that affects the larger society is also applicable to sport. However, the issue is more complex, as discussed earlier under **application**, and will further be engaged in under **affirmative action**.

Human Dignity

Section 10 of the 1996 Constitution provides that:

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

The manner in which the right to dignity is guaranteed by the Bill of Rights differs from the protection afforded to dignity in international instruments and foreign Constitutions. The Constitutions of the U.S., India, and Canada make no express provision for the right to dignity at all. Instead, this right is protected under other rights.

State duty to protect the rights of human beings begins fundamentally with human dignity and can impose restrictions on those rights only in accordance with the law and as required within

a democratic society. As everybody is entitled to the protection of their human dignity, the state is obliged to take measures that will ensure that people do not impinge on the human dignity of others (Rautenbach & Malherbe, 1994). This section implies that sport participants and spectators, whether children or adults, are required to treat each other and to be treated by any one in authority within sport with respect and dignity. As such, this provision could regulate the conduct of managers, coaches as well as players, fans, sport promoters and occupiers of facilities.

Personal Freedom And Security

Section 12 (1) and (2) of the 1996 Constitution provides that:

- 1)“Everyone has the right to freedom and security of the person, which includes the right -
 - a) not be deprived of freedom arbitrarily or without just cause;
 - b) not to be detained without trial;
 - c) to be free from all forms of violence from either public or private sources;
 - d) not to be tortured in any way; and
 - e) not to be treated or punished in a cruel, inhuman or degrading way.”

- 2)“Everyone has the right to bodily and psychological integrity, which includes the right –
 - a) to make decisions concerning reproduction;
 - b) to security in and control over the body; and
 - c) not be subjected to medical or scientific experiments without their informed consent”

This right protects one’s physical and psychological integrity. The Bill goes further than merely describing the interests that are protected. It also describes and prohibits ways in which the state can violate these interests. These prohibitions form separate guarantees. Paragraph (1c) has potential for application to the sport environment. It is this right which is usually violated by violent and dangerous-play situations, by crowd violence and stampedes and by negligence of one or more parties involved in sport. Paragraph (1e) is potentially applicable as it could regulate the manner in which punishments and sanctions in sport are imposed when internal rules are transgressed. Accordingly one finds that sport has devised systems of penalties that range in severity according to the seriousness of the transgression. For instance, in football, one finds verbal warnings, yellow-cards and red cards used as mechanisms to regulate the tendency to break playing rules.

Section 12(2) has potential application to the sportsperson as a player and even within a competitive event as the sportsperson has a right to feel safe and secure both physically and psychologically. It implies that spectators and officials or coaches should not place demands on participants that are beyond their capacity. Coaches, for instance, should not send an injured player back into the field of play for the sake of winning a game, when the player has not recovered adequately. This extends the protection beyond criminal behaviour to include general rules and regulations of all sport bodies which are non-public. Subsection 2(b) could also be interpreted to deter sport coaches and officials from abusing participants, such as children, either physically, mentally, emotionally or sexually. Paragraph (c) could potentially

be used to monitor the phenomenon of scientific experimentation into and evaluation of sport performance, and to an extent, the issue of drug and sex testing. This may play an increasing role in regulating conduct in the sport industry of today that is characterised by technology and experimentation to produce winning results. A relevant legal doctrine applicable to subsection 2 is the principle of consent (*volenti non fit injuria*), particularly in determining liability for injuries in sport.

Environment

Section 24(a) of the 1996 Constitution is relevant in that:

“Everyone has the right to an environment that is not harmful to their health and well-being.”

This section has potential implications for sport and recreation spaces, fields, halls and stadia. It confers rights upon everyone exposed to the sport environment to safe playing, safe practices and sanitary facilities. It could also be applied to all of the aforementioned facilities discussed wherever safety is a critical factor. It could also apply to sports that could potentially cause environmental hazards, such as air and noise pollution from motor sport. Additionally, it places an obligation on sport not to reduce the quality of the physical environment in any way to the detriment of the general public. In this regard, organisers of mega-events such as the Olympic Games are required by the International Olympic Committee to submit environmental impact assessments as part of their plans to host such events.

Culture And Language

The general right to “play sport” is not embodied in the constitution. Instead it is regarded as part of a person’s cultural rights. In this regard Section 30 of the 1996 Constitution reads as follows:

“Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provisions of the Bill of Rights.”

Sport, like music and dance, are part of a nation's cultural heritage. The right to participate in sport as a cultural activity is thus guaranteed in the Constitution. However, sport as a cultural activity occurs by general association. It could involve personality expression like in music and drama. Sport, therefore, cannot be treated as a fundamental right, because it would lead to numerous problems that are beyond the scope of this discussion.

Freedom of Trade, Occupation and Profession

This right is provided for in section 22 of the 1996 Constitution, and relates to and impacts on the economic system. It in effect provides for a market driven economy. In the sport industry, while the amateur sports people would regard sport as part of their cultural rights, the professional players of today would be protected by this right to freely choose their occupation, the parallel principle which in the business world is known as the restraint of trade. They regard sport as their profession, with many signing lucrative player contracts locally or abroad and most, such as the Leeds United captain Lucas Radebe, ranking amongst the highest paid ‘workers’ in South African sport. For instance, the national governing body

for professional soccer, the National Soccer League (NSL) regards every player who receives remuneration in excess of travel and hotel expenses as a professional player. The result of this regulation is that every player who earns an income from soccer, however meagre, will be regarded as a professional and obliged to enter into a written agreement with the club that employs him. In the case of professional rugby players, they have further formed a 'trade' union known as the South African Rugby Players Association (SARPA) that protects their business interests.

In *Coetzee v Comitis and Others* 2001(1) SA 1254(C), the applicant was a twenty one year old professional football player who was adversely affected by the regulations of the NSL, relating to compensation to be paid to a club in respect of any professional footballer whose contract with a club had terminated. The court had to specifically determine whether those provisions of the NSL constitution, rules and regulations were contrary to public policy and unlawful, or whether they were inconsistent with the provisions of the 1996 Constitution and therefore invalid.

It was argued by the applicant that because a player had to wait for a clearance certificate before signing up with a new club, and because the clearance certificate would invariably be issued only once compensation had been fixed, a player's fundamental rights were violated. The applicant contended that the regulations of the NSL violated the fundamental rights of professional players, including those which guarantee just administrative action, fair labour practices, freedom of association, and human dignity.

The regulations of the NSL had an impact on three fundamental rights of a player: freedom of movement; the right to freely choose a profession or occupation; and the right to dignity. Players were placed at the mercy of their employer once their contracts had expired, violating the most basic values underlying the Constitution. The NSL had not satisfied the court that the limitations imposed by its rules were a fair and justifiable limitation of these rights. Further, there was no rational connection between the regime and the purpose it claimed to serve. The court decided that the compensation regime constituted an unreasonable restraint of trade, and that public policy required that it to be declared unlawful. Additionally the court held that the compensation regime was inconsistent with the provisions of the Constitution and was therefore invalid (*Coetzee v Comitis and Others*, 2001(1) SA 1254(C)).

The right to freely pursue and practise ones trade, occupation or profession is particularly significant in a young, developing democracy like South Africa, as economic activity and growth is essential for the realisation of economic and social justice. South Africa suffered the negative impact of economic and trade sanctions imposed against it by most countries that wanted apartheid dismantled. It is also important since a free market is essential for attracting significant foreign investment and business to South Africa. The right is also compatible with statutory provisions to ensure that reasonable standards of competence and integrity are required of those persons practising professions (Devenish, 1998).

Just Administrative Action

It is essential to refer to prior case law to make sense of historical policies and practices. In the unreported case of *Koschade v Suid-Afrikaanse Skermbond* (TPD M 2507/1978), Koschade and four others were experienced fencers who had previously obtained their

Springbok colours. They were again selected for the Springbok team in 1978 to compete internationally. After the team was announced, Koschade and the four others voiced criticism in public about the inexperience of some of their team mates, one of whom was the son of the president of the South African Amateur Fencing Association (SAAFA). The president had been one of the association members selecting the team. The criticism infuriated the president who demanded an apology from the five to SAAFA and to the other selected fencers, failing which their membership of the team would be terminated. They refused to apologise, and their membership was terminated. However, the Supreme Court was prepared to protect their right to represent their country as chosen members of the team. It was held that because the five fencers had not been allowed to state their case before the executive of SAAFA, the decision to terminate their membership was illegal and was set aside (Viljoen, 1991a).

Amongst the other requirements for administrative validity that could be grouped under the broad right to just administrative action, is the important constitutional right to procedural fairness that has been given special recognition in both the Interim and final Constitutions. Section 33 of the 1996 Constitution promises that no right or legitimate expectation can be terminated without just administrative action. The subsection read as follows:

- 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) impose a duty on the state to give effect to the rights in subsections (1) and (2); and promote an efficient administration.

The common-law rules of natural justice, which are similar in scope, content and application to the right to procedural fairness guaranteed by the Constitution, have always applied to the proceedings of all administrative investigations and hearings. However, before the Interim Constitution these rules could be excluded by statute, although the courts were generally reluctant to exclude them in the absence of an express provision to this effect. The latest approach of South African courts in this regard is illustrated in *Ramburan v Minister of Housing (H.O.D.)* 1995 1 SA 353 (D), where the court held that:

the denial of the constitutional right to procedural fairness is a fatal irregularity and invalidates the administrative action in question.

This does not mean that the right to procedural fairness is absolute. It could be limited, provided that the criteria laid down in section 36 of the Constitution have been met. However, while Burns and Bray (1998) are of the view that, given the injustices of the past, there will be very few instances which will justify a limitation of this right, limitation of procedural fairness is a common occurrence. The South African courts have clearly stated that procedural fairness should not be regarded as a codification of pre-constitutional law, or be confined to the principles of natural justice. For instance, in *Van Huyssteen N O v Minister of Environmental Affairs and Tourism* 1996 1 SA 283 (C) the judge stated that:

the right to procedurally fair administrative action must be given a “generous interpretation” to give individuals the full measure of the fundamental rights included in the Bill of Rights.

Thus the constitutional right to procedural fairness described in section 3(1) of the 1996 Constitution is more comprehensive than the rules of natural justice and may encompass aspects of fair procedure not yet addressed at common law (Burns & Bray, 1998).

Professionals in recreation and sport should be aware of the steps required for administrative justice and should seek professional legal advice in formulating policy for specific situations. Individuals have a right to: be informed of all charges and complaints brought against them; a fair hearing; secure counsel; adequate time to prepare to respond to the complaint; opportunity to present their side of the issue; opportunity to call witnesses and to cross-examine opposing witnesses and parties (Burns & Bray, 1998; Clement, 1988).

AFFIRMATIVE ACTION

This is not expressed as a fundamental right in the Bill of Rights. In a sport context, it has been labelled by some as “reverse discrimination”, and it is necessary to discuss it in relation to the fundamental right to equality. From the preceding discussion on the founding principles of the Constitution, the right to equality, the preamble to the 1996 Constitution, from section 8 and also from the “spirit, purport and objects,” in section 39(2), it is clear that the courts have to give more than “formal” expression to the right to equality. In the South African sport context, the author concurs with the view of Cornelius (2000), that the right to equality is arguably the most important fundamental right. A politically contextual and value-coherent interpretation of this pivotal provision is required. The equality provision is highly problematic because it encounters all kinds of difficulties, particularly because it has of necessity to be modified by affirmative action, for which express provision is made. As section 8(2) proscribes “unfair discrimination”, it implies that “fair discrimination” is permissible (Devenish, 1998; De Waal *et al.*, 1999).

The 1996 Constitution thus makes provision for “substantive equality”, the kind that will promote the purpose and ethos of reconciliation and reconstruction in South Africa. A formal concept of equality would be too superficial since it is based on the assumption that all cases of inequality are undesirable, and can be effectively remedied by treating all persons identically. Such an interpretation could be counterproductive and could also deepen the inequities that have their origins in the previous, discredited dispensation in South Africa because of its institutionalised discrimination. The substantive approach accepts the present injustices and disadvantages arising from the discrimination of the past, and that those people disadvantaged are entitled to preferential or advantageous treatment. This is a prerequisite for genuine equality to ultimately emerge in South African society and sport, and is expressly provided for in section 9. It is submitted, however, that the manner in which affirmative action is implemented will invariably be complex, problematic and contentious (Devenish, 1998; De Waal *et al.*, 1999). This was witnessed in the selection of the Protea national cricket team that toured Australia in January 2002. The selectors’ decision was overruled by the management of the Cricket Board, generating widespread dissatisfaction amongst the players, supporters, the media and several others interested in cricket.

The Constitution thus favours the view that affirmative action is not an exception to equality, but is rather a part of the right to equality as a means of achieving an equal society where equality is understood in its restitutionary and substantive sense. Section 9(2) states that “equality includes the full and equal enjoyment of all rights and freedoms” and that to “promote the achievement of equality” affirmative action measures may be undertaken. Further, the right to equality does more than simply prohibit discrimination or unequal treatment by the state or by private individuals. It also imposes a positive obligation on the government to take action to ensure that everyone fully and equally enjoys all rights and freedoms (De Waal *et al.*, 1999).

DISCRIMINATION BASED ON RACE AND SEX

South African sports history has been tainted by racially enforced discrimination. However, the 1996 Constitution has been founded on the values of non-racism and non-sexism (section 1). Thus discrimination on the basis of race and sex has been proscribed and all people are required to be treated equally.

CONCLUSION

Clearly most of the provisions of the Constitution can be invoked and applicable to sport. Sportspersons and managers of sport should realise that their daily demands, tasks and behaviours are broadly and ultimately regulated by the Constitution, which is the supreme law of the country. They have to play, work or manage sport with due consideration to constitutional provisions. This could be achieved by an understanding of the relevant principles and procedures outlined.

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