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THE WORLD ANTI-DOPING CODE: A SOUTH AFRICAN PERSPECTIVE

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ABSTRACT

During February 2003 the World Anti-Doping Agency adopted the World-Anti Doping Code in Copenhagen in an effort to create and independent anti-doping body and to co-ordinate the harmonisation of doping regulations. The Code encompasses the principles around which the anti-doping effort in sport will revolve in future and has since been adopted by the International Olympic Committee. Many countries, including South Africa, are signatories to the Copenhagen Declaration that was adopted at the same time in an effort to involve governments in the fight against doping in sport. This commentary deals with the effect and possible legal implications of this Code in the South African context and endeavours to show that unless the purpose of doping control is more clearly defined, the Code will not be effective in a human rights culture.

Key words: Doping; Harmonisation; Constitutionality; Strict liability; Restraint of trade; World Anit-doping Agency (WADA); World Anti-doping Code.

INTRODUCTION

To dope or not to dope? To ban or not to ban? These are two of the critical questions that athletes and sport administrators have grappled with since the first concerted efforts by sport governing bodies to address the use of performance enhancing substances in the 1960's (Buti & Fridman, 2001).

Doping, like match fixing and other forms of cheating, is regarded as being fundamentally contrary to the spirit of sport. The 'spirit of sport' is often defined to include notions of fair play and concern for the health of athletes. Superficially, the latter can be countered by an argument based on freedom of choice, but the former is based on an ethic and morality for which there is (almost) universal acceptance (Gardiner *et al.*, 2001; O'Leary, 2001). In this paper, it is argued that an understanding of the spirit of sport goes to the heart of doping control and is central to the enforcement (or lack thereof) of anti-doping regulations by the courts.

It is today generally accepted that athletes who participate in team sports are employees and, accordingly, that labour laws are applicable to them (Van Niekerk, 1997). Irrespective of whether they turn to the labour or civil courts to challenge decisions of sport governing bodies in connection with a doping violation, athletes almost invariably seek to review either the decision itself, on grounds of procedural propriety or rationality, or, alternatively, the *legality* of the applicable rules. In respect of the latter, athletes endeavour to show that the relevant doping rule offends public policy or the 1996 Constitution of the Republic of South Africa

(Act 108 of 1996), (Beloff, 1989; De Waal *et al*., 2001; *Coetzee v Comitis and Others*, 2001 (1) SA 1254 (C)).

This paper deals with the effect and possible legal implications of the World Anti-Doping Code (2003) in the South African context. After a brief overview of the background and key issues dominating the debate, the focus shifts to a discussion of this Code. The main aim is to discuss how doping control will be regulated in future. In addition, comments will be made on the merits and purposes of doping control, insofar as these issues impact on the *legality* of doping control in South Africa.

BACKGROUND

Even proponents of the view that doping undermines the spirit of sport appear to have lost faith in the integrity of existing doping control systems. Prevailing scepticism is understandable, given the number of athletes who test positive for banned substances, but still manage to slip through the extremely wide cracks of the existing system. In addition, 'cover-ups' and inconsistencies appear rife. Not so long ago, the Australian Rugby Union, apparently out of fear of losing one of its top players for two years, covered up a positive test by withdrawing the player from a match under the pretence of injury. More recently, Australian cricketer Shane Warne was banned for one year after testing positive for diuretics, in circumstances where the regulations provide for a two-year ban, despite the fact that the adjudicating tribunal described his evidence as vague (*Australian Cricket Board v Warne*, 2002).

Furthermore, national laws have increasingly intruded into the sports arena and complicated the international fight against doping. A celebrated example is that of the British shot putter, Paul Edwards. In 1994, Edwards was sent home after a positive test at the Commonwealth Games. At the time, the rules of the International Amateur Athletics Federation (IAAF) provided that where an athlete tests positive, the national governing body should ban the athlete for a period of four years. German athletes who tested positive contemporaneously were reinstated after two years because German courts deemed the four-year ban to be an unreasonable restraint. The four-year ban imposed on Edwards (who could not claim the same relief in an English court) remained in force, despite the fact that German athletes found guilty of the same offence could resume participation after two years. The IAAF had two options: either expel the national governing body for not enforcing the rule, or reinstate athletes from countries that had deemed the ban unreasonable. As a result of this anomaly, the IAAF was eventually compelled to reduce the period of the ban to two years at its 1997 congress (Gardiner *et al*., 1998). By contrast, the International Swimming Federation (FINA) still provides that for a first doping offence involving, for instance, anabolic agents or diuretics, a minimum four-year suspension shall apply.

In addition to these inconsistencies, questions are also asked about the fairness of a process where testing and sanctioning after a positive test are performed by one and the same body. It has often been suggested that an independent agency should assume responsibility for doping control (Buti & Fridman, 2001; Gardiner *et al*., 2001).

THE WORLD ANTI-DOPING AGENCY

In 1999, in an effort to create such an independent body and to co-ordinate the harmonisation of doping regulations, the International Olympic Committee (IOC) convened a conference in Lausanne on doping in sport. At this conference the World Anti-Doping Agency (WADA), funded by the IOC and certain governments, was formed. After extensive consultation with all stakeholders, the World Anti-Doping Code, (hereafter referred to as the Code) was drafted and subsequently adopted in Copenhagen during February 2003. The signatories of the Code - the IOC and International Sport Federations - have undertaken to implement the Code before the start of the 2004 Olympic Games.

The Code must be distinguished from the Copenhagen Declaration on Anti-Doping in Sport (2003) that was signed by many countries at the same time. The Code is not binding on national governments and an instrument such as a convention is required to create legally binding obligations (Article 22). Signing the Copenhagen Declaration is therefore merely evidence of a government's commitment to incorporate the Code, via an international convention, into the constitutional and administrative framework of that particular government before the Turin Winter Olympic Games in 2008.

THE CODE

General

The Code is one of the three elements of WADA's World Anti-Doping Program that also includes International Standards (Laboratory Accreditation, Prohibited List and Therapeutic Use Exemptions and Testing Standards) as well as Models of Best Practice. Broadly speaking, the Code encompasses the principles around which the anti-doping effort will evolve. Technical and operational issues will be regulated in the International Standard (which will be mandatory). Models of Best Practice will regulate incidental issues and signatories will have the choice of either adopting these models or developing their own rules and regulations consistent with the general principles of the Code.

For instance, the principle of unannounced, out-of-competition testing is endorsed in article 2.4 of the Code, but the procedures for collecting information regarding athlete whereabouts to secure such testing is contained in the International Standard and the rules for a hearing are suggested in the Models of Best Practice.

The principles

If and when the Code becomes effective, administrators, athletes and lawyers will be faced with new challenges and, hopefully, fewer loopholes. It is submitted that the following eight issues go to the heart of the Code:

Deconstructing doping

The relationship between the athlete and the sport governing body is essentially a contractual relationship and the latter has no inherent power to enforce doping control or to discipline the former, unless there is specific provision to that effect in the contract. For example, in 1992, Katrin Krabbe, a German athlete, was found guilty of tampering with her urine sample that

was collected out-of-competition. Mysteriously, the samples provided by Krabbe and two other athletes were identical and from the urine of the same female. Krabbe's appeal against the decision was successful on the basis that there was no provision for out-of-competition testing in the rules of the German Athletics Association (Buti & Fridman, 2001). Clear and unambiguous definitions and contractual terms are therefore essential.

Currently, there is no common legal definition of doping for all sports. Successful harmonisation cannot be achieved unless this stumbling block is removed. Furthermore, the lack of a sufficiently precise definition lies at the root of sport governing bodies' failure to prosecute doping cases successfully (Vieweg & Paul, 2002). As pointed out by Vrijman (2001), definitions of doping often contain vague and non-specific terms, such as 'use' and 'presence', and often refer to the consequences of doping rather than the act of doping. Most sport governing bodies have now adopted the list of prohibited substances published by the IOC in the Olympic Movement Anti-Doping Code (OMADC) as their own. To stay abreast of medical developments, this list (of the OMADC) contains a reference to 'related substances'. This has led to vagueness and confusion since athletes, in the ordinary course, have no knowledge of these substances in the absence of expert guidance (Vieweg & Paul, 2002).

Consequently, one of the most important challenges faced by the drafters of the Code was to find a definition precise enough to be legally acceptable, yet flexible enough to accommodate developments in the laboratory. In Article 1 of the Code, doping is defined as the occurrence of one or more of the eight anti-doping violations listed in Article 2 of the Code. The most far-reaching of these include reference to the *presence* of a prohibited substance in an athlete's bodily specimen and the failure to be available for out-of-competition testing, including the failure to provide whereabouts information for purposes of such tests (Article 2.1 & Article 2.4).

Strict liability

The former violation endorses strict liability in that an athlete will be guilty of doping if the substance on the Prohibited List (the List) is found in the athlete's specimen, whether or not the athlete used the substance intentionally or negligently. The hitherto inconsistent approaches to strict liability by various sport governing bodies are much to blame for the poor perception of doping control. For instance, the International Shooting Union (UIT) requires not only a positive test, but also proof that the banned substance was taken by the athlete with the *aim* of attaining an advantage, but FINA and IAAF regulations merely require the presence of a banned substance (Gardiner *et al*., 2001). Even from disciplines acknowledging strict liability, different results often emerge from similar facts. According to Buti & Fridman (2001), this is probably the result of ruling bodies allowing the desire to protect the image of their sport or the quality of the athlete to impact on their judgement. For example, in 1995 Samantha Riley failed a doping test at the world swimming championship after accepting a headache pill from her coach. No sanction was imposed against Riley, apparently because of her good record. Yet, at the 2000 Olympics gymnast Andrea Raducan lost her gold medal after the team doctor treated her for a cold with a banned substance that gave her no competitive advantage (Buti & Fridman, 2001). The application of the Code, which is a step removed from specific sports, ought therefore to assist with a more clinical approach to strict liability.

However, strict liability as envisaged by the Code, is only applicable in determining whether a doping violation has taken place or not - intention or lack thereof may yet be considered during the sanctioning phase (Article 2.1.1).

Strict liability, as pointed out by Gardiner *et al.* (2001), is rather draconian and therefore requires rigorous checks and balances. However, it must be conceded that doping control will be almost impossible without it.

Whereabouts information

Unannounced, out-of-competition testing lies at the core of effective doping control (Article 2.4). The pharmacological qualities of many substances are such that detection is only possible for a very short period after consumption and it is now generally acknowledged that an effective anti-doping programme must include out-of-competition testing (Gray, 2001). It is believed that East German athletes escaped detection for many years due to the absence of out-of-competition testing and a comprehensive 'clearing' procedure before athletes were allowed to participate outside East Germany (Ungerleider, 2001).

Out-of-competition testing will only be sustainable if information regarding the whereabouts of the athlete is available at all times. The collection of information regarding athlete whereabouts is regulated by an International Standard. The violation in this regard also endorses the principle of strict liability since intent or negligence is not required.

The prohibited list

It is envisaged that WADA should publish, on at least an annual basis, a List as an International Standard. The List shall identify substances and methods that are prohibited at all times (in-competition and out-of-competition) and those substances and methods that are only prohibited in-competition. Unless a quantitative reporting threshold is specifically identified in the List, any quantity shall constitute a violation (Article 2.1.2). A substance or method shall be included on the List if: (a) *two* of the following criteria are met: it has the potential to enhance performance; it violates the spirit of the sport or it represents a potential health risk, or (b) it has the potential to mask the use of prohibited substance or prohibited methods (Article 4.3). This means that a substance or method may be listed even though it has no performance enhancing or masking capacities. Once included in the List, an athlete cannot question the inclusion of the substance on the basis that it would not have enhanced performance in a particular discipline (Article 4.3.3). These two aspects are revisited below.

The 2004 List was recently published by WADA and will come into effect on 1 January 2004. It is expected that more certainty will be created by the (at least) annual revision and publication of the List. The frequent revision of the List should accommodate the banning of new substances and methods as they emerge from the laboratories. However, the reference to 'related substances' is replaced by a reference to substances with a similar chemical structure or effects as the banned substance or their analogues. This, unfortunately, recreates the uncertainties caused by the term 'related substances'.

On the premise that there are certain basic substances that athletes should not take, individual sports will not be permitted to seek exemption from the basic List, but may request that certain substances and methods be added for their specific sport (Article 4.2). An example is the

addition of beta-blockers for shooting or archery (Beta-blockers slow the heart rate: which is opposite to the effect required for optimal results in most other sports.).

Other violations

The other violations listed in Article 2 do not rely on the principle of strict liability since intent or negligence is either specifically required or implied in the nature of the offence. These include the use or attempted use of a prohibited substance or prohibited method; refusing, or failing without compelling justification, to submit to sample collection after notification as authorized in applicable anti-doping rules or otherwise evading sample collection; tampering, or attempting to tamper, with any part of doping control; possession (by an athlete or athlete support personnel) 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 any athlete, or assisting, encouraging, aiding, abetting, covering up or any type of complicity involving an anti-doping rule violation or any attempted violation.

The escape routes

Hitherto there has been a perception (rightly or wrongly) that the existing system is too porous. To address this perception, the Code aims to regulate therapeutic use exemptions (TUE's) far more strictly. Unless an athlete has 'registered' the use of substances in advance through the appropriate procedure, as regulated by an International Standard, such use cannot be raised as a defence *ex post facto* (Article 4.4). Furthermore, the Code aims to describe the impact of a doping violation on the result achieved in the competition, as well as on the eligibility of the athlete to participate in future events, in a more definitive fashion.

Thus, if an athlete tests positive, the individual result obtained in the competition where the sample was collected, as well as subsequent results, will be disqualified and medals, points and prizes will be forfeited (Article 10.1 & Article 10.7). The argument is that, even if the athlete can show the absence of intention or negligence, an unfair advantage was obtained and the other participants should not be prejudiced. Similarly, if the violation occurred during an event such as the Olympic Games or a World Championship where the athlete participates in a series of events (e.g. heats and finals / breaststroke and freestyle), all the athlete's individual results will attract the same censure unless the athlete can prove lack of fault *and* it can be shown that the athlete's performances in the other competitions at the event were not affected by the anti-doping violation (Article10.1 & Article 10.2).

Article 10.2 provides that for a first violation in respect of the following offences, a two-year ban must be imposed, followed by a life ban for further violations:

(a) the presence of a prohibited substance;
(b) the use or attempted use of a prohibited substance or prohibited method;
(c) possession of a prohibited substance or prohibited method;
(d) refusing or failing to submit to sample collection; or
(e) tampering with doping control.

However, the imposition of these penalties is not absolute and there is some discretion to have the ban reduced or completely eliminated. For instance, in respect of (a) and (b) above, if the

athlete can establish *no fault* or *negligence* and can establish how the prohibited substance entered his or her system, the period of ineligibility will be eliminated (Article 10.5.1.1). If no *significant fault* or *negligence* can be established in the case of (a), (b) and (d), the ban may be reduced, but the reduced ban may not be less than half that which would otherwise have been applicable. If the period of ineligibility is a lifetime, the period may be reduced to no less than eight years (Article 10.5.2). No significant fault or negligence is defined to mean that, while present, it is insignificant when viewed in the totality of the circumstances. For instance, taking, without checking the labelling, a headache pill containing a banned substance that has no performance enhancing capacities.

In respect of the other violations (trafficking and administration of prohibited substances or prohibited method), a four-year ban shall be imposed, but in the case of the violation concerning the administration of prohibited substances or methods, the ban may be reduced to not less than two years (Article 2.7, Article 2.8 & Article 10.5.3). For violations in respect of 'athlete whereabouts information', a ban from between three months to two years may be imposed for a first violation (Article 10.4.3).

Furthermore, certain substances may be identified as being susceptible to unintentional violations because of their general availability or because they are less likely to be abused as doping agents, e.g. flu and cold medicine. Where the athlete can show that the use of such substances was not intended to enhance performance, Article 10.3 of the Code provides that the penalty may be anything between a warning and a one-year ban for a first violation, followed by a two-year ban for a second violation and a life ban for a third violation.

The standard of proof

The standard of proof in doping matters remains a contentious issue (Beloff, 2001; Oshütz, 2001). Article 3 introduces a new standard of proof, namely, whether the sport body has established one of the eight doping violations referred to above 'to the comfortable satisfaction of the hearing body bearing in mind the seriousness of the allegation which is made'. The exact meaning of this standard is not explained, but in the commentary on Article 3.1, reference is made to *Y., J., Y., W., v FINA* (2002), an award of the Court of Arbitration in Sport (CAS), in which this standard of proof is described as being more than the ordinary civil standard, but less than the criminal standard. Since this is a standard of proof unknown in most jurisdictions, and certainly in South Africa, more pertinent guidelines should be provided. The reference to the 'seriousness of the allegation' may also lead to confusion. It is submitted that the quality of the evidence should determine whether an offence has been committed, as opposed to the seriousness of the allegation. Although not quantifiable, the criminal and civil standards of proof, i.e. 'beyond reasonable doubt' and 'on a balance of probabilities', are so well embedded in jurisprudence worldwide that one must question the wisdom of introducing a standard of proof which has no universal application nor intuitive understanding, in light of the fact that this may result in inconsistent rulings.

Article 3.2 states that it will be presumed that the laboratory has followed the correct analysis and custodial procedures as prescribed in the International Standard and that the onus will be on the athlete to rebut this presumption by showing a departure from the Standard. The accompanying commentary to this Article states that the athlete may rebut this presumption by showing a departure from the International Standard on a preponderance of the evidence,

whereupon the burden shifts to the sport body to establish that such departure did not cause an *adverse analytical finding*. Although this commentary does not form part of the main body of the Code, it may serve to add to the confusion surrounding the applicable standard of proof. One standard applies to the body making the allegation and another to the athlete who is required to rebut the presumption. On the other hand, the notion that a lesser standard of proof is applicable to athletes rebutting a presumption is not inconsistent with the approach in the South African laws of evidence (Hoffmann & Zeffert, 1988; Beloff, 2001; Soek, 2002).

General

The other principles endorsed in the Code are less controversial. Although the principles of fundamental fairness of the results management process and the right to a fair hearing are endorsed, no specific procedures are prescribed by the Code. For instance, although a sport body is required to observe the requirements of a fair hearing, the nature of the hearing, i.e. inquisitorial, accusatorial or a combination thereof, is left open (Article 7 & Article 8).

In the case of a ban, the ineligibility of the athlete commences on the date of the decision, but, in the case of a provisional suspension, the period of the provisional suspension shall be credited to the athlete (Article 10.8). The athlete will also be credited for delays in the hearing process not attributable to the athlete. This approach will discourage athletes from dragging out the hearing process. Article 10.9 further precludes an athlete from practising with a national team or to coach or act as sport official during the ban.

Where more than one member of a team tests positive for a banned substance, the team shall be subjected to target testing. This means that athletes will be selected for testing on a non-random basis. Article 11 of the Code provides that if more than one member of the team is found guilty, the entire team *may* be disqualified or banned.

In the case of an international event or cases involving international level athletes, Article 13.2 of the Code provides that decisions may be appealed exclusively to CAS. In cases involving national level athletes, an appeal lies to an independent and impartial body in accordance with rules established by the sport governing body concerned, unless the athlete has a right of appeal to CAS in terms of the rules of that body (Article 13.2).

In Part 2 of the Code, emphasis is placed on the need for athletes to be educated. This is nothing new. Most sport governing bodies and governments offer comprehensive programmes in this regard. In South Africa, this function is co-ordinated by the South African Institute For Drug-Free Sport established in terms of the South African Institute For Drug-Free Sport Act, 14 of 1997.

THE APPLICATION OF HUMAN AND OTHER RIGHTS

General

WADA approached three prominent international lawyers to provide an opinion on whether the provisions concerning strict liability, automatic disqualification of an athlete's results in the competition where the athlete tested positive, the potential disqualification of all the athlete's competitive results at the entire event (e.g. the Olympic Games) and the sanctions for

anti-doping rule violations, offend international law and human rights. A favourable opinion was expressed on the basis that these restrictions are proportionate and that, in the case of the disqualification of results other than those obtained in the number in respect of which the positive test was recorded and also in respect of a possible ban, the athlete has the opportunity to eliminate or to reduce the disqualification or ban if it is shown that there was an absence of fault, negligence or significant fault or negligence (Kaufmann-Kohler *et al.*, 2003).

In South Africa, the true test will be whether the Code can survive scrutiny in terms of the 1996 Constitution.

The limitation clause

Chapter 2 of the 1996 Constitution (the Bill of Rights) guarantees certain basic fundamental rights that should ordinarily not be limited or encroached upon. The fundamental rights that are possibly limited by the Code are the rights to privacy and freedom of movement (possibly limited by the whereabouts requirements in the Code); the right of an accused person to be presumed innocent (possibly limited by the strict liability provisions of the Code); the right to freedom of trade, occupation and profession and the right to fair labour practices (the latter two possibly limited by the ineligibility provisions of the Code). Fundamental rights, however, are not absolute – competing fundamental rights and societal needs can place a limitation on the exercise of fundamental rights. Section 36(2) of the 1996 Constitution provides that no law may limit any fundamental right except as provided in section 36 (1) or in any other provision of the 1996 Constitution. Section 36(1) reads as follows:

> 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.

Clearly this allows for the limitation of fundamental rights, but only for a very important purpose, recognised by reasonable citizens, that can only be achieved by limiting the right in question (De Waal *et al.*, 2001). The limitation by the Code of fundamental rights can therefore only be justified if it is the only way to achieve a particularly important purpose.

This raises the question: what is the purpose of doping control? The fundamental rationale of the Code is described as an effort to preserve the spirit of sport, i.e. the celebration of the human spirit, body and mind, characterized by values such as ethics, fair play, honesty, health, excellence in performance, character, education, fun and joy, teamwork, dedication and commitment, respect of rules and laws, respect for self and other participants, courage, community and solidarity. While this rationale is laudable, the fact is that modern professional sport has moved on from Corinthianism to big business where, it is required that winning,

instead of the celebration of 'spirit, body and mind', is a fundamental component for success of the enterprise.

Will our courts accept this broad rationale as the purpose of doping control? Put differently, will the courts uphold doping control in instances where the prohibited substance, such as cannabis and cocaine, has no masking or performance enhancing capacities, but is bad for the athlete's health? Furthermore, even if the courts accept such a broad purpose, are these values important enough to an open and democratic society based on freedom and equality to justify a limitation of a fundamental constitutional right?

Turning to the first question, it is doubtful whether the courts, when delineating the purpose of doping control, will couch it in such wide terms. While there is no case law to support this point, it is suggested that in order not to encroach unnecessarily upon fundamental rights, the courts will formulate the purpose of doping control in fairly narrow terms, namely to ensure fair play. Furthermore, turning to the second question, and assuming that the courts will accept such a broad purpose, it is suggested that reasonable citizens, while they may find the use of drugs unacceptable, will not regard it as compellingly important for sport bodies to uphold anything more than the notion of fair play (De Waal *et al.*, 2001). These replies are made with reference to the ample available evidence suggesting that competitive sport is not always good for one's health and the fact that sport governing bodies show little regard to issues of health when they associate with harmful products such as alcohol and tobacco through sponsorship (Buti & Fridman, 2001; O'Leary, 2001).

These considerations are of particular importance in respect of the List. An athlete may not show that the substance on the List for which he or she has tested positive has no performance enhancing qualities in his or her sport. If the substance is on the List for health reasons only and the protection of the athlete's health is accepted as important enough for the purpose of section 36 of the 1996 Constitution, the implication would be that not only sport cheats, but also social delinquents are targeted by the Code. It is doubtful whether the courts will accept that it is the function of sport governing bodies to regulate such use, however reprehensible it may be.

The Code, in Article 4.2, envisages the possibility of representatives of individual disciplines requesting the addition of certain substances to the List for their sports, but they may not ask that listed substances be removed for their sport since 'there are certain basic doping agents which anyone who chooses to call himself or herself an Athlete should not take'. Such a sweeping list would (perhaps) have been justifiable if there had been no less restrictive means to distinguish between the effects of substances in different sports or to achieve doping control (either in the narrow sense as advocated above, or in the broad sense as captured in the fundamental rationale for the Code) (Vrijman, 2001). The fact is that a process is in place to add substances for the purpose of a specific sport and there is no reason why the same process cannot be utilized to exclude certain substances for the purposes of a specific sport.

It is suggested that before the Code can safely enter South African law, whether through legislation or the rules of governing bodies, the purpose of doping control requires more attention and fine-tuning.

A limitation in terms section 36(1) will, furthermore, only be justified if it is 'law of general application'. If the Code enters South African law via legislation, there is no doubt that it will qualify as a law of general application and it must meet the criteria set out in section 36(1) (De Waal *et al*., 2001). If the Code is only incorporated into the rules of sport governing bodies (which in South Africa are almost without exception voluntary associations) without legislative intervention, it is doubtful whether such rules can be regarded as 'law of general application'. The question, with reference to the common law, will then rather be whether the Code offends public policy. Since the latter is today rooted in Constitutional values (*Brisley v Drotsky*, 2002 (4) SA 1 (A)) this question, it is suggested, will be answered by following an approach analogous to section 36(1) and will result in the same conclusion as discussed above, since our law cannot sustain two conflicting value systems.

Restraint of trade

To what extent can it be claimed that the initial two-year ban constitutes an unreasonable restraint of trade? Some International Federations, such as FIFA (football) and UCI (cycling) have claimed that it will be very difficult for an athlete to regain excellence after a two-year absence and that such a ban will be an unfair restraint of trade. Indeed, this is the basis on which many athletes have in the past challenged a ban (Buti & Fridman, 2001).

Section 22 of the 1996 Constitution provides that every citizen has the right to choose their trade, occupation or profession freely and that the practice of a trade, occupation or profession may be regulated by law.

In *JR 1013 Investments CC and Others v Minister of Safety and Security and Others* 1997 (7) BCLR 925 (E) it was held that section 22 of the 1996 Constitution protects only the right to choose a trade, occupation or profession and that the right to engage in such an activity is always subject to a variety of restrictions - some of them natural, others man-made – that have nothing to do with constitutional rights. Section 22 therefore apparently excludes only those restraints of trade that deny a citizen the right to choose his or her trade, profession or occupation freely (Prinsloo, 2000). It is suggested that a ban to participate as an athlete is merely one of the man-made restrictions referred to above. It may accordingly be difficult for a banned athlete to rely directly on the 1996 Constitution for protection. The only possible exception to this is the provision of the Code rendering the athlete ineligible for activities incidental to the sport such as coaching or officiating (*Cronje v United Cricket Board of South Africa*, 2001 (4) SA 1361 (TPD)), which may offend section 22.

That, however, is not the end of the enquiry. The question remains whether such a restriction amounts to an unfair restraint of trade. In this regard it has repeatedly been held that *Magna Alloys and Research (SA)(Pty) Ltd v Ellis* 1984 (4) SA 874 (A) is still good law: a restraint of trade is enforceable if it does not offend public policy (*Coetzee v Comitis and Others*, 2001 (1) SA 1254 (C)). The 1996 Constitution has not changed this. The nature and content of public policy may, however, have changed to reflect the spirit and objects of the 1996 Constitution. Today, public policy is rooted in the 1996 Constitution and the fundamental values it protects (*Brisley v Drotsky*, 2002 (4) SA 1 (A)).

Considering the evil of doping, the unfair advantages that can be gained by doping, the efforts to educate athletes about doping and the fact that there are many provisions in the Code that

provide the athlete with an opportunity to show special circumstances that will justify either a reduction or a complete elimination of a ban, it is difficult to imagine that a two-year ban (and a life ban for subsequent transgressions) will offend a public policy rooted in principles of fairness, proportionality and reasonableness.

A novel approach, untested in South African sport, would be to regard the doping provisions as ordinary contractual terms and the ban as an agreed remedy for breach of contract. This, however, will still require the covenanter to show that the contractual terms (including the agreed remedy) do not offend public policy.

THE FUTURE

The IOC and other International Sport Federations have undertaken to implement the Code before the first day of the Summer 2004 Olympic Games. It may be some time before the principles of the Code are incorporated into the constitutional and administrative framework of South Africa. At his address at the opening of the World Conference on Doping in Copenhagen (2003), the South African Minister of Sport and Recreation, Mr. Balfour, alluded to the role of the South African government in the process leading up to the conference and stressed that governments, as the custodians of sport in their territories, ought to take the lead in the fight against doping. There is therefore clearly a political will to implement the Code in South Africa. The South African Institute for Drug-Free Sport Act, 14 of 1997 is the obvious vehicle for this process. However, certain amendments will be required. Some of the definitions in the Act, for instance, do not correspond with those of the Code, e.g. doping. In view of the relatively slow legislative processes in South Africa, it is doubted whether the Act can be amended (or a new act passed) in time for the 2004 Olympic Games. It is therefore more likely that the Code will first be adopted by individual sport codes. Whether the principles of the Code enter the South African sports arena via legislation or via the constitutions of international governing bodies, its application as it currently stands will give rise to serious legal questions. Decisions taken in terms of the Code may not be enforceable in South Africa, yet again leading to the anomaly (set out above) that athletes subject to different jurisdictions are treated differently. It is not suggested that the efforts to harmonise doping control be quashed. Harmonisation may indeed be the only way forward. However, many of the potential problems, locally and internationally, can be addressed by narrowing the purpose of doping control to the countering of artificial performance enhancement only and by abandoning the paternalistic attitude that sport governing bodies may dictate what is in the interest of the athlete's health. In its present form, the Code will not sit comfortably in a human rights culture. Furthermore, while processes will become clearer once all the International Standards are published, the new standard of proof is an unknown animal and may result in inconsistent rulings. To ensure consistency it is suggested that governing bodies should revert to the traditional civil burden of proof.

Having said this, the Code is a commendable effort to codify the common denominators in the fight against doping and will, despite the misgivings alluded to above, in all likelihood be implemented in its present form. The full extent of its limitations will therefore only become apparent through its application. Hopefully it will be regarded as a living document, flexible enough to accommodate adjustments as shortcomings become more apparent.

REFERENCES

BELOFF, M.J. (1989). Pitch, pool, rink,…court? Judicial review in the sporting world. *Public Law* 1: 95-110.

BELOFF, M.J. (2001). Drug, laws and versapaks. In J. O'Leary (Ed.), *Drugs and doping in sport: Socio-legal perspectives* (39-56). London: Cavendish.

BUTI, A. & FRIDMAN, S. (2001). *Drugs, sport and the law.* Mudgeeraba: Scribblers.

COPENHAGEN DECLARATION ON ANTI-DOPING IN SPORT (2003). Hyperlink [http://wada-ama.org/docs/web/corporate_planning_programs/world_conference/declaration_en.doc]. Retrieved 11 July 2003.

DE WAAL, J.; CURRIE, I. & ERASMUS, G. (2001). *The Bill of Rights handbook* (4th ed). Landsdowne: Juta.

GARDINER, S.; FELIX, A.; JAMES, M.; O'LEARY, J. & WELCH, R. (1998). *Sports law* (1st ed). London: Cavendish.

GARDINER, S.; JAMES, M.; O'LEARY, J.; WELCH, R.; BLACKSHAW, I.; BOYES, S. & CAIGER, A. (2001). *Sports law* (2nd ed). London: Cavendish.

GOVERNMENT PRINTER (1996). *Constitution of the Republic of South Africa Act, 108 of 1996.* Pretoria: South African Government.

GOVERNMENT PRINTER (1997). *South African Institute for Drug-free Sport Act, 14 of 1997.* Pretoria: South African Government.

GRAY, A. (2001). Doping control: The national governing body perspective. In In J. O'Leary (Ed.), *Drugs and doping in sport: Socio-legal perspectives* (11-30). London: Cavendish.

HOFFMANN, L.H. & ZEFFERT, D. (1988). *The South African Law of Evidence* (4th ed). Durban: Butterworths.

IOC MEDICAL COMMISSION'S LIST OF PROHIBITED CLASSES. Hyperlink [http://multimedia.olympic.org/pdf/en_report_542.pdf?item=headline&headline_id=7]. Retrieved 15 April 2003.

KAUFMANN-KOHLER, G.; MALINVERNI, G. & RIGOZZI, A. (2003). Summary opinion on the conformity of certain provisions of the draft World Anti-Doping Code with commonly accepted principles of international law. 2nd World Anti-Doping Conference, Copenhagen, March 2003.

O' LEARY, J. (2001). Doping solutions and the problem with problems. In In J. O'Leary (Ed.), *Drugs and doping in sport: Socio-legal perspectives* (255-267). London: Cavendish.

OSHÜTZ, R.F. (2001). The jurisprudence of the CAS in doping cases. *The International Sports Law Journal*, 2: 22-30.

PRINSLOO, M.M. (2000). Enkele opmerkinge oor spelerskontrakte in professionele spansport. *Tydskrif vir Suid-Afrikaanse Reg,* 1: 229-245.

SOEK, J. (2002). The legal nature of doping. *The International Sports Law Journal,* 2: 2-7.

UNGERLEIDER, S. (2001). *Faust's gold.* New York, NJ: St. Martin's Press.

VAN NIEKERK, A. (1997). Labour law in sport: A few curve balls. *Contemporary Labour Law*, 15(6): 1.

VIEWEG, K. & PAUL, C. (2002). The definition of doping and the proof of a doping offence. *The International Sports Law Journal,* 1: 2-6.

VRIJMAN, E.N. (2001). Harmonisation a bridge too far? A commentary on current issues and problems. In In J. O'Leary (Ed.), *Drugs and doping in sport: Socio-legal perspectives* (147-165). London: Cavendish.

WORLD ANTI-DOPING CODE (2003). Hyperlink [http://wada-ama.org/docs/web/standards_harmonisation/code/code_v3.pdf]. Retrieved 11 July 2003.

WORLD CONFERENCE ON DOPING RESOLUTION (2003). Hyperlink [http://wada-ama.org/docs/web/corporate_planning_programs/world_conference/resolution_en.doc]. Retrieved 11 July 2003.

2004 PROHIBITED LIST. Hyperlink [http://www.wada-ama.org/docs/web/standards_harmonisation/code/list_standard_2004.pdf]. Retrieved 5 October 2003.

CASES AND AWARDS CONSULTED

Australian Cricket Board v Warne 2002. Hyperlink [http:// http://www-rsa.cricket.org/link_to_database/NATIONAL/AUS/MEDIA_RELEASES/Warne_decision-signed.pdf]. Retrieved 15 April 2003.

Brisley v Drotsky 2002 (4) SA 1 (A).

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

Cronje v United Cricket Board of South Africa, 2001 (4) SA 1361 (TPD)

JR 1013 Investments CC and Others v Minister of Safety and Security and Others 1997 (7) BCLR 925 (E).

Magna Alloys and Research (SA)(Pty) Ltd v Ellis 1984 (4) SA 874 (A).

Y., J., Y., W., v FINA CAS 98/208.

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