

Anti-Doping Law in South Africa - The Challenges of the World Anti-Doping Code

by Portia Ndlovu*

1. Introduction

South African sports, has developed extensively since the advent of our democracy. This national awakening in sports owes its roots to the adoption of constitutionalism and the recognition, respect and upliftment of fundamental human rights in South Africa. This was confirmed in the judgment of *Coetzee v Comitis and Others*¹, where the court held that persons involved in professional sports (*in casu* the sportsperson being a soccer player) have the right to choose their occupation freely without being treated like objects.

The *Coetzee supra* decision established a value judgment based on equity thus establishing a constitutionally sound decision related to sports contracts in South African law. In a judgment by Traverso J and Ngwenya J, concurring, it was held that a contract of employment of a football player bound by rules of National Soccer League (NSL) may not contain a rule that is akin to restraint of trade when dealing with the transfer of a player from one club to another. Such a rule is unreasonable and contrary to public policy. It was thus held that such a rule is inconsistent with the Constitution and therefore invalid. In a similar case of *McCarthy v Sundowns Football Club and Others*² the court emphasized the importance of freedom in sports contracts.

Part of the development of sport in South Africa is evident in the production of world-class athletes in multi-sporting events who have graded international arenas to compete against the world's best with excellent results. Examples of these high sports achievers, to mention a few include the likes of Hestrie Cloete (high jump), Mbulaeni Mulaudzi (800m), Natalie Du Toit (paralympian swimmer), our rugby world-cup win in 1995 and our cricket team's great performances in recent one day international matches. However, this development has not been without certain pitfalls. I would like to mention three main obstacles that plague South African sports today. Firstly, unique to South African sports we have had to deal with the reality of our historical inequalities in sports. The South African Sports Commission Act³ which has now been repealed by the South African Sports Commission Act Repeal Act⁴ summarized the historical position of South African sports prior to the adoption of the Constitution.⁵ This socio-economic obstacle is being addressed through various efforts by national sporting bodies with the aim of producing talents from all social groups in South Africa. This difficult hurdle to sports in South Africa may require more than 11 years to remedy.

The second obstacle I would like to raise is that although South Africa is trying to develop as a great sporting nation, the media reports covering South African sports at the World Championships in Helsinki 2005, for example, highlighted that our efforts are simply insufficient in developing a culture of high performance sport. It was also reported, perhaps unfairly, that the South African athletes lack the 'winning culture' that is necessary to place South Africa on the map through making finals and winning medals or trophies. In the previous year again South Africa failed to perform well at the Athens Olympics finishing 43RD on the final medal table. Not to mention the recent dismal performance by the South African soccer team in the Africa Cup games Egypt in 2006. These reports and statistics show that South Africa is failing to produce enough sporting talent.⁶

Thirdly, the focus of this article, South African sport has been tainted by various doping scandals where, for example, in various codes of sport samples taken from various athletes have been found containing banned substances in the form of various stimulants or anabolic steroids. These doping scandals are clearly contrary to the spirit and law of sports. In May 2005, for instance, South Africa was in shock when our former Olympic 800 metres silver medalist

Hezekiel Sepeng tested positive for the banned steroid norandrosterone.⁷ The former Olympian protested to knowingly taking the banned substance and his case continues.⁸ In team sports, the South African Rugby judiciary had to ban Western Province hooker David Britz for testing positive for the anabolic veterinary steroid boldenone.⁹ These doping scandals are a brief reflection on the problem of doping in South African sports. From these doping offences or scandals one is able to draw some understanding of the humiliating sanctions and consequences of doping both for the sport and the individual athlete therefore it is essential to declare war on doping through proper application of anti-doping law.

The purpose of this article is to educate South African athletes on anti-doping laws and to create awareness that it is possible to win at any level of competition without the use of banned substances.¹⁰ Further, it is essential in law to highlight that there is hope for those athletes who have talent and a desire to succeed but have been historically disadvantaged however they should seek to avoid expedient success through the use of banned substances. In light of the quest to develop as a sporting nation, it is the aim of this paper is to contribute to the legal research applicable to sport by highlighting the laws relating to doping and the challenge in applying these laws in South Africa.

2. South African Sports and Anti-Doping Law

The current legislation on anti-doping law in the Republic is contained in the South African Institute for Drug-Free Sport Act 14 of 1997. The 1997 Act has an express goal 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 1997 Act in relation to sports as the administration of substances belonging to prohibited classes of pharmacological agents or the application of any method intended to enhance performance artificially.

Section 10 of the 1997 Act sets out various objectives aimed at discouraging the use of drugs in sport. These objectives include *inter alia*, at s 10(1)(b) the encouragement of development programmes aimed to educate more specifically the sporting communities about the dangers of doping in sport. It is obvious from the objectives of the Institute that the aim is to eradicate the use of illegal drugs in sport, however, these exceptional 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 wrongful mindset in doping athletes themselves is contrary to our law and places in danger the health of the athletes.

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1 (2001) 22 ILJ 331 (C)

2 (2003) 24 ILJ 197 (LC).

3 Act 109 of 1998, now repealed. The preamble of the Act stated that prior to the adoption on non-racial sports organizations, the apartheid laws that existed had the effect of creating sporting movements which operated under racial policies and in that manner prejudiced and brought detrimental results to sports persons and sport both locally and internationally.

4 Act 8 of 2005.

5 The Constitution of the Republic of South Africa 108 of 1996.

6 For further obstacles that have plagued SA sport see, The International Sports Law Journal by the Asser Institute 2004/1-2. Rochelle le Roux 2003: *Annus Horribilis for South African Sport?*

7 De Jongh Borchardt *Beeld* 8 May 2005.

8 *Pretoria News* 27 January 2006.

9 Stephen Nell *Cape Times* 23 June 2005.

10 This initiative is in compliance with, s 11(2)(k) of the South African Institute for Drug-Free Sport 14 of 1997 and Article 18 and 19 of the World Anti-Doping Code.

3. Practical Application of Current Anti-doping Legislation

In terms of s 10(1)(d) of the 1997 Act,¹¹ the Institute intends to bring about the introduction of a centralized independent sample collection and testing program, which may subject any athlete to dope testing on short notice or without notice both in and out of competition. This method is 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) Act, the Institute aims to develop and maintain drug-testing laboratories accredited by the International Olympic Committee (IOC).

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 (WADA) tools for testing ethics, that being, 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.¹²

It is submitted that it is now possible to measure the progress made by the Institute in achieving its anti-doping objectives in terms of the 1997 Act¹³ as the date of the statute's commencement is 23 May 1997, thus giving it eight years to date of application. Without our reflection on whether the objectives in terms of s 10 of the 1997 Act have been achieved or at least are in the process of achievement, South African anti-doping law will remain in the dark ages and it will be an academic exercise to seek to update our current law with the World Anti-Doping Code if the objectives of our local laws are neither rigorously sought nor applied in reality.

How do we measure success of the 1997 Act objectives? We ought to attempt *inter alia* as a country to establish room for efforts made through various programmes in schools for instance to educate learners on the laws relating to anti-doping and thereby discourage the use of banned substances. There should see a decline in doping statistics through exposing and rehabilitating offenders and exposing the dangers of doping.

To date it South African efforts in achieving the objectives of the 1997 Act are to a limited extent laudable as many of the doping offences have been dealt with publicly and with proper sanction. Further, the stakeholders in South African sports have reacted positively to the need for drug-free sports. This attitude by South Africa is in line with international legal trends on anti-doping. On the international circuit the efforts of WADA and the IOC should be recognized as they managed to punish various doping offenders through the annulment of illegally obtained performances. If South Africa is as aggressive against doping in sports as the rest of the legal world trends, we are going to develop as a sporting nation that truly celebrates the spirit of sports without the promotion and celebration of sports cheats.

4. Duty to publish Information on testing procedures

In terms of s 11(1)(g) of the 1997 Act, a statutory duty to develop, maintain, distribute and publish information on procedures for, and developments concerning, the collection of testing samples is created. However, this duty is not preemptory as the wording of the statute contains the word 'may' in the creation of the duties under s 11 (1). However, s 11(2) creates powers and duties of the Institute, which are preemptory as they are incumbent in the creation of effective anti-doping legislation.

In terms of s 11(2)(a) of the 1997 Act, the institute must maintain a list of prohibited substances and practices listed under the 'List of Doping Classes and Methods'.¹⁴ This list is referred to in the World Anti-Doping Code as the 'Prohibited List' and is regulated in terms of Article 4 of the Code.¹⁵ The annual update of the publication suggests the ongoing research and scientific developments that are taking place in the science of doping methods.

In terms of s 11(2)(d) of the 1997 Act, the Institute has an imperative duty to disseminate information relating to penalties likely to be imposed if athletes test positive for doping or if such athletes fail to comply with requests to provide samples for testing. Clearly a nega-

tive 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 ss (f) of the 1997 Act, it is within the powers of the Institute to select the athletes to be tested, to collect samples from such athletes while securing a tamper-free transit of such samples to approved laboratories. 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, to eliminate common arguments from offending athletes who may claim to be victims of incorrect testing procedures.

5. The Institute Appeal Board

The Institute Appeal Board, which is responsible for hearing and deciding on doping disputes, is established in terms of s 17 of the Act.¹⁶ In terms of s 17(2)(a), the Appeal Board has express power to hear and decide on any dispute relating to drug taking or doping, however, this is done on an appeal level. Prior to lodging an appeal, an amount of a thousand rand must be deposited by the appellant with the Board. The amount payable is refundable if the verdict reached by the Board is in favour of the appellant; however, if the appeal is unsuccessful, the amount deposited is forfeited. In terms of s 17(6) of the 1997 Act sanctions on persons found guilty of doping shall be in accordance with the penalties laid down in the constitutions of the respective sports federations.

6. The World Anti-Doping Code

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.¹⁷ At the heart of the Convention 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.¹⁸

To date nothing is yet mentioned about the World Anti-Doping Code in the South African Institute for Drug-Free Sport Act 14 of 1997. Comparatively speaking, the South African 1997 Act¹⁹ does capture the spirit of the code. However, it is essential that the code is disseminated through our law either as a schedule to the 1997 Act or as a separate World Anti-Doping Convention Act so that it is easily accessible for all. This will also encourage a culture of clean sportsmanship that reflects international trends. It is proposed in this article that amendments in current South African law are necessary to reflect the position expressed in the World Anti-Doping Code.

The creation of the World Anti-Doping Code is a reaction to the reality of doping in sport which is a legal difficulty that is unique to sport. It is stated that, "a large part of sporting jurisprudence deals with disciplinary proceedings, many of them pertaining to doping cases. It is in the latter context that the Court of Arbitration for Sports (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."²⁰

The World Anti-Doping Code deals aggressively with doping in

11 South African Institute for Drug-Free Sport Act 14 of 1997.

12 Rochelle Le Roux *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.

13 South African Institute for Drug-Free Sport Act 14 of 1997.

14 As we are living in an information age, obtaining a list of banned substances and methods should be the responsibility of persons involved in sports. Relevant to South Africa is a list of doping classes and methods banned in sport available at the website: web.uct.ac.za/depts/mmi/jmoodie/sporttab.html & www.drugfreesport.org.za/.

15 <http://www.wada-ama.org>.

16 South African Institute for Drug-Free Sport Act 14 of 1997.

17 Rochelle Le Roux *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.).

18 Ibid.

19 South African Institute for Drug-Free Sport Act 14 of 1997.

20 Rochelle le Roux *Under Starter's Orders: Law, Labour Law and Sport* (2002) 23 ILJ 1206.

the international community. This was confirmed in the recent 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")²¹ In an appeal dated 2 February 2006 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 Mr Lund as "a cheat" because he had been using the banned substance for medical purposes. The CAS rejected the submissions by USADA and allowed the appeal by WADA which was calling for an appropriate sentence of a two year ban on Mr Lund.²²

7. The International Convention against Doping In Sport

It is essential at this point to highlight the distinction between The World Anti-Doping Code discussed herein and the United Nations Educational Scientific and Cultural Organization (UNESCO) Convention against Doping in Sport.²³ It must be pointed out that although this paper supports and calls for the WADA Code to be adopted into South African law it must be noted that there is no legal obligation for countries to adopt the WADA Anti-Doping Code in such a manner. However, the UNESCO Convention against Doping in Sports does create an obligation on the ratifying countries to pass legislation that is consistent with it. With the understanding of the distinction between the Code and the Convention, it is respectfully submitted that greater good would be achieved in South African anti-doping law if the Convention is adopted with the force of law. The proposed adoption of the Convention against Doping in Sport will give rise to the automatic application of the WADA Anti-Doping Code in terms of Article 2 (6) as the Code is an appendix to the Convention.

At present South Africa is not on the list of member States to the Convention against Doping in Sport.²⁴ Member States either by acceptance or ratification include Australia, Canada, Cook Islands, Denmark, Iceland, Monaco, New Zealand, Nigeria, Norway and Sweden. With Drug-Free South Africa²⁵ seeking to apply international standards in the war against doping in sports it is necessary that our local legislation is amended to reflect the application of the Convention against Doping in Sports. The current South African law, the WADA Anti-Doping Code and the UNESCO Convention against Doping in Sports all reflect similar objectives therefore there is no reason barring South Africa from becoming a member State to the Convention.

It is clear from the preamble of the Convention that it is an instrument that is in line with South African as well as international law on doping. This is evident in the following words of the Convention, "Conscious that sport should play an important role in the protection of health, in moral, cultural and physical education and in promoting international understanding and peace. Noting the need to encourage and coordinate international cooperation towards the elimination of doping in sport. *Concerned* by the use of doping by athletes in sport and the consequences thereof for their health, the principle of fair play, the elimination of cheating and the future of sport.... *Mindful also* of the influence that elite athletes have on youth."²⁶ This preamble of the Convention 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.

8. The World Anti-Doping Code and the Constitution

The World Anti-Doping Code, similar to the UNESCO Convention against Doping in Sports²⁷ is based on constitutional principles and human rights²⁸ therefore it is unlikely that the legality of the rules of the Code may fail when tested against the South African Constitution. The Code itself appears to have no rules that may operate against public policy. The Code can be termed an instrument based on the promotion of human rights that seeks to promote such rights through the eradication of immoral practices in sports.

9. The Responsibility to Apply the Code: Sporting Bodies in South Africa

Recently the Department of Sport and Recreation endeavoured to restructure the controlling bodies of sport in South Africa. These efforts resulted in the creation of a sporting superstructure known as the South African Sports Confederation and Olympic Committee (SASCOC).²⁹ SASCOC is the controlling body for all high performance sport in South Africa. It is a Section 21 Company created by representatives from all sports bodies at a general meeting held on 27 November 2004. All members of the Association are listed in Schedule 1 of the company's Articles of Association. It is important to have an understanding of the controlling body of South African sports as it is the umbrella body responsible for the progress of athletes within the confines of the World Anti-doping Code. In terms of the Memorandum of Association, the main object is to promote and develop high performance sport in the Republic of South Africa. Further, SASCOC is to act as the controlling body for the preparation and delivery of Team South Africa at all multi-sport international games including but not limited to the Olympics, Paralympics, Commonwealth Games, World Games and All Africa Games. In achieving its objectives SASCOC is required in terms of clause 4 of its memorandum to assume functions relating to high performance sport which were carried out by the following controlling bodies in the Republic of South Africa:

- i Disability Sport South Africa (Association incorporated under Section 21);
- ii National Olympic Committee of South Africa;
- iii South African Commonwealth Games Association (Association incorporated under Section 21);
- iv. South African Sports Commission³⁰;
- v. South African Student Sports Union;
- vi. Sport and Recreation South Africa; and
- vii United School Sports Association of South Africa;

SASCOC's main responsibilities also include the duties to affiliate to and/or be recognized by the appropriate international, continental and regional sport organisations for high performance sport and for that purpose act as the recognized national entity for the Republic of South Africa. Initiate, negotiate, arrange, finance and control where necessary, multi-sport tours to and from the Republic of South Africa inclusive of events between teams and/or individuals. Ensure, and if necessary approve, that the bidding process relating to the hosting of international sporting events in the Republic of South Africa or any other events are in compliance with the necessary rules and regulations relating to same. Facilitate the acquisition and development of playing facilities including the construction of stadia and other sports facilities. Ensure close co-operation with both the government and private sector, relating to all aspects of Team South Africa and ensure the overall protection of symbols, trademarks, emblems or insignia of the bodies referred to in 1g within the Association's jurisdiction.

With regard to resolving South Africa's crippling social needs SASCOC has pledged to unite and commit towards an improved system

21 Case: Court of Arbitration for Sport (CAS) Ad hoc Division - XX Olympic Winter Games in Turin CAS arbitration NE CAS OG 06/001http://www.tas-cas.org/en/code/frmco.htm

22 The decision of the CAS was handed down on 10 February 2006. What we can draw from the decision is that there are vigorous endeavors by the World-Anti Doping Agency in ensuring that the laws relating to anti-doping are well observed by the international community. As South Africans we can learn from these efforts when dealing with doping in South African Sports.

23 Paris, 19 October 2005.

24 portal.unesco.org/la/convention.asp?KO=31037&language=E&order=alpha#1.

25 The South African Institute for Drug-Free Sports (SAIDS) Tel. (+27 (021) 683 7129/Fax (+27) (021) 683 7274/email drugfree@iafrica.com

26 See, preamble of the Convention against Doping in Sports, Paris 19 October 2005.

27 See, preamble of the Convention against Doping in Sports, Paris 19 October 2005.

28 Rochelle Le Roux *The World-Anti Doping Code: A South African Perspective* South African Journal for Research in Sport, Physical Education and Recreation (2004) Volume 26 (1) 73.

29 http://www.sascoc.co.za

30 Note repeal of Sports Commission Act 109 of 1998.

based upon the principles of equal opportunity, non racialism and non sexism for all persons.³¹ SASCOC is also dedicated to ensuring equitable development at national and representative level, which ensures the implementing of coordinated sports procedures and policies to ensure elite levels of athleticism, thus allowing delivery of Team South Africa by the pooling of activities, resources, experience and expertise. This express vision and goal of SASCOC is essential to creating a social balance in sport, one only hopes that what is expressed by SASCOC on paper can be achieved in practice.

With regard to anti-doping law SASCOC's Articles of Association provide in Article 26 that all members are to comply and be bound by and procure that their members comply with the Code presently in force and adopted by South Africa and the International Olympic Committee (IOC). The code is the World Anti-Doping Code adopted in Copenhagen. Although this code is part of South African law, it has not been expressly reflected in local legislation. It is proposed that the current South African law on anti-doping must be amended to give effect to the changes in sporting bodies as well as the application of the World Anti-Doping Code.

10. Conclusion

In conclusion, it is essential to remember that large investments to

keep South African sports from drug use have been made 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 an international concern that seeks to undermine the integrity of fair play. Therefore, it is essential that our laws be amended to give effect to the World Anti-Doping Code and the UNESCO Convention against Doping in Sports so that matters relating to anti-doping law can be dealt with through a singular international standard. We live in a global village where sport forms a substantial aspect of that village thus harmonization and uniformity of laws relating to sport is clearly desirable. Clearly as a country we are not alone in the fight against drugs in sport, however, we are responsible for educating ourselves on the legal measures we have adopted in order to apply them in sporting bodies and in our courts.

³¹ This goal being in harmony with the objectives of the now repealed Sports Commission Act 109 of 1998.



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