

## Kronieke / Chronicles

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# Voluntary associations and the Constitution: *Eastern Province Athletics Association v Association of Athletics SA*

## 1. Introduction

The relationship between a voluntary association and its members *inter se* is regarded as consensual in nature, and the constitution of each particular association governs the relationship between the parties.<sup>1</sup> Our courts have held that voluntary associations, especially when taking quasi-judicial decisions, are subject to judicial review.<sup>2</sup> The courts were only prepared to exercise their common law power of review where the provisions of the relevant constitution, or the principles of natural justice, were not adhered to, and such irregularity actually prejudiced the applicant.<sup>3</sup> Instances of judicial review of quasi-judicial decisions of voluntary associations normally stem from disciplinary action taken by a tribunal of the association against one or more of its members. The party aggrieved by the decision of the voluntary association is therefore usually a member of that association.

Hoexter points out that prior to 1994 the courts regularly reviewed the decisions of private bodies, such as churches and clubs, regarding disciplinary and non-disciplinary matters.<sup>4</sup> She is of the view that such decisions remain reviewable today, although the basis of such review is not clear.<sup>5</sup> The Constitution provides for the 'horizontal' application of constitutional rights in the private sphere.<sup>6</sup> On the authority of *Klein v Dainfern College*<sup>7</sup> she concludes that the reviewability of state power takes place outside the Constitution in terms of the established common law principles.<sup>8</sup>

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1 Compare *Martin v Durban Turf Club* 1942 AD 112 and *Middelburg Rugbyklub v Suid-Oos Transvaalse Rugby Unie* 1978 1 SA 484 T.

2 Compare in general *Turner v Jockey Club of South Africa* 1974 3 SA 633 A and *Theron and Andere v Ring van Wellington van die NG Sendingkerk in Suid-Afrika en Andere* 1976 2 SA 1 A: 13H, 21D-H and 23D-H.

3 *Odendaal v Loggerenberg en Andere* NNO (1) 1961 1 SA 712 O: 719C-E

4 Hoexter 2007:120-121.

5 Hoexter 2007:121.

6 Section 8(2).

7 2006 3 SA 73 T: para 24.

8 Hoexter 2007:122. In *Pharmaceutical Manufacturers Association of SA: in re: ex parte application the President of South Africa* 2000 3 BCLR 241 CC: para 46, 50 it was however held that the common law is not a body of law separate from the Constitution and

Another grey area in the law applicable to voluntary associations relates to whether institutions which regulate professional sports such as rugby, cricket and athletics exercise a public power in their regulation of these sports.<sup>9</sup> Parliament, through the auspices of the Minister of Sport, together with the Portfolio Committee on Sport and Recreation, is primarily responsible for defining government policy, legislation and budget allocations in respect of sport.<sup>10</sup> The Department focuses on the promotion of a particular sport and recreation policy, as well as the implementation thereof through its agents, the Sports Commission, the National Olympic Committee of South Africa and the various national sports federations.

In the case of rugby, the court held in *President of the Republic of South Africa v South African Rugby Football Union*<sup>11</sup> that the provisions of the Commissions Act<sup>12</sup> can apply (and *in casu* did apply) to the internal management of private autonomous organizations, provided that the affairs in question are matters of public concern.<sup>13</sup> In *Cronje v United Cricket Board of South Africa*<sup>14</sup> the court held that the body regulating cricket is not a public body, wholly unconnected to the State and does not exercise public power. Accordingly its conduct is not subject to the public law rules of natural justice. The court held that the rules of natural justice would only be applicable if these rules were incorporated in the contract regulating the relationship between the association and its members.<sup>15</sup> Burns<sup>16</sup> correctly advances that this decision is open to criticism, as the court should have relied upon the horizontal application provisions of the Bill of Rights, the common law approach to the application of the principles of natural justice to voluntary associations and section 39(3) of the Constitution of South Africa.<sup>17</sup>

De Ville<sup>18</sup> advances that the actions of voluntary associations which have control over a particular industry would qualify as administrative action under the Promotion of Administrative Justice Act<sup>19</sup> even if the control is not monopolistic in nature. He correctly points out that the choices an individual has in exercising religion,<sup>20</sup> acting in accordance with political persuasions<sup>21</sup> or participating in

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that there are not two systems of law, each dealing with its own field with its own highest court. The constitutional law and common law are intertwined and that there can be not difference between them.

9 Compare in this regard Burns and Beukes 2006:140 and Burns 2002:372-381.

10 White Paper of the National Department of Sport and Recreation available at <http://www.srsa.gov.za/WhitePaper.htm> (accessed on 29 July 2007).

11 2001 1 SA 1 CC.

12 8 of 1947.

13 Para 172-173.

14 2001 4 SA 1361 T: 1375.

15 1376.

16 Burns 2002:377.

17 Act 108 of 1996. Hereinafter referred to as 'the Constitution'.

18 De Ville 2003:51.

19 Act 3 of 2000.

20 Compare *Taylor v Kurstag* NO 2005 7 BCLR 705 W.

21 Compare Thornton 1999:351-369.

sport are usually extremely limited. Currie and Klaaren,<sup>22</sup> on the contrary, suggest that the conduct of voluntary associations cannot be reviewed under section 33 of the Constitution, as these bodies do not exercise administrative action.

In the case of *Eastern Province Athletics Association v Association of Athletics SA*<sup>23</sup> the relief sought by the applicant was not a review of a decision affecting any of its members by the voluntary association regulating athletics. Instead the court was requested to consider the constitutionality of clause 27.12 of the constitution of Athletics South Africa. In terms of this clause only South African citizens or permanent residents shall be eligible for team prizes in all athletic events taking place under its auspices.

Although not reported in any printed series, this judgment is relevant and noteworthy, as it deals *inter alia* with the interesting issue of the applicability of the Constitution to voluntary associations, such as sporting bodies. What makes the judgment even more noteworthy, is the fact that the parties directly affected by a decision of the voluntary association concerned did not consist of any of its members but rather athletes from Kenya, whom the applicant had invited to partake in an athletic event it presented.

In its application, the Eastern Province Athletics Association sought an order setting aside clause 27.12 of the constitution of its controlling body, the Association of Athletics South Africa, on the basis that the said clause was unconstitutional and invalid. Both the applicant and the respondent are voluntary organizations. The respondent is made up of various athletic associations, including the applicant, who are spread countrywide and is the overall controlling body of these associations.<sup>24</sup> In terms of section 2.4 of its constitution the respondent is the sole organization administering and controlling athletics in South Africa.

## 2. Background to the application

As part of a Rag gimmick in 1964, athletes of the former University of Port Elizabeth (now merged into the Nelson Mandela Metropolitan University), challenged a steam train running from Grahamstown to Port Elizabeth. In 1980 a new route between Port Elizabeth and Loerie was surveyed and the inaugural Great Train Race took place that year. Teams of 10 athletes each compete against a steam train known as the Apple Express in a road relay over a distance of 73 km.<sup>25</sup>

Since 1980, the race has grown and became a prestigious sporting event attracting between 5 000 and 6 000 entrants locally and from overseas. As opposed to other big road running events like the Comrades and Two Oceans marathons, the Great Train Race is a team event, and prizes are awarded to teams. Teams from the corporate sector, social clubs and schools participate

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22 Currie and Klaaren 2001:71.

23 [2006] JOL 16720 SE. Hereinafter referred to as 'the judgment'.

24 Para 1-2 of the judgment.

25 Compare in this regard <http://www.spoornetgreattrainrace.co.za> (accessed on 25 June 2007) and para 7 and 8 of the judgment.

and more than 5 000 athletes, in approximately 500 teams, participate in the event in ten different race categories.<sup>26</sup>

The race acquired more of an international character in 2003, when the organizers invited Kenyan athletes under the leadership of Patrick Sang, an Olympic medalist, to participate. Ten Kenyan athletes won the race in that year and set a new course record in the process. This team was then awarded the prize money, being a team prize, ostensibly in contravention of clause 27.12 of the respondent's constitution.<sup>27</sup>

As a result of the growth and popularity of the race, Spoornet (which was the main sponsor of the event) increased its sponsorship from R645 000,00 in 2003 to R1,2 million in 2004. Spoornet allocated a sum of R200 000,00 to fund a Kenyan ladies' team, whilst Patensie Citrus sponsored the Kenyan men's team with R248 000,00.

Shortly before the 2004 event the respondent discovered that the awarding of the team prize to a foreign team in 2003 and its plans to again involve foreign athletes in the 2004 race were in contravention of clause 27.12 of its constitution. The applicant's intention was drawn to the relevant provision and it was requested to arrange the events under its control in accordance with the respondent's constitution.<sup>28</sup> The applicant maintained that the clause was invalid, and that it was accordingly not bound by its provisions.

The parties could not resolve the dispute. The respondent thereupon declared the race illegal as it did not comply with its rules and constitution. As a result, the Kenyan team did not participate in the Great Train Race and returned to Kenya. Officials of the applicant were suspended pending disciplinary action, but this matter was later settled. The applicant thereafter brought this application attacking the validity of clause 27.12.

### 3. The grounds of attack against clause 27.12 and the ruling of the court on each ground

The applicant argued that the clause was constitutionally invalid, and advanced the following six grounds in support of its contentions:

#### 3.1 That the clause was not introduced nor amended in terms of the respondent's constitution:

The applicant conceded that the clause had been properly introduced, and this ground of invalidity was not pursued. Accordingly no finding on this ground of attack was made.<sup>29</sup>

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26 Para 7 of the judgment.

27 Para 10 of the judgment.

28 Para 11 of the judgment.

29 Para 12 of the judgment.

### 3.2 That the clause violates section 9 of the Constitution of the Republic of South Africa:

The applicant alleged that the clause is discriminatory in that it does not allow foreign athletes to qualify for team prizes in South Africa, although they are allowed to do so elsewhere in the world. It was further contended that the clause is discriminatory in that foreign athletes are allowed to compete for individual prizes in South Africa, but not for team prizes, and that South African athletes are not allowed to compete against foreign athletes for team prizes.<sup>30</sup> On behalf of the respondent it was argued that the rationale for the exclusion of foreign athletes is that team events allow for a greater degree of participation. This will ensure, it was argued, that the prize monies that are available go to the greatest number of local athletes. The rule therefore protected the rights of South African athletes with a view to encouraging the development of athletics in South Africa.<sup>31</sup>

It was further argued on behalf of the respondent that clause 27.12 was unanimously adopted by its constituent associations and that all the associations, save the applicant, still support the inclusion of the clause. It was furthermore advanced that it is not the court's function to dictate to sporting bodies how they should conduct their affairs unless they operate unlawfully and unconstitutionally.<sup>32</sup>

In deciding the question of discrimination, the court referred to the well-known definition of what constitutes discrimination and the approach to be adopted by a court during such an inquiry, as laid down in the case of *Harksen v Lane NO & others*.<sup>33</sup> The court held that the effect of the clause is that foreign athletes may compete in team events in South Africa but are not eligible for team prizes. They can only receive team awards if they are permanent residents. On the other hand, this rule does not apply to individual events and foreign athletes are allowed to compete and receive prizes. The court accordingly held that the clause differentiates between two categories of athletes, namely foreign athletes who compete in individual events, and those who compete in team events.<sup>34</sup>

The court then considered the question whether or not the differentiation bears a rational connection to a legitimate purpose. Turning to the facts, the court held that it was common cause that a very small percentage of the prize money in the Two Oceans and Comrades marathons is reserved for team competition, being 2.5 percent and 4.6 percent respectively. By referring to the actual amounts of prize monies reserved in the above-mentioned two marathons for individual versus team prizes, the court correctly pointed out that the question to be asked is how a greater group of local athletes can benefit when a substantial amount of the prizes on offer ends in the hands of foreign athletes in individual events.<sup>35</sup>

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30 Para 19 of the judgment.

31 Para 21 of the judgment.

32 Para 27 of the judgment.

33 1998 1 SA 300 CC.

34 Para 23 of the judgment.

35 Para 25 and 26 of the judgment.

The court pointed out that although courts are loath to interfere with the operations of voluntary associations, the position of the applicant was unique in that the Great Train Race is an all-team event. In 2004 the total team prize was a sum of R303 000,00 of which only a maximum of R100 000,00 could be won by foreign athletes provided that they won both the men's and ladies' section. It was therefore evident that more than 50 percent of the total prize money had been allocated for local athletes.

The court accordingly held that the rationale furnished by the respondent for the existence of the rule and the consequent differentiation was illogical and not supported by the evidence. The clause was accordingly held to be irrational, discriminatory and in violation of section 9(1) of the Constitution.<sup>36</sup>

The court, assuming that its view might be wrong regarding the rationale of the rule, went further and considered the question whether the differentiation amounts to unfair discrimination. The court held that to allow foreign athletes to participate in a team event and then prohibit them from receiving awards is an indirect attack on their right to dignity, which in turn amounts to unfair discrimination. On the basis of citizenship, foreign athletes are not excluded from participating in the race, but are prohibited from receiving team awards. National athletes on the other hand, are not excluded from competing with foreign athletes for individual awards but are prohibited from competing with foreign athletes. The attack based upon section 9 of the Constitution was therefore upheld.

### 3.3 That the clause is in conflict with section 22 of the Constitution:

In terms of section 22 of the Constitution, every citizen has the right to choose their trade, occupation or profession freely, although the practice of such trade, occupation or profession may be regulated by law. Referring to the case of *S v Lawrence; S v Negal; S v Solberg*<sup>37</sup> the court held that a voluntary association, such as the respondent, is the appropriate body to decide how regulation should occur. This does not, however, bar an aggrieved party from approaching a court for appropriate relief. On behalf of the respondent it was argued that the applicant failed to exhaust internal remedies before launching this application. The court held, however, that the provisions of the clause constituted unfair discrimination against the applicant and thus impacted on the applicant and its members' rights in terms of section 22 of the Constitution.<sup>38</sup>

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36 Para 27 to 29 of the judgment.

37 1997 4 SA 1176 CC.

38 Para 35 of the judgment.

### 3.4 That the clause is in conflict with Articles 8, 12, 20, 22 and 28 of the African Charter:

Referring to the matter of *Kaunda & others v President of the RSA and others* (2)<sup>39</sup> the court held that the African Charter is a treaty by which independent states bound themselves to follow certain minimum standards. In the court's view, the values enshrined in instruments to which the government is a party are in line with the values enshrined in our Constitution. It therefore follows that government has to comply with those provisions. Likewise an organization such as the respondent has to comply with the laws of its government. However, in view of the fact that the African Charter is a document in very broad terms, the court decided to focus on the provisions of the South African Constitution for purposes of deciding this application.<sup>40</sup>

### 3.5 That the clause is in violation of the spirit and purport of, and *ultra vires*, the International Association of Athletics Federations (IAAF) Rules and Constitution:

The court held that it was common cause that the respondent is a constituent body of the IAAF and that the rules and constitution of the IAAF are binding on the respondent. The rules and constitution of the IAAF do not contain a clause similar to clause 27.12. The IAAF rule dealing with foreign athletes only requires certification and approval from the federation to ensure that countries have some control over the movement and earnings of their athletes. The court held that the applicant had *in casu* not placed any evidence or grounds to support its contentions in this regard. The attack on this ground therefore had to fail.<sup>41</sup>

### 3.6 That the clause is anti-competitive:

The applicant conceded that the court had no jurisdiction to consider an issue concerning conduct that is prohibited in terms of section 65(2) of the Competition Act, 89 of 1998. The applicant also referred a complaint to the Competition Commission, which issued a notice of non-referral, thus declining to refer the matter to the Competition Tribunal. The applicant now relied on competition principles of the common law. The court correctly pointed out that it was trite law that an applicant's case in motion proceedings must be made out in its founding affidavit to entitle it to the relief sought in order to enable the respondent to deal with the relevant factual and legal issues in sufficient detail. The court held that the applicant had failed to furnish any detail to support its contention. The attack based on this ground was accordingly rejected, as it had no legal basis.<sup>42</sup>

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39 2004 10 BCLR 1009 CC.

40 Para 36 of the judgment.

41 Para 37 of the judgment.

42 Para 38-39 of the judgment.

### 3.7 That the clause is in conflict with the spirit of the African Renaissance and New Partnership for Africa's Development (NEPAD):

The court held that this attack had to fail as well, as the applicant failed to set out any legal basis for the court to consider this ground. The court was of the opinion that government, and not the courts, was best equipped to make policy decisions.<sup>43</sup>

### 3.8 That the clause is contrary to the policy set out in the Sport and Recreation White Paper:

Once again the attack on this ground was dismissed, as the applicant failed to provide sufficient details and particularity to enable the court to consider this issue.<sup>44</sup>

## 4. Order and concluding remarks

The court held accordingly that the clause was inconsistent with the values enshrined in the Constitution, and in particular the rights to equality and dignity as set out in section 9, as well as the rights in terms of section 22 of the Constitution. The clause was accordingly declared unconstitutional. The respondent was ordered to pay the costs of the application, which included the costs of two counsel. The applicant was ordered to pay the costs of the respondent's further answering affidavit, as the applicant had introduced new evidence which should have been contained in the founding affidavit.<sup>45</sup>

From a constitutional law perspective this judgment draws attention to the obligation of all voluntary associations (and other similar bodies) to ensure that the rules contained in their constitutions and other instruments conform to the values and principles enshrined in the Constitution. The mere fact that a rule has been introduced in a procedurally correct manner in terms of the constitution of a voluntary association will not ensure that it will be binding on its members.

An important aspect of this judgment is the fact that the application of the rule made by the respondent did not affect its own members, but non-members who were invited to participate in a race that resorted under the auspices of the respondent. This situation is thus not an instance of a disciplinary hearing where the member who appears before a disciplinary tribunal is in a subordinate position.<sup>46</sup> The Kenyan athletes as non-members of the respondent furthermore did not agree to the rules of the respondent as contained in its constitution. Voluntary associations should thus be mindful of the fact that their rules and regulations should pass constitutional muster, not only with regards to their members, but also in regard to non-members affected by the application of their rules.

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43 Para 40 of the judgment.

44 Para 41 of the judgment.

45 Para 43 of the judgment.

46 Compare Burns 2006:141.

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